



12-1-2006

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Recommended Citation

Adam Borstein, *Arbitrary Enforcement: When Arbitration Agreements Containing Unlawful Provisions*, 39 Loy. L.A. L. Rev. 1259 (2006).

Available at: <https://digitalcommons.lmu.edu/llr/vol39/iss4/6>

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ARBITRARY ENFORCEMENT: WHEN ARBITRATION AGREEMENTS CONTAIN UNLAWFUL PROVISIONS

I. INTRODUCTION

There are currently two divergent approaches among federal circuits concerning the enforceability of arbitration agreements that contain unlawful provisions. The Fifth, Sixth, Eighth and District of Columbia Circuits endorse severance of unlawful provisions and enforcement of the remaining portions of arbitration agreements.¹ This approach compels arbitration to go forward once the unlawful provisions are severed, despite the objections of a party resisting arbitration.² Conversely, the Fourth, Ninth, Tenth, and Eleventh Circuits hold that arbitration agreements containing unlawful provisions are entirely void.³ Consequently, claimants who resist arbitration in these circuits may seek relief in an Article III Court.⁴

In the severance-versus-voidance debate, each side pursues its own justifying policy. Circuits favoring severability and enforce-

1. See *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478–79 (5th Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001).

2. See *Gannon*, 262 F.3d at 681. Severance is a judicial remedy where courts remove unlawful provisions from private agreements. After the offending provisions are severed, the remaining provisions of the contract still remain in force. *Id.*

3. See *Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 896 (9th Cir. 2002); *Perez v. Globe Airport Sec. Servs. Inc.*, 253 F.3d 1280, 1286–87 (11th Cir. 2001); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233–35 (10th Cir. 1999); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994) (holding that where the unlawful provisions of the arbitration clause are fully integrated and contravene public policy as set forth by congressional mandate, severance is inappropriate).

4. See cases cited *supra* note 3.

ment of arbitration agreements containing illegal provisions rely on the strong federal policy of “rigorously” enforcing arbitration agreements.⁵ Conversely, circuits that favor voiding arbitration agreements with unlawful provisions reason that enforcement would reward parties who insert illegal provisions in their contracts and would “fail to deter similar conduct by others.”⁶ This Note analyzes the competing policies behind the two divergent approaches, and attempts to predict which methodology the U.S. Supreme Court will ultimately adopt, should the Court have the opportunity to make a definitive ruling on the issue.

To accomplish these ends, Part II of the analysis will trace the historical, legal, and political development of the Federal Arbitration Act (“FAA”), including its enactment in 1925, codification in 1947, and subsequent interpretation by the U.S. Supreme Court.⁷ Part III of the analysis will focus on the principal severance-versus-voidance cases from each federal circuit, highlighting each circuit’s interpretation and application of the FAA. Furthermore, Part III will discuss how the law differs among the circuits with respect to what constitutes an unenforceable arbitration provision because the U.S. Supreme Court has established few uniform standards. This circuit-by-circuit analysis will also show that each circuit imposes a different burden on parties resisting arbitration to prove that given arbitration provisions are illegal.

Finally, Part IV revisits the most recent decisions of the U.S. Supreme Court to predict whether the Court will ultimately adopt a severability or non-severability approach to adjudication of arbitration agreements that contain unenforceable provisions. This review of the Court’s recent decisions will explain the legal justifications and policies behind each decision. In addition, Part IV will profile each individual justice’s views regarding arbitration agreements, contract interpretation, and severability. These profiles will include analyses of recently confirmed Justice Samuel Alito and newly-appointed Chief Justice John Roberts, whose 2005 decision in

5. See Michael K. Daming, Note, *To Sever or Destroy?: The Eighth Circuit Allows Invalid Provisions to be Severed from Otherwise Enforceable Arbitration Agreements*, 2002 J. DISP. RESOL. 425, 428 (2002).

6. *Id.*; see also *Perez*, 253 F.3d at 1287.

7. 9 U.S.C. §§ 1–16 (2000) (originally enacted as Act of Feb. 12, 1925, Ch. 213, § 1, 43 Stat. 883).

*Booker v. Robert Half International, Inc.*⁸ established the District of Columbia Circuit Court's position on the severance-versus-voidance issue⁹.

II. HOW IT ALL BEGAN: THE LEGISLATIVE AND JUDICIAL EVOLUTION OF THE FEDERAL ARBITRATION ACT

A. Congress Mandates Respect for Private Dispute Resolution: Legal and Historical Origins of the FAA

The Federal Arbitration Act ("FAA")¹⁰ was enacted in 1925 and codified in 1947 to "reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts."¹¹ This traditional judicial aversion toward arbitration agreements was founded on concern that compelling private arbitration of disputes deprived aggrieved parties of their right to vindicate substantive rights in court.¹² By enacting the FAA, which provides that arbitration clauses are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," Congress rejected this judicial prejudice against arbitration agreements.¹³ In time, the Court itself disavowed this bias as well.¹⁴

Moreover, the FAA further insures the enforceability of arbitration agreements by preempting any state law that seeks to undermine the federal policy of enforcing arbitration.¹⁵ Although the actual substantive provisions of arbitration agreements are

8. 413 F.3d 77 (2005).

9. *Id.* at 85.

10. 9 U.S.C. §§ 1–16 (originally enacted as Act of Feb. 12, 1925, Ch. 213, § 1, 43 Stat. 883).

11. *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 24 (1991).

12. *See, e.g., Wilko v. Swan*, 427 U.S. 427 (1953). This bias was primarily based on concerns that arbitrators were not bound to follow standard rules of discovery, evidence or civil procedure. An arbitrator's potential lack of neutrality was also a prominent concern. *See id.* at 435–37.

13. 9 U.S.C. § 2 (2000).

14. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

15. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967).

interpreted under state contract law,¹⁶ any question as to the duty to enforce arbitration agreements is exclusively regulated by the FAA.¹⁷ Therefore, the FAA must be applied to arbitration cases brought before state courts as well as to cases brought before federal courts.¹⁸

Thus, by making arbitration agreements as enforceable as other contractual provisions and by preempting state law that would otherwise interfere with this equal level of enforceability, Congress established a strong pro-arbitration policy. After the enactment of the FAA, it was left to courts to determine how extensively and comprehensively this policy would be applied.

*B. The Scope of the FAA Expands: Subsequent U.S.
Supreme Court Interpretation and Application of the FAA*

Until the 1970s, the state of federal law regarding the enforceability and reach of arbitration was uncertain.¹⁹ Since the 1980s, however, the U.S. Supreme Court has consistently held such agreements to be enforceable, absent any evidence of unconscionability, overreaching, or fraud. For example, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,²⁰ the Court held that any doubts as to arbitrability should be addressed “with a healthy regard for the federal policy favoring arbitration” and resolved “in favor of arbitration.”²¹ This respect for the FAA’s pro-

16. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”).

17. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

18. *Southland v. Keating*, 465 U.S. 1, 12 (1984) (“[T]he substantive rules of the [Arbitration] Act were to apply in state as well as federal courts”).

19. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974) (finding that an arbitral decision of a Title VII civil rights claim did not preclude the enforcement of independent statutory Title VII claims); Ellis B. Murov & Beverly A. Aloiso, *Arbitration of Employment Disputes Before and After Circuit City*, 17 LAB. LAW. 327, 329 (2001) (discussing whether the FAA should apply to employment contracts).

20. 460 U.S. 1 (1983).

21. *Id.* at 24–25. The court held that any doubts regarding the arbitrability of a dispute should be resolved in favor of arbitration, “whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense of arbitrability.” *Id.*

arbitration policy was further echoed in *Dean Witter Reynolds, Inc. v. Byrd*, which held that “the preeminent concern of Congress in passing the Act was to . . . rigorously enforce agreements to arbitrate.”²²

In addition to solidifying the enforceability of arbitration agreements in the 1980s, the Court also expanded the scope of claims which are subject to arbitration. Whereas the Court had previously been reluctant to subject federal statutory claims to arbitration,²³ in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁴ the Court changed course. The *Mitsubishi* Court held that a federal antitrust claim between two commercial parties could be resolved through arbitration without depriving either party of the ability to vindicate its statutory rights.²⁵ Under this ruling, a party who has agreed to arbitrate contractual disputes must also arbitrate all federal statutory claims that arise, even though these federal statutory claims are extrinsic to the terms of the contract.²⁶

Mitsubishi also set the stage for an even greater expansion of the scope of arbitration agreements. In *Mitsubishi*, the Court set forth the broad proposition that *all* federal statutory claims should be subject to arbitration, absent congressional intent to “preclude a waiver of judicial remedies for the statutory rights at issue.”²⁷ With one bold move, the Court set aside decades of reluctance to arbitrate

22. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

23. *See Alexander*, 415 U.S. at 56–58. In *Alexander*, the Court rejected contractual arbitration of an employee Title VII anti-discrimination claim because Title VII claims are founded on statutory law extrinsic to the terms of the claimant’s employment contract. *Id.* The ruling is emblematic of the Court’s reluctance, prior to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), to entrust a party’s statutory claims—particularly anti-discrimination claims—to private arbitration. *Id.*

24. 473 U.S. 614 (1985).

25. *Id.* at 626 (“There is no reason to depart from these [FAA] guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights.”).

26. *See id.* at 628.

27. *Id.* The burden for proving Congressional intent to preclude judicial remedies is further developed in *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987), wherein a party resisting arbitration must evince congressional intent via the statute’s text, legislative history, or from an inherent conflict between arbitration and the statute’s underlying purpose.

statutory claims by pronouncing that all statutory claims were presumptively arbitrable.²⁸

In keeping with its *Mitsubishi* dicta, the Court steadily expanded the types of statutory claims that were subject to mandatory arbitration. In *Shearson/American Express v. McMahon*,²⁹ the Court held that claims filed under the Securities Act and Racketeer Influenced and Corrupt Organizations Act (“RICO”) could be subject to mandatory arbitration.³⁰ In *Gilmer v. Interstate/Johnson Lane*,³¹ the Court subsequently held that federal statutory anti-discrimination claims could also be subject to mandatory arbitration.³² Finally, in *Circuit City Stores, Inc. v. Adams*, the court held that subject to certain narrow exceptions, employment contracts were subject to mandatory arbitration, despite concerns that employee agreements to arbitrate are contracts of adhesion that are neither entered into freely nor subject to negotiation.³³

In addition to expanding the scope of claims which are subject to the FAA, the Court in the foregoing cases also reiterated the strong federal policy favoring enforcement of arbitration agreements. According to the court, arbitration agreements should be rigorously enforced, with the following two exceptions: (1) when “Congress [has] intended. . .to preclude a waiver of judicial remedies,”³⁴ or (2) when such a waiver of judicial remedies conflicts with the underlying purpose of a federal statute by depriving a party of the ability to vindicate his substantive statutory rights.³⁵ Absent one of

28. *See Mitsubishi*, 473 U.S. at 626–27.

29. 482 U.S. 220 (1987).

30. *Id.* at 242.

31. 500 U.S. 20 (1991).

32. *See id.* at 29.

33. *See Circuit City v. Adams (Adams II)*, 532 U.S. 105 (2001). The court narrowly interpreted the FAA’s exclusion for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” and held that the exclusion only applies to workers directly involved in interstate transportation. *Id.* at 112 (quoting 9 U.S.C. § 1 (2000)).

34. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

35. *Rodriguez De Quijas v. Shearson/Am. Express*, 490 U.S. 477, 483 (1989) (citing *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 226–27 (1987)).

these circumstances, the claimant will be compelled to resolve his dispute via arbitration.

The court's endorsement of arbitration agreements, as demonstrated in these cases, solidified the federal policy favoring arbitration. At the same time, it firmly placed the burden of proof on parties resisting arbitration to demonstrate that mandatory arbitration of claims would deprive them of adequate opportunity to vindicate their statutory rights.³⁶

While the Court's arbitration rulings clearly expanded the scope of claims subject to arbitration and imposed a high burden on parties resisting arbitration,³⁷ the Court's decisions left two important issues regarding arbitration adjudication unanswered. First, the Court has yet to determine whether unlawful arbitration provisions can be severed from otherwise enforceable arbitration agreements, or whether the offending provisions render the entire arbitration agreements void. Second, the Court has not established uniform standards for determining whether given arbitration provisions are unlawful.

III. SEVERANCE VERSUS VOIDANCE: CIRCUIT-BY-CIRCUIT INTERPRETATION AND APPLICATION OF THE FAA

Although the U.S. Supreme Court has not ruled on whether unlawful provisions within an arbitration agreement should void the entire agreement or merely be severed, the issue has been adjudicated by many federal courts of appeal. This section of the analysis will evaluate the principal appellate rulings, and will discuss the legal reasoning and policies behind them.

A. Pro-Severability Circuits

The federal circuits that favor severing invalid provisions and enforcing the remaining portions of an otherwise valid arbitration agreement generally cite the strong pro-arbitration policy of the FAA to justify their decisions.³⁸ Also guiding severability jurisprudence is the notion that enforcement of arbitration agreements honors the

36. *McMahon*, 482 U.S. at 226-27 (1987).

37. *Id.* at 227; *see Mitsubishi*, 473 U.S. at 628.

38. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 653 (6th Cir. 2003); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001).

intent of the parties.³⁹ These circuits reject the argument that enforcing the remaining portions of the agreements creates a perverse incentive for parties to continue inserting unlawful provisions into their agreements.⁴⁰ Additionally, pro-severability circuits tend to place a higher burden on parties resisting arbitration to prove that given arbitration provisions are unlawful.

1. Eighth Circuit: *Gannon* Sets the Stage

*Gannon v. Circuit City Stores, Inc.*⁴¹ was the first case in which a federal court of appeals severed an unlawful provision from an arbitration agreement and enforced the rest of the agreement.⁴² It involved employee sex discrimination and sexual harassment claims which, under *Mitsubishi* and *Gilmer*, were both subject to arbitration. The arbitration agreement contained a problematic provision that limited the arbitrator's ability to award punitive damages to the prevailing party.⁴³ Although the Eighth Circuit, unlike most other federal circuits, had no precedent for finding such provisions unlawful at that time, Circuit City conceded that the provision was illegal, and agreed to sever it from the rest of the agreement.⁴⁴

The court rejected *Gannon*'s request to deny severance of the provision in favor of voiding the entire agreement.⁴⁵ The existence of a severance clause in the contract served as the primary basis for the court's decision to sever the illegal provision and enforce the remaining portions.⁴⁶ The clause provided that any provisions in the contract which conflict with applicable law shall be "modified automatically to comply."⁴⁷ The court found that the existence of this clause demonstrated the parties' intent to proceed with their

39. See *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84 (D.C. Cir. 2005).

40. *Id.* at 85; *Gannon*, 262 F.3d at 681.

41. 262 F.3d 677 (8th Cir. 2001).

42. See *Gannon*, 262 F.3d at 682–83.

43. *Id.* at 679. The provision limited the prevailing party's punitive damages to \$5,000. *Id.* at 679 n.2.

44. *Id.* at 681. Although the Eighth Circuit Court of Appeals had no precedent for finding limitation-of-damages provisions per se unenforceable at the time, the district court had already found the provision to be unenforceable, and Circuit City did not dispute that finding on appeal. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 680.

agreement in the event that any provision within it was found to be unenforceable.⁴⁸

To a lesser extent, the court's decision to reject avoidance of the entire contract rested on the fact that the arbitration agreement only contained one discrete unenforceable provision that could be severed without "disturbing the primary intent of the parties to arbitrate their disputes."⁴⁹ It flatly rejected Gannon's public policy argument that enforcing the remaining portions of the agreement would encourage employers to insert unlawful provisions into their agreements.⁵⁰ On the contrary, the court reasoned that severance of the illegal provision actually benefited the employee by allowing her to "arbitrate her claims under more favorable terms than those to which she agreed."⁵¹

Gannon, then, stands for the proposition that when a contract contains a severance clause, a presumption exists that the entire arbitration agreement should not be voided solely because the arbitration agreement contains one unlawful provision.

2. Sixth Circuit: Severance Clause is Once Again Determinative

*Morrison v. Circuit City Stores, Inc.*⁵² involved employee race discrimination and sex discrimination claims filed under Title VII of the Civil Rights Act of 1964.⁵³ As in *Gannon*, the court found an arbitration provision limiting a claimant's punitive damages to be unenforceable.⁵⁴ Additionally, the court found a cost-splitting provision within the agreement to be unenforceable because it required a claimant to pay excessive fees in order to arbitrate her claims.⁵⁵ Here, even though the arbitration agreement differed from *Gannon* in that it contained more than one unlawful provision, the

48. *Id.*

49. *Id.* at 681.

50. *Id.* at 682–83.

51. *Id.*

52. 317 F.3d 646 (6th Cir. 2003).

53. 42 U.S.C. § 2000e-17 (2000).

54. *Morrison*, 317 F.3d at 670. By the time *Gannon* was decided, most federal circuits had found provisions denying claimants all of the statutory remedies available in court to be either per se unenforceable, or at the very least, highly suspect. *See id.*

55. *Id.* at 668–69.

court cited *Gannon* and the existence of a severance clause as grounds to sever both illegal provisions and enforce the rest of the agreement.⁵⁶

Morrison also tried to argue that the arbitration agreement was both procedurally and substantively unconscionable⁵⁷ under applicable Ohio contract law.⁵⁸ The court, however, interpreted case law in such a way as to reject both of these unconscionability arguments. Most notably, it rejected Morrison's argument that the arbitration agreement was a contract of adhesion, even though the agreement was a compulsory condition of employment.⁵⁹ Despite this admitted lack of equal bargaining power, the court rejected Morrison's claim of procedural unconscionability.⁶⁰ It reasoned that since Morrison held a master's degree in administration, she was therefore capable of understanding the agreement she was signing.⁶¹

Morrison's claim of substantive unconscionability was also rejected, even though her contract contained a provision which granted Circuit City the unilateral power to alter or terminate the

56. *See id.* at 675. The *Morrison* Court held that:

[W]hen the arbitration agreement at issue includes a severability provision, courts should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement For these reasons, we agree with the Eighth Circuit that [the severance clause] manifests the parties' intent "to sever any terms determined to be invalid and to allow all claims to proceed to arbitration under the remaining provisions of the agreement."

Id. (quoting *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680 (8th Cir. 2001)).

57. *Id.* at 666–67. Procedural unconscionability exists when one party uses deceit or superior bargaining power to compel a weaker party to sign a disadvantageous agreement. *See id.* at 666. Substantive unconscionability exists when the actual terms of an agreement violate minimal fundamental notions of fairness. *See* Larry H. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV 839, 886 (1999).

58. Section 2 of the FAA provides that arbitration agreements, like all other contracts, can be voided upon findings of fraud, overreaching, or unconscionability. 9 U.S.C. § 2 (2000). Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), applicable state contract law governs such findings.

59. *See Morrison*, 317 F.3d. at 666.

60. *Id.*

61. *Id.* at 666–67.

arbitration agreement on December 31 of any given year.⁶² Morrison claimed that this arrangement lacked consideration and thus created a non-mutual obligation,⁶³ but the court disagreed. The court held that the provision did create mutual obligations because Circuit City's power to alter or terminate the arbitration agreement was restricted to only one specific day per year, and therefore was not "unlimited."⁶⁴

As Part III.b.ii of this analysis will reveal, other federal circuits have found nearly identical arbitration agreements to be both procedurally *and* substantively unconscionable.⁶⁵ This suggests that while state law governs unconscionability doctrine, the question of unconscionability and ultimate enforceability may also be influenced by each circuit's own pro-arbitration or anti-arbitration leanings.

In *Morrison*, the court's main contribution to the overall jurisprudence of unlawful arbitration provisions, however, is its adherence to precedent set in *Gannon* of finding illegal provisions presumptively severable when the agreement contains a severance clause.⁶⁶ In fact, *Morrison* extended the holding in *Gannon* because it used the presence of a severance clause to justify the enforcement of an arbitration agreement that had more than one unlawful provision.⁶⁷

3. Fifth Circuit: Who Needs a Severance Clause?

In *Hadnot v. Bay, Ltd.*,⁶⁸ the Fifth Circuit adjudicated an employee race discrimination claim filed under Title VII.⁶⁹ Here, the court severed an unlawful limitation-of-damages provision and enforced the rest of the arbitration agreement, even though the agreement did not contain a severance clause.⁷⁰ The court primarily based its decision on the pro-arbitration policy announced by the

62. *Id.* at 667.

63. *Id.*

64. *Id.*

65. *See* Circuit City Stores, Inc. v. Adams (*Adams III*), 279 F.3d 889 (9th Cir. 2002); *infra* Part III.b.ii.

66. *See Morrison*, 317 F.3d at 675.

67. *See id.* at 668–70.

68. 344 F.3d 474 (5th Cir. 2003).

69. *Id.* at 478.

70. *See id.* at 478–79.

Supreme Court in *Mitsubishi*,⁷¹ and rejected Hadnot's contention that the entire arbitration agreement should be voided.⁷²

Despite the lack of a severance clause, the court held that the illegal limitation-of-damages provision was not integral to the contract and could be severed without undermining the intention of the parties.⁷³ Moreover, the court held that the severing of the illegal clause actually "enhances the ability of the arbitration provision to function fully and adequately under the law."⁷⁴ The court reasoned that the modified arbitration agreement had the effect of allowing Hadnot to pursue all of the statutory remedies provided by Title VII.⁷⁵

Interestingly, the *Hadnot* Court also noted that severing the illegal provision and allowing the arbitration agreement to go forward served to "expand the scope of arbitration rather than reduce or impair it."⁷⁶ This language echoed the Supreme Court's ruling in *Moses H. Cone Memorial Hospital v. Mercury Construction* that any doubts as to arbitrability of claims should be construed in favor of arbitration.⁷⁷ Under *Moses H. Cone*, courts were encouraged to construe arbitration agreements in such a way as to render them as expansive and enforceable as possible.⁷⁸ The Fifth Circuit seems to have adopted that approach in *Hadnot*.⁷⁹

4. District of Columbia Circuit: Severance Clause Plus Discrete Unlawful Provisions Equals Enforcement

Two major arbitration decisions have come out of the District of

71. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

72. *Hadnot*, 344 F.3d at 478.

73. *Id.*

74. *Id.*

75. Title VII provides that prevailing parties may be awarded punitive and exemplary damages, both of which had been denied under Hadnot's original arbitration agreement. 42 U.S.C. § 1981a (2005). After this ban on punitive and exemplary damages was lifted, via severance of the relevant provisions of the contract, Hadnot was free to pursue these statutorily-provided remedies.

76. *Hadnot*, 344 F.3d at 478.

77. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

78. *See id.* at 24-26.

79. *See Hadnot*, 344 F.3d at 478.

Columbia Circuit in recent years. In *Cole v. Burns International Security Services*,⁸⁰ the District of Columbia Circuit outlined five conditions to guarantee fairness in arbitration proceedings,⁸¹ and in *Booker v. Robert Half International, Inc.*,⁸² soon-to-be U.S. Supreme Court Chief Justice John Roberts established the circuit's framework for adjudicating arbitration agreements that contain unenforceable provisions.⁸³

In *Cole*, the District of Columbia Circuit became the first federal court of appeals to create a set of conditions to guarantee fairness in arbitration proceedings.⁸⁴ Prior to *Cole*, neither the FAA nor the U.S. Supreme Court had outlined many specific guidelines to govern arbitration procedures. As a result, most courts had been applying inconsistent, ad hoc standards of fairness.⁸⁵ The standards in *Cole* have been subsequently adopted by several other federal circuits that maintain the Supreme Court has reverse-incorporated these conditions into *Gilmer*.⁸⁶

What the *Cole* court did not establish, however, were specific standards with which to determine whether some of these conditions were met. Specifically, no standards were created to determine “more than minimal discovery” or “unreasonable costs.”⁸⁷ The

80. 105 F.3d 1465 (D.C. Cir. 1997).

81. *Id.* at 1482.

82. 413 F.3d 77 (D.C. Cir. 2005).

83. *Id.* at 83–84.

84. *Cole*, at 1482. The *Cole* court held that an arbitral proceeding was valid when it:

- (1) [provided] for neutral arbitrators,
- (2) [provided] for more than minimal discovery,
- (3) [provided] a written award,
- (4) [provided] for all . . . types of relief that would otherwise be available in court, and
- (5) [did] not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Id.

85. *E.g., id.* at 1473 (“Arbitration . . . is the proverbial ‘new kid on the block,’ . . . for it is not only a new idea, but it comes in no clear form . . .”).

86. *See* *Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 895 (9th Cir. 2002); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.* 163 F.3d 1230, 1233 (10th Cir. 1999). Reverse incorporation occurs when the decision of a court is retroactively incorporated into a *previous* ruling, thus imbedding the case law created by the subsequent ruling into the prior decision.

87. *Cole*, 105 F.3d at 1482 (referring to provisions #2 and #5).

District of Columbia Circuit subsequently defined some of these standards eight years later in *Booker*.⁸⁸

In *Booker*, Justice Roberts relied on the U.S. Supreme Court's ruling in *Green Tree Financial Corp. v. Randolph*,⁸⁹ which held that a party claiming that the cost of arbitration is excessive "bears the burden of showing the likelihood of incurring such costs."⁹⁰ Additionally, *Green Tree* established that neither silence nor speculation regarding arbitration costs was sufficient to prove that the costs were excessive.⁹¹ As such, after *Green Tree*, a party resisting arbitration had to meet the high burden of proving that an arbitration forum was sufficiently expensive, on its face, to prevent a claimant from asserting his statutory rights.⁹²

From the Supreme Court's treatment of the issue of unreasonable cost, Justice Roberts extrapolated the general principle that a party resisting arbitration bears the burden of proving that *any* kind of arbitration provision would interfere with the vindication of his statutory rights.⁹³ Thus, a party contending that an arbitration forum did not provide "more than minimal discovery" carries a fairly high burden of proof.⁹⁴ A party could not base his argument on mere speculation as to how an arbitrator was likely to rule.⁹⁵ Rather, the party must show evidence that the arbitration agreement, as written, denied claimants a minimal level of discovery.⁹⁶

In addition to creating a heightened standard for finding individual arbitration provisions unenforceable, Justice Roberts also revealed his pro-severability leanings. In *Booker*, Roberts found an illegal limitation-of-damages provision to be severable, even though the employment agreement also contained a clause that prohibited either party from waiving any provisions without the other party's written permission.⁹⁷ Justice Roberts based this decision on the

88. See *Booker*, 413 F.3d 77.

89. 531 U.S. 79 (2000).

90. *Id.* at 92.

91. See *id.* at 90–91.

92. See *id.* at 91–92.

93. *Booker*, 413 F.3d at 81.

94. See *id.*

95. *Id.*

96. See *id.*

97. See *id.* at 83–84.

simultaneous existence of a severance clause, holding that severance of an illegal clause was not “a modification subject to the requirements of the waiver clause.”⁹⁸ On the contrary, he reasoned that severance of the offending clause was a “contingency contemplated by the parties at the time of formation.”⁹⁹ Thus, according to Roberts, severance honored the intent of the parties.¹⁰⁰

Justice Roberts’ decision in *Booker* essentially assimilated many of the holdings from the Fifth, Sixth, and Eighth Circuits, all of which had taken a pro-severability stance. Specifically, he cited *Gannon* and *Morrison* as precedent for severing illegal provisions when the arbitration agreement included a severance clause and only contained “discrete unenforceable provisions.”¹⁰¹ To a lesser extent, Roberts also followed *Hadnot* by rejecting the public policy argument that severing illegal provisions encourages drafters to overreach when writing their agreements.¹⁰²

Justice Roberts’ rejection of this public policy argument against severance relied on the rationale that “the more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause.”¹⁰³ Therefore an arbitration agreement that truly overreached would be so laden with illegal provisions that it could neither be severed nor enforced.¹⁰⁴ This reasoning suggests that a severability approach may allow parties to overreach, but it will not allow them to *grossly* overreach.

Justice Roberts’ potential Supreme Court jurisprudence regarding arbitration agreements will be discussed further in Part IV of the analysis, but there is little doubt that his work at the Court of Appeals for the District of Columbia established a very pro-severability approach and created a high burden for parties wishing to resist mandatory arbitration.

B. Anti-Severability Circuits

The Fourth, Ninth, Tenth and Eleventh Circuits favor voiding

98. *Id.* at 83.

99. *Id.*

100. *See id.* at 84.

101. *Id.*

102. *See id.* at 84–85.

103. *Id.* at 85.

104. *See id.*

arbitration agreements that contain unenforceable provisions. This provides claimants the opportunity to seek relief in court.¹⁰⁵ These circuits seek to discourage drafters of arbitration agreements from inserting illegal provisions into their agreements and attempting “to achieve through arbitration what Congress has expressly forbidden.”¹⁰⁶ Thus, these circuits demonstrate greater concern for claimants’ ability to vindicate their statutory rights than for promoting the federal policy of enforcing arbitration agreements.

1. Eleventh Circuit: Public Policy Prevails

In *Perez v. Globe Airport Security Services, Inc.*,¹⁰⁷ the Eleventh Circuit clearly signaled its intention to dissuade employers from inserting illegal provisions in their arbitration agreements.¹⁰⁸ Specifically, the court voided an entire arbitration agreement that contained an unlawful limitation-of-damages provision because enforcing the agreement, “despite the employer’s attempt to limit the remedies available[,] would reward the employer for its actions and fail to deter similar conduct by others.”¹⁰⁹

Unlike the rulings in *Gannon* and *Booker*, the Eleventh Circuit credited the argument that employers should be deterred from inserting unlawful provisions in their arbitration agreements. *Perez* also differed from *Gannon* and *Booker* by holding that a single illegal provision could taint an entire arbitration agreement at an integral level.¹¹⁰ Thus, even though all three cases involved employee anti-discrimination claims, only *Perez* held that a provision denying statutorily mandated damages could render an entire arbitration agreement unenforceable.¹¹¹ The *Perez* court reasoned that the illegal limitation-of-damages provision undermined

105. See *Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 896 (9th Cir. 2002); *Perez v. Globe Airport Sec. Servs. Inc.*, 253 F.3d 1280, 1286–87 (11th Cir. 2001); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233–35 (10th Cir. 1999); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994).

106. *Graham Oil*, 43 F.3d at 1249.

107. 253 F.3d 1280 (11th Cir. 2001).

108. *Id.* at 1287.

109. *Id.*

110. *Id.*

111. See *id.*

the “remedial and deterrent” intent of anti-discriminatory legislation.¹¹² This attempt to defeat those remedial and deterrent functions, according to the court, infected the entire core of the agreement, rendering the provision non-severable and the agreement unenforceable.¹¹³

Although this case can be distinguished from *Gannon* and *Booker* because the agreement did not contain a severance clause, *Perez* was primarily decided on public policy grounds. The court’s desire to discourage the inclusion of overreaching provisions played a much larger role in its decision than the absence of a severance clause.¹¹⁴

2. Ninth Circuit: The Arbitrator’s Worst Nightmare

The Ninth Circuit also favors voiding entire arbitration agreements that contain illegal provisions. In addition to relying on public policy concerns and the desire to discourage overreaching, the Ninth Circuit has shown a willingness to find such agreements unconscionable under traditional principles of contract law.¹¹⁵ This combination of finding unconscionability and favoring public policy over enforcement of the FAA has made the Ninth Circuit more hostile towards unlawful arbitration provisions than any other federal circuit.¹¹⁶

The court’s willingness to void an arbitration agreement for public policy reasons was evidenced in *Graham Oil Co. v. ARCO Products Co.*¹¹⁷ In *Graham*, an oil distributor’s arbitration agreement blatantly violated several provisions of the Petroleum

112. *Id.* at 1286 (“[S]tatutory claims are arbitrable only when arbitration can serve the same remedial and deterrent functions as litigation, and an agreement that limits the remedies available cannot adequately serve those functions.” (citing *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1061–62 (11th Cir. 1998))).

113. *Id.* at 1287 (“Globe’s attempt to defeat the remedial purpose of Title VII taints the entire agreement, making it unenforceable.”).

114. *Id.* (“If an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements.”).

115. *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248–49 (9th Cir. 1994).

116. *See Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 893 (9th Cir. 2002).

117. 43 F.3d at 1248–49.

Marketing Practices Act (“PMPA”).¹¹⁸ Most notably, the agreement denied recovery of punitive damages and attorney’s fees, and shortened the statute of limitations for filing claims from one year to six months.¹¹⁹ Since the agreement’s numerous unlawful provisions undermined the intent of the PMPA, the court voided the entire arbitration agreement and held that “severance is inappropriate when the entire [arbitration] clause represents an ‘integrated scheme to contravene public policy.’”¹²⁰

Moreover, the court found that the various illegal provisions formed a “highly integrated unit” which could not be severed from the rest of the arbitration agreement without drastically altering the intent of the entire contract.¹²¹ Thus, *Graham* primarily highlights the reluctance of courts to judicially rewrite contracts which are inextricably laden with illegality, and does not represent a departure from the arbitration jurisprudence of other federal circuits. In fact, *Graham* is even mentioned in Justice Roberts’ pro-severability decision in *Booker* as the rare type of arbitration agreement that should rightfully be voided in its entirety.¹²²

The Ninth Circuit’s decision in *Adams III*,¹²³ however, highlights how its approach to determining severability differs from that employed by other federal circuits.¹²⁴ Specifically, *Adams III* demonstrates the court’s willingness to find arbitration agreements with unlawful provisions unconscionable under traditional principles of contract law.¹²⁵ Unconscionability is an equitable doctrine which permits courts to refuse to enforce contracts to avoid grossly unfair

118. *Id.* at 1246.

119. *Id.* at 1247.

120. *Id.* at 1249 (quoting E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §5.8, at 70 (2d ed. 1990)).

121. *Id.* at 1248 (“Here, the offending parts of the arbitration clause do not merely involve a single, isolated provision; the arbitration clause in this case is a highly integrated unit containing three different illegal provisions.”).

122. *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 84 (D.C. Cir. 2005). Justice Roberts mentioned *Graham Oil* as an example of an arbitration agreement that “did not contain merely one readily severable illegal provision, but [was] instead pervasively infected with illegality.” *Id.*

123. 279 F.3d 889 (9th Cir. 2002).

124. *See id.*

125. *See id.* at 893.

results.¹²⁶ Since section 2 of the FAA provides that arbitration agreements may be voided upon “such grounds as exist at law or in equity for the revocation of any contract,”¹²⁷ unconscionability represents a way for judges to strike down arbitration agreements without violating the preemptive supremacy of the FAA.¹²⁸ Moreover, because unconscionability is a judicially created doctrine which is defined and determined by courts,¹²⁹ it grants judges discretion to void arbitration agreements for a wide variety of reasons simply by labeling them unconscionable.

Although the doctrine of unconscionability grants courts tremendous power to strike down arbitration agreements, the Ninth Circuit is the only federal court of appeal to aggressively use this powerful judicial tool to void such agreements.¹³⁰ This was exemplified in *Adams III*, where the court found an arbitration agreement contained in an employment application to be unconscionable,¹³¹ despite the fact that other federal circuits had found nearly identical Circuit City agreements *not* to be unconscionable.¹³² Specifically, the court found that the mandatory arbitration agreement was a procedurally unconscionable contract of adhesion because job applicants, who were forced to sign the

126. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

127. 9 U.S.C. § 2 (2000).

128. While the Supreme Court, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), held that state statutes may not preempt the FAA by singling out arbitration agreements for special scrutiny, it did not bar judges from finding arbitration agreements unconscionable. *Id.* at 687. Thus, courts have far more power than state legislators to invalidate arbitration agreements, so long as courts do not strike down such agreements based on state laws that “singl[e] out arbitration provisions for suspect status.” *Id.*

129. *Armendariz*, 6 P.3d at 689.

130. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 203–04, 211 (2004).

131. *See* *Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 893 (9th Cir. 2002).

132. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003) (rejecting claims that a nearly identical arbitration agreement contained in an employment application was either procedurally or substantively unconscionable). In *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001), claims of unconscionability were neither raised by the parties, nor addressed by the Eighth Circuit.

agreement in order to be considered for employment, had relatively little bargaining power compared to Circuit City.¹³³ The court also found the agreement to be substantively unconscionable, or fundamentally unfair¹³⁴, because only employees were required to settle claims through arbitration, whereas Circuit City was free to bring suit in court.¹³⁵ Conversely, the same type of one-sided agreement was found to be neither substantively nor procedurally unconscionable by the Sixth Circuit in *Morrison*.¹³⁶

Although matters of unconscionability are determined by judicially created state case law,¹³⁷ and *Adams III* followed a California Supreme Court case that found a similar employment arbitration agreement unconscionable,¹³⁸ the Ninth Circuit's decision in *Adams III* was not primarily based on any unique aspect of California case law.¹³⁹ More likely, the outcome was primarily

133. *Adams III*, 279 F.3d at 893.

134. *See supra* note 577.

135. *Adams III*, 279 F.3d at 893–94. This lack of reciprocal obligation to arbitrate claims was found to constitute a lack of mutuality under California case law, which mandates that all contracts must evidence a “modicum of bilaterality.” *Id.* at 894.

136. *See Morrison*, 317 F.3d at 667.

137. *Per Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 65 (1938), and *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), legal and equitable grounds for revoking contracts are determined by state substantive law.

138. *Armendariz v. Found. Health Psychare Servs.*, 6 P.3d 669, 694 (Cal. 2000). The California Supreme Court found an employment arbitration agreement to be unconscionable for similar reasons: the disparate bargaining power of the parties and the lack of any reciprocal obligation to arbitrate claims. *Id.* at 690-94.

139. Although the respective California and Ohio unconscionability doctrines relied upon in *Adams III* and *Morrison* had subtle differences, they essentially shared the same two-tier structure common to most unconscionability laws. Specifically, California case law provided that “unconscionability has both a “procedural” and a “substantive” element,’ the former focusing on . . . unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.” *Armendariz*, 6 P.3d at 690 (quoting *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121 (Cal. Ct. App. 1982)). Similarly, “[u]nder Ohio law, the unconscionability doctrine has two components: (1) substantive unconscionability, *i.e.*, unfair and unreasonable contract terms, and (2) procedural unconscionability, *i.e.*, individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible.” *Morrison*, 317 F.3d at 666 (quoting *Jeffrey Mining*

influenced by the Ninth Circuit's hostility towards the use of arbitration agreements in employment contracts.

This contempt for arbitration of employment disputes was revealed two years earlier when the Ninth Circuit tried to void Adams' arbitration agreement by holding that employment contracts fall outside the scope of the FAA.¹⁴⁰ The U.S. Supreme Court reversed the ruling, and instead held that employment contracts fell squarely within the purview of the FAA, save for one narrow exception.¹⁴¹ When the case was consequently remanded to the Ninth Circuit following the Supreme Court's rebuke, the Ninth Circuit relied on unconscionability as an alternative means of voiding Adams' agreement.¹⁴² This course of events suggests that the Ninth Circuit was determined to void Circuit City's arbitration agreement by whatever means necessary.

Although the Ninth Circuit's willingness to find Circuit City's arbitration agreement unconscionable is unique, the court's decision in *Adams III* also relied on some more traditional methods of arbitration jurisprudence. First, the court held that the agreement denied statutory remedies and required claimants to pay excessive arbitration fees, which ran contrary to the two conditions of fairness established in *Cole v. Burns International Security Services*.¹⁴³

Prods., L.P. v. Left Fork Mining Co., 758 N.E.2d 1173, 1181 (Ohio Ct. App. 2001)).

140. *Circuit City Stores, Inc. v. Adams (Adams I)*, 194 F.3d 1070, 1071–72 (9th Cir. 1999). When the Ninth Circuit first heard Adams' case in 1999, it relied on its recent ruling in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999), which held that employment contracts were not governed by the FAA. See *Adams I*, 194 F.3d at 1070. The *Craft* court broadly construed the FAA's exemption for "workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (2000), and concluded that the FAA does not apply to labor or employment contracts that fall under the purview of the Commerce Clause. *Craft*, 177 F.3d at 1093.

141. *Circuit City Stores, Inc. v. Adams (Adams II)*, 532 U.S. 105, 109 (2001). The U.S. Supreme Court flatly rejected the Ninth Circuit's broad interpretation of section 1 of the FAA, and narrowly construed section 1 to only exclude contracts of interstate transportation workers from the jurisdiction of the FAA. *Id.* at 119.

142. *Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 893 (9th Cir. 2002).

143. *Id.* at 895. (citing *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997)). The Ninth Circuit mentions the *Cole* Court conditions of

Moreover, the court held that the “objectionable provisions pervade the entire contract” and that “[r]emoving these provisions would go beyond mere excision to rewriting the contract.”¹⁴⁴ These sentiments are consistent with other federal circuits that have been reluctant to sever pervasively integrated contractual provisions.¹⁴⁵

The Ninth Circuit’s arbitration jurisprudence, overall, is rooted in public policy concerns and a desire to prevent corporations from imposing overreaching, mandatory arbitration agreements on parties with inferior bargaining power.¹⁴⁶ The court has shown a willingness to further this agenda by finding such arbitration agreements unconscionable, and by finding illegal provisions within such agreements to be pervasively integrated and non-severable.¹⁴⁷ Since both approaches create grounds for avoidance, arbitration agreements with unlawful provisions are likely to be voided by the Ninth Circuit.

3. Tenth Circuit: No Severance Clause, No Ambiguity, No Enforcement

In *Shankle v. B-G Maintenance Management of Colorado, Inc.*,¹⁴⁸ the Tenth Circuit voided an entire arbitration agreement because it required claimants to pay excessive costs to arbitrate claims.¹⁴⁹ The court cited *Cole* as grounds for finding provisions requiring excessive fees unenforceable.¹⁵⁰ Under *Cole*, excessive costs render the arbitral forum inaccessible and thus deny claimants a forum in which to vindicate their statutory rights.¹⁵¹

fairness as if they had been reverse-incorporated into *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20 (1991). *Id.*

144. *Id.* at 896.

145. See Hadi S. Al-Shathir, Note, *The Perils of Temptation: Has the Eighth Circuit Given Employers An Incentive To Exploit Employees?*, 67 MO. L. REV. 613, 619 (2002).

146. See *Adams III*, 279 F.3d at 893–94.

147. See *id.* at 896.

148. 163 F.3d 1230 (10th 1999).

149. The arbitration agreement required claimants to pay a \$6,000 deposit, and also required claimants to pay the arbitrator \$250 per hour, plus \$125 per hour of travel time. *Id.* at 1232.

150. *Id.* at 1233 (citing *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997)).

151. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d at 1484.

Although finding excessive arbitration fees illegal became standard practice in many federal circuits after *Cole*¹⁵², the *Shankle* court still had to decide whether to sever the unlawful fee provision or to void the entire agreement. The court decided to void the entire agreement for two specific reasons. First, the agreement did not contain a severance clause, so there was no evidence that the parties intended the agreement to be severable. Second, the court distinguished the agreement from *Cole*, which involved an ambiguous fee provision that required judicial reinterpretation.¹⁵³ In contrast, the agreement in *Shankle* was unambiguous and the fee provision was illegal on its face.¹⁵⁴ Thus, no judicial reinterpretation was required and the court declined to “redline” an unambiguous contract.¹⁵⁵

Hence, the Tenth Circuit’s two main reasons for not severing the illegal provision in *Shankle* were the absence of a severance clause and a reluctance to judicially rewrite an unambiguous contract. Both of these reasons are consistent with the arbitration jurisprudence of other federal circuits.¹⁵⁶

152. *See supra* note 86.

153. *See Cole*, 105 F.3d at 1468. The ambiguity was caused by the fact that the agreement did not specify which party was responsible for payment of arbitration fees. Hence, the court was required to utilize traditional methods of contract interpretation and resolve the ambiguity “against the drafter” and “in favor of a legal construction of the parties’ agreement.” *Id.*

154. *See Shankle*, 163 F.3d at 1234. In *Shankle*, unlike *Cole*, the agreement specifically required employees to pay a portion of their arbitration fees. As a result, *Shankle* would have had to pay between \$1,875 and \$5,000 to arbitrate his claim. *Id.*

155. *Id.* at 1235.

156. The absence of a severance clause was relied on as a reason to void an entire arbitration agreement in *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1286 (11th Cir. 2001). Conversely, the presence of a severance clause was relied on as a reason to sever illegal provisions in *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005), *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003), and *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680 (8th Cir. 2001). The reluctance to judicially rewrite contracts was cited as a reason not to sever illegal provisions in *Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 896 (9th Cir. 2002) and *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994).

4. Fourth Circuit: Bias and Bad Faith is a Bust for Hooters

The Fourth Circuit voided an entire arbitration agreement in *Hooters of America, Inc. v. Phillips* because nearly every provision in the agreement was unlawful.¹⁵⁷ In fact, the court held that the arbitration agreement contained so many biased rules that it created “a sham system unworthy even of the name of arbitration.”¹⁵⁸ There were a host of one-sided procedures: the agreement provided for non-neutral arbitrators, all of whom were to be chosen by Hooters; employees were required to provide Hooters with a list of witnesses before proceedings began, while no similar requirement existed for Hooters; Hooters could expand the scope of arbitration to any matter, while an employee could not; Hooters could move for summary dismissal of employee claims before proceedings began, whereas an employee could not; Hooters could record the proceedings, while employees could not; and Hooters could modify the arbitration rules in whole or in part without notice.¹⁵⁹

Consequently the court voided the entire arbitration agreement because severing these illegal provisions would have effectively dismantled the contract.¹⁶⁰ Additionally, because the agreement was so pervasively laden with illegality, the court took the further step of holding that it violated the covenant of good faith and fair dealing.¹⁶¹

Thus, the Fourth Circuit’s decision in *Hooters* reiterated judicial reluctance to sever arbitration agreements that contain pervasive, integrated illegal provisions. *Hooters* also reinforced the court’s ability to void arbitration agreements upon “such grounds as exist at law or in equity for the revocation of any contract.”¹⁶²

C. Conclusions Gathered from Circuit-by-Circuit Analysis

This circuit-by-circuit analysis has revealed several generally applicable tendencies in arbitration jurisprudence. First, the presence or absence of a severance clause can be determinative to a court’s decision to sever the illegal provisions rather than void the entire

157. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

158. *Id.* at 940.

159. *Id.* at 938–39.

160. *Id.* at 940.

161. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)).

162. 9 U.S.C. § 2 (2000).

agreement.¹⁶³ Second, when an arbitration agreement only contains one discrete, unenforceable provision, courts are likewise inclined to sever the offending provision and enforce the rest of the agreement.¹⁶⁴ Conversely, when an arbitration agreement is pervasively infected with many unlawful provisions or is tainted at an integral level, courts are likely to void the entire agreement.¹⁶⁵ Despite each circuit's views on public policy or the FAA, these tendencies are generally followed by all federal circuits.

The analysis also reveals that certain federal circuits that are hostile towards mandatory arbitration are willing to void arbitration agreements by finding the agreements unconscionable, or by holding that the agreements violate the covenant of good faith and fair dealing.¹⁶⁶ However, it is worth noting that the agreements that have been voided under this rationale also likely could have been voided for containing many unlawful provisions that pervaded the agreement at an integral level. In that sense, the circuits that voided agreements due to unconscionability and lack of fair dealing merely found a new justification for voiding agreements that likely would have been voided by more traditional means.¹⁶⁷

Based on the analysis, another point bears mentioning. While many federal circuits have adopted the arbitration fairness standards established by *Cole*,¹⁶⁸ arguably *Green Tree* has made it more difficult to prove that a given arbitration provision fails to meet these standards. Although *Green Tree* specifically held that unlawfully

163. See *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680 (8th Cir. 2001); cf. *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1286 (11th Cir. 2001) (citing the absence of a severance clause as a reason not to sever illegal provisions).

164. See *Booker*, 413 F.3d at 83; *Morrison*, 317 F.3d at 680; *Gannon*, 262 F.3d at 681.

165. See *Hooters of Am. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994).

166. See *Circuit City Stores, Inc. v. Adams (Adams III)*, 279 F.3d 889, 895–96 (9th Cir. 2002); *Hooters*, 173 F.3d at 940.

167. See *Adams III*, 279 F.3d at 895–96; *Hooters*, 173 F.3d at 940.

168. See *Booker*, 413 F.3d at 83; *Adams III*, 279 F.3d at 894; *Shankle v. B-G Maint. Mgmt. of Colo.*, 163 F.3d 1230, 1234 (10th Cir. 1999).

excessive arbitration costs may not be proven by mere speculation,¹⁶⁹ *Booker* has already construed this holding to mean that mere speculation may not be sufficient to prove the illegality of *any* type of arbitration provision.¹⁷⁰ This expansive construction of *Green Tree*, if adopted by other federal circuits, will impose a more difficult burden on claimants wishing to resist arbitration.

While the above-mentioned tendencies play an important role in a court's determination of whether to sever unlawful provisions or void an entire arbitration agreement, public policy is also highly influential. Federal circuits that favor severance largely rely on the strong federal policy of rigorously enforcing arbitration agreements.¹⁷¹ These circuits routinely cite to the language of the FAA and to U.S. Supreme Court holdings that have reinforced the validity of arbitration agreements and steadily expanded the scope of the FAA.¹⁷² Conversely, federal circuits that favor voiding arbitration agreements with illegal provisions often rely on the need to protect weaker parties against overreaching contracts of adhesion.¹⁷³ However, it is worth noting that these circuits favoring avoidance rely on public policy arguments that are neither supported by recent U.S. Supreme Court holdings nor the language of the FAA.

IV. ADDITIONAL U.S. SUPREME COURT AUTHORITY THAT INDICATES HOW THE

169. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

170. See *Booker*, 413 F.3d at 82.

171. See *id.* at 79; *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 679 (8th Cir. 2001).

172. See *Circuit City Stores, Inc. v. Adams (Adams II)*, 532 U.S. 105, 109 (2001) (holding that employment contracts fall within the scope of the FAA, except for employment contracts of interstate transportation workers); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (finding that anti-discrimination claims fell within the scope of the FAA); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that all statutory claims were subject to arbitration, absent Congressional intent); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (holding that any doubts regarding the arbitrability of claims should be construed in favor of arbitration).

173. See *Circuit City Stores, Inc. v. Adams (Adams, III)*, 279 F.3d 889, 893 (9th Cir. 2002); *Perez v. Globe Airport Sec. Servs.*, 253 F.3d 1280, 1287 (11th Cir. 2001).

SEVERABILITY ISSUE MIGHT ULTIMATELY BE DECIDED.

*A. Vimar and PacifiCare: Rulings That
Reveal a Predominantly Pro-Arbitration Court.*

Presently, there are no cases pending before the U.S. Supreme Court concerning the severance-versus-voidance issue. The matter, however, seems destined for eventual Supreme Court resolution because the current arbitrary enforcement of arbitration agreements deprives drafters of adequate notice of the law. Since lack of notice makes it difficult for drafters to know whether their agreements will be voided or enforced, the system of arbitration is thereby robbed of the predictability and efficiency that make it a favored method of dispute resolution.¹⁷⁴

Assuming that this lack of predictability will eventually bring the severance-versus-voidance issue before the Court, several recent Court decisions hint at how the Court may rule on the matter. Two cases in particular, *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*¹⁷⁵ and *PacifiCare Health Systems, Inc. v. Book*¹⁷⁶ provide insight to the Court's disposition regarding arbitration agreements. While neither case concerns the issue of severance, both cases reveal the Court's general views regarding the enforceability of arbitration agreements.

In *Vimar*, the Court held that an arbitration agreement between an American fruit distributor and a Japanese shipping company was enforceable, despite the fact that the arbitration proceedings were to take place in Japan, where the American company's rights might not have been properly vindicated.¹⁷⁷ The Court stated that "mere speculation" that a claimant's rights may not be vindicated is not sufficient to void the agreement.¹⁷⁸

This ruling is consistent with the Court's subsequent decision in *Green Tree*,¹⁷⁹ which held that mere speculation of excessive

174. See, e.g., *Bhd. of Locomotive Engrs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 47 (Goldberg, J., dissenting) (1963) (commending the efficacy and efficiency of private labor arbitrations).

175. 515 U.S. 528 (1995).

176. 538 U.S. 401 (2003).

177. See *Vimar*, 515 U.S. at 541.

178. See *id.*

179. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

arbitration costs was not sufficient to find an arbitration agreement unenforceable.¹⁸⁰ Read together with *Green Tree*, *Vimar* suggests that the Court is strongly inclined to enforce arbitration agreements and is predisposed to find problematic provisions within such agreements enforceable. More specifically, *Vimar* illustrates that parties resisting arbitration bear a difficult burden in trying to prove that particular arbitration provisions are illegal.¹⁸¹

The Court's pro-arbitration stance was further revealed in *PacifiCare*. Here, the Court enforced an arbitration provision barring punitive damages, even though the applicable RICO statutes mandated the award of treble damages.¹⁸² The Court arrived at its ruling by declining to determine in advance whether the bar on punitive damages was equivalent to a denial of treble damages.¹⁸³ This ruling not only reinforced the Court's reluctance to speculate on how problematic provisions might be interpreted, but also suggested that the Court was willing to go to great lengths to construe these provisions in such a way as to render them enforceable.¹⁸⁴ Thus, *PacifiCare* indicates that since *Vimar*, the Court has become even more determined to enforce arbitration agreements, and even less willing to find particular provisions unlawful.¹⁸⁵

Though the Court's rigorous enforcement of arbitration agreements in these two cases did not specifically address the severability issue, it certainly tends to show that the current Court does not favor voiding arbitration agreements. Additionally, *Vimar* and *PacifiCare* reveal a Court that is eager to interpret individual arbitration provisions in a manner that renders them enforceable. It follows, that if the Court were called on to decide whether to void an entire arbitration agreement or merely to sever an unenforceable provision, it would be more likely to find the agreement severable

180. *Id.* at 91–92.

181. *See Vimar*, 515 U.S. at 555 (Stevens, J., dissenting)

182. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406–07 (2003).

183. *Id.* (“[W]e should not, on the basis of ‘mere speculation’ that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved.” (quoting *Vimar*, 515 U.S. at 541)).

184. *See id.*

185. *Id.*

and enforceable.

*B. Positions Taken by Sitting Supreme
Court Justices on Recent Arbitration Cases*

If the severance-versus-voidance issue were to come before the Court, each justice's views on arbitration would impact on the Court's ruling. In order to accurately assess each justice's position, a brief overview of his or her decisions from the Court's most recent arbitration rulings is in order.

1. Justice Stevens

Justice Steven's record clearly indicates that he is neither a proponent of rigorously enforcing arbitration agreements, nor in favor of expanding the scope of the FAA. He has dissented, in whole or in part, in nearly every prominent pro-arbitration ruling from 1985 to 2001.¹⁸⁶ In *Mitsubishi, McMahon, and Rodriguez De Quijas v. Shearson/American Express*, for example, Justice Stevens advocated that statutory claims should not be subject to mandatory arbitration.¹⁸⁷ Moreover, in *Gilmer*, he adamantly argued that employer-employee disputes should not fall within the scope of the FAA. Finally, in *Vimar* he expressed his willingness to aggressively use Section 2 of the FAA¹⁸⁸ to invalidate arbitration provisions that are overreaching or unconscionable.¹⁸⁹

Justice Stevens clearly favors construing problematic arbitration agreements in such a way as to render them unenforceable. This is

186. See *Circuit City Stores, Inc. v. Adams (Adams II)*, 532 U.S. 105, 124 (2001) (Stevens, J., dissenting); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (Stevens, J., concurring in part and dissenting in part); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 542 (1995) (Stevens J., dissenting); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36 (1991) (Stevens, J., dissenting); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (Stevens, J., dissenting).

187. *Mitsubishi*, 473 U.S. at 641 (Stevens, J., dissenting); see *McMahon*, 482 U.S. at 268 (Stevens, J., concurring in part and dissenting in part).

188. See *supra* text accompanying note 11.

189. See *Vimar*, 515 U.S. at 555-56 (Stevens, J., dissenting).

apparent by noting that he has consistently resisted the steady expansion of the scope of the FAA, and has shown a tendency to find ambiguous arbitration provisions invalid.¹⁹⁰ Thus, it seems likely that he would be inclined to entirely void an arbitration agreement that contained unlawful provisions. Justice Stevens would be even more likely to void such an agreement if it pertained to an employer-employee dispute, given his view that they fall outside the scope of the FAA.¹⁹¹

2. Justices Souter, Ginsburg, and Breyer

While not outspoken critics of arbitration like Justice Stevens, Justices Souter, Ginsburg, and Breyer have expressed several specific concerns about the increasing role of arbitration. In particular, these three justices have argued that employment contracts should not be governed by the FAA.¹⁹² Additionally, these justices have expressed concern that excessive arbitration costs may deter claimants from vindicating their statutory rights.¹⁹³

Their view that employment contracts should not be governed by the FAA was expressed in *Adams II*¹⁹⁴ where Justices Ginsburg and Breyer joined in both Justice Stevens' and Justice Souter's dissents.¹⁹⁵ The dissenting opinions argued that the FAA's exemption for interstate employment contracts should be read broadly to exclude *all* employment contracts that fall within Congress's commerce power.¹⁹⁶ This view diverged from the majority in *Adams II*, which construed the exemption narrowly to

190. *See id.*

191. *See Adams II*, 532 U.S. at 128 (Stevens, J., dissenting).

192. *See id.*

193. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 93-94 (2000) (Ginsburg, J., concurring in part and dissenting in part).

194. 532 U.S. 105.

195. *See id.* at 128-29 (Stevens, J., dissenting); *id.* at 133-37 (Souter, J., dissenting).

196. *Id.* at 128-29 (Stevens, J., dissenting); *id.* at 133-37 (Souter, J., dissenting). In particular, Steven's dissent argued that Congress never intended the FAA to apply to employment contracts. *Id.* at 128 (Stevens, J., dissenting). Souter's dissent contended that the FAA's exemption for interstate employment contracts should be read broadly to reflect the expanded, modern understanding of the Commerce Clause. *Id.* at 137 (Souter, J., dissenting).

only exclude contracts of interstate transportation workers.¹⁹⁷

Additionally, in *Green Tree*, Justices Souter and Breyer joined Justice Ginsburg's dissent regarding the issue of excessive costs of arbitration proceedings.¹⁹⁸ This dissenting opinion expressed concern that excessive costs made arbitral forums inaccessible to certain claimants, and thus deterred them from vindicating their statutory rights.¹⁹⁹ Specifically, dissent contended that arbitration agreements should clearly state the costs of pursuing claims through arbitration,²⁰⁰ and further disagreed with the majority's holding that claimants resisting arbitration bear the difficult burden of proving that such costs are excessive.²⁰¹

The opinions of Justices Souter, Breyer, and Ginsburg—as expressed in *Adams II* and *Green Tree*—do not address the severance-versus-voidance issue, but they do articulate a desire to construe arbitration agreements in such a way as to protect vulnerable claimants, particularly employees.²⁰² This desire to protect less powerful parties *may* inspire these justices to void an entire arbitration agreement with unlawful provisions, especially if the less powerful parties are employees. This assumption, however, is far from certain.

3. Justices Scalia, Thomas, and Kennedy

Justices Scalia, Thomas, and Kennedy have sided with the majority in most of the major pro-arbitration rulings handed down by the Court during their tenure.²⁰³ As such, these three justices favor subjecting employment disputes and statutory claims to arbitration proceedings²⁰⁴ and are proponents of rigorously enforcing such

197. *Id.* at 119.

198. *See Green Tree*, 531 U.S. at 92–93 (Ginsburg, J., concurring in part and dissenting in part).

199. *See id.* at 93–94.

200. *Id.* at 95–97.

201. *See id.* at 90–92.

202. *See id.* at 95–97 (Ginsburg, J., concurring in part and dissenting in part); *Circuit City Stores, Inc. v. Adams (Adams II)*, 532 U.S. 105, 128–29 (2001) (Stevens, J., dissenting); *id.* at 133–37 (Souter, J., dissenting).

203. *See Adams II*, 532 U.S. 105; *Green Tree*, 531 U.S. at 79; *Vimar Seguros y Reaseguros, S.A. v. M.V. Sky Reefer*, 515 U.S. 528 (1995).

204. *See Vimar*, 515 U.S. at 530; *Adams II*, 532 U.S. at 109.

agreements.²⁰⁵ In so doing, they impose a high burden on parties resisting arbitration to prove that the contested arbitration agreements are unlawful.²⁰⁶

As an example, in *Adams II*, Justice Kennedy found employment contracts subject to the FAA and was joined by Justices Scalia and Thomas in his majority opinion.²⁰⁷ Justices Scalia and Thomas also joined Justice Kennedy's majority opinion in *Vimar*, which held that a party resisting arbitration must prove that a contested arbitration provision will produce an unlawful result in *all* circumstances in order to invalidate that particular provision.²⁰⁸ Additionally, all three justices joined Justice Rehnquist's majority opinion in *Green Tree*, which imposed a difficult burden on claimants who wish to prove that arbitration costs are excessive.²⁰⁹

Since Justices Kennedy, Scalia, and Thomas are proponents of rigorously enforcing arbitration agreements and tend to construe arbitration agreements in such a way as to render them enforceable, it is doubtful that these justices would void an entire arbitration agreement that contains unlawful provisions. Conversely, these justices would be likely to sever the offending provisions and enforce the remaining portions of the agreement.

4. Chief Justice Roberts

As discussed previously discussed, Chief Justice Roberts' decision in *Booker* indicates that he favors rigorously enforcing arbitration agreements.²¹⁰ *Booker* also revealed Justice Roberts' tendency to construe ambiguous arbitration provisions in such a way as to render them enforceable.²¹¹ In fact, *Booker* held that an arbitration provision should be found unlawful only if, on its face, it is guaranteed to produce an unlawful result.²¹² These aspects of *Booker* indicate that Justice Roberts will bring a very pro-arbitration

205. See *Vimar*, 515 U.S. at 528.

206. See *id.*

207. See *Adams II*, 532 U.S. at 119.

208. See *Vimar*, 515 U.S. at 540–41.

209. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82–92 (2000).

210. See *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

211. See *id.* at 81.

212. *Id.*

stance to the U.S. Supreme Court.

Additionally, since Justice Roberts expressed his views on the severance-versus-voidance issue in *Booker*, he is the only sitting justice to have specifically revealed his position on the matter. In essence, *Booker* expressed Justice Roberts' view that unlawful provisions should be severed unless the agreement lacks a severance clause and is inextricably laden with illegality.²¹³

Since Justice Roberts is only inclined to void arbitration agreements with numerous unlawful provisions and is reluctant to find such provisions unlawful, he is unlikely to void arbitration agreements with problematic provisions.

5. Justice Alito

The relevant positions of newly appointed Justice Samuel Alito are difficult to examine because he has not yet decided any arbitration cases for the Supreme Court. Moreover, since the Third Circuit did not rule on any watershed arbitration cases during his tenure, Justice Alito's stance on the severance-versus-voidance issue is particularly hard to infer. In the absence of any clear record on the issue, one can only attempt to predict his disposition by examining his general approach toward contract interpretation and enforcement.

In this regard, Justice Alito's record shows him to be a proponent of ardently enforcing private agreements, often in a rigid, formalistic manner.²¹⁴ The most glaring example of this stringent method of contract interpretation occurred in *MBIA Insurance Corp. v. Royal Indemnity Co.*²¹⁵ In *MBIA*, Justice Alito, then sitting on the Third Circuit, applied an "objective theory" of contract interpretation which mandates strict adherence to the wording of a contract, regardless of whether it reflects the intent of the parties.²¹⁶ As a result of this approach, an insurer who insured a loan company

213. *See id.* at 84.

214. *See* Larry E. Ribstein, *Justice Alito on Business*, FORBES, Jan. 13, 2006, http://www.forbes.com/columnists/2006/01/13/alito-ribstein-commentary-cx_lr_0116alito.html.

215. 426 F.3d 204 (3d Cir. 2005).

216. *Id.* at 210 ("Although the law of contract generally strives to enforce agreements in accord with their makers' intent, the objective theory considers 'objective acts (words, acts and context)' the best evidence of that intent." (citation omitted)).

against *any* fraud was found liable for fraud perpetrated by the loan company itself.²¹⁷ Although the intent of the insurance company was only to insure the loan company against fraud perpetrated by *customers*,²¹⁸ Justice Alito's black-letter method of contract interpretation bound the insurer to its own vaguely-worded contract, regardless of the inequitable result.

Justice Alito's ardent enforcement of agreements, however, seems to waver when employer-employee disputes are at issue.²¹⁹ In fact, he tends to be more forgiving when *employers* seek to be relieved of their contractual obligations, but less accommodating when employees try to prove antidiscrimination claims.²²⁰ In *Luden's, Inc. v. Local Union No. 6*, for example, Justice Alito dissented when the court compelled an employer to arbitrate employee grievances.²²¹ Likewise, in *Exxon Shipping Co. v. Exxon Seamen's Union*, he relied on public policy grounds to vacate an arbitration ruling that compelled a shipping company to reinstate an employee who was found to be "highly intoxicated" while on duty.²²² Conversely, his "tightly constricted" approach towards employee antidiscrimination claims creates a very high burden for employees to meet.²²³

Justice Alito's record of siding with employers more often than employees has branded him business-friendly by proponents, and a foe of workers' rights by detractors.²²⁴ While this pro-business

217. The contract provided that "payment for losses under this policy shall be absolute, continuing, irrevocable and unconditional irrespective of . . . *any* fraud with respect to the student loans." *Id.* (emphasis added).

218. *Id.* at 211.

219. See AFL-CIO, REVIEW OF JUDGE SAMUEL ALITO'S RECORD IN WORKERS RIGHTS CASES (Dec. 14, 2005), http://www.aflcio.org/mediacenter/prspmt/upload/alito_review.pdf.

220. See *id.*

221. See *Luden's, Inc. v. Local Union No. 6 of the Bakery, Confectionery and Tobacco Workers' Int'l Union*, 28 F.3d 347, 364 (3d Cir. 1994) (Alito, J., dissenting).

222. *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1190 (3d Cir. 1993).

223. See AFL-CIO, *supra* note 219.

224. See Molly Selvin, *Court Nominee Has Free-Market Bent*, L.A. TIMES, Nov. 1, 2005, at C1. Jonathon Turley, a professor at George Washington University Law School described Justice Alito as "a strong ally for business

stance might place Justice Alito on the severability side of the severance-versus-voidance issue, it will not drastically change the balance of the Court on this issue because retired Justice O'Connor was herself a committed proponent of arbitration.²²⁵

6. Conclusions to be Drawn from Analysis of Sitting U.S. Supreme Court Justices

Although we do not have definitive indications of how each Supreme Court justice would vote on this issue, we can make certain inferences based on the tendencies each justice has displayed in past decisions. For example, since Justice Stevens is opposed to the expanded scope of the FAA, and does not believe that statutory claims or employer-employee disputes should be governed by the FAA,²²⁶ we can infer that he is likely to construe arbitration agreements in such a way as to render them unenforceable.²²⁷ It follows that Justice Stevens probably would void an arbitration agreement that contains unlawful provisions.

Justices Souter, Ginsburg, and Breyer are not as adamantly

interests He will be swimming in the deep right of the court's pool on business questions." *Id.* Conversely, AFL-CIO President John Sweeney claimed Alito's past decisions "repeatedly put basic rights at risk." *Id.*

225. In fact, Justice O'Connor sided with the majority in most of the Court's pro-arbitration decisions. See *infra* text accompanying notes 205-07. She joined with the majority in *Gilmer* and *Adams II*, which found employer-employee disputes to fall within the scope of the FAA, and also agreed with the majority in *Mitsubishi*, *Rodriguez*, and *McMahon*, which held that statutory claims were subject to arbitration. See, e.g., *Circuit City Stores, Inc. v. Adams (Adams II)*, 532 U.S. 105, 109-23 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23-35 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 478-87 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 222-42 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616-40 (1985). O'Connor also joined with the majority in *Green Tree*, which imposed a high burden on parties trying to prove that arbitration costs are excessive. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000). Since Justice O'Connor was therefore a proponent of rigorously enforcing arbitration agreements, Justice Alito's pro-enforcement, pro-business sentiments probably will not alter the balance of power on the Court regarding this issue.

226. See *supra* Part IV.b.i.

227. See *id.*

opposed to the expanded scope of the FAA as is Justice Stevens.²²⁸ However, they have expressed concern that certain arbitration agreements may unfairly favor powerful parties, notably employers.²²⁹ Therefore, it is possible that these three justices may favor voiding arbitration agreements with unlawful provisions when those provisions deter vulnerable parties from vindicating their statutory rights.²³⁰ This assumption, however, is highly conjectural.

Justices Scalia, Kennedy, Thomas, and Roberts are in favor of rigorously enforcing arbitration agreements and tend to construe arbitration provisions in such a way as to render them enforceable.²³¹ As such, these four justices are unlikely to void an entire arbitration agreement that contains discrete illegal provisions.²³²

Overall then, Justices Kennedy, Scalia, Thomas, Alito, and Roberts are not likely to void an arbitration agreement that contains illegal provisions, while Stevens *is* likely to void such an agreement. By contrast, the decisions of Souter, Ginsburg, and Breyer are much more difficult to predict. However, since there are five likely voices in favor of severance, one clearly in favor of voidance, and three voices somewhere in-between, the severance side of the debate seems to have a more solidified base. As such, the proponents of severing the illegal provisions would probably prevail.

Of course, it is impossible to predict how the Court would rule on an abstract basis, based only on the judicial tendencies of its members. Nonetheless, it can be stated with some certainty that the likely proponents of severance are more numerous and more unified in their approach than the likely proponents of voidance.

V. CONCLUSION

Overall, this analysis of the severance-versus-voidance issue reveals several trends in the arbitration jurisprudence of the U.S. Supreme Court. First, the Court has steadily expanded the scope of the FAA since *Mitsubishi*, holding that antitrust claims, anti-discrimination claims, RICO claims, and employment contracts are

228. *See supra* Part IV.b.ii.

229. *See id.*

230. *See id.*

231. *See supra* Parts IV.b.iii–iv.

232. *See id.*

all subject to arbitration.²³³ Second, since 1983, the Court has consistently followed its reasoning in *Moses H. Cone* that any doubts regarding the arbitrability of a dispute should be resolved in favor of arbitration.²³⁴ This expansion of the scope of the FAA and this tendency to construe disputes in favor of arbitrability show the Court's propensity to rigorously enforce arbitration agreements. Thus, the Court is much more inclined to find arbitration agreements enforceable than it is to strike down such agreements for public policy reasons. In fact, the policy of rigorously enforcing arbitration agreements has consistently trumped any public policy concerns, such as fear of corporate overreaching or unconscionability, for the past twenty two years.²³⁵

For these reasons, the federal circuits that favor severance of unlawful provisions and rigorous enforcement of arbitration agreements are much more aligned with the current jurisprudence of the U.S. Supreme Court. These pro-severance circuits share the Court's view that the mandates of the FAA overshadow public policy concerns of corporate overreaching.²³⁶ Moreover, these circuits also follow the Court's tendency to construe ambiguous agreements and provisions in favor of arbitrability.²³⁷ Therefore, the methodology of these circuits is firmly rooted in the recent rulings of the U.S. Supreme Court, and in the Court's current interpretation of the FAA.

Conversely, the federal circuits that favor voiding arbitration agreements with unlawful provisions are in conflict with the sentiments of the U.S. Supreme Court, and with the Court's reading of the FAA.²³⁸ These pro-voidance circuits, which favor public policy concerns over rigorous enforcement of arbitration agreements, are clearly not in alignment with the Court, which has steadily expanded the scope and power of the FAA since *Moses H. Cone* and *Gilmer*.²³⁹

Additionally, the federal circuits that favor severance more closely adhere to the views of the justices of the U.S. Supreme Court.

233. *See supra* text accompanying notes 20–28.

234. *See supra* text accompanying notes 18–19.

235. *See supra* Part II.b.

236. *See id.*

237. *See supra* text accompanying notes 159–62.

238. *See supra* Part II.b.

239. *See supra* text accompanying notes 20–28.

Justices Kennedy, Scalia, and Thomas have consistently ruled in favor of rigorously enforcing arbitration agreements, and Chief Justice Roberts' pro-arbitration, pro-severance views were very clearly revealed in *Booker*.²⁴⁰ The only justice to consistently diverge from this pro-enforcement trend, meanwhile, has been Justice Stevens, whose views have rarely prevailed since *Mitsubishi*.²⁴¹

For the foregoing reasons, if the severance-versus-voidance issue were to come before the Court, the Court would likely hold that arbitration agreements with unlawful provisions should be enforced, so long as the offending provisions can possibly be severed from the remaining portions of the agreement. The Court's policy of rigorously enforcing such agreements, combined with its tendency to construe such agreements in favor of enforceability, strongly suggests this outcome. Therefore, unless an arbitration agreement contains numerous facially unlawful provisions that are inextricably integrated into the agreement, as in *Graham*, the Court is likely to go to great lengths to sever the offending provisions and enforce the rest of the agreement.

This likely outcome is consistent with the Court's desire in *Gilmer* "to place arbitration agreements upon the same footing as other contracts."²⁴² In fact, it suggests that since *Gilmer*, arbitration agreements have arguably been placed upon *better* footing than other contracts, because the presumption that such agreements are enforceable has become so deeply entrenched.

This probable outcome is troubling for those who are compelled to agree to arbitrate claims as a condition of transacting business with more powerful parties. It is especially problematic for employees who are compelled to sign arbitration agreements as a condition of employment, because such parties have virtually no bargaining power and typically lack the resources to challenge unlawful arbitration provisions in court. If courts are unwilling to void arbitration agreements with illegal provisions, employees who are bound by such agreements will have little or no recourse.

Moreover, refusing to void arbitration agreements with illegal

240. See *supra* Parts IV.b.iii-iv.

241. See *supra* Part IV.b.i.

242. *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 24 (1991).

provisions provides no incentive for employers to remove unlawful provisions from their arbitration agreements. Conversely, it essentially assures employers that their arbitration agreements will be enforced, so long as the unlawful provisions are severable and discrete. Furthermore, even in the unlikely event that a claimant resisting arbitration is able to prove that an arbitration agreement contains illegal provisions, the remaining portions of the arbitration agreement will still be enforced and the employer will not be subject to any punitive results. In effect, this amounts to a policy of permitting contractual overreaching by stronger parties, as long as the overreaching is not too pervasive or extreme.

VI. POSSIBLE CONGRESSIONAL RESPONSES & REMEDIES

This inequitable result seems likely, based on current case law, unless Congress refines the language of the FAA to prevent weaker parties from being exploited by disadvantageous arbitration agreements. The most direct approach would be for Congress to expressly provide that arbitration agreements with unlawful provisions are unenforceable. Such a congressional decree would render the entire severance-versus-voidance issue moot and put drafters on notice that overreaching arbitration agreements will not be tolerated.

Congress could further aid drafters by defining what constitutes an unlawful arbitration provision, and by determining a standard of proof for finding such provisions unenforceable.²⁴³ Since the FAA currently provides virtually no guidance as to how arbitration agreements should be interpreted or construed,²⁴⁴ these determinations have almost exclusively been made by courts.²⁴⁵

243. For example, the FAA could be made to expressly prohibit arbitration agreements that compel claimants to waive punitive damages. Additionally, the FAA could impose a ceiling on arbitration costs payable by claimants who were compelled to sign arbitration agreements as a condition of employment.

244. The only FAA guidelines regarding interpretation of arbitration agreements can be found in 9. U.S.C. § 2 (2000), which provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds exist at law or in equity for the revocation of any contract.”

245. *See, e.g., supra* text accompanying notes 86–88. Additionally, many standards governing arbitration agreements and procedures have been promulgated by private arbitration organizations such as the American

Congressionally codified standards would unify the interpretive methods of the federal circuits and increase the consistency with which many recurrent types of arbitration provisions are enforced.

A more tangential remedy, which has been introduced as of this writing, is to remove employment contracts from the purview of the FAA. The Preservation of Civil Rights Protections Act of 2005 ("PCRPA") seeks to exclude all employment contracts from the reach of the FAA, except when employees consent to arbitrate claims *after* they arise, or when employment unions consent to arbitrate claims under collective bargaining agreements.²⁴⁶ The bill was introduced by Dennis Kucinich (D-Ohio) on June 17, 2005, and was referred to the Subcommittee on Employer-Employee Relations on July 25, 2005.²⁴⁷ While barring arbitration of employment contracts does not specifically address the severance-versus-voidance issue, it would nevertheless significantly diffuse the situation, given the high percentage of severance-versus-voidance cases that have arisen from the employer-employee context.²⁴⁸

Ultimately, until either Congress acts or the Court rules definitively on the severance-versus-voidance issue, the arbitrary enforcement of arbitration agreements with unlawful provisions is likely to continue. The resulting uncertainties and inequities that these inconsistent rulings impose, on both individuals and businesses alike, will also likely persist.

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Arbitration Association. See AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2005); AMERICAN ARBITRATION ASSOCIATION, RESOLVING EMPLOYMENT DISPUTES—A PRACTICAL GUIDE (2002).

246. H.R. 2969, 109th Cong. (2005).

247. THOMAS, THE LIBRARY OF CONGRESS, H.R.2969 (2005), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h2969:>.

248. See *Booker v. Robert Half Int'l*, 413 F.3d 77 (D.C. Cir. 2005); *Hadnot v. Bay, Ltd.*, 344 F.3d 474 (5th Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003); *Circuit City v. Adams (Adams III)*, 279 F.3d 889 (9th Cir. 2002); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001); *Perez v. Globe Airport Sec. Servs.*, 253 F.3d 1280 (11th Cir. 2001); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

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