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Note and Comment

COMPULSORY ARBITRATION OF EMPLOYMENT AGREEMENTS: BENEFICENT SHIELD OR SWORD OF OPPRESSION? ARMENDARIZ V. FOUNDATION HEALTH PSYCHCARE SERVICES, INC.

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I. Introduction

Compulsory arbitration, and its position in the workplace, is a controversy that has plagued our society, almost from the moment that judges first grudgingly enforced arbitration agreements pursuant to the mandate of British Parliament. [1] The judiciary was initially jealous and suspicious of the arbitral forum. [2] As time passed, however, and population increased in industrial centers, the proponents of alternative dispute resolution were slowly met with less hostility in the halls of justice. [3]

With respect to the arbitration of employment issues, the application of existing case law and statutory authority has been capricious at best. Today, a split, albeit lopsided, remains among federal Circuits [4] as to whether it is appropriate to arbitrate Title VII [5] claims or other statutory rights. In California, state courts have echoed the quandary of their federal brethren in squaring policy issues and judicial docket control, with contract principles concerning pre-employment compulsory arbitration agreements. To settle the matter, the California Supreme Court agreed to hear a case that involved claims of wrongful termination and discrimination, against a backdrop ***1108** of an agreement to arbitrate "any and all" claims as a condition of employment. [6]

This article looks carefully at that decision, Armendariz v. Foundation Health Psychcare Services, Inc., [7] and analyzes its holdings, the history, and the public policy issues that swirl around it. Although the decision was handed down only scant days before Labor Day 2000, some have already criticized the five-part test for unconscionability elucidated in the opinion, as not going far enough to protect employees. [8] Others, namely firms with large corporate clients, are shocked by the decision, which rendered a pre-employment arbitration provision void. [9] Such firms are already scrambling to revamp and revise their existing arsenal of provisos to meet the considerably more stringent mandates of Armendariz. [10] Whichever road one travels, the future may still be unsettled. History does, after all, tend to repeat itself.

II. Facts of the Case and Procedural History

Two former employees, Marybeth Armendariz and Dolores Olague-Rodgers (collectively Plaintiffs) brought a wrongful termination suit against their former employer, Foundation Health Psychcare Services, Inc. (FHPS). [11] Armendariz and Olague-Rodgers were hired in July and August of 1995, respectively. At the time of the submission of their applications, the signed agreements to submit any wrongful termination claims to binding arbitration. [12] Hired to staff a "Provider Relations" unit at FHPS, the Plaintiffs were later promoted to supervisory positions, and had signed new, separate agreements to arbitrate. [13] Under the terms of the arbitration agreement, the Plaintiffs ***1109** agreed to arbitrate all claims they may obtain against FHPS, while leaving FHPS free to litigate if it saw fit to do so. [14] Moreover, the agreement acted to limit the damages that could be sought by the Plaintiffs to "back pay,"--the amount they would have earned from the date of their termination to the date of the arbitration award. [15] In effect, the agreements precluded Plaintiffs from receiving an award of damages that would otherwise be

available to them at law, namely, "front pay" (future income), and punitive damages. [16] Additionally, provisions for discovery under the agreements were ambiguous, and to the extent that certain assumed parameters applied, discovery was limited in comparison to that which is customarily available in the judicial forum. [17] On June 20, 1996, FHPS notified Plaintiffs that their positions were being eliminated, and terminated both of them. [18]

In response, the Plaintiffs filed suit in superior court. [19] The complaint stated four causes of action, one of which was for violation of the Fair Employment and Housing Act (FEHA). [20] In this claim of discrimination, Plaintiffs alleged that supervisors and co-workers had harassed them because of their sexual orientation (heterosexual). [21] Based upon the terms of the pre- and post-employment agreements with Plaintiffs, FHPS moved to compel arbitration. [22] The trial court, relying upon Stirlen v. Supercuts, Inc., [23] denied the motion on the ground that the provisions to arbitrate were unconscionable. [24] FHPS appealed, [25] arguing that the court abused its discretion in denying the motion to compel arbitration, and to the extent that any of the terms of the agreements were unconscionable, they should have been severed from the remainder, leaving the claims to be submitted to arbitration ***1110** under the reformed agreement. [26] The court of appeal agreed with FHPS, reversing the order of the trial court. [27] The Supreme Court granted certiorari, and the decision, written by Justice Mosk, was published on August 24, 2000. [28]

III. Issues and Holdings of the Court

The questions before the court revolved around three main issues: First, the enforceability of the arbitration agreements, to the extent that they require arbitration of statutory rights. Second, the limitations on the authority of a court to review provisions of such agreements in order to determine the appropriateness of enforcement thereof; and finally, whether such provisions, if deemed unconscionable, are severable; or alternatively, whether the offending provisions render the agreements void. [29]

A. The Arbitration of Claims Involving Statutory Rights

The threshold question has long been the topic of disagreement among the courts. In substance, the issue is whether claims that involve substantial statutory rights should be submitted to arbitration at all. [30] The court answers this in the affirmative, holding that claims involving statutory rights, including claims arising under FEHA [31] are arbitrable. [32] Furthermore, the court indicated that any agreement to arbitrate entered into between employee and employer, and made a condition of employment, should be enforced, assuming such an agreement meets certain minimum requirements. [33]

B. Limits of Conscience in Compulsory Arbitration Provisions

Having determined that statutory rights, including those in the context of employment, were arbitrable, the court turned to the fairness ***1111** of the provisions in the agreements. [34] The court held that the agreements in question were "unconscionably unilateral," in that, certain terms were neither mutual, nor the imbalance justified. [35] Nevertheless, the determination of whether the Plaintiffs would have their day in court rested upon the third and final issue.

C. To Sever, or Not to Sever--That Is the Question

Although the trial and appellate courts agreed that aspects of unconscionability existed in the arbitration agreement, the two fora were at odds concerning whether the offending clauses should be severed. [36] The trial court found the agreement "permeated," and therefore void as against public policy. [37] The court of appeal held that the offending provisions should instead be severed, and reversed the trial court. [38] It was this disagreement that brought the action before the California Supreme Court, which ultimately concurred with the findings of the trial court, holding the agreements entirely unenforceable. [39]

IV. The Analysis of the Court

Justice Mosk, in a careful and thorough opinion, cut a wide swath through California and federal precedent alike. The case turned on a variety of complex issues, including: The basis of the Federal Arbitration Act (FAA), [40] the prevailing judicial attitudes concerning arbitration of substantial statutory rights, the factors that determine an enforceable agreement to arbitrate, and finally, the question of severability. In analyzing each of these issues, it appears that the court attempted to find a secure middle ground. On one side lay the somewhat liberty-barren black letter of contract law, and on the other, substantial justice, the rights of the individual, and quite possibly, the path to federal preemption.

***1112** **A. Authorization for the Arbitral Forum**

In order to reach the substantive issues of the case, the court first looked at the statutory basis for the enforcement of agreements to arbitrate--the FAA, and its state counterpart, the California Arbitration Act (CAA). [41]

1. Judicial Preference of the Federal Arbitration Act

Discussing arbitration generally, the court remarked upon reasoning that had origins in a strong federal policy of upholding agreements to arbitrate. [42] Cases such as United Steelworkers of America v. Warrior & Gulf Navigation Company [43] and its progeny, namely Gilmer v. Interstate/Johnson Lane Corporation, [44] clearly express the growing desire of the federal judiciary to enforce most types of agreements to arbitrate. Under the FAA, such agreements are revocable only upon the grounds that would invalidate any other contract. [45] The fact that California courts have been eager at times to follow suit cannot be mistaken. [46]

The Plaintiffs contended that the FAA excluded contracts of employment concerning “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” [47] Accordingly, they argued that since these classes of workers encompassed all those within reach of federal legislative authority, the incorporation of this language excluded all employment contracts from the FAA's grasp. [48]

The court elected to avoid this question altogether, and held that the applicability of the FAA was of no moment, as the action involved state claims. The court suggested that these claims more appropriately fell within the CAA, which, it reasoned, did not conflict with the FAA. Through this reasoning, the court determined that there was no issue of, ***1113** and therefore, no need to discuss, federal preemption. [49] Nevertheless, matters of federal preemption, and conflict based upon the Ninth Circuit's interpretation of the FAA, do pose relevant questions. [50]

The view presently espoused by the Ninth Circuit [51] was represented in a spirited dissent in Southland Corporation v. Keating (Southland). [52] Justice Rehnquist (now Chief Justice) joined Justice O'Connor in reasoning that the majority “utterly fail[ed] to recognize the clear congressional intent underlying the FAA. [53] Congress intended to require federal, not state, courts to respect arbitration agreements.” [54] As an aside, many of the justices that had formed the majority of the Southland Court have retired. The justices who now fill their positions appear to align more with the O'Connor/Rehnquist view than with the Southland majority. [55] Accordingly, in revisiting the FAA, and the difficult issues that decades of judicial gloss have foisted upon it, the High Court may arrive at a different result. [56] Therefore, it is to the FAA, and its ubiquitous questions, we will ultimately, and perhaps obliquely, return.

2. The Application of the California Arbitration Act

In 1927, two years after Congress enacted the FAA, California responded with its own statute to enforce binding arbitration. [57] This statute, expanded in 1961, became what is known today as the CAA. [58]

***1114** Unlike the FAA, [59] the CAA [60] does not contain an exception for employment contracts of any kind. [61] In fact, the CAA includes references to employment contracts in its definition of the term “agreement.” [62] A factor that may have been of

some interest to the court, aside from the CAA's expansive language, was the fact that under the prevailing view, if the CAA, or any state legislation, restricted the use of arbitration, the FAA would have preempted, and obviated, any such conflicting statute(s). [63] In Armendariz, the court concluded that neither the statute relied upon by Plaintiffs, nor its legislative history contained language to support the proposition that the FEHA was intended to foreclose arbitration. [64] Nevertheless, following the decision in Southland, had such a provision existed within FEHA's language, the Supremacy Clause would have preempted FEHA, thereby forcing the courts to ignore the statutory language and compel arbitration. [65]

B. The Arbitration of Matters Involving Statutory Rights

One of the seminal cases regarding the arbitration of statutory claims prior to the Gilmer [66] decision, was Alexander v. Gardner-Denver (Gardner-Denver). [67] In Gardner-Denver, the Supreme Court held that, although the plaintiff was a member of a union, the fact that the union had entered into a collective bargaining agreement did not, and could not, preclude the plaintiff from litigating Title VII [68] claims (encompassing statutory rights), notwithstanding the requirement of arbitration of grievances stated in the agreement. [69] The Court reasoned that the arbitrator was familiar with the "law of the shop, not the law of the land," [70] and although the arbitral forum was often efficient and ***1115** inexpensive, these qualities were due to its informal nature. Ultimately, it was this very informality of process that made arbitration a less-than appropriate forum for the determination of statutory claims. [71] Further, the Court stated that the arbitrator interprets only the terms and application of the collective bargaining agreement, and does not confine his decision to the requirements of enacted legislation. [72] Moreover, the role of the arbitrator was to define and enforce the intent of the parties, and not to enforce public policy or the intent of the Legislature. [73] Accordingly, the Court held that the arbitral forum was inadequate for the adjudication of statutory rights, and more importantly, these rights were neither waived through third-party negotiations, nor were they waivable with respect to Title VII [74] claims, as the interest of the public in the judicial resolution of these claims took precedent over the interests of private parties in their arbitration. [75] Therefore, the determination was that arbitration of claims under a collective bargaining agreement was intended to "supplement, not supplant, the remedies provided by Title VII." [76] This decision maintained the prevailing attitude of judicial wariness of arbitration of statutory claims until 1991, when following the drafting, but prior to enactment, of the Civil Rights Act of 1991 (CRA), [77] the Supreme Court decided Gilmer. [78]
In Gilmer, [79] the Court reasoned that the FAA [80] was enacted to ameliorate the long-standing hostility that the courts had maintained regarding arbitration. [81] The Gilmer Court relied upon a "liberal federal policy," requiring the enforcement of arbitration agreements at every juncture, the only exception being when the circumstances of the case made the agreement void in accordance with customary common law ***1116** or statutory provisions. [82] Ultimately, the Court held that claims under the Age Discrimination in Employment Act of 1967 (ADEA) [83] were arbitrable. [84] It was further held that, absent a clear and express statement to the contrary within the enactment in question, arbitration of statutory claims was required when invoked pursuant to a prior agreement. [85]

The Armendariz court, considering the legislative intent surrounding the CRA, [86] held that Congress was deemed to know that Gilmer was the law at the time of the enactment, and so determined that since the CRA did not state the express intention that claims within its reach were not subject to the FAA, [87] such claims were therefore covered by the FAA. [88] However, the court did comment that statutory rights were generally unwaivable where they concerned matters of public interest, and therefore, arbitration agreements encompassing such rights should be subject to "particular scrutiny." [89] The court ultimately determined that statutory claims, including claims under FEHA, [90] were no barrier to arbitration under the FAA/CAA. [91] The court was, however, mindful of the fact that compulsory arbitration provisions could be one-sided. As such, the court profiled the circumstances under which arbitration provisions are considered unconscionable in accordance with public policy and California contract law. [92]

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*1117 C. Equalizing the Odds: How Should Arbitration Provisions Be Constructed?

In consideration of the balancing act between upholding private the freedom of private parties to contract, the judicial desire to enforce arbitration agreements, and assuring that statutory rights affecting the public welfare will be properly vindicated, the Armendariz court set forth five essential features a pre-employment arbitration agreement must include. [93] These elements have their origins in the D.C. Circuit case, Cole v. Burns International Security Services. [94] The Cole court voiced similar concerns to those of the Armendariz court. "Obviously, Gilmer cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes." [95] This reasoning gave rise to a set of minimum requirements. The Cole court held that, to be deemed lawful, an agreement to arbitrate encompassing statutory civil rights must: (1) provide for a neutral arbitrator; (2) permit "more than minimal discovery"; (3) require a written award; (4) include all types of relief available at law; and (5) provide that the employer will absorb the arbitrator's fees, as well as the expenses peculiar to arbitration. [96] Noting that statutory civil rights were generally unwaivable, and out of deference to the Gilmer decision, the Armendariz court adopted the Cole factors. [97]

Of these factors, the provision for a neutral arbitrator was not at issue in Armendariz, [98] since the terms of the agreements in question provided explicitly for a neutral forum. [99] Accordingly, other than a brief reaffirmation of its prior holding that the "neutral" was essential to any arbitration agreement, the court deferred any further discussion of the topic to a later date. [100]

*1118 1. Limitation of Remedies--Void as Against Public Policy

Considering recent prior decisions, both in California [101] and the Ninth Circuit, [102] the court held that an arbitration provision cannot limit damages pertaining to statutory claims, and that there was no precedent, of which the court was aware, that disputed this principle. [103]

In Broughton v. Cigna Healthplans of California, [104] the California Supreme Court determined that when patients sue their Health Maintenance Organization (HMO) for medical malpractice under the Consumer Legal Remedies Act (CLRA), [105] a prayer for injunctive relief in accordance with that statute is inappropriate for arbitration. [106]

In the 1995 Ninth Circuit case of Graham Oil Company v. Arco Products Company, [107] the court of appeals determined that a provision which prospectively bars a petitioner from an award of punitive damages and attorney fees was unenforceable under any circumstances, as these remedies were "important to the effectuation of the . . . policies" of the statute in question. [108]

The Armendariz court concluded that damage limitations were void as against public policy, and accordingly rejected, as did the lower courts, the claims by FHPS that the limitations were applicable to contract claims only. [109] Therefore, the Plaintiffs would not be precluded from seeking an award under applicable statutes for punitive damages, attorneys' fees and costs, as well as for general damages and injunctive relief, [110] as requested in their complaint. [111]

*1119 2. Avoiding Implied Limitations on Discovery

In Armendariz, the arbitration agreement did not expressly state the permissible boundaries of discovery. Instead, it merely indicated that the rules provided in the CAA were incorporated in the agreement by reference. [112] Citing to the Dunlop Commission Report, the Plaintiffs argued that a "fair and simple method" [113] to obtain needed information was essential. [114] Implying that the present scheme did not guarantee them the right to employ customary information-gathering methods, the Plaintiffs contended that the discovery mechanisms indicated in the CAA were conclusively deemed a part of the agreement only where the dispute in question is in the nature of a claim for negligence, wrongful death, or personal injury. [115]

The court noted that conflicting authority existed concerning the classification of injuries that fall within the provisions of FEHA. [116] California Appellate courts had come to differing conclusions on the matter; [117] however, the court did not endeavor to make a determination on the scope of the statute. [118]

The court did agree with the Plaintiffs nevertheless, that adequate discovery was essential to vindicate statutory claims, and that the Plaintiffs were entitled to sufficient devices to achieve that end. [119] Notwithstanding this concern, the court also held that in agreeing to arbitrate statutory claims, including claims under FEHA, an employer ***1120** impliedly consents, "absent express language to the contrary," to such necessary discovery. [120] Accordingly, lack of an articulated discovery provision was not fatal to the arbitrability of FEHA claims. [121]

3. Requiring a Written Award

Acknowledging the difficulties inherent in arbitration as it pertains to judicial review, the court nevertheless rejected the contention by Plaintiffs, that their FEHA rights cannot be vindicated if the arbitrator is "free to disregard the law." [122] The court did, however, allude to the fact that the future of this type of argument is by no means on firm ground. [123] In Shearson/American Express, Inc. v. McMahon (Shearson), [124] the United States Supreme Court indicated that the existing rules regarding judicial scrutiny of arbitration awards, although limited, were sufficient to assure the adherence of an arbitrator to relevant statutory law. [125] Concomitantly with the citation to Shearson, the Armendariz court referred to the holding in Moncharsh v. Heily & Blase, [126] deciding that courts may not set aside an arbitration award merely for errors, even if the errors caused "substantial injustice." [127] However, the Moncharsh court also stated, in dicta, that where the protection of a party's statutory rights are concerned, judicial review may be appropriate if an arbitral award appeared inconsistent with public policy. [128]

Leaving aside the apparent conflict as something of a preview of coming attractions, the court reiterated that the issue of award confirmation was not properly before it, and was premature in any event. [129] Instead, the court held that although the CAA [130] did not require it, a proper written award was a necessity if any meaningful ***1121** judicial review were to take place, as this would be impossible without some sort of explanation of the arbitrator's findings and reasoning. [131]

4. The Chooser of the Forum Gets to Pay the Tab--Taxing Arbitration Costs to the Employer

We are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. [132]

This quote from the opinion in Cole, [133] was the underlying theme of the Armendariz court's reasoning. [134] In fact, the Armendariz court quotes liberally from the older federal decision. [135] Furthermore, the court took a similar stance in California Teachers Association v. California (CTA), [136] where a public employee was forced to appear before an administrative law judge to have her claims heard, only to be required to compensate the State of California for the cost of the judicial officer's fees. [137] Applying the reasoning of Cole, [138] the court in CTA [139] held that it is inconsistent to require a public employee to bear such a burden, while her private sector cousin does not. [140] The court accepted the opportunity to stand behind its interpretation of the Cole reasoning once again in Armendariz. [141]

With respect to an employer's objection to the imposition of the full expense of its chosen forum, the court addressed three principal arguments. [142] First, an employer may contend that, as the sole source of payment for all arbitrators fees, the introduction of bias is likely. [143] The court answered this argument by reasoning that an arbitrator is more likely to be biased by the fact that the employer is a "repeat ***1122** player" in the arbitration world. [144] As source of repeat business for the arbitrator, an economically and mutually beneficial relationship with the employer is one that an arbitrator would naturally want

to cultivate. [145] Moreover, the court echoed the Cole court in stating that the plaintiff's bar and other institutional safeguards are sufficient to stave off any corruption in the arbitral forum that may be associated with an employer paying arbitral fees. [146]

A second objection posits that the costs associated with arbitration are, overall, lower than that of the judicial forum and litigation. [147] In sum, the court responded by stating that although "costs" are generally less in arbitration than litigation, so are the awards. [148] The prospect of "footing the bill" for arbitration, coupled with the Solomonic "baby splitting" normally associated with arbitration, would likely discourage the employee from bringing his or her claims. [149] Although agreeing in principle with the idea of putting the employee-plaintiff on the same relative footing in either forum, the court advises that this is largely a speculative endeavor--and one that does not lend itself to the encouragement of certainty and to the resolution of meritorious claims. [150] The court ultimately justified its reasoning by announcing that the rule was "fair, inasmuch as it places the cost of arbitration on the party that imposes it." [151]

The third and final objection relating to the requirement is that it does not appear to be consistent with the CAA, [152] which states that unless the arbitration agreement otherwise indicates, each party shall contribute equally to the fees and expenses of arbitration. [153] The court holds that this portion of the statute is merely the "default provision," and, by implication, any party seeking to demand arbitration of statutory claims must abide by the "remedial provisions of the [affected] statute." [154]

***1123** As to each of the above factors (with the exception of the "neutral," which was not discussed, and the limitation on damages, which was held to be void), the court stated that in absence of an express provision in the arbitration agreement, the ambiguity would be construed against the drafter, and any omitted elements would be present by implication. [155] Accordingly, Armendariz stands for the proposition that neither lack of provisions for guaranteed discovery, an arbitration award in writing, nor even the absence of assignment of costs and fees, are singularly sufficient to render a pre-employment arbitration agreement unenforceable for the purpose of a claim under FEHA. [156]

D. Can This Contract Be Saved?

The FAA states that arbitration provisions may only be invalidated for the same reasons as would invalidate any other contract provision. [157] The CAA reiterates this statement. [158] In the Supreme Court case Doctor's Associates, Inc. v. Casarotto, [159] the Court acknowledged that the "generally applicable contract defenses," fraud, duress, and unconscionability, may render an arbitration agreement unenforceable, in the discretion of the courts, in the same manner as such defenses might invalidate any other contract or provision. [160]

If a provision, or provisions, of the agreement are considered unconscionable, a court must then decide whether the offending provision(s) should be severed, thereby saving (and enforcing) the remainder, or alternatively, if the agreement is so wholly unconscionable that it evades severance, and therefore must be struck down entirely. [161]

***1124** **1. Defining Unconscionability**

The Armendariz court begins an unconscionability analysis with the concept of adhesion. [162] Quoting the venerable Neal v. State Farm Insurance Companies, [163] the court defines the contract of adhesion as one that is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." [164] The court then stated that if a contract is found to be adhesive, then it must be further examined for "other factors," such as a unilateral theme, which on the aggregate, renders the contract unenforceable. [165]

Upon finding a contract adhesive, the enforcement of the contract is divided into two judicially imposed limitations. [166] The first limitation is grounded in the expectation of the weaker party, and whether it is reasonable for that party to believe that the adhesive provision will not be enforced against him. [167] The second limitation, originally considered wholly independent

of the first, is whether the adhesive provision is "unduly oppressive" or unconscionable.[168] Recent decisions have discussed these features as "aspects of unconscionability."[169]

Resting its reasoning upon Williston,[170] as well as recent decisions of the California court of appeal,[171] the Armendariz court measured the agreements in controversy on a sliding scale.[172] This test ***1125** is comprised of dual elements of unconscionability: Procedural unconscionability, or that which arises from oppression or the surprise of unequal bargaining power; and, substantive unconscionability, which occurs as a result of the provision containing overly harsh or unilateral qualities.[173]

The court determined, almost summarily, that the agreement was adhesive, reasoning that an employee is rarely in a position to forego accepting a job offer on the basis of an agreement to arbitrate.[174] Moreover, the economic pressure exerted by employers, who understand that employees have need for gainful employment, may be particularly acute.[175]

Concerning these aspects of unconscionability, the Court focused essentially on the latter category--substantive unconscionability, implicitly resting on the adhesive quality of the agreements to establish the procedural aspect of oppression or unequal bargaining power.[176] With respect to the substantive aspect, the most apparent and egregious provision presumably, was the clause that stated, seemingly innocently, that only the Plaintiffs were required to arbitrate.[177] The court observed that it was not expressly stated, nevertheless, the implication of the document, was that FHPS was free to utilize either the arbitral forum or the courts to litigate its claims.[178] Additionally, the limitation on damages applied solely to the claims of the Plaintiffs, and not to any cause of action that FHPS might accrue.[179]

In essence, the court reasoned that under the provisions in question, arbitration looked less like a neutral forum for alternative dispute resolution, and more like a means for FHPS to maximize the advantages of that forum for its own gain.[180] Had FHPS truly believed in the fairness of arbitration, it would have also agreed to binding arbitration of any claims it may have accrued against the Plaintiffs.[181] Instead, it appeared to the court that FHPS wanted the safety of ***1126** arbitration for the claims of others against it, realizing the tendency of arbitrators to "split the difference," thereby reducing the impact of a potential award.[182] At the same time, FHPS wanted to be able to maximize, through the judicial process, findings that were favorable to its interests.[183]

Overall, the court indicated that had there been a valid business reason, or some other essential purpose to justify the unilateral quality of the agreements, it may have arrived at a somewhat different end. However, neither the record, nor the argument posed by FHPS,[184] provided such adequate justification.[185]

In Saika v. Gold,[186] the California court of appeal stated that agreements to arbitrate require a "modicum of bilaterality."[187] This minimum conscionability standard was echoed in Stirlen v. Supercuts,[188] and Kinney v. United Healthcare Services, Inc.[189] The FHPS agreements were held unconscionable by the Armendariz court, which decided that this "modicum" was missing--and justification for its absence was lacking.[190]

2. Finding the Outer Boundaries of Severability

California Civil Code section 1670.5 provides for a fairly broad exercise of judicial discretion as to the ultimate disposition of contracts with unconscionable provisions.[191] Among the possibilities are limitation of unconscionable provisions, so as to avoid an unconscionable result; the severing of such provisions; or a holding of the contract as entirely void.[192] The Legislative Committee Comment Two pertaining to this statute, was incorporated from the Official Comment to Uniform Commercial Code section 2-302, which states:

***1127** Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results. [193]

The court reasoned that the use of the term "permeated," resulting in a finding complete unenforceability, should be limited to severe circumstances. [194] The court also recognized that there appeared to be a paucity of authority as to either the definition of "permeated"; or a finding that a trial court has abused discretion by prematurely deeming a contract "permeated," and refusing to sever offending provisions of an otherwise enforceable contract. [195] Accordingly, in search of an answer, the court considered the comparatively large body of material on the issue of severability. [196]

Reviewing its holdings in Keene v. Harling, [197] Birbrower, Montalbano, Condon & Frank v. Superior Court, [198] and Santa Clara Valley Mill & Lumber Company v. Hayes; [199] as well as appellate court decisions [200] considered upon a foundation of statutory provisions from the California Civil Code, [201] the court synthesized the relevant factors to determine severability. [202]

First the court observed the two implicit reasons in favor of restricting illegal provisions as opposed to voiding the contract. [203] The apparent primary focus is first to assure that no undeserved windfalls or detriments occur as a result of voiding the contract, particularly when ***1128** one party has already fulfilled its duties thereunder. [204] Second, the court noted that the general preference is to find a way to preserve the contractual relationship, if such a thing can be done without ratification of an illegal scheme. [205] As the Armendariz court stated, "[t]he overarching inquiry is whether 'the interests of justice . . . would be furthered' by severance." [206] For their part, the statutes advise that if the "central purpose of the contract is tainted with illegality," then the contract cannot be enforced. [207] By contrast, if the illegality is merely collateral, then severance may be the more appropriate answer. [208]

In application, the court found that two of the factors weighed in against severance in the instant case. [209] First, more than one of the provisions of the arbitration agreement were illegal. For example, the contract contained an impermissible limitation on damages, as well as an unconscionably unilateral provision for arbitration. [210] The court observed that the multiple provisions indicated a concerted effort to create an arbitral forum for the Plaintiffs that was deleterious at best. [211] This feature lends itself to support the trial court's finding that the agreement was "permeated" with an unlawful purpose, and segues into the second relevant factor. [212]

No less than the multiplicity of illegal provisions, the lack of mutuality evinces a permeation since the trial court could not have merely struck or limited a provision, but would have had to redraft and reform the unilateral provisions. [213] Neither the relevant section of the CAA, [214] nor that of the Civil Code [215] authorize courts to reform a contract by augmenting terms. In fact powers to reform contracts are ***1129** quite limited. [216] The CAA merely authorizes revocation if appropriate grounds exist. [217] Therefore, finding no error, the California Supreme Court upheld the ruling of the trial court. [218]

V. The Singular Issue of the Concurrence

Justice Brown, joined by Justice Chin, separately concurred to express agreement with most of the reasoning and findings of the majority. However, Justice Brown took exception with requiring an employer to bear the entire burden of the costs to arbitrate. [219]

Rather than creating a preemptive and strict rule, the concurrence preferred a case-by-case analysis meted out by the arbitrator, with appellate review by the judiciary. [220] In support of this view, the concurrence reiterated the argument that arbitration is often less costly. Unlike the view of the majority, Justice Brown opined that not every arbitration requires the payment of

expensive fees to the arbitration officer. Moreover, the concurrence reasoned that not all aggrieved employees would be unable to pay their fair share. [221]

Ultimately, however, the concurrence indicated that the employee should not be required to "front" the costs, but rather, costs should be apportioned after resolution of the matter. [222] Further, the concurrence advocated judicial review in particular circumstances, thereby achieving a kind of equality, "without sacrificing the employee's statutory rights." [223]

VI. Author's Analysis

The matter of compulsory arbitration in the workplace is an unquestionably difficult one. Only the effect of similarly adhesive arbitration provisions relating to health care could be considered more onerous than the present impact on the white and blue collar alike.

***1130** The Armendariz decision covered a wide range of legal issues, as well as a stunning variety of authority spanning the nation's courts and legislative bodies. To properly consider the gravity of this decision, it is imperative that the history of arbitration be understood, as well as the biases on both sides that have left us in conflict.

Included in the section that follows is a brief overview of the creation of the FAA, and the reach of the Constitutional Commerce Power that wields it. Additionally considered is the promulgation of the CRA, and whether Congress had intended to permit compulsory arbitration of statutory rights, particularly claims of discrimination in the workplace. Further discussed will be the primary concerns of public policy, and the Cole factors, as the Supreme Court's response to those concerns. Of significant interest is the question of whether such a test is a realistic solution, or merely another form of bread and circuses.

The questions of severability and permeation will also be discussed, as well as the defenses of unconscionability, fraud, and duress as being the last escape hatches left to avoid compulsory arbitration. Finally, the reasoning of the concurring opinion will be placed on its own shelf in accordance with its relative worth.

A. Historical Overview and Analysis--From Parliament to the New Deal

The story of the rise of arbitration, that red-haired stepchild of the law, to a position of some respect in society begins in 1698. In that year, British Parliament, perhaps bored with the hue and cry of various merchants and businessmen over the refusal of the courts to recognize their arbitrary awards, promulgated the Arbitration Act. [224] This Act provided for a court to enter a judgment, pursuant to an arbiter's award, thereby permitting judicial enforcement. [225] Prior to this enactment, payment of such an award by the losing party was largely voluntary, and reliant upon gentlemanly notions of courtesy and honor. [226] For the most part, merchants who sought arbitration wished a determination of their responsibilities under a contract, but did not want the large ***1131** expenditure of resources and time, and perhaps personal embarrassment, which went along with litigating such claims. [227] Therefore, to avoid the court system, these intrepid individuals would seek out private arbitration, and reach quick, efficient, and less reputationally damaging arrangements. However, once obtained, this private justice was largely illusory, as it depended entirely upon the good will of the parties. [228]
For their part, the courts were highly suspicious of what they considered to be armchair justice, particularly since the instruments of that justice were primarily merchants themselves, with little--as the argument goes--understanding of the complexities of the law. [229] Moreover, when the jurists were not busy being overwhelmingly skeptical of the arbitrator's capabilities, they were angry and jealous that these pretender princes could so audaciously attempt to wield the sword of justice. [230] The enactment by Parliament actually did little to ameliorate such attitudes, and the judges often adhered to it only grudgingly. [231]

In the United States, early judges followed the law of their British brethren, and largely shared the judicial elitism perpetuated by these progenitors of jurisprudence. [232] Consequently, arbitration awards in the early days of American society were largely escapable by the wily party. [233]

Nevertheless, as the population began to grow and shift from rural areas to urban ones, commercial booms created a need for alternative dispute resolution in the business communities. [234] Particularly during the Reconstruction Era, merchants actively sought out ways of independent regulation--so that they could conduct their business away from the prying eyes of the federal government. [235]

Although arbitration grew in popularity fairly steadily from 1920 on, judicial suspicion remained--and perhaps not unreasonably so. As ***1132*** is apparent from its somewhat checkered past, individuals who sought arbitration tended to come in two flavors: Those who were honorable and decent, wanting only to have a private resolution for their issues; and those who were rogues, merely intending to find ways to extract themselves from their obligations. It can be argued also that this was due in large part to the refusal of the courts to assist the honest parties in the enforcement of their awards. However, it should be remembered that this was intended to be a private resolution.

The term "arbitration" comes from the Latin root, arbitr meaning, "to give judgment." [236] Modernly, "arbitrate" is defined as: "To judge or decide in the manner of an arbitrator," "[t]o submit to settlement or judgment by arbitration," or, "[t]o serve as an arbitrator." [237] Stemming from the same Latin root, is the term "arbitrary," defined as being "[d]etermined by chance," "[b]ased on or subject to individual judgment or preference," "[e] stablished by . . . a judge rather than a specific law," "[n] ot limited by law," and finally, "despotic." [238] No doubt the judges of yore were aware of this fact, and needless to say, changing the suffix does not an antonym make. It would not be difficult to understand why the judiciary refused to condone what, by virtue of its very roots, appeared to be essentially lawlessness.

In 1920, the New York Legislature enacted the first modern arbitration statute. [239] Following closely on its heels, an American Bar Association (ABA) committee began drafting a similar federal statute, and in 1925, Congress enacted the United States Arbitration Act (USAA), which is known today as the FAA. [240] During the subcommittee hearings prior to the enactment of the USAA, Senator Walsh of Montana voiced concern about the language of the statute-to-be, stating:

It is the same with a good many contracts of employment. A man says [[,] "There are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his cased [sic] tried by the court, and ***1133*** has to have it tried before a tribunal in which he has no confidence at all. [241]

In response, Mr. Piatt, representing the ABA drafters, testified unequivocally that the USAA was intended to be a vehicle for merchants to settle disputes, and determine damages--not for application to labor disputes. [242]

The USAA was enacted prior to the decision in Erie Railroad v. Tompkins, [243] and although this raises certain questions as to application of the FAA in a post- Erie scheme, that topic is beyond the scope of this article. Instead, the inquiry can be resolved--for now, by saying that it is uncertain how prescient Congress was, or how--if ever, it was intended that the FAA be applicable to state cases, since the FAA does not, by itself, confer federal court jurisdiction. [244] Obviously Congress could have legislated more broadly (and perhaps more clearly) than it chose to, as the words of Senator Walsh would indicate, Congress specifically did not intend the FAA to reach so far. [245] Nevertheless, prior Legislative intent does not control Congressional action in the future. It is really of no consequence that the original enactment may have been intended to have a narrow reach, because subsequent action by the Legislature has ratified an expansion of arbitration rather than a curtailment of this private justice. Moreover, what the Legislature has ratified, the Supreme Court has confirmed through interpretation of the Commerce Power as an ever-widening pool. [246]

For example, the then-unique Railway Labor Act, [247] enacted in 1926, was the first federally mandated arbitration structure for collective bargaining agreements, and was devised specifically for ***1134*** railroads and their employees. [248] Later

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labor relations statutes, such as the National Labor Relations Act of 1935 (NLRA), [249] did not contain similar arbitration structures. [250] Nevertheless, revisions of the NLRA did encourage resolution of disputes by arbitration. [251]

B. Considering Judicial Putsches in a Post-New Deal Society

As late as the 1953 decision, Wilko v. Swan, [252] however, the Supreme Court still expressed concern about the fact that arbitrators may make findings not in keeping with precedent, and would fail to explain the reasoning utilized in the formulation of the award sufficiently in writing. [253] Without a proper explanation, the Wilko Court reasoned, judicial review would be hamstrung or eliminated. [254] This holding remained good law, until the Supreme Court underwent the attitude adjustment that resulted in Wilko being overruled by Rodriguez de Quijas v. Shearson/American Express, Inc. [255]

A few years after the Wilko case, in one of the exceptionally few decisions of its kind since the New Deal Era, the Supreme Court held that "commerce" did not involve employees who were not producing goods for interstate commerce. [256] This decision, Bernhardt v. Polygraphic Company of America, [257] was something of a throwback to the earlier, more narrow construction of the Commerce Power that empowered the FAA. [258] Although the Bernhardt Court stated that employees must be engaged in some sort of activity affecting interstate commerce for the FAA to apply, [259] this was somewhat unusual in a post-New Deal age, where the Supreme Court largely read the Commerce Power as quite expansive. [260]

***1135** Alexander v. Gardner-Denver Corporation [261] was decided in 1974, and was yet another case where the Supreme Court expressed a reluctance to make arbitration the last resort for union employees. [262] However, Gardner-Denver was essentially the last of its line, and a mere nine years later the Supreme Court viewed arbitration through entirely different eyes. [263] In 1983, the Court decided Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, [264] announcing a "federal policy favoring arbitration," and marking the beginning of the end of the long and openly held judicial hostility toward arbitration. [265]

Nevertheless, this hostility did not die quietly. Rodriguez de Quijas v. Shearson/American Express, Inc. was the decision that finally struck down Wilko, in a five-to-four decision--accompanied by a rigorous dissent by Justice Powell. [266] The dissent argued that the majority was overstepping its power in overturning precedent that had remained good law for over thirty years. Congress was well aware of the existence of Wilko, Powell contended, and had remained silent. The purported federal policy favoring arbitration was insufficient to provide proper grounds for overruling the earlier case. [267]

C. Into the Gilmer Zone

Congress revised the CRA in 1991, and after the final draft was completed, but prior to its enactment, the Supreme Court handed down its decision in Gilmer. [268] Gilmer is an example of what some would refer to as "one hand not knowing what the other is doing." Less colloquially, while the Gilmer battle raged on, Congress was ensconced in their chambers legislating the future of the protected classes--and apparently believing that arbitration of statutory employment claims was something neither covered by the FAA (as in the employment of ***1136** workers affecting interstate commerce), nor appropriate for arbitration per the holding of Gardner-Denver. [269] Accordingly, Congress--whether intentionally or not--failed to address the issue. [270] One of the primary arguments on the "anti" side of the compulsory arbitration continuum, is that Congress never intended to include employment claims in the FAA scheme whatsoever, but failed to so state this attitude in the 1991 revisions to the CRA because they had thought the matter already settled. [271] Congressional conjecture aside, the Gilmer decision did in fact precede the CRA, and to most accounts, Congress was deemed to know that Gilmer was the new version of reality. [272]

There are, however, those cases that imply Gilmer was wrongly decided, and which contend that the FAA does not apply to employment issues whatsoever. [273] The hypothesis du jour is that if the Commerce Power--as broad as that power is in

today's world--creates federal control over almost every business endeavor as an effect upon interstate commerce. Following the reasoning to its logical conclusion, the FAA would then exclude all employment contracts pursuant to its very language. [274]

On the other side of that ledger, the pro-arbitration contingent contends that ejusdem generis [275] and inclusio unius est exclusio alterius [276] are the doctrines that give such an argument the lie. [277] The exclusionary language in the FAA exempts "seamen, railroad ***1137** employees, or any other class of workers engaged in . . . interstate commerce." [278] The doctrine of ejusdem generis limits the construction of subsequent terms (workers in "any other class") to the same ilk as those preceding them, i.e., "seamen" and "railroad employees." [279] Moreover, to the extent that such limiting terms have been used, they are to the exclusion of all others. [280] Additionally, the student of the law may recall from her Constitutional Law hornbooks that terms used in the Constitution are defined broadly, whereas, statutorily they are narrowly defined. [281] Therefore, although Congress may have power to pull all business into its purview by virtue of the Constitutional version of Commerce, the individual employee may not have the protection of the FAA exclusion, even though engaged in interstate (little "c") commerce. Unfortunately, so long as the prudential/textualists and ethical/doctrinalists incessantly debate about how many Supreme Court justices can dance on the head of the proverbial pin, it does not seem too likely that we will come to a reasonable resolution of those arguments anytime soon.
Returning to the reasoning of the Supreme Court in Gilmer, which-- somewhat schizophrenically--does not actually overrule Gardner-Denver; rather, the Court distinguishes collective bargaining agreements from non-union ADEA claims. [282] Apparently, compulsory arbitration of statutory claims is inappropriate in a collective bargaining situation, because an experienced union negotiator negotiates the contract. [283] However, the inexperienced layperson, who is unlikely to consider litigation when embarking on new employment, is bound by a "take it or leave it" arbitration provision. [284]

The D.C. Circuit explained the role of Gilmer somewhat in Cole v. Burns International Security Service, [285] and stridently classified the ***1138** differences between the "celebrated" tradition of arbitration in a collective bargaining context from the "new kid on the block," that is arbitration of statutory rights. [286] As the opinion states, arbitration of such claims became something of a necessity, in "an attempt to reduce the burdens and expenses of formal litigation." [287] Although Cole involved a collective bargaining agreement, the decision also explained the concerns of the individual, non-union employee, and the problems employees encounter, such as adhesive, lop-sided contracts, and lack of experience with individual arbitrators. [288] Moreover, the Cole court renewed the recognition that arbitrators may not have the requisite understanding of legal issues to resolve statutory issues appropriately. [289] Finally, Cole set forth the features that created a "reasonable" forum for the vindication of statutory rights, required that an employer pay the fees for arbitration in collectively bargained situations, and stated that an employee could not "be required to agree to arbitrate . . . public law claims as a condition of employment if the . . . agreement required . . .pay[ment] . . . [of] the arbitrator's fees." [290] It was this set of factors which led the charge in what could be described as "The Ninth Circuit Rebellion."

D. The Ninth Circuit Rebellion

Where almost every other circuit court has followed Gilmer, [291] two decisions basically stand alone in the face of pro-arbitration opposition, Duffield v. Robertson Stephens & Company, [292] and Craft v. ***1139** Campbell's Soup Company [293]
These renegade opinions stand as implicit, and in the case of Craft, explicit, accusation of the reasoning of the other courts:

The interpretation of the FAA has remained confused, however, because many courts (and the dissent here) have focused on the FAA's exclusions provision, § 1, and not its coverage provision, § 2. However, when interpreting a statute, we logically should look first to the coverage provision (regardless of its number). As noted, the "transaction" requirement suggests that Congress did not intend for § 2 to apply to any employment contracts. At its broadest, however, Congress intended for § 2 to apply only to contracts of workers who transport people or goods in interstate commerce--the full reach of its power in 1925. In § 1, Congress excluded those same workers for the reach of the FAA. Reading § 2 and § 1 together, as we must, demonstrates that Congress

did not intend for the FAA to apply to any employment contracts. Other circuits (and the dissent here) have refused to follow that approach, which is why they have reached the wrong result. [294]

The earlier opinion, Duffield, held that although there was no Constitutional bar to a pre-employment agreement to arbitrate state claims, Title VII claims could not be subject to arbitration. [295] The Craft court, using Duffield as something of a jumping-off position, held that state claims were likewise not subject to arbitration under the FAA, since the federal statute (as stated above) did not encompass any employment contract. [296] Clearly this is a definite break from the recently established judicial norm, and quite likely is what prompted the Supreme Court to grant certiorari in the Ninth Circuit case, Circuit City Stores, Inc. v. Adams. [297] The Armendariz court believed that the reasoning of Duffield deserved little weight, and avoided the difficult question of Craft, by stating that applicability of the FAA not withstanding, the CAA would cover the claims before them. [298] The ***1140** CAA, as discussed above, was more stringent than its federal sister, because it expressly covered claims based on employment agreements. [299] The definition of "agreement" states that it includes "agreements between employers and employees or between their respective representatives." [300] The existence of this stern language, particularly, "or between their respective representatives," begs the question of how statutory claims that arise in cases where collective bargaining agreements are also present will fare. Gardner-Denver and its progeny would suggest that the arbitration provisions of a collective bargaining agreement do not foreclose the possibility of a judicial remedy, [301] but that finding may not be applicable under the carefully crafted words of the CAA. [302] None of these arguments, however, consider federal preemption in the resolution of Title VII, or any other federal claims. Regardless, as the contract in Armendariz was found unenforceable as a matter of law, this and similar questions must wait for future resolution. [303]

E. Analysis--Armendariz and Beyond

This area, although not readily admitted by counsel for either plaintiffs or defendants, is essentially a nest filled with fairly indignant and profoundly irritable hornets. As alluded in the foregoing, there are a host of significant federal and state conflicts, precedent, biases, egos, ***1141** and other problems that arise in determining a case the like of Armendariz. [304] Some of them have been discussed in the preceding sections, others have prudently been left for another foolish mortal to grapple with.

After deciding that although applicability of the FAA may be arguable, the court deemed this question irrelevant, as the CAA was applicable to Armendariz without doubt. [305] One may easily agree with the court in that respect, as it is the path of least resistance. However, such a light dismissal of the problem may not be so easy in the future. In the event that the Supreme Court maintains a broad view of the Commerce Power--or perhaps merely applies a less-restrictive interpretation of the exclusion provision of the FAA, the enforceability of the CAA may come into question. [306] For example, if the High Court reads the FAA as to exclude all employment agreements, as is argued by the Craft court, then the language of the CAA may be viewed to be in contravention of a federal law. [307] Such a situation would render the CAA [308] unconstitutional or otherwise preempted, and the state legislature would need to repeal it for an overhaul. Perhaps more importantly, such a result would likely require corporate lawyers nationwide to go back to the drawing boards to design a better mousetrap for keeping their clients out of court. Corporate inconvenience notwithstanding, following the lead of the Craft court, with its repercussions, may be a better plan, particularly since pulling the plug on several convoluted rules in favor of a single "bright line," would probably win over many more hearts (or perhaps certain members of the High Court) in the long run.

Be this as it may, Armendariz lays out a fairly decent roadmap for the weary traveler (or attorney) to follow for the purpose of classifying private agreements that may, or may not, result in the arbitration of statutory claims. [309] The five factors gleaned from Cole is a noble start, although one could question the wisdom of assuming that a proviso for ***1142** a "neutral" arbitrator will cause friend and foe alike to breathe a collective sigh of relief. [310] That kind of optimism has rarely been seen since Rebecca. [311] Nevertheless, this portion of the discussion will review each of the factors, as well as the concurring opinion of Justice Brown on the matter of the arbitrator's fees. Thereafter, the court's reasoning relating to the role of adhesive contracts in determining unconscionability will be considered, and finally, the questions of severing offensive provisions and judicial "gap filling."

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1. The Cole Factors--One-by-One

The Armendariz court was faced with a tough proposition, that is, a decision had to be made that preserved the rights of the individual, and more importantly, assured that the civil rights of individuals statewide were protected. However, the court needed to accomplish this without creating either a bigger problem, or faulty law, in the process. The court's adaptation of the Cole factors benefits and drawbacks. [312] In the discussion that follows, it will be noted that some of the factors will likely help to assure that individual rights are vindicated, others, as a practical matter, are merely edicts without teeth.

a. The "Neutral" Arbitrator

The Armendariz court had little to say about the requirement of neutrals in the compulsory arbitration situation. [313] It would appear that the court made certain assumptions, and perhaps took it for granted that the employer would "play fair" pertaining to this issue. [314] Perhaps the court--in taking note of some of the difficulties presented to the aggrieved plaintiff--was acknowledging the greater problem for which there is no truly appropriate answer as of yet. [315]

Plenty has been said by the plaintiff's bar about the reality of the "neutral" arbitrator. [316] Of the arguments, the most prevalent relate to ***1143** the fact that the employer is a "repeater," which conveys two distinct advantages over the individual employee: (1) knowledge of the field; and (2) cultivation of further business by the arbitrator. [317] The Cole decision and Armendariz each discuss these advantages. [318] However, both courts apparently believed that there was some type of internal check on the free market economy.

It is without doubt that in a perfect society, not only would that presumption be true, but there would also be no need for arbitrators, since any disputes that arose would all be resolved quite nicely by the parties. Fortunately for the peace of mind of the average attorney, our society is much less than perfect.

A judge is an appointed/elected state official, who has sworn an oath to uphold the Constitution, as well as to fairly, and without bias, adjudge the matters that come before him or her. [319] A mere arbitrator is not so bound. Nor is an arbitrator subject to the Judicial Review Board, recall, censure, or any other method of scrutiny by anyone other than his or her employer/association, if there is one. [320] Unlike the apparently substantial assistance that the Cole decision suggests, all that the "plaintiff's bar" could really do is put the word out to attorneys to avoid a certain arbitrator. [321] However, as a practical matter, such assistance would: (1) require individual attorneys to report negative results to the bar; and (2) require the bar to do something about it. To be frank, the State Bar Associations are busy fielding complaints from the public, administering exams, etc., and could not possibly keep a comprehensive list of the main offenders. [322] In any event, in order to assure proper consideration of each claim or charge, there would need to be an investigating body in addition to administrative staff to ***1144** maintain the list itself. Given that the Bar appears to be largely in favor of a liberal exercise of alternative dispute resolution, the expenditure of funds (allocated from Membership Dues) on such an endeavor is unlikely. [323]

For many of the same reasons, the County Bar Associations could not, in all likelihood, maintain a list that was reasonably diverse, or which covered a sufficient area, because of their regional or local focus. Moreover, the local associations often charge de minimis dues, which would be insufficient to fund a significant investigatory body. [324] More importantly, this raises the question of what constitutes bias for the purpose of verification or discrediting allegations of bias. For example, although it may be appropriate to "open a file" on a particular arbitrator after the first complaint, a body of regulations would be required before any action could really take place. Without caution, the association in question may easily run afoul of common law rules of fair process, not to mention the possibility of legal exposure from other quadrants of the law. Certainly, allowing parties and neutrals to point fingers at one another, in degrees that might range from an actual bias issue to mere posturing, would be more deleterious to justice than beneficial. Perhaps more importantly, it would become difficult to differentiate as between meritorious claims that are wrongly decided, and claims that simply lack merit. The fact that arbitration, by its very nature, is

outside of the public eye, it would be difficult, if not impossible, for a "watch dog" agency keep track of claims to determine their veracity. Overall, this does not seem like a very realistic suggestion.

On the defense side of the ledger, however, attorneys who represent that same client, or clients, on many occasions will have a sense of what to expect from the list of "available neutrals" promulgated by the arbitration association of choice. Moreover, large corporations that arbitrate claims nationwide are more likely to select a national arbitration association to handle all of its claims for the ***1145** purpose of efficiency.[325] This practice, by its inherent nature, creates a sense of security within the selected association of the repeat business. The arbitration association, national or otherwise, is in fact, in business to make a profit. It relies on statutes such as the FAA and the CAA, as well as "repeat" clients, for its continued existence.[326] However, what would happen to the success of the associations if decisions began going badly, on a consistent basis, for their biggest clients? Perhaps to avoid this bedlam, arbitrators developed the practice that opinion and treatise alike have defined as the Solomonic "splitting of the difference."[327] In the final analysis, common sense requires that we question the possibility of an arbitrator that is truly neutral. As long as there exists little accountability for arbitrators--or while "repeaters" are involved--and if one or the other of the parties is directly paying the fees for the arbitrator, actual neutrality should not be counted upon.

b. Written Awards and Judicial Review

The Armendariz court held that a written award is necessary in order to permit a meaningful judicial review.[328] To say the least, this is putting the cart before the horse. Not only is judicial review rare, thus not often requiring a lengthy statement of arbitral findings; but it is so limited in scope and restricted in standard, that one could say that "meaningful judicial review of an arbitration award" is an oxymoron.[329]

Within appellate scrutiny there are gradients, ranging from de novo--or independent review--to clear error, which provides the highest level of deference to the lower court. Moreover, appellate review in civil cases is often once of right. In contrast, to vacate an arbitration award there must be a clear showing of bias on the part of the neutral.[330] Federal and state statutes set forth additional reasons upon which an arbitral award may be held invalid, such as procurement ***1146** by fraud, refusal by the arbitrator to accept evidence, misconduct, and acting in excess of arbitral power.[331]

Differences of phraseology notwithstanding, such additional possibilities merely appear to be variations upon the same theme. No court enjoys a greater level of deference than that which is enjoyed by the arbitration system. To permit such a state seems largely inconsistent with the customary actions of the judiciary. For example, in Marbury v. Madison,[332] Chief Justice John Marshall managed to choose his words carefully, so as to permit several interpretations of the precedent for the use of future Courts, however, one message was clear, "It is emphatically the province and duty of the judicial department to say what the law is."[333]

Similarly in U.S. v. Darby,[334] the Supreme Court felt it entirely appropriate to expand the Commerce Power beyond any that had been known previously;[335] thus making it possible for the Court to decide how our very lives should be regulated. Apparently, however, arbitration is held in greater esteem the hearts of justices than are such things as mere individual liberties.

Without intending to sound unreasonable, one would think that the concept of alternative dispute resolution is to provide an alternative, not an edict. Voluntary arbitration can be a wonderful thing, but it goes too far to impel people into an unwanted forum by virtue of an adhesive contract, then removing all possibility of appellate review as well. It is understood that indiscriminate appellate review of arbitration awards might create an insurgence of parties searching for a second bite at the apple. Judges are, however, somewhat experienced in the exercise of discretion, and could presumably figure that out. It would seem appropriate at this juncture in our history, to find a way to integrate the two systems of dispute resolution, at least where statutory rights are concerned. With more doctors, HMOs, insurance companies, and employers turning to adhesive arbitration provisions every day, the protection of the individual civil rights of the public at large becomes a greater issue.[336] ***1147** The trend to eliminate the court system in civil disputes is but one cog in the machine of injustice, and a provision for an award in

writing is but a Band-Aid for a gunshot wound. Without the willingness of the judiciary to actually review them, a requirement for written awards is an order without teeth.

c. Statutory Remedies and Sufficient Discovery

The Armendariz court set out two other procedural requirements in its rules for conscionable arbitration provisions. The first being that the employee cannot be required to waive the remedies available to him or her under the statutory scheme.[337] The second is that an employer implicitly agrees to a sufficient process of discovery--as necessary under the circumstances--in the event a particular process or quantity of discovery is not stated.[338]

These two holdings are of the most important in the opinion, to the extent that the protection of an employee's rights are concerned. The Armendariz court also held that an arbitration agreement that contains limitations on remedies is unlawful.[339] This is a key feature for the employer/employee relationship, especially in situations where the employee is the less sophisticated of the two parties, and may not be aware of the potential range of damages that might become available to them. Most, if not all, statutory civil rights remedial schemes include a provision for the award of exemplary or punitive damages.[340] In the past, most arbitrators handled claims which were, in essence, contract claims, for which punitive damages are not traditionally available. Such a circumstance would naturally create a reluctance on the part of the individual arbitrator to undertake this task, particularly with older precedent highlighting the shortcomings of arbitrators in determining statutory claims.[341] Therefore, a ruling invalidating damages limitations should help to ameliorate any ***1148** reluctance, as well as disabuse the insidious type of defendant of the notion that there is still "wiggle room" for reduction of their exposure. The fact remains, however, that the arbitrator may truly have a certain degree of difficulty in determining the amount of such an award, insofar as this has traditionally been beyond the scope of their work.[342] Accordingly, appropriately sufficient awards may continue to be rare. As discussed in the previous section, however, the sword of judicial review cuts in both directions.[343] A more liberal attitude in the review of arbitration awards would necessarily check the arbitrator in the event that he or she was incited by pride or prejudice to award more than the plaintiff's fair share, or an amount which may utterly destroy a defendant, and push it into insolvency.[344] Corporations and other forms of successful businesses are always trying to find new ways to make operations more efficient, less costly, and more profitable. This is just in the nature of business entities, and is part of what makes our economy so lucrative in a self-sustaining way. Therefore, it should not be surprising to anyone that companies will try to maximize profits, even if it is at the expense of their (former) employees. Consider for a moment that the former employee is the person who is the least important to the company--they are not likely to be customers, particularly if they left the fold on bad terms; they have no real market impact on an individual level; and, the probability that the former employee will go to work for a direct competitor is high. Consequently, the future position of such a former employee, in relation to the company, is that of a continuing drain on a company's resources. No business is in business merely to pay salaries to employees and overhead. Moreover, a corporation has a duty to its shareholders to minimize losses. Accordingly, large companies customarily write terms into their arbitration provisions, requiring an employee to waive statutory remedies that would otherwise have been available to them.

A directive from the courts would be the only way--aside from legislation--to put an end to such problematic limitations. Unfortunately, the holdings of Armendariz do nothing to assure that an ***1149** arbitrator has adequate knowledge and capability for meting out appropriate awards for statutory claims.

With respect to discovery procedures, similar rationale motitivates business entities to draft provisions that limit such prepatory devices. Although this may be, at first blush, a less egregious predilection, it is important to keep in mind that usually the defendant/company has all the information they need.[345] If the former employee has difficulty in accessing this information, they will have equal difficulty proving their case, and accordingly, receive a lesser award--or none at all. In the collective corporate consciousness such a situation is perfectly fine with them. Again, we cannot blame them for this reasoning, it is most certainly in their nature.

The Armendariz court's determination in this respect, that the CAA discovery provisions are merely the default position, and not the rule, [346] is somewhat less than satisfying. The court's terms of "sufficient discovery" [347] and "implied agreement" [348] may not necessarily comport with the statute. The court stated "whether or not the employees in this case are entitled to the full range of discovery provided . . . [by statute] . . . they are at least entitled to discovery sufficient to adequately arbitrate . . . ." [349] Of course, such a holding sets forth the challenge of determining who or what it is that makes a determination of what qualifies as "sufficient" discovery for statutory claims. The California Code of Civil Procedure sets forth the discovery devices available to parties to a claim of general jurisdiction. [350] If the parties are "permitted" to agree to something less than that, by what yardstick should we measure "enough," or "sufficient" to adequately arbitrate? Alternatively, if the writing provides for less than "necessary" discovery, does the Armendariz holding make the term essentially void? In the total absence of a provision, there is also an implicit agreement to availability of "necessary" discovery devices. So at what time can the plaintiff claim protection of the CAA's "default" rule? To the casual observer, this ***1150** appears to be a fatal conflict with the rules of statutory interpretation. [351] If the court had intended to create an entirely new discovery scheme solely for statutory claims, it failed to state this proposition in so many words. Instead, the court appears to render the CAA discovery provision moot for the purpose of statutory claims. [352] Perhaps of equal import, this ruling creates a potential nightmare for the unwitting arbitrator who is suddenly forced to ascertain just how much discovery is enough for the circumstances, no doubt with each party pushing loudly for its way.

d. Let the Employer Pay--Equal Footing and Concurring Opinions

Without intending to be unduly cynical, that "the railroad always wins" type of attitude is exactly what the Industrial Revolution was built upon. [353] It is not a rare thing to find late nineteenth and early twentieth century cases in which a judge stretched and interpreted the law to let the corporate entity, or burgeoning business "off the hook." This was not because the judiciary had no sympathy for plaintiffs, but because they did not want to stifle the entrepreneurial spirit by saddling new enterprises with heavy liability. [354] A century ago, this sort of paternal hand-holding of industry may have been prudent, if not necessary. However, one cannot now say that corporations such as Circuit City, or Mitsubishi Motors, are so frail as to require such kid gloves by the courts. [355]

In fact, it could be said, and fairly was by the Armendariz court, that business entities are rather predatory these days with respect to obtaining results. [356] The employer drafts the employment agreement, the employer chooses the forum, the employer is generally the one to ***1151** compel arbitration. [357] Overall, it seems less than equitable to permit the employer to have the benefit of the employee paying half of the fees as well.

The concurring opinion of Justice Brown suggests that it is more important to assure that the expenses of arbitration be apportioned equally, and relies upon the arbitrator, not a court, as the appropriate vehicle for the apportionment. [358] The concurrence also asserts that it is presumptive for the court to create a "bright line" rule, which assumes that the employee would be--in all cases--unable to pay the costs associated with arbitration, and further, that this inability would "chill" the aggrieved party from asserting his or her rights. [359]

Unfortunately, what is ignored by this argument is that under a litigation scheme, a plaintiff may, under certain circumstances, be able to move through the entire process to settlement or judgment without expending a dime of his or her own money up front. The "expenses of the forum" are usually initial filing fees, motion fees, jury fees, and court reporter fees. In the State of California, if a plaintiff shows that he or she is "indigent" and unable to afford the fees, the court may--in its discretion--waive them. [360] Arrangements can be made by attorneys, who are so willing, to pay up front costs or negotiate with experts and others. for the postponement of their fees until after a settlement or judgment. Although the latter can be arranged with respect to arbitration, the court fee waiver does not have an arbitral counterpart. Moreover, the filing fees in state court are slight in comparison to the administrative fees, rentals, and arbitrator's fees that are a part of the arbitration process. [361]

Finally, Justice Brown argues that in some cases an employee is able to pay. [362] Nevertheless, the relative ability of an employee to pay is not germane as far as the broader picture is concerned. Such a perspective does not address the totality of the circumstances present in a pre-employment arbitration agreement, the possibility of "deck stacking" by a wiser employer, or any other inherent disadvantage that the employee may experience as the result of an adhesive contract. ***1152** The employer chooses a forum that is "alternative" and not a matter of right for all people. Therefore, it is only just that the employer pay the cost of its selection.

2. Escape Hatches & Defenses to Formation

The "escape hatches" out of arbitration for aggrieved parties attempting to vindicate their rights in a judicial forum are few, and far between. [363] In the years following the Gilmer decision, the prevailing concept has been that a party who agrees to an arbitration provision, perhaps without realizing what they were doing, would be engaging in "forum shopping" if they were permitted to bring their action in court. [364] For example, in Southland Corporation v. Keating, the Supreme Court was obviously concerned about encouraging impermissible "forum shopping." [365] As a remedy, the Keating Court resolved that it was better to lock the parties into an agreement to arbitrate, and thus avoid the problem. [366]

In reality, permitting the compelling party to enforce such an agreement creates the opposite effect. In arbitration, the party "in the know" has complete control over which arbitrator is selected. Often the selection process is completely voluntary, and subject to the agreement of both parties. If one of the parties knows the habits and holdings of a wide variety of arbitrators, then to that party goes the advantage to pick and choose. By contrast, litigating parties are confined to the assigned judge with few exceptions. [367] Accordingly, and particularly true in cases where unilateral provisions are used, the employer engages in the worst kind of forum shopping--electing to sue in court if it chooses, and forcing arbitration when litigation does not suit the purpose--or when the employee has claims to prove. Adding insult to injury, the employer then benefits from superior knowledge of the field. This understanding requires a shift of perception on the part of the courts. In the interim, the ways in which to avoid the agreement are essentially two--fraud and unconscionability. [368]

***1153** a. Fraud in the Inducement and Duress

To the extent that fraud was not an issue in Armendariz, it will not be heavily discussed here, except insofar as it remains a questionable alternative to unconscionability for the purpose of invalidating an arbitration agreement. It is "questionable" because, in spite of statutory language to the contrary, there are many courts which have insisted that even claims of fraud in the inducement are arbitrable, effectively giving the arbitration provision deference. [369] The language of the FAA and CAA states plainly that a provision to arbitrate is invalidated only on those grounds which would invalidate any other contract. [370] In other words, that arbitration provisions are only susceptible to the customary defects of formation--as any other agreement. [371] When a contract contains no arbitration provision, a finding of fraud in the inducement renders a contract voidable at the pleasure of the wronged party. [372] Therefore, it would seem more equitable to allow the "wronged party" the pleasure of electing whether he or she wishes to submit to arbitration when that party has a colorable claim for fraud in the inducement. This is especially true when the plaintiff's claims involve matters of substantial statutory rights. This policy would not create the proverbial deluge of filings at the court clerk's window; it merely returns the alternative dispute system to the position that it should rightfully occupy--a voluntary one. If a plaintiff was fraudulently induced into an agreement that he or she did not bargain for, thereby calling the entire agreement into question, it does not follow that such a plaintiff should be required to argue her case before a forum that equates to "fruit of the poisonous tree." In such cases, justice is best left to those who are sworn to uphold it.

b. Unconscionability and Adhesion

The alternative applicable contract theory that permits the voiding of contract provisions is unconscionability. [373] In the determination of ***1154** whether a term or contract is unconscionable, a court will consider factors such as: (1) whether there is

surprise or oppression in the presentation or execution of the contract; (2) unilaterality of terms; and (3) lack of justification for those terms. [374] These tests of unconscionability are divided into two groups, procedural and substantive. [375] As was discussed above in the Court's Analysis portion, the Armendariz court paid little notice to the "procedural" aspect of unconscionability (i.e., surprise and oppression). [376] Perhaps the court took it for granted that the circumstances surrounding the agreement, insofar as they were in an employment context, were de facto oppressive. Moreover, in the continuum of unconscionability, the factors tend to bleed into one another, and are essentially interdependent. The rub here, if there can be said to be one, is not in where the court finished its analysis, but where it began--Adhesion. [377]

The common argument with respect to agreements to arbitrate employment issues is that such agreements are contracts of adhesion, obtained through an unreasonable exercise of a stronger bargaining position. [378] The Armendariz court attempted to reassure future plaintiffs by stating:

Given the lack of choice and the potential disadvantages that even fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement. "Private arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration however, may also become an instrument of injustice imposed on a 'take it or leave it' basis." [379]

It would be difficult to take exception with the sincerity of the court's language. However, this statement also speaks of the California rule of adhesion, and more than one California court has followed ***1155** federal law with respect to pre-employment arbitration provisions. [380] This occurred due to federal preemption by the FAA, and federal law does not consider the adhesion principle as carrying significant weight when determining the enforceability of an arbitration provision. [381] This, of course, creates a less-than sympathetic atmosphere, and an adherence to the policy that there is nothing illegal or unethical about "driving a hard bargain." The concept that prevails is that contracts of adhesion fall short of duress on the basis that potential employers do not have such dominion over would-be employees that they could be said to wield "undue influence." [382] Nevertheless, it is when driving a hard bargain steps over into misrepresentation, fraud or outright unconscionability, that this becomes another matter entirely.

3. Severing the Ties--Permeated Agreements

The Armendariz court found the arbitration agreements to be "permeated," and therefore, entirely unenforceable. [383] Traditionally, doctrines governing the severance of provisions or reformation of a contract have been quite rigid, with significant limitations placed on judicial discretion. [384] Insofar as the agreements in question related to employment--not goods, the agreements came under the governance of California common law. [385] As discussed below, the Armendariz court held that given the permeation factor, the arbitration agreements must be entirely void. [386] The ultimate result was that the Plaintiffs would have their day in court, but for a jury trial with all the trimmings, rather than for the mere purpose of confirmation of an arbitrary award. [387]

California Civil Code section 1670.5(a) sets forth the limits of judicial discretion regarding enforcement of contracts containing ***1156** unconscionable provisions. [388] The objective of the statute is to avoid an unconscionable, oppressive, or unfairly surprising result. [389] This purpose is accomplished by permitting a court to choose to void the entire contract, to sever the offending provision(s), or to limit such provisions. [390] With respect to finding a contract wholly void, Legislative Committee Comment Two advises that such a holding is only warranted in cases of "permeated" contracts. [391]

The term "permeated" remains undefined in the Comments. [392] Moreover, there are no reported cases shedding a significant amount of light on the subject. [393] Two additional statutes, however, do provide some direction. [394] California Civil Code

section 1598 expresses those conditions in which a contract is deemed wholly void as consisting of a single object, either illegal or impossible to perform.[395] The entire contract is also void when it is "so vaguely expressed as to be wholly unascertainable . . . ."[396]

Similarly, California Civil Code section 1599 advises that where a contract has more than one object, and at least one of those objects is lawful, the contract should be severed, leaving the lawful portions in tact.[397] Enacted in 1872, both statutes have received a significant amount of judicial interpretation during the intervening years.[398]

In Keene v. Harling, the California Supreme Court determined that, in cases where there is partial illegality in the consideration, if the contract can be reasonably divided, then the court should make distinctions and save those portions of the contract that have a legal purpose.[399] However, this holding is tempered somewhat by a much older decision, Mission Brewing Company v. Rickert, which ***1157** established that distinctions should not be made as between legal and illegal portions of an agreement, when the party requesting such severance is the breaching party, or the party responsible for the making of the illegality.[400]

Since the party requesting severance was the "breaching" FHPS, it appears that the Mission Brewing rule factored significantly in the reasoning of the Armendariz court.[401] The agreements in controversy had a single purpose--to require the Plaintiff-employees to submit their claims to binding arbitration.[402] By way of illustration, the Armendariz agreements were not fully written contracts for employment, including detailed provisions for duties and obligations of either party, of which an arbitration provision was only a part.[403] Had this been the case, the court may have entertained a different result. Instead, the court held that the singular purpose-- arbitration--was expressed in a singular provision riddled with impermissible restrictions.[404] Accordingly, the contracts were deemed to be "permeated."[405] The Armendariz court relied on the fact that the agreements were intended, at the time that their making, to apply only to the employee.[406] As the court held that a lack of such a "modicum of bilaterality" was fatal, FHPS's later concession to be bound by the same terms was irrelevant.[407]

In fact, to accept such platitudes proffered by the Defendant would have the effect of providing a broad license to all future defendants who enter into similar one sided agreements--the ability to enforce them without risk to themselves. There would be no risk mainly because unless the employee was a highly skilled one, or upper level management, there would be little need to sue for breach of contract or tort, such as misappropriation of trade secrets. If, however, the employer accrued such a claim by chance, and suit was brought, the employer-plaintiff would be able to elect litigation over arbitration.

***1158** Conversely, and as was attempted by FHPS, the employer could take the position that the unilateral quality of the provision was of a "no harm, no foul" variety, as the employer would be so kind as to agree to be bound by the provision after the fact.[408] This argument appears disingenuous at best. If such a thing had been the true intent of the drafter, then the agreement would not have been drafted in a unilateral fashion in the first instance. Although it is not expressly stated by the Armendariz court, there can be little doubt that principles such as those found in Mission Brewing played a significant role in the decision of the court to bar FHPS from reaping such duplicitous rewards.

In the end, the court found a way for true justice to prevail in spite of the mandate of Southland Corporation v. Keating--Thou shalt not invalidate an arbitration provision for adhesion alone.[409] Given this simple fact, perhaps there is hope for consistency after all, notwithstanding the differing rules between collective bargaining agreements, private agreements, and the FAA.[410]

VII. Conclusion

In Armendariz--as in all disputes of this variety--the arguments on both sides of the line drawn by compulsory arbitration are difficult to refute and thorny to negotiate. Like the power struggle between the several states and the federal government for the possession of sovereign power, the foregoing issue is one of the best examples of perpetual conflict, such as that between realism and idealism, between public policy and judicial convenience, and between the politics of science and religion.

Perhaps the rules of compulsory arbitration should be adjusted in relation to the parties affected by them (i.e., leniency for the individual, less for the business, and even less for the gigantic corporate entity). Perhaps all arbitration should be voluntary, or compulsory arbitration limited to contracts as between merchants for sales of goods as defined by the Uniform Commercial Code.[411] However, each of these options ***1159** present their own difficulties in the scheme of stare decisis. Perhaps then we should just look upon this issue with a sense of decency and fair play, which is so often missing in these cases.

In any event, a significant degree of caution is required, lest the nation be forced to choose between complete unionization in order to benefit from collective bargaining agreements, or the twin evils of widespread corruption and indentured servitude. Perhaps less dramatically, the public should be educated as to the long-term effects of "signing on the dotted line" when an arbitration provision is present. When the people choose to collectively strike out these provisions, there is a certain safety in numbers. Nevertheless, common sense dictates that the rational person would not choose litigation for themselves--unless absolutely necessary. In the mind of that ubiquitous reasonable person, litigation is seen as a difficult and upsetting process, and most are more than happy to forget this process even exists--until they need it. Unless the finger of discrimination or a similar civil rights violation has touched us, or those near us, the message that a judge and a trial by jury is an important and fundamental right, would most likely be ignored--until it is too late.

In closing, and to echo the dissent in Saturn Distribution Corporation v. Williams, the role of the judiciary is to assure that justice is done, not to assure themselves of a clear docket, or a small case inventory.[412] Yet it is unlikely that the courts will retreat down the path that they have prepared for themselves. Accordingly, it becomes clear that the only recourse for the average employee is reliance upon a benevolent Congress--not unlike seventeenth century Parliament--to take on the task the judiciary has set its face against. In a world where corporate lobbyists and election funds reign supreme, this is at best a narrow hope. At the end of the day, it is probably best remembered by justice and legislator alike, that the people can only rely upon governmental wisdom and prudence to hold arbitration as a beneficent shield, and not a despotic sword of oppression.

Footnotes

a1 Whittier Law School, Class of 2003. The author wishes to thank Professors Cindy Alberts-Carson and Mary Ellen Gale for their invaluable wisdom and tutelage. Additionally, the author wishes to convey deepest appreciation to Steven L. Stern, Esq., for his mentoring and encouragement, without which this project would not have been undertaken.

1 An Act for Determining Differences by Arbitration, 9 Will. III, ch. 15 (1698).

2 See generally Henry S. Kramer, Alternative Dispute Resolution in the Workplace, § 1.02[3] (L. J. Seminars 1998 & Supp. 2000) (citing microformed on Statutes of the Realm, vol. VII, o, 369-72).

3 Id.

4 See Craft v. Campbell Soup Co., 177 F.3d 1083, 1085-86 (9th Cir. 1999) (discussing contrary authority in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits); Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1199 (9th Cir. 1998).

5 Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

6 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 675 (Cal. 2000).

7 Id. at 669.

8 See Kevin Livingston, California Supreme Court Upholds Mandatory Arbitration, Recorder (Aug. 25, 2000) (available at <http://www.law.com/regionals/ca/opinions/stories/edt0825d.shtml> (accessed Apr. 21, 2001)).

9 Armendariz, 6 P.3d at 699; see Jeffrey S. Sloan, What to Do After "Armendariz," Recorder (Sept. 13, 2000) (available at <http://www.law.com/regionals/ca/opinions/stories/edt0913e.shtml> (accessed Apr. 21, 2001)).

10 See Sloan, supra n. 9.

11 Armendariz, 6 P.3d at 674.

12 Id.

13 Id. at 674-75.

14 Id. at 675.

15 Id.

16 Id.

17 Id.; see Cal. Code Civ. Proc. §§ 2016-2034 (West 2000).

18 Armendariz, 6 P.3d at 674-75.

19 Id.

20 Fair Employment & Housing Act, Cal. Gov. Code § 12900 (West 1999); see Armendariz, 6 P.3d at 675.

21 Armendariz, 6 P.3d at 675.

22 Id.

23 60 Cal. Rptr. 2d 138 (App. 1st Dist. Div. 2 1997).

24 Armendariz, 6 P.3d at 675.

25 Id.

26 Id. at 699.

27 Id. at 675.

28 Id. at 669, 673, 675.

29 Id. at 674.

30 Id.

31 Cal. Gov. Code § 12900 (West 1999).

32 Armendariz, 6 P.3d at 674.

33 Id.

34 Id.

35 Id. at 694

36 Id. at 674.

37 Id. at 675.

38 Id.

39 Id.

40 Federal Arbitration Act, 9 U.S.C. §§1-10 (2000).

41 Cal. Code Civ. Proc. §§ 1280-1294.2 (West 2000).

42 Armendariz, 6 P.3d at 677-78.

43 United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

44 500 U.S. 20 (1991).

45 9 U.S.C. § 2 (2000).

46 See e.g. Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 72-73 (Cal. 1999).

47 Armendariz, 6 P.3d at 678 (citing 9 U.S.C. § 1 (2000)).

48 Id.

49 Id. at 678-79.

50 For a discussion of the FAA's effects on arbitrability of claims involving statutory rights, consult the text accompanying infra notes 295-302.

51 See e.g. Craft v. Campbell's Soup Co., 177 F.3d 1083 (9th Cir. 1999).

52 465 U.S. 1, 21-36 (1984) (O'Connor and Rehnquist, JJ., dissenting).

53 Id. at 22-23.

54 Id.

55 See e.g. U.S. v. Lopez, 514 U.S. 549 (1995) (majority opinion by O'Connor, J., holding that the Gun-Free School Zones Act was ultra vires).

56 The High Court is in fact revisiting the issue, and has granted certiorari upon a recent Ninth Circuit case. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), rev'd, 121 S.Ct. 1302 (2001). For a discussion of the outcome of the Adams case, see infra note 303.

57 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 678-79 (Cal. 2000) (citing Keating v. Super. Ct., 645 P.2d 1192, 1201-1202 (Cal. 1982), rev'd in part and aff'd in part, 465 U.S. 1 (1984)).

58 Cal. Code of Civ. Proc. §§ 1280-1294.2 (West 2000).

59 9 U.S.C. § 1 (2000).

60 Cal. Code Civ. Proc. §§ 1280-1294.2 (West 2000).

61 Id.

62 Cal. Code Civ. Proc. § 1280(a) (West 2000).

63 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 678-79 (Cal. 2000) (citing Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687-88 (1996)).

64 Id.

65 465 U.S. 1, 15-16 (1984); see U.S. Const. art. VI, § 1.

66 500 U.S. 20 (1991).

67 415 U.S. 36 (1974).

68 42 U.S.C. § 2000e (2000).

69 415 U.S. at 47-49.

70 Id. at 57.

71 Id. at 58.

72 Id. at 56-58.

73 Id. at 58 n. 19.

74 42 U.S.C. § 2000e (2000).

75 Alexander v. Gardner-Denver, 415 U.S. 36, 36 (1974).

76 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 676-77 (Cal. 2000) (citing to H.R. Rpt. 102-40(I), at 97 (Mar. 19, 1991)).

77 42 U.S.C. § 1981 (2000).

78 500 U.S. 20 (1991).

79 Id.

80 9 U.S.C. §§ 1-10 (2000).

81 Gilmer, 500 U.S. at 33.

82 Id.

83 29 U.S.C. § 621 (2000).

84 Gilmer, 500 U.S. at 27.

85 Id. at 26.

86 42 U.S.C. § 1981 (2000).

87 9 U.S.C. §§ 1-10 (2000).

88 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 677-78 (Cal. 2000).

89 Id. at 680 (citing to In re Marriage of Fell, 64 Cal. Rptr. 2d 522 (App. 2d Dist. Div. 6 1997)).

90 Cal. Lab. Code § 12900 (West 1999).

91 9 U.S.C. § 1 (2000); Cal. Code Civ. Proc. §§ 1280-1294.2 (West 2000); Armendariz, 6 P.3d at 679.

92 Armendariz, 6 P.3d at 680-81.

93 Id. at 682

94 105 F.3d 1465, 1482 (D.C. Cir. 1997).

95 Id. at 1482.

96 Id.

97 Armendariz, 6 P.3d 669, 681-82 (Cal. 2000).

98 Id. at 682.

99 Id.

100 Id. (citing to Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981)).

101 See Broughton v. Cigna Healthplans of Cal., 988 P.2d 67 (Cal. 1999).

102 See Graham Oil Co. v. Arco Prods. Co., 43 F.3d 1244, 1248 (9th Cir. 1995).

103 Armendariz, 6 P.3d at 682.

104 988 P.2d 67 (Cal. 1999).

105 Cal. Civ. Code §§ 1750-1784 (West 2000).

106 Broughton, 988 P.2d at 77-79.

107 43 F.3d at 1248.

108 Id.

109 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683 (Cal. 2000).

110 See e.g. Cal. Civ. Code § 3294 (West 1999), Cal. Lab. Code § 218.5 (West 1999).

111 Armendariz, 6 P.3d at 675.

112 Id. at 684.

113 Id.; see Sen. Comm. on Banking, Housing & Urban Affairs, Mandatory Arbitration Agreements in Securities Industry Employment Contracts 105th Cong. (July 31, 1998) (available in 1998 WL 437052) (testimony of Professor Samuel Estreicher on the problems of mandatory arbitration and the Dunlop Commission Report); 140 Cong. Rec. S3678-02 (daily ed., Mar. 24, 1994) (available in 1994 WL 95336) (statement of Sen. Danforth discussing the Dunlop Commission, headed by Professor John Dunlop, which, in Dec. 1994, submitted a Report to the Senate, entitled The Future of Worker-Management Relations, Report and Recommendations).

114 Armendariz, 6 P.3d at 684.

115 Cal. Code Civ. Proc. §§ 1283.05, 1283.1 (West 2000); Armendariz, 6 P.3d. at 684.

116 Cal. Gov. Code § 12900 (West 1999).

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117 Compare Bihun v. AT&T Info. Sys., Inc., 16 Cal. Rptr. 2d 787, 803-04 (App. 2d Dist. Div. 7 1993), disapproved on other grounds in, Lakin v. Watkins Assoc. Indus., 863 P.2d 179, 192 (Cal. 1993) with Holmes v. Gen. Dynamics Corp. 22 Cal. Rptr. 2d 172, 183-84 (App. 4th Dist. Div. 1 1993).

118 Armendariz, 6 P.3d at 684.

119 Id.

120 Id.

121 Id.

122 Id. at 684-85.

123 Id. at 685.

124 482 U.S. 220, 232 (1987).

125 Id.

126 832 P.2d 899 (Cal. 1992).

127 Id. at 915-16.

128 Id. at 919.

129 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 685 (Cal. 2000).

130 Cal. Code Civ. Proc. §§ 1280, et seq. (2000).

131 Armendariz, 6 P.3d at 685.

132 Cole v. Burns Intl. Sec. Servs., Inc., 105 F.3d 1465, 1484 (D.C. Cir. 1997).

133 Id.

134 6 P.3d at 685-86.

135 Id.

136 975 P.2d 622, 642 (Cal. 1999).

137 Id. at 643.

138 Cole v. Burns Intl. Sec. Servs., Inc., 105 F.3d 1465, 1484-85 (D.C. Cir. 1997).

139 975 P.2d at 643.

140 Id.

141 6 P.3d 669, 687-88 (Cal. 2000).

142 Id.

143 Cole, 105 F.3d at 1485.

144 Armendariz, 6 P.3d at 687-88.

145 Id.

146 Id.

147 Id.

148 Id.

149 Id.

150 Id.

151 Id.

152 Id.

153 Cal. Code Civ. Proc. § 1284.2 (West 2000).

154 Armendariz, 6 P.3d at 688 (citing Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 80-81 (Cal. 1999)).

155 Id. at 682-85, 687-88.

156 Id.

157 9 U.S.C. § 2 (2000).

158 Cal. Code Civ. Proc. § 1281 (West 2000).

159 517 U.S. 681, 687 (1996).

160 Id. at 687.

161 Cal. Civ. Code §§ 1598, 1599 (West 2000).

162 6 P.3d 669, 689 (Cal. 2000).

163 10 Cal. Rptr. 781, 784 (App. 1st Dist. Div. 1 1961).

164 Armendariz, 6 P.3d at 689.

165 Id.

166 Id.

167 Id.

168 Id.

169 See e.g. A & M Prod. Co. v. FMC Corp., 186 Cal. Rptr. 114, 121-22 (App. 4th Dist. Div. 1 1982).

170 Williston, Williston on Contracts vol. 15 § 1763A, 226-27 (3d ed. 1972) (reasoning that unconscionability is a "sliding scale" where procedural and substantive unconscionability are considered in proportion to each other).

171 Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145 (App. 1st Dist. Div. 2 1997) (holding that the prevailing view requires both procedural and substantive unconscionability before a court may refuse to enforce it as unconscionable); A & M Prod. Co., 186 Cal. Rptr. at 121-22 (defining the procedural and substantive elements of unconscionability).

172 Armendariz, 6 P.3d at 689-90.

173 Id.

174 Id.

175 Id.

176 Id.

177 Id. at 690-91, 693-94.

178 Id. at 693-94.

179 Id. at 694.

180 Id. at 693-94.

181 Id. at 692.

182 Id. at 693-94.

183 Id.

184 Id. at 694 (FHPS contended that the actions of employees in positions similar to those held by the Plaintiffs would have held only a nominal possibility of eliciting a lawsuit) Id.

185 Id.

186 56 Cal. Rptr. 2d 922, 925 (App. 4th Dist. Div. 3 1996).

187 Id.

188 60 Cal. Rptr. 2d 138, 151-52 (App. 1st Dist. Div. 2 1997).

189 83 Cal. Rptr. 2d 348, 355 (App. 4th Dist. Div. 1 1999).

190 6 P.3d at 691, 693-95.

191 See Cal. Civ. Code § 1670.5 (West 2000).

192 Id.

193 U.C.C. § 2-302 cmt. 2 (Found. Press 1998); Legislative Committee Comment, 9 Cal. Civ. Code Ann. cmt. 2, 494 (West 1985).

194 Armendariz, 6 P.3d at 695.

195 Id.

196 Id. at 695-97.

197 392 P.2d 273, 320-21 (Cal. 1964).

198 949 P.2d 1 (Cal. 1998).

199 18 P. 391 (Cal. 1888).

200 See generally Benyon v. Garden Grove Med. Group, 161 Cal. Rptr. 146 (App. 4th Dist. Div. 2 1980); Warner v. Knoll, 201 P.2d 45 (Cal. App. 3d Dist. 1948).

201 Cal. Civ. Code §§ 1598, 1599 (West 2000).

202 Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d 669, 696-97 (Cal. 2000).

203 Id.

204 Id.

205 Id.

206 Id. at 696; Benyon v. Garden Grove Med. Group, 161 Cal. Rptr. 146, 155 (App. 4th Dist. Div. 2 1980).

207 Armendariz, 6 P.3d at 696-97 (paraphrasing Cal. Civ. Code § 1599 (West 2000)).

208 Id.

209 Id.

210 Id.

211 Id.

212 Id.

213 Id. at 696-97.

214 Cal. Code Civ. Proc. § 1281.2 (West 2000).

215 Cal. Civ. Code § 1670.5 (West 2000).

216 Armendariz, 6 P.3d at 697.

217 Cal. Code Civ. Proc. § 1281.2 (West 2000).

218 Armendariz, 6 P.3d at 698-99.

219 Id. at 699-700 (Brown, Chin, JJ., concurring).

220 Id.

221 Id.

222 Id.

223 Id.

224 See An Act for Determining Differences by Arbitration, 9 Will. III, ch. 15 (1698).

225 See Henry S. Kramer, Alternative Dispute Resolution in the Workplace, § 1.02[3], 1-11 (L. J. Seminars 1998 & Supp. 2000).

226 Id.

227 Id.

228 Id.

229 Id.

230 Id.

231 Id.

232 Id. at § 1.02[4].

233 Id.

234 Id.

235 Id.

236 The American Heritage College Dictionary 69 (3d ed. Houghton Mifflin Co. 1997) (emphasis added).

237 Id.

238 Id.

239 N.Y. Civ. Prac. L. §§ 7501, et seq. (McKinney 2000); Kramer, supra n. 225 at § 1.02[5], 1-12-1-13.

240 9 U.S.C. § 1 (2000); Kramer, supra n. 225 at § 1.02[5], 1-12-1-13.

241 H.R. Jud. Comm., Sales & Contracts to Sell in Interstate & Foreign Commerce & Federal Arbitration, 67th Cong. 4th Sess. 9 (1923) [[hereinafter Arbitration Act Hearings] (emphasis added).

242 Id.

243 304 U.S. 64 (1938).

244 See Kramer, supra n. 225, at § 1.02[5], 1-14.

245 See e.g. Arbitration Act Hearings, supra n. 241, at 9.

246 See e.g. U.S. v. Darby, 32 U.S. 100 (1941) (overruling Carter v. Carter Coal Co., and signaling the beginning of an almost relentless expansion of Commerce Power); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936) (interpreting the power to regulate interstate commerce as plenary).

247 45 U.S.C. § 151 (2000).

248 See generally Kramer, supra n. 225, at § 1.02[5].

249 29 U.S.C. § 150 (2000).

250 See generally Kramer, supra n. 225, at § 1.02 [5].

251 29 U.S.C. § 173(d) (2000).

252 346 U.S. 427, 436 (1953).

253 Id. at 436.

254 Id.

255 490 U.S. 477, 484 (1989).

256 Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201 (1956).

257 Id.

258 U.S. Const. art. I § 8(3); see e.g. Hammer v. Dagenhart, 247 U.S. 251 (1918); U.S. v. E.C. Knight Co., 156 U.S. 1 (1895).

259 350 U.S. at 201.

260 See e.g. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Hotel, Inc. v. U.S., 379 U.S. 241 (1964); U.S. v. Darby, 312 U.S. 100 (1941) (discussing the expanding role of the Commerce Power in statutory interpretation).

261 415 U.S. 36 (1974).

262 Id. at 49-51.

263 See Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983).

264 Id.

265 Id. at 24.

266 490 U.S. 477, 484 (1989) (Powell, J., dissenting).

267 Id. at 486.

268 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). For a discussion of the Gilmer decision, review the text accompanying supra notes 78-85.

269 See Alexander v. Gardner-Denver, 415 U.S. 36 (1974); Craft v. Campbell's Soup Co., 177 F.3d 1083, 1091-92 (9th Cir. 1999).

270 Craft, 177 F.3d at 1091-92.

271 Id.

272 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 678 (Cal. 2000).

273 See e.g. Craft v. Campbell Soup, Co., 177 F.3d 1083 (9th Cir. 1999); Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998); Willis v. Dean Witter Reynolds, Inc. 948 F.2d 305 (6th Cir. 1991); Gray v. Toshiba Am. Consumer Prods., 959 F. Supp. 805 (M.D. Tenn. 1997).

274 9 U.S.C. §§ 1, 2 (2000).

275 Black's Law Dictionary 517 (6th ed. West 1990) (defining ejusdem generis as "[o]f the same kind, class or nature.... [T]he [rule] is, that where general words follow an enumeration of persons or things ... such general words are not to be construed in their widest extent").

276 Id. at 763 (defining inclusio unius est exclusio alterius as "[t]he inclusion of one is the exclusion of another.... [A]n irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded").

277 See e.g. Craft, 177 F.3d at 1092.

278 9 U.S.C. § 1 (2000).

279 Black's Law Dictionary 517 (6th ed. West 1990).

280 See generally Gooch v. U.S., 297 U.S. 124, 128 (1936); Craft v. Campbell's Soup Co. 177 F.3d 1083, 1092 (9th Cir. 1999); Cole v. Burns International Sec. Servs., Inc., 105 F.3d 1465, 1471 (D.C. Cir. 1997) (discussing ejusdem generis); Black's Law Dictionary 763 (6th ed. West 1990).

281 See e.g. Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law Substance and Procedure, § 23.19 (3d ed., West 1999).

282 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

283 See e.g. McDonald v. City of West Branch, 466 U.S. 284, 290-91 (1984).

284 Cole v. Burns Intl. Sec. Servs., Inc., 105 F.3d 1465 (D.C. Cir. 1997).

285 Id.

286 Id. at 1473.

287 Id.

288 Id. at 1477.

289 Id.

290 Id. at 1482-85.

291 See Dickstein v. duPont, 433 F.2d 783, 785 (1st Cir. 1971); Erving v. Va. Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Tenny Engr., Inc. v. United Elec. Workers Local 437, 207 F.2d 450, 452-53 (3d Cir. 1953); O'Neil v. Hilton Head Hosp., 115 F. 3d 272, 274 (4th Cir. 1997) contra Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067-68; (4th Cir. 1993); see Rojas v. T.K. Comm., Inc., 87 F.3d 745, 747-48 (5th Cir. 1996); Asplundh Tree Expert Co. v. Bates, 71 F. 3d 592, 596-601 (6th Cir. 1995); Pryner v. Tractor Supp. Co., 109 F.3d 354, 356-58 (7th Cir.); McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998) contra United Food Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 943-44 (10th Cir. 1989); see Cole v. Burns Intl Sec. Serv., 105 F.3d 1465, 1470-72 (D.C. Cir. 1997).

292 Duffield v. Robertson Stephens & Co., 144 F.3d 1192 (9th Cir. 1999).

293 Craft v. Campbell's Soup Co., 177 F.3d 1083 (9th Cir. 1999).

294 Id. at 1091-92 (citations omitted, emphasis supplied).

295 Duffield, 144 F.3d at 1085.

296 Craft, 177 F.3d at 1092.

297 Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), rev'd, 121 S. Ct. 1302 (2001); see infra n. 303.

298 Armendariz v. Found. Health Psychcare Servs., Inc. 6 P.3d 669, 677-79 (Cal. 2000).

299 For a discussion of the CAA generally, review the text accompanying supra notes 56-61.

300 Cal. Code Civ. Proc. § 1280(a) (West 2000).

301 415 U.S. 36, 49 (1974).

302 Id.

303 On March 21, 2001, the Supreme Court, in a five-to-four decision, sealed the fate of Saint Clair Adams. Justice Kennedy, writing for the majority, reversed the decision of the Ninth Circuit, and by dismissing the lower court's interpretation of the Legislative history of the FAA, effectively put an end to at least one chapter of the "Ninth Circuit Rebellion." This turn of events was not entirely surprising, and does not affect the holding of Armendariz, which was based well within the tolerance levels of Gilmer. Nevertheless, this opinion--with Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist, two of which argued so contrarily in the Southland dissent, and all of whom are usually suspicious of expansive federal power-- facing off against Justices Stevens, Souter, Ginsburg, and Breyer, all of whom are generally sympathetic to "liberal" as well as federal interests--stands as a stark reminder of the result-based orientation of the current majority. See Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Southland Corp. v. Keating, 465 U.S. 1, 21-36 (1984) (O'Connor and Rehnquist, JJ., dissenting).

304 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 669 (Cal. 2000).

305 Id. at 678-79.

306 U.S. Const. art I § 8(3); 9 U.S.C. § 2 (2000); Cal. Code Civ. Proc. §§ 1280-1294.2. (West 2000).

307 9 U.S.C. § 2 (2000); Cal. Code Civ. Proc. §§ 1280-1294.2 (West 2000); Craft v. Campbell's Soup Co., 177 F.3d 1083 (9th Cir. 1999).

308 Cal. Code Civ. Proc. §§ 1280-1294.2 (West 2000).

309 Armendariz, 6 P.3d at 680.

310 105 F.3d 1465, 1482-83 (D.C. Cir. 1997).

311 .. of Sunnybrook Farm. See generally Kate Douglas Wiggin, Rebecca of Sunnybrook Farm (Grosset & Dunlap 1903).

312 Armendariz, 6 P.3d at 680; For a discussion of the Cole factors, review the text accompanying supra notes 93-100.

313 Armendariz, 6 P.3d at 682.

314 Id.

315 Id.

316 See generally Bias of Arbitrator, 4 Proof of Facts 2d 709 (1975 & Supp 2000).

317 Cole v. Burns Intl. Sec. Serv., 105 F.3d 1465, 1476 (D.C. Cir. 1997); Armendariz, 6 P.3d at 690.

318 Cole, 105 F.3d at 1476; Armendariz, 6 P.3d at 690.

319 See e.g. Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 77-79 (Cal. 1999); Cannon v. Comm. on Judicial Qualifications, 537 P.2d 898 (Cal. 1975).

320 See e.g. Broughton, 988 P.2d at 77-79; Cannon, 537 P.2d at 898.

321 105 F.3d at 1485; See Committee on Alternative Dispute Resolution, California State Bar Association, <http://www.calbar.org/2ent/3gps/gps-f.htm> (accessed Apr. 26, 2000). Although the Bar Association has a 22 person Committee on Alternative Dispute Resolution (ADR), this committee is mainly concerned with the review of current legislation, its impact on the practice of law, and the education of Bar members regarding ADR. Id.

322 California State Bar Association, supra n. 321.

323 See California State Bar Association, 1997 Conference of Delegates: Approved Resolutions <http://www.calbar.org/2ent/3con/4con3/02-15-97.htm> (accessed Nov. 8, 2000).

324 See e.g. Orange County Bar Association, Membership Application < http://www.ocbar.org/memberapp.htm> (accessed Nov. 8, 2000). The OCBA charges membership dues on a sliding scale, in relation to the applicant's length of admission to the California Bar. As of the year 2000, the dues ranged from $30 to $175. Id.

325 See e.g. Richard A. Bales, Compulsory Arbitration, 109 (Cornell U. Press 1997).

326 9 U.S.C. §§ 1-10 (2000); Cal. Code Civ. Proc. §§ 1280-1294.2 (West 2000).

327 See e.g. Bales, supra n. 325, at 148-49.

328 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 685 (Cal. 2000).

329 See e.g. 9 U.S.C. § 10 (2000); Cal. Code Civ. Proc. § 1286.2 (West 2000).

330 See generally Bias of Arbitrator, supra n. 316.

331 See e.g. 9 U.S.C. § 10 (2000); Cal. Code Civ. Proc. § 1286.2 (West 2000).

332 5 U.S. (1 Cranch) 137 (1803).

333 Id. at 177 (emphasis added).

334 312 U.S. 100 (1941).

335 Id.; see U.S. Const. art I § 8(3).

336 Legislative Activity: Bill Barring Mandatory Arbitration Passes Assembly Policy Committee, 8 Cal. Health L. Monitor 4 (2000) (discussing legislative findings that most HMOs have employed or are employing compulsory arbitration provisions in their agreements with new patients).

337 Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d at 682.

338 Id. at 684.

339 Id. at 683.

340 See e.g. 42 U.S.C. § 2000e (2000); Cal. Gov. Code §§ 12900, et seq. (West 2000).

341 See e.g. Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974).

342 See generally Bales, supra n. 325, at 22.

343 For a discussion of judicial review, see supra pt. VI.E.1.b.

344 See generally Chavez v. Keat, 41 Cal. Rptr. 2d 72 (App. 4th Dist. Div. 2 1995) (stating that the purpose of a punitive damage award was to punish the offender, and discourage similar activity in the future, not to totally destroy a defendant).

345 See e.g. Bales, supra n. 325, at 132.

346 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 684 (Cal. 2000).

347 Id.

348 Id.

349 Id.

350 See Cal. Code Civ. Proc. §§ 2016-2034 (West 2000).

351 See generally Rotunda & Nowak, supra n. 281, at § 23.24.

352 Cal. Code Civ. Proc. § 1283.05 (West 2000); Armendariz, 6 P.3d at 684.

353 See generally Chicago, Burlington & Quincy R.R. Co. v. Krayenbuhl, 91 N.W. 880 (Neb. 1902) (where toddler lost an arm while playing on a turnable owned by defendant railroad, jury verdict for plaintiff reversed for error).

354 Id.; Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934) (discussing "Pennsylvania Rule," the minority rule at that time, which required that a driver stop, look, and listen before crossing the train tracks, no matter how clear the tracks seem to be).

355 Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), rev'd, 121 S.Ct. 1302 (2001); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

356 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000).

357 Id. at 687-88.

358 Id. at 699 (Brown, Chin, JJ., concurring).

359 Id.

360 Cal. Rules Ct. Rule 1 (West 2000).

361 Armendariz, 6 P.3d at 687-88.

362 Id.

363 See e.g. 9 U.S.C. § 2 (2000).

364 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); see e.g. Southland Corp. v. Keating, 465 U.S. 1 (1984).

365 Southland, 465 U.S. at 15.

366 Id.

367 See e.g. Cal. Code Civ. Proc. §§ 170.1, 170.3, 170.6 (West 2000).

368 See 9 U.S.C. § 2 (1994); Cal. Code Civ. Proc. § 1281 (West 2000).

369 See generally Jay M. Zitter, Claim of Fraud in Inducement of Contract as Subject to Compulsory Arbitration, 11 A.L.R.4th 774, 778 (1982).

370 9 U.S.C. § 2 (1994); Cal. Code Civ. Proc. § 1281 (West 2000).

371 9 U.S.C. § 2 (1994); Cal. Code Civ. Proc. § 1281 (West 2000).

372 Zitter, supra n. 369, at 778.

373 See Restatement (Second) of Contracts § 208 (1979).

374 See e.g. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689, 691-92 (Cal. 2000).

375 Id. at 689.

376 Id. at 689-90.

377 Id. at 690.

378 Id.

379 Id. (citing to Engalla v. Permanente Med. Group., 938 P.2d 903, 927 (Cal. 1997) (Kennard, J., concurring)) (emphasis added).

380 E.g. Chan v. Drexel Burnhham Lambert, Inc., 223 Cal. Rptr. 838 (App. 2d Dist. 1986); Tonetti v. Shirley, 219 Cal. Rptr. 616 (App. 4th Dist. 1985) (holding that California law as to adhesion contracts must be disregarded in determining validity of arbitration provisions pursuant to FAA).

381 Bayma v. Smith Barney, Harris Upham & Co., 784 F.2d 1023 (9th Cir. 1986).

382 See Restatement (Second) of Contracts § 177 (1979).

383 Armendariz, 6 P.3d at 697.

384 See e.g. E. Allan Farnsworth & William F. Young, Contracts: Cases and Materials, 463 (5th ed. Found. Press 1995).

385 Id. at 17 n.1.

386 6 P.3d at 697.

387 Id. at 699.

388 Cal. Civ. Code § 1670.5 (West 2000).

389 Id. at cmt. 1.

390 Cal. Civ. Code § 1670.5 (West 2000).

391 Id. at cmts. 1-3.

392 Armendariz, 6 P.3d at 695.

393 Id.

394 Cal. Civ. Code §§ 1598, 1599 (West 2000).

395 Cal. Civ. Code § 1598 (West 2000).

396 Id.

397 Cal. Civ. Code § 1599 (West 2000).

398 See generally Cal. Civ. Code §§ 1598, 1599 (West 2000) (annotated versions of these statutes provide explanatory holdings of California courts from cases dating back to the nineteenth century).

399 392 P.2d 273 (Cal. 1963).

400 179 P. 720 (Cal. App. 2d Dist. Div. 2 1919).

401 6 P.3d 669, 697 n. 13 (Cal. 2000).

402 Id. at 697.

403 Id. at 675.

404 Id. at 697.

405 Id.

406 Id.

407 Id. at 697 n. 13.

408 Id.

409 See 465 U.S. 1 (1984).

410 9 U.S.C. § 1 (2000).

411 U.C.C. §§ 2-104(1), 2-105(1) (1979) (defining a merchant as one who deals in or is knowledgeable of goods or skills of a kind and goods as all moveable things, and things in action, except money, for sale).

412 905 F.2d 719, 731 (4th Cir. 1995) (Weidner, J. dissenting).

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