Alternative Dispute Resolution in the Employment Context

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During the last year and half, the legal environment surrounding the use of alternative dispute resolution (ADR) in the employment context has become yet more murky, in the pale light of recent judicial and legislative developments. This has happened despite employers' proliferating use of mandatory arbitration provisions in employment contracts to resolve workplace disputes and the concomitant need for clear guidelines.

Three developments in particular signal the increased confusion and search for clarity in the ADR arena - (1) the Wright case, decided by the Supreme Court in November 1998, which addressed but did not resolve the preclusive effect of mandatory arbitration of employment dispute provisions in union contracts; (2) the proposed Civil Rights Procedure Protection Act, which would bar mandatory arbitration of employment disputes; and (3) the increased use of mediation in employment disputes, perhaps as a reaction to this unsettled status of arbitration or as a recognition of mediation's own virtues.

In Wright v. Universal Maritime Service Corporation[1] the United States Supreme Court examined the prerequisites for enforcement of a mandatory arbitration clause in a collective bargaining agreement, but failed to answer the ultimate question of whether such a clause is enforceable in the first instance. The Court was willing to find that the collective bargaining agreement in question did not contain a "clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination" and was therefore not enforceable. Without such a clear and unmistakable waiver, the Court found, an employee's choice as to whether to accept employment, along with the condition, was not sufficiently informed and thus did not meet the common law requirements for a valid employment contract. However, the Court explicitly refused to provide guidance as to whether a "clear and unmistakable waiver," if present, would allow for enforcement of such a clause in a collective bargaining agreement.

This refusal presents a problem to employers, particularly in the unionized workplace, because the Wright decision does little other than to tell employers that agreements without a "clear and unmistakable waiver" are not enforceable. It does not provide guidance on a prospective basis as to whether such agreements are enforceable in a collective bargaining agreement where they do contain a proper waiver. An employer is faced with the likelihood of entering into an arbitration agreement, possibly making other concessions to secure that agreement, only to find out that it is not binding on the employees and that they can arbitrate or not, but still file their complaint in court, thus

taking "two bites of the apple". In Alexander v. Gardner-Denver,[2] the Supreme Court held that mandating the arbitration of employment disputes in a collective bargaining agreement is unenforceable. It based its decision on two grounds: (1) that unions could not waive employees' individual rights to redress discrimination claims in a judicial forum; and (2) that arbitration was an inappropriate process to resolve such disputes because arbitrators are required to enforce the collective bargaining agreement, not to enforce statutory claims.

Curiously, Wright does not rely on Alexander v. Gardner-Denver to prohibit mandatory arbitration provisions in collective bargaining agreements. Rather the Court relied on the narrow, technical ground of lack of clarity in the waiver, instead of simply holding it illegal because it was contained in the union contract. Most Circuits enforcing mandatory arbitration impose a requirement that the waiver of the right to litigate be "voluntary and knowing". The Supreme Court in Wright simply applied that standard to the ambiguous waiver which was before it. Since the mandatory arbitration provision did not describe precisely which statutory violations which would be subject to arbitration, it was found unenforceable. Perhaps the Court's narrow holding was a result of its initial appetite for addressing the broader policy issues being frustrated by disagreements between the Justices as to how far to go in this area, leading to the narrow consensus for invalidating the arbitration provision which finally emerged.

The Court's failure to explicitly affirm Alexander v. Gardner-Denver, which it had the opportunity to do, is perhaps significant, especially since at least one Circuit has given preclusive effect to an arbitration clause in a CBA.[3] The Courts' narrow decision is also troublesome in the non-union context, since the Court neither affirmed nor clarified its holding in Gilmer v. Interstate/Johnson Lane Corp.[4]

What adds to the confusion in this arena is the fact that virtually all of the federal Courts of Appeals have found, at least in the non-union setting, that such agreements are enforceable, following the Supreme Court's decision in Gilmer, which broadly endorsed the enforceability of mandatory arbitration of employment disputes, at least in the non-union setting. Gilmer enforced an arbitration agreement between a stockbroker and the securities industry association but did not directly address the enforceability of employment disputes between an employee and employer. Enforcement of such predispute arbitration agreements is also questionable because the Federal Arbitration Act, the statutory basis for enforcing arbitration agreements generally, excludes contracts of employment. However, most courts have construed this exclusion narrowly to exclude only employment contracts involving transportation employees.

Nonetheless, the following Circuits have found that Title VII claims may validly be made the subject of pre-dispute mandatory arbitration agreements: First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh and District of Columbia. To date, only the Ninth Circuit has rejected such arbitrability. In Duffield v. Robertson Stephens Co. and Craft v. Campbell the Ninth circuit found that the legislative history of Title IV and of _____ did not support arbitration as the exclusive forum for the resolution of discrimination disputes. In Circuit City stores, the Ninth Circuit finding that the FAA

did not sanction the mandatory arbitration of employment dispute represents a similar finding of legislative intent concerning an unrelated statute. Nonetheless the result was the same, that mandatory arbitration of employment disputes is unenforceable The Seventh Circuit has not addressed the question.

The D.C. Circuit, in Bailey v. Federal National Mortgage Association,[5] held that provisions mandating arbitration of employment disputes must meet the strict requirements of a binding contract: a "meeting of the minds" as to all material terms, or an intent to be bound. Where the employee did not sign a document describing the arbitration obligation, but rather only received a copy of the company policy, no contractual obligation attached. This was so even though the policy itself allowed an employee to prosecute his/her complaint in court or before an agency even after the arbitration. The Court stated that the employee might be prejudiced by the arbitration in terms of cost, delay or court adoption of the facts established in the arbitration.

In previous decisions, the D.C. Circuit has held that mandatory arbitration provisions will only be upheld if they meet rigorous due process standards including the right to full statutory remedies and thorough judicial review. Here it has gone a step further down the road in forcing the arbitration process to meet judicial and statutory obligations. Arbitration of employment disputes are thus more and more looking like a court proceeding, rather than an informal, expeditious workplace based dispute resolution process.

In summary, many employers are reluctant to introduce mandatory arbitration programs because they are uncertain as to their legality in light of the conflicts in the case law. In the non-union environment, the Ninth Circuit is clearly in conflict with all the other circuits, yet the Supreme Court has not seen fit to resolve the conflict. Also, strict common law due process and contract rights are being applied to the obligation to arbitrate and to the arbitration process itself. In the union setting, courts have chipped away at Alexander v. Gardner-Denver but, when given an opportunity to overrule it in Wright, the Supreme Court did not do so. The Supreme Court's docket for next term includes a case which addresses the issue of whether arbitration provisions in consumer "contracts" are enforceable, and is expected to issue a decision next fall. Randolph v. Green Tree Financial Corp.[6] The Court may use the case to address open issues involved in the enforceability of mandatory arbitration provisions.

With the Courts unable or unwilling to provide clarity and consistency in this area, Congress has entered the picture. Senator Feingold has recently proposed legislation, the Civil Right Procedures Protection Act (S-121) which, rather than extend the judiciary's trend toward enforcing mandatory arbitration, would prohibit such pre-dispute agreements. As discussed above, such clauses are increasingly common. This act would make such agreements unenforceable. The Act echoes the disapproval of mandatory arbitration of employment disputes expressed by the Equal Employment Opportunity Commission in a 1997 policy statement, stating that such arbitration undermined the civil rights laws.

The Act would amend the Federal Arbitration Act (and Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Civil Rights Act of 1866, the Equal Pay Act, and the Family and Medical Leave Act) to specify that the Federal Arbitration Act "shall not apply with respect to a claim of unlawful discrimination in employment if such claim arises from discrimination based on race, color, religion, sex, national origin, age, or disability." The practical effect of the Act would be to eviscerate all pre-dispute arbitration agreements, because any employment dispute could be rendered non-arbitrable simply by inclusion of a "protected class" claim.

While Feingold feels that the Act addresses problems inherent in the employer-employee bargaining process - such as a perceived disparity in bargaining power - it appears that the Act may go too far to the other end of the pendulum, as it conclusively rules out all pre-dispute agreements, under any conditions. At bare minimum, it calls into question the future of mandatory arbitration of employment disputes.

Increasingly, perhaps in response to the uncertain status of arbitration described above, employers are moving towards mediation as the preferred mode of ADR. Employers have found that mediation is effective, and is less expensive, less time consuming, and less adversarial than either litigation or arbitration. Mediation's desirability is further enhanced by the possibility of avoiding the uncertainty inherent in an arbitral award or a jury verdict. Mediation allows the parties to accept only those resolutions which suit it, from both a financial and non-financial perspective.

Entering into mediation also allows both parties to enter into negotiations while still maintaining the appearance of a strong defense. The presence of the third-party mediator helps to remove any stigma attached with "settlement discussions." Another benefit to mediation is that it may allow a resolution which preserves the relationship between the parties. Litigation, and even arbitration, often separates the parties, causing them to harden their positions. Mediation, on the other hand, is often seen as a "bringing together" process, one in which the parties can discuss their differences, air their grievances, reach a solution, and proceed forward.

Over the last several months then, we have seen a number of important trends in employment-related arbitration. First, the federal courts continue to have an inconsistent, complicated and unresolved approach to the enforcement and enforceability of mandatory arbitration agreements. Second, some in Congress and at the EEOC have adopted a hostile stance towards mandatory arbitration, deeming such arbitration incompatible with the federal civil rights laws. Finally, business - perhaps in response to the above movements, and perhaps in response to the inherent benefits, have begun to gravitate towards mediation as their preferred method of employment-related ADR.

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FOOTNOTES

[1] 119 S.Ct. 391 (1998).
[2] 415 U.S. 36 (1974).
[3] Austin v. Owens-Rockway Glass Container, Inc., 844 F. Supp. 1103 (W.D. Va. 1994), aff'd 78 F.3d 875 (4th Cir. 1996).
[4] 500 U.S. 20 (1991).
[5] (D.C. Cir. No. 99-7103, 4/21/00).
[6] 178 F.3d 1149 (11th Cir. 1999), cert. granted 120 S.Ct. 1552 (2000).