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Why arbitrate a statutory employment claim? Proponents of ADR point to its speed, economy and informality, benefits buttressed by both court and Congressional support, says H. David Kelly, Jr. The use of arbitration to resolve statutory disputes has, however, given rise to substantive issues that must be considered by party advocates, says Kelly. Possible cost, neutral selection, adequacy of the remedy, and finality of the award are a few of the concerns that must be considered by prudent counsel to ensure that the arbitration is conducted to the satisfaction of the parties.

Practical Concerns Affecting the Arbitration of Statutory Claims

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The arbitration of statutory employment claims remains controversial[1] despite the fact that the United States Supreme Court and Congress have both embraced it as a means to resolve these employment disputes, at least under some circumstances. Its proponents declare that it is preferred because of attributes noted by the court: its alleged speed, economy, and informality in comparison with litigation.[2] However, there is good reason to suggest that the primary motivation prompting employers to mandate its use by their employees is the desire to avoid a jury trial.[3] The official support for, and acquiescence to, the privatized adjudication of public law issues manifested in the Supreme Court's Gilmer decision and Congress' encouragement of alternative dispute resolution, including arbitration where appropriate, in the Civil Rights Act of 1991 and the Americans with Disabilities Act, raise very important questions for our civil society and constitutional order that cannot be addressed within the scope of this article. The goal here is much more modest: to assist counsel who may be considering submission of a statutory claim to arbitration, by alerting them to issues they may likely confront if they choose to use arbitration to resolve a particular dispute. While many of these issues also arise with employer-mandated arbitration, voluntary arbitration is its focus.

Reasons to Arbitrate a Statutory Claim

In *Gilmer*, the Supreme Court noted that by agreeing to arbitration, parties "trade[ ] the procedures and opportunity for review of the courtroom for…simplicity, informality, and expedition."[4] The reference is to the fact that in arbitration, discovery is much more limited; the procedural tools that permit courts to terminate cases prior to trial are absent; there is a diminished reliance on the rules of evidence; and there is the expectation that a privately arranged arbitration will occur well before a court case would come to trial. Each of these attributes should be considered in evaluating whether a case is appropriate for arbitration.

As both federal and state court dockets have swollen so that the judiciary is hard-pressed to keep pace with the demand for its services, the opportunity to arbitrate statutory claims has become more attractive to many parties. By taking the matter into their own hands, parties will very likely be able to obtain an earlier decision through arbitration. An extended delay in resolving a claim may have undesirable effects on both parties. For a claimant, delay may impede his ability to obtain new employment and to move forward with his life. A wide range of personal concerns, including deteriorating health, may prompt a claimant to want to resolve the matter quickly. For a defendant organization, delay may mean that the uncertainty and diminished morale that accompany a charge of discrimination will continue to undermine its organizational efforts in other areas. Counsel should take these matters into consideration when advising their clients regarding a discrimination claim. But as the *Gilmer* opinion recognizes, choosing to expedite dispute resolution through arbitration comes at a cost. The arguments the majority in *Gilmer* relied upon in concluding that arbitration was adequate to vindicate the recalcitrant Robert Gilmer's ADEA claim provide important guidance about what those costs may be. Some of these considerations necessitate modifications in the procedures that have traditionally been used in arbitration. Counsel must carefully evaluate whether the relative speed and informality of arbitration will adequately serve their client's needs in a particular case. This determination should only be made after considering the extent to which the relatively relaxed procedures of arbitration will affect the manner in which the claim will be presented and specifically how will it affect the primary witnesses and proofs.

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This concern leads to a consensus among the plaintiffs' counsel and neutrals I consulted while researching this topic: arbitrate only if you do not need formal discovery to prove your case or if your proposed agreement provides for adequate discovery, albeit on an expedited basis. It should be recalled that one of the reasons the *Gilmer* court gave for finding the challenged arbitration procedures adequate was that the New York Stock Exchange (NYSE) rules provided for "document production, information requests, depositions, and subpoenas," and that while "not as extensive" as discovery in litigation, it was deemed adequate.[5] For the court, its conclusion that these procedures were adequate was buttressed by the fact that arbitrators are not bound by the rules of evidence.[6] This is quite significant because discovery has not typically been available in arbitration.[7] It should be noted that, consistent with the *Gilmer* court's observations, every recent effort to set forth procedures for the arbitration of employment disputes provides that the arbitrator may require reasonable discovery.[8] This leads to the following observation: assuming that employer's counsel will always prefer arbitration because it eliminates the risk of a large jury verdict and is conducted in relative privacy, they should always be prepared to agree to discovery since it will quite likely be completed more quickly and be less burdensome than discovery under the court rules. Therefore, plaintiffs' counsel can be confident that a demand for procedures to accomplish needed discovery will be accommodated in negotiating to submit a dispute to arbitration.

Concerns about presentation of the plaintiff's case and about the nature of the remedy sought are frequently mentioned as reasons for a plaintiff to agree to arbitrate his claims. A key witness who is a poor storyteller or who may have other reasons to avoid testifying in a public forum have been offered as reasons to submit a claim to arbitration. In considering this, counsel would be well advised to recognize that many arbitrators take an active role in the hearing far in excess of that typical of a judge in the courtroom. Counsel's ability to shield a witness may actually be diminished, rather than enhanced, in the arbitral forum. Some of this involvement is simply a manifestation of the informality of the proceeding and the arbitrator's belief that he or she needs certain information to adequately perform his or her duties. There is also some suggestion that in accepting responsibility for arbitrating employ-

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ment discrimination claims, competent and ethical arbitrators must accept responsibility to ensure the matter is fully aired, and that the record and law relevant to the claim have been presented. This may mean they are less inclined to trust the adversarial process to achieve that result. In either case, counsel will sometimes find they have less, not more, control over what occurs in the hearing and must be flexible. This is particularly so because of the relaxed rules regarding evidentiary matters. The private nature of arbitration may be highly desirable in some cases where this is a particular concern. Of course, there is considerable variation in the approach taken in conducting the hearing by individual arbitrators. To the extent possible, counsel will want to determine a particular arbitrator's approach to these matters.

Similarly, where an arbitrator may be more likely to order reinstatement than a court, plaintiff's counsel may want to arbitrate the claim. In addition, there is some support for the view that reinstatement following an arbitration is likely to be more successful than if it results from a court or agency order. If the case presents a novel legal issue or there is a need for the court's authority to compel essential testimony, however, there may be a need to litigate the claim regardless of the relative attractiveness of arbitration in that case.

Selecting a Competent Arbitrator

If you have determined arbitration is desirable, the process to be used must be negotiated. This may involve simply agreeing to use the American Arbitration Association, the National Center for Dispute Settlement, or some other dispute resolution organization to facilitate the arbitration process, including the selection of an arbitrator from the available panels. Alternatively, you may want to specify the authority of an arbitrator selected by the parties independent of any intermediary organization. If you choose to submit the matter to an intermediary organization, be aware that this will add to your expenses. Further, reliance on such organizations does not ensure selection of an arbitrator competent to hear your case, and an express waiver of any liability arising from the use of its services and the arbitration is typically required.[9] The decision to optimize the parties' control may come easier to experienced counsel, but in either case, ensuring that the procedures provide for selection of a competent arbitrator familiar with the statutes involved is essential. The problem of individuals accepting assignments to arbitrate statutory claims where they lack the requisite knowledge and/or sensitivity to the issues raised in these cases has been manifest in both securities and labor arbitration.[10] The *Gilmer* court's declaration that judicial review would be available to ensure that an arbitrator "comply with the requirements of the statute" reinforces the importance of this criterion in selecting an arbitrator.[11]

The opportunity to select the decision-maker is the hallmark of private arbitration and its importance cannot be overstated. Accurate information regarding potential arbitrators is essential if the power to select an arbitrator is to be meaningful. Counsel should conduct any necessary investigation prior to agreeing to a proposed arbitrator. It should be recognized that it can be difficult to verify representations made by potential arbitrators, particularly statements that relate to their preparation to address a claim arising under a particular statute. Since contemporary arbitration is a product of the market, and arbitrators are necessarily engaged in self-promotion to secure submissions, this is an abiding concern. While arbitrators subject to the Labor Arbitrators' Code of Professional Responsibility have a duty to reject assignments outside their competence, an arbitrator may perceive all antidiscrimination laws as essentially the same. Even experienced counsel may find they lack sufficient information regarding proposed arbitrators after drawing upon their established network of contacts. In an appropriate case, one may want to review the potential arbitrator's published opinions before making a selection. In this regard, it is significant that the Due Process Protocol recommends that parties, prior to making their selection, be provided with information which would enable them to contact representatives of the parties in the arbitrator's six most recent cases. The AAA makes a similar commitment in its Rules. Providing parties with the information they need to investigate potential arbitrators is a significant step toward ensuring that the parties can exercise their right to select an arbitrator in a meaningful way.

In addition to ensuring that an arbitrator possesses the requisite skills, another important aspect of selection is avoiding a biased decision-maker. All those with whom I spoke mentioned their concern with bias and ethical lapses affecting arbitration. Some commentators suggest that arbitration, as a market-based mechanism, has an inherent bias in favor of those parties most likely to be "repeat players"— employers in the context of arbitration of employment claims.[12] To the extent this tendency exists, it may be mitigated by the existence of an experienced plaintiff's bar that is prepared to share information. The procedures used should require potential arbitrators to disclose any ties to either party or any consideration that might affect their independence. In *Gilmer*, where the claimant could only choose from among those selected by the industry, the court noted with approval that the NYSE's rules provided for data about, and one challenge to, a proposed arbitrator, and found that these rules, along with the arbitrator's duty to disclose material information, served to protect the proceedings from bias.[13] Importantly, these obligations are reinforced by the fact that one of the few bases for vacating an award under the Federal Arbitration Act is the "partiality or corruption" of the arbitrators.[14] While the availability of relief should such a problem come to light is significant, it is not always available, and courts are hesitant to vacate awards even where the misconduct is egregious.[15]

Proponents of arbitration like to suggest that it is essentially the same as adjudication, but faster and cheaper. This might be so, but in at least one important respect it is more expensive—the arbitrator must be paid whereas the public pays the judge. Under both the AAA's Rules and the Due Process Protocol, the arbitrator's compensation is to be borne equally by the parties, unless the parties agree to the contrary.[16] The Due Process Protocol specifically declares that "[I]mpartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator," and suggests that an intermediary organization "might be able to reduce the bias potential of disparate contributions [should that be necessary] by forwarding payment…without disclosing the parties' share therein."[17] This view was manifest in the comments of one of the practitioners I consulted who mentioned that a retired judge then serving as a neutral had cautioned him about permitting the employer to pay the entire fee, suggesting that his client might regard that as a reason for an unfavorable award.

Whatever its rationale, splitting the arbitrator's fee and expenses has made sense in commercial or labor arbitration where it would rarely be inequitable given the resources of the entities involved. However, in the context of arbitrating employment disputes it is quite likely financial resources, like power, will actually be quite imbalanced. The same approach may not be equitable under these circumstances. This issue warrants re-examination since the obligation to pay several thousands of dollars in potential costs may chill some complainants' willingness to pursue meritorious claims. It is, in fact, difficult to support the view that an ethical arbitrator would be influenced unfavorably by a disproportionate allocation of his or her fees or that a biased one would adjust his or her view because a disfavored party has paid a portion of the fee. Striving for the proper allocation of fees is not an effective means to ensure ethical decision-making in these cases. Additionally, the obligation to pay these costs was recently held to be unenforceable in a case involving employer-mandated arbitration of a statutory claim since "no beneficiary of a federal statute had been required to pay for the services of a judge to hear his or her case."[18] While the *Cole* decision does not by its terms apply to consensual arbitration, counsel would be well advised to review the decision to ensure that the procedures they intend to use do not burden a party's opportunity to fully vindicate his rights.[19]

Preservation of Claimant's Statutory Remedies is Essential

In agreeing to arbitrate a statutory claim, the parties should recognize that the *Gilmer* decision is premised in large part on the fact that the

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NYSE Rules that established the procedures for the arbitration of Gilmer's ADEA claim did not attempt to limit the relief he could be awarded. On that basis, the court's majority found that arbitration was adequate to serve Congress' objectives, and stated that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[20] Considered along with the court's assertion that the standards of judicial review would ensure that the arbitrator complies with the applicable statute,[21] it should be clear to all that an agreement to submit the claim to an arbitrator should only change the forum in which the claim is to be resolved. If the

parties intend to obtain a final and binding award, there should not be any modification in the relief the claimant might obtain from that which would be available in court. Both the Due Process Protocol and AAA rules provide that an arbitrator be authorized to grant whatever relief would be available under the law if the case were tried in court.[22] However, the AAA Rules appear to impart discretion to the arbitrator as to the remedies to be granted, while directing that "the arbitrator shall assess fees and compensation."[23] This distinction may be of little significance if the arbitrator appreciates the obligation to ensure the award complies with the statute, but an agreement to proceed under these rules could arguably undermine a claim that an award should be vacated because the arbitrator found liability but failed to provide relief available under the law. Where the parties choose to proceed under a negotiated agreement, it may be appropriate to stipulate to the damages to be awarded if liability is established, or to direct that the arbitrator shall award such relief as would be available from a court. This would, of course, press the issue of the reasons the parties are using arbitration to the foreground, but a defendant interested in an enforceable award should be prepared to use a stipulation since it can serve to limit risk while furthering its desire to expedite resolution of the dispute.

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Judicial Review of Awards Resolving Statutory Claims

Arbitration is intended to produce a final and binding award that the parties accept. Accordingly, judicial review of arbitration awards is quite limited. In the context of arbitration of contract disputes, this judicial deference has meant an award would not be overturned simply because the court would have ruled differently on an issue or has concluded that the arbitrator erred. The well-established standard insulating awards from review under the Federal Arbitration Act had required the challenger to demonstrate that the award reveals a "manifest disregard of the law." Thus, an award that failed to grant mandatory attorneys' fees to the prevailing claimant was confirmed because the standard requires an error that must be "readily and instantly perceived by the average [arbitrator]," and the arbitrator must "appreciate the existence of the clearly governing legal principle but decide[] to ignore it."[24] Counsel should be alerted that part of the reason the 2nd Circuit panel rejected the challenge to the award was that the record revealed that counsel had emphasized the state law corollary to the ADEA, under which an award of attorneys' fees was discretionary, rather than the federal statute that mandated the award. This decision serves to reinforce the fact that parties must be explicit about the statutory requirements that govern the arbitrator's decision if the opportunity for judicial review is to be meaningful.

Nevertheless, there are procedures to challenge an award. As noted above, under the Federal Arbitration Act which, the *Gilmer* court ruled, authorized arbitration of Gilmer's ADEA claim, evidence of bias or corruption affecting the award will support a post-award challenge.[25] Additionally, dissatisfied parties have challenged awards on the basis that the result violates public policy. Significantly, the 6th Circuit has recognized that where an arbitration regarding federal statutory rights has occurred, "the aggrieved may request a federal court, at the award-enforcement stage, to determine whether the arbitration award violates public policy," because the statutory rights were not fully recognized.[26] However, it should be recognized that these avenues to correct arbitral error will rarely be available to aid a disappointed party.

The standard for judicial review of an award under the FAA has been questioned in the wake of the *Gilmer* court's expansion of its purview to include statutory antidiscrimination claims. The court rejected Gilmer's challenges because it found that the procedures identified in the NYSE Rules applicable to arbitrating his claim did not curtail the relief he could obtain or seriously limit the means available to him to prove his claim such that he could, in the majority's view, vindicate his statutory rights in that arbitral forum. The court had also rejected his claim that judicial review was too limited, reiterating its view that while "necessarily limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."[27] Based upon this, and the court's reflection upon the attributes of the arbitral regime it found adequate, the court in *Cole* found that it was required to engage in a more rigorous review than would have otherwise obtained where an individual's statutory claim was made subject to arbitration. The view that an alternative standard evidencing considerable less deference is required has been recognized by other courts,[28] and will undoubtedly continue to be the subject of post-award litigation until the Supreme Court addresses the issue.

Conclusion

As this discussion suggests, the law affecting the arbitration of statutory claims remains unsettled as it continues to develop. In agreeing to arbitrate such claims, counsel are well advised to carefully consider the various aspects of the procedures they intend to use to ensure that the arbitration is conducted appropriately, and to continue to follow developments in this still emerging and important area of law. ■

ENDNOTES

[1] See, for example, H. David Kelly, Jr., "An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration," 75 *U. Det.-Mercy L. Rev. 1*, 2-3 n. 2 (listing a substantial number of the articles that have been published regarding this development), and at 3-4 n. 3 (discussing two circuit court opinions in which judges acknowledged their displeasure and concern with the *Gilmer* court's embrace of employer-mandated arbitration of statutory claims).

[2] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31; 55 FEP 1116 (1991).

[3] See, for example, Ray J. Schoonhoven, ed. in chief, *Fairweather's Practice and Procedure in Labor Arbitration* 528, 3rd ed. (1991) (discussing arbitration in the non-collective-bargaining setting and stating that, in general, the employer has a better chance of prevailing on any given case if the matter is arbitrated rather than tried to a jury). See also the opinion written by the influential jurist, Richard Posner, for the 7th Circuit panel holding that bargaining unit members are not barred from bringing suit even though the collective-bargaining agreement has a grievance procedure ending with binding arbitration and an antidiscrimination clause paralleling the federal statutory protections available to that individual, unless they individually agree to arbitrate their claim, and noting that to rule otherwise in this circumstance would not be "appropriate," a limitation Congress expressly placed on its utilization. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363; 154 *LRRM* 2806; 73 *FEP* 615(7th Cir. 1997). Chief Judge Posner commented further that "[I]t would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to a jury for the first time…to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in those cases." *Id.* (citations omitted.)

[4] 500 U.S. at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

[5] *Supra*, note 2, at 31.

[6] *Id.*

[7] See Laura J. Cooper, "Discovery in Labor Arbitration," 72 *Minn. L. Rev.* 1281 (1988) (noting the traditional absence and contemporary uncertainty regarding discovery in arbitration).

[8] See, for example, "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship," in *New Challenges and Expanding Responsibilities*, Appendix B at 298-304, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Joyce M. Nijita (1996) (a document developed by a number of influential individuals from professional associations, governmental bodies, and employee advocacy groups); AAA, "National Rules for the Resolution of Employment Disputes," 13 (1997); and Commission on the Future of Worker-Management Relations [Dunlop Commission], Report and Recommendation 31 (U.S. Dept. of Labor & U.S. Dept. of Commerce: 1994).

[9] See, for example, AAA, *National Rules for the Resolution of Employment Disputes* § 35 (d). "Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these procedures."

[10] See Stuart H. Bompey and Andrea H. Stempel, "Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims after *Gilmer v. Interstate/Johnson Lane Corp*.," 21 *Emp. Rel. L. J.* 21, 37-43 (No. 2, Autumn 1995) (the authors of the article include an unofficial survey that indicates employers prevailed on the discrimination claim in 76% of the NASD arbitrations and in 59% of the NYSE arbitrations. The authors also acknowledge a Governmental Accounting Office report that spurred controversy when it revealed that these organizations' rules provided that arbitrators "be knowledgeable in the area of controversy," but that neither operated to ensure that assignments were made based on the requisite expertise. *Id.* at 43. See also Megan L. Dunphy, "Comment, Mandatory Arbitration: Stripping Securities Industry Employees of Their Civil Rights," 44 *Cath. U. L. Rev.* 1169, 1172 n.13 (1995) (relating a report in the *Wall Street Journal* regarding the NYSE's handling of a woman's sexual harassment claim by assigning it to three male arbitrators, none of whom had any training or experience in discrimination cases, and noting that that panel dismissed her claims after comparing the crude and offensive treatment she experienced with "industry norms" rather than the established legal standards). Labor arbitrators have also been criticized for failing to approach these cases appropriately where judgments vacating two awards that ordered the reinstatement of men discharged for sexual harassment on public policy grounds were both affirmed on appeal. See *Stroehman Bakeries, Inc. v. Local 776*, IBT, 969 F.2d 1436; 140 *LRRM* 2625; 59 *FEP* 249 (3d Cir, 1992), *cert. denied*, 113 S. Ct. 660 (1992); *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840; 135 *LRRM* 2659; 54 *FEP* 24 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1314 (1991); Chris Baker, "Comment, Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?" 61 *U. Cinn. L. Rev.* 1361 (1993); Lamont E. Stallworth and Martin H. Malin, "Conflicts Arising Out of Work Force Diversity, in *Arbitration and the Changing World of Work*, 113-129, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (1994).

[11] *Gilmer*, 500 U.S. at 31-32 n.4.

[12] See *Cole v. Burns International Security Svcs., Inc.*, 105 F.3d 1465, 1476, 1485 n. 18; 72 FEP 1775 (D.C. Cir. 1997); Sarah Rudolph Cole, "Incentives and Arbitration: the Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees," 64 *UMKC L. Rev.* 449 (1996).

[13] *Supra*, note 2, at 30-31.

[14] *Id.*

[15] See Perry A. Zirkel and Peter D. Winebrake, "Legal Boundaries for Partiality and Misconduct of Labor Arbitrators," 3 *Det. Coll. L. Rev.* 679 (1992) (collecting cases relating to arbitral bias and other misconduct affecting viability of an award. The article reveals that even when evidence of impropriety comes to light, the courts are reluctant to vacate an award).

[16] AAA, *supra*, note 8, at 27, § 37.

[17] *Protocol*, *supra*, note 8, at 302-303.

[18] *Cole*, *supra*, note 12.

[19] While the decision is not binding precedent other than in the D.C. Circuit, the opinion is likely to prove influential in shaping this developing law since its author, Chief Judge Harry Edwards, had been an active labor arbitrator and law professor prior to being appointed to the bench and has written numerous articles addressing the use of arbitration to resolve statutory claims. For a case finding Judge Edwards reasoning persuasive, see *Shankle v. B-G Maintenance Mgmt. of Colorado, Inc.*, 74 FEP 94 (D. Colo. 1997).

[20] *Supra*, note 2, at 28.

[21] *Id.* at 31-32 n.4

[22] *Protocol*, *supra*, note 8, at 302; AAA, *supra* at 24-25, § 32.

[23] AAA, *supra*, note 8, at 24-25, § 32.c ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable...")

[24] *DiRussa v. Dean Witter Reynolds, Inc.*, 936 F. Supp. 104 (S.D.N.Y. 1996), *aff'd*, 121 F.3d 818; 74 *FEP* 726 (2d Cir. 1997).

[25] *Gilmer*, *supra*, note 2, at 30, citing 9 U.S.C. § 10(b).

[26] *George Fischer Foundry Sys., Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206, 1210 (6th Cir.1995).

[27] *Supra*, note 2, at 31 (citation omitted).

[28] *Supra*, note 24, at 822 (acknowledging the issue but declining to consider it because appellant had not raised the issue before the district court).