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OREGON v. SMITH AND THE RELIGIOUS FREEDOM RESTORATION ACT: AN EDUCATIONAL PERSPECTIVE

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collectability if left inaccessible by another layer of federal bureaucracy. On the whole, the relationship among private fossil enthusiasts, commercial collectors, and university paleontologists is non-adversarial. The healthy competition for discoveries among the three groups leads to an ever-increasing scope of scientific knowledge about the earth's past.

The Black Hills controversy prodded Congress to introduce and strongly consider Senate bill 3107. Legislators feel that the new fossil regulations should be modeled after ARPA, which Congress designed to curtail the systematic plundering of archeological sites on federal land in the western United States. The profound differences between the disciplines of archaeology and paleontology and between fossils and artifacts make parallel legislation unwise and unnecessary. Rare and scientifically valuable fossils are unearthed only when private collectors, university researchers, and commercial collectors vigorously collect fossils.

Marc Villarreal*
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EPILOGUE

As this article proceeded to publication, the Black Hills Institute was indicted on 39 charges of trafficking in fossils illegally taken from Federal land. "Sue", the tyrannosaurus rex, was not mentioned in the indictment. However, the DOJ said that it did not intend to return the fossil to the Institute.[67]

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67. See Malcolm W. Browne, *Fossil Dealers in Tyrannousaur Seizure are Indicted*, N.Y. TIMES, Nov. 25, 1993 at A17.

CASE COMMENT

EEOC v. BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES: COLLECTIVE-BARGAINING AGREEMENTS AND AGE DISCRIMINATION IN EMPLOYMENT ACT CLAIMS: WHAT COUNTS AS RETALIATION UNDER ADEA SECTION 4(D)?

INTRODUCTION

University governing boards and higher-education administrative bodies have a natural interest in avoiding litigation and minimizing administrative costs of alleged-wrongful-termination claims. As a result, universities and colleges often enter into specific collective-bargaining agreements providing for the opportunity to arbitrate such claims. One difficulty with such provisions, however, is that on occasion they may violate constitutional or statutory protections applicable to those claims. By way of illustration, some collective-bargaining agreements may attempt to require that all Title VII claims be submitted for binding arbitration. In *Alexander v. Gardner-Denver Co.*,[1] however, the United States Supreme Court held that collective-bargaining agreements (CBA) requiring arbitration of contractual rights cannot take away an employee's statutory civil right to judicial resolution of Title VII claims.[2] On the other hand, the Supreme Court has also held that in certain circumstances individual agreements may validly require arbitration of civil-rights claims.[3] These different treatments of agreements to arbitrate

1. 415 U.S. 36, 94 S. Ct. 1011 (1974).

2. "[T]he legislative history of Title VII manifests congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under . . . a collective bargaining agreement." *Id.* at 48, 94 S. Ct. at 1019. For further discussion of this issue *see infra* note 77 and note 84 and accompanying text. *Cf. also* McDonald v. City of West Branch, 466 U.S. 284, 104 S. Ct. 1799 (1984) and Barrantine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 101 S. Ct. 1437 (1981).

3. *See* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1657 (1991), involving claims filed under the ADEA. *See infra* notes 76 and 77.

statutory rights indicate that the validity of challenged contractual provisions may depend not only upon the particular federal statute upon which an employee may base a claim, but also on whether that provision is part of a CBA or an individual agreement.

In *Equal Employment Opportunity Commission v. Board of Governors of State Colleges and Universities*[4] (*BOG II*), the United States Court of Appeals for the Seventh Circuit addressed the issue of whether a particular CBA provision agreed to by the Board of Governors and the faculty union facially violated the Age Discrimination in Employment Act (ADEA). Article 17.2 of the CBA provided that union-member employees would have a right to arbitration of their claims only so long as they refrained from simultaneously bringing those substantive claims before other administrative or judicial forums.[5] In *BOG II*, the Seventh Circuit held this provision facially invalid and *per se* discriminatory under section 4(d) of the ADEA.[6]

This Comment discusses problematic aspects of the issue facing the Seventh Circuit in *BOG II* and presents rationales supporting a conclusion contrary to that reached by that court.[7] Part I reviews the facts and holding of the Seventh Circuit decision in *BOG II*. Part II examines the conflicting judicial rationales applied in *BOG I* and *BOG II* to determine whether Article 17.2 was lawful. Part III examines additional arguments bearing on the validity of such provisions. Finally, Part IV proposes a practical solution for universities and colleges seeking to avoid the risk of duplicative procedures when faced with wrongful-termination claims based on the ADEA.

I. Facts and Holding

The Board of Governors of State Colleges and Universities (Board) and the University Professionals of Illinois Union (Union) entered into a collective-bargaining agreement on behalf of the Union's members.

4. 957 F.2d 424 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 299 (1992)[hereinafter *BOG II*].

5. *See infra* text accompanying note 8 for CBA provision 17.2.

6. *BOG II*, 957 F.2d at 431. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §4(d), 81 Stat. 602, 603 (1968) (codified at 29 U.S.C. § 623(d) (1988)), provides:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for any employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this chapter.

7. This discussion relies heavily, but not exclusively, on topics raised by the Board of Governors in its Petition for Writ of Certiorari to the Supreme Court (No. 91-1895) [hereinafter *Board's Pet. for Cert.*].

This agreement contained, among others, a provision permitting the Board to cancel at its discretion any arbitration proceeding initiated by a union member if that member, prior to or subsequent to the commencement of arbitration, brought action on that grievance in another forum. Article 17.2 of the collective-bargaining agreement provided: "If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any university shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure."[8]

On April 9, 1984, Raymond Lewis, Associate Professor of Business Law at Northeastern Illinois University (NIU), having been denied tenure, initiated a grievance proceeding through the Union against the President of NIU, alleging the University had not followed its procedural guidelines for granting or denying tenure.[9] On May 3, 1984, the Board ratified NIU's denial of tenure to Mr. Lewis and, in response to Mr. Lewis's claim, an arbitration hearing was scheduled for May of 1985.[10] On May 14, however, shortly before the scheduled hearing date, Mr. Lewis filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that the University had violated his ADEA rights by denying him tenure because of his age.[11] Although first learning of the EEOC action only after the arbitration hearing had taken place, the Board nevertheless invoked its right to cancel arbitration under Article 17.2 and directed the arbitrator not to render his decision.[12] In consequence of the Board's action, Mr. Lewis again contacted the EEOC and filed a second charge against the Board and NIU. In his second charge, Lewis alleged that the Board and NIU had unlawfully retaliated against him for filing his original, substantive claim under the ADEA.[13]

Although Lewis personally settled his claims with the Board and NIU, in July of 1985 the EEOC brought charges on behalf of other employees who were similarly situated and sought prospective injunctive relief against NIU and the Board.[14] After unsuccessful attempts to negotiate a settlement, the EEOC sued the Board and Union in January of 1986.[15] In its complaint, the EEOC alleged that since early 1979 the Board had repeatedly violated section 4(d) of the ADEA by invoking

8. EEOC v. Board of Governors of State Colleges and Univ., 735 F. Supp. 888, 889 (N.D. Ill. 1990) [hereinafter *BOG I*]; *BOG II*, 957 F.2d at 426.

9. *BOG I*, 735 F. Supp. at 889; *BOG II*, 957 F.2d at 426.

10. *BOG II*, 957 F.2d at 426. The record does not disclose why the hearing was delayed for over a year. This issue, however, is irrelevant for the issues presented by the case.

11. *Id.*

12. *BOG I*, 735 F. Supp. at 889; *BOG II*, 957 F.2d at 426.

13. *BOG I*, 735 F. Supp. at 889; *BOG II*, 957 F.2d at 426.

14. *BOG II*, 957 F.2d at 426, n.2.

15. *BOG I*, 735 F. Supp. at 889.

Article 17.2 of the CBA and terminating the grievance proceedings of persons filing complaints under the ADEA.[16]

The District Court for the Northern District of Illinois granted summary judgment in favor of the Board[17] (*BOG I*), relying on the Seventh Circuit's decision in *Rose v. Hearst Magazines Div., Hearst Corp.*[18] The district court ruled that in view of *Rose's* requirement of intent as an element of retaliation under the ADEA, and in consideration of the Board's apparent good faith in exercising Article 17.2, the Board could not have retaliated.[19]

The EEOC appealed *BOG I* and the Seventh Circuit reversed.[20] Distinguishing *Rose*, the Seventh Circuit held that Article 17.2 of the CBA evidenced a *per se* retaliatory policy and thus violated section 4(d) of the ADEA.[21] The court explained that the Board had retaliated for purposes of section 4(d) by taking away a contractual right of access to union grievance procedures "for the sole reason that the employee has engaged in protected activity (filing an ADEA claim)."[22]

II. Analysis: Judicial Construction of Retaliation under ADEA Section 4(d)

A. *The District Court Decision: Good Faith and Retaliation*

In *BOG I*, the district court, based on its interpretation of the Seventh Circuit holding in *Rose*, granted summary judgment in favor of the Board.[23] In *Rose*, the Seventh Circuit held that an employer's technical violation of the ADEA, if committed in good faith, *i.e.*, non-willfully, precluded a finding of retaliation. The *BOG I* district court noted, however, that *Rose* did not provide any guidelines for determining

16. *Id.* at 889-890.

17. *Id.* at 892. Prior to granting summary judgment in favor of the Board, the district court had denied the EEOC's motion for partial summary judgment on the issue of liability (reported at 706 F. Supp. 1377 (N.D. Ill. 1989)) and the Board's motion for dismissal (reported at 665 F. Supp. 630 (N.D. Ill. 1987)). The final decision of the district court in *BOG I* raises all substantive issues addressed in these earlier rulings.

18. 814 F.2d 491 (7th Cir. 1987). *See infra* part II(A) for a discussion of *Rose*.

19. *BOG I*, 735 F. Supp. at 890-91.

20. *BOG II*, 957 F.2d at 431.

21. *Id.* at 430-31.

22. *Id.* at 430.

23. In *Rose*, 814 F.2d 491 (7th. Cir. 1987), a plaintiff sued the Hearst Corporation claiming it had retaliated against him for filing ADEA charges with the EEOC. At the conclusion of trial the jury found retaliation. Presented with special verdict questions, the jury first concluded that Mr. Rose had proved that the filing of the EEOC charge was the cause for his discharge. Yet, the jury also found that Rose had failed to prove Hearst had "willfully" violated age discrimination law.

The Seventh Circuit in *Rose* viewed these special verdicts inconsistent and reversed the lower court. "The jury found that Hearst's violation of the Act was nonwilfull. If Hearst acted in good faith, it cannot be logically held to have retaliated against Rose." *Id.* at 493.

what constituted "good faith" in the context of retaliation claims.[24] Furthermore, the district court in *BOG I* contrasted *Rose* with other Seventh Circuit decisions involving ADEA claims where no finding of intent was required to support a finding of liability. In one of those, *Burlew v. Eaton*,[25] the Seventh Circuit found that a plaintiff needed to show only that age was a determining factor in order to find discrimination: "For example, an age discrimination claim could result from an employer's unconscious application of stereotypes. Therefore a plaintiff can establish liability for age discrimination without presenting any evidence of the defendant's state of mind."[26]

In attempting to resolve these difficulties in *BOG I*, the district court inferred that the Seventh Circuit distinguished the intent required for proving substantive age discrimination claims from that required for retaliation claims.[27] The district court concluded that the Seventh Circuit in *Burlew* did not require a finding of intent for liability on substantive age-discrimination claims as long as the age of the plaintiff played some significant factor in the defendant's decision to terminate employment.[28] Based on *Rose*, however, the district court held that ADEA retaliation claims in the Seventh Circuit must be supported by evidence of an intent to retaliate against employees specifically because they have exercised their rights under the ADEA.[29]

Applying this distinction, the district court in *BOG I* found no evidentiary basis for concluding that the Board had intentionally retaliated against Mr. Lewis because he filed a claim under the ADEA.[30] Instead, the Board produced ample evidence that it adopted Article 17.2 and terminated arbitration proceedings purely "in order to avoid inconsistent results and to save the time, money and effort resulting from litigating in two forums simultaneously."[31] Given the EEOC's failure to rebut the Board's explanation, the district court granted summary judgment in favor of the Board.[32]

B. *The Circuit Court Rationale for Reversing Summary Judgment and Ordering Relief for the EEOC.*

In *BOG II* the Seventh Circuit reversed the decision below. The court supported its decision, first, by rejecting the district court's inference that the Seventh Circuit distinguished the state of mind required for

24. *BOG I*, 735 F. Supp. at 890.

25. 869 F.2d 1063 (7th Cir. 1989).

26. *BOG I*, 735 F. Supp. at 890-91. *Cf. Burlew*, 869 F.2d at 1066.

27. *BOG I*, 735 F. Supp. at 891.

28. *Id.*

29. *Id.* (relying on *Rose*: "Retaliation, by its very nature, requires that the employer undertake its actions willfully." 814 F.2d at 493).

30. *Id.*

31. *Id.*

32. *Id.* at 892.

substantive "discrimination" versus that required for "retaliation" under the ADEA; second, by distinguishing the *Rose* decision; and, third, by appealing directly to the statutory language of the ADEA.[33]

The Seventh Circuit first explained that although it had used the terms "discrimination" and "retaliation" "to distinguish substantive age discrimination claims from claims of discrimination based on the exercise of legal rights granted by the ADEA . . . . [n]othing in section 4(d) requires a showing of intent in retaliatory policy cases."[34] In *BOG II*, the court stated that section 4(d), the retaliation provision, was primarily "concerned with the effect of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates."[35] The court stressed that the retaliation provision of the Act was specifically intended to protect claimants from being adversely affected because they have exercised their rights regardless of what caused that deprivation.

While *BOG II* did acknowledge that the ADEA offers employers an affirmative defense to substantive discrimination claims under the ADEA,[36] it insisted that there could be no "good faith reason for taking retaliation."[37]

In the court's view, the Board's assertion that it adopted Article 17.2 to avoid costly and redundant litigation did not rebut the charge of retaliation but merely attempted to justify the admitted retaliation.[38] The court reasoned that whatever the Board's ulterior motive, the immediate cause of arbitration cancellation was the fact that Mr. Lewis filed a claim under the ADEA. This sort of adverse action, therefore, constituted retaliation.

Addressing next the district court's reliance on *Rose*, the court of appeals distinguished *Rose* both on its facts and its nature as an individual disparate-treatment case. The circuit court highlighted the fact that the issue in *BOG I* and *II* was an allegedly facially discriminatory policy and not a disparate-treatment claim.[39] The Seventh Circuit stated that an individual disparate-treatment claim involves adverse action taken against a protected member as a result of an individual decision and not a discriminatory policy.[40] The court noted that while

33. *BOG II*, 957 F.2d 424 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 299 (1992).

34. *Id.* at 427.

35. *Id.*

36. *Id.* at 427-28. 29 U.S.C. § 623(f) (Supp. III 1991). *See infra* note 45 for text of code. There is no similar affirmative defense granted by statute to violations of the retaliation provision codified at § 623(d).

37. *Id.* at 428.

38. "[T]he Board's asserted justification for Article 17.2, avoiding duplicative litigation, does not rebut the claim that the Board discriminated against employees who engaged in protected activity. Rather the Board's justification alleges that non-malicious discrimination against employees ought not be legally prohibited." *Id.*

39. *BOG II*, 957 F.2d at 431.

40. *Id.*

Rose might continue to apply to disparate-treatment cases and thus require a higher showing of intent, it did not apply to situations involving a facially discriminatory policy adversely affecting a protected class.

To justify its view that Article 17.2 embodied a facially discriminatory policy, the Seventh Circuit adopted the argument offered by the EEOC:

> [A] discriminatory policy is no less so with respect to the protected class because non-protected persons are also adversely affected by the policy: [suppose that] a company adopts a policy which bans the hiring of anyone over 40 years of age. Clearly, that policy constitutes facial discrimination under the ADEA. But if an employer enacts a policy that prohibits hiring anyone over 35 years of age, that policy would constitute a discriminatory policy with regard to members of the protected class since all protected class members are excluded from employment because of age. . . . Likewise, if Article 17.2 authorized the Board to terminate grievance proceedings if and only if an employee filed an ADEA claim with the EEOC, that policy would be clearly discriminatory under section 4(d). The contention that the policy is any less discriminatory when its scope is broadened is unpersuasive. . . . [E]mployers could consistently employ discriminatory criteria as long as they were careful to draw their discrimination lines broadly enough to include members of a non-protected class.[41]

Having denied the applicability of *Rose* and asserting that Article 17.2 was discriminatory on its face, the court in *BOG II* next considered the explicit language of the ADEA. The majority opinion noted that Congress chose not to enact any affirmative defenses to section 4(d), nor provide any exceptions to that section justified on rational or financially prudent grounds, although Congress did expressly enact such defenses for substantive age-discrimination claims.[42] The court concluded that "[i]f the Board wants to lobby for a benign discrimination exception to section 4(d), its appeal would be appropriately directed to Congress rather than this Court."[43] Thus, relying on the view that express legislative approval of certain defenses precluded the availability of more traditional judicially constructed defenses, the Sev-

41. *Id.* at 430. Additionally, noting two other circuits' rejection of *Rose*, the court of appeals appeared ambivalent about the future of the holding. *Id.*, n.7, citing Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1571 (2d Cir. 1989) (retaliation need not be established in every case by a finding of willfulness); Anderson v. Phillips Petroleum Co., 861 F.2d 631, 636 (10th Cir. 1988) (rejects view that "a finding against willfulness cannot consistently stand with a jury finding of intentional discrimination").

42. *BOG II*, 957 F.2d at 428.

43. *Id.*

enth Circuit ultimately rested its reversal of *BOG I* on the absence of an express statutory affirmative defense to section 4(d).[44]

III. Disparate-Impact And ADEA Section 4(d) Retaliation Claims

The fact that the ADEA does not provide an affirmative defense to section 4(d), but explicitly provides affirmative defenses to other provisions of section 4,[45] should not alone bar courts from allowing such a defense to section 4(d). Reasonable grounds supporting an affirmative defense to ADEA retaliation claims are provided both by judicial precedent under Title VII and by the inherent limits of the ADEA statutory rights of persons who have lawfully contracted limitations on those rights.

A. *Element Analysis of Retaliation and Affirmative Defenses Under Title VII*

In its attempt to persuade the Supreme Court to review *BOG II*, the Board analogized the treatment of a Title VII retaliation claim in *EEOC v. J. M. Huber Corp.*[46] to retaliation claims under the ADEA.[47] In *Huber*, a female employee whose retirement benefits were withheld after filing a Title VII discrimination claim[48] filed a second charge with the EEOC

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44. *BOG II*, 957 F.2d at 428. The circuit court panel was not, however, entirely unsympathetic to the Board's position. In his concurring opinion, Judge Manion argued that while the Seventh Circuit's judgment adopting the EEOC interpretation of section 4(d) was "technically" correct, its effect would be to chill an employer's motivation to provide arbitration:

> Without Article 17.2, the Board has little incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum. As it is, the collective bargaining agreement would offer an incentive for both sides to resolve the issue quickly . . . . If the grievance procedure wasn't working, the Union member could turn to the courts (or some other form of arbitration), thus overriding the grievance procedure . . . . But the Board may see no benefit in doubling its exposure and adding to the costs of its administrative and legal defense. Thus, it could conclude that if court action must be an alternative, it will be the only alternative. It seems to me that this rigid result was not really the goal of our federal laws against discrimination. Nevertheless, any adjustment will have to be statutory, not with the courts.

Id. at 431-32.

45. 29 U.S.C. § 623(f) provides:

> It shall not be unlawful for an employer . . .:
>
> (1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . .

46. 927 F.2d 1322 (5th Cir. 1991).

47. *Board's Pet. for Cert.* at 91.

48. *Huber*, 927 F.2d at 1324.

claiming retaliation under Title VII.[49] Evidence indicated that the employer withheld benefits not because of any discriminatory motive, but solely to protect the tax-qualified status of the company's benefit plan under ERISA.[50] The EEOC argued for employer liability on the retaliation claim by relying on *EEOC v. Cosmair, Inc., L'Oreal Hair Care Division*,[51] in which the Fifth Circuit held that an employer had violated the ADEA by withholding benefits from an employee because he had filed an age discrimination claim.[52] Given the holding in *Cosmair*, the EEOC contended in *Huber* that a withholding policy triggered by the exercise of statutory rights, such as filing a discrimination claim, was *per se* retaliatory and facially invalid.[53]

The *Huber* court, however, rejected the EEOC's argument that the employer's action in the instant case was retaliatory under *Cosmair*. It pointed out that in *Cosmair* the court had explicitly stated that "if Cosmair stopped providing [the employee] benefits to which he was otherwise entitled *simply* because he filed a charge, the company would be guilty of retaliation."[54] In *Huber*, however, the facts before the court made clear that "[the employer] did *not* withhold [the employee's] benefits *simply* because [the employee] filed a Title VII charge."[55] Rather, the employer routinely withheld benefits from all terminated employees who challenged their dismissal, regardless of the specific nature of their claim. This clearly indicated that withholding was only incidentally motivated by the fact that a Title VII claim was filed.[56]

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49. *Huber*, 927 F.2d at 1325. *See* Title VII, § 704(a), 42 U.S.C. § 2000e-3(a) (1988):

> It shall be unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

50. *Huber* at 1327; "According to [the employer], it withholds benefit plan funds from former employees who challenge termination for any reason because, if the terminated employee were later ordered reinstated, the premature benefit payment could jeopardize the benefit plan's qualified tax status." *Id.* at 1324.

51. 821 F.2d 1095 (5th Cir. 1987).

52. *Huber*, 927 F.2d at 1326-27; *See Cosmair*, 821 F.2d at 1090; In *BOG II*, 957 F.2d at 429, n.8, the Seventh Circuit cited *Cosmair* in order to support its decision and explicitly distinguished it from *Huber*. *See infra* note 59 for a discussion of the Seventh Circuit's reliance on *Cosmair* and the Fifth Circuit's later discussion of this issue.

The *Huber* court expressly noted the similarity between the Title VII retaliation provision and the content of ADEA § 4(d) and stated: "*Cosmair* arose under the nearly identical prohibition on retaliation contained in section 4(d) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(d)." *Id.* at 1327 n.13.

53. *Huber*, 927 F.2d at 1326.

54. *Cosmair*, 821 F.2d at 1089 (emphasis added).

55. *Huber*, 927 F.2d at 1327 (emphasis added).

56. *Id.*: "Cosmair is distinguishable from the instant case: [the employer here] did not withhold [the employee's] benefits simply because [the employee] had filed a Title VII charge—[the employer] contends that it withheld benefits to preserve the tax qualified status of its benefit plan under ERISA."

The Fifth Circuit in *Huber* explained that the proper model for determining whether unlawful retaliation had occurred was to analyze the effect of the employment policy under a disparate-impact theory.[57] Applying that analysis, the court would proscribe an employer's policy as discriminatory and retaliatory only if it had a disparate-impact on those engaging in otherwise protected activity and the employer could offer no significant business purpose:

> Under a disparate-impact theory, however, the employer must defend by showing that the policy is significantly related to a legitimate business concern. Moreover, under an impact theory, the nondiscriminatory character of the actual motive does not suffice to overcome a prima facie case of disparate-impact: if the impact of the policy is disparate, the non-prohibited nature of an employer's motive is no defense unless that motive is determined objectively to have a substantial business justification.[58]

In ruling for the employer, the *Huber* court held that because the employer routinely withheld benefits from all terminated employees who brought any sort of wrongful termination claim and for a lawful business purpose, the policy was not discriminatory.[59]

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57. *Id.* at 1329.

58. *Id.*

59. Explaining its use of disparate impact analysis, the *Huber* court, in its order to deny rehearing en banc, 942 F.2d 930, stated: "[the employer's] policy of withholding a former employee's distributable benefits under a qualified retirement plan when the former employee challenges termination by filing a Title VII charge and seeks reinstatement does not on its face violate Title VII's prohibition against retaliation." *Id.*

The *Huber* Court distinguished the Supreme Court's holding in International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). In *Johnson*, the policy of excluding certain employees from jobs involving lead exposure was directed, not at fertile persons in general, whether male or female, but instead only at *female* fertile persons, and thus aimed at a gender-specific group. The Supreme Court held that since by its own terms the policy applied only to female persons and discriminated on the basis of gender, the policy was not neutral on its face and application of a disparate impact analysis was not appropriate. Rather, the employer would have to prove, as required by § 703(e)(1) of Title VII, 42 U.S.C. § 2000e-2(e)(1), that the policy was a legitimate instance of discrimination based on a bona fide occupational qualification (BFOQ). *Id.* at 1203-04.

The *Huber* Court of Appeals distinguished its holding from *Johnson* because in *Huber* there was no facial discrimination and therefore § 703(e)(1) was inapplicable. Rather, it was appropriate to apply a disparate impact analysis to determine "whether the policy is significantly related to a legitimate business concern." *Huber*, 942 F.2d at 932.

The relevance of the *Huber* court's later effort to distinguish its decision from the decision of the Supreme Court in *Johnson*, is crucial in view of the Seventh Circuit's discussion of *Johnson*, *Huber*, and *Cosmair* in *BOG II*. In *BOG II*, the court stated, "*Huber* is inconsistent with the Supreme Court's holding in [*Johnson*] . . . . There the Court held that 'the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.'" *BOG II*, 957 F.2d 429, n.8 *citing*, 111 S. Ct. at 1203-04.

As is evident from its later decision, the *Huber* court, however, explicitly rejected any comparison between its ruling and the *Johnson* decision precisely because it found the policy in question in *Huber* not facially discriminatory and thus *Johnson* did not apply. ". . . [*Johnson*] is of very limited applicability, if any, to anti-retaliation cases. It is clearly inapposite to the facts and circumstances we consider in *Huber*." 942 F.2d at 933.

It is ironic that in *BOG II* (957 F.2d at 429) the Seventh Circuit supported its decision to deny a defense to the Board by appealing to the very statement from *Cosmair* which the *Huber* Court (927 F.2d at 1329) used to justify its decision to allow a defense, namely, "[I]f the [employer] stopped providing [the employee] benefits to which he was otherwise entitled *simply because he filed a charge*, the company would be guilty of retaliation." *Cosmair*, 821 F.2d at 1089. Construing its earlier statement in *Cosmair*, the Fifth Circuit in *Huber* read the "simply because" phrase as allowing defenses to retaliation when other legitimate business reasons supported the decision. *BOG II*, however, did not acknowledge this interpretation.

60. *Huber*, 927 F.2d at 1329.

61. *See also* Jordan v. Wilson, 755 F. Supp. 993 (M.D. Ala. 1990).

62. Title VII prohibitions of substantive discriminatory practices are codified at 42 U.S.C. § 2000e-2(a)-(c)(1988) and an affirmative defense based on disparate impact analysis is codified in § 2000e-2(k). The retaliation provision of Title VII, codified at 42 U.S.C. § 2000e-3(a), however, offers no affirmative defense.

63. *Board's Pet. for Cert.* at 16.

64. *Id.* at 14.

65. *Id.* at 17.

For the *Huber* court, then, no warrant existed for finding a *per se* retaliatory policy even though an employer implemented a policy that would automatically have adverse impact on persons bringing suit under Title VII. A finding of retaliation was inappropriate because the employer had not effected the policy for a discriminatory motive and it was supported by a legitimate business concern.[60] Thus, in *Huber*, a Title VII case, the Fifth Circuit allowed an affirmative defense to a policy that on its face allegedly violated the retaliation provision of Title VII.[61] Yet, analogous to the ADEA, although other Title VII provisions are subject to expressly offered affirmative defenses, Title VII offers no explicit affirmative defense to a retaliation claim.[62]

Analogizing the facts in *Huber* to those in *BOG II*, the Board noted that "[p]ersons affected by the policy here at issue were adversely affected not for an unlawful discriminatory purpose, but for the *lawful purpose of avoiding duplicate forums*, not just for those who invoked a duplicate forum for discrimination disputes, but for those who did so for any dispute."[63] The Board argued that the purpose of Article 17.2 was solely to avoid duplicative proceedings and protect the integrity of alternative dispute-resolution proceedings.[64] Along the line of argument the *Huber* court offered to justify its holding, the Board maintained that since Article 17.2 applied impartially to all employees regardless of the nature of the specific claims triggering it and given its legitimate business purpose, any incidental adverse impact on discrimination claimants did not justify finding Article 17.2 *per se* discriminatory.[65]

In its brief against certiorari,[66] the EEOC rejected the *Huber* analogy and distinguished *Huber*, arguing that, unlike *BOG*, it was primarily concerned with a conflict between two federal statutes.[67] This characterization of *Huber*, however, reflects no explicit reasoning of the Fifth Circuit but only that of the EEOC. Although the case did involve a conflict of federal statutes, nowhere did the court give any indication that its holding should be limited to conflicts arising between federal statutes. Rather, having explicitly likened the retaliation provision of Title VII to the "nearly identical" retaliation provision of the ADEA,[68] the court, apparently without hesitation, applied a disparate-impact analysis to determine whether unlawful discrimination had occurred.[69] Furthermore, the EEOC's willingness to distinguish *Huber* in fact ultimately supports the Board's view to the extent that the EEOC appears to approve—at least in limited circumstances—*judicially created* affirmative defenses to claims of retaliation.

Thus, while the Board, supported by *Huber*, argued in favor of an affirmative defense based on disparate-impact analysis, the Seventh Circuit in *BOG II* did not recognize any judicially created affirmative defense to the retaliation provision of the ADEA. It is precisely this view that led the Seventh Circuit to conclude that Article 17.2 was *per se* or facially retaliatory even though it made no explicit distinction in regard to age. Insofar as there could be no defense to retaliation, and since Article 17.2 would peremptorily trigger adverse effects on anyone filing a claim under the ADEA, it becomes *per se* retaliatory.

The Seventh Circuit's rationale for reversing *BOG I* did not, however, rest exclusively on the absence of statutory authorization for an affirmative defense to retaliation. The court also adopted the EEOC's substantive objection to an affirmative defense. In short, the court argued that acceptance of the Board's view would allow employers consistently to evade discrimination laws merely by making the triggering conditions of their discriminatory activity so generic that they covered some individuals outside of the protected class:

> Were we to adopt the Board's argument that a policy imposing adverse treatment on all members of a protected class was rendered non-discriminatory by the inclusion of some members outside the protected class, employers could consistently employ discrimina-

66. Brief for the Equal Employment Opportunity Commission in Opposition at 11. (No. 91-1895).

67. While we do not agree with everything the Fifth Circuit had to say in its opinion in *Huber*, that case is very different from this case. The court, *in effect*, assumed that the distribution of pension plan assets to a former employee who might be reinstated would be contrary to ERISA and would result in disqualification of the employer's pension plans, a drastic result.
Id. (emphasis added).

68. *Huber*, 927 F.2d at 1327, n.13. *See supra* note 52.

69. *Id.* at 1327-28.

> tory criteria as long as they were careful to draw their discriminatory lines broadly enough to include members of a non-protected class.[70]

Responding to this argument presented by the EEOC and adopted by the Seventh Circuit,[71] the Board stated that *BOG II* misconstrued the proper analogy:

> Analogies, as we all know, are frequently dangerously unreliable. We could counter, for example, by posing a hypothetical policy providing that employees testifying in any litigated proceeding would not receive their regular wages for time spent away from work while testifying. Clearly this policy would have an adverse effect by causing a loss of a benefit (wages) to persons who testify in discrimination proceedings. Under the EEOC's argument, then, apparently such a policy would be retaliatory and unlawful, and could not be defended merely because "unprotected" employees testifying in other types of proceedings would also not receive wages. The flaw in this analysis, as in the one utilized by the EEOC and the Seventh Circuit, is that the employees were adversely affected when testifying in any proceeding not because of a discriminatory purpose, but *because they did not work*. That is a lawful purpose, and therefore such a policy would obviously be nondiscriminatory.[72]

In fact, the Board did not argue, as the court in *BOG II* implied, that a policy should be considered non-discriminatory *merely* because it would apply to members of a non-protected group as well as to members of a protected group.[73] Rather, the Board argued that the fact that its policy would affect both protected and non-protected members only established that the policy was not *per se* discriminatory and, therefore, that it should have been analyzed under the disparate-impact standard. The EEOC's argument, adopted by the Seventh Circuit in *BOG II*, is a case of misplaced concern, for such abuses would represent instances where disparate-impact analysis would certainly lead to findings of retaliation based on latent discriminatory purposes lacking legitimate business justification.

Additionally, the Seventh Circuit's argument[74] fails to reflect legislative intent inasmuch as its reasoning would equally imply that Congress should never have enacted the existing affirmative defenses for

70. *BOG II*, 957 F.2d at 431.

71. *See supra* at text accompanying note 41.

72. *Board's Pet. for Cert.* at 15.

73. Upon implementation of the policy the Board in fact had no basis for knowing with certainty that ADEA claimants would even be members of the affected group.

74. *See supra* text accompanying notes 41 and 70.

employers facing substantive ADEA discrimination claims. If the Seventh Circuit's argument were consistent with the view of Congress, it would imply that an employer should never have an affirmative defense, even when discriminating against a particular age group on the basis of a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[75] The weakness of the Seventh Circuit's reasoning is that the very nature of an affirmative defense presupposes the lawfulness of policies excluding protected members, either explicitly or by implication when included within broader groups, when such discrimination is based on bona fide occupational qualifications or legitimate business concerns. The sweeping language in *BOG II* would prove too much and argues against the validity of affirmative defenses in general.

B. *Contractual Limitations on ADEA Claims*

Additional grounds for rejecting the Seventh Circuit's strict interpretation of section 4(d) and the arguments supporting this interpretation can be found in the willingness of Congress and the courts to allow contractual limitations and waivers of employees' ADEA statutory rights.

It is not *per se* unlawful for employees to agree either to contractual waivers of their right to bring action under the ADEA or to agree to submit ADEA claims to binding arbitration.[76] Presumably, employers

75. 29 U.S.C. § 623(f).

76. In *Gilmer v. Interstate/Johnson Lane Corp.*, *see supra* note 3, the Supreme Court held that, in certain circumstances, ADEA claims can be subject to binding arbitration. *See infra* note 77 for a discussion of the distinction between *Gilmer* and *Alexander*. *Cf.* Michael T. Sweeney, Case Note, *Employment Arbitration Age Discrimination in Employment Act Arbitrability of Claims Under Age Discrimination in Employment Upheld Pursuant to Arbitration Agreement*, 22 SETON HALL L. REV. 540 *passim* (1992).

In 1990, Congress amended the ADEA adding 29 U.S.C. § 626(f) which lists the specific conditions required for any valid waiver of ADEA:

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum;
>
> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within

acting in reliance on contractual agreements in which employees have

> which to consider the agreement;
>
> (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;
>
> (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.
>
> (2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633(a) of this title may not be considered knowing and voluntary unless at a minimum—
>
> (A) subparagraphs (A) through (E) of paragraph (1) have been met; and
>
> (B) the individual is given a reasonable period of time within which to consider the settlement agreement.
>
> (3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).
>
> (4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Older Workers Benefit Protection Act, PUB. L. 101-433, § 201, 104 Stat. 978, 983 (1990).

Contained in the same 1990 amendment, at §202(b), 104 Stat. at 984, was a provision prospectively voiding the existing EEOC rules concerning waivers: "[e]ffective on the date of enactment of this Act [Oct. 16, 1990], the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627.16(c) of title 29, CODE OF FEDERAL REGULATIONS, shall have no force and effect."

29 C.F.R. § 1627.16(c)(1990) read:

> (1) . . . [I]t has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.
>
> (2) When assessing the validity of a waiver agreement, the Commission will look to, add is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver: (i) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA; (ii) A reasonable period of time was provided for employee deliberation; (iii) The employee was encouraged to consult with an attorney. These are not intended as exclusive

limited their statutory rights under the ADEA must be immune to charges of retaliation and have waiver available as a legitimate affirmative defense.

Yet, the strict construction of section 4(d) offered by the Seventh Circuit in *BOG II*—that there is absolutely no availability of a judicially created affirmative defense to retaliation claims—would appear to require a mandatory finding of retaliation even when claimants bring charges after having contractually waived their statutory rights. Any adverse action taken by the employer, including seeking to enjoin the action or counter-suits based on contractual provisions, would presumably be considered retaliatory.

If, however, courts and Congress allow contractual limitations of statutory rights, such allowance implies that these agreements must sometimes be supported with an affirmative defense to retaliation claims. While this argument, based on voluntary individual waivers of ADEA rights, does not resolve whether collective-bargaining agreements are appropriate instruments for requiring employees to choose a forum for their claims,[77] it does indicate another respect in which the Seventh

nor must every factor necessarily be present in order for a waiver to be valid, except that a waiver must always be in writing. Moreover, even where these three factors are present, if a waiver is challenged, the Commission will look to the substance and circumstances to determine whether there was fraud or duress.

(3) No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

77. The recent Supreme Court decision in *Gilmer*, 111 S. Ct. 1647, *see supra* notes 3 and 76, has left unresolved the question of whether CBA agreements made by unions on behalf of employees, or even employment contracts in general, can validly mandate arbitration of individual employee statutory claims.

In *Gilmer*, an employee was required by his employer to register independently as a securities representative with the New York Stock Exchange. One provision of the NYSE registration agreement provided that any controversy arising out of the registered representative's employment or termination was to be resolved by compulsory arbitration. Gilmer's employment was terminated when he was 62 years old. In response to termination, Gilmer filed a claim with the EEOC and subsequently brought suit in federal court alleging violation of the ADEA. The employer motioned to compel arbitration based on the agreement and the provisions of the Federal Arbitration Act which encouraged arbitration. 111 S. Ct. at 1650-51.

The district court denied the motion based on its view that Congress intended to protect ADEA claimants from waiver of the judicial forum and relying on the Supreme Court's decision in Alexander v. Gardner-Denver, Co. In *Alexander*, 415 U.S. 36, 94 S. Ct. 1011, *see supra* notes 1 and 2 with accompanying text, the Supreme Court ruled that an employee's suit under Title VII of the Civil Rights Act of 1964 was not foreclosed by prior submission of that claim to compulsory arbitration under the terms of a collective bargaining agreement. *Id.* at 59, 94 S. Ct. at 1025.

In *Gilmer*, however, the Supreme Court held that some ADEA claims could be subjected by agreement to compulsory, binding arbitration. 111 S. Ct. at 1651-57. Specifically addressing the *Alexander* ruling the court distinguished the instant case in regard to three points: 1) *Alexander* did not involve a contractual agreement to arbitrate statutory claims but only contract-based claims; 2) the arbitration in *Alexander* was mandated based on the provisions of a collective bargaining agreement and thus created concerns about a tension between collective representation and individual statutory rights; and 3) *Alexander* was not decided under the Federal Arbitration Act. *Id.* at 1655-56.

Application of the *Alexander* and *Gilmer* principles, however, still leaves unresolved whether CBA provisions mandating compulsory arbitration of statutory claims are lawful. In *Alexander*, the collective bargaining agreement referred only to contract claims, and in *Gilmer* arbitration was required not by a CBA provision but by a registration agreement. On the one hand, the Court appears reluctant to accept the notion that CBA provisions give adequate protection to the individual statutory rights of union members, for sometimes the interest of individual members might be sacrificed for the benefit of the union itself. On the other hand, neither case put the question squarely before the Supreme Court and the Court explicitly left the question unresolved. *Gilmer* at 1656.

Of course, Article 17.2, at issue in the *BOG* rulings, does not involve a provision requiring mandatory arbitration of statutory claims but rather the patently less offensive restriction of putting the employee to a choice of forums for resolution of the claim. As the *BOG* line of cases illustrates, however, this sort of choice can lead to adverse consequences against employees who in the first instance choose to arbitrate but later decide to pursue their claims in the courts. It is at this point that the issues raised in *BOG I* and *II* touch upon the issues presented in *Gilmer* and *Alexander*. This issue, however, did not figure prominently in the *BOG* decisions.

78. 29 U.S.C. § 623(d).

Circuit's opinion fails to appreciate the complexity of the retaliation issue. The Seventh Circuit's blanket view that all adverse action based on the filing of substantive claims constitutes retaliation and is subject to no affirmative defense conflicts with legal implications of lawful waivers of ADEA rights.

IV. Conclusion and Recommendation

The fundamental difficulty encountered by the courts in interpreting section 4(d) is that the precise causal connection between an employee-claimant's actions and the employer's action has not been clearly defined by statute. Until Congress chooses to clarify this connection, it is not clear that any one interpretation is intrinsically more faithful to the statutory language than another.

Section 4(d) explicitly provides:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.[78]

The Board, analogizing from the treatment of retaliation claims under Title VII, construed this provision as requiring specific retaliatory

intent, that is, the specific motivation of the employer's action must result from knowledge that the employee has exercised ADEA rights.[79] The Board viewed as irrelevant, however, the fact that the employee's claim was an ADEA claim. Although filing an ADEA action could trigger implementation of Article 17.2, arbitration was not cancelled simply "because an ADEA action has been filed," but because a suit, regardless of its nature, had been filed.[80] Thus the policy did not violate section 4(d). In essence, the Board argued that it did not "discriminate" on the basis of the exercise of ADEA rights and, hence, the retaliation provision is not applicable, or, in the alternative, that any disparate discriminatory effect is justified by legitimate business reasons.

The Seventh Circuit, however, in addition to other objections to an affirmative defense,[81] viewed adoption of the Board's position as an improper use of judicial power. Absent any clear legislative authorization, the court preferred to defer to the executive branch's interpretation, as provided by the EEOC. Courts presented with ADEA retaliation claims must determine whether judicial recognition of an affirmative defense, when no statutory provision specifically authorizes that defense, constitutes a "legislative" exercise of judicial power. In other words, does the inclusion of specifically enumerated affirmative defenses in itself imply that Congress intended to exclude any defenses not mentioned? An analysis of the broader policy debate suggested by this question, however, falls beyond the scope of this Comment.

Since the United States Supreme Court has refused to review this issue,[82] any definitive resolution must be left to Congress. It is impossible to predict when, or if, Congress will amend the ADEA to provide for affirmative defenses to section 4(d). Case history and the differing positions discussed in this Comment indicate distinct rationales that may influence courts to rule inconsistently on section 4(d) claims. While some courts may allow defenses, it is more likely that most jurisdictions will await legislative action and follow a more restrained line, as the Seventh Circuit did in *BOG II*.

Universities or colleges in jurisdictions allowing such a defense, or in jurisdictions that have not yet ruled on the issue, may choose to continue with CBA provisions similar in substance to Article 17.2. To insure that universities or colleges will not be forced to defend an action in two forums, however, the sole recourse at present seems to be renegotiation of their CBA arbitration provisions. New collective-bargaining agreements should provide, as predicted by Judge Manion in his concurring opinion in *BOG II*,[83] that all ADEA claims, and

79. *Board's Pet. for Cert.* at 15-17.
80. *Id.*
81. *See infra* Part II(B).
82. *See supra* note 4.
83. *See supra* note 44.

perhaps all federal statutory claims, be submitted solely to judicial resolution and thus denied any opportunity for arbitration.[84]

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84. While it might initially appear desirable for universities and colleges to renegotiate their collective-bargaining agreements to require submission of all claims, whether contractual or statutory, to binding arbitration, recent Supreme Court decisions leave the validity of this sort of provision in question. *See* discussion *supra* at note 77.

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