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THE EVOLUTION AND ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE

STATUTORY CLAIMS

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Over the course of the last century binding arbitration of disputes between private parties has gained acceptance in American jurisprudence. A series of actions by the legislative branch, such as the Railway Labor Act, and the National Labor Relations Act, have grounded the Supreme Court's decisions granting great deference to private agreements to submit disputes to the arbitral forum.<sup>1</sup> In light of judicial deference to private parties' right to agree to a particular forum for the submission of their disputes, the Supreme Court has encouraged arbitration as a substitute for litigation in the settlement of disputes both private and statutory issues.<sup>2</sup>

This article will examine the expanding roll of pre dispute agreements to arbitrate claims arising from contractual relations. Starting with the least controversial arbitration clauses, where parties agree to arbitrate claims that arise from their contractual relationships, this article will move on to examine newer, and more controversial,

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<sup>1</sup> Kelly, Matthew A., *Labor and Industrial Relations*, 98-108 (1987).

<sup>2</sup> Frank Elkouri & Edna Elkouri, *How Arbitration Works* 4 (2003).

arbitration clauses. Instances where parties of unequal bargaining power agree to arbitrate their contractual claims have raised issues of unconscionability in contract formation. Further, mandatory pre dispute agreements to arbitrate personal employee claims of statutory violations have raised issues of knowing and voluntariness of the individual's waiver of a judicial forum. Finally it will examine recent developments that have given life to the most controversial pre dispute agreements to arbitrate, where a third party union can bargain away the right of a member to bring a statutory claim of employment discrimination against his employer in a judicial forum.

Arguments in support of granting great deference to agreements to arbitrate private disputes are grounded in contract common law, procedural equity, the needs of judicial economy, and statutory construction.<sup>3</sup> First, parties to contractual agreements are entitled to designate where disputes over the terms of their agreements will be heard in advance. Second, since arbitration has been found, arguably, to be faster and cheaper than litigation, the typical economic disadvantage suffered by the average plaintiff is less likely to be outcome determinative.<sup>4</sup> In the same vein, agreements to arbitrate claims between consenting parties allow for reduced litigation costs where the parties retain control of the process.<sup>5</sup> The parties themselves are able to outline the procedures by which their disputes will adjusted, and therefore control the timeliness of settlement

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<sup>3</sup> Michael Brady, *Exclusive Separability? Arbitrability and the Contract Formation Defense*, 28 REV. LITIG. 913, 950 (2009).

<sup>4</sup> Byron Allyn Rice, *Enforceable or Not? Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 Hous. L. REV. 215, 246 (2008).

<sup>5</sup> Elkouri, *supra* note 2 at 40.

and costs incurred.<sup>6</sup> Relaxed evidentiary standards in the arbitral forum lead to lower litigation costs as well, allowing economically disadvantaged plaintiffs to bring claims in arbitration where they would find it exceedingly difficult to secure adequate counsel for litigation in a judicial setting.<sup>7</sup> Third, judicial economy calls for an alternate forum where claims can be heard without adding additional burdens to an already overburdened legal system.<sup>8</sup> Fourth, the Federal Arbitration Act requires judicial deference to contractual agreements to arbitrate, Title VII expressly calls for alternate dispute resolution in the processing of claims, and does not proscribe parties from submitting their statutory claims to arbitration.

The efficacy of prearranged agreements to arbitrate private disputes should be analyzed in context. It is helpful to examine four important areas of the law where arbitration is currently an acceptable forum for the resolution of grievances between private parties. We will touch on each, agreements between commercial entities, agreements between commercial entities and individuals in a services context, agreements between private individuals and employers, and agreements between collective bargaining representatives and employers covering statutory rights of individual employees, in turn.

In the first instance, where the agreement to arbitrate disputes between commercial entities, one is most likely to find procedurally and substantively fair clauses.<sup>9</sup> Commercial entities that enter into

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<sup>6</sup> Elkouri, *supra* note 2 at 14.

<sup>7</sup> David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1267-68.

<sup>8</sup> Elkouri, *supra* note 2 at 13.

<sup>9</sup> Gilles Cuniberti, *Beyond Contract-The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 451 (.2009).

contractual agreements to arbitrate their disputes are highly likely to have been represented by competent counsel during the drafting of arbitration clauses. It is also likely that many people have had an opportunity to examine such an agreement before it is endorsed. What's more, the relationship between the parties, while not always equal, is more likely than not to have allowed for a fair meeting of the minds. Under these circumstances, the sophistication of the parties, assuming that they are both mature organizations, infers that their agreement to forgo litigation in the event of disputes were made with the knowledge of the advantages and disadvantages of their decision. The Supreme Court announced in *Soler Chrysler-Plymouth* that nothing in the Federal Arbitration Act precluded parties from agreeing to arbitrate statutory claims where transnational corporations have contracted to do so.<sup>10</sup>

The Supreme Court has noted that parties have a right to forsake litigation in favor of a streamlined procedure afforded by arbitration without forgoing the substantive rights granted by statutory constructions.<sup>11</sup> In subsequent rulings the Court has continued to endorse the expansion of corporate agreements to arbitrate statutory claims.<sup>12</sup> That the Federal Arbitration Act applies is uncontested; the issue is whether or not it applies to contracts of employment and, more specifically, to contractual clauses deferring statutory rights to the arbitral forum.

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<sup>10</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

<sup>11</sup> Barbara T. Lindemann, Paul Grossman, *Employment Discrimination Law*, 2978,79 (C. Geoffrey Weirich Ed. in Chief, B.N.A.4th ed. 2007) (1976).

<sup>12</sup> *Id.* at 2979, see *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1987) (state law securities claim), see also *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (federal securities claim under the Racketeer Influenced and Corrupt Organizations Act), see generally *Rodriquez de Quijas v. Sherson/American Express Inc.*, 490 U.S. 477 (1989)(federal securities claims).

When subject to scrutiny on contract law grounds, an agreement to arbitrate disputes enclosed in a contract, no matter the relationship the contract governs, is always subject to the legitimacy of the agreement. The Supreme Court held in *Doctors Associates* that contracts containing arbitration clauses are subject to state law governing the validity, revocability, and enforceability of the underlying agreement in finding that the Federal Arbitration Act does not preempt state common law governing the enforceability of contracts.<sup>13</sup> In *Southland Corp.* the Supreme Court made clear in a footnote that only section 2 of the Federal Arbitration Act applies to state courts, which therein states that any private agreement to submit disputes to arbitration are presumptively valid and enforceable unless the contract itself is unenforceable under state law governing contracts.<sup>14</sup> Thus, if a contract that contains an arbitration clause is found to violate state law doctrines defining traditional defenses to contract formation such as lack of assent, fraud, duress, and unconscionability, such a clause will have no force or effect.<sup>15</sup>

Next in line are agreements between private individuals and commercial entities for the purchase goods or services where the parties to the contract are often in unequal bargaining positions. Even in light of a strong claim that the underlying agreement was a contract of adhesion, the *Carnival Cruise Lines* Court held a forum selection clause contained in a contract for services enforceable where the consumer's

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<sup>13</sup> *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686,87 (1996).

<sup>14</sup> Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IN. L. J. 393, 400 (2004).

<sup>15</sup> *Id.* at 409.

acquiescence to the agreement was not induced by fraud.<sup>16</sup> The Supreme Court reasoned that if a clause contained in a contract is read by both parties, the forum selection clause is not unconscionable. However, in *Kortum-Managhan* the Montana Supreme Court, in holding an arbitration clause unenforceable, reasoned that the where the clause changed a previously agreed to contract and was contained in a envelope with other "bill stuffers", the consumer did not "knowingly and intelligently" waive her constitutional right of access to the courts and a jury trial.<sup>17</sup>

In the same vein the New Jersey Supreme Court held in *Marchak* that a contractual waiver deferring all disputes governing a homeowners warranty to arbitration must clearly state its purpose in order to be enforceable. While the Court reasoned that agreements to arbitrate contractual disputes should be read liberally, it is imperative that the parties clearly understand that by signing such a contract they are electing arbitration as their exclusive remedy and waiving their constitutional right to a judicial forum.<sup>18</sup> Later, the same court held in *Garfinkel* that neither party is entitled to force the other into an arbitral forum in the absence of a consensual agreement.<sup>19</sup> That particular Court thereafter reasoned that it will not assume employees intended to waive their right to sue unless they are party to an agreement that states their intent in the most unambiguous terms.<sup>20</sup> It is clearly the intent of both federal and state courts that any agreement between parties to forgo the right to sue and defer their disputes to binding final arbitration be stated clearly and

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<sup>16</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

<sup>17</sup> *Kortum-Managhan v. Herbergers*, 204 F. 3d 693, 700,01 (Mont. 2009).

<sup>18</sup> *Marchak v. Claridge Commons, Inc.*, 633 A. 2d 531, 535 (N.J. 1993).

<sup>19</sup> *Garfinkel v. Morristown Obstetrics & Gynecology Ass.*, 773 A. 2d 665, 670 (N.J. 2001).

<sup>20</sup> *Id.* at 672.

unambiguously in their agreements, and that those agreements stand up to contractual scrutiny in order for those arbitration agreements to be enforceable.

The third situation that merits examination is where a mandatory arbitration clause is contained in an individual employment contract. This type of agreement is distinguished from collective bargaining agreements covering terms and conditions of employment in that the individual knowingly, if not voluntarily, signs the agreement thereby subjecting him to its terms. In the collectively bargained employment contract an individual is generally bound to the terms contained therein by a consensus vote of the employees that are represented by the collective bargaining agent. The individual that is subject to the arbitration clause of a collective agreement could very well have been in opposition to its ratification and opposed, in particular, to the subjugation of his constitutional right to seek redress in a court of law to the determination of an arbitrator.

The Supreme Court addressed the mandatory arbitration of an individual's statutory discrimination claim in *Gilmer v. Interstate/Johnson Lane*. The Court stated that by signing an employment contract containing a clause compelling arbitration of a discrimination claim an individual does not waive his statutory rights, but just submits them to an arbitrator in lieu of a judicial forum.<sup>21</sup> The Court reasoned that if Congress wanted all discrimination claims tried in a court they would have stated so and held that a party is allowed to waive his right

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<sup>21</sup> Elkouri, *supra* note 2 at 38, *see also* *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

to a jury trial.<sup>22</sup> In support of their position the majority in *Gilmer* cited to the Older Workers Benefits Protection Act which states that any waiver of statutory rights to a judicial forum must be knowing and voluntary, in addition to reasoning that the statutory mediation procedures of the Title VII and the Americans with Disabilities Act leads to the conclusion that Congress wanted individual claims of discrimination subject to alternative resolution procedures.<sup>23</sup>

The majority failed to adequately address Justice Stevens' dissent in *Gilmer* where he asserted that a waiver in an employment contract cannot be knowing and voluntary where such a waiver was required as a condition of employment.<sup>24</sup> In addressing the plaintiff's arguments against arbitration of a statutory discrimination claim, the Court found no inconsistencies between the narrow interests of the aggrieved individual and the broader public policy remedies envisioned by Congress.<sup>25</sup> The majority, in addition, asserted the claim that the greater goals envisioned by Congress in enacting anti discrimination statutes are not impinged by individual agreements to arbitrate since the Equal Employment Opportunity Commission is not precluded from bringing an independent claim against an employer.<sup>26</sup> The dissent countered that compulsory arbitration clauses, such as contained in *Gilmer's* employment contract, frustrate Congressional intent authorizing broad ranging class wide injunctive relief that can result from an individual discrimination claim adjudicated

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 27 (the EEOC must submit to informal methods of mediation before it can institute an action against an employer).

<sup>24</sup> *Gilmer*, 500 U.S. 20 at 40 (Stevens, J., dissenting).

<sup>25</sup> *Id.* at 27,28.

<sup>26</sup> *Id.* at 32.

in a court of law.<sup>27</sup> Finally, the majority addressed the procedural differences between the judicial and arbitral forums by pointing to the New York Stock Exchange rules where the selection of panel members are fair and open to scrutiny, any awards are required to be in writing, and that punitive and equitable damages are available.<sup>28</sup> What the court failed to do, and in actuality dismissed in the most perfunctory way, is to deal with the issue of discovery. Justice White, in writing for the majority of the Court, claims it unlikely that age discrimination claims will require more discovery than R.I.C.O. and antitrust claims.<sup>29</sup> While he points out that the New York Stock Exchange guide allows for document production, information request, depositions and subpoenas, he acknowledged that such discovery is reduced in arbitration but then claims that this deficiency is adequately countered by relaxed standards of evidence.<sup>30</sup>

One does not have to look very hard to find opponents to compulsory arbitration provisions in contracts of employment. In reacting to the *Gilmer* decision the National Association of Arbitrators, the American Arbitration Association, and the American Bar Association have promulgated procedural guidelines to assist their members in adjudicating federal and state statutory claims in arbitration.<sup>31</sup> These organizations acknowledged that reduced discovery is "placing employees at a greater disadvantage than employers".<sup>32</sup> While, in 1997, the National Association of Securities Dealers voted to discard mandatory arbitration of employment

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<sup>27</sup> *Id.* at 42 (Stevens, J., dissenting).

<sup>28</sup> *Id.* at 30-32.

<sup>29</sup> *Id.* at 32.

<sup>30</sup> *Id.* at 31.

<sup>31</sup> Elkouri, *supra* note 2 at 36 n.166.

<sup>32</sup> *Id.*

discrimination claims for registered stock brokers<sup>33</sup>, both houses of Congress have introduced bills eliminating mandatory arbitration of federal employment discrimination claims.<sup>34</sup> The E.E.O.C., as well as the National Labor Relations Board, has come down firmly on the side of eliminating such contractual provisions as well; the Chairmen of the Labor Board going as far as questioning whether the Board ought to grant deference to awards in non union settings where the arbitration system is set up and paid for by management.<sup>35</sup> Finally, the Commission on the Future of Worker-Management Relations, as well as the Dunlop commission, while strongly supporting the growth of ADR mechanisms in the work place, have come down strongly against mandatory arbitration of employment claims as a condition of employment.<sup>36</sup>

After *Gilmer* many commentators wondered if and when the Court would revisit *Gardner Denver's* dicta which announced "we think it clear that there can be no prospective waiver of an employee's rights under Title VII".<sup>37</sup> That moment came on April 1st, 2009, when the court handed down its opinion in *14 Penn Plaza v. Pyett*.<sup>38</sup>

The fourth and final context which merits examination is where contractual agreements to arbitrate individual statutory claims are contained in collective bargaining agreements. Arbitration of disputes in the union-management relationship finds its genesis in the Supreme Court's opinion in *Lincoln Mills*, handed down in 1957, and three decisions known as the Steelworkers Trilogy announced by the Court on June 20th, 1960. The

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<sup>33</sup> *Id.* at 36 n.168.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 37 n.169.

<sup>36</sup> *Id.* n.171.

<sup>37</sup> *Gilmer*, 500 U.S. 20 at 51.

<sup>38</sup> *14 Penn Plaza L.L.C. v. Pyett*, 129 S.Ct. 1456 (2009).

*Lincoln Mills* Court established that section 301 of the Taft Hartley act of 1947 authorized federal judicial enforcement of contractual union-management agreements to arbitrate disputes.<sup>39</sup>

Once the Court had established the viability of labor arbitration, and authorized judicial orders compelling parties to arbitrate disputes, it turned to the question of how federal courts would enforce agreements to arbitrate. In the Trilogy, Justice Douglas, speaking for the Court, set forth the principles by which the judiciary would compel parties to arbitrate disputes, how they would deal with petitions to enforce arbitration awards, and under what circumstances courts could vacate arbitral decisions.<sup>40</sup>

*Warrior & Gulf Navigation*, one prong of the trilogy, stands for the proposition that a labor arbitrator should be the final arbiter of industrial disputes and agreements to arbitrate disputes should be broadly construed.<sup>41</sup> Likewise, in *American Manufacturing* the Court held that it is not proper for courts to determine whether or not a grievance has merit, but only whether the parties have agreed to arbitrate the dispute in question when ordering a party to arbitrate a particular dispute. In *Enterprise Wheel & Car* the Court finally held that the interpretation of the collective bargaining agreement is the province of the arbitrator and as long as his decision interprets the agreement, as well as the common law of the shop, courts have no business intervening.<sup>42</sup> It is important to

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<sup>39</sup> Albert Y. Kim, *Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem without Damaging Labor Relations*, 65 U. CHI. L. REV. 225, 227 (1998), see also *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455, 48 (1957), see also *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 764 (1983) (The Court may not second guess the correctness of an arbitrators award).

<sup>40</sup> Kelly, *supra* note at 1, 152, 53.

<sup>41</sup> *Id.* at 155.

<sup>42</sup> United Steel Workers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

note that Justice Douglas, in *Enterprise Wheel & Car*, noted that the arbitrator must confine his decision to the interpretation and application of the agreement. As a result, while arbitrators can look for guidance from many sources, awards must draw their essence from the collective bargaining agreement.<sup>43</sup> Nowhere in these seminal cases did the Court authorize arbitrators to rule on issues of substantive statutory law. It is essential to note that Justice Douglas grounded his decisions granting deference to arbitration in section 301 of the Taft Hartley act of 1947, not the Federal Arbitration Act of 1925.

The Supreme Court first grappled with the question of judicial interpretation of arbitral awards based on statutory law in *Wilko v. Swan*. There, the Court set the bar for judicial vacatur of an arbitration award grounded in a statutory right when they stated "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error".<sup>44</sup> This interpretation of the scope of judicial review squares with that later enunciated by the court in the Steelworkers Trilogy. Twenty one years later the Court ruled in *Gardner Denver* that a statutory right conferred upon an individual by law which, was also subjected to an obligation to arbitrate in a collective bargaining agreement, proffered two separate claims, one contractual and one civil. This led the court to conclude that even though the employee's claim of racial discrimination was submitted to arbitration he still retained the right to pursue a civil remedy in federal court.<sup>45</sup> Notably, the Court reasoned that arbitral procedures, such as reduced

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<sup>43</sup> *Id.* at 597.

<sup>44</sup> *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

<sup>45</sup> Lindemann & Grossman, *supra* note 8 at 2978.

discovery, make arbitration an inappropriate forum for the final resolution of Title VII rights.<sup>46</sup>

After *Gilmer*, the Court turned to what constituted a clear and unmistakable waiver of a statutory right in a collective bargaining agreement. The *Wright v. Maritime Service Corp.* Court held that in order for an arbitration clause to preempt an individual from pursuing litigation the waiver must be clear and unmistakable.<sup>47</sup> It is important to distinguish the clear and unmistakable language being applied to the collective context from the knowing and voluntary standard, discussed above. Just because a CBA contains a clear and unmistakable waiver does not mean that the individual subject to its terms has knowingly or voluntarily waived their constitutional right to a judicial forum.

Thereafter Court turned to the question of whether the Federal Arbitration Act applies to contracts of employment and replied affirmatively in *Circuit City v. Adams*.<sup>48</sup> In *Circuit City* the Court dealt with the thorny issue of whether an agreement to arbitrate a statutory claim reached between private parties limited an administrative agency's right to bring suit on behalf of the general public. Since Congress intended for the Equal Employment Opportunity Commission to represent the interest of the public in bringing wide ranging litigation in support of Title VII and other anti discrimination legislation the Court held In *EEOC v. Waffle House* that the agency could pursue victim specific remedies for individuals restricted by arbitration clauses as well as class actions designed to change long term invidious discriminatory practices of

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<sup>46</sup> *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 56 (1974).

<sup>47</sup> *Wright v. Maritime Service Corp.*, 525 U.S. 70 (1998).

<sup>48</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

employers, even where those employees were compelled to arbitrate their claims.<sup>49</sup>

Finally, we can turn to the Courts earth shattering decision announced in *14 Penn Plaza v. Pyett*. Justice Thomas, in writing for the majority of a bitterly divided court, opined that a clear and unmistakable clause subjecting an employee's claim of age discrimination contained in a collective bargaining agreement operates as a waiver of that employee's right to a judicial forum. The majority cited to *Gilmer* as justification of its position that the Age Discrimination in Employment Act does not preclude agreements to arbitrate claims grounded therein.<sup>50</sup> Justice Thomas writes that nothing in the law suggests a distinction between an arbitration agreement between an individual employee and a collective bargaining agent. His argument completely ignores the well settled law announced in *Gardner Denver* dicta, which states that an individual's right to pursue a claim of discrimination against his employer cannot be prospectively waived by his collective representative. Justice Stevens, in his dissent, argues that there is a difference between statutory rights related to collective activity and those conferred by the legislature upon individuals.<sup>51</sup> Justice Stevens' position is born out in the Courts holding in *Connecticut v. Teal*, where the majority announced that Title VII prohibits practices that deprive individuals of employment opportunities.<sup>52</sup> In addition, the dissent pointed out that it is permissible for a collective bargaining agent to subordinate the interest of an individual to the interests of all the employees in a bargaining

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<sup>49</sup> *EEOC v. Waffle House*, 534 U.S. 279 (2002).

<sup>50</sup> *14 Penn Plaza L.L.C. v. Pyett*, 129 S.Ct. 1456, 1465(2009).

<sup>51</sup> *Id.* at 1477 (Stevens, J., dissenting).

<sup>52</sup> *Connecticut v. Teal*, 457 U.S. 440, 454 (1982).

unit while pointing out that it is plainly a mistake to subjugate an individual's statutory claim to a collective bargaining agent.<sup>53</sup>

Curiously, Justice Thomas completely fails to square his opinion with the longstanding and much quoted position of the Court announced by Justice Douglas in *Enterprise Wheel & Car*, supra, that an arbitrator must draw his decision from the essence of the contract. Since Justice Thomas fails to articulate reasoning on how an arbitrator can draw rights statutorily given from a collective bargaining agreement it is unclear how he grounds his decision in this regard. The majority's failure to comport its decision in *Pyett* with the realities of stare decisis is quite troubling.

In its defense it is important to put out that the majority in *14 Penn Plaza* deals with the danger of a collective bargaining agent subjugating an individual's claim to the interests of the group by pointing out that unions have a duty of fair representation; unions must not treat their members' grievances in an arbitrary or capricious manner.<sup>54</sup>

Justice Thomas' position, from the perspective of an aggrieved employee, fails to square with the realities of the nature of a union's duty. Employees normally face great difficulties in establishing unions have failed in their duty of fair representation.<sup>55</sup> A union breaches its duty of fair representation when it processes a member's claim in an arbitrary, discriminatory, or bad faith manner.<sup>56</sup> In defining a union's duty in this context the Court stated in *Vaca v. Sipes* that an employee

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<sup>53</sup> *Pyett*, 129 S.Ct. at 1478 (Stevens, J., dissenting).

<sup>54</sup> *Id.* at 1473 *et. seq.* (discussing the majority opinion).

<sup>55</sup> Ronald Turner, *Employment Discrimination, Labor and Employer Arbitration, and the case against Union Waiver of the individual Workers Statutory Right to a Judicial Forum*, 49 EMORY L. J. 135, 187 (200).

<sup>56</sup> *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

does not have an absolute right to have his grievance submitted to binding arbitration.<sup>57</sup>

Since a collective bargaining agent is allowed a wide range of reasonableness in its prosecution of grievances the burden of proof that a union has breached its duty is upon the aggrieved employee.<sup>58</sup> The Supreme Court itself has held that the evaluation of evidence establishing a union's failure in its duty must be seen as highly deferential to the union's judgment.<sup>59</sup> The *Barrentine v. Arkansas-Best* Court held that a union can decide not to vigorously support an employee's statutory claim without violating its duty of fair representation.<sup>60</sup>

Tangentially, the *McDonald v. City of West Branch* Court expressed its concern with the lack arbitral expertise in resolving complex legal questions, union control over the contractual grievance process, and the fact that arbitral fact finding is inferior to that exercised in federal judicial proceedings.<sup>61</sup>

It is not hard to imagine a situation where a union could claim that the age discrimination claim of a member, if won in arbitration, would impinge on the interests of the majority of its members. An additional problem is presented where smaller unions have limited resources. It might be seen as reasonable if such an underfunded union were to claim that costs associated with the arbitration of one members claim would hurt their ability to represent the majority. The Federal Court sitting in the Southern District of New York dealt with precisely this issue in holding

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<sup>57</sup> *Id.* at 191.

<sup>58</sup> *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554, 569,571 (1976).

<sup>59</sup> *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 78 (1991).

<sup>60</sup> *Vaca*, 386 U.S. at 188, *see generally* *Barrentine v. Arkansas-Best*, 450 U.S. 728 (1981).

<sup>61</sup> *Id.* at 189, *see generally* *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

that *Pyett* provides for an exception to the collective bargaining agreement's waiver of statutory claims where the union failed to arbitrate the individuals claim. In that case Judge Baer stated that such a failure by the union would allow the plaintiff to file his discrimination claim in federal court since the arbitration provision would no longer be enforceable.<sup>62</sup>

In light of all these issues Congress began the process of reversing *Pyett* when the House of Representatives proposed the Arbitration Fairness Act of 2009 which, if enacted, will amend section two of the Federal Arbitration Act and render unenforceable any pre-dispute arbitration agreements in employment, consumer, or franchise matters.<sup>63</sup>

It is apparent that the *Pyett* Court rationalizes its position that arbitral procedures afford the victim of employment discrimination the same protections as those granted in civil proceedings. Justice Thomas claims that it is unlikely that age discrimination actions require more discovery than RICO or antitrust claims.<sup>64</sup> Interestingly, he ignores the fact that plaintiffs in discrimination claims often bring suit while in possession of the most circumstantial evidence. Rarely do plaintiffs possess direct evidence of discrimination and must rely on exhaustive discovery in order to survive an employer's proffered legitimate non discriminatory reason for its actions. The need for exhaustive discovery in order for a plaintiff to root out evidence of discrimination is not afforded in labor arbitration forums, while courts continue to allow for

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<sup>62</sup> *Borrero v. Ruppert Housing Co.*, No. 08 CV 5869 (HB), 2009 WL 1748060 at \*3 (S.D.N.Y. June 19, 2009)

<sup>63</sup> Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

<sup>64</sup> *Pyett*, 129 S.Ct. at 1471.

broad discovery in discrimination cases.<sup>65</sup> It has been argued that unions can negotiate heightened standards of discovery in situations where they agree to arbitrate discrimination claims, but it is obvious that employers will resist those measures. Even if employers do agree to heightened discovery unions will be burdened with the costs associated with such expensive procedures offering them another reason to forgo arbitrating complex discrimination claims.

Contractual agreements compelling parties to arbitrate claims have gained widespread judicial acceptance over the course of the last century.<sup>66</sup> As the enforceability of pre dispute agreements to forgo judicial forums in favor of arbitration have grown controversy has arisen. While most agree that parties can freely to agree to, and courts should enforce, provisions designating the forum in which their disputes will be adjudicated this commentator concludes that the reason for the Court's position enforcing arbitration clauses of employment discrimination claims in both private employment and collective bargaining contexts is their distaste for such claims.

Congress has found it necessary to re-legislate in order to overturn Supreme Court decisions it felt were contrary to its intent in proffering anti discrimination statutes.<sup>67</sup> The Civil Rights Act of 1991 rolled back Supreme Court decisions making it more difficult for individuals to prove claims of disparate impact as well as allowing plaintiffs to establish unlawful discrimination even if employers could prove that they would have made the same employment decisions on other, non discriminatory, grounds.

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<sup>65</sup> Lindemann & Grossman, *supra* note 8 at 2236,37.

<sup>66</sup> *Pyett*, 129 S.Ct. at 1469 .

<sup>67</sup> 397 PLI/Lit 7, \*19-20.

The A.D.A. Amendments Act was passed in 2001 envisioning Congress' intent to protect disabled persons and to roll back the Courts decisions making it difficult for disabled individuals to secure protections against unlawful employment discrimination.

It is clear that Congress will have to legislate limits to the enforceability of agreements to arbitrate individual claims of discrimination in order to protect individual's rights to be free from unlawful discrimination in the workplace.