

To Arbitrate or Not to Arbitrate

March 28, 2001

Last week, the U.S. Supreme Court held, in *Circuit City Stores, Inc v. Adams*, that an agreement requiring arbitration of all disputes was enforceable under the Federal Arbitration Act ("FAA"). The plaintiff in *Circuit City* had signed an employment application which included the following language: "I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration by a neutral arbitrator." The application also identified some of the federal statutory claims that would be covered, including Title VII.

Two years after being hired, Adams sued the company in California state court asserting various state law claims. Circuit City responded by filing suit in federal court to enjoin the state court action and to compel arbitration of Adams' claims pursuant to the FAA. The U.S. District Court entered the requested order. On appeal, however, the Ninth Circuit Court of Appeals reversed the lower court, holding that the FAA does not apply to employment contracts. It was that question - whether the FAA covers employment contracts - which the Supreme Court decided last week.

The Supreme Court concluded that, except for transportation workers such as seamen or railroad workers, the FAA covers all contracts of employment and that the Act may be used to compel arbitration of employment-related claims. While *Circuit City* involved only state law claims, the Court had held previously in *Gilmer v. Interstate/Johnson Lane Corp.*, that federal age discrimination claims (and presumably other federal civil rights claims as well) were arbitrable under the FAA.

With the Supreme Court's decision in *Circuit City*, it has now become clear that pre-dispute arbitration agreements between employees and their employers are enforceable. Some questions remain as to the benefits to be derived from adopting such an alternative dispute resolution process. For example, the Court assumed for purposes of its decision that the two-sentence provision in *Circuit City* was a valid arbitration agreement. It remains to be seen whether arbitration agreements which fail to mention, for example, what rules will govern the arbitration proceeding or how the arbitrator will be chosen, are adequate. The Sixth Circuit Court of Appeals, in *Floss v. Ryan's Family Steak Houses, Inc.*, has indicated that such factors may play a role in whether such agreements are enforceable.

Another question is whether courts will impose certain standards on the arbitration process itself. For example: Will there be mandatory discovery? Will the plaintiff be entitled to legal representation? Must available damages duplicate those permitted under federal law (including mental and emotional distress damages and front pay)? And may attorneys' fees be awarded? In *Rembert v. Ryan's Family Steak House*, the Michigan Court of Appeals answered most of these questions in the affirmative. Moreover, the losing party is generally unable to obtain appellate review of the arbitrator's decision.

Arbitration of employment claims has clearly been given a boost by the Supreme Court and in some respects is certainly attractive when compared to litigation quick resolution of claims, reduced public exposure, and involvement in choosing your trier of fact. However, as noted, it is not without some drawbacks. An employer should therefore, carefully examine the pluses and minuses before adopting a pre-dispute arbitration approach. alaimo@millercanfield.com
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