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## ARTICLE

### ARBITRABILITY AND SEVERABILITY IN STATUTORY RIGHTS ARBITRATION AGREEMENTS: HOW TO DECIDE WHO SHOULD DECIDE

Thomas J. Lilly, Jr.\*

#### ABSTRACT

Agreements to arbitrate disputes arising under federal and state statutes have become commonplace, but the law governing those agreements remains unsettled. In particular, the circuit courts are split on what to do if one of the parties alleges that the arbitration agreement prevents the vindication of a statutory right. For example, an agreement might prevent the arbitrator from awarding punitive damages to a claimant with a sex discrimination claim under the Civil Rights Act of 1964. The Supreme Court has stated that arbitration agreements that prevent the vindication of statutory rights may be unenforceable but has not decided an important preliminary question of arbitrability: Who should decide whether the arbitration agreement prevents the vindication of a statutory right, a court or an arbitrator? In some circuits the answer is a court, and in others it is an arbitrator. This article examines the different approaches

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\* Assistant Professor and Chair Politics, Economics and Law Department, State University of New York, College at Old Westbury; J.D., Georgetown University Law Center.

taken by the circuit courts and argues that the issue should be for a court to decide.

In the event that an arbitration agreement does prevent the vindication of a statutory right, the circuit courts are also divided as to what the remedy should be. Some circuits liberally sever the illegal portions of the arbitration agreement so that the underlying dispute may still be decided in arbitration. Some circuits will sever the illegal portions only if that appears to be the intent of the parties as evinced by a severance clause in the contract. Some circuits will sever the illegal portions unless they judge the illegality to be too pervasive. The Tenth Circuit, however, holds that the illegal provision should not be severed and that the entire arbitration provision becomes unenforceable. This article argues that the Tenth Circuit is correct and that severance is an inappropriate remedy because it creates no disincentive for contracts of adhesion to include illegal provisions designed to prevent the vindication of statutory rights in arbitration.

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## I. INTRODUCTION

Arbitrability is an inherently confounding topic.<sup>1</sup> Parties to a dispute will sometimes disagree as to whether the dispute should properly be before an arbitrator or a court.<sup>2</sup> Such preliminary disputes about the proper

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1. See *Escobar-Noble v. Luxury Hotels Int’l, Inc.*, 680 F.3d 118, 127 (1st Cir. 2012) (Lynch, C.J., concurring) (explaining that arbitrability law is complex and evolving); George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L. L. 1, 50 (2012) (stating that American law of arbitrability “has produced considerable doctrinal complexity”); Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1, 5 (2011) (noting that arbitrability is “one of the most difficult issues in arbitration law”).

2. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624–25, 628 (1985) (concerning arbitrability of antitrust dispute); *Terminix Int’l Co. v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1329 (11th Cir. 2005) (describing a “familiar scenario” of arbitrability dispute); *Anders v. Hometown Mortg. Servs. Inc.*, 346 F.3d 1024, 1026 (11th Cir. 2003) (“This is another arbitration dispute in which the parties are litigating whether or not they should be litigating.”).

forum in which to decide the parties' underlying dispute raise questions of arbitrability.<sup>3</sup> In determining issues of arbitrability, it is impossible to avoid sending a party to an improper forum. If the issue of arbitrability is assigned to a court, and it is later determined that the case should be before an arbitrator, then we have turned the parties' agreement to arbitrate into an agreement to litigate and arbitrate. The assignment of the issue to a court would thus violate "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."<sup>4</sup> If, on the other hand, the issue of arbitrability is wrongly assigned to an arbitrator, instead of a court, then a party was forced into a private forum to which it never agreed to submit, contravening the fundamental principal that arbitration is a voluntary process.<sup>5</sup>

Because the Federal Arbitration Act (FAA)<sup>6</sup> applies to almost all agreements in interstate commerce,<sup>7</sup> the rules of arbitrability have generally been developed by federal courts. Initially, the FAA was thought to apply only to agreements to arbitrate contract claims.<sup>8</sup> However in 1985, the Supreme Court held that courts must also enforce agreements to arbitrate disputes arising under statutes "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."<sup>9</sup> While it is now clear that statutory disputes are arbitrable, a party will frequently resist arbitration by arguing that the way a particular arbitration agreement is drafted prevents the effective vindication of a

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3. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002) (defining "arbitrability").

4. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

5. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

6. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

7. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–77 (1995) (recounting that FAA exercises Congress's full power to regulate interstate commerce). By its terms the FAA does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, but that phrase has been interpreted narrowly to exclude only contracts of employment in the transportation industry. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

8. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting) ("Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims.").

9. *Id.* at 637.

statutory right.<sup>10</sup> However, it is unclear whether a court or the contract arbitrator should decide whether the arbitration agreement permits effective vindication of the claimant's statutory rights. The circuit courts are split on that issue,<sup>11</sup> which has eluded resolution in the Supreme Court.<sup>12</sup>

In addition, some arbitration agreements will have one or more provisions that prevent the complaining party from being fully able to vindicate its statutory rights. For example, a provision might limit the remedies which an arbitrator may award,<sup>13</sup> or it might impose prohibitive arbitration fees on the prospective claimant.<sup>14</sup> In such cases the offending parts of an arbitration agreement might be severed until what remains meets the minimum level necessary to allow statutory rights to be effectively vindicated. However, the circuit courts do not agree on when parts of an arbitration provision should be severed.<sup>15</sup>

This article analyzes the issue of whether a challenge to an arbitration agreement on the ground that it does not allow for the effective vindication of a statutory right should be for a court or an arbitrator to decide. The article also analyzes whether and when it is appropriate to sever portions of an agreement to arbitrate statutory rights in order to make a legally deficient agreement to arbitrate statutory rights enforceable. Part II reviews the law of arbitrability generally, including how severability is used in arbitrability analysis.<sup>16</sup> Part III reviews the current state of the law as to when an arbitration agreement should be invalidated for failure to allow the vindication of a statutory right.<sup>17</sup> Part IV examines the different

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10. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (discussing whether the arbitration agreement permitted vindication of rights under Sherman Antitrust Act); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (discussing whether the arbitration agreement permitted vindication of rights under the Truth in Lending Act); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 553–54 (4th Cir. 2001) (discussing whether the arbitration agreement permitted vindication of rights under the Civil Rights Act).

11. *See infra* notes 214–309 and accompanying text.

12. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 403–07 (2003) (mentioning that petitioner argued that court erred by deciding issue instead of sending issue to arbitration, but decision below reversed and remanded on other grounds).

13. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (invalidating arbitration agreement that limited remedies available under federal statute).

14. *See Bradford*, 238 F.3d at 553–54 (stating that an arbitration agreement is unenforceable where fees and costs are prohibitively high).

15. *See infra* notes 352–79 and accompanying text.

16. *See infra* notes 20–116 and accompanying text.

17. *See infra* notes 117–204 and accompanying text.

approaches that the circuit courts have taken as to whether effective vindication challenges are for a court or an arbitrator to decide and argues that the issue should be decided by a court.<sup>18</sup> Part V reviews the different approaches that the circuit courts have taken when deciding whether to rehabilitate an arbitration provision by severing those portions of the provision that prevent the vindication of a statutory right and argues that severance is not appropriate for that purpose.<sup>19</sup> Finally, the article concludes that challenges to arbitration agreements based on the ability to vindicate a statutory right should be decided by the courts rather than arbitrators and that using severance as a tool to resolve those challenges is inappropriate.

## II. RULES OF ARBITRABILITY

### A. *The Federal Arbitration Act*

Originally the United States judiciary adopted the English common law rule that arbitration agreements were not enforceable prior to issuance of a final award.<sup>20</sup> That common law rule was legislatively overturned in 1925 when Congress passed the FAA, which was intended to place arbitration agreements “[on] the same footing as other contracts.”<sup>21</sup> Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>22</sup>

The phrase “involving commerce” has been construed broadly as an

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18. See *infra* notes 205–351 and accompanying text.

19. See *infra* notes 364–425 and accompanying text.

20. See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982–84 (2d Cir. 1942) (discussing history of judicial hostility to arbitration).

21. H.R. REP. NO. 68-96, at 1 (1925).

22. 9 U.S.C. § 2 (2012).

exercise of Congress's full authority to regulate interstate commerce.<sup>23</sup>

Section 4 of the FAA provides that when a party to an arbitration agreement refuses to arbitrate, the other party can get an order from a federal district court compelling arbitration upon convincing the court that "the making of the agreement for arbitration or the failure to comply therewith is not in issue."<sup>24</sup> Furthermore, the Supreme Court has determined that the FAA preempts state law<sup>25</sup> and that state courts are required to apply the FAA.<sup>26</sup> The FAA, therefore, not only overturned the common law rule that arbitration agreements were unenforceable but also federalized the law of arbitration.<sup>27</sup>

The Supreme Court has repeatedly held that the FAA establishes a strong federal policy in favor of arbitration.<sup>28</sup> However, the FAA also makes clear that not every party to every dispute may be compelled to arbitrate.<sup>29</sup> At a minimum, section 2 requires that there be a written agreement to arbitrate.<sup>30</sup> Moreover, the FAA provides that an arbitration agreement may be unenforceable "upon such grounds as exist at law or in

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23. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–77 (1995) (discussing how "involving commerce" should be interpreted under the FAA).

24. 9 U.S.C. § 4 (2012).

25. *Allied-Bruce Terminix*, 513 U.S. at 272.

26. *See Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 (1984).

27. *See Henry C. Strickland, The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 396 (1992) (stating that, as construed by the Supreme Court, the FAA "federalized the law of arbitration"). Arguably, the Congress that passed the FAA in 1925 did not intend for it to have the broad application that it currently does pursuant to the Supreme Court's construction of the statute over subsequent decades. *Id.* at 386. When Congress passed the FAA in 1925, Congress's power to regulate interstate commerce was construed much more narrowly than it has been since the Supreme Court's decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The Supreme Court has explicitly stated that the scope of the FAA expanded "along with the expansion of the Commerce Clause power itself." *Allied-Bruce Terminix*, 513 U.S. at 275. In addition, the FAA was not construed to apply to disputes arising under statutes until 1985. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646–47 (1985) (Stevens, J., dissenting) ("Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims.").

28. *See Perry v. Thomas*, 482 U.S. 483, 490–91 (1987) (stating that the FAA establishes "clear federal policy" favoring arbitration); *Mitsubishi*, 473 U.S. at 631 (1985) ("emphatic federal policy in favor of arbitral dispute resolution"); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985) ("strong federal policy in favor of enforcing arbitration agreements").

29. *See* 9 U.S.C. § 2 (2012).

30. *Id.*

equity for the revocation of any contract.”<sup>31</sup> The question of whether a particular dispute should be before a court or before an arbitrator is a “question of arbitrability.”<sup>32</sup>

### B. Issues of Contract Formation

One ground on which a party might contest the arbitrability of a dispute concerns contract formation.<sup>33</sup> The FAA requires a written agreement to arbitrate,<sup>34</sup> and in some cases there will be an issue as to whether an agreement that includes an arbitration provision was ever concluded.<sup>35</sup> The parties might, for example, contest whether the person who signed the agreement had authority to do so.<sup>36</sup> Such cases raise an issue of arbitrability: Who should decide whether the contract was ever validly formed, a court or the contract arbitrator? The Supreme Court directly addressed this issue in *Granite Rock v. International Brotherhood of Teamsters*.<sup>37</sup>

In *Granite Rock* a union and an employer negotiated a contract with an arbitration clause and a no-strike clause, but the union subsequently contended that the contract was not properly ratified by the membership.<sup>38</sup> When the union then went on strike, the employer contended that the contract had been properly ratified and was binding on the union.<sup>39</sup> The issue then became whether the parties’ dispute as to ratification of the contract should be decided by the contract arbitrator or a court.<sup>40</sup> The Supreme Court determined that the issue was one of contract formation and that the issue is one for a court to decide, not the contract arbitrator.<sup>41</sup>

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31. *Id.*

32. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). In *Howsam*, the Court noted that, in one sense, any issue that prevents an arbitrator from reaching the merits of a dispute could be called a question of arbitrability. *Id.* The more technical use of the term, however, refers to the narrow issue of who, court or arbitrator, should decide a “gateway” issue in the dispute. *Id.* at 83–84.

33. *See Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 294–96 (2010).

34. 9 U.S.C. § 2.

35. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 & n.1 (2006) (distinguishing between a valid contract and a contract which was never signed).

36. *See id.* at 444 n.1.

37. *See Granite Rock Co.*, 561 U.S. at 292.

38. *Id.* at 292–94.

39. *Id.* at 294–95.

40. *Id.* at 295–96.

41. *Id.* at 296.



In reaching that conclusion, the Court recognized the federal policy favoring arbitration but stated that the policy “cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly ‘a matter of consent.’”<sup>42</sup> The gateway issue of whether a party has consented to arbitration by forming a contract will therefore not be sent to an arbitrator for determination.<sup>43</sup>

### *C. Issues of Substantive Arbitrability*

A different sort of arbitrability issue arises when the parties to a dispute agree that they have an arbitration agreement but disagree as to whether the terms of the agreement cover the substance of a particular dispute. Such disputes over the scope of the arbitration clause are generally referred to as issues of substantive arbitrability.<sup>44</sup> The question of whether a court or an arbitrator should decide issues of substantive arbitrability was determined by the Supreme Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*<sup>45</sup>

In *Warrior & Gulf* a union and an employer had a contract that provided for arbitration but also stated that matters which were “strictly a function of management [would] not be subject to arbitration.”<sup>46</sup> Predictably, the parties had a dispute and disagreed as to whether the subject of the dispute fell within the meaning of the phrase “strictly a function of management.”<sup>47</sup> If it did, then the dispute would be non-arbitrable.<sup>48</sup> But who, court or arbitrator, should decide whether the subject of the dispute was non-arbitrable? As with issues of contract formation,

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42. *Id.* at 299 (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

43. *Id.* at 299–300. For a discussion of an alternative to the American approach to issues of consent to arbitration, see Bermann, *supra* note 1, at 15–19 (discussing the French rule allowing an arbitration forum to decide its own competence absent “manifest nullity” of the arbitration agreement).

44. *See, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 558 (1964) (distinguishing between substantive and procedural arbitrability); *Int’l Ass’n of Machinists & Aerospace Workers, Local Lodge 1943 v. AK Steel Corp.*, 615 F.3d 706, 709 n.1 (6th Cir. 2010) (“Substantive arbitrability is whether an issue is within the scope of an agreement’s arbitration clause . . . .”); *Bell Atl.-Pa., Inc. v. Commc’n Workers, Local 13000*, 164 F.3d 197, 200 (3d Cir. 1999) (“Substantive arbitrability refers to the question whether a particular dispute is subject to the parties’ contractual arbitration provision(s).”).

45. 363 U.S. 574, 581–83 (1960).

46. *Id.* at 575–76.

47. *Id.* at 577.

48. *Id.* at 576.

the Court decided that issues concerning the scope of the agreement to arbitrate are for a court to decide in the first instance because “a party cannot be required to submit to arbitration any dispute [to] which he has not agreed . . . .”<sup>49</sup>

While *Warrior & Gulf* gave courts the power to determine issues of substantive arbitrability, it also placed a critical limitation on that ability. In making a determination of substantive arbitrability, a court must find in favor of sending the substantive dispute to arbitration “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”<sup>50</sup> Any doubts as to whether the arbitration clause covers the substance of the dispute “should be resolved in favor of coverage.”<sup>51</sup>

#### *D. Issues of Procedural Arbitrability*

In some cases, the parties agree that they have an arbitration agreement that covers the substantive dispute but disagree as to whether the complaining party satisfied the necessary procedural preconditions.<sup>52</sup> For example, the party resisting arbitration might contend that the claimant did not attend a required settlement conference<sup>53</sup> or commence the arbitration within a contractually required time.<sup>54</sup> Such issues of procedural arbitrability are for the contract arbitrator to determine, not a court.<sup>55</sup> The Supreme Court has stated that contract arbitrators have greater expertise in applying arbitral procedures, and “for the law to assume an expectation [by the parties to the agreement] that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike.”<sup>56</sup>

#### *E. Disputes Arising Under Statutes*

The FAA provides for federal court enforcement of “[a] written

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49. *Id.* at 582.

50. *Id.* at 582–83.

51. *Id.* at 583.

52. *See* *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555–56 (1964).

53. *Id.*

54. *See* *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002).

55. *John Wiley & Sons*, 376 U.S. at 557.

56. *Howsam*, 537 U.S. at 85.

provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof.”<sup>57</sup> That language identifies two possible sources of agreements to arbitrate future disputes: a “maritime transaction” or a “contract evidencing a transaction involving commerce.”<sup>58</sup> For the latter, the arbitration agreement to be enforced is one to settle a controversy “arising out of such a contract.”<sup>59</sup> Arguably, based on the statutory language “arising out of such a contract,” only agreements to arbitrate contract claims should be enforced by federal courts.<sup>60</sup> For most of the FAA’s history, that was how the FAA was construed.<sup>61</sup>

Early cases in which the Supreme Court declined to enforce agreements to arbitrate statutory rights tended to be critical of the arbitral forum as suitable for such claims,<sup>62</sup> demonstrated by the 1953 case of *Wilko v. Swan*.<sup>63</sup> In *Wilko*, a brokerage firm moved, pursuant to the FAA and the terms of the parties’ contract, to compel arbitration of a claim arising under the Securities Act of 1933.<sup>64</sup> In declining to compel arbitration, the Court stated that, even though the terms of the Securities Act would be applied in arbitration,

their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the

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57. 9 U.S.C. § 2 (2012).

58. *Id.* The phrase “involving commerce,” which does not occur in any other federal statute, has been construed broadly by the Supreme Court to mean “affecting interstate commerce.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74 (1995).

59. 9 U.S.C. § 2.

60. *Id.*; *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting) (stating that the “plain language” of FAA is to enforce arbitration agreements for claims arising under contract).

61. *See Mitsubishi*, 473 U.S. at 646 (Stevens, J., dissenting).

62. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–81 (1989) (criticizing prior “suspicion of arbitration”).

63. 346 U.S. 427, 432, 435 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 478–79 (1989) (holding that statutory claims under the Securities Act of 1933 are subject to arbitration as consistent with the FAA).

64. *Id.* at 428–29.

arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" cannot be examined.<sup>65</sup>

Because the Court considered arbitration unsuitable for claims under the Securities Act, it held that Congress must have intended such claims to be determined in a judicial forum.<sup>66</sup>

Similarly, in *Alexander v. Gardner-Denver Co.*,<sup>67</sup> the Supreme Court was critical of arbitration as an appropriate forum to determine a claim arising under the Civil Rights Act of 1964.<sup>68</sup> In that case, an employee arbitrated whether his discharge violated the collective bargaining agreement between his employer and union.<sup>69</sup> After the arbitrator found that the employee had been "discharged for just cause,"<sup>70</sup> the employee commenced an action in federal court under Title VII of the Civil Rights Act.<sup>71</sup> The employer argued that it should be granted summary judgment since the issue raised by the litigation had already been determined in the arbitration.<sup>72</sup>

In rejecting that argument, the Court stated,

[W]e have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by

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65. *Id.* at 435–37 (footnotes & citation omitted).

66. *Id.* at 436–38.

67. 415 U.S. 36 (1974).

68. *Id.* at 56.

69. *Id.* at 38–42.

70. *Id.* at 42.

71. *Id.* at 43.

72. *Id.* at 55–56.

Title VII.<sup>73</sup>

In the years that followed, the FAA did not change, but the Supreme Court's attitude toward arbitration did. In 1985 the Court decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>74</sup> and ruled the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."<sup>75</sup> In *Alexander v. Gardner-Denver Co.* the Court had asserted that "the choice of forums inevitably affects the scope of the substantive right to be vindicated."<sup>76</sup> The *Mitsubishi* Court adopted the opposite approach, stating that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the same statute."<sup>77</sup> In *Wilko* the Court had been unwilling to trust arbitrators with "the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact.'"<sup>78</sup> In contrast, the *Mitsubishi* Court sent the parties to arbitrate claims arising under the Sherman Act, stating that it "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."<sup>79</sup>

Although it did not explicitly overrule any prior case, *Mitsubishi* was clearly a turning point in the Court's approach to the arbitrability of statutory rights claims.<sup>80</sup> By way of explanation for its change of direction, the Court simply stated, "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>81</sup> After *Mitsubishi*, agreements to arbitrate statutory rights claims became enforceable, although "legal constraints external to the parties' agreement" could still render such an agreement unenforceable in a particular case.<sup>82</sup>

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73. *Id.* at 56 (citation omitted) (quoting *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 359–60 (1971) (Harlan, J., concurring)).

74. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

75. *Id.* at 627.

76. *Gardner-Denver Co.*, 415 U.S. at 56 (quoting Harlan, J., concurring, *U.S. Bulk Carriers*, 400 U.S. at 359–60).

77. *Mitsubishi*, 473 U.S. at 628.

78. *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

79. *Mitsubishi*, 473 U.S. at 634.

80. *See id.* at 646–47 (Stevens, J., dissenting) (discussing departure from precedent).

81. *Id.* at 626–27.

82. *Id.* at 628.

*F. Severability of the Arbitration Provision*

In some cases, one of the parties to a contract with an arbitration clause will contend that the entire contract is unenforceable.<sup>83</sup> The FAA provides that arbitration agreements should be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>84</sup> Arguably, if the entire contract is void, then there is no agreement to arbitrate, and the party resisting arbitration should not be forced into an arbitral forum.<sup>85</sup> On the other hand, if the challenge to the entire contract turns out to be without merit, then the party seeking arbitration should not have been forced to litigate that issue.<sup>86</sup> The federal courts escape this conundrum by applying the doctrine of severability of the arbitration provision.<sup>87</sup>

The doctrine of severability of the arbitration provision springs from the language of section 4 of the FAA.<sup>88</sup> Section 4 authorizes federal courts to compel arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.”<sup>89</sup> The Supreme Court reasoned that the “making of the agreement for arbitration” referred to in section 4 is separate from the making of the agreement in its entirety.<sup>90</sup> A federal court, therefore, should not consider a claim that the entire contract, of which the arbitration provision is a part, is unenforceable. That argument must be referred to the contract arbitrator.<sup>91</sup> However, a federal court should consider an argument that the

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83. See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 350, 352 (2008) (arguing the contract was invalid under California Talent Agencies Act); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (arguing the contract was illegal due to usury); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 399 (1967) (arguing fraud in the inducement).

84. 9 U.S.C. § 2 (2012).

85. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”).

86. See *Prima Paint Corp.*, 388 U.S. at 404 (stating the FAA’s intent that parties to arbitration agreement not be subject to delays in litigation).

87. See *Buckeye Check Cashing*, 546 U.S. at 445. In *Buckeye Check Cashing* the parties resisting arbitration argued that the entire contract was usurious and “criminal on its face.” *Id.* at 443. They did not raise any objection specifically to the arbitration provision contained within the arguably void contract. *Id.* The Court ruled that the “arbitration provision is severable from the remainder of the contract” and that the arbitrator could rule on the question of whether the contract in its entirety was void. *Id.* at 445-46.

88. See *Prima Paint Corp.*, 388 U.S. at 403-04.

89. 9 U.S.C. § 4 (2012).

90. See *Prima Paint Corp.*, 388 U.S. at 403-04 (quoting 9 U.S.C. § 4).

91. *Id.* at 404.

arbitration provision, separate from the rest of the contract, is unenforceable.<sup>92</sup> That argument is correctly addressed to the court, not the arbitrator, pursuant to section 4 of the FAA.<sup>93</sup>

The doctrine of severability of the arbitration provision dates back to 1967,<sup>94</sup> but the Supreme Court's 2010 decision in *Rent-A-Center, West, Inc. v. Jackson*<sup>95</sup> may presage an expansion of its use.<sup>96</sup> In *Rent-A-Center, Jackson*, an employee, signed a document titled "Mutual Agreement to Arbitrate Claims" as a condition of employment by Rent-A-Center.<sup>97</sup> It is noteworthy that this is not a case in which the parties had a written contract that included an arbitration agreement; rather, the agreement signed by the employee was solely about arbitration.<sup>98</sup> Pursuant to the terms of the document, Jackson agreed to arbitrate any disputes arising out of his employment, including any claims for discrimination or violation of federal law.<sup>99</sup> The document also included the following provision:

The Arbitrator, and not [a] federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.<sup>100</sup>

Jackson later filed a discrimination suit under state and federal statutes and contended that the arbitration agreement was unenforceable as unconscionable.<sup>101</sup>

The Ninth Circuit held that the question of whether an arbitration agreement was unconscionable was for the court to decide.<sup>102</sup> The Supreme Court reversed.<sup>103</sup> The Court recognized that ordinarily under the severability doctrine a challenge to the enforceability of an entire contract would be for an arbitrator to decide, and a challenge to the enforceability

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92. *Id.*

93. *Id.* at 403–04.

94. *Id.* at 395.

95. 561 U.S. 63 (2010).

96. *See id.* at 85 (Stevens, J., dissenting).

97. *Id.* at 65 (majority opinion).

98. *Id.* at 72.

99. *Id.* at 65–66.

100. *Id.* at 66.

101. *Id.* at 65–66.

102. *See id.* at 66–67.

103. *Id.* at 76.

of the arbitration agreement contained therein would be for a court to decide.<sup>104</sup> However, in *Rent-A-Center*, the entire contract was the arbitration agreement.<sup>105</sup> The Court then treated the provision delegating to an arbitrator the power to determine whether the agreement was unenforceable as an arbitration provision within the overall arbitration agreement.<sup>106</sup> The Court then found that there was no unconscionability challenge to the delegation provision and sent the question of the unconscionability of the overall agreement to arbitration for determination.<sup>107</sup>

*Rent-A-Center* may presage a new type of super-severability in which not only is the arbitration provision severed from the agreement, but parts of the arbitration agreement itself are severed in order to make an otherwise nonarbitrable dispute arbitrable.<sup>108</sup> A vigorous dissent to *Rent-A-Center* criticized the majority opinion for adding “a new layer of severability—something akin to Russian nesting dolls—into the mix.”<sup>109</sup>

On the other hand, the facts in *Rent-A-Center* are somewhat unusual. Its holding may be limited to cases in which the arbitration agreement is a separate document, and the severed provision delegates the determination of arbitrability to the contract arbitrator.<sup>110</sup> In addition, the employee in *Rent-A-Center*, perhaps because he had not anticipated the Court’s new super-severability approach to arbitrability, did not allege that the delegation clause itself was unconscionable.<sup>111</sup> If he had, the Ninth Circuit’s determination of unconscionability may have been upheld.<sup>112</sup> It remains to be seen if *Rent-A-Center* has a substantial or limited effect on the use of severability in the arbitrability analysis.<sup>113</sup>

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104. *Id.* at 70–71.

105. *Id.* at 72.

106. *Id.*

107. *See id.* at 70–73.

108. *See id.* at 86–87 (Stevens, J., dissenting) (criticizing “an infinite severability rule”).

109. *Id.* at 85.

110. *See id.* at 87 (stating that the holding may be “limited to separately executed arbitration agreements”).

111. *Id.* at 73 (majority opinion).

112. *Id.* at 74.

113. It is worth noting, in this regard, that *Rent-A-Center* is a 5-4 decision and that the authors of both the majority opinion and the dissent are no longer with the Court. *See id.* at 64, 76.



*G. Trends in Arbitrability Analysis*

A review of the above rules reveals an obvious trend in favor of arbitrability.<sup>114</sup> The first big change came with the passage of the FAA, reversing the common law presumption against arbitration and giving federal courts the power to enforce arbitration agreements.<sup>115</sup> That statute was then broadly interpreted to be a full exercise of Congress's power to regulate interstate commerce, to establish a federal policy in favor of arbitration, and to preempt state law.<sup>116</sup> In 1960 the Supreme Court determined that substantive arbitrability is for a court to determine but that any doubts must be resolved in favor of arbitrability.<sup>117</sup> Soon thereafter, the Court established that procedural objections to arbitrability are to be determined by the contract arbitrator.<sup>118</sup> In 1967 the Court determined that, pursuant to the severability doctrine, an objection to the enforceability of a contract containing an arbitration clause should also be addressed to the contract arbitrator.<sup>119</sup>

The second great expansion in arbitrability came in 1985, when the Supreme Court first determined that the FAA extends to disputes arising under statutes.<sup>120</sup> That determination came with the limitation that if an arbitration agreement covers disputes under a statute, there might be other "legal constraints" that would prevent arbitrability in a particular case.<sup>121</sup>

### III. EFFECTIVE VINDICATION AND UNCONSCIONABILITY CHALLENGES TO STATUTORY RIGHTS ARBITRATION AGREEMENTS

#### A. Challenges Based on Vindication of Federal Statutory Rights

In holding that statutory rights claims are arbitrable, *Mitsubishi* stated that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution

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114. See *supra* notes 20–113 and accompanying text.

115. See *supra* notes 20–32 and accompanying text.

116. See *supra* notes 33–43 and accompanying text.

117. See *supra* notes 43–51 and accompanying text.

118. See *supra* notes 52–56 and accompanying text.

119. See *supra* notes 83–93 and accompanying text.

120. See *supra* notes 74–82 and accompanying text.

121. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

in an arbitral, rather than a judicial, forum.”<sup>122</sup> The Court particularly noted that the right to recover treble damages for a violation of the Sherman Act is a vital part of the statute and that the right to recover such damages could be exercised in an arbitration.<sup>123</sup> The purpose of the statute would be served “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>124</sup>

*Mitsubishi*’s use of that phrase gave rise to what became known as the effective vindication doctrine.<sup>125</sup> Construing the FAA to cover statutory as well as contract claims was arguably an expansion beyond what Congress intended when it passed the FAA in 1925.<sup>126</sup> However, if one accepts the premise that, pursuant to the FAA, agreements to arbitrate claims arising under federal statutes are enforceable, then courts reviewing such agreements must try to effectuate two federal statutes: the FAA and the statute under which the particular claim is asserted.<sup>127</sup>

In *Mitsubishi*, therefore, the Court determined that a claim arising under the Sherman Act was arbitrable only if the claim could be effectively vindicated “in the arbitral forum.”<sup>128</sup> If rights under the Sherman Act claim could not have been vindicated in the anticipated arbitration, then the arbitration agreement would have been unenforceable “as against public policy.”<sup>129</sup> That limitation on the arbitrability of federal statutory rights is consistent with the general rule that parties may not agree to waive a prospective federal statutory right if to do so would violate public policy.<sup>130</sup>

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122. *Id.*

123. *See id.* at 635–36.

124. *Id.* at 637.

125. Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 125 (“[T]he Supreme Court announced the effective vindication doctrine in *Mitsubishi*, lower courts have relied on this important doctrine . . .”).

126. *See Mitsubishi*, 473 U.S. at 646 (Stevens, J., dissenting) (“Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.”).

127. *But see, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 84 (2000) (reconciling the FAA and the Truth in Lending Act); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539–41 (1995) (reconciling the FAA and the Carriage of Goods at Sea Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28, 34 (1991) (reconciling the FAA and the Age Discrimination in Employment Act).

128. *Mitsubishi*, 473 U.S. at 637.

129. *Id.* at 637 & n.19.

130. *Id.*; *see also* *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945) (stating that parties may not agree to waive rights under the Fair Labor Standards Act).

Fifteen years later, the Supreme Court directly addressed the effective vindication doctrine in *Green Tree Financial Corp.-Alabama v. Randolph*.<sup>131</sup> In *Green Tree* a borrower and a lender had an agreement to arbitrate any disputes arising from or relating to their contract, including statutory claims.<sup>132</sup> The borrower later sued the lender pursuant to the federal Truth in Lending Act, and the lender moved to compel arbitration.<sup>133</sup> However, the borrower argued that the contract was silent as to how the fees of the arbitration would be paid, which created a risk that she would be required to pay “prohibitive arbitration costs.”<sup>134</sup> She contended that because of that risk, “she [was] unable to vindicate her statutory rights in arbitration” and that the matter was, therefore, not arbitrable.<sup>135</sup>

The Court responded to the plaintiff-borrower’s arbitrability argument by acknowledging “that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”<sup>136</sup> However, the burden is on the party resisting arbitration to prove “that the claims at issue are unsuitable for arbitration.”<sup>137</sup> Because the record contained almost no information on what the costs to the plaintiff-borrower would be, the Court concluded that the alleged “risk” was “too speculative to justify the invalidation of an arbitration agreement.”<sup>138</sup>

The combined effect of *Mitsubishi* and *Green Tree* is a rule that an arbitration agreement is not enforceable if the party resisting arbitration carries the burden of proving that it would be unable effectively to vindicate a federal statutory right in the arbitral forum.<sup>139</sup> Typical grounds for effective vindication challenges to arbitration provisions are prohibitive arbitral costs<sup>140</sup> and restrictions on the remedies that may be

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131. 531 U.S. 79, 90 (2000).

132. *Id.* at 82–83.

133. *Id.* at 83.

134. *Id.* at 90.

135. *Id.*

136. *Id.*

137. *Id.* at 91.

138. *Id.*

139. *See, e.g.,* *Kristian v. Comcast Corp.*, 446 F.3d 25, 51 (1st Cir. 2006) (restriction on statutory remedies); *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370, 387–88 (6th Cir. 2005) (unfair arbitrator selection process); *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 213–14 (3d Cir. 2003) (prohibitive arbitral costs).

140. *See* *Musnick v. King Motor Co.*, 325 F.3d 1255, 1260 (11th Cir. 2003) (alleged prohibitive costs for Civil Rights Act claim).

awarded.<sup>141</sup>

The scope of the effective vindication doctrine has come into question as a result of the Supreme Court's 2013 decision in *American Express Co. v. Italian Colors Restaurant*.<sup>142</sup> In that case, the American Express Company had contracts with merchants who accepted the American Express charge card requiring the merchants to also accept the American Express credit card.<sup>143</sup> Those same contracts provided that all disputes would be arbitrated and that the arbitration would not be on a class basis.<sup>144</sup> In addition, the agreements prohibited joinder or consolidation of claims and included a confidentiality provision that prevented the merchants from coordinating their cases.<sup>145</sup> A group of merchants initiated a class action alleging that American Express was using its monopoly power to create a tying arrangement in violation of the Sherman Antitrust Act.<sup>146</sup> American Express moved to compel arbitration pursuant to the parties' agreement and the FAA.<sup>147</sup>

The plaintiff merchants in *American Express* argued that their claim was not arbitrable because they would not be able effectively to vindicate their statutory rights in arbitration.<sup>148</sup> They "submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed \$1 million,' while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled."<sup>149</sup> Because the cost of arbitrating greatly exceeded the recovery cost for any single plaintiff and the arbitration agreement prohibited arbitration on a class basis, the merchants argued that the arbitration agreement was unenforceable.<sup>150</sup> The Second Circuit agreed with the merchants,<sup>151</sup> but the

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141. See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (invalidating arbitration agreement that limited remedies available for federal statutory claim).

142. 133 S. Ct. 2304 (2013).

143. *Id.* at 2308.

144. *Id.*

145. *Id.* at 2316 (Kagan, J., dissenting).

146. *Id.* at 2308 (majority opinion).

147. *Id.*

148. *Id.* at 2310.

149. *Id.* at 2308.

150. See *id.* (merchants arguing that even though each plaintiff would likely be required to pay over \$38,000, the contract precludes class action arbitration).

151. *Id.*

Supreme Court reversed.<sup>152</sup>

In a 5-3 decision, the *American Express* Court stated that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”<sup>153</sup> The Court described “effective vindication” as an exception to the FAA that “originated as dictum” and has never been applied by the Court to invalidate an arbitration agreement.<sup>154</sup> The Court acknowledged that “the [effective vindication] exception finds its origin in the desire to prevent ‘prospective waiver of a party’s *right to pursue* statutory remedies.’”<sup>155</sup> Furthermore, it “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>156</sup> However, it does not cover an arbitration provision that prohibits class actions. Such a provision may make a statutory remedy “not worth the expense,” but it “does not constitute the elimination of the *right to pursue* that remedy.”<sup>157</sup>

After *American Express*, courts have continued to apply the effective vindication doctrine,<sup>158</sup> but the decision does imply that the scope of the effective vindication doctrine may be narrower than the lower courts had previously thought.<sup>159</sup> Justice Kagan’s dissent accuses the *American Express* majority of departing from the Court’s precedents and argues that the effective vindication doctrine should have been applied pursuant to the rationale set forth in *Green Tree*.<sup>160</sup> On the other hand, the *American*

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152. *Id.* at 2312.

153. *Id.* at 2309.

154. *Id.* at 2310.

155. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

156. *Id.* at 2310-11.

157. *Id.* at 2311.

158. *See, e.g.*, *Kobren v. A-1 Limousine Inc.*, No. 16-156-BRM-DEA, 2016 U.S. Dist. LEXIS 154012, at \*18–20 (D.N.J. Nov. 7, 2016) (cost sharing provision prevented effective vindication of the Fair Labor Standards Act); *Monserrate v. Hartford Fire Ins.*, No. 6:14-cv-149-Orl-37GJK, 2014 U.S. Dist. LEXIS 116023, at \*4 (M.D. Fla. Aug. 20, 2014) (“[T]he effective vindication doctrine permits courts to invalidate arbitration agreements . . . .”); *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994 (ARR)(RML), 2013 U.S. Dist. LEXIS 107117, at \*37 & n.11 (E.D.N.Y. July 31, 2013) (objection based on cost of “access to the arbitral forum” was not foreclosed by *American Express*).

159. Szalai, *supra* note 125, at 126 (arguing that *American Express* erred by weakening the effective vindication doctrine).

160. *See Am. Express*, 133 S. Ct. at 2318 (Kagan, J., dissenting) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000)) (discussing how the majority disregarded

*Express* Court implied that the effective vindication doctrine may not extend to an arbitration agreement that makes a statutory claim “not worth the expense involved in proving a statutory remedy.”<sup>161</sup> Whether *American Express* is the beginning or the end of a narrowing of the effective vindication doctrine remains to be seen.

### B. Challenges Based on Vindication of State Statutory Rights

The effective vindication doctrine applies to arbitration agreements that prevent a party from effectively vindicating its rights under a federal statute.<sup>162</sup> The effective vindication doctrine does not apply to arbitration agreements that prevent a party from effectively vindicating its rights under a state statute.<sup>163</sup> The purpose of the effective vindication doctrine is to harmonize two Congressional commands: the FAA and the federal statute underlying a particular party’s claim.<sup>164</sup> Thus the Court in *Mitsubishi* ruled that the complaining party’s Sherman Antitrust Act claim could be arbitrated only after the Court determined that the arbitral forum was effectively able to vindicate the rights arising under that federal statute.<sup>165</sup>

In a case involving an arbitration agreement and a state statutory right, there is only one Congressional mandate for the courts to obey: the FAA. To the extent that there is tension between the FAA’s direction to enforce arbitration agreements on the one hand and a state statute on the other, the state statute is preempted by the FAA.<sup>166</sup> The distinction between

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the litigation costs the plaintiffs would incur).

161. *Id.* at 2311 (majority) (emphasis omitted).

162. *See supra* notes 122–61 and accompanying text.

163. *See* *Ferguson v. Corinthian Colls., Inc.*, 773 F.3d 928, 935–36 (9th Cir. 2013) (stating that effective vindication does not apply to state statutes); *Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343, 344 (6th Cir. 2006) (same); *Torres v. CleanNet U.S.A., Inc.*, 90 F. Supp. 3d 369, 377 (E.D. Pa. 2015) (same); *see generally* E. Gary Spitco, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1 (2015) (stating that effective vindication cannot be logically applied to state statutes).

164. *See Am. Express*, 133 S. Ct. at 2310 (discussing the possible exception allowing a class action, under Rule 23, when the costs of arbitration would deter litigants from pursuing their rights).

165. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

166. *See Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503–04 (2012) (mentioning that the FAA preempts state law and that state courts must abide by the

arbitration agreements that conflict with a state statute and a federal statute was stated bluntly in Justice Kagan's dissent in *American Express*:

When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so . . . the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law . . . .<sup>167</sup>

While the effective vindication rule does not apply to state law cases, that does not mean that arbitration agreements that prevent the vindication of state statutory rights are necessarily enforceable. Section 2 of the FAA provides 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."<sup>168</sup> The Supreme Court has stated that unconscionability is a "generally applicable contract defense[]" that "may be applied to invalidate arbitration agreements" under the terms of the FAA.<sup>169</sup> When courts are faced with an arbitration agreement that makes it impossible to vindicate rights arising under state statutes, they frequently find the agreement to be unconscionable and therefore unenforceable.<sup>170</sup>

The analysis of an arbitration clause that prevents vindication of a state law right is usually similar to the effective vindication analysis for a federal statutory right.<sup>171</sup> For example, in *Chavarria v. Ralph's Grocery Co.*,<sup>172</sup> a grocery store employee brought an action against her employer under California state statutes.<sup>173</sup> The employer moved to compel arbitration pursuant to an agreement contained in the employee's job

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Supreme Court's interpretation).

167. *Am. Express*, 133 S. Ct. at 2320 (Kagan, J., dissenting).

168. 9 U.S.C. § 2 (2012).

169. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

170. *See, e.g.*, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 777–78 (7th Cir. 2014); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267 (3d Cir. 2003); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 94 (Ct. App. 2004).

171. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006) ("As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis.").

172. 733 F.3d 916 (9th Cir. 2013).

173. *Id.* at 919.

application.<sup>174</sup> The employee argued that the agreement was unconscionable based in part on having to pay prohibitive fees at the outset of the arbitral process.<sup>175</sup> The Ninth Circuit found that the arbitration agreement was unconscionable, relying in part on the Supreme Court's discussion of the effective vindication doctrine in *American Express*.<sup>176</sup>

On the other hand, the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*<sup>177</sup> shows that there are important differences between effective vindication and state law unconscionability. In *AT&T Mobility* the Concepcions brought an action against AT&T alleging that the company overcharged them by \$30.22.<sup>178</sup> Their action was consolidated with a putative class action alleging false advertising and fraud.<sup>179</sup> However, the contract between AT&T and its customers included an arbitration provision requiring that all claims be brought in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."<sup>180</sup> When AT&T moved to compel arbitration, the Concepcions opposed the motion on the ground that the arbitration agreement was unconscionable.<sup>181</sup> At the time *AT&T Mobility* was decided, California state law prohibited class action waivers in consumer contracts of adhesion in which any disputes would likely involve small sums.<sup>182</sup> Relying on that state law, the Ninth Circuit found that the arbitration agreement was unconscionable and thus invalid.<sup>183</sup>

The Supreme Court reversed.<sup>184</sup> The Court stated that the inquiry into whether state law is preempted by the FAA "becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."<sup>185</sup> In the Court's view, a primary

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174. *Id.*

175. *See id.* at 925 (discussing how the employee had to pay over \$3,500 per day of arbitration).

176. *Id.* at 926–27 (citing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013)).

177. 563 U.S. 333 (2011).

178. *Id.* at 337.

179. *Id.*

180. *Id.* at 336.

181. *Id.* at 337–38 (discussing Concepcions' response to AT&T's motion to compel).

182. *Id.* at 340 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

183. *Id.* at 338.

184. *Id.* at 352.

185. *Id.* at 341.



purpose of the FAA was to allow the parties to design an arbitration process with “efficient, streamlined procedures.”<sup>186</sup> The California rule against class action waivers “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass.”<sup>187</sup> Based on those premises, the Court concluded that the California state law was “an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA].”<sup>188</sup> The state law protecting class action rights was, therefore, preempted.<sup>189</sup>

*AT&T Mobility* demonstrates the decreased likelihood that an arbitration agreement will be found unenforceable if it intrudes on a state law rather than a federal law right. If a federal statute had guaranteed the right to proceed on a class basis, then the agreement in *AT&T Mobility* would presumably have been unenforceable pursuant to the effective vindication doctrine.<sup>190</sup> *AT&T Mobility* makes clear that the FAA will preempt not only state laws that are in conflict with it but also state laws that “have been applied in a fashion that disfavors arbitration.”<sup>191</sup>

### C. Trends in Effective Vindication and Unconscionability Analysis

There has been a strong trend in favor of arbitrability generally since the passage of the FAA in 1925.<sup>192</sup> That trend includes the Supreme Court’s 1985 decision that made the FAA applicable to statutory rights claims.<sup>193</sup> Since 1985 the judicial trend has been toward increased arbitrability of statutory claims. *American Express* made the point that the Supreme Court has never upheld an effective vindication challenge to arbitrability, and the Court’s decision implies that going forward the effective vindication doctrine may be applied more sparingly.<sup>194</sup> *AT&T*

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186. *Id.* at 344.

187. *Id.* at 348.

188. *Id.* at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

189. *Id.*

190. In *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), the Court’s decision was based on the premise that there is no federal law guaranteeing the right to proceed on a class basis in a Sherman Antitrust Act case. *Id.* at 2309.

191. *AT&T Mobility*, 563 U.S. at 341.

192. See *supra* notes 20–121 and accompanying text.

193. See *supra* notes 74–82 and accompanying text.

194. See *supra* notes 162–191 and accompanying text; *Byrd v. SunTrust Bank*, No. 2:12-cv-02314-JPM-cgc, 2013 U.S. Dist. LEXIS 101909, at \*40 (W.D. Tenn.) (July 22, 2013) (mentioning that *American Express* appears to make it more difficult to prove

*Mobility* changed the unconscionability analysis to require an inquiry as to whether the state law at issue would have a disproportionate impact on the purposes of the FAA.<sup>195</sup> *Rent-A-Center, West, Inc. v. Jackson* expanded the use of severability in order to make a state law unconscionability dispute arbitrable.<sup>196</sup>

This trend toward increased arbitrability since 1985 has come not from Congress, but from the Supreme Court.<sup>197</sup> In *AT&T Mobility*, when the Court found that a state rule requiring the option of class actions for arbitrations was preempted, the Court commented critically that “class arbitration was not even envisioned by Congress when it passed the FAA in 1925.”<sup>198</sup> The same could be said about enforceable agreements to arbitrate statutory rights disputes.<sup>199</sup>

While the trend has been in favor of increased arbitrability, a backlash has begun to emerge. First, the Supreme Court itself is deeply divided over the expansion of arbitrability that has occurred since 2010; the majority decisions in *American Express*, *AT&T Mobility*, and *Rent-A-Center* each garnered only five votes,<sup>200</sup> and each drew a strong dissent.<sup>201</sup> In this regard it is worth noting that all three of those decisions were authored by Justice Scalia, who had emerged as the Court’s foremost champion of an expansive view of the arbitrability of statutory rights.<sup>202</sup> Second, there has been a great deal of scholarly criticism of the recent expansion of

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arbitration clauses unenforceable).

195. See *supra* notes 172–84 and accompanying text.

196. See *supra* notes 83–113 and accompanying text.

197. See Szalai, *supra* note 125, at 117–18.

198. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011).

199. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 647 (1985) (Stevens, J., dissenting) (arguing that the Congress that passed FAA could not have anticipated its application to statutory claims).

200. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013); *AT&T Mobility*, 563 U.S. at 334; *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 64 (2010). *American Express* had only three dissenters, with Justice Sotomayor taking no part in the decision. *Am. Express*, 133 S. Ct. at 2307. Justice Sotomayor was one of the dissenters in *AT&T Mobility*, 563 U.S. at 334, and *Rent-A-Center*, 561 U.S. at 64.

201. See *Am. Express*, 133 S. Ct. at 2313 (Kagan, J., dissenting) (arguing that the majority opinion was “a betrayal of our precedents, and of federal statutes”); *AT&T Mobility*, 563 U.S. at 367 (Breyer, J., dissenting) (majority opinion does not honor federalist principles); *Rent-A-Center*, 561 U.S. at 88 (Stevens, J., dissenting) (describing majority’s reasoning as “fantastic”).

202. See *Am. Express*, 133 S. Ct. at 2307; *AT&T Mobility*, 563 U.S. at 336; *Rent-A-Center*, 561 U.S. at 64.

arbitrability of statutory rights.<sup>203</sup> Third, criticism of increased use of arbitration has begun to appear in the popular press.<sup>204</sup>

There has also been some congressional response to the Supreme Court's expansion of the arbitrability of statutory rights. The Dodd-Frank Wall Street Reform and Consumer Protection Act gave the newly created Consumer Financial Protection Bureau the power to

prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.<sup>205</sup>

The Department of Defense Appropriations Act of 2010 prohibited certain federal contractors from entering into agreements to arbitrate claims arising under Title VII of the Civil Rights Act of 1964.<sup>206</sup> While those statutes by themselves do not create any fundamental change to the law of arbitrability, they indicate that arbitrability of statutory rights is an issue of concern to at least some members of Congress. Furthermore, in recent years, legislation has regularly been introduced, although not necessarily enacted, substantially to restrict agreements to arbitrate.<sup>207</sup>

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203. See Paul B. Marrow, *Determining if Mandatory Arbitration is "Fair": Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks*, 54 N.Y. L. SCH. L. REV. 187, 188 (2010) ("Recent academic literature is filled with articles condemning [mandatory arbitration provisions]."); see, e.g., J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) ("[T]he [Supreme] Court's [recent] arbitration jurisprudence . . . undermines . . . substantive law . . ."); Imre Stephen Szalai, *More Than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 54–58 (2014) (calling for legislative response to Supreme Court's interpretation of FAA); Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 701–05 (2012) (same).

204. See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1; David Cole, *How the Court Made You Less Free*, WASH. POST, June 30, 2013, at B1; M. Jerome Elmore, *Supreme Court and the Limits of Access*, ATLANTA J.-CONST., Dec. 6, 2013, at 16A.

205. 12 U.S.C. § 5518(b) (2012).

206. Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116 (a)(1)–(2), 123 Stat. 3409, 3454–55 (2009).

207. See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009);

Congress passed the FAA in 1925 in response to judicial hostility to arbitration agreements.<sup>208</sup> As the Supreme Court has stated, the judiciary is now “well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”<sup>209</sup> In light of the negative reaction to the expansion of arbitrability in statutory rights cases, it may be that the new threat to the continued development of arbitration is a growing perception that the courts are allowing it to be used as a tool to defeat statutory rights.<sup>210</sup>

#### IV. APPROACHES TO ARBITRABILITY IN STATUTORY RIGHTS CASES

It is now well established that agreements to arbitrate statutory disputes are enforceable under the FAA<sup>211</sup> and that a party may be able to invalidate a particular arbitration agreement if that agreement would prevent the vindication of a statutory right in the arbitral forum.<sup>212</sup> But who, a court or an arbitrator, should decide the issue of whether a particular arbitration agreement is invalid on the ground that it does not allow the vindication of a statutory right? That is a question that the Supreme Court has not answered and which has split the circuit courts.<sup>213</sup>

In *PacifiCare Health Systems, Inc. v. Book*,<sup>214</sup> the Supreme Court seemed poised to answer the question of who should decide effective vindication challenges to arbitration agreements. In that case, a group of physicians alleged that PacifiCare Health Systems violated various statutes including the Racketeer Influenced and Corrupt Organization Act (RICO).<sup>215</sup> PacifiCare Health Systems then moved to compel arbitration pursuant to its arbitration agreement with the plaintiff-physicians.<sup>216</sup> The Eleventh Circuit ruled that the matter was not arbitrable because the arbitration agreement did not allow for an award of treble damages and

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Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); Restoring Statutory Rights and Interests of the States Act of 2016, S. 2506, 114th Cong. (2016).

208. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

209. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985).

210. *See supra* notes 192–210 and accompanying text.

211. *See supra* notes 57–82 and accompanying text.

212. *See supra* notes 122–91 and accompanying text.

213. *See infra* notes 223–321 and accompanying text.

214. 538 U.S. 401 (2003).

215. *Id.* at 402.

216. *Id.* at 403.

thus would not allow the plaintiffs to obtain the relief to which RICO entitled them.<sup>217</sup>

PacifiCare Health Systems objected that the question of whether the arbitration agreement was unenforceable should have been decided by the contract arbitrator, not the court, and the Supreme Court granted certiorari.<sup>218</sup> However, on review, the Supreme Court determined that the arbitration agreement was ambiguous as to whether it did or did not allow for an award of treble damages.<sup>219</sup> That ambiguity presented a question of contract interpretation for the arbitrator.<sup>220</sup> Because the Court did not know how the arbitrator would interpret the remedial provisions of the arbitration agreement, it determined that “whether it is for [the] courts or arbitrators to decide enforceability in the first instance” was not properly presented for resolution.<sup>221</sup> The lower federal courts thus remain without any explicit guidance from the Supreme Court as to whether it is for a court or an arbitrator to determine whether an arbitration agreement is invalid on the ground that it prevents the vindication of a statutory right. As is discussed below, the circuit courts are divided on the issue.<sup>222</sup>

*A. Circuits in Which Challenges Based on Statutory Rights Are  
for the Arbitrator*

The Seventh and Eighth Circuits have held that an arbitrator should determine whether a particular agreement to arbitrate is invalid on the ground that it prevents a party from vindicating a statutory right.<sup>223</sup> While

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217. *Id.*

218. *Id.*

219. *Id.* at 405.

220. *Id.* at 406–07.

221. *Id.* at 407.

222. *See, e.g.,* *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2002) (comparing *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001), and *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997), with *Paladino v. Avnet Comput. Techs., Inc.*, 134 F.3d 1054, 1059–60 (11th Cir. 1998), and *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1246–48 (9th Cir. 1995)) (“The circuit courts are split on whether the enforceability of an arbitration clause should be adjudicated before arbitration when a party contends that public policy prevents the clause’s waiver of certain remedies.”); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1030 (11th Cir. 2003).

223. In 2003 the Eleventh Circuit stated that the Seventh, Eighth, First and Third Circuits all followed the rule that the issue was for an arbitrator. *Anders v. Hometown Mortg. Servs.*, 346 F.3d at 1030–31. As is discussed below, the First and Third Circuits have changed their approaches. *See infra* notes 260–309 and accompanying text.

there is some ambiguity in the Eighth Circuit, the Seventh Circuit is solidly of the view that the issue is for the arbitrator.<sup>224</sup>

In *Carbajal v. H&R Block Tax Services, Inc.*,<sup>225</sup> Carbajal sued under the federal Fair Debt Collection Practices Act alleging, in the words of the Seventh Circuit, that “he had been snookered” in connection with a tax refund anticipation loan.<sup>226</sup> The district court, relying on a broad arbitration clause, dismissed the suit.<sup>227</sup> Carbajal argued that the arbitration agreement should not be enforced because it “require[d] the parties to bear their own costs, while the [Fair Debt Collection Practices Act] entitles prevailing litigants the right to recover attorneys’ fees.”<sup>228</sup> The Seventh Circuit rejected that effective vindication argument, stating “the arbitrator rather than the court determines the validity of these ancillary provisions. . . . Whether any particular federal statute overrides the parties’ autonomy and makes a given entitlement non-waivable is a question for the arbitrator.”<sup>229</sup>

While *Carbajal* involved a challenge to arbitrability based on federal statute, the Seventh Circuit case *Hawkins v. Aid Ass’n for Lutherans*<sup>230</sup> involved a challenge to arbitrability based on unconscionability.<sup>231</sup> In *Hawkins* the plaintiffs sued in state court.<sup>232</sup> The case was removed to federal court, and the district court granted a motion to compel arbitration.<sup>233</sup> On appeal the plaintiffs argued “that the arbitration provision [was] unconscionable because it limit[ed] the remedies available to them. Specifically, they complain[ed] that the clause [was] invalid because [it] prohibit[ed] them from obtaining (1) injunctive relief, (2)

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224. See *infra* 225–53 and accompanying text.

225. 372 F.3d 903 (7th Cir. 2004).

226. *Id.* at 904.

227. See *id.* at 904–06 (discussing the breadth of the arbitration clause and the force of the FAA as justification for dismissal).

228. See *id.* at 906 (explaining it is the arbitrator’s, not the court’s, responsibility to evaluate the applicable provisions).

229. *Id.* at 906–07 (citations omitted). In support of its conclusion, the Seventh Circuit cited *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). That the Third Circuit cited the same Supreme Court case to reach the opposite conclusion indicates the unsettled state of the law. See *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 216 & n.1 (3d Cir. 2003) (explaining that federal law would trump the terms of the contract, thereby awarding attorney’s fees to the winner despite the agreement stating otherwise).

230. 338 F.3d 801 (7th Cir. 2003).

231. *Id.* at 807.

232. *Id.* at 804 (explaining that the plaintiffs sued for illegal churning by the insurance company).

233. *Id.* at 804–05.

compensatory damages, and (3) punitive damages and attorney's fees."<sup>234</sup> The Seventh Circuit rejected that argument:

[C]omplaints about the unavailability of such remedies first must be presented to the arbitrator. . . . Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement, these challenges must first be considered by the arbitrator.<sup>235</sup>

Taken together, *Carbajal* and *Hawkins* indicate that in the Seventh Circuit the issue of whether an arbitration agreement prevents the vindication of a statutory right is for the arbitrator to decide regardless of whether the statutory right arises under federal or state law.

In the Eighth Circuit, the seminal case on the correct decision-maker for vindication of statutory rights challenges is *Larry's United Super, Inc. v. Werries*.<sup>236</sup> In that case a group of grocers sued their supplier for violations of state law and the federal RICO Act.<sup>237</sup> The supplier moved to compel arbitration pursuant to the parties' agreement, and the grocers countered that the terms of the arbitration agreement would not allow them to vindicate their federal statutory right to punitive damages.<sup>238</sup> The Eighth Circuit held that any argument that the arbitration agreement waived a substantive right under a federal statute should be made in arbitration.<sup>239</sup> The Eighth Circuit recognized that other circuits had reached the opposite conclusion on who should decide such issues but declined to follow those precedents.<sup>240</sup>

The Eighth Circuit has repeatedly stated that *Larry's United Super* correctly states the rule that arbitrators, not courts, should decide the issue of whether an arbitration agreement violates public policy by preventing

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234. *Id.* at 807.

235. *Id.*

236. 253 F.3d 1083 (8th Cir. 2001).

237. *Id.* at 1084.

238. *Id.*

239. *Id.* at 1086. In support of its conclusion, the Eighth Circuit cited *Great Western Mortg. Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir. 1997). As is discussed below, it is questionable whether the Third Circuit still adheres to that view. *See infra* notes 260–73 and accompanying text.

240. *Larry's United Super*, 253 F.3d at 1086 (first citing *Paladino v. Avnet Comput. Techs. Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); and then citing *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248–49 (9th Cir. 1994)).

the vindication of a statutory right.<sup>241</sup> However, the Eighth Circuit case *Faber v. Menard, Inc.*<sup>242</sup> suggests that there is a significant exception to that rule.<sup>243</sup> In *Faber* an employee sued his employer alleging violations of the federal Age Discrimination in Employment Act.<sup>244</sup> The employer moved to compel arbitration pursuant to an arbitration provision in the parties' employment agreement.<sup>245</sup> The arbitration provision required each party to pay its own attorney's fees plus half of the costs of the arbitration.<sup>246</sup> The employee argued that the provision was unenforceable because the fees would "effectively prevent him from being able to vindicate his rights in arbitration."<sup>247</sup> The Eighth Circuit, citing *Larry's United Super*,<sup>248</sup> held that the issue of whether the arbitration provision prevented the employee from vindicating his right to recover attorney's fees was properly for the arbitrator to decide.<sup>249</sup> However, the issue of whether the arbitral fees were "cost-prohibitive and preclude[d] the vindication of statutory rights" was for the court to decide.<sup>250</sup>

Reconciling *Faber* with other Eighth Circuit precedents, it is still generally the rule that challenges to an arbitration provision on the ground that it does not allow a party to vindicate its statutory rights will be referred to the arbitrator.<sup>251</sup> However, if the challenge is based on the high cost of the arbitral forum, then the issue will be decided by a court.<sup>252</sup> It may be that the Eighth Circuit would make other exceptions to the general rule of arbitrability if an effective vindication challenge were based on some other type of provision that prevents the complaining party from reaching a fair arbitral forum at the outset.<sup>253</sup>

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241. See *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 725 (8th Cir. 2003) (following *Larry's United Super*, 253 F.3d 1083 (8th Cir. 2001)); *Arkcom Dig. Corp. v. Xerox*, 289 F.3d 536, 539 (8th Cir. 2002) (same); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 n.6, 682 (8th Cir. 2001) (same).

242. *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004).

243. *Id.* at 1053–54.

244. *Id.* at 1051.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1052 (citing *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1085 (8th Cir. 2001)).

249. *Id.*

250. *Id.* at 1053–54.

251. *Id.* at 1052.

252. *Id.* at 1053–54.

253. See *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 385 (6th Cir. 2005) (invalidating arbitration agreement on ground that biased arbitral forum would not



*B. Circuits in Which Challenges Based on Statutory Rights Are for the Court*

The Third,<sup>254</sup> Fourth,<sup>255</sup> Fifth,<sup>256</sup> Sixth,<sup>257</sup> Ninth,<sup>258</sup> Tenth,<sup>259</sup> Eleventh,<sup>260</sup> and District of Columbia<sup>261</sup> Circuits follow the majority rule that a court, not an arbitrator, should decide whether an arbitration agreement is unenforceable on the ground that it prevents the vindication of a statutory right. Based on dicta, it is likely that the Second Circuit also adheres to that rule.<sup>262</sup>

Of those decisions following the majority rule, the District of Columbia Circuit's decision in *Booker v. Robert Half International, Inc.*<sup>263</sup> is particularly intriguing because it was written by then-Judge Roberts prior to his elevation to Chief Justice of the U.S. Supreme Court.<sup>264</sup> *Booker* concerned an arbitration agreement that precluded an award of punitive damages although the claimant had a right to pursue punitive damages under the District of Columbia Human Rights Act.<sup>265</sup> Without much

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effectively vindicate statutory rights); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting) (discussing how effective vindication might be prevented at different stages of the arbitral process).

254. See *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 264 (3d Cir. 2003) (rejecting the argument that arbitrator should decide statutory rights issue).

255. See *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282–83 (4th Cir. 2007) (deciding effective vindication challenge).

256. See, e.g., *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316 (5th Cir. 2002) (stating that a court should decide issue of whether public policy prevents waiver of statutory right).

257. See, e.g., *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1019 (6th Cir. 2005) (stating that a court is required to address enforceability of an arbitration agreement).

258. See *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1292 (9th Cir. 2006) (stating that a court decides if arbitration clause forces a party to forgo a statutory right).

259. See *Shankle v. B–G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (discussing the issue of whether arbitration agreement infringes on statutory rights is within a court's power).

260. See *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1027 (11th Cir. 2003) (discussing that a court decides gateway issues of whether an arbitration agreement is prohibitively expensive or limits statutory remedies).

261. See, e.g., *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (deciding the issue and enforcing the arbitration agreement).

262. See *Duran v. J. Hass Grp., L.L.C.*, 531 F. App'x 146, 147 (2d Cir. 2013) (assuming, without deciding, that an unconscionability challenge to arbitration agreement is for a court to decide).

263. 413 F.3d 77.

264. See *id.* at 79.

265. *Id.*

discussion, the court quickly concluded that the arbitration clause as written was not enforceable.<sup>266</sup> The possibility of referring that question to the arbitrator for decision was not even considered.<sup>267</sup> In similar fashion, the Fourth Circuit has also determined effective vindication challenges to arbitration agreements without discussing the alternative possibility of referring those challenges to an arbitrator for determination.<sup>268</sup>

Although the Third Circuit once agreed with the Seventh and Eighth Circuits that effective vindication of statutory rights challenges were for the arbitrator,<sup>269</sup> the Third Circuit now applies the majority rule that such challenges are for a court to decide.<sup>270</sup> In the 1997 case *Great Western Mortgage Corp. v. Peacock*,<sup>271</sup> the Third Circuit considered a case in which an employee alleged that she was sexually harassed by her employer in violation of New Jersey state law.<sup>272</sup> The dispute was covered by an arbitration agreement that did not allow the arbitrator to award punitive damages or attorney's fees.<sup>273</sup> The employee argued that the arbitration agreement was unenforceable because it did not allow her to exercise her state statutory rights.<sup>274</sup> The Third Circuit, however, held that her argument concerning her state law rights was for the arbitrator to decide.<sup>275</sup>

While *Great Western Mortgage* seemed to establish a rule in the Third Circuit that effective vindication challenges should be directed to the arbitrator,<sup>276</sup> that rule did not survive the court's subsequent decision in *Spinetti v. Service Corp. International*.<sup>277</sup> *Spinetti* involved claims by an employee that her employer violated her rights under the Civil Rights Act

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266. *Id.*

267. *Id.* The case focused on the issue of whether the court should sever the offending part of the arbitration agreement in order to make the agreement enforceable. *See infra* notes 392–93 and accompanying text.

268. *See Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 668 (4th Cir. 2016); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 277 (4th Cir. 2007).

269. *See Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1030–31 (11th Cir. 2003) (listing circuits that disagreed with the Eleventh Circuit's approach).

270. *See Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 180 (3d Cir. 2010) (challenging enforceability of the arbitration agreement on the ground that a class action waiver is unconscionable is “for judicial determination”).

271. 110 F.3d 222 (3d Cir. 1997).

272. *Id.* at 224.

273. *Id.* at 225.

274. *Id.* at 230.

275. *Id.* at 231–32.

276. *Id.*

277. 324 F.3d 212, 216 n.1 (3d Cir. 2003).

of 1964 and the Age Discrimination in Employment Act.<sup>278</sup> As in *Great Western Mortgage*, the parties' arbitration agreement did not allow the arbitrator to award attorney's fees.<sup>279</sup> The plaintiff employee argued that the arbitration agreement was unenforceable because it did not allow her to vindicate her right to recover attorney's fees under the relevant federal statutes.<sup>280</sup> Understandably, the employer contended that under *Great Western Mortgage* the employee's statutory rights argument should be referred to the arbitrator for decision.<sup>281</sup> The Third Circuit, however, rejected that argument in a footnote, stating that *Great Western Mortgage* merely held that the issue could be decided in arbitration, not that the court was foreclosed from deciding it.<sup>282</sup> Subsequent cases have confirmed that the Third Circuit now holds that challenges to an arbitration agreement based on the inability to vindicate statutory rights are for the judiciary to decide.<sup>283</sup>

In *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*,<sup>284</sup> the Fifth Circuit unambiguously adopted the majority rule that effective vindication challenges should be decided by a court, but only after acknowledging the split in the circuits over what it called a "close" question.<sup>285</sup> The Fifth Circuit was persuaded to adopt the majority rule by two considerations.<sup>286</sup> First, the party resisting arbitration was seeking to void the entire arbitration provision on public policy grounds.<sup>287</sup> Second, in *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>288</sup> the Supreme Court considered an effective vindication challenge to an arbitration

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278. *Id.* at 214.

279. *See id.* at 216 (agreeing with the lower court's ruling that each party must pay its own fees).

280. *Id.* at 214.

281. *Id.* at 216 n.1.

282. *Id.*

283. *See Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 264 (3d Cir. 2003) (rejecting the argument that arbitrator should decide statutory-rights issue); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 180 (3d Cir. 2010) (discussing the validity of an arbitration agreement prohibiting class action is for court to decide).

284. *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2002).

285. *Id.* at 316.

286. *Id.*

287. *Id.* The Fifth Circuit did not explain why it thought seeking to void the entire arbitration provision was significant. *Id.* One year later, the Fifth Circuit determined that if a part of an arbitration provision prevents the vindication of a statutory right, then the offending provision should be severed. *See Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003).

288. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

agreement without submitting the matter to an arbitrator.<sup>289</sup> *Investment Partners*, however, predates the Supreme Court's decision in *PacifiCare Health Systems, Inc. v. Book*,<sup>290</sup> in which the Court stated that it considers the issue of "whether it is for courts or arbitrators to decide enforceability in the first instance" to be unresolved.<sup>291</sup>

### C. The First Circuit

In response to the question of who should decide whether an arbitration agreement is invalid because it prevents the vindication of a statutory right, some courts say the arbitrator,<sup>292</sup> some say the court,<sup>293</sup> and the First Circuit says sometimes the arbitrator and sometimes the court.<sup>294</sup> The First Circuit originally held that such questions are for the arbitrator. In 2002, in *Thompson v. Irwin Home Equity Corp.*,<sup>295</sup> the plaintiff-borrowers brought an action under the federal Truth in Lending Act and argued that an arbitration agreement was unenforceable because it prohibited them from recovering attorney's fees pursuant to that statute.<sup>296</sup> Citing precedent from the Eighth Circuit, the First Circuit held that the argument should be addressed to the arbitrator.<sup>297</sup> The First Circuit was thus firmly in the minority camp in holding that effective vindication challenges were for an arbitrator to decide.<sup>298</sup>

Four years later, in *Kristian v. Comcast Corp.*,<sup>299</sup> the First Circuit held that it was for the court to decide whether the provisions in an arbitration agreement were invalid because they prevented the plaintiffs from vindicating their statutory rights.<sup>300</sup> Under *Kristian*, it seemed that the First Circuit had switched to the majority rule,<sup>301</sup> until the next year when the

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289. See *Inv. Partners*, 298 F.3d at 316.

290. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

291. *Id.* at 407.

292. See *supra* notes 223–53 and accompanying text.

293. See *supra* notes 254–91 and accompanying text.

294. *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 91 (1st Cir. 2002).

295. 300 F.3d 88.

296. *Id.* at 91.

297. *Id.* (citing *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1085–86 (8th Cir. 2001)).

298. See *supra* notes 223–53 and accompanying text.

299. 446 F.3d 25 (1st Cir. 2006).

300. *Id.* at 29.

301. *Id.*; see *supra* notes 254–91 and accompanying text.

court decided *Anderson v. Comcast Corp.*<sup>302</sup>

In *Anderson* a customer sued a cable provider under a state consumer protection statute.<sup>303</sup> The parties had an arbitration agreement, which the customer argued prevented him from vindicating his statutory rights by prohibiting any award of multiple damages, prohibiting class actions, and imposing a one-year limitations period.<sup>304</sup> Concerning the prohibition of class actions, the arbitration provision included the qualifying language: “unless your state’s laws provide otherwise.”<sup>305</sup> Because the contract language could be interpreted to be consistent with state statutory law, the court found that the question should be referred to the arbitrator.<sup>306</sup> That result is clearly consistent with Supreme Court precedent which instructs that courts should not presume that an arbitrator will interpret an ambiguous contract provision in a way that will conflict with external law.<sup>307</sup>

Turning to the agreement’s prohibition of multiple damages, the *Anderson* Court stated that it was “ambiguous” whether Massachusetts law would allow the plaintiff to waive his right to that remedy.<sup>308</sup> Based on that ambiguity, the First Circuit held that the plaintiff’s objections concerning the multiple damages provision should be considered by the arbitrator rather than the court.<sup>309</sup> It is important to note that the ambiguity to which the First Circuit refers in this instance is not ambiguity in the language of the parties’ contract; rather, the ambiguity is an uncertainty as to how to interpret a state statute.<sup>310</sup> There is ample precedent for the proposition that ambiguous contract language should be left to the arbitrator to interpret.<sup>311</sup> The First Circuit, however, adopted a rule that

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302. 500 F.3d 66 (1st Cir. 2007).

303. *Id.* at 68.

304. *Id.*

305. *Id.* at 72.

306. *Id.*

307. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406–07 (2003).

308. *Anderson*, 500 F.3d at 74–75.

309. *Id.* at 75.

310. *Id.* at 74–75.

311. *See, e.g., PacifiCare Health Sys.*, 538 U.S. at 406–07 (stating the Court will not assume an arbitrator will interpret prohibition of punitive damages as applying to treble damages); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540–41 (1995) (stating the Court will not assume an arbitrator will interpret a contract in a manner contrary to American law); *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1018 (6th Cir. 2005) (stating the court will not assume an arbitrator will interpret a prohibition in a way that violates plaintiff’s rights).

leaves difficult points of statutory law for the arbitrator to interpret.<sup>312</sup>

Regarding the shortened limitations period, *Anderson* held that the arbitration agreement was in direct, unambiguous conflict with statutory law.<sup>313</sup> On that basis, *Anderson* held that it was for the court, not the arbitrator, to decide whether the shortened limitations provision was permissible.<sup>314</sup>

The subsequent case of *Awuah v. Coverall North America, Inc.*<sup>315</sup> adds yet another layer to the First Circuit's analysis. In *Awuah* franchisees of a janitorial services company alleged violations of wage, overtime, and consumer protection laws.<sup>316</sup> Their disputes were covered by arbitration agreements, but they alleged that the cost of arbitrating prevented them from being able to vindicate their rights.<sup>317</sup> The First Circuit affirmed the district court's refusal to order arbitration and held that it was properly the role of the court to determine whether the cost of proceeding in arbitration made the possibility of such a proceeding "illusory."<sup>318</sup>

In sum, the rule in the First Circuit seems to be that a challenge to an arbitration agreement based on an argument that the claimant cannot vindicate its statutory rights should be decided by a court if the conflict between the agreement and the relevant statute is clear and direct.<sup>319</sup> Furthermore, a court should decide the issue if the costs of arbitration are such as to make the availability of arbitration illusory.<sup>320</sup> If it is arguable, based either on the law or the language of the contract, that the arbitration agreement is not in conflict with the relevant statute, then the issue is for the arbitrator to decide.<sup>321</sup>

*D. Objections to Arbitration Agreements Based on the Inability to Vindicate Statutory Rights Should Be Decided by Courts*

The law is currently unsettled as to whether a court or an arbitrator

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312. See *Anderson*, 500 F.3d at 74–75.

313. *Id.* at 75–76.

314. *Id.*

315. 554 F.3d 7 (1st Cir. 2009).

316. *Id.* at 8–9.

317. *Id.* at 12–13.

318. *Id.* at 13.

319. See *Anderson*, 500 F.3d at 66, 75–76 (finding that there was a clear and direct conflict between the agreement and the statute of limitations).

320. *Awuah*, 554 F.3d at 13.

321. See *Anderson*, 500 F.3d at 74–75 (describing how the factual discovery that the arbitrator made might render the question of statutory conflict moot).

should decide objections to arbitration agreements based on the inability to vindicate statutory rights.<sup>322</sup> The circuits are split,<sup>323</sup> and the Supreme Court has specifically noted that it has yet to rule on the issue.<sup>324</sup> A majority of the circuits have adopted a rule that the issue is for a court to decide.<sup>325</sup> For the reasons that follow, the majority rule is the better rule, and it should be generally adopted by the courts.

First, the weight of precedent favors a rule that courts should decide challenges to arbitration agreements based on the inability to vindicate statutory rights. While the Supreme Court has explicitly stated that this is an open question,<sup>326</sup> three cases demonstrate that in the past the Court has implicitly presumed that such issues were for a court to decide. *Mitsubishi*<sup>327</sup> established the rule that agreements to arbitrate statutory disputes are enforceable, but only “so long as the prospective litigant effectively may vindicate its statutory cause of action.”<sup>328</sup> The *Mitsubishi* Court stated, “[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement [to arbitrate] as against public policy.”<sup>329</sup> While that language is dicta, it indicates that the *Mitsubishi* Court believed, at least as far as agreements to arbitrate antitrust claims are concerned, that a court should decide whether the arbitration agreement prevented the vindication of a statutory right.

In *American Express*,<sup>330</sup> the Supreme Court noted that it had never applied the effective vindication doctrine to invalidate an arbitration agreement.<sup>331</sup> Nevertheless, in *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>332</sup> the Court considered the possibility that prohibitive arbitral costs could prevent a claimant from effectively vindicating a federal

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322. See *supra* notes 211–321 and accompanying text.

323. See *supra* notes 211–321 and accompanying text.

324. See *supra* notes 211–22 and accompanying text.

325. See *supra* notes 254–91 and accompanying text.

326. See *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406–07 (2003) (declining to decide the question of whether a court or an arbitrator should decide enforceability of arbitration agreement).

327. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

328. *Id.* at 636–37.

329. *Id.* at 637 n.19.

330. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

331. *Id.* at 2310.

332. *Green Tree*, 531 U.S. at 91.

statutory right.<sup>333</sup> Likewise, in *American Express*, the Court declined to apply the effective vindication doctrine, but only after considering the possibility that it might do so.<sup>334</sup>

Past Supreme Court cases that seem to presume that courts should decide effective vindication issues are particularly significant because of an important principle of arbitrability set forth in *Howsam v. Dean Witter Reynolds, Inc.*<sup>335</sup> In *Howsam* the Court stated that gateway issues concerning arbitration agreements are for courts to decide:

[W]here contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing [the] parties to arbitrate a matter that they may well not have agreed to arbitrate.<sup>336</sup>

It is inherently speculative to consider what the parties would have intended if they had thought about whether a court or an arbitrator would decide a particular challenge to the enforceability of their arbitration agreement.<sup>337</sup> Nonetheless, the Supreme Court itself seems to have assumed the issue was for a court to decide in *American Express*,<sup>338</sup> *Green Tree Financial*,<sup>339</sup> and *Mitsubishi*.<sup>340</sup> In addition, Chief Justice Roberts, while still a circuit court judge, also seemed to have assumed that such

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333. *Id.* at 91.

334. *Am. Express*, 133 S. Ct. at 2310. Furthermore, the three dissenters to *American Express* (Justices Kagan, Ginsberg, and Breyer) must be of the opinion that effective vindication challenges are for a court to decide because they would have applied the doctrine to invalidate the arbitration agreement at issue in that case. *See id.* at 2313 (Kagan, J., dissenting). On the other hand, Justice Thomas's concurring opinion indicates that he believes only issues of contract formation are for a court to decide. *See id.* at 2312–13 (Thomas, J., concurring).

335. 537 U.S. 79 (2002).

336. *Id.* at 83–84.

337. Parties to an arbitration agreement can provide a definite answer to the question of who they intend to decide arbitrability issues by including a provision specifying who is to decide a legal challenge to the enforceability of their agreement. Such provisions are generally enforceable. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (parties can agree to arbitrate arbitrability issues).

338. *See Am. Express*, 133 S. Ct. at 2310–12.

339. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000).

340. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).



issues were for a court to decide.<sup>341</sup> It is logical to conclude that parties to an arbitration agreement would similarly assume that challenges based on the inability to vindicate a statutory right would be decided by a court. Pursuant to *Howsam*, therefore, the issue should not be referred to an arbitrator.<sup>342</sup>

In addition, parties sometimes argue that they cannot vindicate their statutory rights in an arbitral forum because the arbitration agreement imposes prohibitive costs.<sup>343</sup> In particular, such issues may arise when the arbitration agreement requires that the party asserting a statutory claim split the arbitration fees with the responding party.<sup>344</sup> In such cases, referring the issue of arbitrability to the arbitrator may mean that the prudent claimant simply abandons the claim rather than endure ruinous costs.<sup>345</sup> This problem caused the First Circuit to amend its original rule that effective vindication of statutory rights issues are for the arbitrator to decide, adding an exception that the court should decide the issue if prohibitive costs make the arbitral forum illusory.<sup>346</sup> Such a bifurcated approach adds an unnecessary layer of complexity in comparison to the more elegant solution of having all such issues determined by a court.

On a more fundamental level, challenges to arbitration agreements based on the inability to vindicate a statutory right involve statutory policy considerations not limited to the parties to the contract.<sup>347</sup> While it would

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341. See *supra* notes 263–65 and accompanying text.

342. See *Howsam v. Dean Witter Reynolds*, 537 U.S. at 83–84.

343. See, e.g., *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 90–92 (stating that a party resisting arbitration has the burden of showing prohibitive costs); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 213–14, 217 (3d Cir. 2003) (stating that the defendant-employer must pay for costs of arbitration and attorney’s fees where prohibitive costs prevent effective vindication of the plaintiff-employee’s statutory rights); *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1149–50 (10th Cir. 2014) (stating that arbitral costs may prevent vindication of statutory rights).

344. See *Bradford v. Semiconductor Sys., Inc.*, 238 F.3d 549, 553–54 (4th Cir. 2001) (“[I]t is undisputed that fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny . . . access to the arbitral forum.”).

345. See *Green Tree*, 531 U.S. at 90–91 (stating that the plaintiff failed to carry the burden of showing that prohibitive arbitral costs would cause her to forgo her claim).

346. See *supra* notes 292–321 and accompanying text.

347. See, e.g., *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1112 (9th Cir. 2016) (stating that public policy allows courts to invalidate arbitration agreements that prospectively waive statutory remedies); *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 377 (10th Cir. 2016) (stating that effective vindication of statutory rights is required on public policy grounds); *Spinetti*, 324 F.3d at 213–14 (stating that public policy is an important factor that

be theoretically possible to allow parties to contract away statutory rights that involve public policy, such as the right not to be subjected to racial discrimination by one's employer, the law of the United States, on public policy grounds, does not allow such prospective waivers.<sup>348</sup> Thus when an arbitration provision prevents a party from vindicating a federal statutory right, the congressional policy of the FAA in favor of arbitration agreements must be reconciled with the congressional policy of another statute, such as the Sherman Antitrust Act.<sup>349</sup>

Arbitrators are, of course, fully capable of balancing the need to enforce the contract that empowers them against the public policy concerns expressed in another statute.<sup>350</sup> However, the question is whether they should be required to do so in cases where the dictates of the parties' contract arguably contradict the public policy contained in a statute.<sup>351</sup> Arbitration is a "creature of contract."<sup>352</sup> The arbitrator's authority is only that which the parties agree to allow.<sup>353</sup> Furthermore, arbitrations are generally private proceedings closed to the public.<sup>354</sup> In contrast, a federal court has an equal interest in enforcing the FAA and the substantive federal statute underlying a party's claim.<sup>355</sup> Courts thus seem better situated to balance the statutory interests at stake.<sup>356</sup> Aligning the decision to be made with the forum that is in the better position to strike the appropriate balance "will help better to secure a fair and expeditious

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must be weighed when deciding whether to invalidate an arbitration agreement).

348. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974) (stating that an individual cannot waive rights under Civil Rights Act).

349. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

350. See *Mitsubishi*, 473 U.S. at 626–27 (“[W]e are well past the time when judicial suspicion of . . . the competence of arbitral tribunals inhibited the development of arbitration . . .”).

351. See *Gardner-Denver Co.*, 415 U.S. at 56–57 (stating that an arbitrator's “task is to effectuate the intent of the parties rather than the requirements of enacted legislation”).

352. *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224 (2d Cir. 2001).

353. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49 (1986).

354. See *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 518 (3d Cir. 2013).

355. See *Mitsubishi*, 473 U.S. at 637 n.19 (stating that the Court would “have little hesitation in condemning [arbitration] agreement [that waives statutory remedies] as against public policy”).

356. The fact that courts are public institutions charged with applying public laws further bolsters the argument that a party to an arbitration agreement would ordinarily intend that an objection based on the ability to enforce an external statutory right would be determined by a court. See *supra* notes 337–42 and accompanying text.

resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike.”<sup>357</sup>

The argument is stronger for having courts decide challenges based on federal statutes as opposed to state statutes because there is no need to balance the state statute against the FAA. If the state statute is in tension with the FAA, the FAA preempts the state statute.<sup>358</sup> Nonetheless, even in the case of a challenge based on state statutory rights, a court or an arbitrator must determine whether public policy concerns justify a finding that the arbitration agreement is unconscionable.<sup>359</sup> As with challenges based on federal statutory rights, a public court is in a better position than a private arbitrator to make that determination.<sup>360</sup> Based on the weight of precedent,<sup>361</sup> the likely expectations of the parties,<sup>362</sup> and the appropriateness of having public courts decide matters of public policy,<sup>363</sup> courts, not arbitrators, should decide whether an arbitration agreement is invalid on the ground that it prevents a party from vindicating a statutory right.

#### V. APPROACHES TO SEVERABILITY IN STATUTORY RIGHTS ARBITRATION CASES

Once it is determined that an agreement to arbitrate is unenforceable because it prevents a party from vindicating a statutory right, a decision must be made whether to sever the offending part or parts of the agreement in order to make the dispute arbitrable.<sup>364</sup> The circuit courts are split as to whether severance is ever appropriate as a means of rehabilitating an

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357. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (explaining that NASD arbitrators can best resolve NASD time limit rules better than judges can).

358. *See supra* notes 166–70 and accompanying text.

359. *See supra* notes 171–76 and accompanying text.

360. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 60 n.22 (1st Cir. 2006) (“[T]he unconscionability analysis always includes an element that is the essence of the vindication of statutory rights analysis—the frustration of the right to pursue claims granted by statute.”).

361. *See supra* notes 326–34 and accompanying text.

362. *See supra* notes 335–42 and accompanying text.

363. *See supra* notes 343–60 and accompanying text.

364. *See, e.g., Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 186 (3d Cir. 2010) (after considering whether a provision is unenforceable, consider severing the provision); *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 83–84 (D.C. Cir. 2005) (severing provision prohibiting award of punitive damages); *Shankle v. B–G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (declining to sever provision requiring claiming party to pay half of arbitration fees).

agreement that would otherwise frustrate the enforcement of a statutory right,<sup>365</sup> but a strong majority of circuits will sever offending provisions under certain circumstances.<sup>366</sup> The circuits that employ severance disagree as to when severing an offending provision is appropriate.<sup>367</sup>

A. *Circuits in Which Provisions That Prevent the Vindication of Statutory Rights May Be Severed Without Reliance on a Severance Clause*

Of those circuits that will sever the portions of an arbitration provision that prevent a party from vindicating its statutory rights, five permit such severance even if the parties' contract does not include a severability provision.<sup>368</sup> In *In re Cotton Yarn Antitrust Litigation*,<sup>369</sup> the Fourth Circuit remanded a case to the district court to consider whether the limitations period contained in the parties' arbitration agreements would prevent the vindication of a statutory right.<sup>370</sup> The Fourth Circuit instructed the district court that if it determined that the limitations provisions were unenforceable, it "must then consider whether severance of the limitations provisions, rather than invalidation of the arbitration agreements, would be the appropriate remedy."<sup>371</sup> While the majority opinion did not give the district court guidance on how to determine whether severance was appropriate,<sup>372</sup> a concurring opinion stated that the district court should simply "sever the offending limitations provisions from the otherwise

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365. See *Booker*, 413 F.3d at 84 (noting split in circuits).

366. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 n.23 (1st Cir. 2006) (explaining that state and federal courts have refused to compel arbitration to prevent shielding parties against antitrust claims).

367. See *infra* notes 368–93 and accompanying text.

368. E.g., *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001) (stating that severance is appropriate even in absence of severability provision); see, e.g., *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 292 (4th Cir. 2007) (directing the district court to consider severance as "appropriate remedy" for unenforceable provision); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) (severing without reliance on severability provision); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 215–16 (3d Cir. 2003) (severing portion of arbitration agreement with no severability clause); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248–49 (9th Cir. 1994) (stating that an entire arbitration provision preventing vindication of statutory rights may be severable, even if it is "an integrated part of the contract").

369. 505 F.3d 274.

370. *Id.* at 292.

371. *Id.*

372. *Id.*

enforceable arbitration agreements.”<sup>373</sup>

The Fifth Circuit has also embraced severance of an unenforceable provision in an arbitration agreement without reliance on a severability provision in the parties’ contract.<sup>374</sup> In *Hadnot v. Bay, Ltd.*,<sup>375</sup> a provision in the parties’ arbitration agreement was unenforceable because it proscribed an award of punitive damages to an employee with a claim under the Civil Rights Act.<sup>376</sup> The Fifth Circuit upheld the district court’s decision to sever the damages provision.

The purpose of the arbitration provision is to settle any and all disputes arising out of the employment relationship in an arbitral forum rather than a court of law. Even with its unlawful limitation on the types [of] permissible damage awards lifted, so that the decision maker is free to address punitive damages, the arbitration clause remains capable of achieving this goal. In fact, the lifting of that illegal restriction enhances the ability of the arbitration provision to function fully and adequately under the law. . . .

. . . The severing of such a prohibition or restriction serves to expand the scope of arbitration rather than reduce or impair it, thereby freeing that provision to fulfill its intended function.<sup>377</sup>

The Eighth Circuit has explicitly stated that a severability clause is not required for a court to sever a provision in an arbitration agreement that prevents the vindication of a statutory right.<sup>378</sup> Relying on Missouri state contract law, the Eighth Circuit severed the portion of the parties’ arbitration agreement that prohibited an award of punitive damages to an employee with a sexual harassment claim.<sup>379</sup> The court stated that such severance was appropriate even in the absence of a severability provision because the “essence of the contract” was to settle disputes through binding arbitration.<sup>380</sup>

The Third Circuit, citing the Sixth Circuit, also relied on state law in

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373. *Id.* at 301 (Johnston, J., concurring in part and dissenting in part).

374. *See Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) (explaining that the removal of an illegal provision better enables arbitration to resolve the issue).

375. 344 F.3d 474.

376. *Id.* at 478.

377. *Id.*

378. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680–81 (8th Cir. 2001).

379. *Id.* at 679–80, 683.

380. *Id.* at 680–81.

deciding to sever a provision in an arbitration agreement that would have required a claimant to forgo her right to recover attorney's fees pursuant to the Civil Rights Act of 1964.<sup>381</sup> The Third Circuit specifically noted that the parties' agreement had no severability clause and, in fact, included language stating that the arbitration agreement could only be modified by a writing signed by both parties.<sup>382</sup> The court nonetheless severed the offending provision, stating that "the satellite issues of costs and attorney's fees may not be the tail wagging the dog."<sup>383</sup>

Applying general contract principles, the Ninth Circuit has stated that it would be appropriate to sever the portion of an arbitration clause that prevents vindication of a statutory right if the offending portion is not "an integrated part of the contract."<sup>384</sup> In *Graham Oil Co. v. ARCO Products Co.*,<sup>385</sup> the Ninth Circuit considered severing those portions of an arbitration agreement that prevented the claimant from vindicating its rights under the Petroleum Marketing Practices Act but declined to do so because "the arbitration clause . . . [was] a highly integrated unit containing three different illegal provisions."<sup>386</sup> While *Graham Oil* did not sever a portion of the arbitration agreement, the court's reasoning indicates that the Ninth Circuit would do so under different circumstances even in the absence of a severability clause.<sup>387</sup>

*B. Circuits in Which Provisions That Prevent the Vindication of  
Statutory Rights May Be Severed if the Contract Includes a  
Severance Clause*

The First, Sixth, and District of Columbia Circuits have also found that it is appropriate to sever a portion of an arbitration agreement that

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381. See *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 214, 216 (3d Cir. 2001) ("Therefore, '[i]f arbitration is to offer claimants the full scope of remedies available under Title VII, arbitrators in Title VII cases, just like courts, must be guided by *Christiansburg* and must ordinarily grant attorney fees to prevailing claimants' rather than be restricted by private contractual language." (alteration in original) (quoting *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 673 n.15 (6th Cir. 2003))).

382. *Id.* at 215.

383. *Id.* at 219–20.

384. See *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248–49 (9th Cir. 1994) (explaining that typically clauses integrated in a contract cannot be severed, thereby indicating those provisions not integrated can be).

385. 43 F.3d 1244.

386. *Id.* at 1248.

387. See *id.* (discussing general principles of severability).

prevents the vindication of a statutory right, but they have only done so in cases where the relevant contract included a severability provision.<sup>388</sup> In deciding to sever the offending portion of an arbitration provision, the Sixth Circuit emphasized the importance of ascertaining the intent of the parties, stating that “when the arbitration agreement at issue includes a severability provision, courts should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement.”<sup>389</sup> Similarly, the District of Columbia Circuit considered the intent of the parties, as evinced by a severability clause, to be a “critical consideration” in its decision to sever the unenforceable portion of an arbitration agreement.<sup>390</sup>

*C. Circuits in Which Provisions That Prevent the Vindication of Statutory Rights Will Not Be Severed if the Illegality Is Pervasive*

While a large majority of the circuit courts have found that severance of a portion of the arbitration agreement is the proper response to a clause that prevents the vindication of a statutory right, the Fourth, Eighth, Ninth, and District of Columbia Circuits have made clear that they would invalidate the entire arbitration agreement if the infringement on statutory rights became too severe.<sup>391</sup> The District of Columbia Circuit’s decision in *Booker* is of particular interest because it was written by then-Judge Roberts shortly before his elevation to Chief Justice of the U.S. Supreme Court.<sup>392</sup> Although dicta, *Booker* includes the following cautionary note on severance:

If illegality pervades the arbitration agreement such that only a

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388. See *Anderson v. Comcast Corp.*, 500 F.3d 66, 77 (1st Cir. 2007); *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 83–85 (D.C. Cir. 2005); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003).

389. *Morrison*, 317 F.3d at 674–75; see also *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1016 (6th Cir. 2005) (intention of parties indicated by severability clauses).

390. *Booker*, 413 F.3d at 84–85.

391. See *id.* (“[T]he more the employer overreaches, the less likely a court will be able to sever . . . .”); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001) (“[O]ne party may include so many invalid provisions that the validity of the entire agreement would be undermined.”); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (promulgating many biased rules requires rescission of entire arbitration agreement); *Graham Oil Co.*, 43 F.3d at 1249 (deciding to strike entire arbitration clause rests on multiple offensive provisions).

392. See *Booker*, 413 F.3d at 79.

disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties. . . . Thus, the more the [drafter] overreaches, the less likely a court will be able to sever the provisions and enforce the clause . . . .<sup>393</sup>

#### D. The Tenth Circuit

The Tenth Circuit is the only circuit that refuses to sever a portion of an arbitration agreement that prevents the vindication of a statutory right.<sup>394</sup> In *Shankle v. B-G Maintenance Management of Colorado, Inc.*,<sup>395</sup> the Tenth Circuit found that a fee-splitting provision in the parties' arbitration agreement prevented the plaintiff-employee from vindicating his rights under the Age Discrimination in Employment Act.<sup>396</sup> The court rejected the employer's request that the offending provision be severed because the agreement was clear, and the court considered itself to be without authority to alter it.<sup>397</sup>

#### E. Arbitration Agreements That Prevent a Party from Vindicating a Statutory Right Should Not Be Rehabilitated Through Severance

The current state of the law is that a large majority of circuit courts will sever the portion of an arbitration agreement that prevents vindication of a statutory right in order to make the underlying dispute arbitrable,<sup>398</sup> although some courts will only sever if the contract includes a severance clause,<sup>399</sup> and some will decline to sever if the impermissible provisions are too numerous or affect the essence of the agreement.<sup>400</sup> For the reasons that follow, the majority practice of severing the offending part of the arbitration provision should be abandoned, and courts should adopt a rule whereby an arbitration provision that prevents a party from vindicating a

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393. *Id.* at 84–85 (citations omitted).

394. *See Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234–36, 1235 n.6. (10th Cir. 1999) (citing *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 930 (10th Cir. 1992) (“A court is without authority to alter or amend contract terms and provisions absent an ambiguity in the contract.”)).

395. 163 F.3d 1230.

396. *Id.* at 1233–35.

397. *Id.* at 1235 n.6.

398. *See supra* notes 368–93 and accompanying text.

399. *See supra* notes 388–90 and accompanying text.

400. *See supra* notes 391–93 and accompanying text.



statutory right is unenforceable.

The majority rule of severing the offending portion of an arbitration provision has not been adopted without objection. In both the District of Columbia and the Third Circuit, the Equal Employment Opportunity Commission (EEOC) filed amicus briefs in opposition to severance as a remedy for an arbitration agreement that prevents a claimant from vindicating a statutory right.<sup>401</sup> If severance of the offending provision is the only remedy for an arbitration clause that has been drafted in a manner that prevents the vindication of statutory rights, then there is no disincentive for including such provisions in an arbitration agreement.<sup>402</sup> That may not be particularly troubling in agreements negotiated by sophisticated parties at arm's length, but a review of the case law indicates that such provisions are typically contained in contracts of adhesion,<sup>403</sup> such as employment contracts<sup>404</sup> and consumer contracts.<sup>405</sup>

The Third Circuit's response to the EEOC's objection to severance was that invalidating the entire arbitration agreement would "throw the baby out with the bath water. It would compel the impecunious employee to resort to the courts—the only alternative to arbitration in dispute adjudication."<sup>406</sup> Invalidating an arbitration agreement, however, does not compel anyone to litigate. The parties to the dispute remain free to agree to arbitrate on terms that both sides find acceptable.<sup>407</sup>

The District of Columbia Circuit responded to the EEOC's objection to severance by limiting the circumstances in which the court would find severance appropriate.<sup>408</sup> First, the District of Columbia Circuit said that it would seek to honor the intent of the parties, which includes consideration of whether there is a severance clause in the parties' contract.<sup>409</sup> Second,

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401. See *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 80, 84 (D.C. Cir. 2005); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 223 (3d Cir. 2003).

402. *Spinetti*, 324 F.3d at 223.

403. See *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 n.10 (8th Cir. 2001) (Vietor, J., dissenting) ("The agreement to arbitrate was crafted by Circuit City, not the parties.").

404. See *Booker*, 413 F.3d at 79 (employment contract precluding punitive damages).

405. See *Anderson v. Comcast Corp.*, 500 F.3d 66, 68 (1st Cir. 2007) (preventing cable customers from pursuing rights under antitrust statutes).

406. *Spinetti*, 324 F.3d at 223.

407. See Equal Emp't Opportunity Comm'n Policy Statement on Mandatory Arbitration, No. 915.002 (July 10, 1997) (endorsing use of the post-dispute arbitration agreements to resolve statutory claims).

408. See *Booker*, 413 F.3d at 84–85.

409. *Id.*

it said that it would consider whether “illegality pervades the arbitration agreement,” as opposed to a situation in which there was only a single illegal provision.<sup>410</sup>

Limiting severance to cases in which there are only one or two illegal provisions is preferable to a rule that simply severs all offending parts regardless of whether the illegality is pervasive.<sup>411</sup> However, the District of Columbia Circuit’s approach still allows the drafter one free try at thwarting the will of the legislature. In *Booker*, the employer included a provision that precluded punitive damages, even though an employee with a valid discrimination claim has a statutory right to recover punitive damages.<sup>412</sup> There is no reason for employers in the District of Columbia not to include a similar provision in future arbitration agreements, because if an employee ever objects, the illegal language will simply be severed.<sup>413</sup>

In a case strikingly similar to *Booker*, the Eighth Circuit, like the District of Columbia Circuit, severed the part of an arbitration agreement that prohibited an award of punitive damages to an employee with a statutory discrimination claim.<sup>414</sup> Both circuits have reasoned that the illegality was not sufficiently pervasive to merit invalidating the entire arbitration provision.<sup>415</sup> One dissenting judge pointed out the problem with permitting such attempts to defeat statutory rights.

The near-eradication of substantive recovery rights enacted by Congress and the Missouri legislature is, in my judgment, unconscionable. . . .

. . . This case does not involve a procedural provision or a minor term of any sort. It involves a term that guts 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.<sup>416</sup>

The problem may be harsher in circuits that allow the severance of portions of an arbitration agreement without regard to the extent of the

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410. *Id.*

411. *See supra* notes 368–90 and accompanying text.

412. *Booker*, 413 F.3d at 79.

413. *See id.* at 85–86 (severing the objectionable part of an arbitration agreement).

414. *See Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001).

415. *Id.*

416. *Id.* at 683–84 (Vietor, J., dissenting).

illegal provisions.<sup>417</sup> In such jurisdictions, the drafter of the arbitration agreement can incorporate several provisions that arguably frustrate a future claimant's ability to vindicate its statutory rights, secure in the knowledge that the offending parts will be trimmed away until an arbitration agreement meeting the minimum legal requirements remains. For example in *Anderson v. Comcast Corp.*, the arbitration agreement included a class action waiver, a prohibition of multiple damages, and a shortened statute of limitations period, all of which arguably contradicted Massachusetts consumer protection law.<sup>418</sup>

The federal courts' interest in discouraging schemes to circumvent statutory law is particularly acute in cases involving federal statutes because in those cases the courts must balance the need to enforce both the FAA and the federal statute that is being circumvented.<sup>419</sup> Nonetheless, the FAA as interpreted by the Supreme Court also requires federal courts to determine whether to enforce an arbitration agreement that is arguably unconscionable because it prevents the parties from exercising their rights under state statutes.<sup>420</sup> As the First Circuit has noted, an unconscionability analysis concerning state statutory rights has "striking similarities" with an effective vindication analysis concerning federal statutes.<sup>421</sup> A similar result for severability of provisions that prevent the vindication of both state and federal statutes is, therefore, desirable.<sup>422</sup>

Those courts which have favored severing just the portion or portions of an arbitration agreement that prevent vindication of statutory rights have tended to rely on the federal policy favoring arbitration.<sup>423</sup> However, "we are well past the time [that] judicial" hostility was a threat to

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417. See *supra* notes 368–90 and accompanying text.

418. *Anderson v. Comcast Corp.*, 500 F.3d 66, 71–77 (1st Cir. 2007).

419. See *supra* notes 166–70 and accompanying text.

420. See *supra* notes 168–83 and accompanying text.

421. *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006).

422. The Restatement notes that unconscionability "overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981). The effective vindication doctrine for federal statutes is based on public policy grounds. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

423. See, e.g., *Anderson*, 500 F.3d at 70 (considering case against the backdrop of a strong pro-arbitration policy); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 213–14 (3d Cir. 2003) (stating that the court must respect the liberal policy favoring arbitration); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 653 (6th Cir. 2003) (stating that the court must reconcile goal of the statute with the liberal federal policy favoring arbitration).

arbitration as a civil “dispute resolution” mechanism.<sup>424</sup> The major threat to arbitration today is a growing perception that arbitration is increasingly being used as a means of preventing individuals and small businesses from getting a fair chance to pursue their legal rights.<sup>425</sup> A severance rule that trims away just enough of an illegal arbitration provision to make the agreement minimally acceptable and creates no disincentive for contracts of adhesion that include illegal restrictions, does not further the policy of encouraging arbitration as a valid alternative dispute resolution process.

## VI. CONCLUSION

The law is unsettled as to whether a court or an arbitrator should decide whether an arbitration agreement is invalid for preventing a claimant from vindicating a statutory right. The circuits are split, and the issue has eluded determination by the Supreme Court. The majority view is that the determination should be made by a court. That view is consistent with precedent and general principles of the law of arbitrability. In addition, the determination as to whether an arbitration agreement infringes on nonwaivable statutory rights involves public policy concerns beyond the interests of the parties to the dispute. Those public policy concerns are more appropriate to a public forum.

The law is also unsettled as to whether a portion of an arbitration agreement that prevents a party from vindicating a statutory right should be severed so that the underlying dispute may still be decided by an arbitrator. A majority of the circuit courts have determined that such severance may be appropriate, although they disagree as to what circumstances make it appropriate. However, merely severing an offending provision provides no disincentive for including such provisions in the first place. Permitting severance encourages parties drafting contracts of adhesion to insert provisions that seek to thwart statutory rights, knowing that at worst a court will trim away that which is impermissible. A better rule would be not to sever the offending part but to find the entire arbitration provision unenforceable on the ground that it prevents the vindication of a statutory right.

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424. See *Mitsubishi*, 473 U.S. at 626–27 (“[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”).

425. See *supra* notes 192–210 and accompanying text.