Beyond Let Them Eat Cake: An Argument for the Armendariz Method of Cost Allocation in Mandatory Employment and Consumer Arbitration

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I. INTRODUCTION

Jane Doe is a twenty-two year old young woman who recently has been experiencing problems at work. About two years ago, Jane took a job at a local fast-food establishment, Bubba’s, which is a subsidiary of a larger corporation. The job has provided barely enough income for Jane to support herself and her two year old daughter while she has been earning an associate teaching degree at the local junior college. Jane planned to continue working at Bubba’s while finishing her degree, but the recent behavior of her supervisor has made her question whether she will be able to continue working at all.

Throughout Jane’s two years at Bubba’s, John, her supervisor, has repeatedly invited her to social gatherings outside of work. Jane has refused both because she prefers to spend her time off with her daughter and because she is not interested in spending any more time with John than her job requires. Over time, John’s persistence has intensified. The other night, he made her uncomfortable by following her out to her car as she was leaving. She threatened to report him to the General Manager, to which he replied, “Good luck,” and walked away.

The next day, John’s behavior did not change. Jane discussed reporting him to the General Manager with a fellow female employee. Jane learned that this was not the first time John had behaved this way. In fact, Jane was hired to fill the vacancy that was left when the General Manager fired the last female employee to complain about John’s behavior. Also, John bragged at work that he was much less replaceable than the non-management employees, and that “there’s an endless supply of waitresses that can pour coffee.” Jane’s fellow employee had heard that after being fired, the former employee could not find another food service job in the area because she had acquired a reputation for being a troublemaker.

Frustrated, Jane decided that she needed to talk to an attorney and set a meeting with a local general practitioner. The attorney agreed to research the merits of her claim for a one thousand dollar non-refundable retainer and meet with her to discuss her options. Jane was reluctant to spend so much money with the possibility of hearing bad news, but the positive attitude of the attorney left her feeling confident. She was proud of herself for making a copy of the agreement she signed when she started working at Bubba’s, and the attorney had commended her for doing so when she handed it over. She counted the days until their next meeting. However, when she met with the attorney again, she was given the following assessment:
ATTORNEY: Well Jane, the problem that we’re going to run into with your claim is that when you started working at Bubba’s you signed a pre-dispute arbitration agreement that covers “any and all disputes arising out of your employment.”

JANE: A what?

ATTORNEY: Arbitration is a process that’s similar to suing someone in court, only it typically allows for claims to be resolved faster, is generally cheaper, and can be more flexible because the arbitrator’s award can take into account a broader range of social and ethical considerations that don’t always make their way to a jury.¹

JANE: So, that’s good, right? I don’t think I’m seeing the problem.

ATTORNEY: The problem is this cost-allocation provision. It says that you agree to pay for half the costs of arbitration up front, and that you’ll be responsible for Bubba’s other half if you lose.²

JANE: Okay. That sounds expensive. But didn’t you say that arbitration was cheaper?

ATTORNEY: Well, it certainly can be cheaper, but typically only in the long run.³ The problem is upfront costs. The fee for filing a complaint in federal court is $350.⁴ The upfront fee for your claim, depending upon how much we’re going after, could be anywhere from $950 to $2,250.⁵

JANE: I gave you most of my spare cash for the retainer. Is there no way around those upfront costs?

ATTORNEY: We can try to get a waiver or reduction, but it takes a showing of extreme hardship.⁶ There’s just no guarantee that you’re going to meet that standard; and, even if you did, that waiver wouldn’t

². The “loser pays” provision in Goodman v. ESPE Am., Inc., No. 00-CV-862, 2001 WL 64749 at *3 n.2 (E.D. Pa., Jan. 19, 2001) provides an example of this type of cost-allocation provision.
⁶. Id. at 740.
even cover what we have to pay the arbitrator.\textsuperscript{7} Plus, you’ve got to keep in mind that whatever we try to prove, you’re going to be paying me to prove it.\textsuperscript{8}

\textbf{JANE:} That’s kind of what I was hoping to talk to you about today. When my dad broke his ankle at work, his attorney took his case, not for free, that’s not what I want to say . . .

\textbf{ATTORNEY:} On a contingency?

\textbf{JANE:} Yes.

\textbf{ATTORNEY:} I do sometimes take cases on a contingency fee basis. But in your case, it’s a little more complicated. You see, when I take cases on a contingency basis, I’m putting up that $250 filing fee and foregoing payment of my legal fees if we lose. For you, the upfront fees are probably going to be a lot more than $250, which is more than I want to risk. I think you’ll find that most attorneys feel the same way.\textsuperscript{9}

\textbf{JANE:} But if we win you can recover your fees?

\textbf{ATTORNEY:} I’m not sure. Bubba’s has a provision in your arbitration agreement that limits your recovery to breach of contract damages, which means that under the agreement, you can’t recover attorney’s fees.\textsuperscript{10} So far, the research that I’ve done has led me to believe that I can get around this provision.\textsuperscript{11} But, the arbitration agreement also has a severability

\footnotesize{
\begin{itemize}
  \item \textsuperscript{7} Id. Drahozal writes:
  As the AAA explains, “[s]ince every hardship request is unique and involves many variables, the AAA reserves the right to deny or grant any request based on the information given by the requesting party.” Note that even if the AAA waives its administrative fees, the waiver does not include arbitrators’ fees. Id. at 740 (citations omitted). \textit{See also supra notes} 4 and 5.
  \item \textsuperscript{8} Clyde W. Summers, \textit{Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate}, 6 U. PA. J. LAB. & EMP. L. 685, 725-26 (2004) (“As Professor Malin has emphasized, the deterrence impact is double-layered, for it includes the cost of challenging the cost-sharing. Invalidating the cost-sharing provision does nothing to discourage an employer from including such a clause because it will deter others who lack the resources to challenge it in court.” (citing Martin H. Malin, \textit{Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree}, 41 BRANDEIS L.J. 779, 791-95 (2003))).
  \item \textsuperscript{9} \textit{See generally Drahozal, supra} note 5, at 731-32 (noting higher costs and fees in the initial phases of arbitration).
  \item \textsuperscript{10} The “costs and fees” provision of the arbitration agreement in \textit{Perez v. Globe Airport Security Services, Inc.}, 253 F.3d 1280 (11th Cir. 2001) provides an example of this type of cost-allocation provision. The court’s analysis of this provision is as follows:
  The arbitration agreement states, “despite any rule providing that any one party must bear the cost of filing and/or the arbitrator’s fees, all costs of the American Arbitration Association and all fees imposed by any arbitrator hearing the dispute, will be shared equally between you and the Company.” This provision circumscribes the arbitrator’s authority to grant effective relief by mandating equal sharing of fees and costs of arbitration despite the award of fees permitted a prevailing party by Title VII.
  \textit{Id.} at 1285.
  \item \textsuperscript{11} Summers, \textit{supra} note 8, at 727-28.
\end{itemize}
}
clause, which means that the arbitrator or court could hold that the attorney's fees provision is severable from the rest of the agreement. In that case, we still have to arbitrate, and it's quite common for arbitrators to refuse to award costs and fees; or, worse yet, your fees may end up being more than the award. And, frankly, it strikes me as unethical for me to counsel you to pursue this arbitration when there's a good chance that it could end up costing you so much.

JANE: How about this: there was another woman that this same thing happened to before I got there. Is there any way that she and I could file a claim together so that we can split the upfront costs?

ATTORNEY: What you're talking about, Jane, is a class action, and Bubba's has a provision against that as well. Under the authority that I've found so far, it seems unlikely that you'll be able to get that provision tossed out. I want to help you, Jane. I really do, but I just can't say with any certainty that pursuing this claim is the best possible course of action available to you right now.

Jane, not wanting to be labeled a troublemaker, decided to apply for other jobs. She applied at the restaurant across the street from Bubba's, called Billy Bob's. She did well in the interview and got the job. After she quit Bubba's and just before she started work at her new job, the manager gave her a form that he said she had to sign...
II. BACKGROUND

A. In General

The journey of the federal policy favoring arbitration, from the American Arbitration Act of 1925 to the current state of mandatory employment and consumer arbitration has been fraught with surprises. The Federal Arbitration Act (FAA) makes no mention of cost allocation and facially excludes employment contracts from its scope. Section One states: “Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” However, in Circuit City Stores, Inc. v. Adams, the Supreme Court adopted a narrow construction of Section One, holding that only employment contracts of transportation workers were exempted from the FAA.

The FAA also does not provide for the arbitration of statutory claims, as Congress specifically limited its scope to “maritime transactions” and “commerce.” In the 1953 case Wilko v. Swan, the Supreme Court voided an arbitration provision in a securities sales contract as an “invalid waiver of the substantive law” created by § 12(2) of the Securities Act of 1933. Lower courts interpreted the holding in Wilko as a “public policy defense” to the enforcement of arbitration provisions. However, in Alexander v. Gardner-Denver Co., the Court held that an employee does not forfeit his right to a judicial forum by pursuing arbitration employees, as a condition of employment, to submit all employment claims to arbitration, but the employer retained the right to litigate any claims it might have against the employees. In Ingle v. Circuit City Stores, Inc., the employer imposed a statute of limitations much shorter than the limitations period imposed by law, prohibited class actions, and required employees to pay a “filing fee” directly to the employer as a prerequisite for bringing a claim. In Hooters of Am., Inc. v. Phillips, the employer required that arbitrators be chosen from a panel created exclusively by the employer (which would have permitted the employer to place its own managers on the list), and reserved the right to amend the arbitration rules at any time with no notice (which would have permitted the employer to change the rules of arbitration in the middle of an arbitration proceeding). Nor are overreaching employers likely to limit themselves to only one or two types of overreaching: in many of the cases cited above, courts refused to enforce the arbitration agreement because the agreement overreached in as many as eight different ways. And while the cases cited above all are employment arbitration cases, consumer arbitration cases provide a similar litany.

Courts generally agree that exceptionally lopsided arbitration agreements, such as the ones cited above, should not be enforced. There is a wide range of variation, however, on the point at which an arbitration agreement becomes sufficiently lopsided to justify non-enforcement.

Id. at 607-08 (citations omitted).
22. Id.
24. Id. at 113-19.
27. See Bales, supra note 17, at 589.
of a Title VII discrimination claim under a collective bargaining agreement because arbitrators do not have the authority to decide statutory claims.  

In the two decades between Wilko and Alexander, the Court increasingly began to favor arbitration as a means of reducing the federal docket and providing a faster and inexpensive forum for resolving disputes in the context of labor arbitration. In a series of cases in the late 1980s known as the Mitsubishi Trilogy, the Court expanded the federal policy favoring arbitration from collective bargaining to the arbitration of employment disputes. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Court first articulated the principle that a party does not forego statutory rights by submitting its claim to arbitration, but merely submits to their resolution in an arbitral, rather than a judicial, forum. In the third case of the Mitsubishi Trilogy, the Court overruled Wilko.

The Court then laid the foundation for its current approach to cost allocation in Gilmer v. Interstate/Johnson Lane Corp. In this case, the Court rejected the plaintiff’s argument that arbitration agreements should be voided due to the coercion often applied by employers in obtaining the employee’s signature. The court held that “mere inequality in bargaining power...is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” Also, in the commercial and collective bargaining contexts, the Court’s interpretation of the FAA has been resolutely contractual. Emphasizing the proportional bargaining power of the parties, the Court has held that such agreements can determine the choice of law, as well as specify the types of damages.

Courts at first noted that proportional bargaining power cannot be assumed in employment and consumer contracts. In Cole v. Burns International Security Services, a 1997 D.C. Circuit case, Judge Harry Edwards outlined five criteria that must be included in mandatory employment arbitration agreements in order to adequately protect an employee seeking to vindicate statutorily created rights. The agreement must:

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30. Id. at 49-57.
31. Bales, supra note 17, at 589. vz
33. Mitsubishi, 473 U.S. at 628.
34. Id.
35. Id.
36. Rodriguez de Quijas, 490 U.S. at 483-85.
37. 500 U.S. 20 (1991); see also Bales, supra note 17, at 596-600.
38. Gilmer, 500 U.S. at 33.
39. Id.
41. Volt, 489 U.S. at 479.
42. Mastrobuono, 514 U.S. at 58.
44. 105 F.3d 1465 (D.C. Cir. 1997).

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Beyond "Let Them Eat Cake"

(1) provide[] for neutral arbitrators, (2) provide[] for more than minimal discovery, (3) require[] a written award, (4) provide[] for all of the types of relief that would otherwise be available in court, and (5) . . . not require employees to pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the arbitration forum.45

In regards to cost allocation, the Cole court was particularly concerned about the deterrence effect of requiring employees to pay arbitration costs in excess of court filing fees and other administrative expenses.46 This approach to the cost allocation issue established the D.C. Circuit as the first jurisdiction to adopt a rule that the imposition of excessive costs under a fee-splitting provision renders an arbitration agreement unenforceable.47 After Cole, the majority of courts that considered the cost allocation issue interpreted the imposition of costs beyond those required for litigation as a bar to enforcement of the arbitration agreement.48

Then, in 2000, the U.S. Supreme Court handed down a decision in Green Tree Financial Corp. v. Randolph49 that took a different stand as far as plaintiff’s arbitration costs and whether they make an arbitration agreement unenforceable.50 Green Tree is significant not only for establishing Supreme Court precedent for the case-by-case approach to cost allocation, but also because Green Tree involved a consumer, not an employer-employee dispute.51 The holding of Green Tree and its impact on cost-splitting provisions in employment contracts represents a marriage of consumer and employment arbitration in regards to cost allocation.52

In Green Tree, the plaintiff, who had financed her mobile home through Green Tree Financial Corporation, sued for violations of the Truth in Lending Act and the Equal Credit Opportunity Act.53 After the U.S. District Court for the Middle District of Alabama granted Green Tree’s motion to compel arbitration, pursuant to a contract requiring arbitration of all disputes, the plaintiff appealed her case to the Eleventh Circuit.54 The Eleventh Circuit agreed with the plaintiff that the agreement’s silence as to who would bear the costs of arbitration sub-

45. Id. at 1482 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)). “The decision in Cole has received considerable attention because of its scholarly analysis, its comprehensiveness, and because its author, Chief Judge Harry Edwards, was a highly respected labor law professor and arbitrator prior to his appointment to the bench.” Malin, supra note 8, at 788.
46. Cole, 105 F.3d at 1484.
50. Malin, supra note 8, at 790-91.
51. Green Tree, 531 U.S. at 94-95 (Ginsburg, J., concurring & dissenting).
52. Id.
53. Id. at 82-83.
54. Id. at 83-84.
jected the plaintiff to an unreasonable risk. However, on appeal, the Supreme Court reversed by a 5-4 vote.

Reasoning from the federal policy favoring arbitration, the Court analogized the enforceability of prohibitive costs provisions to the enforceability of the arbitration of statutory claims. The Court stated that previous holdings had established that the plaintiff seeking to avoid arbitration of a statutory claim has the burden of proving that "Congress intended to preclude arbitration of the statutory claims at issue." The Court concluded that the federal policy favoring arbitration demands the same result in terms of costs provisions: the plaintiff has the burden of proving that costs would be prohibitive under the arbitration agreement.

B. Methods of Interpreting Prohibitive Costs Provisions: The Per Se Rule Versus Judicial Review

The holdings in Cole and Green Tree represent the two general methods of interpreting prohibitive costs provisions: per se unenforceability versus judicial review of the plaintiff's ability to pay the costs of arbitration under the agreement. Under the per se method, if an arbitration agreement is presented to an employee as a condition of employment, the costs of arbitration are assessed against the employer at the time that the employer moves to compel arbitration. This rule contemplates that employees will bear the amount of costs that is traditionally associated with filing a claim in court. Costs are assessed at the "motion to compel" stage in order to avoid the double-layered deterrence effect of judicial review. The first layer of deterrence results from the risk that the arbitrator may require the employee to pay substantial arbitration costs under the agreement. The second layer of deterrence stems from the attorneys fees and court costs associated with proving to a reviewing court that the first layer of costs are prohibitive (following an appeal of the trial court's granting the motion to compel). Judicial review of prohibitive costs provisions, the method endorsed by the Supreme Court in Green Tree, does not consider the deterrence effect of double-layered costs, opting instead to focus on the federal policy favoring arbitration. Judicial review of costs allocation can occur prior to the arbitration dur-

55. Id. at 84.
56. Id.
57. Id. at 91-92.
59. Green Tree, 531 U.S. at 92.
60. Crawford, supra note 47, at 280-81.
64. See Summers, supra note 8, at 725.
65. See id. at 725-26.
67. Id. at 91. See also Malin, supra note 8, at 794-95; Crawford, supra note 47, at 286; Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663-65 (6th Cir. 2003).
ing the plaintiff’s appeal of the motion to compel, or after the arbitration during the plaintiff’s appeal of the arbitrator’s award. The advantage of post-arbitration judicial review is that it allows courts to make a direct comparison of the actual costs of the arbitration at issue with the plaintiff’s ability to pay without speculation. However, this approach has been criticized for a variety of reasons, particularly because the narrow scope of review for arbitration awards will likely preclude the plaintiff’s recovery of arbitration costs. Only two circuits, the Seventh and the First, have utilized post arbitration judicial review.

The Green Tree court implicitly endorsed pre-arbitration judicial review of costs allocation provisions by making its determination prior to requiring the parties to proceed to arbitration. The Green Tree “case-by-case” method of judicial review focuses on the individual plaintiff’s ability to meet the cost burden under the arbitration agreement. However, due to the ambiguous record in this case, the Court avoided the task of defining this standard: “The record reveals only the arbitration agreement’s silence on the subject, and that fact alone is plainly insufficient to render it unenforceable.”

In applying Green-Tree’s individualized, “case-by-case” approach, circuit courts have chosen two different methods of pre-arbitration judicial review: the “integrated” approach and the “general deterrence” approach. In Bradford v. Rockwell Semiconductor Systems, Inc., the Fourth Circuit developed the integrated approach by adding two inquiries to the Green Tree “individual claimant’s ability to pay” standard: the expected cost differential between the arbitral forum and litigation, and “whether that cost differential is so substantial as to deter the bringing of claims.” Citing Gilmer, the court analyzed the cost issue as an aspect of the adequacy of the arbitral forum for vindicating the plaintiff’s statutory rights, reasoning that prohibitive costs necessarily make for an inadequate forum. The Fourth Circuit dismissed the Cole per se rule as being too focused on where the money is going (i.e., to an arbitrator versus a judge) as opposed to a costs comparison between arbitration and litigation as a whole. In this sense, the court did not analyze the impact that the higher upfront costs of arbitration may have on a potential claimant.

68. Crawford, supra note 47, at 281.
69. Id. at 285.
70. See Dawahare v. Spencer, 210 F.3d 666, 669 (6th Cir. 2000); Crawford, supra note 47, at 284-85.
73. Id. at 91-92.
74. Id. at 91.
75. Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001) (holding that courts should focus, among other things, upon the claimant’s ability to pay the 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).
76. Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (holding that the deterrence factor is the only proper consideration when determining whether or not a cost allocation provision is unduly prohibitive).
77. 238 F.3d 549 (4th Cir. 2001).
78. Id. at 556.
79. Id.
80. Id.
In *Morrison v. Circuit City Stores, Inc.*, however, the Sixth Circuit attempted to address the issue of prohibitive up-front costs by focusing exclusively on whether the cost differential is so substantial as to deter the bringing of claims. The *Morrison* court laid out a multi-step process for making the "prohibitive" determination: (1) Identify a class of litigants based on job description and socioeconomic background; (2) without conducting a detailed analysis of the individual plaintiff's resources, examine the individual plaintiff's ability to pay as representative of the class; (3) determine the difference between the average costs of arbitration for that class and the average costs of arbitrating a similar claim, not focusing on the costs of the particular arbitration before the court; (4) determine the costs of litigation, taking into account the pervasion of contingency fee agreements; and (5) consider the likelihood that similarly situated plaintiffs would be deterred from bringing a claim due to prohibitive costs.

The case-by-case method runs contrary to the prevailing persuasive authority that preceded the decision in *Green-Tree*. As previously mentioned, following *Cole*, the majority of courts considering the issue interpreted the imposition of excessive costs as a bar to the enforceability of the arbitration agreement. This per se rule was well-received by the Eleventh and Tenth Circuits. These circuits recognized *Cole* as an extension of *Gilmer*’s holding that the federal policy favoring arbitration is not without limits, particularly in regards to arbitration agreements that effectively deprive the plaintiff of access to a neutral forum.

In a seminal case preceding *Green Tree, Armendariz v. Foundational Health Psychcare Services, Inc.*, the California Supreme Court adopted a version of the per se rule allowing the parties to proceed to arbitration by severing a prohibitive cost allocation provision at the time of the motion to compel and imposing costs on the party that mandated the arbitration agreement. *Armendariz* involved a mandatory arbitration agreement requiring arbitration of all claims under the California Fair Employment and Housing Act. The agreement was subject to a provision of the California Civil Code that required each party to pay a pro rata share of arbitration costs. The court, citing *Cole*’s interpretation of *Gilmer*, held that an employee subject to a mandatory arbitration agreement cannot be required to pay costs beyond that of litigation filing fees. The court reasoned that such costs

81. 317 F.3d 646 (6th Cir. 2003).
82. *Id.* at 658 (6th Cir. 2003) ("The arbitration of statutory claims must be accessible to potential litigants as well as adequate to protect the rights in question so that arbitration, like the judicial resolution of disputes, will 'further broader social purposes.'" (citing *Gilmer* v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991))).
83. *Id.* at 663-65.
85. *See supra* note 48.
86. *See Paladino*, 134 F.3d at 1062; *Shankle*, 163 F.3d at 1233-34.
87. *See Paladino*, 134 F.3d at 1062; *Shankle*, 163 F.3d at 1234 & n.3.
88. 6 P.3d 669 (Cal. 2000).
89. *Id.*
90. *See also* CAL. GOV'T CODE §§ 12900-12906 (2005).
91. *Armendariz*, 6 P.3d at 685.
92. *Id.* at 685-87.
deter the filing of statutory and constitutional claims in a manner that is on par with an outright denial of those rights. 93

The Armendariz court required the determination as to costs be made at the time of the motion to compel, as opposed to the judicial review stage. 94 By making the prohibitive costs determination at the time of the motion to compel, the court avoided the deterrence effect of forcing the employee to incur legal and other fees to obtain additional judicial review. 95 The court followed the Cole principle that the "arbitration agreement or . . . process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." 96 The court also followed the Cole principle: "[T]he above rule is fair, inasmuch as it places the cost of arbitration on the party that imposes it." 97

In the same manner as Cole, the Armendariz court did not purport to invalidate the arbitration agreement on the basis of costs alone. 98 In fact, the court explicitly stated in its holding: "The absence of specific provisions on arbitration costs would . . . not be grounds for denying the enforcement of an arbitration agreement." 99 The court required that the party that imposed the mandatory arbitration agreement be responsible for "all types of costs that are unique to arbitration." 100 The court specifically excluded the costs provision from its discussion of both unconscionability and severability. 101 Despite the controversial nature of the holding of Armendariz, and after the holding in Green-Tree, 102 California, New Mexico, and Oklahoma have codified provisions that are similar to the California Supreme Court's treatment of prohibitive costs in mandatory arbitration agreements in post-Green-Tree legislation. 103

It is also worth noting that in the related area of labor law, 104 cost allocation provisions have been interpreted in a manner that parallels Cole and Armendariz. 105 In Bond v. Twin Cities Carpenters Pension Fund, 106 the Eighth Circuit considered a retired union carpenter's claim that the cost allocation provision of

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93. Id. at 686.
94. Id. at 687 ("Because we conclude the imposition of substantial forum fees is contrary to public policy, and is therefore grounds for invalidating or 'revoking' an arbitration agreement and denying a petition to compel arbitration . . . we hold that the cost issues should be resolved not at the judicial review stage but when a court is petitioned to compel arbitration.").
95. Id.
96. Id. ("[W]e conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.").
97. Id. at 688.
98. Id. at 689-94.
99. Id.
100. Id.
101. Id. at 696-97. The Court identified the agreement's multiple unlawful provisions: an unlawful damages provision and an unconscionably unilateral arbitration clause, as well as the agreement's lack of mutuality, as being the primary grounds for unenforceability. Id.
103. See Drahozal, supra note 5, at 757-58.
104. See 2 COMMERCIAL ARBITRATION § 45:3 (2007).
105. See, e.g., Bond v. Twin Cities Carpenters Pension Fund, 307 F.3d 704 (8th Cir. 2002).
106. Id.
the mandatory arbitration agreement contained in the pension plan restricted access to a reasonable opportunity for a full and fair review of benefits determinations. This type of review is statutorily guaranteed by the Employee Retirement Income Security Program (ERISA). The Court’s opinion was based on a Department of Labor opinion letter, which states that when a pension plan requires participants to submit to arbitration, cost-splitting contravenes the reasonableness standard set forth in section 2560.503-1(b)(3) of the Code of Federal Regulations. Therefore, the court held that the cost-splitting provision requiring the participants to bear half of the costs of arbitration violated the reasonableness standard and was unenforceable.

A comparison of the costs of litigation and arbitration further illustrates the problem of double-layered deterrence discussed in Armendariz and Bond. The American Arbitration Association requires the following filing fees for the arbitration of disputes arising under individual employment contracts:

<table>
<thead>
<tr>
<th>Amount in Dispute</th>
<th>Initial Filing Fee</th>
<th>Case Service Fee</th>
<th>Total</th>
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<td>$4250</td>
<td>$1750</td>
<td>$6000</td>
</tr>
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</table>

The initial filing fee for individual employment arbitration under employer-imposed agreements is capped at $125; however, as the above table illustrates, significant costs are assessed in addition to the initial filing fee. Also, unlike in litigation, the parties to an arbitration agreement must also pay the arbitrator. Arbitrators’ typical fees can range from $3,000 to $14,000 and can be much higher when a dispute involves difficult determinations.

107. Id. at 705-06.
110. Id. See Department of Labor Opinion Letter No. 82-46A (1982).
111. Id. 29 C.F.R. § 2560.503-1(b)(3) (2007) states in pertinent part:

   The claims procedures for a plan will be deemed to be reasonable only if [t]he claims procedures do not contain any provision, and are not administered in a way, that unduly inhibits or hampers the initiation or processing of claims for benefits. For example, a provision or practice that requires payment of a fee or costs as a condition to making a claim or to appealing an adverse benefit determination would be considered to unduly inhibit the initiation and processing of claims for benefits.

112. Bond, 307 F.3d at 707.
115. Summers, supra note 8, at 696-97.
116. Id.
C. Severability

In addition to applying a per se rule, the Armendariz court endorsed the severability of unlawful provisions within arbitration agreements. 118 Severability, or the practice of severing "illegal" portions of contracts and enforcing the remainder, 119 is widely employed in the modern judicial treatment of contracts. 120 However, its use is not without tension as the concept runs afoul of the longstanding judicial policy of not interfering with the freedom to contract by rewriting the parties' terms. 121 Despite the courts' stated reluctance to sever unlawful provisions, the doctrine has been applied in the areas of collective bargaining and employment contract interpretation. 122 Additionally, in Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 123 the U.S. Supreme Court endorsed severability of the arbitration agreement itself when it held that a claim of fraud in the inducement of the entire contract would not allow the claimant to bypass an otherwise valid arbitration agreement contained therein. 124

In cases involving the unconscionability or illegality of provisions contained in arbitration agreements, however, the issue of severability has been all but ignored in favor of rendering the entire agreement unenforceable. 125 Also, the few cases that do discuss severability diverge in application. 126 In Armendariz, for example, the court endorsed the application of severability, but refused to sever the unenforceable provisions of the agreement due to "multiple defects" [that] indicate[d] "a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." 127 On the other hand, in Morrison, the Sixth Circuit allowed for the severance of multiple provisions requiring cost-splitting, limiting back pay, front pay, and punitive damages, and allowing attorney's fees only at the discretion of the arbitrator. 128 In the article Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate, Professor Clyde W. Summers identifies a problem inherent in Morrison's application of severability that has significant implications for costs allocation:

118. Armendariz, 6 P.3d at 697 (Cal. 2000). Cole implicitly severed the prohibitive costs provision by allowing the dispute to proceed to arbitration. Cole, 105 F.3d at 1483-84.
119. Also known as "blue penciling." 17A AM. JUR. 2D Contracts § 318 (2007).
120. 17A AM JUR. 2D Contracts § 318, n.3 (2007).
121. Summers, supra note 8, at 729.
123. 388 U.S. 395 (1967).
124. Id. at 406-07.
125. Summers, supra note 8, at 729 ("In most cases, severability is never discussed and the whole arbitration agreement is declared unenforceable.").
126. Id.

Where several objectionable provisions must be severed, the court may say that this goes beyond mere excision to rewriting the contract, which is not the proper role of this Court or that, a court may, in its discretion, refuse to enforce the contract as a whole if it is permeated by the unconscionability. But McCaskill held that denial of attorney's fees, the single right of a winning plaintiff, was sufficient to make the whole arbitration agreement unenforceable. 127

Id. (quoting McCaskill v. SCI Mgmt. Corp., 298 F.3d 677, 680 (7th Cir.)) (Internal quotation marks omitted).
[Severance], of course, did not deprive the employer of its ill-gotten gain—the in terrorem effect of these provisions on those deterred from pursuing their claims—a rather surprising result when the court had explicit ly measured the enforceability of these provisions according to their deterrence effect on others similarly situated. 

The “double-layered” nature of costs deterrence is a formidable hurdle to overcome if severability is to have any impact in terms of redressing the cohesiveness of employment and consumer arbitration agreements. This concern is particularly relevant in light of the Eleventh Circuit’s argument in Perez v. Globe Airport Security Services, Inc., that widespread application of severance could in fact create an incentive for employers to include unconscionable or unenforceable provisions. Professor Summers’ solution to this poisoned limb is to cut down the tree by refusing to enforce that arbitration agreement as a whole. However, as the following will contend, this conclusion is not inevitable, as application of the Armendariz per se rule allows employment and consumer disputes to proceed to arbitration without saddling the non-imposing party with double-layered prohibitive costs.

III. COMMENT

The dilemma inherent in mandatory employment and consumer arbitration is epitomized by the lawyer’s statement to Jane in the above hypothetical: “You’ve got to keep in mind that whatever we try to prove, you’re going to be paying me to prove it.” The proposed methods for case-by-case judicial review of cost allocation are wholly inadequate at resolving this problem due to the risk imposed on the plaintiff that the reviewing court will not rule in her favor. At the time of the motion to compel, the court that decides to compel arbitration should apply (1) a per se rule that imposes costs on the party that presented the arbitration agreement as a condition of employment or purchase, and (2) the severability doctrine to the prohibitive costs provision. This method, as applied in Armendariz, is the only method of costs allocation that allows the parties to proceed to arbitration without the deterrence effect of double-layered costs.

129. Summers, supra note 8, at 730.
130. See supra note 8 and accompanying text.
131. Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280 (11th Cir. 2001), vacated, 294 F.3d 1275 (11th Cir. 2002).
132. Id.
133. Among other comparable solutions, Professor Summers offers the following:
   The cures for this sick body of law . . . are surprisingly simple and obvious, even if courts will not change their holdings and employers will not change their practices. The FAA could be amended to say explicitly what it was originally intended to say, that it did not apply to contracts of employment, legislatively overruling Circuit City Stores, Inc. v. Adams. More appropriately, the FAA might be amended to render unenforceable mandatory arbitration provisions in all adhesion contracts, so as to reach consumer, credit, and service contracts where mandatory arbitration similarly deprives plaintiffs of their statutory rights.
   Summers, supra note 8, at 731-32 (citation omitted).
134. See generally Summers, supra note 8.
135. See Summers, supra note 8, at 723-27; Malin, supra note 8, at n.66.
A. The Failure of the Case-By-Case Method to Address Double-Layered Deterrence

The case-by-case approach endorsed by Green Tree and its progeny, namely Bradford and Morrison, is far and away the most widely touted method. However, criticism has been directed at its focus on the individual plaintiff without consideration of the systemic effects of double-layered prohibitive costs. Circuit courts following Green Tree have confirmed this criticism, particularly by citing Green Tree when upholding “loser pays” provisions, which mandate that the non-prevailing party be saddled with the entire costs of arbitration. For example, in Musnick v. King Motor Co., the Eleventh Circuit upheld an arbitration agreement with the following provision:

The prevailing party shall be awarded costs including reasonable attorneys' fees, filing fee, subpoena service and witness fee, deposition and hearing transcription costs and similar expenses. . . . In cases where a party asserts any claim, position or defense, which is not substantially justified by the law or facts, the arbitrator shall award to the opposing party that party's reasonable attorney's fees incurred as a result of that party's defending any such claim, position or defense.

The court cited Green Tree for the conclusion that an arbitration agreement cannot be rendered unenforceable “merely because it may involve some ‘fee-shifting.’” There is no greater testament to the inadequacy of Green Tree's case-by-case approach than the failure of lower courts to consider the deterrence effect that an indeterminate case-by-case evaluation has on the employee or consumer seeking arbitration. Holdings such as the Eleventh Circuit's in Musnick frustrate the federal policy favoring arbitration by preventing valid arbitrable claims from ever being brought.142

136. Malin, supra note 8, at 791 (citing, e.g., Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002); Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002); Bradford v. Rockwell Semiconductor Sys., Inc., 238 F. 3d 549 (4th Cir. 2001); Boyd v. Haynerville, 144 F. Supp. 2d 1272 (M.D. Ala. 2001)). Drahozal, supra note 5, at 747-48 (“Virtually every circuit to have addressed the question since Green Tree has adopted a case-by-case approach to cost-based challenges.”).

137. Malin, supra note 8, at 794; Crawford, supra note 47, at 286; Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663-65 (6th Cir. 2003).

138. See Saafir, supra note 1, at 99-100 (citing Goodman v. ESPE Am., Inc., No. 00-CV-862, 2001 WL 64749, *3 (E.D. Pa. Jan. 19, 2001); Musnick v. King Motor Co., 325 F.3d 1255, 1258-60 (11th Cir. 2003) (requiring plaintiff to arbitrate Title VII claim pursuant to agreement that provided for award to costs and attorney fees to prevailing party); Manuel v. Honda R & D Ams., Inc., 175 F. Supp. 2d 987, 991-95 (S.D. Ohio 2001) (enforcing arbitration provision that imposed arbitrator's fees and other costs on the losing party); Thompson v. Irwin Home Equity Corp., 300 F.3d 88, 91-92 (1st Cir. 2002) (confirming arbitration award that required non-prevailing plaintiff to pay the entirety of defendant employer’s attorney fees)).

139. 325 F.3d 1255.

140. Id. at 1257.

141. Id. at 1259.

142. See supra section II.A for an overview of the federal policy favoring arbitration.
Prior to Musnick, the Eleventh Circuit in Perez v. Globe Airport Security Service, Inc. took an interesting approach to an employer’s mandatory cost-splitting provision, holding that such a limitation on the arbitrator’s remedial authority rendered the agreement unenforceable. While certainly more employee-friendly than the previously mentioned case-by-case incarnations, such an approach still perpetuates the double-layered dice roll inherent in submitting the employee’s challenge in the first place.

The “general deterrence” approach in Morrison, which focuses on the effect of prohibitive costs on the class of employees that are similarly situated to the plaintiff, has been offered as the medicine for the deterrence effect of the individualized case-by-case approach. However, as a general matter, identifying a class of litigants has proven significantly difficult. For example, in Haro v. NCR Corp., the Southern District of Ohio accepted the plaintiff’s definition of his “class” as “former NCR employees over the age of forty who have been released from employment since January 2004 due to economic reasons and who were given a bonus and/or merit increase in 2004.” Such a narrow definition of “class” renders the “general deterrence” approach indistinguishable from the individualized Green Tree approach, as it is highly unlikely that there will be a sufficient number of future plaintiffs within the scope of the class.

Beyond this difficulty in application, the conceptual underpinnings of the Morrison opinion accomplish very little in terms of mitigating the deterrence impact of double-layered costs. In the article Going Dutch: Should Employees Have to Split the Costs of Arbitration in Disputes Arising from Mandatory Employment Arbitration Agreements, experienced international arbitrator John F. Crawford explains the advantages of the Morrison method:

The case-by-case approach raised in Green Tree, and the subsequent standard set forth in Bradford, 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. In contrast, the Sixth Circuit in Morrison looks at the “whole picture” when attempting to determine the validity of a cost-splitting provision. The court’s standard does not attempt to decide the issue for an individual claimant in a particular case. 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

143. 253 F.3d 1280 (11th Cir. 2001), vacated, 294 F.3d 1275 (2002).
144. Id. at 1285-86.
145. See Malin, supra note 8, at 795 (“There are post-Green Tree precedents that continue to police arbitration agreements closely for procedural fairness. However, several of them have been qualified substantially, undermining their effectiveness.”).
146. Crawford, supra note 47, at 286.
147. See generally Bales, supra note 17, at 626 (“Unfortunately, while courts are searching for non-existent standards to guide their decisions, consumers and employees are being subjected to a laissez-faire labor market for arbitration.”).
149. Id. at *2.

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Beyond "Let Them Eat Cake"

The cost-splitting issue must be decided for the group, not just one individual in a given case.\(^{150}\)

Although Crawford is a bit generous in connecting \textit{Morrison} to precedent,\(^{151}\) the above sufficiently outlines the advantages of the general deterrence approach over the case-by-case analysis of \textit{Green Tree}. However, it certainly seems remiss for the Sixth Circuit to discuss how the "burden" on the employee is eased by calculating deterrence in terms of class-wide prohibitive costs as opposed to individual prohibitive costs, and in the same opinion provide no consideration of the glaring problem inherent in requiring the employee to prove any prohibitive costs in the first place.\(^{152}\) The value of looking at the "whole picture" of class-wide deterrence costs is limited due to the variety of plaintiffs likely to come before the courts, and the difficulty of defining a class.\(^{153}\) The \textit{Bradford} approach, which considers both class-wide and individual deterrence costs, is merely a synthesis of the individualized and general deterrence methods.\(^{154}\) As those two methods fail to address the deterrence effect of prohibitive costs, the integrated approach is necessarily subject to the same criticism.

The primary advantage asserted in favor of any case-by-case judicial review of costs allocation is that the "sophisticated wealthy employee," or a class thereof in terms of \textit{Morrison}, will not be able to avoid an otherwise valid contractual agreement by falsely claiming that the arbitration costs would prohibit bringing a claim.\(^{155}\) This "advantage" begs the question, "What do sophisticated employees have to fear from arbitration?" In the event of termination, the sophisticated, well-compensated employee, by definition, is much more likely to find adequate

\(^{150}\) Crawford, \textit{supra} note 47, at 286 (citation omitted).

\(^{151}\) \textit{Id.} at 284. Crawford's above statement concerning the relationship between \textit{Morrison} and \textit{Green Tree} is a reference to the following statement made earlier in the article, which is a patently erroneous interpretation:

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

In the article \textit{Let's Get A Vision: Drafting Effective Arbitration Agreements In Employment and Effecting Other Safeguards to Insure Equal Access to Justice}, Professor Laurie Leader makes the following statement regarding \textit{Morrison}, which is decidedly more accurate:

In \textit{Morrison v. Circuit City Stores, Inc.}, the Sixth Circuit considered the deterrent effect of arbitration costs and the plaintiff's financial instability in determining whether to pursue arbitration, where the risks of expending 'scarce resources' would reap 'uncertain benefit[s].' This approach involved an expansive reading of \textit{Green Tree}, since the \textit{Green Tree} holding only considered whether arbitration is cost-prohibitive to the individual plaintiff.


\(^{152}\) \textit{Morrison v. Circuit City Stores, Inc.}, 317 F.3d 646, 663-64 (6th Cir. 2003). \textit{See also supra} note 8.

\(^{153}\) \textit{See supra} notes 147-49 and accompanying text.


\(^{155}\) Crawford, \textit{supra} note 47, at 285.
employment quickly, as well as to comfortably endure an extended period of unemployment. Also, she is better able to afford experienced counsel that can effectively guide her through the arbitration process. Particularly when one takes into account, contrary to popular perception, that arbitration may in fact be preferable to litigation for the recently dismissed employee, it becomes less and less clear why such great measures are taken to protect employers from these sophisticated shirkers at the expense of deterring an indeterminably high number of employees from seeking resolution of their claims.

Application of the Armendariz per se rule could and perhaps inevitably will allow some sophisticated wealthy employees to avoid the costs of arbitration at the expense of their employer. Such a consequence would be unfair to the employer and should certainly be taken into consideration by the arbitrator when determining the substance of any award to the employee. However, a far greater unfairness results when the threat of arbitration costs is utilized by employers as a tool of intimidation, thereby chilling the remedies made available through the pursuit of statutory claims. To borrow an analogy from criminal jurisprudence, "[I]t is better that ten guilty persons escape, than that one innocent suffer." The same logic applies here: in general, it is be better to let ten sophisticated employees shirk arbitration costs than to let one employee with a valid statutory claim lose any chance at resolution. Particularly when one considers the cost advantage to employers in utilizing arbitration over litigation on the whole, it offends common sense to then conclude that employers should enjoy the further advantage of having valid claims deterred by prohibitive cost allocation provisions in adhesive agreements.

156. Consider this quote from Cole v. Burns Int'l Security Serv., 105 F.3d 1465 (D.C. Cir. 1997): [L]itigation has become a less-than-ideal method of resolving employees' public law claims. As spelled out in the Fact Finding Report, employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint. Moreover, the average profile of employee litigants . . . indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation system; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries. Id. at 1488 (quoting Commission on the Future of Worker-Mgmt. Relations, U.S. Dept of Labor & U.S. Department of Commerce, Report and Recommendations 30 (1994)). See also Leader & Burger, supra note 153, at 109 ("There is also evidence to suggest that employees more often prevail before an arbitrator than in court, although their awards may be less in arbitration.").


158. See supra note 17.

159. See 4 William Blackstone, Commentaries 358 (photo. reprint 1992) (1765); see also In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.").

160. Leader & Burger, supra note 151. at 111 ("The agreement also may state that the employer bears all costs. But even in this scenario, the employer comes out ahead, since the cost of arbitration is significantly less than the cost of protracted litigation." (citing Linda Goodspeed, Litigation's Rising Price Tag Boosts Arbitration's Appeal, Boston Bus. J., Oct. 4, 2002, available at <http://boston.bizjournals.com/boston/stories/2002/10/07/focus3.html> (last viewed July 7, 2004); Helen W. Gunnarson, Law Pulse, 90 ILL. B.J. 282, 285 (2002)).
B. The Armendariz Per Se Rule is Consistent with the Federal Policy Favoring Arbitration

In analyzing prohibitive costs allocation, pro-employee holdings often reference the extent to which the imposition of such costs frustrates the purpose of federal anti-discrimination statutes.\(^{161}\) However, prohibitive cost allocation frustrates the purpose behind the federal policy favoring arbitration as established in the FAA as well.\(^{162}\) Commentators have dismissed the per se rule as being merely reflective of a judicial bias against arbitration.\(^{163}\) If one's view of the federal policy favoring arbitration is that it merely relieves the overcrowded docket of our federal and state courts, then this dismissal is warranted: adhesive agreements that subject an employee to the imposition of prohibitive costs will certainly reduce the amount of both litigation and arbitration. However, if one views the federal policy favoring arbitration as the promotion of a valid tool for providing disputants with a flexible, efficient means of resolving even complex disputes, then it logically follows that unfair cost allocation provisions in mandatory adhesion contracts frustrate the federal policy favoring arbitration by preventing plaintiffs from seeking redress of their claims in this forum. The deterrence of valid claims serves only to undermine arbitration as a social institution, an outcome of far greater consequence than requiring an employer to pay the arbitration costs of a sophisticated wealthy employee that otherwise could have afforded such costs.

Setting aside the obvious point that there is no language in either \textit{Cole} or \textit{Armendariz} that evidences any actual bias toward arbitration,\(^{164}\) the case-by-case method unnecessarily undermines the federal policy.\(^{165}\) Employers understand the cost advantages of arbitration, and arbitration would likely remain a more economical choice for employers even if the employer was required to pay the employee's attorneys fees.\(^{166}\) In other words, even if all costs are per se assessed against the employer, which the \textit{Armendariz} rule does not require, employees' claims still get to arbitration, thus satisfying the federal policy favoring arbitration to a much greater extent than the other alternatives that deter the arbitration of claims altogether.

In addition to accusations of bias, criticisms of the \textit{Armendariz} per se rule have offered precedent in place of logic by citing \textit{Gilmer} as somehow precluding any application of the rule.\(^{167}\) This issue can be resolved by returning to Judge

\begin{itemize}
  \item \textit{Cole v. Burns Int'l. Sec. Servs.}, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (holding that defendant employer's mandatory arbitration agreement both restricted the employee's right to a judicial forum while imposing prohibitive cost that limited access to the arbitral forum: "Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws.").
  \item Crawford, \textit{supra} note 47, at 285; See generally Randall, \textit{supra} note 102, at 203-09.
  \item See \textit{supra} note 18.
  \item See \textit{supra} note 160.
  \item Crawford, \textit{supra} note 47, at 285:
  \begin{itemize}
    \item Per se denial of cost-splitting provisions is not in line with the Supreme Court's ruling in \textit{Gilmer}, where the Court upheld the judiciary's "liberal policy favoring arbitration." In \textit{Gilmer}, the Court "fully endorsed the use of arbitration for statutory claims," and therefore courts should always attempt to allow arbitration in the appropriate circumstances. The per se denial approach does not
  \end{itemize}
\end{itemize}
Edwards' reasoned analysis in *Cole*, in which he reconciles the per se rule with the holding in *Gilmer*:

In *Gilmer*, the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.168

While the above passage overflows with relevance to the post-*Green Tree* era of employment arbitration, perhaps the most significant statement therein is the clarification that in *Gilmer*, the Court was not considering an arbitration system in which costs could be assessed against the employee.169 The Court's citing of *Gilmer* as precedent for the *Green Tree* holding,170 with no mention of the widely accepted interpretation of *Gilmer* in *Cole*, represents an inadequate consideration of the deterrence effect of cost allocation.171 The *Armendariz* per se rule, on the other hand, promotes the arbitration of employment disputes by refusing to enforce prohibitive costs provisions, which is far more consistent with *Cole*.

### C. Potential Problems with the Armendariz Per Se Rule

#### 1. The "Repeat-Player" Problem

Although the *Armendariz* per se rule is the only method of costs allocation that effectively encompasses the public policy favoring arbitration, it is not without its problems.172 One negative aspect of this rule identified by the California Supreme Court in *Armendariz* is the effect of requiring the employer to pay arbitration costs on arbitrator neutrality.173 Crawford, however, broadens the scope of this problem beyond the per se rule in his discussion of the results and ramifications of the *Morrison* decision:

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173. *Id.*
There is evidence to suggest that employers are often repeat players in the arbitration system, while employees are usually only one-time players. 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. 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. This criticism does not undermine the Sixth Circuit's approach, 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. 174

While Crawford's assessment of the problem is accurate, his suggested remedy may not be so easy: even in a system that allows the employee to choose her own arbitrator, the arbitrator may still favor the repeat-player due to either previous contacts or the opportunity to establish a mutually beneficial relationship. 175 Fortunately, there are significant safeguards available that can ameliorate the impact of the repeat-player problem. Summers provides the following solution:

The most obvious cure . . . would be the use of a public agency—such as the FMCS [Federal Mediation and Conciliation Service]—or state mediation agencies to provide panels of arbitrators. Currently, the FMCS maintains a large panel of arbitrators for grievance arbitration from which it provides lists to the parties. It could have a second panel of those to be used in individual employment cases, with arbitrators being able to be on both panels. With these changes by the institutional providers, the implication of the Supreme Court—that arbitration is just another forum—could, without any statutory changes, become true in almost all respects. 176

Also, in addressing arbitral neutrality, the Armendariz opinion rejects the idea that the problem is directly implicated by the per se rule: "[I]t is not the fact that the employer may pay an arbitrator that is most likely to induce bias, but rather the fact that the employer is a "repeat player" in the arbitration system who is more likely to be a source of business for the arbitrator." 177 This notion that arbitral neutrality is at risk regardless of whether the employer is required to pay all or some of the costs is certainly worthy of consideration. However, the court in Armendariz then goes on to legitimate the problem by highlighting the institutions—such as state bar associations and the AAA—that are already in place to guard against corrupt arbitrators. 178 Regardless of whether or not the problem of arbitral neutrality is inherent in the per se rule or employment and consumer arbitration in general, even if all of these approaches to mitigating forum bias are tried and abandoned, common sense alone demands that an employee would rather face a

175. Summers, supra note 8, at 733.
176. Id.
178. Id.
potentially biased arbitrator than to have zero access to any forum due to prohibitive costs.

2. "The Armendariz Per Se Rule is Inherently Unfair to Employers"

By requiring the employee to pay all of the costs associated with litigation, the employer's only argument that such a scenario unfairly favors the employee is that the employee can now bring any and all claims in arbitration just as easily as she could in litigation. In fact, the Armendariz per se rule does nothing to disturb significant factors that tilt the system in the employer's favor: (1) Although a plaintiff is more likely to prevail in arbitration, the award is typically less than that of litigation, which will deter some claimants, and (2) attorneys rarely take claims to arbitration on a contingency fee basis. The absence of this oft utilized aspect of litigation is a serious deterrence to employees that are subject to a binding arbitration clause.

3. "Severability Does Nothing to Address the In Terrorem Effect of Prohibitive Cost Provisions"

The Eleventh Circuit's criticism in Perez v. Globe Airport Security Services, Inc. that widespread application of severability could in fact create an incentive for employers to include unconscionable or unenforceable provisions is not without merit. Should the unsophisticated employee (or consumer) actually read the arbitration agreement prior to consulting with an attorney, it is quite possible that a prohibitive cost provision could deter the employee from filing suit. However, in response to this criticism, it may be sufficient to consider which of the following scenarios is more likely: whether the unsophisticated employee would scrutinize the arbitration agreement herself and subsequently decide not to seek the assistance of counsel, or if similar to Jane in the above hypothetical, the employee would submit her employment agreement to an attorney without attempting to form her own opinion as to its contents. Regardless of which is more likely, the Armendariz per se rule at the very least ameliorates the deterrence effect for the plaintiff that chooses to pursue her claim despite being intimidated by the employer's inclusion of a prohibitive cost provision.

179. Leader & Burger, supra note 151, at 109 ("There is also evidence to suggest that employees more often prevail before an arbitrator than in court, although their awards may be less in arbitration.").
180. See Drahozal, supra note 5.
181. Id.
182. 253 F.3d 1280, 1287 (11th Cir. 2001), vacated, 294 F.3d 1275 (2002).
183. Id.; see also Summers, supra note 8, at 730; Cynthia L. Estlund, Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law, 155 U. PA. L. REV. 379 (2006).
185. See supra "Introduction."
Beyond "Let Them Eat Cake"

D. The Armendariz Per Se Rule As Compared to Other Alternatives For Addressing the Impact of Prohibitive Costs

1. Contingency Fees

Lawyers typically do not take arbitration cases on a contingency fee basis, and at least one commentator has suggested that doing so would effectively ameliorate the deterrence effect of prohibitive costs provisions. In the article Arbitration Costs and Contingency Fee Contracts, Christopher R. Drahozal sets forth both economical and ethical reasons for lawyers to take arbitration cases on a contingency fee basis. Such a shift in practices would likely provide a substantial increase in plaintiffs' access to arbitration. Likewise, the analysis herein contains nothing to disagree with this aspect of Drahozal's assessment, particularly due to the fact that claimants who are not as prone to saving money as Jane would be deterred from pursuing a claim in arbitration as a result of attorney's fees alone. However, to the extent that Drahozal's thesis could be understood as proposing the proliferation of contingency fees as a cure-all to the deterrence effect of judicial review of costs allocation, there are two significant problems with this interpretation: (1) Drahozal's appeal to the ethical and economical considerations of attorneys, as a normative matter, is commendable; however, prescriptively speaking, there is no guarantee that his ideas will catch on, and (2) the plaintiff's attorney being willing to foot the upfront costs of arbitration will not inspire the risk averse plaintiff that understands the possibility of being assessed such costs by the arbitrator. The Armendariz per se rule addresses the above problems by removing the possibility of prohibitive costs altogether without relying on the ethical or economical judgment of the individual practitioner.

2. State Law Contract Defenses

The FAA also preserves a plaintiff's right to state law contract defenses such as "unconscionability" and "breach of contract," and the argument could be made that such defenses preclude the need for the Armendariz per se rule. While these remedies stand as potential tools for the plaintiff that is subject to an adhesive arbitration agreement, as Richard A. Bales points out in his article The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration, the application of these defenses is considerably inconsistent. The Armendariz per se rule avoids the deterrence effect of inconsistent application that is inherent in the state law defenses. Furthermore, the proving of such a defense would require significant, resource-

186. See generally Drahozal, supra note 5.
188. See supra "Introduction".
190. Id. at 618 ("[T]here is still a significant degree of inconsistent authority, not only on the issue of what the proper source of authority for refusing to enforce one-sided arbitration agreements should be, but also on the issue of which arbitration agreements go "over the line" and are unenforceable.").
consuming judicial review for the low-income plaintiff, which again implicates a deterrence impact due to double-layered costs.\(^\text{191}\)

3. Bales' Argument for Amending the FAA

Bales' solution to the inconsistency of state law defenses is to amend the FAA to include a "Bill of Rights" that will govern due process in arbitration.\(^\text{192}\) The argument could be made that such an amendment would preclude the need for the \textit{Armendariz} per se rule. Bales references previously drafted suggestions for amending the FAA\(^\text{193}\) as well as adding his own long list of demands.\(^\text{194}\) While such an amendment to the FAA may in fact effectively address the issue of prohibitive costs in the long term and thereby preclude the need for the \textit{Armendariz} per se rule, the political process involves the consideration of numerous competing interests.\(^\text{195}\) Such considerations make the outcome of attempting to amend the FAA unpredictable. As such, the courts should not wait for Congress and instead simply take advantage of the judicial tools that are already available for managing the disparate impact of adhesive arbitration agreements—the \textit{Armendariz} per se rule.

4. Application of the Lawyer's Duty to the Public Justice System to the Drafting of Employment Arbitration Agreements

In his article \textit{Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree}, Professor Martin H. Malin makes an ethical appeal similar to that of Drahozal by arguing that the drafting of arbitration agreements is one of the rare situations in which the attorney's duty to the public justice system is a significant limitation on the duty to the client.\(^\text{196}\) Malin appeals to the Model Rules of Professional Conduct (MRPC) for the proposition that it is each lawyer's individual determination as to how to strike the balance between "responsibilities to clients, to the legal system and to the lawyer's own interest in

\(^{191}\) See generally Bales, supra note 17.

\(^{192}\) Bales, supra note 17, at 627-29. Summers calls for similar measures. Summers, supra note 8, at 732.


\(^{194}\) Bales, supra note 17, at 629.

I believe, for example, that the "bill of rights" should strictly limit cost-splitting, should reject filing fees payable from consumers and employees to companies and employers, should reject alterations to statutory statutes of limitation, should permit class actions in arbitration on the same basis as class actions currently are permitted in court, should limit the ability of the company or employer to unilaterally modify the arbitration agreement and the underlying arbitral procedures, and should guarantee the selection of neutral arbitrators.

\(^{195}\) Id. ("Notwithstanding my opinion on how each of these issues should be resolved, the statute should instead reflect the give-and-take of input from various constituencies as part of the political process.")(emphasis added).

\(^{196}\) Malin, supra note 8, at 804-18.
remaining an upright person while earning a satisfactory living.”

As commendable a point as Malin makes in this article, the conventional wisdom that absolute power corrupts absolutely demands more than the MRPC for policing arbitration agreements. The federal policy favoring arbitration has been flogged to the point of allowing employers to do generally whatever they want short of hand-picking their own panel of arbitrators. Therefore, as a prescriptive matter, it is unwise to rely upon lawyers to draft arbitration agreements that don’t favor their clients to the extent allowed by law. Until either the Supreme Court’s rejection of *Green Tree* or amendment of the FAA, Malin’s approach is essential to assuring arbitral fairness, but it does not carry the assurance of the *Armendariz* per se rule.

**IV. CONCLUSION**

One’s view of the per se rule could vary depending upon one’s accepted interpretation of the federal policy favoring arbitration: is this a policy that merely relieves the federal docket or is this a policy that acknowledges arbitration as a forum that is rife with potential benefits for both plaintiff and defendant? If one takes the latter view, then the idea that the federal policy favoring arbitration requires the enforcement or consideration of prohibitive costs provisions is untenable—the deterrence effect on innumerable employees and consumers will discourage arbitration on the whole. However, if courts and legislators embrace the *Armendariz* per se rule while allowing for the severance of prohibitive costs provisions, the plaintiff at least gets in the door to arbitration, and the debate as to Judge Edwards’ other four criteria for an enforceable arbitration agreement can continue. If not, countless other employees and consumers such as Jane will walk away from the opportunity to vindicate their statutory rights, deterred by the double-layered prohibitive costs of proving their right to be in the arbitral forum in the first place.

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197. *Id.* at 815 (citing Model Rules of Prof'l Conduct, pmbl. ¶ 8 (2002)).
198. *See, e.g.*, *Hooters of America, Inc. v. Phillips,* 173 F.3d 933 (4th Cir. 1999) (holding that an employer materially breached an agreement to arbitrate discrimination claims when it promulgated arbitration rules that required that all arbitrators be selected from list created by employer and placed no limits on whom employer could place on list).
199. *Malin,* *supra* note 8, at 800-01.
200. *For example, how arbitration agreements can better “(1) provide[] for neutral arbitrators, (2) provide[] for more than minimal discovery, (3) require[] a written award, and (4)[] provide for all of the types of relief that would otherwise be available in court. . . .” Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997).*