

CIRCUIT CITY V. ADAMS: THE BATTLE OVER ARBITRATION AGREEMENTS RAGES ON

by: Glenn R. Gaffney and Justin Gaffney

In *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001), the U.S. Supreme Court held that the Federal Arbitration Act (FAA), 9 USC §1 **et seq.** is applicable to employment agreements. The FAA was enacted to overcome reluctance to enforcement of arbitration agreements. *Allied-Bruce Terminix COS. v. Dobson*, 513 U.S. 265, 270 (1995). Federal policy favors arbitration and federal common law favoring arbitration preempts contrary state law. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

However, after the U.S. Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, **supra** the cause was remanded to the 9th Circuit Court of Appeals. The 9th Circuit has struck the agreement again; this time based upon a contractual analysis. The "Circuit City Dispute Resolution Agreement" (DRA) required Adams and all other Circuit employees to submit all claims and disputes to binding arbitration. Pursuant to the agreement, damages were restricted and the employee was required to split the costs of arbitration, including the daily fees of the arbitrator, court reporter and hearing room rental. The 9th Circuit noted that although the employee was required to arbitrate any claims against the employer, the reverse was not true. Circuit City was not required to arbitrate any claims it had against the employee. An employee cannot work at Circuit City without signing the DRA and if an applicant for employment refuses, Circuit City did not consider the applicant.

The 9th Circuit Court of Appeals held that the Circuit City DRA was "unconscionable under California law". Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract". 9 U.S.C. §2. In determining the validity of an arbitration agreement, federal courts "should apply ordinary state law principles that govern the formation of contracts". *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). General contract defenses such as fraud, duress, or unconscionability, may operate to invalidate an employment arbitration agreement. *Doctors Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

The 9th Circuit held that the Circuit City DRA "functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees". *Circuit City Stores, Inc. v. Adams*, 2002 WL 152986 (CA 9, February 4, 2002). The 9th Circuit held that the Circuit City DRA is unconscionable as a contract of adhesion as the one-sided DRA is a prerequisite to employment and job applicants are not permitted to modify its terms-they must take the contract or leave it.

The 9th Circuit also held that the DRA, which requires an employee to split the arbitrator's fees with Circuit City, renders the arbitration agreement unenforceable. *Cole v. Burns Intern. Security Services SVCS.*, 105 F.3^d 1465 (D.C. 1997). Additionally, the Circuit City DRA deprived the employee of his rights under statutory law. The Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), held that "by agreeing to arbitrate a statutory claim, [an employee] does not forego the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial form".

In *Greentree Finance Corp., v. Randolph*, 121 S.Ct. 513 (2000), the Supreme Court recognized “it may well be that the existence of large arbitration costs could preclude a litigant from effectively vindicating (his or her) federal statutory rights in the arbitral forum”. *Greentree*, 531 U.S. 90. When a party seeks to invalidate an arbitration agreement on the grounds of prohibitive expense, “that party bears the burden of showing the likelihood of incurring such costs”. *Greentree*, 531 U.S. 92.

In *Phillips v. Associates Home Equity Services, Inc.*, 2001 WL 1159216 (N.D. Ill. 2001), Northern District of Illinois Judge Kennelly denied the Defendant employer’s motion to compel arbitration pursuant to the *Greentree doctrine*. In *Phillips*, the Plaintiff offered evidence from the American Arbitration Association (AAA) that she was forced to pay “upwards of \$4,000 simply to file her claim”. Phillips provided an affidavit stating that she “cannot afford to pay” the filing fee and other costs and that she was in “severe financial straits”. The Defendant employer argued that the AAA commercial rules provided safeguards to protect Phillips from incurring exorbitant costs. The court found Defendant’s arguments to be unavailing as they related to the possibility that Phillips may ultimately be reimbursed for the costs, but that Phillips had made a reasonable and good faith effort to estimate actual costs from the AAA and showing that she was unable to front those expenses. *Greentree*, 531 U.S.92; *Giordano v. Pep-Boys-Manny, Moe & Jack, Inc.*, 2001 WL 484360 (E.D. Pa. March 29, 2001)(finding that arbitration costs in the thousands of dollars would deter Plaintiff’s vindication of his claims; thus the costs-sharing provisions of the arbitration agreement were unenforceable). Judge Kennelly cautioned that the showing by Phillips “does not create some bright-line rule for future litigants”. Any *Greentree* type inquiry must be determined on a “case-by-case basis”.

As arbitration agreements are becoming more and more prevalent in the employment setting, disputes over their enforcement has become a hotbed of current litigation. There is a strong federal policy favoring arbitration agreements pursuant to the FAA. Arbitration agreements are enforceable in employment contracts as they are in other commercial settings. However, the arbitration agreement cannot preclude an employee from enforcing his or her rights pursuant to federal statutes such as remedial or punitive damages available under Title VII or pursuant to the Civil Rights Act of 1991. Additionally, arbitration agreements are subject to other contractual defenses such as unconscionability and duress. Finally, should the cost and expenses of arbitration effectively preclude a litigant from prosecuting his or her claim, a motion to compel arbitration may be denied if proven. Such an analysis must be made on a “case-by-case basis”. It is the burden of the person avoiding arbitration to set forth specific facts proving the actual cost of arbitration and his or her financial inability to afford the costs of arbitration.