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Ann C. Hodges

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# Fallout from *14 Penn Plaza v. Pyett*: Fractured Arbitration Systems in the Unionized Workplace

Ann C. Hodges\*

The Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*<sup>1</sup> for the first time held that union-negotiated waivers of employee rights to litigate their legal claims<sup>2</sup> are enforceable.<sup>3</sup> As a result, employers and unions must decide whether to negotiate provisions that bind employees to arbitrate, rather than litigate, statutory claims. The choices made by employers and unions will affect the arbitration process, including legalism in arbitration. This article will analyze the potential for increased legalization of arbitration in the unionized workplace as a result of *Pyett*.<sup>4</sup>

First, the article will review the history of arbitration of statutory employment claims, including the *Pyett* decision. Second, the article will look at the history and causes of legalism in arbitration. Then the article will consider the probable responses of employers and unions to *Pyett*. While predictions are necessarily speculative, it is likely that some unionized employers will seek to require employees to arbitrate statutory claims, perhaps in higher percentages than in the nonunion workplace. While unions may, and perhaps should, resist, many future collective bargaining agreements (CBAs) may contain such provisions. The article then discusses the alternative dispute resolution approaches that might be negotiated. The article concludes that if statutory claims are incorporated in the collectively bargained grievance and arbitration procedure, that procedure will become more legalistic, perhaps even in cases where no legal claim is involved. If

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\* Professor of Law, University of Richmond. The author is grateful for valuable research assistance from Jemika Davenport, Paul Falabella, Mary Hallerman, and Joyce Yoon and for the comments and questions of the participants at the symposium. The article also benefited from the comments and questions of participants in the panels on *14 Penn Plaza v. Pyett* at the 2009 AALS Workshop on Work Law and the Southeastern Association of Law Schools 62d Annual Meeting in 2009.

1. 129 S. Ct. 1456 (2009).

2. In this article, I will use the terms statutory claims and legal claims interchangeably while recognizing that they are not equivalent. In the cases litigated to date regarding arbitration of employment law claims, most have involved federal and state statutory claims, primarily discrimination. However, a few cases have involved constitutional claims or state common law claims as well. See, e.g., *Schumacher v. Souderton Area Sch. Dist.*, No. CIV. A. 99-1515, 2000 WL 72047 (E.D. Pa. Jan. 21, 2000) (holding that employee claiming violation of constitutional rights to due process and equal protection was not required to arbitrate under the collective bargaining agreement); *Mercuro v. Superior Court*, 116 Cal. Rptr. 2d. 671, 673, 685 (Cal. Ct. App. 2002) (refusing to order arbitration of plaintiff's claims which included, inter alia, common law claim of wrongful discharge in violation of public policy). The *Pyett* rationale is not limited to statutory claims. See Alan Hyde, *Labor Arbitration of Discrimination Claims after 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiff May Sue Them*, OHIO ST. J. ON DISP. RESOL. (forthcoming 2010) (discussing the impact of *Pyett* on a variety of legal claims).

3. *Pyett*, 129 S. Ct. at 1474.

4. Legislation that would reverse *Pyett* is pending in the Senate. Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 402(b)(2) (referred to S. Comm. on the Judiciary, Apr. 29, 2009).

a separate arbitration procedure for statutory claims is negotiated, however, the new procedure may become the vehicle for legal claims, returning the contractual procedure to its traditional and favored role as an extension of the contract negotiation process.<sup>5</sup> There are many legal and practical hurdles to creating an effective separate procedure for statutory claims in the unionized workplace, however, leading to substantial uncertainty about the future of arbitration in the unionized workplace.

## I. THE HISTORY OF ARBITRATION OF STATUTORY CLAIMS

For many years, the courts regularly refused to enforce agreements to arbitrate statutory claims, but in the 1980s the Supreme Court, in a trilogy of cases, reversed its position.<sup>6</sup> In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court enforced an agreement to arbitrate a statutory employment law claim for the first time.<sup>7</sup> Following the Court's reversal of its position, the law regarding arbitration of statutory claims developed along two different lines in the union and nonunion workplaces. Nonunion employees could waive their right to a judicial forum for statutory claims, unless the statute at issue clearly precluded it.<sup>8</sup> Courts enforce such waivers, even if they are compelled as a condition of employment, unless the employee can defeat the arbitration requirement by showing that there was in fact no agreement, that the agreement to arbitrate is unenforceable (typically on grounds of unconscionability), or that the agreement to arbitrate effectively precludes statutory enforcement. Unionized employees, however, relied on *Alexander v. Gardner-Denver Co.*, which held in 1974 that despite unsuccessful arbitration of his unjust termination claim, an employee could proceed in court with his race discrimination claim based on the same facts, but alleging a violation of Title VII.<sup>9</sup> The Court in *Gardner-Denver* emphasized the distinction between

5. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 580, 581 (1960) (describing arbitration as an extension of the negotiation process which gives meaning and content to the agreement); Theodore St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977) (noting that the arbitrator functions as the parties' "designated 'reader' of the contract," a "joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement").

6. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (enforcing agreement to arbitrate claims under the Securities Act of 1933); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing agreement to arbitrate claims under § 10(b) of the Securities Exchange Act of 1934 and the Racketeer Influence and Corrupt Organizations Act (RICO)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing agreement to arbitrate claims based on antitrust law).

7. 500 U.S. 20, 26 (1991).

8. See *Gilmer*, 500 U.S. at 26 (holding nonunion employee could waive his right to a judicial forum for his Age Discrimination in Employment Act claim as nothing in the statute precluded such a waiver); *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001) (reading Federal Arbitration Act to exclude arbitration agreements of transportation employees only, allowing enforcement under the Act for all other employee agreements to arbitrate). Any agreement to arbitrate does not bind the administrative agencies enforcing the statute, however, so that a claim may still be filed with the appropriate administrative agency, which may bring suit. See *EEOC v. Waffle House*, 534 U.S. 279, 294 (2002).

9. 415 U.S. 36 (1974). In two subsequent cases the Court reached the same conclusion with respect to claims under the Fair Labor Standards Act, *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981), and under 42 U.S.C. § 1983, *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (involving a discharge that allegedly violated the employee's constitutional rights).

contractual and statutory claims and noted that the union could not waive the individual's statutory rights under Title VII.<sup>10</sup> The Court also rejected the notion that the employee was bound by an election of remedies.<sup>11</sup> In addition, the Court rebuffed the employer's argument that the courts should defer to prior arbitration awards in considering statutory claims, stating that such awards were admissible evidence and courts should decide the appropriate weight to be given to the award based on the circumstances of the particular case.<sup>12</sup>

In 1991, the *Gilmer* Court rejected the nonunion plaintiff's reliance on *Gardner-Denver*, noting that in the context of collective bargaining agreements, there was a "tension between collective representation and individual statutory rights, a concern not applicable to the present case."<sup>13</sup> Post-*Gilmer*, courts regularly enforced agreements to arbitrate statutory claims in the nonunion workplace, but only the U.S. Court of Appeals for the Fourth Circuit required unionized employees to arbitrate statutory claims over their objections.<sup>14</sup> Based on the circuit split, the issue returned to the Supreme Court in *Wright v. Universal Maritime Service Corp.*, where the Court held that *if* a union could waive an employee's statutory right to a judicial forum, the "waiver must be clear and unmistakable."<sup>15</sup> Following *Wright*, the split between the Fourth Circuit and all others to address the issue remained,<sup>16</sup> leading to the grant of certiorari in *14 Penn Plaza LLC v. Pyett*.<sup>17</sup>

The lawsuit in *Pyett*, which arose out of the Second Circuit, was filed by employees who were transferred to less desirable jobs and filed grievances with their union alleging age discrimination, as well as violations of the seniority and overtime provisions of the collective bargaining agreement.<sup>18</sup> After the union withdrew the discrimination claims from arbitration, the employees sued and the employer moved to compel arbitration.<sup>19</sup> The contractual language in *Pyett* made the grievance and arbitration procedure the "sole and exclusive" remedy for discrimination, including claims under the ADEA and state and local discrimination law.<sup>20</sup> Both the district court and Second Circuit denied the motion to compel on the basis of *Gardner-Denver*, which they read as holding that clauses in a collective bargaining agreement, "which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable."<sup>21</sup>

The Supreme Court's 5-4 decision followed the recent trend of expanding enforcement of arbitration agreements of all types. The majority, in an opinion written by Justice Thomas, found no barrier to union waiver of employees' rights to a

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10. *Gardner-Denver*, 415 U.S. at 51-52.

11. *Id.* at 49-50.

12. *Id.* at 59-60.

13. *Gilmer*, 500 U.S. at 35.

14. *See, e.g.*, *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996); *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001) (per curiam).

15. 525 U.S. 70, 79-80 (1998).

16. *Compare Cone Mills Corp.*, 248 F.3d at 308 (finding waiver), *with Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 630 (6th Cir. 1999) (finding no waiver permissible and rejecting Fourth Circuit's analysis as "unsound").

17. *14 Penn Plaza LLC v. Pyett*, 552 U.S. 1178 (2008).

18. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1462 (2009).

19. *Id.*

20. *Id.* at 1461. For the precise language of the contract, see *infra* note 99.

21. *Pyett v. Pa. Bldg. Co.*, 498 F.3d at 93-94 (2d Cir. 2007).

judicial forum for statutory claims, basing this conclusion on both the union's broad authority to negotiate, limited only by the duty of fair representation, and the absence of any restriction on such authority in the ADEA.<sup>22</sup> The Court did not read *Gardner-Denver* as precluding a waiver, but rather as holding that there was no waiver (or preclusion) in that case because the collective bargaining agreement did not cover statutory claims.<sup>23</sup> The opinion suggests that any concern for conflict of interests between the individual employee and the collective, the grounds on which *Gilmer* distinguished *Gardner-Denver*, is a matter for Congress and, additionally, "proves too much" for the emphasis on collective interests is the premise of the National Labor Relations Act (NLRA).<sup>24</sup> Further, the Court indicated that the duty of fair representation protects individuals whose interests may be at odds with the majority.<sup>25</sup>

As for the waiver itself, because the employees had "acknowledged" in the courts below that the contractual provision was "sufficiently explicit" to preclude the lawsuit, the Court refused to consider the argument that the waiver was not clear and unmistakable.<sup>26</sup> Last but certainly not least, the Court declined to address the question of whether a process that allows the union to block arbitration of employee statutory claims would constitute an impermissible substantive waiver of those claims.<sup>27</sup>

The dissent's criticism of the majority was stinging. Justice Stevens stated that the majority had simply "reexamin[ed] the statutory questions resolved in *Gardner-Denver* through the lens of the policy favoring arbitration,"<sup>28</sup> further noting that "the majority's preference for arbitration again leads it to disregard our precedent."<sup>29</sup> Justice Souter's dissent also criticized the majority for abandoning precedent.<sup>30</sup> Justice Souter variously characterizes the decision as "misread[ing]" *Gardner-Denver*, reaching conclusions "impossible to square" with *Gardner-Denver*, ignoring *Gardner-Denver*, and "diminish[ing] [its] reasoning, and . . . holding."<sup>31</sup>

The decision in *Pyett* is open to criticism on many grounds, not the least of which is its disregard of *stare decisis*. The Court shows a remarkable lack of understanding of the realities of labor relations and labor law, despite briefing by experienced labor attorneys and amicus briefs filed by the National Academy of Arbitrators, the AFL-CIO, Change to Win, and the Service Employees International Union.<sup>32</sup> This lack of understanding is most fundamentally illustrated by

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22. *Pyett*, 129 S. Ct. at 1465.

23. *See id.* at 1468.

24. *Id.* at 1472.

25. *See id.* at 1473 (citing *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

26. *Id.* at 1473.

27. *Id.* at 1474.

28. *Id.* at 1475 (Stevens, J. dissenting).

29. *Id.* at 1475.

30. *Id.* at 1476-77 (Souter, J. dissenting).

31. *Id.* at 1479, 1480.

32. While the employer was represented by experienced labor attorneys and other employer organizations also filed briefs, their interests in limiting employees to the arbitral forum did not provide an incentive to educate the court on the aspects of labor relations unfavorable to that argument.

the failure to distinguish labor arbitration from arbitration of statutory claims.<sup>33</sup> Additionally, the Court blithely suggests that such a waiver is a mandatory subject of bargaining, without recognition of many cases holding that waivers of rights are not mandatory subjects.<sup>34</sup> Further, the opinion assumes that the duty of fair representation will protect employees in the event of conflicts of interest between the individual and the collective, an issue that has pervaded the opinions of courts and commentators rejecting the *Pyett* view.<sup>35</sup> The Court's decision relies on the lack of any statutory language precluding collectively bargained waivers of judicial forums, ignoring the fact that *Gardner-Denver* was widely read as precluding such waivers. What would prompt Congress to include such a provision in a statute when there was no reason to believe that a waiver was permissible under existing law? While much more could be said about each of these criticisms of the decision, the focus of this symposium is creeping legalism in arbitration. What impact will *Pyett* and the fallout from *Pyett* have on the arbitration process? Most relevant to that discussion are the criticisms regarding the Court's failure to appreciate and take into account the realities of labor relations and labor arbitration. Those will be explored further after a discussion of creeping legalism.

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33. For a thorough discussion of the differences between labor arbitration and employment arbitration and the *Pyett* Court's failure to appreciate the distinction, see Martin H. Malin, *The Evolving Schizophrenic Nature of Labor Arbitration*, 2010 J. DISP. RESOL. 58 (2010).

34. *Pyett*, 129 S. Ct. at 1464; see Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 526-39 (2001) (and cases cited therein). Cf. *Utility Vault Co.*, 345 N.L.R.B. 79 (2005) (where the NLRB found unilateral imposition of a dispute resolution program for statutory claims violated the statute). For further discussion of this issue see *infra* note 128.

35. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (noting the "potential disparity in interests between a union and an employee" and "the "tension between collective representation and individual statutory rights"); *McDonald v. City of West Branch*, 466 U.S. 284, 291-92 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.* 450 U.S. 728, 742 (1981) (discussing unions' difficulty in balancing individual and collective interests in the FLSA context); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974) ("In arbitration . . . the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."); *NLRB v. Magnavox Co.*, 415 U.S. 322, 327 (1974) (Stewart, J. concurring in part, dissenting in part) (discussing unions' conflicting interests in the context of employees' Section 7 NLRA rights); *Plumley v. S. Container*, 303 F.3d 364, 374 (1st Cir. 2002) ("If unions were so empowered, the rights of a minority (each individual union member) would be subject to the will of the majority"); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362-64 (7th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 524-26 (11th Cir. 1997); *Varner v. Nat'l Super Mkts. Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996); *Randolph v. Cooper Indus.*, 879 F. Supp. 518, 521 (W.D. Pa. 1994) (noting that "[n]othing in *Gilmer* suggests that the Court abandoned its concern about the inherent conflicts between group goals and individual rights that exist in the give-and-take of the collective bargaining process"); Alfred W. Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination in Employment*, 24 ARB. J. 88, 95-99 (1969) (discussing the subordination of civil rights interests in arbitration under collective bargaining agreements); Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMP. RTS. & EMP. POL'Y J. 123, 144-46 (1998) (discussing the inadequacies of the duty of fair representation in protecting employees in this context); Martin H. Malin, *Arbitrating Statutory Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 84 (1996); Janet McEneaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution*, 15 HOFSTRA LAB. & EMP. L.J. 137, 158-162 (1997); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to Judicial Forum*, 49 EMORY L.J. 135, 187-191 (2000); See generally, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Bhd. of Locomotive Fireman & Enginemen*, 323 U.S. 210 (1944).

## II. CREEPING LEGALISM IN ARBITRATION

Labor arbitration has been hailed as a triumph of American labor relations. Disputes between employers and unions are resolved through the grievance and arbitration procedure embodied in almost all labor agreements, rather than through litigation, or more importantly, through the exercise of economic power. The *Steelworkers Trilogy*, an exaltation of labor arbitration by the Supreme Court, described the process thus:

[A]rbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.<sup>36</sup>

Indeed, the link between arbitration and industrial strife is so strong that if a collective bargaining agreement contains an arbitration provision, the courts will presume that the union has agreed not to strike during the term of the contract even if there is no such provision in the agreement.<sup>37</sup> To preserve the right to strike, which is a statutorily guaranteed right,<sup>38</sup> the union must obtain an express contractual provision to that effect.<sup>39</sup>

Critics have been decrying creeping legalism in labor arbitration almost since its inception. While the early days of labor arbitration in the United States encompassed wide variation in the process, the American system of labor arbitration, encouraged by the War Labor Board during World War II, largely adopted a judicial form.<sup>40</sup> Given the widespread choice of the judicial model over the mediatorial model of arbitration, perhaps the creeping legalism should not be a surprise. The source, and to some extent the nature of legalism has changed, however, since the early criticism began. Initially, the concern was primarily about the adoption of more legalistic procedures—transcripts, evidentiary objections, formal examination and cross-examination of witnesses, and post-hearing briefs.<sup>41</sup> According to the critics, these accoutrements of court formalized an essentially informal procedure, adding complexity and lengthening the proceedings, thereby

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36. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

37. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105-06 (1962).

38. 29 U.S.C. § 163 (2006).

39. E.H. Schopler, *Collective Bargaining Agreement as Restricting Right to Strike or Picket*, 2 A.L.R.2d 1278 (“As a general proposition, the right to strike and picket, though otherwise recognized, cannot be exercised during the life of a valid collective labor agreement which fails by its terms to preserve such rights.”).

40. Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 FLA. L. REV. 557, 575-76 (1983). For further discussion of the history of labor arbitration in the United States, see Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 FLA. L. REV. 373 (1983).

41. See, e.g., John F. Sembower, *Halting the Trend Toward Technicalities in Arbitration*, 10 PROC. NAT’L ACAD. ARB. 98, 100-105 (1957); Clare B. McDermott, *The Presidential Address—An Exercise in Dialectic: Should Arbitration Behave as Does Litigation*, 33 PROC. NAT’L ACAD. ARB. 1, 10-18 (1981); George Nicolau, *Can The Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense?*, 38 PROC. NAT’L ACAD. ARB. 69, 70, 72, 81, 82, 83 (1986).

threatening to eliminate some of the benefits of arbitration.<sup>42</sup> Additionally, these procedures made arbitration less accessible to the average working person and made it more difficult for the parties to arbitrate without expensive legal counsel.<sup>43</sup>

In recent years, another source of creeping legalism has emerged. Both Congress and state legislatures have enacted increasing numbers of statutory provisions relating to the workplace.<sup>44</sup> These statutory requirements, unlike earlier laws that typically provided minimum benefits that could be expanded in collective bargaining, layered additional legal requirements onto collectively bargained terms and conditions of employment. These new laws often intertwined with contractual provisions, leaving the possibility, if not the likelihood, of legal arguments in traditional contractual arbitration. For example, a claim that an employee was discharged or disciplined without just cause might also allege that the action violated discrimination laws<sup>45</sup> or the anti-retaliation provisions of a law such as the Occupational Safety and Health Act (OSHA)<sup>46</sup> or the Employee Retirement Income Security Act (ERISA).<sup>47</sup> Similarly, a denial of promotion might allege violation of both contractual seniority requirements and discrimination law.<sup>48</sup> A discharge for absenteeism might also claim violation of the Family and Medical Leave Act (FMLA) because that law privileged some of the absences.<sup>49</sup> The addition of these legal issues has contributed to the escalation in the use of attorneys and the adoption of judicial-like procedures in arbitration.

The growing legislation relating to employment led to a debate among arbitrators about the role of external law in arbitration. Three primary positions emerged, identified with leading proponents, all members of the National Academy of Arbitrators. Bernard Meltzer's view was that the role of the arbitrator, and indeed the arbitrator's special expertise, was to interpret the contract not the law.<sup>50</sup> If the contract and the law conflicted, the arbitrator should interpret the contract as written and leave the parties to seek judicial resolution of the legal issue.<sup>51</sup> Robert Howlett, on the other hand, suggested that contracts must be read in light of the

42. G. Allen Dash, *Discussion*, 10 PROC. NAT'L ACAD. ARB. 106, 108-111 (1957); Sembower, *supra* note 41, at 98-99; McDermott, *supra* note 41, at 10-18; Arnold M. Zack, *Suggested New Approaches to Grievance Arbitration*, 30 PROC. NAT'L ACAD. ARB. 105, 108 (1977).

43. Leonard Woodcock, *Problem Areas in Arbitration*, 12 PROC. NAT'L ACAD. ARB. 90, 92, 95-96 (1959); Dash, *supra* note 42, at 109.

44. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 145 (2d ed. 2006); THE DUNLOP COMMISSION ON THE FUTURE OF LABOR-MANAGEMENT RELATIONS, FACT FINDING REPORT 125-26 (U.S. Dept. of Labor & U.S. Dept. of Commerce 1994), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key_workplace).

45. See Winn Newman, *Post-Gardner-Denver Developments in the Arbitration of Discrimination Claims*, 28 PROC. NAT'L ACAD. ARB. 36, 52 (1975) (noting the large number of discharge, discipline and layoff grievances involving claims of discrimination and quoting the president of the American Arbitration Association to that effect).

46. 29 U.S.C. § 660(c)(1) (2006) (prohibiting discrimination against employees for exercising their rights under OSHA).

47. 29 U.S.C. § 1140 (2006) (prohibiting discrimination for exercising rights under ERISA or under any employee benefit plan, as well as discrimination to prevent attainment of plan benefits).

48. Newman, *supra* note 45, at 52.

49. Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1, 25-26 (2008).

50. Bernard Meltzer, *Ruminations about Ideology, Law, and Labor Arbitration*, 20 PROC. NAT'L ACAD. ARB. 1, 16 (1967).

51. *Id.* at 16-17.



law since an illegal contract has always been unenforceable, and he read the contract as implicitly incorporating existing law.<sup>52</sup> Thus, the arbitrator should consider the law as well as the contract where the law is implicated by the contract provisions at issue.<sup>53</sup> Richard Mittenthal took the middle ground.<sup>54</sup> To Mittenthal, the real issue arose with a conflict between the law and the agreement.<sup>55</sup> He argued that an arbitrator should not order an employer to violate the law but suggested that such a decision was in fact a construction of the contract, not the law.<sup>56</sup> An arbitrator's award could, however, permit unlawful conduct if permitted by the contract.<sup>57</sup> Michael Sovern argued for a slightly different intermediate approach.<sup>58</sup> Sovern suggested that an arbitrator could follow the law instead of the contract in circumstances where the arbitrator is qualified to interpret the law, the legal question is implicated in the contractual dispute, the law immunizes or requires conduct that violates the contract, and the courts do not have primary jurisdiction to decide the dispute.<sup>59</sup>

In many cases where the law is implicated by the contract, however, the extreme situation that led to the Meltzer/Howlett debate is not present. Where the parties expressly authorize the arbitrator to consider the law, either in the contract or the arbitration submission, virtually all agree that the arbitrator should follow the parties' direction.<sup>60</sup>

At the time of the initial Meltzer/Howlett debate, many of the current laws that may affect the subjects covered by collective bargaining agreements had yet to be enacted. While Title VII of the Civil Rights Act<sup>61</sup> and the ADEA<sup>62</sup> had recently taken effect, OSHA,<sup>63</sup> ERISA,<sup>64</sup> FMLA,<sup>65</sup> the Americans with Disabilities Act (ADA),<sup>66</sup> the Health Insurance Portability and Accountability Act (HIPAA),<sup>67</sup>

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52. Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts*, 20 PROC. NAT'L ACAD. ARB. 67, 83 (1967).

53. *Id.* at 83-88.

54. Richard Mittenthal, *The Role of Law in Arbitration*, 21 PROC. NAT'L ACAD. ARB. 42 (1968).

55. *Id.* at 46-47.

56. *Id.* at 48-49.

57. *Id.* at 50.

58. Michael Sovern, *When Should Arbitrators Follow Federal Law?*, 23 PROC. NAT'L ACAD. ARB. 29 (1970).

59. *Id.* at 38.

60. *Id.* at 30.

61. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 (codified as amended in 42 U.S.C. §§ 2000e-2000e-17 (2006)).

62. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 (codified as amended in 29 U.S.C. §§ 621-634 (2006)).

63. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596 (codified as amended in 29 U.S.C. §§ 651-678 (2006)).

64. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (codified as amended in various sections of 29 U.S.C. (2006)).

65. Family Medical Leave Act of 1993, Pub. L. No. 103-3 (codified as amended in 5 U.S.C. §§ 6381-6387 (2006), 29 U.S.C. §§ 2601-2154 (2006)).

66. Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (codified as amended in 42 U.S.C. §§ 12101-12213 (2006)).

67. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (codified as amended in scattered sections of 18, 26, 29, & 42 U.S.C.(2006)).

and most recently, the Genetic Information Nondiscrimination Act (GINA),<sup>68</sup> not to mention a multitude of state laws, have since magnified the intersections of law and contract.<sup>69</sup> In 1980, a distinguished group of arbitrators, judges, and attorneys studied the decisional process in arbitration and addressed the issues of external law, particularly in light of the decision in *Gardner-Denver*, which had reignited the debate.<sup>70</sup> This group's report stated:

The arbitrator may have no choice [about dealing with external law] if the agreement specifically includes references to relevant statutes. But barring such provisions, our view is that arbitrators should limit themselves to the task specified by the arbitration clause—the interpretation and application of the agreement. This conforms to the parties' intent. It also reaffirms the essential holding of the *Trilogy* which emphasized the arbitrator's expertise in industrial relations and the law of the shop. It also recognizes that many arbitrators are not lawyers and have no special competence in interpreting federal statutes and court decisions.

But even though most arbitrators try to stay aloof from external law, the decisional process has been substantially affected by such cases as *Gardner-Denver* . . . .<sup>71</sup>

The study panel went on to recommend that arbitrators and parties try to insure finality of arbitration by keeping in mind the guidance from the courts in cases such as *Gardner-Denver*.<sup>72</sup> The Court there suggested that a court in subsequent litigation could give great weight to an arbitral decision where the statutory issue was essentially coextensive with the contractual one, the arbitration was procedurally fair with an adequate record relating to the statutory issue, and the arbitrator was competent to decide it.<sup>73</sup> According to the expert panel, if the parties and the arbitrator in cases involving overlap of statutory and contractual claims followed this guidance, the decision of the arbitrator would be more likely to be final, but they acknowledged that formality in arbitration would increase as a result.<sup>74</sup>

Professor Malin recently argued that in light of subsequent developments, the debate about external law in arbitration has been effectively resolved.<sup>75</sup> Malin offered three reasons that courts should enforce arbitration awards based on the law alone. First, at the time the article was written, a minority of courts were

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68. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233 (codified as amended in 26 U.S.C. § 9834 and 42 U.S.C. §§ 300qq-53, 1320d-9, 2000ff-2000ff-11 (2006)) (prohibiting discrimination on the basis of genetic information with respect to health insurance and employment).

69. Other statutes that may overlap with collective bargaining agreements include the Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379 (codified as amended in 29 U.S.C. §§ 2101-2109 (2006)), and the Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347 (codified as amended in 29 U.S.C. §§ 2001-2009 (2006)).

70. Alex Elson et al., *Decisional Thinking*, 32 PROC. NAT'L ACAD. ARB. 62, 68 (1980).

71. *Id.* (footnote omitted).

72. *Id.* at 69.

73. *Alexander v. Gardner-Denver*, 415 U.S. 36, 60 n.21 (1974).

74. Elson, *supra* note 70, at 69.

75. Malin, *supra* note 49, at 26.

requiring arbitration of legal claims under collective bargaining agreements.<sup>76</sup> Second, courts are increasingly giving great weight to the awards of labor arbitrators in subsequent litigation based on related legal claims.<sup>77</sup> And third, the FMLA must be considered by labor arbitrators deciding absenteeism cases, which often turn on whether absences are privileged by the statute.<sup>78</sup> Accordingly, arbitrators should consider legal issues and courts should enforce awards based solely on the law, contrary to the statement in the *Steelworkers Trilogy* that an award based on the law alone, rather than the contract, was not enforceable as it did not draw its essence from the agreement.<sup>79</sup>

The decision in *Pyett* has added weight to Professor Malin's first point; agreements to arbitrate legal claims are now clearly enforceable. What does this mean for creeping legalism in arbitration? Perhaps legalism will no longer be *creeping* but instead *leaping* into arbitration. As the previously discussed authorities and many others<sup>80</sup> have pointed out, the growing number of legal claims that overlap with contractual claims has forced arbitrators to decide how to treat the law. To the extent that the law is considered at all, it increases legalism, both substantive and procedural. The parties to an arbitration with legal implications will be more inclined to use lawyers to arbitrate. Lawyers are more comfortable with the trappings of litigation, and their involvement alone is likely to increase the use of legal procedures, such as evidentiary objections. Lawyers will also make legal arguments drawn from other settings, that the exclusionary rule should prohibit use of evidence after improper searches, for example, or that the accused employee is entitled to confront his or her accuser.<sup>81</sup> The increase in legal arguments may encourage the parties to rely more often on arbitrators with legal expertise.

Further, as noted above, *Gardner-Denver* left open the possibility of a subsequent legal action based on the same or related facts. Accordingly, the incentives to use a lawyer, require a transcript, limit evidence with objections, and other trappings of litigation were enhanced even prior to *Pyett*, at least for the employer. At minimum, the employer would want to prevail with an arbitral opinion that would enable it to obtain summary judgment based on the decision in any legal claim filed.<sup>82</sup> It is clear from court decisions, however, that in some cases, unions failed to assert legal claims in arbitration despite the fact that the employees made such claims.<sup>83</sup> It is not clear whether unions were attempting to preserve such claims for later litigation or whether there is some other explanation. Where there is clearly no waiver, as was commonly the case prior to *Pyett*, there is an incentive for the union to keep those cases where individual legal claims predominate out of

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76. *Id.* at 14.

77. *Id.* at 14-15.

78. *Id.* at 15, 25-26.

79. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

80. *See, e.g.*, Newman, *supra* note 45, at 37, 45-52; Harry T. Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265, 267-68 (1976).

81. *See* Elson et al., *supra* note 70, at 64-65 (1980).

82. *See infra* notes 195, 200-223 and accompanying text.

83. *See, e.g.*, *Moore v. Duke Power*, 971 F. Supp. 978, 984-85 (W.D.N.C. 1997) (finding union's failure or refusal to raise disability discrimination claim in arbitration did not permit plaintiff to sue on the claim).

arbitration to preserve the employee's right to litigate.<sup>84</sup> If the employee has consulted an attorney, the attorney may well advise the employee to litigate rather than arbitrate. Legal remedies will typically be greater and a jury trial available.

If the case does not involve an important contractual issue, an employee who hires a private attorney to litigate a legal claim preserves union funds for arbitration of issues deemed more central to the union's representational function. Additionally, it offers the employee the opportunity to control the arguments and focus on legal rather than contractual claims, as opposed to arbitration, which is controlled by the union with contractual issues generally paramount. In *Wright v. Universal Maritime Serv. Corp.*,<sup>85</sup> for example, the union recommended to the employee that he file a legal claim in his Americans with Disabilities Act case. Thus, in some ways, the *Gardner-Denver* rule may have reduced the number of legal claims in arbitration, thereby slowing the trend toward legalization. Now that *Pyett* has changed the landscape, what are the implications for the arbitration process?

### III. THE IMPACT OF *PYETT*

*Pyett's* effect on the arbitration process will depend in large part on actions taken by employers, unions, and employees in response to the decision.<sup>86</sup> The task of predicting those reactions, however, is significantly complicated by the questions left open in the decision and the uncertainties resulting from it. The key factor in determining how many legal claims arise in arbitration may be one that *Pyett* left unresolved: What happens if the union controls the decision of whether to arbitrate and declines to do so? Justice Souter suggested that:

[o]n one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, . . . which is usually the case.<sup>87</sup>

Unquestionably, the failure to decide this issue will lead to continued litigation. If the ultimate result, or the widespread response of the lower courts faced with the issue, is that employees can proceed in court when the union declines to arbitrate,<sup>88</sup> then the impact on legalism in arbitration will be limited. Unions and

84. See *infra* note 196 and accompanying text.

85. 525 U.S. 70, 74 (1998); see also *Safir v. Cone Mills*, 248 F.3d 306, 307-08 (4th Cir. 2001) (finding a waiver, although the union urged the employee to pursue legal remedies and did not file a grievance on her claim of violation of a prior settlement reached in the grievance process).

86. Although *Pyett* was a private sector case, public sector employers have asserted it in support of their waiver arguments also. See, e.g., *Catrino v. Ocean City*, No. WMN-09-505, 2009 U.S. Dist. Lexis 59783, at \*10-\*13 (D. Md. July 14, 2009) (finding no waiver because the collective bargaining agreement mandated arbitration of contractual discrimination claims only, and not those based on discrimination statutes), *vacated*, 2009 U.S. Dist. Lexis 95599 (D. Md. Oct. 14, 2009) (on other grounds).

87. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1481 (2009) (Souter, J., dissenting) (internal citations omitted).

88. See, e.g., *Kravar v. Triangle Servs., Inc.*, No. 1:06-cv-07858-RJH, 2009 U.S. Dist. Lexis 42944, at \*8-\*9 (S.D.N.Y. May 19, 2009).

employees desirous of preserving the right to litigate can achieve that result with a union decision not to arbitrate the legal claim.

A final resolution of that sort, however, seems at odds with the Supreme Court's strong preference for enforcement of agreements to arbitrate.<sup>89</sup> The Fourth Circuit, which led the way in enforcing collectively bargained agreements to arbitrate statutory claims, has not been troubled by the fact that employees whose union refuses to arbitrate have no forum for their statutory claims.<sup>90</sup> Yet complete deprivation of any forum for vindication of statutory rights is not merely the change in forum approved by the Supreme Court in enforcing agreements to arbitrate statutory claims,<sup>91</sup> but instead a deprivation of substantive statutory rights.<sup>92</sup> Given that the courts have already split on this issue, it will most likely return to the Supreme Court for resolution.

The failure to resolve this question is not the only uncertainty resulting from *Pyett*. The Court has held that any waiver must be clear and unmistakable, yet it has not offered a test for determining when that standard is met.<sup>93</sup> Additionally, there are multiple questions about the application of the duty of fair representation to union decisions relating to employees' statutory claims.<sup>94</sup> Yet despite the unknowns, unions, employers, and employees must negotiate contracts, process grievances, decide whether to arbitrate cases, decide whether to litigate claims, and decide whether to contest litigation based on collectively bargained arbitration provisions. The decisions that they make and the reaction of the courts to those decisions will impact legalism in the arbitration process. What provisions will employers and unions negotiate, and how will the courts evaluate them if they are challenged by employees? How will unions respond when faced with grievances that implicate legal claims? Will employees arbitrate legal claims or challenge arbitration provisions in court? How will courts respond to arbitration decisions urged as persuasive authority in cases where no waiver existed? The following sections will analyze these questions and their impact on the process of arbitration.

Overlapping contractual and statutory claims have been arbitrated regularly for many years.<sup>95</sup> While it has been persuasively argued that the increase in legal

89. See *Pyett*, 129 S. Ct. at 1469-71 (describing "radical change" in the Court's view of arbitration from hostility to support); James L. Stone & Jonathan Boonin, *The Supreme Court's Emerging Endorsement of Arbitration*, COLO. LAW., Sept. 2001, at 67.

90. See *Safrit*, 248 F.3d at 308.

91. *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

92. See *Green Tree Fin. Servs. v. Randolph*, 531 U.S. 79, 90 (2000) (quoting *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637)) (stating that "even claims arising under a statute designed to further important social policies may be arbitrated because "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," the statute serves its functions"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (1997) ("At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections.").

93. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998)

94. See *Hodges*, *supra* note 35, at 155-59; *infra* notes 115-119, 151-152, 169, 171, 173-174, 195-196, 210-211, 223-224 and accompanying text.

95. See *Newman*, *supra* note 45, at 45-52, 54; *IKO Prods., Inc. v. Pace Int'l Union, Local 823*, 118 Lab. Arb. Rep. (BNA) 887 (2003) (Imundo, Arb.) (interpreting FMLA to decide whether employee entitled to contractual bonus based on attendance); *Mead Prods., Inc. v. United Paperworkers Int'l Union, Local 291*, 114 Lab. Arb. Rep. (BNA) 1753 (2000) (Nathan, Arb.) (interpreting the Americans

issues has adversely impacted the institution of labor arbitration,<sup>96</sup> and contributed to increasing legalism,<sup>97</sup> *Pyett* will only make a difference if substantial additional numbers of employee statutory claims are forced into a contractually negotiated grievance procedure or if unions and employers approach the legal issues in arbitration differently as a result of *Pyett*.

### A. The Negotiation of Waivers

If waivers are rare, *Pyett* may have little impact on legalism in arbitration. The decision in *Pyett* itself, along with decisions from the Fourth Circuit and several post-*Pyett* district court decisions, demonstrates that there are currently collectively bargained provisions that constitute judicial forum waivers.<sup>98</sup> Further, *Pyett* offers clear direction to employers and unions that desire to negotiate waivers. Parrotting the *Pyett* contract language would almost certainly result in a clear and unmistakable waiver.<sup>99</sup> In the Fourth Circuit, either an arbitration clause that includes statutory claims or incorporation of a statute into an agreement with an arbitration provision is sufficient to effectuate a waiver.<sup>100</sup> Neither a general anti-discrimination requirement nor a clause that mimics the statutory language constitutes a waiver in the Fourth Circuit, however.<sup>101</sup>

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with Disabilities Act to decide whether employer violated agreement by allowing disabled employee to bump a more senior employee because he could not perform the job of junior employee); *Int'l Paper Co. v. United Paperworkers Int'l Union, Local 404*, 69 Lab. Arb. Rep. (BNA) 857 (1977) (Taylor, arb.) (considering discrimination laws and executive order to decide whether award of apprenticeship to a junior black employee instead of a senior white employee violated the agreement).

96. See, e.g., David E. Feller, *Arbitration: The Days of its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 107-10 (1977-78). See also Bonnie L. Siber, *The Gardner-Denver Decision: Does it Put Arbitration in a Bind?*, 25 LAB. L.J. 708, 714-16 (1974) (arguing that *Gardner-Denver* may increase legalism and formalism in arbitration because courts will be reviewing arbitration decisions for admissibility); *Judge Edwards Defends Use of Arbitration as Better Means to Settle Labor Disputes*, 107 Daily Lab. Rep. (BNA) at A-1 (June 3, 1982) (suggesting that judicial review of arbitration decisions may encourage arbitrators to write their decisions for the courts to the detriment of the process).

97. See *supra* notes 70-79 and accompanying text.

98. See 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1465 (2009); *Aleman v. Chugach Support Servs.*, 485 F.3d 206, 215-19 (4th Cir. 2007); *Safrit v. Cone Mills*, 248 F.3d 306, 307-08 (4th Cir. 2001); *Johnson v. Tishman-Speyer Prop., L.P.*, No. 09-CV-1959, 2009 U.S. Dist. Lexis 96464, at \*7 (S.D.N.Y. Oct. 16, 2009); *Borrero v. Ruppert Hous. Co.*, No. 08-CV-5869, 2009 U.S. Dist. Lexis 52174, at \*9-\*10 (S.D.N.Y. June 19, 2009); *Moore v. Duke Power Co.*, 971 F. Supp. 978, 984 (W.D.N.C. 1997). *Borrero* and *Johnson* involved employers who were part of the same multi-employer bargaining association as 14 Penn Plaza and thus the contract language was identical. The other cases all preceded the Supreme Court's decision in *Pyett*. As indicated *infra* notes 189-192 and accompanying text, *Pyett* does not directly address what language would be necessary to constitute a waiver. It is not clear whether the Fourth Circuit's waiver test will remain the same after *Pyett*.

99. The contract language in *Pyett* stated as follows:

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

*Pyett*, 129 S. Ct. at 1461.

100. See *Brown v. ABF Freight Sys., Inc.* 183 F.3d 319, 322 (4th Cir. 1999).

101. *Id.* at 323; *Carson v. Giant Food Inc.*, 175 F.3d 325, 331 (4th Cir. 1999).

The *Pyett* decision is likely to prompt more employer efforts to negotiate provisions requiring arbitration of statutory claims.<sup>102</sup> Some attorneys are cautioning employers to tread carefully in seeking contractual waivers.<sup>103</sup> The cost of arbitrating legal claims will probably be higher than the cost of traditional labor arbitration, particularly if the parties negotiate provisions that allow for some discovery and a broader range of remedies.<sup>104</sup> Further, the employer may have to offer some contractual benefit to the union in negotiations to obtain the waiver.<sup>105</sup> Despite the potential for increased costs, however, these waivers are likely to appeal to some employers for several reasons. Employers have complained for years about systems in which aggrieved employees get two bites at the apple.<sup>106</sup> That is most often the case where both a contractual grievance and a statutory lawsuit are permissible. While an arbitration provision adopted by a nonunion employer might prompt claims that otherwise would not be filed, in the unionized workplace incorporating statutory arbitration consolidates two existing claims into the arbitral forum. Additionally there is evidence that unionized employees are more likely to file legal claims than nonunion employees.<sup>107</sup> Further, the limited

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102. See Gerald C. Peterson, *Be Careful What You Wish For: An Analysis of the U.S. Supreme Court's Decision in 14 Penn Plaza LLC v. Pyett*, 60 LAB. L.J. 137, 144 (2009). Peterson, a management attorney, suggests that many employers will welcome the decision because it will allow cheaper, quicker resolution of statutory claims. *Id.*; see also Sarah R. Cole, *Let the Grand Experiment Begin: Pyett Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. (forthcoming 2010) (citing recommendations of various law firms representing employers advocating inclusion of provisions requiring arbitration of statutory claims in collective bargaining contracts) (copy on file with the author).

103. See, e.g., *Panelists Discuss High Court's Pyett Ruling And Issues Confronting Contract Negotiators*, 146 Daily Lab. Rep. (BNA), at B-1 (August 3, 2009) (articulating various concerns for employers considering negotiating waivers, including whether liability insurance covers arbitrated claims and the absence of summary judgment in arbitration); Peterson, *supra* note 102, at 145-46 (cautioning employers about the following potential consequences of negotiating waivers: 1. unions may demand substantial concessions in exchange for waivers; 2. unions with contracts containing waivers may seek more information relating to discrimination issues; 3. employers may be liable for the opposing party's attorneys' fees; 4. employers may feel the need to use attorneys for these arbitrations and to have a court reporter; and 5. the costs of arbitration may increase if more complex issues are arbitrated).

104. See *infra* notes 153-162 and accompanying text (suggesting that such provisions may be necessary to ensure that courts uphold the arbitration provisions).

105. If unions put a high price on waivers, employers may decide to forego them. The costs and benefits of arbitration are difficult to assess accurately. See Douglas M. Mahony & Hoyt N. Wheeler, *Adjudication of Workplace Disputes*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 361, 378-90 (Kenneth G. Dau Schmidt et al, eds. 2009); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 421-440 (2000). Dennis Nolan argues that few employers will find these provisions of sufficient value to offer enough to induce unions to sacrifice employee rights, which is not in the interest of unions in any event. Dennis R. Nolan, *Disputatio: "Creeping Legalism" as a Declension Myth*, 2010 J. DISP. RESOL. 1.

106. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 26, 55-56 (1974).

107. See FREEMAN & ROGERS, *supra* note 44, at 155 (explaining "unionized workers and high wage workers are more likely to go to an agency or court than other employees"); Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 77 (1986) (finding correlation between union activism and filing of lawsuits); Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. ILL. L. REV. 115, 134-36 (finding that both union activism and grievance filing were positively associated with filing of lawsuits and discrimination charges).

resources of unions<sup>108</sup> and the inability of some employees to find counsel<sup>109</sup> may result in the abandonment of some statutory claims. In these difficult economic times, discrimination complaints at the federal and state level have soared,<sup>110</sup> which may prompt more employers to consider arbitration to limit judicial actions. Also, the recent enactment of the amendments to the Americans with Disabilities Act, which reverses several Supreme Court decisions that narrowed the coverage of the statute and resulted in an overwhelming win rate for employers,<sup>111</sup> and the new Genetic Information Nondiscrimination Act,<sup>112</sup> increase the likelihood of successful legal claims against employers.<sup>113</sup> Thus, some unionized employers

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108. This is a more likely result if employees are not allowed to pursue their own claims in arbitration. See *infra* notes 135-136, 143-147, and accompanying text.

109. It is difficult for employees to find attorneys for court cases. The limitation to arbitration will discourage plaintiffs' attorneys who prefer to litigate before juries with the full range of statutory rights and remedies, including awards of attorneys' fees if they prevail. See *infra* note 152 and accompanying text.

110. *EEOC Posts Fiscal 2009 Enforcement Data*, 3 Daily Lab. Rep. (BNA) at A-15, Jan. 7, 2010 (discussing record number of private sector EEOC charges filed in fiscal 2008, with second highest number of charges filed in the last 20 years in fiscal 2009, including record numbers of charges alleging disability, religious and national origin discrimination); Tresa Baldas, *Complaints Flood EEOC*, NAT'L L.J., Nov. 2, 2009, at 1 (discussing twenty-eight percent jump in EEOC charges since 2007 and also large increases in filings with state discrimination agencies).

111. See ADA Amendments Act of 2008, Pub. L. No. 110-325 (2008) (explicitly overturning U.S. Supreme Court decisions in order to broaden the term "disability", and thereby increase the number and types of persons covered by the Act); *Disabilities Discrimination: Employer's Overwhelming Win Rate in Disability Suits is Rising*, ABA Survey Says, 121 Daily Lab. Rep. (BNA) at A-2 (June 22, 2000) (finding that employers prevailed in 95.7% of all federal Title I ADA cases and that in 1999, zero percent of employees bringing Title I ADA cases prevailed in five of the federal circuits); John Parry, *American Bar Association Survey on Court Rulings Under Title I of Americans with Disabilities Act*, 119 Daily Lab. Rep. (BNA) at E-1, (June 22, 1998) (finding that employers prevailed in ninety-two percent of Title I ADA cases from 1992 to 1998); Amy L. Allbright, *2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513 (2005) (finding plaintiff win rates as follows: 1992-1997: 7.9%; 1998: 5.7%; 1999: 4.3%, 2000: 3.6%, 2001: 4.3%; 2002: 5.5%; 2003: 2%; 2004: 3%); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (finding that employers had prevailed at the trial court level ninety-four percent of the time in Title I ADA cases).

112. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233 (codified as amended in 26 U.S.C. § 9834 and 42 U.S.C. §§ 300qq-53, 1320d-9, 2000ff-2000ff-11 (2009)) (prohibiting discrimination on the basis of genetic information with respect to health insurance and employment).

113. On the other hand, the Supreme Court's recent decisions in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly* may make it more difficult for employees to state a claim for discrimination. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 1953 (2009) (making clear that *Twombly*'s requirement that a complaint must contain sufficient factual information to make a complaint plausible on its face applies to all civil cases); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-58 (2007) (holding that complaint must contain factual information that makes allegations more than speculative or suspicious; the claim must be plausible); *Ageropoulos v. Exide Technologies*, 2009 U.S. Dist. LEXIS 59009 (E.D.N.Y. 2009) (granting a motion to dismiss in a case where the Plaintiff alleged continuous harassment on the basis of his national origin, and provided some examples in the complaint, on the grounds that the allegations did not rise to the level of "plausibility" under *Iqbal*); Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 415-16 (2009) (discussing *Iqbal* as the most important case of the term and a significant benefit for defendants by judicially amending Federal Rule of Civil Procedure Rule 8 to substitute plausibility pleading for notice pleading). Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009) (discussing impact of *Twombly* for employment discrimination claims). It is probable, however, that these cases will create less of a problem for employees in unionized workplaces where the union can assist with evidence that will enable the employee to plead with sufficient specificity to avoid dismissal.



will conclude that the advantages of a statutory arbitration provision are likely to outweigh any disadvantages.<sup>114</sup>

Will unions agree to such waivers? There are many reasons that unions should be extremely wary of waiving employee statutory rights. Resource limitations will prevent most unions from arbitrating all statutory claims, just as unions cannot currently afford to arbitrate all contractual claims. This will be a particularly acute problem in right-to-work states where the union must represent employees even if they choose not to pay union dues, reducing the resources available to the union for arbitration.<sup>115</sup> If the union's decision not to arbitrate deprives the employee of a forum to litigate statutory rights, the employee's only recourse may be to sue the union for breach of the duty of fair representation.<sup>116</sup> An increase in duty of fair representation litigation will further deplete union resources. Although employees must meet a high burden to prove breach of the duty of fair representation and, as a result, unions often prevail,<sup>117</sup> litigation of the claims is costly for the union and the resulting publicity is undesirable to organizations trying to recruit members.<sup>118</sup> If the case that the union declines to arbitrate alleges discrimination (the most common claim in cases to date), the union may be faced with a discrimination suit in addition to a breach of fair representation action.<sup>119</sup>

114. As Michael Green has persuasively pointed out, arbitration has some disadvantages for employers. Green, *supra* note 105. Among the concerns identified are the uncertainty of real cost savings and speed, particularly where more court-like procedures are incorporated in arbitration; the costly and sometimes successful litigation by employees, and occasionally administrative agencies, initiated to challenge arbitration where procedures are not sufficiently protective of statutory rights; and the absence of summary judgment and the discovery that may be necessary to support a summary judgment motion. *Id.* at 421-40. Green also points out the benefits of litigation for employers, including availability of summary judgment and discovery, plaintiffs' low win rate, the backlog at the EEOC, and plaintiffs' difficulties in obtaining counsel. *Id.* at 450-60. Employers might seek to negotiate arbitration provisions in union contracts that minimize the drawbacks and create some of the advantages present in the court system. *See infra* note 167 and accompanying text.

115. Section 14(b) of the National Labor Relations Act allows states to enact laws barring unions and employers from negotiating union security provisions, which require employees to pay dues and initiation fees to the union. 29 U.S.C. § 164(b)(2006). The union must represent all employees in the bargaining unit, however, even those who choose not to pay for representation, commonly known as free riders. James C. Thomas, *Right-to-Work: Settled Law or Unfinished Journey*, 8 LOY. J. PUB. INT. L. 163, 203-04 (2007). Twenty-two states have enacted such laws, known as right to work laws. *See* National Right to Work Legal Defense Foundation, Inc., *Right to Work States*, <http://www.nrtw.org/rtws.htm> (last visited Mar. 2, 2010).

116. The employee might also sue the union for discrimination or sue in court and challenge the arbitration requirement. *See infra* notes 119, 153-162 and accompanying text. The number of these cases may be limited by employees' inability to obtain legal representation, however. *See infra* note 152.

117. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1987) (stating that the union has a "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct"); LAURA J. COOPER, ET AL., *ADR IN THE WORKPLACE* 162 (2005) (noting review of duty of fair representation cases from 2000-2004 shows that employees file many cases but few are successful); Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 432 (2004) (indicating unions are rarely found liable in duty of fair representation cases because of the substantial deference to their decisions).

118. Nicolau, *supra* note 41, at 89 (discussing the cost of duty of fair representation litigation and the potentially devastating cost of losing such a case).

119. The discrimination statutes impose liability for discrimination on unions as well as employers. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c) (2006); The Age Discrimination in Employment Act of 1964, 29 U.S.C. § 623(c) (2006); The Americans with Disabilities Act of 1990,

Arbitration of statutory claims will make greater demands on union resources than arbitration of contractual claims because union officials, who often represent the union in arbitration, are not trained in statutory interpretation or litigation. Therefore, unions will need to provide additional training to union officials involved in the grievance and arbitration procedure and to use lawyers more frequently in arbitration, adding to the costs. The more complex issues in some legal claims will require longer arbitrations, adding to the cost for the arbitrator and any legal representation. Furthermore, agreements to arbitrate will deprive employees of statutory rights to jury trials and, depending on the arbitration provision negotiated, perhaps to discovery essential to prove the case, statutory damages, attorneys' fees, extended statutes of limitations, and other statutory benefits.

Unions can be advocates of employee rights without depriving employees of their right to litigate. Where there is an overlap between contractual and statutory rights, unions can continue to arbitrate where arbitration provides an effective forum and the case fits with bargaining unit priorities for arbitration. But where statutory issues predominate or where the complexity of the case requires substantial legal expertise, a legal forum can be used.<sup>120</sup> Unions regularly assist employees in litigation of statutory claims, sometimes providing counsel and other times support in the form of gathering and providing evidence and persuading witnesses to testify.

Despite the persuasive reasons to avoid a waiver, however, they may prove hard for unions to resist. If employers desire such provisions, they may be willing to offer incentives such as wage and benefit increases to obtain them. To the employees, a current increase in wages or benefits may have greater appeal than waiver of a forum for future claims that may not arise. Empirical evidence suggests that employees do not understand the law relating to employment termination, consistently overestimating the legal protection that exists.<sup>121</sup> While one might expect that experience in the workplace, particularly the unionized workplace,<sup>122</sup> might correct these misperceptions, the data do not support that

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42 U.S.C. § 12111(2) (2006); Genetic Information Nondiscrimination Act of 2008, 42 U.S.C.A. § 2000ff-3, Pub. L. No. 110-233, § 204 (2008).

120. Even an optional arbitration procedure for statutory claims could aid employees without depriving those who desired to do so of the right to litigate. See further discussion of the optional procedure *infra* notes 175-177 and accompanying text. See also Newman, *supra* note 45, at 36-37, 38-41 (suggesting that arbitration can be an effective forum for discrimination claims because an arbitrator is closer to the problem and can create a more effective and quicker resolution for discrimination claims where empowered to do so by the union and employer). Newman also points out, however, that arbitrators must have legal expertise and apply the law, in addition to being sensitive to discrimination issues, in order to be effective. *Id.* at 47-51.

121. See Pauline T. Kim, *Norms, Learning and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 456-63 (discussing survey results showing high percentages of employees in Missouri, New York, and California misunderstood and overestimated the legal protection relating to employment termination); Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 326 (2002) (replicating Kim's results with surveys in Nebraska and Virginia). Employees who overestimate the legal protections from employment termination may underestimate the probability of termination.

122. The hypothesis is that employees in the unionized workplace, where just cause protection is one of the negotiated benefits, would understand that the protection is not provided by law. Kim, *supra* note 121, at 475.

assumption.<sup>123</sup> Even more relevant to the current discussion, employees also overwhelmingly underestimated the effectiveness of a waiver of rights, believing that discharge was unlawful despite a waiver of protection.<sup>124</sup> In addition to failing to understand the existing legal protections and the effect of waivers, employees may discount the probability that they will suffer from employer conduct that requires a legal action on their part, or undervalue the right to litigate legal claims.<sup>125</sup> It may be difficult for union leaders to convince employees to value the right to litigate.<sup>126</sup> Accordingly, popularly elected union leaders who must respond to the desires of their membership may sacrifice the right to litigate to obtain benefits that the membership values more at contract time.<sup>127</sup>

If employers value the waiver, they may insist on it to impasse.<sup>128</sup> Even if employees value their right to go to court, will they strike over it? Will they hold up a contract settlement to obtain it? The prospect seems unlikely even in good economic times, much less today's troubled economy. Therefore, it is probable that more collective bargaining agreements than in the past will incorporate arbitration of statutory claims. The effect of this increase on legalism in arbitration depends on further variables, however, which are discussed in the following sections.

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123. *Id.* at 473-76.

124. *Id.* at 465.

125. See Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 240-44 (2001) (describing the human behavioral characteristics of risk optimism, lack of foresight regarding the value of lost benefits, and "editing out" consequences that they view as having a low probability, even if the consequences of occurrence are disastrous); Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 620 (indicating that "judgmental bias" will cause employees to disregard or underestimate the possibility that they will suffer harm that will require litigation against the employer).

126. If indeed the leaders understand its value. Cf. Sunstein, *supra* note 125, at 264-65 (suggesting that unions may not have the problems of individual employees in evaluating waivers). The buyer's remorse will come later when an employee with a legal claim seeks advice from an attorney and the reality of the foregone legal protections such as a jury trial and punitive damages sinks in. Cf. Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 252-53 (2000) (suggesting that agreements to arbitrate in the absence of accurate information may be rational and not detrimental to employees over time). If Professor Hylton is correct, we may see more of these agreements, but that may not alter the significant possibility that some individual employees will sue the union for breach of duty of fair representation based on buyer's remorse, particularly those employees whose claims are undervalued by the union's decision. *Id.* at 255-56.

127. The law mandates regular election of union officials. See 29 U.S.C. § 481 (2006) (requiring elections of national and international union officers at least every five years by secret ballot or at a convention with delegates elected by secret ballot, and for local officers, at least every three years, by secret ballot).

128. Justice Thomas' opinion stated in dicta that the waiver was a mandatory subject of bargaining. 14 Penn Plaza v. Pyett, 129 S. Ct. 1456, 1464 (2009). This assumption is supported by the *Utility Vault* decision of the NLRB. *Utility Vault Co.*, 345 N.L.R.B. 79 (2005). In *Utility Vault*, the NLRB agreed with the ALJ that an employer's unilateral imposition of a Dispute Resolution Program that encompassed statutory claims violated section 8(a)(5). *Id.* There is a persuasive argument, however, based on NLRB precedent, that because arbitration effects a waiver of a statutory right to a judicial forum, it is not a mandatory subject of bargaining. See Hodges, *supra* note 34, at 515. Even if it is a mandatory subject of bargaining, it is probable that unilateral imposition by the employer at impasse would be unlawful. Both agreements to arbitrate and waivers require consent, and in the case of a waiver, it must be clear and unequivocal. *Id.* at 539-40. Accordingly, lawful unilateral imposition is precluded but frustration of bargaining will still occur if an employer can insist to impasse on inclusion of a waiver. *Id.*

*B. The Parameters of Arbitration*

If a provision regarding arbitration of statutory claims is negotiated, it will probably take one of the following forms: (1) traditional labor arbitration with union control of the claim; (2) traditional labor arbitration with employee control of the claim; (3) modified traditional labor arbitration; (4) a distinct statutory arbitration procedure; or (5) an employee option. I will discuss each of these in turn, analyzing the advantages and problems, as well as the likelihood of adoption by the parties, followed by an assessment of the impact on legalism.

*1. Traditional Labor Arbitration*

As in the *Pyett* contract, statutory claims could be incorporated into the grievance and arbitration procedure used for contractual claims. In the traditional union contract, decisions about which grievances to arbitrate are controlled by the union, or, in some cases, a vote of the membership.<sup>129</sup> The union also decides the arbitration strategy, including who represents the union in arbitration, what arguments are made, what witnesses are called, and what evidence is submitted.<sup>130</sup> So long as these decisions are not arbitrary, discriminatory, or in bad faith, the union does not violate its duty to the employee.<sup>131</sup>

The traditional arbitration procedure is designed for contract claims. It eschews discovery<sup>132</sup> and has a very short statute of limitations for grievances, often a few days and rarely more than a month.<sup>133</sup> Claims may be lost if not

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129. See LAURA J. COOPER, ET AL., *supra* note 117, at 157; *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (recognizing the value of grievance and arbitration system that provides the union with the discretion to decide which grievances to pursue to arbitration); *Cross v. United Auto Workers*, 450 F.3d 844, 847 (8th Cir. 2006) (finding no breach of the duty where union decided in good faith that it could not win grievance and did not arbitrate); *Driver v. U.S. Postal Serv., Inc.*, 328 F.3d 863, 869 (6th Cir. 2003) (finding union decision not to arbitrate employee's grievance lawful); *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651, 658 (4th Cir. 2002) (finding union decision not to pursue grievance it believed unmeritorious did not breach the duty of fair representation even if the union's judgment was erroneous).

130. See *Hodges*, *supra* note 35, at 145-49 and cases cited therein.

131. See *id.*; *Emmanuel v. Int'l Bhd. Teamsters*, 426 F.3d 416, 420-21 (1st Cir. 2005) (finding union that declined to interview witnesses recommended by employee and to use strategy suggested by employee did not breach duty of fair representation, although information discovered later revealed evidentiary support for the employee's strategy); *Garrison v. Cassens Transp. Co.*, 334 F.3d 528, 539-40 (6th Cir. 2003) (finding tactical decisions of union representative who was in charge of sixty to seventy grievances per month did not breach the duty of fair representation, noting that union representatives could not be held to the standard of lawyers); *Murphy v. Air Transp. Local 501*, 123 F. Supp. 2d 55, 60-62, 64-65 (D. Conn. 2000) (finding union representative who failed to return phone calls, had a double vodka before closing arguments, and made poor tactical decisions did not violate the duty of fair representation, noting that he was not a lawyer and should not be compared to one).

132. The union is entitled under the National Labor Relations Act to information necessary to administer the collective bargaining agreement and thus may obtain information relevant to a grievance by request to the employer. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). The information available has been limited to documents, however, and does not include judicial discovery options such as interrogatories and depositions. The NLRB may have to decide whether the duty to furnish information encompasses information necessary to arbitrate a statutory claim pursuant to a contractual waiver.

133. See *Collective Bargaining And Contract Clauses*, 170 *Collective Bargaining Negot. & Cont.* (BNA) 1401 (collecting sample contract clauses containing time limits on filing grievances); *Griev-*

grieved immediately. Additionally, in traditional labor arbitration punitive damages and attorneys' fees are not ordered except in unusual cases.<sup>134</sup> Accordingly, remedies available under many statutory regimes will not be recoverable in labor arbitration.<sup>135</sup>

As noted above, resource limitations will preclude unions from arbitrating all statutory claims, and failure to arbitrate will lead at least some employees to sue the union for either breach of the duty of fair representation, discrimination, or both. Also, arbitrating these claims will be costly for the union, which will need to train union representatives in the law and to use lawyers more frequently in arbitration. This option will be appealing to employers, however, because it will limit employee claims more than any of the other options. The shorter statute of limitations, lack of discovery, and restrictions on damages as compared to statutory actions also benefit employers. A reduced statute of limitations will preclude employees who miss the statute from asserting claims that would have been timely in litigation. The lack of discovery also benefits employers, who need it less often than employees to prove their case.<sup>136</sup> The reduced damages and absence of attorneys' fees will make arbitration losses less costly for employers.

There is some evidence, although its validity and significance is debated, that employees with legal claims are more likely to prevail in arbitration than in litigation.<sup>137</sup> Employees are far more successful in arbitration on contractual claims than on statutory claims, however.<sup>138</sup> Further, it appears that labor arbitrators are more likely to rule in favor of employees than employment arbitrators.<sup>139</sup> Generally, employees are more likely to obtain a higher award in court than in arbitration, but the data do not consider cases that settle prior to litigation.<sup>140</sup> Low-wage employees may have more opportunities to pursue their claims in arbitration, however.<sup>141</sup> The possibility of employees prevailing more often, and the absence of summary judgment, which may be one cause of the increase in employee victories, may make arbitration less appealing to employers.<sup>142</sup> If the employee might

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*ance Procedures*, 9 Collective Bargaining Negotiations and Contracts (BNA) 2101 (noting that most contracts contain a time limit for filing grievances somewhere between three days and sixty days).

134. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 1216-17, 1221-22 (6th ed. 2003).

135. For example, Title VII of the Civil Rights Act and the Americans with Disabilities Act allow compensatory and punitive damages for intentional discrimination, as well as attorneys' fees, and the Age Discrimination in Employment Act allows liquidated damages and attorneys' fees. 42 U.S.C. § 1981a(a)(1) (2006) (Title VII); 42 U.S.C. § 1981a(a)(2) (2006) (ADA); 29 U.S.C. § 626(b) (2006) (ADEA).

136. See *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 96-100 (Cal. Ct. App. 2004) (finding discovery limitations unconscionable in employee's claim of age discrimination because, although the limitations were mutual, they had a more detrimental effect on the employee since employer possessed much of the evidence relevant to the claim); Laurie Leader & Melissa Burger, *Let's Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMP. RTS. & EMP. POL'Y J. 87, 117 (2004).

137. For a thorough and detailed discussion of the studies and their limitations, see Mahony & Wheeler, *supra* note 105, at 378-90. After reviewing various studies, the authors conclude that employment arbitration is less advantageous to employees than litigation. *Id.* at 385, 390.

138. *Id.* at 380.

139. *Id.* at 380, 387-90.

140. *Id.* at 383-85.

141. *Id.* at 385, 390.

142. See Green, *supra* note 105, at 448-49, 450-54.

have prevailed on a contractual claim arising out of the same facts, however, then the employer has lost nothing by agreeing to arbitration.

## 2. *Employee-controlled Labor Arbitration*

The drive to avoid duty of fair representation claims may influence unions to choose another option: allowing employees to arbitrate their statutory claims under the contractually negotiated grievance procedure.<sup>143</sup> Traditionally, unions have been extremely reluctant to allow employees to arbitrate their own claims for several reasons, only one of which will discourage this option for legal claims.

First, employers agree to arbitration on the condition that unions screen claims and decline to process those that lack merit.<sup>144</sup> If unions were to allow employees to arbitrate at will, arbitration would be far less appealing to employers, who would face more claims. As a result, employers might refuse to agree to contractual arbitration or exact a greater concession from the union in exchange for the arbitration agreement. To the extent that employee arbitration merely shifts statutory claims from court to the employer's preferred arbitration forum, however, employers should not object to such a provision.<sup>145</sup> And indeed, post-*Pyett*, some employers have urged courts to find a waiver based on the employer's agreement to allow the employee to arbitrate when the union declines to do so, even in the absence of a contractual provision permitting employee arbitration.<sup>146</sup> The other reason that unions control the decision to arbitrate and the arguments put forth is to control interpretation of the collective bargaining agreement and to prevent arbitration decisions that adversely affect employees in the bargaining unit.<sup>147</sup> To address this concern, the parties could negotiate provisions that allow the union to intervene in employee-controlled arbitration to support its interpretation of the collective bargaining agreement, should it differ from that urged by the

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143. For an argument that unions should consider assigning to employees the right to arbitrate their own grievances in many cases, see Mitchell H. Rubinstein, *Assignment of Labor Arbitration*, 81 *ST. JOHN'S L. REV.* 41 (2007). Rubinstein does not limit his argument to cases involving legal claims and suggests that there is no need to protect employers from arbitration by employees since they might well be sued by employees in hybrid breach of contract/breach of duty of fair representation claims in cases where the union declined to arbitrate, a result likely to be significantly more costly than arbitration. *Id.* at 69-70.

144. See *Vaca v. Sipes*, 386 U.S. 171, 191-93 (1967).

145. Modification of contract language may be required to permit employee arbitration. See Rubinstein, *supra* note 143, at 44-45 (citing several public sector cases in which courts refused to allow unions to assign arbitration to individual employees where the contract did not expressly allow it).

146. See *Kravar v. Triangle Servs.*, No. 1:06-CV-07858, 2009 U.S. Dist. Lexis 42944, at \*9 (S.D.N.Y. May 12, 2009) (holding that arbitration agreement did not allow employee to arbitrate so she could not be bound to arbitration of her statutory claim if the union declined to arbitrate, despite employer's offer to allow her to arbitrate as an individual). To allow an employer to control the forum by agreeing to allow employee arbitration in cases where the union declines to arbitrate is problematic. The employer could then choose whether to allow the employee to bring the case in court or whether to authorize to arbitration by the employee even if not clearly permitted by the contract, thereby binding the employee to arbitrate. The better rule would be to allow employee arbitration only by agreement of the employer, employee, and union.

147. See Rubinstein, *supra* note 143, at 68-69.

employer and employee, or to protect the interests of other employees who might be adversely affected by the arbitration decision.<sup>148</sup>

Several other issues require resolution if employees are permitted to arbitrate. In the typical labor contract the parties split the cost of the arbitrator.<sup>149</sup> As noted, unions cannot arbitrate all statutory claims due to limited resources. Thus, the employee arbitration option will be feasible only if the union is not required to pay for the arbitrator.<sup>150</sup> The other issue requiring resolution is how to determine whether a legal claim is sufficiently implicated to allow individual arbitration. This decision might be left to the union or incorporated into the contract. The specter of the duty of fair representation hangs over this option as well. Does the duty of fair representation limit the union's ability to assign arbitration rights to employees?<sup>151</sup> If there are neutral standards for making the decision and the court does not view the assignment as violative of the rights of other employees, the union should survive a duty of fair representation claim. A secondary question is whether the union can choose to arbitrate some cases with legal claims, and defer others to the employee without breaching the duty of fair representation? If the decision is not arbitrary, discriminatory, or in bad faith, it should be upheld, but union officers will need training as to the legitimate criteria to be applied, and some duty of fair representation claims may result from such decisions. As a result, unions might choose an absolute rule, rather than selecting among cases to

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148. Cf. Newman, *supra* note 45, at 56 (suggesting that employees be allowed to use their own counsel at their expense in arbitration of discrimination claims so long as they do not attack the collective bargaining agreement or take a position at odds with the union's interpretation of the agreement, without limiting the union's ability to participate in the arbitration as well). Again the duty of fair representation raises its head, with the potential that employees whose interests are adverse to the union may sue the union for breach if it intervenes in opposition to the employee's position. This underscores the need for resolution of the many uncertainties resulting from the decision in order to facilitate an effective response by the parties to collective bargaining agreements and suggests another reason for unions to avoid negotiation of waivers without resolution of the duty of fair representation issues.

149. ELKOURI & ELKOURI, *supra* note 134, at 40.

150. In some nonunion arbitration procedures, the employer pays all or most of the cost of arbitration. See Mei L. Bicker, et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997, at 8 (reporting results of employer survey in which half of employers reported that they paid all the costs of arbitration and others shared costs, with some of the remainder paying a large portion of the cost or paying the costs in the case of employee financial hardship). While this option raises concerns about whether the arbitrator may have an incentive to favor the paying employer, 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, 153, 195 (2002), the presence of the union may diminish this concern because the arbitrator desirous of repeat business will not want to alienate either employer or union. See *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1475 (D.C. Cir. 1997). Charging the cost to employees, however, may invalidate the arbitration agreement. See *infra* note 158 and accompanying text.

151. See, e.g., *Anchorage Police Dep't Employees Ass'n. v. Feichtinger*, 994 P.2d 376 (Alaska 1999). In *Feichtinger*, the court upheld the lower court's denial of summary judgment on a duty of fair representation claim to a union that refused to arbitrate where contract allowed employee to do so. The union argued that because the employee could and did arbitrate the case himself, there could be no breach. *Id.* at 382. The court found a genuine issue of material fact as to whether the union's refusal to arbitrate undermined the arbitration process, noting that the employee proceeded pro se because he did not have the resources to hire an attorney and also that his case was widely publicized, which may have made union representation important to the credibility of his claim. *Id.* at 383. See also *Martin v. City of O'Fallon*, 670 N.E.2d 1238, 1242 (Ill. Ct. App. 1996) (holding that union could not assign to employee the right to arbitrate because the union has the duty to represent employees and employees did not choose or authorize the employee as their representative).

arbitrate. A bright-line rule leaving to employees all claims that have legal implications might prevent the union from arbitrating some cases with significant implications for contract interpretation, which could affect other employees in the bargaining unit, however.

One of the benefits of unionization is the institutional knowledge that the union maintains as a result of years of negotiations and contract administration, which can be of great assistance to employees with contractual and legal claims. For example, unions will have information about prior disciplinary actions against other employees which may help to prove differential treatment. Unions can provide evidence in their possession, help employees gather evidence, and identify relevant witnesses and persuade them to testify. This could be particularly important in the traditional grievance procedure which lacks provisions for discovery. There is a risk of duty of fair representation allegations if the union provides assistance that is perceived as inequitable, however. The risk counsels uniform treatment of employee claims, yet practical factors, such as the strength of the employee's case and the importance of the issue to other employees, may call for more nuanced decisions on the part of the union. Local union officials, who are most often rank-and-file employees, and even international officials, who typically have significantly more experience in workplace governance but rarely legal training, will need either extensive training or legal advice to make such decisions.

The limitations inherent in the traditional arbitration procedure may lead employees with counsel<sup>152</sup> to challenge the arbitration requirement in court, whether the employee or the union controls the arbitration process. In employment arbitration in the nonunion workplace, employees have challenged the enforceability of arbitration provisions on several grounds.<sup>153</sup> The two most likely to be used to challenge collectively bargained provisions requiring arbitration are (1) the agreement is unconscionable, or (2) the agreement constitutes an effective waiver

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152. Employee plaintiffs' difficulties in finding legal representation have been widely documented. See William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 *DRAKE L. REV.* 256, 288 (1994); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 *COLUM. HUM. RTS. L. REV.* 29, 58 (1998); Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 *IND. L.J.* 83, 91 (2001). The limitations on discovery and damages, including attorneys' fees, may create even more problems for employees trying to hire attorneys in these cases. Plaintiffs' attorneys have been very active in opposing mandatory arbitration. See Brief for Trial Lawyers for Public Justice et al. as Amici Curiae Supporting Respondent, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235), 2000 WL 1022874; Brief for National Employment Lawyers Association as Amici Curiae Supporting Respondent, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379), 2000 WL 1376974; Brief for National Employment Lawyers Association et al. as Amici Curiae Supporting Petitioner, *EEOC v. Waffle House*, 534 U.S. 279 (2002) (No. 99-1823), 2001 WL 603393; Cliff Palefsky, *Civil Rights Struggle of the 90s: From 'Separate but Equal' to 'Just Another Forum'*, *THE RECORDER*, May 1999, at 535 available at 1999 WLNR 8540737; National Employment Lawyers Association, *Advocacy: Forced Arbitration*, <http://www.nela.org/NELA/index.cfm?event=showPage&pg=mandarbitration> (describing advocacy efforts by largest association of lawyers representing employees to oppose mandatory arbitration, including filing amicus briefs, lobbying for legislation, and serving as a resource for the press).

153. For discussion of challenges to arbitration, see Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 *J. DISP. RESOL.* 469, 500 (discussing application of unconscionability defense); Leroy & Feuille, *supra* note 150, at 195 (discussing empirical research on impact of cost sharing provisions on enforcement of arbitration). Cf. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 *U. ILL. L. REV.* 695 (discussing arbitration agreements in franchise contracts and arguing that truly unfair arbitration provisions are uncommon).



of statutory rights.<sup>154</sup> The absence of discovery,<sup>155</sup> the shortened statute of limitations,<sup>156</sup> the limitations on damages and attorneys' fees,<sup>157</sup> and any requirement

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154. In the nonunion workplace, agreements to arbitrate have been invalidated, *inter alia*, on grounds of unconscionability and inability to vindicate statutory rights. See Drahozal, *supra* note 153, at 705-06. The courts have used the Federal Arbitration Act (FAA) and state contract law. See Burton, *supra* note 153, at 483-85. Collective bargaining agreements are enforced under section 301 of the Labor Management Relations Act, however. 29 U.S.C. § 185 (2006); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957). It is unclear whether these grounds for invalidating arbitration agreements under the FAA will apply if employees go to court to challenge arbitration provisions negotiated by the union but covering statutory claims. The Supreme Court has held that the FAA applies to most employment agreements, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), but has not directly addressed its applicability to collective bargaining agreements, which have a separate statutory provision governing their enforcement. The *Pyett* Court implicitly treated the agreement as covered by the FAA, however, as the motion to compel arbitration and the interlocutory appeal in the courts below were based on the FAA. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1462-63 (2009). The Supreme Court has required courts to apply federal law under section 301 for enforcement of collective bargaining agreements in order to insure uniform interpretation of such agreements regardless of the location of the employer. See *Lincoln Mills*, 353 U.S. at 456-57; *Local 174 v. Lucas Flour*, 369 U.S. 95, 103-04 (1962). Under the FAA, however, courts look to state law to determine enforceability of arbitration agreements on unconscionability grounds. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). Empirical studies suggest that different courts reach different conclusions on these issues, a result at odds with the goal of uniformity in interpretation of collective bargaining agreements. See *Leroy & Feuille*, *supra* note 150, at 193-94 (noting differences in enforcement rates by circuit but also indicating that it is not clear whether the differences are factual or differences in legal analysis).

Moreover, unconscionability defenses usually rely in part on the adhesive nature of the contract because they require both procedural and substantive unconscionability. See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (finding contract of adhesion, offered on take it or leave it basis by powerful party to less powerful party meets requirement of procedural unconscionability). Will courts find union-negotiated provisions to be adhesive or otherwise procedurally unconscionable, given that the imbalance of power is less significant for union-represented employees? One might argue that it is adhesive as to employees but since the union acts as their agent, the union and its officers are chosen by the employees, and the employees often have input into bargaining demands and the right to ratify the agreement, such an argument is likely to fail. Use of the unconscionability defense thus appears problematic, leaving the defense of inability to vindicate statutory rights as a more promising ground for setting aside union-negotiated agreements to arbitrate. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (recognizing that substantial arbitration costs could prevent a plaintiff from effectively vindicating statutory rights in arbitration). Prior cases finding waivers under collective bargaining agreements generally have not addressed the issue of enforceability based on grounds of unconscionability or inability to effectively vindicate statutory rights. A rare exception is *Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320 (E.D.N.Y. 2000). The *Clarke* court looked at the adequacy of arbitral procedures in a case where it granted summary judgment on plaintiff's claims alleging violations of Title VII and state law on the basis of a prior arbitral decision under a collective bargaining agreement. The court applied the law of preclusion and looked at the adequacy of the arbitral procedures before according preclusive effect to the arbitrator's factual findings. *Id.* at 335-36. In finding the procedures adequate, the court noted the five days of hearing with testimony from ten witnesses under oath and subject to cross-examination, representation by counsel who filed post-hearing briefs, use of a transcript, and evidentiary objections. *Id.* at 336. Rights of discovery and compulsory process were also available. *Id.* at 335. Further, the plaintiffs apparently did not dispute the fairness or adequacy of the arbitration process. *Id.* at 335.

155. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 683-85 (Cal. 2000) (finding that adequate discovery, although not necessarily the full panoply of discovery, is essential for employees to vindicate their statutory rights in arbitration); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 96-100 (Cal. Ct. App. 2004) (finding discovery limitation unconscionable in employee's claim of age discrimination because, although the limitations were mutual, they had a more detrimental effect on the employee since the employer possessed much of the evidence relevant to the claim).

156. See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003) (finding thirty day time limit for filing claims unconscionable); *Circuit City Stores, Inc., v. Adams*, 279 F.3d 889, 894-95 (9th Cir. 2002) (finding strict one year statute of limitations in arbitration agreement deprived the

that the employee pay the cost of the arbitrator,<sup>158</sup> alone or in combination,<sup>159</sup> could form the basis of a successful challenge to the arbitration requirement.<sup>160</sup> If the employee is not given a role in selection of the arbitrator, that may provide another basis for challenge.<sup>161</sup> A successful legal challenge to the arbitration agreement could result in either complete invalidation or severance of the offending portion while enforcing the remainder of the agreement.<sup>162</sup> This potential for legal challenge to arbitration interferes with the primary goals of arbitration—a low-cost, speedy, and final determination of the dispute. Further, if the arbitration agreement is invalidated, it may prevent achievement of the employer’s goal of limiting the employee to one forum for all claims.

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employee of continuing violation doctrine for extending limitations period which was available under the statute).

157. *See, e.g.,* Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269, 278-79 (3d Cir. 2004) (finding unconscionable requirement that each party pay own attorneys’ fees where underlying claims based on Title VII and Virgin Islands law would allow recovery of attorneys’ fees); *Alexander*, 341 F.3d at 267 (finding damage limitations and requirement that employee pay own attorneys’ fees unconscionable where underlying legal claim would allow greater damages and recovery of attorneys’ fees); *Paladino v. Avnet Computer Techs. Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (refusing to force plaintiff to arbitrate Title VII claims under agreement that limited plaintiff to contract damages because it was “fundamentally at odds with the purposes of Title VII”).

158. *See* *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1484-85 (D.C. Cir. 1997) (holding that employee could not be required to pay cost of arbitrator to vindicate statutory claim and interpreting the agreement to require the employer to pay the full cost of arbitration in order to find it enforceable); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663-65 (6th Cir. 2003) (stating that if payment of arbitration costs would prevent vindication of statutory rights, as it would in many cases of lower paid employees, such provisions are unenforceable); *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 670-71 (Cal. Ct. App. 2004) (finding requirement that employee pay arbitration costs substantively unconscionable); *O’Hare v. Mun. Res. Consultants*, 132 Cal. Rptr. 2d 116, 125-26 (Cal. Ct. App. 2003) (finding arbitration agreement that required employee to pay half of arbitration costs unconscionable where such costs would not be required to vindicate age discrimination claim under state law and further finding that employer’s later agreement to cover costs could not make unconscionable agreement enforceable). *See also* *Leroy & Feuille*, *supra* note 150, at 191-92 (discussing empirical research finding that a significant minority of courts strike down either the cost-sharing provisions in arbitration agreements or the entire agreement if it requires cost-sharing).

159. *See* *Burton*, *supra* note 153, at 499 (noting that most of the cases he studied found unconscionability based on more than one reason).

160. Of course, not all courts invalidate arbitration agreements on these grounds but so long as some do, the potential for legal challenges is present and such challenges will reduce the savings to employers from arbitration. *See, e.g.,* *Mercuro v. Superior Court*, 116 Cal. Rptr. 2d 671, 682-83 (Cal. Ct. App. 2002) (finding limitation on discovery permissible, noting that adequate discovery was not the same as full discovery that would be available in court).

161. *See, e.g.,* *McMullen v. Meijer*, 355 F.3d 485, 494-96 (6th Cir. 2004) (refusing to enforce arbitration agreement for plaintiff’s Title VII claims where employer had exclusive control over the pool of potential arbitrators because plaintiff could not effectively vindicate statutory rights, remanding for a determination as to whether the provision could be severed to render the remainder of the agreement enforceable); *Mercuro*, 116 Cal. Rptr. 2d at 678-79 (finding the plaintiff’s inability to participate in the selection of the arbitrator to be a factor in finding substantive unconscionability).

162. *Mahony & Wheeler*, *supra* note 105, at 373; *Mercuro*, 116 Cal. Rptr. 2d at 683-4 (stating, “When a court finds a contract unconscionable or illegal it has several options. It may refuse to enforce the contract; it may sever the offending clause; or it may limit the application of the offending clause so as to avoid the unconscionable or illegal result. As a general rule, if the central purpose of the contract is “permeated” or “tainted” with unconscionability or illegality then the contract as a whole cannot be enforced. If, on the other hand, the unconscionability or illegality is collateral to the main purpose of the contract, and the offending provisions can be excised from the contract by means of severance or limitation, then the remainder of the contract can be enforced.” (citations omitted)).

### 3. *Modification of the Traditional Grievance Procedure*

To avoid invalidation of the traditional arbitration procedure, the parties could agree to modify the procedure when applied to statutory claims. Such a modification would create a dual-track procedure, one track for contract-based claims and one for statutory claims. The latter could allow employee control of the grievance and provide some of the protections of the statutes, such as discovery and the potential for attorneys' fees awards.<sup>163</sup> There is very little difference between this alternative and negotiation of a separate procedure for statutory claims. Therefore, the issues relating to this option will be fully discussed in the following section.

### 4. *Negotiating an Alternative Procedure for Legal Claims*

The differences between labor arbitration and statutory litigation suggest another approach to arbitration of statutory claims. The union and employer could negotiate a separate arbitration procedure for statutory claims. Negotiation of a distinct and tailored procedure could eliminate some of the problems resulting from forcing statutory claims into a procedure not designed for their resolution.<sup>164</sup> An alternative procedure could address the statute of limitations problem, applying the statutory limitations rather than the much shorter grievance limitations. The parties could negotiate discovery provisions to insure that employees are not disadvantaged in proving their claims by the absence of discovery. At the parties' option, discovery could be more limited than in litigation to reduce costs and speed the process. Additionally the alternate procedure could expressly authorize arbitrators to provide for statutory damages. There are many models in the non-union workplace for statutory arbitration procedures,<sup>165</sup> and the Due Process Protocol<sup>166</sup> includes the basic elements of a fair procedure, providing a template for

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163. For a proposal for a modified arbitration procedure for discrimination claims, including proposed contract language, see Newman, *supra* note 45, at 56-58.

164. After the *Gardner-Denver* decision, Judge Harry Edwards, then a law professor, suggested that unions and employers negotiate procedures for arbitration of certain discrimination cases which involved individual claims that the "company allegedly violated the contract and the 'law' while enforcing or applying the terms of the collective bargaining agreement." Edwards, *supra* note 80, at 273-75. Edwards argued that the procedure should incorporate the following elements: a specialized panel of arbitrators with legal expertise; an authorization to the arbitrators to consider legal principles; an employee option to use the procedure, with his or her own counsel, and forego filing a charge or lawsuit while the arbitration was pending; an expedited process taking no more than sixty days; a transcript of the proceedings; a written arbitration decision with findings of fact and conclusions of law; and full statutory remedies. *Id.* at 274-75.

165. The Dunlop Commission set forth the elements of a fair workplace arbitration procedure in its report in 1994. Those include: (1) a neutral arbitrator with knowledge of the law and the concerns of the parties; (2) a means of cost-sharing that allows the employee affordable access to the procedure; (3) employee choice of representation; (4) availability of all legal remedies; (5) a written opinion containing the arbitrator's reasoning; (6) employee access to information relevant to the claim through a fair and simple procedure; and (7) judicial review to insure consistency with the law. THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 57 (U.S. Dept. of Labor & U.S. Dept. of Commerce 1994), available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/2](http://digitalcommons.ilr.cornell.edu/key_workplace/2).

166. The Due Process Protocol, developed by representatives of the National Academy of Arbitrators, the American Arbitration Association, the American Bar Association, the American Civil Liberties

negotiation. The agreement should make provisions for arbitrator payment, also. While negotiation of these statutory protections might reduce employer interest in arbitration, the employer would still benefit from the absence of a jury, and the employee would benefit from the absence of summary judgment, allowing a full hearing on the claim.<sup>167</sup>

Because of the overlap of statutory and contractual issues, several of the issues mentioned above would still arise for the union.<sup>168</sup> The union would need to preserve the right to intervene to protect its interpretation of the collective bar-

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Union, the Federal Mediation and Conciliation Service, the National Employment Lawyers' Association and the Society of Professionals in Dispute Resolution set forth the following elements for a fair arbitration procedure: (1) employee choice of representatives; (2) arbitrator authority to award attorneys' fees as a remedy; (3) adequate but limited prehearing discovery, including depositions; (4) access to names and contact information for the parties in the arbitrator's recent cases; (5) joint selection of the arbitrator from a roster of impartial arbitrators with diverse backgrounds and relevant legal expertise; (6) a written decision consistent with the law and the rules of the agency designating the arbitrator; (7) arbitrator authority to award relief allowed by the statute(s) on which the claim is based; (8) final and binding awards with limited judicial review; 9) fee sharing unless one party cannot afford to do so, in which case other arrangements should be made with efforts to preserve arbitrator neutrality. See A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, [https://www.naarb.org/due\\_process/due\\_process.html](https://www.naarb.org/due_process/due_process.html) (last visited Apr. 7, 2010).

167. Of course, since the procedure is negotiable, the parties could include in it whatever best fit their circumstances, and employers might seek a procedure for summary judgment or other favorable provisions such as precluding class arbitration. In *Green Tree Fin. Corp. v. Bazzle*, the Supreme Court held that whether an arbitration agreement allows class claims is a matter of contract to be decided by the arbitrator. 539 U.S. 444, 447 (2003). The Court is currently considering the question of the whether to vacate an award under the Federal Arbitration Act where the arbitrator allowed class arbitration under an agreement that did not address the matter of class arbitration. See *Justices Asked to Prohibit Class Arbitration When Parties' Contract Is Silent on the Issue*, 235 Daily Lab. Rep. (BNA) at AA-1 (Dec. 10, 2009). Employers frequently use arbitration to avoid class action lawsuits. See Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 23 WAKE FOREST L. REV. 173, 205-07 (2003) (discussing impact of class actions on employers and their desire to avoid them using arbitration agreements); Paul E. Starkman, *Open Issues After Circuit City: Still No Easy Answers on Mandatory Arbitration*, 27 EMP. REL. L.J. at 69, 76 (2002) (noting that arbitration can prevent class actions, the "bane of employers"). The law regarding whether banning class actions invalidates an arbitration agreement is unsettled. See Hodges, *supra*, at 211-18 (discussing conflicting cases and also arguing that a class action ban violates the National Labor Relations Act). An arbitral ban on class actions could discourage claims regarding failure to pay overtime or failure to pay for preliminary and postliminary activities, since these cases involve small amounts of damages for each individual, which would be outweighed by the cost of arbitration. See *Aggressive Plaintiffs' Bar, Labor Secretary Spotlighting FLSA Compliance, Speaker Says*, 127 Daily Lab. Rep. (BNA) at C-1 (July 7, 2009) (discussing explosion of Fair Labor Standards Act claims, including collective actions); Hodges, *supra*, at 211-16 (discussing impact of arbitral ban on collective actions on Fair Labor Standards Act cases which typically involve small individual claims); *Franco v. Athens Disposal Co.*, 90 Cal. Rptr. 539, 552 (Cal. Ct. App. 2009) (finding waiver of class arbitration unconscionable in case involving alleged violation of state law requiring meal and rest period breaks because, *inter alia*, the size of each individual's claim was small). Cf. *Pomposi v. GameStop, Inc.*, No. 3:09-cv-340, 2010 WL 147196 (D. Conn., Jan. 11, 2010) (finding that collective action waiver did not make arbitration agreement unenforceable in claim for overtime pay under the Fair Labor Standards Act and state law because the disparity between the cost and the potential recovery was not so great as to make individual litigation or arbitration ineffective). For a case where collective claims under the Fair Labor Standards Act were intertwined with the provisions of the collective bargaining agreement, see *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009) (holding that collective bargaining agreement provision excluding changing of clothes from compensable time covered putting on and removing protective equipment and therefore the employees were not entitled to pay under the Fair Labor Standards Act, which allows unions and employers to exclude pay for changing clothes through collective bargaining).

168. See *supra* notes 147-148, 151 and accompanying text.

gaining agreement and the rights of other employees. With a separate procedure controlled by the employee and his or her chosen representative, however, the union may have a stronger argument that the duty of fair representation does not apply.<sup>169</sup> While the employee may still have some difficulty obtaining counsel, the difficulty would not be exacerbated by limits on damages and attorneys' fees.<sup>170</sup> The presence of the union, with its institutional knowledge, and the protection provided for potential employee witnesses against retaliation by the contractual requirement of just cause for discipline, might make these cases more attractive to attorneys than cases requiring arbitration in nonunion workplace. Additionally, outside counsel for unions might provide a ready source of attorneys for employees in these cases.<sup>171</sup>

With a separate procedure or modified traditional procedure for statutory claims, there would remain a need to determine which claims belong to which forum. As noted earlier, many contractual and statutory claims overlap and could be properly brought in either forum. The best option may be to provide that the employee can bring the claim in either forum but not both.<sup>172</sup> The contractual grievance procedure still would have some appeal because of union representation and the ability to assert both contractual and statutory claims in many cases. For example, if the contract contain a nondiscrimination clause, a discharge could be challenged both as without just cause and discriminatory. In the statutory procedure, the only claim would be discrimination. But the statutory procedure would provide employees with discovery, statutory damages, and the right to choose their own representative. Employees who did not grieve quickly enough might be limited to statutory claims because of the longer limitations period. To avoid deprivation of a forum, the contract could contain provisions that would preserve the right to the statutory procedure if the union did not arbitrate the contractual claim.

An alternative to the employee option would be to negotiate specific guidelines about which disputes belong in which forum or to allow the union to decide (which would still require specified criteria to minimize duty of fair representation

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169. See Hodges, *supra* note 35, at 155-56 and cases cited therein (noting that duty of fair representation arose from the exclusivity of union representation in negotiations and contract administration and should not be applied in situations, such as statutory claims, where the employee is not bound to union representation). Under this theory, while negotiation of the procedure would be subject to the duty, arbitration of claims would not be.

170. Any limitations on discovery might continue to discourage counsel if they appear to create difficulty in proving the claim. See *supra* notes 136, 152 and accompanying text; Palefsky, *supra* note 152, at 535; Maltby, *supra* note 152, at 33.

171. The union should avoid preferential treatment of any employee in referral to counsel or assistance with the claim, however, unless it is clear that the duty of fair representation doesn't apply or the difference is based on nondiscriminatory, relevant factors such as the merits of the claim. See *supra* notes 131, 151-152 and accompanying text.

172. In the public sector, where employees may have both civil service or tenure and contractual protection, they often have a choice of claims. See MASS. GEN. L. ANN. Ch. 150E § 8 (West 2004) (providing that employees with collective bargaining agreements may elect to use the grievance and arbitration procedure and if they do, it is the exclusive method of resolving disputes rather than the provisions of the civil service law which provide for hearings when employees are disciplined or terminated); MINN. STAT. ANN. § 179.A20(4) (West 2006) (stating that employees covered by both collective bargaining agreements and civil service systems may pursue a claim under the grievance procedure or the civil service appeals procedure but not both, and that teachers may choose arbitration under a collective bargaining agreement or a hearing before the school board but not both).

problems.)<sup>173</sup> In the latter case, the criteria would be applied by the union alone and not subject to contractually binding requirements. Unlike the employee option, the union decision probably would be subject to the duty of fair representation, as it would bind the employee because the employee is exclusively represented by the union.<sup>174</sup>

Use of this alternative would meet the employer's objective of avoiding two bites at the apple, while providing a more appropriate forum for statutory arbitration. It would avoid forcing statutory claims into the contractual procedure, which is not designed for such claims. The enhanced procedures would reduce the likelihood of employee legal challenge to the procedure. While more claims would reach arbitration than would be the case if claims were limited to union-represented traditional arbitration, the employer would obtain a single forum with some advantages over the courts. The union would have the benefit of providing the employees with a better arbitral forum than many nonunion employees have and might be able to persuade the courts not to apply the duty of fair representation to its decisions regarding employee statutory claims.

### 5. *Optional Arbitration*

A final possibility is negotiation of an option for employees, which permits them to arbitrate or litigate but not both. This approach could be used with either the traditional labor arbitration procedure or with the addition of an alternative procedure. The advantage of this approach for the employer is that it limits the employee to one forum for overlapping contractual and legal claims. If the union can completely waive the employees' right to litigate, then an election of remedies provision should be permissible as well.<sup>175</sup> To insure compliance with the duty of fair representation, the union should provide information to all employees with potential legal claims about the election provision of the agreement and recommend consultation with an attorney to assist in making the decision. Further the parameters of choice should be carefully considered. Would the mere filing of a grievance alleging violation of a contract constitute a choice or does the choice take place at the point of arbitration when contractual and legal claims overlap?<sup>176</sup>

173. See *supra* notes 130-131, 151-152 and accompanying text.

174. See *supra* note 169 and accompanying text.

175. *But see* EEOC v. Bd. of Governors of State Colls. & Univs., 957 F.2d 424, 431 (7th Cir. 1992) (holding that provision of collective bargaining agreement that conditioned the hearing of grievances in arbitration upon an employee's refraining from filing discrimination claims under the ADEA and Title VII was discriminatory on its face). *Cf.* Richardson v. Comm'n on Human Rts. & Opportunities, 532 F.3d 114, 124 (2d Cir. 2008) (upholding election-of-remedies provision in collective bargaining agreement because it was a "'reasonable defensive measure' utilized by [the] employer to litigate discrimination claims brought against it effectively and efficiently"), *cert. denied*, 130 S. Ct. 56 (2009). In their opposition to the petition for certiorari in *Richardson*, the employer and union cited *Pyett*, arguing that if a waiver is permissible then putting the employee to a choice of remedies is also permissible. See *Retaliation: High Court Will Not Review Case Where Bargaining Provision Required Forum Choice*, 191 Daily Lab. Rep. (BNA) at B-8 (Oct. 6, 2009).

176. It would seem clear from the Supreme Court's decision in *EEOC v. Waffle House, Inc.* that regardless of any provision negotiated, the employee could still file a claim with any administrative agency with statutory enforcement authority and the agency could litigate if it chose to do so. 534 U.S. 279, 297 (2002). Given the small number of cases litigated by enforcement agencies, this would not be a deterrent to negotiation of waiver provisions, any more than it has deterred those employers who

If the choice is made earlier, it must be made with the understanding that there is no guarantee of union arbitration of the contractual grievance. The employer, however, might be more reluctant to agree to this option if the union's failure to arbitrate allowed the employee to choose litigation at that point, assuming the statute of limitations has not run. On the other hand, depending on the courts' approach to the question left open in *Pyett*, this may be the result in any case.<sup>177</sup>

### C. The Impact of Negotiated Waivers on Legalism in Arbitration

If I am correct that more waivers will be negotiated after *Pyett*, then legalism will almost certainly increase in traditional labor arbitration, unless legal claims are funneled to a separate statutory arbitration procedure. Although the overlap of legal and contractual claims has contributed to the increasing legalism to date,<sup>178</sup> incorporation of a waiver will add more legal issues to arbitration.<sup>179</sup> The possibility of duty of fair representation suits from employees who have no forum for their legal claims may encourage unions to arbitrate more cases involving legal claims. Almost certainly, those unions that can afford to do so will feel compelled to consult legal counsel more often and perhaps involve them in arbitration because of the legal uncertainties resulting from *Pyett* and the concerns about duty of fair representation claims.

Even if resource limitations restrict the number of arbitrations, the legal claims will likely take on more prominence in arbitration. Duty of fair representation claims are less likely if any legal issues are raised and ruled on by the arbitrator. While cases to date have left to unions the choice of arbitration strategy, even where the union declined to raise legal arguments and focused on contractual claims instead,<sup>180</sup> if an employee's subsequent legal claim is precluded, an increase in duty of fair representation claims is a predictable result. Such claims are costly for the union to defend and drain resources that could be used for employee representation. Thus, attorneys may advise the union to make the legal arguments even if they are deemed weak or less persuasive than the contractual argument, so long as the legal argument is not detrimental to the union's interests. The employer also has an incentive to focus on legal issues, for it will want to insure that even if the employee somehow persuades a court to hear the case, the legal issue will have been decided and the court will give the arbitrator's decision great

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desire to impose arbitration on their nonunion employees. See Mahony & Wheeler, *supra* note 105, at 375 (noting that in 2000, the EEOC filed only 291 of 21,302 discrimination cases). In fiscal year 2009, the agency filed only 276 lawsuits, continuing a five year trend of declining legal actions initiated by the agency. *EEOC Filed Fewer Suits in Fiscal 2009, Law Firm Says*, 217 Daily Lab. Rep. (BNA) at A-1 (Nov. 13, 2009). EEOC reports filing 281 lawsuits in 2009, while receiving 93,277 charges of discrimination in the private sector. *Charge Intake Remains High at EEOC, Which Had Record Monetary Results in FY09*, 220 Daily Lab. Rep. (BNA) at A-7 (Nov. 18, 2009). Regardless of which figure is correct for 2009 lawsuits, the number is miniscule in comparison to charges filed.

177. See *supra* notes 87-92 and accompanying text.

178. Feller, *supra* note 96, at 113-24.

179. I do not want to overemphasize the effect of *Pyett* on legalism. While I anticipate negotiation of some waivers, not all contracts will include them and the absence of waivers will limit *Pyett*'s effect on legalism. As noted *infra*, however, even where waivers are not intentionally negotiated *Pyett* may affect the decisions of unions, employers and employees regarding which cases to arbitrate and which arguments to emphasize in arbitration. See *infra* notes 189-224 and accompanying text.

180. See *supra* notes 129-131 and accompanying text.

weight or perhaps even preclusive effect.<sup>181</sup> Even where the employee has opted for grievance arbitration and waived litigation under a contract with an employee option, the risk-averse union and employer are likely to emphasize any legal arguments in hopes of foreclosing any potential for later litigation.

Where the employee is free to arbitrate if the union declines, the number of legal claims in arbitration will increase, for at least some employees will choose to arbitrate.<sup>182</sup> If possible,<sup>183</sup> the employees will hire attorneys who specialize in the legal claims at issue. Like attorneys representing unions in traditional labor arbitration, these attorneys will demand more legal process.<sup>184</sup> Arbitrators will see more pure legal claims in labor arbitration and arbitrators with legal expertise may obtain more appointments. If the process is not amended for legal claims, however, some employees and their attorneys may choose to fight arbitration in court. If employees frequently and successfully challenge the arbitration provision in court as unconscionable or more likely, insufficient for vindication of statutory rights, *Pyett's* effect on legalism in arbitration will be impacted. If employees are able to escape arbitration, then either the procedures will be modified by the parties, almost certainly becoming more legalistic,<sup>185</sup> or more legal claims will be brought in court, and arbitration will return to its pre-*Pyett* form. Given the Supreme Court's current preference for arbitration, however, along with that of some lower courts, it seems likely that, over time, the bases for employee challenges to arbitration may be limited, confining more employees to arbitration.

The use of a separate procedure for arbitration of legal claims should minimize increasing legalism in the labor arbitration procedure as a result of *Pyett*. Some cases with overlapping legal and contractual claims that would have been arbitrated under the contract may end up in the statutory procedure, particularly if potential damage awards are higher. Many cases in the statutory procedure will be those that would have been litigated instead, however. The statutory procedure would certainly be legalistic, although the extent will depend on the precise elements negotiated by the parties. It is possible that, over time, legalism might actually decrease in the contractual procedure where a statutory procedure exists, but that is an unlikely prospect. There will still be legal issues, like the FMLA,<sup>186</sup> that intertwine with contractual issues and provide legal arguments to support contractual claims in arbitration. Additionally, the parties are accustomed to the more

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181. See *infra* notes 199-224 and accompanying text discussing two post-*Pyett* cases where one district court found an arbitration decision under a collective bargaining agreement preclusive in the absence of a waiver and another deferred to a contractual arbitration decision in a statutory action.

182. Employees might also choose to fight the arbitration requirement, arguing that the traditional union grievance procedure contains insufficient safeguards to insure that employees can effectively vindicate their statutory rights. See *supra* notes 153-162 and accompanying text.

183. See *supra* note 152.

184. See Sylvester Garrett, *The Role of Lawyers in Arbitration*, 14 PROC. NAT'L ACAD. ARB. 102, 105-114 (1961); Albert Brundage, *Discussion*, 14 PROC. NAT'L ACAD. ARB. 124, 125 (1961); Robert H. Canan, *Discussion*, 14 PROC. NAT'L ACAD. ARB. 129, 130-32 (1961); Dash, *supra* note 42, at 110. But see Perry A. Zirkel & Andriy Krahnal, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?*, 16 OHIO ST. J. ON DISP. RESOL. 243, 259 (2001) (noting that there is not sufficient data to demonstrate an actual increase in legal formalism).

185. The parties might add discovery, for example.

186. As noted earlier, challenges to discipline for absenteeism will often involve claims that the employee was penalized for absences protected by the FMLA. Malin, *supra* note 49, at 25-26.



legalistic process that has evolved and are likely to continue to use it.<sup>187</sup> Even nonlawyers who arbitrate use legalized processes. Indeed, some arbitrators have suggested that the nonlawyers find the legal procedures more appealing than the lawyers.<sup>188</sup> Thus, in all probability, the contractual procedure will not change even if some legal claims are relegated to a separate arbitration procedure.

With an employee option, legalism in arbitration may increase but less than with a binding arbitration provision. If the choice is between the labor arbitration procedure and litigation, then legalism in labor arbitration will increase where employees choose that option. Whether the employee or the union is controlling the arbitration, the legal issues will not be ignored and will probably be emphasized. The union will focus on the legal issues, if only to avoid a duty of fair representation claim. If a statutory procedure is negotiated, however, the impact on labor arbitration should be reduced.

#### D. The Impact of Waiver Uncertainty on Legalism

*Pyett* will almost certainly encourage more employers to contest unionized employees' lawsuits, urging waiver on the basis of existing contract language. While *Pyett* held that waivers are permissible and *Wright* held that waivers must be clear and unmistakable, neither gave crystal clear direction as to what contractual language is required to meet the test. The *Pyett* Court found a waiver because the plaintiffs had effectively conceded the issue in the courts below. Nevertheless, the contract language there, which barred discrimination under a list of laws including the ADEA and stated in the same provision that the grievance and arbitration procedure was the "sole and exclusive remedy" for such claims, would seem to constitute a clear and unmistakable waiver.<sup>189</sup> *Wright* provided some further guidance.<sup>190</sup> It found the general arbitration provision, referring to arbitration of "matters in dispute" insufficient, stating that the reference could be solely to contract matters.<sup>191</sup> The Court there further noted the contract did not incorporate the statute and did not even contain a non-discrimination clause.<sup>192</sup> As noted previously, the Fourth Circuit has interpreted *Wright* in a series of cases, articulating two circumstances where it will find a clear and unmistakable waiver. Either an arbitration clause that includes statutory claims or incorporation of a statute into an agreement with an arbitration provision waives the right to litigate.<sup>193</sup> A gener-

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187. As Arbitrator Dennis Nolan points out, the procedure has evolved in response to the needs and desires of the parties. Nolan, *supra* note 105. Proposals to simplify and reduce formality abound, however, and some parties utilize processes that eschew some of the formalities of litigation. See, e.g., Nicolau, *supra* note 41. One unresolved question after *Pyett* is whether courts will bind employees to arbitrate under such systems or give weight, preclusive or otherwise, to decisions from such tribunals. See Hyde, *supra* note 2 (discussing whether the decision in *Pyett* will be applied to dispute resolution systems using joint labor-management grievance committees as the final step in the grievance procedure); *Saunders v. Int'l Longshoremen's Ass'n*, 265 F. Supp. 2d 624, 627-28 (E.D. Va. 2003) (finding waiver of judicial forum where grievances were heard by a joint labor-management committee rather than a neutral arbitrator).

188. Zack, *supra* note 42, at 108; Garrett, *supra* note 184, at 107-08.

189. For the full provision, see *supra* note 99.

190. *Wright v. Maritime Serv. Corp.*, 525 U.S. 70 (1998)

191. *Id.* at 80.

192. *Id.*

193. See *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 322 (4th Cir. 1999).

al anti-discrimination requirement or a clause that tracks the statutory language is insufficient to waive the right to litigate in the Fourth Circuit, however.<sup>194</sup>

If the Fourth Circuit's test prevails, it is doubtful that unintentional waivers will be widespread. Without a definitive ruling from the Supreme Court as to what constitutes an effective waiver, however, employers have an incentive to move to dismiss employee lawsuits if the contract language can even arguably be construed as requiring arbitration.<sup>195</sup> Where arbitration has already occurred, the waiver argument will be combined with arguments for preclusion and deferral. Further, post-*Pyett*, unions cannot afford to dismiss legal arguments on the grounds that the employee can bring those claims elsewhere, unless it is certain that no waiver exists. Plaintiffs' lawyers will be looking for ways to avoid arbitration (or deference to an unfavorable arbitration award that has already issued). The obvious answer is a suit for duty of fair representation against the union. Accordingly, the well-advised union faced with a grievance where there are potential legal claims will assess the contract to determine whether a waiver argument is possible.

If the union is certain no waiver exists, it might eschew arbitration in some cases to allow the employee to sue without having to contend with a prior arbitration decision, particularly if the employee has an attorney and has already decided to take legal action.<sup>196</sup> But the mere possibility of a waiver argument might cause the union to arbitrate more cases with legal implications or to make more legal arguments in those cases that it would have arbitrated on contractual grounds. And more legal arguments portend more lawyers in arbitration and more emphasis on judicial-like procedures. Again, the rationale traces back to avoiding duty of fair representation claims. Resource limitations will have some dampening effect on this trend. But despite those limitations, the influence will be present and may well cause more legalism in arbitration.

### *E. The Impact of Pyett on Preclusion and the Weight Accorded to Arbitral Decisions by Courts*

In *Pyett*, Justice Thomas distinguished *Gardner-Denver* as a preclusion case rather than a case about enforcement of an arbitration agreement waiving a judicial forum for statutory claims.<sup>197</sup> In a footnote, however, the opinion suggested that *Gardner-Denver* might be ripe for overruling given the alteration in the Court's view of arbitration since 1974.<sup>198</sup> A few lower courts have read *Pyett*

194. *Id.* at 323; *Carson v. Giant Food Inc.*, 175 F.3d 325, 331 (4th Cir. 1999).

195. This trend has already started. *See, e.g.*, *Catrino v. Ocean City*, No. WMN-09-505, 2009 U.S. Dist. Lexis 59783, at \*8-9 (D. Md. July 14, 2009); *Dunnigan v. Peoria*, No. 09-CV-1064, 2009 U.S. Dist. Lexis 71797, at \*6-9 (C.D. Ill. July 15, 2009); *Markell v. Kaiser Found. Health Plan*, No. CV. 08-752-PK, 2009 U.S. Dist. Lexis 95891, at \*19-20 (D. Or. Sept. 14, 2009); *Shipkevich v. Staten Island Univ. Hosp.*, No. 08-CV-1008, 2009 U.S. Dist. Lexis 51011, at \*5-7 (E.D.N.Y. June 16, 2009).

196. Any decision may be given weight by the court and a negative decision could adversely affect the employee's statutory claim. *See infra* note 223 and accompanying text.

197. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1467-69 (2009).

198. *Id.* at 1469 n.8. The declaration was qualified by the statement that overruling would be appropriate if the dissent's broad reading of the case was correct. *Id.*

broadly,<sup>199</sup> precluding litigation or deferring to the arbitration, in contradiction to *Gardner-Denver*, which refused to do either. This expansive reading of *Pyett* may be prompted by the footnote suggesting that *Gardner-Denver* may no longer be good law or by the recognition that *Pyett* rejected much of the rationale underlying *Gardner-Denver*.

In *Mathews v. Denver Newspaper Agency LLP*, the U.S. District Court for the District of Colorado found the plaintiff's Title VII claims precluded by a prior arbitration under a collective bargaining agreement.<sup>200</sup> The court concluded that there was no waiver of a right to a judicial forum, but because the plaintiff participated in arbitration using his own lawyer and the arbitrator considered and decided the claim that his demotion was discriminatory, the court applied *res judicata* to bar the judicial action.<sup>201</sup> While the court seemed to suggest that the statutory claim was arbitrated, the judge quoted the arbitrator as stating that the contractual anti-discrimination provision recognized that actions that violate the statute also violate the contract and provided a contractual remedy for those violations.<sup>202</sup> The court followed by stating that the parties "recognized that the CBA's arbitration agreement covered Plaintiff's statutory claims . . . ."<sup>203</sup>

But making a statutory violation also a contract violation is not the same as agreeing to arbitrate a statutory claim, thereby waiving the right to go to court. Employers and unions regularly contract to bar discrimination on the same bases as the law in their agreements.<sup>204</sup> Contracts also commonly state that the parties agree to comply with the law. And where the contract provision parallels the law, arbitrators will typically look to the law for guidance in interpreting the contract.

199. A few lower courts reached similar conclusions after *Wright*, so perhaps I am overemphasizing the potential effect of these decisions. *See, e.g.,* *Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320, 336 (E.D.N.Y. 2000) (applying preclusive effect to the decision of the arbitrator, although also finding a waiver, albeit on dubious grounds); *Serafin v. Conn. Dep't of Mental Health & Addiction Servs.*, No. 3:98CV398, 2005 U.S. Dist. Lexis 3603 (D. Conn. Mar. 9, 2005) (precluding litigation of FMLA claim because plaintiff voluntarily arbitrated her statutory claim under the collective bargaining agreement at her own expense, with her own attorney and without the union). It is possible that unions and employers will not change their current practices with respect to contractual grievances with legal implications. Because *Pyett* clearly authorized a waiver, however, interest has been widespread among attorneys practicing in the field and thus, the case and those of the lower courts interpreting it seem likely to have an impact on the practices of unions and employers. *See* Kevin P. McGowan, *Supreme Court Ruling on Arbitration Could Hurt Unions, Workers With Bias Claims, Lawyer Warns*, 62 Daily Lab. Rep. (BNA) at AA-1 (Apr. 3, 2009); Lawrence E. Dubé, *Panelists Discuss High Court's Pyett Ruling and Issues Confronting Contract Negotiators*, 146 Daily Lab. Rep. (BNA) at B-1 (Aug. 3, 2009); Lawrence E. Dubé, *ABA Panelists See Legal, Practical Issues Remaining After High Court's Pyett Ruling*, 213 Daily Lab. Rep. (BNA) at C-3 (Nov. 6, 2009).

200. No. 07-CV-02097, 2009 WL 1231776 (D. Colo. May 4, 2009).

201. *Id.* at \*5-6.

202. *Id.* at \*5.

203. *Id.*

204. Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 319 (2007) (citing BNA, *Basic Patterns in Union Contracts*, finding that in 1995, eighty-seven percent of union contracts contained non-discrimination clauses); *Components of the Contract*, *Collective Bargaining Negot. & Cont.* (BNA), at 8:3701 (stating that almost all collective bargaining agreements contain nondiscrimination clauses based on some or all of the following categories: "race, color, creed, religion, gender, national origin, age, qualified disability, marital status, or sexual orientation"). Indeed failure include a nondiscrimination clause in the agreement may risk a finding of liability for discrimination. *See* Hodges, *supra* note 35, at 162-63.

But a non-discrimination clause or an agreement to comply with the law is not a waiver of the right to go to court on the legal claim.<sup>205</sup>

The court, perhaps justifiably, may have been unhappy with the plaintiff's attempt to end run the result of the arbitration decision in a case where he controlled the arbitration and the arguments made therein,<sup>206</sup> but *Gardner-Denver*, which was not overruled, rejects the application of preclusion based on a contractual arbitration.<sup>207</sup> *Gardner-Denver* also rejected the application of the doctrine of election of remedies.<sup>208</sup> The *Mathews* court seems to hold that even without a contractual waiver, an employee may waive the right to litigate by participating in an arbitration that raises discrimination claims analogous to the law and using the law to interpret the agreement.<sup>209</sup>

Although it is not clear from the opinion, it is possible that *Mathews* presented his Title VII claims directly to the arbitrator. If so, the court's decision is more understandable. Yet it seems a subtle distinction since arbitrators regularly look to the law to interpret contractual provisions patterned after the law.<sup>210</sup> Did *Mathews* truly understand that he was waiving his right to litigate? And what guidance does this offer the union? If it makes the legal argument it risks waiving the employee's right to litigate even in the absence of a contractual waiver, yet if it does not, it may lose the claim or provoke a duty of fair representation suit by the employee.

Another troubling post-*Pyett* decision is *Tewolde v. Owens & Minor Distribution, Inc.*<sup>211</sup> The union arbitrated and lost two grievances, one challenging the employer's refusal to promote *Tewolde* and the other challenging his subsequent discipline, discharge, and discriminatory assignment of cleaning duties.<sup>212</sup> *Tewolde* filed a statutory discrimination claim based on the failure to promote and later a claim alleging that the assignment of cleaning duties and the discipline and discharge constituted statutory retaliation.<sup>213</sup> The court read *Pyett* as requiring "an extraordinary level of deference"<sup>214</sup> to an arbitrator's decision, citing a section of the opinion relating to judicial review of an arbitrator's decision under the Federal Arbitration Act.<sup>215</sup> The court stated that if an arbitrator's decision could directly limit judicial review of a claim based on a statute, then deference that precludes statutory claims is also warranted.<sup>216</sup> But this was precisely the distinction made

205. See *supra* notes 100-101, 190-194 and accompanying text.

206. It is not clear whether the court would have reached the same result had the union, rather than the plaintiff, arbitrated the claim.

207. In *Gardner-Denver*, there was a nondiscrimination clause in the agreement and the issue of race discrimination was raised in the arbitration hearing but the arbitrator did not address it directly, ruling only that the discharge was for just cause. *Alexander v. Gardner-Denver*, 415 U.S. 36, 42, & n.2. The court found that arbitration of the contractual claim of discrimination did not preclude litigation of a statutory claim of discrimination. *Id.* at 52.

208. *Id.* at 50-51.

209. The Court in *Gardner-Denver* said "mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver." *Id.* at 52.

210. *Sovern, supra* note 58, at 30.

211. No. 07-CV-4075, 2009 WL 1653533 (D. Minn. June 10, 2009).

212. *Id.* at \*4-5.

213. *Id.*

214. *Id.* at \*9.

215. *Id.*

216. *Id.*

by Justice Thomas between *Pyett* and *Gardner-Denver*. *Gardner-Denver* expressly rejected both preclusion and deferral to arbitrators' decisions on contractual issues arising out of the same facts.<sup>217</sup> While the *Gardner-Denver* Court did hold that the court could give to the arbitrator's decision the weight that it warranted,<sup>218</sup> the *Tewolde* court "deferred" to the decisions of the arbitrators, granting summary judgment against *Tewolde*.<sup>219</sup> Perhaps this is only a matter of semantics and the court used the term "deferral" as equivalent to giving substantial weight to the decision, which is clearly permissible. Since the court engaged in some discussion of the facts this is a plausible interpretation, although the court certainly should have been more careful in its language.

*Mathews* and *Tewolde* illustrate the potential for an expansive reading of the *Pyett* decision.<sup>220</sup> While other courts have declined to read *Pyett* so broadly,<sup>221</sup> these two decisions alone have implications for legalism in arbitration. Since some courts have eroded the impact of *Gardner-Denver* by precluding litigation or deferring to labor arbitration decisions, the union and employer must consider the possibility that others will follow. They cannot ignore the legal implications of contractual arbitrations and are more likely to consult with legal counsel when faced with arbitration of such a claim. Even where there is no waiver, as in the cases discussed above, the parties must consider the potential effect of *Pyett*.

These cases create a dilemma for the union contemplating arbitration. One strategy would be to downplay or avoid the legal issues, in hopes of preserving them for the employee's later lawsuit. Since the union's expertise is contractual issues, a focus on the contractual arguments may provide the greatest chance of prevailing in the arbitration. If the union wins the case, the adverse impact on any subsequent legal claim will be limited.<sup>222</sup> In some cases, however, the legal ar-

217. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-59 (1974).

218. *Id.* at 60.

219. *Tewolde*, 2009 WL 1653533, at \*10.

220. These cases suggest that the *Pyett* decision may have returned us to the state of the law prior to *Gardner-Denver*, where courts variously treated legal claims following contractual arbitrations using the doctrines of deferral, election of remedies and preclusion. See *Siber*, *supra* note 96, at 711-13. *Gardner-Denver* settled the law by rejecting the application of all three doctrines, but it appears that *Pyett* has reinvigorated them despite declining to overrule *Gardner-Denver*.

221. In *Markell v. Kaiser Foundation Health Plan*, for example, the Oregon District Court refused to accord preclusive effect to a contractual arbitration decision in a legal action for discrimination arising out of the same facts, where there was no agreement to arbitrate statutory claims. No. 08-CV-752, 2009 U.S. Dist. Lexis 95891, at \*20-21 (D. Or. Oct. 15, 2009). And in *Catrino v. Ocean City*, the District Court of Maryland found that where the arbitration provision covered only contractual discrimination claims, *Gardner-Denver* rather than *Pyett* applied and therefore rejected the employer's preclusion and election of remedies arguments. No. WMN-09-505, 2009 U.S. Dist. Lexis 59783, at \*13-14, (D. Md. July 14, 2009). *Accord*, *St. Aubin v. Unilever HPC, NA*, No. 09 C 1874, 2009 U.S. Dist. Lexis 55626, at \*9-11 (N.D. Ill. June 26, 2009).

222. The employee might still choose to litigate a legal claim to obtain additional damages unavailable in arbitration. If the arbitration is given res judicata effect, however, the employee will be unable to proceed on the statutory claim. Res judicata should only apply if the statutory claim is actually litigated in the arbitration. Res judicata or claim preclusion applies to foreclose a party from relitigating a claim which was or could have been litigated in a prior case. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 18 FEDERAL PRACTICE & PROCEDURE § 4402. Since *Pyett* requires a waiver of the right to litigate the statutory claim, if there is no waiver and no litigation of the statutory claim, a court should not bar an employee from litigation on the grounds that the claim was or should have been litigated in the arbitration. Absent application of res judicata, a victory in arbitration should benefit the employee on the statutory claim.

gument may be either stronger or unavoidable. Additionally, even if a court does not find the arbitration preclusive or defer to it, it may give the arbitrator's decision great weight.<sup>223</sup> Failure to raise the legal argument may prevent it from ever being heard and thereby prompt a duty of fair representation claim. Consultation with the employee or the employee's attorney, if one has been hired, may assist the union in deciding how to handle the case and may reduce the likelihood of a duty of fair representation claim against the union.

Given these difficulties in determining the best approach in arbitration, many unions are likely to employ an attorney to evaluate cases with legal implications to determine whether, and to what extent, to make legal arguments.<sup>224</sup> Even if legal arguments are deemphasized in a particular case, the increased use of attorneys in arbitration will insure that judicial-like procedures are prominent features of arbitration.

As for employers, their arguments will respond to those made by unions. If the unions urge legal claims, management will respond to them. Management's task is simpler, however. The goal is to win the arbitration on whatever ground makes the strongest argument. A victory will allow the employer, even in the absence of a waiver of the right to litigate, to argue that the arbitrator's decision is preclusive, entitled to deference, or entitled to great weight. Acceptance of any of these arguments virtually guarantees that the employer will prevail in court after a successful arbitration. Like the union, however, the employer is more likely to use an attorney in the arbitration if it anticipates a subsequent legal action. The importance of a victory is enhanced, as it will do double duty. Saving money by foregoing legal counsel in arbitration will be viewed as penny wise and pound foolish in such cases. The lawyer will have the expertise to assess the case and determine the best strategy for prevailing in both litigation and arbitration. Accordingly, even in cases where no waiver exists, *Pyett* has the potential to increase legalism in arbitration.

#### IV. ALTERNATIVES TO ARBITRATION

*Pyett* might prompt unions to consider alternatives to arbitration to achieve the goals of increased compliance with statutory requirements and quicker, cheaper resolution of disputes. Mediation of legal claims offers an alternative method of resolving disputes that may meet the needs of employers, unions, and em-

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223. Early evidence regarding application of *Gardner-Denver* indicated that subsequent litigation seldom resulted in a decision that differed from the outcome of labor arbitration. See Michele M. Hoyman & Lamont E. Stallworth, *Arbitrating Discrimination Grievances in the Wake of Gardner-Denver*, 106 MONTHLY LAB. REV. 3, 6 (1983); Michele M. Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. 49, 55 (1984). See also Malin, *supra* note 49, at 21-23 (discussing cases where courts rely on prior arbitration awards to decide statutory claims).

224. Again, I do not want to overemphasize the extent to which unions will draw on attorneys in grievances with legal implications. Resource limitations may affect decisions as to how often to use attorneys in arbitration. Some unions may limit the use of attorneys despite the risks involved in these cases. Some unions may continue to operate as they have pre-*Pyett*. If duty of fair representation claims increase, however, unions may be forced to reevaluate these decisions.

employees.<sup>225</sup> Mediation would not preclude litigation but might resolve disputes, effectively reducing the need for legal action, accomplishing the employer's goal of reducing the cost of dispute resolution and avoiding litigation. Unions could assist employees in mediation, reducing their costs as well. Since *Pyett* has created a need to train union representatives about legal issues, this training could aid unions in representing their constituents in mediation as well, providing an additional benefit to union members. Because of the potential overlap between contractual and legal claims, unions negotiating a mediation option would need to ensure that mediation neither interfered with the arbitration of contractual claims nor lulled employees into complacency about the need to file charges to preserve their legal claims.<sup>226</sup> A carefully crafted mediation option, however, might result in the resolution of some statutory claims to the satisfaction of all parties. Diverting some claims to mediation might also reduce the number of legal claims in arbitration, thereby limiting legalism to some extent.

## V. CONCLUSION

Unions can and should be strong advocates for employee legal rights. The decision in *Pyett* should prompt unions and their attorneys to reconsider the best way for unions to protect employees from violations of both their contractual and legal rights.<sup>227</sup> The unresolved questions in the case will hamper efforts to respond most effectively to the decision, however. Various unions and employers may reach different conclusions on how to respond to *Pyett* in contract negotiations, arbitration, and court. If more legal claims are arbitrated in the traditional labor arbitration system, however, legalism is likely to increase. Union officials and human resource personnel may be replaced in arbitration by attorneys. An alternative arbitration or a mediation system for legal claims may help preserve the traditional arbitration system, allowing it to perform its function as an extension of contract negotiations, with the arbitrator as an expert "contract reader" for the parties.<sup>228</sup> Given the common overlap of legal and contractual claims, the uncertainties remaining from unresolved issues in *Pyett*, and the ever present specter of duty of fair representation claims for unions, however, creating an effective alternative system may prove difficult.

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225. For in depth discussion of mediation of legal claims in the unionized workplace, see Hodges, *supra* note 117.

226. *See id.* at 437-38. For example, under Title VII, the ADA and ADEA, charges must be timely filed with the Equal Employment Opportunity Commission as a prerequisite to any legal action. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (2006); The Age Discrimination in Employment Act of 1964, 29 U.S.C. § 626(d)(1) (2006); The Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a) (2006).

227. Marion Crain and Ken Matheny suggested some years ago that allowing unions to waive employee rights to litigate might encourage unions to become more active in supporting the rights of women and workers of color and encourage more workers to unionize. Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1839-45 (2001). *See also* Cole, *supra* note 102 (arguing that unions can and will effectively represent employees in arbitration of statutory discrimination claims). I hope that their rather more optimistic view of the effect of *Pyett* is correct. I fear, however, that the decision, coupled with resource constraints, will create more difficulty for an already beleaguered labor movement.

228. St. Antoine, *supra* note 5, at 1140.