

# DETERMINING THE PROPER STANDARD FOR INVALIDATING ARBITRATION AGREEMENTS BASED ON HIGH PROHIBITIVE COSTS: A DISCUSSION ON THE VARYING APPLICATIONS OF THE CASE-BY-CASE RULE

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## I. INTRODUCTION

Arbitration is a common means of resolving commercial disputes. Although arbitration is an attractive alternative to litigation, arbitration can be disadvantageous to a potential plaintiff because of high costs.<sup>1</sup> The United States Supreme Court endorsed a “liberal ... policy favoring arbitration agreements” whenever possible.<sup>2</sup> However, a party is often at a disadvantage upon signing an arbitration agreement when little understanding of the agreement’s cost implications exist. Such scenarios can arise when negotiating adhesion contracts or employee handbook agreements, and when they do arise, the question of whether an agreement can be invalidated because of its cost implications must be answered convincingly.

In *Green Tree Financial Corp. v. Randolph*, the United States Supreme Court left open the possibility of an arbitration agreement being invalidated because of prohibitive costs.<sup>3</sup> However, the *Green Tree* Court did not comment on how detailed the showing of prohibitive costs must be in order to do so.<sup>4</sup> Instead, *Green Tree* ultimately leaves examination of specific cost issues to the lower courts, and those lower courts must also decide the appropriate standard for invalidating an agreement.<sup>5</sup>

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<sup>1</sup> Michelle Eviston & Richard A. Bales, *Capping the Costs of Consumer and Employment Arbitration*, 42 U. TOL. L. REV. 903, 903 (2011).

<sup>2</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>3</sup> *Green Tree Fin. Corp-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

<sup>4</sup> *Id.* at 92.

<sup>5</sup> *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660 (6th Cir. 2003).

The federal circuit courts take varying approaches on how to invalidate an agreement based on cost.<sup>6</sup> One circuit holds any agreement that places significant costs on the party bringing the claim *per se* invalid.<sup>7</sup> The majority of jurisdictions apply a case-by-case analysis in determining whether to invalidate an agreement.<sup>8</sup> However, two main approaches exist in applying the case-by-case test.<sup>9</sup> The first, adopted by the Court of Appeals for the Fourth Circuit, evaluates the cost impact of the agreement based on the individual party's situation.<sup>10</sup> The second test, used by the Court of Appeals for the Sixth Circuit, applies the case-by-case test by evaluating the cost impact to a similarly situated "group of plaintiffs."<sup>11</sup>

This article argues that the best method of assessing prohibitive costs is the Sixth Circuit's case-by-case approach, which evaluates the cost to a similarly situated group of potential plaintiffs.<sup>12</sup> Part II of this article provides background on arbitration costs as opposed to litigation costs, and examines the *Green Tree* opinion that set the stage for possibly invalidating arbitration agreements based on prohibitive costs. Part III explains the federal circuit split between the "group of plaintiffs" approach found in *Morrison v. Circuit City Stores, Inc.*, and the "individual plaintiff" approach in *Bradford v. Rockwell Semiconductor Systems, Inc.*<sup>13</sup> Part IV analyzes the specific advantages and disadvantages of the group-of-plaintiffs approach and the individual-plaintiff approach. Part V of this article concludes that the best method of analyzing prohibitive costs is the *Morrison* group-of-plaintiffs approach.<sup>14</sup>

## II. BACKGROUND

### A. *The FAA and the Supreme Court's Preference For the Enforcement of Arbitration Agreements*

Arbitration has a long history in the English and American legal systems, despite the fact that early courts disfavored resolving disputes through arbitration.<sup>15</sup> Because judges in English courts received pay based on the number of cases decided, they believed arbitration would infringe on their ability to make money because they would decide fewer cases.<sup>16</sup> In

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<sup>6</sup> Eviston and Bales, *supra* note 1, at 904.

<sup>7</sup> *Circuit City Stores, Inc. v. Adams*, 279 F.3d 891, 892 (9th Cir. 2002).

<sup>8</sup> Eviston & Bales, *supra* note 1, at 904.

<sup>9</sup> *Morrison*, 317 F.3d at 669; *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238 F.3d 549, 557 (4th Cir. 2001).

<sup>10</sup> *Bradford*, 238 F.3d at 557.

<sup>11</sup> *Morrison*, 317 F.3d at 669.

<sup>12</sup> *Id.* at 663.

<sup>13</sup> *Bradford*, 238 F.3d at 557.

<sup>14</sup> *Morrison*, 317 F.3d at 663.

<sup>15</sup> JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2 (2002).

<sup>16</sup> *Id.*

the early 1920s, the industrialization of the United States and the resulting increase in disputes led to a push for viewing arbitration more favorably.<sup>17</sup> Merchants who sought to strengthen the effect of arbitration agreements within trade associations worked to enact the Federal Arbitration Act (“FAA”).<sup>18</sup> These trade associations had three main purposes for supporting arbitration.<sup>19</sup> First, the associations hoped to save money by lowering the costs of dispute resolution through arbitration.<sup>20</sup> Second, they hoped that arbitration would allow industry insiders to supply the rules of decision in arbitration proceedings instead of judges with little knowledge of trade practices.<sup>21</sup> Third, associations preferred to have disputes decided by members of their respective trades rather than by a judge with no particular knowledge of industry practices.<sup>22</sup> On February 12, 1925, their efforts culminated with President Calvin Coolidge signing the FAA into law.<sup>23</sup>

The FAA meant to provide an alternative to the courts for resolving legal disputes. Congress affirmed that at least part of the purpose for the FAA was to place arbitration agreements “upon the same footing as other contracts, where [they] belong.”<sup>24</sup> By creating the FAA, Congress hoped that many of the legal issues normally handled by litigation would be more easily resolved in arbitration, so long as the agreements were valid and enforceable.<sup>25</sup>

Recent Supreme Court decisions have gone even further and have created a strong preference of enforcing the agreements in all types of claims.<sup>26</sup> Even in cases involving major public policy questions, arbitration agreements have been enforced.<sup>27</sup> A number of cases have made clear that all claims are subject to mandatory arbitration unless there is a clear intent from Congress to bar the claim from the arbitral forum.<sup>28</sup>

B. *The Price of Arbitration vs. The Price of Litigation*

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<sup>17</sup> *Id.*

<sup>18</sup> David S. Schwartz, *If You Love Arbitration, Set it Free: How “Mandatory” Undermines “Arbitration,”* 8 NEV. L. J. 400, 403 (2007).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Federal Arbitration Act, ch. 213, 43 Stat. 883-86 (1925) (codified as amended at 9 U.S.C. §§ 1-307 (1948)).

<sup>24</sup> H.R. REP. No. 68-96, at 1 (1924).

<sup>25</sup> *Id.*

<sup>26</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000).

<sup>27</sup> *See Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614 (1985).

<sup>28</sup> Schwartz, *supra* note 18, at 407.

Because many parties do not have unlimited liquid assets, the cost of resolving a dispute is an important consideration and may be the deciding factor for whether to pursue a claim.<sup>29</sup> This section first describes the approximate cost of arbitration and then compares the cost of arbitration to the cost of resolving a dispute in court. This article only describes the “forum costs” of arbitration and litigation. Forum costs are costs a party must pay to have a claim heard in a particular forum.<sup>30</sup> Forum costs are only part of the “transactional cost” of litigation, which also includes attorneys’ fees, discovery costs, expert witnesses, and other expenses borne by a party regardless of the forum.<sup>31</sup>

#### 1. American Arbitration Association

The American Arbitration Association (“AAA”), one provider of arbitration services in the United States, charges both administrative fees and arbitrator fees in each arbitration proceeding.<sup>32</sup> The fees are listed in several different fee schedules and are determined based on the damage amount sought and on the type of claim being arbitrated (consumer, commercial, labor, or employment).<sup>33</sup> This section evaluates the costs of two types of arbitration proceedings commonly found in agreements entered into without any meaningful negotiations: consumer and employment arbitration.

##### a. Consumer Arbitration

Parties in a consumer contract dispute must pay both filing fees and arbitrator fees to use the AAA for arbitration.<sup>34</sup> The consumer and the business divide fees according to the AAA schedule with fees based on the amount in controversy.<sup>35</sup> If the amount in controversy is less than \$75,000, a desk-arbitration<sup>36</sup> costs \$250, and an in-person arbitration hearing costs \$750 per day.<sup>37</sup> If the amount in question is over \$75,000, the arbitrator’s fee is the amount noted in the arbitrator’s AAA panel biography.<sup>38</sup>

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<sup>29</sup> See *Morrison*, 317 F.3d 646.

<sup>30</sup> Public Citizen, *Report on Costs of Arbitration* 40 (2002).

<sup>31</sup> *Id.*

<sup>32</sup> See Eviston & Bales, *supra* note 1, at 907.

<sup>33</sup> *Consumer Arbitration Costs, Administrative Fee Waivers and Pro Bono Arbitrators*, AMERICAN ARBITRATION ASS’N, [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_014025](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_014025) [hereinafter *Consumer Arbitration Costs*]; see also *Employment Arbitration Rules*, AMERICAN ARBITRATION ASS’N, 1, (rules effective November 1, 2009) [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> A desk arbitration is where the case is decided based solely on the written documents, and no face-to-face hearing is held.

<sup>37</sup> *Consumer Arbitration Costs*, *supra* note 34.

<sup>38</sup> *Id.*

Allocation of fees depends on the amount in controversy.<sup>39</sup> As long as a claim or counterclaim does not exceed \$10,000, the consumer pays one half of the arbitrator's fee up to \$125 and no administrative fees, while the business pays \$975 in administrative fees plus whatever remains of the arbitrator's fee.<sup>40</sup> If either party's claim or counterclaim involves between \$10,000 and \$75,000, the consumer pays one half of the arbitrator's fee up to \$375 and no administrative fees, while the business pays \$1,275 in administrative fees (or only \$975 if a hearing does not occur) and the remainder of the arbitrator's fee.<sup>41</sup> Thus, for disputes involving less than \$75,000 the consumer could pay up to \$375 of the arbitrator's fee with the business paying all remaining costs.<sup>42</sup>

However, proceedings become significantly more expensive when the amount in controversy exceeds \$75,000 or when a non-monetary issue is the subject of the dispute.<sup>43</sup> Claims and counterclaims exceeding \$75,000 require parties to pay fees according to the Commercial Fee Schedule.<sup>44</sup> According to the Commercial Fee Schedule, the filing party pays the fees, and fees vary based on the amount in controversy.<sup>45</sup> For example, a claim involving \$300,000 requires the filing party to pay an initial "filing fee" of \$4,350 and a "final fee" of \$1,750.<sup>46</sup> The final fee is due at the first hearing.<sup>47</sup> A filing party in a non-monetary claim must pay a filing fee of \$3,350 and a final fee of \$1,250.<sup>48</sup> In addition to administrative fees, each party must pay half of the arbitrator's fee and half of the other fees incurred.<sup>49</sup> Thus, a party seeking arbitration for claims of over \$75,000 or in non-monetary disputes can face significant costs to pursue the claim.

b. Employment Arbitration

When an arbitration request in the employment setting is first filed, the AAA makes an initial administrative determination to determine whether the dispute arises from an employer-promulgated plan or an individually negotiated employment agreement or contract.<sup>50</sup> According to AAA rules, "[t]his determination is made by reviewing the documentation provided to the AAA by the parties, including, but not limited to, the

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Eviston & Bales, *supra* note 1, at 909.

<sup>44</sup> *Consumer Arbitration Costs*, *supra* note 34.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Commercial Arbitration Rules*, AMERICAN ARBITRATION ASS'N, (rules effective June 1, 2009), [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Employment Arbitration Rules*, *supra* note 34.

demand for arbitration, the parties' arbitration program or agreement, and any employment agreements or contracts between the parties.<sup>51</sup> Determining the type of agreement is necessary because the fee-schedule differs for each type.<sup>52</sup> Parties in any type of employment arbitration agreement could agree to a different cost allocation scheme than the default rules of the AAA.<sup>53</sup>

In an "employer promulgated plan," an employee's fees are limited. The employee pays only \$175 for the filing fee.<sup>54</sup> The employer bears most of the burden when it compels arbitration through company policy, and must pay the remainder of the filing fee, the arbitrator's fees, hearing fees, room rental fees, and any other expenses.<sup>55</sup>

If AAA classifies the dispute as a dispute arising from an individually negotiated employment agreement, the Commercial Fee Schedule applies.<sup>56</sup> The amount in controversy affects the amount of money that the filing party must pay.<sup>57</sup> Unlike in consumer arbitration, there is no "small claim" provision that caps the filing party's expenses for smaller claims.<sup>58</sup> In the employment setting, the filing party bears the administrative fees according to the fee schedule no matter how small the amount of actual damages being sought.<sup>59</sup> A party seeking actual damages of \$1 must pay \$975 in administrative expenses.<sup>60</sup> In a larger claim such as a Title VII claim where actual damages sought might amount to \$300,000, the filing party must pay \$6,100 in administrative expenses.<sup>61</sup> In addition to administrative expenses, if the arbitration agreement is an individually negotiated contract outside of the employment agreement, the parties must split all other associated costs, including arbitrator's fees, room rental and expenses.<sup>62</sup> Beyond just estimating the costs based on the fee schedule, one court cited to a Public Citizen Study that found the costs of arbitrating an \$80,000 claim could be as high as \$11,625.<sup>63</sup>

To summarize, determining the type of claim being arbitrated is critical to accurately anticipating costs. The system for determining the type of agreement is fairly subjective, and as a result, prospective litigants will assume the worst-case scenario before filing.<sup>64</sup> If a

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 42.

<sup>54</sup> *Id.* at 40.

<sup>55</sup> *Id.* at 41.

<sup>56</sup> *Id.* at 42.

<sup>57</sup> *Id.* at 44.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 45.

<sup>63</sup> *Morrison*, 317 F.3d at 669; *Eviston & Bales*, *supra* note 1, at 9.

<sup>64</sup> *Morrison*, 317 F.3d at 665.

prospective litigant faces the possibility of paying high arbitration costs, the litigant might not file the claim.

c. Fee Waivers and Other Means of Moving Costs

The AAA offers fee waiver for those who meet certain economic criteria.<sup>65</sup> A party may be considered for fee waiver if its annual gross income is below 200% of the federal poverty line.<sup>66</sup> The annual poverty line for a family of four in the lower 48 states is \$22,350, and \$10, 890 for a single person.<sup>67</sup> Despite the financial guideline, the AAA reserves the right to approve or deny any hardship requests it wishes.<sup>68</sup> Once a party has demonstrated its need for a waiver through affidavits and other evidence, the AAA may appoint a single pro bono arbitrator for a one-day hearing.<sup>69</sup>

2. Other Providers of Arbitration

In addition to the AAA, two other major providers of arbitration services are the National Arbitration Forum (“NAF”) and Judicial Arbitration and Mediation Services/Endispute (“JAMS”).<sup>70</sup> The fee procedures for the other arbitration providers are mostly comparable with the basic structure of the AAA’s fee schedule.<sup>71</sup> For example, the NAF requires the filing party to pay fees, although three fees are required instead of two.<sup>72</sup> For a filing party seeking \$300,000 in actual damages, the fees for the NAF arbitration are a \$500 filing fee, a \$500 commencement fee, and a \$1,000 administrative fee, for a total of \$2,000.<sup>73</sup> In addition to these fees, the party requesting the hearing pays the arbitrator’s fees.<sup>74</sup> NAF charges fees for other small items like discovery requests and written reports.<sup>75</sup> While NAF costs appear smaller than AAA on their face, a 2002 Public Citizen Study found that total costs with NAF greatly exceeded costs in comparison to AAA.<sup>76</sup>

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<sup>65</sup> *Consumer Arbitration Costs*, *supra* note 34.

<sup>66</sup> *Id.*

<sup>67</sup> 2011 HHS Poverty Guidelines, <http://aspe.hhs.gov/poverty/11poverty.shtml> [hereinafter *Poverty Guidelines*].

<sup>68</sup> *Consumer Arbitration Costs*, *supra* note 34.

<sup>69</sup> *Id.*

<sup>70</sup> Public Citizen, *Report on Costs of Arbitration* 40 (2002).

<sup>71</sup> *NAF Fee Schedule*, <http://www.adrforum.com/users/naf/resources/2008FeeSchedule-FinalPrint1.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Public Citizen, *Report on Costs of Arbitration* 42 (2002).

### 3. The Cost of Litigating a Case in Court

Traditional court-based litigation results in three primary costs: attorney's fees, litigation expenses, and forum costs.<sup>77</sup> This section examines each of the three primary costs in more detail and discusses their impact on parties to a claim.

A party entering into litigation usually pays some type of attorney's fees unless the party is litigating *pro se*. Attorney's fees are often costly, especially in cases where complex discovery is required, and contingency fee arrangements in such cases are common.<sup>78</sup> Of course, the key advantage of contingency fee arrangements is in eliminating "pay as you go" attorney fees, which allows for litigation with little, if any, continuous out-of-pocket expense.

Second, parties typically pay "litigation expense" fees. These fees usually include travel, expert witnesses, and other expenses associated with litigation.<sup>79</sup> There is no specific data showing whether litigation expenses are higher in court versus arbitration.<sup>80</sup> A party's attorney normally pays the up-front costs of litigation expenses until the case is resolved.<sup>81</sup>

The third cost to a party in a court dispute is the forum fees. The forum fee to get an action into federal court consists of only the filing fee.<sup>82</sup> For a party to file a claim in Federal court, the cost is \$350.<sup>83</sup> Unlike in arbitration conducted by the AAA, a court's fee schedule is not based on the amount in controversy, and there no cost difference exists between different types of claims.<sup>84</sup>

Forum fees are the primary cost difference between resolving claims in arbitration versus traditional litigation. For example, a party seeking \$300,000 in actual damages on a Title VII employment claim faces payment of \$6,100 in administrative expenses, in addition to half the arbitration fees, just to file and proceed through the arbitration forum.<sup>85</sup> Moreover, the party would still be responsible for attorney's fees and litigation expenses upon resolution of the claim.<sup>86</sup> Contrast this reality with the same party paying only \$350 to get into federal court plus whatever agreed-upon fee arrangement exists between party and

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<sup>77</sup> Eviston & Bales, *supra* note 1, at 912.

<sup>78</sup> Public Citizen, *Report on Costs of Arbitration* 4-5 (2002).

<sup>79</sup> *Id.*

<sup>80</sup> Christopher R. Drazohal, *Arbitration Costs & Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736 (2006).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See i.e. Fee Schedule*, <http://www.ohsd.uscourts.gov/feeschedule.htm>.

<sup>84</sup> *Id.*

<sup>85</sup> *Employment Arbitration Rules*, *supra* note 34.

<sup>86</sup> *Id.*



attorney.<sup>87</sup> This often-significant cost differential may be enough to deter a party from pursuing valid legal claims.<sup>88</sup>

C. *Judicial Treatment of Excessive Costs*

1. *Green Tree* and Invalidation of Arbitration Agreements Based on Cost

As noted previously, high costs for a party choosing or forced to resolve a dispute in arbitration might deter pursuit resolution of valid legal claims.<sup>89</sup> In the 2000 decision *Green Tree Financial Corp. v. Randolph*, the United State Supreme Court faced the question of whether prohibitive costs could invalidate an arbitration agreement.<sup>90</sup> Although *Green Tree* arose out of a consumer claim, its principles relating to arbitration agreements are broadly applicable.<sup>91</sup>

In *Green Tree*, Larketta Randolph financed a mobile home through Green Tree Financial Corporation.<sup>92</sup> The financing agreement contained an arbitration clause providing that “all disputes arising from, or relating to, the contract, whether arising under case law or statutory law, [must] be resolved [in] binding arbitration.”<sup>93</sup> The clause was silent regarding which party would bear the costs of arbitration.<sup>94</sup>

Randolph sued Green Tree in federal court alleging Green Tree violated the Truth in Lending Act (“TILA”)<sup>95</sup> by failing to disclose charges in Randolph’s loan.<sup>96</sup> Randolph also amended her claim to allege a violation of the Equal Credit Opportunity Act<sup>97</sup> because of the arbitration requirement on her statutory claim.<sup>98</sup> After Randolph filed suit, the district court granted a motion filed by Green Tree to compel arbitration.<sup>99</sup> Randolph appealed to the Court of Appeals for the Eleventh Circuit, which reversed the district court’s order to compel arbitration.<sup>100</sup> The Eleventh Circuit found issue with the agreement’s silence regarding which party would bear the costs of arbitration.<sup>101</sup> The court held that the

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<sup>87</sup> *Fee Schedule*, *supra* note 92.

<sup>88</sup> *Morrison*, 317 F.3d at 665.

<sup>89</sup> *Id.* at 664.

<sup>90</sup> *Green Tree Fin. Corp.*, 531 U.S. at 82.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 82-83.

<sup>94</sup> *Green Tree Fin. Corp.*, 531 U.S. at 84.

<sup>95</sup> 15 U.S.C. §§ 1601-93 (2012).

<sup>96</sup> *Green Tree Fin. Corp.*, 531 U.S. at 83.

<sup>97</sup> 15 U.S.C. §§ 1691-1691(f) (2012).

<sup>98</sup> *Green Tree Fin. Corp.*, 531 U.S. at 83.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 84.

<sup>101</sup> *Id.*

agreement was unenforceable because the risk of “steep” arbitration costs to Randolph interfered with her ability to effectively vindicate her statutory claims.<sup>102</sup> The Supreme Court then granted certiorari to review the case.<sup>103</sup>

At the Supreme Court, Randolph argued that she could not vindicate her statutory rights because she was highly likely to incur significant costs in arbitration.<sup>104</sup> Randolph reasoned that the agreement’s silence regarding costs created a significant risk that she would be obligated to pay a large sum of money.<sup>105</sup> The Court acknowledged that large arbitration costs might deter someone from vindicating their statutory rights, but the Court noted a lack of evidence to support the notion that Randolph would actually bear the costs if the case proceeded to arbitration.<sup>106</sup> The Court held that the mere risk of Randolph being saddled with the costs was too speculative to justify finding the arbitration agreement unenforceable.<sup>107</sup> The Court further held that invalidating the agreement on such grounds went against their own endorsed liberal policy favoring enforcement of arbitration agreements.<sup>108</sup> Additionally, the Court held that “where...a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs,” and that Randolph did not meet that burden.<sup>109</sup>

Although the Supreme Court did not invalidate the particular agreement in *Green Tree* based upon prohibitive costs,<sup>110</sup> the Court did leave open the possibility that other agreements could be invalidated based upon cost issues.<sup>111</sup> However, the Court did not provide direction on how detailed the showing of prohibitive expenses must be for a court to invalidate an agreement.<sup>112</sup> The lack of guidance in this area has led to varying approaches by lower courts,<sup>113</sup> and a need exists for the Supreme Court to adopt a consistent approach.

## 2. The *Per Se* Rule

Since *Green Tree*, one circuit still holds that arbitration agreements containing fee-splitting provisions requiring a plaintiff to pay any part of the arbitrator’s fee make the

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 90.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 91.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 92.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 90.

<sup>112</sup> *Id.* at 92.

<sup>113</sup> *Eviston & Bales, supra* note 1, at 915.

agreement *per se* unenforceable.<sup>114</sup> In *Circuit City Stores Inc. v. Adams*, Saint Clair Adams applied for a job at Circuit City and signed an arbitration agreement upon being hired.<sup>115</sup> The agreement required Adams to potentially pay half of the arbitrator's fees in the event of arbitration.<sup>116</sup> A dispute ensued, and Adams sued Circuit City alleging discrimination among other state claims.<sup>117</sup> When before the Court of Appeals for the Ninth Circuit, the court held that requiring an employee to pay even part of the arbitrator's fees makes an agreement unenforceable as a matter of law.<sup>118</sup> The court based its reasoning on the idea that a person should not be required to pay the fees or expenses of an arbitrator any more than a person is required to pay the salary of a judge hearing claims.<sup>119</sup> However, it is important to note that only the Ninth Circuit follows a *per se* rule.<sup>120</sup> Most other courts now follow the case-by-case rule discussed in the next section of this article.<sup>121</sup>

### 3. Case-by-Case Rule

Most courts evaluate the prohibitive costs of arbitration using a case-by-case analysis.<sup>122</sup> Although most courts agree that the case-by-case inquiry is the most appropriate, two variations of the case-by-case test have emerged.<sup>123</sup> One approach focuses on the financial situation of the specific party involved in the dispute, while the other focuses on the impact of cost provisions on similarly situated individuals, not just the particular party in the litigation.<sup>124</sup> The next section of this article explains the difference in approaches in more detail.

## III. CIRCUIT SPLIT

In *Green Tree*, the Supreme Court hinted at applying a case-by-case standard for invalidating an arbitration agreement based on prohibitive costs, but the Court never squarely adopted such a test.<sup>125</sup> However, most federal courts of appeal use a variation of the case-by-case test (with the exception of the Ninth Circuit). Even so, a circuit split exists

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<sup>114</sup> *Circuit City Stores, Inc. v. Adams*, 279 F.3d at 889, 892 (9th Cir. 2002).

<sup>115</sup> *Id.* at 891.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 892.

<sup>118</sup> *Id.* at 894.

<sup>119</sup> *Id.*

<sup>120</sup> *Eviston & Bales*, *supra* note 1, at 915.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Eviston & Bales*, *supra* note 1, at 917.

<sup>124</sup> *Id.* at 920.

<sup>125</sup> *Green Tree Fin. Corp.*, 531 U.S. at 92.

on to the proper application of the case-by-case rule.<sup>126</sup> This section explains the two predominant methods of applying the case-by-case analysis.

A. *Bradford's Individual Plaintiff Case-by-Case Analysis*

The Court of Appeals for the Fourth Circuit adopted its version of the case-by-case analysis in *Bradford v. Rockwell Semiconductor Systems Inc.*<sup>127</sup> More specifically, the court answered the question of whether arbitration agreements with cost-splitting provisions should be found invalid regardless of the circumstances of the case.<sup>128</sup>

John Bradford worked for Brooktree Corporation (“Brooktree”) in 1996 while Brooktree was in the process of being acquired by Rockwell Semiconductor Systems Inc. (“Rockwell”).<sup>129</sup> As a condition of employment, Bradford signed a “Mutual Agreement to Arbitrate Claims.”<sup>130</sup> The agreement included statutory claims.<sup>131</sup> The agreement also provided that the parties “share equally” the fees and costs of the arbitrator.<sup>132</sup> The stated purpose of the fee-splitting arrangement was “[t]o ensure that the Arbitrator is not biased in any way in favor of one party because that party is paying all or most of the ... costs.”<sup>133</sup>

The dispute arose when Rockwell discontinued Bradford’s employment.<sup>134</sup> Bradford believed his discharge was based on age discrimination and undertook two legal actions: first, a demand to arbitrate based on an alleged violation of an age discrimination statute,<sup>135</sup> and second, a lawsuit alleging discrimination.<sup>136</sup> The arbitrator ruled against Bradford’s demand to arbitrate.<sup>137</sup> Nearly simultaneously, the district court granted summary judgment against Bradford in the lawsuit.<sup>138</sup> In granting summary judgment, the court held that Bradford failed to show that the arbitration agreement’s cost-splitting provision made the agreement unenforceable because of the financial hardship it caused him.<sup>139</sup>

Bradford appealed the district court’s ruling to the Fourth Circuit, arguing on appeal that the fee-splitting provisions contained in the arbitration agreement made the agreement

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<sup>126</sup> See *Bradford*, 238 F.3d at 557; *Morrison*, 317 F.3d at 658.

<sup>127</sup> *Bradford*, 238 F.3d at 559.

<sup>128</sup> *Id.* at 554.

<sup>129</sup> *Id.* at 551.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 551-52.

<sup>137</sup> *Id.* at 551.

<sup>138</sup> *Id.* at 552.

<sup>139</sup> *Id.*

invalid as a matter of law.<sup>140</sup> Bradford maintained that provisions creating a risk of high cost to an employee could deter victims of discrimination from vindicating their legal rights effectively.<sup>141</sup> Bradford also argued that forcing employees to arbitrate their claims undermined the deterrent and remedial functions of the federal anti-discrimination statutes.<sup>142</sup> He further contended that employees who cannot afford the up-front cost of arbitration are unable to vindicate their statutory rights.<sup>143</sup> As a secondary argument, Bradford argued that he had shown enough personal hardship and financial deterrence that the agreement should not be enforced against him, even if the agreement was not *per se* unenforceable.<sup>144</sup>

The court rejected Bradford's position that arbitration agreements containing fee-splitting provisions were *per se* invalid, reasoning that the critical inquiry is whether the arbitration forum is an adequate and accessible substitute to litigation.<sup>145</sup> Thus, the court's chief concern focused on whether the individual party possesses an adequate ability to effectively vindicate statutory rights.<sup>146</sup> The court declined to hold agreements unenforceable as a matter of law because circumstances in each case are different with respect to each plaintiff's situation.<sup>147</sup>

After rejecting the *per se* rule, the court applied a case-by-case test to determine whether Bradford was, in fact, deterred from vindicating his statutory claims.<sup>148</sup> Applying its interpretation of *Green Tree*, the court held that each plaintiff holds the burden of proving that their claims are not suitable for arbitration.<sup>149</sup> The court looked at three issues to decide how the claimant properly meets the burden of proof. First, the court evaluates the individual claimant's ability to pay.<sup>150</sup> Second, the court analyzes the expected cost differential between arbitration and litigation, and whether it deters the bringing of claims.<sup>151</sup> Finally, the court decides if the difference in cost is so significant that it would deter parties from bringing claims.<sup>152</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Bradford*, 238 F.3d at 556.

<sup>146</sup> *Id.* at 557.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 557-58.

<sup>149</sup> *Id.* at 556.

<sup>150</sup> *Id.* at 558.

<sup>151</sup> *Id.* at 558.

<sup>152</sup> *Id.*

B. *Morrison's Group of Plaintiffs Case-by-Case Analysis*

In *Morrison v. Circuit City Stores, Inc.*, the Court of Appeals for the Sixth Circuit created a revised case-by-case analysis that evaluated the possible “chilling effect” of the cost-splitting provision on similarly-situated plaintiffs rather than just on the party actually involved in the dispute.<sup>153</sup> *Morrison* consolidated two cases involving terminated employees who sued their employers for discrimination. In both situations, the employers attempted to compel arbitration.<sup>154</sup> For the purposes of this section, since the two fact patterns in the consolidated case are largely similar, only the facts of the *Morrison* situation will be discussed.

Lillian Pebbles Morrison was a highly qualified candidate<sup>155</sup> applying for a managerial position at a Circuit City store in Cincinnati, Ohio.<sup>156</sup> During the application process, Morrison signed a “Dispute Resolution Agreement” that required arbitration for all disputes arising out of her employment with Circuit City.<sup>157</sup> The agreement included all state and federal statutory claims, tort claims, and contract claims.<sup>158</sup> Any claims proceeded under a company manual called the “Circuit City Dispute Resolution Rules and Procedures.”<sup>159</sup> The rules included a cost-splitting clause that required Morrison to pay a \$75 filing fee,<sup>160</sup> as well as half the costs of the arbitration unless the arbitrator used discretionary powers to require one party pay more.<sup>161</sup>

Circuit City hired Morrison in December of 1995 and fired her two years later.<sup>162</sup> After her termination, Morrison sued Circuit City alleging race and sex discrimination.<sup>163</sup> Circuit City removed the case to federal court and filed a motion to compel arbitration.<sup>164</sup> The district court granted Circuit City’s motion to compel, and Morrison appealed to the Sixth Circuit.<sup>165</sup>

On appeal, Morrison argued the cost-splitting provisions contained in the agreement denied her from being able to vindicate her statutory rights.<sup>166</sup> The court first addressed

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<sup>153</sup> *Morrison*, 317 F.3d at 663.

<sup>154</sup> *Id.* at 652.

<sup>155</sup> *Id.* at 654.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 655.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 656.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 657-58.

whether to apply a *per se* approach.<sup>167</sup> The court rejected the argument that cost-splitting provisions make an arbitration agreement *per se* invalid and interpreted *Green Tree* to require a case-by-case approach in determining whether an individual agreement's cost schemes interfered with a vindication of legal rights.<sup>168</sup>

The court next looked for guidance on how to apply a case-by-case test, and evaluated the Fourth Circuit's *Bradford* approach.<sup>169</sup> While acknowledging the appropriateness of the case-by-case analysis, the court identified two negative aspects of the Fourth Circuit's application.<sup>170</sup> First, the court reasoned that a plaintiff's ability to concretely estimate the projected costs of a dispute at the dispute's commencement is difficult.<sup>171</sup> Instead, the court considered the possibility of using a post-hoc judicial review of arbitration awards to protect the plaintiff from high costs.<sup>172</sup> However, the court ultimately rejected the idea of judicial review because of its narrowness, and because once a party undergoes arbitration, the party already assumes the risk of incurring the costs.<sup>173</sup> The problem for the claimant arises on the front end of the dispute when he or she is using cost as a factor in deciding whether or not to file the claim.<sup>174</sup> Reviewing costs after arbitration places the claimant in a "Catch-22," because once proceedings conclude, the claimant is already too far down the path of having to pay and cannot turn back.<sup>175</sup> The court also believed that the Fourth Circuit's *Bradford* analysis did not adequately protect the deterrent functions of federal anti-discrimination statutes.<sup>176</sup>

After evaluating the various standards for invalidating the agreements, the court adopted a "revised case-by-case approach."<sup>177</sup> The court held potential litigants needed an opportunity to show that potential costs of arbitration deterred the litigants and other similarly situated plaintiffs from vindicating their statutory rights if forced to arbitrate.<sup>178</sup> This approach most significantly differed from the *Bradford* approach by evaluating the "chilling effect" of enforcing the agreement upon similarly situated potential plaintiffs, rather than by evaluating only the individual plaintiff's situation.<sup>179</sup> The court preferred this approach because it better addressed protection of the deterrent functions of anti-

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<sup>167</sup> *Id.* at 658-59.

<sup>168</sup> *Id.* at 659.

<sup>169</sup> *Id.* at 660.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 661.

<sup>173</sup> *Id.* at 663.

<sup>174</sup> *Id.* at 662.

<sup>175</sup> *Id.* at 662-63.

<sup>176</sup> *Id.* at 660.

<sup>177</sup> *Id.* at 663.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

discrimination statutes by looking at the impact of arbitration agreements on the people the statute is designed to protect.<sup>180</sup>

Next, the court addressed how to decide whether deterrence from vindicating rights actually occurred as a result of the cost-splitting provisions in the arbitration agreement.<sup>181</sup> The court held that any court reviewing cost arrangements should look to “average or typical” arbitration costs and the difference between the cost of arbitration and the cost of litigation because the party will do the same.<sup>182</sup> In reviewing the costs, the court should also discount the possibility that the party may not be required to pay based on fee shifting or if a claim is successful on the merits.<sup>183</sup> The court’s analysis should focus on the “worst-case scenario” because most parties will err on the side of caution and not take the risk of incurring significant fees by filing a claim.<sup>184</sup>

The final issue in the *Morrison* case was severability.<sup>185</sup> Because the agreement contained a severability clause, the court followed state contract law in determining whether or not the cost-allocation clause could be severed from the agreement, and severed the cost-splitting scheme from the arbitration agreement.<sup>186</sup> In the case, arbitration had already occurred due to an outside agreement, and Morrison did not have to pay any costs, so the arbitration award was upheld.<sup>187</sup>

Ultimately, the court held Morrison met the burden in showing that the cost-splitting provisions would deter her and similarly situated plaintiffs from pursuing their claims in the arbitral forum.<sup>188</sup> During its analysis, the court evaluated what arbitration would cost each plaintiff and found the cost high enough to deter them and similarly situated plaintiffs from filing their claims.<sup>189</sup>

Thus, the *Morrison* court evaluated the impact of the cost-splitting provision on both the party involved and a class of similarly situated potential claimants, finding that although Morrison showed financial hardship, she was compelled to arbitrate due to a severability clause that allowed the agreement to be enforced without the cost-splitting provision.<sup>190</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 664.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 665.

<sup>185</sup> *Id.* at 674.

<sup>186</sup> *Id.* at 674-675.

<sup>187</sup> *Id.* at 675.

<sup>188</sup> *Id.* at 669.

<sup>189</sup> *Id.* at 670.

<sup>190</sup> *Id.*



#### IV. ANALYSIS

This section of the article first addresses the two negative aspects of the *Bradford* approach as that evaluates each individual plaintiff's situation separately, as identified by the Sixth Circuit. It then addresses how *Morrison's* "group of plaintiffs" approach provides solutions to those two issues. Finally, it argues that the *Morrison* approach is the best-reasoned way to apply the case-by-case analysis.

##### A. *The Two Problems With the Individualized-Plaintiff Approach*

The individualized-plaintiff approach in *Bradford* creates two primary problems. First, in the initial stages of proceedings, it is very difficult for a plaintiff to accurately project potential costs. Second, the individualized-plaintiff approach does not adequately protect the deterrent functions of anti-discrimination statutes. This section examines each of the two problems in detail.

##### 1. Plaintiff's Difficulty in Determining Concrete Costs

The first problem with the individualized-plaintiff approach is the difficulty for of accurately projecting arbitration costs at the outset of a claim. Some relatively concrete numbers seem necessary to pass the *Bradford* test.<sup>191</sup> The *Bradford* court required analysis of the plaintiff's expected cost of arbitration and the difference between the cost of arbitration and the cost of traditional litigation.<sup>192</sup> In cases where a party seeks to invalidate an arbitration agreement because of prohibitive costs, the party bears the burden to demonstrate why the costs warrant invalidation of the agreement.<sup>193</sup> A party will have a difficulty meeting its burden of proof under the *Bradford* analysis because at the outset of proceedings, it may be impossible to obtain a good grasp of what the ultimate costs might be.

Cost ambiguity in arbitration agreements makes it very difficult to apply the individualized-plaintiff analysis in *Bradford*. *Green Tree's* holding that silence on costs was not enough to show the risk of incurring prohibitive costs set the stage for plaintiffs experiencing difficulty in proving prohibitive costs.<sup>194</sup> For example, consider an arbitration agreement that allows for different arbitration providers, contains ambiguous language as to how many arbitrators would hear the case, and contains ambiguity involving the possibility of shifting of attorney's fees. A party in such a situation would experience significant difficulty calculating a concrete projected cost in order to meet the burden under the

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<sup>191</sup> *Bradford*, 238 F.3d at 556.

<sup>192</sup> *Id.*

<sup>193</sup> *Green Tree Fin. Corp.*, 531 U.S. at 92.

<sup>194</sup> *Id.*

individualized-plaintiff approach. In this case, great potential exists for a party to end up with a very high cost burden, and the party proving what the real cost risk might be is a speculative exercise at best. Most people faced with this decision would likely err on the side of caution and not pursue any claim.<sup>195</sup> Even in less ambiguous agreements, a party may still experience difficulty in calculating potential costs because at the beginning of proceedings (and prior to discovery), a party may not know the size or complexity of the issue at hand. Without such information, a claimant cannot produce good estimates of potential costs.

## 2. The Individualized-Plaintiff Approach Fails to Protect the Deterrent Function of Anti-Discrimination Statutes

By potentially allowing deterrence of a large number of plaintiffs, the individualized-plaintiff approach also fails to protect the deterrent function of anti-discrimination statutes.<sup>196</sup> An agreement that deters a large group of potential litigants should be held unenforceable.<sup>197</sup> Based on this view, if a court merely looks at an individual plaintiff's financial situation instead of the possible "chilling effect" any given type of arbitration agreement might exercise over a larger group of potential litigants, the court's analysis would not protect an anti-discrimination statute's deterrent function.

Disputes arising out of statutory claims may go through arbitration as long as arbitration allows a plaintiff to effectively vindicate their statutory rights.<sup>198</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that anti-discrimination statutes serve two purposes: remediation and deterrence.<sup>199</sup> The remedial function of anti-discrimination statutes serves to make the plaintiff whole from injuries suffered as a result of a violation.<sup>200</sup> Additionally, the deterrent function serves to protect a much larger group of potential plaintiffs by "deter[ing] conduct which has been identified as contrary to public policy and harmful to society as a whole."<sup>201</sup>

Even so, the issue of critical importance that *Bradford's* individual-plaintiff test fails to address is that if a court's analysis of an arbitration agreement is based only on the situation of the plaintiff involved in the litigation, it may miss the fact that a cost-splitting provision interferes with the deterrent function for the rest of the group that an anti-discrimination statute is designed to protect.<sup>202</sup> Although one plaintiff may be able to absorb the costs and not be deterred from filing a claim, other plaintiffs protected by the statute

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<sup>195</sup> *Morrison*, 317 F.3d at 665.

<sup>196</sup> *Id.* at 661.

<sup>197</sup> *Id.*

<sup>198</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

<sup>199</sup> *Id.*

<sup>200</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1999).

<sup>201</sup> *Id.* at 264.

<sup>202</sup> *Morrison*, 317 F.3d at 663.

may not be able to afford to do the same. If only the single plaintiff's situation is assessed, the larger impact of the cost-provision and the potential chilling effect it may have on litigation may never be known.

B. *Post Hoc Judicial Review as an Alternative Approach*

Several courts have hinted at the attractiveness of using post hoc judicial review to guarantee the adequacy of the arbitral forum.<sup>203</sup> Those courts reason that if the issue is whether the costs of arbitration make the arbitral forum too expensive, then determining the actual costs after arbitration is complete would be far easier than forcing plaintiffs and reviewing courts to “speculate” beforehand about potential costs.<sup>204</sup>

Although judicial review may seem attractive, there are two primary arguments against it. First, a party faces a nearly impossible task in showing that arbitration costs actually deterred them after the claim is filed and arbitrated.<sup>205</sup> If a party proceeds through arbitration and receives a bill, it seems that a court would likely conclude that the party was not deterred since it actually pursued the claim. The *Morrison* court reasoned that deterrence occurs early in the process:<sup>206</sup> “If we [are not able to resolve] the ultimate cost-splitting question until the end, we [will] know who has lost from the beginning...[and that is the plaintiffs who were] deterred from initiating their claims at all.”<sup>207</sup>

Second, most parties faced with high up-front costs will err on the side of caution and not file a claim.<sup>208</sup> Parties considering bringing claims will look at the worst-case scenario for potential cost.<sup>209</sup> If a party is forced to arbitrate first, pay later, and then have judicial review, the party bears the risk of arbitrating, paying a potentially significant bill, and then potentially losing in judicial review. For this reason, the party faces a very difficult position and will likely abstain from filing a claim.<sup>210</sup> Because of this “Catch-22” situation,

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<sup>203</sup> See, e.g., *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999) (“[I]f unreasonable fees were to be imposed ... the argument ... could be presented by the employee to the reviewing court.”); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir. 1998) (“[W]e are convinced that judicial review of arbitration awards is sufficient to protect statutory rights.”); *Boyd v. Town of Hayneville*, 144 F. Supp. 2d 1272, 1280 (M.D.Ala. 2001) (noting that “judicial review” of any arbitration award is available in rejecting argument that potential costs of arbitration were excessive); *Arakawa v. Japan Network Grp.*, 56 F. Supp. 2d 349, 355 (S.D.N.Y. 1999) (maintaining jurisdiction “over any subsequent petition with respect to the award”).

<sup>204</sup> *Morrison*, 317 F.2d at 661.

<sup>205</sup> *Id.* at 662.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 665.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

after-the-fact judicial review of arbitration costs does not adequately protect the deterrent function of anti-discrimination statutes.

C. *The Morrison Group Approach's Benefits*

This section discusses two main reasons why the *Morrison* approach is ideal for determining if an arbitration agreement should be invalidated due to high prohibitive costs. It then discusses the primary counter argument against the *Morrison* group-of-plaintiffs approach.

First, the *Morrison* approach is the most effective means to protect the deterrent functions of anti-discrimination statutes. As opposed to *Bradford's* individualized approach, the *Morrison* approach looks at the “chilling effect” on a group of potential plaintiffs.<sup>211</sup> The “group-of-plaintiffs” approach should be preferred over the “individual-plaintiff approach” because it eliminates the possibility that one plaintiff's personal situation can effectively produce precedential value for an entire class of claims. Just because one plaintiff might not be deterred does not mean that a similar arbitration agreement would not deter other plaintiffs. The point of ensuring the deterrent function of the statute is not undermined has nothing to do with a particular plaintiff's situation, but rather with the impact of the cost-splitting provision in the aggregate.

The second reason *Morrison* should enjoy preference is because it places less importance on the individual employee's financial situation and instead looks at the financial situation of the group of employees as a whole. The *Morrison* inquiry focuses on the individual plaintiff's personal situation only as representative of the class.<sup>212</sup> *Morrison* takes into account factors such as job description and socioeconomic background to identify a class of “similarly situated [plaintiffs].”<sup>213</sup> This is more effective because it prevents the possibility “outliers” such as a wealthy plaintiff existing among a group of less wealthy plaintiffs. If the inquiry is on an individual's situation, and the individual happens to be very wealthy, an agreement might be found valid when in the cases of many other identically situated employees, the exact same agreement would deter pursuit of claims.

However, the *Morrison* approach might be arguably contrary to some of the language in *Green Tree*. The *Green Tree* Court held that the risk that of the claimant being saddled with prohibitive costs was too speculative to justify invalidating the agreement.<sup>214</sup> This language might arguably suggest that the Court made, or would have made, its assessment based on Randolph's particular situation. If this reading of *Green Tree* is accurate, the *Morrison*

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<sup>211</sup> *Id.* at 663.

<sup>212</sup> *Id.*

<sup>213</sup> *Morrison*, 317 F.3d at 663.

<sup>214</sup> *Green Tree Fin. Corp.*, 531 U.S. at 91.

approach could be inconsistent with *Green Tree*. On the other hand, *Green Tree* also contains language indicating that the Court evaluated how “claimants” fare under the *Green Tree* arbitration clause.<sup>215</sup> This language might suggest that the Court at least evaluated the impact to a group of potential litigants.

## V. CONCLUSION

Arbitration agreements are becoming increasingly common across the United States as an alternative to resolving disputes through traditional litigation. However, some studies suggest that “forum costs” of arbitration are significantly higher than resolving the same claim in court.<sup>216</sup> When required to accept arbitration agreements with very little negotiating power, it is critical that plaintiffs enjoy some kind of protection from the possibility of incurring very high arbitration fees, which may prevent them accesses to a proper forum for exercising their legal rights.

In *Green Tree*, the Supreme Court suggested that an arbitration agreement may be invalidated because of high prohibitive costs. In determining when such invalidation is appropriate, the majority of lower courts use a case-by-case approach to figure out when cost is prohibitive enough to cause an arbitration agreement to be unenforceable.<sup>217</sup> Currently, the circuit courts of appeal are split as to whether the proper analysis must assess the financial situation of a particular plaintiff involved in the dispute or the financial situation(s) of a broader group of similarly situated litigants.<sup>218</sup>

This article argues that courts should follow the analytical approach modeled by the Court of Appeals for the Sixth Circuit in *Morrison* that assesses the potentially deterrent nature of arbitration costs based on how it might impact a larger group of similarly situated potential plaintiffs. Assessing prohibitive costs in this manner best protects the deterrent functions of anti-discrimination statutes. Furthermore, using this approach provides the most protection to plaintiffs who could potentially be deterred from filing their claims if the arbitration agreement is enforced against them.

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<sup>215</sup> *Id.* at 90-91.

<sup>216</sup> Eviston & Bales, *supra* note 1, at 903.

<sup>217</sup> *Id.* at 915.

<sup>218</sup> See *Bradford*, 238 F.3d at 557; *Morrison*, 317 F.3d at 658.