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Reducing the Presumption of Arbitrability

Jennifer L. Peresie†


The United States Supreme Court has expressed a "liberal federal policy favoring arbitration." However, under Gilmer v. Interstate/Johnson Lane Corp., arbitration agreements are only enforceable if "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." In Green Tree Financial Corp.-Alabama v. Randolph, the Supreme Court, applying Gilmer, held that plaintiffs could avoid arbitration by showing the "likelihood" of incurring prohibitive costs.

The Courts of Appeals have split in interpreting Green Tree. In Bradford v. Rockwell Semiconductor Systems, Inc., the Fourth Circuit focused on the individual litigant’s ability to pay the costs of arbitration. The Fifth, Seventh, and Eleventh Circuits have followed suit. In contrast, the Sixth Circuit, in Morrison v. Circuit City Stores, Inc., and the Third Circuit rejected the analysis in Bradford and held that the operative question is whether the costs of arbitration have "the 'chilling effect' of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights." This Case Note argues that while the Bradford approach is more consistent with Green

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4. 238 F.3d 549, 556 (4th Cir. 2001).


6. 317 F.3d 646 (6th Cir. 2003) (en banc).


8. Morrison, 317 F.3d at 661.
Tree and the strong federal presumption of arbitrability, the Morrison decision accords more closely with Gilmer and is a more realistic means of determining whether plaintiffs can vindicate their rights effectively.  

I. GREEN TREE AND THE PRESUMPTION OF ARBITRABILITY

The Supreme Court has repeatedly held that the Federal Arbitration Act (FAA) articulates a presumption of arbitrability. Under this presumption, courts should "rigorously enforce . . . arbitration agreements according to their terms." Thus, where parties have signed valid arbitration agreements, courts generally compel them to arbitrate their disputes. Gilmer presented two standards for avoiding arbitration of federal statutory claims. Under the first standard, plaintiffs must show that they are unable to vindicate their rights effectively in arbitration. The second standard requires plaintiffs to prove that Congress intended to prohibit a waiver of the judicial forum by pointing to the text of the statute, its legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. Courts have interpreted both standards stringently, making the Gilmer test very difficult to pass. The Green Tree Court examined the enforceability of arbitration agreements where plaintiffs alleged that arbitration was cost prohibitive. The Court concluded that high costs were valid grounds for resisting arbitration because such costs render litigants unable to vindicate their rights effectively.

9. Both the Fourth and the Sixth Circuits specifically rejected the idea that provisions imposing costs on employees beyond those expenses imposed in court are per se invalid, an approach adopted post-Green Tree by the Ninth Circuit, see Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 786 (9th Cir. 2002); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 & n.5 (9th Cir.), cert. denied, 535 U.S. 1112 (2002). Green Tree, arguably, rejected a per se test by placing the burden on the plaintiff to show prohibitive costs. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000); see also Bradford, 238 F.3d at 558. The D.C. Circuit adopted a per se rule pre-Green Tree, see Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997), and has not yet reconsidered this rule.


12. E.g., Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999) ("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." (citation omitted)). For an empirical examination of the enforcement of arbitration agreements where plaintiffs alleged the costs were prohibitive, see Michael H. LeRoy & Peter Feuille, When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration, 50 UCLA L. REV. 143, 177 (2002) (finding that district courts ordered arbitration in seventy-nine percent of cases in which employees objected that arbitration was too costly).


14. Id. at 26 (quoting Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 227 (1987)).


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*Green Tree* held that the burden of proof lies with the plaintiff to show the “likelihood” of prohibitive costs. The plaintiff in *Green Tree* did not meet this burden because her arbitration agreement contained *no* information on the assignment of costs. The Court stated that “the ‘risk’ that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement,” and it compelled the plaintiff to arbitrate.  

The *Green Tree* Court explicitly left open the questions of what constitutes a “likelihood” of high costs and “how detailed the showing of prohibitive expenses must be,” thus leading to the current circuit split on the appropriate test. However, the Court provided some direction as to the nature of the test because its decision focused on both the individual plaintiff’s ability to pay and the actual costs of arbitration. This focus was essential to the Fourth Circuit’s analysis in *Bradford*, but practically absent from the Sixth Circuit’s decision in *Morrison*.

II. *BRADFORD*’S FOCUS ON THE PLAINTIFF’S ABILITY TO PAY

In interpreting the *Green Tree* decision, the *Bradford* court emphasized that *Green Tree* required much more than “an abstract and speculative risk” of high costs; it necessitated a “showing of individualized prohibitive expense.” The court set out a stringent test for determining the enforceability of cost provisions. The *Bradford* approach requires the plaintiff to provide specific evidence of his or her “ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.”

*Bradford* involved a somewhat unsympathetic plaintiff, John Bradford, who was fired from his job at Rockwell Semiconductor Systems in 1996. Bradford alleged age discrimination, and sought to resist arbitration because he claimed the costs were prohibitive, despite his $115,000 base salary and considerable annual bonuses. However, Bradford had first brought his claim in arbitration and paid all of the required fees. He filed suit in a North Carolina district court, while the arbitration was pending. Before the court heard Bradford’s case, the arbitrator dismissed his claims. The district court granted the defendant’s

17. *Id.* at 91.
18. *Id.* at 92.
19. *Id.* at 90; see also *id.* at 93 (Ginsburg, J., dissenting) (“The Court holds that [the plaintiff] bears the burden of demonstrating that the arbitral forum is financially inaccessible to *her*.” (emphasis added)); Nelson v. Insignia/Esg, Inc., 215 F. Supp. 2d 143, 155 (D.D.C. 2002) (“This Court finds it noteworthy that the Supreme Court focused in *Green Tree* on the individual employee’s inability to demonstrate that she would be prohibited from vindicating her statutory rights in an arbitral forum.” (emphasis added)).
22. *Id.* at 556.
23. *Id.* at 550-52 (summarizing the case’s background). Under Bradford’s arbitration agreement,
motion for summary judgment. The Fourth Circuit affirmed, finding that Bradford offered "no evidence" that he was unable to pay the $4470.88 arbitration costs. The conclusion the Bradford court reached was logical because Bradford failed to make any showing that the costs of arbitration were prohibitive. Instead, he argued that imposing arbitration costs on plaintiffs was fundamentally unfair. Consistent with the Green Tree decision, the court disagreed with Bradford's theory. Writing for a unanimous court, Judge Williams noted, "This case presents a paradigmatic example of why fee-splitting should not be deemed to automatically render an arbitration agreement unenforceable." The court expressed concern that invalidating Bradford's arbitration agreement would "simply give Bradford a second bite of the apple [to pursue his claim]." The Fourth Circuit's aim, in adopting the Bradford test, was to prohibit plaintiffs like Bradford—who could or, as in Bradford's case, did pay for arbitration—from avoiding arbitration based on their desires to bring their claims in court.

Bradford, though a well-reasoned decision, had far-reaching, negative consequences that went beyond the mandates in Green Tree: The decision makes it almost impossible for plaintiffs to avoid arbitration based on high costs. The Bradford approach results in mini-trials of plaintiffs' financial states in which litigants must provide specific evidence of their inability to afford arbitration. For instance, in Blair v. Scott Specialty Gases, the plaintiff showed that her low income and high debt rendered her unable to afford arbitration, but the Third Circuit, relying on Bradford, held that she needed more detailed documentary evidence such as bank statements and bills to prove that the costs were prohibitive—something not required by Green Tree.

Further, the Bradford test is so strict that even the poorest plaintiffs have difficulty meeting it. Bradford raises Green Tree's standard of proof from the "likelihood" of prohibitive costs to a near "certainty" and leaves poor plaintiffs with little recourse where they face high costs, but do not know the actual amount. For example, an Alabama district court compelled arbitration where the plaintiff and his wife had just over $100 remaining after paying for living

the parties split the arbitration costs equally, unless the arbitrator used her discretion to direct the losing party to pay. Id. at 551.
24. Id. at 558.
25. Bradford argued for a per se prohibition of arbitration provisions that impose costs on litigants. Id. at 554.
26. Id. at 558.
27. Id. This concern is a general motivation of courts to enforce arbitration where the parties have already arbitrated their claims. However, in one context—union contracts—the Supreme Court allows two "bite[s] of the apple." Where an employee arbitrates his or her grievance pursuant to an arbitration clause in a collective-bargaining agreement, he or she is not precluded from subsequently bringing an action in court. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-34 (1991) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974)).
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expenses each month and the plaintiff showed arbitration would cost between $1150 and $6400 because the court found that the costs were merely “anticipated” projections.29

The problem with the high burden of proof established in Bradford is particularly acute with agreements that contain fee-shifting provisions, which require or allow the arbitrator to shift costs to the losing party. Where incurring prohibitive costs is contingent on the outcome of arbitration, courts employing the Bradford approach have been extremely reluctant to invalidate arbitration agreements because they consider the costs too speculative to be prohibitive.30 However, because they face the high possibility of substantial costs, potential plaintiffs often choose not to bring their claims at all. This result runs counter to both the Gilmer Court’s holding that arbitration must not bar the vindication of statutory rights and the general idea that redress should be available to everyone, not only those who safely can afford it.

III. MORRISON’S CLASS-BASED DETERRENCE APPROACH

The idea that possible high costs deter plaintiffs from arbitrating—virtually ignored by the Bradford court—was central to the Sixth Circuit’s decision in Morrison. The Morrison test broadens the focus in Bradford from the individual to a class of similarly situated persons and examines whether the arbitration agreement deters members of the class from bringing claims. Compared to Bradford, which requires a near definite showing of prohibitive costs, Morrison lowers the burden of proof on the plaintiff by analyzing probable costs. While the Sixth Circuit’s approach diverges from Green Tree, it is more supportive of plaintiffs’ desires to vindicate their statutory rights.

Like Bradford, the plaintiff in Morrison, Lillian Morrison, signed an arbitration agreement in which she agreed to split the costs of arbitration proceedings equally with her employer. However, Morrison was a more sympathetic plaintiff than Bradford as her salary was only about one-third of Bradford’s—$54,060 a year—and she brought her initial claim not in arbitration, but in court.31 When she was fired in 1997, Morrison claimed her arbitration agreement was unenforceable and sued her employer, Circuit City, in an Ohio federal district court. The district court dismissed Morrison’s claims and compelled the parties to arbitrate.32 Morrison proceeded in arbitration, and

29. Boyd v. Town of Hayneville, 144 F. Supp. 2d 1272, 1280 (M.D. Ala. 2001); see also Mildworm v. Ashcroft, 200 F. Supp. 2d 171, 175, 180 (E.D.N.Y. 2002) (compelling arbitration where an employee’s annual income was $31,000 and he faced initial fees between $500 and $11,000 because the costs were speculative).
32. Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815, 828-29 (S.D. Ohio 1999). Morrison did not argue that costs were prohibitive in her district court case, which was heard before the Supreme
In 2000, the arbitrator issued an award. On appeal, Morrison claimed the high cost of arbitration rendered her agreement unenforceable. In a 6-2 decision en banc, the Sixth Circuit found the agreement's cost provisions unenforceable because they deterred employees from bringing claims. Nonetheless, the court affirmed the lower court decision compelling arbitration by severing the cost provisions from the agreement.

The Sixth Circuit adopted a three-part analysis for evaluating the enforceability of cost provisions in arbitration agreements: First, it examined the plaintiff's income, position, and financial resources to define similarly situated employees. Next, the court evaluated the "average or typical arbitration costs," stating "that is the kind of information that potential litigants will take into account in deciding whether to bring their claims." Finally, it looked at whether these costs deterred the plaintiff and similarly situated individuals from pursuing their claims. Writing for the majority, Judge Moore, explained, "[I]f the fees and costs of the arbitral forum deter potential litigants, then that forum is clearly not an effective, or even adequate, substitute for the judicial forum."

The Morrison court rejected the Bradford approach, holding that it is inadequate to protect the deterrent functions of federal statutes and that requiring concrete estimates of expected arbitration costs asks too much of litigants. The Morrison court wanted to ensure that corporations would "not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from seeking any forum for the vindication of their rights." Although district courts in the Sixth Circuit have upheld the enforceability of cost provisions in arbitration agreements in two of the four decisions handed down since Morrison, the Morrison approach renders most cost-splitting

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33. *Morrison*, 317 F.3d at 656 (6th Cir. 2003) (en banc). The arbitrator directed Circuit City to pay all the costs and fees of arbitration because Morrison's appeal of her federal case, based on the high costs of arbitration, was pending. *Id.* at 654-55.

34. The case was argued before a hearing panel in 2001, but no decision was issued. The case was consolidated with another case, *Shankle v. Pep Boys-Manny, Moe & Jack, Inc.*, which was argued in 2000, but also had no decision, for rehearing en banc. The reason for this consolidation is unspecified; however, this probably occurred because there was a conflict between the two opinions. As in *Morrison*, the Sixth Circuit found the cost provisions of the plaintiff's arbitration agreement in *Shankle* unenforceable and severed those provisions from the agreement. *Id.* at 676-77.

35. *Id.* at 663.

36. *Id.* at 664.

37. *Id.* at 659.

38. *Id.* at 660.

39. *Id.* at 658.

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provisions at least suspect in cases in which the litigants have low incomes.

The *Morrison* majority stated that it was following *Green Tree* because it adopted a "case-by-case" standard that places the onus on plaintiffs to show the "likelihood" of prohibitive costs. But while it examines each case separately, the Sixth Circuit's test moves beyond just examining the individual plaintiff as directed by *Green Tree*. As Judge Batchelder's dissent to *Morrison* observed, the majority's test creates a "complicated pre-arbitration quasi-class action litigation scheme" by requiring courts to identify a class of litigants similarly situated to the plaintiff and consider the effects of the arbitration agreement on the class, rather than on the individual litigant. Judge Batchelder criticizing this requirement as unnecessary because each case involves a particular plaintiff who argues that he or she cannot pay the costs of arbitration.

However, this criticism obscured her more glaring condemnation of *Morrison*—it is inconsistent with *Green Tree*. As Judge Batchelder recognized, "Nothing in *Green Tree* authorizes the majority's novel requirement [of a class-based showing of typical costs]. . . . The majority opinion creates the anomalous likelihood that a district court could scrutinize, and perhaps strike down, a cost-splitting provision where the particular worker was fully able to pay the costs. . . ."

*Green Tree* said nothing about taking into account the possible "chilling effect" on the plaintiff, let alone the deterrence effect on potential "similarly situated" litigants who may or may not bring statutory claims. Indeed, the Supreme Court rejected the plaintiff's argument in *Green Tree* that the agreement barred her and "members of the putative class" from pursuing their claims. Furthermore, the Sixth Circuit looked to the "typical or average costs of arbitration" rather than the actual costs as in *Green Tree* or *Bradford*. The *Green Tree* Court held that the plaintiff's evidence about the typical costs of arbitration, as shown in the American Arbitration Association (AAA) Fee Schedule and other arbitration statistics, was "too speculative" to invalidate the arbitration agreement. Nonetheless, the *Morrison* court accepted similar evidence from Morrison, including one of the very articles on which the plaintiff in *Green Tree* unsuccessfully attempted to rely.

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41. *Morrison*, 317 F.3d at 653.
42. *Id.* at 681 (Batchelder, J., dissenting).
43. *Id.* at 682-83.
45. *Morrison*, 317 F.3d at 664.
47. *Morrison*, 317 F.3d at 685 (Batchelder, J., dissenting). A key distinction between *Morrison* and *Green Tree*, however, is that *Morrison*'s arbitration agreement contained some information about the costs Morrison was likely to bear compared to no information in the agreement signed by the plaintiff in *Green Tree*. 

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By including similarly situated persons and typical costs in its analysis, the *Morrison* court adopted a more liberal view of whether litigants can avoid arbitration based on costs than is allowed under *Green Tree*. While the *Green Tree* Court held that arbitration agreements were enforceable where they failed to protect litigants from potentially high costs, such costs are sufficient to invalidate arbitration agreements under the Sixth Circuit’s approach. The *Morrison* court explicitly refused to consider that a plaintiff could avoid paying any costs by prevailing on the merits under an agreement with a “loser pays” provision. The court held that even where there was a potential for no costs, plaintiffs might be able to avoid arbitration because the great likelihood of prohibitively high costs deters employees from arbitrating.

*Morrison* relaxed the presumption of arbitrability where plaintiffs face high costs to ensure claimants can exercise their statutory rights. The *Morrison* court held that when the costs of arbitration deterred employees from bringing claims, the arbitral forum was inaccessible and thus the arbitration agreement was unenforceable. In contrast, *Bradford* and its progeny focused on whether an employee had proven he or she could not afford to arbitrate the claim.

IV. CONCLUSION

The circuit split between *Bradford* and *Morrison* points to a need to refine, if not completely reconsider, *Green Tree*. The *Green Tree* decision is problematic because of the Supreme Court’s complete lack of guidance in defining “likelihood” when referring to prohibitive costs. The *Bradford* court interpreted likelihood so narrowly that it essentially meant “definite,” while the *Morrison* court interpreted it so broadly that it disregarded the language of *Green Tree*.

*Bradford* set too high a burden of proof on the plaintiff, but this result is grounded in the language of *Green Tree*. An implicit holding of *Green Tree*—which *Bradford* made explicit—is that a great risk of high costs does not render arbitration agreements unenforceable. The courts thus either overlooked or blatantly ignored the fact that such costs dissuaded plaintiffs from arbitrating their claims. However, where they face likely high costs, plaintiffs, specifically those with limited means, are unlikely to gamble their food or housing money on the chance of a substantial arbitration award. Moreover, what does likelihood mean if there is not some speculation involved? Under *Bradford*, there is great incentive for employers to draft arbitration agreements that make costs somewhat “speculative,” so that plaintiffs cannot avoid arbitration by claiming the costs are prohibitive. Because *Morrison* offers a much more

48. *Id.* at 662 (majority opinion) (“If we do not know who will prevail on the ultimate cost-splitting question until the end, we know who has lost from the beginning: those whom the cost-splitting provision deterred from initiating their claims at all.”).

49. See *id.* at 664-65.
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practical approach than Bradford does to determine whether arbitration is a suitable forum, the Supreme Court should resolve the circuit split in favor of Morrison and use Morrison's reasoning to reconsider Green Tree.

Both Morrison and Bradford are somewhat inconsistent with Supreme Court precedent. While Bradford accords more closely with the analysis in Green Tree, its holding diverges from Gilmer, arguably the Supreme Court's foundational case on the enforceability of arbitration agreements. The Bradford test does not ensure that plaintiffs can vindicate their rights effectively through arbitration. By contrast, Morrison diverges from Green Tree, while remaining consistent with the Gilmer understanding that arbitration agreements should not bar the effective vindication of rights. The Morrison court recognized the need for realistic limits on arbitration. The decision reflects the idea that arbitration is not a practical option when the intent or effect of an arbitration agreement is to make arbitration too costly for potential litigants.

As the popularity of mandatory arbitration agreements continues to grow in employment and consumer settings, it is imperative for the Supreme Court to affirm the principles of Gilmer, while taking a stronger stance against high costs that effectively foreclose the arbitral forum.50 I am not calling for a return to the "longstanding judicial hostility to arbitration agreements."51 But Morrison does point to the need for greater skepticism regarding the arbitrability of claims under agreements imposing high costs. Some private arbitration organizations52 and employers53 have already recognized that costs can serve as a barrier to arbitration, but we cannot rely on private actors alone to ensure avenues exist for the effective vindication of rights. And we cannot allow less well-meaning employers or corporations to take advantage of the law and craft contracts designed to deter employees and consumers from vindicating their rights. The Supreme Court cannot continue to claim that arbitration "further[s] broader social purposes"54 without first making certain

50. A recent study of the costs of arbitration showed that to arbitrate a typical $80,000 employment discrimination claim, the AAA would charge the plaintiff between $4850 and $6650 in fees, the National Arbitration Forum would charge the plaintiff $11,265, and the Judicial Arbitration and Mediation Services (JAMS) would charge between $4350 and $7950, compared to $221 in a typical urban court. The Costs of Arbitration, CONGRESS WATCH (Public Citizen), Apr. 2002, at 40-42, available at http://www.citizen.org/documents/ACF110A.PDF.


53. In some cases, employers have voluntarily agreed to assume responsibility for the full cost of arbitration for disputes with their employees. See, e.g., Livingston v.Assoc's Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003); Taylor v. Citibank USA, N.A., 292 F. Supp. 2d 1333, 1343 (M.D. Ala. 2003); Roberson v. Clear Channel Broad., Inc., 144 F. Supp. 2d 1371, 1374 (S.D. Fla. 2001).

54. Gilmer, 500 U.S. at 28.
that the arbitral forum is accessible to all litigants—whatever their financial circumstances.