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John F. Crawford

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Going Dutch: Should Employees Have to Split the Costs of Arbitration in Disputes Arising from Mandatory Employment Arbitration Agreements?

*Morrison v. Circuit City Stores, Inc.*¹

I. INTRODUCTION

Employers often require their employees to sign arbitration agreements as a condition of employment, obligating employees to submit their disputes with employers to binding arbitration. These agreements may include terms, such as cost-splitting provisions, that may be advantageous to the employer, but extremely limiting to an employee seeking to enforce her statutory rights. The United States Supreme Court has yet to set out a clear position about whether an employee, by signed agreement, can be required to pay all or part of the arbitration fees and costs when the employee submits a statutory claim to arbitration. Federal district courts have set out different standards, but there has yet to be a consensus in approaches to the issue. In the instant case, the Sixth Circuit closely examines the different approaches to determining whether cost-splitting provisions in mandatory arbitration agreements are enforceable and then sets forth its own standard.

II. FACTS AND HOLDING

The United States Court of Appeals for the Sixth Circuit ordered the consolidation of two cases² in order to address the enforceability of cost-splitting provisions of mandatory arbitration agreements in employment contracts.³

*A. Morrison v. Circuit City Stores, Inc.*⁴

On July 10, 1995, Lillian Pebbles Morrison (Morrison) applied for a managerial level position at a Circuit City Stores, Inc., (Circuit City) store in Cincinnati, Ohio.⁵ As a condition of employment, Circuit City required potential employees to sign a document entitled “Dispute Resolution Agreement,” which contained an arbitration clause requiring any and all legal disputes relating to employment with Circuit City to be settled in an arbitral forum.⁶ The arbitration clause required that

1. 317 F.3d 646 (6th Cir. 2003).

2. See *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815 (S.D. Ohio 1999); *Shankle v. Pep Boys-Manny, Moe & Jack, Inc.*, No. 99-5891 (M.D. Tenn. June 1, 1999).

3. *Morrison*, 317 F.3d at 652.

4. See *id.* (citing *Morrison*, 70 F. Supp. 2d. 815).

5. *Id.* at 654.

6. *Id.*

all arbitration proceedings follow "Circuit City Dispute Resolution Rules."⁷ Rule Four of the agreement required any employee filing an arbitration claim to initiate arbitration proceedings and pay a seventy-five dollar filing fee within one year from the time the employee became aware or should have become aware of the facts giving rise to a claim.⁸ Rule Thirteen required Circuit City to pay all initial costs of the arbitration, but then required each party to split the costs equally following an arbitration award.⁹ Additionally, pursuant to Rule Thirteen of Circuit City's rules and procedures, each party was responsible for its own attorney fees, unless the arbitrator used her discretionary power to award reasonable attorney fees to one party.¹⁰

On or about December 1, 1995, Morrison began her employment with Circuit City and was terminated two years later, on December 12, 1997.¹¹ On December 11, 1998, Morrison filed a lawsuit in Ohio state court alleging federal and state claims of race and sex discrimination (violations of Ohio public policy), as well as promissory estoppel.¹² Circuit City had the case removed to federal court and moved to dismiss Morrison's claims and compel arbitration. The federal district court granted Circuit City's motion and issued an order compelling arbitration.¹³ Morrison appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit, but was forced to participate with Circuit City in arbitration proceedings in April 2000.¹⁴ On July 14, 2000, the arbitrator issued an award that was not challenged by either Morrison or Circuit City.¹⁵ Because Morrison failed to object to the award, Circuit City filed a motion with the United States Court of Appeals for the Sixth Circuit to dismiss Morrison's appeal as moot.¹⁶ This motion was denied on January 17, 2002.¹⁷

*B. Shankle v. Pep Boys-Manny, Moe & Jack, Inc.*¹⁸

Mark F. Shankle (Shankle) started working at Pep Boys-Manny, Moe & Jack, Inc. (Pep Boys) on January 25, 1997.¹⁹ As a condition of employment, Pep Boys required employees to sign a "Mutual Agreement to Arbitrate Claims."²⁰ This

7. *Id.* These rules addressed many issues, including time limitations for filing, limitations on remedies available to the employee, allocation of arbitration costs, and filing fees. *Id.* (citing *Circuit City Dispute Resolution Rules and Procedures*, Joint Appendix at 129).

8. *Id.* (citing *Circuit City Dispute Resolution Rules and Procedures*, Joint Appendix at 129).

9. *Id.* (citing *Circuit City Dispute Resolution Rules and Procedures*, Joint Appendix at 134). However, the arbitrator may use her discretion and require the losing party to pay all arbitration costs. *Id.* at 654-55.

10. *Id.* at 654 (citing *Circuit City Dispute Resolution Rules and Procedures*, Joint Appendix at 134).

11. *Id.*

12. *Id.* at 655-56.

13. *Id.* at 656.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* (citing *Shankle v. Pep Boys-Manny, Moe & Jack, Inc.*, No. 99-5891 (M.D. Tenn. June 1, 1999)).

19. *Id.* at 656.

20. *Id.*

agreement provided that each party would equally share all arbitration costs and fees.²¹ After quitting his job with Pep Boys on May 21, 1998, Shankle initiated arbitration proceedings against Pep Boys on August 4, 1998, in order to obtain severance pay.²² On September 3, 1998, Shankle attempted to withdraw his arbitration claim and then filed a suit in a Tennessee state court alleging Title VII violations.²³ On November 6, 1998, Pep Boys removed the suit to federal district court and moved to stay the litigation pending the outcome of the arbitration.²⁴ On June 1, 1999, Pep Boys' motion was denied and the district court granted Shankle's motion to stay the arbitration.²⁵ The court held that the cost-splitting provision in the arbitration agreement was invalid and unenforceable.²⁶ Pep Boys filed a timely notice of appeal and the case was argued in front of an appellate hearing panel on June 16, 2000.²⁷ On October 17, 2001, the court issued an order for rehearing en banc.²⁸

C. Consolidation of Morrison and Shankle

On March 20, 2002, the United States Court of Appeals for the Sixth Circuit held a consolidated rehearing of *Morrison v. Circuit City Stores, Inc.* and *Shankle v. Pep-Boys-Manny, Moe & Jack, Inc.*²⁹ After a rehearing en banc of the two cases, the appellate court held the cost-splitting provisions in each case unenforceable.³⁰ The court also held that potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration would be so high as to deter them, or similarly situated potential litigants, from seeking to vindicate their statutory rights through arbitration.³¹

III. LEGAL BACKGROUND

The enactment of the Federal Arbitration Act (FAA) in 1925 was an attempt to reverse longstanding judicial aversion to arbitration agreements.³² Section Two of the FAA provides that a "written provision in any . . . contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract."³³ Since the enactment of the FAA, the Supreme Court has ruled that statutory rights may be subject to mandatory arbitra-

21. *Id.* at 657.

22. *Id.* at 656-57.

23. *Id.* at 657.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 663.

31. *Id.* The court affirmed the district court's decision in the *Morrison* case to compel arbitration because *Morrison* was not required to pay any arbitration costs. The court affirmed the district court's decision in the *Shankle* case with respect to the unenforceability of the cost-splitting provision and reversed and remanded the decision on other grounds. *Id.* at 675-80.

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

33. 9 U.S.C. § 2 (2000).

tion if the parties' rights can be effectively vindicated in an arbitral forum.³⁴ In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court clarified that "[b]y 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."³⁵ *Gilmer* did not, however, specifically address the issue of whether cost-splitting provisions in arbitration agreements between an employee and an employer are enforceable.³⁶ Courts have not yet reached a consensus on whether a cost-splitting provision in an arbitration agreement allows an employee to have her rights effectively vindicated in an arbitral forum.³⁷ Courts have adopted several different approaches to resolving the cost-splitting issue.³⁸

A. *Per Se Denial of Statutory Rights*

One approach, adopted by the Tenth, Eleventh, and D.C. Circuits, views cost-splitting provisions in arbitration agreements as a *per se* denial of an employee's statutory right to have her claim vindicated in an effective forum.³⁹ These courts have ruled that an employee raising a statutory claim can never be required, as a condition of the contract, to pay for an arbitrator's fee when attempting to resolve such a claim because arbitration should be "a reasonable substitute for a judicial forum."⁴⁰ When accessing the judicial forum, litigants pay only the costs of court filing fees, without the additional cost of hiring a judge.⁴¹ On the other hand, hiring an arbitrator can range from \$500 to \$1,000 or more per day.⁴² These costs, in addition to administrative and attorney's fees, can add up to huge amounts that would most likely deter an individual, especially an unemployed former employee, from pursuing her statutory claims through arbitration.⁴³ Therefore, courts using this approach have ruled that all administrative fees associated with arbitration, including the arbitrator's compensation, should be paid by the employer alone and any cost-splitting provisions in which the employer does not pay all the costs will be *per se* invalid because it does not provide a reasonable substitute for a judicial forum.⁴⁴

34. *Morrison*, 317 F.3d at 658.

35. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

36. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997); *Gilmer*, 500 U.S. 20.

37. Clara H. Saafir, Comment, *To Fee or Not to Fee: Examining Enforceability of Fee-Splitting Provisions in Mandatory Arbitration Clauses in Employment Contracts*, 48 LOY. L. REV. 87, 100 (2002).

38. *Id.*

39. *Id.* *See also* *Shankle v. B-G Maint. Mgmt. Col., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole*, 105 F.3d 1465.

40. *Cole*, 105 F.3d at 1468, 1484.

41. *Id.*

42. *Id.* *See also* Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1, available at 1996 WL 3112130; Kathryn Kranhold, *Solo Legal Arbitrators Put Longtime Leader in a Jam*, WALL ST. J., Nov. 13, 1996, at CA2, available at 1996 WL 11805966.

43. *Cole*, 105 F.3d at 1468.

44. *Id.* at 1481. *See also Shankle*, 163 F.3d 1230; *Paladino*, 134 F.3d 1054.

B. Judicial Review of Cost Sharing

Some courts, including the First and Seventh Circuits, use an alternative approach, suggesting that judicial reviews of arbitration awards do adequately protect statutory rights.⁴⁵ Under this approach, an employee is required to submit her claims to arbitration and then argue to either the arbitrator or a reviewing court that the costs of arbitration are too high and prohibitive.⁴⁶ The arbitrator or reviewing court would then determine the validity of the employee's claim.⁴⁷

This approach has been criticized for many reasons.⁴⁸ One problem is that the scope of review for arbitration awards is very narrow.⁴⁹ When reviewing an arbitrator's decision, a court must find partiality or manifest disregard for the law in order to overturn an award.⁵⁰ Manifest disregard for the law is especially difficult to prove when the arbitrator does not issue a written explanation along with the arbitration award, as often occurs.⁵¹ The larger problem with the "arbitrate first and review the award of costs later" approach⁵² is it essentially eliminates the employee's claim. Critics of this approach note that courts are unlikely to find that arbitration costs to be cost-prohibitive if, in fact, the employee was capable of arbitrating the dispute (a prerequisite for judicial review).⁵³

C. Case-by-Case Approach

Using a third approach, the United States Supreme Court has attempted to deal with the issue of cost-splitting provisions in arbitration agreements.⁵⁴ In *Green Tree Financial Corp.-Alabama v. Randolph*, the Supreme Court held that the party seeking to avoid arbitration "bears the burden of showing [that] the likelihood of incurring such costs" would prohibit that individual from pursuing her rights.⁵⁵ However, *Green Tree* failed to provide a standard for "how detailed the showing of prohibitive expenses must be" in order for a court to find that the cost-splitting provision is unenforceable.⁵⁶

The Fourth Circuit has set such a standard.⁵⁷ In *Bradford v. Rockwell Semiconductor Systems, Inc.*, the court developed a case-by-case analysis that focuses on the individual employee's ability to pay for the costs of arbitration and whether these costs are so much more than the costs of litigation as to deter that employee from bringing a claim in the arbitral forum.⁵⁸ The employee opposing the arbitra-

45. *Morrison*, 317 F.3d at 661. See also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999).

46. *Morrison*, 317 F.3d at 661.

47. *Id.*

48. *Id.*

49. *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000).

50. *Id.*

51. *Id.*

52. *Morrison*, 317 F.3d at 662.

53. *Id.*

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

55. *Id.* at 92.

56. *Morrison*, 317 F.3d at 660.

57. *Id.* See also *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001).

58. *Bradford*, 238 F.3d at 556.

tion has the burden of showing that the costs of the arbitration will, in fact, prohibit her from vindicating her statutory rights.⁵⁹

Critics have also identified numerous problems with the Fourth Circuit's case-by-case approach.⁶⁰ First, it is extremely difficult for a litigant to speculate on the amount of money it will take to submit a claim for arbitration, especially before knowing the identity of the arbitrator.⁶¹ In addition, where some provisions in the agreement might provide for the costs of arbitration to be shifted to one party based on the outcome of the arbitration, the ability of the employee to adequately gauge the likelihood of success would be much "too speculative."⁶²

IV. INSTANT DECISION

In the instant case, the Sixth Circuit attempts to integrate the Fourth Circuit's case-by-case *Bradford* approach into a new standard for determining the enforceability of cost-splitting provisions in arbitration agreements.⁶³ In contrast with the case-specific *Bradford* inquiry, the *Morrison* court examines the possible "chilling effect of the cost-splitting provision on similarly situated potential litigants," not just on the individual litigant bringing suit in a given case.⁶⁴

Statutory claims are meant to have both a remedial and deterrent function.⁶⁵ The court reasoned that cost-splitting provisions preventing substantial numbers of potential litigants from filing claims would undermine this deterrent function.⁶⁶ To remedy this problem, the Sixth Circuit set forth a new analysis for determining whether a cost-splitting provision has the effect of preventing arbitration because of cost. First, when deciding whether a particular provision will deter a substantial number of litigants, the court should identify a class of litigants, based on job description and socio-economic background.⁶⁷ The court should then look to the individual litigant's resources and income as representative of the class' ability to "shoulder the costs of arbitration," but the court should not do a detailed analysis of that individual's expenses and bills.⁶⁸ Furthermore, when the court is attempting to determine the potential costs of arbitration on the class, it should look at the average cost of submitting that type of claim in arbitral forum, not at the costs of the particular arbitration before the court.⁶⁹

59. *Id.* at 557.

60. *Morrison*, 317 F.3d at 660.

61. *Id.* Different arbitrators employ different procedures and may have substantially different costs and fees. Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 161 (2002).

62. *Morrison*, 317 F.3d at 660.

63. *Id.* at 663.

64. *Id.*

65. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). "The deterrent function of the laws in question is, in part, that employers who engage in discriminatory practices are aware that they may incur liability in more than one case." *Morrison*, 317 F.3d at 663.

66. *Morrison*, 317 F.3d at 663.

67. *Id.*

68. *Id.* at 663-64.

69. *Id.* at 664.

In addition, the court should look at the employee's potential costs of litigation as an alternative to arbitration.⁷⁰ The courts should determine the costs of litigation in a realistic manner, taking into account that discrimination suits are sometimes taken on a contingency fee basis, with the attorney advancing most of the expenses.⁷¹ In some cases, there may be little difference in cost to a litigant between bringing a suit in a judicial forum as opposed to an arbitral forum except for the arbitrator's fees and costs.⁷² The main issue the court should look at is the "overall cost of arbitration" to the employee and whether it "is greater than the cost of litigation in court."⁷³

Furthermore, when conducting this analysis, the court should not consider that the costs may be shifted based on the outcome of arbitration.⁷⁴ The court should consider the decision-making process of all similarly situated potential litigants and whether they would be deterred from submitting a claim to arbitration.⁷⁵ In most cases, employees will be deterred from submitting a claim if they know that losing the arbitration will require them to pay all the arbitration costs under a cost-shifting provision.⁷⁶

When examining Morrison's case, the Sixth Circuit used the preceding analysis to determine whether her claim would be cost prohibitive for similarly situated potential litigants.⁷⁷ The court found Morrison had numerous "necessities" that a recently terminated employee would be hard-pressed to continue to pay.⁷⁸ Even if a potential litigant in Morrison's situation could find employment quickly, the court noted that arbitration of a "typical" employment discrimination case could involve costs ranging from three to nearly fifty times the basic costs of litigation in a judicial forum.⁷⁹ The Sixth Circuit found in the instant case that Morrison satisfied her burden of showing that a substantial number of similarly situated employees would be deterred from effectively vindicating their rights in an arbitral forum, and since the arbitration had already taken place, she would not be required to pay any of her share of the costs of arbitration.⁸⁰

Using the same analysis to examine Shankle's case, the court found that a typical arbitration of an employment discrimination case "would result in costs between \$2,250 and \$6,000."⁸¹ Because Shankle was employed as a mechanic, the court did not have to inquire into his financial situation to conclude that these costs would prohibit him and others similarly situated from bringing statutory claims.⁸² The court found that the cost-splitting provision in *Shankle* was not enforceable because the costs of arbitration were clearly much more than Shankle

70. *Id.*

71. *Id.*

72. *Id.* Such fees are not incurred in a judicial forum. Litigants do not pay for the services of the judge assigned to hear their case. *Id.*

73. *Id.* (quoting *Bradford v. Rockwell Semiconductors Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)).

74. *Id.*

75. *Id.* at 664-65.

76. *Id.* at 665.

77. *Id.* at 669.

78. *Id.* Such "necessities" include housing, utilities, transportation, food, etc. *Id.*

79. *Id.* (citing PUBLIC CITIZEN, THE COSTS OF ARBITRATION 40-42 (2002)).

80. *Id.* at 670, 675.

81. *Id.* at 676.

82. *Id.*

would be able to afford and would deter a substantial number of similarly situated potential claimants.⁸³

V. COMMENT

A. Relation of Morrison to Precedent

In *Green Tree*, the United States Supreme Court eased the circuit courts' resistance towards cost-splitting provisions.⁸⁴ However, *Green Tree* provided little guidance about when a cost-splitting provision in a mandatory arbitration agreement should be enforceable.⁸⁵ The Sixth Circuit in the instant case provides a clear and logical analysis derived from the Fourth Circuit's approach in *Bradford*.⁸⁶

B. Advantages of Other Approaches

The per se denial of cost-splitting provisions in mandatory arbitration agreements adopted by the Tenth, Eleventh, and D.C. Circuits is certainly advantageous to employees.⁸⁷ First, it is obvious that arbitration can be expensive for an employee when compared to a traditional judicial forum.⁸⁸ These additional costs may become prohibitive for the employee trying to "effectively vindicate her statutory rights" and, as a result, allow employers to continue their discriminatory practices.⁸⁹ Second, by adopting an approach that invalidates cost-splitting provisions, courts are, in effect, telling employers that they must pay all the costs if they want the benefit of arbitration. This, however, should not be a concern for employers, because arbitration is still a lower cost alternative for them than litigation, providing an effective and fair resolution for less expense.⁹⁰

Other courts, including the First and Seventh Circuits, have adopted an approach allowing judicial review of arbitration costs.⁹¹ Under this approach, the court determines whether the actual costs of arbitration were prohibitively expensive *after* the arbitration has taken place, avoiding the problem discussed in *Green Tree*—that determining the costs of arbitration *beforehand* is "too speculative."⁹² This approach allows courts to make a more informed decision as to whether the

83. *Id.* In her dissent, Judge Batchelder concluded that the court should follow the *Green Tree* approach and look only at the plaintiffs before the court. *Id.* at 681-82 (Batchelder, J., dissenting). Furthermore, she concluded that the "district court's job is to determine not whether this or similarly situated plaintiffs have been or will be deterred, but whether this plaintiff can afford the costs." *Id.*

84. Saafir, *supra* note 37, at 104.

85. *Id.* at 106.

86. *Morrison*, 317 F.3d at 663-65.

87. Saafir, *supra* note 37, at 104. See also *Shankle v. B-G Maint. Mgmt. of Col., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

88. *PUBLIC CITIZEN*, *supra* note 79, at 40-42.

89. See *Cole*, 105 F.3d at 1483-85.

90. *LeRoy & Feuille*, *supra* note 61, at 161-65.

91. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Koveliskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999).

92. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 661-662 (6th Cir. 2003).

arbitration costs actually were prohibitive because the court can compare the actual arbitration costs and the claimant's actual ability to pay.

The case-by-case approach proposed in *Green Tree*, and further set forth in *Bradford*, tried to deal with the cost-splitting issue with a more individualized standard.⁹³ The courts have required that the employee prove that the arbitration costs were a burden on the effectiveness of statutory vindication.⁹⁴ This seems like a reasonable proposition because different claimants often have vastly different abilities to pay for arbitration costs.⁹⁵ In fact, the *Bradford* court emphasized that an individual's ability to pay is one of the key determinants for the enforceability of cost-splitting provisions.⁹⁶ The main advantage of this approach is that a sophisticated wealthy employee, who signed an arbitration agreement with a cost-splitting provision, will not be able to shirk a valid contract by claiming that the arbitration costs would prohibit her from bringing a claim and effectively vindicate her statutory rights.

C. Disadvantages of Other Approaches

Per se denial of cost-splitting provisions is not in line with the Supreme Court's ruling in *Gilmer*, where the Court upheld the judiciary's "liberal policy favoring arbitration."⁹⁷ In *Gilmer*, the Court "fully endorsed the use of arbitration for statutory claims,"⁹⁸ and therefore courts should always attempt to allow arbitration in the appropriate circumstances. The per se denial approach does not follow this policy because the costs of arbitration do not always prohibit an employee from bringing a claim against the employer.

Post hoc judicial review, at first glance, seems like a logical approach. However, there are at least two problems with this approach.⁹⁹ As discussed earlier, the scope of review is very narrow for arbitration awards, leaving courts almost no option but to let the arbitration award stand. Courts are also unlikely to overturn an arbitration award if the claimant has already exhibited the ability to bring a claim. However, even if a claimant has garnered the necessary resources to bring a claim, the individual may have sacrificed her life savings or forgone necessities of life in order to do so. Additionally, courts using the post hoc judicial review approach fail to consider that the claimant may never get the opportunity to have her claims heard because she will not want to risk losing the review and be responsible for the costs associated with the arbitration.

93. See *Green Tree Fin. Corp.-Ala v. Randolph*, 531 U.S. 79 (2000); *Bradford v. Rockwell Semiconductor Sys, Inc.*, 238 F.3d 549 (4th Cir. 2001).

94. *Green Tree*, 531 U.S. at 92. "Where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of such costs." *Id.*

95. *LeRoy & Feuille*, *supra* note 61, at 180.

96. *Bradford*, 238 F.3d at 556. "[T]he appropriate inquiry is one that . . . focuses . . . upon the claimant's ability to pay arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Id.*

97. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

98. *Safir*, *supra* note 37, at 95.

99. See *Morrison v. Circuit City Store, Inc.*, 317 F.3d 646, 661-63 (2003).

The case-by-case approach raised in *Green Tree*,¹⁰⁰ and the subsequent standard set forth in *Bradford*,¹⁰¹ attempt to bring a more logical approach to the cost-splitting issue, but they also raise additional problems. Mainly, the case-by-case approach places a large burden on the employee because costs associated with an arbitration, which courts using this approach require employees to estimate, are much “too speculative” at the initial stages of a dispute.¹⁰² In contrast, the Sixth Circuit in *Morrison* looks at the “whole picture” when attempting to determine the validity of a cost-splitting provision.¹⁰³ The court’s standard does not attempt to decide the issue for an individual claimant in a particular case.¹⁰⁴ The court recognizes that employers often discriminate on a consistent basis and that in order for all employees to “effectively have their rights vindicated,” the cost-splitting issue must be decided for the group, not just one individual in a given case.¹⁰⁵

D. Results and Ramifications of Morrison

Where does *Morrison* leave the issue of cost-splitting provisions in mandatory employment contracts? While *Green Tree* did not settle this issue, the Sixth Circuit’s approach will hopefully provide a benchmark for the Supreme Court. Arbitration is becoming an increasingly integral part of the employment dispute resolution process.¹⁰⁶ Employers, as well as many employees, now recognize that arbitration, even with its faults, is often a better alternative than a traditional judicial forum.¹⁰⁷ However, studies have shown that while courts broadly approve of arbitration clauses in employment contracts, they often “deny enforcement of contracts that create access barriers to employees.”¹⁰⁸ This has and may continue to lead to situations in the future where employers simply pay for all arbitration costs in order to ensure resolution of disputes in an arbitral forum.¹⁰⁹ However, this strategy may create additional problems.¹¹⁰ There is evidence to suggest that employers are often repeat players¹¹¹ in the arbitration system, while employees are usually only one-time players.¹¹² If the repeat-player employers are always financing the arbitration, some critics fear that arbitrators will be biased in favor of the employers because it is the employers that pay the arbitrators’ salaries.¹¹³ Furthermore, this seems to cut against the process that courts are attempting to encourage—specifically, fair arbitration practices as a reasonable substitute for the judicial forum.¹¹⁴ This criticism does not undermine the Sixth Circuit’s approach,

100. *Green Tree*, 531 U.S. 79.

101. *Bradford*, 238 F.3d 549.

102. *Morrison*, 317 F.3d at 660.

103. *Id.* at 663-65.

104. *Id.*

105. *Id.*

106. Saafir, *supra* note 37, at 114.

107. *Id.* at 114-15.

108. LeRoy & Feuille, *supra* note 61, at 191.

109. *Id.* at 195.

110. *Id.*

111. *Id.* Repeat players are employers who repeatedly use arbitration to resolve disputes with employees. *Id.*

112. *Id.* Employees almost never have more than one dispute in front of a particular arbitrator. *Id.*

113. *Id.*

114. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

however, because the “repeat-player system” can easily be remedied by allowing employees to seek resolution with an arbitrator of her choice instead of using the employer’s choice of arbitrator.

There are many policy issues courts must consider when dealing with mandatory arbitration agreements and cost-splitting provisions. In order to have a fair standard for dealing with these issues, courts must examine many factors in each individual case. The Sixth Circuit’s approach provides the least amount of barriers for employees, yet still allows employers to have the mandatory arbitration they seek. While this analysis does not settle the issue definitively, other courts should see that the Sixth Circuit has provided the most clear and logical examination of the issues.

VI. CONCLUSION

As the popularity of mandatory arbitration agreements in employment contracts increases and more disputes arise, the courts will be prompted to settle the issue of enforceability of cost-splitting provisions. The Sixth Circuit has examined the various approaches and set forth its own clear standard that will likely provide a guideline for other courts when faced with the same issue in the future. How other courts will ultimately decide on this issue is not completely clear at this time, but the Sixth Circuit is definitely leading the way by developing an approach that is advantageous to both employers and employees. Because of the Sixth Circuit’s analysis, employers will be forced to closely scrutinize current employment contracts and how they draft their employment agreements in the future.

JOHN F. CRAWFORD

