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Notes

The Perils of Temptation: Has the Eighth Circuit Given Employers an Incentive to Exploit Employees?

Gannon v. Circuit City Stores, Inc.[1]

I. INTRODUCTION

The use of arbitration agreements by employers as an alternative to litigation has inflamed the passions of many in the legal community for the past decade. While some champion the use of arbitration as a relatively inexpensive and efficient alternative to litigation,[2] others view the use of arbitration agreements as a tool of corporate exploitation.[3] This Note examines a recent and growing debate within the world of arbitration that is quite controversial and has important policy implications. Specifically, the debate centers around what a court should do with an illegal clause within a binding arbitration agreement: sever it from the agreement or void the agreement in its entirety?

II. FACTS AND HOLDING

In May 1998, Marken Gannon ("Gannon") entered into a Dispute Resolution Agreement ("DRA") as a prerequisite for employment with Circuit City Stores, Inc. ("Circuit City").[4] The agreement required Gannon to settle all employment-related claims against Circuit City solely through mandatory binding arbitration.[5] Prior to signing the agreement, Gannon was advised to familiarize herself with the rules and procedures of the agreement.[6] Terms in

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1. 262 F.3d 677 (8th Cir. 2001).

2. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 234 (3d. ed. 1999); Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 6.

3. *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 21-28 (2000); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701-12 (1996).

4. *Gannon*, 262 F.3d at 679.

5. *Id.*

6. *Id.* A provision in the DRA advised Gannon. *Id.*

bold print alerted Gannon that the agreement would affect her legal rights.[7] These terms also advised Gannon to obtain legal advice prior to signing the agreement.[8] Gannon had the option of withdrawing her consent within three days after she signed the agreement and was informed of the process for withdrawing consent.[9] After Gannon signed the DRA, Circuit City hired her.[10]

One year later, Circuit City terminated Gannon's employment.[11] Gannon subsequently filed complaints with the Missouri Commission on Human Rights and the Equal Employment Opportunity Commission.[12] Gannon alleged that "during her employment with Circuit City she had encountered sexual harassment, a hostile work environment, sex discrimination, and retaliation."[13] After receiving her right-to-sue letters from both agencies, Gannon filed suit in federal court.[14] In response, Circuit City filed a motion to dismiss Gannon's case and to compel arbitration.[15] Circuit City based its motion on the DRA.[16] The district court denied the motion and did not compel arbitration because the court concluded that an illegal clause in the agreement limiting punitive damages invalidated the entire DRA.[17] Circuit City subsequently filed a motion for reconsideration, arguing that another clause within the agreement "served to automatically strike terms judicially determined to be unenforceable."[18] Once again, the district court denied Circuit City's motion.[19] The United States Court of Appeals for the Eighth Circuit granted Circuit City's interlocutory appeal and reversed.[20]

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* The district court held that "[t]he failure of the Circuit City arbitration provision to provide remedies equivalent to those allowed under Title VII and the [Missouri Human Rights Act] thus prevents Plaintiff from effectively vindicating her rights." Gannon v. Circuit City Stores, Inc., No. 4:00-CV-330 JCH, 2000 WL 1062102, at *3 (E.D. Mo. July 10, 2000).
18. *Gannon*, 262 F.3d at 679. This is commonly known as a "severance" provision.
19. *Id.*
20. *Id.* The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, sitting by designation, dissented. *Id.* at 683-84.

The issue before the Eighth Circuit was whether the illegal clause invalidated the entire DRA, thus terminating Circuit City's right to arbitration, or whether the clause could be severed from the agreement, thus compelling Gannon to arbitrate her claims.[21] The Eighth Circuit chose the latter.[22] In his opinion, Circuit Judge Bowman enumerated several reasons for the court's decision.[23] First, the court found that the clear intent of the parties, based upon a term of the contract, was to sever the offending clause.[24] Second, even if the parties had not included an express provision to sever the clause, Missouri contract law "declares severance to be proper in this instance."[25] Finally, the court concluded that an order severing the clause and compelling arbitration was consistent with the "liberal federal policy favoring arbitration agreements."[26] The Eighth Circuit held that the invalid clause in the DRA must be severed, leaving the remaining agreement intact, and, therefore, compelling arbitration of the dispute between Gannon and Circuit City.

III. LEGAL BACKGROUND

A. The Basis For Severance Under Contract Law

Strict doctrine governs the severance of contractual provisions, placing substantial limitations on judicial discretion.[27] Generally, a provision cannot be severed from a contract "when it is an integrated part of the contract."[28] "[A] contract should be treated as entire when by consideration of its terms, nature

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21. *Id.* at 678.

22. *Id.* at 682-83.

23. *Id.* at 680-83.

24. *Id.* at 680. The court specifically cited Rule 18 of the arbitration agreement in concluding that the clear intent of the parties was to sever the provision. *Id.* Rule 18 states, in pertinent part, that:

> [I]n the event that any of these Dispute Resolution Rules and Procedures agreed upon by the Parties is held to be in conflict with a mandatory provision of applicable law, the conflicting Rule or Procedure shall be modified automatically to comply .... [I]n the event of an automatic modification with respect to a particular Rule or Procedure, the remainder of these Rules and Procedures shall not be affected.

Id.

25. *Id.*

26. *Id.* at 682.

27. *See* S. Kathleen Isbell, Note, *Compulsory Arbitration of Employment Agreements: Beneficient Shield or Sword of Oppression?*, Armendariz v. Foundation Health Psychcare Services, Inc., 22 WHITTIER L. REV. 1107, 1155 (2001).

28. Graham Oil Co. v. Arco Prods. Co., 43 F.3d 1244, 1248 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995).

and purposes each and all of the parts appear to be interdependent and common to one another."[29] This idea is contrasted with the idea that severance of a clause "is inappropriate when the entire clause represents an 'integrated scheme to contravene public policy.'"[30] Finally, contract law governs the judicial determination as to whether an arbitration agreement is valid,[31] and federal courts must utilize state contract law when determining the validity of an arbitration agreement.[32]

When a court interprets a contract, Missouri contract law requires the court "to ascertain the intention of the parties and to give effect to that intention."[33] If the contract is unambiguous, the intent of the parties should be ascertained solely from the instrument embodying the contract.[34] Even in the absence of a severability provision within the contract, Missouri courts have concluded that severance is still proper, stating that "[w]ith respect to contracts which contain a forbidden or invalid provision, our [Missouri] Supreme Court at an early date declared the 'general rule to be, that if the good be mixed with the bad, it shall nevertheless stand, provided a separation can be made.'"[35] If the illegal clause can be severed without harming the essence or primary intent of the contract, then the clause should be severed.[36] Severance, however, is improper when there is an "all-pervading vice, such as fraud, or some unlawful act which is

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29. *Id.* (quoting JOSEPH D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 478 n.76 (3d ed. 1987)).

30. *Id.* at 1249 (quoting E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.8, at 70 (1990)); *see also* Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1058 (11th Cir. 1998); Wright v. Circuit City Stores, Inc., 82 F. Supp. 2d 1279, 1287 (N.D. Ala. 2000).

31. *See also Wright*, 82 F. Supp. 2d at 1283; AT & T Tech., Inc. v. Comm. Workers of Am., 475 U.S. 643, 648-49 (1986).

32. *Wright*, 82 F. Supp. 2d at 1283; *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

33. Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 680 (8th Cir. 2001) (quoting Speedie Food Mart, Inc. v. Taylor, 809 S.W.2d 126, 129 (Mo. Ct. App. 1991)).

34. *Id.*; *see also* Marshall v. Pyramid Dev. Corp., 855 S.W.2d 403, 406 (Mo. Ct. App. 1993).

35. *Gannon*, 262 F.3d at 680-81 (quoting Kisling v. MFA Mut. Ins. Co., 399 S.W.2d 245, 250 (Mo. Ct. App. 1966)).

36. *See id.* at 681. The *Gannon* court stated that:

> Where one provision in a contract, which does not constitute its main or essential feature or purpose, is void . . . but is clearly separable and severable from the other parts which are relied upon, such other parts are not affected by the invalid provision, and may be enforced as if no such provision had been incorporated in the contract.

Id. (quoting Schibi v. Miller, 268 S.W. 434, 436 (Mo. Ct. App. 1925)).

condemned by public policy or the common law and avoids all parts of the transaction because all are alike infected."[37]

B. A Brief Introduction to Arbitration

Prior to the enactment of the Federal Arbitration Act ("FAA")[38] in 1925, courts generally would not enforce arbitration agreements, even though entered into by two merchants with equal bargaining power.[39] The growth of commerce in the early part of the twentieth century and the resulting increased burden on the courts, however, caused many business groups to lobby state and federal lawmakers to create laws that would validate the use of arbitration as an alternative to litigation.[40] As a result of these lobbying efforts, Congress enacted the FAA in 1925.[41] It was re-enacted and codified in Title 9 of the United States Code in 1947.[42]

The FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[43] To accomplish this objective, Section 2 of the FAA states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[44] Unless the arbitration clause is illegal according to traditional contract law principles, therefore, the FAA mandates that courts compel arbitration when parties have entered into a valid arbitration agreement.[45]

Views on binding arbitration in the employment agreement context are sharply polarized amongst the legal community.[46] Some praise arbitration as a "quicker and cheaper" alternative to litigation that allows parties to tailor the

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37. *Id.* (quoting Koontz v. Hannibal Sav. & Ins. Co., 42 Mo. 126, 129 (Mo. 1868)).

38. 9 U.S.C. §§ 1-307 (2000).

39. *See* Sternlight, *Panacea*, *supra* note 3, at 644-45.

40. *See* Sternlight, *Panacea*, *supra* note 3, at 645; Isbell, *supra* note 27, at 1130-32.

41. *See* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1470 (D.C. Cir. 1997).

42. *Id.*

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

44. 9 U.S.C. § 2 (2000).

45. *See* Sternlight, *Mandatory*, *supra* note 3, at 21. In *Stirlen v. Supercuts, Inc.*, the California Court of Appeals held that an employment contract precluding the plaintiff from recovering damages other than actual damages for breach of contract was unconscionable under California contract law. 60 Cal. Rptr. 2d 138, 150-52 (Cal. Ct. App. 1997).

46. *See* Sternlight, *Mandatory*, *supra* note 3, at 21-24.

dispute resolution process to a form that maximizes their individual needs.[47] Others argue that companies "use arbitration clauses abusively to achieve unfair advantages over consumers, employees, or others."[48] Initially, the United States Supreme Court was hesitant to compel binding arbitration in instances where it was thought to stand in direct conflict with the public interest.[49] Since 1983, however, the Court has become a staunch supporter of arbitration.[50] In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[51] the Supreme Court stated that:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . . [T]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense of arbitrability.[52]

The Supreme Court noted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[53] that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, a concern which requires that we rigorously enforce agreements to arbitrate."[54] The Court has stated that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[55] The Supreme Court, however, has not said that all arbitration agreements are per se good.[56]

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47. *See* Sternlight, *Mandatory*, *supra* note 3, at 21-22; Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985); *Gilmer*, 500 U.S. at 31.

48. Sternlight, *Mandatory*, *supra* note 3, at 23-24.

49. *See* Sternlight, *Mandatory*, *supra* note 3, at 22; Isbell, *supra* note 27, at 1133-34.

50. *See* Sternlight, *Mandatory*, *supra* note 3, at 22-23; Sternlight, *Panacea*, *supra* note 3, at 660-64; Isbell, *supra* note 27, at 1133-37.

51. 460 U.S. 1 (1983).

52. *Id.* at 24-25.

53. 473 U.S. 614 (1985).

54. *Id.* at 625-26 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)) (internal quotation marks omitted).

55. *Id.* at 628.

56. *See id.*; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

C. Severance or Total Voiding?: The Views of the Courts

Courts that have dealt with arbitration agreements containing clauses that prohibit statutorily available remedies have chosen one of two approaches to resolve the issue: sever the clause from the agreement and compel arbitration, or void the agreement in its entirety.[57] Courts that conclude severance is proper generally base their holdings on either the federal policy favoring arbitration or a severance provision within the agreement.[58] Courts that have voided the entire agreement generally have based their holdings on reasons such as: (1) finding too many one-sided and egregious provisions favoring the employer,[59] (2) the fact that the agreement is integrated,[60] and (3) the improper incentive given to employers to include illegal provisions within the agreement.[61]

1. Cases in Which Courts Found Severance To Be Proper

In *Herrington v. Union Planters Bank, N.A.*,[62] the United States District Court for the Southern District of Mississippi noted, in dicta, that a provision within an arbitration agreement that waived the employees' ability to obtain punitive damages was severable.[63] Plaintiffs argued that the arbitration agreement was unenforceable because it denied them the right to pursue punitive damages afforded to them by the Truth in Savings Act ("TISA").[64] The court

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57. Perez v. Globe Airport Sec. Serv. Inc., 253 F.3d 1280, 1286 (11th Cir. 2001).

58. *Id.*; *see, e.g.*, Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 683 n.8 (8th Cir. 2001); Wright v. Circuit City Stores, Inc., 82 F. Supp. 2d 1279, 1287-88 (N.D. Ala. 2000); Etokie v. Carmax Auto Superstores, Inc., 133 F. Supp. 2d 390, 395 (D. Md. 2000); Herrington v. Union Planters Bank, N.A., 113 F. Supp. 2d 1026, 1033 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001); Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815, 828 (S.D. Ohio 1999); Primerica Fin. Serv., Inc. v. Wise, 456 S.E.2d 631, 635 (Ga. App. 1995). *But see* Sosa v. Paulos, 924 P.2d 357, 362-65 (Utah 1996).

59. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999).

60. *See* Armendariz v. Found. Health Psychcare Serv. Inc., 6 P.3d 669, 696-97 (Cal. 2000).

61. *See* Perez v. Globe Airport Sec. Serv., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001).

62. 113 F. Supp. 2d 1026 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001).

63. *See id.* at 1033. The agreement stated, in pertinent part, that: "[t]here may be no claims or recovery of punitive, incidental, or consequential damages as to any Dispute submitted to Arbitration." *Id.* at 1028 (emphasis omitted).

64. *Id.* at 1032. The court noted that the "Third Circuit rejected a similar argument by finding that a contractual waiver of punitive damages is irrelevant to the issue of whether the plaintiff's claims should be arbitrated, even if such damages are recoverable under the statute." *Id.* (citing Great Western Mortgage v. Peacock, 110 F.3d 222, 232 (3d Cir. 1997)); *see also* Truth in Savings Act, 12 U.S.C. §§ 4301-4313 (2000).

found that the waiver of punitive damages was not a legitimate basis for denying the compulsion of arbitration.[65] After analyzing the remedies prescribed by TISA, the court concluded that TISA did not afford the right to punitive damages, and, therefore, the waiver of punitive damages in the arbitration agreement did not preclude plaintiffs from recovering rights guaranteed under TISA.[66] The district court pointed out that courts have "severed provisions which would otherwise render an arbitration agreement unenforceable."[67] Noting the federal policy favoring arbitration, the district court found that "the waiver of punitive damages, if applicable to the plaintiffs' TISA allegations, is severable from the arbitration agreement."[68]

In *Wright v. Circuit City Stores, Inc.*,[69] the United States District Court for the Northern District of Alabama severed a provision within an arbitration agreement that limited remedies afforded to the plaintiffs under 42 U.S.C. § 1981.[70] The district court noted the basic rule that "[w]hen an arbitration clause has provisions that defeat the remedial and deterrent functions of a statute, the prospective litigant cannot effectively vindicate [his or her] statutory rights, thereby making the arbitration clause unenforceable."[71] Although the district court conceded that the provision precluded plaintiffs from vindicating their rights under 42 U.S.C. § 1981, and, therefore, could not be enforced, the court did not feel that the entire agreement should be void.[72] Relying on a severability provision within the agreement, the district court held that severance of the provision was the proper resolution of the dispute.[73]

In *Etokie v. Carmax Auto Superstores, Inc.*,[74] the United States District Court for the District of Maryland severed a provision within an arbitration

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65. *Id.*

66. *Id.* at 1033.

67. *Id.* (quoting Jones v. Fujitsu Network Comm. Inc., 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999)). The court also cited *Sims v. Unicor Mortgage, Inc.*, No. 4:98CV25DB (N.S. Miss. 1998), which held that a waiver of punitive damages provision is severable from an arbitration agreement even if it is contrary to public policy. *Id.*

68. *Id.*

69. 82 F. Supp. 2d 1279 (N.D. Ala. 2000).

70. *See id.* at 1287. The Circuit City agreement placed limitations on back pay, front pay, and punitive damages. *Id.* at 1286.

71. *Wright*, 82 F. Supp. 2d at 1285 (citing Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998)); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

72. *See Wright*, 82 F. Supp. 2d at 1286-87.

73. *See id.* at 1287. The court distinguished *Paladino* on the grounds that (1) the agreement was not integrated, (2) the provision did not taint the entire agreement, and (3) the agreement did not attempt to "contravene public policy." *Id.*

74. 133 F. Supp. 2d 390 (D. Md. 2000).

agreement limiting plaintiff's remedies under the Americans with Disabilities Act[75] and Title VII of the Civil Rights Act of 1964.[76] Plaintiff argued that he was unable to vindicate his statutory rights and that case law clearly asserted that an arbitration agreement limiting statutorily prescribed remedies is unenforceable.[77] The district court disagreed and held that contract law permits the severance of a provision if the contract is not integrated.[78] The district court further noted that in the present case the arbitration agreement contained a severance provision, that the agreement was not integrated, and that the defendants were not attempting to contravene public policy.[79] The court pointed out that an identical provision in *Wright v. Circuit City Stores, Inc.*, which also contained a severability provision, was found to be severable, and that severing the provision not only conformed to the federal policy favoring arbitration, but also provided plaintiff with the opportunity to fully vindicate his rights.[80]

2. Courts Finding Voidance To Be Proper

In *Graham Oil Co. v. ARCO Products Co.*,[81] the United States Court of Appeals for the Ninth Circuit voided an arbitration clause contained in a franchisor distributor agreement that limited a number of the plaintiff's statutorily mandated rights under the Petroleum Marketing Practices Act.[82] After determining that the arbitration clause was severable, the court was forced to decide whether the entire arbitration clause should be stricken, or whether the provisions of the clause denying plaintiff his statutorily mandated rights could simply be removed.[83] The court concluded that the arbitration clause was not

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75. 42 U.S.C. §§ 12101-12213 (1994).

76. *See Etokie*, 133 F. Supp. 2d at 395; 42 U.S.C. §§ 2000e-2000e-17 (1994).

77. *See Etokie*, 133 F. Supp. 2d at 393-94. In support of his argument, plaintiff cited *Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir. 2000), *cert. denied*, 530 U.S. 1276 (2000); *Paladino v. Avnet Comp. Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998); and *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995). *Etokie*, 133 F. Supp. 2d at 394.

78. *See id.*

79. *See id.*

80. *See id.* at 395.

81. 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995).

82. *See id.* at 1246-49. Plaintiff was denied the right to exemplary damages, the right to recover reasonable attorney's fees, and the right to a one-year statute of limitation. *See id.* at 1247-48. The court held that "[b]ecause the arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded franchisees by the PMPA, we hold that the clause contravenes the Act." *Id.* at 1248; *see also* Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 (2000).

83. *See Graham Oil Co.*, 43 F.3d at 1248.

"a single isolated provision . . . [but] a highly integrated unit containing three different illegal provisions."[84] Relying on the well-founded contract principle of integration,[85] the court held that the entire arbitration clause must be severed, further noting that defendants attempted to use the clause "to achieve through arbitration what Congress had expressly forbidden."[86]

In *Hooters of America, Inc. v. Phillips*,[87] the United States Court of Appeals for the Fourth Circuit held that an arbitration agreement containing numerous one-sided and egregious provisions favoring the employer at the expense of the employee must be declared void and unenforceable.[88] Hooters argued that, by twice signing the agreement, Phillips voluntarily assented to a bilateral agreement that required Phillips to submit her Title VII claim to arbitration.[89] The court disagreed, stating, in pertinent part, that:

> Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith . . . . By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution.[90]

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84. *Id.*

85. The well-founded contract principle is the following: "a contract should be treated as entire when by consideration of its terms, nature and purposes each and all of the parts appear to be interdependent and common to one another." *Id.* (quoting JOSEPH D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 478 n.76 (3rd ed. 1987)).

86. *Id.* at 1249. The court felt that ARCO "blatant[ly] misuse[d]" the arbitration procedure, which, therefore, tainted the entire agreement. *Id.* The clause, according to the court, represented "an integrated scheme to contravene public policy." *Id.* (quoting E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.8, at 70 (1990)). The dissent attacked the majority for not determining whether a party could, by agreement, waive or limit punitive damages as provided by the Petroleum Marketing Practices Act. *Id.* at 1250-51 (Fernandez, J., dissenting).

87. 173 F.3d 933 (4th Cir. 1999).

88. *See id.* at 940-41.

89. *Id.* at 938.

90. *Id.* at 939-41. The "egregious" provisions included requiring the employee to give notice of the claim, but not requiring Hooters to file any responsive pleadings or give notice of its defenses; a mechanism ensuring that Hooters would be able to select a biased decision-maker; allowing Hooters, but not the employee, the right to cancel the arbitration agreement upon thirty days notice. *Id.* at 938-39.

In *Perez v. Globe Airport Security Services, Inc.*,[91] the United States Court of Appeals for the Eleventh Circuit voided an arbitration agreement containing a clause that limited remedies afforded to plaintiff under Title VII of the Civil Rights Act of 1964.[92] After noting that the agreement failed to contain a severance provision, the court rejected the argument that the federal policy favoring arbitration required the court to sever the provision, rather than void the agreement.[93] The Eleventh Circuit held that an agreement that limited remedies afforded by Congress fails to serve the same remedial and deterrent functions of litigation and must, therefore, be held unenforceable.[94] The court felt that severing the clause would condone the employer's conduct and fail to deter other employers from engaging in similar conduct.[95] Further, the court felt that the clause tainted the entire agreement stating, in pertinent part, that:

> If an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements. Such provisions could deter an unknowledgeable employee from initiating arbitration, even if they would ultimately not be enforced. It would also add an expensive procedural step to prosecuting a claim; the employee would have to request a court to declare a provision unlawful and sever it before initiating arbitration.[96]

Even prior to *Perez*, the Eleventh Circuit, in *Paladino v. Avnet Computer Technologies, Inc.*,[97] voided an arbitration agreement limiting plaintiff's remedies under Title VII of the Civil Rights Act of 1964.[98] The court found that

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91. 253 F.3d 1280 (11th Cir. 2001), *vacated by* 294 F.3d 1275 (11th Cir. 2002).

92. *See id.* at 1287. The illegal provision required the parties to split the costs of arbitration equally, denying the employee the right under Title VII to obtain costs and fees upon winning the suit. *See id.* at 1286-87.

93. *See id.* at 1286.

94. *See id.* at 1286-1287. The court concluded that limiting the employee's right to costs and fees denied her the remedial rights afforded under Title VII, and, therefore, failed to serve the remedial and deterrent function of the statute. *See id.* at 1287.

95. *Id.*

96. *Id.*

97. 134 F.3d 1054 (11th Cir. 1998).

98. *See id.* at 1060. One provision did not require the employer to advance the costs of arbitration and another provision limited plaintiff's remedies to damages for breach of contract. *See id.* at 1061-62 (Cox, J., concurring). The Supreme Court recently held that an agreement that does not specify which party must advance the arbitration fees and costs is not for that reason rendered invalid. *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 82 (2000). The court in *Perez*, however, declared that the Supreme Court's decision "does not cast doubt on the continuing vitality of the primary

the provisions "denie[d] the employee the possibility of meaningful relief in an arbitration proceeding" because the arbitrator was precluded from granting Title VII damages and equitable relief, therefore defeating the remedial purpose of Title VII.[99] The court held that if an arbitration agreement contains provisions that defeat the remedial and deterrent functions of a statute, the employee is denied the opportunity to vindicate his or her statutory rights, and a court is compelled to void the entire agreement because the illegal clause taints the entire agreement.[100]

Finally, in *Armendariz v. Foundation Health Psychcare Services, Inc.*,[101] the Supreme Court of California voided an arbitration agreement containing numerous clauses the court found to be unconscionable.[102] After analyzing various California cases discussing the doctrine of severability, the court pointed out that two general reasons are given for severance as opposed to voiding: (1) severance prevents parties from obtaining an unwarranted benefit or "suffering undeserved detriment" which result from the invalidation of the entire agreement; and (2) severance serves the general policy of preserving a contractual relationship if doing so does not support an illegal scheme.[103] Generally, the court stated, an arbitration agreement must be voided if the central

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holding in *Paladino*. An arbitration agreement containing provisions that defeat a federal statute's remedial purpose is still not enforceable." *Perez*, 253 F.3d at 1287.

99. *See Paladino*, 134 F.3d at 1062.

100. *See id.*

101. 99 Cal. Rptr. 2d 745 (Cal. 2000).

102. *See id.* at 774-77. The court noted that "[t]he principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees seems to be undisputed." *Id.* at 759. The illegal provision stated, in pertinent part, that:

> I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief.

See id. at 759-60. For an analysis of the *Armendariz* case, *see generally* Isbell, *supra* note 27.

103. *See id.* at 774. The court also analyzed California Civil Code § 1598, which states, in pertinent part, that "[w]here a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." *Id.* at 773. In addition, the court analyzed California Civil Code § 1599, which states, in pertinent part, that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." *Id.*

purpose of the contract is infected with illegality.[104] If the illegal provision is collateral to the main purpose of the contract, then severance is proper.[105] The court held that severance was improper in *Armendariz* because the agreement at hand contained numerous provisions that served as a "systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage" and because there was no single provision that could be stricken to eradicate the unconscionable permeation from the agreement.[106]

IV. INSTANT DECISION

A. The Majority Opinion

In *Gannon v. Circuit City Stores, Inc.*,[107] the United States Court of Appeals for the Eighth Circuit resolved a dispute directly involving the severance debate.[108] The issue before the court was whether the illegal punitive damages clause invalidated the entire agreement, forcing the parties to resolve the dispute in federal court, or whether the clause could simply be severed from the agreement, leaving the remaining agreement intact and compelling arbitration.[109] In an opinion by Circuit Judge Pasco Bowman, the court chose to sever the clause.[110]

The Eighth Circuit began its opinion by discussing the Federal Arbitration Act ("FAA"), noting that the FAA was enacted by Congress to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place

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104. *Id.* at 775.

105. *Id.*

106. *Id.* The court noted that it did not have to determine whether the illegal damages provision was enough to void the entire agreement. *See id.* at 775 n.13. The court noted, however, that severing an illegal damages provision:

> [W]ill not . . . dete[r] [an employer] from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter. In that sense, the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme, and severance would be disfavored unless it were for some other reason in the interests of justice.

Id.

107. 262 F.3d 677 (8th Cir. 2001).

108. *See id.* at 678.

109. *See id.*

110. *See id.* at 683.

arbitration agreements upon the same footing as other contracts."[111] The appellate court also noted that the FAA manifests a "liberal federal policy favoring arbitration agreements."[112] The court stated that its role was to determine "whether the parties have entered into a valid agreement to arbitrate and, if so, whether the existing dispute falls under the coverage of the agreement."[113] If both requirements are satisfied, then the FAA mandates the court to compel arbitration.[114]

The parties did not dispute that the DRA covered the dispute, and Circuit City did not contest the district court's finding that the punitive damages clause was illegal.[115] The threshold question before the court, therefore, was whether the parties had entered into a valid arbitration agreement.[116] Circuit City argued that the DRA and Missouri contract law clearly established that the illegal term should be severed from the agreement.[117] Gannon argued that the invalid clause tainted the entire agreement and that public policy thus required that the entire agreement be declared unenforceable.[118] Gannon's argument was rejected by the majority and the court held that the proper remedy, according to Missouri contract law and federal policy, was severance of the illegal provision.[119]

In support of its holding that the provision should be severed, the Eighth Circuit concluded that severance was required by Missouri contract law.[120] Under Missouri contract law, a court must determine the intent of the parties when interpreting a contract,[121] and the court concluded that in this case the intent of the parties was unambiguously stated in Rule 18 of the Circuit City arbitration agreement.[122] That provision clearly stated that any invalid terms

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111. *Id.* at 679 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

112. *Id.* at 680 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

113. *Id.*

114. *See id.*

115. *See id.* The district court recognized that "punitive damages act as an important deterrent to employers who might otherwise discriminate on unlawful bases." Gannon v. Circuit City Stores, Inc., No. 4:00-CV-330 JCH, 2000 WL 1062102, at *3 (E.D. Mo. July 10, 2000). Because the denial of punitive damages failed to "effectively vindicate [plaintiff's] rights" provided by statute, the court found the punitive damages clause to be illegal. *See id.*

116. *Gannon.*, 262 F.3d at 680.

117. *See id.*

118. *See id.*

119. *Id.* at 681-83.

120. *See id.* at 680-81.

121. *See id.* at 680.

122. *See id.*; *supra* note 24 and accompanying text.

should be severed from the agreement and that the parties should resolve their dispute by arbitrating under the remaining terms.[123]

Even if the DRA had not contained a severance clause, the court believed that Missouri contract law still required the severance of the illegal provision rather than voiding the entire agreement.[124] Citing *Kisling v. MFA Mutual Insurance Co.*,[125] and *Schibi v. Miller*,[126] the court concluded that the "essence of the contract . . . [is] to settle their employment disputes through binding arbitration."[127] Thus, the punitive damages clause functioned as one aspect of the DRA "and can be severed without disturbing the primary intent of the parties to arbitrate their disputes."[128]

The court also rejected Gannon's public policy arguments. Gannon argued that public policy required that the entire DRA be invalidated.[129] She asserted that the clause fell under an exception to severance under Missouri contract law.[130] Specifically, Gannon argued that the clause tainted or infected the entire agreement and rendered the entire agreement unenforceable.[131] Gannon further argued that failure by the court to sever the agreement would encourage employers to fill their agreements with illegal terms because "employees will be forced either to arbitrate under the unfair terms or to go to court to get them removed from the agreement."[132] In this way, Gannon argued, severance provides an incentive to employers to engage in inappropriate conduct.[133]

The court disagreed with Gannon's arguments, concluding that the illegal provision did not taint the entire agreement.[134] Citing *Hooters of America, Inc. v. Phillips*,[135] the court conceded that in certain instances, agreements may contain numerous invalid provisions that would undermine the legitimacy of the entire agreement.[136] Still, the court found that the DRA in the present case did

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123. *See Gannon*, 262 F.3d at 680.

124. *Id.* at 680-81.

125. 399 S.W.2d 245, 250 (Mo. Ct. App. 1966); *see supra* note 35 and accompanying text.

126. 268 S.W. 434, 436 (Mo. Ct. App. 1925); *see supra* note 36 and accompanying text.

127. *Gannon*, 262 F.3d at 681.

128. *Id.*

129. *See id.*

130. *See id.*; *supra* note 37 and accompanying text.

131. *See id.*

132. *Id.*

133. *See id.*

134. *See id.*

135. 173 F.3d 933, 940 (4th Cir. 1999).

136. *See Gannon*, 262 F.3d at 681.

not contain numerous invalid provisions.[137] Further, the court questioned whether the provision at issue was invalid. After noting that Circuit City had not appealed the invalidation of the provision, the court stated that there was no existing precedent that would invalidate such a provision anyway.[138] The court's survey of Missouri law discovered that "Missouri courts have not suggested that it is improper for parties to include such terms in their contracts."[139] Therefore, because public policy exceptions require "supporting legal authority," and because there was no such authority, the court was forced to reject Gannon's public policy argument.[140]

The court concluded its opinion by addressing what it referred to as Gannon's "general public-policy arguments."[141] The court noted that the FAA limited its review to "whether a dispute is properly arbitrable."[142] The court did not have the authority to consider "public-policy advantages or disadvantages resulting from the enforcement of the agreement."[143] This is even more true "where controlling federal public policy has already been firmly established."[144] Specifically, Congress' purpose behind the act was to enforce voluntary agreements between parties.[145] This objective requires courts to "rigorously enforce agreements to arbitrate."[146] The court stated that:

> [i]f we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract.[147]

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137. *See id.*
138. *See id.*
139. *Id.*
140. *See id.* at 682.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *See id.* The Supreme Court has stated that "the preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, a concern which requires that we rigorously enforce agreements to arbitrate." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).
146. *Gannon*, 262 F.3d at 682.
147. *Id.*

Deterring parties from forming contracts with arbitration provisions under the FAA would function as the direct "antithesis of the 'liberal federal policy favoring arbitration agreements.'"[148] Also, because Gannon had evinced her intent to resolve disputes through binding arbitration by signing the DRA,[149] the court found that severing the invalid clause not only coincided with federal policy but also with Gannon's intent because "excluding the provision only allows her the opportunity to arbitrate her claims under more favorable terms than those to which she agreed."[150]

B. The Dissent

The Honorable Harold D. Vietor dissented from the majority opinion.[151] Judge Vietor concluded that the punitive damages provision was in direct violation of public policy.[152] Judge Vietor argued that the "near-eradication of substantive recovery rights enacted by Congress and the Missouri legislature is ... unconscionable."[153] Citing *Perez v. Globe Airport Security Services, Inc.*,[154] Judge Vietor concluded that severance was an improper resolution and that the

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148. *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983)). The court disagreed with Gannon's argument that severance would encourage employers to include illegal provisions. *See id.* at n.7. The court pointed out that the present dispute had led to several months of "time-consuming and expensive litigation for both sides." *Id.* The court quoted the United States Supreme Court, which stated, "by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)) (internal quotation marks omitted). The court further noted that the present dispute had deprived Circuit City of the benefits of arbitration, and, therefore, these "forfeitures belie the argument that severance encourages employers to insert problematic terms that likely will result in litigation." *Id.*

149. *Id.* at 682.

150. *Id.* at 682-83. The court also noted that the Eleventh Circuit in *Perez* had recognized the arguments presented by Gannon and the dissent, but disagreed with the Eleventh Circuit insofar as they based those arguments upon a public policy exception. *Id.* at 683 n.8. The court further noted that the agreement in *Perez* did not contain a severance provision. *Id.*

151. *Id.* at 683-84 (Vietor, J., dissenting).

152. *Id.* at 683 (Vietor, J., dissenting). Vietor noted that the punitive damages clause "takes away all but $5,000 of the $300,000 maximum recovery available under Title VII." *Id.* (Vietor, J., dissenting). Vietor also noted that the Missouri Human Rights Act places no limits on punitive damages. *Id.* (Vietor, J., dissenting).

153. *Id.* (Vietor, J., dissenting).

154. 253 F.3d 1280 (11th Cir. 2001), *vacated by* 294 F.3d 1275 (11th Cir. 2002). The *Perez* court held that "[a]n arbitration agreement containing provisions that defeat a federal statute's remedial purpose is ... not enforceable." *Id.* at 1287.

entire agreement should be held unenforceable.[155] Further, Judge Vietor addressed the majority's concern regarding the discouragement of parties to form contracts under the FAA.[156] The term in the DRA, according to Judge Vietor, was not a "procedural provision or a minor term of any sort."[157] Judge Vietor concluded that the term:

> [G]uts a major substantive remedy that Congress and the Missouri legislature chose to provide to employees. It is a term that seeks to drastically change the substantive law (in favor of the employer) that is to be applied in the arbitration process.[158]

V. COMMENT

In *Gannon v. Circuit City Stores, Inc.*, the Eighth Circuit Court of Appeals held that severance of the punitive damages clause in the DRA was the proper resolution of the parties' dispute.[159] The court, in reaching this holding, disagreed with the courts that have held that a clause denying an employee remedial rights afforded by statute taints the entire agreement and, therefore, renders the agreement unenforceable.[160] While the court's holding is reasonable under the specific facts of the case, differing factual scenarios may require the court to deviate from the holding to better accommodate the interests of justice.

First, the court held that the intent of the parties, based upon a term in the agreement, was to sever the illegal clause.[161] While this conclusion, read in light

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155. *Gannon*, 262 F.3d at 684 (Vietor, J., dissenting)..

156. *Id.* (Vietor, J., dissenting).

157. *Id.* (Vietor, J., dissenting).

158. *Id.* (Vietor, J., dissenting).

159. *Id.* at 683.

160. *See supra* notes 91-100 and accompanying text.

161. *See supra* notes 121-23 and accompanying text; Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857 (1999). Professor Harding notes that:

> When a clause restricting remedies appears in an adhesion arbitration contract, ascertaining party intent is problematic. For example, if an employer inserts a clause restricting the arbitrator's power to award statutory damages, including punitive damages, it seems clear that the drafting party intended to use the arbitral process to gain certain advantages over the employee. It is not clear whether an employer would still want to arbitrate if the restriction on remedies was declared invalid. Under those circumstances, an arbitrator would be empowered to award all the remedies available to the employee under federal and state statutory and common law if the employee were to prevail. Consequently, the employer, now unable to gain those advantages, may instead prefer a judicial forum where review of

of a freedom of contract approach, appears to be reasonable, contextually, it makes little sense.[162] It is highly unlikely that Gannon read and understood the terms of the contract. Also, as the less sophisticated party in the employer/employee relationship, Gannon probably lacked knowledge of the possible range of damages available to her.[163] Finally, the "voluntariness" of the agreement is also questionable. When faced with choosing employment over unemployment, an individual will likely take any opportunity presented to him or her, even one requiring assent to an arbitration agreement, that assists in relieving a financial burden.

One must also question why the Eighth Circuit, in rejecting Gannon's public policy argument, came to a different conclusion than that reached by other courts that have rested their holdings on public policy arguments and have clearly declared that a "no punitive damages" clause cannot deny rights afforded by statute.[164] Even though the Eighth Circuit determined that it did not have the authority to consider public policy arguments, other federal courts have concluded otherwise.[165] The fact that a severance provision was present in the contract may be relevant. Further, while the Eighth Circuit found that under

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> a court or jury decision on damages, particularly punitive damages, is not as limited as it is when such damages are provided in an arbitration award.
>
> Ascertaining employee intent with respect to severability is also difficult. It is likely that the employee did not even know about the restriction on remedies when the employee supposedly agreed to the arbitration provision. If an employee does not know about the invalid provision, it is impossible to discern his or her intent as to its severability.

Id. at 940-41 (footnotes omitted). Professor Harding also notes that:

> When an arbitration provision is declared invalid because it violates public policy . . . as with a clause restricting statutory remedies, courts have been reluctant to find the drafting party's intent dispositive when determining whether to sever the offending arbitration terms. The unwillingness stems from a concern that to hold otherwise would unjustly reward those parties who seek to use the arbitral process to gain unfair advantages.

Id. at 942 (footnotes omitted).

162. Professor Harding notes that "[i]t is contrary to the notion of freedom of contract to take the position that an arbitration agreement signed by both parties . . . should be unenforceable when it limits or restricts statutory remedies." *Id.* at 947. Professor Harding argues, however, that "prohibiting private ordering by use of restrictive arbitration clauses, while in conflict with the freedom of contract doctrine, is entirely permissible because such ordering is inconsistent with the public policies embedded in the anti-discrimination statutes, the deterrence of unlawful behavior and the compensation to persons for harms caused by violations of public laws—policies that outweigh the public interest in freedom of contract." *Id.* at 947-48 (footnotes omitted).

163. *See* Isbell, *supra* note 27, at 1147.

164. *See supra* notes 91-100 and accompanying text.

165. *See supra* notes 91-100 and accompanying text.

Missouri precedent the punitive damages clause was not improper, other courts, including the district court in the present case, have held that a punitive damages clause that denies remedies afforded by statute is illegal and, therefore, renders the entire arbitration agreement unenforceable.[166]

The facts of this case, however, lead to the conclusion that the Eighth Circuit made the right decision. The only illegal provision, at least as determined by the district court, was the punitive damages clause.[167] A severance provision was located in the contract[168] and, as the Eighth Circuit noted, severance of the illegal clause did not dilute the primary intent of the contract: to arbitrate the dispute.[169] It is difficult to conclude that the clause "tainted" the entire agreement or that the agreement was integrated. In fact, severance of the clause, as the court notes, provided Gannon with the remedial rights guaranteed by statute.[170]

From a policy standpoint, however, the court's holding seems dangerous. Little doubt exists that employers, cognizant of the holding, may feel encouraged to fill their arbitration agreements with illegal provisions, aware that severance will be the only penalty.[171] Even if an employee is aware of a provision's illegality, he or she will be forced to incur added expenses to determine the validity of the agreement.[172] Courts should not provide an incentive to employers to include obviously illegal provisions that deny rights mandated by statute, an incentive that exists if severance becomes the dominant judicial mechanism.[173] Doing so would seem to "condone an illegal scheme that contravenes public policy."[174] Although the federal courts do favor arbitration, compelling arbitration should not occur at the expense of workers' rights.[175] As

166. *See supra* notes 17, 91-99 and accompanying text.

167. *See supra* note 115.

168. *See supra* notes 120-23 and accompanying text.

169. *See supra* notes 127-28 and accompanying text.

170. *See supra* note 150 and accompanying text.

171. *See* Isbell, *supra* note 27, at 1148. Isbell notes that "[c]orporations and other forms of successful businesses are always trying to find new ways to make operations more efficient, less costly, and more profitable . . . therefore, it should not be surprising to anyone that companies will try to maximize profits, even if it is at the expense of their (former) employees." *Id.*; *see also* Harding, *supra* note 161, at 940.

172. *See supra* text accompanying note 96.

173. *See supra* notes 96 and 106 and accompanying text.

174. *See supra* note 86.

175. Professor Harding argues that when courts find tension between the rules regarding severance and the federal policy favoring arbitration, "a policy seeking to discourage parties from abusing or misusing the arbitral process should take precedence over the federal policy favoring arbitration; otherwise, we are left with a federal policy favoring abusive arbitration practices. Surely this is not an acceptable result." Harding, *supra* note 161, at 946-47.

many courts have noted, arbitration must provide the same remedial and deterrent functions as statutes.[176] The only difference should be that the dispute will be resolved in a different forum that best serves the needs of both of the parties.

A case-by-case approach is the only reasonable means of resolving this problem. While a per se rule stating that any illegal clause will render an arbitration agreement unenforceable would effectively deter employers from including such clauses, it would also deter employers from entering into arbitration agreements altogether.[177] This negative effect can be avoided by a case-by-case approach with certain clearly delineated factors to make the court's decision whether to sever a clause or invalidate an entire agreement much easier. The underlying inquiry should be a determination as to whether the employer acted in good or bad faith.[178] If a certain clause, such as one that denies remedial rights afforded by statute, has been judicially determined to be illegal, inclusion of that clause in an arbitration agreement should render the entire agreement unenforceable.[179] This will give employers notice as to what they can or cannot include in an agreement. Other factors that must be taken into consideration include the presence of a severance provision, the inclusion of numerous egregious provisions, integration, the sophistication of the employee, and the inability to remove the illegal provision's or provisions' unconscionable taint by severing the illegal provision from the agreement. No single factor should be dispositive and courts should be given wide discretion in making this determination to take into account the unique factual scenarios presented by each case.[180]

VI. CONCLUSION

While the holding in *Gannon* may tempt employers to load their arbitration agreements with illegal provisions, they must also be wary that the right factual scenario may cause a court to reach a different result than that reached by the Eighth Circuit in *Gannon*. Although there seems to be a split amongst authorities as to the severance issue, a bright line rule seems inadequate. The

176. *See supra* notes 91-100 and accompanying text.

177. *See supra* text accompanying note 147.

178. *See* Armendariz v. Found. Health Psychcare Serv. Inc., 99 Cal. Rptr. 2d 745, 774 (Cal. 2000) ("[t]he overarching inquiry is whether 'the interests of justice . . . would be furthered' by severance") (quoting Beynon v. Garden Grove Med. Group, 100 Cal. App. 3d 698, 713, 161 Cal. Rptr. 146 (1980)).

179. *See* Harding, *supra* note 161, at 944 ("When a party attempts to abuse the arbitral process and gets caught, that party should completely lose the privilege—gained only by its superior economic position—of requiring the weaker party to arbitrate.").

180. Harding, *supra* note 161, at 944.

differing factual scenarios in each case lead to the conclusion that the proper resolution is for the courts to adopt a case-by-case approach. A case-by-case approach would help alleviate the existing tension between freedom of contract, workers' rights, and employers' rights, a tension that makes the resolution of these cases quite difficult.

HADI S. AL-SHATHIR