# ARBITRATION OF EMPLOYMENT DISPUTES: THE CONFLUENCE OF *GILMER V. INTERSTATE JOHNSON LANE* AND THE CIVIL RIGHTS ACT OF 1991.

by EUwood F. Oakley, III*

> "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."
>
> Section 118, Civil Rights Act of 1991

The Civil Rights Act of 1991 (CRA/1991) occupied center stage in the continuing national debate over the extent to which the federal government should influence private employment decisions of businesses. The politics of the "quota bill," as the CRA/1991 was labeled by the Bush Administration and Republicans in Congress,[1] was Washington hard ball at its best. In the fall of 1991, the gripping public debate over the Clarence Thomas nomination for the U.S. Supreme Court converged with the floor debate on CRA/1991. This produced widespread media coverage and public interest in the subject of employment law. Amidst the sound and the fury, the Alternative Dispute Resolution (ADR) provisions of Section 118 escaped both public scrutiny and in depth debate by the Congress. It is suggested that Section 118 of the CRA/1991 will play a **significant** role in the evolution of the practice of employment law during the coming decade.

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'HOUSE COMM, ON JUDICIARY. Qvn. RIGHTS AND WOMEN'S EQUITY IN EMPLOYMENT ACT of 1991, H R. REP. NO. 102-40, Part 2. 102d Cong. 1st Sess. 52 (1991).

## I. ARBITRATION PRIMER

Arbitration is one of the procedural and forum selection took available to parties seeking an alternative to traditional dispute resolution mechanisms.[2] When arbitration is selected, the parties utilize an extrajudicial panel of lay persons (usually experts) to determine the outcome of the dispute. Arbitration may be binding or nonbinding; voluntary or compulsory, predispute or postdispute in form. In that the U.S. Constitution (and most state constitutions) guarantee parties access to a jury trial in common law civil matters, compulsory ADR mechanisms imposed on parties by the legal system are typically not binding. In that nonbinding arbitration may be appealed by a dissatisfied participant to a trial court for a *de novo* trial, it is viewed as an adjunct to the legal system and not a true alternative. By contrast, voluntary binding arbitration provides that the parties acknowledge the finality of an arbitration award, and waive their constitutional or statutory jury trial rights

The voluntary choice of arbitration reflects dissatisfaction with one or more aspects of our state sponsored judicial system. Proponents of alternative dispute resolution point out the advantages of arbitration as: (a) time savings; (b) cost savings; (c) informality of hearings, with relaxed rules of evidence and questioning format; (d) limited discovery, (e) confidentiality of process and result; and (f) subject-matter expertise of panel members.

Even a casual study of our court system reveals significant problems with access to justice. Delays of three to four years are not uncommon in civil cases in many jurisdictions. Abuse of civil discovery by aggressive fee driven attorneys is well documented. Runaway damage awards by urban jury panels are well reported in the media. Surveys of participants in the civil justice system consistently point out dissatisfaction with the process and the outcome. At the highest level of the federal government, the call for reform of the justice system is being pushed as a political issue. Even the EEOC, the federal agency with primary responsibility for enforcing the employment laws, is testing a pilot ADR program.[3] The EEOC pilot program would permit voluntary use of outside mediators to resolve termination disputes. The ADR movement has greatly prospered in today's chaotic and inefficient legal environment.

A dose look at the increased use of arbitration as a jury alternative calls into question at least some of the assumptions of its proponents. In a recent study released by the General Accounting Office[4], it was found that programs with voluntary, binding arbitration of medical malpractice Haim* are seldom used in the IS states that have enacted them. Of the 15 state systems,

[2] A useful general reference text is THOMAS H. OEHMXE. COMMERCIAL ARBITRATION (1987).

[3] World Arbitration & Mediation Rep.. NOV. 1991, at 295.

[4] GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE; ALTERNATIVES TO LITIGATION Jan. 10. 1992.

only Michigan has a method for making patients aware of the arbitration option, but even in Michigan relatively little use has been made of arbitration. From 1975 through March 1991, only 882 arbitration claims were filed compared with 20,000 malpractice lawsuits.[5] Georgia, which only permits arbitration agreements to be entered into *after* the medical malpractice dispute has arisen, has had almost no usage by malpractice claimants since its statute was enacted in the mid 1980s.®

A study by the Rand Corps Institute for Civil Justice of a pilot arbitration program in the U.S. District Court for the Middle District of North Carolina reviewed 350 civil cases filed in the late 1980's.[7] The North Carolina project provided mandatory referral of cases of all sizes and complexity to nonbinding arbitration. When compared to the control cases, the study found that the arbitrated cases saved money (in the form of reduced attorneys fees), but not time. The arbitrated cases took an average of 285 days to conclude, while the litigated cases averaged 282 days. The study concluded, however, that the participants in the arbitration cases were more pleased with the process than parties from the control group who appeared before juries. The parties in arbitration perceived that they had received an "improved quality" of justice.

While more study is needed to test the true effectiveness of ADR, arbitration is a procedural tool that offers much to its voluntary participants. Arbitration is typically used to resolve commercial contract disputes between business entities. The contract of employment, although grounded in general contract principles, has legal and social features which distinguish it from commercial contracts. The remainder of this paper will focus on the feasibility of using arbitration to resolve employment disputes.

## II. THE SCOPE OF EMPLOYMENT ARBITRATION

An analysis of the scope of permissible arbitration must begin with the Federal Arbitration Act® (9 U.S.C. Sec 1 et. seq.). Legislative history shows that the purpose of the Federal Arbitration Act was to "reverse centuries of judicial hostility to arbitration agreements" by placing them "upon the same footing as other contracts."[9] As noted in the case of *Moses H. Cone Memorial*

[5]*Id*

'Conversations with the Georgia claims directors of the two insurance companies comprising over 90% of the state medical malpractice market; St. Paul Fire & Marine and MAG Mutual (Summer 1990).

'Reported in the WALL STREET JOURNAL. Sept. 5,1990, at B-10.

*9 U.S.C 5 1 (1982).

'Scherk v. Alberto-Culver Co. 417 U.S. 506.510-511 (1974), quoitng FROM H.R. Ref. No. 96, 68th Cong-, 1st Sess. 1, 2 (1924). An excellent article tracing the history and development of the FAA has been written by Prof. Don Mayer of Oakland University. Don Mayer, *Arbitration of Employment Discrimination Claims under the Federal Arbitration Act,* 25 BUS. L. REV. 63 (1992).

*Hospital* v. *Mercury Construction* Co..® the broad provisions of the FAA manifest a "liberal federal policy favoring arbitration agreements." Specifically, the FAA provides that agreements to arbitrate contained in contracts "evidencing a transaction involving commerce"[11] will be enforceable. Id that the reaches of interstate commerce have been found by our federal courts to be 'as broad as the Atlantic Ocean and as saving as the power of salvation,"[u] at first blush the scope of the FAA would appear to be virtually boundless- Two forces have combined, however, to place significant restrictions on the FAA in the employment context: (1) Section 1 of the FAA; and (2) hostility of state law to arbitration.

### *A. FAA Section 1 Exclusion*

The fim restriction is the statutory limitation of Section I of the FAA. which provides that, "(njothing herein contained shall apply to contracts of employment...of workers engaged in loreign or alternate commcrce.'[1]* While a "plain meaning" analysis of Section 1 would appear to exdude the typical employment contract from the scope of the FAA, "plain meaning" has not been the only tool of interpretation used by the courts. The federal courts have struggled with defining the scope of Section 1 since enactment of the FAA in 1925, and the results have been an>thing but consistent. In the First Circuit Court of Appeals case of *Dickstem v. DuPont,"* the Section 1 exemption was held to be limited to workers "involved m or dosely related to, the actual movement of goods m interstate commerce.* The Second and Third Circuit Courts of Appeal have construed the exemption as applicable only to workers "actually in the transportation industries."[11]

In that many employment disputes arse in the context of a negotiated collective bargaining agreement between unions and companies, another layer of judicial analysis has developed Federal labor law provides in Section 301 of the Taft-Hartley Act for the availability of arbitration under collective bargaining agreements. The Supreme Court held in *Test tie Workers Union* v. *Ijncoln Mills* ** that Section 301 was a source of substantive federal law. and thus enforceable. The *Lincoln Mills* decision did not address the apparent

*406 *VS*. I. 24 (1983).

"9 *VS*.C I 2 (1988)

[a]MGC Development Corp. v 8ck RooJtv Co. 140 G*. App. 41 (1976)

°9 *VSC*. f 2 (1988).

"443 F 2d 783 (1« Or 197J).

"Spj*»-Sui Carp v. Uniied Etec Radio 4 Machine Worker«. 235 F.2d 29« (2d Or. 1956), Tenney En*we*rtn*. Ine. v. United Eke Radio A Mathne Worker*. 207 F-2d 450 (3«1 Or 1933).

-353 *VS*. 488 (19J7).

conflict of Section 301 with Section 1 of the FAA. but did put the matter to rest in the context of labor contracts.

The issue of arbitration of Title VII dvil rights daims within a collective bargaining agreement was presented in the 1974 case o! *Alexander v. Gardner-Dtnver Co.*[1] In that case, it was held by the Supreme Court that the employee's claim was entitled to a trial *de novo* despite a ruling adverse to the employee in a prior labor grievance Fhc labor grievance was based on a general nondocnmmalton dause in the collective bargaining agreement. The Court reasoned that the employees Title VII statutory rights were substantively different, even though they arose from the same factual circumstances The Court m *Gardner-Dtnver Co.* was not required to, aor did it. address (via dicta) the applicability of the Section 1 exclusion of the FAA to the dispute.

### *B. Gilmer* v. *Interstate ¡Johnson Lane: FAA and More*

The U.S. Supreme Court has not dircctly addressed the scope of Seaton 1 in an employment case outside a collective bargaining agreement, although it was rcccntly presented the opportunity. In the dosely watched case of *Gdmerv. Interstate ¡Johnson Lane Corp.** decided m May of 1991, the Court held in a 7-2 decision that a stockbroker must pursue his age discrimination claim pursuant to an arbitration agreement. The Age Discrimination in Employment Act of 1967 (ADEA) as amended,[1,] expressly permitted access to jury trials in federal court. At the time Gilmer applied to the New York Stock Exchange (NYSE) for a license to serve as a registered security representative (Le. stockbroker), be agreed to arbitrate under NYSE rules any dispute with the member broker/dealer (Internal«) arising out of the employment relationship. It is assumed that Plaintiff Gilmer (Age 62) preferred to present his age discrimination claim to a jury of his peers, in that almost everyone b either in the protected dass of 40+ or has pareniVgrandparcnts in that class. Instead. Gilmer's contractual arbitration agreement required him to submit the dispute to a three person panel, one of whom was required to be an employee of a NYSE member firm.

The tnal court denied the defendants Motion to Compel Arbitration, based on the precedent of *Alexander v. Gardner-Dtnver* Co.* The Court of Appeals reversed, and the Supreme Court concurred that *Gardner-Denwr* was not controlling. In explaining the majority's reasoning. Justice White distinguished between a claimant's *contractual* employment rights contained in a collective bargaining agreement, and his *statutory* employment rights

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*415 **VS.** 36 (1*74).

contained in Title VII. In that the contractual rights were independent of the statutory rights, the labor arbitration could not preclude a civil action under Title VII. In that *Gilmer* did not arise in the context of collective bargaining, *Gardner-Denver* was inapplicable.

*Gilmer* is also significant because it put to rest several challenges to mandatory arbitration of employment claims raised in the lower court decisions. The Court rejected the claimants challenge to the agreement as a contract of adhesion. From the perspective of the current Supreme Court, mere inequality of bargaining power (regardless of the degree of disparity) will not suffice to constitute an unenforceable contract of adhesion; there must also be some showing of fraud of coercion.[21] If the facts of *Gilmer* do not give rise to a claim of adhesion, it is difficult to imagine a set of facts which would. The facts of *Gilmer* presented a classic case of "take it or leave it." For Gilmer to gain employment as a stockbroker, he must have had a NYSE administered license (under delegation from the Securities and Exchange Commission). In order to obtain a license, he had to agree in the application to arbitrate when required to do so under NYSE Rules. There appears to be no way in which Gilmer could have become a stockbroker without agreeing to arbitration.

In a slightly different context, the Supreme Court has recently ignored customer claims of adhesion in upholding the mandatory arbitration provisions of the customer account agreement under attack in *ShearsonlAmerican Express, Inc.* v. *McMahon* and *Rodriquez De Quijas v. ShearsonlAmerican Express, Inc.*[23] It is safe to predict that an adhesion argument would face a monumental uphill battle before the present Court.

The *Gilmer* decision also placed the Supreme Court's stamp of approval on a number of procedural aspects of securities arbitration: abbreviated discovery, industry selected panel members; lack of written opinions of decisions; and lack of broad equitable power. In short, the Court approved the streamlined procedures of arbitration with little regard for preservation of judicial safeguards traditionally available to claimants in the federal courts.

The one issue which *Gilmer* did not definitively address is the applicability of the employment exclusion provision of FAA Section 1 to contract based arbitration requirements. The majority opinion attempted to finesse the issue in a footnote. Finding that the arbitration agreement was with the NYSE rather than the employer, the Court stated that it would be inappropriate to address the scope of the FAA "because the arbitration clause being enforced here is not contained in a contract of employment."[24]

"Carnival Cruise Lines v. Shute, 111 S. Q. 1522 (1991).

[a]482 U.S. 220 (1987).

"490 U.S. 477 (1989).

"*Gilmer,* 111 S. Ct at 1651, a 2.

The dissent of Justice Stevens, joined by Justice Marshall, addressed FAA Section 1 head on. The Stevens dissent expressed the view that the *Gilmer* contract fit squarely within the FAA Section 1 exclusion, and therefore was not enforceable. In view of the cohesive conservative composition of the Court, and the retirement of Justice Marshall, it is difficult to imagine the current Court adopting the position of Justice Stevens when (or if) faced with a pure employer/employee agreement to arbitrate all disputes arising out of the employment relationship. The Court did hold the door slightly ajar for clarifying the scope of the Section 1 exclusion, with the statement that "Consequently, we leave for another day the issue raised by *amici curiae.*™ It would be a mistake to construe that comment as an invitation for radical change from the pronouncements of *Gilmer.*

### *C. State Law Hostility to Arbitration Agreements*

While federal statutory law appears to welcome arbitration agreements with open arms, state courts and state substantive law are a bit more leery of this new fangled device. Lawyers are generally conservative in their habits (whatever their politics might be) and resistant to change. It is not unusual for a trial judge to state: "If the rules of hearsay evidence were good enough for Thomas Jefferson, they are good enough for me, By God" (or words to that effect). Given the judiciary's conservative predilections, it was not completely unexpected for the Alabama Supreme Court to pronounce in the 1991 case of *H.L. Fuller Const. Co., Inc. v. Industrial DeveL Bd.*[26] that "this Court feels compelled to point out its disfavor of predispute arbitration agreements."[27] The Court noted that Ala. Code Section 8-1-41 (3) explicitly prohibits the enforcement of predispute arbitration awards, which is "rooted in the belief that parties should not be permitted, *by their agreement,* to oust the courts of their jurisdiction".[28] Nevertheless, the Alabama Supreme Court conceded that in cases governed by the FAA, the federal substantative law of arbitration controls, despite contrary state law or policy. This concession was based on following the holding of the U.S. Supreme Court announced in the 1984 case of *Southland Corp.* v. *Keating.*[29]

In a less hostile environment, the federal courts sitting in New York and California have recently issued rulings which suggest that despite *Southland Corp.* v. *Keating,* the FAA may be vulnerable to limitations imposed by state substantive law. In a case with high visibility in the securities community, a divided U.S. Second Circuit Court of Appeals held in

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*465 U.S. 1 (1984).

*Fahnestock & Co. v. Waltman** that the state law prohibitions against punitive damages in arbitration takes precedent over the FAA. The case arose in the context of NYSE based securities arbitration between a member company and its former employee. The claim of Waltman, a Pennsylvania resident, was based on wrongful discharge and defamation. While the NYSE arbitration panel awarded Waltman compensatory and punitive damages, the Court of Appeals vacated the punitive damages. Following the New York state case law that precludes arbitrators from awarding punitive damages as "a matter of public policy,"[31] the court found that the federal securities law did not preempt state remedies law, despite the use of an arbitration forum approved by the Securities Exchange Commission. The key for the majority in *Fahnestock* was that diversity of citizenship provided the basis for subject matter jurisdiction. Applying the doctrine of *Erie R.R. v. Tompkins*, Judge Miner observed that:

> [T]he measure of damages in general is a matter controlled by New York substantative law where federal jurisdiction in New York is predicated on the diversity of the parties.... It follows that in this action the *Garrity* rule prohibiting the award of punitive damages by arbitration must be applied.
> That the rule is grounded in state policy concerns renders it no less a rule of substantive law....[32] (Citations omitted).

Judge Mahoney's dissent argued that it is "clearly inappropriate" to apply the diversity rationale of *Erie* to a field in which the Supreme Court has said that federal law (Le. the FAA) is controlling.

In another recent attack on the scope of the FAA, the U.S. Court of Appeals for the Ninth Circuit ruled that under *Gilmer,* the FAA's applicability to employment contracts is an "unresolved question."[33] The plaintiff had signed an "Application for Employment" with *Shearson* (not the NYSE) in California, which contained an agreement requiring her to arbitrate any dispute concerning her employment with the brokerage company. After Mago filed a Title VII suit alleging sexual harassment and gender discrimination, Shearson moved to compel arbitration. Mago raised two legal points in objection to arbitration: (1) the Section 1 exclusion to FAA, and (2) the agreement constituted an unenforceable contract of adhesion under California state law. The Ninth Circuit remanded the case to the District Court for consideration of both points, citing the holding in *Gilmer* that a claim "of unequal bargaining power is best left for resolution in specific cases". Unless this case is settled, it should provide an ideal vehicle to test the scope of

»935 F.2d 512 (2d Or. 1991).
»'Garrity v. Lyle
Stuart Inc, 353
»Mago v. Shearson Lehman Hutton, 956 F.2d 932 (1992).

*Gilbert* and the FAA. The Ninth Circuit appears ready to force clarification of this important matter by the Supreme Court. Assuming that the District Court finds for Plaintiff in her state based adhesion claim, an appeal is almost certain to follow. Perhaps the ghost of *Erie R.R.* will rise up and divine to our courts the scope and limits of federalism.

## III. CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 (Senate Bill 1745) was a product of heated political rhetoric. Its Democratic sponsors were determined to legislatively address the holdings of *Wards Cove Packing Co.* v. *Antonio*[34] and its sister cases, which were widely perceived as having "weakened the scope and effectiveness of Federal civil rights protections".[35] Labeled as a "quota bill" by its Republican opponents in the Bush administration and Congress,[36] it seemed destined to die in the gridlock of political Washington. The unanticipated turmoil created by the nomination of Clarence Thomas to the Supreme Court and the allegations of Law Professor Anita Hill changed the political dynamics on Capitol Hill. In the aftermath of the Thomas/Hill televised hearings in the fall of 1991, the Republicans were portrayed in the national press as being insensitive to civil rights and sexual discrimination issues. In order to counter the political implications of the Thomas hearings, the Bush administration agreed to "compromise" with the Democrats on Senate Bill 1745, and the gridlock was broken.

### *A. Substantive Provisions of CRA/1991*

The CRA/1991 overturned the holdings of *Wards Cove Packing Co.* v. *Antonio*[37] (proof of disparate impact via statistics); *Patterson v. McLean Credit Union*[38] (conduct after formation of employment contract); *Martin v. Wilks*[39] (challenge to finality of consent judgments); *Lorance v. AT&T*[0] (seniority system challenges); *West Virginia University Hospitals* v. *Casey*[41] (expert witness fees); *EEOC v. Arabian American Oil Co.*[a] (extraterritoriality of Title VII) and *Price Waterhouse* v. *Hopkins*[43] (mixed motive cases).

*490 U.S. 642 (1989).
"Civil Rights Act of 1991, Pub. L No. 102-166, § 2, 105 Slat. 1071. "H.R. Rep. No. 102-40, *supra* note 1.
"490 U.S. 642 (1989).
"491 *VS.* 164 (1989).
"490 U.S. 755 (1989).
"490 U.S. 900 (1989).
"111 S.Q. 1138 (1991). [c]111 S.CL 1227 (1991).
[3]490 U.S. 228 (1989).

In addition to its sweeping judicial reversals, the CRA/1991 also created significant new remedies for civil rights violations. Under prior law, only victims of intentional racial or ethnic bias could obtain compensatory and punitive damages. The new law extends such damages to victims of intentional sex, religious, and disability discrimination under Title VII, the ADA and Section 501 of the 1973 Rehabilitation Act.[44] The Attorney Fee Awards Act also was amended to provide for attorneys' fees under the new provisions.[45] The Act placed a sliding cap on most compensatory and all punitive damages.[46] The cap is $50,000 for employers of 100 or fewer, $100,000 for employers with fewer than 201 employees; $200,000 for fewer than 501 employees; and $300,000 for employers of more than 500 workers. Significantly, the CRA/1991 expressly permits jury trials when claims for compensatory or punitive damages are sought.[47] Prior to CRA/1991, only age discrimination cases had access to juries. In light of these new remedies and jury trial opportunities, the CRA/1991 was jokingly referred to as the lawyers relief act." Much of the Senate floor debate centered on the incentives for litigation built into SB 1745 and predictions of a new wave of litigation in the federal courts.

### *B. Section 118 ADR Provisions*

Virtually unnoticed in CRA/1991 is Section 118, titled "Alternative Means of Dispute Resolution." Section 118 (set out in full at the beginning of this paper) encourages ADR, including arbitration, to resolve employment disputes "when appropriate and to the extent authorized by law." For Congress to expressly establish jury trial rights and expressly encourage arbitration in the same piece of legislation is a bit of a policy puzzle. What were the underlying policy objectives of Congress?

The legislative history is not particularly revealing. The Senate did not produce a Committee Report to support SB 1745, but two Committees of the House produced a joint report for two companion bills. Much of the content of CRA/1991 was contained in House sponsored legislation, HR. 1 (Democratic leadership bill) and H.R. 1375 (Bush administration bill). The House Committee on Education and Labor and the House Committee on the Judiciary both addressed ADR in committee reports. The Education and Labor Report (HR 102-40, Part 1) was dated April 24,1991 and the Judiciary Report (HR 102-40, Part 2) was dated May 17,1991. Although the Judiciary Report was dated a few days after release of the *Gilmer* decision by the , officially Supreme Court (May 13), it contained no mention of *Gilmer,* and it

-Pub. L No. 102-1066, § 102 (1991).
°Pub. L No. 102-1066, § 103 (1991).
"Pub. L No. 102-1066, 5 102 (1991).
*"Id.*

appears that the *Gilmer* decision played no part in the analysis of the committees.

The majority report of Education and Labor made clear that the use of ADR "is intended to supplement, not supplant, the *remedies* provided by Title VII."[4]* The report concluded that an agreement to submit disputed issues to arbitration:

> [D]oes not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII *mAlexanderv. Gardner-DenverCo....The,* Committee does not intend this section to be used to preclude *rights and remedies* that would otherwise be available.[49]

If the terms *rights and remedies* are intended to refer to the substantive provisions of Title VII, then arbitration is not precluded. If *rights and remedies* extend to the procedural right of jury trial provided under CRA/1991, then it would seem to render meaningless the ADR provisions of Section 118.

The minority report of Education and Labor noted that H.R. 1375 specifically provided that any agreement to arbitrate must be "knowing and voluntary."[50] The parallel provision of H.R. 1 did not contain that stipulation, nor did the final version of CRA/1991. In that Congress considered, but rejected the requirement that ADR be "voluntary", an implication can be drawn that Congress approved of binding predispute arbitration agreements.

The House Judiciary Committee Report contained an analysis of ADR virtually identical to that of the House Education and Labor Committee, and concluded that "the Committee does not intend for the inclusion of this section be used to preclude rights and remedies that would otherwise be available."[51] The minority report of the House Judiciary reached the conclusion that the ADR section had no teeth. The minority report state, "[ujnfortunately, this section is nothing but an empty promise to those claimants (and employers) who wish to resolve their disputes without expensive litigation."[52] The report is unclear as to why the minority felt that Section 118 would be an "empty promise," but an explanation might lie in the expectation that the holding of *Alexander v . Gardner-Denver Co.* would extend to all employment contracts. It was apparent that neither side anticipated the holding or impact of *Gilmer* on the developed case law.

*H.R. REP. NO. 102-40, Part II, 102d Cong., 1st Sess., 97 (1991)(einphasis added).
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[5]H.R. Rep. No. 102-40, Part II. 102nd Cong.. 1st Sess., 41 (1991).
at 78.

While the Senate produced no Committee Report of SB 1745, the extensive floor debate in late October 1991, produced substantive comment along with political posturing of both the Democratic Party leadership and the Bush administration representatives.

Upon announcing the "compromise" on October 30,1991, Republican Senator Bob Dole (Minority Leader) presented a section-by-section analysis of the Act representing the views of the Bush administration and the Republicans in the Senate. The coverage of Section 118 is notably brief.

> This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.
> In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.[53]

While Senator Dole's statement is the first legislative recognition of the effect of the *Gilmer* decision on the debate, it does not appear to grasp the import of the *Gilmer* holding. The Bush administration clearly favored the use of ADR over jury trials in the employment contract setting, but took no action to amend the implied limitations on employment arbitration contained in the FAA.

Not to be outdone, Democratic Representative Don Edwards offered his "interpretative memorandum" during the House debate the following week.[54] Representative Edwards was subcommittee chair of the House Judiciary Committee and principal author of H.R. 1. He noted that the Senate version of the Civil Rights Act of 1991 "achieved the same fundamental purposes as H.R. 1," while acknowledging numerous language differences. Like Senator Dole's statement of analysis, Representative Edwards' "interpretative memorandum" could be viewed by our Supreme Court as self serving and not legitimate legislative history. It does, however, provide a stark contrast to the interpretative views of the Bush Administration. In addressing the provisions of Section 118, the Edwards memorandum firmly rebuts Senator Dole's position on the impact of *Gilmer.*

> This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory

”137 CONG. REC. SI5478 (daily «L Oct. 30, 1991)(citing for additional authority Gilmer v Interstate Johnson Lane, Ul S. Ct. 1647 (1991)).

*137 CONG. REC H9526 (daily ed. Nov. 7, 1991)(statemem of Rep. Edwards).

> rights. No approval whatsoever is intended of the Supreme Court's recent decision in *Gilbert v. Interstate Johnson Lane Corp.*, or any application or extension of it to Title VII. This section is virtually identical to section 216 in H.R.l as previously passed by the House in this Congress and as explained in H.R. Rep. No. 102-40.[55]

Despite the express reference to the House Committee Report, Representative Edwards' views on arbitration are not explicitly endorsed in the House Judiciary Committee Report. As a practical matter, it would have been impossible to factor in the *Gilmer* decision in the Committee Report because preparation of the Report predated release of *Gilmer* by the Supreme Court. Representative Edwards' policy position clearly reflects a point on the left" side of the political spectrum while that of Senator Dole is on the other end of the spectrum. Neither is representative of the composite "intent" of the Congress, in that Congress did not analyze or debate the policy implications of its actions.

In view of the political pressures to produce civil rights legislation and attempt to save face as well, the administration of President Bush placed all of its ADR eggs in the *Gilmer* basket. In that *Gilmer* does not provide a definitive resolution of the question of the scope of employment arbitration, the President and Congress missed a golden opportunity to provide clarification via the CRA/1991. It will be left to the federal judiciary to provide the needed clarification in its case law development. Until then, employers attempting to address the proper use of ADR in the employment context are left to their own devices and crystal balls.

### C. *Initial Reaction to CRA/1991*

The December 30,1991 headline of the *Wall Street Journal* screamed *RIGHTS LAW TO SPUR SHIFTS IN PROMOTIONS.*[56] The article noted "quota" fears and runaway jury fears of business. It reported an October employment related award against Texaco by a Texas jury of $17.7 million, including $15 million in punitive damages. The news report did not emphasize that the award was based on Texas law of wrongful termination and not the CRA/1991. In addressing the ADR provisions of CRA/1991, the article noted that some attorneys were urging corporate clients to require arbitration agreements when staff members join or advance into management, but that women and other protected classes would likely resist mandatory arbitration.

*"**Id.*** at H.9530 (citations omitted).

*WALL STREET JOURNAL, Dec. 30.1991, at B-l.

The same *Wall Street Journal* article reported favorably on the experience of Northrop Corp. in offering voluntary, company paid arbitration for its 31,000 non-union employees in southern California. The industrial relations director of Northrop reported fear of a negative reaction if binding arbitration were contractually imposed (the "handcuff effect). Under Northrop's existing policy, fewer than 12 grievances a year lead to arbitration. The *Wall Street Journal* article reported similar policies of Aetna Life & Casualty in providing a voluntary nonbinding mediation option. These initial reports suggest that the ADR provisions of CRA/1991 should be utilized along with common sense and sensitivity to employee concerns in order to benefit business interests.

Another practical concern facing employers in strong "employment at will" states is the feeling of not wanting to tamper with the status quo.[57] It is felt that creation of a written contract containing the arbitration agreement might erode the employment at will relationship. Employee handbooks containing mandatory arbitration provisions could be construed as creating implied contracts. Providing for mandatory arbitration might be construed as an acknowledgment that the employee has a cause of action under developing state law principles of wrongful termination. In addition, inclusion of arbitration clauses might have the effect of raising employees' awareness of their ability to challenge employment decisions they consider unfair or discriminatory.

On the other hand, employment law specialists at Jones, Day, Reavis, Pogue, one of the largest law firms in the country, have suggested that employers have little to lose in having employees execute an arbitration agreement as a condition of new employment, continued employment, promotion, or a pay increase.[58] The Jones, Day lawyers acknowledged the legal uncertainty involved, but concluded that an invalid compulsory arbitration agreement would leave the employer with the jury trial it would otherwise face. This position will likely be adopted by enough employers to produce test cases in most of the federal judicial circuits. In that the validity of arbitration clauses would be addressed at the commencement of the dispute and expedited appeals taken, our federal appellate courts should be addressing the early test cases in 1993. These cases will be closely watched by the employment law community.

At least one Congressman acknowledged an awareness of the potential impact of Section 118 arbitration. Edward Markey (Dem. Mass.), Chair of the House Energy and Commerce Subcommittee, recently demanded a report from the Comptroller General on the effect of arbitration in the securities

"Conversations with partners in two labor law Grins (management client base) in Atlanta, Ga. (Summer 1992).

"Robert Layton et al., *Using Compulsory Arbitration to Resolve EEO Disputes*, N.Y. L-I-, July 14, 1992, at 1.

industry. In his April 27, 1992, letter to the Comptroller General, Rep. Markey stated, The growing practice of mandatory arbitration of age, race and sex discrimination claims raises a series of concerns."[59] Markey cited the *Gilmer* decision and asked for information regarding usage and outcome of securities arbitration. Finally, he inquired as to whether there are other industries in which arbitration (of employment claims) is as pervasive as the securities industry.

While the answers to Rep. Markey's concerns will of necessity be in a preliminary form, other policy makers, industry representatives, and employer/employee groups will be asking the same questions. The questions raised by Rep. Markey and others are important to the ongoing policy debate. They also provide fertile research opportunities for academics interested in the topic of employment law.

## CONCLUSION

The underlying legal question to be answered is whether agreements to arbitrate employment disputes are enforceable or whether they contravene Section 1 exclusions of the FAA. While the federal appellate courts, and ultimately the U.S. Supreme Court, are muddling towards an answer, employers and employees will continue to experiment with use of arbitration. By the time the courts decide whether mandatory arbitration is legally acceptable, corporate America should have enough practical experience to decide whether it is an effective tool to resolve employment disputes.

*World arbitration A Mediation Rep , June 1992. at 138.