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Arbitration Whack-A-Mole: The Federal Policy Favoring Arbitration Hammers the Rights of Individual Employees

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NOTE

Arbitration Whack-A-Mole: The Federal Policy Favoring Arbitration Hammers the Rights of Individual Employees

Huffman v. Hilltop Companies, LLC, 747 F.3d 391 (6th Cir. 2014).

SPRING E. TAYLOR*

I. INTRODUCTION

Sally and Billy are two recent college graduates entering the work force. Sally is hired by ABC Corporation. As part of Sally's new hire paperwork, she signs an employment agreement stating any employment disputes would be resolved through arbitration. Billy is hired by XYZ Company, a union shop, where his employment is governed by the collective bargaining agreement (CBA) that Union and XYZ have executed. The CBA states any disputes arising out of the CBA are to be resolved through arbitration. Both the employment agreement and the CBA's arbitration provision language are ambiguous as to whether the duty to arbitrate applies after the agreements expire and whether the right to a jury trial is waived. Both are also silent as to whether class arbitration is permitted. In due time, the employment contract and the CBA expire. Now Sally claims her employer violated a statutory fundamental right. The question remains whether her duty to arbitrate that claim continues. Based on recent cases, both Sally and Billy have a continuing obligation to arbitrate, and the agreements would be found to have post-expiration effect. Where the union would arbitrate the grievance on Billy's behalf giving his claim class-like effect, Sally is left without the advantage of a class-wide action against her employer.

In a country that protects the plaintiff's right to a day in court, it only seems natural that Sally should have the opportunity to take her cause to the courthouse. But the strong federal presumption that supports the enforcement of arbitration provisions is like a hammer that pushes plaintiffs like Sally and those in *Huffman* into the arbitration arena. In *Huffman*, the Sixth Circuit rescued an employer from an ambiguous arbitration provision contained in the employer-drafted employment

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agreement and enforced the arbitration provision as one of the provisions to survive expiration of the contract, even though it was not listed in the survival clause.

While in the context of a bargained-for contract between a union and an employer, enforcing arbitration provisions is reasonable for plaintiffs like Billy because he knows that he has additional protection because of his union membership. Sally knew that she voluntarily signed the employment agreement just like the *Huffman* plaintiffs did. But questions remain in the individual employment context: how "bargained-for" is a contract drafted by an employer, and how knowledgeable and voluntary is that employee's agreement? If Sally's results seem perplexing and at odds with the protections that individual employees should have, read on.

II. FACTS & HOLDING

Patricia Huffman, Joseph Passerino, George Pruden, Janet Carrigan, and Russell Smith (Plaintiffs) were employees of The Hilltop Companies (Hilltop)[1] an accounting, tax, and consulting firm focused in the banking, real estate, and government finance industries.[2] Hilltop hired Plaintiffs to review mortgage files from PNC Bank.[3] Each Plaintiff signed an employment agreement with Hilltop.[4] From October 2011 through January 2013, Plaintiffs were contracted to review mortgage loans and regularly worked more than forty hours per week.[5] Yet, they were not paid extra for working overtime under the Fair Labor Standards Act (FLSA)[6] because Hilltop classified them as independent contractors.[7] Asserting their classification was in error, Plaintiffs filed a FLSA class action claim for overtime wages against Hilltop in the federal district court for Southern District of Ohio.[8]

The relationship between Plaintiffs and Hilltop was governed by employment agreements, which contained both an arbitration clause and a survival clause.[9] The arbitration clause stated "any claim arising out of or relating to" the contract would be resolved by binding arbitration.[10] In response to Plaintiff's claim, Hilltop filed a motion to dismiss and compel arbitration.[11]

However, the agreement's survival clause[12] specifically enumerated twelve clauses, none of which included or referenced the arbitration clause.[13] Plaintiffs

1. Huffman v. Hilltop Cos., LLC, 747 F.3d 391, 393 (6th Cir. 2014).
2. Our Company, HILLTOP COMPANIES, http://thehilltopcompanies.com/our-company/ (last visited Aug. 11, 2015).
3. *Huffman*, 747 F.3d at 393.
4. *Id.*
5. *Id.*
6. The Fair Labor Standards Act of 1938 is codified in 29 U.S.C. §§ 201-19 (2014). The maximum number of work hours and the requirement for any time over forty hours per week are to be paid at one and one-half times the regular rate of pay is outlined in 29 U.S.C. § 207 (2014).
7. *Huffman*, 747 F.3d at 393.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. The Survival clause stated: "22. SURVIVAL. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 17, and 22 shall survive the expiration or earlier termination of this Agreement." *Id.* at 394.
13. *Id.* Survival clauses are used in contracts when the parties want specific provisions of the contract to continue to remain in effect after the expiration of the contract. *See, e.g.*, Survival Clause, TRANSLEGAL.COM, http://www.translegal.com/legal-english-dictionary/survival-clause (last visited Aug. 11, 2015).

cited the doctrine of *expressio unius* and claimed the arbitration clause was excluded from the survival clause, did not survive the expiration of the agreement, and was not binding.[14]

While the Southern Ohio District Court acknowledged that when contract language is ambiguous the federal preference favors arbitration, the court found the arbitration clause was not enumerated in the survival clause; therefore, the parties had no duty to arbitrate.[15] Hilltop's motion to dismiss was denied, and Plaintiffs were allowed to proceed with their claim in federal court.[16] Hilltop filed for a stay pending appeal of the district court's denial to the Sixth Circuit, and the district court granted the motion.[17]

On appeal to the Sixth Circuit, Hilltop argued the district court erred when it held the arbitration provision did not survive the expiration of the contract.[18] Hilltop further argued the Plaintiffs were prohibited from arbitrating as a class because the arbitration clause did not expressly authorize class arbitration.[19] Disagreeing with the trial court, the Sixth Circuit held that when ambiguity comes from a broadly worded arbitration provision, it should be enforced because of the strong federal presumption in favor of arbitration.[20] The court further held the arbitration provision had post expiration effect because the survival provision contract "did not clearly imply" otherwise.[21] Finally, the court held that the arbitration clause did not allow for class arbitration because the clause was silent regarding classwide arbitration, therefore the employees were required to arbitrate their claims individually.[22]

III. LEGAL BACKGROUND

To understand the impact of the Huffman decision is to understand how the law has developed to bring employees to such a point. First, this section begins with a brief analysis of the traditional common law that applies to contracts, statutory law applicable to arbitration provisions, and the enforceability of arbitration provisions in expired contracts. Then this section explores the widespread federal policy favoring arbitration as it relates to the instant case. Next, this section highlights the different legal atmospheres surrounding CBAs and individual employment contracts. Finally this section concludes with an examination of how the right to a jury trial can be waived, and when class arbitration is permitted.

14. Huffman v. Hilltop Cos., No. 1:13-CV-00219, 2013 WL 3944478 (S.D. Ohio July 31, 2013).
15. *Id.* at *1.
16. *Id.* at *2.
17. Huffman v. Hilltop Cos., No. 1:13-CV-00219, 2014 WL 695844, at *2 (S.D. Ohio Feb. 24, 2014).
18. *Id.*
19. Brief for Appellant, Huffman v. Hilltop Cos., 747 F.3d 391 (2014) (No. 13-3938) 2013 WL 5593234, at *21-30.
20. Huffman v. Hilltop Cos., 747 F.3d 391, 396-96 (6th Cir. 2014).
21. *Id.* at 398.
22. *Id.*

A. Common Law Principles

Contract provisions can be expressed in words or implied-in-fact.[23] An implied-in-fact contract provision is one that is not expressed in the words, but the terms are to be inferred from the specific situation and behavior of the parties.[24] For example, an implied-in-fact contract can be found when an express contract expires and the parties continue to perform under the terms of the expired contract.[25]

Rules of construction apply when the contract at issue is ambiguous.[26] One canon of common law contract interpretation is *contra proferentem*,[27] meaning contract ambiguities should be interpreted against the drafter.[28] Another key tenet of contract interpretation is *expressio unius est exclusio alterius*,[29] meaning if a contract provision explicitly lists some items, it excludes all others not listed.

Contracts become ambiguous when their language has more than one meaning.[30] Ambiguities often arise when the parties are of unequal bargaining power[31] because what is unambiguous to a sophisticated party may be ambiguous to an unsophisticated party.[32] Employers and unions are generally thought of as sophisticated parties;[33] conversely, employees are not ordinarily considered sophisticated parties.[34] The fundamental difference between arbitration in the union/employer context and the individual employee context is an argument for enforcing the contract made in these situations differently.[35] Employers and unions negotiate and eventually agree to the terms of a collective agreement, making the arbitration provision it contains voluntary.[36] Because both parties are involved in the bargaining process, unions and employers agree to the collective bargaining process and the resulting terms willingly and voluntarily, reducing the risks by building in fairness.[37] On the other hand, when employers draft employment agreements that

23. 17 AM. JUR. 2D *Contracts* § 12 (2014) (contract can also be constructive, which is not a subject matter of this note).

24. *Id.*

25. *See* CORBIN ON CONTRACTS § 1.19 (rev. ed. 1993) (continued performance after the expiration of an agreement permits courts to infer parties intended to renew the contract for the same terms).

26. 17 AM. JUR. 2D *Contracts* § 329 (2014).

27. Latin for "against the offeror." *Contra proferentem*, BLACK'S LAW DICTIONARY (9th ed. 2011).

28. Hauf v. Life Extension Found., 454 Fed. Appx. 425, 431 (6th Cir. 2011).

29. Thomas v. Nicholson, 423 F.3d 1279, 1284 n.4 (Fed. Cir. 2005) (Latin for the "expression of one thing is the exclusion of another").

30. 17 AM. JUR. 2D *Contracts* § 331 (2014).

31. Omega Healthcare Inv'rs, Inc. v. Lantis Enters., 256 F.3d 774, 777 (8th Cir. 2001).

32. 17 AM. JUR. 2D *Contracts* § 331 (2014).

33. *See, e.g.*, B. Frank Joy Co. v. Isaac, 636 A.2d 1016, 1023 (Ct. App. Md. 1994); Citizens Gas & Coke Util. v. Local Union No. 1400, IBEW, 874 N.E.2d 391, 402 n.5 (Ct. App. Ind. 2007).

34. Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 88 n.10 (3d Cir. 2003). *But see B. Frank Joy Co.*, 636 A.2d at 1023 (finding that employees can still be considered sophisticated parties when represented by an attorney).

35. Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 8 (2014).

36. *Id.* (Comsti uses the term "voluntary arbitration" to refer to the employer and a union agreement to arbitrate, and the term "forced arbitration" to refer to arbitration provisions contained in employer-drafted agreements). While technically, all arbitration is voluntary, for the purposes of this note, arbitration between an employer and a union is referred to as "voluntary union arbitration," whereas the provisions contained in employer-drafted employment agreement will be referred to as "employer-drafted arbitration."

37. *Id.*

contain arbitration provisions as a condition of employment with no meaningful bargaining,[38] the arbitration might be viewed as forced.[39] An employer-drafted arbitration clause is almost always found in employment contracts.[40]

B. Statutory Law Applicable to Contract Arbitration Provisions

The Federal Arbitration Act (FAA) is the foundation of arbitration law in the United States.[41] When a contract contains a written arbitration provision, the FAA requires enforcement of the agreement.[42] Years of Supreme Court interpretation of the FAA uphold the validity of employment adhesion contracts if the substantive provisions are fair.[43] When parties have a grievance, the duty to arbitrate is created by their contract.[44] In other words, there is a presumption in favor of arbitrating a dispute when a contract contains an arbitration clause.[45]

Originally, the FAA was intended to apply only to the voluntary arbitration context.[46] Yet the Supreme Court has routinely applied the FAA to situations involving individuals.[47] In *Circuit City v. Adams*,[48] the Supreme Court determined the FAA applied to *individual* employment contracts.[49] The FAA limits courts' power to review arbitration agreements.[50] To be within the court's power, the contract must be facially valid and the disputed issue must fall within the scope of the contract.[51]

An arbitration provision is understood to remain in effect after the expiration of the contract[52] unless the contract expressly or clearly indicates otherwise.[53] Parties can expressly or clearly indicate their preference by using plain language

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38. Under Ohio law, when there is a lack of meaningful choice "combined with contract terms that are unreasonably favorable to the other party" the contract is deemed unconscionable. Jones v. U-Haul Co. of Mass. & Ohio, 16 F. Supp. 3d 922, 935 (S.D. Ohio 2014).

39. Comsti, *supra* note 35, at 8.

40. *Id.* Employment contracts are often contracts of adhesion because the contract is drafted by the dominant party and given to the weaker party on a "take-it-or-leave-it" basis, with no opportunity to negotiate the contract's terms. *See generally*, WILCOX, CALIFORNIA EMPLOYMENT LAW ch. 90, § 90.20 (2014).

41. Kenneth R. Davis, *A Model For Arbitration: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 167, 179 (1999).

42. 9 U.S.C. § 2 (2015).

43. Stephen L. Hayford, Jamie Darin Prenkert, & Anjanette H. Raymond, *Employment Arbitration at the Crossroads: An Assessment and Call for Action*, 2014 J. DISP. RESOL. 255, 256.

44. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 204 (1991) (quoting Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 250-51 (1977)).

45. AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 650 (1986).

46. Comsti, *supra* note 35, at 23.

47. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

48. Circuit City v. Adams, 532 U.S. 105 (2001).

49. Linda D. Walton, *All That Glitters Is Not Gold – Or the Problem of Unenforceable Agreements to Arbitrate Employment Claims*, SL070 ALI-ABA 695 (March 2006).

50. Berkery v. Cross Country Bank, 256 F. Supp. 2d 359, 365 (E.D. Penn. 2003) (quoting PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990)).

51. *Id.*

52. Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 781 (10th Cir. 1999); *see also* Newmont U.S.A. Ltd. v. Ins. Co. of N. Am., 615 F.3d 1268, 1275 (10th Cir. 2010) (stating that arbitration provisions are "presumed to survive the expiration of" the contract).

53. *Id*. "Where the dispute is over a provision of the expired agreement, the presumption favoring arbitrability must be negated expressly or by clearly implication." *Id.* (quoting Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 255 (1977)).

in the contract.[54] The contracting parties' intention as to the post-expiration effect of the arbitration provision is not established by silence.[55]

C. Collective Bargaining Agreements and the Effect of Arbitration Provisions That Have Expired

The post-expiration effect of arbitration provisions has been reviewed mostly in the context of collective bargaining agreements.[56] Generally, an arbitration provision is presumed to survive the expiration of the contract unless the language expressly or implicitly states otherwise.[57] The Supreme Court expressly addressed this issue in two key cases.

In the first Supreme Court case, *Nolde Brothers v. Bakery & Confectionery Workers Union*,[58] the issue before the Court was whether a party to a CBA containing an arbitration clause was required to arbitrate contractual disputes regarding severance pay after the termination of the agreement.[59] Employer Nolde Brothers and the Union representing the bakery workers agreed in 1970 to a collective bargaining agreement that stated "'any grievance' arising between the parties was subject to binding arbitration."[60] The agreement was to remain in effect until July 21, 1973, and until a new agreement was made or terminated by either party.[61] Negotiations for a new CBA were unsuccessful, the Union terminated the agreement, and the employer eventually closed the plant.[62] The Union demanded severance pay as outlined under the prior agreement[63] and submitted

54. W. Liberty Foods, LLC v. Moroni Feed Co., 753 F.Supp. 2d 881, 888 (S.D. Iowa 2010).

55. *Nolde Brothers*, 430 U.S. at 253.

56. There are very few cases that discuss post-expiration effect of arbitration clauses when the contract is not a collective bargaining agreement. *See, e.g.*, Bolinger v. Virgin Islands Tel. Corp., 293 F.Supp. 2d 559 (D.V.I. 2003).

57. *Riley Mfg. Co.*, 157 F.3d at 781.

58. *Nolde Bros.*, 430 U.S. at 255.

59. *Id.* at 244.

60. *Id.* at 245. The contract provision says in part:

> GRIEVANCES AND ARBITRATION
>
> Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.
>
> Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate . . . .
>
> Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties . . . .

Id. at 245 n.1.

61. *Id.* at 246 (the contract required that in the event no agreement was reached by July 21, 1973, the parties would continue to work under the previous CBA while negotiations continued for a new CBA).

62. *Id.*

63. *Id.* at 247. The collective bargaining agreement says in part:

> WAGES
>
> Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years . . . .

the matter to arbitration.[64] When the Nolde Brothers refused to submit to arbitration, the Union filed a motion to compel in the Eastern District Court of Virginia.[65] The district court found that when the Union voluntarily terminated the CBA it destroyed any right to severance pay for the workers.[66]

On appeal, the Fourth Circuit found the district court should first determine if the parties' duty to arbitrate the disputed issue "survived the expiration of the contract."[67] The court held the employer had a duty to arbitrate even after the contract terminated.[68] Appealing to the Supreme Court, Nolde argued the duty to arbitrate must necessarily expire with the CBA that brought the duty into existence.[69] Relying on precedent, the Court stated that the requirement to arbitrate contract disputes survived the expiration of a CBA.[70] The Court held when "the dispute is over a provision of the expired agreement, the presumption favoring [arbitration] must be negated expressly or by clear implication."[71] Finding the duty to arbitrate was not "negated expressly or by clear implication," the Court affirmed the appellate court's requirement the dispute be resolved by arbitration.[72] In reaching the holding, the Court never reached the merits of the claim.[73]

The second case to address post-expiration enforceability came in *Litton Financial Printing Division v. National Labor Relations Board.*[74] *Litton* is notable because the Court laid out the test for determining when a grievance falls within the scope of the CBA after its expiration. Employer Litton Financial Printing refused to bargain with a newly-elected Union Board and refused to process layoff grievances.[75] After administrative proceedings, the administrative law judge (ALJ) for the NLRB found that Litton had violated the NLRA[76] because it failed to process the Union's grievances.[77] Nevertheless, on appeal, the panel for the NLRB did not order Litton to arbitrate the layoff grievances.[78] At the Ninth Cir-

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Id. at 245 n.2.

64. *Nolde Bros.*, 430 U.S. at 247.

65. Local No. 358, Bakery and Confectionery Workers Int'l Union v. Nolde Brothers, Inc., 382 F. Supp. 1354 (E.D. Va. 1974).

66. *Id.* at 1358.

67. Local No 358, Bakery and Confectionery Workers Int'l Union v. Nolde Brothers, Inc., 530 F.2d 548, 550 (4th Cir. 1975) (finding that the district court incorrectly and backwardly approached the issue by first determining whether the severance pay survived the contract).

68. *Id.* at 553.

69. Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 250 (1977).

70. *Id.* at 251-52.

71. *Id.* at 255.

72. *Id.*

73. *Id.* at 249.

74. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 197 (1991).

75. *Id.* at 194.

76. The NLRA, codified in 29 U.S.C. §§ 151-69, is a law passed in 1935 that provides the foundation for the guarantee of basic rights for private sector employees to organize into unions and engage in collective bargaining activities. *See also* Ramona Mariani, Case Brief, *Issues in the Third Circuit: Labor Law – Post-Expiration Arbitability Under Collective Bargaining Agreement in the Third Circuit*, Luden, Inc. v. Local Union No. 6, 40 VILL. L. REV. 957 (1995).

77. *Litton*, 501 U.S. at 195.

78. NLRB v. Litton Fin. Printing Div., Inc., 893 F.2d 1128, 1130 (9th Cir. 1990). The NLRB found the layoff grievance did not "arise under" the CBA because the layoffs occurred after the CBA expired; thus, the NLRB found Litton did not have to arbitrate the dispute because it had "no contractual obligation to arbitrate the grievances." 286 N.L.R.B. 817, 821-22 (1987).

cuit, Litton argued the duty to arbitrate had expired with the contract.[79] The Union argued the NLRB should have held the layoff grievances arose under the expired collective bargaining agreement and should be arbitrated because the obligation to arbitrate survives the CBA's expiration.[80] The Ninth Circuit held the layoff grievances arose under the expired agreement and the parties were ordered to arbitrate.[81]

Certiorari was granted by the Supreme Court to address the issue of the arbitability of layoff grievances.[82] The Court distinguished Litton by stating there might have been other issues that arise which although related to a contract term, do not have post expiration effect because the contract is no longer legally enforceable when it expires.[83] It is because of this distinction the Court addressed the merits of *Litton* to determine if the right arose under the expired CBA. Now known as the *Litton* test, a dispute falls within the scope of the contract where 1) "it involves facts and occurrences that arose before expiration, 2) where an action taken after expiration infringes a right that accrued or vested under the agreement, 3) or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."[84] In creating these three requirements, the Court narrowed the *Nolde Brothers* finding that the "continued duty to arbitrate is binding only for disputes that either arose before the contract expired, or that concern 'a right that accrued or vested under the agreement.'"[85] Finding the layoff provision could not be said to create a right vested or accrued during the agreement, the Court held the duty to arbitrate did not carry over after expiration.[86]

Yet, when the Third Circuit was faced with the issue of post expiration effect, it took a different approach in *Luden's, Inc. v. Local Union No. 6 of the Bakery, Confectionary, and Tobacco Workers' International Union of America*.[87] In 1988, Tobacco Worker's International Union of America (Tobacco Workers) and Luden's had a three-year CBA.[88] After negotiations for a new agreement broke down in 1991, the Tobacco Workers invoked the grievance procedure of the 1988 agreement to address an issue involving the retroactivity of wages.[89]

Under *Nolde Brothers*, the arbitability of a grievance depends on whether that issue arose under the contract; here, the Tobacco Workers argued that the wage issue was vested under the 1988 agreement and that CBA required the matter be submitted to arbitration.[90] Luden's filed suit against the Union for an injunction to prevent going to arbitration.[91] Applying the *Litton* test which allows a court to review the merits of the claim, the district court found the retroactive wage dispute

79. *Id.*
80. *Id.*
81. *Id.* at 1138-39.
82. *Litton*, 501 U.S. at 197-98.
83. *Id.* at 206.
84. *Id.* at 192.
85. Linda Greenhouse, *Court Narrows Arbitration Precedent*, N.Y. TIMES (June 14, 1991), http://www.nytimes.com/1991/06/14/us/court-narrows-arbitration-precedent.html.
86. *Litton*, 501 U.S. at 210.
87. Luden's Inc. v. Local Union No. 6 of the Bakery, Confectionery & Tobacco Workers Int'l Union, 28 F.3d 347 (3rd Cir. 1994); *see also* Mariani, *supra* note 76.
88. *Id.* at 349-50.
89. *Id.* at 349.
90. *Id.* at 350-51.
91. *Id.* at 349.

did not arise under the agreement.[92] The court held that Luden's did not have to submit the dispute to arbitration.[93]

On appeal to the Third Circuit, the Union challenged the district court's injunction preventing arbitration.[94] Reviewing the Supreme Court cases on the enforceability of arbitration provisions, the Third Circuit determined that *Litton* was at odds with *Nolde*.[95] The appellate court noted that while *Nolde* suggested the court should not address the merits of the underlying claim, *Litton* held that the court has a "duty to reach the merits of a claim" when the issue in dispute has not "vested"[96] and can only compel arbitration if the expired agreement "in fact creates the right or obligation at issue."[97] *Nolde* cast a wide net on what disputes must be resolved through arbitration, including any post-expiration grievances, depending on how the contract was interpreted.[98] On the other hand, *Litton* significantly narrowed the types of disputes that must be arbitrated if the grievance arises after the contract has expired.[99]

To address this conflict, the Third Circuit approached the issue from a different angle and found an implied-in-fact agreement may exist between parties after the lapse of the contract if parties continue to perform their duties after the expiration of the contract.[100] An implied-in-fact CBA would contain the same provisions as the expired contract.[101] By taking this approach, the Third Circuit was able to avoid the merits of the case (the *Nolde* and *Litton* contradictions) and to decide if the arbitration clause should be given effect.[102] Looking at the facts, the court concluded the parties continued to perform after the agreement expired as if there was an agreement.[103] Consequently, the Third Circuit held that after the termination, Luden's had a surviving duty to arbitrate the CBA because there was an implied-in-fact contract,[104] and arbitration was required.[105]

D. Availability of Class Arbitration When the Agreement Is Silent

While silence is golden in a movie theater, when an arbitration provision is silent regarding whether or not class arbitration is permitted, courts have come up

92. Luden's Inc. v. Local No. 6 of the Bakery, Confectionery & Tobacco Workers Int'l Union, 805 F. Supp. 313, 326-27 (E.D. Penn. 1992).
93. Luden's Inc. v. Local Union No. 6 of the Bakery, Confectionery & Tobacco Workers Int'l Union, 28 F.3d 347, 353 (3rd Cir. 1994).
94. *Id.* at 349.
95. *Id.* at 353.
96. Mariani, *supra* note 76, at 972-73.
97. *Luden's*, 28 F.3d at 353.
98. Mariani, *supra* note 76, at 972.
99. *Id.* at 973-74.
100. *Luden's*, 28 F.3d at 364. The court looked to "general principles of contract law" and declared that "when a contract lapses but the parties to the contract continue to act as if they were performing under a contract, the material terms of the prior contract will survive intact unless either party clearly and manifestly" indicated they no longer wished to be bound by the contract's terms. *Id.* at 355.
101. *Id.* at 355-56.
102. Mariani, *supra* note 76, at 975.
103. *Luden's*, 28 F.3d at 350 (when a new CBA was not finalized before the deadline, the parties had agreed to "continue operating under the terms of the current contract").
104. *Id.* at 349.
105. *Id.*

with rules to fill the void.[106] When employee are allowed to proceed as a class against their employer to arbitrate a dispute, the employees are able to share the benefits of class actions, such as accelerated proceedings, shared costs, informal discovery, confidentiality, and a more informal setting.[107]

The Supreme Court has held the question of class arbitration is dependent on the language of the contract.[108] The Court addressed whether class arbitration could go forward when the agreement was otherwise silent in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[109] According to the Court, under the FAA, a party is not required to submit to class arbitration if the parties did not agree to do so.[110] Moreover, an arbitrator is not permitted to infer an implicit agreement to allow class arbitration.[111]

The issue of whether a group of individuals may arbitrate a dispute as a class is a "gateway matter" for courts to decide.[112] So when an arbitration provision is silent as to class arbitration, then the court decides whether class arbitration is permitted.[113] If class arbitration is not mentioned anywhere in the agreement, the Sixth Circuit has found classwide arbitration is not authorized.[114]

E. Comparing Arbitration Agreements in CBAs to Arbitration Agreements in Employment Contracts

The Supreme Court held in *Metropolitan Edison Company v. NLRB* that a union could waive a statutory protection only if the waiver was explicitly stated and "clear and unmistakable."[115] The Court expanded this holding in *Wright v. Universal Maritime Service Corporation*, and found a CBA may waive the right to a judicial forum when the issue is employment discrimination, but again, it must be explicit and clear.[116] *Wright* does not address waiver of individually negotiated rights in the employment context.[117]

The Sixth Circuit addressed arbitration agreements in the individual employee context in *Walker v. Ryan's Family Steak House, Inc.*[118] The *Walker* plaintiffs

106. *See* Carole J. Buckner, *Toward a Pure Arbitration Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301 (2004) (addressing how various courts have addressed the issue of class arbitration when the arbitration clause is silent).

107. Andrew Powell and Richard A. Bales, *Ethical Problems in Class Arbitration*, 2011 J. DISP. RESOL. 309.

108. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003).

109. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

110. *Id.* at 684.

111. *Id.* at 685 (the Supreme Court found class arbitration "changes the nature of arbitration"); *see also* S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielson, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201 (2012) (a detailed analysis of how and if class arbitration changes the nature of arbitration).

112. Huffman v. Hilltop Cos., 747 F.3d 391, 398 (6th Cir. 2014) (quoting Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013)).

113. *Reed*, 734 F.3d at 599. *See also* Kevin Sack, Case Note, *Plurality Influence: Reed Elsevier and the Precedential Value of Bazzle on Class Arbitrability*, Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 2014 J. DISP. RESOL. 379, 381.

114. *Huffman*, 747 F.3d at 398-99 (citing *Reed* 734 F.3d at 599); s*ee also* Andrew Powell & Richard A. Blasé, *Ethical Problems in Class Arbitration*, 2011 J. DISP. RESOL. 309 (discussing the ethical issues connected with the decisions that prohibit of class arbitration).

115. Metro. Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

116. Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998).

117. Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir. 2002).

118. Walker v. Ryan Family Steak House, Inc., 400 F.3d 370 (6th Cir. 2005).

were former employees of Ryan's. When hired by Ryan's, they signed an arbitration agreement.[119] The Ryan's arbitration agreement was atypical because it was a contract between the employees themselves and Employment Dispute Services, Inc. (EDSI), a third-party dispute services company.[120] Ryan's contracted with EDSI to provide employment dispute resolution services between Ryan's and its employees.[121] Any disputes would be resolved by arbitration through EDSI and "not through litigation in state or federal court."[122]

The *Walker* plaintiffs filed suit against Ryan's claiming they were not paid minimum wage or overtime, in violation of the FLSA.[123] Ryan's sought to enforce the arbitration agreement the employees signed when they were hired.[124] The district court for the Middle District of Tennessee found the plaintiffs did not "knowingly and voluntarily" agree to arbitration and waive their right to a jury.[125] On appeal, the Sixth Circuit applied five factors to determine if a party to a contract had "knowingly and voluntarily" waived the right to a jury: 1) the party's "experience, background, and education;" 2) the amount of time given to review the agreement and whether an attorney was consulted; 3) "the clarity of the waiver;" 4) consideration; and 5) the totality of the situation.[126] In holding the arbitration agreement was not enforceable, the *Walker* court gave substantial weight to the fifth factor, noting that EDSI was basically in the pocket of the employer and arbitration would not provide a fair and unbiased forum. As a result, the Sixth Circuit found the employees did not knowingly and voluntarily waive their right to a jury trial.[127]

The Supreme Court's decisions in the union cased of *Litton*, *Nolde Brothers*, and *Stolt-Nielson* have shaped the path that individual employment contracts must navigate when the issue is related to the post expiration effect on the obligation to arbitrate grievances. The Sixth Circuit has determined that class arbitration for individual employees is a threshold issue for the courts to decide. However, the Sixth Circuit's decision in *Walker* has complicated the post expiration effect of the obligation to arbitrate when the totality of the circumstances means that individual employees unknowingly waived a substantive right. The instant case stepped onto the stage in this rocky arena.

IV. INSTANT DECISION

In *Huffman v. Hilltop*, the Sixth Circuit first reviewed whether the arbitration provision had any effect after the expiration of the contract.[128] The court found "the need for an arbitration provision to have post-expiration effect is intuitive."[129]

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119. *Id.* at 373 (rather than having employees sign an employment agreement, Ryan's had its employees only sign an arbitration agreement).
120. *Id.* at 374.
121. *Id.* at 375.
122. *Id.* at 382 (emphasis deleted).
123. *Id.* at 373.
124. *Walker*, 400 F.3d at 373.
125. *Id.*
126. *Id.* at 381 (citing Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003) (*en banc*) and quoting Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995)).
127. *Id.* at 382.
128. Huffman v. Hilltop Cos., 747 F.3d 391, 394 (6th Cir. 2014).
129. *Id.* at 395.

Without an implied post-expiration effect, the requirement to arbitrate would expire with the contract and the party with a grievance would simply have to wait to sue until after the contract expired.[130]

The *Huffman* court found the arbitration provision in the contract was broadly worded.[131] Because broadly worded arbitration clauses place the burden on the plaintiff to rebut the federal preference for arbitration by showing clear implication of the parties' intention, any doubts as to the parties' intentions must usually be resolved in favor of arbitration.[132]

The court rejected the argument for the application of *contra proferentum*—rather all doubts relating to ambiguous contract language were "resolved in favor of arbitration."[133] When the court reviewed the whole document, nothing indicated the duty to arbitrate had expired with the contract.[134] The court determined the survival clause was not intended to be an exhaustive list of clauses to survive expiration, mainly because the non-compete clause was not enumerated in the survival clause and non-compete clauses by their very nature last until after the contract has expired.[135] The court thus found the survival clause "invites ambiguity as to which additional provisions the parties believed should survive expiration" of the employment contract.[136]

The court also rejected the argument for application of *expressio unius est exclusion alterius* because the survival clause was silent on many important contractual issues between the parties.[137] For example, if the survival clause had listed twenty-three of the twenty-four contract provisions and simply did had not mentioned the arbitration clause, *then* there would be a clear implication the parties did not intend to arbitrate disputes post-expiration of the contract.[138] Because that was not the case here and looking at the employment contract as a whole, the Sixth Circuit held the omission of the arbitration clause from the survival clause did not clearly imply the arbitration clause had no post-expiration effect.[139]

Importantly, the Sixth Circuit did acknowledge the plaintiffs' argument that they did not consent to arbitration knowingly or voluntarily because the arbitration provision was employer-drafted.[140] The court stated the Sixth Circuit had rejected the requirement that an arbitration provision must have a statement that plainly waives the individual employee's right to a jury trial.[141] Rather, waiver must be explicitly stated only in a collective bargaining situation.[142]

Regarding the issue of class arbitration, the Sixth Circuit looked to the language of the arbitration clause itself.[143] Citing a recent decision,[144] courts are the

130. *Id.*
131. *Id.* (the arbitration provision stated "[a]ny Claim arising out of or relating to this agreement" will be submitted to arbitration).
132. *Id.*
133. *Id.* at 396-97.
134. Huffman v. Hilltop Cos., 747 F.3d 391, 397 (6th Cir. 2014).
135. *Id.* (the non-compete clause contained language stating it would remain in effect for twelve months after the expiration of the contract).
136. *Id.*
137. *Id.* at 398.
138. *Id.*
139. *Id.*
140. Huffman v. Hilltop Cos., 747 F.3d 391, 396 (6th Cir. 2014).
141. *Id.* at 396 n.2.
142. *Id.*
143. *Id.* at 398.

decision makers who presumptively decide "the question of class arbitability."[145] The court concluded since the employer-drafted arbitration provision was silent as to class arbitration, then it was not permitted; thus, the plaintiffs were required file individually.[146]

V. COMMENT

Huffman is significant because it was the first time a circuit court was faced with determining the post-expiration effect of an arbitration provision in an individual employment contract in light of the strong federal policy favoring enforcing arbitration clauses.[147] Finding the arbitration to be enforceable,[148] the Sixth Circuit's result maintained the nationwide trend to uphold arbitration clauses.[149]

It is important to note in deciding *Huffman*, the Sixth Circuit followed the practice of applying the holdings from union arbitration cases to a situation of employer-drafted arbitration involving individual employees. While union arbitration cases can be looked to for guidance, courts must keep in mind that in the labor context, protection and fairness are built into the bargaining and agreement process, but those protections are missing when individuals are in situations where the employer drafted the arbitration provision. Union arbitration in the labor context is a key component of the employee and union relationship,[150] the NLRB is authorized by Congress to enforce unions and employers to "engage in fair and equal bargaining,"[151] and voluntary union arbitration is the method used to enforce the terms of the CBA.[152] Voluntary union arbitration is premised on the idea that the grievance and arbitration process will be made available in exchange for unions' promise not to strike.[153] Voluntary union arbitration thus creates a system of fairness and self-governance for both union workers and employer.[154]

Courts routinely take holdings from voluntary union arbitration cases and apply the principles to situations of employer-drafted arbitration,[155] but this raises problems for several reasons. First, when parties are forced to arbitrate statutory rights, the arbitration process is not required to conform to the minimal standards of fairness found under the law;[156] also, employees do not have the option to strike when the terms are unfair.[157] Second, because the employer writes the terms and

144. Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013).
145. Huffman v. Hilltop Cos., 747 F.3d 391, 398 (6th Cir. 2014).
146. *Id.* at 398-99.
147. *Id.* at 396.
148. *Id.* at 398.
149. While it appears in the Sixth Circuit poor contract drafting will be saved by the federal policy favoring the enforcement of arbitration provisions, *Huffman* serves as a reminder to contract drafters that this is not always the case. One takeaway is the importance of using express contract language. Contracts should clearly address the post-expiration effect of an arbitration provision. Drafters should also review survival clauses to prevent disputes over the effect of contract provisions after the contract expires or terminates. Furthermore, drafters should state whether or not class arbitration is permitted.
150. Comsti, *supra* note 35, at 19.
151. *Id.* at 20.
152. *Id.*
153. *Id.* at 20-21.
154. *Id.* at 21.
155. *See, e.g.*, Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013) (an example of the Court applying precedent from a voluntary arbitration case to a forced arbitration situation).
156. Comsti, *supra* note 35, at 9.
157. *Id.* at 21.

procedures, often requiring employees to waive the right to bring class actions, the process is stacked against the employees.[158] Third, research shows in employer-drafted arbitration, employees "lose more often, win smaller awards, and spend more money" than if they had brought their claim in court.[159] Finally, the secretive and confidential nature of employer-drafted arbitration protects employers from public accountability and judicial review.[160]

The *Huffman* plaintiffs' employer-drafted arbitration issue is further distinguishable from the voluntary union cases the Sixth Circuit cited for several reasons. First of all, in union cases, neither party is seeking to go to court;[161] but, in cases like *Huffman*, plaintiffs usually desire a judicial forum where the employer is seeking arbitration. Second, in voluntary arbitration the union seeks to arbitrate on behalf of its members in order to enforce rights under a CBA,[162] while individual employee plaintiffs seek to enforce their statutory rights under the FLSA and state law without the backing of a union. Third, the union's rights only exist because of the CBA,[163] but the Huffman plaintiffs' rights exist under federal statutory law. Finally, in the context of a CBA, for the court to deny survival of the arbitration provision is to deny the rights the CBA grants. But when the Sixth Circuit found the arbitration provision in *Huffman* has post expiration effect, it undermined statutory workplace rights.[164]

Moreover, the Sixth Circuit did not adequately explore the Huffman plaintiffs' concerns regarding the waiver of the right to a jury trial when there is an underlying statutory claim.[165] *Walker v. Ryan's Family Steak House*[166] is an example where the Sixth Circuit found the arbitration provision in the employees' individual employment contracts unenforceable because the plaintiffs did not knowingly and voluntarily agree to arbitration.[167] In the *Huffman* opinion, the Sixth Circuit downplayed the importance of the knowingly and voluntary standard which has been used by that court since 1995.[168] Originally articulated in *Adams v. Philip Morris, Inc.*,[169] it was later used in the *en banc* Sixth Circuit decision *Morrison v. Circuit City Stores, Inc.*[170] Additionally, *Walker* states the *en banc* decision in *Morrison* "clearly adopted the knowingly and voluntary standard for

158. *Id.* at 9.
159. *Id.* at 9-10.
160. *Id*. at 10. Since the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427, 436 (1953), courts have incrementally limited the scope of judicial review of arbitration awards only when the arbitrator(s) exhibited "manifest disregard" of the law. *Id*. at 16-17.
161. *See generally*, Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 196 (1991); *and* Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 255 (1977).
162. *See generally*, 1 EMP. & UNION MEMBER GUIDE TO LABOR LAW § 2:34, Westlaw (database updated May 2015).
163. *Id.*
164. *See* Comsti, *supra* note 35, at 7 ("forced arbitration has eroded the statutory purposes and protections of our nations workplace laws" like the FLSA).
165. The Huffman plaintiffs alleged Hilltop violated both the FLSA and the Ohio Minimum Fair Wage Standards Act. Huffman v. Hilltop Cos., 747 F.3d 391, 393 (6th Cir. 2014).
166. Walker v. Ryan's Family Steak House, Inc., 400 F.3d 370 (6th Cir. 2005).
167. *Id.* at 383.
168. *Id.* at 381 (to determine if a party had "knowingly and voluntarily" waived their jury right, a court must review five factors: (1) party's "experience, background, and education;" (2) the time given to review the agreement and whether an attorney was consulted; (3) "the clarity of the waiver;" (4) consideration; and (5) the totality of the situation).
169. Adams v. Phillip Morris, 67 F.3d 580, 583 (6th Cir. 1995).
170. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003) (*en banc*).

agreements to arbitrate in lieu of litigation."[171] Thus, leaving it a mystery as to why the Sixth Circuit did not adopt the "knowingly and voluntary" standard for the *Huffman* plaintiffs.

If the Sixth Circuit had applied the knowingly and voluntary standard to determine if the Huffman plaintiffs had waived their right to a jury trial or bring their claims as a class, then it is possible the court would have determined the Huffman plaintiff's fundamental rights were violated with the employer-drafted arbitration. In situations of employer-drafted arbitration, the most careful analysis is necessary in order to ensure principles of fairness from the voluntary arbitration context are present as well.

The Sixth Circuit's determination that class arbitration must be explicitly permitted by the agreement meant the *Huffman* plaintiffs were unable to bring a FLSA collective action against their employer. The Sixth Circuit should have used both *Walker* and *Cooper v. MRM Investment Company*[172] to determine a fundamental right had been violated invalidating the arbitration provision. Like the *Cooper* plaintiffs, each of the *Huffman* plaintiffs alleged a statutory FLSA claim against Hilltop, and should have been permitted to proceed as a class under the FLSA.[173] Similarly to *Walker*, when the *Huffman* plaintiffs' statutory rights are compromised, the totality of the circumstances demonstrates fundamental unfairness and consequently becomes a denial of a fundamental statutory right. The Sixth Circuit ought to have relied on these two cases to distinguish individual employer-drafted arbitration from voluntary union arbitration and held them to not be enforceable in situations such as *Huffman*.[174]

VI. CONCLUSION

Let's return to Sally and Billy, the new employees. The post-expiration effect of arbitration provisions is an issue that impacts the substantive rights of individual employees like Sally who agree to employer-drafted contracts. As more employers are increasingly including arbitration provisions in individual employment situations, Sally's fundamental statutory rights are restricted by these contracts. This situation is likely to affect more employees than in the past because union membership in the United States is declining,[175] causing fewer workers to really have any sort of meaningful power to negotiate the arbitration agreements they are

171. *Walker*, 400 F.3d at 381.

172. Cooper v. MRM Inv. Co., 367 F.3d 493 (6th Cir. 2004). It is also important to note that the underlying state law applicable in *Cooper* was Tennessee law, and the "knowingly and voluntarily" standard was based on *Morrison*, a case applying Ohio law. *Id*. at 496; *Morrison*, 317 F.3d at 666. Moreover, the underlying state law in *Huffman* was Ohio law. *See Morrison*, 317 F.3d at 666 ("In Morrison's case, we apply the Ohio law of contract formation, as Morrison is employed by Circuit City in the state of Ohio . . . .").

173. *See* Iliza Bershad, Note, *Employing Arbitration: FLSA Collective Actions Post Concepcion*, 34 CARDOZO L. REV. 359 (2012) (arguing that FLSA plaintiffs should be allowed to proceed as a class because the right is protected under the FLSA, even if the arbitration provision is silent as to class arbitration).

174. Further, if the *Huffman* plaintiffs instead had been a union, then it is clear that the arbitration clause in a CBA would have had to explicitly state that the union and its members waived their right to a jury trial. Huffman v. Hilltop Cos., 747 F.3d 391, 396 n.2 (6th Cir. 2014).

175. Drew Desilver, *American Unions Membership Declines as Public Support Fluctuates*, PEW RESEARCH CTR. - FACTTANK (Feb. 20, 2014), http://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/.

entering. These employment adhesion contracts are stripping away employee's statutory protections in the workplace. Courts should ensure an employee's fundamental statutory rights are protected when reviewing the enforcement of employer-drafted arbitration.