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NOTE

Vindicating the Effective Vindication Exception: Protecting Federal Statutory Rights in the Employment Context

I. Introduction

Arbitration is a form of alternate dispute resolution that allows parties to submit a dispute to an independent third party for resolution.¹ Arbitration serves the purpose of resolving disputes between parties without involving the traditional judicial process.² The terms and procedures for arbitration are dictated by an arbitration agreement, and barring a few exceptions,³ the decision to arbitrate is binding upon the parties.⁴ Under federal law, courts treat arbitration agreements as a matter of contract.⁵ The primary benefits of arbitration are the reduced cost and quicker resolution of disputes as compared to the traditional legal process.⁶ Critics of arbitration, however, point out that arbitration can easily become more expensive than the traditional legal process when one accounts for the costs associated with the arbitral forum, including arbitrator fees and administrative costs.⁷

In recent decades, as the United States Supreme Court has repeatedly expressed a federal preference for the enforcement of arbitration agreements, corporations have increasingly begun to insert arbitration clauses in form contracts with employees.⁸ This increase in mandatory arbitration in the employment context can create problems for employees when a dispute with their employer arises. Unlike arbitration agreements between sophisticated, repeat-player corporations in which both sides voluntarily accept the terms, arbitration agreements in the employment context often create inequities between parties as a result of boilerplate

1. 1 JAY E. GRENIG, *ALTERNATE DISPUTE RESOLUTION* § 6:1 (3d ed. 2016).

2. *Id.*

3. 9 U.S.C. § 10 (2012).

4. GRENIG, *supra* note 1, § 12:20.

5. *See* 9 U.S.C. § 2.

6. GRENIG, *supra* note 1, § 6:2.

7. *Id.*

8. *See* Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 336 (2015); Michele L. Giovagnoli, Comment, *To Be or Not to Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. REV. 547, 555 (1996).

language, ignorance of what arbitration entails, and unequal bargaining power.

One particular concern with mandatory arbitration in the employment context involves the de facto waiver of federal statutory rights. The Supreme Court has repeatedly endorsed the compelled arbitration of claims that arise out of federal statutory rights.⁹ Now, some commentators have voiced concern that individuals will be increasingly forced to forego federal statutory claims because the filing fees and costs associated with arbitration make it economically unfeasible to pursue those claims.¹⁰ The combination of compelled arbitration and the often prohibitive costs associated with arbitration can lead to situations in which a prospective litigant is barred from vindicating his or her federal statutory rights in court, and is likewise unable to vindicate those rights in the arbitral forum because arbitration costs may far exceed his or her potential recovery.¹¹

One solution to this problem exists in the form of the “effective vindication” exception to the arbitration of federal statutory rights. The effective vindication doctrine invalidates arbitration agreements that thwart a party from “effectively . . . vindicat[ing] its statutory cause of action in the arbitral forum.”¹² Although the effective vindication exception provides an avenue for courts to protect important federal statutory rights, recent developments in the doctrine have created an open question as to the true breadth of the exception.¹³

In the most recent Supreme Court analysis of the effective vindication exception, the Court construed the exception narrowly, suggesting that it applies only to arbitration agreements that “constitute the elimination of the *right to pursue*” a federal statutory right.¹⁴ This narrow conception of the effective vindication exception appears to limit its application to arbitration agreements that expressly forbid the assertion of a federal statutory right or

9. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

10. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 133 (2004).

11. *Id.* at 133–34.

12. *Mitsubishi Motors Corp.*, 473 U.S. at 637.

13. Compare *Italian Colors*, 133 S. Ct. at 2311 (2013) (focusing effective vindication exception analysis on the party’s “*right to pursue*” federal statutory claims), with *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 377 (2016) (focusing effective vindication exception on whether arbitration agreement provides party with an “effective and accessible” forum).

14. *Italian Colors*, 133 S. Ct. at 2311.

to those that result in “filing and administrative fees . . . that are so high as to make access to [arbitration] impracticable.”¹⁵

Based on its decision in *Shankle v. B-G Maintenance*,¹⁶ and more recently in *Nesbitt v. FCNH, Inc.*,¹⁷ the Tenth Circuit charted a separate path regarding the application of the effective vindication exception. The Tenth Circuit applies the effective vindication exception to arbitration agreements that forbid the assertion of federal statutory rights and to agreements that do not provide an “effective and *accessible* alternative forum.”¹⁸ By considering the totality of the effects the arbitration has on a litigant’s ability to vindicate his or her federal statutory rights, the Tenth Circuit’s approach to the effective vindication exception offers a better balance between the federal preference for enforcing arbitration and the needs of prospective litigants who face a significant disadvantage in terms of sophistication, bargaining power, and financial resources.

This Note explores the Tenth Circuit’s interpretation of the effective vindication exception. Part II traces the development of the law regarding the general enforceability of arbitration agreements and the effective vindication exception prior to *Nesbitt*. Part III examines the factual and procedural background of *Nesbitt* and the Tenth Circuit’s rationale for invalidating the arbitration agreement involved. Part IV explores the potential benefits and consequences of *Nesbitt*, both for individuals seeking to invalidate arbitration agreements and for businesses seeking to enforce those agreements, as well as for the future of arbitration as a whole. Finally, Part V explains why courts should adopt the Tenth Circuit’s approach in *Nesbitt* so as to better effectuate the effective vindication exception and the ultimate purpose of the Federal Arbitration Act.

II. Law Before the Case

A. The Federal Arbitration Act and Initial Non-Arbitrability of Federal Statutory Rights

In 1925, Congress enacted the Federal Arbitration Act (FAA) to “reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration upon the same footing as other contracts.”¹⁹ In pertinent part, the FAA provides that:

15. *Id.* at 2310–11.

16. 163 F.3d 1230, 1234 (10th Cir. 1999).

17. 811 F.3d at 380–81.

18. *Id.* at 377 (emphasis added).

19. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁰

Other portions of the FAA allow for a judicial stay when a dispute may be subject to arbitration and, when necessary, an order compelling a party to comply with its agreement to arbitrate a dispute.²¹ Together these provisions demonstrate a “liberal federal policy favoring arbitration agreements.”²² Because of this federal preference for arbitration, courts have come to “‘rigorously enforce’ arbitration agreements according to their terms.”²³

While it is now well-established that this federal preference for arbitration includes agreements to arbitrate federal statutory claims, this was not always the case. For the first sixty years of the FAA’s existence, the Supreme Court did not permit the arbitration of federal statutory claims.²⁴ The Court first voiced its opposition to the arbitration of federal statutory rights in *Wilko v. Swan*.²⁵ *Wilko* involved an arbitration agreement that covered federal statutory rights guaranteed by the Securities Act of 1933.²⁶ The Securities Act of 1933 includes a provision which renders void “[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the Act].”²⁷ The Court invalidated the agreement to arbitrate claims arising under the Securities Act of 1933, noting that “the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.”²⁸

Justice Frankfurter’s dissent in *Wilko* provides insight to the Court’s current position on the arbitrability of federal statutory rights. Justice

20. 9 U.S.C. § 2 (2012).

21. *Id.* §§ 3, 4.

22. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

23. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

24. Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 394 (2014).

25. 346 U.S. 427, 438 (1953).

26. *Id.* at 428–29.

27. 15 U.S.C. § 77n (2012).

28. *Wilko*, 346 U.S. at 438.

Frankfurter disagreed with the majority's conclusion that arbitration would be inappropriate for issues arising under the Securities Act.²⁹ He pointed out that "[a]rbitrators may not disregard the law" and their doing so would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act."³⁰ In his opinion, the advantages of allowing claims arising under the Securities Act to be resolved by arbitration outweighed the Court's concern that an arbitrator's decision would be inferior to the judicial forum and would jeopardize a plaintiff's federal statutory rights.³¹

B. The Development of the Effective Vindication Exception

As arbitration increased in popularity, the Court was forced to rethink its position on the arbitrability of federal statutory claims. The rule forbidding the arbitration of federal statutory claims conflicted with the Court's developing preference for arbitration.³² In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court finally addressed this conflict head-on.³³

Mitsubishi involved a dispute between two international companies, a Japanese car manufacturer (Mitsubishi) and a Puerto Rican distributor (Soler Chrysler-Plymouth).³⁴ The two companies entered into a Distributor Agreement and Sales Agreement whereby Soler Chrysler-Plymouth would sell cars produced by Mitsubishi.³⁵ The Sales Agreement included an arbitration clause which provided that "[a]ll disputes, controversies, or differences which may arise between [Mitsubishi] and [Soler] . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."³⁶

After multiple disagreements arose between Mitsubishi and Soler regarding poor sales performance and Mitsubishi's resulting refusal to divert certain shipments, Mitsubishi brought an action in the United States District Court for the District of Puerto Rico seeking enforcement of the

29. *Id.* at 440 (Frankfurter, J., dissenting).

30. *Id.* (quoting *Wilko v. Swan*, 201 F.2d 439, 445, *rev'd* *Wilko v. Swan*, 346 U.S. 427).

31. *Id.* at 439–40.

32. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 255 (1977); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960).

33. 473 U.S. 614, 616 (1985).

34. *Id.* at 616–17.

35. *Id.* at 617.

36. *Id.*

arbitration agreement under the FAA.³⁷ Soler counterclaimed, alleging, among other things, a violation of the Sherman Antitrust Act.³⁸

In reversing the Court's previous course, the *Mitsubishi* Court rejected the *Wilko* non-arbitrability doctrine in favor of the liberal federal policy favoring arbitration.³⁹ Dismissing concerns about the protection of important statutory rights, the Court explained that "[in] 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."⁴⁰ Thus, the Court extended the strong presumption in favor of arbitration to arbitration agreements concerning federal statutory rights.⁴¹

Even as it expanded the breadth of the FAA, the Court rejected the notion that its holding in *Mitsubishi* implied that "all controversies implicating statutory rights are suitable for arbitration."⁴² Rather, the Court laid out the framework for the effective vindication exception, stating that "so long as the prospective litigant *effectively may vindicate* its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."⁴³ But if the provisions of an arbitration agreement would operate to waive a litigant's right to pursue a statutory remedy, the Court "would have little hesitation in condemning the agreement as against public policy."⁴⁴ So while the Court determined that the FAA permitted the arbitration of federal statutory claims, it also reserved the right to invalidate any arbitration agreement that threatens to undermine the vindication of federal statutory rights.⁴⁵

Subsequent to *Mitsubishi*, the Court has recognized the effective vindication exception but has never applied it to invalidate an arbitration agreement.⁴⁶ The Supreme Court's apparent hesitation in invoking the

37. *Id.* at 618 (alterations in original).

38. *Id.* at 619-20.

39. *Id.* at 639-40.

40. *Id.* at 628.

41. *Id.*

42. *Id.* at 627.

43. *Id.* at 637 (emphasis added).

44. *Id.* at 637 n.19.

45. See Robert Ward, Note, *Divide & Conquer: How the Supreme Court Used the Federal Arbitration Act to Threaten Statutory Rights and the Need to Codify the Effective Vindication Rule*, 39 SETON HALL LEGIS. J. 149, 155-56 (2015).

46. See, e.g., 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91-92 (2000); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

effective vindication exception therefore suggests that a party claiming the exception likely faces a heavy burden in proving its applicability.⁴⁷

However, the Tenth Circuit's application of the effective vindication exception in *Shankle v. B-G Maintenance Management of Colorado, Inc.*, provided a more forgiving burden for a party seeking to invalidate an arbitration agreement.⁴⁸ In *Shankle*, the Tenth Circuit invalidated an arbitration agreement between an employee and his employer that required the employee to pay one-half of the arbitrator's fees.⁴⁹ The arbitration agreement's failure to provide an "accessible forum" for the employee to assert his Age Discrimination in Employment Act (ADEA) claims "clearly undermine[d] the remedial and deterrent functions of the federal anti-discrimination laws."⁵⁰ The Tenth Circuit's interpretation of the effective vindication rule clearly set a lower bar for application of the exception than the Supreme Court evinced in its earlier decisions.⁵¹

The most detailed analysis of the effective vindication exception performed by the Supreme Court since *Mitsubishi* occurred in *Green Tree Financial Corp.-Alabama v. Randolph*.⁵² *Green Tree* involved an arbitration agreement between Green Tree (a lender) and Randolph (a borrower).⁵³ When Randolph brought a claim against Green Tree under the Truth in Lending Act (TILA), Green Tree filed a motion to compel arbitration.⁵⁴ Randolph asked the district court to invalidate the arbitration agreement because her lack of financial resources coupled with the steep costs of arbitration would force her to "forgo her [federal statutory] claims against [Green Tree]."⁵⁵

While the Court declined to apply the effective vindication exception to Randolph's TILA claims, it provided some insight into what type of circumstances would trigger the exception. The Court mused that while "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,"⁵⁶

47. Olga Bykov, Note, *Vindication of Federal Statutory Rights: The Future of Cost-Based Challenges to Arbitration Clauses After American Express v. Italian Colors Restaurant and Green Tree v. Randolph*, 50 U.C. DAVIS L. REV. 1323, 1341 (2017).

48. 163 F.3d 1230, 1234 (10th Cir. 1999).

49. *Id.* at 1234-35.

50. *Id.* at 1235.

51. *See* cases cited *supra* note 13.

52. 531 U.S. 79 (2000).

53. *Id.* at 82.

54. *Id.* at 83.

55. *Id.* at 83-84.

56. *Id.* at 90.

the mere “risk” that a litigant may face prohibitive costs was not enough to trigger the exception.⁵⁷ Instead, a party seeking to invoke the effective vindication exception must show a “likelihood” that he or she will actually incur prohibitive costs.⁵⁸ The Court did not elaborate, however, on the level of detail a party must provide before the party seeking to compel arbitration must supply evidence to the contrary.⁵⁹

After *Green Tree*, the contours of effective vindication rule became clearer: an agreement to arbitrate a federal statutory claim would be enforced unless the challenging party could demonstrate that the arbitration agreement would prohibit the party from effectively vindicating those rights.⁶⁰ Circumstances that would trigger the effective vindication exception included, at a minimum, agreements that expressly waived federal statutory rights or imposed prohibitively large arbitration costs.⁶¹ Moreover, the party challenging the enforceability of the agreement bears the burden of demonstrating the existence of those circumstances.⁶²

C. Limitations on the Effective Vindication Exception

Prior to *American Express Co. v. Italian Colors Restaurant*,⁶³ the Court’s effective vindication exception existed as set forth in *Mitsubishi* and *Green Tree*. In *Italian Colors*, rather than more clearly defining the exception, the Court instead chose to curtail its applicability.

In the case, a group of merchants commenced a class action against American Express for violations of section 1 of the Sherman Act and section 4 of the Clayton Act.⁶⁴ The agreement between American Express and the merchants required that all disputes arising out of the contractual relationship be submitted to arbitration.⁶⁵ Additionally, each merchant was required to arbitrate individually, as the agreement expressly prohibited class arbitration.⁶⁶ While the district court granted American Express’s motion to compel arbitration and dismissed the class action, the Second Circuit reversed the decision, due in part to the prohibitive costs the

57. *Id.* at 91.

58. *Id.* at 92.

59. *Id.*

60. Chukwumerije, *supra* note 24, at 400.

61. *Id.*

62. See *Green Tree*, 531 U.S. at 90–92; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

63. 133 S. Ct. 2304 (2013).

64. *Id.* at 2308.

65. *Id.*

66. *Id.*

merchants would incur if “compelled to arbitrate under the class action waiver.”⁶⁷

On appeal to the Supreme Court, after determining that the parties voluntarily submitted to arbitration and that no “contrary congressional command” compelled the Court to invalidate the arbitration agreement, the Court turned to consideration of the effective vindication rule.⁶⁸ The Court began by noting that the effective vindication exception “originated as dictum in *Mitsubishi Motors*” out of concern for arbitration agreements that eliminate a party’s “right to pursue” federal statutory claims.⁶⁹ By reducing the exception to mere dictum, the Court created ample space to redefine the scope of the rule.

Focusing in particular on the right to pursue statutory remedies instead of the ability to effectively vindicate those remedies, the Court narrowed the exception to cover only arbitration agreements that actually prohibit a party from accessing the arbitral forum. Thus, the exception “would certainly cover a provision . . . forbidding the assertion of certain statutory rights” and “would *perhaps* cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”⁷⁰ This new iteration of the effective vindication exception seemingly eliminates collateral costs not specific to the arbitral forum, such as the costs of attorney’s fees, expert witnesses, and production of evidence.⁷¹ Justice Scalia’s majority opinion made clear “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”⁷²

In a strong dissent, Justice Kagan objected to Justice Scalia’s characterization of the effective vindication exception as mere dicta and to his application of the exception to the facts presented in *Italian Colors*.⁷³ Justice Kagan pointed out that by refusing to apply the effective vindication exception to the agreement between American Express and the merchants, the Court effectively allowed American Express to insulate itself from private enforcement of both the Sherman Act and the Clayton Act, because the cost of proving an antitrust violation (between several hundred thousand

67. *Id.* (quoting *In re Am. Express Merchant’s Litig.*, 554 F.3d 300, 315-16 (2d Cir. 2009)).

68. *Id.* at 2309.

69. *Id.* at 2310.

70. *Id.* (emphasis added).

71. See Bykov, *supra* note 47, at 1349, 1353.

72. *Italian Colors*, 133 S. Ct. at 2311.

73. *Id.* at 2317–18, 2317 n.3 (Kagan, J., dissenting).

and one million dollars) far exceeds the potential recovery for individual merchants (\$38,549 in Italian Colors Restaurant's case).⁷⁴ Justice Kagan asserted that this was precisely the type of prohibitive cost the exception was meant to safeguard against, because "[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands."⁷⁵

The Court's newest limitation of the effective vindication exception in *Italian Colors* led many commentators to wonder what remains of the rule.⁷⁶ Moreover, *Italian Colors* seemed to directly conflict with the Tenth Circuit's application of the effective vindication rule set forth in *Shankle*. Just two years later, the Tenth Circuit was presented an opportunity to reconsider the effective vindication exception in light of the developments at the Supreme Court level.

III. Nesbitt v. FCNH, Inc.

A. Facts

Rhonda Nesbitt brought an action against FCNH, Inc. and five other defendants in the United States District Court for the District of Colorado on April 7, 2014, for violations of the Fair Labor Standards Act (FLSA) and state labor laws.⁷⁷ FCNH and the other defendants owned and operated thirty-one for-profit schools that offered education in massage therapy, skin care, and esthetics.⁷⁸ These schools required students to provide services to the public but did not compensate the students for providing such services.⁷⁹

Nesbitt enrolled in one of the defendants' schools, the Denver School of Massage Therapy, and was required to provide uncompensated services to the public as a part of her curriculum.⁸⁰ When Nesbitt enrolled, she signed an enrollment contract that included an arbitration clause.⁸¹ This clause required arbitration of any dispute arising out her enrollment at the school,

74. *Id.* at 2316.

75. *Id.*

76. *See, e.g.,* Bykov, *supra* note 47, at 1336; Chukwumerije, *supra* note 24, at 449.

77. *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 375 (10th Cir. 2016).

78. *Id.* at 373.

79. *Id.* at 374.

80. *Id.*

81. *Id.*

the educational services provided to her by the school, or any other related matter.⁸² The agreement also stated the following:

Arbitration shall be conducted in accordance with the Commercial Rules of the American Arbitration Association applying federal law to the fullest extent possible, and the substantive and procedural provisions of the Federal Arbitration Act shall govern this Arbitration Agreement and any and all issues relating to the enforcement of Arbitration Agreement and the arbitrability of the claims between the parties.⁸³

Finally, the arbitration agreement provided that “[e]ach party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of the proofs,” and allowed students to opt out of the arbitration agreement by mailing in a signed rejection notice.⁸⁴ Nesbitt failed to comply with the opt-out procedures required by the arbitration agreement.⁸⁵

B. District Court Proceedings

After Nesbitt brought suit, FCNH and the other defendants filed a motion to stay the proceedings and compel arbitration pursuant to the arbitration agreement.⁸⁶ Although the district court agreed with the defendants that the arbitration agreement “[wa]s not procedurally unconscionable” because Nesbitt was provided with ample opportunity to review the contract and opt out of the arbitration agreement, it denied the defendants’ motion on other grounds.⁸⁷ The court turned to the effective vindication exception, finding that two provisions of the arbitration agreement served to “prevent Ms. Nesbitt . . . from effectively vindicating [her] statutory rights under the FLSA,”⁸⁸ including (1) a section requiring that arbitration be conducted according to the Commercial Rules of the American Arbitration Association, and (2) a section requiring each party to bear its own expenses in proving its case in arbitration.⁸⁹ The district court agreed with Nesbitt’s contention that together these two provisions imposed a prohibitively high

82. *Id.*

83. *Id.* (citation omitted).

84. *Id.* at 374–75.

85. *Id.* at 378.

86. *Id.* at 375.

87. *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366, 1372 (D. Colo. 2014).

88. *Id.* at 1373.

89. *Id.*

cost on Nesbitt's ability to vindicate her claim in the arbitral forum, thereby making the agreement unenforceable under the effective vindication exception.⁹⁰ In agreeing with Nesbitt's effective vindication argument, the district court relied on *Shankle v. B-G Maintenance Management of Colorado, Inc.*, which held an arbitration agreement unenforceable because it placed the employee-plaintiff "between the proverbial rock and a hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost [of arbitration] substantially limited use of the arbitral forum."⁹¹

The district court understood *Shankle* as standing for the proposition that "an arbitration agreement requiring a plaintiff to share in the costs of arbitration is unenforceable when the agreement effectively deprives the plaintiff of an accessible forum to resolve his statutory claims and vindicate his statutory rights."⁹² The district court's interpretation of *Shankle* and application of the effective vindication exception greatly differs from the Supreme Court's approach in *Italian Colors*. Rather than focusing on a party's technical right or ability to vindicate a federal statutory claim in the arbitral forum (as *Italian Colors* instructed), the district court focused instead on the *accessibility* of the arbitral forum.⁹³ While this approach undoubtedly provides more protection to individuals who have signed arbitration agreements, it runs counter to the "liberal federal policy favoring arbitration" and the Court's narrow application of the effective vindication exception.⁹⁴ Nevertheless, finding no savings clause in the arbitration agreement, the district court invalidated the entire arbitration agreement as unenforceable.⁹⁵

C. Tenth Circuit Decision

On appeal, the issue before the Tenth Circuit Court of Appeals was whether the district court properly applied the effective vindication exception.⁹⁶ This forced the Tenth Circuit to address the incongruity between its conception of the effective vindication exception in *Shankle* and

90. *Id.*

91. 163 F.3d 1230, 1235 (1999).

92. *Nesbitt*, 74 F. Supp. at 1373 (quoting *Daugherty v. Encana Oil & Gas (USA), Inc.*, No. 10-CV-02272-WJM-KLM, 2011 WL 2791338, at *10 (D. Colo. July 15, 2011)).

93. *See* cases cited *supra* note 13 and accompanying text.

94. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *see also* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013).

95. *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 376 (10th Cir. 2016).

96. *Id.*

the Supreme Court's most recent application of the exception in *Italian Colors*.⁹⁷

The Tenth Circuit began its analysis by reiterating the general effective vindication exception rule: agreements to arbitrate are invalid when they “operate as a prospective waiver of a party’s *right to pursue* statutory remedies.”⁹⁸ While the Tenth Circuit made mention of language the Supreme Court used in *Italian Colors*—language indicating that the effective vindication exception “would certainly cover a provision . . . forbidding the assertion of certain statutory rights” and possibly “filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable”⁹⁹—the Tenth Circuit did not follow such a narrow interpretation of the effective vindication exception.

Instead, the Tenth Circuit, like the district court below, relied on *Shankle* and focused not only on the *right* to access the arbitral forum, but also on the *practical ability* to access the forum.¹⁰⁰ The court’s effective vindication rule set forth in *Nesbitt* invalidates any arbitration agreement when factors specific to the arbitral forum act to “prevent an individual from effectively vindicating his or her statutory rights.”¹⁰¹ Having determined that the effective vindication exception applies when an arbitration agreement denies a litigant an “effective and accessible alternative forum,” the court then considered whether *Nesbitt* met her burden under *Green Tree* to show that the arbitration agreement imposed prohibitive costs that would trigger the effective vindication exception.¹⁰²

The defendants first argued that *Nesbitt* was precluded from asserting the effective vindication doctrine because she failed to utilize the opt-out provision that would have “eliminated any dispute regarding the cost of arbitration.”¹⁰³ The Tenth Circuit flatly rejected this argument because *Nesbitt*’s failure to opt out indicated that she voluntarily entered into the arbitration agreement and had no bearing on whether that agreement imposed costs that would trigger the exception.¹⁰⁴ Next, the court rejected the defendants’ contention that *Nesbitt*’s failure to “pursue the possibility of deferred or reduced [arbitration] fees” meant that she failed to meet her

97. *See generally id.*

98. *Id.* at 377.

99. *Id.* (quoting *Italian Colors*, 133 S. Ct. at 2310–11).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 378.

104. *Id.*

burden.¹⁰⁵ The court noted that because Nesbitt would “be[] at the mercy” of the arbitrator as to whether she would be forced to shoulder prohibitive arbitration costs, relying on deferred or reduced fees did not facilitate the effective vindication of her rights under the FLSA.¹⁰⁶ Finally, the defendants argued that Nesbitt failed to meet her burden under the effective vindication exception because she did not provide “evidence regarding the cost of prosecuting her class or collective action claims.”¹⁰⁷ The court flatly rejected this argument because the defendants failed to raise the argument below.¹⁰⁸

Because the Tenth Circuit concluded that the effective vindication exception could apply to prohibitively expensive arbitration agreements and that Nesbitt met the burden required by *Green Tree*, it affirmed the district court’s decision to invalidate the arbitration agreement. In doing so, the Tenth Circuit reaffirmed *Shankle* and its broader application of the effective vindication doctrine. Adoption of the Tenth Circuit’s approach by other courts would present the best opportunity for courts to both remain true to the federal preference for arbitration and protect the federal statutory rights of relatively powerless individuals.

IV. Analysis

The Tenth Circuit’s conception of the effective vindication exception strikes the ideal balance between the protection of consumers’ and employees’ federal statutory rights and the enforcement of valid arbitration agreements while also remaining consistent with the Supreme Court’s decisions in *Green Tree* and *Italian Colors*. While *Italian Colors* forecloses the use of class action waivers as a justification for the invalidation of otherwise valid arbitration agreements under the effective vindication exception,¹⁰⁹ the doctrine remains alive and well with respect to costs directly associated with the arbitral forum.¹¹⁰ Lower courts have recognized this distinction post-*Italian Colors* and have found that the effective vindication exception can be used to invalidate arbitration agreements when

105. *Id.*

106. *Id.*

107. *Id.* at 379.

108. *Id.* (citing *Martinez v. Angel Expl., LLC*, 798 F.3d 968, 974 (10th Cir. 2015)).

109. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013).

110. *Bykov*, *supra* note 47, at 1348–49.

arbitration-specific costs prevent a plaintiff from vindicating its federal statutory claims.¹¹¹

In the absence of any legislation codifying the effective vindication exception in the FAA,¹¹² courts should adopt the Tenth Circuit's approach to the effective vindication exception for two reasons. First, applying the effective vindication exception to arbitration-specific costs that inhibit the practical ability to access the arbitral forum offers more protection for employees and consumers who possess little bargaining power. And second, companies seeking to impose mandatory arbitration on employees or consumers can still craft mandatory arbitration agreements that may help to reduce litigation while still allowing the vindication of federal statutory rights.

Subsequent to the Supreme Court's decision to abandon the non-arbitrability doctrine in the 1980s and 1990s, corporations have greatly expanded their use of mandatory arbitration clauses to compel the arbitration of federal statutory rights.¹¹³ These arbitration clauses are inserted into contracts that employees or consumers must sign as a condition precedent to obtaining employment or obtaining a good or service.¹¹⁴ Mandatory arbitration has become so popular among large companies that one recent study found that around ninety-three percent of leading telecommunications, credit, and financial firms employ arbitration clauses in their contracts with employees.¹¹⁵ The proliferation of mandatory, binding arbitration agreements often forces consumers and employees to choose between accepting mandatory arbitration or foregoing employment opportunities or the ability to purchase goods and services.¹¹⁶ Although mandatory arbitration may benefit some consumers by limiting costs—perhaps ultimately reducing the price of goods and services—it also

111. See, e.g., *Nesbitt*, 811 F.3d at 376; *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013); *Byrd v. SunTrust Bank*, No. 2:12-cv-02314-JPM-cgc, 2013 WL 3816714, at *18–19 (W.D. Tenn. July 22, 2013).

112. See Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015).

113. Ashley M. Sergeant, Student Article, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 149 (2012).

114. *Id.*

115. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008).

116. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

threatens the ability of consumers and employees to pursue claims and undermines federal statutory rights.

The effective vindication exception can provide a solution to both problems if accorded the appropriate breadth. Rather than focusing the effective vindication exception on the technical ability to access the arbitral forum, as the Supreme Court did in *Italian Colors*,¹¹⁷ courts should instead consider the totality of the circumstances surrounding an arbitration agreement like the Tenth Circuit did in *Nesbitt*.¹¹⁸ When an arbitration agreement expressly forbids the assertion of a federal statutory right, or imposes arbitration-specific expenses¹¹⁹ that make access to the arbitral forum impracticable, courts should invalidate the agreement under the effective vindication exception if the party opposing arbitration meets its burden of showing it will actually incur those expenses.¹²⁰ But if the only impediment facing the party opposing arbitration is the possibility that the cost of proving its claim in arbitration might outweigh potential recovery on that claim, such agreement must be upheld under the Court's decisions in *Green Tree* and *Italian Colors*.¹²¹

The Court's decision to allow the compelled arbitration of federal statutory rights in *Mitsubishi* was predicated on the ability to "effectively [] vindicate its statutory cause of action."¹²² Additionally, as the United States pointed out in its amicus brief in *Italian Colors*, "[p]rivate actions are a vital supplement to government enforcement not only under the antitrust laws, but also under a wide range of other federal statutes."¹²³ The Tenth Circuit's approach to the effective vindication exception in *Nesbitt* should be adopted in order to ensure not only that prospective litigants may effectively vindicate their rights, but also to ensure that private enforcement of federal statutory rights remains a vital supplement to enforcement by the government.

117. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

118. *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 377 (10th Cir. 2016).

119. Arbitration specific costs include, inter alia, arbitration filing fees, arbitrators' compensation costs, post-award cost shifting mechanisms, and "loser pays" provisions. *See Bykov*, *supra* note 47, at 1346–53.

120. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000); *Nesbitt*, 811 F.3d at 380–81.

121. *Italian Colors*, 133 S. Ct. at 2310–11; *Green Tree*, 531 U.S. at 91–92.

122. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

123. Brief for the United States as Amicus Curiae Supporting Respondents at 33, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 367051.

Additionally, broadening the application of the effective vindication exception need not lead to a marked increase in the invalidation of mandatory arbitration agreements. Companies could simply alter their contracts to include “consumer-friendly” arbitration clauses that will withstand cost-based challenges to compelled arbitration.¹²⁴ In the wake of the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, where the Court praised AT&T’s consumer-friendly arbitration agreement,¹²⁵ corporations were advised to adopt similar consumer-friendly provisions in their own agreements to avoid judicial invalidation.¹²⁶ One commentator examined thirty-seven arbitration clauses post-*Concepcion*, noting that nearly all the clauses had been amended, many to add pro-consumer provisions.¹²⁷ By adding consumer-friendly provisions to arbitration agreements, potential defendants can ensure they will reap the benefits of compelled arbitration of federal statutory rights without inhibiting the ability of potential plaintiffs to vindicate those same rights.

V. Conclusion

As recent cases involving mandatory arbitration have demonstrated, the Supreme Court maintains a very narrow view of the effective vindication exception’s applicability. The Court’s detached focus on the right to vindicate statutory claims disregards the practical realities that face many employees and consumers subject to arbitration agreements. Such individuals often cannot afford the filing fees and other costs associated with arbitration, precluding the vindication of their federal statutory claims. The Tenth Circuit’s approach to the effective vindication exception focuses instead on the practical effects of an arbitration agreement by requiring an *accessible* arbitral forum.

Arbitration represents an effective tool to expedite the resolution of disputes and relieve an increasingly overcrowded court docket. Yet these benefits do not justify the erosion of federal statutory rights that has occurred over the past three decades. Individuals who sign arbitration

124. See Myriam Gilles, *Killing Them With Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 844 (2012).

125. 563 U.S. 333, 351–52 (2011).

126. Gilles, *supra* note 124, at 844–45 (“Much of this advice explicitly urges prospective defendants to follow AT&T’s lead by providing that all fees and costs of suit are recoverable by a prevailing plaintiff, and by offering cash bounties where claimants receive an arbitration award superior to defendant’s final pre-award offer, among other features.”).

127. *Id.* at 853.

agreements often do so because they have little choice, largely due to the differences in bargaining power and sophistication between large corporations and individual employees or consumers. To rectify this disparity, the Supreme Court should adopt the Tenth Circuit's approach to the effective vindication rule and acknowledge that a more flexible totality of the circumstances approach will better serve the needs of individuals without undermining the text or purpose of the Federal Arbitration Act.

Colby J. Byrd