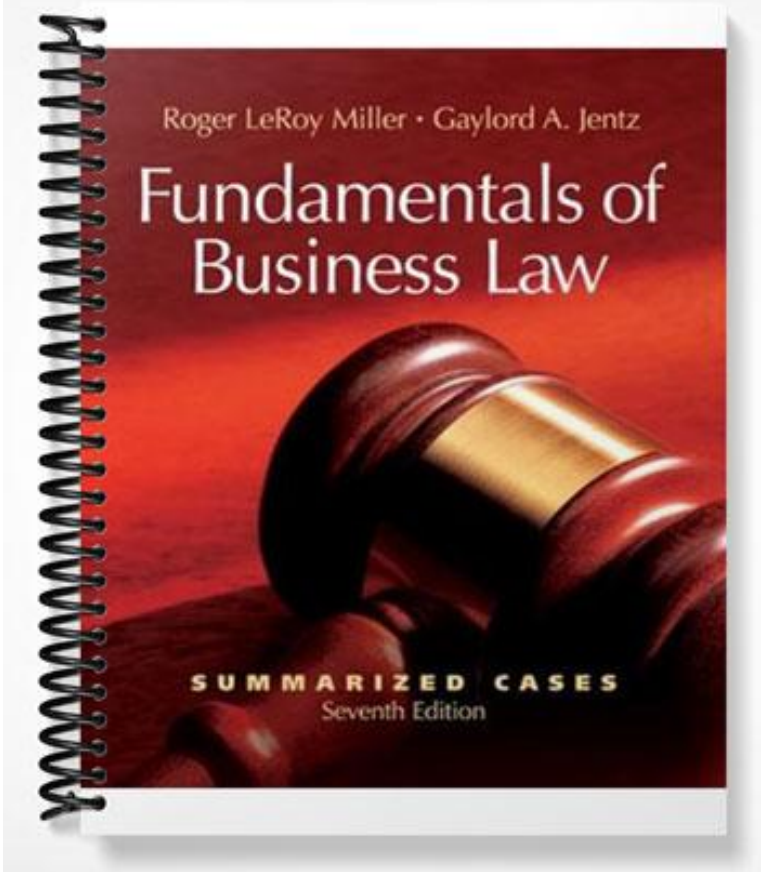
SOLUTIONS MANUAL



Chapter 2

Traditional and Online Dispute Resolution

Case 2.1

35 Cal.4th 1054, 112 P.3d 28, 29 Cal.Rptr.3d 33, 05 Cal. Daily Op. Serv. 4765, 2005 Daily Journal D.A.R. 6517
Supreme Court of California
Frank SNOWNEY et al., Plaintiffs and Appellants,
v.
HARRAH'S ENTERTAINMENT, INC., et al., Defendants and Respondents.
No. S124286.
June 6, 2005.
, J.
In this case, a California resident filed a class action against a group of Nevada hotels for failing to provide notice of an energy surcharge imposed on hotel guests. Although these hotels conduct no business and have no bank accounts or employees in California, they do advertise heavily in California and obtain a significant percentage of their business from California residents. These advertising activities include billboards located in California, print ads in California newspapers, and ads aired on California radio and television stations. These hotels also maintain an Internet Web site and

toll-free phone number where visitors or callers may obtain room quotes and make reservations. We now consider whether, based on these activities, California courts may exercise personal jurisdiction over these hotels, and conclude that they may.

I.

Defendants Harrah's Las Vegas, Inc., Harrah's Laughlin, Inc., Harrah's Operating Company, Inc. (HOC), Rio Properties, Inc., and Harveys Tahoe Management Company, Inc. (collectively defendants) own and operate hotels in Nevada. Plaintiff Frank Snowney is a California resident. In 2001, plaintiff reserved a room by phone from his California residence at one of the hotels owned and operated by defendants. To make the reservation, plaintiff gave the reservation agent his credit card number. At the time plaintiff made the reservation, the agent told him that the room would cost $50 per night plus the room tax. When plaintiff paid his bill at checkout, however, the bill included a $3 energy surcharge.

Plaintiff filed the instant class action against defendants and other entities on behalf of himself and other "persons who were charged an energy surcharge as an overnight hotel guest in one of the defendant's hotels, yet were never given notice that there was an energy surcharge and/or what such charge would be." In the complaint, plaintiff alleged that defendants charged him and other guests an energy surcharge during their stays at hotels owned and operated by defendants without providing notice of these charges during the reservation or check-in process. He further alleged that, in doing so, defendants charged more than the advertised or quoted price. His complaint alleged causes of action for: (1) fraudulent and deceptive business practices in violation of et seq.; (2) breach of contract; (3) unjust enrichment; and (4) violations of et seq.

> These other entities are Harrah's Entertainment, Inc. (HEI), Rio Hotel & Casino, Inc., Harveys Casino Resorts, Harrah's Reno Holding Company, Inc., Rio Vegas Hotel & Casino, Inc., Harrah's Management Company, and Harveys P.C., Inc. The Court of Appeal affirmed the trial court's dismissal as to these defendants, and Snowney did not petition for review of, and does not appear to challenge, this portion of the court's ruling.

In response, defendants and other entities filed a motion to quash the summons for lack of personal jurisdiction. In support of the motion, defendants submitted a declaration from Brad L. Kerby, the corporate secretary of HEI. Kerby stated that defendants were incorporated in either Nevada or Delaware and maintained their principal place of business in Nevada. According to Kerby, defendants conducted no business in California and had no bank accounts or employees in California. Kerby, however, acknowledged that HOC was licensed to do business in California and that Harrah's Marketing Services Corporation (HMSC), a wholly owned subsidiary of HOC, operated offices in California to "assist customers who contact those offices" and "attempt[ed] to attract a limited number of high-end gaming patrons to Harrah's properties."

In opposition, plaintiff submitted several declarations, a transcript of Kerby's deposition, and various exhibits. This evidence established that defendants: (1) advertised extensively to California residents through billboards in California, California newspapers, and California radio and television stations; (2) had a joint marketing agreement with National Airlines, which served Los Angeles and San Francisco, and advertised in the airline's print media; (3) maintained an interactive Web site that accepted reservations from California residents, provided driving directions to their hotels from California, and touted the proximity of their hotels to California; (4) accepted reservations from California residents through their Internet Web site and a toll-free phone number listed on the site and in their advertisements; (5) obtained a significant percentage of their patrons from California through reservations made through the toll-free number and Web site; and (6) regularly sent mailings to those California residents among the four to six million people enrolled in their "Total Rewards" program. Plaintiff's evidence also confirmed that HSMC maintained several offices in California to handle reservations and market defendants' hotels.

The trial court granted the motion to quash for lack of personal jurisdiction. Specifically, the court found that plaintiff had failed to establish either general or specific jurisdiction. Plaintiff appealed.

The Court of Appeal reversed as to defendants, concluding that defendants had "sufficient contacts with California to justify the exercise of specific jurisdiction." Specifically, the court held that: (1) "by soliciting and receiving the patronage of California residents" through their advertising activities, defendants "have purposefully directed their activities at California residents, have purposefully derived benefit from their contacts with California, and have established a substantial connection with this state"; (2) defendants' California contacts "are substantially connected to causes of action that challenge an alleged mandatory surcharge imposed on all hotel guests"; and (3) the exercise of jurisdiction over defendants would be fair and reasonable. In doing so, the court declined to follow disapproved in part in

We granted review to determine whether the exercise of jurisdiction over defendants is proper.

II.

"California courts may exercise personal jurisdiction on any basis consistent with the Constitution of California and the United States. (The exercise of jurisdiction over a nonresident defendant comports with these Constitutions 'if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate " 'traditional notions of fair play and substantial justice.' " ' ([quoting ().)")

"The concept of minimum contacts ... requires states to observe certain territorial limits on their sovereignty. It 'ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.' " quoting) To do so, the minimum contacts test asks "whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State." quoting

The test "is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."
Under the minimum contacts test, "[p]ersonal jurisdiction may be either general or specific." Because plaintiff does not claim general jurisdiction, we only consider whether specific jurisdiction exists here.
"When determining whether specific jurisdiction exists, courts consider the ' "relationship among the defendant, the forum, and the litigation." ' quoting A court may exercise specific jurisdiction over a nonresident defendant only if: (1) 'the defendant has purposefully availed himself or herself of forum benefits' (2) 'the "controversy is related to or 'arises out of' [the] defendant's contacts with the forum" ' quoting and (3) ' "the assertion of personal jurisdiction would comport with 'fair play and substantial justice' " ' quoting [ ].)"
"When a defendant moves to quash service of process" for lack of specific jurisdiction, "the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction." "If the plaintiff meets this initial burden, then the defendant has the burden of demonstrating 'that the exercise of jurisdiction would be unreasonable.' " quoting Where, as here, " 'no conflict in the evidence exists ... the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record.' " Applying these standards to the facts of this case, we conclude that California may exercise specific jurisdiction over defendants.
A.
We first determine whether defendants purposefully availed themselves of the privilege of doing business in California. Based on defendants' purposeful and successful solicitation of business from California residents, we find that plaintiff has established purposeful availment.
" 'The purposeful availment inquiry ... focuses on the defendant's intentionality. [Citation.] This prong is only satisfied when the defendant purposefully and voluntarily directs [its] activities toward the forum so that [it] should expect, by virtue of the benefit [it] receives, to be subject to the court's jurisdiction based on' [its] contacts with the forum." quoting Thus, purposeful availment occurs where a nonresident defendant " 'purposefully direct[s]' [its] activities at residents of the forum" " 'purposefully derive[s] benefit' from" its activities in the forum "create[s] a 'substantial connection' with the forum" " 'deliberately' has engaged in significant activities within" the forum or "has created 'continuing obligations' between [itself] and residents of the forum" By limiting the scope of a forum's jurisdiction in this manner, the " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts...." Instead, the defendant will only be subject to personal jurisdiction if " 'it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state.' " quoting
Here, defendants' contacts with California are more than sufficient to establish purposeful availment. We begin by examining defendants' Internet contacts. To determine whether a Web site is sufficient to establish purposeful availment, we first look to the sliding scale analysis described in (See "At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. [Citation.] At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. [Citation.] The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."
Defendants' Web site, which quotes room rates to visitors and permits visitors to make reservations at their hotels, is interactive and, at a minimum, falls within the middle ground of the sliding scale. In determining whether a site falling within this middle ground is sufficient to establish purposeful availment, however, courts have been less than consistent.

> Snowney contends the site falls within the first category and establishes that defendants conduct business in California. Although we question this contention (see [holding that a hotel's Web site permitting visitors to make online reservations falls in the middle of the continuum]; [holding that a Web site that permits visitors to purchase the defendants' merchandise falls in the middle of the continuum]), we need not resolve it here because defendants' California contacts clearly establish purposeful availment.

"Some courts have held that sufficient minimum contacts are established, and the defendant is 'doing business' over the Internet where the defendant's website is capable of accepting and does accept purchase orders from residents of the forum state." Other courts have suggested that " 'something more' " is necessary, such as " 'deliberate action' within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state." see also ["there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts"].) Other courts "have criticized emphasis on website interactivity" and focus instead on "traditional due process principles" asking whether the site expressly targets

"residents of the forum state" According to these courts, "Website interactivity is important only insofar as it reflects commercial activity, and then only insofar as that commercial activity demonstrates purposeful targeting of residents of the forum state or purposeful availment of the benefits or privileges of the forum state." see also ["A defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with residents of the state"].)

We need not, however, decide on a particular approach here because defendants' Web site, by any standard, establishes purposeful availment. By touting the proximity of their hotels to California and providing driving directions from California to their hotels, defendants' site specifically targeted residents of California. (See Defendants also concede that many of their patrons come from California and that some of these patrons undoubtedly made reservations using their Web site. As such, defendants have purposefully derived a benefit from their Internet activities in California and have established a substantial connection with California through their Web site In doing so, defendants have "purposefully availed [themselves] of the privilege of conducting business in" California "via the Internet." [holding that a Web site that specifically targeted the forum state and its residents established purposeful availment].)

Defendants' attempt to analogize their Web site to the site in is unavailing. In the federal district court declined to exercise personal jurisdiction over the defendant based on his Web site. But, unlike the Web site at issue here, the site in was wholly passive--not interactive--and did not specifically target forum residents. Moreover, the defendant in unlike defendants here, conducted no business with forum residents through his Web site.

In any event, even assuming that defendants' Web site, by itself, is not sufficient to establish purposeful availment, the site in conjunction with defendants' other contacts with California undoubtedly is. Aside from their Web site specifically targeting California residents, defendants advertised extensively in California through billboards, newspapers, and radio and television stations located in California. They also listed a toll-free phone number for making reservations at their hotels in their California advertisements and on their Web site, and many of their California patrons used this number to make reservations. Finally, defendants regularly sent mailings advertising their hotels to selected California residents. As a result of these promotional activities, defendants obtained a significant percentage of their patrons from California. Thus, defendants purposefully and successfully solicited business from California residents. In doing so, defendants necessarily availed themselves of the benefits of doing business in California and could reasonably expect to be subject to the jurisdiction of courts in California.

> (See [holding that advertising in local media, through brochures sent to travel agents in the forum, and through promotional seminars in the forum established purposeful availment], revd. on other grounds in [holding that the defendant "conducted 'purposeful, affirmative activity within the' " forum "by purposefully directing advertisements for its ... stores at a potential customer base in the" forum]; [finding purposeful availment because "the defendant engaged in widespread advertising in" the forum "that particularly targeted" forum "residents"].)

In reaching this conclusion, we reject defendants' contention that no purposeful availment exists here because the subject matter of their contracts with California residents resides exclusively in Nevada. Unlike the cases cited by defendants, which held that a few contracts with California residents could not, by themselves, establish purposeful availment, our finding of purposeful availment is not premised solely on defendants' contracts with forum residents. Rather, our finding is premised on defendants' purposeful and successful solicitation of business within California. Indeed, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." Where, as here, "[t]he actions taken by" defendants "to solicit business within" California "were clearly purposefully directed toward residents of" California, "it is irrelevant where" their hotels are located. (cf. [finding purposeful availment even though the accident giving rise to the action did not occur in the forum state].)

> (See [finding no purposeful availment based solely on the defendants' execution of "sales, security and escrow agreements" with a forum resident]; [finding no purposeful availment based solely on the defendant's contractual relations with a forum resident]; [finding no purposeful availment based solely on the defendant's contract with a forum resident].)

We also find inapposite and Unlike defendants here, neither of the defendants in and engaged in extensive advertising that specifically targeted California residents and resulted in numerous transactions with California residents. (See [refusing to exercise jurisdiction over a hotel based solely on the activities of an independent travel agency that sold accommodations at the hotel to a California resident]; [refusing to exercise jurisdiction based solely on the defendant's purchase of products from a California distributor and the defendant's proximity to California].)

Finally, we do not find persuasive the purposeful availment analysis in In the plaintiffs brought a negligence action against the defendant, a Nevada hotel, after the theft of their property during their stay at the hotel. In refusing to exercise jurisdiction over the defendant, the Court of Appeal spent the bulk of its opinion finding that no general jurisdiction existed and that the controversy did not relate to or arise out of the defendant's contacts with California. Nonetheless, the court also concluded that the defendant did not avail "itself of any benefits afforded by the State of California" or seek the " 'protection of its laws' " based on the defendant's maintenance of a toll-free phone number for reservations and "advertising

in California newspapers, a service paid for and rendered without any involvement of the forum state's laws or public facilities"

> In we rejected the proximate cause test applied by in determining whether the plaintiff's claims related to or arose out of the defendant's contacts with the forum. We apparently left undisturbed its analysis of purposeful availment.

By focusing solely on the defendant's involvement with California's laws or public facilities, however, applied an overly narrow interpretation of the purposeful availment test. Purposeful availment may exist even though the defendant did not invoke the legal protections of the forum state. Indeed, purposeful availment exists whenever the defendant purposefully and voluntarily directs its activities toward the forum state in an effort to obtain a benefit from that state. (See *ante,* 29 Cal.Rptr.3d at pp. 38-39, 112 P.3d at pp. 32-33.) And, to the extent holds that advertising activities targeted at forum residents can never establish purposeful availment, we disapprove of it. In any event, defendants' promotional activities--which were far more extensive than the promotional activities at issue in --unequivocally establish that defendants purposefully and voluntarily directed their activities at California residents. Accordingly, we conclude that defendants purposefully availed themselves of the privilege of conducting business in California.

> Our finding of purposeful availment does not rely on the " 'economic reality' " test rejected in Rather, it relies on defendants' purposeful and successful solicitation of business within California--and not on the mere foreseeability that California residents will patronize businesses of a neighboring state.

B.

We now turn to the second prong of the test for specific jurisdiction (the relatedness requirement), and determine whether the controversy is related to or arises out of defendants' contacts with California. We find that it is.

In we carefully examined the relatedness requirement. After reviewing the relevant cases and the rationale behind the specific jurisdiction doctrine, we declined to apply a proximate cause test or a "but for" test Following a detailed discussion of the relevant law and policy considerations, we also rejected the "substantive relevance" test proposed by Professor Brilmayer. Instead, we adopted a substantial connection test and held that the relatedness requirement is satisfied if " there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim."

> The proximate cause test asks whether "the alleged injury was proximately caused by the contacts in the forum state."
>
> The "but for" test asks "whether the injury would have occurred 'but for' the forum contacts."
>
> The substantive relevance test asks whether "conduct constituting a forum contact that took place *in* the forum normally would be pleaded under state substantive law applicable to the plaintiff's cause of action."

In adopting this test, we observed that "for the purpose of establishing jurisdiction the intensity of forum contacts and the connection of the claim to those contacts are inversely related." "[T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Thus, "[a] claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction." Moreover, the "forum contacts need not be directed at the plaintiff in order to warrant the exercise of specific jurisdiction." Indeed, " ' "[o]nly when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that [contact]." ' " quoting

Amicus curiae Chamber of Commerce of the United States urges us to reconsider and, instead, adopt the substantive relevance test. It, however, presents nothing new. Indeed, in we carefully considered and rejected the very reasons cited by amicus curiae for adopting the substantive relevance test. We therefore continue to apply the substantial connection test established in

Applying this test, we find that plaintiff's claims have a substantial connection with defendants' contacts with California. Plaintiff's causes of action for unfair competition, breach of contract, unjust enrichment, and false advertising allege that defendants failed to provide notice of an energy surcharge during the reservation process and in their advertising. Thus, plaintiff's causes of action are premised on alleged omissions during defendants' consummation of transactions with California residents and in their California advertisements. Because the harm alleged by plaintiff relates directly to the content of defendants' promotional activities in California, an inherent relationship between plaintiff's claims and defendants' contacts with California exists. Given "the intensity of" defendants' activities in California, we therefore have little difficulty in finding a substantial connection between the two. The fact that many of defendants' contacts with California do not directly arise out of plaintiff's transaction with defendants is immaterial. (See [refusing to limit the relevant contacts to "those contacts directly arising out" of defendant's "deal with" the plaintiff].) By purposefully and successfully soliciting the business of California residents, defendants could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident. (See

Cases holding that claims for injuries suffered during a plaintiff's stay at a hotel or resort are not related to and do not arise from that hotel's or resort's advertising in the forum state are inapposite. As an initial matter, most, if not all, of these cases did not apply the substantial connection test established in In any event, even if we agree with the holdings in these cases, they are distinguishable. Unlike the injuries suffered by the plaintiffs in those cases, the injury allegedly suffered by

plaintiff in this case relates *directly* to the content of defendants' advertising in California. As such, the connection between plaintiff's claims and defendants' contacts is far closer than the connection between the claims and contacts alleged in the cases cited above. Indeed, some courts that have refused to exercise jurisdiction where a plaintiff suffered an injury during a stay at a hotel or resort acknowledge that they would have reached a different conclusion if that plaintiff had alleged false advertising or fraud. (See [suggesting that claims of false advertising or fraudulent misrepresentation would meet the relatedness requirement]; ["A foreign corporation that advertises in Michigan can reasonably expect to be called to defend suits in Michigan charging unlawful advertising or alleging that the advertising, itself, directly injured a Michigan resident"].) Accordingly, we conclude that plaintiff has met the relatedness requirement.

(See, e.g., [holding that a tort claim arising out of a burglary of the plaintiff's hotel room does not relate to or arise out of that hotel's advertising in the forum]; [holding that a claim arising out of the plaintiff's slip and fall at a resort did not relate to or arise out of that resort's advertising in the forum]; [holding that a claim arising out of the plaintiff's slip and fall at a hotel did not relate to or arise out of that hotel's advertising in the forum]; [same]; revd. on reconsideration on another ground in [same]; [same]; [same]; [holding that a claim arising out of the plaintiff's slip and fall at a ski resort did not relate to or arise out of the resort's advertising in the forum].)

Indeed, several courts have reached the opposite conclusion-- that injuries suffered during a stay at a hotel or resort *are* related to and *do* arise from that hotel's or resort's advertising in the forum state. (See, e.g.,

C.

Having concluded that plaintiff has satisfied the purposeful availment and relatedness requirements, we now determine "whether the assertion of specific jurisdiction is fair." In making this determination, the "court 'must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." ' " quoting "Where[, as here,] a defendant who purposefully has directed [its] activities at forum residents seeks to defeat jurisdiction, [it] must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." In this case, defendants do not contend the exercise of jurisdiction would be unfair or unreasonable, and we see no reason to conclude otherwise. Therefore, we hold that defendants are subject to specific jurisdiction in California.

III.

Accordingly, we affirm the judgment of the Court of Appeal.

WE CONCUR: , C.J., , , , , and , JJ.

Case 2.2

356 F.3d 188
United States Court of Appeals,
Second Circuit.

Rohit PHANSALKAR, Plaintiff-Consolidated-Defendant-Appellee-Cross-Appellant,

v.

ANDERSEN, WEINROTH & CO., L.P., G. Chris Andersen and Stephen D. Weinroth Defendants-Consolid ated-Plaintiffs-Appellants-Cross-Appellees, Aw & Col, Inc., Defendant-Appellant-Cross-Appellee.

Docket No. 02-7928(L).
Argued: April 9, 2003.
Decided: Sept. 16, 2003.
Motion Decided: Jan. 7, 2004.
Before: JACOBS, STRAUB, Circuit Judges, and WOOD, Judge.

The Honorable Kimba Wood of the United States District Court for the Southern District of New York, sitting by

designation.

PER CURIAM:

Appellants Andersen, Weinroth & Co., L.P., G. Chris Andersen, Stephen D. Weinroth, and AW & Co., Inc. ("the AW parties") have filed a bill of costs under (""), that includes expenditures associated with creating electronic copies of appellate briefs and appendices. Appellee Rohit Phansalkar ("Phansalkar") objects to this portion of the AW parties' Bill of Costs pursuant to . In accordance with the principles of and the rules of this Court, we disallow that portion of the AW parties' bill of costs.

I

On September 16, 2003, this Court reversed a judgment of approximately $4.4 million entered by the U.S. District Court for the Southern District of New York in favor of Phansalkar. . On September 29, 2003 the AW parties submitted an itemized bill of costs. As appellants who have won a reversal, they are clearly entitled to costs for the docketing of the appeal and for printing the "necessary" copies of the regular and special appendices of appellants' main brief and reply brief, an amount totaling $16,112. That entitlement is supported by , by this Court's Local Instructions for Bill of Costs, and by this Court's Model Form for an Itemized and Verified Bill of Costs. In addition, the AW parties seek $16,065 in costs associated with preparing and submitting companion appendices and briefs in hyperlinked CD-ROM format.

The AW parties and Phansalkar vigorously dispute whether an agreement was ever reached over how these CD-ROM costs would be allocated between them following this appeal. There is no dispute, however, that if such an agreement was reached, it was never committed to writing either in the scheduling order or in correspondence. The issue raised by the parties, which this Court has not yet decided, is whether and the rules of this Court contemplate taxation of the costs of preparing such electronic submissions.

II

Under ,

> [a] court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

This Court was among the first circuits to promulgate such a local rule, by administrative order on October 17, 1997. That order was supplemented on January 30, 1998 with Administrative Order 98-2 (In the Matter of Companion Electronic Briefs and Appendices), which states that the submission of electronic format briefs is "allowed and encouraged" as long as "[a]ll parties have consented ... or a motion to file has been granted." Several other circuits have adopted local rules that permit or even require the filing of electronic briefs, usually on companion disks. *See e.g.* 1st Cir. R. 32; 5th Cir. R. 31.1; 7th Cir. R. 31(e); 8th Cir. R. 28A(d). The submission of an electronic version of a paper brief very likely entails small incremental costs.

CD-ROM submissions that hyperlink briefs to relevant sections of the appellate record are more versatile, more useful, and considerably more expensive. Our January 30, 1998 order allows and encourages the use of such "interactive CD-ROM" formats. The Federal Circuit also allows CD-ROM briefs to be filed with the prior consent of both the court and the opposing party. . To date, only the First Circuit appears to have adopted formally a local rule that applies to submission of hyperlinked CD-ROM briefs. *See* 1st Cir. R. 32.1 (allowing submission of CD-ROM's without the consent of other parties represented by counsel). Such submissions can assist judicial review and are welcomed, but they are not necessarily taxable as costs.

We have found no local rule or holding from another circuit that allocates CD-ROM costs. No guidance can be found in the relevant text of , which authorizes taxation of costs incurred to produce "necessary" copies of briefs, appendices, and portions of the record relevant to an appeal, , and a variety of other costs of appeal, such as filing fees, . In we explained that, in the absence of a specific textual reference in , an expense can be an "allowable cost of appeal" when it is "analogous" to one of the costs specifically authorized by . Citing this test, and our administrative orders encouraging the use of CD-ROM's, the AW parties argue that CD-ROM expenses are allowable costs under .

However, cited several other factors that are also important in determining if a cost is authorized by : whether the party seeking disallowance has clearly consented to the expense; whether a court has previously approved the expense; and whether the alternative arrangement costs less than the expense specifically authorized by the Rule. None of these factors assists the AW parties. In particular, it appears that a substantial portion of the costs were duplicative. *See* ("A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying [the Federal Rules of Appellate Procedure]."). Since the AW parties incurred costs both to produce hard copies of their appellate materials *and* to produce hyperlinked CD-ROM copies, suggests that the CD-ROM costs in this case were duplicative rather than an analog of hard copy production costs. Taxing the CD-ROM costs under such circumstances is inconsistent with our past applications of .

Finally, it is decisive that there is no written stipulation or understanding between the parties concerning the allocation of the incremental costs of this useful technology.

* * * * * *

For the reasons set forth above, the motion to disallow costs of $16,065 for CD-ROM preparation is hereby GRANTED.

Case 2.3

(Cite as: 532 U.S. 105, 121 S.Ct. 1302)
149 L.Ed.2d 234, 69 USLW 4195, 85 Fair Empl.Prac.Cas. (BNA) 266, 79 Empl. Prac. Dec. P 40,401, 143 Lab.Cas. P 10,939, 17 IER Cases 545, 1 Cal. Daily Op. Serv. 2250, 2001 Daily Journal D.A.R. 2849, 14 Fla. L. Weekly Fed. S 139, 2001 DJCAR 1466
Supreme Court of the United States
CIRCUIT CITY STORES, INC., Petitioner,
v.
Saint Clair ADAMS.
No. 99-1379.
Argued Nov. 6, 2000.
Decided March 21, 2001.
**1306 *109 Justice KENNEDY delivered the opinion of the Court.
Section 1 of the Federal Arbitration Act (FAA) excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. All but one of the Courts of Appeals which have addressed the issue interpret this provision as exempting contracts of employment of transportation workers, but not other employment contracts, from the FAA's coverage. A different interpretation has been adopted by the Court of Appeals for the Ninth Circuit, which construes the exemption so that all contracts of employment are beyond the FAA's reach, whether or not the worker is engaged in transportation. It applied that rule to the instant case. We now decide that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.
I
In October 1995, respondent Saint Clair Adams applied for a job at petitioner Circuit City Stores, Inc., a national retailer of consumer electronics. Adams signed an employment application which included the following provision:
"I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or *110 relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort." App. 13 (emphasis in original).
Adams was hired as a sales counselor in Circuit City's store in Santa Rosa, California.
Two years later, Adams filed an employment discrimination lawsuit against Circuit City in state court, asserting claims under California's Fair Employment and Housing Act, Cal. Govt.Code Ann. § 12900 et seq. (West 1992 and Supp.1997), and other claims based on general tort theories under California law. Circuit City filed suit in the United States District Court for the Northern District of California, seeking to enjoin the state-court action and to compel arbitration of respondent's claims pursuant to the FAA, 9 U.S.C. §§ 1-16. The District Court entered the requested order. Respondent, the court concluded, was obligated by the arbitration agreement to submit his claims against the employer to binding arbitration. An appeal followed.
While respondent's appeal was pending in the Court of Appeals for the Ninth Circuit, the court ruled on the key issue in an unrelated case. The court held the FAA does not apply to contracts of employment. See Craft v. Campbell Soup Co., 177 F.3d 1083 (C.A.9 1999). In the instant case, following the rule announced in Craft, the Court of Appeals held the arbitration agreement between Adams and Circuit City was contained in a "contract of employment," and so was not subject to the FAA. 194 F.3d 1070 (C.A.9 1999). Circuit City petitioned this Court, noting that the Ninth Circuit's *111 conclusion that all employment contracts are excluded from the FAA conflicts with every other Court of Appeals to have addressed the question. See, e.g., McWilliams v. Logicon, Inc., 143 F.3d 573, 575-576 (C.A.10 1998); O'Neil v. Hilton Head Hospital, 115 F.3d 272, 274 (C.A.4 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (C.A.7 1997); Cole v. Burns Int'l Security Servs.,

105 F.3d 1465, 1470-1472 (C.A.D.C.1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 747-**1307 748 (C.A.5 1996); Asplundh Tree Co. v. Bates, 71 F.3d 592, 596-601 (C.A.6 1995); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (C.A.2 1972); Dickstein v. duPont, 443 F.2d 783, 785 (C.A.1 1971); Tenney Engineering, Inc. v. United Elec. & Machine Workers of Am., 207 F.2d 450 (C.A.3 1953). We granted certiorari to resolve the issue. 529 U.S. 1129, 120 S.Ct. 2004, 146 L.Ed.2d 955 (2000).

II

A

Congress enacted the FAA in 1925. As the Court has explained, the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice. See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270-271, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). To give effect to this purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements. The FAA's coverage provision, § 2, provides that

"[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such *112 grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

We had occasion in Allied-Bruce, supra, at 273-277, 115 S.Ct. 834, to consider the significance of Congress' use of the words "involving commerce" in § 2. The analysis began with a reaffirmation of earlier decisions concluding that the FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty, see Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), and that the Act was applicable in state courts and pre-emptive of state laws hostile to arbitration, see Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). Relying upon these background principles and upon the evident reach of the words "involving commerce," the Court interpreted § 2 as implementing Congress' intent "to exercise [its] commerce power to the full." Allied-Bruce, supra, at 277, 115 S.Ct. 834.

The instant case, of course, involves not the basic coverage authorization under § 2 of the Act, but the exemption from coverage under § 1. The exemption clause provides the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Most Courts of Appeals conclude the exclusion provision is limited to transportation workers, defined, for instance, as those workers "actually engaged in the movement of goods in interstate commerce." Cole, supra, at 1471. As we stated at the outset, the Court of Appeals for the Ninth Circuit takes a different view and interprets the § 1 exception to exclude all contracts of employment from the reach of the FAA. This comprehensive exemption had been advocated by amici curiae in Gilmer, where we addressed the question whether a registered securities representative's employment discrimination claim under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq., could be submitted to arbitration pursuant to an agreement in his securities registration application. *113 Concluding that the application was not a "contract of employment" at all, we found it unnecessary to reach the meaning of § 1. See Gilmer, supra, at 25, n. 2, 111 S.Ct. 1647. There is no such **1308 dispute in this case; while Circuit City argued in its petition for certiorari that the employment application signed by Adams was not a "contract of employment," we declined to grant certiorari on this point. So the issue reserved in Gilmer is presented here.

B

[1] Respondent, at the outset, contends that we need not address the meaning of the § 1 exclusion provision to decide the case in his favor. In his view, an employment contract is not a "contract evidencing a transaction involving interstate commerce" at all, since the word "transaction" in § 2 extends only to commercial contracts. See Craft, 177 F.3d, at 1085 (concluding that § 2 covers only "commercial deal[s] or merchant's sale [s]"). This line of reasoning proves too much, for it would make the § 1 exclusion provision superfluous. If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in ... interstate commerce" would be pointless. See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"). The proffered interpretation of "evidencing a transaction involving commerce," furthermore, would be inconsistent with Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), where we held that § 2 required the arbitration of an age discrimination claim based on an agreement in a securities registration application, a dispute that did not arise from a "commercial deal or merchant's sale." Nor could respondent's construction of § 2 be reconciled with the expansive reading of those words adopted in Allied-Bruce, 513 U.S., at 277, 279-280, 115 S.Ct. 834. If, then, *114 there is an argument to be made that arbitration agreements in employment contracts are not covered by the Act, it must be premised on the language of the § 1 exclusion provision itself.

Respondent, endorsing the reasoning of the Court of Appeals for the Ninth Circuit that the provision excludes all employment contracts, relies on the asserted breadth of the words "contracts of employment of ... any other class of workers engaged in ... commerce." Referring to our construction of § 2' s coverage provision in Allied-Bruce--concluding that the words "involving commerce" evidence the congressional intent to regulate to the full extent of its commerce power--respondent contends § 1's interpretation should have a like reach, thus exempting all employment contracts. The two provisions, it is argued, are coterminous; under this view the "involving commerce" provision brings within the FAA's scope all contracts within the Congress' commerce power, and the "engaged in ... commerce" language in § 1 in turn exempts from the FAA all employment contracts falling within that authority.

[2][3] This reading of § 1, however, runs into an immediate and, in our view, insurmountable textual obstacle. Unlike the "involving commerce" language in § 2, the words "any other class of workers engaged in ... commerce" constitute a residual phrase, following, in the same sentence, explicit reference to "seamen" and "railroad employees." Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases "seamen" and "railroad employees" if those same classes of workers were subsumed within the meaning of the "engaged in ... commerce" residual clause. The wording of § 1 calls for the application of the maxim ejusdem generis, the statutory canon that "[w]here general words follow specific words in a statutory **1309 enumeration, the general words are construed to *115 embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991); see also Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991). Under this rule of construction the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it; the interpretation of the clause pressed by respondent fails to produce these results.

[4] Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction. The application of the rule ejusdem generis in this case, however, is in full accord with other sound considerations bearing upon the proper interpretation of the clause. For even if the term "engaged in commerce" stood alone in § 1, we would not construe the provision to exclude all contracts of employment from the FAA. Congress uses different modifiers to the word "commerce" in the design and enactment of its statutes. The phrase "affecting commerce" indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause. See, e.g., Allied-Bruce, 513 U.S., at 277, 115 S.Ct. 834. The "involving commerce" phrase, the operative words for the reach of the basic coverage provision in § 2, was at issue in Allied-Bruce. That particular phrase had not been interpreted before by this Court. Considering the usual meaning of the word "involving," and the pro-arbitration purposes of the FAA, Allied-Bruce held the "word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." Ibid. Unlike those phrases, however, the general words "in commerce" and the specific phrase "engaged in commerce" are understood to have a more limited reach. In Allied-Bruce itself the Court said the words "in commerce" are "often-found words of art" that we have not read as expressing *116 congressional intent to regulate to the outer limits of authority under the Commerce Clause. Id., at 273, 115 S.Ct. 834; see also United States v. American Building Maintenance Industries, 422 U.S. 271, 279-280, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975) (the phrase "engaged in commerce" is "a term of art, indicating a limited assertion of federal jurisdiction"); Jones v. United States, 529 U.S. 848, 855, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (phrase "used in commerce" "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce").

It is argued that we should assess the meaning of the phrase "engaged in commerce" in a different manner here, because the FAA was enacted when congressional authority to regulate under the commerce power was to a large extent confined by our decisions. See United States v. Lopez, 514 U.S. 549, 556, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (noting that Supreme Court decisions beginning in 1937 "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause"). When the FAA was enacted in 1925, respondent reasons, the phrase "engaged in commerce" was not a term of art indicating a limited assertion of congressional jurisdiction; to the contrary, it is said, the formulation came close to expressing the outer limits of Congress' power as then understood. See, e.g., The Employers' Liability Cases, 207 U.S. 463, 498, 28 S.Ct. 141, 52 L.Ed. 297 (1908) (holding unconstitutional jurisdictional provision in Federal Employers Liability Act (FELA) covering the employees of "every common carrier engaged in trade or commerce"); Second Employers' Liability Cases, 223 U.S. 1, 48-49, 32 S.Ct. 169, 56 L.Ed. 327 (1912); but cf. Illinois Central R. Co. v. Behrens, 233 U.S. 473, 34 **1310 S.Ct. 646, 58 L.Ed. 1051 (1914) (noting in dicta that the amended FELA's application to common carriers "while engaging in commerce" did not reach all employment relationships within Congress' commerce power). Were this mode of interpretation to prevail, we would take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the statute means now.

*117 A variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation. The Court has declined in past cases to afford significance, in construing the

meaning of the statutory jurisdictional provisions "in commerce" and "engaged in commerce," to the circumstance that the statute predated shifts in the Court's Commerce Clause cases. In FTC v. Bunte Brothers, Inc., 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881 (1941), the Court rejected the contention that the phrase "in commerce" in § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45, a provision enacted by Congress in 1914, should be read in as expansive a manner as "affecting commerce." See Bunte Bros., supra, at 350-351, 61 S.Ct. 580. We entertained a similar argument in a pair of cases decided in the 1974 Term concerning the meaning of the phrase "engaged in commerce" in § 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 18, another 1914 congressional enactment. See American Building Maintenance, supra, at 277-283, 95 S.Ct. 2150; Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-202, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). We held that the phrase "engaged in commerce" in § 7 "means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." American Building Maintenance, supra, at 283, 95 S.Ct. 2150; cf. Gulf Oil, supra, at 202, 95 S.Ct. 392 (expressing doubt as to whether an "argument from the history and practical purposes of the Clayton Act" could justify "radical expansion of the Clayton Act's scope beyond that which the statutory language defines").

[5] The Court's reluctance to accept contentions that Congress used the words "in commerce" or "engaged in commerce" to regulate to the full extent of its commerce power rests on sound foundation, as it affords objective and consistent significance to the meaning of the words Congress uses when it defines the reach of a statute. To say that the statutory words "engaged in commerce" are subject to variable interpretations depending upon the date of adoption, even a date *118 before the phrase became a term of art, ignores the reason why the formulation became a term of art in the first place: The plain meaning of the words "engaged in commerce" is narrower than the more open-ended formulations "affecting commerce" and "involving commerce." See, e.g., Gulf Oil, supra, at 195, 95 S.Ct. 392 (phrase "engaged in commerce" "appears to denote only persons or activities within the flow of interstate commerce"). It would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment.

In rejecting the contention that the meaning of the phrase "engaged in commerce" in § 1 of the FAA should be given a broader construction than justified by its evident language simply because it was enacted in 1925 rather than 1938, we do not mean to suggest that statutory jurisdictional formulations "necessarily have a uniform meaning whenever used by Congress." American Building Maintenance Industries, supra, at 277, 95 S.Ct. 2150. As the Court has noted: "The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula." A.B. Kirschbaum Co. v. Walling, 316 U.S. 517, 520, 62 S.Ct. **1311 1116, 86 L.Ed. 1638 (1942). We must, of course, construe the "engaged in commerce" language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose. These considerations, however, further compel that the § 1 exclusion provision be afforded a narrow construction. As discussed above, the location of the phrase "any other class of workers engaged in ... commerce" in a residual provision, after specific categories of workers have been enumerated, undermines any attempt to give the provision a sweeping, open-ended construction. And the fact that the provision is contained in a statute that "seeks broadly to overcome judicial hostility to arbitration agreements," Allied-Bruce, 513 U.S., at 272-273, 115 S.Ct. 834, which the Court concluded in Allied-Bruce counseled *119 in favor of an expansive reading of § 2, gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA's coverage.

In sum, the text of the FAA forecloses the construction of § 1 followed by the Court of Appeals in the case under review, a construction which would exclude all employment contracts from the FAA. While the historical arguments respecting Congress' understanding of its power in 1925 are not insubstantial, this fact alone does not give us basis to adopt, "by judicial decision rather than amendatory legislation," Gulf Oil, supra, at 202, 95 S.Ct. 392, an expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used. While it is of course possible to speculate that Congress might have chosen a different jurisdictional formulation had it known that the Court would soon embrace a less restrictive reading of the Commerce Clause, the text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2 as to all employment contracts. Section 1 exempts from the FAA only contracts of employment of transportation workers.

C

[6] As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision. See Ratzlaf v. United States, 510 U.S. 135, 147-148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear"). We do note, however, that the legislative record on the § 1 exemption is quite sparse. Respondent points to no language in either committee report addressing the meaning of the provision, nor to any mention of the § 1 exclusion during debate on the FAA on the floor of the House or Senate. Instead, respondent places greatest reliance upon testimony before a Senate subcommittee hearing suggesting that the exception may have been added in response to the objections of the president of the International Seamen's Union of America. See Hearing on *120 S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923). Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the

full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. Cf. Kelly v. Robinson, 479 U.S. 36, 51, n. 13, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986) ("[N]one of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements"). We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal--even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case. It is for the Congress, not the courts, to consult political forces **1312 and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.

Nor can we accept respondent's argument that our holding attributes an irrational intent to Congress. "Under petitioner's reading of § 1," he contends, "those employment contracts most involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925 ... are excluded from [the] Act's coverage; while those employment contracts having a less direct and less certain connection to interstate commerce ... would come within the Act's affirmative coverage and would not be excluded." Brief for Respondent 38 (emphases in original).

We see no paradox in the congressional decision to exempt the workers over whom the commerce power was most apparent. To the contrary, it is a permissible inference that the employment contracts of the classes of workers in § 1 were excluded from the FAA precisely because of Congress' undoubted authority to govern the employment relationships *121 at issue by the enactment of statutes specific to them. By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§ 300-316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C. § 651 (repealed). It is reasonable to assume that Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.

As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation. See Pryner v. Tractor Supply Co., 109 F.3d, at 358 (Posner, C.J.). Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees, see 49 Stat. 1189, 45 U.S.C. §§ 181-188.

III

Various amici, including the attorneys general of 22 States, object that the reading of the § 1 exclusion provision adopted today intrudes upon the policies of the separate States. They point out that, by requiring arbitration agreements in most employment contracts to be covered by the *122 FAA, the statute in effect pre-empts those state employment laws which restrict or limit the ability of employees and employers to enter into arbitration agreements. It is argued that States should be permitted, pursuant to their traditional role in regulating employment relationships, to prohibit employees like respondent from contracting away their right to pursue state-law discrimination claims in court.

It is not our holding today which is the proper target of this criticism. The line of argument is relevant instead to the Court's decision in Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), holding that Congress intended the FAA to apply in state courts, and to pre- empt state antiarbitration laws to the contrary. See id., at 16, 104 S.Ct. 852.

The question of Southland's continuing vitality was given explicit consideration in **1313 Allied-Bruce, and the Court declined to overrule it. 513 U.S., at 272, 115 S.Ct. 834; see also id., at 282, 115 S.Ct. 834 (O'CONNOR, J., concurring). The decision, furthermore, is not directly implicated in this case, which concerns the application of the FAA in a federal, rather than in a state, court. The Court should not chip away at Southland by indirection, especially by the adoption of the variable statutory interpretation theory advanced by the respondent in the instant case. Not all of the Justices who join today's holding agreed with Allied- Bruce, see 513 U.S., at 284, 115 S.Ct. 834 (SCALIA, J., dissenting); id., at 285, 115 S.Ct. 834 (THOMAS, J., dissenting), but it would be incongruous to adopt, as we did in Allied-Bruce, a conventional reading of the FAA's coverage in § 2 in order to implement proarbitration policies and an unconventional reading of the reach of § 1 in order to undo the same coverage. In Allied-Bruce the Court noted that Congress had not moved to overturn Southland, see 513 U.S., at 272, 115 S.Ct. 834; and we now note that it has not done so in response to Allied-Bruce itself.

[7] Furthermore, for parties to employment contracts not involving the specific exempted categories set forth in § 1, it is true here, just as it was for the parties to the contract at issue in Allied-Bruce, that there are real benefits to the *123 enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. See Gilmer, 500 U.S., at 30-32, 111 S.Ct. 1647. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular

importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship, cf. Egelhoff v. Egelhoff, post, at 1316- 1317, --- U.S. ----, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (noting possible "choice-of-law problems" presented by state laws affecting administration of ERISA plans), and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others. The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and "breeding litigation from a statute that seeks to avoid it." Allied-Bruce, supra, at 275, 115 S.Ct. 834. The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in Gilmer, " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " 500 U.S., at 26, 111 S.Ct. 1647 (quoting Mitsubishi Motors Corp. v. Soler Chrysler--Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Gilmer, of course, involved a federal *124 statute, while the argument here is that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in Southland and Allied-Bruce, and we do not revisit the question here.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded **1314 for further proceedings consistent with this opinion.

It is so ordered.

Supplemental Case Printout for:
Adapting the Law to the Online Environment

2002 WL 975713 (S.D.N.Y.)United States District Court, S.D. New York.

ROWE ENTERTAINMENT, INC., Leonard Rowe, Sun Song Productions, Inc., Jesse Boseman, Summitt Management Corporation, Fred Jones, Jr., Lee King Productions,
Inc. and Lee King, Plaintiffs,
v.
THE WILLIAM MORRIS AGENCY, INC., Creative Artists Agency, Lcc, Agency for the
Performing Arts, Inc., Monterey Peninsula Artists, QBQ Entertainment, Howard Rose Agency, Ltd., Renaissance Entertainment Inc., Variety Artists

International, Inc., Beaver Productions Inc., Belkin Productions, Inc., Bill Graham Enterprises, Inc., the Cellar Door Companies, Inc., Cellar Door Concerts of the Carolinas Inc., Cellar Door Concerts of Florida Inc., Cellar Door Productions of Michigan Inc., Cellar Door North Central, Inc., Cellar Door Productions Inc., Cellar Door Productions of D.C., Inc., Cellar Door (Southern) Corp., Cellar Door Entertainment, Inc., Concert/Southern Promotions Inc., Contemporary Productions Inc., Delsener/Slater Enterprises, Ltd., DiCesare-Engler, Inc., Don Law Company, Inc., Electric Factory Concerts, Inc., Evening Star Productions, Inc., Fantasma Productions of Florida, Inc., Jam Productions Ltd., Magicworks Concerts, Inc., Pace Concerts, Inc., Sfx Entertainment Inc., Sunshine Promotions Inc., and WJS III, Inc., Defendants.

No. 98 Civ. 8272(RPP).

Factors Considered by Judge Francis

1. Specificity

Judge Francis found that plaintiffs' "extremely broad" discovery requests favored shifting the costs of discovery to them. He contrasted plaintiffs' requests to other cases such as *Daewoo* where the plaintiff sought only specific data sets that were utilized in the administrative review that resulted in the challenged governmental order. . Similarly, in *McPeek* the court did not shift costs but required production of only the e-mails of specific persons who purportedly retaliated against the plaintiff. .

Plaintiffs argue that Judge Francis's order was based on plaintiffs' document demands from several years earlier. Instead, they argue, their papers discussed at length the proposals and concessions made by plaintiffs to narrow considerably the e-mail sought. (Pls.' Objections, at 18.) These proposals, they assert, involved curtailing discovery to a select group of e-mail users within each user, sampling of materials rather than restoration of the entire body of e-mail possessed by defendants, the use of automated searching using an agreed list of search terms, and electronic review and production. (Id.)

Defendants, in response, argue that the issue of the breadth of plaintiffs' proposal was squarely before Judge Francis, who rejected plaintiffs' contention that they had narrowed their requests, when they had not. (Defs.' Opp'n, at 11.)

Judge Francis did not find that plaintiffs could not narrow their requests as they suggest, rather he found that the broadness of their discovery requests favored shifting the cost of production to them. A review of the record by this Court shows that plaintiffs never made a specific, concrete proposal which narrowed these requests. Judge Francis' finding as to this factor was accurate and certainly not "clearly erroneous."

2. Likelihood of a Successful Search

Judge Francis followed the court in *McPeek,* in using a marginal utility analysis in determining whether to shift costs:

> The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make [that party] search at its own expense. The difference is "at the margin."

. Judge Francis found "there has certainly been no showing that the e-mails are likely to be a gold mine," nonetheless he found there was a high enough possibility that a broad search of the defendants' e-mails would elicit some relevant information so that the search should not be precluded altogether. In particular, Judge Francis pointed out that no witness has testified about any e-mail communications that allegedly reflect discriminatory or anti-competitive practices. Therefore, he found that the marginal value of searching the e-mails is modest at best, militating in favor of imposing the costs of discovery on the plaintiffs. (Order, at 20.)

Although the plaintiffs have had complete access to the defendants' files and many depositions have been completed, the only things that plaintiffs point to in favor of their "likelihood of a successful search" is one printed e-mail in defendants' concert files, testimony of Mr. Embree who is not involved in concert promotion that e-mail was used by employees of CAA, documents that were not in e-mail form regarding a Janet Jackson tour, handwritten notes the meaning of which is greatly disputed, and the general volume of e-mail communication.

The one printed e-mail that plaintiffs cite to as showing a "likelihood of a successful search" describes an upcoming meeting between CAA and SFX. Plaintiffs assert that this led them to the discovery that "at this meeting the outlines of an anti-competitive and discriminatory agreement were discussed." (Pls.' Objections, at 4.) The agreement is an alleged agreement by SFX, a concert promoter, and CAA, a booking agency, not to compete. Assuming such an agreement exists, which the defendants vigorously dispute, the anti-competition agreement "is not a theory that is alleged in the complaint" as plaintiffs admitted at the March 19, 2002 argument. (3/19/02 Tr. at 12.)

As for the Janet Jackson tour, at the March 19, 2002 plaintiffs assert, "Early 1998 Rowe was attempting to bid on the

national tour of Janet Jackson. He was conveyed a set of terms by Mr. Light from CAA that purported to describe terms that were being directed to all interested promoters. It turns out that in fact that was a complete--that was a fraudulent statement, essentially. At the very same time he was sending those set of terms to Mr. Rowe, he was concluding a deal with Magicworks for far less onerous terms." (3/19/02 Tr. 22-23.) Once again, the facts surrounding this issue are vigorously disputed, but plaintiffs point to nothing in their extensive arguments on this subject that in anyway show a likelihood of a successful search. Plaintiffs do not offer any evidence that even suggests that any e-mails were exchanged in connection with Ms. Jackson's 1998 Tour.

As for Mr. Embree's testimony, at the March 19, 2002 Hearing, plaintiffs admitted "... we have not elicited testimony from a witness identifying any particular e-mail beyond what Mr. Embree testified to as relating to a particular subject that we are attempting to discovery [sic]." (3/19/02 Tr., 20.) In the deposition testimony cited by plaintiffs, Mr. Embree, a black employee of CAA, testified primarily about an act of racial discrimination by two white mail room employees who were promptly discharged. He also testified that an in-house e-mail advised of a meeting requiring the attendance of all employees and that Mr. Lovett responded by e-mail to a letter Mr. Embree sent him about his concerns about the company not being "colorful" enough. Mr. Embree testified that in that e-mail Mr. Lovett thanked him for his opinions, told him that he appreciated them, and said he would try to do what he could and that his door is open anytime. (Pls.' Reply Ex. C, at 29-30; 50.) This testimony does not point to any e-mails that will be of "explosive importance" as plaintiffs' assert or even that any e-mail discovery may be useful to plaintiffs case. Furthermore, Mr. Embree is not a witness likely to have evidence supporting plaintiffs claims: he started as a copier at CAA, Inc. in 1991 (Frank Dec. Ex. A at 8), then moved to the library where he was responsible for filing, data entry, copying, keeping track of files, answering the phone, taking in requests and, on occasion, helping the head researcher (Id. at 9-10.) He now works in the music contracts room handing out faxes, copying and putting the contracts together with riders, bios, pictures, sending the contracts to the promoter, entering the date of the shipment into the computer and checking to see if the other assistants need help when they are overloaded. (Id. at 10; 104-105.) Mr. Embree has no responsibility for the selection of concert promoters or the booking or routing of concerts. Accordingly, Mr. Embree's testimony does not show a likelihood of success in an e-mail search.

> The Court ordered discovery of records of complaints of race discrimination by employees filed against the defendants as possibly tending to show a propensity to be racially discriminatory in business contacts. It did not contemplate plaintiffs' attorneys attempting to engender complaints in the discovery process as is suggested by the Embree deposition.

Lastly, the mere volume of e-mail which includes not just inter-company communications but in-house communication of all employees also does not point to a likelihood of a successful search and the couple of handwritten notes that plaintiffs point to, although relevant, do not indicate a that a search of e-mail communications would be helpful to plaintiffs.

Judge Francis did not set up a "goldmine" standard for the "likelihood of a successful search" factor in determining whether to shift costs, rather he used the marginal utility analysis that was completely appropriate and, given the miniscule evidence presented by plaintiffs of the likelihood of success, decided in a manner that was not "clearly erroneous or contrary to law" that "the marginal value of searching the e-mails is modest at best" and decided that "this factor, too militates in favor of imposing the costs of discovery on the plaintiffs." (Order at 20.) The Court agrees with this finding, especially since, as pointed out by the moving defendants, the non-moving defendants, who are alleged co-conspirators, have already produced their e-mail and plaintiffs have not identified any of that production to support their argument of the "likelihood of a successful search."

3. Availability from Other Sources

Judge Francis found that defendants had not shown that their e-mail communications are generally available other than by a search of the defendants' hard drives or back-up tapes and that the moving defendants' representations that "important" e-mails were probably printed out and contained in other files were entirely speculative. He found this factor favored requiring the defendants to produce the e-mail at their own expense. This finding has not been disputed.

4. Purposes of Retention

If a party maintains electronic data for business purposes, they will be obligated to produce that same information in discovery. The guiding principle is "information which is stored, used or transmitted in new forms should be available through discovery with the same openness as traditional forms." . Conversely, a party that happens to retain data only in case of emergency or simply because it has neglected to discard it, should not be put to the expense of producing it. Judge Francis found that the back-up tapes clearly fell into the latter category as there is no evidence that defendants ever search these tapes for information or even have a means for doing so. Accordingly, he found that cost-shifting is warranted with respect to the back-up tapes. He made the same findings with regard to e-mails that, although deleted from the user's active files, remain on the hard drive. "Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the costs of retrieving deleted e-mails." (Order at 23.)

Plaintiffs argue that there is no case law that supports including this factor, and that the determination of this factor against the plaintiffs was in the absence of any evidence supporting such a conclusion. (Pls.' Objections, at 21-22.) Defendants point to both and which refer to whether the producing party has retained the discovery materials for active

use in its business. Defendants also argue that plaintiffs have pointed to no business purposes for which defendants keep these e-mails and point to their affidavits which state that the back-up tapes and hard drive are retained for "emergency" purposes. (Defs.' Opp'n, at 15.)

Purposes of retention was merely one factor in Judge Francis' Order which found that the e-mails are on the back-up tapes or remained on the hard drive and were not used by defendants in the course of their business, and therefore that this factor tipped in favor of shifting the costs of discovery to plaintiffs. Plaintiffs did not press this argument at the oral argument on March 19, 2002. Certainly this factor relates to the burden and expense of such discovery. There is no reason to find that Judge Francis' opinion on this point was clearly erroneous.

5. Benefit to the Parties

Judge Francis noted that where the responding party itself benefits from the production, there is less rationale for shifting costs to the requesting party. However, he found in this case, since the e-mails are not relevant to any issue on which the defendants bear the burden of proof and cataloguing or searching e-mail would have little business value to them, there is no possible benefit to the defendants making cost-shifting more appropriate.

Plaintiffs assert that any number of relevant issues relating to the manner in which agencies and white promoters (and black promoters) communicate with one another (or internally within each defendant) would be revealed by defendants' email communications, and beneficial to defendants, if their claims are correct. Plaintiffs contend that whether or not the defendants have the burden of proof should not be significant. (Pls.' Objections, at 23.)

The moving defendants respond that the argument that restoration of years of e-mail would benefit them by proving defendants' contention that they are not engaged in a race-based and antitrust conspiracy is nonsensical. They assert it would only show the absence of support for plaintiffs' meritless claims. (Defs.' Opp'n, at 16.)

Judge Francis specifically found that the recovery of e-mail will not benefit the defendants on any issue on which defendants bear the burden of proof. This finding was not disputed by plaintiffs at the March 19, 2002 and cannot be seriously disputed.

6. Total Costs

Judge Francis found that the costs of the discovery desired by plaintiffs would be substantial by any definition and therefore the magnitude of these expenses favors cost-shifting. (Order at 24.)

Plaintiffs argue that the Order disregarded entirely the extensive and uncontradicted case law governing e-mail discovery, cited by plaintiffs, that the cost estimates achieved by plaintiffs are well within the bounds of what has been held not to be so large as to justify cost-shifting. Defendants argue that the principal case on which plaintiffs rely, *In re* has been criticized for simplistically likening electronic files to paper documents and reflexively holding that the producing party should pay the costs citing . Defendants also argue that the plaintiffs misrepresent the other case they cite, *United States* at *2 (S.D.N.Y. July 7, 1999) as the court in that case expressly "reserved decision about which party will ultimately bear the cost of producing e-mail." Defendants also argue that Judge Francis found the costs for e-mail restoration were substantial even using plaintiffs lower estimates without making a finding as to whether plaintiffs' or defendants' estimates were reasonable.

> The issue of costs is strongly contested. Plaintiffs project that the costs of WMA would be between $24,000 and $87,000; for Monterey between $10,000 and $15,000; and for SFX and QBQ approximately $64,000. Defendants project that the costs of WMA would be $395,944 if eight selected back-up sessions were produced and as much as $9,750,000 if all of the back-up tapes were produced; for Monterey between $43,110 and $84,060; for CAA a minimum of $395,000; and SFX and QBQ for over $403,000. Monterey also proffered an estimate of $247,000 to review the e-mails for privilege and CAA approximated $120,000 for their privilege review.

The cases cited by plaintiffs do not support their position that Judge Francis disregarded the law governing e-mail discovery. The court in *In Re Brand Prescription Drugs Antitrust Litig* does not shift production costs to the plaintiffs, but the court in that case recognizes that "central to any determination of whether a cost should be shifted to a producing party is the issue of whether the expense or burden is 'undue." ' . The court in that case also required the Class Plaintiffs to narrow their request for the express purpose of "containing costs" which had been estimated at $50,000--$70,000. *Id.* at 7. As defendants point out, in the other case cited by plaintiffs, the court simply "reserved decision about which party will ultimately bear the cost of producing e-mail. Additionally, simply looking at the costs involved in this case and comparing it to the costs in another case where the court decided not to shift the cost of production, is not a sufficient analysis as there are the other factors that are being taken into account, particularly the likelihood of a successful search and the materiality of the information being sought to the claims in this case. Judge Francis did not base his decision on the substantial costs of the production alone, it was merely one factor in his analysis that favored the shifting of costs. In view of the amount in question, the finding that it was a substantial amount that favored cost-shifting was not "clearly erroneous or contrary to law."

7. Ability to Control Costs

Judge Francis found that "where the discovery process is going to be incremental, it is more efficient to place the burden on the party that will decide how expansive the discovery will be." (Order at 25, *citing* .) Therefore, he found that plaintiffs are in the best position to decide whether further searches would be justified, militating in favor of cost-shifting.

This factor has not been disputed.

8. The Parties' Resources

Judge Francis noted that all of the parties have sufficient resources to conduct this litigation (Order at 25-26.) As to plaintiffs argument that defendants are some of the most powerful players in the concert promotion business, Judge Francis found that as the plaintiffs purport to be able to compete with them in the market place, the relative financial strength of the parties at most a neutral factor. (Order at 26.)

Plaintiffs argue that defendants are the word's largest concert promotion companies and the largest and wealthiest talent agencies all of whom have pointed out the modest financial condition of plaintiffs whereas plaintiffs' financial situations have "declined precipitously since this action was commenced" and "the Order poses a substantial risk that they will not be able to acquire this material at all." (Pls.' Objections, at 25.) Plaintiffs argue the level of financial resources necessary for plaintiffs to be participants in the concert industry during the relevant period in the complaint "has no bearing on plaintiffs' current financial condition." (Id.)

Defendants argue in response that: 1) plaintiffs failed to present any evidence on this issue to Judge Francis and therefore plaintiffs' current attempt on this motion to introduce, through an attorney's affidavit, information relating to plaintiffs' financial resources is improper and should be disregarded; 2) plaintiffs clearly do have the resources necessary to conduct this litigation, hiring four different law firms to prosecute this action, and do claim to be able to compete with defendants in the marketplace; and 3) plaintiffs' unsupported contention that plaintiffs' financial situation have declined precipitously is contradicted by plaintiff Leonard Rowe's testimony that since the lawsuit began he has been making more money. (Defs.' Opp'n, at 20-21.) At oral argument, defendants stated without contradiction that one of the plaintiffs is extremely wealthy. (3/19/02 Tr. at 50-51.)

When objecting to a magistrate judge's report before a district court, a party has "no right to present further testimony when it offer[s] no justification for not offering the testimony at the hearing before the magistrate." , *citing* . If plaintiffs wanted to argue that their resources had changed since the relevant time period in the suit, they should have brought that argument before the magistrate judge or at least moved for reconsideration with supporting affidavits.

Furthermore, the weighing of the parties' resources is not simply a test of which party has more resources, but as Judge Francis noted, "[i]n some cases, the cost, even if modest in absolute terms, might outstrip the resources of one of the parties, justifying an allocation of those expenses to the other." (Order, at 25.) Therefore, finding that this factor is neutral, in light of the ability of both parties to conduct this litigation and plaintiffs' assertion that they are able to compete with defendants on the market place was not "clearly erroneous." Judge Francis' conclusion was not that defendants' and plaintiffs' resources are equal as plaintiffs argue, but that in view of plaintiffs' resources it would not justify an allocation to the defendants. Judge Francis clearly found the burden or expense of the proposed discovery outweighs its likely benefit, taking into account "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues ." . There has been no showing that Judge Francis' finding was "clearly erroneous."

Conclusion

For the above reasons, plaintiffs' motion to reverse Judge Francis' Order of January 15, 2002 with respect to that portion of the order that granted defendants motion to shift the costs of production of their e-mail communications to plaintiffs is denied.

IT IS SO ORDERED.

Supplemental Case Printout for:

Management perspective: Arbitration Clauses in Employment Contracts

173 F.3d 933, 79 Fair Empl.Prac.Cas. (BNA) 629, 75 Empl. Prac. Dec. P 45,822
United States Court of Appeals,
Fourth Circuit.
HOOTERS OF AMERICA, INCORPORATED, a Georgia corporation, Plaintiff-Appellant,
v.
Annette R. PHILLIPS, an individual resident of South Carolina, Defendant & Third Party Plaintiff-Appellee,
v.
Hooters of Myrtle Beach, Incorporated, a Georgia corporation, Third Party Defendant-Appellant.
National Restaurant Association; Society of Professionals in Dispute Resolution; National Academy of Arbitrators; Equal Employment Opportunity Commission, Amici Curiae.
No. 98-1459.
Argued Jan. 28, 1999.
Decided April 8, 1999.
Before , Chief Judge, , Circuit Judge, and GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.
Affirmed and remanded by published opinion. Chief Judge wrote the opinion, in which Judge and Judge GOODWIN joined.
OPINION
, Chief Judge:
Annette R. Phillips alleges that she was sexually harassed while working at a Hooters restaurant. After quitting her job, Phillips threatened to sue Hooters in court. Alleging that Phillips agreed to arbitrate employment-related disputes, Hooters preemptively filed suit to compel arbitration under the Federal Arbitration Act, . Because Hooters set up a dispute resolution process utterly lacking in the rudiments of even-handedness, we hold that Hooters breached its agreement to arbitrate. Thus, we affirm the district court's refusal to compel arbitration.
I.
Appellee Annette R. Phillips worked as a bartender at a Hooters restaurant in Myrtle Beach, South Carolina. She was employed since 1989 by appellant Hooters of Myrtle Beach (HOMB), a franchisee of appellant Hooters of America (collectively Hooters).
Phillips alleges that in June 1996, Gerald Brooks, a Hooters official and the brother of HOMB's principal owner, sexually harassed her by grabbing and slapping her buttocks. After appealing to her manager for help and being told to "let it go," she quit her job. Phillips then contacted Hooters through an attorney claiming that the attack and the restaurant's failure to address it violated her Title VII rights. Hooters responded that she was required to submit her claims to arbitration according to a binding agreement to arbitrate between the parties.
This agreement arose in 1994 during the implementation of Hooters' alternative dispute resolution program. As part of that program, the company conditioned eligibility for raises, transfers, and promotions upon an employee signing an

"Agreement to arbitrate employment-related disputes." The agreement provides that Hooters and the employee each agree to arbitrate all disputes arising out of employment, including "any claim of discrimination, sexual harassment, retaliation, or wrongful discharge, whether arising under federal or state law." The agreement further states that

> the employee and the company agree to resolve any claims pursuant to the company's rules and procedures for alternative resolution of employment-related disputes, as promulgated by the company from time to time ("the rules"). Company will make available or provide a copy of the rules upon written request of the employee.

The employees of HOMB were initially given a copy of this agreement at an all-staff meeting held on November 20, 1994. HOMB's general manager, Gene Fulcher, told the employees to review the agreement for five days and that they would then be asked to accept or reject the agreement. No employee, however, was given a copy of Hooters' arbitration rules and procedures. Phillips signed the agreement on November 25, 1994. When her personnel file was updated in April 1995, Phillips again signed the agreement.

After Phillips quit her job in June 1996, Hooters sent to her attorney a copy of the Hooters rules then in effect. Phillips refused to arbitrate the dispute.

Hooters filed suit in November 1996 to compel arbitration under . Phillips defended on the grounds that the agreement to arbitrate was unenforceable. Phillips also asserted individual and class counterclaims against Hooters for violations of Title VII and for a declaration that the arbitration agreements were unenforceable against the class. In response, Hooters requested that the district court stay the proceedings on the counterclaims until after arbitration, .

In March 1998, the district court denied Hooters' motions to compel arbitration and stay proceedings on the counterclaims. The court found that there was no meeting of the minds on all of the material terms of the agreement and even if there were, Hooters' promise to arbitrate was illusory. In addition, the court found that the arbitration agreement was unconscionable and void for reasons of public policy. Hooters filed this interlocutory appeal, .

II.

The benefits of arbitration are widely recognized. Parties agree to arbitrate to secure "streamlined proceedings and expeditious results [that] will best serve their needs." . The arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve. Amicus Brief for Society of Professionals in Dispute Resolution at 2-3 (*citing* Baxter, Arbitration or Litigation for Employment Civil Rights?, 2 *Individual Employment Rights* 19 (1993 94); Maltby, The Projected Impact of the Model Employment Termination Act, *Annals of the Am. Acad. of Pol. and Soc. Sci.* (Nov. 1994)). Further, the adversarial nature of litigation diminishes the possibility that the parties will be able to salvage their relationship. For these reasons parties agree to arbitrate and trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." (internal quotation marks omitted).

In support of arbitration, Congress passed the Federal Arbitration Act (FAA), ch. 213, 43 Stat. 883 (1925) (codified as amended at *et seq.*). "Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." . The FAA manifests "a liberal federal policy favoring arbitration agreements." . When a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings, , and to compel arbitration, *id.* .

The threshold question is whether claims such as Phillips' are even arbitrable. The EEOC as amicus curiae contends that employees cannot agree to arbitrate Title VII claims in predispute agreements. We disagree. The Supreme Court has made it plain that judicial protection of arbitral agreements extends to agreements to arbitrate statutory discrimination claims. In *Gilmer v. Interstate/Johnson Lane Corp.,* the Court noted that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " (alteration in original) (*quoting* Thus, a party must be held to the terms of its bargain unless Congress intends to preclude waiver of a judicial forum for the statutory claims at issue. Such an intent, however, must "be discoverable in the text of the [substantive statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.*

The EEOC argues that in passing the Civil Rights Act of 1991, Congress evinced an intent to prohibit predispute agreements to arbitrate claims arising under Title VII. This circuit, however, has already rejected this argument. . The Civil Rights Act of 1991 provided that "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under [Title VII]." 105 Stat. at 1081. In *Austin,* we stated that this language "could not be any more clear in showing Congressional favor towards arbitration." . We also noted that the legislative history did not establish a contrary intent nor was there an "inherent conflict" between the Civil Rights Act and arbitration. *Id.* at 881-82. This holding is in step with our sister circuits which have also rejected the EEOC's argument. *See, e.g.,* ; , *cert. denied,* ; . *But see* , *cert. denied,* .

III.

Predispute agreements to arbitrate Title VII claims are thus valid and enforceable. The question remains whether a binding arbitration agreement between Phillips and Hooters exists and compels Phillips to submit her Title VII claims to

arbitration. The FAA provides that agreements "to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." . "It [i]s for the court, not the arbitrator, to decide in the first instance whether the dispute [i]s to be resolved through arbitration." *AT &* ; *see also* ("[W]hether there is a contract to arbitrate 'is undeniably an issue for judicial determination.' " (*quoting AT &*). In so deciding, we " 'engage in a limited review to ensure that the dispute is arbitrable-- i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement.' " (*quoting*).

Hooters argues that Phillips gave her assent to a bilateral agreement to arbitrate. That contract provided for the resolution by arbitration of all employment-related disputes, including claims arising under Title VII. Hooters claims the agreement to arbitrate is valid because Phillips twice signed it voluntarily. Thus, it argues the courts are bound to enforce it and compel arbitration.

We disagree. The judicial inquiry, while highly circumscribed, is not focused solely on an examination for contractual formation defects such as lack of mutual assent and want of consideration. (holding that continued existence of arbitration agreement is matter for judicial determination). Courts also can investigate the existence of "such grounds as exist at law or in equity for the revocation of any contract." . However, the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole. ; *see also* . In this case, the challenge goes to the validity of the arbitration agreement itself. Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.

Hooters and Phillips agreed to settle any disputes between them not in a judicial forum, but in another neutral forum--arbitration. Their agreement provided that Hooters was responsible for setting up such a forum by promulgating arbitration rules and procedures. To this end, Hooters instituted a set of rules in July 1996.

> The 1996 rules superseded a set of rules drafted in 1994 and would govern any arbitration of Phillips' claims. Because we deal with Hooters' performance under the agreement and not contract formation issues, we focus exclusively on the details of the 1996 rules.

The Hooters rules when taken as a whole, however, are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding. The rules require the employee to provide the company notice of her claim at the outset, including "the nature of the Claim" and "the specific act(s) or omissions(s) which are the basis of the Claim." Rule 6-2(1), (2). Hooters, on the other hand, is not required to file any responsive pleadings or to notice its defenses. Additionally, at the time of filing this notice, the employee must provide the company with a list of all fact witnesses with a brief summary of the facts known to each. Rule 6-2(5). The company, however, is not required to reciprocate.

The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. Rule 8. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.

Nor is fairness to be found once the proceedings are begun. Although Hooters may expand the scope of arbitration to any matter, "whether related or not to the Employee's Claim," the employee cannot raise "any matter not included in the Notice of Claim." Rules 4-2, 8-9. Similarly, Hooters is permitted to move for summary dismissal of employee claims before a hearing is held whereas the employee is not permitted to seek summary judgment. Rule 14-4. Hooters, but not the employee, may record the arbitration hearing "by audio or videotaping or by verbatim transcription." Rule 18-1. The rules also grant Hooters the right to bring suit in court to vacate or modify an arbitral award when it can show, by a preponderance of the evidence, that the panel exceeded its authority. Rule 21-4. No such right is granted to the employee.

In addition, the rules provide that upon 30 days notice Hooters, but not the employee, may cancel the agreement to arbitrate. Rule 23-1. Moreover, Hooters reserves the right to modify the rules, "in whole or in part," whenever it wishes and "without notice" to the employee. Rule 24-1. Nothing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding.

If by odd chance the unfairness of these rules were not apparent on their face, leading arbitration experts have decried their one-sidedness. George Friedman, senior vice president of the American Arbitration Association (AAA), testified that the system established by the Hooters rules so deviated from minimum due process standards that the Association would refuse to arbitrate under those rules. George Nicolau, former president of both the National Academy of Arbitrators and the International Society of Professionals in Dispute Resolution, attested that the Hooters rules "are inconsistent with the concept of fair and impartial arbitration." He also testified that he was "certain that reputable designating agencies, such as the AAA and Jams/Endispute, would refuse to administer a program so unfair and one-sided as this one." Additionally,

Dennis Nolan, professor of labor law at the University of South Carolina, declared that the Hooters rules "do not satisfy the minimum requirements of a fair arbitration system." He found that the "most serious flaw" was that the "mechanism [for selecting arbitrators] violates the most fundamental aspect of justice, namely an impartial decision maker." Finally, Lewis Maltby, member of the Board of Directors of the AAA, testified that "This is without a doubt the most unfair arbitration program I have ever encountered."

In a similar vein, two major arbitration associations have filed amicus briefs with this court. The National Academy of Arbitrators stated that the Hooters rules "violate fundamental concepts of fairness ... and the integrity of the arbitration process." Likewise, the Society of Professionals in Dispute Resolution noted that "[i]t would be hard to imagine a more unfair method of selecting a panel of arbitrators." It characterized the Hooters arbitration system as "deficient to the point of illegitimacy" and "so one sided, it is hard to believe that it was even intended to be fair."

We hold that the promulgation of so many biased rules--especially the scheme whereby one party to the proceeding so controls the arbitral panel-- breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration--a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.

Moreover, Hooters had a duty to perform its obligations in good faith. *See* ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); (" 'The courts could leave all discretion in performance unbridled.... No U.S. court now takes this approach.... Thus, contractual discretion is presumptively bridled by the law of contracts--by the covenant of good faith implied in every contract.' ") (*quoting* Steven J. Burton & Eric G. Anderson, *Contractual Good Faith* 46-47 (1995)). Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." cmt. a. Bad faith includes the "evasion of the spirit of the bargain" and an "abuse of a power to specify terms." *Id.* § 205 cmt. d. By agreeing to settle disputes in arbitration, Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck. Thus we conclude that the Hooters rules also violate the contractual obligation of good faith.

Given Hooters' breaches of the arbitration agreement and Phillips' desire not to be bound by it, we hold that rescission is the proper remedy. Generally, "rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." ; *see also* (noting rescission is permitted " 'for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract.' " (*quoting Williston on Contracts* § 1467 (rev. ed.))). As we have explained, Hooters' breach is by no means insubstantial; its performance under the contract was so egregious that the result was hardly recognizable as arbitration at all. We therefore permit Phillips to cancel the agreement and thus Hooters' suit to compel arbitration must fail.

> Phillips asserts that the Hooters rules also attempt to effect a waiver of substantive statutory rights by limiting the remedies that an arbitration panel may award. She further argues that employees cannot waive substantive statutory rights in predispute arbitration agreements, or at the very least, such waivers must be knowing and voluntary. Because we hold that no valid agreement to arbitrate exists in this case, we need not take up these questions.

IV.

We respect fully the Supreme Court's pronouncement that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." . Our decision should not be misread: We are not holding that the agreement before us is unenforceable because the arbitral proceedings are too abbreviated. An arbitral forum need not replicate the judicial forum. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *see also* (rejecting abbreviated discovery and lack of written opinions as reasons to inhibit arbitration of statutory claims).

Nor should our decision be misunderstood as permitting a full-scale assault on the fairness of proceedings before the matter is submitted to arbitration. Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance. Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in for vacating an arbitral award. In the case before us, we only reach the content of the arbitration rules because their promulgation was the duty of one party under the contract. The material breach of this duty warranting rescission is an issue of substantive arbitrability and thus is reviewable before arbitration. *See* . This case, however, is the exception that proves the rule: fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in of the FAA.

By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution. This we refuse to do.

The judgment of the district court is affirmed, and the case is remanded for further proceedings consistent with this opinion. *AFFIRMED AND REMANDED.*