THE ARBITRATION FAIRNESS ACT: PERFORMING SURGERY WITH A HATCHET INSTEAD OF A SCALPEL?

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Arbitration of employment disputes has become an increasingly controversial issue in recent years. Many plaintiff-side employment lawyers and other commentators have been intensely critical of pre-dispute arbitration agreements. This groundswell of criticism has crested with the introduction in Congress of the Arbitration Fairness Act ("AFA").¹

The AFA was proposed to combat perceived injustice arising from "mandatory" employment arbitration, meaning arbitration pursuant to a pre-dispute agreement.² The AFA’s supporters assert that such agreements too frequently are entered into unwillingly or unwittingly on the part of employees; moreover, having waived their right to a judicial forum, employees suffer further injustice due to features of the arbitration process that tilt the playing field against them.³ The AFA seeks to remedy these perceived problems by providing that "no [pre-dispute] arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute."⁴

The assurance of fair procedures for the resolution of employment disputes is of paramount importance, and, as a prevalent means of dispute resolution, arbitration warrants close examination to ensure that justice is being served. Such examination reveals that, while

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² S. 931 § (2)(5-7).

³ Id.

⁴ S. 931 § 402(a).
employment arbitration is controversial, the issues involved are complex. Criticisms of arbitration that may have force with respect to certain categories of employees or employment claims, may have less or no application as to other categories. But, rather than address this complexity, the AFA would prohibit pre-dispute employment arbitration agreements for all employees and any employment claims.5

This article suggests a more nuanced approach. Part I offers a brief history of how employment arbitration has been regarded by courts in New York and the U.S. Supreme Court. Part II considers the AFA by examining the perceived advantages and disadvantages of arbitration and, in that context, the shortcomings of the AFA. It proposes that the AFA be more narrowly targeted to address more directly the perceived inequities it is intended to correct.

I. A BRIEF HISTORY OF EMPLOYMENT ARBITRATION IN THE COURTS

Over the past few decades, New York and federal law regarding employment arbitration has undergone a dramatic change, from suspicion and hostility, to affirmation and support. The roots of this change lie in the Federal Arbitration Act (“FAA”),6 first enacted in 1925.7 The purpose of the FAA was “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”8 Under the FAA, an agreement to arbitrate is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”9

The FAA preempts state law on the subject of the enforceability of arbitration clauses, and is controlling even though the dispute itself may arise under state law.10 Thus, the New York Court of Appeals has recognized that “regardless of what our own State’s policies or

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5 Id.
case law might dictate in other circumstances, we are bound by the policies embodied in the Federal statute and the accompanying case law." The U.S. Supreme Court has taken the lead in shaping law in this area, and the New York Court of Appeals has followed.

The U.S. Supreme Court’s early resistance to employment arbitration was reflected in Alexander v. Gardner-Denver Co., in which the Court allowed an employee to pursue an employment discrimination claim in court despite the fact that a related arbitration had already been conducted. When his employment was terminated, Alexander filed a grievance under a collective bargaining agreement, according to which disputes went to arbitration if they were not resolved in negotiations. After the arbitrator ruled that he was discharged for just cause, Alexander brought a Title VII discrimination claim in federal court. The employer was granted summary judgment by the district court on the basis that Alexander was bound by the prior arbitral decision. The Tenth Circuit affirmed.

The U.S. Supreme Court reversed, holding that Alexander’s statutory right to trial in federal court was not foreclosed by the prior submission of a claim to arbitration under the collective bargaining agreement. Congress had placed “ultimate authority” to secure compliance with Title VII in federal courts, and the private right of action was “an essential means of obtaining judicial enforcement.” The Court distinguished between the contractual rights under the collective bargaining agreement and the statutory rights under Title VII, and emphasized that Alexander had the right to vindicate both sets of rights. “[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator’s decision. Rather, he is asserting a statutory right independent of the arbitration process.”

Alexander reflected and validated a resistance to employment arbitration, especially for discrimination claims, found in courts.

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11 Id. at 631, 619 N.E.2d at 1001, 601 N.Y.S.2d at 689.
13 Id. at 59–60.
14 Id. at 39, 40–42
15 Id. at 43.
17 Alexander, 466 F.2d 1209, 1210 (D. Colo. 1972).
19 Id. at 45 (citing 42 U.S.C. § 2000e-5(f)(1) (2006)).
20 Id. at 49–50.
21 Id. at 54.
across the country at that time.\textsuperscript{22} In New York, the Court of Appeals' general suspicion of arbitration was expressed in Wertheim & Co. v. Halpert.\textsuperscript{23} Wertheim held that an arbitration clause was not enforceable in an employment discrimination dispute because the substantive rights at stake were too important to be trusted to arbitration.\textsuperscript{24}

In Wertheim, Halpert had filed discrimination complaints with the New York City Commission on Human Rights and the Equal Employment Opportunity Commission.\textsuperscript{25} The employer moved to compel arbitration based on the securities registration application form executed by both parties at the beginning of the employment.\textsuperscript{26} Despite the presence of a clause in the form providing for arbitration of any controversy arising out of the employment, the Court of Appeals agreed with the lower court that arbitration should not be compelled.\textsuperscript{27}

Although arbitration is a favored method of dispute resolution, arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced. This is especially true in the area of discrimination where particular remedies are afforded by both state and federal statutes. Allowing the petitioner to pursue its claim in arbitration at this time risks chilling the exercise of the statutory right and poses the possibility of inconsistent verdicts in the two proceedings.\textsuperscript{28}

Wertheim echoed an earlier decision, in the antitrust context, where the Court of Appeals opined that "[t]he enforcement of our State's antitrust policy cannot be left to commercial arbitration, which . . . is not a fit instrument for the determination of antitrust controversies which are of such extreme importance to all of the people of this State."\textsuperscript{29}

\textsuperscript{22} See KENNETH W. TABER ET AL., EMPLOYMENT LITIGATION IN NEW YORK § 10:7 (2001); David Sherwyn, Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication, 24 BERKELEY J. EMP. & LAB. L. 1, 9 (2003).


\textsuperscript{26} Id.

\textsuperscript{27} Wertheim, 48 N.Y.2d at 683, 397 N.E.2d at 387, 421 N.Y.S.2d at 876.

\textsuperscript{28} Id. at 683, 397 N.E.2d at 387, 421 N.Y.S.2d at 877 (citations omitted).

\textsuperscript{29} Aimco Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 624, 237 N.E.2d 223, 224,
Lower courts in New York followed *Wertheim* by refusing to compel arbitration for discrimination claims.\(^{30}\) That the parties previously may have agreed to arbitrate the dispute was "not relevant, for 'the broadest of arbitration agreements cannot oust our courts from their role in the enforcement of major State policies, especially those embodied in statutory form.'"\(^{31}\)

By 1991, there was a major shift in the case law. In the landmark case of *Gilmer v. Interstate/Johnson Lane Corp.*,\(^{32}\) the U.S. Supreme Court again addressed the distinction between a claim based on a contractual arbitration provision and a statutory claim.\(^{33}\) However, in an apparent departure from the attitude expressed in *Gardner-Denver*, the Court held that a statutory discrimination claim can be subject to mandatory arbitration under the FAA, and expressly rejected the circuit court's resistance to arbitration.\(^{34}\)

Gilmer had agreed to arbitration as part of the securities registration application form required by his employer.\(^{35}\) After his employment was terminated, he brought suit in federal court under the Age Discrimination in Employment Act ("ADEA"), and the employer moved to compel arbitration.\(^{36}\) The Court observed that statutory claims could be the subject of an arbitration agreement enforceable under the FAA, noting that it had held enforceable arbitration agreements arising under other statutes similarly designed to advance important public policies, such as the Sherman Act, the Securities Exchange Act of 1934, the RICO Act, and the Securities Act of 1933.\(^{37}\) Thus, Gilmer had the burden of showing that, in enacting the ADEA, Congress intended to depart from the norm and preclude a waiver of judicial forum for ADEA claims.\(^{38}\) Gilmer did not persuade the Court that there was a meaningful difference between the arbitration of claims under the ADEA and arbitration of disputes under these other statutes.\(^{39}\)

\(^{289}\) N.Y.S.2d at 968, 969 (1968).


\(^{33}\) *Id.* at 33–34.

\(^{34}\) *Id.* at 26.

\(^{35}\) *Id.* at 23.

\(^{36}\) *Id.* at 23–24.

\(^{37}\) *Id.* at 26.

\(^{38}\) *Id.*

\(^{39}\) *Id.* at 28.
Gilmer’s argument that compulsory arbitration of ADEA claims was inconsistent with the statute failed, the arbitration clause was enforceable.\(^{40}\)

Foreshadowing arguments being advanced today in support of the AFA, Gilmer also argued that arbitration procedures were inadequate to resolve employment disputes due to bias, limited discovery, lack of effective appellate review, lack of public knowledge of decisions, and unequal bargaining power of the parties.\(^{41}\) The Court rejected each of these arguments in turn.\(^{42}\)

Finally, the Court distinguished Gardner-Denver, reiterating that the employee’s contractual rights under the collective bargaining agreement in Gardner-Denver, which were the subject of the arbitration, were distinct from the employee’s statutory Title VII rights, which were not covered by the collective bargaining agreement’s arbitration clause, and which the employee sought to litigate in court.\(^{43}\) In Gilmer, by contrast, there was an agreement to arbitrate statutory claims.\(^{44}\)

Gilmer was a clear statement by the Court that agreements to arbitrate employment discrimination disputes are enforceable under the FAA. By the time Gilmer was decided, the U.S. Supreme Court had already made clear, in Southland Corp. v. Keating,\(^{45}\) that the enforceability of arbitration agreements under the FAA trumped any state law to the contrary.\(^{46}\) Southland involved a state statute, the California Franchise Investment Law, which had been interpreted by the California Supreme Court to require judicial consideration of any claims brought thereunder.\(^{47}\) Based on this reading, the state court refused to enforce the parties’ contract to arbitrate such claims.\(^{48}\)

The U.S. Supreme Court reversed, holding that the arbitration agreement should be enforced because Congress intended the FAA to apply to state courts and to pre-empt state anti-arbitration laws to the contrary.\(^{49}\) With the enactment of the FAA, “Congress declared a national policy favoring arbitration and withdrew the

\(^{40}\) \textit{Id.} at 27–29.

\(^{41}\) \textit{Id.} at 30–33.

\(^{42}\) \textit{Id.}

\(^{43}\) \textit{Id.} at 35.

\(^{44}\) \textit{Id.} at 23.


\(^{46}\) \textit{Id.} at 16.

\(^{47}\) \textit{Id.} at 5.

\(^{48}\) \textit{Id.}

\(^{49}\) \textit{Id.} at 16–17.
power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."\(^{50}\) Congress intended the act to have a broad scope in order to address "the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements."\(^{51}\)

After *Southland*, the New York Court of Appeals expressly recognized that the FAA barred states from requiring litigation of employment claims that the parties had agreed to arbitrate, holding that the "right which the Act grants to enforce an arbitration provision is not dependent upon the forum—Federal or State—in which it is asserted."\(^{52}\) Agreements to arbitrate were to be "rigorously enforced," even when such enforcement resulted in piecemeal litigation in multiple proceedings.\(^{53}\) Thus, in *GAF v. Werner*, an employee's motion to compel arbitration of his compensation rights was granted even though a related dispute concerning his stock option rights would be resolved by litigation; the employment agreement included an arbitration agreement, but the stock option agreements contained no such provision.\(^{54}\) *GAF* also clarified that section 4 of the FAA, which states that a party wishing to compel arbitration under the Act can do so in "any United States district court," required state courts to enforce the Act as well.\(^{55}\)

These cases paved the way for the Court of Appeals to respond to *Gilmer* with a strong expression of commitment to the enforcement by state courts of employment arbitration agreements, even for statutory discrimination claims. In *Fletcher v. Kidder, Peabody & Co.*,\(^{56}\) two employees brought discrimination actions under the New York Human Rights Law.\(^{57}\) Defendants moved to compel arbitration based on the arbitration clause in plaintiffs' securities registration application forms.\(^{58}\) In light of *Gilmer*, the Court of Appeals held that the arbitration clause should be enforced, and

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\(^{50}\) Id. at 10.

\(^{51}\) Id. at 14.


\(^{53}\) Id. at 102, 485 N.E.2d at 981, 495 N.Y.S.2d at 316.

\(^{54}\) Id. at 100 n.1, 485 N.E.2d at 979 n.1, 495 N.Y.S.2d at 314 n.1.


\(^{57}\) Id. at 629–630, 619 N.E.2d at 1000, 601 N.Y.S.2d at 688.

\(^{58}\) Id. at 631–32, 619 N.E.2d at 1000–01, 601 N.Y.S.2d at 688–89.
overruled Wertheim for cases governed by the FAA.\textsuperscript{59} As explained in Fletcher, under Gilmer, the party seeking to avoid enforcement of an arbitration clause governed by the FAA [is required to] demonstrate a congressional intent “to preclude a waiver of a judicial forum” for disputes based on a particular statutory right. Where the right [at issue] is predicated on a State . . . statute . . ., [courts must] draw an analogy to the equivalent Federal law, where possible, and to consider Congress’ intentions with regard to the rights created by that law. The closest Federal analog to [the state statute under which plaintiffs’ claims arise is] Title VII of the Civil Rights Act . . . [and] nothing in the legislative history [of Title VII] would suggest the existence of a congressional intent to override the general rule that anticipatory contracts to arbitrate are enforceable under the FAA.\textsuperscript{60}

The court dismissed plaintiffs’ concerns, similar to those raised in Gilmer, that the arbitral forum was inadequate.\textsuperscript{61} Concerns about the adequacy of arbitration have already been considered, and presumably balanced, by the Congress that enacted the FAA and thereby expressed its own preference for enforcing the parties’ arbitration agreements. To the extent that the Supreme Court expressed a degree of mistrust for the arbitral process in Alexander v. Gardner-Denver Co., that sentiment has clearly been supplanted by the more current view that arbitration is an important and respected method of resolving private disputes. Indeed, . . . concerns about arbitration “as a method of weakening the protections afforded in the substantive law to would-be complainants” are “far out of step with the current strong endorsement by the Federal courts of the statutes favoring this method of resolving disputes.”\textsuperscript{62}

In the following decade, the U.S. Supreme Court issued two

\textsuperscript{59} See id.

\textsuperscript{60} Id. at 633, 619 N.E.2d at 1002, 601 N.Y.S.2d at 690 (citations and footnote omitted).

\textsuperscript{61} Id. at 635, 619 N.E.2d at 1004, 601 N.Y.S.2d at 692.

\textsuperscript{62} Id. (citations omitted) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)); see also Garcia v. Bellmac Prop. Mgmt., 295 A.D.2d 233, 234, 745 N.Y.S.2d 13, 14 (App. Div. 1st Dep't 2002) (Gardner-Denver, “relied on by plaintiff as holding that contractual anti-discrimination claims are distinct from statutory anti-discrimination claims, and that only the former can be waived . . . does not reflect modern Federal policy favoring arbitration.”).
important decisions regarding the breadth of the FAA’s application. First, the Court held in Allied-Bruce Terminix Cos. v. Dobson that language in the FAA providing for its application to “contract[s] evidencing a transaction involving commerce” does not require that the parties to a contract have contemplated an interstate commerce connection, rather than a local one. Second, the Court held in Circuit City Stores, Inc. v. Adams that virtually all non-union employment contracts are covered by the FAA, ending persistent speculation that employment contracts were excluded from the FAA by statutory language excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

In the wake of Circuit City, New York courts have continued to give strong support to employment arbitration agreements, recognizing that the FAA establishes “an ‘emphatic’ national policy favoring arbitration which is binding on all courts, State and Federal”, applies to any contracts involving interstate commerce, including most employment contracts and partnership agreements, and mandates that “any ambiguities as to the scope of [an arbitration provision should be] resolved in favor of arbitration.”

II. THE ARBITRATION FAIRNESS ACT

As employment arbitration has been validated by the U.S. Supreme Court and the New York Court of Appeals, its use has grown, usually pursuant to pre-dispute agreements. According to

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64 Id. at 268 (quoting 9 U.S.C. § 2 (2006)).
66 Id. at 109 (quoting 9 U.S.C. § 1 (2006)). The Court previously had avoided interpreting this language. In Gilmer, the contract containing the arbitration agreement was not a contract of employment, but rather the employee’s securities registration application, which is an agreement between the employee and the securities exchange, not the employee and his employer. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2. (1991).
68 Id. at 636–37, 770 N.Y.S.2d at 455.
70 See NAT’L EMPT LAWYERS ASSN. DATA POINTS: INCREASING PREVALENCE OF MANDATORY ARBITRATION SYSTEMS IMPOSED ON EMPLOYEES 1 (2007). In addition, in a 2007 study of nonconsumer contracts entered into by leading U.S. companies, ninety percent of employment contracts included an arbitration agreement. Theodore Eisenberg et al.
the National Employment Lawyers Association, fifteen to twenty-five percent of U.S. employers require arbitration of employment disputes, covering more than thirty million employees, or twenty-five percent of the non-union workforce. At the same time, observers in the legal and civil rights communities have increasingly expressed concerns about the prevalence and nature of mandatory arbitration. Particularly when arbitration is mandated by a pre-dispute agreement, critics argue that it can be unfair to employees. And when waiver of an employee’s right to a judicial forum is a condition of his or her employment, some critics see a serious injustice.

Advocacy by groups objecting to employment arbitration has led to the introduction of the AFA in Congress. The Senate version of the bill was introduced by Senator Russ Feingold (D-Wis.) on April 29, 2009. Representative Hank Johnson (D-Ga.) introduced a similar bill in the House. The bill takes aim directly at the line of U.S. Supreme Court precedent discussed above.

(1) The Federal Arbitration Act ... was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power. (2) A series of United States Supreme Court decisions have changed the meaning


71 See NAT’L EMP’T LAWYERS ASS’, supra note 70, at 3.

72 Concerned observers include the National Employment Lawyers Association, supra note 70, at 1; the Equal Employment Opportunity Commission, which has issued a statement against mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment, U.S. EQUAL’T OPPORTUNITY COM’N, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997) [hereinafter EEOC POLICY STATEMENT], available at http://www.eeoc.gov/policy/docs/mandarb.html; and a coalition of organizations advocating against mandatory arbitration for employment, consumer, civil rights, and franchise disputes, see Alliance for Justice et al., Letter in Support of Arbitration Fairness Act, H.R. 1020, PETER GOSSELAR’S BLOG (Mar. 2, 2009), http://www.fairarbitrationnow.org/content/letter-support-arbitration-fairness-act-hr-1020 [hereinafter Letter in Support of AFA].

73 EEOC POLICY STATEMENT, supra note 72, at V.

74 Id.; Letter in Support of AFA, supra note 72.


76 S. 931, 111th Cong. (2009).

77 H.R. 1020, 111th Cong. (2009). References in this article to “the bill” refer to the Senate version, supra note 76.
of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are forcing millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.\textsuperscript{78}

According to the AFA’s statutory findings, employees are forced into agreements to arbitrate, often without realizing it; employers add unfair provisions to arbitration clauses that deliberately tilt the systems against employees; arbitrators “are sometimes under great pressure” to favor the employers upon whom they depend for their livelihood;\textsuperscript{79} the lack of transparency and accountability in arbitration may lead to arbitrary or inconsistent decisions; and the development of public law is inhibited by the movement of dispute resolution away from courts and into arbitration.\textsuperscript{80} The AFA responds to these concerns by invalidating all pre-dispute agreements requiring arbitration for employment, consumer, franchise, or civil rights disputes.\textsuperscript{81}

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\textsuperscript{78} S. 931 § 2(1)-(2).

\textsuperscript{79} S. 931 § 2(4).

\textsuperscript{80} S. 931 § 2(2)-(7).

\textsuperscript{81} The AFA does not generally apply to collective bargaining agreements, except that no arbitration provision in a collective bargaining agreement “shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.” S. 931 § 3(a) (amending tit. 9 of the U.S.C. to add § 402(b)(2)). Senator Feingold has stated that this provision is intended to reverse the Supreme Court’s ruling in \textit{14 Penn Plaza LLC v. Pyett}, 129 S. Ct. 1456 (2009), that arbitration provisions contained in such agreements are enforceable for discrimination claims. Feingold 2009 Press Release, supra note 75. A further discussion of employment arbitration as it relates to collective bargaining agreements is outside the scope of this article, except to note that prior to \textit{14 Penn Plaza}, New York courts already had held that a union can waive an employee’s right to a judicial forum, as long as the waiver is clear, explicit, and unequivocal. \textit{Conde v. Yeshiva Univ.}, 16 A.D.3d 185, 186, 792 N.Y.S.2d 387, 388 (App. Div. 1st Dep’t 2005) (holding that employees were not obligated to arbitrate discrimination claims because the collective bargaining agreement did not clearly and unmistakably waive their statutory right to a judicial forum); \textit{Garcia v. Bellmarc Prop. Mgmt.}, 295 A.D.2d 233, 234, 745 N.Y.S.2d 13, 14 (App. Div. 1st Dep’t 2002) (affirming order compelling action for age discrimination under state Human Rights Law, and holding that union can waive employee’s right to a judicial forum); \textit{Crespo v. 160 W. End Ave. Owners Corp.}, 253 A.D.2d 28, 32–33, 687 N.Y.2d 79, 82 (App. Div. 1st Dep’t 1999) (holding that the arbitration provision in a collective bargaining agreement did not clearly, explicitly, and unequivocally waive the right to litigate statutory discrimination claim).
A. Perceived Advantages of Arbitration

Employment arbitration holds the promise of a number of purported advantages over litigation. First, arbitration can be faster and more economical for both parties. A disgruntled employee need not wait for his or her turn in the backlog of cases choking the litigation system. Arbitration is procedurally streamlined. Discovery is limited by eliminating or reducing document production, depositions, and interrogatories. Because there is no appellate process within arbitration, a dispute is resolved with greater finality when the arbitrator issues his or her decision. For these reasons, arbitration can cost the parties less in legal fees than litigation.

Second, arbitration is private. Proceedings usually are kept confidential. This is attractive to employers who wish to avoid public airing of employee grievances, and can also be preferable to employees who want to keep private the personal details of their employment or compensation, or where discrimination or harassment is alleged.

Third, at least for certain types of complex employment disputes, arbitration can be more competent than litigation. An arbitrator is often an expert in the area of the dispute, while a juror, or even a judge, may know relatively little about the type of dispute at issue.

Finally, arbitration may provide a means of dispute resolution to employees who cannot litigate their claims in court. Most employment litigation is handled by attorneys who are paid on a contingency basis. An attorney typically will evaluate the value of

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83 See id.

84 Id.

85 Id. at 178.

86 Id.

87 Id.

88 Id.

89 Id. at 178.

90 Id.

a potential claim at the outset of the litigation. If the value of the claim is too low, the attorney knows that even if he or she wins and collects a contingency fee, the fee may not be enough to make taking the case financially worthwhile. A 1995 survey of employment lawyers found that for a discrimination claim with provable damages (not including punitive damages) of less than $60,000, an employee was unlikely to be able to find counsel willing to represent him or her on contingency; no doubt this dollar figure would be significantly higher today. An employee with a non-discrimination claim will have an even more difficult time finding representation, since such claims usually do not provide a statutory basis for attorney’s fees, and therefore will be less attractive to counsel. Unless the employee can afford to pay an attorney by the hour—unlikely for a lower-paid employee, especially one who has just lost a job—the employee will not be able to bring his or her claim in court. Arbitration may be such an employee’s only opportunity to pursue a claim.

B. Perceived Disadvantages of Arbitration

The circumstances in which many employment arbitration agreements arise may raise concerns that those agreements were not entered into willingly or knowingly by employees. According to the AFA, most employees “have little or no meaningful option whether to submit their claims to arbitration... and because entire industries are adopting these clauses, people increasingly have no

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92 See id.
93 Id.
94 Id. (citing William M. Howard, Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?, DISP. RESOL. J., Oct.–Dec. 1995, at 44; Eisenberg & Hill, supra note 82, at 10; see also Lewis L. Maltby, Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights, 12 N.Y.L. SCH. J. HUM. RTS. 1, 2–3 (1994) (finding that the vast majority of cases do not have a potential recovery large enough to induce an attorney to take the case on contingency).
95 Lewis L. Maltby estimated in 2003 that, with inflation, the threshold would be at least $75,000. Because the average income of American employees at the time of Maltby’s writing was $26,500, most employment claims would involve less than $75,000 in provable damages. Lewis L. Maltby, Employment Arbitration and Workplace Justice, 38 U.S.F. L. REV. 105, 116 (2003) [hereinafter Maltby, Workplace Justice].
96 Hill, supra note 91, at 783; Eisenberg & Hill, supra note 82, at 10.
97 Hill, supra note 91, at 782–83 (arguing that middle- and lower-income employees do not have access to the courts); id. at 803 (finding arbitration is generally affordable for lower- and middle-income employees); Eisenberg & Hill, supra note 82, at 5 (observing a “systematic absence of lower pay employees from realistic access to court in non-civil rights disputes”). Arbitration is less expensive than litigation, and attorneys will accept cases with lower demands. See Maltby, Workplace Justice, supra note 95, at 116–17.
choice but to accept them." In addition, some commentators liken agreements to arbitrate employment disputes to contracts of adhesion, offered on a "take it or leave it" basis with little or no opportunity for the employee to negotiate. Contracts of adhesion strike critics as being inherently unjust. Many arbitration agreements are incorporated into employee handbooks, and otherwise not negotiated or discussed between the employer and employee. Furthermore, most are signed without the advice of counsel, and few employees are qualified to evaluate an arbitration provision's fairness. Moreover, employers may add to an arbitration agreement provisions that could tilt the system against employees, such as by allowing the employer unilaterally to select the arbitrator, or by forcing employees to arbitrate their claims hundreds of miles from their homes.

Some argue that employees can be disadvantaged in a number of ways by the arbitration process itself. Arbitration fees can be high enough to prevent some employees from engaging in arbitration, although litigation is also costly. The limited discovery allowed in many arbitrations can hurt the employee because the employer is usually in possession of the evidence that the employee needs to make his or her case. The employer is far more likely than the employee to be a "repeat player" in arbitration, making the

98 S. 931, 111th Cong. § 2(3) (2009).
100 Indeed, studies have shown that employers arbitrating pursuant to an adhesion arbitration clause imposed through an employee handbook had superior outcomes. See Lisa B. Bingham & Shimon Sarraf, Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 303, 304 (Samuel Estreicher & David Sherwyn eds., 2004) [hereinafter Bingham & Sarraf, Before and After].
102 Maltby, Workplace Justice, supra note 95, at 106.
103 S. 931 § 2(7).
104 See Brady v. William Capital Group, 14 N.Y.3d 459, 464–66, 928 N.E.2d 383, 385–87, 902 N.Y.S.2d 1, 3 (2010). David D. Siegel opined that Brady may lead to "a parade of I-can't-afford-it claims" under "equal share" provisions of arbitration agreements, which may require "extensive litigation just to determine whether there may be an arbitration." David D. Siegel, Who Pays for Arbitration, N.Y. ST. L. DIG., No. 604 (Apr. 2010).
employer more knowledgeable about the arbitration process and individual arbitrators.\textsuperscript{106} Some critics, including the drafters of the AFA, have hypothesized that arbitrators are biased in favor of repeat player employers because they are dependent on the employers for repeat business.\textsuperscript{107} Studies have shown that repeat player employers do better in employment arbitration than one-time-only employers.\textsuperscript{108} It is not clear, however, that the repeat player effect is due to arbitrator bias rather than other factors.\textsuperscript{109}

The U.S. Supreme Court and the New York Court of Appeals have been unsympathetic to many of these concerns. According to the Court of Appeals, the limitations on discovery in arbitration are a fair trade off for the “simplicity, informality, and expedition of arbitration.”\textsuperscript{110} As for possible arbitrator bias, the Supreme Court “decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.”\textsuperscript{111} The Supreme Court found that unequal bargaining power between employer and employee may exist, but it was no reason to refuse to enforce an arbitration agreement.\textsuperscript{112} Other relationships that might give rise to an arbitration agreement, such as “between securities dealers and investors . . . may involve unequal bargaining power,” but have been held to be enforceable.\textsuperscript{113} “[T]he FAA’s purpose was to place arbitration agreements on the same footing as other contracts,” which are generally enforceable.\textsuperscript{114}

Finally, some argue that the large-scale movement of employment adjudication from courts to arbitral fora may have costs for the


\textsuperscript{107} See S. 931 § 2(4); see also Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 EMPL. RTS. & EMP. POLY J. 189, 214 (1997) [hereinafter Bingham, Repeat Player Effect].


\textsuperscript{109} See Hill, supra note 91, at 805–06.


\textsuperscript{111} Id., 500 U.S. at 30.

\textsuperscript{112} Id. at 33.

\textsuperscript{113} Id.

\textsuperscript{114} Id.
The AFA asserts that, "[w]ith the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules." Under this line of argument, our legal system depends on the transparent publication of legal decisions and the existence of an appellate review process, which provide accountability, consistency, and a process by which our body of law can respond to new social developments. Critics claim that not only may arbitral awards be inconsistent and unpredictable, but the body of employment law may stagnate without the feedback provided by the litigation of claims in court. The U.S. Supreme Court recognized the importance of this concern in *Gilmer*, but resolved it because the specific arbitration awards at issue (resulting from the New York Stock Exchange's arbitration process) were, in fact, in writing and publicly available, and because the Court considered it "unlikely that all or even most ADEA claimants will be subject to arbitration agreements.""}

**C. Shortcomings of the AFA as Proposed**

The AFA aims to cure the perceived ills of employment arbitration discussed above. But, as currently drafted, the AFA may be significantly overbroad. First, it does not distinguish between pre-dispute agreements that are a condition of employment or coercively obtained, and pre-dispute agreements that are truly voluntary. The latter group includes agreements that are part of individually-negotiated employment contracts, some of which are entered into by sophisticated employees with significant bargaining power, such as high-level executives.

Second, the AFA fails to ensure that employees have satisfactory options for resolving claims. The AFA takes away a significant means of resolving disputes without offering anything to take its place. If the AFA is enacted, disputes may be litigated in court, or may be subject to post-dispute arbitration agreements. Those cases

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116 S. 931, 111th Cong. § 2(5) (2009); see also S. 931 § 2(6) (criticizing the lack of transparency and accountability in arbitration).
118 *Gilmer*, 500 U.S. at 32.
119 S. 931 § 3(a) (amending tit. 9 of the U.S.C. to add § 401(5)).
120 See Bingham, *Repeat Player Effect*, *supra* note 107, 208–14 (explaining a repeat player's unequal bargaining ability over inexperienced employees).
that are litigated in court will face the very deficiencies of the litigation process that make arbitration appealing in some circumstances. To the extent that disputes will be arbitrated under post-dispute arbitration agreements, the AFA offers no solution to some of the key perceived weaknesses of arbitration that purportedly are the motivation for the legislation, including a lack of transparency, a lack of meaningful judicial review, and a possible bias in favor of, or other unfair advantage for, corporate repeat players.

In fact, the AFA may have the unintended consequence of foreclosing some employees from either arbitration or litigation as a recourse in the event of a dispute. Post-dispute agreements to arbitrate are extremely uncommon and are unlikely to gain much traction even if the AFA is enacted. After a dispute arises, a defendant can predict the value of the claim and, if the value is low enough that the defendant knows that the plaintiff likely will not be able to retain counsel, the defendant may make the strategic decision to refuse to agree to arbitrate, with the result that the plaintiff has no means of pursuing his or her claim. If the value of the claim is high, the employee’s counsel is unlikely to offer arbitration because removing the threat of trial will reduce bargaining power in settlement discussions. One study found that seventy-two percent of employees arbitrating pursuant to “promulgated” agreements (i.e., agreements that were not individually negotiated) “were of low to middle income and did not earn enough income to gain access to the courts with an employment-related claim.”

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122 One commentator has suggested that the repeat player problem, if caused by arbitrator bias, may be magnified by the decrease in the supply of arbitration business, forcing arbitrators into more intense competition which provides a greater incentive to achieve a favorable result for corporate repeat customers. See Darren P. Lindamood, Comment, Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009, 45 WAKE FOREST L. REV. 291, 310–11 (2010).

123 See generally Maltby, Post-Dispute Employment Arbitration, supra note 121, at 323; see also Estreicher, supra note 82, at 557; Sherwyn, supra note 22, at 31–58.

124 See supra notes 82–97 and accompanying text.

125 Maltby, Post-Dispute Employment Arbitration, supra note 121, at 318.


127 Hill, supra note 91, at 804.
Third, the AFA fails to recognize that, when due process standards are met, employment arbitration outcomes can be favorable to employees—better than, or roughly equal to, litigation.\textsuperscript{128} A 2003 study comparing American Arbitration Association ("AAA") employment arbitration outcomes to employment litigation outcomes estimated that employees had a sixty-two percent success rate in arbitration, compared with a forty-three percent success rate in litigation.\textsuperscript{129} That arbitration is favorable to employees when compared with litigation is especially true for high-earning employees.\textsuperscript{130} The majority of the AAA arbitration studied is of contractual, rather than discrimination, claims, and a 2002 study of NYSE/NASD statutory civil rights claims found that employees prevailed only approximately forty-four percent of the time.\textsuperscript{131} However, employees with statutory civil rights claims are also less successful in court when compared to employees with non-civil rights claims.\textsuperscript{132}

Finally, the AFA would redefine an important aspect of millions of employment agreements, causing a significant and unanticipated change to the employment legal landscape, possibly with unintended negative consequences.\textsuperscript{133}

\textsuperscript{128} See generally Maltby, Workplace Justice, supra note 95, at 109; Empirical Research on Arbitration Outcomes, CTR. FOR LEGAL SOLUTIONS, http://centerforlegalsolutions.org/arbitration.data.shtml (last visited Feb. 17, 2011); Estreicher, supra note 82, at 564–65; Bingham, On Repeat Players, supra note 108, at 233 (citing Lisa Bingham, Is There a Bias In Arbitration of Non-Union Employment Disputes? An Analysis of Actual Cases and Outcomes, 6 INT'L J. OF CONFLICT MGMT. 369, 369–86 (1995) (finding employees won more often than employers and recovered a greater percentage of their demands); Bingham & Sarraf, Before and After, supra note 100, at 312 (discussing a study finding no evidence of pro-employer bias in early AAA employment arbitration cases); Sherwyn, supra note 22, at 27–28 (critiquing the assertion that employees do better in litigation than arbitration).

\textsuperscript{129} Maltby, Workplace Justice, supra note 95, at 113–14. It should be noted that the AAA uses high-quality arbitrators who strictly follow due process guidelines. As the study's author commented, "it is almost inconceivable that all of the hundreds of providers in this unregulated field meet AAA's high standards. The above analysis shows that arbitration can provide victory rates that are as good or even better for employees than courts can provide. It does not prove that arbitration generally provides the high victory rates reported in this article." Id. at 114.

\textsuperscript{130} Hill, supra note 91, at 787, 789–90 (discussing the finding by Bingham that employees earning more than $40,000 in a 1997 study had better win rates and outcomes than those earning less, and discussing the finding by Howard that highly-compensated employees with discrimination claims win more often in arbitration than in litigation); Eisenberg & Hill, supra note 82, at 5 (for highly-paid employees, finding "little evidence that arbitrated outcomes materially differ from trial outcomes").

\textsuperscript{131} See id. at 111; Eisenberg & Hill, supra note 82, at 16–19.

\textsuperscript{132} See Fletcher v. Kidder, Peabody & Co., 81 N.Y.2d 623, 635, 619 N.E.2d 988, 1004, 601 N.Y.S.2d 686, 692 (1993) (securities registration application form that included the arbitration provision at issue had been signed by thousands of registrants for various
D. Proposals for a Better AFA

Employment dispute arbitration is a complex issue. Employment arbitration, far from being the pure evil that the AFA suggests, has both disadvantages and advantages for employees. Some arbitration takes place under conditions that are unfair or damaging to employees. And yet, not all employees enter arbitration agreements unwillingly. Not all employees, even knowing the potential risks of arbitration, would prefer to litigate their claims. Not all employees can afford to bring their claims to court, even if they wish to do so. Although employment arbitration has perceived weaknesses that might be addressed by legislative action, Congress should provide a solution that is finely-tuned to these nuances and meets the needs of a broad spectrum of employees. As presently drafted, the AFA fails to meet this goal.

One of the AFA’s biggest faults is that it paints all employees with the same brush. If the AFA could distinguish among employees according to which employees are thought to be most disadvantaged by the status quo, the AFA would have greater potential to improve employment dispute resolution. For example, the legislation could exempt highly-paid employees, who have greater bargaining power and sophistication when negotiating employment contracts, and thus are less likely to have been pressured to accept an unwanted arbitration agreement.

Evidence suggests that high-level employees frequently do include arbitration clauses in their employment contracts. In one study of negotiated employment contracts for CEOs, forty-two percent included arbitration agreements, and the agreements often reflected careful consideration of details, such as the selection process for arbitrators and the right to appeal the arbitrator’s

financial exchanges, and to conclude that the arbitration clause was unenforceable “would destabilize long-standing practices in this highly regulated industry and would wreak havoc with the regulatory system”).

134 Maltby, Workplace Justice, supra note 95, at 106.
136 See id. at 238.
137 See Maltby, Workplace Justice, supra note 95, at 116.
138 For example, “CEOs overwhelmingly contract around the at-will default standard of termination,” indicating that they have bargaining power and engagement with the negotiation process. Schwab & Thomas, supra note 135, at 233; see also Spitko, supra note 105, at 628. For one proposal regarding how legislation might identify those high-level employees who should be exempt from the AFA, see Spitko, supra note 105, at 633–46.
decision.\textsuperscript{139} That CEOs might choose to agree to arbitrate is understandable.\textsuperscript{140} Although employees may normally want to preserve their right to a jury trial (but for the greater expense) because they calculate that a jury of their peers would be more sympathetic to their situation than to the company firing them . . . , CEOs may have good reason to believe that juries will not identify with their compensation demands because the amounts involved may seem excessive to most members of the public.\textsuperscript{141}

When highly-paid employees choose to agree to arbitrate, they do so in spite of the fact that they are more likely than their lower-paid colleagues to be able to afford to litigate their claims.\textsuperscript{142} Indeed, "most employment discrimination cases are brought by managers and professionals, rather than lower-level workers," which is consistent with high-level workers likely earning enough to be able to prove damages above the minimum threshold required to attract plaintiffs' attorneys.\textsuperscript{143} Employees who could litigate their claims, but nonetheless elect to be bound to arbitration, are evidence that not all employees regard arbitration as an inferior avenue for dispute resolution. Those that freely choose to agree to arbitrate should be regarded as making a meaningful choice that the law should respect.

Arbitration outcomes suggest that whatever employer advantage may exist in arbitration is lessened for high-level employees who negotiate their employment contracts on an individual basis. High-level employees do better in arbitration than low-level employees.\textsuperscript{144} By contrast, employers arbitrating pursuant to a personnel manual do better than those arbitrating under an individually-negotiated contract,\textsuperscript{145} which is typically associated with highly-paid employees. To the extent that the AFA is intended to protect employees from what is perceived to be an uneven playing field, it is more appropriately aimed at lower-level employees.

\textsuperscript{139} Schwab & Thomas, supra note 135, at 258 ("[M]any of these clauses address the procedures to follow in the event of the need for arbitration: how, when, and where to file the demand for arbitration; who will select the arbitrators; and who pays the costs associated with it.").\textsuperscript{140} Id. at 238.
\textsuperscript{141} Id.
\textsuperscript{142} See id. (noting that the reason for arbitration may be due to perceived high compensation bias); Malthy, Workplace Justice, supra note 95, at 116.
\textsuperscript{143} Eisenberg & Hill, supra note 82, at 10; Hill, supra note 91, at 783.
\textsuperscript{144} See Spitko, supra note 105, at 629–32.
\textsuperscript{145} See Bingham, On Repeat Players, supra note 108, at 224, 239.
Distinguishing among employees is not the only way that the AFA could be more nuanced. It could also distinguish among types of businesses and exempt small businesses from its scope. Small employers are less able to afford employment litigation and are therefore more reliant on arbitration. They are also less likely to enjoy a “repeat player” advantage in arbitration. In addition, it may be the case that “small employers are less likely than larger employers to enjoy a gross advantage in bargaining power vis-à-vis their employees,” and therefore “are less likely to be able to bully their employees into unfair arbitration agreements.”

The AFA could be further fine-tuned by distinguishing among types of disputes. For example, it could ban the enforcement of pre-dispute arbitration agreements for statutory claims, while leaving such agreements in place for contract or compensation claims. The perceived importance of public development of the law is more applicable to disputes involving statutory rights than to those arising under individual contracts. Moreover, contract or compensation disputes are more likely to involve higher-level employees and individually-negotiated contracts. Distinguishing between types of disputes, therefore, might serve as a “bright line,” easily-applied proxy for distinguishing between high- and low-level employees, or between adhesion contracts and individually-negotiated contracts.

These proposals would narrow the scope of the AFA’s ban on pre-dispute arbitration agreements, but would leave the ban substantially in place. Alternatively, legislators could consider ideas that lie further afield of the bill currently under consideration. One such idea is to pass legislation that would allow for the enforcement of a pre-dispute arbitration agreement only at the employee’s election. This would protect employees from being forced into arbitration by adhesive contracts, while preserving the arbitration option for employees with low-value claims who would

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146 See Spitko, supra note 105, at 646–51.
147 Id. at 648.
148 Id.
149 Id. at 617–18, 625–26.
150 Id. at 644–48.
151 Hill, supra 91, at 804 (twenty-eight percent of arbitrations involve people in the upper income tier).
152 It is interesting to note that under New York law, mutuality of remedy is not required in employment arbitration agreements. See Sablosky v. Edward S. Gordon Co., 73 N.Y.2d 133, 136, 535 N.E.2d 643, 645, 538 N.Y.S.2d 513, 515 (N.Y. 1989) (employment contract compelling one party to submit disputes to arbitration, but allowing the other party the choice between arbitration and litigation, was not invalid for lack of mutuality of remedy).
have difficulty retaining counsel to pursue litigation, or who simply prefer arbitration over litigation.

Another idea is to enforce pre-dispute arbitration agreements, but allow for judicial review of an arbitral decision at the employee's election only.\textsuperscript{153} Under one such proposal, an arbitration agreement would be enforced, but the plaintiff could choose to appeal the result. The standard of review by the court would be de novo for questions of law, while findings of fact would have a presumption of accuracy, to be overcome by a preponderance of the evidence.\textsuperscript{154} This system would preserve arbitration as the primary means of dispute resolution for employees with arbitration agreements, but would offer a counterweight to any unfair advantages conferred on employers.\textsuperscript{155}

Whatever action is taken, one of the most important objectives of legislative reform should be to ensure that basic due process standards apply when employment arbitration takes place. Congress could achieve this by requiring that certain due process standards be in place for employment arbitration.\textsuperscript{156} A starting point for the drafting of such standards could be the American Arbitration Association's Employment Arbitration Rules and Mediation Procedures,\textsuperscript{157} and the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, drafted in 1995 by representatives from the American Bar Association, American Civil Liberties Union, Federal Mediation & Conciliation Service, National Academy of Arbitrators, National Employment Lawyers Association, and the Society of Professionals in Dispute Resolution.\textsuperscript{158} Arbitrations that use this Protocol have outcomes for employees that are roughly similar to, or more favorable than, litigation outcomes,\textsuperscript{159} and employers arbitrating pursuant to employee handbook arbitration clauses are less successful after the Protocol than before.\textsuperscript{160}

\textsuperscript{153} See Lindamood, \textit{supra} note 122, at 312.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} See \textit{id.} at 315.


\textsuperscript{158} See Task Force on Alternative Dispute Resolution in Employment, \textit{supra} note 157.

\textsuperscript{159} See Maltby, \textit{Workplace Justice}, \textit{supra} note 95, at 113–14.

\textsuperscript{160} See Bingham & Sarraf, \textit{Before and After}, \textit{supra} note 100, at 325. However, overall employer success improved after the Protocol, which Bingham theorized "might be explained by the enhanced scrutiny to which employers were subject after the Protocol." \textit{Id.} at 328. This "might cause employers to screen out and settle those cases in which they believed there
III. CONCLUSION

The AFA aims to redress perceived injustices resulting from mandatory arbitration of employment disputes. By better tailoring the legislation to the perceived problem areas, however, the AFA could avoid unnecessarily closing off a fair and cost-effective avenue for dispute resolution in many other areas of employment law.

While awaiting congressional action on the AFA, New York practitioners handling employment disputes should be aware of the increasing prevalence of pre-dispute arbitration agreements. New York courts will continue to give strong support to employment arbitration agreements, regardless of what state law or policy might otherwise suggest. As a result, practitioners should craft their legal strategies with a focus on the likelihood of arbitration, in most instances including a limited discovery process and limited opportunity for appellate review.

Attorneys who, on the other hand, are advising clients entering into employment contracts should carefully consider the uncertainty concerning the future validity of pre-dispute agreements to arbitrate, and should draft employment contracts that take into account the potential impact of the AFA on dispute resolution provisions.