IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Courtney Dimidik, *On behalf of herself and those similarly situated*, Plaintiff, v. Hallrich Incorporated, *et al.*, Defendants.	Case No. 3:21-cv-00306 Judge Walter H. Rice Magistrate Judge Peter B. Silvain, Jr.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

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1. Introduction

Employers routinely require employees, even minimum wage workers, to sign arbitration contracts. *Cui bono*? Who benefits? It certainly isn't the employees.

It is time to have an honest conversation about forced arbitration in the employment setting. Current case law is largely based on a fantasy that arbitration provides a neutral forum to hear disputes that is effective and efficient. As this brief discusses, the reality is far different.

Plaintiff opposes Defendants' attempt to force her to arbitrate her wage claims for two overarching reasons:

First, arbitration acts as a private dispute resolution system. Private resolutions of Fair Labor Standards Act (FLSA) disputes are unenforceable unless a court or the Department of Labor

(DOL) reviews and approves the resolution. Because the arbitration rules forbid this review, the arbitration is unenforceable. Moreover, even if the rules were read to allow such a review, the review (to be effective) would negate the purported purpose of the arbitration—a final, binding adjudication of the dispute. When a contract's purpose is defeated, the contract is unenforceable. *See, e.g.*, *Bozeman v. Fitzmaurice*, 107 N.E.2d 627, 629 (Ohio 8th Dist.1951) (finding that "the vital object of the contract" was "frustrated," so it "fail[ed]").

Second, the arbitration agreement is unconscionable. Courts have repeatedly recognized the coercive nature of the employment relationship.[1] Still, courts have operated under the assumption that arbitration provides a neutral and effective forum for resolving employment disputes. The facts no longer justify that deferential assumption.

Plaintiff respectfully asks the Court to deny Defendants' Motion to enforce their arbitration agreements.

2. Prior courts' rosy assumptions about arbitration do not match the cold reality of forced arbitration.

As employment arbitration has grown in popularity (for employers), courts have based their decisions on outdate assumptions about arbitration that practice has shown to be incorrect. The fantasy is that arbitration provides a forum where a neutral expert can efficiently and effectively hear disputes. *Contra Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Of course, the fantasy also involves a world where employees and employers are on equal footing in terms of knowledge and bargaining power. If this that were true, employees would have no complaints about proceeding to arbitration.

[1] *Tony & Susan Alamo Found. v. Secy. of Labor*, 471 U.S. 290, 302 (1985) ; *Kleiner v. First Natl. Bank*, 751 F.2d 1193, 1203 (11th Cir. 1985); *Crosby v. Stage Stores, Inc.*, 377 F.Supp.3d 882, 889 (M.D. Tenn. 2019).

The reality, however, is grim. Arbitration is not a neutral forum. The arbitration industry is itself a big business with motivations heavily stacked in favor of its main, repeat customers—employers. To behave otherwise would jeopardize the future business of organizations like the American Arbitration Association (AAA) and individual arbitrators (who are often practicing attorneys who represent companies). It is time for courts to recognize this unfortunate truth and evaluate the reality of forced arbitration.

The most important component of effective and fair adjudication is the neutrality of the decisionmaker. Arbitrators get paid by being selected to arbitrate disputes. Common sense indicates that they are likely to favor repeat customers, who, in this case, are employers. If they do not, they will not receive further business—but favoring employers results in repeat business.[2] Recent studies indicate that the "repeat player effect" is a real problem in arbitration.[3] In this case, the Defendant pizza company has over 1,750 employees subject to arbitration. A small fraction of those employees may arbitrate one time. In contrast, Defendant is likely to arbitrate hundreds of times.

Neutrality of the forum's rules is also critical to a fair resolution. Again, arbitration fails. After all, if the rules were fair, why would an employer force workers into the forum?

[2] For example, in a nearly identical delivery driver minimum wage violation arbitration, the arbitrator Eric Epstein granted the pizza company's cross-motion for partial summary judgment as to the appropriate legal standard for adjudicating the claims. Arbitrator Epstein was promptly rewarded for providing a favorable decision—just twenty days later, Arbitrator Epstein had to disclose that he had accepted an offer of employment as arbitrator in another case where the same defense firm was represented another company. *See* Email of Hiro Kawahara to Counsel and attachment (attached as Exhibit 1).

[3] Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. Times, (Nov. 1, 2015) (accessible at https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html) (attached as Exhibit 2).

Under the AAA rules,[4] the arbitrator has wide latitude to determine the course and scope of the private adjudication of the case. For example, the arbitrator has the power to rule on his or her jurisdiction (including any objections with respect to the existence, scope, or validity of the arbitration agreement),[5] the power to determine what discovery is necessary (with the caveat that such discovery should be consistent with the expedited nature of arbitration),[6] and the power to set the rules for conducting the proceedings, including by directing the order of proof, bifurcating proceedings, and directing the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.[7] These rules provide the arbitrator, individuals unbound by the Code of Judicial Conduct for United States Judges or any similar code or regulation, with unchecked power to decide how a case should be resolved. Despite boasting "fairness," the parties have little to no recourse for the abuse of such power.

As another example is that, despite the Arbitration Plan's promise to the contrary, employees are not able to utilize subpoena power to obtain pre-hearing discovery or deposition testimony from non-parties. *See, e.g., Life Receivables Tr. V. Syndicate 102 at Floyd's of London*, 579 F.3d 210, 125–16 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407, (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999); *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159–60 (11th Cir. 2019). In a wage case, where the employer purchases their vehicle reimbursement rate from a third-party

[4] *See* AAA Employment Arbitration Rules and Mediation Procedures Excerpts (accessible in full at https://www.adr.org/sites/default/files/Employment%20Rules.pdf) (attached as Exhibit 3).
[5] *See id* at Rule 6(a).
[6] *See id.* at Rule 9.
[7] *See id.* at Rule 28.

company, the inability to subpoena a party that is directly involved in determining the employees' wages obliterates the employees' ability to effectively prosecute their claims.

Defendants' Arbitration Plan is even worse than the AAA's standard rules.

First, Defendants strip employees of the most powerful tool they have to adjudicate wage claims: the class and collective action. Doing so does nothing but limit Defendants' potential liability and make it cheaper to break the law than to follow it.

Second, the Arbitration Plan denies employees full discovery, which they *need* and are often entitled to in order to prove their case,[8] by modifying the already employer-friendly AAA Employment Rules. The Supreme Court has recognized that, particularly in wage cases, employers hold most or all of the evidence. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946). A limit on discovery only serves to harm the employee.

Third, the Arbitration Plan also overrides AAA Employment Rule 27, which allows arbitrator discretion to permit dispositive motions if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case, and instead requires that the arbitrator allow summary judgment briefing.[9] While this change may seem innocuous at first blush, it is no coincidence that evidence shows that employers succeed in winning dismissal in over half of these motions.[10]

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[8] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.*, ("The remedial nature of [the FLSA] and the great public policy which it embodies, however, militate against making [the] burden [of proving damages] an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11 (c) of the Act to keep proper records… and who is in position to know and to produce the most probative facts…. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy."); Ohio Constitution, Art. II, § 34a (entitling an employee to request their employment records).

[9] *See* Ex. 3 at Rule 27.

[10] Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 Ohio St. J. On Disp. Resol., 59, 68 (2014) (attached as Exhibit 4).

Fourth, the employer is allowed to amend the Plan "at any time."[11] So, if Defendants concoct any other ways to make it difficult for employees to vindicate their rights, they can add them. While change does not take effect until the employee and AAA have received notice, the employee has no similar right to alter the agreement.

One would expect that, if, in fact, the forum was so heavily stacked against employees, that it would show up in arbitration outcomes. It does. Although arbitration is confidential by its nature, recent empirical studies and investigations have demonstrated that employees fair far worse in arbitration than in court—not only are employees less likely to win, but employees also recover lower damages.[12]

The Supreme Court has said that arbitration must allow for the effective vindication of an employee's rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Arbitration, as it currently exists, does not. Under different circumstances, it could. But that is not the reality. Plaintiff asks that the Court deal with the world as it exists, not the fantasy.

3. History of the FLSA and FAA

How did we reach a point where courts recognize that employees lack the bargaining power to negotiate basic wages,[13] but simultaneously find that employees hold sufficient bargaining power to waive away their rights to courts, juries, and representative actions?

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[11] Doc. 14-1 at PageID 169. Further, despite reserving this right to themselves, there is no evidence that Defendants bothered to inform Anthony Digiorgi or Ronnie Edmonds, that the Plan's statute of limitations waiver was found illegal. *Jefferis v. Hallrich Corp.*, No. 1:18-CV-687, 2019 U.S. Dist. LEXIS 127825, at *16–18 (S.D. Ohio July 31, 2019), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 143045 (S.D. Ohio, Aug. 22, 2019).

[12] For an overview of research, *see* Stone, Katherine V.W., and Alexander J.S. Colvin, *The Arbitration Epidemic*. Economic Policy Institute, 414 (2015) (available at https://files.epi.org/2015/arbitration-epidemic.pdf) (accessed February 28, 2022) (attached as Exhibit 4); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lal. L. 71 (2014) (attached as Exhibit 5); Estlund, Cynthia, *The Black Hole of Mandatory Arbitration*, 96 N.C.L. Rev. 3 (2018) (attached as Exhibit 6).

[13] *Alamo*, 471 U.S. at 302; *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1043 n.6 (6th Cir. 1986).

An historical review shows the development of a judicially-created doctrine of super-deference to arbitration contracts without foundation in the FAA and in defiance of the FLSA. This deference was improper in its genesis and currently relies upon false assumptions about arbitration.

3.1. Historical Overview

Congress passed the Federal Arbitration Act (FAA) in 1925 near the height of the *Lochner* era, when the freedom to contract was treated as an unqualified absolute right. *See generally, W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (abrogating *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and *Lochner v. New York*, 198 U.S. 45 (1905), and ending the now-reviled "*Lochner* era").[14] In the early 1900s, most workers still earned their daily bread on farms rather than in factories,[15] and, for the first time in history, the 1920 Census showed a majority of Americans living in cities rather than the country.[16]

As the Twentieth century opened, massive changes swept American society, working life, and law. In 1938, during the Great Depression, Congress passed the Fair Labor Standards Act to protect American workers when they were at their most vulnerable and to standardize working conditions across the country to help revitalize the American economy.

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[14] *Holden v. Hardy*, 169 U.S. 366, 382 (1898) ("'The legislature has also recognized the fact… that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide…. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.'").

[15] *See* Donald M. Fisk, *American Labor in the 20th Century*, U.S. Bureau of Labor Statistics (2003) (accessible at https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf) (last accessed March 5, 2022) (attached as Exhibit 7).

[16] Donald A. Hicks, *Revitalizing Our Cities or Restoring Ties to Them? Redirecting the Debate*, 27 U. Mich. J.L. Reform 813, 824 (1994).

3.2. The Fair Labor Standards Act

When Congress enacted the Fair Labor Standards Act, it used the statute's opening sections to explain that the purpose of this law is to protect both workers and the American economy by creating a set of publicly-known, nationwide, minimum permissible employment standards—or in their own words:

> The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
>
> It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202(a)–(b).

The protections of the FLSA are so strong that "the purposes of the Act require that it be applied even to those who would decline its protections." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) [hereinafter *Alamo*]. That is because, for example, "[i]f an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely

to exert a general downward pressure on wages in competing businesses." *Id.* (internal citation omitted).

Since the passage of the FLSA, the Supreme Court has regularly affirmed Congress' ability to rectify "[s]ubstandard labor conditions [that] were deemed by Congress to be 'injurious to the commerce and to the states from and to which the commerce flows.'" *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 576–77 (1942) (citing *United States v. Darby*, 312 U.S. 100, 115 (1941)) (referencing, specifically that "If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress' power to use it to promote the employees' well-being" and discussing how "Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length work weeks, by offering opportunities for unfair competition, through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work.").

The Supreme Court's "decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, [the Supreme Court has] held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (citing cases); *see also Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944) ("The [FLSA] clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes.").

For instance, the Supreme Court has found it "essential to uphold the Wage and Hour Administrator's authority to ban industrial homework in the embroideries industry, because 'if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage.'" *Id.* (citing *Gemsco, Inc. v. Walling*, 324 U.S. 244, 252–254 (1945)).

3.3. The Federal Arbitration Act

The common law, first in England and then in America, has long-opposed arbitration contracts. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974) (discussing how the common law refused to enforce arbitration agreements). Then, in 1925, Congress passed the Federal Arbitration Act, abrogating that common law doctrine and making arbitration contracts as valid as any other contact:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

In passing the FAA, Congress placed arbitration agreements "on equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017) (citing cases); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 n.7 (1985) [hereinafter *Dean Witter*] (quoting 65 Cong. Rec. 1931 (1924) ("[The FAA] creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty

contracts."). Arbitration contracts are entitled to the same treatment as other contracts and can be invalidated under general contract principles. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) [hereinafter *Epic Systems*] (citing cases) (discussing the how the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'" but does not permit "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue"). This does not make arbitration agreements invincible, as the FAA does not pursue its purposes "at all costs." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) [hereinafter *Italian Colors*] (quoting *Rodriguez v. United States*, 480 U. S. 522, 525–526 (1987).

Further, and unlike the FLSA, the FAA itself provides no internal statement of purpose. The text clearly demonstrates that the act is intended to end the historic general prohibition on arbitration—nothing more.

The lack of textual purpose, however, has not stopped courts from "discovering" purposes and supporting policies. For example, courts have found that there is a "liberal federal policy favoring arbitration agreements,"[17] that courts are required to "rigorously" "enforce arbitration agreements,"[18] and that the FAA has two purposes, "enforcement of private agreements and encouragement of efficient and speedy dispute resolution."[19] Each of these policies are the result of judge-made law lacking support. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (explaining statutory interpretation). These extra-textual standards have, in turn, created a

[17] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (stating that "Instead of overriding Congress's policy judgments, today's decision seeks to honor them.")
[18] *Epic Systems*, 138 S. Ct. at 1621 (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 233 (2013).
[19] *Dean Witter*, 470 U.S. at 221; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (observing that "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.")

jurisprudence of excessive deference to arbitration contracts, which elevates them above normal contracts, contrary to the plain meaning and text of the FAA.

First, this idea of a "liberal policy favoring arbitration" was invented in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) [hereinafter *Moses*]. After just quoting the statute, the Court simply states that there is a liberal policy without explanation:

> Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.… the Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses, 460 U.S. at 24 (internal footnotes omitted). The same formulation was repeated more recently in *Gilmer*:

> The FAA was originally enacted in 1925.… Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts. Its primary substantive provision states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, § 4. These provisions manifest a "liberal

> federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

Gilmer, 500 U.S. at 24–25 (internal citations other than *Moses* omitted). And the proposition was summarily cited in *Epic Systems*. *Epic Systems*, 138 S. Ct. at 1621 ("The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements.").[20]

Courts have treated the mere enactment of the FAA as making arbitration agreements special rather than simply permitting them. Enacting a statute, of course, shows that Congress favors its policies, but the *mere* enactment of a statute does not entitle it to special treatment as somehow superior to other statutes. That is doubly true if the FAA and FLSA are compared, because the FLSA give explicit textual indications of how it should be construed, something the FAA lacks. *See* Part 3.2, *supra*. If "[l]egislation is, after all, the art of compromise" and "limitations expressed in statutory terms [are] often the price of passage," then the clear explanation of the FLSA's purpose and Congressional intent should be given significant consideration. *Cf. Encino Motorcars*, 138 S. Ct. at 1142 (citing *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017)).

Second, the perceived requirement that courts must "rigorously" "enforce arbitration agreements" is also drawn from judge-made law. *See Epic Systems*, 138 S. Ct. at 1621 (quoting *Italian Colors*, 570 U. S. at 233. The Court in *Italian Colors* simply stated that "Courts must 'rigorously enforce' arbitration agreements according to their terms." *Id.* at 228 (quoting *Dean Witter*, 470 U. S. at 221). Earlier, the Supreme Court had stated that Congress' "preeminent

[20] The Court in *Southland* followed the same idea but phrased it slightly differently: "enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration…." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("As this Court recognized in *Southland Corp. v. Keating*… the [FAA], establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.").

concern" in passing the FAA "was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Dean Witter*, 470 U.S. at 221. Not only is the idea of rigorous enforcement drawn from the Court's assumption of Congressional intent, *there is* a profound countervailing policy manifested in the FLSA. *See Part* 3.2, *supra*.

Third, even if the super-deference to arbitration agreements must continue, "no legislation pursues its purposes at all costs." *Italian Colors.*, 570 U.S. at 234 (quoting *Rodriguez*, 480 U. S. at 525–526). A judge-created liberal policy favoring rigorous arbitration enforcement cannot be used to invalidate Congress' explicit enactment of the FLSA to protect both workers and the American economy with a set of publicly-known, nationwide, minimum permissible employment standards *See* Part 3.2, *supra* (citing 29 U.S.C. § 202).

Properly understood, arbitration contracts are entitled to equal treatment. *Epic Systems*, 138 S. Ct. at 1622. They are the same as other contracts, no better, no worse:

> [The FAA's] saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts..... The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*, 563 U. S., at 339.... At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Id.*, at 344....

Epic Systems, 138 S. Ct. at 1622.

Recently, the Supreme Court provided relevant guidance on how to properly interpret a statute:

> Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." Scalia, Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the FLSA "'pursues'" its remedial purpose "'at all costs.'"

Encino Motorcars, 138 S. Ct. at 1142 (citing cases) (discussing the interpretation of FLSA exemptions).

Defendants' Motion encourages the Court enforce the FAA at all costs and relies upon a judicially fabricated liberal policy favoring rigorous enforcement arbitration. *See* Doc. 14 at PageID 147. The Court should reject those misbegotten standards because the FAA gives no textual indication that it should be construed liberally, so there is no reason to give them anything other than a fair (rather than a 'liberal' and 'rigorous') interpretation. *Cf. Encino Motorcars*, 138 S. Ct. at 1142 (quoting Antonin Scalia, Reading Law at 363 (2011)). The liberal-construction and rigorous enforcement principles rely on the flawed premise that the FAA pursues its arbitration-permitting purpose "at all costs." *Cf. id.* But the FAA savings clause permits an arbitration contract to fail or be invalidated just as any other contract. That savings clause is as much a part of the FAA's arbitration-permitting purpose as the validation of arbitration contracts. Thus, the Court has no license to give the FAA anything but a fair reading. *Cf. id.*

Seeing both the failure of employment arbitration and its abuses, Congress recently banned arbitration for Sexual Harassment cases.[21] Congress is also considering eliminating class and collective action arbitration, likely for the same reasons.[22]

4. Argument

As discussed below, Plaintiff contends that the arbitration agreement in this case is unenforceable for two reasons.

First, it is well-established that employees may not resolve FLSA (or the equivalent state law) disputes absent either judicial or Department of Labor oversight. *Lopez v. Silfex, Inc.*, No. 3:21-cv-61, 2021 U.S. Dist. LEXIS 232508, at *8–9 (S.D. Ohio Dec. 3, 2021) [hereinafter *Silfex*] (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982) [hereinafter *Lynn's Food*]). Because arbitration is nothing more than a dispute resolution process where employees have less control than a settlement, the process is unenforceable.

Even if the process was enforceable on some level, the arbitrator's decision would be subject to thorough judicial or DOL review. Such a review would necessarily entail a de novo review of the facts and law, thereby defeating the fundamental purpose of the arbitration agreement. As with any contract, if the fundamental purpose is defeated (or impossible to perform), the contract is unenforceable. *Bozeman*, 107 N.E.2d at 630.

Second, the agreement is unconscionable as a matter of law. In virtually every other context, the employment relationship is recognized as a fundamentally coercive. *Alamo*, 471 U.S. at 302 (citing cases). But in arbitration, courts have relied upon the judge-created liberal policy

[21] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Public Law No: 117-90 (accessible at https://www.congress.gov/bill/117th-congress/house-bill/4445/text) (attached as Exhibit 8).
[22] Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019), (accessible at https://www.congress.gov/bill/116th-congress/house-bill/1423) (attached as Exhibit 9).

favoring rigorous arbitration enforcement to ignore this fact. This is improper. Moreover, arbitration, not as envisioned, but as actually practiced, does not allow employees to effectively vindicate their rights.

Defendants rely heavily on the *Jefferis* case, but it was decided on different grounds.[23] And here, Plaintiff additionally disputes the neutrality and fairness of the AAA, the Arbitration Plan's discovery modification provisions (*see* Part 2, *supra*), and, as well as the waiver provision, which the *Jefferis* court previously found unenforceable.

4.1. Arbitration is not enforceable because it evades the judicial and public scrutiny that the FLSA requires.

The FLSA is a unique law in that it creates non-waivable rights that are of a public-private nature. The nature of those rights requires courts to exercise additional protective measures not required in virtually any other setting. And, because of those measures, private resolution of FLSA claims is unenforceable. *Casso-Lopez v. Beach Time Rental Suncoast, LLC*, 335 F.R.D. 458, 461 (M.D. Fla. 2020). As discussed below, this applies as much to arbitration as it does to private settlements.

Plaintiff notes from the outset that Defendants are likely to say that some courts and the Sixth Circuit have allowed arbitration of FLSA cases. This is undoubtedly true. *See, e.g.*, *Gaffers v. Kelly Servs.*, 900 F.3d 293, 295 (6th Cir. 2018). No court, however, has addressed whether the

[23] *Jefferis*, 2019 U.S. Dist. LEXIS 127825, at *6 ("Plaintiffs oppose defendants' motion to compel mediation and arbitration on three bases: (1) the Plan signed by plaintiffs is an illusory promise, not a contract, and is unenforceable; (2) the Plan attempts to illegally waive the relevant statute of limitations; and (3) the Plan violates the Ohio Constitution, Article II, Section 34a.").

judicial (or DOL) oversight required by the FLSA either prevents arbitration altogether or strips the arbitrator of doing more than rendering a non-binding advisory opinion.[24]

4.1.1. The FLSA creates non-waivable rights that are of a public-private nature.

The FLSA is a remedial statute designed around the fact that employees lack the bargaining power to negotiate what Congress determined to be a wage sufficient for a minimum, acceptable standard of living. *See, e.g.*, *Alamo*, 471 U.S. at 302 (1985); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1043 n.6 (6th Cir. 1986). As a result, "Congress enacted the FLSA in 1938 with the goal of 'protect[ing] all covered workers from substandard wages and oppressive working hours.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (quoting *Barrentine*, 450 U.S. at 739)). Congress designed the FLSA "to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine*, 450 U.S. at 739 (internal quotation marks omitted) (citing *Overnight Motor Transportation Co.*, 316 U.S. at 578).

The purpose of the FLSA "was to secure for the lowest paid segment of the nation's workers a subsistence wage, [which] leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage. [An unsupervised] compromise thwarts the public policy of minimum wages, promptly paid, embodied in the [FLSA], by reducing the sum selected by Congress as proper compensation for withholding wages." *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1234–35 (M.D. Fla. 2010) (quoting *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946)).

[24] *Gaffers* focused only on the question of whether the right to a collective action was waivable, which is not argued here. *Gaffers*, 900 F.3d at 295–97.

These protections mean nothing if employees can simply waive them. *Alamo*, 471 U.S. at 302.

The result of such a waiver would be to drive wages down. *See id.* Thus, the FLSA and its enforcement have both a private and public component. *Id.* This effects on how FLSA cases are adjudicated. First, cases must be open to public scrutiny. *Dees*, 706 F. Supp. 2d at 1233, 1245–46 (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 705–08 (1945)). This scrutiny ensures that the purposes of the FLSA are carried out, protects employees from being taken advantage of (by their employer or their attorney), and permits defendants to obtain enforceable settlements. *Lynn's Food*, 679 F.2d at 1354–55; *Casso-Lopez*, 335 F.R.D. at 461; *Dees*, 706 F. Supp. 2d at 1241–46. Second, employees may not agree to resolve their claims outside of judicial or DOL scrutiny. *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9 (quoting *Lynn's Food*).

4.1.2. An employee may not resolve his or her FLSA claim outside of judicial or Department of Labor scrutiny.

The non-waivable and public nature of an employee's FLSA rights necessitate judicial or DOL oversight. Thus far, this has been most thoroughly explored in the context of FLSA settlement approval. As described in the next section, these principles apply as much to arbitration as to settlements.

This Court has previously recognized that "Congress made the FLSA's provisions mandatory and, except in two narrow circumstances, they are generally not subject to bargaining, waiver, or modification by *contract* or settlement." *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9 (emphasis added) (citing *Lynn's Food*, 679 F.2d at 1352–53; *O'Neil*, 324 U.S. at 706 and other cases); *see also Dees*, 706 F. Supp. 2d at 1235. FLSA settlements must either be supervised by the

Secretary of Labor or approved by a court. *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9 (citing *Lynn's Food*, 679 F.2d at 1353–55).

> Stated differently, unless supervised by the Department of Labor or approved by a district court, any compromise, relinquishment, or other diminution of an employee's FLSA rights — by whatever mechanism undertaken or procured, even by a rule of procedure — is illusory, ineffective, and unenforceable, and the employee can ignore the entire episode, including an executed settlement agreement (exactly what happened in *Lynn's Food*) and immediately sue the employer to obtain whatever FLSA rights the employee earlier purported to compromise, relinquish, or otherwise diminish. Also, any release, confidentiality or non-disclosure agreement, or any other covenant or agreement granting the employer anything else of value in exchange for the FLSA wage is unenforceable. The FLSA commands that result, the Supreme Court confirms that result, *Lynn's Food* and similar cases expound that result, and a district court must enforce that result — no evasive gimmicks allowed.

Casso-Lopez, 335 F.R.D. at 461.

"FLSA rights cannot be *abridged by contract* or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740 (emphasis added) (quoting *O'Neil*, 324 U.S. at 707). "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections" because "[i]f an exception to the Act were carved out… employers might be able to use superior bargaining power to coerce employees to… waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." *Alamo*, 471 U.S. at 302 (prohibiting employees from testifying that they worked on a voluntary basis); *see also Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 205 (2d Cir. 2015) ("[A]lthough employees, through counsel, often voluntarily consent to dismissal of FLSA claims and, in some instances, are

resistant to judicial review of settlement, the purposes of FLSA require that it be applied even to those who would decline its protections.").

The Sixth Circuit recognizes that "the distinction between procedural and substantive rights is notoriously elusive." *Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603, 606 (6th Cir. 2013) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). This places a "demanding" "obligation" on courts "to police FLSA settlements to ensure that they are fair and reasonable" *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 178 (S.D.N.Y. 2015) [hereinafter *Nights of Cabiria*]. That analysis "implicates both the rights of the settling employee and the interests of the public at large," both must be satisfied to ensure that the FLSA is enforced:

> To fully implement the policy embodied by the FLSA, the district should scrutinize the compromise in two steps. First, the court should consider whether the compromise is fair and reasonable to the employee (factors 'internal' to the compromise). If the compromise is reasonable to the employee, the court should inquire whether the compromise otherwise impermissibly frustrates implementation of the FLSA (factors 'external' to the compromise). The court should approve the compromise *only if* the compromise is reasonable to the employee *and furthers implementation of the FLSA in the workplace*.

Id. at 178–79 (emphasis added) (quoting *Dees*, 706 F. Supp. 2d 1227).

This court has also recognized that although the Sixth Circuit has never definitively answered the question, "district courts in our Circuit regularly find that the FLSA context counsels in favor of courts approving settlements." *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8; *see also Athan v. United States Steel Corp.*, 523 F. Supp. 3d 960, 964–65 (E.D. Mich. 2021) (collecting cases). Additionally, this court observed that there is "a circuit split regarding whether Supreme Court precedent requires 'judicial approval of *all* FLSA settlements'" *Id.* (emphasis in

original). The Second,[25] Fourth,[26] Seventh,[27] Ninth,[28] and, of course, the Eleventh[29] Circuits have required judicial approval of FLSA settlements. The Eighth Circuit disclaims a position, despite appearing to have endorsed *Lynn's Food*.[30] While the First,[31] Third,[32] Tenth,[33] and D.C.[34] Circuits have not ruled, but their district courts embrace *Lynn's Food*. Only the Fifth Circuit has explicitly permitted a private settlement of FLSA claims, and even then, it was under unique circumstances.[35]

The Sixth Circuit has, however, endorsed heightened scrutiny of FLSA settlements due to "the well-known problems arising from the unequal bargaining positions of employers and employees and 'substandard wages and oppressive working hours'" which are implicated "to a significantly greater degree" in FLSA settlements. *Runyan*, 787 F.2d at 1043 n.6 (internal citations omitted) (citing *Barrentine*, 450 U.S. at 739; *Alamo*, 471 U.S. at 302). Further, courts in this

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[25] *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 205 (2d Cir. 2015).
[26] *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 462–63 (4th Cir. 2007), *superseded by regulation on other grounds as recognized in*, *Whiting v. Johns Hopkins Hosp.*, 416 F. App'x 312 (4th Cir. 2011).
[27] *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986).
[28] *Seminiano v. Xyris Enter.*, 602 F. App'x 682, 683 (9th Cir. 2015).
[29] *Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1306–08 (11th Cir. 2013) (re-affirming *Lynn's Food*).
[30] *Barbee v. Big River Steel, LLC*, 927 F.3d 1024, 1026–27 (8th Cir. 2019) ("We have never taken a side on this issue."); *but see Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008).
[31] *See, e.g., Anderson v. Team Prior, Inc.*, No. 2:19-cv-00452-NT, 2021 U.S. Dist. LEXIS 162626, at *13 (D. Me. Aug. 27, 2021) ("'[I]n the FLSA context, for an employee's waiver of his rights to unpaid wages and liquidated damages to be binding, either the U.S. Secretary of Labor must supervise the settlement or a court must approve it.' …. Part of the court's role is to assure that the FLSA is being properly applied and that the lawsuit is not being used as a device to discount employees' rightful claims.").
[32] *Kane v. Ollie's Bargain Outlet Holdings, Inc.*, 2022 U.S. Dist. LEXIS 31113, at *3 (M.D. Pa. Feb. 22, 2022).
[33] *See, e.g.*, *Aguilar v. Pepper Asian*, Civil Action No. 21-cv-02740-RM-NYW, 2022 U.S. Dist. LEXIS 24278, at *23 n.2 (D. Colo. Feb. 10, 2022) ("The Tenth Circuit has not addressed whether an FLSA settlement requires court approval. However, the presiding judge in this case requires court approval of any FLSA settlement…").
[34] *See, e.g.*, *Carrillo v. Dandan Inc.*, 51 F. Supp. 3d 124, 130 (D.D.C. 2014) (endorsing the *Lynn's Food* court's "logical inferences from the Supreme Court's *Gangi* dicta…").
[35] *Martin v. Spring Break '83 Prods., Ltd. Liab. Co.*, 688 F.3d 247, 257 (5th Cir. 2012); *but see Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 163–65 (5th Cir. 2015) (discussing *Martin* and noting that "the union representative concluded it would be impossible to validate the number of hours claimed by the workers for unpaid wages" but conclusion "The general prohibition against FLSA waivers applies in this case, and the state court settlement release cannot be enforced against the plaintiffs' FLSA claims.").

district, [36] and across the Sixth Circuit,[37] routinely look to *Lynn's Food* when approving settlements. It is, therefore appropriate to find that *Runyan* indicates that the Sixth Circuit, if presented with the same issue under the FLSA, would require court approval of settlements or stipulations of dismissal. *Steele v. Staffmark Invs., Ltd. Liab. Co.*, 172 F. Supp. 3d 1024, 1028 (W.D. Tenn. 2016) (denying motion for settlement and ordering submission of the settlement agreement for review). In the Sixth Circuit, the private resolution of FLSA disputes requires judicial approval

4.1.3. At its core, arbitration is a means to resolve FLSA disputes.

It is black-letter law that an employee cannot bargain with her employer to be paid less than minimum wage. 29 U.S.C. § 206(a). Thus, an employee could not say "I agree to be paid $1 per hour." Such an "agreement" would have no effect. *Alamo*, 471 U.S. at 302; *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016).

Based on the same principles, employees and employers cannot settle FLSA claims except for under the supervision of a court or the DOL. *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9. To hold otherwise would lead to the same result as the first type of waiver. Thus, an employee could not say "I contend that my employer has paid me only $1 per hour. I will resolve any claims I have arising from this situation for an additional $1 per hour."

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[36] *Silfex*, 2021 U.S. Dist. LEXIS 232508 (S.D. Ohio Dec. 3, 2021); *Pierce v. Diversified Health Mgmt.*, No. 2:21-cv-02624, 2021 U.S. Dist. LEXIS 184536, at *2 (S.D. Ohio Sep. 27, 2021); *Wachtelhausen v. CCBCC, Inc.*, No. 2:20-cv-06234, 2021 U.S. Dist. LEXIS 162275, at *5 (S.D. Ohio Aug. 26, 2021); *Kritzer v. Safelite Sols., LLC*, No. 2:10-cv-0729, 2012 U.S. Dist. LEXIS 74994, at *17 (S.D. Ohio May 30, 2012); *Gentrup v. Renovo Servs., LLC*, No. 1:07CV430, 2011 U.S. Dist. LEXIS 67887, at *6 (S.D. Ohio June 24, 2011).

[37] *Savanich v. Nat. Essentials, Inc.*, No. 5:20-cv-2088, 2021 U.S. Dist. LEXIS 223372, at *4 (N.D. Ohio Nov. 19, 2021); *Cross v. Hamilton Cty. Gov't*, No. 1:20-CV-227-KAC-CHS, 2021 U.S. Dist. LEXIS 249945, at *2 (E.D. Tenn. June 24, 2021); *Athan*, 523 F. Supp. 3d at 965 ("Although the Sixth Circuit has never definitively answered the question of whether court approval is required for FLSA settlement agreements, district courts in our Circuit regularly find that the FLSA context counsels in favor of courts approving settlements."); *Steele v. Staffmark Invs., Ltd. Liab. Co.*, 172 F. Supp. 3d 1024, 1026 (W.D. Tenn. 2016) ("The Sixth Circuit has yet to rule definitively on the question; however, based on the unique purpose of the FLSA and the unequal bargaining power between employees and employers, this Court finds that FLSA settlements require approval by either the Department of Labor or a court."); *Crawford v. Lexington-Fayette Urban Cty. Gov't*, No. 06-299-JBC, 2008 U.S. Dist. LEXIS 90070, at *12 (E.D. Ky. Oct. 23, 2008)

Arbitration presents a third type of waiver. In arbitration, the employee essentially assigns the ability to compromise his or her claim to a third-party. It is the equivalent of saying "I know that I cannot agree to work for less than minimum wage. But, if this third-party says I can, then I will." It is also the equivalent of saying "I relinquish control of settling my own claim and, instead, assign it to a third-party."

None of this passes muster under the FLSA. An employee can neither waive her right to a wage, nor assign to someone else the ability to waive that right. In the same way that an employee and employer cannot flip a coin to decide whether the employee should be or was paid minimum wage, the parties cannot agree to have a third party make that decision.

Consider that courts do not approve settlements negotiated directly between employees and employers. *Lynn's Food*, 679 F.2d at 1355. Courts will not allow employees represented by counsel to resolve their claims without court approval. *Casso-Lopez*, 335 F.R.D. at 461. The FLSA's prohibition of purely private settlements is necessary to ensure that employees (and employers!) are not being taken advantage of by their counsel:

> Based on the many 'stipulated' attempts at evasion submitted to me after *Dees*, either many FLSA plaintiff's lawyers unaccountably agree to these transparent and doomed devices with confidence that the court will reject the defendant's attempt, many plaintiff's lawyers are unaware of the employee's FLSA rights, or many plaintiff's lawyers are indifferent to the employee's FLSA rights (and choose, instead, the lawyer's quick payday over the employee's just payday). On the other hand, the willingness of defense lawyers to enter these putative settlements — perhaps accomplishing little or nothing for their client — might originate in an unawareness of the law explained in *Lynn's Food*, *Dees*, and elsewhere and might expose both lawyer and client to the same unpleasant surprise — another claim by the same plaintiff — experienced by counsel and client in *Lynn's Food*.

Id.

"[T]he act of filing the suit, airing the parties' dirty laundry in public and before a judge, and then coming to an agreement distinguishes stipulated judgments from private, back-room compromises that could easily result in exploitation of the worker and the release of his or her rights." *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 406 (2d Cir. 2019). Such back-room compromises would include scenarios where, "the employer in an FLSA case might offer full monetary compensation to the employee for the FLSA claim but might require the employee to refrain from informing fellow employees about the result the employee obtained. Or the employer might require the employee to trim the shrubbery at the employer's home each weekend for a year. In either instance, the employee outwardly receives full monetary compensation for her unpaid wages, but effectively the additional term (the 'side deal') confers a partially offsetting benefit on the employer. To the extent that the employee receives a full wage but relinquishes something else of value, the agreement (even if exhibited to the court as a stipulation for 'full compensation' or an offer of judgment) involves a 'compromise,' and *Lynn's Food* requires judicial approval of the compromise." *Dees*, 706 F. Supp. 2d at 1240 (citing *Silva v. Miller*, 307 F. App'x 349, 351 (11th Cir. 2009)).

Arbitration further frustrates the vindication of FLSA rights due to its private and secretive nature. In addition to protections for individual workers, Congress also sought to protect "the public's independent interest in assuring that employees' wages are fair and thus do not endanger 'the national health and well-being.'" *O'Neil*, 324 U.S. at 706; *see also Joo v. Kitchen Table, Inc.*, 763 F. Supp. 2d 643, 645 (S.D.N.Y. 2011) (describing how employee rights under the FLSA have a "private-public" character where the public has an "independent interest" in assuring that the FLSA is properly enforced).

"[V]indication of FLSA rights throughout the workplace is precisely the object Congress chose to preserve and foster through the FLSA." *Dees*, 706 F. Supp. 2d at 1244. That is why the "overwhelming majority of courts reject the proposition that FLSA settlements can be confidential." *Souza v. 65 St. Marks Bistro*, No. 15-CV-327 (JLC), 2015 U.S. Dist. LEXIS 151144, at *13 (S.D.N.Y. Nov. 6, 2015). That is because "most" confidentiality provisions are "clearly designed to reduce the employer's exposure to having to pay FLSA wages to other employees, or having to litigate its obligation to pay other employees, by preventing other employees from learning of their rights." *Klich v. Konrad Klimczak*, No. 21-cv-4812 (BMC), 2021 U.S. Dist. LEXIS 222230, at *10 (E.D.N.Y. Nov. 16, 2021).

The rational for prohibiting arbitration of wage claims is similar to "[t]he rationale for rejecting confidential FLSA settlements… since '[s]ealing FLSA settlements from public scrutiny could thwart the public's independent interest in assuring that employees' wages are fair.'" *Nights of Cabiria*, 96 F. Supp. 3d at 178. "Preventing the employee's co-workers or the public from discovering the existence or value of their FLSA rights is an objective unworthy of implementation by a judicial seal, which is warranted only under 'extraordinary circumstances' typically absent in an FLSA case. Absent an 'overriding interest' in the preservation of some 'higher value,' the court should not abide the parties' request for a seal." *Dee*, 706 F. Supp. 2d at 1245–46. So too for arbitration.

There is nothing magical about an arbitrator. If two parties represented by counsel are not permitted to resolve their disputes without Court approval, then those parties cannot "agree" to have a third party to that which they cannot. It makes no difference that the arbitrator "decides"

who is right and wrong in a dispute. The parties lack the power to assign resolving wage disputes to either themselves, a third party, or some other non-judicial (or non-DOL) method.

Because employees may not compromise their claims outside of judicial (or DOL) supervision and approval, they may not agree to do so before an arbitrator. Thus, an arbitration agreement binding employees to a decision of the arbitrator for FLSA claims is unenforceable.

In the alternative, an arbitrator's decision is simply not enforceable itself under the FLSA, the same as any other private FLSA resolution. Thus, while the arbitrator could render a decision, a district court would need to conduct a full, de novo review of that decision. This would necessarily include discovery, arguments, briefing, and perhaps a hearing. Such a situation would fundamentally defeat the purpose of the arbitration, also rendering the agreement unenforceable.

4.2. The Defendants' forced mediation and arbitration agreement is unconscionable.

Even if the FLSA permitted the private resolution of disputes outside of judicial supervision, Defendants' Arbitration Plan is unconscionable and is therefore unenforceable.

Plaintiff recognizes, of course, that courts have held that arbitration agreements are not unconscionable. But those decisions rest on two flawed premises that should be reexamined.

First, the decisions have held that the employment relationship does not present an unduly coercive situation for a low-wage employee. This, however, seems to rest on the judge-created doctrine of super-deference to arbitration by enforcing arbitration because it ignores reality. As discussed below, in numerous situations, and with a high level of consistency, courts have found that the employment relationship is necessarily coercive. *See* Part 4.2.2, *infra*.

Second, the decisions rest on the assumption that arbitration involves a fair, neutral, and effective forum. The evidence is that this assumption is incorrect. The opposite is true. Arbitration

is stacked so heavily against employees that they are less likely to win arbitration cases and they recover lower damages.[38]

Arbitration frustrates the attainment of a fair and reasonable resolutions because even if arbitration may generally be a suitable forum, the "arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) (citing *Gilmer*, 500 U.S. at 28). As discussed throughout this brief, the arbitral forum has been structured to deny workers the ability to effectively vindicate their rights. It is a forum effective for employers only.

4.2.1. Legal Standard

In determining the enforceability of an arbitration agreement, courts apply state law of contract formation. *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 195 (6th Cir. 2016). Ohio law holds that arbitration agreements are, "'valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.'" *Dacres v. Setjo, L.L.C.*, 2019-Ohio-2914, 140 N.E.3d 1041, ¶ 11 (8th Dist.) (quoting *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 33; and O.R.C. § 2711.01(A).

A contract is unconscionable when one party lacks a meaningful choice and the contract's terms are unreasonably favorable to the other party. *Khaledi v. Nickris Properties*, 6th Dist. Huron

[38] Alexander J.S. Clovin, *The growing use of mandatory arbitration*, Economic Policy Institute (September 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ (last accessed March 9, 2022) (attached as Exhibit 10); American Association for Justice, *The Truth About Forced Arbitration* (September 2019), https://www.justice.org/resources/research/the-truth-about-forced-arbitration (last accessed March 9, 2022) (attached as Exhibit 11).

No. H-17-015, 2018-Ohio-3087, ¶ 27 (6th Dist.). Unconscionability has two parts: procedural and substantive unconscionability. *Id.*

Procedural unconscionability relates to the formation of the contract and relies on a totality of the circumstances. *Id.* at ¶¶ 27–28 (citing cases). When assessing an arbitration clause's procedural unconscionability: "courts consider the relative bargaining positions of the parties, whether the terms of the provision were explained to the weaker party, and whether the party claiming that the provision is unconscionable was represented by counsel at the time the contract was executed." *Id.* (citing *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, ¶ 17 (9th Dist.)).

Substantive unconscionability focuses on the terms of the agreement, court assess "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Id.* at ¶32 (citing cases). There is no "bright-line" set of factors for determining substantive unconscionability, the relevant factors vary with the content of the agreement at issue. *Id.* at ¶ 32 (quoting *Ranazzi v. Amazon.com, Inc.*, 2015-Ohio-4411, 46 N.E.3d 213, ¶ 25 (6th Dist.).

4.2.2. Defendants' Arbitration Plan is Procedurally Unconscionable

Case law has presented a curious split on the same issue. On one hand, in an effort to enforce arbitration agreements, seemingly at all costs, courts have held that an employee's bargaining position is on par with a company of any size and sophistication. *See Gilmer*, 500 U.S. at 26; *Gaffers*, 900 F.3d at 295.

That context aside, courts have repeatedly recognized that the employment relationship is inherently coercive and subject to abuse on the part of employers. The most obvious example of

this is the Fair Labor Standards Act. Courts have consistently recognized that the FLSA was necessary because of the superior, coercive bargaining power that employers hold over their employees. *See, e.g.*, *Alamo*, 471 U.S. at 302; *Runyan*, 787 F.2d at 1043 n.6.

Courts have also recognized the coercive nature of employment relationships and the danger of employers unduly interfere with a class because of the power that the employment relationship grants employers. *Kleiner v. First Natl. Bank*, 751 F.2d 1193, 1203 (11th Cir. 1985) (citing *Zarate v. Younglove*, 86 F.R.D. 80, 90 n.13 (C.D. Cal. 1980)) ("Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the fact, without opportunity for rebuttal. The damage from misstatements could well be irreparable."); *Crosby v. Stage Stores, Inc.*, 377 F.Supp.3d 882, 889 (M.D. Tenn. 2019) (citing cases) ("[T]he potential for coercion and abuse of the class action is especially high when there is an ongoing business relationship between the two parties, particularly when that relationship is one of employer to employee."); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 666 (E.D. Pa. Apr. 9, 2001) ("If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined."); *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) (citing *Kleiner*, 751 F.2d. at 1202–03) ("Where the defendant is the current employer of putative class members who are at-will employees, the risk of coercion is particularly high; indeed, there may in fact be some inherent coercion in such a situation.").

That inherently unbalanced relationship is why employers are able force employees to sign arbitration agreements in the first place. The agreements serve only to the detriment of employees; thus, there is no rational reason for them to sign the agreements but-for the employer's superior bargaining power.

Defendant's Arbitration Plan is procedurally unconscionable and bears many hallmarks of a contract of adhesion. "An adhesion contract is a standard-form contract prepared by one party, to be signed by the party in a weaker position, usu(ally) a consumer, who adheres to the contract with little choice about the terms." *Bayes v. Merle's Metro Builders/Boulevard Constr., LLC*, 11th Dist. Lake No. 2007-L-067, 2007-Ohio-7125, ¶ 33 (11th Dist.). "Although an adhesion contract is not per se unconscionable, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability." *Id.* (internal quotation marks omitted). Defendants' Arbitration Plan is a preprinted, standardized form contract prepared by the Defendants and offered to employees that have no choice as to the terms. As Defendants admit, "[e]ach Plan signed by Plaintiffs is identical." (Doc. 14 at PAGEID 144). These agreements come about solely because of Defendants' superior bargaining power—no negotiation or actual bargaining is taking place. The Defendants are abusing their power as owners and operators over one hundred Pizza Hut franchise locations to contract around the FLSA by requiring the delivery drivers, sub-minimum wage workers often desperate to make ends meet, to give up FLSA protections in order to get a job.

There are also numerous problems in the text of the agreement, each undermining Plaintiff's ability to effectively vindicate her claims.

4.2.3. Defendants' Arbitration Plan is Substantive Unconscionable

As discussed in Part 2, *supra*, the terms of Defendants' contact and the AAA's pro-employer bias make Defendants' Arbitration Plan substantively unconscionable.

Undoubtedly, Defendants know the substantial, liability-limiting benefits of arbitration. That is why the use it.

What's more, Defendants have continued to force workers to sign an agreement that they know, at least in part, is illegal. Defendants inform this Court that the *Jefferis* Court enforced "the exact same Dispute Resolution Plan that each of the current Plaintiff Pizza Delivery Drivers signed." See Doc 14-1 at PAGEID 140. Defendants conveniently fail to mention that the Arbitration Plan's waiver of the statute of limitations periods were found to be "prohibited and unenforceable," but coyly state that "*even if* a provision of The Plan was found to be unfair, unreasonable, or otherwise unenforceable…" (which, of course, the *Jefferis* Court did find) "[t]he Plan's terms require that such provision be severed from the agreement and that the rest of The Plan remain intact… Hallrich previously has waived the Plan's time limitation on filing." *Id*. at PAGEID 149–150.

Defendants' own brief makes clear, Defendants are well aware that the time limitations set forth in their forced mediation and arbitration agreement are prohibited and unenforceable since at least August 2019. *See Jefferis v. Hallrich Corp.*, No. 1:18-CV-687, 2019 U.S. Dist. LEXIS 127825 *15–19 (S.D. Ohio July 31, 2019), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 143045 (S.D. Ohio Aug. 22, 2019). Despite this, Defendants have continued to require each of their employees to electronically sign the exact same document, containing prohibited and unenforceable terms that blatantly misrepresent the employees' legal rights. Why would

Defendants continue to require employees sign a document without removing the prohibited and unenforceable terms? Surely this change would require minimal effort on Defendants' part, particularly because the agreement is a single, form document.

The answer is easy—the illegal terms serve the monetary interests of the Defendants by misleading employees into believing the time for filing potential claims has passed. There can be no doubt that the Defendants' conduct demonstrates a willful violation of the FLSA. While Defendants again attempt to rely on the severability clause, when the cumulative effect of multiple illegal provisions "taints" the overall agreement and prevents a court from enforcing the agreement, severability is improper. *Scovill v. WSYX.ABC*, 425 F.3d 1012 (C.A.6, 2005). "The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement. Because the sickness has infected the trunk, we must cut down the entire tree." *Alexander v. Anthony Internatl. L. P.*, 341 F.3d 256, 261 (C.A.3, 2003). When viewed in conjunction with the unconscionability of the agreement as a whole, it become clear that severability is improper here.

4.3. Defendants' Arbitration Plan's statute of limitations waiver is illegal.

Unsatisfied with forcing workers into arbitration, Defendants have gone even further. Defendants have continued to include a waiver of the FLSA statute of limitations in the Arbitration Plan. It claims shorten the employee's statute of limitations to a mere six months.[39] That provision was found illegal by *Jefferis* court. *Jefferis*, 2019 U.S. Dist. LEXIS 127825, at *15–19 (S.D. Ohio July 31, 2019), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 143045 (S.D. Ohio Aug. 22, 2019); *see also Boaz*, 725 F.3d at 606 (citing *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161, 167 (1945)).

[39] Doc. 14-1 at PageID 162, 176, 190, 204, 218, 232 (¶ 5.B.)

Despite provisions like this being repeatedly struck down, Defendants have continued to include the illegal statute of limitations waivers in Arbitration Plans for their newly hired employees.[40] One does not have to wonder too long to understand why: although unenforceable, the provision is designed to fool employees into believing that their rights have been waived.

To the extent that the Court enforces the agreement at all, it should sever the following provisions as illegal:

> A Party must initiate proceedings under The Plan by filing with the AAA a written mediation request. The mediation request must be filed within six (6) months of the date of the occurrence of the event which gave rise to the Dispute or within some alternative period of time agreed upon by the Parties. The Parties waive any statute of limitations to the contrary. Failure of a Party to timely file the mediation request shall bar the Party from any relief or other proceedings under this Plan or otherwise, and any such Dispute shall be deemed to have been finally and completely resolved.

Doc. 14-1 at PageID 162 ¶ 5.B. (emphasis in original).

5. Conclusion

The Defendants' have successfully evaded liability for their wage practices for years, in no small part thanks to the nearly-blind deference to arbitration. As a result, hundreds of Defendants' employees have been stripped of their ability to fairly vindicate their rights to minimum wages. To enforce this agreement, despite willfully illegal and unconscionability, would be to enforce arbitration "at all costs." Accordingly, Defendants' Dispute Resolution Plan should be held unenforceable and the Plaintiff should be free to pursue her claims before this Court.

Respectfully submitted,

/s/ Emily Hubbard
Andrew R. Biller (Ohio Bar No. 0081452)

[40] Doc 14-1 at PageID (Courtney Dimidik, March 20, 2021); PageID 187 (Leah Taylor, November 25, 2020); PageID 215 (Haily Gordon, November 27, 2020); PageID 229 (Gavin Blankenship, October 8, 2021).

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Counsel for Plaintiff

Certificate of Service

The undersigned hereby certifies that the above document was filed on March 10, 2022, through the Court's ECF system, which will provide notice to all parties.

/s/ *Emily Hubbard*
Emily A. Hubbard

EXHIBIT 1

From: AAA Hiro Kawahara <HiroKawahara@adr.org>
Sent: Monday, November 22, 2021 12:38 PM
To: Andrew Kimble <akimble@billerkimble.com>; Andy Biller <abiller@billerkimble.com>; Ashley Burns <aburns@billerkimble.com>; Emily Hubbard <ehubbard@billerkimble.com>; Samuel Elswick, Jr <selswick@billerkimble.com>; aberg@nwlink.com; Tuska-Butler, Roshel <rtuska-butler@fisherphillips.com>; Gray, Lee <lxgray@fisherphillips.com>; Korn, Matthew <mkorn@fisherphillips.com>; Che, Sieu <sche@fisherphillips.com>
Subject: Zaine Graves v. Carpe Diem Pizza, Inc. 01-21-0002-6820 - Supplemental Disclosure

Dear Counsel,

Arbitrator Epstein has provided the attached Notice of Offer and Notice of Acceptance regarding future professional relationships or employment pursuant to Standard 12(d)(1) of the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Any objections or comments to the Notice of Offer and Notice of Acceptance should be submitted within fifteen (15) days of this email. If an objection is received, all other parties will have five (5) days to provide comments copying the other side. Pursuant to Standard 12(d)(3)(C) the arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of the offer or the arbitrator's acceptance of the offer. Therefore, AAA will make a determination regarding the arbitrator's continued service in accordance with the AAA Rules.

As requested by the arbitrator, if either party or their counsel knows of any contact or conflict that may be relevant, they are to communicate this information to the Association within ten (10) days.

The arbitrator shall not be copied of any comments related to a disclosure.

Please do not hesitate to contact the undersigned with any questions and/or concerns.

Thank you,
Hiro

AAA Hiro Kawahara
Manager of ADR Services

American Arbitration Association

T: 972 774 6956 E: HiroKawahara@adr.org
13727 Noel Road, Suite 700, Dallas, TX 75240
adr.org | icdr.org | aaamediation.org

From: Eric M. Epstein <emepstein@aol.com>
Sent: Friday, November 19, 2021 7:52 PM
To: AAA Hiro Kawahara; Hiroyuki Kawahara
Subject: Graves v. Carpe Diem Pizza, #01-21-0002-6820 - Notice of Offer of Employment and Acceptance

***** External E-Mail – Use Caution *****

Hi Hiiro,

Please transmit the following Notice of Offer of Employment and Acceptance to all counsel in the above referenced case and "cc" me on the transmittal:

On November 17, 2021, I was offered employment to serve as an Arbitrator in the following case, which said offer I accepted on November 19, 2021

Wang v. Coway USA, Inc.(the "Wang" case):

The Respondent in the Wang case is represented by Fisher & Phillips, LLP ("Fisher & Phillips"), who also represents Respondent, Carpe Diem Pizza, in the above referenced case of **Graves v. Carpe Diem Pizza** (the "Graves" case). The attorneys at Fisher & Phillips who are handling the Wang case are Sieu Che and Matthew Korn.

Please note that in response to Question #28 on my initial Disclosures in the Graves case, I stated as follows:

"Although I will not entertain offers of employment or new professional relationships as an attorney, consultant or expert witness from a party or lawyer for a party while this instant arbitration is pending, I will entertain offers from a party or lawyer for a party to serve as a dispute resolution neutral in another case."

The above information is notice of my acceptance of an offer of employment to serve as an Arbitrator in another case in which Fisher & Phillips represents one of the parties.

Sincerely,

Eric M. Epstein, Arbitrator
1901 Ave. of the Stars, #1100
Los Angeles, CA 90067
310-552-5366 (Office)
310-704-1845 (Cell)

EXHIBIT
2

The New York Times
https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html

BEWARE THE FINE PRINT | PART II

In Arbitration, a 'Privatization of the Justice System'

Jessica Silver-Greenberg and Michael Corkery
Nov. 1, 2015

Deborah L. Pierce, an emergency room doctor in Philadelphia, was optimistic when she brought a sex discrimination claim against the medical group that had dismissed her. Respected by colleagues, she said she had a stack of glowing evaluations and evidence that the practice had a pattern of denying women partnerships.

She began to worry, though, once she was blocked from court and forced into private arbitration.

Presiding over the case was not a judge but a corporate lawyer, Vasilios J. Kalogredis, who also handled arbitrations. When Dr. Pierce showed up one day for a hearing, she said she noticed Mr. Kalogredis having a friendly coffee with the head of the medical group she was suing.

During the proceedings, the practice withheld crucial evidence, including audiotapes it destroyed, according to interviews and documents. Dr. Pierce thought things could not get any worse until a doctor reversed testimony she had given in Dr. Pierce's favor. The reason: Male colleagues had "clarified" her memory.

When Mr. Kalogredis ultimately ruled against Dr. Pierce, his decision contained passages pulled, verbatim, from legal briefs prepared by lawyers for the medical practice, according to documents.

"It took away my faith in a fair and honorable legal system," said Dr. Pierce, who is still paying off $200,000 in legal costs seven years later.

If the case had been heard in civil court, Dr. Pierce would have been able to appeal, raising questions about testimony, destruction of evidence and potential conflicts of interest.

But arbitration, an investigation by The New York Times has found, often bears little resemblance to court.

Over the last 10 years, thousands of businesses across the country — from big corporations to storefront shops — have used arbitration to create an alternate system of justice. There, rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found.

The change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court.

"This amounts to the whole-scale privatization of the justice system," said Myriam Gilles, a law professor at the Benjamin N. Cardozo School of Law. "Americans are actively being deprived of their rights."

All it took was adding simple arbitration clauses to contracts that most employees and consumers do not even read. Yet at stake are claims of medical malpractice, sexual harassment, hate crimes, discrimination, theft, fraud, elder abuse and wrongful death, records and interviews show.

The family of a 94-year-old woman at a nursing home in Murrysville, Pa., who died from a head wound that had been left to fester, was ordered to go to arbitration. So was a woman in Jefferson, Ala., who sued Honda over injuries she said she sustained when the brakes on her car failed. When an infant was born in Tampa, Fla., with serious deformities, a lawsuit her parents brought against the obstetrician for negligence was dismissed from court because of an arbitration clause.

Even a cruise ship employee who said she had been drugged, raped and left unconscious in her cabin by two crew members could not take her employer to civil court over negligence and an unsafe workplace.

For companies, the allure of arbitration grew after a 2011 Supreme Court ruling cleared the way for them to use the clauses to quash class-action lawsuits. Prevented from joining together as a group in arbitration, most plaintiffs gave up entirely, records show.

Still, there are thousands of Americans who — either out of necessity or on principle — want their grievances heard and have taken their chances in arbitration.

Little is known about arbitration because the proceedings are confidential and the federal government does not require cases to be reported. The secretive nature of the process makes it difficult to ascertain how fairly the proceedings are conducted.

Some plaintiffs said in interviews that arbitration had helped to resolve their disputes quickly without the bureaucratic headaches of going to court. Some said the arbitrators had acted professionally and without bias.

But The Times, examining records from more than 25,000 arbitrations between 2010 and 2014 and interviewing hundreds of lawyers, arbitrators, plaintiffs and judges in 35 states, uncovered many troubling cases.

Behind closed doors, proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favor. A hearing that lasted six hours cost the plaintiff $150,000. Arbitrations have been conducted in the conference rooms of lawyers representing the companies accused of wrongdoing.

Winners and losers are decided by a single arbitrator who is largely at liberty to determine how much evidence a plaintiff can present and how much the defense can withhold. To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show.

"What rules of evidence apply?" one arbitration firm asks in the question and answer section of its website. "The short answer is none."

Like the arbitrator in Dr. Pierce's case, some have no experience as a judge but wield far more power. And unlike the outcomes in civil court, arbitrators' rulings are nearly impossible to appeal.

When plaintiffs have asked the courts to intervene, court records show, they have almost always lost. Saying its hands were tied, one court in California said it could not overturn arbitrators' decisions even if they caused "substantial injustice."

Unfettered by strict judicial rules against conflicts of interest, companies can steer cases to friendly arbitrators. In turn, interviews and records show, some arbitrators cultivate close ties with companies to get business.

Some of the chumminess is subtler, as in the case of the arbitrator who went to a basketball game with the company's lawyers the night before the proceedings began. (The company won.) Or that of the man overseeing an insurance case brought by Stephen R. Syson in Santa Barbara, Calif. During a break in proceedings, a dismayed Mr. Syson said he watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)

Stephen R. Syson, who lost an insurance case in arbitration. Jeff Clark for The New York Times

Other potential conflicts are more explicit. Arbitration records obtained by The Times showed that 41 arbitrators each handled 10 or more cases for one company between 2010 and 2014.

"Private judging is an oxymoron," Anthony Kline, a California appeals court judge, said in an interview. "This is a business and arbitrators have an economic reason to decide in favor of the repeat players."

With so much latitude, some organizations are requiring their employees and customers to take their disputes to Christian arbitration. There, the proceedings can incorporate prayer, and arbitrators from firms like the Colorado-based Peacemaker Ministries can consider biblical scripture in determining their rulings.

The firms that run the arbitration proceedings say the process allows plaintiffs to have a say in selecting an arbitrator who they think is most likely to render a fair ruling.

The American Arbitration Association and JAMS, the country's two largest arbitration firms, said in interviews that they both strived to ensure a professional process and required their arbitrators to disclose any conflicts of interest before taking a case.

The American Arbitration Association, a nonprofit, said it allowed plaintiffs to reject arbitrators on the ground of potential bias.

JAMS, a for-profit company, said it did the same and put extra protections in place for consumers and employees. "Their core value is neutrality — their business depends on it," Kimberly Taylor, chief operating officer of JAMS, said of its arbitrators.

But in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.

Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. "Why would an arbitrator cater to a person they will never see again?" she said.

Arbitration proved to be devastating to Debbie Brenner of Peoria, Ariz., who believes she did not get a fair shake in her fraud case against a for-profit school chain that nearly left her bankrupt. In a rambling decision against Ms. Brenner that ran to 313 pages, the arbitrator mused on singing lessons, Jell-O and Botox.

"It was a kangaroo court," Ms. Brenner said. "I can't believe this is America."

From Cradle to Grave

An ob-gyn's office in Tampa, Fla., now informs expectant mothers that if problems arise — a botched vaginal delivery, a flawed C-section — the patients cannot take their grievances to court. Neither can the families of loved ones who are buried at Evergreen Cemetery outside Chicago, which also requires disputes to be resolved privately.

From birth to death, the use of arbitration has crept into nearly every corner of Americans' lives, encompassing moments like having a baby, going to school, getting a job, buying a car, building a house and placing a parent in a nursing home.

The first contact point can arise prenatally, when obstetricians seek to limit liability by requiring patients to sign agreements containing arbitration clauses as a condition of treating them.

Leydiana Santiago of Tampa was devastated when her baby was born in November 2011 with vision and hearing loss and thumbs that needed to be amputated. Ms. Santiago blamed her doctor at Lifetime Obstetrics and Gynecology for the problems. She said her doctor mistakenly determined that she had miscarried, court records show. As a result, Ms. Santiago resumed taking medication for lupus — medication that can cause birth defects.

Women's Care Florida, which owns Lifetime, declined to comment on the case.

In April 2014, a Florida appeals court upheld a decision to force Ms. Santiago into arbitration. "I obey what appears to be the rule of law without any enthusiasm," wrote one of the judges, Chris Altenbernd, adding that he feared "I have disappointed Thomas Jefferson and John Adams."

Students from high school to graduate school can likewise find themselves caught in the gears. Lee Caplin discovered this when he enrolled his 15-year-old son at Harvard-Westlake, a private school in Los Angeles.

His son said he was bullied and harassed, and received graphic and profane death threats, including some that came from school computers. Among the threats, court records show, were, "I'm going to pound your head with an ice pick" and "I am looking forward to your death."

Harvard-Westlake declined to comment on the case, but said that it "takes allegations of bullying very seriously."

Afraid for his life, the teenager dropped out and the family relocated. When Mr. Caplin sued the school for failing to protect his son, he learned that even civil rights cases can be blocked from court.

The arbitrator ruled in favor of Harvard-Westlake, saying the plaintiff did not sufficiently prove that the school was "negligent."

"It's not a system of justice; it's a rigged system of expediency," Mr. Caplin said.

Many companies give people a window — typically 30 to 45 days — to opt out of arbitration. Few people actually do, either because they do not realize they have signed a clause, or do not understand its consequences, according to plaintiffs and lawyers.

Cliff Palefsky, a San Francisco lawyer who has worked to develop fairness standards for arbitration, said the system worked only if both sides wanted to participate. "Once it's forced, it is corrupted," he said.

Graduates entering the job market can confront even more challenging terrain. For many people, when the choice is between giving up the right to go to court or the chance to get a job, it is not a choice at all.

That is why a housekeeper in suburban Virginia said she had to sign an employment agreement with an arbitration clause that her employer had printed from the Internet. She said she regretted it later when he sexually harassed her and she had no legal recourse in court.

Circumstances are not any easier on the home front, where residents like Jordan and Bob Fogal of Houston can become stuck with a construction nightmare.

- Goldman Sachs is pulling out of Russia, becoming the first big U.S. bank to leave.
- Stocks drop as Wall Street's swings continue.
- Russia has destroyed $100 billion worth of Ukrainian assets, a top economic official says.

Not long after they moved into their townhouse, more than 100 gallons of water crashed through their dining room ceiling.

The couple won when they took their builder to arbitration, but they ended up with only $26,000, about a fifth of what they needed to make repairs. Unable to come up with the rest of the money and sickened from pervasive mold, the Fogals moved out.

The perils of using a secretive system can be even more acute in old age, as illustrated by numerous cases involving nursing homes.

Daniel Deneen said he was incredulous when he got a fax from a nursing home in McLean, Ill., about a client for whom he was a legal guardian.

The client, a 90-year-old woman with dementia, needed prompt care for bed sores. Unless Mr. Deneen agreed to arbitration, he said, doctors working at the nursing home would not treat her there.

"It was the most obnoxious, unfair document I have ever been presented with in over 30 years of practicing law," Mr. Deneen said.

Once contracts with arbitration clauses are signed, nursing homes can also use them to force civil cases involving sexual assault and wrongful death out of the courts.

In May 2014, a woman with Alzheimer's was sexually assaulted twice in two days by other residents at the Bella Vista Health Center, a nursing home in Lemon Grove, Calif., according to an investigation by the state's department of public health. The investigation also found that the nursing home "failed to protect" the woman.

A lawyer for Bella Vista, William C. Wilson, said the company disputed the state's findings and that the staff "makes the health and safety of its patients their top priority."

After unsuccessfully fighting to have the arbitration clause in their agreement voided, the woman's family settled with Bella Vista.

Between 2010 and 2014, more than 100 cases against nursing homes for wrongful death, medical malpractice and elder abuse were pushed into arbitration, according to The Times's data.

Roschelle Powers said she found her mother, Roberta, who had diabetes and dementia, vomiting and disoriented one day in May 2013 at a Birmingham, Ala., nursing home. Ms. Powers said she alerted the home, Greenbriar at the Altamont, specifically mentioning pills she had found in her mother's hand, according to a deposition.

A few days later, Roberta Powers's son, Larry, said he called 911 after finding her alone and unresponsive.

A day after the ambulance took his mother to the hospital, she was dead. An autopsy showed that the 83-year-old Mrs. Powers had more than 20 times the recommended dose of metformin, a diabetes medication, in her blood.

During arbitration, the nursing home acknowledged the blood test results but said they had been the result of renal dysfunction. The arbitrator ruled in favor of Greenbriar. "There was no evidence to support the allegation that Ms. Powers somehow gained access to, and then took, more than her prescribed amount of metformin," Joseph L. Reese Jr., a lawyer for the nursing home, said.

Perry Shuttlesworth, the family's lawyer, said that "it was only because of forced arbitration that the nursing home got away with this." He added that "a jury would not have let this happen. "

Even when plaintiffs prevail in arbitration, patterns of wrongdoing at nursing homes are kept hidden from prospective residents and their families.

Recognizing the issue, 34 United States senators have asked the federal government to deny Medicare and Medicaid funding to nursing homes that employ arbitration clauses. "All too often, only after a resident has suffered an injury or death," the senators wrote in a letter in September, "do families truly understand the impact of the arbitration agreement they have already signed."

Sometimes, even death provides no escape.

Willie K. Hamb stands in the cemetery where she wanted her husband to be buried in a simple plot. David Kasnic for The New York Times

Willie K. Hamb was at the funeral for her husband at Evergreen Cemetery outside Chicago when she discovered that his coffin would not be buried in the shady plot she said she had requested.

Instead, the cemetery informed Mrs. Hamb that it would place the coffin in a wall crypt until the more than $56,000 marble mausoleum they said she had agreed to in a contract was complete.

Mrs. Hamb, 72 and retired, said all she could afford for her husband, known to his friends as Pudden, was the simple plot and service she had already paid $12,461 to arrange.

Mrs. Hamb's husband, known to his friends as Pudden. David Kasnic for The New York Times

Service Corporation International, one of the nation's largest providers of funeral services and the owner of Evergreen Cemetery, declined to comment.

The dispute will be resolved in a coming arbitration. Mrs. Hamb's lawyer, Michelle Weinberg, said she was not optimistic that her client would prevail, especially since the arbitrator is a bank compliance officer.

A Crash Course

Debbie Brenner enrolled in the surgical technician program at Lamson College near Phoenix in her 40s with high hopes of reinventing herself. She spent hours learning about the tools used in surgical procedures as if mastering the movements of the waltz, each handoff in graceful succession: scalpel, retractor, clamp, sutures.

Whether the instruments featured in lessons were real, or just depictions in photographs, depended on what teachers could round up on any given day. Lamson students became accustomed to empty surgical trays and anatomical mannequins missing their plastic replicas of organs. One enterprising instructor fashioned hearts, livers and kidneys out of felt and string.

Students considered that instructor to be one of Lamson's better faculty members, more than a dozen of them said in interviews. Some teachers routinely disappeared from class, leaving tests conspicuously on the desks to be copied, they said.

Ms. Brenner, a devout Christian, said she prayed that the program's shortcomings would not diminish her job prospects. She said the enrollment officer who persuaded her to sign up for the $24,000-a-year program had promised her she would easily find a job after graduation.

Debbie Brenner, whose fraud case against a for-profit school chain was forced into arbitration and left her nearly bankrupt. Nick Cote for The New York Times

When Ms. Brenner completed the program with high marks in 2009, she said, Lamson failed to find her an internship. She was volunteering at Maricopa County Hospital when, she said, a surgical technician told her that most hospitals refused to hire Lamson students because they were so poorly trained. According to students, some did not even know how to properly sterilize their hands before surgery.

"It was a joke," Ms. Brenner said. "The school's brochure was all about making our dreams come true, but this was a nightmare."

Soon after, Lamson shut down the program when it was unable to place enough of its students in internships. In March 2011, Ms. Brenner and other students filed a lawsuit against the school and its owner, Delta Career Education Corporation, accusing them of fraud. The case was promptly dismissed because of an arbitration clause in the students' enrollment agreements.

Ms. Brenner, confident she could prevail in arbitration, persuaded her husband to withdraw $12,000 from his retirement account to put toward legal fees.

By the time her case was heard in March 2013, the attorney general of Arizona had sued another Delta school for defrauding students in a criminal justice program. And a federal class-action lawsuit in Michigan had accused a Delta school of defrauding students out of millions of dollars in student loans. The company did not admit wrongdoing, but settled both lawsuits for a total of more than $8 million.

Arbitration would prove to be more advantageous for the company, records and interviews show.

Ms. Brenner's case was conducted in the Phoenix office of Gordon & Rees, one of two big law firms defending Lamson and Delta. The arbitrator, Dennis Negron, was a corporate lawyer and real estate broker who had written papers on how to limit liability because "last on your list of desires is to be sued."

As in most arbitrations, lawyers for both sides chose Mr. Negron from a list provided by an arbitration firm, in this case the American Arbitration Association.

Lawyers for Ms. Brenner and four other students grouped into the same arbitration said they anticipated victory because they believed that the evidence was overwhelmingly in their favor.

Even the school's former head of admissions, Jeff Bing, testified that he had been instructed by his superiors at Delta to increase enrollment at all costs.

Mr. Bing said it was widely known that the admissions staff, whose compensation was tied to the number of students recruited, was "overpromising" on jobs. He testified that the job placement rate for graduates was around 20 percent.

To keep the enrollment numbers up, Mr. Bing said, virtually anyone who applied was accepted. He added in an interview that the only qualification was "a pulse."

Mr. Bing and other former employees recounted in interviews with The Times how profits drove most of the decision-making at Lamson.

As administrators were pressured to increase enrollment, instructors were drilled on the importance of student retention — which factored into federal aid disbursements.

Penny Philippi and Karen Saliski, two former teachers, said they were directed not to flunk anyone, including a student who skipped classes to "chase U.F.O.s."

Delta declined to comment.

During the arbitration proceedings, even a witness for the defense expressed concerns about Lamson. Kelly Harris, who headed the school's surgical technician program, defended the quality of education offered at Lamson but said the school enrolled too many students.

Ms. Harris, in an interview with The Times, said she warned school executives that the practice would dilute the quality of training, flood the job market and make the Lamson degree worthless. They scoffed, she said.

"It broke my heart to see these kids treated as dollar signs," Ms. Harris said.

She was one of only two people who testified for the defense. Lawyers for Lamson and Delta denied that enrollment officers guaranteed jobs, adding that they were hard to come by during the recession.

In the end, Mr. Negron ruled in favor of Lamson and Delta.

Mr. Negron found that the defense had presented the "two most credible witnesses" and praised for-profit education, according to his decision, a copy of which was obtained by The Times. Mr. Negron did not return repeated calls and emails seeking comment.

"There is little doubt that for-profit technical or specialty schools, like the college, serve an invaluable service to the public," he wrote in his decision.

Mr. Negron found that the college did not make job promises during the enrollment process but may have engaged in "puffery, which each of the adult students should have known and recognized as puffery." Chiding Ms. Brenner for not being a savvier shopper, he said she had approached her decision to enroll in a "most cavalier manner" as if "buying a Snickers at the local market."

His opinion was not shared by arbitrators who ruled in favor of students in two nearly identical cases against Lamson, documents obtained by The Times show.

If the cases had played out in court, legal experts said, Ms. Brenner could have referred to those decisions to appeal Mr. Negron's.

As it stands, Ms. Brenner lost far more than the case.

Mr. Negron decided that she and the other students should pay the defense's $354,210.77 legal bill because of the "hardship" the students had inflicted on Lamson and Delta.

"I felt like I had been sucker-punched," Ms. Brenner said.

Repeat Business

Fearful of losing business, some arbitrators pass around the story of Stefan M. Mason as a cautionary tale. They say Mr. Mason ruled in favor of an employee in an age discrimination suit, awarding him $1.7 million, and was never hired to hear another employment case.

While Mr. Mason's experience was rare, more than 30 arbitrators said in interviews that the pressure to rule for the companies that give them business was real.

Companies can even specify in contracts with their customers and employees that all cases will be handled exclusively by one arbitration firm. Big law firms also bring repeat business to individual arbitrators, according to documents and interviews with arbitrators. Jackson Lewis, for example, had 40 cases with the same arbitrator in San Francisco over a five-year period.

The JAMS arbitrator in an employment case brought by Leonard Acevedo of Pomona, Calif., against the short-term lender CashCall simultaneously had 28 other cases involving the company, according to documents disclosed by JAMS during the proceedings.

"This whole experience burst my bubble," said Mr. Acevedo, a 57-year-old veteran, who lost his case in October 2014. His lawyer, James Cordes, offered a more critical take. "It clearly appears that the arbitrator was working for the company," Mr. Cordes said. "And he disregarded evidence to hand a good result to his client."

JAMS denied that its arbitrator had been influenced by CashCall.

Linda S. Klibanow, an employment arbitrator in Pasadena, Calif., acknowledged the potential for conflicts of interest but said she thought most arbitrators, many of whom are retired judges, could remain fair.

"I think that most arbitrators put themselves in the place of a jury as the fact finder and try to render a fair decision," Ms. Klibanow said.

Elizabeth Bartholet, an arbitrator in Boston who has handled more than 100 cases, agreed that many arbitrators had good intentions, but she said that the system made it challenging to remain unbiased. Ms. Bartholet recalled that after a company complained that she had scheduled an extra hearing for a plaintiff, the arbitration firm she was working with canceled it behind her back.

A year later, she said, she was at an industry conference when she overheard two people talking about how an arbitrator in Boston had almost cost that firm a big client. "It was a conference on ethics, if you can believe it," said Ms. Bartholet, a law professor at Harvard.

Deborah Pierce, the doctor in Philadelphia, said she did not expect to confront in arbitration the very problem she was suing

her employer over: an uneven playing field.

Dr. Pierce decided to go to arbitration after learning that another female doctor had been denied a partnership by her employer, Abington Emergency Physician Associates, under similar circumstances. She also had the backing of the Equal Employment Opportunity Commission, which found that there was probable cause that Dr. Pierce had been discriminated against.

The practice is now under different management.

Dr. Pierce needed to prove the partners' states of mind when they dismissed her, or debunk whatever reason the company gave for letting her go. Both required access to the practice's records and witnesses.

Once in arbitration, she and her lawyers said, the arbitrator gave them a weekend to review hundreds of records the defense originally withheld.

Vasilios J. Kalogredis, the arbitrator, said he could not comment on details of the proceedings because they were confidential, though he emphasized that "everything was handled properly."

For Dr. Pierce, the most astounding moment came when her lawyers asked Mr. Kalogredis to impose sanctions on the defense for breaking the rules of discovery and destroying evidence. He fined the defense $1,000 after investigating the matter, then billed Dr. Pierce $2,000 for the time it took him to look into it.

"I kept thinking, 'I'm not a lawyer, but this can't be right,' " said Dr. Pierce, who had to take out a second mortgage to cover her legal expenses, which included a $58,000 bill from Mr. Kalogredis.

After the ruling, Dr. Pierce's lawyers wrote to Mr. Kalogredis's arbitration firm questioning his qualifications. The firm, American Health Lawyers Association, responded that it was not its responsibility to verify the "abilities or competence" of its arbitrators.

EXHIBIT
3

EMPLOYMENT

Employment

Arbitration Rules and Mediation Procedures

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Rules Amended and Effective November 1, 2009
Fee Schedule Amended and Effective July 1, 2016

(2) Simultaneously shall send a copy of any counterclaim to the Claimant.

(3) Shall include with its filing the applicable filing fee provided for by these rules.

(iv) The Claimant may file an Answer to the counterclaim with the AAA within 15 days after the date of the letter from the AAA acknowledging receipt of the counterclaim. The Answer shall provide Claimant's brief response to the counterclaim and the issues presented. The Claimant shall make its filing in duplicate with the AAA, and simultaneously shall send a copy of the Answer to the Respondent(s). If no answering statement is filed within the stated time, Claimant will be deemed to deny the counterclaim. Failure to file an answering statement shall not operate to delay the arbitration.

c. The form of any filing in these rules shall not be subject to technical pleading requirements.

5. Changes of Claim

Before the appointment of the arbitrator, if either party desires to offer a new or different claim or counterclaim, such party must do so in writing by filing a written statement with the AAA and simultaneously provide a copy to the other party(s), who shall have 15 days from the date of such transmittal within which to file an answer with the AAA. After the appointment of the arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator.

6. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

7. Administrative and Mediation Conferences

Before the appointment of the arbitrator, any party may request, or the AAA, in its discretion, may schedule an administrative conference with a representative

xii. the allocation of attorney's fees and costs;

xiii. the specification of undisclosed claims;

xiv. the extent to which documentary evidence may be submitted at the hearing;

xv. the extent to which testimony may be admitted at the hearing telephonically, over the internet, by written or video-taped deposition, by affidavit, or by any other means;

xvi. any disputes over the AAA's determination regarding whether the dispute arose from an individually-negotiated employment agreement or contract, or from an employer plan (see Costs of Arbitration section).

The arbitrator shall issue oral or written orders reflecting his or her decisions on the above matters and may conduct additional conferences when the need arises.

There is no AAA administrative fee for an Arbitration Management Conference.

9. Discovery

The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

The AAA does not require notice of discovery related matters and communications unless a dispute arises. At that time, the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination.

10. Fixing of Locale (the city, county, state, territory, and/or country of the Arbitration)

If the parties disagree as to the locale, the AAA may initially determine the place of arbitration, subject to the power of the arbitrator(s), after their appointment to make a final determination on the locale. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

11. Date, Time and Place (the physical site of the hearing within the designated locale) of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in

22. Attendance at Hearings

The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any other witness. The arbitrator also shall have the authority to decide whether any person who is not a witness may attend the hearing.

23. Confidentiality

The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.

24. Postponements

The arbitrator: (1) may postpone any hearing upon the request of a party for good cause shown; (2) must postpone any hearing upon the mutual agreement of the parties; and (3) may postpone any hearing on his or her own initiative.

25. Oaths

Before proceeding with the first hearing, each arbitrator shall take an oath of office. The oath shall be provided to the parties prior to the first hearing. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

26. Majority Decision

All decisions and awards of the arbitrators must be by a majority, unless the unanimous decision of all arbitrators is expressly required by the arbitration agreement or by law.

27. Dispositive Motions

The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

28. Order of Proceedings

A hearing may be opened by: (1) recording the date, time, and place of the hearing; (2) recording the presence of the arbitrator, the parties, and their representatives, if any; and (3) receiving into the record the Demand and the Answer, if any. The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court.

Witnesses for each party shall submit to direct and cross examination.

With the exception of the rules regarding the allocation of the burdens of proof and going forward with the evidence, the arbitrator has the authority to set the rules for the conduct of the proceedings and shall exercise that authority to afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute. When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including web conferencing, internet communication, telephonic conferences and means other than an in-person presentation of evidence. Such alternative means must still afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide that such witness submit to direct and cross-examination.

The arbitrator, in exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute, may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

Documentary and other forms of physical evidence, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

EXHIBIT 4

Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?

ALEXANDER J.S. COLVIN AND KELLY PIKE*

I. INTRODUCTION[1]

In an influential 2001 article, Prof. Samuel Estreicher analogized employment arbitration to a "Saturn" system of justice, referring to the then prominent economy car line produced by General Motors.[2] He contrasted this to the inequality in the employment litigation system, where a few who were successfully able to access it would receive a Cadillac system of justice with high levels of due process, whereas the larger group of employees who were unable to obtain access to the courts would be left with a Rickshaw system providing no effective access to justice for their claims.[3]

Estreicher's argument resonates powerfully because it provides a positive public policy vision justifying the use of employment arbitration and guiding its development. It moves beyond the at times formalistic and simplified assumptions of many of the court decisions that led to the expanded deferral

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[1] Access to the data examined in this study was thanks to the assistance of the American Arbitration Association, which we very gratefully acknowledge. We would particularly like to express our appreciation to the staff of the AAA's Boston office, where we conducted our review of the employment arbitration case files, which they had assembled from across the country. Given the sensitive nature of many of the issues around employment arbitration, organizations involved in this area have natural concerns about disclosure of information. There is a tension between the privacy interests in employment arbitration and the importance of the public policy issues involved. In our view it is to the AAA's credit that they provided us with access to this data for research purposes, which we hope will advance public policy and knowledge in this area. Any findings, conclusions, and errors in this research are, of course, entirely our own responsibility.

[2] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–66 (2001).

[3] *Id.* at 563–64.

of the courts to arbitration.[4] Rather than simply arguing that interpretation of the Federal Arbitration Act requires enforcement of arbitration agreements, Estreicher is arguing that as a matter of public policy we should be supporting the expansion of mandatory employer promulgated arbitration procedures because they will enhance the access by employees to justice in the workplace. If correct, this provides perhaps the strongest rationale for mandatory arbitration and should lead to both legislative and judicial actions directed at removing impediments to its adoption.

Estreicher was able to marshal some empirical evidence about employment arbitration in support of his argument. However, he was writing at a time when empirical research on employment arbitration was in its infancy with only a small number of researchers having examined relatively small samples of arbitration cases.[5] During the 1990s when this early research was conducted, relatively fewer employers had yet adopted mandatory arbitration procedures and few cases had been heard in arbitration based on these employer promulgated procedures.[6] Indeed, the larger number of employer arbitration cases during this period were based on individually negotiated agreements, typically involving higher level employees such as senior executives who are able to negotiate detailed individual contracts, often with the assistance of their own legal counsel.[7] Since that time,

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[4] For example, in the key decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), the majority cited on the key issue of the adequacy of arbitration its previous reasoning in *Mitsubishi Motors* that, "So 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." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). The court provides no evidence to support this assumption, instead offering it as an assertion that presumes the conclusion that it is supposed to support. Arbitration can have advantages and disadvantages as a dispute resolution mechanism. The question for public policy is whether or not the relevant advantages outweigh the disadvantages of using this mechanism.

[5] *See, e.g.*, Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 110–12 (1996); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189–90 (1997); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30–31 (1998).

[6] Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 408–09 (2007).

[7] Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data,* 23 N. Z. J. INDUS. REL. 5, 9 (1998); Colvin, *supra* note 6, at 406–08.

employer promulgated procedures have spread more widely[8] and we have seen larger numbers of cases in arbitration based on these procedures.[9] As a result, more recent research has been able to examine larger scale datasets that focus on employment arbitration cases that are based on employer promulgated procedures.[10] A major source of data driving this new research is disclosure mandates placed on arbitration service providers under the California Code of Civil Procedure. However those disclosure requirements only apply to a limited set of information about each arbitration case, providing only a partial picture of the current state of employment arbitration.

In this article, we examine a new, more detailed dataset of employment arbitration cases administered by the American Arbitration Association (AAA), which includes information on many important aspects of these cases that are not included in the California Code of Civil Procedure disclosure requirements. With the availability of this new data, we are able to revisit Estreicher's argument and look at the question of whether employment arbitration has become a new Saturn system of justice providing better access to employees and to what degree it is different from the Cadillac-Rickshaw system of justice in employment litigation. We begin by describing our new data and then turn to examining what it tells us about employment arbitration as a system of justice providing access to employees.

II. THE DATA

In this study, we examine data on all employment arbitration cases that were administered by the AAA nationally and that terminated in 2008. Overall there were 449 AAA employment arbitration cases that terminated that year. Our initial sources of data were AAA files containing information on the parties; claim and award amounts; key dates for proceedings; and other important case characteristics. These AAA files are used by the organization as the basis for its publicly available filings on consumer

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[8] Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 376 (2003); David Lewin, *Employee Voice and Mutual Gains*, PROCEEDINGS OF THE 60TH ANNUAL MEETINGS OF THE LABOR AND EMPLOYMENT RELATIONS ASSOCIATION 61, 61–62 (2008).

[9] Colvin, *supra* note 6, at 408–09.

[10] Colvin, *supra* note 6, at 407; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. of EMPIRICAL LEGAL STUD. 1 (2011).

arbitration cases, which include employment arbitration cases based on employer promulgated procedures, required under California Civil Code provisions[11] regulating arbitration service providers.[12] However, the AAA's files include additional information that is not required to be included with the California mandated public filings. In addition, we were able to review in detail the full case files for 217 of the employment arbitration cases, which allowed us to investigate a number of aspects of arbitration proceedings not included in the standard AAA data files. This in-depth case file investigation also provided an opportunity for checking the reliability of the information in the AAA data files, and hence, also in the California mandated public disclosure information provided by the AAA. Our comparison of these data sources indicates that the AAA's data files and public disclosures are highly accurate. We identified a few minor corrections in claim and award amounts; however, the error rates were very low for the relatively large and complex data sets involved and typical of normal measurement error found in data sets.

As with any research that focuses on a particular data source, the nature of the data imposes some limitations that need to be recognized. The AAA is the largest provider of employment arbitration services, however its practices and cases may not be representative of other service providers or especially what is occurring in ad hoc arbitration cases where there is no arbitration service provider administering the case. Notably, the AAA has written its employment arbitration rules to comply with the terms of the Due Process Protocol developed by a number of leading participants in arbitration in the 1990s.[13] For arbitration cases based on employer promulgated procedures, the AAA policy is that it will not administer cases under procedures that violate its rules.[14] For example, if it decides that the case is based on an employer

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[11] CAL. CIV. PROC. CODE § 1281.96 (West 2007).

[12] Colvin, *supra* note 6, at 407–08; Colvin, *supra* note 10, at 1.

[13] Some other organizations, notably JAMS (Judicial Arbitration and Mediation Services, Inc.) in the employment arbitration setting, have also adopted similar due process protections. Current JAMS policy is that it will not administer any employment arbitration that does not meet its minimum fairness standards, which parallel the provisions of the due process protocol, unless the arbitration agreement was individually negotiated by the employee or negotiated with the advice of counsel. JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, effective Jul. 15, 2009, JAMS, *available at* www.jamsadr.com/minimum-employment-standards (last visited May 31, 2013).

[14] The AAA's authority to decline cases on this basis is set out in: AAA Employment Arbitration Rules and Mediation Procedures, effective Nov. 1, 2009

promulgated procedure, it will only administer the case if the employer pays the arbitrator's fee, apart from a minimal filing fee.[15] This standard places a more universal burden on employers than the courts have done, where based on the *Green Tree Financial v. Randolph*[16] standard the question of whether or not the employee can be required to pay arbitrator fees is determined on a case by case basis using the criterion of ability to pay. As a result, we may be examining a relatively employee-favorable setting for employment arbitration, particularly in comparison to ad hoc arbitrations where there is no administering organization.

A. *What Types of Claims are Brought in Employment Arbitration?*

We begin by examining the type of claims brought in employment arbitration and the characteristics of the employees who bring them.

1. *How Many are Based on Employer Promulgated Procedures?*

Employment arbitration cases can be divided into two categories based on differences in how the arbitration agreement was formed. Much of the debates around employment arbitration have focused on what are variously described as employer promulgated or mandatory arbitration agreements. In employer promulgated arbitration procedures, the employer adopts arbitration as a standard policy governing dispute resolution with its employees. The employees are then presented with the employment arbitration agreement as a standard form adhesive contract that they must accept or reject on a take–it–or–leave–it basis. The arbitration agreement is a mandatory term and condition of employment in the sense that if the prospective employee does not sign it, then the offer of employment will be rescinded, leading to the moniker of mandatory arbitration. In this respect, employer promulgated arbitration procedures are similar to many other terms and conditions of employment that govern most employees, arising from standard organization-wide employment policies developed by the employer

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available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased (last visited Oct. 24, 2013).

[15] Jacquelin F. Drucker, *The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions*, 11 EMP. RTS. & EMP. POL'Y J. 345, 351 (2007).

[16] Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 88–92 (2000).

that are not subject to individual level variation or modification. Many employment arbitration cases involve this type of employer promulgated arbitration procedure[17] and they have been the focus of much of the debate over employment arbitration.

However, other employment arbitration cases arise in the context of individually negotiated agreements. In this setting, the prospective employee is individually negotiating the terms and conditions of employment and not simply adhering to standard employment policies of the organizations. The best known example of this situation is the negotiation of executive level employment contracts, which include many non-standard features such as specific termination and severance provisions and individualized compensation and benefit packages. In the course of individually negotiating these contracts, some parties enter into arbitration agreements to resolve any contractual or other disputes that may arise in the course of the relationship. Beyond the differences in their contractual origins, there are good reasons to suspect that the characteristics of the employees and the cases they bring under individually negotiated agreements will differ substantially from their counterparts under employer promulgated procedures. Individually negotiated agreements are likely to involve wealthier, more sophisticated employees who are more likely to be able to retain better legal counsel. The cases they bring are likely to involve claims based on the individual contracts they have negotiated, which may provide an easier basis for proving claims than employment statutes. For this reason, in any empirical analysis of employment arbitration it is critical to distinguish between cases based on individually negotiated agreements and those based on employer promulgated procedures.

In many of the early studies of employment arbitration, most of the cases included in the datasets involved individually negotiated arbitration agreements rather than employer promulgated procedures.[18] This may have

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[17] *See, e.g.*, the procedure at issue in the leading case of *Circuit City v. Adams*, 532 U.S. 105, 109–10 (2001) was a standard employment arbitration policy that had been promulgated by the employer throughout the organization on an adhesive basis, without individual negotiated of its terms with employees. For a more detailed discussion of the Circuit City arbitration procedure and its promulgation, see Zev Eigen, *The Devil in the Details: The Interrelationship among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 401–02 (2008).

[18] For example, the early studies of employment arbitration by Bingham (1996, 1997), Maltby (1997), Bingham and Sarraf (2004), and Eisenberg and Hill (2003), all involve samples that were mostly individually negotiated agreement cases. Eisenberg and Hill (2003) note this distinction in the types of cases, but only have a relatively small

contributed to a misleading picture of employment arbitration. Our results will suggest that arbitration under individually negotiated agreements has very different characteristics and outcomes than arbitration under employer promulgated agreements. The dataset of AAA employment arbitration cases that we analyzed included all individually negotiated and employer promulgated procedure based cases administered by the AAA in 2008. The AAA conducts a preliminary review of employment arbitration cases that it administers before proceeding begin in order to determine which category they fall into. This classification process conducted by the AAA is substantively important because the AAA will only administer employer promulgated procedure cases under its own employment arbitration procedure rules. These standard AAA rules include a requirement that for employer promulgated procedure cases the employer pay all arbitrator fees and administrative costs apart from a small filing fee, whereas the agreement can determine fee allocation between the parties in individually negotiated agreement cases. This classification of cases is done based on an internal review by the AAA of the agreements. In our own review of the materials in the arbitration case files, we did not find any instances where we would have made a different classification of the case from that made by the AAA and in almost all cases the classification process was relatively straightforward.

Overall in our dataset we find that employer promulgated procedure cases are more common, comprising 325 of the 449 total cases (72.4%), whereas individual negotiated agreement cases comprise the remaining 124 cases (27.6%). Our dataset includes all cases administered by the American Arbitration Association in 2008, so this indicates that the largest portion of employment arbitration by this period involved employer promulgated procedures. This finding suggests that results from earlier research that involved samples primarily consisting of individually negotiated agreement cases should be treated with caution in extrapolating to the more recent period.

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sample of employer promulgated procedure cases, and in their analysis compare litigation outcomes with those from individually negotiated agreement arbitration cases and not with the employer promulgated procedure cases. *See* Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDING OF THE N.Y.U. 53RD ANNUAL CONFERENCE ON LABOR 303 (Samuel Estreicher & David Sherwyn eds. 2004); Bingham, *supra* note 5, at 110–12; Bingham, *supra* note 5, at 190; Maltby, *supra* note 5, at 30–31; Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 44–45 (2004).

2. *How Many Cases Involve Employer Claims?*

Another important distinction to make in analyzing arbitration cases is between cases involving claims by employees and those involving claims by employers. Although the typical employment case involves an employee plaintiff making a claim such as being wrongfully terminated or discriminated against in the workplace, there are also some cases involving employer claims. Examples of these types of claims include efforts to recover salary advances paid to employees who quit their employment prior to the end of the pay period or claims seeking to recover severance payments where the employee subsequently breaches the terms of the agreement. In our sample, amongst cases based on employer promulgated procedures, 28 of 325 (8.6%) involved claims by employer plaintiffs. By contrast, amongst cases based on individually negotiated agreements, 20 of 124 (16.1%) involve claims by employer plaintiffs. The higher incidence of employer claims amongst cases based on individually negotiated agreements likely reflects the more widespread use of salary advances, severance, and other special payments to higher salary employees. Although they represent only a small segment of total cases, it is important to account for employer plaintiff cases since they may have different characteristics from cases brought by employee plaintiffs. Grouping the two categories of cases together could bias estimates of case characteristics and outcomes.

3. *What Kinds of Employees Bring Claims in Employment Arbitration?*

We are able to examine a number of individual characteristics of employees who bring claims in employment arbitration. Of the employee plaintiffs in cases based on employer promulgated procedures, we find that 54.8% were men and 31.8% were managers. Amongst these employee plaintiffs, 83.1% had salaries of under $100,000 per year. These findings indicate that most plaintiffs in employer promulgated procedure cases are middle to lower level employees.

By contrast, the characteristics of employee plaintiffs in individually negotiated agreement cases are very different. Of these employee plaintiffs, 86.4% are male and 65.8% are managers. Amongst these employee plaintiffs, only 20.9% made less than $100,000 per year, whereas 62.7% made between $100,000 and $250,000 per year and 16.4% made over $250,000 per year. This indicates that individually negotiated cases predominantly involved higher level employees compared to the employees in employer promulgated procedure cases.

4. *What Damages are Claimed in Employment Arbitration?*

The median or typical claim brought by employee plaintiffs under employer promulgated procedures is $167,880. There are some relatively large claims, with the top 10% of claims being $2,000,000 or greater. There are relatively few small claims, with the 25th percentile of the distribution of claims falling at $61,984, meaning that three-quarters of the claims are greater than this amount. This is an important comparison point since some past research has suggested that damages of at least $60,000 are necessary for it to be feasible to proceed to litigation with an employment case.[19] Our results suggest that the claim amounts in arbitration cases based on employer promulgated procedures are mostly in the range as those that are seen in litigation.

By comparison, the median or typical claim brought by employee plaintiffs under individually negotiated agreements is $233,427. There are also relatively few small claims in this category, with the 25th percentile of the claim distribution falling at $88,204. Interestingly, although the size of claims brought under individually negotiated agreements is higher, the median claim is only 39% larger than that for employer promulgated procedure claims. This may indicate that despite the generally higher salaries of employees covered by individually negotiated agreements, in either instance it requires a reasonably large potential claim for it to be feasible to bring a claim in arbitration.

5. *How Many Cases Involve Statutory Claims?*

The leading cases and much of the debate around mandatory employer promulgated procedures in employment arbitration has focused on cases involving statutory claims.[20] Major employment statutes such as Title VII of the Civil Rights Act embody important public policies, leading to concerns about the resolution of these statutory rights in the private forum of employment arbitration. Some researchers have suggested that in practice this concern is overblown because cases brought in employment arbitration might not involve many statutory issues.[21] The problem with this argument is

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[19] William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 44 (1995).

[20] *See, e.g.*, Gilmer v. Interstate/Johnson Lane, 500 U.S. 20 (1991); Circuit City v. Adams, 532 U.S. 105 (2001).

[21] Eisenberg & Hill, *supra* note 18, at 44–45.

that it was based on samples that included mostly cases based on individually negotiated agreements, rather than the cases based on employer promulgated procedures that have been at the center of debates around employment arbitration. By contrast, in our sample, as noted earlier, most of the cases were based on employer promulgated procedures. We had access to the complete case files for 217 of the employment arbitration cases, which allowed us to determine the nature of the claims being brought in them. We found that 79 out of 146 cases (54.1%) brought by employees under employer promulgated procedures involved statutory claims. By contrast only 5 out of 44 cases (11.4%) brought by employees based on individual negotiated agreements involved statutory claims. These results indicate that for the type of employer promulgated procedure case that has been the central focus of public policy debates about employment arbitration, statutory claims are frequent and constitute a majority of all cases brought.

6. *How Many Cases Involve Ongoing Employment, i.e. Not Post Termination Disputes?*

Very few cases involve ongoing employment relationships as opposed to disputes that arise following termination of the employment relationship. In only 10 out of 195 cases (5.1%) brought by employees where we could identify the employment status of the plaintiff was there a non-termination situation. If anything this may be an upper estimate of the likelihood of arbitration being used in the context of ongoing employment since we do not know whether the employee continued in employment after the closing of the case. Employment arbitration cases mostly involve employees who have been fired or quit and arbitration does not appear primarily to be a mechanism for resolving conflict in existing employment relationships.

B. *What Type of Representation do Parties Have in Employment Arbitration?*

Representation of parties, particularly of employees, is an important but understudied phenomenon in employment arbitration. The ability to obtain effective attorney representation can be a key factor in the ability to proceed with a claim. The difficulty for employees to obtain effective attorney representation has been one of the criticisms leveled at the employment litigation system. Given that most lower to middle income employees will be unable to afford to pay typical hourly attorney fees, they are left reliant on the system of contingency fee arrangements, where the plaintiff attorney

himself or herself provides the primary financing for the case and takes the financial risk of success or failure. The plaintiff attorney financed nature of this system creates a bias towards only taking cases with a relatively high prospect of success and large provable damages. This barrier to representation is at the heart of Estreicher's critique of the Rickshaw-Cadillac system of justice in litigation. If employment arbitration is to serve as a more accessible Saturn system of justice, then we should expect to see employees being more able to obtain representation and/or able to proceed more effectively without attorney representation than is the case in litigation. We begin by examining the patterns of representation in employment arbitration cases and then later turn to the effects of representation.

1. *How Many Employees are Self-Represented?*

Self-representation is an important phenomenon to consider in evaluating whether employment arbitration in practice provides a more accessible dispute resolution system than litigation. In employment litigation, just under a quarter of employee plaintiffs are self-represented.[22] By comparison, in our sample in 102 out of 325 (31.4%) cases based on employer promulgated procedures the employee was self-represented with no attorney. This suggests a slightly higher self-representation rate than in litigation, though not a large difference. A large majority of employee plaintiffs in both forums are represented by attorneys. In this area we see a very different pattern for cases based on individually negotiated agreements, where only 10 out of 124 (8.1%) cases involve self-represented employees. This greater likelihood of attorney representation likely reflects the higher salaries and professional or managerial background of employees involved in individually negotiated agreement cases.

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[22] Nielsen, Nelson, and Lancaster find in a study of employment discrimination cases filed in federal district courts that 14.8% of plaintiffs were pro se throughout litigation and a further 7.7% initially filed pro se but subsequently obtained representation at some point during the proceedings, making a total of 22.5% of cases that were initially filed by pro se plaintiffs. Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States,* 7 J. EMPIRICAL LEGAL STUD. 175, 200 (2010).

2. *Who Represents Employees and Employers in Employment Arbitration?*

Amongst employees who do have representation in employment arbitration, what can we say about the attorneys who are providing this representation? How are they similar or different to the attorneys representing employers in these cases? One aspect to consider is whether the attorney specializes in the employment law area. To the degree that the attorney specializes in employment law cases we might expect greater knowledge and expertise in this area. This could be a particular advantage in employment arbitration cases because it could result in greater familiarity with potential arbitrators, producing an advantage in the arbitrator selection process. We examined this issue initially by looking at whether or not the attorneys included employment law amongst their practice areas in the Martindale-Hubbell listings of attorneys. Almost all the attorneys in our database were included in the Martindale-Hubbell listings and most of them listed their practice areas. For those that did not list practice areas or were not in the directory, we searched other online listings of attorney and/or consulted their individual websites.

Amongst attorneys representing employees in cases under employer promulgated procedures, 56.7% included employment law in their primary practice areas. By contrast amongst attorneys representing employers in the same cases, 76.6% included employment law in their primary practice areas. To provide another measure of specialization relative to employment arbitration in particular, we examined the number of cases in our database that the same firm handled. We focused on law firm rather than individual attorney here to look at the degree to which firms provide expertise to parties. In cases based on employer promulgated procedures, most often the law firm representing the employee only appeared once in our database, with only 10.7% of cases involving an employee side law firm that appeared in two or more cases. By contrast, in over half of these same cases, 54.6% of the time, the employer was represented by a law firm that handled more than one case in our dataset. What these statistics indicate is that in employment arbitration under employer promulgated procedures, employers are much more likely to be represented by attorneys that specialize in employment law and by law firms that handle employment arbitration cases frequently.

Some similar patterns are found in cases based on individually negotiated agreements, though the differences between employee and employer representation are smaller. In cases based on individually negotiated agreements, 46.7% of the time the employee was represented by an attorney specializing in employment law, whereas 60.8% of the time the employer

was represented by an employment law specialist. Only 6.7% of the time in the individually negotiated agreement cases was the employee represented by a law firm appearing more than once in our database, whereas in those same cases 19.3% of the time the employer was represented by a firm appearing more than once in our database.

C. *How Does the Process of Employment Arbitration Work?*

1. *How Many Cases Settle?*

Our detailed analysis focuses on the files of cases that were resolved through an award, i.e. a final decision by an arbitrator. However we are able to examine patterns of type of disposition using a broader dataset of all employment and consumer cases administered by the AAA. This dataset is provided to the public by the AAA under California Code provisions regulating arbitration service providers. It only contains cases brought under employer promulgated procedures, not those based on individually negotiated agreements, however it does provide a comprehensive set of all the AAA's promulgated cases. Using this dataset, we calculate that of the employment arbitration cases resolved in 2008, 26.9% were disposed of by an award by an arbitrator. Of the remainder, 13.3% were withdrawn by the plaintiff and 59.5%, were settled. This settlement rate is similar to the 58% settlement rate in federal court employment discrimination litigation reported by Nielsen, Nelson, and Lancaster[23], indicating that in arbitration as in litigation, the predominant mode of resolution is settlement.

As with litigation settlements, the vast majority of arbitration settlements are confidential and so we do not know their content. We would certainly expect that in both forums the settlements would be influenced by the likely outcomes of a hearing in litigation or arbitration, respectively. However we do not have evidence on the nature of the cases that are settling and what type of selection effects this may exert on the sample of cases that do proceed to a hearing. It may be that defendants are willing to settle relatively strong cases before a hearing on favorable terms to the plaintiffs, so that only the less meritorious cases proceed to a hearing. Or alternatively it could be that plaintiffs are unwilling to proceed with weaker cases to a hearing and instead are willing to accept any small amount as a settlement, leaving only the relatively stronger cases to go to a hearing.

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[23] *Id.* at 187.

2. *How Frequent are Summary Judgment Motions in Employment Arbitration?*

One procedural step that is likely to influence the selection process of which cases ultimately go to a hearing is summary judgment. Summary judgment motions are widely used in litigation, with defendant employers frequently obtaining dismissals of employment lawsuits.[24] Although this filtering of unmeritorious cases will certainly result in a stronger pool of cases proceeding towards trial, there may also be an offsetting effect on settlement behavior. If the employer brings a summary judgment motion that is denied, this may provide information signaling to the defendant that the plaintiff has a relatively stronger case and increase the incentive to offer a larger settlement that is more likely to be accepted. Thus we would expect settlements between the summary judgment motion and trial stages in litigation to filter out more of the relatively strong cases, which would then not proceed to a hearing.

By contrast, arbitrators traditionally disfavored summary judgment motions. The idea was that arbitration is a process that provides a hearing on the merits of the case without complex procedures or legal formalities. Indeed the absence of motion practice with its potential advantages to employers is one of the strong arguments in favor of employment arbitration being an employee-favorable "Saturn" system of dispute resolution in Estreicher's terms.[25] However in recent years there have been anecdotal suggestions that motion practice and summary judgments have increased in frequency in employment arbitration as the procedure has become dominated by attorneys accustomed to litigation practice.

We were able to examine this issue in our study by examining the number of employment arbitration cases in which defendants filed summary judgment motions with the arbitrator and the numbers that were granted. We were able to do this for the 217 employment arbitration cases for which we were able to review the full case file, including all motions filed. Overall, we found that motions for summary judgment were made in 52 of 217 cases or 23.9% of the time. Of these motions, 25 were granted in full and 12 in part, indicating some degree of success in 37 cases or 17.1% of the time. Amongst different types of cases, we found the highest incidence in cases brought by employees under employer promulgated procedures, where there were 43

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[24] Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 432–36 (2004).

[25] Estreicher, *supra* note 2, at 563.

motions for summary judgment out of 149 cases or 28.9% of the time. These motions were fully granted in 21 cases and partially granted in 12 cases, for a total of 33 cases or 22.1% in which there was some degree of success with a summary judgment motion. Although still occurring in a minority of all cases, these results indicate that summary judgment has become a significant element in employment arbitration and that in a number of cases it results in the plaintiff not being able to obtain a hearing on the merits.

3. *How Long do Cases Take to be Resolved?*

One of the key advantages of arbitration in the area of accessibility is that cases take less time to proceed to a hearing than do cases in litigation. In employment litigation, it is typical for cases to take around two years on average to reach trial, whereas in employment arbitration, time to hearing is more typically around one year.[26] The time to hearing in our sample is consistent with these findings. Amongst employment arbitration cases in 2008 based on employer promulgated procedures, we found a mean time from initial filing to resolution following a hearing of 366.9 days, almost exactly a year. Amongst cases that settled in this group, we found a mean time from filing to settlement of 278.9 days.

4. *How Many Hearing Days do Cases Involve?*

Another aspect of the argument in favor of employment arbitration accessibility is that the process of resolution tends to be simpler. One indicator of this is the amount of time it takes to conduct a hearing. The median or typical case in our sample had two days of hearings and one preliminary organizational conference call. Some cases did involve more extensive proceedings. The upper tenth percentile of cases in terms of hearing length involved 5 or more days of hearing and 2 or more preliminary conference calls. This pushes the mean or average number of hearing days per case up to 2.3 and the average number of preliminary conference calls to 1.5. Interestingly, these statistics do not vary significantly between employer promulgated procedure and individually negotiated agreement cases, indicating similar levels of procedural complexity for these two categories. Overall employment arbitration appears to involve some degree of procedural complexity, though less than we would expect in typical court proceedings.

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[26] Colvin, *supra* note 10, at 8.

5. *How Much are Arbitrator Fees?*

We find that the median or typical arbitrator fee in a case is $9,450, whereas the mean or average arbitrator fee is $15,097, indicating a right skewed distribution with a few relatively large fee amounts. Arbitrator fees in cases involving employer promulgated procedures are somewhat lower, with a median fee amount of $8,890 and a mean fee amount of $12,264. By contrast, for cases involving individually negotiated agreements, the median fee amount is $13,142 and the mean fee amount is $22,521. Given that the numbers of preliminary conference calls and numbers of hearing days are very similar across the two categories of cases, this suggests that arbitrators in cases involving individually negotiated agreements are charging substantially higher daily and hourly fee rates than those in cases involving employer promulgated procedures. This could be an advantage for employer promulgated procedures in indicating a lower cost procedure, but also may indicate a disadvantage if the higher fee rates in the individually negotiated agreement cases reflect arbitrators with greater experience or expertise. In any event, this will likely have little impact on accessibility from the employee perspective in that we find in the employer promulgated procedures cases we examined that the employer paid all arbitrator fees in accordance with the AAA's policy requiring this in the cases they administer. The greater impact of arbitrator fee amounts may be on whether it affects the employer decision whether or not to promulgate a mandatory arbitration procedure in the first place.

D. *What are the Outcomes of Employment Arbitration?*

1. *What is the employee win rate?*

Employee win rates in employment arbitration vary substantially depending on the type of case and whether the employee or the employer is the plaintiff. In the cases based on employer promulgated procedures where the employee is the plaintiff, employees won 24.7% of the time. This is using a broad definition of an employee win where there was any finding of liability, even if the amount of damages awarded was relatively small compared to the amount claimed. By contrast, in individually negotiated agreement cases where the employer is the plaintiff, the employee won 64.6% of the time. This may reflect both the greater sophistication and better counsel available to the generally higher income group of plaintiffs in these cases. It also may be a product of more of these cases being based on contractual claims that are easier to establish than the statutory

discrimination claims more common in the employer promulgated procedure cases. Meanwhile, in cases where the plaintiff is the employer, there is a relatively high success rate for these employer plaintiffs under either employer promulgated procedures, 57.1%, or individually negotiated agreements, 66.7%.

2. *What Damage Amounts are Awarded in Employment Arbitration?*

Damages exhibit a similar pattern of varying with the type of case and who is the plaintiff. There are a number of different statistical measures of damage amounts that we can look at to give a fuller picture of the outcomes of employment arbitration. Focusing initially on the category of cases brought by employee plaintiffs under employer promulgated procedures, we find that amongst the 91 cases where the employee won the case, the median or typical damage award was $39,609. The median claim in these cases was $100,000, indicating that successful employees typically received around 40 cents on each dollar sought. The mean or average damage award received by successful plaintiff employees was $81,835, with this larger average reflecting a right skewed distribution with a few relatively large awards amongst a greater number of more moderate award amounts. These statistics give us a picture of the outcomes in cases that employees won. However, it is also useful to consider the overall nature of outcomes including the cases that employees lost as well as those the employee won.[27] From an economic perspective, this is the expected outcome across all cases, including both the probability of success and the amount won if successful. From a legal system perspective, this is also an important measure because it indicates the average likely outcome for a plaintiff or plaintiff attorney initiating a case. Particularly for an attorney who is representing employees in a number of different cases on a contingency fee basis, it is an important measure because it indicates the average expected outcome for that whole portfolio of cases. We find that the mean or average damages amongst the 291 cases brought by employee plaintiffs under employer promulgated procedures was $19,967.[28]

The patterns of outcomes look very different when we compare different types of cases and categories of plaintiffs. In cases brought by employee

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[27] Colvin, *supra* note 10, at 20.

[28] For this category of cases, including employee losses as well as wins, the median is not a particularly informative statistic, being $0 because most employees lost their cases.

plaintiffs under individually negotiated agreements, the median damage award in the 64 cases won by employees was $75,000 and the average damages were $220,736. Amongst all 99 cases in this category, including employee losses, the average damages were $142,465. As expected, employee plaintiffs recover much more in cases under individually negotiated agreements than under employer promulgated procedures. This reflects larger amounts claimed in the individually negotiated agreement cases with the median damage claim of a successful plaintiff having been $207,000, so that the typical award of $75,000 represents about 36 cents per dollar claimed, close to the rate for plaintiffs under employer promulgated procedures. The more noteworthy difference is that the greater chance of success for employee plaintiffs under individually negotiated agreements, combined with the larger amounts being claimed and awarded, means that the overall expected outcome across all cases is $142,465. This is 7.1 times as large as the equivalent expected outcome of $19,967 in the employer promulgated procedure cases. This means that from the perspective of a plaintiff attorney considering which cases to take in employment arbitration, there is a strong and clear economic incentive to take cases based on individually negotiated agreements rather than those based on employer promulgated procedures.

Damage amounts in cases involving employer plaintiffs are generally smaller, likely reflecting the different nature of claims in these cases, which are often efforts to recover overpayments or pre-payments of compensation to employees.[29] For employer promulgated procedure cases with employer plaintiffs, the median or typical damage award to a successful plaintiff was $10,000 and the mean award was $39,002. For individually negotiated agreement cases with employer plaintiffs, the median award to a successful plaintiff was $36,014 and the mean award was $152,947.

3. *How Common are Punitive Damages?*

Punitive damages are a relatively uncommon but important remedy in that they serve to deter egregious behavior by imposing greater sanctions beyond normal compensatory awards. In the employment law area, a key feature of the Civil Rights Act of 1991 was that it amended Title VII to permit jury trials and compensatory and punitive damages, albeit with caps depending on the size of the employer, whereas these had previously not been permitted in employment discrimination claims under the Federal Civil

[29] A few employer plaintiff cases also involved fraud claims.

Rights Act.[30] Punitive damage awards in jury trials are often seen as an expression of the jury's embodiment of popular outrage at especially reprehensible conduct by defendants. By contrast, arbitrators are professional neutrals and may be less likely to be swayed by the same popular concerns of juries. For critics of litigation, this might be seen as an advantage of arbitration, but if punitive damage awards are considered an important element of how the litigation system polices and deters conduct that goes against public policy then failures to award punitive damages in arbitration could be of significant concern.

In our dataset we were able to examine the written awards in the 217 cases where we reviewed the full case files and determine whether the damage awards included a punitive damage component. Of these cases, 80 resulted in plaintiff wins with some amount of damages awarded. Amongst this group, there was a punitive damage award in three cases, two in cases based on employer promulgated procedures and one based on an individually negotiated agreement. What is perhaps more surprising is that all three of these cases were ones in which the plaintiff was an employer. There were no cases in our sample where punitive damages were awarded to an employee plaintiff. We should recognize that given that punitive damages are not awarded in the typical case, even in litigation, and our sample for this aspect was not overly large, we may have just happened to draw a set of cases that did not present appropriate circumstances for punitive damage awards. However, if we look more broadly at the field of employment law, where a key public policy purpose is to counteract the danger of abuses by employers due to their generally greater bargaining power compared to most individual employees in a free labor market, it is highly disturbing that employment arbitrators should be viewing employee defendants and not employers as the appropriate parties against which to award punitive damages. This is an issue that clearly deserves further examination.

4. *How Common are Attorney Fee Awards and How Large are They?*

Another important category of damages in employment law cases are attorney fee awards. This is particularly important as an incentive for plaintiff attorneys to take on cases representing employees who often lack the financial resources to retain counsel out of their personal funds. The prospect of recovering attorney fees provides an incentive for lawyers to take on cases

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[30] Clermont & Schwab, *supra* note 24, at 433.

where the provable damages may be relatively modest in nature, such as the lost wages of a lower paid employee. Attorney fees are recoverable under the key employment statutes, notably in Title VII employment discrimination cases. In the 217 cases where we were able to review the full arbitration case file and written award, we were able to identify when attorney fees had been included as part of the award. We found that in cases based on employer promulgated procedures with employee plaintiffs, attorney fees were awarded in 17 of the 71 cases (24%) in which there was an award of damages. The median or typical attorney fee award was $51,710 and the mean attorney fee award was $76,467. In cases based on individually negotiated agreements with employee plaintiffs, attorney fees were awarded in 13 of 64 cases (20%) in which there was an award of damages. The median attorney fee award was $48,206 and the mean attorney fee award was $43,618. These figures indicate that while attorney fees are only awarded in a minority of cases in employment arbitration, they can be substantial, which may provide some incentive for plaintiff attorneys to take on these cases.

5. *What Factors Predict Win Rates and Damage Awards?*

We have seen that win rates and damage awards vary substantially, depending on whether the case is brought by an employee or an employer plaintiff and whether it is based on an employer promulgated procedure or an individually negotiated agreement. What other factors influence outcomes in employment arbitration? The strongest predictor of outcomes in the data we examined was whether the employee was self-represented or had representation by an attorney. Looking just at cases with employee plaintiffs under employer promulgated procedures, we find that self-represented employees won 17% of cases they brought, whereas employees represented by attorneys won 27.9% of cases they brought. In cases that these plaintiff employees won, self-represented employees were awarded an average of $11,071 in damages, whereas employees represented by attorneys won an average of $99,217. Taking into account the chance of winning and the likely damages awarded, the overall mean outcome across all cases, including losses, was $27,722 for employees represented by attorneys, but only $1,781 for self-represented employees. These outcomes are strikingly more meager for self-represented employees.

There is also a difference in outcomes depending on whether the case involved claims of discrimination, the key category of statutory claims that has been at the center of much of the debate over employment arbitration. We find that in cases brought by employee plaintiffs under employer promulgated procedures, employees won only 17.6% of cases involving

claims of discrimination compared to 29.0% of cases involving other types of claims. Where successful in these cases, however, employees who won an award received an average of $116,191 in cases involving discrimination claims, but only an average of $63,940 in cases involving other types of claims. Discrimination claims appear harder to prove, but result in larger damage awards where successful.

One other factor that appears to predict outcomes is where the cases occurred. We examined the state in which the case was filed and heard. Our particular interest was whether there was an effect for California cases, since that state is often described as being particularly employee friendly and as having an especially strong plaintiff's bar. We find that in cases with employee plaintiffs under employer promulgated procedures, employees won 35.1% of cases in California compared to 23.1% of cases in other states. Similarly, in cases that employees did win, the average damage award in California was $131,025 compared to $70,811 in other states. The resulting overall outcome, including both cases won and lost for employees, is a mean of $46,035 in California compared to $16,169 in other states. The anecdotal impressions of a significant California effect are supported by our data.

III. DISCUSSION

Estreicher's Saturn analogy suggests that employer promulgated arbitration procedures could provide a simple, but fair and accessible system for employees to resolve disputes, in contrast to the overly complex and inaccessible system of employment litigation. What do our results indicate about the degree to which this type of dispute resolution has come into existence with employer promulgated arbitration?

Some aspects of the current employment arbitration system do accord with Estreicher's vision. The time it takes to get a hearing, while arguably still too long at around a year, is shorter than typical in the litigation system. The employees bringing claims under employer promulgated procedures are mostly of lower to middle income levels, earning less than $100,000 a year. Employees do win some cases, just under a quarter of all hearings, and recover some substantial damages, albeit the employee win rates and damage amounts are lower than those found in litigation cases that manage to get to the trial stage. Under the AAA's rules, employers are paying the arbitration fees, which at almost $10,000 per case could otherwise be a substantial barrier to access.

In other respects, however, the picture is less encouraging for Estreicher's vision of a simple, effective, and accessible system. The typical case in employer promulgated arbitration is a statutory claim based case with

a fairly substantial damage claim of well over $100,000, which is the type of case we also typically see in litigation. There are relatively few of the smaller claims that are often seen as excluded from accessibility in the litigation system. Although a third of employees are going to arbitration pro se, not much higher than the one-quarter pro se rate seen in employment litigation, the majority of two-thirds of employees are proceeding in employment arbitration with representation from attorneys. Furthermore, the self-represented employees have lower success rates and receive much smaller damages. What we are seeing is in some ways a replication of the structure of the litigation system, where employees mostly need attorney representation to successfully proceed with claims.

It is also striking the degree to which some of the structural features of the litigation system for how cases proceed are replicated in arbitration. Settlement is the predominant mechanism for resolving cases in litigation, with a smaller number of cases being resolved on preliminary motions and relatively few proceeding to a hearing.[31] Settlement is similarly the resolution mechanism for most cases in arbitration.[32] The perennial problem of how to compare litigation and arbitration outcomes, given that different types of cases may proceed to a hearing, is exacerbated because most cases in both systems are resolved through private settlements where we have limited information on the outcomes. It may be that only the stronger cases in litigation end up going to trial, but it could also be that settlement exerts a similar filtering effect on the cases that proceed to a hearing in arbitration. One important structural difference that is often pointed to in litigation is the availability of summary judgment motions, which result in many cases being dismissed before trial, often to the defendant employer's advantage.[33] Traditionally, summary judgment motions were seen as incompatible with

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[31] Clermont & Schwab, *supra* note 24, at 440; Nielsen, Nelson & Lancaster, *supra* note 22, at 184–88.

[32] Nielsen, Nelson & Lancaster, *supra* note 22, at 184, find in their study of federal court litigation that 50% of cases are resolved in the early stages of proceedings and a further 8% following summary judgment motions, for a total of 58% of cases resolved through settlement. Similarly, Colvin, *supra* note 9, at 16, finds in a sample of 3940 employment arbitration cases that 59% were resolved through settlement. In that latter study there was a difference based on representational status, with a 64.8% settlement rate amongst the 75.1% of cases where the employee was represented by an attorney and a 41.8% settlement rate amongst the 24.9% of cases where the employee was self-represented, which combine to yield the overall settlement rate amongst all employment arbitration cases of 59%.

[33] Clermont & Schwab, *supra* note 24, at 433–35.

the arbitral forum, where the opportunity to obtain a hearing on the merits of the case was seen as an important strength of the process. However, we find that summary judgment motions have become a feature of the employment arbitration process as well, with such motions being brought in a quarter of the cases we examined and most of these motions being successful. It appears that the idea of employment arbitration ensuring a claimant a hearing on the merits of the case is eroding.

A key aspect of accessibility is whether the costs of proceeding with a case through the system are low enough to be justifiable given the likely outcomes of the case. The criticism of litigation as a Cadillac system is grounded in the idea that this will only be true in the court system for a strong case with a relatively large damage claim. What do our results tell us about this calculation for employment arbitration under employer promulgated procedures? The key economic outcome statistic is the average award across all cases, including employee losses, so as to include both the chance of winning and the likely damages that will be awarded if successful. For employee plaintiffs bringing cases under employer promulgated procedures, this amount is just under $20,000. How does this compare to the cost of bringing a case? Although we do not have direct evidence on this, our results provide some suggestive parameters to work with. The average arbitrator fee in employer promulgated cases is just over $12,000. It seems reasonable to assume that an attorney would spend at least as much time working on a case as the arbitrator and likely significantly more given the need to engage in preparation and also to conduct pre-hearing discovery. As a result, this can be viewed as a lower bound estimate on the attorney costs for a plaintiff bringing a case. Another suggestive parameter is the size of attorney fees awarded in cases where such fee requests are granted. We find that the typical attorney fee award in employer promulgated procedure cases is a little over $50,000. Now it is possible that cases in which attorney fees are awarded tend to be ones involving greater complexity and where the burden of such costs on plaintiff employees is higher than usual. For sake of illustration, let us suppose that average attorney fees for employee fees across all cases are only half this amount, or $25,000. This would also be plausible relative to the size of arbitrator fees charged in cases. However it is also higher, by $5,000, than what we find to be the mean damages outcome across all cases (about $20,000 as noted above). Put alternatively, in most cases the cost of obtaining representation to proceed with a case in employment arbitration under employer promulgated procedures will outweigh the potential damages that can be expected to be recovered in these cases. Most often, bringing cases in employment arbitration will not be

economically viable and the system will not be readily accessible to employees.

Now this does not mean that there are no economically viable cases in employment arbitration, and indeed our sample consists of cases that employees chose to proceed with and that employee side plaintiff attorneys chose to represent. Where the attorney identifies the case as involving a relatively strong likelihood of liability and relatively large provable damages then it may make sense to proceed with the case. We do find that most claims are relatively large, over $100,000, supporting this inference. The possibility of attorney fee awards, which are awarded in a quarter of cases, provides a mechanism for some attorneys to get paid; albeit, given that three-quarters of the cases did not produce such an award, its impact on accessibility is somewhat limited. Furthermore, the one-third of employees who proceed pro se are at least getting a hearing and a small chance of winning some moderate amount of damages with relatively little direct costs in the absence of attorney fees or having to contribute to arbitrator fees. Overall, however, our results indicate that attorney representation is the typical scenario for bringing cases in employment arbitration and that the economic calculus will make it difficult for plaintiff attorneys to accept cases unless they offer relatively high damages and strong prospects of winning.

IV. CONCLUSION

Overall, the system of employment arbitration under employer promulgated procedures appears to us to be strikingly similar to the litigation system in providing relatively little accessibility to employees who do not have strong cases and large provable damages. One concerning aspect of our findings is that we examined all cases for the year 2008 based on employer promulgated procedure administered by the AAA, which is the country's largest provider of employment arbitration services. Yet the whole population of employer promulgated procedure based cases resolved through hearings for the entire year was only 325 cases. Including settlements and cases withdrawn before a hearing, there were still only 946 arbitration cases disposed of that year. This relatively small number of cases is despite employer promulgated procedures now likely covering at least a quarter of nonunion employees in the United States: around 30 million employees.[34] If

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[34] Colvin, *supra* note 5, at 410; David Lewin, *Employee Voice and Mutual Gains*, PROCEEDINGS OF THE 60TH ANNUAL MEETINGS OF THE LABOR AND EMPLOYMENT RELATIONS ASSOCIATION 61, 63 (2008).

even a third of these procedures use the AAA as the arbitration service provider, we would expect 10 million covered employees.[35] This would mean that there is only 1 case per 10,000 employees a year, a remarkably low rate. Where are the missing cases? Our overall conclusion based on our examination of the operation of the system is that they are not being brought because employment arbitration is not providing an accessible, economically viable forum for bringing most employment claims. Instead of a new Saturn system of justice, it appears that employment arbitration appears to have become another Cadillac system for a few plaintiffs and another Rickshaw system for most employees who still do not have access to justice in employment disputes.

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[35] This may be a conservative estimate given that the number of employees covered by AAA administered employment arbitration procedures grew from 3 million to 6 million between 1997 and 2001. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 9, 9–10 (2003). If growth continued at even half this rate for the next 12 years, we would expect by 2013 some 12 million employees to be covered by AAA administered procedures.

EXHIBIT 5

EPI BRIEFING PAPER
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THE ARBITRATION EPIDEMIC

Mandatory arbitration deprives workers and consumers of their rights

BY **KATHERINE V.W. STONE** AND **ALEXANDER J.S. COLVIN**

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Executive summary

In the past three decades, the Supreme Court has engineered a massive shift in the civil justice system that is having dire consequences for consumers and employees. The Court has enabled large corporations to force customers and employees into arbitration to adjudicate practically all types of alleged violations of countless state and federal laws designed to protect citizens against consumer fraud, unsafe products, employment discrimination, nonpayment of wages, and other forms of corporate wrongdoing. By delegating dispute resolution to arbitration, the Court now permits corporations to write the rules that will govern their relationships with their workers and customers and design the procedures used to interpret and apply those rules when disputes arise. Moreover, the Court permits corporations to couple mandatory arbitration with a ban on class actions, thereby preventing consumers or employees from joining together to challenge systemic corporate wrongdoing. As one judge opined, these trends give corporations a "get out of jail free" card for all potential transgressions. These trends are undermining decades of progress in consumer and labor rights.

This report tracks these developments and presents the most recent research findings, summarized here:

- It is common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes they might have with their employer and one that prohibits them from pursuing their claims in a class or collective action in court.
- Employees subject to mandatory arbitration can no longer sue for violations of many important employment laws, including rights to minimum wages and overtime pay, rest breaks, protections against discrimination and unjust dismissal, privacy protection, family leave, and a host of other state and federal employment rights.
- On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court.
- Employers tend to win cases more often when they appear before the same arbitrator in multiple cases, indicating that they have a repeat-player advantage over employees from regular involvement in arbitration.

Introduction: The problem

Over the past 25 years, it has become increasingly commonplace for corporations to insert arbitration clauses into their contracts with customers and employees. These clauses appear to be innocuous, or even beneficial, to consumers and employees, but they pack a powerful punch. They prevent customers and employees from going to court if they have a dispute. Instead, when there is an arbitration clause, consumers and employees are required to take their complaints to a privatized, invisible, and often inferior forum in which they are less likely to prevail—and if they do, they are less likely to recover their due. Moreover, once a dispute is decided by an arbitrator, there is no effective right of appeal.

At the time of contracting, most consumers and employees do not object to having an arbitration clause in their contracts. After all, who thinks they will have a dispute with their employer or their bank? Who would risk a valuable job opportunity or an important consumer financial transaction over an obscure procedural provision? And if a dispute should arise, who wants to go to court to resolve a dispute over a faulty product or nonpayment of overtime pay? Courts are slow, excessively technical, and intimidating to most people. To hire a lawyer to handle the case would usually cost more than most disputes are worth. Yet despite the seeming benefits of arbitration, there are serious pitfalls.

As the research cited in this report shows, consumers and employees often find it more difficult to win their cases in arbitration than in court. For one thing, arbi-

tration may not provide parties with the same extent of discovery that a court would. In certain types of cases, such as employment discrimination claims, it is practically impossible to win without the right to use extensive discovery to find out how others have been treated. In addition, while some arbitration agreements include due-process protections, others shorten statutes of limitations, alter the burdens of proof, limit the amount of time a party has to present his or her case, or otherwise impose constrictive procedural rules. In practice it is the corporation not the consumer or employee that gets to decide whether to include fairness protections in the arbitration procedure. Although a consumer or employee can try to challenge enforcement of unfair rules in court, the ability to challenge arbitration agreements has been substantially limited by the courts. Moreover, arbitrators are often reluctant to award generous damages to prevailing parties, and their awards are not appealable. On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court. And in a new development, some arbitration agreements are requiring that the losing party pay all the arbitration fees, including the other side's attorney fees. The loser-pays clauses provide a powerful deterrent to workers or consumers asserting any claims.

The trend toward increasing use of arbitration in consumer and employment relationships threatens to undermine decades of achievements in worker and consumer rights. Over the past few decades, the courts have expanded the scope of arbitration, reduced the ability of individuals to avoid arbitrating their disputes, and narrowed the possibility of obtaining judicial review. They have adopted such sweeping pro-arbitration doctrines that arbitration clauses are almost always upheld when challenged in the courts, even when individuals can show that an arbitration clause was buried in fine print or incorporated by reference to an obscure and inaccessible source. Courts also uphold clauses even when an individual can show that an arbitration system is too expensive for him or her to use. The result has been that many important employment rights can no longer be brought to a court by employees subject to mandatory arbitration. These rights include rights to minimum wages and overtime pay, rest breaks, protections against discrimination and unjust dismissal, privacy protection, family leave, and a host of other state and federal employment rights.

The most pernicious development in arbitration involves the coupling of arbitration with class-action waivers. Major corporations began to insert class-action prohibitions into arbitration clauses for consumer transactions in the late 1990s. Indeed, in 1999, the 10 major banks that issue credit cards—including American Express, Citibank, First USA, Capital One, Chase, and Discover—formed a group called "the Arbitration Coalition" to promote the use of arbitration clauses that bar class actions. This group also funded and jointly drafted amici curiae briefs to convince the Supreme Court to uphold these clauses.[1] In part as a result of their efforts, courts generally permit arbitration to be coupled with prohibitions on class-action lawsuits, both for consumer and employment class actions. Thus today it is common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes they might have with their employer and one that prohibits them from pursuing their claims in a class or collective action. The legal developments have de facto stripped employees of many of the legal rights and protections that they have fought long and hard to obtain.

A quick primer on arbitration

Arbitration clauses are frequently included in the fine print that an individual is required to click through when making an online purchase. Arbitration clauses are also often included in the company orientation and personnel materials a worker receives when beginning a new job. Because these arbitration clauses are usually buried in a sea of boilerplate, many people who are subject to them do not realize that they exist or understand their impact. These terms are called mandatory or forced arbitration

because if the employee or consumer does not agree to arbitration, he or she will be denied employment or the ability to purchase the product or service. The employee or consumer has no real choice or ability to negotiate the terms of the arbitration clause. Mandatory arbitration in the consumer and employment setting is very different from arbitration clauses in contracts between two businesses or a company and a union; in those cases, the parties have voluntarily negotiated as equals and knowingly agreed to arbitrate disputes between them.

Unlike a court proceeding, there is no one form of arbitration. It is a term that describes a wide range of procedures that parties can design however they choose. In practice, however, arbitration typically takes place in a conference room, where parties are seated around a large table. Witnesses may or may not be in the room. Parties may or may not have lawyers. The arbitrator sits at the head of the table. He or she is not a judge and does not wear a judicial robe or other ceremonial garb. Rather, the arbitrator can be any person the parties have designated, although they frequently are lawyers. There is no court reporter or jury.

The arbitrator convenes the hearing and usually begins by explaining that it is an informal proceeding not subject to formal rules of evidence or procedure. Rather, he or she explains that the arbitrator's role is to hear any evidence that either side wants to submit and then render a binding decision. Instead of excluding inadmissible evidence based on objections from lawyers, the arbitrator will generally hear all the evidence and then decide how much weight to give it in reaching a decision. Witnesses are sworn in by the arbitrator and the proceeding begins. During the hearing, the party who initiated the proceeding tells his or her story and presents any documents or witnesses that support it. The other side has an opportunity to cross-examine. Then the defending party presents its case, also subject to cross-examination. The arbitrator may also ask questions of the witnesses. After the close of the hearing, the arbitrator considers the evidence presented and issues an award. Often the award takes the form of a simple statement of who won, and the amount of the recovery, if any. Sometimes the arbitrator issues a written decision explaining the outcome. Once the arbitrator has ruled, there is no realistic possibility for appeal.

The greater flexibility and informality of arbitration compared with court proceedings means that the parties are relying much more on the neutrality, expertise, and fairness of the arbitrator in reaching a just outcome. This can work well when two equal parties come together to design an arbitration procedure and choose an arbitrator who they both trust. However, for consumers or employees who are required to enter into mandatory arbitration with a large corporation in order to buy a product or service or to get a job, removing these formal protections leaves them vulnerable to unfair procedures and unjust outcomes.

An example of arbitration

One recent case illustrates the difficulties employees now face when trying to enforce their rights under basic employment statutes. In 2008, Stephanie Sutherland was hired by Ernst & Young to work as a "staff/assistant."[2] Her work involved relatively routine, low-level clerical work, for which she was paid a fixed salary of $55,000 per year. She routinely worked 45 to 50 hours per week, but because she was classified by her employer as exempt from overtime, she did not receive any additional compensation for overtime. By the time Ms. Sutherland was terminated in 2009, she had worked 151 hours of overtime, for which she should have been paid about $1,867, had the Fair Labor Standards Act (FLSA)[3] and New York state labor laws been observed. She filed a class-action lawsuit seeking to recover overtime pay for her work in excess of 40 hours a week and for other current and former nonlicensed Staff 1 and Staff 2 employees of the firm who worked overtime.

When Ms. Sutherland was hired, she was given an offer letter that also provided that "if an employment related dispute arises between you and the firm, it will be subject to mandatory mediation/arbitration under the terms of the firm's alternative dispute-resolution program, known as the Common Ground Program, a copy of which is attached." The arbitration agreement specified that claims arising under state and federal labor statutes, including the federal Fair Labor Standards Act, were subject to the arbitration program. It further specified that any dispute must be brought to arbitration and not to a court, and that all disputes must be brought on an individual basis.

In her lawsuit, Ms. Sutherland attempted to enforce her rights under state and federal minimum-wage and overtime laws. The federal Fair Labor Standards Act has a provision that expressly permits lawsuits for minimum-wage and overtime violations to be brought on a collective basis. Mr. Sutherland sought to use that provision, but to do so, she had to avoid the force of the arbitration clause that said she could only bring a case on an individual basis. To this end, she argued that if she had to arbitrate her claim on an individual basis, it would cost her $160,000 in attorney fees, more than $6,000 in other costs, and more than $25,000 in expert testimony. Overall, she claimed, she would have to spend nearly $200,000 to recover less than $2,000 in unpaid overtime. She argued that because she was unemployed and had substantial college debt, she could not afford to arbitrate on an individual basis, and thus should not be subject to the arbitration provision or the class-action waiver because together they operated to deprive her of rights under the FLSA.

The lower court was sympathetic to Ms. Sutherland's arguments, and held that the class-action waiver did not apply because it would prevent her from vindicating her rights under the Fair Labor Standards Act. However, the U.S. Court of Appeals reversed, relying on the 2013 Supreme Court decision in *American Express Co. v. Italian Colors*, 133 U.S. 2304, an antitrust case, in which the Supreme Court held that a class-action waiver in an arbitration clause was enforceable despite the high cost of bringing an individual action. In that case, Justice Scalia, speaking for the majority, wrote that "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." On the basis of this precedent, the Court of Appeals denied Ms. Sutherland's right to bring her dispute to a court or arbitration on a collective basis, thereby effectively eliminating her right to overtime pay under the federal statute.

This case is not an anomaly. Rather, it reflects the current law of arbitration and illustrates the difficulties that ordinary workers face when they try to enforce their statutory employment rights. Below we map out the current law of arbitration and then present data on the extent of use of arbitration and the impact of arbitration on the ability of workers and consumers to enforce their rights.

Where did the arbitration epidemic come from?

The current arbitration epidemic is a result of judicial developments that began in the 1980s, when the U.S. Supreme Court reinterpreted a little-known federal law enacted in 1925 called the Federal Arbitration Act (FAA). The FAA provides that when a dispute involves a contract that has a written arbitration clause, a court *must*, upon motion, stay litigation so that the dispute can go to arbitration.[4] And after an arbitration proceeding is complete, the FAA gives courts extremely limited power to review arbitral awards, no matter how erroneous they might be. Under the statute, an award can only be set aside on four grounds: it was procured by fraud, the arbitrator was biased, the arbitrator refused to hear relevant evidence, or the arbitrator exceeded his or her power as set out in the parties' arbitration agreement. Each of these has been interpreted exceptionally narrowly. There is no provision for overturning an award based on errors of fact, contract interpretation, or law.

Initially, the drafters, commentators, and the courts assumed that the FAA applied only to a narrow range of commercial disputes—those brought in a federal court pursuant to its power to decide issues arising under federal law. However, in the 1980s the U.S. Supreme Court radically expanded the scope of the statute. Today courts interpret the statute to apply to disputes of all types, whether brought in a federal or a state court. Moreover, the Supreme Court has held that the FAA overrides any state law that runs counter to the pro-arbitration policies of the FAA. It is important to recount the path by which this transformation occurred because it shows how entrenched the current interpretation has become and how overwhelming are the obstacles to change under the statute as currently interpreted. This, in turn, explains why new congressional action is necessary.

The FAA from 1925 to the mid-1980s

Under the common law as it stood in the early 20th century, arbitration agreements were not specifically enforceable, so it was easy for a reluctant party to an arbitration agreement to avoid arbitrating a dispute. To get this changed and make arbitration agreements enforceable, the New York Chamber of Commerce and the American Bar Association's Committee on Commerce, Trade, and Commercial Law mounted a multipronged campaign to overturn the anti-arbitration policies of the common law. They drafted and successfully enacted the New York Arbitration Act of 1920. They then turned to Congress, and drafted the 1925 Federal Arbitration Act and lobbied intensely for its enactment. Their main ally in the battle for the federal statute was the Secretary of Commerce, Herbert Hoover, who saw the bill as fitting into his larger vision of promoting business self-regulation.

The stated purpose of both the New York and the federal statutes was to make written agreements to arbitrate enforceable. The key provision of the federal law, copied from the New York statute, was Section 2, which made written agreements to arbitrate in contracts involving commerce "valid, irrevocable, and enforceable, save on such grounds as exist in law or in equity for the revocation of any contract."[6] Other sections of the statute included a mandatory stay of judicial proceedings and the requirement that courts order parties to arbitrate when disputing parties have a written agreement to arbitrate. The FAA also provided for judicial enforcement of arbitration awards and specified extremely narrow grounds for a court to refuse to do so.

The drafters, legislators, and advocates of the FAA assumed that the statute applied only to business disputes. It was drafted with an eye toward trade association arbitration, not employment or consumer disputes. Indeed, the statute contains a specific exemption for "contracts of employment." Consistent with this understanding, between 1925 and the 1980s, courts interpreted the FAA as applying to a narrow set of cases—commercial cases involving federal law that were brought in federal courts on an independent federal ground. But in the 1980s, the U.S. Supreme Court turned the FAA upside-down through a series of surprising decisions. These decisions set in motion a major overhaul of the civil justice system. It is no exaggeration to call the Supreme Court's arbitration decisions in the 1980s the hidden revolution of the Reagan Court.

The expanding reach of the FAA after 1985

Between 1985 and 2015, there were more than two dozen Supreme Court decisions in arbitration cases, virtually all of which expanded the scope of the FAA and restricted the ability of states to maintain laws to protect consumers and employees and the ability of individuals to resist costly and unfair arbitration systems. In light of these decisions, the ability of a party to challenge an arbitration clause on the basis of state law has shrunken to a vanishing point.

First, in the 1980s, the Supreme Court adopted a presumption in favor of arbitration to use when deciding cases involving the FAA. It ruled in *Moses H. Cone Memo-*

rial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), that when deciding whether a particular dispute comes within an arbitration clause, courts should resolve all doubts in favor of arbitration. It said that such a presumption furthered the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." This declaration of federal policy has served as a fixture of arbitration law and provided a rationale for the extraordinary expansion of the FAA that followed.

Then, in 1984, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the high court rejected the view that the FAA only applied to cases in federal courts. Rather, the Court held that the FAA also applied to disputes over contracts that were brought in state courts, so long as the dispute involved interstate commerce. The *Southland* decision was a major expansion of the scope of the statute. Moreover, despite direct evidence in the FAA's legislative history to the contrary, and despite language in Section 2 of the FAA preserving the role of state law to regulate arbitration, the Supreme Court majority held that the statute preempted any state laws with which it conflicted. Thereafter, any state efforts to regulate arbitration would be subject to preemption by the FAA.[7]

A third development of the 1980s concerned the types of disputes that were subject to the FAA. Whereas previously the FAA had been found to apply only to contractual disputes, in 1985, in *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985), the Supreme Court held that the FAA also compelled arbitration of statutory disputes. *Mitsubishi* involved a business dispute in which one party alleged a violation of antitrust laws. Two years later, in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), the Supreme Court expanded on its holding to conclude that a dispute involving alleged violations of the anti-racketeering RICO statute (formally called the Racketeer Influenced and Corrupt Organizations Act) and federal securities laws was also subject to an ordinary boilerplate arbitration clause.

The *Southland* decision on preemption and the *Mitsubishi* decision on the arbitration of statutory claims in the 1980s vastly expanded the scope of the FAA. In 1991, the Court further expanded the range of statutes whose provisions were subject to arbitration by holding, in *Gilmer v. Interstate/Johnson Lane Corp*. 500 U.S. 20 (1991), that an employee's allegations that he had been subject to age discrimination in violation of civil rights laws had to be taken to arbitration. Thenceforth, most claims arising under federal statutes would be subject to arbitration. In the decades that followed, the Supreme Court further expanded the scope of the FAA in order to promote the liberal policy in favor of arbitration that it read into the 1925 statute.

At the same time, the Court repeatedly rebuffed attempts by states to enact legislation that would protect consumers and employees from unfair arbitration agreements. Beginning in the late 1980s and through the 1990s the Court struck down legislative efforts by states to protect consumers and employees from oppressive arbitration agreements. One case involved a 1985 Montana law requiring that arbitration agreements in consumer contracts appear on the first page of the contract in reasonable-sized type (Mont. Code Ann. § 27-5-114 (1993)). The purpose of the statute was to ensure that consumers knew that they were consenting to arbitration when they entered into a contractual relationship with a large corporation. In 1992, a Subway franchise owner and his wife in Montana sued, claiming that Subway had defrauded them by refusing to give them the preferred location they had been promised, causing their business to fail and their loan collateral—in this instance, their life savings—to be forfeited. Their franchise agreement with Subway had an arbitration clause that said all disputes must be arbitrated in Connecticut, far from Montana. To travel there and hire a Connecticut lawyer would have been exceedingly costly for the nearly bankrupt Casarottos. Moreover, the arbitration clause did not comply with the requirements of the Montana statutory notice provision: Rather than appearing prominently in the contract,

it had been buried in small type. The Montana Supreme Court refused to enforce the arbitration clause, but the U.S. Supreme Court reversed, holding in *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996) that the law was restrictive of arbitration and therefore preempted.

The Supreme Court has also made it difficult for consumers or workers to avoid arbitration on the grounds that it would be prohibitively costly for them to take their cases to arbitration. In 2000, in *Green Tree Financial Corp.-Ala. .v Randolph*, 531 U.S. 79, an individual who borrowed money to purchase a mobile home and who was subsequently saddled with exorbitant finance charges sued, claiming that the lender had violated the Truth in Lending Act—a statute intended to protect consumer borrowers from misleading terms in loans. Her loan agreement had a clause requiring an arbitration tribunal that would have imposed costs far beyond her ability to pay. The Supreme Court nonetheless enforced the arbitration clause, despite acknowledging that the projected costs of the arbitration would probably preclude Ms. Randolph from bringing her case at all. The Court said that a party who opposes arbitration on the grounds that it is too expensive to proceed to arbitration had the burden of showing that the costs of arbitration would be prohibitive.

The Court has also further cut back on the ability of consumers and employees to avoid arbitration on the grounds that a contract is illegal, unconscionable, or otherwise not enforceable. One might think that if a contract is unenforceable, a party cannot be required to arbitrate under it because the arbitration clause is part of the unenforceable contract. That was the law until 1967. But in 1967 the Supreme Court held, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, that when a party claimed that a contract it had signed was induced by fraud, that party had to assert its claim in arbitration. That is, even if the entire contract (in that case, a commercial lease) was invalid, the arbitration clause survived because, the Court found, the promise to arbitrate was separable from the rest of the contract. This holding is called the "separability doctrine."

In 2006, the Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, extended the separability doctrine to illegal contracts, even though doing so meant that a party had to arbitrate an alleged violation even when the underlying contract that contained the arbitration agreement was entirely void. The only exception the Court recognized was when a party claimed that there was illegality, fraud, or some other recognized contractual defense in the arbitration clause itself.

One of the most frequently raised objections to arbitration clauses is that they are unconscionable. Unconscionability is a well-established contract-law doctrine that says that when a contract is grossly unfair in its terms and/or in the manner in which it was procured, it will not be enforced. Each state has developed its own definition of unconscionability over time. In 2010, in *Rent-A-Center West v. Jackson*, 561 U.S. 63, the Court expanded the separability doctrine in a way that eliminated many unconscionability challenges to arbitration clauses. In that case, the Court held that a party who claimed that the arbitration clause in his employment contract was unconscionable under his state law had to bring that claim to arbitration because the aspect of the arbitration clause he alleged was unconscionable was not the same aspect to which he objected. As Justice Stevens explained in dissent:

> Prima Paint and its progeny allow a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement.* Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator [emphasis in original].

In addition to expanding the scope of the FAA, the Court has narrowed the standard of review of arbitral awards, thus restricting the ability of parties to appeal an arbitral decision in court. In 2008, in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, the Court held that parties cannot agree to have a court review the decisions of their arbitration tribunals. In that case, the parties to a commercial lease had an arbitration agreement that called for arbitration of all disputes but also specified that a court should vacate any award that was not supported by the facts or was based on an erroneous conclusion of law. Although arbitration is said to be a creature of the parties' contract, and the parties are supposed to be able to craft arbitration systems however they like, the Supreme Court refused to enforce the parties' agreement about the scope of review. Rather, it held that the national liberal policy favoring arbitration required limiting judicial review to the specific grounds enumerated in the FAA itself. In dicta, the Supreme Court also disparaged the long-settled principle that courts could refuse to enforce arbitration awards that were "in manifest disregard of the law." Thus, after *Hall Street*, the grounds for attacking an arbitral award have become extremely narrow.

Supreme Court decisions on arbitration of employment contracts

The arbitration of employment disputes has its own history, although one that parallels the general trends described above. The FAA contains a clause that appears to exclude employment disputes from the statute's coverage. Section 1 of the statute provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Despite this language, in 1991, in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, the Supreme Court applied the FAA to an employment case, ruling that an employee was required to bring his age discrimination complaint to arbitration rather than to a court. The decision was ambiguous about the effect of the statutory exclusion for contracts of employment because, in that case, the arbitration clause was not in a contract between an employee and an employer, but rather was in a contract between an employee and the agency with which the employee was required to register to get the job. The Supreme Court clarified the ambiguity in 2001 in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, interpreting the exemption for "contracts of employment" exceedingly narrowly. It ruled that the statute applied to all contracts of employment except those involving workers who, like seamen and railroad workers, were engaged in transportation that crossed state lines. Since then, courts have applied the FAA to numerous employment cases.

Legal issues in arbitration today: Arbitration and class-action waivers

The most controversial issue in arbitration law today grows out of the interaction between arbitration and class actions. Composite arbitration–class-action waivers have become common in contracts offered by credit card companies, banks, cell phone providers, and providers of other common services.[8] They are also used with increasing frequency in employment contracts.[9] Consumers and employees have challenged composite arbitration–class-action waivers on two grounds—that such composite clauses are unconscionable or that they make it impossible to vindicate statutory rights. Some state courts and lower federal courts have refused to enforce these composite clauses on both grounds, but recent decisions by the Supreme Court are calling these decisions into question.

The Supreme Court has addressed the issue of composite arbitration–class-action waivers several times in recent years. In 2011, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), it held that a California law making class-action waivers in most consumer cases unconscionable was invalid because it was preempted by the FAA. In 2013, in *American Express Co. v. Italian Colors Restaurant*, the Court enforced a class-action waiver even though the plaintiffs had shown that without a class action, it would be impossible for them to vindicate

their legal rights. Although *Italian Colors* was not a labor case, it has significant ramifications for employees' rights under the labor laws. Both these cases will be discussed below.[10]

Preemption, unconscionability, and class-action waivers

In 2011, in *AT&T Mobility LLC v. Concepcion*,[11] the Supreme Court upheld a class-action waiver in a consumer contract against a challenge that the waiver was unconscionable under California state law. In that case, an AT&T customer brought a class action alleging that the company had engaged in fraudulent practices by charging sales taxes—approximately $15 per phone—to customers promised free cell phones in exchange for a two-year service contract. AT&T's customer agreement included an arbitration clause that also banned class actions and classwide arbitration. The plaintiffs wanted to bring their case as a class action, so they argued that the class-action waiver was unconscionable.

The Ninth Circuit applied California's three-pronged test, which determines that a class-action waiver in a consumer contract is unenforceable if (1) the agreement is a contract of adhesion—i.e., a form contract presented by a powerful party to a weaker party on a take-it-or-leave-it basis, (2) the dispute is likely to involve small amounts of damages, and (3) the party with superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. The Ninth Circuit found all three prongs of the test satisfied, and therefore denied AT&T's motion to compel arbitration on an individual basis.[12]

The Supreme Court reversed, holding that the California rule was preempted because it interfered with arbitration. Justice Scalia, writing for the majority, also disparaged the use of class arbitration. He enumerated the reasons he found class arbitration to be an unsatisfactory procedure. He stated that class arbitration would undermine the informality, efficiency, and speed that are the raison d'être for arbitration in the first place. He also stated that in class arbitration, an arbitrator would have to devise a method to afford absent class members notice, an opportunity to be heard, and a right to opt out. He then stated that class arbitration could impose great risks on defendants, who could receive a devastating judgment when numerous small claims were aggregated and yet would lose their right to interlocutory appeals or judicial review. For these reasons, he concluded that "[a]rbitration is poorly suited to the higher stakes of class litigation."[13]

Some lower courts initially limited the *Concepcion* decision to the consumer setting and refused to extend it to the employment cases, but over time, most courts have extended it.[14] Moreover, although the *Concepcion* case was about preemption of a specific state law, many courts have read it more broadly to disallow all unconscionability challenges to class-action waivers.[15]

The effective-vindication doctrine

Even though the *Concepcion* decision has been read to preclude most unconscionability challenges to arbitration in the employment setting, there is another line of argument some have used to invalidate waivers of the right to bring collective or class actions. That is the argument that a ban on class litigation would abrogate plaintiffs' substantive statutory rights.

The U.S. Supreme Court has long maintained that arbitration is only appropriate when it entails no loss of substantive statutory rights. The Court first expressed this principle in 1985 in *Mitsubishi Motors v. Soler Chrysler-Plymouth* discussed above, in which the Court held that a party was required to arbitrate a claim arising under the Sherman Antitrust Act.[16] In justifying its decision in *Mitsubishi,* the Court stated that arbitration could be ordered only if the litigant "may vindicate its statutory cause of action in the arbitral forum."[17] The Court further explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."[18]

The effective-vindication-of-substantive-rights principle is essential if courts are to justify closing the courthouse door to otherwise qualified litigants. In a number of consumer and employment cases, plaintiffs have asserted that the enforcement of class-action waivers would force litigants to forgo their substantive rights, and hence that arbitration should not be required.[19] These cases were not controlled by *Concepcion* because, as explained above, the *Concepcion* decision involved a conflict between the FAA and state law, and the Court found the state law to be preempted. In contrast, the effective-vindication doctrine is of primary importance when there is a potential conflict between the FAA and a federal law.

Consumers have raised effective-vindication arguments against arbitration in cases in which it would be prohibitively expensive for them to arbitrate their claims. As we saw above, the Supreme Court has not been sympathetic to these arguments. Employees have raised effective-vindication arguments when arbitration combined with a ban on class actions would extinguish their substantive rights to engage in collective action.

Many effective-vindication cases arise under the Fair Labor Standards Act—a statute that explicitly provides that aggrieved employees can bring a "collective action."[20] Often these cases involved allegations of misclassification—for example, whether employees were improperly termed supervisors and thus improperly determined to be ineligible for overtime payments. In deciding FLSA class-action waiver cases, lower courts have to decide whether the provision in the FLSA statute for bringing "collective actions" is a procedural right or a substantive right. If it is a substantive right, then under *Mitsubishi,* it cannot be waived. Most courts that have considered this issue have held that the right to proceed in a collective action under the FLSA is procedural, and thus the composite arbitration and class-action waiver was required.[21]

While it might be reasonable to see the right to engage in a collective action to be a procedural right in the FLSA context, the same argument cannot be made concerning class-action waivers in claims arising under the National Labor Relations Act (NLRA). In the NLRA, the right to engage in collective and concerted action is the core right that the statute protects. Yet there is currently an open question as to whether a composite arbitration and class-action waiver clause would deprive workers of their substantive right to engage in collective action under the National Labor Relations Act. In *D.R. Horton*, *Inc.*, 357 NLRB No. 184 (2012), the National Labor Relations Board took the position that a mandatory arbitration clause in an employment contract that required all actions to be brought on an individual basis interfered with the employee's rights to engage in concerted activity under the labor laws. The *D.R. Horton* decision was overturned by the Fifth Circuit. There are several other similar cases pending in other circuits, and the issue may reach the U.S. Supreme Court.

Although the question raised by *D.R. Horton* has not yet been addressed by the Supreme Court, there is another recent Supreme Court case that bears ominously on the issue. In June 2013, the Supreme Court decided *American Express Co. v. Italian Colors Restaurant.*[22] The case arose when a group of merchants brought a class action alleging that American Express (AmEx) imposed on them an illegal tying arrangement that violated the Sherman Antitrust law. Each of the merchant's contracts with AmEx contained a clause that prohibited the merchant from bringing any dispute to a forum other than arbitration, and required that all disputes be arbitrated on an individual basis. AmEx moved to compel arbitration, and the district court granted the motion. The merchants contended that arbitration of the antitrust claim on an individual basis would cost hundreds of thousands of dollars, whereas the average recovery would be only $5,000. Hence, they claimed, without the ability to bring a class or collective action, they would lose their substantive rights. The Second Circuit agreed.[23]

The Second Circuit decision was overturned by the Supreme Court in June 2013. The Supreme Court upheld the class-action waiver despite irrefutable evidence that the cost of bringing an antitrust case was so high that without the ability to proceed as a class action, the case could not be brought. In doing so, Justice Scalia, writing for the majority, cast doubt on the effective-vindication-of-substantive-rights principle. He called the principle mere "dicta," and stated that, at most, it might apply to "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[24] He wrote, cryptically, "[T]he 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."[25]

Justice Kagan delivered a strong dissent in *Italian Colors*. The overall effect of the opinion, she explained, is that "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[26] She argued that the effective-vindication rule was essential to prevent stronger parties from using these and other kinds of means to eviscerate statutory protections. As she explained, "The effective-vindication rule [ensures that] arbitration remains a real, not a faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights."[27]

Although the *Italian Colors* case itself involved a dispute brought by merchants, the majority's decision has important consequences for employment cases. By narrowing the effective-vindication doctrine, the Court has potentially undermined challenges to class-action waivers in arbitration clauses. That is, just as *AT&T Mobility* knocked out most unconscionability challenges to unfair arbitration agreements on preemption grounds, *Italian Colors* threatens to eliminate most challenges brought on the basis of the effective-vindication doctrine. And in doing so, *Italian Colors* suggests that the arbitration law trends may signal the destruction of the legal protection for collective action that has been at the heart of labor laws for over 60 years.[28]

Other current issues: Severance, interpretation of arbitration agreements, and private attorney general actions

There are two arbitration cases that will be decided by the Supreme Court this term. One, *MHN Government Services, Inc. v. Zaborowski*, concerns whether a court, when presented with an arbitration agreement that is unconscionable in several respects, can invalidate an entire arbitration agreement or whether it must simply sever the unconscionable elements and enforce the rest.[29] The California courts have taken the position that when there are multiple unconscionable aspects to an arbitration clause, it can invalidate the clause in its entirety. This principle is important because it disincentivizes powerful parties from writing arbitration clauses with unduly harsh provisions. If a court would simply sever any unconscionable provision and enforce the rest of an arbitration clause, a powerful party might be tempted to include numerous harsh elements, knowing that even if some are deemed unenforceable, they can still require the counterparty to arbitrate. The principle is being challenged on the grounds that it is an arbitration-specific rule that disfavors arbitration and is therefore preempted by the FAA.

The other arbitration case currently before the Supreme Court involves a state court's ability to interpret arbitration clauses. It has generally been assumed that contract law is a matter of state law, and that it is for state courts, not federal courts, to interpret contracts. In a consumer arbitration class-action waiver case called *DIRECTTV, Inc. v. Imburgia,* an arbitration clause provided that, notwithstanding the arbitration clause, "If, however, the law of your state would find the agreement to dispense with class arbitration procedures unenforceable, then [the entire section requiring arbitration] is unenforceable."[30] The case arose in California at a time when class-action

waivers in consumer contracts of the sort in that contract were held to be unenforceable. Accordingly, the state court refused to enforce the class-action waiver. The Supreme Court has accepted review in order to determine whether the state's own interpretation of the contract conflicts with the FAA and hence should be overturned.

Another issue that is likely to come to the Supreme Court soon involves the waiver of rights under statutes that permit individuals to enforce laws enacted for the public benefit. In 2004, California enacted a statute called the Private Attorney General Act, or PAGA law, to assist in the enforcement of its Labor Code.[31] The purpose of the statute was to permit aggrieved employees to enforce the California Labor Code because the public enforcement agency lacked the resources to achieve maximum compliance with state labor laws.

In 2014, in *Iskanian v. CLS Transport*, a truck driver brought a class-action suit alleging failure to pay overtime and provide rest breaks.[32] In that case, the employee was subject to an employment agreement that contained both an arbitration clause and a waiver of class or representative action. The California Supreme Court found that the waiver was not enforceable as applied to PAGA claims. Relying on the settled proposition that "[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement," it found that PAGA actions were representative actions and thus the right to bring the suit to a court could not be waived.

The lower federal courts in California have been inconsistent in their willingness to follow *Iskanian* and prevent a compelled waiver of employment PAGA actions. Some lower courts have done so, but many others have rejected *Iskanian* on the grounds that its reasoning and result are inconsistent with *Concepcion*.[33] However, on September 30, 2015, the Ninth Circuit, in a divided opinion, affirmed the result in *Iskanian* and rejected a class-action waiver of PAGA claims.[34] It is likely that this issue will go to the Supreme Court.

The future of arbitration law

Arbitration law is a dynamic area of law. Because the Supreme Court decisions have made arbitration the only forum available for resolving disputes in many cases, the particular details of arbitration procedures need to be resolved. Hence the number of cases continues to grow, and new issues are continually arising. However, the trends are clear: Courts will not permit states to constrict arbitration, and they will enforce arbitration agreements in all but the rarest circumstances, no matter how much advantage they give to the stronger parties. In light of these rulings, it is not surprising that the use of arbitration by private-sector businesses and employers has grown enormously.

How mandatory arbitration works

The prevalence of mandatory arbitration and class-action waivers

Arbitration in employment

Until the 1990s, arbitration in employment was almost exclusively a creature of the labor contracts of unionized workplaces. In the unionized setting, labor arbitration provides a jointly established mechanism for enforcing the provisions of collective-bargaining agreements and providing industrial justice in the workplace. Labor arbitration has been one of the most enduring and successful features of the American industrial relations system because it has served the interests of both unions and management, and both parties are equally involved in establishing and administering the system. These arbitration cases are decided by a well-established cadre of professional neutral labor arbitrators whom both parties must consider fair and neutral to be selected to decide cases. By contrast, prior to the 1990s, arbitration was only rarely used in nonunion workplaces precisely because there was no union present to play the insti-

tutional role as the bilateral partner to the employer in establishing arbitration.

The picture of arbitration as a creature of the unionized workplace started to shift as the Supreme Court began allowing statutory employment rights to be subject to arbitration agreements in its 1991 *Gilmer* decision, discussed above. Beyond simply providing for arbitration of statutory claims, *Gilmer* gave the green light to employers to require employees to sign arbitration agreements as a mandatory term and condition of employment. The case and its progeny allowed employers to unilaterally introduce arbitration procedures to cover statutory employment rights and make these procedures mandatory in the sense that the employer would refuse to hire a job applicant who would not sign the arbitration agreement.

Since 1991, arbitration has grown rapidly in nonunion workplaces.[35] Many major corporations now use mandatory arbitration procedures, including Anheuser-Busch InBev, Citigroup, Darden Restaurants, Haliburton, J.C. Penney, Lowes, Oracle, Rent-A-Center, Securitas, Sysco, United Healthcare, and Wells Fargo.[36] As this list suggests, mandatory arbitration now covers a wide range of employees in many different industries.

How many employees are covered by mandatory arbitration procedures? This is a surprisingly difficult question to answer, in part because of the private nature of these arbitration procedures. There is no requirement that employers who require their employees to sign mandatory arbitration agreements report this to a government agency such as the Bureau of Labor Statistics (BLS). Nor are data on the incidence of mandatory arbitration gathered in any of the official government surveys of employers. As a result, while the BLS releases detailed data annually on the extent of union membership and representation, there is no official government estimate of the extent of mandatory arbitration.

In the absence of official government statistics on the extent of mandatory arbitration, our best estimates come from academic surveys that have looked at aspects of this question. The picture they show is one of substantial growth over the 1990s and 2000s. These studies are summarized below.

A 1992 survey of corporate use of dispute-resolution procedures found that only 2.1 percent of the employers surveyed used mandatory arbitration.[37] By comparison, a 1995 GAO survey of 1,448 establishments subject to Office of Federal Contract Compliance Programs (OFCCP) reporting requirements found that 7.6 percent of them had adopted mandatory arbitration procedures covering their employees.[38] More recently, a 2003 survey of 291 employers in the telecommunications industry that one of us (Colvin) conducted found that 14.1 percent had adopted mandatory arbitration procedures.[39] However, since the adopting employers tended to be the larger organizations, 22.7 percent of the nonunion employees in the organizations surveyed were covered by mandatory arbitration procedures. In that survey the focus was on procedures covering typical lower-level employees in the industry, such as customer service workers or technicians.

An important feature of the proliferation of mandatory arbitration procedures is that it has encompassed a broad range of lower-level employees. For example, use of mandatory arbitration is widespread in the retail industry, including in chains such as Macy's and Target. It is also used by many restaurant chains, such as Hooters, the Olive Garden, and Waffle House. If the growth trends have continued since that 2003 survey, it is reasonable to estimate that today, a quarter or more of all employees in nonunion workplaces are subject to mandatory arbitration agreements. Put differently, it is likely that the share of American workers who are subject to employer-initiated mandatory arbitration procedures is twice the rate of the now only 11.1 percent who are union members.[40]

Arbitration in consumer contracts

Arbitration has become even more common in consumer transactions than in employment. The most comprehensive and recent study of the prevalence of arbitration in consumer transactions was conducted by the Consumer Financial Protection Bureau (CFPB). The Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) that established the CFPB also mandated that it conduct a study of the use of mandatory arbitration clauses in consumer financial contracts. In addition, it empowered the CFPB to issue regulations governing the use of mandatory arbitration in these contracts based on the results of this study.

The CFPB began its study in 2012, released preliminary findings in December 2013, and issued its final report in March 2015. The CFPB's Arbitration Study report documents that mandatory arbitration in consumer financial contracts is widespread and that mandatory arbitration clauses are included in a majority of contracts in many areas of consumer finance. The CFPB study found that credit card issuers representing 53 percent of the total credit card market include mandatory arbitration clauses. For prepaid cards, which tend to be used more by lower-income individuals, 92 percent of agreements include mandatory arbitration clauses. In student loans, 86 percent of the largest private lenders use mandatory arbitration clauses. The study found that in California and Texas over 99 percent of payday loan agreements include mandatory arbitration. Even among checking accounts, where use is lower, banks and credit cards that use mandatory arbitration represent 44 percent of insured deposits. In addition, the rate of use of mandatory arbitration in credit card agreements is likely to be temporarily depressed because the settlement of an antitrust lawsuit required four large banks to cease using mandatory arbitration for three-and-a-half years. Although these banks had not resumed using mandatory arbitration at the time of the study, which immediately followed the expiry of the settlement, if they were to resume using mandatory arbitration, this would raise the usage rate to over 90 percent for credit cards.

Regarding the content of these mandatory arbitration procedures, the most important finding of the CFPB study is that over 90 percent of them expressly prohibit class actions. Given the relatively small amounts of many consumer financial transactions and the similarity across claims, the availability of class actions is a crucial element in providing access to justice for consumer financial claims.

Another important finding of the CFPB study is that most consumers are unaware that they had entered into mandatory arbitration agreements. Three-fourths of the consumers surveyed in the study did not know that their credit card agreement included an arbitration clause. Misunderstandings were also widespread. Fewer than 7 percent of the consumers were aware that they were covered by an arbitration agreement that kept them from suing in court.

The CFPB study makes it clear that arbitration has largely displaced the civil justice system for most of the major transactions of ordinary people. A further question is whether this is a good thing. There is debate among researchers about whether consumers fare better in arbitration than in the courts. Some claim that consumers do better, and some claim the contrary.[41] The evidence involves individual claims, each with its own merits.

The CFPB found that most arbitration agreements in consumer transactions include a class-action waiver. This finding reinforces a 2007 survey that found that the most prominent firms in the telecommunications, credit, and financial service industries routinely insert arbitration clauses into their contracts with consumers (76.9 percent), but rarely use them in their other commercial agreements. (6.1 percent).[42] The authors of the survey opined that corporations preferred to have arbitration clauses in contracts with consumers because the clauses could be coupled with bans on class actions. In a similar

vein, a survey conducted in 2009 by one of the authors of this report, Katherine Stone, found that arbitration was a mandatory term in the service agreements of all four of the largest cell phone companies, five of the eight largest cable companies, six of the nine major credit card companies, and three of four large national retail banks, and that all of the arbitration clauses were accompanied by a ban on class actions.[43] Thus the detrimental impact of arbitration clauses on the ability of consumers to band together to pursue low-value claims seems undeniable. And it is only through collective efforts that consumer and employment rights can truly be protected.[44]

The arbitration process

Arbitration processes in general involve some form of private tribunal that adjudicates the issue in dispute. Arbitration procedures are typically a simpler, more informal version of court procedures, for example relaxing the formal rules of evidence. Underneath these generalizations, however, there is a great deal of variation in arbitration procedures. Different arbitration procedures vary considerably in their degrees of formality, similarity to court procedures, and amount of due process provided to the participants.

The arbitration agreement itself is the primary source of the rules governing the arbitration process. The parties to this private agreement are generally allowed to write into the arbitration clause whatever rules they wish to govern how disputes will be resolved. In practice this means that the corporation that chooses to make arbitration mandatory for its workers or consumers will write the rules of the procedure, and the worker or consumer will have no choice but to assent if they want to enter into an employment or consumer transaction.

Although corporations are free to craft whatever rules they wish for arbitration, many choose to incorporate by reference the rules of an established arbitration service provider. These arbitration service providers, such as the American Arbitration Association (AAA) or JAMS, will administer the arbitration, providing lists of arbitrators for the parties to select from, hearing rooms in which the arbitration can be conducted, and standard rules or procedures to be followed. Organizations such as the AAA and JAMS are important actors in the arbitration system. While they are established as private nonprofit entities, they are also well-known organizations that are subject to public pressures and provide legitimacy to the arbitration process.

In response to concerns about fairness in mandatory arbitration in the 1990s, a number of interested organizations jointly drafted a Due Process Protocol establishing basic fairness standards to be followed in arbitration. These included such important standards as the right to representation by counsel and disclosure of arbitrator conflicts of interest. However, in many other areas of procedure, such as how much discovery should be provided, the allocation of the arbitrators' fees, and whether arbitration should be mandatory or voluntary, the Due Process Protocol did not provide clear guidance. Despite its limitations, the Due Process Protocol did provide some degree of fairness protections, which were then incorporated into the procedures of both the AAA and JAMS. In some areas these organizations' procedures go beyond the protections provided in the Due Process Protocol. For example, whereas the protocol leaves the allocation of fees issue open, the AAA's employment arbitration rules provide that when arbitration is mandatory (i.e., "employer promulgated"), the employer is required to pay 100 percent of the arbitrator's fees.

The larger service providers administer many, but not all, mandatory arbitration cases. In a 2014 survey of plaintiff attorneys conducted by one of the authors of this report, Alexander Colvin, and Mark Gough of Penn State University, respondents were asked who had administered the most recent mandatory arbitration case they were involved in. The AAA was the largest service provider, administering 50 percent of cases. JAMS was second with 20 percent of cases. Another 15 percent of cases were

administered by other smaller service providers, which have not been subject to the same scrutiny or research attention as AAA or JAMS. Meanwhile a further 15 percent of cases were run on an ad hoc basis with no administering agency at all. In this latter category of ad hoc cases, it is the mandatory arbitration agreement itself that alone provides the rules establishing the procedures for arbitration. While we can look at the procedures of organizations such as the AAA and JAMS as providing some degree of due process protections for employees or consumers required to arbitrate under mandatory procedures, this research suggests that there is a high degree of variation in arbitration processes. The ability of corporations to set the rules of mandatory arbitration allows them, and not the workers or consumers, to choose whether to adopt the procedures of a reputable organization with due process protections or rules that violate basic principles of fairness.

A major new feature of mandatory arbitration agreements in both the employment and consumer settings is the inclusion of waivers of class-action claims. The Supreme Court's 2011 decision in *AT&T v. Concepcion* upholding the enforceability of class-action waivers is fueling the adoption of class-action waivers in arbitration agreements. A corporate-defense law firm recently estimated that the percentage of companies that include arbitration clauses with class-action waivers in their contracts grew from 16 percent in 2012 to 43 percent in 2014.[45]

Class-action waivers appear to be widely used in employment arbitration agreements. In a 2015 survey of 481 practicing employment arbitrators, Colvin and Gough asked the arbitrators about the provisions of the arbitration agreements in cases they had decided. The respondents reported that class-action waivers were included in 52 percent of the agreements in cases they had decided.[46]

Procedures provide only part of the story of how arbitration works. Under established arbitration law, if the arbitration agreement does not specify procedures to be used, then the arbitrator has plenary authority to decide how the case is conducted, with very limited grounds for review. As a consequence, the neutrality and fairness of the arbitrator is a central concern in ensuring the fairness of the arbitral process.

Colvin and Gough's 2015 survey of practicing employment arbitrators provides some insights into who the arbitrators are. Demographic diversity is limited; 74 percent are male and 92 percent are non-Hispanic white. Just under half (49 percent) are full-time neutrals. Most of the part-time neutrals who also serve as arbitrators are practicing attorneys, and these are twice as likely to normally represent employers (61 percent) as employees (30 percent) in their legal practices. Over half (59 percent) of all full- or part-time employment arbitrators had at some point in their career worked as legal counsel representing employers, whereas 36 percent had at some point represented employees or unions. It is certainly possible and indeed often happens that an arbitrator can become a genuine neutral despite having been an advocate representing one side or the other. But it is a major concern that a substantial majority of employment arbitrators come out of backgrounds representing employers.

Outcomes of mandatory arbitration

Mandatory arbitration is not just a theoretical limitation on worker and consumer rights; it has a major practical impact on the ability of workers and consumers to pursue their legal claims and to win their cases.

Impact of arbitration on workers' success rates and recovery amounts

Arbitration can be an effective alternative mechanism to the courts for resolving many disputes. Whereas the litigation system is often slow and costly, arbitration systems can be faster and cheaper. For example, labor arbitration has a long track record of success in unionized workplaces and is widely accepted as fair and effective by organized labor and employers. However, for workers and consumers, the question is whether mandatory arbitra-

tion unilaterally introduced by companies can be as effective as the courts at enforcing their statutory rights.

Investigating the outcomes of mandatory arbitration is challenging for researchers. Ideally we would like to conduct a double blind study in which cases are randomly assigned to either litigation or mandatory arbitration and the outcomes compared. However in practice this would be both impracticable and unethical when dealing with people with real cases. Nonetheless, even if we cannot compare randomly assigned cases under litigation with arbitration, we can get some information by looking generally at the outcomes of cases in the two forums and then analyzing similarities or differences between them.

Table 1 shows the results from a 2011 study comparing overall trial outcomes in mandatory arbitration and litigation. The comparison looks at the outcomes of 1,213 mandatory arbitration cases administered over a five-year period by the American Arbitration Association, the nation's largest arbitration service provider. These are compared with the outcomes of studies of employment discrimination cases in the federal courts and non–civil rights employment cases in state courts.

This comparison supports the idea that arbitration can avoid some of the delays of the litigation system. Whereas the average time to trial is almost two years in either federal or state court, it is just under a year under mandatory arbitration. However, the differences in the outcomes of trials are also stark.

Employee win rates in mandatory arbitration are much lower than in either federal court or state court, with employees in mandatory arbitration winning only just about a fifth of the time (21.4 percent), which is 59 percent as often as in the federal courts and only 38 percent as often as in state courts. Differences in damages awarded are even greater, with the median or typical award in mandatory arbitration being only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts. The most comprehensive comparison comes when we look at the mean or average amount recovered in damages across all cases, including those in which the employee loses and zero damages are awarded. When we make this comparison, we find that the average outcome in mandatory arbitration is only 16 percent of that in the federal courts and 7 percent of that in state courts. While there are additional factors to consider in comparing the two systems, at the outset it is important to recognize that in a simple aggregate comparison, mandatory arbitration is massively less favorable to employees than are the courts.

Evidence suggests that the picture has not changed much since 2011. A 2015 study of federal court employment discrimination litigation by Theodore Eisenberg found that the employee win rate has dipped in recent years to an average of only 29.7 percent.[48] At the same time, another 2015 study found that the employee win rate in employment arbitration had also dipped in recent years, to an average of only 19.1 percent.[49] Research has not shown whether a similar dip in employee win rates has occurred in state courts. Whatever the reason for the declining employee success rate in employment cases, these results indicate that while the gap between federal court and arbitration win rates has decreased, it is still the case that the employee win rate in arbitration is 35.7 percent lower than the employee win rate in federal court.

The data presented above only look at overall differences in outcomes. It is reasonable to wonder how much of the mandatory arbitration–litigation outcome gap is due to factors such as the type of cases reaching the trial stage. After all, most cases filed in court settle before they go to trial. So it is possible that settlement patterns could explain part of the difference between trial and arbitration outcomes.

We do not believe that settlement can explain the difference because both court cases and arbitration cases settle prior to trial or hearing in roughly similar proportions. A major study by Nielsen et al. found a 58 percent settlement rate in federal court employment-discrimination

TABLE 1

Comparison of outcomes of employment arbitration and litigation

	Mandatory employment arbitration (Colvin)	Federal court employment discrimination (Eisenberg and Hill)	State court non-civil rights (Eisenberg and Hill)
Mean time to trial (days)	361.5	709	723
Employee trial win rate	21.40% (n=1,213)	36.40% (n=1430)	57% (n=145)
Median damages	$36,500	$176,426	$85,560
Mean damages	$109,858	$394,223	$575,453
Mean including zeros	$23,548	$143,497	$328,008

Note: All damage amounts are converted to 2005 dollar amounts to facilitate comparison.

Source: The "Colvin" dataset draws on all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association from January 1, 2003, to December 31, 2007. Data are assembled by Colvin from reports filed by the AAA under California Code arbitration service provider reporting requirements. Alexander J.S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies* 8(1): 1–23 at 5 (2011). The "Eisenberg and Hill" litigation statistics are reported in Eisenberg, Theodore, and Elizabeth Hill "Arbitration and Litigation of Employment Claims: An Empirical Comparison." *Dispute Resolution Journal* 58(4): 44–55 (2003).

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litigation,[50] while recent research on mandatory arbitration found a 63 percent settlement rate across all employment cases in that forum.[51] It may be that there are some differences in which cases settle, but overall it does not appear that differences in the likelihood of settlement before trial can explain the mandatory arbitration–litigation outcome gap.

Another factor that might explain some of the gap between arbitration and court outcomes is differences in pretrial disposition of cases. Many employment litigation cases are resolved through summary judgment motions. The cases that reach trial are often those that survive summary judgment and as a result represent stronger claims. Traditionally, summary judgment was not used frequently in arbitration. However, that picture is increasingly inaccurate, at least as far as mandatory employment arbitration is concerned.

In their 2014 survey, Colvin and Gough asked plaintiffs' attorneys about their most recent employment cases in litigation and mandatory arbitration.[52] In court, summary judgment motions were filed in 77 percent of the cases. However, and surprisingly, summary judgment motions were also filed in nearly half of the arbitration cases (48 percent). While this gap is not insignificant, summary judgment is more common in arbitration than often recognized. One way of looking at how much impact summary judgment has on outcomes is to compare cases across litigation and arbitration where no summary judgment motion was filed. Given the lack of any summary judgment motion in these cases, any differences between the two forums would not be the result of different use of summary judgment. Looking at this subsample of cases in arbitration and litigation where there was no summary judgment motion, Colvin and Gough found that the win rate was 32 percent lower in mandatory arbitration than in litigation. This result indicates that the gap in outcomes cannot be explained away as an effect of greater use of summary judgment motions in litigation.

It could also be argued that the extra time to reach trial might lead to higher damages in the litigation cases. In employment discrimination cases, an employee who is successful in proving discrimination is entitled to collect

damages for the economic loss suffered, including back pay and front pay. This would include losses from any period of resulting unemployment, taking into account the duty to mitigate losses by searching for and accepting alternate employment. The key point is that the damages are tied to the period of unemployment caused by the discriminatory employment decision, not to the period from taking a claim to trial. But even considering the possibility of some accumulation of additional damages while awaiting trial, for example due to ongoing psychological distress, the damages under litigation so far outstrip the time to trial that they cannot be explained by the time to trial. According to Table 1, the period to trial in litigation is only about twice as long as in arbitration, whereas the average damages in federal court are nearly four times as large and in state court well over five times as large as in mandatory arbitration.

Overall, the data show a very large gap in outcomes between cases in courts and under mandatory arbitration. The most important measure of overall outcomes is the average damages across all cases, including wins and losses so as to take both win rates and damage rates into account. These are the results reported in the final row of Table 1, which indicate that plaintiffs' overall economic outcomes are on average 6.1 times better in federal court than in mandatory arbitration ($143,497 versus $23,548) and 13.9 times better in state court than in mandatory arbitration ($328,008 versus $23,548). These are very large differences in outcomes, and attempts to explain away this gap have been largely unsuccessful.

Impact of arbitration on workers' access to justice and ability to get attorneys

The mandatory arbitration–litigation gap in outcomes has a direct effect on the ability of individual workers to recover compensation for the injuries they have suffered. The gap also reduces the liability exposure of corporations that adopt mandatory arbitration. However, equally important, the mandatory arbitration–litigation gap has a major impact on the ability of workers to make claims in the first place.

To effectively pursue legal claims, most employees rely on finding an attorney willing to take their case. Although individuals can file claims without using an attorney, few are willing to do so, and their success rates are much lower than those who have legal representation. Nielsen et al. found that only 22.5 percent of employees filing employment discrimination cases in the federal courts were unrepresented, and just over a third of those employees eventually obtained representation by legal counsel before the case was completed.[53] Some have argued that the greater simplicity and lower cost of arbitration would allow more employees to bring cases in that forum without legal representation. But in practice, we find that only 21.1 percent of employment cases in mandatory arbitration are brought by employees without legal counsel.[54]

How do employees obtain legal representation? Given that most consumers and low- or middle-income employees lack the financial resources to pay lawyers' typical hourly rates, the key mechanism for financing representation is the contingency fee, where the plaintiff's attorney receives 30–40 percent of the damages as a fee if successful, but charges no fee if the employee loses. In their study of plaintiffs' attorneys in employment cases, Colvin and Gough found that 75 percent typically represented employees under a contingency-fee arrangement, and a further 17 percent used a hybrid arrangement that combined contingency and hourly fees.

The mandatory arbitration–litigation outcome gap has a significant and pernicious effect on the ability to obtain legal counsel under these contingency-fee arrangements. The plaintiffs' attorney accepting employment cases knows that he or she will lose some of the cases and receive no fee for them, while receiving a fee based on the damages awarded in the successful cases. As a result, attorneys decide whether to accept a case based on their judgment about the likely outcome. But as we have seen, the average outcome is substantially lower in mandatory arbitration than it is for litigation: Damages from arbi-

tration are 16 percent of the average damages from federal court litigation and a mere 7 percent of the average damages in state court. Thus lawyers are reluctant to take cases that are subject to mandatory arbitration. Even if arbitration cases are easier and cheaper to process, the large differences in outcomes can substantially reduce the financial incentive and ability of plaintiffs' attorneys to accept cases brought by employees covered by mandatory arbitration.

In surveying plaintiffs' attorneys about their likelihood of accepting potential cases, Colvin and Gough found just such an effect. Whereas on average plaintiffs' attorneys accepted 15.8 percent of potential cases involving employees who could go to litigation, they accepted about half as many, 8.1 percent, of the potential cases of employees covered by mandatory arbitration. Thus, in addition to producing worse case outcomes than litigation, mandatory arbitration also reduces the likelihood of obtaining the legal representation that will help employees bring a claim in the first place.

Repeat player advantages in arbitration

In dispute resolution, the advantages accruing to repeat players in the system have long been a concern. A business or other organized group that frequently engages in litigation is likely to have advantages over an individual employee or consumer with no previous experience in resolving disputes.[55] Repeat players have advantages because they gain familiarity with the system and how to operate effectively in it. They may also be able to lobby for changes to the system that benefit them.

One of the advantages of the traditional labor arbitration system in unionized workplaces is that both the company and the union are repeat players in the system. That means that they are both likely to be involved in future cases, have experience with past cases, and are invested in the development of a fair, effective system of dispute resolution. This balanced bilateral system with repeat players on both sides means that an arbitrator who was not a genuine neutral, and instead began to favor one side, would soon become unacceptable to the other side and not be selected for future cases. This balance between two strong repeat players is a key feature allowing private arbitration systems to function effectively.

In employment and consumer arbitration, the employer is likely to be a repeat player whereas the employee or consumer is likely to be a one-shot player.[56] How then can the advantage of the repeat player be balanced? One possibility is that the legal counsel on each side serves as an effective repeat player in the system. A large sophisticated law firm representing the business could be balanced by an aggressive and sophisticated law firm representing the plaintiff. However, in practice legal representation for employees and consumers is much more fractured and of variable quality than that for businesses, which can generally afford to hire large and sophisticated corporate law firms to defend their cases. In a study of lawyers representing parties to employment arbitration, Colvin and Pike found that 76.6 percent of attorneys representing employers listed employment law as a primary practice area, compared with only 56.7 percent of attorneys representing employees.[57] Furthermore, in that study, 54.6 percent of employers were represented by a law firm that handled multiple cases in the study population, whereas only 10.7 percent of employees were represented by a law firm handling multiple cases. While attorneys and law firms can provide a type of repeat player in arbitration, this result indicates that it is employers who are far more likely than employees to benefit from representation by this type of repeat player.

Do we find repeat-player advantages in the outcomes of mandatory arbitration cases? In a study of 2,802 mandatory employment arbitration cases decided between 2003 and 2014, Colvin, one of the authors of this report, and Gough looked at the relationship between numbers of cases involving the same employer and outcomes.[58] They initially found that as employers were involved in more cases they tended to win more of these cases. This is not surprising and could arise from a range of fac-

tors, such as larger employers having better lawyers, more sophisticated human resource (HR) departments, and better internal systems for dealing with workplace conflicts. However, once they controlled for the number of cases involving the employer, they also found a significant effect for the number of cases in which the employer appeared before the same arbitrator. More specifically, the first time an employer appeared before an arbitrator, the employee had a 17.9 percent chance of winning, but after the employer had four cases before the same arbitrator the employee's chance of winning dropped to 15.3 percent, and after 25 cases before the same arbitrator the employee's chance of winning dropped to only 4.5 percent.[59] The study also found that this negative effect of a long-term employer/arbitrator relationship on an employee's chances of winning was stronger when the employee was self-represented, i.e., when there was no plaintiff lawyer available to balance the employer's repeat-player advantage.

What could explain the repeat-player advantage of employers appearing before the same arbitrator multiple times? One possibility is that arbitrators may feel pressure to rule in favor of the employer to be selected in future cases. Although this would go against arbitrator ethical standards and is something that genuinely neutral arbitrators would consciously resist, part-time or more marginal arbitrators without well-established neutral practices could be subject to greater pressures of this nature. While it is difficult to get firm data on this issue, it is noteworthy that some arbitrators in the recent *New York Times* series on mandatory arbitration admitted that these pressures favor repeat players.[60] Even absent any sort of arbitral bias, more sophisticated repeat-player employers may gain an advantage by getting to know particular arbitrators well and developing an understanding of their decision-making patterns and what types of arguments appeal to them. While this alternative explanation might exonerate arbitrators themselves of bias, it would nevertheless suggest that there is a bias in the system that gives employers an advantage over employees as repeat players in the system.

The use of arbitration as part of corporate HR

Mandatory arbitration in employment contracts is spreading as companies adopt it as part of their employment policies. Arbitration has become an important tool in the corporate arsenal to defend against legal claims. But it is also part of the overall human resources strategy of many companies and interacts with other HR policies. Most large companies that adopt mandatory arbitration also have internal dispute-resolution procedures to resolve organizational conflicts before they reach arbitration.

One well-known American company that has introduced this type of internal dispute-resolution procedure is Anheuser-Busch.[61] Its dispute-resolution procedure includes mandatory arbitration of employment law disputes. However, the procedure begins with local management review of employee complaints, followed by mediation of any potential legal dispute before the claim proceeds to arbitration. A study of this procedure by Bales and Plowman found that the vast majority of claims are successfully resolved in these earlier stages. From 2003 to 2006, 95 percent of claims were resolved at the initial local review stage. Of the 87 claims that proceeded to mediation over this period, 72, or 83 percent, were successfully resolved at that stage. Ultimately only 15 cases, or 1 percent of the total number of complaints filed under the procedure over the four-year period, reached arbitration. Mandatory arbitration is a part of the Anheuser-Busch procedure, but the overwhelming majority of the claims brought under this system are being effectively resolved through mediation and internal dispute-resolution procedures.

Other companies have adopted more elaborate internal dispute-resolution procedures. The diversified manufacturing company TRW adopted employment arbitration

after an upsurge of litigation in the early 1990s.[62] However, as part of developing a more comprehensive set of internal dispute-resolution procedures, it also introduced local management complaint procedures, peer review panels (in which peers of the complainant sit on a type of workplace jury to decide complaints), and mediation. The range of dispute-resolution options provided employees with alternative ways of resolving complaints. The result was that cases were resolved early in the process, with only 72 cases reaching mediation over the first three years of the program and only three of these cases reaching arbitration. Furthermore, when cases did reach arbitration, TRW set up the procedure to be binding on the company if they lost, but *not* binding on the employee if the company won. As a result, employees retained the right to go to court after arbitration. TRW's procedure is unusual in this respect, but it is a powerful example of the feasibility of resolving employment disputes through effective internal procedures without the necessity of mandatory arbitration procedures that bar employee access to the courts.

These examples show that multipronged dispute-resolution procedures can obviate the need to resort to arbitration under mandatory, binding procedures. However, under current law, the company gets to decide what procedures will be imposed on workers or consumers. The way in which this allows companies to control the legal environment under which they operate was illustrated recently by the conflicts around the ride-sharing company Uber.

There has been a great deal of attention in the courts and the media to the employment status of Uber drivers. The question is, should they be considered employees and thus entitled to the protections of employment law or, as the company alleges, should they be considered independent contractors and not entitled to any employment rights? Despite the publicity, it is less well known that, since 2013, Uber has required its drivers to sign mandatory arbitration agreements. As explained above, the arbitration clause means that a private arbitrator, not a court, will answer the crucial policy question of whether Uber drivers are employees or independent contractors. The question is important not only for Uber drivers, but for other workers in the so-called "gig economy," who provide on-demand services coordinated by entities that maintain service platforms.

In a recent decision, a California state court judge refused to enforce Uber's arbitration agreement on the basis that it was unconscionable.[63] Among the features rendering the agreement unconscionable was that it required the driver to pay half of any arbitrator's fees, creating a major barrier to access for low-income drivers. While the agreement did allow drivers to opt out of the arbitration clause within the first 30 days following signing on to drive for Uber, the opt-out language was buried in fine print toward the end of a long contract, leading the judge to describe it as "illusory because it was highly inconspicuous and incredibly onerous to comply with."[64] Although that judge declined to enforce the arbitration agreements used by Uber in 2013 and 2014, the case is under appeal. In practice Uber can easily redraft the mandatory arbitration agreement to correct the specific deficiencies identified by the judge, thereby making its arbitration agreement enforceable.

The Uber mandatory arbitration procedure requires that all claims be brought individually, not as class actions. As explained above, such a clause is allowable and usually enforceable, thereby preventing Uber drivers from banding together to get their legal claims and status determined, whether by an arbitrator or by a court. In the new world of combined arbitration and class-action waivers, an increasing numbers of workers and consumers are, like Uber drivers, trying to band together to protect their legal rights because to proceed solo would be prohibitively expensive. The status of the Uber class-action ban, as well as the Uber arbitration agreement, is currently on appeal.[65]

What can be done?

Arbitration Fairness Act

The most direct way to address mandatory arbitration would be for Congress to amend the Federal Arbitration Act to exempt consumer and employment arbitration, or to provide more protection for consumer and employee rights in arbitration. Whereas state-level legislative action to this effect would almost certainly be preempted by the FAA, legislation passed by Congress would encounter no such problem.

The most prominent effort to deal with mandatory arbitration at the federal level has been the proposed Arbitration Fairness Act (AFA). Although there have been various versions of the statute, the most recent version would amend the FAA to specify that "…no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."[66]

If enacted, the AFA would effectively eliminate all mandatory arbitration in the employment or consumer realms, as well as in antitrust and civil rights cases. In its statement of congressional findings, the proposed AFA specifically refers to the problems of employees and consumers having little effective choice about entering mandatory arbitration agreements, the deleterious effect on the development of public law, and the lack of judicial review.[67]

The Arbitration Fairness Act has been repeatedly introduced in Congress, with versions proposed in 2009, 2011, and 2013. Most recently, the AFA was again proposed in 2015 by Sen. Al Franken (D-Minn.) and Rep. Hank Johnson (D-Ga.). However, it has not received a vote, and passage in the current Congress appears unlikely.

The Franken Amendment and the Fair Pay and Safe Workplaces Executive Order

In the absence of general action addressing mandatory arbitration, more progress has been achieved on specific limitations. In 2009, Franken successfully amended the annual Department of Defense Appropriations Act of 2010 to address the use of mandatory arbitration by defense contractors. The specific case motivating the amendment involved serious allegations of sexual assault, harassment, and discrimination of a female employee of Halliburton. The Franken Amendment barred any defense contractor with over $1 million in contracts from enforcing a mandatory arbitration agreement in any case involving claims under Title VII of the Civil Rights Act or tort claims relating to sexual assault or harassment. The Franken Amendment is a substantial restriction on the use of mandatory arbitration by defense contractors, but is limited to that sector and applies only to the limited set of claims specified in the amendment. For example, the amendment does not restrict use of mandatory arbitration for other statutory claims such as wage and hour claims under the Fair Labor Standards Act or any claims based on state employment statutes.

The approach taken in the Franken Amendment was subsequently extended to all federal contracts through the Fair Pay and Safe Workplaces Executive Order of 2014 (the FPSW order). The FPSW applies to all federal contractors with contracts of greater than $1 million. Similar to the Franken Amendment, it bars these contractors from enforcing mandatory arbitration agreements in claims based on Title VII or tort claims involving sexual assault or harassment. Although the FPSW is an important extension of the Franken Amendment to a broader set of employers, it suffers from the same limitation in that it applies only to a limited subset of potential employment cases. A federal contractor subject to the FPSW could continue to require its employees to sign mandatory arbitration agreements and simply decline to enforce the agreement for Title VII and the specified tort claims, while retaining the ability to use mandatory arbi-

tration as a shield against litigation based on FLSA, state laws such as the state antidiscrimination and wage and hour statutes, or other claims. A further limitation of the FPSW order is that it may well be subject to legal challenge on the basis that it contradicts the provisions of the FAA (as a statutory measure, the Franken Amendment would not be subject to this same argument).

Consumer Financial Protection Bureau

As discussed earlier, the Consumer Financial Protection Bureau has conducted a study of mandatory arbitration in the consumer financial industry as required by the Dodd–Frank Wall Street Reform and Consumer Protection Act. In addition to mandating this study, Dodd–Frank also gives the CFPB authority to restrict or ban mandatory arbitration in consumer financial contracts. The CFPB is considering whether to ban class action waivers in mandatory arbitration agreements based on the results of its study. If it does ban the use of mandatory arbitration, this would eliminate the practice in the consumer-finance industry and have a major impact on credit card and other consumer debt contracts.

While the potential action by the CFPB could have a major salutary effect in the consumer-finance contracts field, it is important to recognize the limits of its authority. Action by the CFPB would not extend to employment contracts. Nor would it extend to other types of consumer contracts. So whereas mandatory arbitration clauses might disappear from credit card contracts, they would still exist in restaurant employee contracts, software purchase agreements, medical services contracts, Uber driver agreements, and many other agreements that affect American consumers and workers on a daily basis.

Conclusion

In the past three decades, the Supreme Court has engineered a massive shift in the civil justice system that is having dire consequences for consumers and employees. The Court has enabled large corporations to force customers and employees into arbitration to adjudicate practically all types of alleged violations, including violations of laws to prevent consumer fraud, unsafe products, employment discrimination, nonpayment of wages, and countless other state and federal laws designed to protect citizens against corporate wrongdoing. By delegating dispute resolution to arbitration, the Court now permits corporations to write the rules that will govern their relationships with their workers and customers and design the procedures used to interpret and apply those rules when disputes arise. Moreover, the Court permits corporations to couple mandatory arbitration with a ban on class actions, thereby preventing consumers or employees from joining together to challenge systemic corporate wrongdoing. As one judge opined, these trends give corporations a "get out of jail free" card for all potential transgressions. These trends are undermining decades of progress in consumer and labor rights.

It is difficult to know the practical impact of the courts' broad delegation of dispute resolution to arbitration because arbitration is private and arbitration decisions are not generally published. However, research suggests that consumers and employees are less likely to win their cases when they are heard in arbitration, and when they do win, the amounts of damage awards are far less than would be forthcoming in a court. Moreover, there is considerable evidence that individuals who have suffered from corporate wrongdoing are deterred from bringing their claims altogether because arbitration can be too expensive and the results too risky for individual consumers or workers to undertake. The ban on class actions in particular makes it unlikely that many claims of corporate wrongdoing—particularly those that involve small sums for each in large groups of individuals—will ever be heard. As Justice Breyer opined, "Only a lunatic or a fanatic sues for $30."[68]

In the few years since the Supreme Court upheld the use of class-action bans coupled with arbitration clauses, this type of composite clause has become ubiquitous in

the small print governing employment, credit cards, cell phones, bank accounts, Internet providers, and countless other types of everyday transactions. The increase of arbitration clauses that require the losing party to pay the winning party's costs, including attorney fees, will have an even more profound dampening effect on the ability of ordinary citizens to have their day in court.

What can be done to reverse these trends? Arbitration providers tout their voluntary efforts to ensure that arbitration provides due-process protections and unbiased decision-makers. However, while voluntary efforts by arbitration service providers and corporations to enhance due process in their arbitration procedures are desirable, they do not address the fundamental problem that the current law of arbitration allows the corporation to decide what type of arbitration procedure to impose on its employees or customers. Voluntary measures cannot prevent corporations that want to protect their interests—at the expense of employees and customers—from introducing provisions such as class-action waivers and loser-pay clauses that cut off access to justice. Nor can they adequately police against repeat-player bias.

Some courts and state legislatures have tried to oppose the radical change in the civil justice system, but to little avail. The Supreme Court has stated that the Federal Arbitration Act embodies a liberal federal policy in favor of arbitration, and that the act must be applied by state and federal courts. The Court repeatedly holds that the act overrides any state law or judicial doctrine that obstructs arbitration.

In addition to efforts at the state level, two federal agencies are attempting to curtail the use of arbitration by large corporations to deprive consumers and employees of their legal rights. The Consumer Financial Protection Bureau is considering a ban on class action waivers in mandatory arbitration in consumer financial transactions. By focusing on this issue, the CFPB has attracted a response from the U.S. Chamber of Commerce, which has launched a well-funded campaign to curtail the CFPB's powers and possibly defund it altogether. At the same time, the National Labor Relations Board is attempting to curtail the use of class-action-barring arbitration agreements in the employment setting on the grounds that such agreements interfere with the core principle of labor law—employees' rights to engage in concerted action for mutual aid and protection. However, to date, the Courts of Appeals have rejected the NLRB's reasoning.

Despite the laudable efforts of the Consumer Financial Protection Bureau and the NLRB to protect consumers and employees from arbitrations, the legal trends suggest that agency action on this front will very likely be struck down. As a result, the only way to reverse these trends is to amend the statute itself.

The Arbitration Fairness Act currently before Congress is the best hope for stopping these trends and restoring justice to ordinary citizens. It is crucial that this act get the support of everyone who believes that consumer and employee rights are important and worth protecting.

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Endnotes

1. The history of the Arbitration Coalition is recounted in Ross v. American Express, 35 F. Supp. 3d 407 (S.D.N.Y. 2014) (failing to find antitrust liability despite the banks' concerted efforts to promote class action barring arbitration clauses), *aff'd sub nom*, Ross v. Citigroup., ___ F.3d ___ (Case No. 14-1610, 2d. Cir., Nov. 19. 2015).

2. Sutherland v. Ernst & Young, 726 F.3d 290 (2d Cir. 2013).

3. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

4. 9 U.S.C. § 3. In order to come under the FAA, an agreement must involve commerce and include a written arbitration clause. 9 U.S.C. § 2.

5. The history and vision behind the enactment of the FAA is presented in Katherine V.W. Stone, "Rustic Justice: Community and Coercion Under the Federal Arbitration Act," *North Carolina Law Review* 77: 931 (1999).

6. 9 U.S.C. Sec. 2.

7. The holding in *Southland* was reinforced and expanded in *Perry v. Thomas* in 1987 482 U.S. 483 (1987).

8. See Katherine V.W. Stone, "Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights," *UCLA Law Review Discourse*: 61, 164 (2013).

9. See e.g., O'Conner et al. v. Uber Technologies, Inc. et al., (N.D. Calif. 2015); Mohamed v. Uber Technologies, Inc., (N.D. Calif., 2015).

10. There is another controversial issue that arises when parties are precluded from bringing a class action by virtue of an enforceable class-action waiver and they seek to arbitrate their claim on a class-wide basis. Courts agree that parties are free to specify whether their arbitration clause permits a class arbitration proceeding and if they do so, their intent will be controlling. However, in the majority of situations, an arbitration clause doesn't say anything about the availability of class-wide arbitrations. Courts have been divided on what should be the default rule when a contract is silent about the availability of class arbitration. See, generally, Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010). Courts are also divided on the predicate issue of whether a court or an arbitrator should decide whether the parties' agreement did or did not intend to permit class arbitration.

11. 563 U.S. 333 (2011).

12. Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom. Concepcion*, 131 S. Ct. 1740.

13. Id. at 1752.

14. See Tory v. First Premier Bank et al., No. 10-C-7326, 2011 WL 4478437 (N.D. Ill. Sept. 26, 2011); Sanchez v. Valencia Holding Co., 132 Cal. Rptr. 3d 517 (Ct. App. 2011); see also Jerett Yan, "A Lunatic's Guide to Suing for $30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion," *Berkeley Journal of Employment and Labor Law*: 32, 551, 559–61 (citing cases).

15. See, e.g., Chen-Oster v. Goldman, Sachs & Co., 785 F.Supp.2d 394 (2011) (S.D.N.Y. 2011); Owen v. Bristol Care, Inc., 702 F.3d 1051 (8th Cir., 2013).

16. Id. at 640.

17. Id. at 637.

18. Id. at 628.

19. See, e.g., Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011) (holding that a clause barring class actions was unenforceable because it would require plaintiffs to forgo their substantive rights). But see Banus v. Citigroup Global Mkts., Inc., 757 F. Supp. 2d 394 (S.D.N.Y. 2010) (enforcing class action waiver).

20. See 29 U.S.C. § 216(b).

21. See, e.g., Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005); Carter v. Countrywide Credit Industries, Inc., 362 F.3d 294 (5th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002). But see Raniere v. Citigroup, 827 F. Supp. 2d 294 (D. Conn. 2003) (refusing to enforce waiver of class action in a Fair Labor Standards Act action).

22. 133 S. Ct. 594 (2013).

23. *In re* Am. Express Merchs.' Litig., 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010), *remanded to sub nom. In re* Am. Express Merchs.' Litig, 634 F.3d 187 (2d Cir. 2011), *aff'd on reh'g*, 667 F.3d 204 (2d Cir. 2012), *cert. granted sub nom. Am. Express Co.*, 133 S. Ct. 594.

24. Slip Op at 6-7 (Opinion of the Court).

25. Id.

26. Slip Op at 1 (J.Kagan dissenting).

27. Id. at 5.

28. See Yan, *supra* note 14 at 552 (noting that "[t]he unavailability of the class proceedings would have dire ramifications on employees seeking to vindicate their rights").

29. The lower court opinion is at 936 F. Supp. 2d 1145 (ND Calif. 2013).

30. The lower court opinion is at 225 Cal.App.4th 338 (2014).

31. Stats. 2003, ch. 906, § 1

32. The lower court opinion is at 173 Cal. Rptr. 3d 289.

33. See Nanavati v. Adecco USA, Inc., 2015 WL 1738152 (N.D. Calif. 2015), summarizing California lower court PAGA waiver cases after *Iskanian.*

34. Sakkab v. Luxottica Retail North America, slip. op. No. 13-55184 (9th Cir., September 28, 2015), reported in *National Law Journal*, October 5, 2015.

35. See Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*, 11(2): 405–447 (2008).

36. Although there is no public registry listing all the companies that require mandatory arbitration of their employees, the disclosure statements that arbitration service providers are required to make public include the names of the companies involved. The most complete and extensive case disclosures currently available are those provided by the American Arbitration Association: https://www.adr.org/aaa/faces/aoe/gc/consumer.

37. See Peter Feuille and Denise R. Chachere, "Looking Fair and Being Fair: Remedial Voice Procedures in Nonunion Workplaces." *Journal of Management* 21: 27–36 at 31 (1995).

38. Although the GAO survey initially found that 9.9 percent of respondents had adopted mandatory arbitration, when the agency followed up with the respondents to obtain copies of their procedures, a number indicated that they did not actually have mandatory employment arbitration and had made errors in their responses. When that correction is made, only 7.6 percent of the respondents remain as mandatory arbitration adopters. See General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution,* GAO/HEHS 95-150, (1995).

39. Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*: 11(2): 405–447 (2008).

40. "Union Members–2014," Bureau of Labor Statistics (2015).

41. See generally, Sarah Randolph Cole, "Of Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence." *Houston Law Review*, 48(3): 457–506 at 471–476 (2011).

42. Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin, "Arbitration's Summer Soldiers," *University of Michigan Journal of Law Reform* 41(4): 871–896 at 886 (2008).

43. Katherine V.W. Stone, "Signing Away Our Rights," *The American Prospect* (April 2011) 20.

44. Katherine V.W. Stone, "Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights," *UCLA Law Review Discourse* 61: 164–181 (2013).

45. Carlton Fields Jorden Burt, *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Risk and Managing Cost in Class Action Litigation.*

46. Alexander J.S. Colvin and Mark D. Gough, *Understanding the Professional Practices and Decision-Making of Employment Arbitrators*. Report to the National Academy of Arbitrators Research and Education Fund (2015).

47. Notes: All damage amounts are converted to 2005 dollar amounts to facilitate comparison.

The "Colvin" dataset draws on all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association from January 1, 2003, to December 31, 2007. Data are assembled by Colvin from reports filed by the AAA under California Code arbitration service provider reporting requirements. Alexander J.S. Colvin, "An Empirical Study

of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies* 8(1): 1–23 at 5 (2011).

The "Eisenberg and Hill" litigation statistics are reported in Eisenberg, Theodore, and Elizabeth Hill "Arbitration and Litigation of Employment Claims: An Empirical Comparison." *Dispute Resolution Journal* 58(4): 44–55 (2003).

48. Theodore Eisenberg, "Four Decades of Federal Civil Rights Litigation." *Journal of Empirical Legal Studies* 12: 4–28 (2015).

49. Alexander J.S. Colvin and Mark D. Gough, "Individual Employment Rights Arbitration in the United States: Actors and Outcomes." *ILR Review* 68(5): 1019–1042 (2015).

50. Laura Beth Nielsen, Robert L. Nelson and Ryon Lancaster, "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States," *Journal of Empirical Legal Studies* 7(2): 175–201 (2010).

51. Colvin and Gough (2015), supra note 49.

52. Alexander J.S. Colvin and Mark D. Gough, *Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes*. Report to the Robert L. Habush Endowment of the American Association for Justice (2014).

53. Nielsen et al. (2010) supra at 200.

54. Colvin and Gough (2015) supra at 1030.

55. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9(1): 95–160 (1974).

56. The problem of repeat-player effects in mandatory arbitration was first raised in a series of studies by Lisa Blomgrem Amsler (formerly Bingham), e.g., Lisa B. Bingham, "Employment Arbitration: The Repeat Player Effect," *Employee Rights and Employment Policy Journal* 1(1): 1–38 (1997); Lisa B. Bingham, "On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards." *McGeorge Law Review* 29(2): 223–259 (1998).

57. See Alexander J.S. Colvin and Kelly Pike, "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" *Ohio State Journal on Dispute Resolution* 29(1): 59–83 at 70 (2014).

58. See Colvin and Gough (2015), supra note 69.

59. Ibid at 1033–34.

60. Jessica Silver-Greenberg and Michael Corkery, "In Arbitration, a 'Privatization of the Justice System,'" *New York Times*, Nov. 1, 2015, p. A1.

61. See: Richard A. Bales and Jason N.W. Plowman, "Compulsory Arbitration as Part of a Broader Dispute Resolution Process: The Anheuser-Busch Example" *Hofstra Labor & Employment Law Journal*, 26(1): 1–32 (2008).

62. Alexander J.S. Colvin, "Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace." *Advances in Industrial & Labor Relations*, 13: 80–94 (2004).

63. Joel Rosenblatt, "Uber Loses Bid to Force Arbitration on California Driver," *BloombergBusiness*, Sept. 21, 2015.

64. Carolyn Said, "Judge Rejects Uber Forced-Arbitration Clause; 2 Cases Proceed," *San Francisco Chronicle*, June 10, 2015.

65. O'Connor v. Uber Technologies, Inc. et al.: Mohamed v. Uber Technologies

66. Section 3(a), Proposed "Arbitration Fairness Act of 2015," H.R. 2087.

67. Section 2, AFA.

68. Justice Breyer, dissenting in *AT&T Mobility LLC v. Concepcion*.

EXHIBIT 6

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The Black Hole of Mandatory Arbitration

Cynthia Estlund

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THE BLACK HOLE OF MANDATORY ARBITRATION*

CYNTHIA ESTLUND**

INTRODUCTION

From the early days of mandatory arbitration of statutory claims—especially employment-discrimination claims—one major critique has been the loss of transparency and publicity that attends a shift from litigation in public courts to arbitration in private tribunals.[1] Given the lack of written, publicly available decisions and the relative secrecy of arbitral proceedings, the diversion of legal disputes from courts to arbitrators under the Federal Arbitration Act ("FAA")[2] threatens to stunt both the development of the law and public knowledge of how the law is interpreted and applied in important arenas of public policy.

Judith Resnik and others have shown that the presumed contrast to litigation was in some ways overstated as litigation itself has

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1. *See* Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. L. POL. & SOC'Y 367, 378–83 (1992); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017, 1047 (1996).

2. 9 U.S.C. §§ 1–16 (2012).

dramatically receded from the public stage.[3] Public trials in civil cases have become nearly extinct, as the overwhelming majority of cases are resolved either on dispositive motions (usually in unpublished opinions) or out-of-court settlements. Settlements between private parties often include non-disclosure provisions barring parties from discussing anything about the case or its resolution.[4]

While it is important not to overstate the contrast between arbitration and litigation, there is no doubt that much more of the arbitral process is shielded from public view. In particular, the plaintiff's allegations are set out in a complaint that appears on a public docket in litigation but not in arbitration, and the hearing, if any, occurs in open court in the case of litigation but usually in a private conference room in the case of arbitration.[5] In cases that proceed through a hearing and decision, the typically terse nature of arbitral rulings means that much of the actual rationale for the decision is hidden inside the arbitrator's head—and even these terse rulings are rarely published.[6] The relative secrecy of arbitration is a product partly of the confidentiality norms that prevail within this private contractual forum and the community of arbitrators,[7] and partly of confidentiality agreements that often accompany pre-dispute arbitration agreements and that bind the parties.[8] The private and contractual nature of arbitration makes it relatively easy for firms to

3. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2932–33 (2015) [hereinafter Resnik, *Diffusing Disputes*] (quoting JUD. CONF. U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 19–20 (1995), http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf [http://perma.cc/WEY3-9U0q]); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 810 (2008). Among others elaborating similar views, see Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117, 1123 (2009); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2629–32 (1995).

4. *See, e.g.*, Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004).

5. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC 5 (2015), http://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/M65J-JXNT] (describing differences between arbitration and court proceedings).

6. *See id.*

7. For example, staff of the American Arbitration Association ("AAA")—the country's largest providers of arbitration services—have an ethical obligation to keep information confidential. *AAA Statement of Ethical Principles*, AM. ARB. ASS'N, https://www.adr.org/StatementofEthicalPrinciples [https://perma.cc/2E4A-EAZL].

8. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 466 (2006).

prevent disclosure of just about anything concerning allegations, evidence, disposition, or settlement of the disputes, not just by parties but by the tribunals themselves.

To the extent that firms do impose obligations on their employees (and customers) to arbitrate rather than litigate future legal disputes, they can often draw a heavy veil of secrecy around allegations of misconduct and their resolution. That means that firms have less to worry about if they violate the law. They face more limited "reputational sanctions," which are among the most powerful deterrents to illegal or legally questionable conduct, at least among reputable firms.[9] The relative invisibility of particular disputes and their outcomes in arbitration thus undermines the regulatory function of private-enforcement actions, which serve not only as a dispute resolution mechanism but also as an ex post alternative or supplement to *ex ante* prescriptive rules of conduct.[10]

The relative secrecy and obscurity of arbitral proceedings extends to the nature of arbitral procedures themselves. Courts follow published rules of procedure that are promulgated by publicly accountable bodies. Arbitrators are primarily bound by the agreements under which they are appointed—agreements that are written by the parties, or rather by one party in the case of most employment and consumer arbitration agreements.[11] Some arbitration instruments adopt the procedures of reputable arbitration providers like the American Arbitration Association ("AAA");[12] others use more obscure providers or invent their own procedures.[13] Either way, firms have no legal obligation to make their chosen procedures publicly available.[14] That has made it impossible to develop an accurate empirical assessment of the shape of mandatory arbitration as a mechanism of dispute resolution and has greatly handicapped efforts to hold firms publicly accountable for the fairness of their dispute resolution procedures.

9. *See generally* Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193 (2016) (exploring the impact of litigation on reputational sanctions).

10. *See* Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 377, 385–86 (2007).

11. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681–84 (2010).

12. STONE & COLVIN, *supra* note 5, at 17.

13. *Id.*

14. *See id.* at 18. On why that is problematic and why transparency should be mandated (both for firms' chosen arbitration procedures and for other terms and conditions of employment), see generally Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency,* 63 STAN. L. REV. 351 (2011).

In this Article, I focus on another dimension of the obscurity surrounding mandatory arbitration: the outright disappearance of claims that are subject to this process. The secrecy and non-transparency of arbitration providers and procedures greatly impeded empirical research on arbitration, its incidence, and its outcomes for decades after the Supreme Court launched the mandatory-arbitration juggernaut. But the picture is gradually coming into focus. It now appears that the great bulk of disputes that are subject to mandatory arbitration agreements ("MAAs")—that is, a large share of all legal disputes between individuals (consumers and employees) and corporations—simply evaporate before they are even filed. It is one thing to know that mandatory arbitration draws a thick veil of secrecy over cases that are subject to that process. It is quite another to find that almost nothing lies behind that veil. Mandatory arbitration is less of an "alternative dispute resolution" mechanism than it is a magician's disappearing trick or a mirage. Metaphors beckon, but I have opted for that of the black hole into which matter collapses and no light escapes.

The paucity of employment claims in arbitration has not gone unnoticed by scholars. Alexander Colvin and his co-authors, who have conducted much of the empirical work on arbitration of employment disputes, have noted the strikingly small number of arbitration filings.[15] Jean Sternlight in particular has surveyed the literature and data on this point and elaborated the implications for employee rights.[16] I highlight and elaborate on these findings here because their implications are profound, and they deserve more attention than they have gotten so far.

A word on the scope of this Article: first, the focus here is on employment disputes. Although mandatory arbitration has probably had a greater proportional impact on consumer claims (largely by way of anti-class action provisions), employment claims are distinctive in ways that matter here. Employment cases, with the exception of wage-and-hour claims, are much more likely than consumer claims to involve individual disputes with significant financial stakes for

15. *See* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 6 (2011).

16. *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1328–29 (2015). Judith Resnick and Maria Glover have also highlighted the paucity of arbitrations in both employment and consumer cases and the implications for access to justice. *See* J. Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3091–92 (2015); Resnik, *Diffusing Disputes, supra* note 3, at 2936.

individual claimants (relative to their total resources). The prevalence of fee-shifting provisions in many employment statutes[17] attests to the recognized importance of both the public interests at stake and of private enforcement in vindicating those public interests.[18] For present purposes, it is also important that employment litigation has long been and continues to be a major part of federal court dockets.[19] Although the use of arbitration agreements has sharply increased in recent years, many employees remain free to file their claims in court.[20] That makes it possible to compare some aspects of litigation and arbitration that might otherwise remain obscure.[21]

Within the field of employment arbitration, this Article focuses on employer-promulgated pre-dispute arbitration agreements in the non-union workplace; that is what is meant here by "mandatory arbitration." Arbitration under individually negotiated agreements (mainly for high-salaried employees) or under either post-dispute agreements to arbitrate or collective bargaining agreements is different, and more likely to be a mutually beneficial alternative to either litigation or labor-management strife. But arbitration that is imposed on employees as a condition of employment before any dispute has arisen, which is the focus of this Article, has been deservedly controversial since its inception.

The Article proceeds as follows. Part I briefly reviews the decades-long quest for empirical data on mandatory-employment arbitration and highlights the small number of arbitrations that take place under these provisions. Part II develops some rough estimates of the number of "missing claims"—potential claims that are subject to arbitration but never enter any adjudicatory process. Part III explores some dimensions of the causal story behind why so few claims are filed in arbitration. Part IV turns to the consequences of the missing claims for enforcement of employee rights. Part V concludes with a plea to reconsider the law of mandatory arbitration

17. *See, e.g.*, 29 U.S.C § 216(b) (2012); 42 U.S.C. § 2000e-5(k).

18. *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968) (per curiam) (noting that Congress enacted a fee-shifting provision to help individuals advance important policy goals by pursuing private remedies). These features are all found most clearly in cases alleging discriminatory or retaliatory discharge, which make up a large share of employment litigation. In wage-and-hour disputes, individual stakes are typically smaller, and cases are often not viable without collective adjudication, as with most consumer claims.

19. *See infra* note 70 and accompanying text.

20. *See infra* notes 61–63 and accompanying text.

21. There are still many difficulties with comparing data on arbitration and litigation. Sternlight, *supra* note 16, at 1325. Those difficulties are greatest in relation to data on outcomes. This Article focuses more narrowly on initial filings.

in light of mounting evidence that it effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies.

I. THE LONG QUEST FOR DATA ON MANDATORY ARBITRATION

Federal courts keep public records of lawsuits and filings, and some basic information about types of cases. Based on that data and other information about the disposition of cases, scholars have long been producing empirical studies of litigation.[22] (Data from state courts is far more difficult to gather or assess.)[23] The information is limited, but the federal courts are exemplars of transparency compared to the world of arbitration. While federal law routinely consigns federal statutory claims to private arbitration pursuant to mandatory pre-dispute "agreements" imposed as a condition of employment, it does not require either employers or arbitration providers to publish any information about the agreements, the procedures, or the cases thus resolved.[24] Moreover, nothing in the burgeoning law of arbitration under the FAA, despite its impact on the enforcement of important public policies, regulates what entities may provide arbitration. Apart from concerns about the fairness of these decision-making processes, the lack of regulation and transparency has made it very difficult for scholars to assemble data about the aggregate dimensions or consequences of arbitration in employment (or consumer) cases.[25]

The largest arbitration providers are well-established, reputable organizations like the American Arbitration Association and the Judicial Arbitration and Mediation Service ("JAMS").[26] Survey data

22. For examples in the employment discrimination field, see generally Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

23. Sternlight, *supra* note 16, at 1324–25.

24. *See* Estlund, *supra* note 14, at 355. Some state laws (including in California) require arbitration providers to publicize certain information about the consumer and employment cases they handle; although compliance with these laws varies, the resulting data has greatly improved the empirical study of arbitration. *Id.*

25. Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, The Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32, 42–43 (2014); Sternlight, *supra* note 16, at 1323–24.

26. *See* ALEXANDER J.S. COLVIN & MARK D. GOUGH, COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS, AND OUTCOMES 34 (2014),

indicate that the AAA is designated in about half of employment arbitration agreements, and JAMS in another twenty percent.[27] Both organizations provide lists of qualified arbitrators and are relatively transparent in how arbitrators are chosen, who they are, and how they deal with disputes (though both organizations also promote confidentiality in the proceedings themselves).[28] Both the AAA and JAMS also adhere to the much-touted "Due Process Protocol" ("DPP"), a set of standards for fair employment arbitration procedures that was approved by a diverse group representing employers, unions, employees, and dispute resolution professionals.[29] But nothing in the law of arbitration requires arbitration providers to adhere to the DPP, and nothing requires employers to designate the AAA or JAMS as the arbitration provider.

An estimated thirty percent of arbitration provisions call for adjudication of disputes through other providers or ad hoc processes.[30] In this grey zone, arbitration procedures, the pool of arbitrators, the selection process, and case outcomes may all be impossible for outside observers to ascertain. It appears that some of those providers succumb to the temptation to supply what some firms demand, and cater quite openly to the employers who unilaterally draft and impose arbitration agreements and who choose the providers. For example, consider the egregiously one-sided agreement struck down by the Fourth Circuit in *Hooters of America, Inc. v. Phillips*,[31] which, among its many defects, essentially guaranteed that the employer would choose the arbitrator.[32] But it can hardly be surprising that the overwhelmingly asymmetric process

http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1059&context=reports [https://perma.cc/A853-9SK4].

27. *Id.* at 34–35.

28. JUDICIAL ARBITRATION & MEDIATION SERV., JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES 16–18, 28 (2014), https://www.jamsadr.com/files/uploads/documents/jams-rules/jams_comprehensive_arbitration_rules-2014.pdf [https://perma.cc/8ELD-9VV5]; AM. ARB. ASS'N, *supra* note 7.

29. *See* Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 174 (2005); *see also* AM. ARBITRATION ASS'N, EMPLOYMENT DUE PROCESS PROTOCOL 1–5 (1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [https://perma.cc/C6M4-5CW8].

30. *See* COLVIN & GOUGH, *supra* note 26, at 35 fig. 23.

31. 173 F.3d 933 (4th Cir. 1999).

32. *Id.* at 938–39 ("[T]he employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list.").

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of "choosing" arbitration and arbitration providers would put pressure on the neutrality of the process.

A 2015 front page *New York Times* series pierced the veil of secrecy to expose the partiality of arbitration in practice—even among some AAA and JAMS arbitrators.[33] Among the "subtler" forms of partiality was "the case of the arbitrator who went to a basketball game with the company's lawyers the night before the proceedings began. (The company won.)"[34] In another case, "a dismayed [plaintiff] watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)"[35] Part of the problem is the so-called "repeat player effect," or the tendency of arbitrators to favor the party that is more likely to produce repeat business.[36] The *Times* reporters found that, out of the cases they examined, "41 arbitrators each handled 10 or more cases for one company between 2010 and 2014."[37] One "JAMS arbitrator in an employment case . . . simultaneously had 28 other cases involving the [defendant] company."[38] As for the impact of this fact, in interviews, "more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business."[39] As for the employee-complainants, one arbitrator said, "Why would an arbitrator cater to a person they will never see again?"[40] The veil of secrecy that shields arbitration from public scrutiny and from all but the most persistent investigators has obscured these problems for decades.

The opacity of the arbitration process translates into a paucity of empirical data on how mandatory arbitration works and how it has affected the enforcement of public laws. From 1992, when *Gilmer v. Interstate/Johnson Lane Corp.*[41] launched the mandatory arbitration

33. *See* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/9UY4-3K3K (dark archive)]; 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 [https://perma.cc/Z5WM-H8C2 (dark archive)].

34. Silver-Greenberg & Corkery, *supra* note 33.

35. *Id.*

36. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190–91 (1999).

37. Silver-Greenberg & Corkery, *supra* note 33.

38. *Id.*

39. *Id.*

40. *Id.*

41. 500 U.S. 20, 31 (1991).

juggernaut within the field of statutory employment claims, until about 2010, there was little representative data on any aspect of arbitration under those employer-devised procedures.[42] The early data that did exist came disproportionately from individually negotiated arbitration agreements (typically involving high-level executives).[43]

Based on the partial early data, some commentators reached a conclusion that was quite consistent with the *Gilmer* Court's sanguine account of the *quid pro quo* of mandatory arbitration: By agreeing to arbitrate, parties trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[44] Plaintiffs, for their part, lost access to juries, judges, and appellate review, but gained access to a faster and often cheaper adjudication process.[45] Based on that early data, Professor Samuel Estreicher and others concluded that arbitration had some advantages for both sides over the expensive and "lottery-like" litigation process; recoveries were more limited, but employees—especially low-income employees—were more likely to get some kind of hearing and more likely to get some kind of remedy.[46] On that then-plausible account, the advent of mandatory arbitration appeared likely to enhance ordinary employees' access to justice.

The picture has become a bit clearer in recent years, due in part to a handful of state laws, including California's, requiring arbitration providers to publicly disclose a modicum of information about the disputes they handle.[47] In addition the AAA has allowed some scholars to examine case files, under assurances of confidentiality, and to publish some aggregate data.[48] The comparatively rich body of empirical research that has emerged in recent years is still far from

42. *See* Colvin, *supra* note 15, at 11 tbl.2.

43. *See id.* at 5.

44. *Gilmer*, 500 U.S. at 31 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 472 U.S. 614, 628 (1985)).

45. *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL., 559, 563–64 (2001).

46. *See id.*; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30 (1998); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 148 (1999); Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. LAB. & EMP. L. 411, 417–18 (2010).

47. CAL. CIV. PROC. CODE § 1281.96 (West, Westlaw through ch. 2 of 2018 Reg. Sess.).

48. *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 79–82 (2014).

comprehensive. It is also likely to overstate the fairness of arbitration for claimant-employees because the data comes from arbitration providers who comply with state-disclosure requirements (many do not),[49] and especially from the AAA, which has supported scholarly efforts to understand the operation and impact of arbitration.[50]

With that in mind, it is striking how discouraging the more recent data are. It now appears not only that average recoveries are significantly lower in arbitration than in court (as previously believed), but also that employee-complainants may be significantly *less* likely to prevail and to recover anything.[51] Colvin and Gough, for example, found that employees won something in 19.1% of AAA arbitrations that were terminated from 2003 to 2013.[52] That compares to the findings of other scholars that plaintiffs won something in 29.7% of federal employment discrimination cases,[53] 57% of state non-civil rights employment cases, and 59% of California state wrongful discharge cases.[54] Moreover, employees who did win something recovered much less in AAA arbitration than in litigation: The median award was $36,500 in arbitration versus $176,426 in federal discrimination cases, $85,560 in state non-civil rights employment cases, and $355,843 in California wrongful discharge cases.[55] Still, data on case outcomes are hotly contested, and their

49. *See* David J. Jung et al., PUB. LAW RES. INST., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA 3 (2013), http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update [https://perma.cc/UZ46-FX6K].

50. Colvin and Gough, for example, were able to examine AAA files, under promises of confidentiality, to examine case outcomes and characteristics. Alexander J.D. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019, 1019 (2015).

51. Data on outcomes are difficult to gather and to interpret, particularly in light of high rates of settlement, about which information is especially scarce. So there is still considerable debate about these matters. *See, e.g.*, Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. (forthcoming 2018) (manuscript at 16) (on file with the North Carolina Law Review) (comparing and critiquing various studies on outcomes in arbitration and litigation).

52. Colvin & Gough, *supra* note 50, at 1028 tbl.1. Looking at more recent data, Professor Estreicher, Heise, and Sherwyn found an employee win rate of 22.4% in cases resulting in an award. Estreicher et al. *supra* note 51 (manuscript at 10).

53. *See* Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 28 (2015).

54. *See* David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 535 (2003).

55. Colvin, *supra* note 48, at 80.

meaning is clouded by high rates of dismissal and summary judgment in court and by the paucity of data on settlements.[56]

My focus here, however, is not on outcomes in arbitration versus litigation, but on the sheer number of cases in each. The single most striking fact uncovered by the recent studies is the very small number of arbitration cases that enter the process. During the eleven-year period from 2003 through 2013, an average of about 940 cases per year were filed and terminated with the AAA under employer-promulgated procedures.[57] If the AAA is the designated provider in about half of arbitration agreements (as surveys suggest),[58] that yields an estimate of fewer than 2000 employment arbitration cases terminated per year under MAAs.[59] At first glance, that appears to be a very low number. Let us dig in a bit to see how low it is (in Part II) and to begin to understand why it might be so low (in Part III).[60]

II. COUNTING "MISSING" ARBITRATION CASES

To assess the meaning of the small number of arbitrations, we might start by comparing that number with the number of employees covered by MAAs. Until recently, the prevailing scholarly estimate was that those agreements covered roughly twenty percent of non-union private sector employees.[61] (That compared to just over two percent coverage in 1992.[62]) By contrast, Colvin's more comprehensive 2017 study estimated that 56 percent of non-union private sector employees, or approximately 60 million employees, are now covered by MAAs.[63] That is a steep increase in coverage, and it sharply raises the stakes in debates over mandatory arbitration. But of course those numbers beg the question: How many such

56. *See* Estreicher et al., *supra* note 51 (manuscript at 10–11).

57. Colvin & Gough, *supra* note 50, at 1027.

58. *See* COLVIN & GOUGH, *supra* note 26, at 34–35.

59. In theory, there could be a larger, though hidden trove of arbitrations conducted by non-AAA providers. But the opposite is more probable: Claimants are probably much less likely to file claims with non-AAA providers, many of which are less reputable and less committed to treating claimants fairly. *See infra* text accompanying note 78–79.

60. Again, let me note that Jean Sternlight has reported on these matters in greater detail than I do here. *See* Sternlight, *supra* note 16, at 1332.

61. This estimate was based on Colvin's 2007 studies of the telecommunications industry, in which he found that fifteen to twenty-five percent of employees were covered by arbitration agreements. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 410–11 (2007).

62. ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 4 (2017), http://www.epi.org/files/pdf/135056.pdf [https://perma.cc/VCG8-37UU].

63. *Id*. at 2.

individuals each year have potential employment law claims—claims that proceed past "naming" and "blaming" to "claiming" in some forum or another?[64]

I will focus here solely on the number of claims filed (whether or not they are terminated), as that will allow for a relatively clean comparison with federal court filing statistics, and will avoid many controversies surrounding the analysis of case outcomes. I will focus on filings in 2016, the most recent year for which solid data are available for both the AAA and federal courts.[65] The AAA reports that 2879 individuals filed employment cases with the AAA under employer-promulgated procedures in 2016.[66] Following the provisional assumption above that this represents half of all arbitrations under MAAs,[67] that suggests that about 5126 cases were filed in arbitration by the approximately 60 million employees who are covered by MAAs. That appears to represent an increase above what Colvin found, on average, from 2003 to 2013, and that is what one would expect given his recent findings on growing use of MAAs.[68] Still, it seems like a very low number. But to make sense of it, one needs to know how many claims were filed in court by those free to do so. That might make it possible to roughly estimate the number of claims one would expect to see among those covered by MAAs.[69]

64. The iconic terminology is from William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC'Y REV. 631, 631 (1980).

65. I use a single year's data in part because of Colvin's 2017 study showing that coverage of MAAs has risen steeply in recent years. COLVIN, *supra* note 62, at 1. In earlier years, fewer workers were presumably covered by MAAs, but there is no data on coverage. Insofar as the coverage percentage is a key element of the analysis below, I use only the most recent year for which data on court and arbitration are available.

66. Email from Ryan Boyle, Vice President, Statistics and In-House Research, to author (Oct. 24, 2017) (on file with the North Carolina Law Review). Between 2012 and 2016, an average of 2563 cases per year were filed under employer promulgated procedures. *Id*. The AAA reports one filing per individual, even if multiple individuals are covered by the same complaint. *See Consumer Arbitration Statistics*, AM. ARB. ASS'N, https://www.adr.org/ConsumerArbitrationStatistics [https://perma.cc/N2MJ-YRW4].

67. *See supra* notes 58–60 and accompanying text. I will question that assumption below.

68. *See supra* text accompanying notes 57–64. Note, too, that my 2016 data are on filings, while Colvin's numbers above from 2003–2013 are for cases filed *and terminated*.

69. One caveat to this comparison stems from the fact that some unknown number of individuals (mostly high-income professional or managerial employees) are covered not by employer-promulgated procedures (what I call MAAs here) but rather by individually-negotiated arbitration agreements. Those individuals are not included in Colvin's estimate of 56% coverage by MAAs, and arbitrations under those agreements are not included in the AAA numbers reported here. *See* Alexander Colvin & Kell Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29

Let us begin with federal court litigation, as to which data are readily available. In 2016, approximately 31,000 federal lawsuits were filed in five categories of employment cases: "Civil rights: employment," "ADA [Americans with Disabilities Act]/employment," "FLSA" (Fair Labor Standards Act), "ERISA" (Employee Retirement Income Security Act), and "FMLA" (Family and Medical Leave Act).[70] If those 31,000 federal court cases were all filed by the 44 percent of employees who are not covered by MAAs, then we would expect over 39,000 claims to be filed in arbitration by the other 56 percent of employees who are subject to mandatory arbitration.[71] Given the preliminary estimate of 5,126 arbitration filings,[72] this comparison would suggest about 34,000 "missing" arbitrations per year—that is, 34,000 cases that we would expect to enter the arbitration process, based on the general rate of employment litigation and the number of employees covered by MAAs, but that are never filed.

That is a striking number of "missing" arbitrations. But these numbers are open to several objections, two of which may call for downward adjustments, and are reflected in Figure 1. First, some federal court lawsuits are filed by public employees, who are not generally subject to MAAs and should be excluded from the comparison. If government employees (who make up 15.2% of non-farm employees) are as likely as private sector employees to file an employment lawsuit in federal court, the relevant number of federal court filings would fall to 26,300.[73] Second, some of the federal court lawsuits were presumably filed by individuals who were covered by

OHIO ST. J. ON DISP. RESOL. 59, 63–66 (2014). In terms of actual arbitrations, the numbers are small; in 2008, for example, 27.6% of the AAA's employment arbitration docket (124 out of 449 cases) arose out of individually-negotiated agreements. *Id.* Ignoring those cases might introduce some small distortion into the comparison between rates of litigation and of arbitration. I have tried to take this problem into account below. *See infra* note 79.

70. *U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2012 Through 2016*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf [https://perma.cc/8428-MMJ5].

71. That is: (56 ÷ 44) x 31,000. It is more likely that the federal court numbers includes some claims that are covered by MAAs. That is taken into account below, *see infra* note 74.

72. *See supra* text accompanying note 67.

73. According to the Bureau of Labor Statistics, 15.2% of non-farm employees work for the government at some level. *Current Labor Statistics*, BUREAU OF LABOR STATISTICS (Sept. 2017), https://www.bls.gov/web/empsit/ceseeb1a.htm [https://perma.cc/6SA9-H23W].

MAAs (and thus faced a motion to compel arbitration).[74] In the absence of any data on this point, Figure 1 shows a range of expected arbitration claims, with the top number reflecting the assumption that *no* claims covered by MAAs were initially filed in federal court, and the bottom number reflecting the assumption that *all* such claims were initially filed in federal court.[75] These two adjustments lead to an estimate of "expected" arbitrations between 14,700[76] and 33,500,[77] as compared to the 5,126 arbitrations that appear to have been filed, and to an estimate of between 9600 and 28,400 "missing" arbitrations.

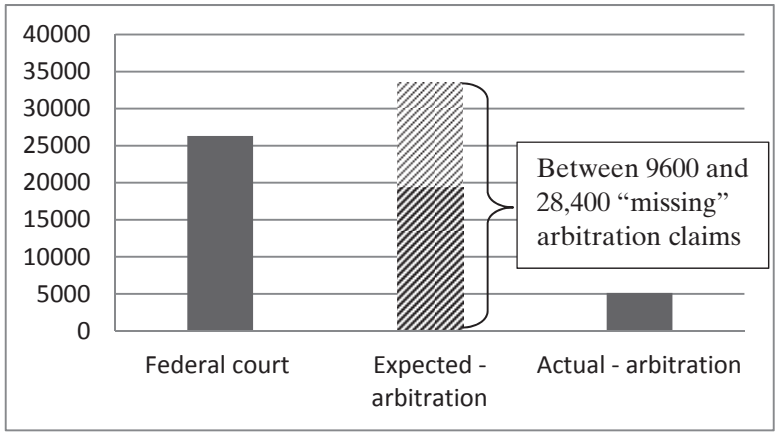

Figure 1: An Initial Estimate of "Missing" Employment Claims in Arbitration (2016)

In several respects, however, the Figure 1 estimate of "missing arbitrations" is far too conservative. To begin with, the estimate of arbitrations filed is almost certainly too high. It assumes that employee-plaintiffs are equally likely to file a claim whether they are covered by AAA- or non-AAA-administered arbitrations. Given that many of the latter do not abide by the DPP, and that some are

74. Plaintiffs and their attorneys are not always aware of the existence of an MAA until after filing a lawsuit. *See* Mark D. Gough, *Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice?*, in 22 MANAGING & RESOLVING WORKPLACE CONFLICT 105, 124 (David B. Lipsky, Ariel C. Avgar, & J. Ryan Lamare eds., 2016).

75. In the latter (extremely unlikely) event, the federal claims (26,300) would represent 100% of all claims, and 56% of those claims (about 14,700) would be relegated to arbitration.

76. *See supra* note 75.

77. That is: (56 ÷ 44) x 26,300. *See supra* note 73 and accompanying text.

employer-controlled,[78] it seems probable (and my conversations with plaintiffs' attorneys and other experts suggest) that employee-plaintiffs are much less likely to file a claim if they are subject to a non-AAA-administered arbitration. If that is so, then a more realistic estimate of arbitration cases filed in 2016 might be 4000 or less. Nonetheless, I have left the higher estimate of 5126 in place in Figure 2 below.[79]

At the same time, the number of court filings in Figure 1 is certainly too low. First, it takes no account of employment litigation in *state* court; that would include employee claims resting on state common law or statutory grounds, and those that plaintiffs choose to file in state court because the forum is viewed as friendlier. In the most populous state of California, for example, plaintiffs' attorneys rarely choose to file employment actions in federal court.[80] Second, some of the federal lawsuits (as well as some of the excluded state lawsuits) are class or collective actions, some of which might cover hundreds of employees or more. By contrast, employees covered by MAAs are usually precluded from pursuing their claims as a group.[81]

On the first point, the volume of employment litigation in state courts is notoriously difficult to pin down.[82] However, Professor Mark Gough, drawing on two large studies of state court litigation, has developed a rough estimate of 195,000 employment lawsuits per year in state courts of general jurisdiction.[83] That estimate is based on

78. *Cf.* COLVIN & GOUGH, *supra* note 26, at 34.

79. I do so partly because of the lack of data on non-AAA arbitrations, and partly in order to offset any potential distortion that might be attributed to the exclusion of arbitrations under individually-negotiated arbitration agreements. *See supra* note 69.

80. *See* Sternlight, *supra* note 16, at 1332 n. 143 (citing GARY BLASI & JOSEPH W. DOHERTY, UCLA LAW-RAND CTR. FOR LAW & PUB. POLICY, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50, at 11 (2010)).

81. Colvin's 2017 survey showed that thirty percent of MAAs contained such a clause. COLVIN, *supra* note 62, at 3. Because larger employers were more likely to have such a clause in their MAAs, that suggests that forty-one percent of employees covered by MAAs, and twenty-three percent of all employees, were expressly barred from filing or participating in a class or collective action. *Id*. For agreements that are silent about class claims, however, the Supreme Court's decision in *Stolt-Nielsen v. AnimalFeeds International Corp.* holds that silence regarding class arbitration implies *lack* of party consent, and thus precludes class arbitration. 559 U.S. 662, 687 (2010).

82. *See* Sternlight, *supra* note 16, at 1325 nn.99–100.

83. *See* email from Mark D. Gough, Assistant Professor, Penn State Coll. of Liberal Arts, to author (Nov. 30, 2017) (on file with the North Carolina Law Review). Gough used the most recent (2013) data from the National Center for State Courts ("NCSC") showing that over 5.9 million civil cases were filed in state courts of general jurisdiction. *See* NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS (2015), http://www.courtstatistics.org/~/media

some untested (though plausible) assumptions, as Gough recognizes.[84] But it is more likely to understate than to overstate the volume of state employment litigation given that it still excludes cases from five jurisdictions, including California, which together account for eighteen percent of the national population.[85] All in all, including Gough's estimate of 195,000 state cases is likely to yield a more realistic estimate of total employment lawsuits, and a more realistic estimate of "missing" arbitration cases.[86]

The second point relates to a legal controversy over the status of aggregate employment claims in arbitration that is currently before the Supreme Court.[87] The National Labor Relations Board ("NLRB") held in *D.R. Horton, Inc.*,[88] that employers violate the National Labor Relations Act ("NLRA") in seeking employees' waiver of the right to bring collective legal claims of any kind: Section 7 of the NLRA protects employees' right to engage in "concerted

/microsites/files/csp/ewsc_csp_2015.ashx [https://perma.cc/G2QL-VG8R]. Gough then used the Civil Justice Survey of State Courts ("CJSSC") finding that 3.3% of civil *verdicts* in 2005 were in employment disputes. *See* U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 STATISTICS 2 tbl.1 (2008) https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf [https://perma.cc/EFA4-QZRL].

84. The resulting estimate of 194,700 employment cases is based on two assumptions: that employment cases represented the same percentage of filings as of verdicts; and that this percentage has held steady since 2005. In Gough's view (and mine), both assumptions are reasonable though unproven. Any overestimate of employment cases is likely to be offset by the uncounted cases from California and five other jurisdictions, which are still excluded. *See infra* note 85.

85. The excluded jurisdictions are California, Illinois, Idaho, Minnesota, and the District of Columbia (plus Puerto Rico). They are excluded from the NCSC data that Gough relied on because they have "single-tiered" court systems, which take in enormous numbers of cases (such as traffic violations) that go to courts of limited jurisdiction in the included jurisdictions. I calculated the populations using 2016 Census data. *See Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016*, *2016 Population Estimates*, U.S. CENSUS BUREAU (Dec. 2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/6Z3N-JNE4].

86. It should be noted that some cases might be filed in state court but then removed to federal court; they might thus be counted twice in state and federal court statistics. That is especially likely for class actions given the removal provisions of the Class Action Fairness Act. *See* 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012). But given the severe undercount of class actions overall, and the omission of cases from California in state statistics, *see infra* note 85, I do not believe the potential double-counting problem is significant.

87. The Court granted certiorari and consolidated three decisions: *Lewis v. Epic Sys. Corp*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S.Ct. 809 (2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S.Ct. 809 (2017); and *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S.Ct. 809 (2017).

88. 357 N.L.R.B. 2277 (2012), *enforcement denied in part*, 737 F.3d 344, 364 (5th Cir. 2013).

activities for . . . mutual aid or protection,"[89] and that has long been held to include employees' collective pursuit of legal claims through courts or otherwise.[90] According to the NLRB, the fact that such a waiver is part of an arbitration agreement does not make it enforceable under the FAA.[91] Given a split among the courts of appeals,[92] the Supreme Court has agreed to decide the matter.

The problem for employees is that some legal claims cannot practicably be adjudicated on an individual basis. In particular, many FLSA wage and hour claims involve incremental pay disparities over a few years; the cost of litigating them as an individual often exceeds the expected returns.[93] But if many individuals are subject to the same challenged practice, as is often true, employees can practicably pursue their claims through a class or collective action.[94] If employers have their way in the Supreme Court, they will be free to block all such actions, and to virtually nullify a large category of employee claims that are not viable on an individual basis, simply by requiring individual arbitration. This is a point to which I will return in Part V. For present purposes, however, the point is simpler and less controversial: Given the existence of class and collective claims in court (but not in arbitration), any count of court cases, including the number of federal cases in Figure 1, greatly understates the number of individuals whose claims are encompassed by those filings.

Some useful data exist in one category of cases: lawsuits under the FLSA filed in federal court (8686 cases in 2016). A recent law firm report asserts that nearly all FLSA lawsuits in the past several

89. 29 U.S.C. § 157.

90. *D.R. Horton Inc.*, 357 N.L.R.B. at 2278.

91. *Id*. at 2287.

92. *Compare Epic Sys.*, 823 F.3d at 1147 (upholding the NLRB view) *and Ernst & Young*, 834 F.3d 975 at 975, 990 (same) *and* NLRB v. Alternative Entertainment, Inc., 858 F.3d 393, 408, No. 16-1385 (6th Cir. 2017) (same), *with* Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016) (rejecting the NLRB view) *and Murphy Oil*, 808 F.3d at 1015 (rejecting NLRB view) *and* Sutherland v. Ernst & Young LLP, 726 F.3d 290, 299 (2d Cir. 2013) (same).

93. *See* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 427–29 (2006).

94. A "collective action" under the FLSA allows many similarly situated individuals to join in a single lawsuit, and thus to litigate more efficiently than through multiple individual lawsuits; yet this form of group litigation lacks many of the advantages of class actions, and particularly of "opt-out" actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure. *See generally* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 U. MINN. L. REV. 1317 (2008) (chronicling the difficulties of collective FLSA actions as compared to class actions).

years were filed as class or collective actions.[95] Let us assume, more conservatively, that 7000 of those 8686 FLSA actions were aggregate actions,[96] and that each of those covered, on average, fifty individuals.[97] That would yield an additional 350,000 claims in federal court—that is, 350,000 individuals who would stand some chance of recovering something as a result of group litigation. Figure 2 reflects that adjustment, as well as Gough's partial estimate of 195,000 additional employment claims filed in state court. Those additions to the Figure 1 estimate of 26,300 federal lawsuits bring the estimated total number of employment claims encompassed by court filings to 571,300.

As Figure 2 illustrates, the resulting estimate of total employment claims filed in court leads to a striking estimate of "expected" claims in arbitration: If MAA-covered employees were as willing and able to arbitrate their claims as non-MAA-covered employees are willing and able to litigate, then we would expect to see between 320,000 and 727,000 employment claims in arbitration (depending again on how many of the claims encompassed by court filings were covered by MAAs).[98] Given the estimated 5126 claims actually filed in arbitration, that suggests an estimated 315,000 to 722,000 "missing" arbitration cases. Stated differently, well under two percent of the employment claims that one would expect to find in some forum, but that are covered by MAAs, ever enter the arbitration process.

95. *See* SEYFARTH SHAW LLP, 13TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 20 (2017), https://www.workplaceclassaction.com/wp-content/uploads/sites/214/2017/01/CAR-2017-Chapter-1-FINAL.pdf [https://perma.cc/92KB-HXYX].

96. For the total number of FLSA actions (8686), see U.S. COURTS, *supra* note 70, at tbl.C-2A. The estimate of 7000 FLSA aggregate actions is conservative relative to the Seyfarth Shaw report contending that "[v]irtually all" FLSA claims are filed as class or collective actions. *See* SEYFARTH SHAW LLP, *supra* note 95, at 20.

97. Fifty claims per aggregate action is meant to be a conservative estimate; compare to Professor Sternlight's estimate of 500 individuals per group claim. Sternlight, *supra* note 16 at 1337. If fifty seems high, consider that other class and collective actions, such as those under employment discrimination laws and all of those filed in state court, are not taken into account at all.

98. *See supra* text accompanying notes 75–77 (explaining the rationale behind the top and bottom of this range).

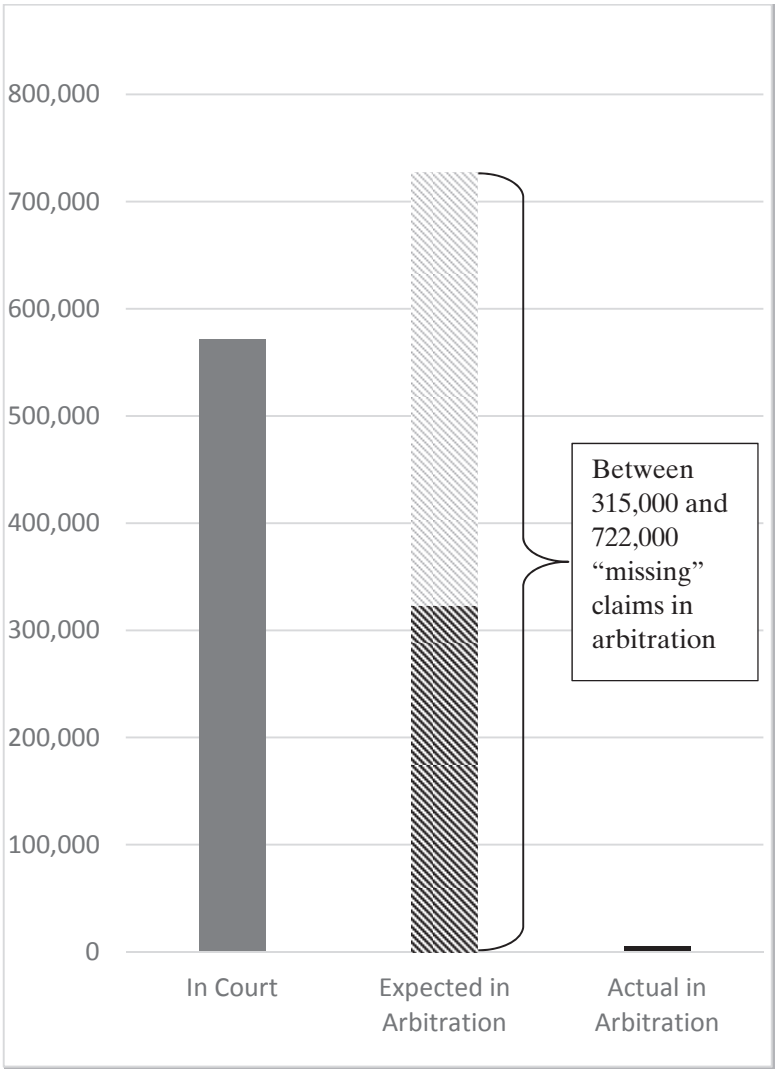

Figure 2: An Estimate of "Missing" Employment Claims in Arbitration (including those encompassed by aggregate FLSA claims) (2016)

By graphically representing these estimates, I do not intend to imply greater precision than the evidence permits. I do intend to

highlight the jaw-dropping disparities in estimated filing rates between court and arbitration, which are large enough, I would argue, to swamp any quibbles about precise numbers. And that is despite the omission of state court litigation in California and several other jurisdictions, as well as many claims encompassed by class or collective actions. Given those omissions, Figure 2 probably understates the number of claims encompassed by court filings, and thus the number of claims one would hypothetically expect to be filed in arbitration if it were a comparably accessible and hospitable forum. All in all, the available evidence suggests that the overwhelming majority of claims that would have been litigated but for the presence of a MAA are simply dropped without being filed in any forum at all.

Before turning to the reasons for the paucity of arbitration cases, let us take note of two possible but unquantifiable explanations for at least part of the disparity shown above. First, it is possible that employers that impose MAAs are systematically different from those that do not, and less likely to generate claims. We do know that larger and more sophisticated employers are more likely to use MAAs.[99] If those larger employers are less likely to violate the law and to generate employee claims, then one would expect fewer claims from employees covered by MAAs than the "expected" numbers generated above. On the other hand, it would not be surprising if the obscure netherworld of employer-dominated arbitration attracted some less scrupulous employers seeking to immunize themselves from liabilities. Nor would it be surprising if employers who jumped on the mandatory arbitration bandwagon in the wake of *AT&T Mobility LLC v. Concepcion*[100] and *American Express Co. v. Italian Colors Restaurant*,[101] and who might have been motivated chiefly by the prospect of foreclosing all group claims, are a less scrupulous bunch than the early adopters, and perhaps less scrupulous than the average employer. Either of those surmises might lead one to expect *more* disputes arising among employees covered by MAAs than the "expected" numbers above. I know of no data pointing either way, but these possibilities cloud the meaning of the "missing" arbitration cases, and qualify what follows.

It is also important to recognize that employee claims can be resolved before they are filed in any forum, and that this might be more likely for claims that are subject to mandatory arbitration than

99. *See* COLVIN, *supra* note 62, at 5.
100. 563 U.S. 333 (2011).
101. 570 U.S. 228 (2013).

for those that are not.[102] Some employers use mandatory arbitration as the final stage in a structured alternative dispute resolution ("ADR") process.[103] Those processes typically call for formal or informal mediation, as well as confidential meetings with ombudsmen, before any arbitration.[104] At least in the first decade or so after *Gilmer*, employers that used mandatory arbitration were considerably more likely to have robust internal-grievance procedures.[105] To the extent that remains true, it suggests that the resolution of arbitrable claims before they are formally filed—through mediation, for example—might account for some of the "missing claims" estimated above. On the other hand, it is possible that later adopters of MAAs, and especially those drawn in by the ability to block group claims, were less likely than the early adopters to embed arbitration within a structured dispute resolution process. All in all, it seems unlikely that this difference—a higher rate of early dispute resolution among arbitrable claims—accounts for more than a fraction of the estimated "missing" arbitration cases. But it is surely one more source of uncertainty about the numbers.

Much is still unknown about the fate of cases in arbitration (and litigation). From whatever angle one looks at the numbers, however, it appears that a very large majority of aggrieved individuals who face the prospect of mandatory arbitration give up their claims before filing. For all the sound and fury about skewed outcomes, repeat player effects, biased arbitrators, limited discovery, and lack of adherence to or production of precedent in arbitration,[106] it turns out

102. I thank Professor David Sherwyn for highlighting this point.

103. *See* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1581–91 (2005).

104. *Id.* at 1586.

105. Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 649 (2001) (finding telecommunications industry employers that elected to use arbitration were more likely to also have structured ADR processes). Moreover, employees were more likely to bring grievances in workplaces that had such systems. Alexander J.S. Colvin, *The Dual Transformation of Workplace Dispute Resolution*, 42 INDUS. REL. 712, 729 (2003) (finding peer-review and nonunion arbitration procedures had grievance rates that were, respectively, forty-three percent and sixty-eight percent higher than basic nonunion procedures). It is worth noting, however, that not all claims resolved via such grievance procedures are legally cognizable. *See* W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J. L. REFORM 843, 849 n.14 (2008).

106. *See, e.g.,* Bingham, *supra* note 36, at 190–91 (discussing repeat player effects); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 246 (2012) ("If the arbitrator decides that the arbitration agreement is unenforceable, he loses income."); Stone, *supra* note 1, at 1040 (discussing pro-employer outcomes in arbitration).

96 N.C. L. REV. 679 (2018)

that, except for a relative handful of cases, arbitration does not take place at all.[107] That is the black hole of mandatory arbitration.

III. ACCOUNTING FOR MISSING CASES: WHY SO FEW ARBITRATIONS?

What happens to the claims that can be adjudicated only in arbitration but are never filed? Conjecture calls for caution. But let us bring some hypothetical plaintiffs' attorneys into the story.[108] And let us assume that those attorneys are rational actors with at least a rough idea of the law and empirics surrounding arbitration. After all, attorneys' livelihood depends on their ability to calculate the probabilities and degrees of success, or risk-return ratios, in cases brought to them.[109] Suppose now that they learn that a prospective client is subject to a mandatory arbitration agreement. What enters into their calculations in deciding whether to take a case?

With or without an express anti-aggregation clause, they know that an MAA is likely to knock out some small value claims at the outset even if they are shared by hundreds or thousands of the complainant's co-workers.[110] The legality of those clauses is currently before the Supreme Court, as noted above,[111] so let us focus on other legally questionable provisions the attorney might encounter, and that might impede the fair adjudication of otherwise viable individual claims.

Attorneys at the intake point may or may not have access to a detailed written description of the arbitration process. If they do, they might find some provisions that would bar the claim altogether (like a very short limitations period or unaffordable arbitrator fees), or impede investigation (like very limited discovery), or sharply skew proceedings against the complainant (like a biased arbitrator pool or a skewed selection process), or curtail recovery even in the event of

107. Of course, that may be precisely because of the many discrete problems that have attracted critical attention; more on this below.

108. Although claimants can proceed in arbitration without legal representation—that was once thought to be an advantage of arbitration—it does not appear to be a very successful strategy. Colvin found that, for the 24.9% of employees who represented themselves, the win rate was 18.3% and the average award overall was $12,228, as compared to 22.9% win rate and $28,993 average award for represented claimants. Colvin, *supra* note 15, at 16. I note that the perspective of plaintiffs' attorneys, as with much else in this Article, has been explored quite thoroughly by Professor Gough based on his survey of 1,256 employment plaintiff attorneys, Gough, *supra* note 74, and by Professor Sternlight in her article, Sternlight, *supra* note 16, at 1334–40.

109. For evidence that they do just that, see Gough, *supra* note 74, at 120–21.

110. *See* Estlund, *supra* note 93, at 427–30.

111. *See supra* note 87.

"success" (like provisions against attorney fee shifting or punitive damages, or damage limits). It hardly helps, of course, if the arbitration agreement is vague or silent about these matters. If attorneys do identify invalid or troublingly vague provisions, they know that a court challenge would be costly, and would almost certainly pour them back into the still-flawed arbitration process, whether or not the court recognizes the flaws in that process.[112]

Let us underscore this point: Some "missing" or dropped cases are probably dropped because they would be subject to invalid arbitration provisions that nonetheless deter claims. The viable legal objections to arbitration are dwindling, especially under the Supreme Court's decisions in *Concepcion* and *Italian Colors*, which sharply limited courts' ability to police the fairness of arbitration agreements under either the state contract doctrine of unconscionability or the federal common law concept of "effective vindication" of statutory rights.[113] But the doctrine appears to still make it possible to challenge arbitration provisions that, for example, preclude statutorily prescribed remedies (including attorney fees),[114] skew the selection of arbitrators,[115] or impose excessive arbitrator fees or other barriers to the arbitral forum.[116] Unfortunately, even these standards of fairness are administered in a manner that undermines their efficacy. Most objections are relegated to the arbitral forum itself for case-by-case resolution (as in the case of excessive arbitrator fees);[117] unfair provisions are likely to be struck or amended from an agreement rather than invalidating the agreement. As a result, firms get the benefit of the arbitration agreement despite any overreaching.[118] That inevitably tempts unscrupulous firms to "go for it"—to include knowingly unfair or invalid provisions that are likely to discourage many complainants and their attorneys from pursuing a case at all, with little or no downside risk in case the overreach is detected and

112. Most alleged defects in the arbitral process must be adjudicated within that very process. *See* Schwartz, *supra* note 106, at 265.

113. *See* American Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013).

114. That appears to come within the narrowed *Italian Colors* exception to blanket enforceability of arbitration agreements: the exception "would certainly cover a provision . . . forbidding the assertion of certain statutory rights." *Id.* at 236.

115. Or so one can hope. Some "arbitration agreements," like the one invalidated in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999), arguably do not even qualify as "arbitration," the essence of which is an impartial decision maker chosen by both sides.

116. "Perhaps" such a provision would be invalid, per *Italian Colors*, 570 U.S. at 236.

117. *See* Green Tree Fin. v. Randolph, 531 U.S. 79, 89–92 (2000).

118. *See* Estlund, *supra* note 93, at 405.

corrected.[119] Legally objectionable arbitration clauses and procedures, as well as vague and indeterminate ones, can deter both litigation and arbitration, especially by plaintiffs in relatively small-dollar cases.

Even if plaintiffs' attorneys do not encounter (or can surmount or ignore) all these hurdles to a fair arbitration process, they presumably know that they are less likely to win anything, and thus recover any attorneys' fees, and even less likely to win enough to make the odyssey worthwhile for the attorney or the client. In short, expected recoveries (including attorneys' fees) in arbitration will often fall below some threshold of economic viability for attorneys. Even in cases with "smoking gun" evidence and scandalous facts that might have jolted a jury into a mega-bucks verdict or posed a risk of serious public opprobrium for the defendant firm, arbitration muffles or even eliminates those risks.

With all of this in mind, does a rational attorney take the case? Is it even worth writing a demand letter seeking to settle such a claim? Would a demand letter have any credible threat behind it? From all that appears from the data, the answer to all those questions is "rarely."

Of course, litigation is no panacea for plaintiffs.[120] Many potential employee-claimants who believe they have been wronged are still free to litigate their claims (if they have not already waived those claims on their way out of the job though a severance agreement).[121] Yet most of them cannot get an attorney to represent them. Given plaintiffs' bleak track record in court, experienced attorneys agree to represent only a tiny fraction of the prospective clients they see—only about ten percent, according to surveys of plaintiffs' attorneys.[122] For most claims, the risk-return ratio is apparently too low even in court. To be sure, many individuals who believe they have been wronged, and who seek legal advice, have very weak legal claims on either the facts or the law.[123] Still, it looks as

119. *Id.*

120. *See generally* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL. REV. 103 (2009) (detailing how plaintiffs in employment cases struggle in litigation).

121. *See* Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 RUTGERS U. L. REV. 943, 948 (1998).

122. COLVIN & GOUGH, *supra* note 26, at 14–15.

123. That proposition is obviously difficult to document. But it is often repeated by judges and by lawyers for both plaintiffs and employers, even with regard to claims that are actually filed. For example, two management-side lawyers quote several federal judges who characterize some employment litigation as frivolous or not well-founded. *See* Jay W. Waks & Gregory R. Fidlon, *Federal Judges Recognize Growing Trend of Dubious Workplace Discrimination Cases*, N.Y. EMP. L. & PRAC., Mar. 2000, at 1–2,

though the presence of a mandatory arbitration provision dramatically reduces an employee's chance of securing legal representation,[124] as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf.

IV. FROM CAUSES TO CONSEQUENCES: EMPLOYER EXCULPATION AND JUDICIAL ABDICATION

If the imposition of mandatory arbitration means that the employer faces only a miniscule chance of ever confronting a formal legal claim in any forum regarding future legal misconduct against its employees, then such a provision virtually amounts to an ex ante exculpatory clause, and an ex ante waiver of substantive rights that the law declares non-waivable.[125] Let me explain.

Nearly all statutory rights and most common law rights of employees are non-waivable or inalienable: An employee who is covered by the minimum wage law cannot make a valid agreement to waive its protections and to accept a lower wage; nor can she agree to waive the protections of antidiscrimination laws and to be subject to discrimination.[126] Scholars debate the wisdom of non-waivable employee rights, with the usual face-off between market enthusiasts and market skeptics.[127] But that normative debate should not distract from the point that, as a matter of positive law, most employee rights are not waivable ex ante. Of course, once claims arise, they can be settled or given up, even before any actual disputation, as with a severance agreement that waives any existing claims arising out of the

https://www.fidlonlegal.com/files/dubious-workplace-discrimination-cases.pdf [https://perma.cc/7KS8-3TJ2].

124. More than half of plaintiffs' attorneys reported in a large survey that the presence of an arbitration provision tends to discourage them from accepting a case (even relative to the low percentage of cases they accept in general). Gough, *supra* note 74, at 121–22. Given the tiny number of arbitrations actually filed, these self-reports probably understate the actual impact of arbitration provisions on filing behavior. Indeed, Gough found that, in addition to those attorneys who reported that they were more likely to reject cases because of an arbitration clause as such, others acknowledged that lower expected recoveries in arbitration did affect their decisions. *Id*.

125. The essentials of this argument are developed in Estlund, *supra* note 93, at 427–30.

126. *See id.* at 380.

127. On the pro-contract side, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 358–59 (5th ed. 1998); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 982 (1984); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1131–37 (1989). For just two examples of the contract-skeptics, see Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2787 (1991) and Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482–83 (1976).

employment in exchange for a severance payment beyond what is contractually due.[128] But the relevant rights and liabilities cannot be waived ex ante.

Imagine now that an employer required employees, as a condition of employment, to agree that any disputes that arise out of the employment, including claims of discrimination or other violations of statutory rights, must be submitted to the company president for a final and binding decision. That agreement would presumably be void, for contracting ex ante into a one-sided or sham process of adjudication—one that offers no fair opportunity to vindicate one's rights—is equivalent to a waiver of the underlying rights.

Obviously, mandatory arbitration is not supposed to be that. It is supposed to be, and in principle could be, a fair alternative process for the adjudication of disputes. Under the Court's very broad reading of the FAA, the right to *litigate* future disputes over non-waivable substantive rights is itself waivable, but only in exchange for an alternative process for the adjudication of disputes by an impartial decision maker in which all substantive rights are preserved.[129] But unless the alternative arbitral process does in fact allows for fair and impartial adjudication, and for the "effective vindication" of substantive rights, then a mandatory arbitration provision amounts to an *ex ante* waiver of those rights.

The condition of "effective vindication" of rights is what ensures that "arbitration remains a real, not faux, method of dispute resolution . . . . Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights."[130] Unfortunately, that compelling language comes from Justice Kagan's powerful dissent in *Italian Colors*. Until that ruling, the Court's FAA decisions appeared to require an opportunity for "effective

128. Ordinarily such a waiver must be "knowing and voluntary." 29 U.S.C. § 626(f)(1) (2012). Under the Older Workers' Benefits Protection Act ("OWBPA"), a valid waiver of an existing ADEA claim must be "in exchange for consideration in addition to anything of value to which the [employee] already is entitled," such as normal severance pay, and it must be preceded by disclosure of information about the triggering event and sufficient time to consult with an attorney, among other requirements. *Id.*

129. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). I have argued elsewhere that, under the FAA, the right to litigate over non-waivable substantive rights is only "conditionally waivable"—it is waivable in favor of a fundamentally fair arbitration process—rather than fully or unconditionally waivable; and that is because unconstrained waiver of the right to litigate would amount to a waiver of the underlying rights. Estlund, s*upra* note 93, at 409.

130. American Express Co v. Italian Colors Rest., 570 U.S. 228, 244 (2013) (Kagan, J., dissenting).

vindication" of substantive rights through arbitration.[131] *Italian Colors* was deeply unsettling in two ways: At a minimum, the decision diluted the meaning of "effective vindication." For the majority, an arbitration provision does not prevent "effective vindication" unless it actually blocks access to the arbitral forum (like an unreasonably high arbitrator's fee) or explicitly denies substantive rights.[132] On that formalistic view, a provision that makes adjudication economically infeasible (like a bar against aggregation of "negative value" claims) does not prevent "effective vindication" of rights.[133] Even more disturbing, the Court in *Italian Colors* seems to have demoted "effective vindication" from a fixed principle guiding the assessment of arbitral fairness to something like dicta.[134] If mandatory arbitration is not held to the standard of "effective vindication," then it will devolve into—if it is not already—a mechanism for employers' unilateral dissolution of inalienable substantive rights.

Until recently, the piecemeal nature of the challenges to mandatory arbitration agreements and the paucity of data had obscured the cumulative impact of the Court's decisions and of the many ways employers can tilt the process in their favor. Since the early decisions expanding the reach of mandatory arbitration (*Gilmer* and *Circuit City Stores v. Adams*[135] in the employment context), the challenges to arbitration have mostly proceeded one by one: Does one particular provision prevent fair adjudication of claims? The Court, often by narrow majorities, has rejected most of those challenges and relegated nearly all of the challenges that it has recognized in principle to the arbitral forum itself. Each of those rulings might be defended given the law and norms of arbitration that had evolved in the context of disputes between business entities or between unions and employers. But the cases give no indication that the Court has ever stepped back and looked at the cumulative effect of its rulings, and at the mounting evidence on how mandatory arbitration of employee (and consumer) claims works in practice, to see whether it does indeed represent a fair quid pro quo relative to litigation.

Ultimately, the proof is in the pudding—in the revealed preferences of those who are subject to MAAs. There is a kind of verdict on mandatory arbitration in the thousands of decisions that

131. *Id.* at 241.
132. *Id.* at 234–37 (majority opinion).
133. *Id.* at 236–37.
134. *See id.* at 235.
135. 532 U.S. 105 (2001).

employees and their attorneys make about whether it is worth submitting a claim to arbitration versus simply abandoning it. For all but a relative handful of cases per year, the answer appears to be that it is just not worth it. Somehow the cumulative effect of the Court's rulings, given the dominant power of employers to tweak and tilt the arbitration process to their liking, have made arbitration so inhospitable to claimants that they routinely give up their claims.

A skeptic might respond: If MAAs did represent a virtual insurance policy against employment claims—and one that is free, no less—then why wouldn't all employers impose such agreements? I fear that may be exactly where we are headed, albeit more slowly than one might have expected. And the lag in adoption of MAAs might be traceable to the obscurity surrounding mandatory arbitration and the long quest for reliable empirical data on its impact.

As noted above, after *Gilmer* opened the door to mandatory arbitration of employment claims, some early data seemed to suggest that arbitration was a mixed bag for employers: It tended to produce more modest and predictable recoveries, but at the cost (to employers) of greater employee access to the forum and perhaps more claims reaching a hearing on the merits.[136] Moreover, in the early days of mandatory arbitration it appeared that the lower courts were rising to the challenge of policing the fairness of MAAs, so that manifestly skewed arbitration procedures were likely to trigger litigation, and perhaps be invalidated.[137] Many employers might sensibly have decided to take their chances in court, where they held familiar advantages. Others—especially small employers without regular access to sophisticated legal counsel—might simply not have learned about the arbitration option.

But the arbitration landscape has changed with the Supreme Court's drastic constriction of judicial oversight of arbitration and its presumptive green light to provisions that foreclose aggregate claims.[138] Just since *Italian Colors*, the evidence suggests that employers have responded quickly and enthusiastically to the Court's invitation to block group claims: A law firm survey found that employers' usage of anti-class action provisions in MAAs rose from

136. *See* Estreicher et al., *supra* note 51 (manuscript at 7–8).

137. *See, e.g.*, Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS U. L.J. 399, 429 (2000).

138. "Presumptive" because the legality of such clauses in employment agreements under the NLRA is currently before the Court. *See supra* note 87.

sixteen percent to nearly forty-three percent just from 2012 to 2014.[139] Although anti-class action provisions do not affect all employment claims, they can obliterate potentially costly group claims at the virtual stroke of a pen. So why not? That single advantage of arbitration might indeed be driving the dramatic expansion in the adoption of MAAs shown by Colvin's recent survey data.[140]

The appeal of mandatory arbitration for employers might be affected by the outcome in this term's *D.R. Horton* cases. The shift to arbitration seems likely to accelerate if the Court reverses the NLRB and removes the last legal hurdle to employers' use of MAAs to preclude aggregate claims. If the Court instead affirms the NLRB and bars that use of MAAs, some employers might have second thoughts about arbitration, and some employees will have access to mechanisms of collective adjudication, either in court or in arbitration. But emerging data on the miniscule number of arbitrations that are filed at all—the data that are highlighted here—underscore the advantages of MAAs for employers even in individual cases, and might fuel the arbitration juggernaut for years to come.

CONCLUSION

The premise of *Gilmer* in the crucial domain of employment discrimination was that arbitration was merely an alternative forum—more informal but comparably effective—for the vindication of statutory rights. But *Gilmer* took a leap of faith on that score, for at the time there was no evidence on how mandatory arbitration would actually work when designed by the more powerful party in the highly asymmetric employment relationship and imposed as a condition of initial or continued employment. The empirical evidence—or enough of it—is now in. It now appears that, by imposing mandatory arbitration on its employees, an employer can ensure that it will face only a miniscule chance of ever having to answer for future legal misconduct against employees. Such a provision amounts to a virtual *ex ante* waiver of substantive rights that the law declares non-waivable.

Already in 1996, Professor Katherine Stone described mandatory pre-dispute arbitration agreements as the modern equivalent of the pre-New Deal "yellow dog contracts" by which employees had to

139. *See* CARLTON FIELDS JORDEN BURT, THE 2015 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY 26 (2016), http://www.thenalfa.org/files/2015_Carlton_Class_Action_Survey.pdf [https://perma.cc/3FR6-4K96].

140. *See* COLVIN, *supra* note 62, at 7.

agree not to join a union as a condition of employment: "Today's 'yellow dog contracts' require employees to waive their statutory rights in order to obtain employment."[141] At the time that conclusion might have seemed a bit hyperbolic. It was not foreordained that submission to arbitration would amount to a waiver of substantive rights. But that now appears to be the cumulative effect of the FAA jurisprudence on judicial oversight (or lack thereof) of the fairness of arbitration agreements.

The erasure of substantive rights will be plain for all to see if the Court allows employers to use MAAs to ban aggregate actions, for that alone will sound a death knell to most wage and hour claims, and will confer virtual immunity on firms for those claims.[142] But the data reviewed above show that MAAs function as a virtual death knell for most employment claims, including the many individual wrongful dismissal or harassment claims that are not amenable to collective adjudication and are unaffected by anti-aggregation provisions. The upshot of the Court's nearly-unwavering insistence on deferring to the arbitration "agreement"—that is, to the employer who drafts the agreement and imposes it as a condition of employment—has been to swallow up most employment disputes on the way from "naming" and "blaming" to "claiming," and before they take shape in a formal complaint.

It is not clear, and this Article does not venture to say, what particular combination of changes to the doctrine, if any, could make mandatory arbitration reasonably hospitable to actual plaintiffs and their attorneys. Perhaps there is nothing that can be done to ensure the fairness of mandatory pre-dispute arbitration in the context of the highly asymmetric employment relationship. Or perhaps the efficacy of arbitration for claimants could be salvaged by the establishment of a clear set of minimum standards of fairness for both arbitration procedures and arbitration providers, with full compliance as a condition of enforceability.[143] In any case, the Court's FAA

141. Stone, *supra* note 1, at 1037.

142. *See generally* Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISCOURSE 164 (2013) (discussing how collective arbitration is being threatened by the courts and employers).

143. It would help to require employers to disclose publicly the terms of any mandatory arbitration agreements to which employees are subject. That would better enable advocates and scholars to expose and challenge legal defects, and to pressure firms to live up to legal standards and norms of fair process, outside the context of particular disputes and apart from the risk-return calculations that govern attorneys' decisions. *See* Estlund, *supra* note 14, at 427–30.

jurisprudence so far has done almost nothing to encourage such an effort. As things stand, the imposition of mandatory arbitration by employers amounts to a virtual cancellation of employee rights—an *ex ante* forced waiver of non-waivable rights.

The FAA is a mere statute—albeit a miraculously muscled up statute. It is thus open to Congress to either reject the application of the FAA in some or all employment (and consumer) cases or to impose more rigorous standards of fairness in such cases. But in the face of congressional inaction, if not dysfunction, the fate of employee rights turns on the evolving views of mandatory arbitration in the Supreme Court. One might hope that the Court's stubborn insistence (by the slimmest of margins) on routine enforcement of MAAs stems from a lag in empirical understanding of their impact on employee rights. Perhaps the judicial proponents of mandatory arbitration still hold the view that arbitration entails a fair tradeoff, and allows for the effective vindication of employee rights.[144] In light of what we now know about the sheer paucity of arbitrations, however, that view can no longer stand. If the Court continues on its current pro-arbitration path in the face of this stark reality, it will be complicit in employers' effective nullification of employee rights and protections.

144. Mandatory employment arbitration has its academic defenders. *See, e.*g., Waks & Fidlon, *supra* note 124, at 1–2. But none has thus far acknowledged and responded to the emerging empirical evidence on the miniscule number of arbitration claims and the import for employee rights.

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EXHIBIT 7

American Labor in the 20th Century

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The 20th century was a remarkable period for the American worker, as wages rose, fringe benefits grew, and working conditions improved. Even though many statistics were sketchy at the beginning of the century, the picture is clear: The American workforce was much better off at the end of the century than it was at the beginning. The statistics used to understand the condition of working Americans also improved over the course of the century, as we discuss in these articles excerpted from the *Report on the American Workforce* (U.S. Department of Labor, 2001).

Comparison of the American workforce at the end of the 20th century with that at the beginning shows numerous changes. Some of these are dramatic; others less so. Many of these changes are well known, but some are not. In certain cases, statistical data are lacking to make quantitative comparisons between the beginning and end of the century; but most of the changes are discernible, nevertheless.

The size of the Nation's workforce increased roughly six fold during the 20th century. The workforce registered 24 million in 1900 with those aged 10 and above reporting a gainful occupation;[1] in 1999 it was 139 million (aged 16 and older).[2] But it is not just the sheer numbers that are striking. The composition, compensation, workplace, and very nature of work also changed during the century.

Over the course of the 20th century, the composition of the labor force shifted from industries dominated by primary production occupations, such as farmers and foresters, to those dominated by professional, technical, and service workers. At the turn of the century, about 38 percent of the labor force worked on farms. By the end of the century, that figure was less than 3 percent. Likewise, the percent who worked in goods-producing industries, such as mining, manufacturing, and construction, decreased from 31 to 19 percent of the workforce. Service industries were the growth sector during the 20th century, jumping from 31 percent[3] of all workers in 1900 to 78 percent[4] in 1999.

The labor force composition shifted in other ways too. Female participation in the labor market grew dramatically in the 20th century. In 1900, only 19 percent[5] of women of working age participated in the labor force, whereas 60 percent[6] of them did in 1999. Furthermore, there was a marked change in female occupational employment. In 1900, only 1 percent of the lawyers and 6 percent of the Nation's physicians were women.[7] In 1999, the figures were 29 percent for lawyers and 24 percent for physicians.[8]

Child labor was common at the turn of the century, and many families needed the income earned by their children to survive. The 1900 census counted 1.75 million individuals aged 10 to 15 who were gainful workers.[9] At that time, these children comprised 6 percent of the labor force. There were no national laws that governed child labor, and while some States enacted and enforced such laws, most did not. By 1999, Federal and State law regulated child labor; and Federal law effectively prohibited full-time workers under the age of 16.

Statistics are sparse on minority participation in the labor force at the turn of the century, even by the standards of the day. Using the terminology of the day, census data show that the nonwhite workforce numbered a little under 3.8 million in 1900. This was about 14 percent of the labor force.[10] In 1999, the black workforce numbered 16.5 million, or about 12 percent, of the labor force.[11] There were also American Indians, Japanese, and Chinese in the labor force at the turn of the century, but their numbers were few compared with the Negro.[12] By 1999, the other minority groups had increased, but blacks remained the largest racial minority group.

In 1900, per capita income (in 1999 dollars) was $4,200; it was about $33,700 in 1999.[13] The average hourly pay of manufacturing production workers in 1999 was $13.90; in 1909, the first measured year, it was about $3.80 (in 1999

dollars).[14] In addition to wages and salaries, benefits comprised a major part of employee compensation at the end of the 20th century. Statistics show that benefits averaged $5.58 per houror 27.5 percent of total compensationin 1999.[15] Benefit data are not available for the beginning of the century, but benefits were minimalif available at allto workers in the industrial economy. One compensation series shows that benefits accounted for a little more than 1 percent of total compensation in 1929, the first year measured.[16] Wages and salaries improved during the course of the century, although in *real* terms they seem to have leveled off during the last quarter of the century. If total compensationwages, salaries and benefitsis examined, the trend remains positive.

The average workweek changed dramatically during the 20th century. In 1900, the average workweek in manufacturing was 53 hours,[17] and in 1999 it was about 42 hours.[18] But the decline was not steady, as the workweek is very sensitive to business conditions. During the Great Depression, the average number of hours per workweek for production workers in manufacturing dropped as low as 34.6. During World War II, it rose to 45.2 hours at one point. After the War, it stabilized at about 40 hours per week. The normal range for the four decades after World War II was 39 to 41 hours per week, but the factory workweek exceeded 41 hours for most of the 1992-1999 period.[19]

The number of hours at work varies by industry sector, as well as in response to the state of the economy. In 1999, the weekly average for the total private sector was 34.5 hours; and the average for the total goods-producing sector was 41.0 hours. The retail trade sector average workweek was 29 hours, wholesale was 38.3, construction was 39.1, and mining was 43.8. Average retail trade hours, for example, have shown a fairly constant drop since 1947, as industry added more part-time workers.[20] Mining hours, on the other hand, rose over that period. Workweeks in some sectors, such as manufacturing and construction, are impacted by changes in the economy; and many sectors, including retail trade and construction, are affected by seasonal changes.

Workplace safety improved dramatically during the 20th century. Almost 1,500 workers[21] were killed in coal mine accidents in 1900. However, in 1999, the figure[22] was 35. And it was not just coal mines that were unsafe. There were 2,550 railroad workers[23] killed in 1900, compared with 56 in 1999.[24]

These two industries were picked because of data availability, as fatality statistics are not available for most industries at the turn of the century. Moreover, injury data are not available at the beginning of the century for *any* industry. Some national injury data were collected in 1911, but detailed statistics were not available until later in the century. Whether accidents are fatal or not, statistics indicate that they are less common, and the workplace is a much safer place, for the worker at the end of the century than at the beginning.

If an employee was injured on the job in 1900, his only recourse for compensation was to sue for damages. Such lawsuits were generally unsuccessful. It is estimated that at that time only 15 percent of workers injured on the job were successful in obtaining any damages under common law.[25] By 1999, there were a number of government programs that assisted those injured on the job. Long-term disability payments, Worker's Compensation, and other provisions in statute or contracts provided safety nets for the worker in 1999 that did not exist in 1900.

Unemployment is estimated at 5 percent[26] in 1900; in 1999 it averaged 4.2 percent.[27] While these two figures are not much different, they reflect very different dynamics. Data from four StatesCalifornia, Kansas, Maine, and Michiganand the 1910 census suggest that workers around the turn of the century faced a high probability of being laid off or unemployed sometime during the year. But the length of time one was unemployed was likely to be shorter than it was at the end of the century.[28] In 1999, the median duration of unemployment was 6.4 weeks.[29]

There were 19 business cycles in the 20th century.[30] As a result, the century experienced periods of very low unemployment and periods of extremely high unemployment. Between 1900 and 1908, the unemployment rate fell below 3 percent. Later in the century, rates above 8 percent were recorded during recessions, such as those in 1915, 1921, 1975, and 1982. The highest rates of unemployment came during the Great Depression, when there were rates above 20 percent for several years. In 1933, there were more than 12 million workers unemployed; and the unemployment rate averaged 24.9 percent. More recently, double-digit unemployment rates were recorded during parts of 1982 and 1983, but there was a fairly steady decline from 7.8 percent in mid-1992 to 4.1 percent at the end of 1999.[31]

Forces Of Change

What forces underlie the changes of the workforce in the 20th century? Technology, capital, demography, immigration, education, and government intervention are often mentioned. In most cases, it is impossible to point to a single force or action that led to changes in the workforce. Most changes reflect the confluence of several factors or events.

Technology entered the workplace in a massive way in the 20th century. The list of technological improvements in the workplace in the last century is almost endless: communication devices, measuring devices, computer controlled equipment, the x-ray, wind tunnel, arc welder, circuit breaker, transistor, geiger counter, laser, neon lamp, teletype, fiber optics, stainless steel, and the atomic clock. The list goes on and on. At the turn of the century, only 5 percent of the Nation's factories used electricity to power their machines.[32] However, by the end of the century, electrical powered machines were omnipresent; and heating, air conditioning, and air filtration were common in the workplace. And technological improvements often resulted in improved safety in the workplace, as technology replaced the worker in some of the more dangerous tasks.

Additionally, technological improvements that entered the home in the 20th century led to major changes in the workplace, as more homemakers were able to shift some of their time from home production to paid jobs. At the same time, new industries were created to serve the home; and existing industries expanded. Electricity was in less than 10 percent of the Nation's homes at the turn of the century, but it was almost universal by the end of the century.[33] New machines introduced in the home in the 20th century included the refrigerator, dishwasher, clothes washer, dryer, iron, vacuum cleaner, microwave oven, automatic toaster, electric razor, and electric hairdryer. In addition, there was prepackaged food, frozen food, and a host of other convenience items. The list could extend for many pages. Expansion of the paid workforce was certainly facilitated by these labor-saving goods and devices that were introduced into the home in the 20th century.

Likewise, technological improvements have worked their way throughout the economy. Medical advances have extended the life span of individuals and have led to fewer and less severe illnesses, allowing workers to work longer with fewer debilitating illnesses. Those injured on the job were more likely to return to work sooner. There was a host of new drugs and medical procedures; and new contraceptives facilitated family planning, especially impacting women workers. Major changes in transportation, primarily the use of the automobile, led to massive shifts in the location of the workplace. Factories were resettled to areas of cheap land and built on single levels. No longer were factories tied to the city. The explosion of communications permitted further dispersal of the workplace. The automobile also led to dispersion of the home and shopping. Computers were a major factor in the economic growth of the last decade of the 20th century, but the overall importance of computers in the economy and workplace will not be known for decades.[34]

To put the new technology to work often required massive amounts of capital. In 1996, for example, investment in information technology per worker was $29,200 for telecommunications; $7,600 for real estate; and $4,600 for railroads.[35] While real capital input increased 3.8 percent per year between 1948 and 1998 for the private sector, information equipment and software increased 11.4 percent per year; and computers and related equipment software increased 27.8 percent per year.[36] In 1999, the economy consumed over one trillion dollars of fixed capital. Without capital, technology would not have made its way into the workplace.

Changes in the demographics of the population in the 20th century had a profound impact on the workplace. The population aged, became more diverse, and grew dramatically. In 1900, the life expectancy of a newborn was 47.3 years;[37] in 1999 it was 77.0.[38] In 1900, 80 percent of American children had a working father and a stay-at-home mother, however, by 1999, that figure was only 24 percent.[39] The population at the beginning of the century was 76 million, but approached 280 million by the end of the century. (The official 1999 Census count is 273 million, but the 2000 Census counted 281 million).[40]

Immigration was crucial to the development of the U.S. economy and the workplace in the 20th century. In 1900, 448,572 individuals passed through immigration control, and for the decade as a whole (1900-9) there were 8.2 million.[41] Those of work age had come to find employment and a stake in a better job. Most were laborers or listed no occupation on their entry documents.[42] (Recent numbers are only slightly larger and, as a proportion to the overall population, a great deal smaller.) In 1998, there were 660,477 legal immigrants; and for the decade as a whole (1990-99), there were close to 10 million.[43] During

the 1930s and 1940s, in contrast, immigration dropped to less than 100,000 per year, as a result of the strict quota system established under the National Origin Act of 1929. But the Immigration and Naturalization Act of 1965 removed racial quotas and opened the doors to a large number of non-European immigrants. Immigration laws had a major impact on the labor force. Indeed, one observer suggests "that quotas restricting the less-skilled immigrant labor were the single most important piece of labor legislation in the twentieth century."[44]

However, it was not just immigration that changed the workplace in the 20th century. Education played an important role in the advancement of the individual worker, the workforce, and the economy; and during the 20th century, there was a steady increase in educational attainment. In 1900, less than 14 percent of all Americans graduated from high school.[45] By 1999, that figure had increased to 83 percent.[46] In 1910, the first year for which estimates are available, less than 3 percent of the population had graduated from a school of higher learning.[47] By 1999, the figure was 25 percent.[48] Furthermore, increased education resulted in substantial monetary payoff for the individual worker. Men with college degrees earned 62 percent more and women 65 percent more in hourly compensation than did those with a high school degree at the end of the century (1997).[49] A substantial part of the growth of the economy is attributable to increased education.[50]

There is no question about the increasing role of government during the 20th century.[51] But what impact did government intervention have on the workplace and on the workforce? This question is not easily answered. Even when there was workplace legislation, one cannot ascribe changes in the workplace to changes in the law. As one observer notes, "government intervention often reinforced existing trends, [such as in the case of] the decline of child labor, the narrowing of the wage structure, and the decrease in the hours of work."[52] In addition to workplace legislation, there was legislation directed at larger societal issues that had a dramatic impact on the workplace.

A number of pieces of legislation dealt with the workforce and workplace in the 20th century. In addition, there was general societal legislation that had an impact on the workforce and the workplace, although the focus of the legislation was elsewhere. Social insurance legislation, such as Social Security and Medicare, had a profound affect on the workforce and workplace by providing many workers a retirement stipend and health insurance for the first time. Other legislation that had a profound impact on the workforce includes the 1990 Americans with Disabilities Act, the post-World War II GI Bill, and the Civil Rights Act. Studies show that the Civil Rights Act of 1964, specifically Title VII, had an important affect on hiring of black workers.[53] Other actions that impacted the workforce indirectly include the funding and building of the interstate highway system, funding of research and development, and enforcing patent and copyright laws.

Counting The Changes

Much of what we know about the improvements in the workforce came from the advancements that were made in counting the workforce in the 20th century. Important developments came in methodology and data gathering. In addition, there was a major expansion of the data collection effort. Here, we briefly touch on some of these improvements and the underlying forces that set the stage for these developments. Details are discussed in the articles of this issue.

Statistics are often lacking on the American workforce at the beginning of the 20th century as workforce data were restricted largely to special studies that addressed subjects like child labor, immigrant labor, and pensions. Rudimentary statistics were produced on wages and hours in manufacturing in 1904, but these series were discontinued in 1908 for more investigative reporting.[54]

Wage and hours surveys were resumed in 1913, but resources permitted only 10 industry studies every other year.[55] These studies focused on industries, or industry groups, such as cotton, wool and silk. For each study, data were collected and published on hourly wage rates, full-time weekly earnings, fluctuations in employment during the year, volume of employment, and productivity. In 1916, the Bureau of Labor Statistics (BLS) began to publish monthly employment series for five industries.[56] This was the start of the establishment series on employment and payrolls.

Gaps in labor force statistics became apparent, with the mobilization for World War I. Federal statistics were "woefully incomplete and inadequate" according to Bernard Baruch, Chairman of the War Industries Board.[57] Wartime needs led to a massive expansion of statistical data. Prices and wages were of immediate concern, since wage rates needed to be adjusted

to keep pace with inflation. In 1918, wage and hour surveys were expanded to 780 occupations in 28 industries, covering 2,365 establishments in 43 States.[58] There was also increased interest in information on strikes and lockouts. With the termination of the war, statistical budgets were trimmed, and the wage and hour program was reduced to its prewar level.

The next surge of interest in labor statistics came in the latter part of the 1920s. By 1927, there was monthly reporting of employment on 54 manufacturing industries covering 11,000 establishments; and in 1928-29, agriculture, mining, construction and trade were added to the reporting. Several studies addressed the issue of how to collect unemployment statistics, a continuing and unresolved issue at that time.[59]

The Great Depression provided the next great push to improved labor force statistics. Modern-day employment statistics, unemployment statistics, occupational statistics, and the like grew out of the Great Depression. The creation of the Central Statistical Board, in 1933, led to a number of new statistical initiatives. One created the Interdepartmental Committee on Industrial Classification, in 1937, that resulted in the creation of the Standard Industrial Classification (SIC) system. This was the first time that the United States had produced a comprehensive industry classification system. Until that point, industry data collection was pretty much ad hoc, responding to immediate needs and what could be collected, given the time and available funding. The result was different data definitions and overlapping data collection. The SIC underwent four major revisions before being replaced in 1997 by the North American Industry Classification System (NAICS).

The Great Depression spawned a number of new laws, such as the Fair Labor Standards Act, which required new statistics on the labor force. Collection of unemployment statistics remained an unresolved issue in the 1930s. After many studiesand false startsa household survey was undertaken; and national unemployment estimates were produced, for the first time, in 1940. In 1938 the Central Statistical Board and the American Statistical Association moved to develop an occupational classification system that reflected the similarity of work, education requirements, skill levels, and socioeconomic class. This new classification was used in the 1940 census and the development of the Occupational Outlook Program. With the outbreak of World War II, the statistical focus changed from recession and depression to wartime needs.[60]

There was need for greatly expanded labor force statistics in World War II, as in World War I. United States statistical data collection and analyses shifted to focus on defense industries and the wartime economy. Wages and prices were controlled, and many items were rationed. At the beginning of the war, employment and wage data were collected on 90 industries; at the end of the war, data were collected on 180 industries. New defense-related industries sprung up overnight.[61] There was need for detailed, recurring data on price and wage changes. Occupational wage studies were expanded and refocused on the occupational skills needed by private industry to meet military needs. In order to set and control wages, wage reports were broken down by area and occupational group. Thousands of interplant wage inequity cases had to be heard and resolved, which required additional labor force information. The Cost of Living Index became a contentious political issue during the Second World War, because it was used to adjust and set wages. Basic issues, including changes in the quality of products and substitution affects, were the same ones that continue to torment developers of these indexes today. In 1945, the name of the index was changed to the Consumer Price Index.[62] The World War II era also saw the expansion of productivity studies and monthly reporting of industrial injuries.

Statistical data collection and reports were cut back following the conclusion of WWII; in fact, BLS staff was cut by 40 percent.[63] Data collection activities that remained were redirected from wartime to post-war problems. At about the same time, the Council of Economic Advisers and the Joint Economic Committee were created. Almost immediately, these two organizations focused attention on gaps in workforce data, leading to further changes in data collection and analysis. Worker budget estimates were revised and calculated for large cities, benefit studies were undertaken, and industry productivity studies were re-instituted. In 1948, General Motors and the United Auto Workers agreed to use the CPI to establish a wage-escalator clause, which gave new emphasis to the CPI, at a time when there was serious thought in cutting back funding of the index.[64] Occupational studies initially focused on veterans' re-entry into the labor force; later, studies reverted to their prewar focus of providing data for counseling young people in their choice of careers.

With the advent of the Korean War, there were demands to update much of the statistical program, especially the price and wage statistics which were needed to set price and wage guidelines. A revised CPI was instituted; and collective bargaining

agreements were tracked, summarized, and published. The Wage Stabilization Board used the wage data to establish guidelines.[65]

The Vietnam war did not require the massive development of new data, as had the earlier wars of the 20th century. But the so-called "War on Poverty" introduced a whole new set of statistical requirements for information on the poor, unemployed, and minorities. The 1963 Vocational Education Act required the States to develop information on future occupations. This led to the development of occupational statistics by industry.[66] Many of the revisions and improvements in data did not take place until the 1970s, when new income support and training laws prompted more detailed reporting. The President's Concentrated Employment Program led to a series of studies on employment in poverty areas, and BLS introduced a quarterly series that tracked the situation in poverty areas in the United States. The Comprehensive Employment and Training Act of 1973 required information on unemployment and poverty by detailed geographic area.[67] This was also a period when inflation was a major economic and political issue, and the Cost of Living Council was established to provide guidelines on wage and price escalation that put renewed emphasis on price, wage and productivity statistics.[68]

The rest of the 20th century saw continuing improvement of workforce statistical data. These changes were evolutionary. While the decennial census collected data on occupations, it was not until 1977 that the first Standard Occupation Classification manual was published. The manual grew out of the Bureau of the Budget's Office of Federal Statistical Policy and Standards initiative to develop a single occupational classification system that would be used by all major U.S. statistical organizations. It was at this time that occupational statistics were updated through a series of industry studies, and an industry-occupation matrix was developed for the first time. These statistics were necessary ingredients to the preparation of the industry and occupational projections. But this was not all. There were revisions in the industry and occupational classifications and additional minority and demographic data collected. Wage data has also undergone major expansion to capture total compensation. In 1980, the Employment Cost Index included benefits for the first time; and indexes were calculated and presented by occupational group and major industry.[69]

What Comes Next?

The following articles discuss workplace compensation, how it evolved, and how it was measured in the 20th century.

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End Notes

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21 U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970*, Part 1, Series M 271-86, p. 607.

22 "National Census of Fatal Occupational Injuries, 1999," USDL 00-236 (Bureau of Labor Statistics, Aug. 17, 2000), table 3, p. 8.

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53 Ibid., p. 46.

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61 Ibid., p. 165.

62 Ibid., p. 158.

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EXHIBIT
8

PUBLIC LAW 117–90—MAR. 3, 2022

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

Public Law 117–90
117th Congress

An Act

Mar. 3, 2022
[H.R. 4445]

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.
9 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021".

SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

9 USC 401 prec.

"CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

9 USC 401.

"§ 401. Definitions

"In this chapter:

"(1) PREDISPUTE ARBITRATION AGREEMENT.—The term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

"(2) PREDISPUTE JOINT-ACTION WAIVER.—The term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"(3) SEXUAL ASSAULT DISPUTE.—The term 'sexual assault dispute' means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

"(4) SEXUAL HARASSMENT DISPUTE.—The term 'sexual harassment dispute' means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

"§ 402. No validity or enforceability 9 USC 402.

"(a) IN GENERAL.—Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

"(b) DETERMINATION OF APPLICABILITY.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.". Contracts.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting "or as otherwise provided in chapter 4" before the period at the end;

(B) in section 208—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4."; and

(C) in section 307—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4.".

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following: 9 USC 201 prec.

"208. Application.".

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following: 9 USC 301 prec.

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following: 9 USC 1 prec.

"4. Arbitration of disputes involving sexual assault and sexual harassment ..... 401".

9 USC 401 note.

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

Approved March 3, 2022.

LEGISLATIVE HISTORY—H.R. 4445 (S. 2342):

HOUSE REPORTS: No. 117–234 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 168 (2022):
Feb. 7, considered and passed House.
Feb. 10, considered and passed Senate.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2022):
Mar. 3, Presidential remarks.

○

EXHIBIT 9

IIB

116TH CONGRESS
1ST SESSION

H. R. 1423

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 24, 2019
Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 9 of the United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Forced Arbitration Injustice Repeal Act'' or the ''FAIR Act''.

SEC. 2. PURPOSES.

The purposes of this Act are to—

(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and

(2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

''CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

''§ 401. Definitions

''In this chapter—

''(1) the term 'antitrust dispute' means a dispute—

"(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act) or State antitrust laws; and

"(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

"(2) the term 'civil rights dispute' means a dispute—

"(A) arising from an alleged violation of—

"(i) the Constitution of the United States or the constitution of a State;

"(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code

of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

"(B) in which at least one party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

"(3) the term 'consumer dispute' means a dispute between—

"(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and

"(B)(i) the seller or provider of such property, services, securities or other investments, money, or credit; or

"(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

"(4) the term 'employment dispute' means a dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action

under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

"(5) the term 'predispute arbitration agreement' means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

"(6) the term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"§ 402. No validity or enforceability

"(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

"(b) APPLICABILITY.—

"(1) IN GENERAL.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity

and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

"(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 1 by striking "of seamen," and all that follows through "interstate commerce" and inserting in its place "of individuals, regardless of whether such individuals are

designated as employees or independent contractors for other purposes'';

(B) in section 2 by inserting ''or as otherwise provided in chapter 4'' before the period at the end;

(C) in section 208—

(i) in the section heading by striking ''**CHAPTER 1; RESIDUAL APPLICATION**'' and inserting ''**APPLICATION**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''; and

(D) in section 307—

(i) in the section heading by striking ''**CHAPTER 1; RESIDUAL APPLICATION**'' and inserting ''**APPLICATION**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''.

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections of chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

"208. Application.".

(B) CHAPTER 3.—The table of sections of chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters of title 9, United States Code, is amended by adding at the end the following:

"4. Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes ..... 401".

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises or accrues on or after such date.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit the use of arbitration on a voluntary basis after the dispute arises.

Passed the House of Representatives September 20, 2019.

Attest: CHERYL L. JOHNSON,

Clerk.

EXHIBIT 10

Economic Policy Institute

The growing use of mandatory arbitration

Access to the courts is now barred for more than 60 million American workers

Report • By Alexander J.S. Colvin • September 27, 2017

Executive summary

In a trend driven by a series of Supreme Court decisions dating back to 1991, American employers are increasingly requiring their workers to sign mandatory arbitration agreements. Under such agreements, workers whose rights are violated can't pursue their claims in court but must submit to arbitration procedures that research shows overwhelmingly favor employers.

In reviewing the existing literature on the extent of this practice, we found that the share of workers subject to mandatory arbitration had clearly increased in the decade following the initial 1991 court decision: by the early 2000s, the share of workers subject to mandatory arbitration had risen from just over 2 percent (in 1992) to almost a quarter of the workforce. However, more recent data were not available. In order to obtain current data for our study, we conducted a nationally representative survey of nonunion private-sector employers regarding their use of mandatory employment arbitration.

This study finds that since the early 2000s, the share of workers subject to mandatory arbitration has more than doubled and now exceeds 55 percent. This trend has weakened the position of workers whose rights are violated, barring access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.

In October 2017, the Supreme Court will hear a set of consolidated cases challenging the inclusion of class action waivers in arbitration agreements. Class action waivers bar employees from participating in class action lawsuits to address widespread violations of workers' rights in a workplace. The Court will rule on whether class action waivers are a violation of the National Labor Relations Act; their decision could have wide-reaching implications for workers' rights going forward.

Key findings of this study

- More than half—53.9 percent—of nonunion private-sector employers have mandatory arbitration

SECTIONS

procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.

- Among private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures. Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.
- Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures—meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through collective legal action.
- Large employers are more likely than small employers to include class action waivers, so the share of *employees* affected is significantly higher than the share of employers engaging in this practice: of *employees* subject to mandatory arbitration, 41.1 percent have also waived their right to be part of a class action claim. Overall, this means that 23.1 percent of private-sector nonunion employees, or 24.7 million American workers, no longer have the right to bring a class action claim if their employment rights have been violated.

Introduction

Mandatory arbitration is a controversial practice in which a business requires employees or consumers to agree to arbitrate legal disputes with the business rather than going to court. Although seemingly voluntary in that the employee or consumer can choose whether or not to sign the arbitration agreement, in practice signing the agreement is required if the individual wants to get the job or to obtain the cellphone, credit card, or other consumer product the business is selling. Mandatory arbitration agreements are legally enforceable and effectively bar employees or consumers from going to court, instead diverting legal claims into an arbitration procedure that is established by the agreement drafted by the company and required as a condition of employment or of doing business with it.[1]

Much attention has focused on the use of mandatory arbitration agreements in consumer contracts, such as consumer financial contracts, cellphone contracts, and nursing home resident contracts and the implications of such agreements for consumer rights.[2] There is less awareness of the use of mandatory arbitration agreements in employment contracts, but it is no less of a concern for those workers affected by it. These mandatory employment arbitration agreements bar access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act. If an employment right protected by a federal or state statute has been violated and the affected worker has signed a mandatory arbitration agreement, that worker does not have access to the courts and instead must handle the claim through the arbitration procedure designated in the agreement.

Mandatory employment arbitration is very different from the labor arbitration system used to resolve disputes between unions and management in unionized workplaces. Labor arbitration is a bilateral system jointly run by unions and management, while mandatory employment arbitration procedures are unilaterally developed and forced on employees by employers. Whereas labor arbitration deals with the enforcement of a contract privately negotiated between a union and an employer, mandatory employment arbitration concerns employment laws established in statutes. Research has found that employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts. Indeed, employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration providers.[3]

Background: The Supreme Court's role in the increased use of mandatory employment arbitration agreements

A crucial 1991 Supreme Court decision, *Gilmer v. Interstate/Johnson Lane*,[4] upheld the enforceability of mandatory employment arbitration agreements, meaning that such agreements now had the potential to substantially change how the employment rights of American workers are protected. But the practical impact of mandatory employment arbitration depends on whether or not American businesses decide to require that their employees sign these agreements as a term and condition of employment. Research from the 1990s and 2000s found that mandatory employment arbitration was expanding and by the early 2000s nearly one-quarter of the workforce was subject to mandatory arbitration. However there was a lack of subsequent research tracking whether this growth trend had continued beyond the early 2000s and describing the current extent of mandatory employment arbitration (see literature review, next section below).

The lack of basic data on the extent of mandatory arbitration is especially concerning given that recent years have seen a series of court decisions encouraging the expanded use of mandatory arbitration. In two key decisions, *AT&T Mobility LLC v. Concepcion* (2011) and *American Express Co. v. Italian Colors Restaurant* (2013),[5] the Supreme Court held that class action waivers in mandatory arbitration agreements were broadly enforceable. This meant that businesses could not only use mandatory arbitration agreements to bar access to the courts for individual claims, but they could also shield themselves from class action claims. This gave businesses an additional incentive to include mandatory arbitration agreements in employment and other contracts.

In October 2017, the Supreme Court will hear a consolidated set of cases (*Murphy Oil/Epic Systems/Ernst & Young*) challenging the enforceability of class action waivers in mandatory employment arbitration agreements.[6] In this set of cases, the central issue is whether requiring this waiver of the ability to use collective action to address employment law violations is a violation of the protections of the right to engage in concerted action contained in Section 7 of the National Labor Relations Act (NLRA). If the Supreme Court

accepts the argument that such waivers are in violation of the NLRA, the Court's decision would effectively put an end to the use of class action waivers in mandatory employment arbitration agreements. However, if the Court sides with the employers' arguments in these cases, this will signal to businesses that the last potential barrier to their ability to opt out of class actions has been removed. This would likely encourage businesses to adopt mandatory employment arbitration and class action waivers even more widely.

Existing research on the extent of mandatory employment arbitration

Despite growing attention to the issue of mandatory employment arbitration, there is a lack of good data on how widespread it has become. A 1992 academic study of conflict resolution procedures used by corporations in nonunion workplaces found that 2.1 percent of the companies surveyed included arbitration in their procedures.[7] The one major governmental effort to investigate the extent of mandatory arbitration was a 1995 GAO survey, which found that 7.6 percent of establishments had adopted mandatory employment arbitration.[8]

Colvin's 2003 survey of conflict resolution procedures used in the telecommunications industry found that 14.1 percent of establishments in that industry had adopted mandatory arbitration and that these procedures applied to 22.7 percent of the nonunion workforce in the industry (since larger establishments were more likely to have adopted mandatory arbitration).[9]

The overall picture we have is one of mandatory employment arbitration expanding through the 1990s and early 2000s to nearly a quarter of the workforce. This study seeks to determine whether this expansion has continued beyond 2003 and how widespread mandatory employment arbitration is currently.

Findings of this study

To investigate the extent of mandatory employment arbitration, we conducted a national survey of private-sector American business establishments, focusing on the use of mandatory arbitration for nonunion employees. The survey was conducted from March to July 2017 and had a sample size of 627, yielding a margin of error at 95 percent confidence of plus or minus 3.9 percentage points.

More than half of private-sector nonunion workers are subject to mandatory arbitration

On the central question of whether employees were required to sign a mandatory "agreement or provision for arbitration of legal disputes with the company," 50.4 percent

of respondents indicated that employees in their establishment were required to enter into this type of agreement.

Although mandatory employment arbitration is usually established by having employees sign an arbitration agreement, typically at the time of hiring, in some instances businesses adopt arbitration procedures simply by announcing that these procedures have been incorporated into the organization's employment policies. An additional 3.5 percent of establishments had adopted mandatory arbitration using this second mechanism. Combined with the 50.4 percent of employers who require employees to sign an agreement, this means that a total of 53.9 percent of all establishments in the survey had adopted mandatory employment arbitration through one of these two mechanisms.

The establishments that have adopted mandatory arbitration tend to be those with larger workforces. Adjusting for workforce size, overall 56.2 percent of employees in the establishments surveyed were subject to mandatory arbitration procedures. Extrapolating to the overall private-sector nonunion workforce, this corresponds to 60.1 million American workers who are now subject to mandatory employment arbitration procedures and no longer have the right to go to court to challenge violations of their employment rights.[10]

Larger companies are more likely to adopt mandatory employment arbitration than smaller companies

As mentioned above, the likelihood that an employer will adopt mandatory employment arbitration varies with the size of the employer. Whereas 53.9 percent of all establishments had mandatory arbitration, among establishments that were part of companies with 1,000 or more employees, 65.1 percent had mandatory arbitration. In general, larger organizations with more sophisticated human resource policies and better legal counsel are more likely to adopt policies like mandatory arbitration that protect them against legal liability.[11] They could also become trendsetters over time if smaller employers copy these practices that larger employers have proven to be effective in protecting employers against legal actions.

Mandatory arbitration discourages employees from bringing claims when their rights are violated

Although around 60 million American workers are now subject to mandatory employment arbitration procedures, this does not mean that the number of workers arbitrating workplace disputes has increased correspondingly. It has not. Mandatory arbitration has a tendency to suppress claims. Attorneys who represent employees are less likely to take on clients who are subject to mandatory arbitration,[12] given that arbitration claims are less likely to succeed than claims brought to court and, when damages *are* awarded, they are

likely to be significantly smaller than court-awarded damages.[13] Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney.

In an earlier study, Colvin and Gough (2015) found that an average of 940 mandatory employment arbitration cases per year were being filed with the American Arbitration Association (AAA), the nation's largest employment arbitration service provider.[14] Other research indicates that about 50 percent of mandatory employment arbitration cases are administered by the AAA.[15] This means that there are only about 1,880 mandatory employment arbitration cases filed per year nationally. Given the finding that 60.1 million American workers are now subject to these procedures, this means that only 1 in 32,000 employees subject to these procedures actually files a claim under them each year. These findings indicate that employers adopting mandatory employment arbitration have been successful in coming up with a mechanism that effectively reduces their chance of being subject to any liability for employment law violations to very low levels.

In addition to losing their right to private legal action, nearly 25 million of these workers are also prohibited from participating in class action suits

Although class action waivers are one of the most controversial features of mandatory arbitration procedures, it is important to recognize that mandatory arbitration agreements do not necessarily include class action waivers. Among the survey respondents whose companies had mandatory arbitration procedures, 30.1 percent included class action waivers. These tended to be in establishments with larger workforces, so overall 41.1 percent of employees subject to mandatory arbitration procedures were also subject to class action waivers. Relative to the overall workforce, including both those subject to and those not subject to mandatory arbitration, these estimates indicate that 23.1 percent of all private-sector nonunion employees are subject to class action waivers in mandatory arbitration procedures, corresponding to 24.7 million American workers.

The finding that many employers who have adopted mandatory employment arbitration have not included class action waivers in their procedures stands in contrast to the situation with consumer financial contracts, which the CFPB found almost always include class action waivers along with mandatory arbitration.[16] One explanation for the lower use of class action waivers in the employment setting is the ongoing legal uncertainty about their enforceability given the NLRA issues that the Supreme Court will be deciding in the upcoming *Murphy Oil/Epic Systems/Ernst & Young* cases.

Conclusion: Mandatory arbitration is a growing threat to workers' rights

Mandatory employment arbitration is the subject of fierce legal and policy debates. There is growing evidence that mandatory arbitration produces outcomes different from those of litigation, to the disadvantage of employees, and suffers from due process problems that give the advantage to the employers who impose mandatory arbitration on their workers.[17] What has been less clear is how widespread the impact of mandatory employment arbitration is. In the consumer arena, the CFPB's 2015 study showed that mandatory arbitration clauses are common, being included in a majority of credit card, prepaid card, student loan, and payday loan agreements.[18] By contrast, in the employment arena our knowledge of the extent of mandatory arbitration was limited to a few surveys from the 1990s and early 2000s, the latter of which suggested that nearly a quarter of employees might have been subject to mandatory arbitration by that point in time.

The study described in this report shows that mandatory employment arbitration has continued to grow in extent, and now, in 2017, in over half of American workplaces, employees are subject to mandatory arbitration agreements that take away their right to bring claims against their employer in court. This represents a dramatic and important shift in how the employment rights of American workers are enforced. Rather than having their rights adjudicated through the public courts and decided by juries of their peers, more often now American workers have to bring claims—claims that are based on statutes enacted by Congress or state legislatures—through arbitral forums designated by agreements that their own employers drafted and required them to agree to as a condition of employment.

The employment conditions experienced by the American worker have changed dramatically in recent decades as labor standards and their enforcement have eroded, union representation has declined, and the wage-suppressing effects of globalization have been amplified by an overvalued U.S. dollar and trade agreements that have eroded workers' power. Against this backdrop of increased economic risk and uncertainty for workers and the disruption of traditional protections, laws protecting employment rights such as the minimum wage, the right to equal pay, and the right to a safe workplace free of harassment or discrimination based on race, gender, or religion have become increasingly important as a workplace safety net. However, these protections are at risk of being undermined if there is no effective means of enforcing them.

Mandatory employment arbitration has expanded to the point where it has now surpassed court litigation as the most common process through which the rights of American workers are adjudicated and enforced. It is likely to become an even more widespread practice if the Supreme Court upholds the enforceability of class action waivers in its October 2017 decision. In fact, if the Court rules in favor of the employers in these cases, imposing mandatory arbitration with class action waivers is likely to become the predominant

management practice and workers will find it exponentially more difficult to enforce their rights going forward.

About the author

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Methodological appendix

To measure the current extent of mandatory employment arbitration, we conducted a national-level survey of private-sector employers. The survey was funded by the Economic Policy Institute and administered through telephone- and web-based methods by the Survey Research Institute (SRI) at Cornell University.

The study measured the extent of mandatory employment arbitration by surveying employers rather than by surveying employees because research has found that employees are often unaware or fail to recall that they have signed arbitration agreements and may not understand the content and meaning of these documents.[19] The survey was limited to private-sector employers because public-sector employees typically have their employment regulated by specific public-sector employment laws and employment practices differ substantially between private- and public-sector employers. The survey focused on nonunion employees since unionized employees have their employment governed by collective bargaining agreements, which provide for labor arbitration to resolve disputes. Although both are forms of arbitration, labor arbitration differs in many respects from mandatory employment arbitration and should not be included in the same category.[20]

The survey population was drawn from Dun & Bradstreet's national marketing database of business establishments. It was stratified by state population to be nationally representative. The survey population was restricted to private-sector business establishments of 50 or more employees, and the analysis was restricted to procedures affecting nonunion employees. The individual respondents were the establishment's human resources manager or whichever individual was responsible for hiring and onboarding employees. The reason for use of this individual as the person to respond to the survey is that mandatory arbitration agreements are typically signed as part of the onboarding paperwork when a new employee is hired. As a result, the manager responsible for this process is the individual most likely to be knowledgeable about the documents the new employee is signing. Typical job titles of individual respondents included human resource director, human resource manager, personnel director, and personnel manager.

Participants were initially contacted by telephone and then given the option of completing phone or web versions of the survey. Follow-up calls were made to encourage participation. Where participants had provided email addresses, a series of emails were also sent to prompt completion of the survey. To encourage participation, respondents were offered the opportunity to win one of ten $100 Amazon gift cards in a raffle drawing from among participants in the survey.

Data collection started in March 2017 and was completed in July 2017. A total of 1,530 establishments were surveyed, from which 728 responses were obtained, representing an overall response rate of 47.6 percent. Some survey responses had missing data on specific questions; however, 627 respondents provided complete data on the key variables of interest. The response rate and sample size are similar to those obtained in past establishment-level surveys of employment relations and human resource practices. The median establishment size in the sample is 90 employees, and the average size is 226 employees. Most establishments are single-site businesses, while 38.2 percent are part of larger organizations. These larger organizations have an average workforce size of 18,660 employees. Overall, 5.2 percent of establishments in the sample are foreign-owned.

Endnotes

1. For a general discussion of the state of the law and practice around mandatory arbitration, see Stone and Colvin 2015.

2. The Consumer Financial Protection Bureau conducted a study of the widespread use of mandatory arbitration in consumer financial contracts and has proposed a rule limiting the use of class action waivers in these agreements. Mandatory arbitration in nursing home resident contracts was the focus of a proposed rule by the Obama administration banning their use.

3. For an overview of this research, see Stone and Colvin 2015, 18–23.

4. 500 U.S. 20 (1991).

5. *AT&T Mobility LLC v. Concepcion* 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant* 133 S. Ct. 594 (2013).

6. *NLRB v. Murphy Oil USA, Inc.*, No. 16-307; *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300. For more about the *Murphy Oil/Epic Systems/Ernst & Young* cases and the implications of the pending Supreme Court decision, see McNicholas 2017.

7. See Feuille and Chachere 1995, 31.

8. GAO 1995. The GAO's survey initially indicated that 9.9 percent of establishments had mandatory arbitration procedures; however, on follow-up a number of them indicated that they had made mistakes in reporting, such as confusing union labor arbitration procedures with nonunion mandatory employment arbitrations. Adjusting for these erroneous responses, only 7.6 percent of the establishments actually had mandatory employment arbitration.

9. See Colvin 2008.

10. This estimate is based on the Bureau of Labor Statistics report "Union Members – 2016," released January 26, 2017, which reports an overall private-sector workforce of 115.417 million, among which 8.437 million are union-represented private-sector workers, with the remaining 106.980 million workers being nonunion.

11. See, e.g., Edelman 1992, showing that larger organizations are more likely to adopt organizational policies designed to protect them from the impact of civil rights laws.

12. See Colvin 2014.

13. See Colvin and Gough 2015.

14. See Colvin and Gough 2015 (1027), reporting that 10,335 claims were filed with the AAA over the 11-year period from 2003–2013.

15. See Stone and Colvin 2015, 17.

16. The Consumer Financial Protection Bureau's Arbitration Study found that over 90 percent of consumer financial contract arbitration clauses that it studied contained class action waivers (CFPB 2015).

17. See Stone and Colvin 2015.

18. CFPB 2015.

19. A study by Zev Eigen (2008) found that a majority of Circuit City employees he interviewed were unaware that they had signed arbitration agreements or of the import of such agreements, even though the company had a longstanding policy of requiring its employees to sign mandatory arbitration agreements and even though Circuit City's arbitration policy had been the subject of an important case on the enforceability of these agreements that was decided by the Supreme Court in 2001.

20. One of the most important differences is that labor arbitration procedures are jointly established and administered by unions and management, in contrast to mandatory arbitration, which is unilaterally established by the employer. In addition, most labor arbitration procedures do not bar employees from bringing statutory employment claims separately through the courts.

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EXHIBIT 11

THE TRUTH ABOUT FORCED ARBITRATION

Americans are more likely to be struck by lightning than win in forced arbitration

SEPTEMBER 2019

AMERICAN ASSOCIATION *for* JUSTICE®

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THE TRUTH ABOUT FORCED ARBITRATION

SEPTEMBER 2019

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EXECUTIVE SUMMARY

Forced arbitration is a rigged system designed by corporations in which injured workers and consumers have no meaningful chance of finding justice. Forced arbitration requires Americans to "agree" to surrender fundamental constitutional rights – often without ever realizing they've done so. When corporations harm workers and consumers by cheating, stealing, or even breaking the law, cases that should be heard by a judge or jury are instead funneled into a secret system controlled by the wrongdoers in which there is no right to go to court, no right to a jury, no right to a written record, no right to discovery, no transparency, no legal precedents to follow, no opportunity for group actions when it would be too difficult or costly to file a claim alone, no guarantee of an adjudicator with legal expertise, and no meaningful judicial review. Without such checks and balances, the deck is stacked heavily against workers, patients, and consumers, and systemic misconduct is allowed to continue in secret.

Forced arbitration's proponents counter that the process is faster, fairer, and better for workers and consumers than going to court. However, this comprehensive analysis of the self-reported data provided by the arbitration organizations makes clear that forced arbitration is not an alternative judicial process, but instead eliminates claims, immunizes corporations, and allows abuse, discrimination, fraud, and essentially all other corporate wrongdoing to go unchecked. Americans are more likely to be struck by lightning than they are to win a monetary award in forced arbitration.

Claim Elimination

- It is estimated that more than 800 million arbitration provisions permeate our everyday lives.[1] However, the American Arbitration Association (AAA) and JAMS, the two most dominant consumer arbitration providers, recorded only approximately 30,000 consumer arbitrations over five years (2014-2018), an average of just 6,000 per year.
- In contrast, there are more than 2 million small claims cases filed in court every year.[2]
- **Despite having millions of customers—all subject to forced arbitration agreements—corporations such as Amazon (101 million Prime subscribers but just 15 forced arbitrations over five years), GM (8 million vehicles sold a year but just 5 forced arbitrations over five years), and Walmart (275 million customers a week but just 2 forced arbitrations over five years) rarely face any claims.**

Consumer Winners

- Only 1,909 consumers won a monetary award over the five-year period.
- On average, approximately 382 consumers won a monetary award each year—less than the number of people struck by lightning each year in the United States.[3]
- Only 6.3% of cases arbitrated at either AAA or JAMS resulted in consumers winning a monetary award over the five years.
- **Over the last five years, no corporation has used forced arbitration more than AT&T. Nearly 1,000 consumers attempted to go through the forced arbitration process between 2014 and 2018, claiming more than $440**

million in damages. Seventeen consumers won a monetary award, collecting a total of just $376,251.

Nursing Home Forced Arbitration

- Forced arbitration clauses allow nursing homes to avoid accountability for everything from negligent care to sexual assault.
- Over five years, consumers pursuing a nursing home claim with wither AAA or JAMS won a monetary award in only four cases.
- **In one case, the corporation—The Rehabilitation & Nursing Center at Greater Pittsburgh—was awarded $20,000 more than it had claimed. The arbitrator in that case was a former human resource counsel to a large hospital system in Ohio.**

Employment Forced Arbitration

- Of the 60 million employees subject to forced arbitration, only 11,114—0.02%—tried to pursue a dispute in forced arbitration.
- Just 282 of these employees were awarded monetary damages over the five-year period, an average of 56 workers per year—less than one-ten-thousandth of one percent of covered workers.
- **The corporation with the most employment arbitration cases at AAA was Darden Restaurants, owners of the Olive Garden and LongHorn Steakhouse chains. Since 2005, Darden has paid over $14 million to settle lawsuits filed in court over reprehensible working conditions. However, in forced arbitration, Darden faced just 329 claims. Employees won an award in just eight cases, for a total of $73,961.**

Forced Arbitration Involving Credit Cards and Banks

- Consumers pursued 6,012 forced arbitrations involving financial claims, claiming at least $3.7 billion in damages. They won monetary awards in just 131 cases (2.2%), totaling $7.4 million—0.2% of the claimed damages.
- Corporations pursued 137 financial claims through arbitration, but remarkably won monetary awards in twice as many as they initiated, winning $5.4 million in 314 cases.
- **No bank used forced arbitration more than Spain-based Santander. Consumers initiated 848 arbitrations against the corporation, claiming $44 million in damages. Only three consumers won a monetary award, for a total of $10,978, equivalent to 0.000002% (two one-hundred-thousandths of one percent) of the corporation's $315 billion in revenues.**

Data Manipulation

- AAA, the country's largest consumer arbitration provider, deletes data every quarter in a way that significantly distorts arbitration results.
- AAA deletes cases by *filed date*, instead of *closed date*, even though this is a database of *closed claims*. This has the effect of systematically scrubbing claims that take a long time from its database.
- The longer a case takes, the quicker it is purged from the database. All research claiming that arbitration is faster than litigation has been skewed by this data elimination.
- **The oldest known filed case was filed in August of 2009—a business-initiated residential construction case—and was closed four and half years later in March 2014. However, because the case was pending it did not appear in any published database until the second quarter of 2014, and then was deleted in the very next quarter because of its early filing date.**

INTRODUCTION: HOW FORCED ARBITRATION ELIMINATES CLAIMS

Forced arbitration clauses are endemic in today's marketplace—hidden in everything from credit card agreements to pest control contracts. It is estimated that more than 800 million arbitration provisions infiltrate our everyday lives.[4] Given how common such forced arbitration clauses are, it is surprising how few cases are ever pursued through arbitration. AAA and JAMS are the predominant arbitration organizations for consumers forced into arbitration.[5] Yet over the last five years, the two organizations have recorded only approximately 30,000 consumer arbitrations, an average of 6,000 per year.[6]

To put that number in context, there are more than 2 million claims in small claims court each year.[7]

As this report shows, there is a clear reason for the disparity between the number of forced arbitration clauses in effect and the number of cases that are ever filed by consumers. Forced arbitration is a rigged corporate-friendly scheme in which consumers have the odds stacked against them.

Although some states have passed laws requiring arbitration organizations to disclose information to the public about consumer arbitrations, this information is limited, error-filled, and subject to manipulation by the issuing organizations.[8] Nor is there any access to the underlying materials, meaning that individual case information detailing systematic negligence and wrongdoing remain concealed from the public eye. These limited, incomplete disclosures pale in comparison to the information available in traditional court cases.

It is difficult to quantify how many consumer arbitrations there are because of the way the arbitration providers count cases. Neither AAA nor JAMS publish cases in their databases until the cases are concluded (other arbitration organizations include "pending" cases), so information on the number of cases filed is incomplete.

In addition, AAA deletes data every quarter. In fact, not only does AAA delete data but it deletes data by "filing date," which has the effect of removing closed cases from subsequent years. In effect, AAA is not deleting cases based on how old they are but on how long they took.

Because AAA deletes cases by filed date instead of closed date, claims that take a long time are automatically scrubbed from its database. For instance, archived records preserved by Yale Law School show that more than 1,000 closed cases in 2014 have been deleted from AAA's current records for 2014.[9] At least 389 of those cases took more than a year, 90 took more than two years, and 20 took more than three years—all of which have been purged. The oldest known filed case was filed in August of 2009 and was closed four -and-a-half years later in March 2014, but it was deleted from the database that same year (the third quarter of 2014). In reality many more cases closed in 2014 are likely to be missing and any cases that took longer than four years will have been deleted.

This data manipulation—whether done purposefully or by accident—has major ramifications for researchers and policymakers trying to judge the efficiency and fairness of forced arbitration.

This analysis of AAA and JAMS closed claims examines cases that were filed and terminated during the five years from 2014 to 2018. We attempted to compensate for AAA's data deletion by restoring missing data culled from archived databases. To pinpoint consumer success, we focused on the only true measure of a documented consumer victory: monetary awards. The number of successful consumers identified this way was actually higher than the given number of "prevailing" consumers and appears to be a more accurate measure of how many consumers are truly successful.

How Many Consumer Forced Arbitrations Are There?

Over the last five years, the two major arbitration providers have only recorded around 30,000 consumer arbitrations, an average of 6,000 per year. To put that number in context, AAA's total alternative dispute resolution (ADR) caseload, including commercial arbitration, is approximately 200,000 cases *each year.*[10]

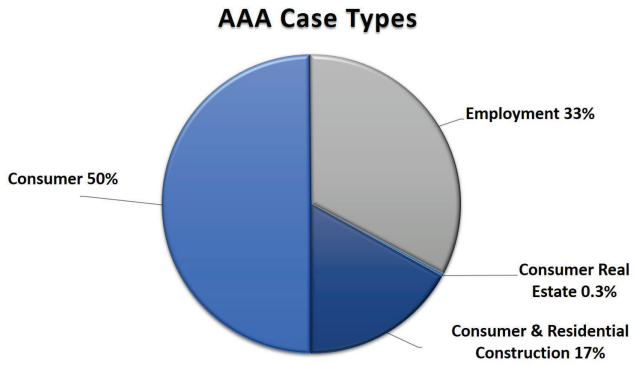
YEAR	CASES CLOSED
2014	3,569
2015	4,304
2016	5,892
2017	7,409
2018	9,165
TOTAL	**30,339**

Total consumer arbitrations at AAA and JAMS - 2014-2018.

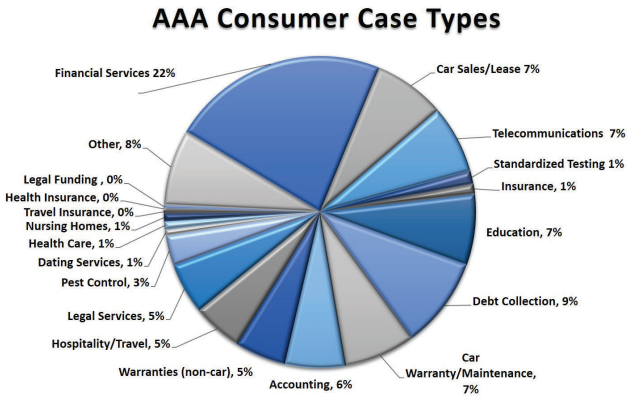
Case Types

Forced arbitration provisions are most frequently associated with financial services agreements, like credit cards, or employment contracts. But they are also found in a wide variety of other situations, including everything from dating apps to nursing home contracts.

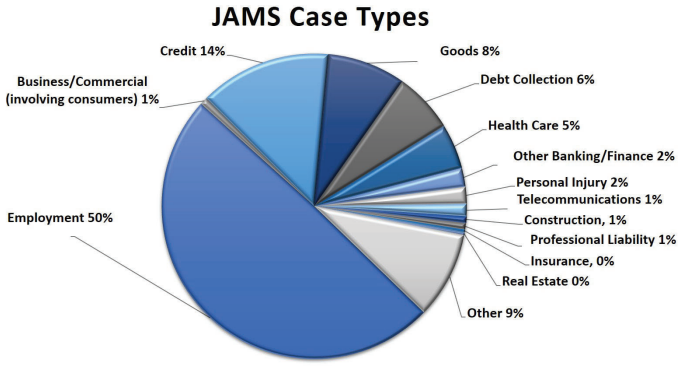
AAA's cases are split into five broad categories.[11]



The "Consumer" cases are then split into further subsets.



JAMS does not use the same categories, though there is some overlap.



Why Don't Consumers File in Forced Arbitration?

As mentioned above, over the last five years, the two major forced arbitration providers have recorded only approximately 30,000 consumer arbitrations. This is not an indication that forced arbitration does not work but rather that it works just as intended: by eliminating claims. As University of Wisconsin-Madison Law professor David S. Schwartz puts it:

> "*It is not a justice system… It is not demonstrably fair. It is not imposed to promote small claims or otherwise help the "little guy" who is excluded from meaningful access to the courts. Finally, let's stop calling it "mandatory arbitration," that bloodless, hypertechnical, and misleading term. "Mandatory" implies that the arbitration process is binding on both sides, but that is less than half true: it is voluntarily chosen by the defendant, who drafts the arbitration clause, and "mandatory" only on the party who doesn't want it, typically the plaintiff. So what is this thing? It is claim-suppressing arbitration. It is designed and intended to suppress claims, both in size and number.*"[12]

Other researchers have come to the same conclusion.[13] A 2015 *New York Times* investigation backed up these conclusions, finding that some of the country's largest corporations, with millions of customers subject to pervasive forced arbitration clauses, only ever faced a handful of consumer arbitrations. "*Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily,*" the *Times* wrote. "*But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.*"[14]

> "Once blocked from going to court as a group, most people dropped their claims entirely."
>
> – *The New York Times*

The *Times* investigation found that between 2010 and 2014, "*only 505 consumers went to arbitration over a dispute of $2,500 or less. Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations in those five years, the data shows. Time Warner Cable, which has 15 million customers, faced seven.*"

Consumers Do Not Understand Forced Arbitration

The Consumer Financial Protection Bureau (CFPB) studied forced arbitration extensively, and concluded few consumers chose to try their chances in forced arbitration. According to the CFPB, "*almost no consumers filed arbitrations about disputes under $1,000.*"[15] The agency also noted that out of 13 million consumers in conventional class actions, only 3,605 opted out of the settlements, and only a handful of those chose to file an arbitration claim.[16]

One reason the CFPB suggested that consumers did not pursue arbitration claims was that the arbitration agreements were too impenetrable for them to understand. A 2015 survey conducted by St. John's University Law Professor Jeff Sovern found definitive evidence of such confusion and concluded consumers had a "*profound lack of understanding about the existence and effect of arbitration agreements.*"[17] The survey found that while 43% of consumers recognized a sample contract included an arbitration clause, 61% believed they would, nevertheless, have a right to go to court. Less than nine % realized the truth: that there was a clause that would prevent them from exercising their constitutional right to go to court. Writing in *American Banker*, Sovern concluded, "*the consent consumers provide when they sign a contract taking away their right to sue is no more meaningful to most consumers than if the clause had been printed in a foreign language.*"[18]

"The consent consumers provide when they sign a contract taking away their right to sue is no more meaningful to most consumers than if the clause had been printed in a foreign language."

– St. John's University Law Professor Jeff Sovern

Alan Kaplinsky, one of forced arbitration's leading proponents, has also acknowledged that there are few consumer arbitrations. Kaplinsky claims that's because instead they either call the company to complain or go to the Better Business Bureau: "*That's why you don't see a heck of a lot of arbitration or litigation when there's a clause.*"[19] There are no data to back this up though, and long-standing research suggests consumers don't complain to the company or Better Business Bureau.[20]

Company	Number of Customers (U.S.)	Number of Arbitration Cases from 2014-2018 (AAA & JAMS)
Amazon	101 million Prime subscribers	15
AT&T (includes DirecTV)	177 million AT&T subscribers	940
CVS	5 million customers per day	46
FedEx	15 million shipments per day	8
GM	8.38 million vehicles sold in 2018	5
Kroger	8.5 million customers per day	2
United Health Group	142 million individuals served	239
Walmart	275 million customers per week	2

Despite having millions of customers and employing forced arbitration agreements, corporations face a comparatively small number of claims.

FAIRER? WHO WINS IN FORCED ARBITRATION?

- 1,909 – Number of Consumer Winners at AAA/JAMS over five years
- 382 – Average Number of Consumer Winners at AAA/JAMS per year
- 6.3% – Percentage of Consumer Winners at AAA/JAMS averaged over five years

Perhaps the most compelling theory for why consumers do not pursue forced arbitration claims against corporations is that they may suspect that a dispute resolution process suggested by the corporation (in fact, required by the corporation) is unlikely to offer them much chance of success. In this, consumers are correct.

The 2015 CFPB analysis of arbitrations in six consumer financial markets found that consumers were successful just 20% of the time.[21] However, analysis of AAA and JAMS' databases shows consumers are far less successful across all industries.

As the CFPB has pointed out, it is not easy to figure out who wins in forced arbitration or even what should count as a win.[22] Both AAA and JAMS list "prevailing" parties, but many cases finished in ways that were inconsistent with the given "prevailing" party. In hundreds of cases at AAA, one party would be listed as prevailing when the other received a monetary award. In one case, a consumer was listed as prevailing but a note mentioned he or she was ordered to return a car. In another case, an employee was listed as prevailing and winning a $390,000 award, only for the corporation to receive $59 million.[23] Conversely, many of those consumers who did win a monetary award are not listed as prevailing. Similarly, JAMS listed 306 prevailing consumers, but only 227 featured an award, monetary or otherwise. Seven of the "prevailing consumer" cases were, in fact, abandoned, withdrawn, or dismissed.[24] "Both" parties were listed as winners in 11 cases. JAMS also often listed "both" parties as prevailing but then did not specify which party received the award, making it impossible to know if a consumer was truly successful.

Both organizations also list "awarded" as an outcome, but hundreds of these "awarded" cases feature no monetary or non-monetary award.

Yale Law School Professor Judith Resnik highlighted the challenges of figuring out case winners when trying to investigate AT&T's arbitration cases:

> "*In the 316 cases in which AT&T was involved between 2014-2017, thirty-nine were described as ending in decisions, called "awards," 251 settled, and twenty-six fell under the categories of "administrative," "dismissed," or "withdrawn." Within the thirty-nine "awarded" cases, twenty-two involved instances when AT&T "prevailed." Of those cases, in three, consumers were to pay the company in amounts ranging from $566 to $2103. In the other seventeen cases that ended in awards, the AAA compilation listed "zero" as funds that would be ordered paid; in nine instances, the compilation listed no party prevailing. In one case, no party was listed as prevailing, but the consumer was described as receiving a positive award. Counting this case along with the other seven claims in which consumers were listed as prevailing, these eight consumer awards ranged from $2.23 to $1,449, with a median of $525.36.*" [25]

Non-Monetary Awards

Both AAA and JAMS include limited data on non-monetary relief but again the data here are misleading in terms of indicating wins and losses. At AAA, 2,249 consumers were listed as receiving non-monetary relief. However, in more than 100 of these cases, corporations were said to have prevailed and in 36 of these cases, corporations won monetary awards, rendering them inconsistent with a successful consumer outcome. In 1,356 of these cases, the non-monetary relief was listed as "other." The relief in the rest of the cases was either recission/reinstatement (as in the reinstatement of a loan), or declaratory judgments (the details of which remain unclear).

JAMS offered more concrete details about non-monetary awards in 30 cases in which consumers allegedly prevailed. In seven cases, the consumers' "award" turned out to be a complete denial of claims and explicit recognition of the corporation as the winning party. In five cases, the "award" was a dismissal, including two which explicitly denied "class-wide arbitration." In eight cases, there was some recognizable consumer relief, including continued phone service, deletion of an item from a credit score, reinstatement and back pay, and repair of an air bag.

Monetary Awards

Given the inadequacies of the data on "prevailing" parties and non-monetary awards, this analysis focuses on the only true measure of a documented consumer victory: monetary awards. This study sought to identify consumers who won a monetary award greater than the corresponding business award (in many cases consumers won an award but the opposing corporation won the same or an even higher award). The number of successful consumers defined this way was actually higher than the given number of "prevailing" consumers, but appears to be a more accurate measure of consumer success.

JAMS offered its own unique challenge by listing "both" parties as prevailing but not distinguishing which party won the listed award (to be conservative, this analysis considered these consumer wins).

	Number of Consumer Winners		
	AAA	JAMS	AAA + JAMS Combined
Consumer v. Any Corporation	1,686 (7.1%)	223 (3.3%)	1,909 (6.3%)

On average, approximately 382 consumers win a monetary award in arbitration each year. **More people are struck by lightning each year in the United States**.[26]

Consumer Winners by Case Type

Overall, in consumer cases, consumers won monetary awards in 5.5% of cases (employment cases saw employee monetary awards even less frequently at 2.3%). But the type of dispute made a significant difference to consumer success. The highest rate of consumers winning a monetary award was in pest control cases (22.8%). On the other hand, no consumer received a monetary award in any nursing home case over the entire five years.

AAA—Consumers Winning Monetary Awards by Case Type	
Pest Control	22.4%
Health Care (Patient/Provider)	22.2%
Consumer & Residential Construction	20.9%
Car Warranty/Maintenance	14.9%
Consumer Real Estate	14.5%
Car Sales/Lease	12.6%
Education	12.6%
Travel Insurance	12.5%
Insurance (Other)	10%
Hospitality/Travel	7.4%
Warranties (Non-Car)	7.2%
Accounting	6.6%
Telecommunications (Phone, Cable)	5.8%
ALL CONSUMER CASES	5.5%
Legal Services	4.7%
Debt Collection	3.6%
Employment	2.3%
Financial Services	2.1%
Health Insurance	zero %

Standardized Testing	zero %
Nursing Home	zero %

JAMS—Consumers Winning Monetary Awards by Case Type	
Insurance	20%
Goods	7%
Telecommunications (phone, cable)	4.8%
Other	4%
Business/Commercial (still involving consumers)	3.8%
Health Care	3.4%
Employment	3.1%
Credit	2.8%
Other Banking or Finance	2.3%
Professional Liability/Malpractice	2.3%
Personal Injury	1.7%
Debt Collection	0.9%
Construction	zero %
Real Estate	zero %

When Corporations File Against Consumers

When businesses initiated a case against a consumer, they won a monetary award 24.8% of the time. When consumers initiated a case, they won an award 7.4% of the time. Beyond that were several curious findings. Consumers actually did better when a corporation initiated a case than when they themselves initiated a case, "prevailing" more often (5% of the time in corporate-initiated cases versus 4.6% of the time in their own cases) and winning monetary awards more often (9.1% of the time in corporate-initiated cases versus 7.4% of the time in their own cases).

No company initiated more cases than ACT, Inc.—the company that administers the ACT test for high school students. ACT initiated 208 cases, all but two of which ended as "awarded" (one was settled and another withdrawn). However, none featured any monetary award and only two suggested any kind of non-monetary relief. Only two consumers "prevailed." Consumers did not fare much better in cases they brought either, with no monetary awards and only three consumers prevailing. The non-profit Level Playing Field has highlighted ACT's arbitration practices before, suggesting that AAA has manipulated data on the company.[27]

Few consumers ever try to pursue an arbitration claim and fewer still win. But beyond that, forced arbitration has other pitfalls. Forced arbitration's proponents like to suggest that corporations usually pay for the cost of the arbitration, and AAA and JAMS themselves claim to cap the consumer contribution to a filing fee of $200 and $250 respectively:

> "*In cases before a single arbitrator where the consumer is the Claimant, a nonrefundable filing fee, capped in the amount of $200, is payable in full by the consumer when a case is filed unless the parties' agreement provides that the consumer pay less… All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the business.*" - AAA[28]

> "*With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is $250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company.*" - JAMS[29]

However, as Public Justice Executive Director Paul Bland has highlighted, many corporations go back on their promises to pay arbitration's costs, forcing consumers to choose between paying for everything or dropping the case.[30] AAA even reprimanded Comcast for refusing to pay fees and told it to stop using the AAA name in its contracts.

Such bait-and-switch behavior is neither cheaper or fairer than traditional litigation. In over 112 cases at AAA, consumers initiated arbitrations and either lost completely or won a lesser award than the defending corporation, and then had to pay 100% of the arbitration fees as well. In those cases, consumers claimed an average of $170,000 per case, won an average of $1,400, but were forced to pay an average of $27,000 in arbitration fees and payments to the defendant and its attorneys.[31]

Consider the experience of these consumers from the AAA/JAMS' databases who chose not to drop their cases and ended up far poorer for it:

- The consumer who apparently initiated an arbitration claim against Fairfield Imports Three LLC, over a car sale/lease for $60,000, and ended up not only losing but also was charged $600,000 for Fairfield's attorney fees.
- The employee who took IPC Healthcare—the healthcare company that agreed to pay $60 million in 2017 to settle a whistleblower employee's claims that the company routinely encouraged staff to overbill Medicare and Medicaid—to arbitration over $15,001, and left with a $300,000 bill for IPC's attorneys' fees.[32]
- The homeowner who took Advantage Contractor Solutions to arbitration claiming $300,000 in a new home construction case, and

who won one-tenth of that 18 months later ($30,228), only to be hit with an arbitration fee of $52,000.[33]

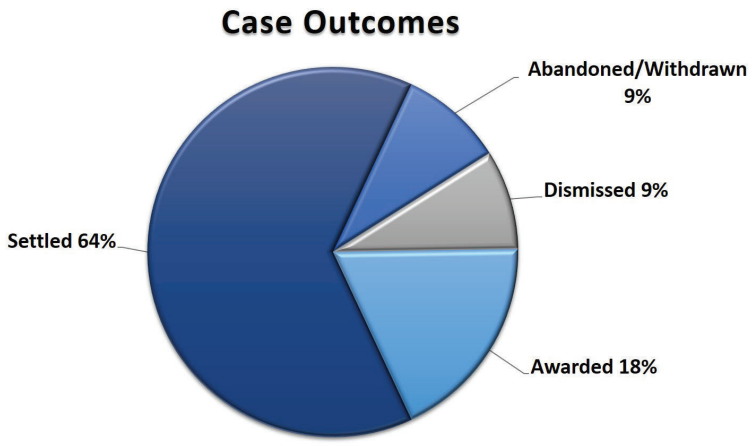
- The employee who took Litchfield Cavo, LLP to arbitration claiming $13 million, only for the arbitrator to award $13 million to the other side.
- The employee who took Document Technologies, LLC to arbitration claiming $16 million, only for the arbitrator to apparently award the defending corporation $59 million.

Numerous such cases apparently exist. Did arbitrators really award corporations defending claims millions of dollars in each case? Or are these database errors? There is no way of knowing because arbitration proceedings conceal access to any and all underlying materials.

Are Forced Arbitration's "Settlements" Favorable to Consumers?

The majority of consumer arbitration cases are "settled." Does this mean consumers won some kind of relief, as is often the case with traditional litigation? It's hard to know because of the secretive nature of forced arbitration and the lack of access to underlying materials. The CFPB pointed out that it is impossible to know what the true outcome of "settled" cases are in arbitration: "*Because our ability to review substantive outcomes is generally limited to arbitration decisions on the merits, the substantive outcomes of most consumer financial arbitration disputes are unknown and largely unknowable to reviewers.*"[34]

However, there is much to suggest that such settlements are not always favorable to consumers. Of the more than 4,000 cases "settled" at JAMS, information was apparently available on the nature of the settlement in 60:[35]



The vast majority of consumer arbitrations are "settled," but provide little to no information about the settlement.

The vast majority of cases listed in AAA and JAMS' databases are "settled." However, there is no way of knowing if these are truly settled or if they have just been closed.

Of the nearly 4,000 cases "settled" at JAMS, information was apparently available on the nature of the settlement in 29:

- In 10 cases, there was an apparent non-monetary award.
- In two of these, both involving Sprint, the consumer received continued service. In three more, the non-monetary award was simply "settled."

- In one case, the corporation appeared to have won.
- The other 4 of the 10 cases were in fact dismissals, two of which also listed "Ruling Denying Class-Wide Arbitration."
- In 19 cases, the settlement listed a monetary award. Nine awards were linked to the consumer prevailing, three were linked to the corporation prevailing, one was linked to both prevailing (but did not identify to whom the award went), one was a monetary award of $0, and five were linked to "Not Applicable" winners.
- All told, in the 29 settled cases for which the outcome could be discerned, consumers received some sort of documented relief in 11, and corporations won documented relief in 8. The other 3,900 feature no information about the nature of the settlement.

At AAA, roughly one in seven of the approximately 15,000 settled cases gave some information about the type of settlement. "Recission" or "reinstatement" was listed as the outcome in several hundred cases, mostly involving car sales or leases, implying that consumers had reinstated auto loans or redeemed repossessed cars. Other outcomes included "declaratory judgment" and "other." Another three% of all AAA cases ended as "administrative," with no more information available. Thus, the vast bulk of AAA's settled cases provided no information about the real outcome.

It may be that some settled cases are actually cases that have been closed with no true settlement. In 2018, lawyers for FitBit unveiled some of the mystery behind arbitration proceedings in a case where they argued no rational party would pay hundreds of dollars in fees to arbitrate a claim over a $162 fitness tracker. FitBit's lawyer said they offered the consumer a settlement, and when they did not hear back, considered the matter "concluded."[36]

As FitBit's lawyer told the court, "*What she is asking us to do is go to arbitration on a claim of $162; that we have to pay $750 just to get the arbitrator… I said, we felt no rational litigant would require that.*"[37]

U.S. District Judge James Donato disagreed, telling FitBit's lawyer,

> "*I could not disagree more. I am developing a very slow but distinct burn over what appears to be an absolutely unacceptable level of gamesmanship by Fitbit in this case. Now, you all came to me and said this case could not be heard in court -- no way, no how -- because it was subject to arbitration. And I litigated that, and I issued an Order, and I sent you to arbitration. For Fitbit now to say, unilaterally,* This case is not arbitrable, because we think it's a cheap case, and we offered her plenty money to get rid of it, and she said "No," and she's crazy as a result of that, so our hands are not tied*, strikes me as profoundly troubling; troubling to the point where I'm beginning to consider whether this is a form of civil contempt.*"[38]

No FitBit case appears in either database.

FASTER? TIME TO RESOLUTION

Forced arbitration's proponents claim arbitration is faster than traditional litigation. Unfortunately, it appears these proponents have been misled by AAA's data manipulation.

To comply with a variety of state laws, consumer arbitration providers are required to publicly release data on the outcomes of cases.[39] Around a third of all consumer arbitration providers do not appear to comply with these laws, but AAA and JAMS do.[40] AAA and JAMS release databases of their consumer cases each quarter but AAA also deletes a quarter each time.

The longer a case takes, the quicker it is purged from the database.

This is not simply a case of deleting the "oldest" quarter as they add the "newest" quarter. AAA deletes cases by *filed date*, instead of *closed date*, even though this is a database of *closed claims* (other organizations include "pending" claims but neither AAA or JAMS goes beyond closed claims). This has the effect of systematically scrubbing claims that take a long time to resolve from its database. For instance, archived records of previous iterations of the AAA database show that more than 1,000 claims closed in 2014 are missing from AAA's current records for 2014 because they were filed before 2014 and have been deleted. At least 389 of those cases took more than a year to close, 90 took more than two years, and 20 took more than three years—all of which are now gone. In reality, many more cases closed in 2014 are likely to be missing and any cases that took longer than four years will have been deleted.

Other analyses of the AAA database are similarly corrupted by this data deletion—for instance, at least $8.2 million in awards *to corporations* in 2014 has disappeared—but no other statistic has been more tainted than the duration of a case. **The longer a case takes, the quicker it is purged from the database.**

On January 6, 2012, a homeowner filed a "new home construction" claim against Tri State Building Specialties. The case was eventually settled on April 17, 2014—27 months later. However, because AAA deleted cases by filing date, the case no longer appears under 2014's closed claims. The oldest known filed case was filed in August of 2009—a business-initiated residential construction case—and was closed four and half years later in March 2014,. However, because the case was pending it did not appear in any published database until the second quarter of 2014, and then was deleted in the very next quarter because of its early filing date.

By way of comparison, JAMS' database features 18 cases filed *before* 2009—cases that *could not* show up in AAA's database because of the deletion strategy. These cases took between and five and six years to close. Any analysis claiming that arbitration is faster than litigation benefits from the automatic deletion of such cases.

It is impossible to know—at least without AAA agreeing to release deleted data—how many cases have been deleted beyond the thousands found in the Yale archive. Neither AAA nor JAMS includes pending claims in their databases (other arbitration providers do). The result is that any claim filed any time before March 2014 that was still pending by July 1, 2014, **has been deleted from the database**. Analysis of a 2017 archive, courtesy again of Yale Law School, finds more than 200 cases that fit this criteria. Any case that takes more than five years, by definition, **can never appear in the AAA database**.

BETTER? REPEAT PLAYERS IN FORCED ARBITRATION

"Repeat players" is a term describing corporations that appear frequently in forced arbitration. Forced arbitration's repeat player problem renders it inherently unfair. Corporate repeat players become highly adept at navigating arbitration proceedings and can potentially select arbitrators with favorable track records. Arbitrators themselves are also at risk of favoring corporate repeat players because they, and their organization, rely on them—not consumers—for repeat business. In contrast, arbitrators who rule in favor of consumers have found themselves occasionally frozen out.[41]

The 2015 CFPB study found that corporate repeat players were represented in 84% of arbitration filings.[42] The CFPB also found that consumers won less often when facing a repeat player corporation (winning 20% of the time against a non-repeat player and 11% of the time versus a repeat player).[43] Other researchers have found that when consumers go up against a corporation with even a limited history of participation in arbitration, they are 79% less likely to win than if they faced a corporation with little to no arbitration history.[44]

This analysis found similar results. Corporate repeat players were represented in 77% of cases.[45]

Number of Repeat Appearances	Number of Corporations in Each Category
1 or more	23,253 (76.6%)
10 or more	15,717 (51.8%)
50 or more	10,895 (29.1%)
100 or more	8,814 (29.1%)
1000 or more	2,452 (8.1%)

Consumer win rates also dropped when facing corporate repeat players. The more frequently a corporation appeared in arbitration, the less likely a consumer was to win a monetary award.

	Consumers Winning a Monetary Award
Consumer v. Any Corporation	1,904 (6.3%)
Consumer v. Repeat Player Corporation	1,042 (4.5%
Consumer v. Repeat Player Corporation with at least 10 prior arbitrations	528 (3.6%)
Consumer v. Repeat Player Corporation with at least 100 prior arbitrations	243 (2.8%)
Consumer v. Repeat Player Corporation with at least 1,000 prior arbitrations	60 (2.5%)

Top Corporate Repeat Players

When the CFPB analyzed consumer arbitrations, it also examined class actions as a comparison. Their analysis of five years of class action settlements involving corporate misconduct in consumer financial markets found that class actions had forced corporations to return at least $2.7 billion in compensation and in-kind relief to an estimated 34 million consumers.[46] It is no surprise then that the most frequent corporate users of forced arbitration are some of the country's (and other countries') biggest banks.

The 10 corporations to use AAA and JAMS most frequently over the last five years were involved in nearly one-fifth of all cases (19%).

Corporation	Cases
AT&T (incl. DirecTV)	940
Santander	852
Citibank	627
Discover	623
American Express	618
Credit One	560
Kaiser Permanente	478
Windstream Communications	421
Darden Restaurants	328
Wells Fargo	327

Top Ten Repeat Player Corporations, 2014-2018 – AAA & JAMS, All Cases.

Over the last five years, no corporation has used forced arbitration more than AT&T. AT&T and its subsidiary, DirecTV, have 177 million customers.[47] A 2017 CBS News investigation uncovered more than 4,000 complaints against the company related to misleading deals, promotions, and overcharging. AT&T forces such disputes into arbitration, using both AAA and JAMS.

Nearly 1,000 consumers attempted to go through the arbitration process between 2014 and 2018, claiming more than $440 million in damages. Seventeen consumers won a monetary award, collecting a total of $376,251.[48]

AT&T recorded revenues of $774 billion over the same period.[49] **Thus, the amount consumers recovered in arbitration against the corporation equaled approximately 0.0005% of the corporation's revenues.**

AT&T's arbitration clause does offer consumers the alternative of pursuing their claim in small claims court. In 2012, Matt Spaccarelli, an AT&T customer with an unlimited data plan who discovered the company was throttling his phone, succeeded in winning $850 in small claims court. AT&T responded by threatening to terminate Spaccarelli's service if he did not sign a non-disclosure agreement.[50]

Repeat Player Arbitrators

Corporations are not the only identifiable repeat players in forced arbitration.[51] Arbitrators themselves frequently appear in multiple cases.

- The top 10 arbitrators each at AAA and JAMS handled 1,776 cases claiming nearly a quarter of a billion dollars ($241,897,611 – the true claim amount was undoubtedly more because 980 JAMS cases listed the claim amount as "unknown").
- These 20 arbitrators ordered nearly $4 million to consumers ($3,935,917) but took in nearly three times as much in arbitrator fees ($9,733,034).
- Of the 1,064 cases handled by the top 10 most frequently appearing arbitrators at JAMS, only 51 (4.8%) resulted in a documented consumer victory. Remarkably, 32 of these consumer-winning cases were handled by one arbitrator—a former in-house corporate counsel—and all but two of those involved payday lender CashCall, Inc.
- The other nine top arbitrators handled an average of 102 cases each but ordered consumers a monetary award in less than three cases each over five years.
- The top 10 most frequently used arbitrators at AAA handled a total of 712 cases.
- Consumers won monetary awards just 34 times in five years when these 10 were in charge. Again, most of those wins were handled by a minority of arbitrators: 28 of the 34 consumer wins were handled by one of three arbitrators. Three of the top 10 arbitrators never

awarded a single consumer a monetary award over the entire five-year period.

- The most frequently used AAA arbitrator—a former insurance agent turned corporate defense attorney from West Virginia—handled 84 consumer arbitrations claiming a total of $6.8 million. He ordered a consumer a monetary award in just one case, for $1,682.[52]
- The second most frequently used AAA arbitrator—a California-based career arbitrator—handled more than 80 employment arbitrations. The employee prevailed in one, winning just $771. The third most frequently used AAA arbitrator—a Florida-based career arbitrator—ordered no consumer awards over five years.

NURSING HOMES, EMPLOYMENT, AND FINANCIAL SERVICES

Nursing Home Arbitration

While financial products, such as bank accounts and credit cards, and employment contracts may make up the bulk of forced arbitration cases, no example of forced arbitration raises more questions about the fundamentally unfair nature of this system than nursing home admission contracts.

Forced arbitration clauses in nursing home admission contracts exploit senior citizens and people with disabilities in their most vulnerable state. People most commonly enter nursing homes when too sick or debilitated to care for themselves, or when no one else is available to care for them. They may suffer from injuries or dementia to the extent that admission to a nursing home is less a choice than a necessity. It is at this point that they or their loved ones are told (or often not told) they must sign away their rights.[53]

A 2011 study by Atlanta's John Marshall Law School professor Lisa Tripp found that 43%—and in some counties, 100%—of nursing homes used pre-dispute forced arbitration clauses for seniors being admitted into nursing homes, and that the American Health Care Association (AHCA)—the nursing home industry trade organization—was pushing a model contract.[54] Since then, experts believe as many as 90% of large nursing home chains and senior living centers have embraced such clauses.[55]

Forced arbitration clauses in nursing homes are not only unreasonable for the residents and families who must sign them but also deprive the public at large of information about problematic facilities. A 2017 CNN investigation found that the federal government had cited more than 1,000 nursing homes for mishandling or failing to prevent alleged cases of rape, sexual assault, and sexual abuse at their facilities between 2013 and 2016.[56] Forced arbitration helps to cover up such abuse.

A 2016 Obama administration rule promulgated by the U.S. Centers for Medicare and Medicaid Services (CMS) and supported by groups such as AARP and the American Bar Association, sought to prohibit such agreements

in long-term care facilities, but was challenged in court by the nursing home industry and never took effect.[57] In June 2017, the Trump administration offered a contrary rule: nursing homes would be allowed to *require* residents to sign forced arbitration agreements or find somewhere else to live.[58]

If pre-dispute forced arbitration clauses in nursing home contracts represent the lowest moral use of such clauses, the AAA/JAMS data also suggest they represent the worst possible consumer outcomes:

- Over the five-year period, there were only 16 nursing home cases at AAA, 10 brought by consumers and 6 brought by corporations.
- No consumer won any of the nursing home cases at AAA over the entire period.
- Corporations won four of the six cases they initiated, receiving a total of $217,010.
- In one case, the corporation—The Rehabilitation & Nursing Center at Greater Pittsburgh—was awarded $20,000 more than it had claimed. The arbitrator in that case was a former a human resource counsel to a large hospital system in Ohio.

JAMS did not list "nursing homes" as a category, however, this analysis was able to identify 65 cases within the "health care" category that involved nursing homes or their parent corporations.

- Consumers brought 52 of the 65 cases, but won only four for a total of $780,959.
- Corporations brought 12 cases (another was brought by "unknown") and were listed as prevailing in 10, and won a monetary award in 5.

Employment Arbitration

Forced arbitration provisions in employment contracts (and sometimes not even in contracts but in employee handbooks and manuals provided post-hiring) allow corporations to push employee disputes, including those involving employment discrimination or sexual harassment, into arbitration procedures that overwhelmingly favor employers. According to the Economic Policy Institute (EPI), at least 60 million employees are covered by such forced arbitration clauses.[59] By 2024, more than 80 percent of private-sector, nonunion workers will be covered by forced arbitration clauses.[60] Employee opt-out options are rare and sometimes impractical: in the case of Kindred Health Care, for instance, employees who wish to opt out of the arbitration provision must terminate their own employment. If they continue to show up for work, Kindred regards them as having "opted-in."[61]

Thus, it is no surprise that of the 60 million employees subject to forced arbitration, only 11,114—0.02%—tried to pursue a dispute.

There are good reasons why employees do not tend to look at forced arbitration as a genuine option when involved in a dispute. A 2011 analysis of AAA employment proceedings in California by Cornell Law Professor Alexander Colvin found that employees won arbitrations with their employer just 21% of the time, as compared to success rates in state and federal courts of between 33 and 60%.[62] The median award when the employee was successful was $36,500, as compared to awards in employment cases in state and federal courts of between $150,500 and $297,000.

This analysis paints a similarly pessimistic picture:

- Just 282 employees were awarded monetary damages over the five-year period at either AAA or JAMS, an average of 56 workers a year.
- Only 2.5% of employment cases resulted in an employee award (that was not outweighed by an even larger employer award).[63]
- Compared to the 60 million covered workers, successful claimants amounted to a vanishingly small 0.00007% (less than one-ten-thousandth of one %) of covered workers.[64]

Other studies have commented on the salary range of the employees involved, but more than half of all employment claims did not list such information rendering such comments unreliable.[65]

In Colvin's employment arbitration study, approximately 66% of arbitrations involved corporate repeat players, and they were almost twice as likely to win as non-repeat players, or "one-shotters" (employees won 32% against one-shot companies, but only 17% against repeat-players).

This analysis of AAA and JAMS found even higher rates of corporate repeat players:

- Out of 11,114 employment cases 8,692 (78.2%) involved repeat player corporations.
- 5,190 cases (46.7%) involved repeat player corporations with at least 10 prior arbitrations.[66]
- 3,121 cases (28.1%) involved repeat player corporations with at least 50 prior arbitrations.
- 2,242 cases (20.2%) involved repeat player corporations with at least 100 prior arbitrations.
- 602 cases (5.4%) involved repeat player corporations with at least 1,000 prior arbitrations.

The corporation with the most employment arbitration cases at AAA was

Darden Restaurants, owners of the Olive Garden and LongHorn Steakhouse chains, among others.

Darden has long suffered from labor problems because of drastic cuts to employee pay. The company, which has 150,000 workers, admits it pays at least 20% of its U.S. workforce no more than the federal tipped minimum wage of $2.13 an hour, and then pushes those tipped workers to do as much non-tipped work (for instance cleaning and table prep) as possible.[67] Since 2005, Darden has paid over $14 million to settle lawsuits over such working conditions. The company has also spent an average of $1.8 million a year since 2008 to lobby against legislation promoting higher wages and better working conditions.

At AAA and JAMS, Darden faced 329 employment arbitrations claiming more than $20 million in wages and damages. Employees won an award in just eight cases, for a total of $73,961.

The corporation with the most employment arbitration claims at JAMS was CashCall, a payday lender that has been sanctioned by the CFPB and state regulators for charging consumers interest rates approaching 350% that were illegal in many states.[68] The company faced 123 employment arbitrations, and awards were made in a relatively high 35 cases (28.5%).

CashCall had previously made news among arbitration providers and lawyers with its bizarre arbitration provisions. Prior to turning to AAA/JAMS, CashCall had provided that disputes would be arbitrated by the laws of the Cheyenne River Sioux Tribe. However, because the tribe had nothing to do with CashCall's loans and had no arbitration law, procedures, or even arbitrators, courts had ruled the clause was unenforceable.[69]

Credit Cards, Banks, and Other Financial Services Forced Arbitration

The single largest category of forced arbitration clauses outside of employment contracts was financial services, including bank accounts and credit cards, with a combined 6,751 cases.[70]

- Consumers brought 6,012 of these cases between 2014 and 2018, claiming at least $3.7 billion in damages (JAMS did not reveal the claim amount in three-quarters of all cases).

- They won monetary awards in just 131 cases (2.2%), totaling $7.4 million—0.2% of the claimed damages.
- Corporations brought 137 cases, but remarkably won monetary awards in twice as many as they initiated, winning $5.4 million in 314 cases.

This finding matches those of other researchers. EPI also found that consumers initiating claims against financial institutions often ended up paying out of pocket. "*While the average consumer who* wins *a claim in arbitration recovers $5,389, this is* not even close *to a typical consumer outcome. Because consumers win so rarely, the average consumer ends up* paying *financial institutions in arbitration—a whopping $7,725.*"[71]

The second-most frequent corporate user of forced arbitration over the five-year period was the Spain-based bank Santander.

Many banks force consumers into arbitration but none as often as Santander. Consumers initiated 848 arbitrations against the corporation, claiming $44 million in damages (Santander itself initiated another four). Only three consumers won a monetary award, for a total of $10,978.[72] Santander's revenue over the five-year period was $315 billion. Thus, the amount consumers recovered in arbitration equaled approximately 0.000002% (two one-hundred-thousandths of one %) of the corporation's revenues. Consumers have fared better against Santander when able to go to court. In 2018, Santander settled with the CFPB for $11.8 million over claims it misled consumers into extending auto loans.[73] In 2017, Santander settled with Massachusetts and Delaware over similar claims for $26 million.[74] In 2015, Santander was forced to settle with the U.S. Department of Justice for $9.35 million over claims the company was illegally repossessing servicemembers' cars.[75]

CONCLUSION

This analysis examined data from the two most prominent consumer arbitration providers. The same data, in fact, used by forced arbitration's keenest proponents, though here data purged by AAA's data deletion policy was somewhat restored. The findings demonstrate that very few consumers or workers subject to a forced arbitration clause ever pursue a claim, that they rarely win monetary awards, and that non-monetary awards and settlements are not aligned with anything that could be described as favorable to wronged consumers and employees.

All of these conclusions speak to a system that is clearly not "fairer" than the Seventh Amendment right to a trial by jury.

This study also highlighted how seriously AAA's data deletion policy has distorted case duration statistics. The average time to conclude an arbitration can never be properly known when the country's largest consumer arbitration provider systematically removes cases based on their duration. Arbitration may or may not be "faster" than traditional litigation, but the picture portrayed by the available data cannot establish this because it has been so seriously affected by inappropriate deletion.

Finally, can forced arbitration be said to be "better" than litigation? For corporations, clearly the answer is yes, as the U.S. Chamber of Commerce and any number of defense counsel will attest. Corporations face fewer claims in arbitration, lose less often and lose less money, face no precedence, no group actions, and can hide any negligence or wrongdoing in a veil of secrecy. But for consumers and workers, the answer is no.

METHODOLOGY

This analysis used databases provided by the two largest consumer arbitration providers, AAA and JAMS. It examined cases that were filed and terminated during the five years from 2014 to 2018. Because AAA deletes data by filing date, thereby removing cases that closed during the representative time period, researchers attempted to repair the database with the addition of identified missing data culled from archived databases.

Both arbitration providers' databases contain other imperfections common with any database, including missing data, duplicate records, and differing categories between databases. At AAA, at least 37 cases listed the involved corporation as simply "Corporate Legal" and at least 300 cases listed the corporation as "None." Similarly, at JAMS at least 25 cases listed the involved corporation as "Private Party." AAA listed monetary awards by party but offered no details on non-monetary awards. JAMS occasionally offered details on non-monetary awards but did not differentiate between awards to corporations and awards to consumers (in some cases "both" parties were listed as prevailing but no information was present to identify which party received the listed award).

AAA's databases includes multiple duplicate records and partial duplicates. The organization claims these are not mistakes but represent multiple defendants or claimants. In truth, that is not the case, as other researchers have found.[76] This analysis found hundreds of duplicate records – in some cases the records were completely identical, in others there were differences likely attributable to errors filling out forms, such as records identical except for blank fields.[77]

Both AAA and JAMS list "prevailing" parties but many cases finished in ways that were inconsistent with the given "prevailing" party. In hundreds of cases at AAA, one party would be listed as prevailing when the other received a monetary award. Both organizations also list "Awarded" as an outcome, but hundreds of these "awarded" cases feature no monetary or non-monetary award.

Given the inadequacies of the data on "prevailing" parties and non-monetary awards, we focus here on the only true measure of a documented consumer

victory: monetary awards. This study sought to identify consumers and workers who won a monetary award greater than the corresponding business award (in many cases consumers won an award, but the opposing corporation won the same or an even higher award). The number of winning consumers defined this way was actually higher than the given number of "prevailing" consumers, but appears to be a more accurate measure of how many consumers are successful.

JAMS offered its own unique challenge by listing "both" parties as prevailing but not distinguishing which won the listed award (to be conservative, we considered these consumer wins).

The final, and most damaging, limitation of the data was the lack of access to underlying materials. Not only can records not be verified, but specific details cannot be identified. For instance, AAA's categorization of dispute types does not allow researchers to pinpoint disputes as fundamental as credit cards. Nor is there any way of knowing how many employment claims featured discrimination or sexual harassment.

While confidentiality is not unknown in traditional litigation, courts do not systematically withhold data on issues like discrimination or sexual harassment, nor do they delete case records arbitrarily.

ENDNOTES

1 Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, UC Davis Law Review, February 2019, https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf.

2 The National Center for State Courts (NCSC) lists 2,035,090 small claims cases in the 37 states for which it has data in 2017.

3 *Lightning Strike Probabilities*, National Lightning Safety Institute, http://lightningsafety.com/nlsi_pls/probability.html; Jacob D. Jenson, Andrew L. Vincent, *Lightning Injuries*, StatPearls, February 19, 2019, https://www.ncbi.nlm.nih.gov/books/NBK441920/.

4 Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, UC Davis Law Review, February 2019, https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf.

5 *Arbitration Study Preliminary Results*, Consumer Financial Protection Bureau (CFPB), December 2013, at 34, https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

6 As detailed later, there is good reason why an exact number is hard to reach. *AAA Consumer and Employment Arbitration Statistics*, American Arbitration Association (AAA), https://www.adr.org/consumer; *Consumer Case Information*, JAMS, https://www.jamsadr.com/consumercases/.

7 In reality there are even more small claims cases, as the National Center for State Courts only retains data on 37 states: *2017 Civil Caseloads – Small Claims*, National Center for State Courts (NCSC), http://www.courtstatistics.org/Explore-the-Data.aspx.

8 See, for instance, state statutes such as the California Code of Civil Procedure §1281.96 and Maryland Commercial Law §§ 14-3901 to 3905. Both require arbitration organizations to publish information, including the name of the non-consumer party and whether it has previously appeared before the arbitration organization, the type of claims, and the prevailing party. Not all arbitration organizations comply with such laws: *Arbitration Reporting in California: Compliance with CCP* §1281.96, Public Law Research Institute, UC Hastings College of the Law, June 28, 2017, http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf.

9 *Yale Law School Consumer Arbitration Data Archive*, Yale Law School, May 23, 2018, https://library.law.yale.edu/news/yale-law-school-consumer-arbitration-data-archive.

10 AAA's website indicates a caseload of 150,000 (*AAA Statement of Ethical Principles*, https://www.adr.org/StatementofEthicalPrinciples), but AAA's Vice President for Statistics and In-House Research, Ryan Boyle, has indicated the true total is closer to 200,000 – see, Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, Yale Law School, 2015, at fn 653, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5950&context=fss_papers.

11 In addition, 13 cases are categorized as "Texas Non-Subscriber."

12 David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239, 2012, https://www.repository.law.indiana.edu/ilj/vol87/iss1/15/.

13 See, for instance, University of Nevada Law professor Jean R. Sternlight: "it is not true that mandatory employment arbitration affords employees increased access to justice. Rather, it seems that the imposition of mandatory arbitration is

actually suppressing the claims of employees." – Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, Scholarly Commons @ UNLV Law, 2015, https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1959&context=facpub.

14 *Arbitration Everywhere, Stacking the Deck of Justice*, New York Times, October 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

15 *CFPB Finds Few Consumers File Arbitration Cases*, Consumer Financial Protection Bureau (CFPB), December 12, 2013, https://www.consumerfinance.gov/about-us/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/.

16 *Arbitration Study*, CFPB, at p.104, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

17 Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, University of Maryland Law Review, 2015, https://digitalcommons.law.umaryland.edu/mlr/vol75/iss1/2/.

18 Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, University of Maryland Law Review, 2015, https://digitalcommons.law.umaryland.edu/mlr/vol75/iss1/2/.

19 *Bank Customers May Get Their Day in Court*, Bloomberg Businessweek, March 20, 2015, https://www.bloomberg.com/news/articles/2015-03-20/bank-customers-may-get-their-day-in-court.

20 Jeff Sovern, *Kaplinsky on Why Consumers Don't File Arbitration Claims*, Consumer Law & Policy Blog – Public Citizen, March 20, 2015, https://pubcit.typepad.com/clpblog/2015/03/kaplinsky-on-why-consumers-dont-file-arbitration-claims-.html.

21 *Arbitration Study*, Consumer Financial Protection Bureau (CFPB), March 2015, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

22 *Arbitration Study*, CFPB, at Section 5, p.5, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

23 As this case was initiated by the employee there may be some error involved. Otherwise, the possibility of losing an arbitration case one brought and being forced to pay $59 million would be a compelling reason to never bring an arbitration case.

24 JAMS does not distinguish between consumer and business awards, so it is possible that consumers are listed as prevailing and have a monetary award listed even though the corporation won more money, as happened with the AAA cases. JAMS also listed 21 cases with a prevailing party of "both" and 74 cases with a prevailing party of "Not Applicable." Because JAMS does not distinguish between awards to corporations and awards to consumers, it is impossible to know which party was successful in these cases.

25 Judith Resnick, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, North Carolina Law Review, March 1, 2018, at 651, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5971&context=nclr.

26 *Lightning Strike Probabilities*, National Lightning Safety Institute, http://lightningsafety.com/nlsi_pls/probability.html; Jacob D. Jenson, Andrew L. Vincent, *Lightning Injuries*, StatPearls, February 19, 2019, https://www.ncbi.nlm.nih.gov/books/NBK441920/.

27 *Is the AAA manipulating its arbitration case data?* Level Playing Field, March 21, 2018, https://blog.levelplayingfield.io/is-data-being-manipulated/.

28 *Consumer Arbitration Rules*, American Arbitration Association (AAA), https://www.adr.org/sites/default/files/Consumer_Rules_Web.pdf.

29 *Consumer Arbitration Minimum Standards*, JAMS, https://www.jamsadr.com/consumer-minimum-standards/

30 Paul Bland, *Bait and Switch: Many Corporations Promise to Pay Arbitration Fees, But Don't*, Public Justice, March 25, 2014, https://www.publicjustice.net/bait-and-switch-many-corporations-promise-to-pay-arbitration-fees-but-dont/.

31 JAMS listed only two consumers as paying 100 percent of fees, though they may or may not have been duplicates of

each other. The consumer(s) in that case won.

32 *IPC Healthcare Agrees to Settle Qui Tam Lawsuit Alleging Company Engaged in Fraudulent Medicaid and Medicare Billing Scheme; Agrees to Pay $60 Million*, National Law Review, February 9, 2017, https://www.natlawreview.com/article/ipc-healthcare-agrees-to-settle-qui-tam-lawsuit-alleging-company-engaged-fraudulent.

33 Many corporations pay arbitration fees up to a point for consumers. In this case, the homeowner was apparently on the hook for 100 percent of the fee, despite winning.

34 *Arbitration Study*, CFPB, at Section 5, p.6, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

35 AAA and JAMS do not use the same case outcome categories. JAMS included "consolidated" and "default" categories not included by AAA. Each of these was less than one percent of cases. AAA featured an "administrative" category, which made up 2.9 percent of cases – as the administrative category featured no awards or and only two prevailing corporations (and no prevailing consumers) it was included with dismissals. AAA formerly also included an "impasse" category, but this is no longer used, and, in fact, AAA's data deletion policy has scrubbed it entirely from records. Using archival records 69 cases (less than one percent) with an "impasse" outcome were reinstated in our version of the AAA database.

36 Transcript of Recordings, *McClellan v. FitBit, United States District Court Northern District of California, No. C 16-00036 JD, May 31, 2018,* https://static.reuters.com/resources/media/editorial/20180601/fitbitclassaction--hearing5.31.pdf.

37 Transcript of Recordings, *McClellan v. FitBit, United States District Court Northern District of California, No. C 16-00036 JD, May 31, 2018,* https://static.reuters.com/resources/media/editorial/20180601/fitbitclassaction--hearing5.31.pdf.

38 Transcript of Recordings, *McClellan v. FitBit, United States District Court Northern District of California, No. C 16-00036 JD, May 31, 2018,* https://static.reuters.com/resources/media/editorial/20180601/fitbitclassaction--hearing5.31.pdf.

39 See, for instance, state statutes such as the California Code of Civil Procedure §1281.96 and Maryland Commercial Law §§ 14-3901 to 3905.

40 *Arbitration Reporting in California: Compliance with CCP §1281.96*, Public Law Research Institute, UC Hastings College of the Law, June 28, 2017, http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf.

41 *Testimony of Elizabeth Bartholet*, Hearing before the United States Senate Committee on the Judiciary, "Courting Big Business: The Suprreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations," July 23, 2008, http://www.judiciary.senate.gov/imo/media/doc/Bartholet%20Testimony%20072308a.pdf.

42 *Arbitration Study*, Consumer Financial Protection Bureau (CFPB), March 2015, at 56-60, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

43 *Arbitration Study*, Consumer Financial Protection Bureau (CFPB), March 2015, at 65-68, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; *Forced Arbitration: How Corporations Use The Fine Print To Bully Americans*, American Association for Justice (AAJ), July 2016, https://www.justice.org/sites/default/files/file-uploads/Forced_Arbitration2016WebFINAL.pdf.

44 David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, The Georgetown Law Journal, Vol. 104:57, 2015, at 111, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614773.

45 AAA and JAMS count previous arbitrations differently. AAA counts all arbitrations, hence every single corporation is considered to have at least one arbitration (there are no companies with zero cases). JAMS only lists prior arbitrations, hence companies that appear just once in the database are listed as having zero prior arbitration .

46 *Arbitration Study*, CFPB, at Section 8, p.4, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

47 AT&T has 153 million phone subscribers and DirecTV has 23.9 million subscribers to DirecTV and DirecTV Now: *AT&T's wireless customer growth slows, revenue misses estimates*, CNBC, January 30, 2019, https://www.cnbc.com/2019/01/30/att-misses-revenue-estimates-on-slower-wireless-customer-growth-.html; *AT&T misses on revenue, loses more DirecTV Now customers*, CNET, April 24, 2019, https://www.cnet.com/news/at-t-misses-on-revenue-loses-more-directvnow-customers/.

48 AT&T itself initiated 10 cases and 18 more were brought by AT&T employees.

49 AT&T's operating revenue worldwide from 2006 to 2018 (in billion U.S. dollars), Statistia, https://www.statista.com/statistics/272308/atundts-operating-revenue-since-2006/.

50 *AT&T allegedly trying to silence lawsuit-winner Matt Spaccarelli*, CBS News, March 15, 2012, https://www.cbsnews.com/news/att-allegedly-trying-to-silence-lawsuit-winner-matt-spaccarelli/.

51 In theory consumers themselves could be repeat players but data is not available to identify consumers, nor is repeat players consumers likely a significant factor.

52 The arbitrator awarded the consumer $7,960 but offset that with a $6,278 award to the defending corporation.

53 Professor Lisa Tripp's research found that nursing home staff frequently insisted on the signing of forced arbitration agreements as a condition of admission, even when such contracts included language stating it was voluntary: Lisa Tripp, *Arbitration in Nursing Home Cases: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 2011, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884279.

54 Lisa Tripp, *Arbitration in Nursing Home Cases: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 2011, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884279.

55 *An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here's Why She Couldn't Sue*, Time, November 16, 2017, https://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/.

56 *Sick, dying and raped in America's nursing homes*, CNN, February 2017, https://www.cnn.com/interactive/2017/02/health/nursing-home-sex-abuse-investigation/.

57 *Nursing Home Residents Could Lose Their Day in Court*, AARP, August 15, 2017, https://www.aarp.org/caregiving/health/info-2017/trump-nursing-home-arbitration-fd.html; *Should CMS Prohibit Arbitration in Nursing Home Admission Contracts?* American Bar Association, October 15, 2018, https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_36/issue_6_august2015/cms_binding_arbitration_comments/.

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59 *The growing use of mandatory arbitration*, Economic Policy Institute (EPI), April 6, 2018, https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

60 *Unchecked corporate power*, Economic Policy Institute (EPI), May 20, 2019, https://www.epi.org/publication/unchecked-corporate-power/.

61 *Dispute Resolution Agreement v.12-15*, Kindred Health Care, on file with AAJ.

62 Alexander Colvin, *An empirical study of employment arbitration: Case outcomes and processes*, Journal of Empirical Legal Studies, 8(1), 2011, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles.

63 Data on "prevailing" parties did not match awards. 308 employees were listed as prevailing and 601 corporations were listed as prevailing.

64 Again, listed "prevailing" parties did not correspond with monetary awards: cases listed as having no prevailing party had awards for one side or the other, and cases with an employee or corporation listed as prevailing actually featured monetary awards for the other side. JAMS listed both sides as prevailing in many cases, some of which featured awards but did not discern to which party.

65 See, for instance, the discussion over "characteristics of employment arbitration cases" in *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration*, NDP Analytics for the Institute for Legal Reform, May 2019.

66 Of those corporations in the JAMS employment claim database listed as having no previous arbitrations, 321 had previously done business with JAMS through "mediation" procedures. Including these as repeat players would increase the percentage of repeat players to 79 percent.

67 *Olive Garden has unlimited breadsticks -- also lots of labor issues, illness outbreaks, and an icky sexual harassment policy*, Salon, February 1, 2016, https://www.salon.com/2016/02/01/olive_garden_has_unlimited_breadsticks_also_lots_of_labor_issues_illness_outbreaks_and_an_icky_sexual_harassment_policy/.

68 *CashCall stopped making loans, but its founder, targeted by regulators, is still in the business*, Los Angeles Times, September 2,

2018, https://www.latimes.com/projects/la-fi-reddam-cashcall-loanme/.

69 *Reference to Nonexistent Arbitration Forum Nullifies Arbitration Agreement*, American Bar Association, March 8, 2018, https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2018/reference-non-existent-arbitration-forum-nullifies-agreement/.

70 Specifically, "financial services" that were not also categorized as employment claims at AAA and "credit" and "other banking or finance" at JAMS. For the sake of clarity we did not include related categories such as "accounting" and "debt collection."

71 *Forced arbitration is bad for consumers*, Economic Policy Institute (EPI), October 2, 2017, https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/.

72 Only two consumers were listed as prevailing. Another 384 consumers were listed as having received some other unspecified relief.

73 *Santander Bank to Pay $11.8 Million to Settle Auto Loan, Insurance Claims*, Insurance Journal, November 21, 2018, https://www.insurancejournal.com/news/national/2018/11/21/509895.htm.

74 *Santander to pay $26m to settle subprime auto-loan case*, Boston Globe, March 29, 2017, https://www.bostonglobe.com/business/2017/03/29/santander-pay-million-settle-auto-loan-securitization-case-healey-says/cSdMsa6xp9J5FnPhKfddML/story.html.

75 *Justice Department Reaches Settlement with Santander Consumer USA to Resolve Allegations Concerning Over 1,100 Illegal Car Repossessions Against Service Members*, U.S. Department of Justice, February 25, 2015, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-santander-consumer-usa-resolve-allegations-concerning.

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77 137 cases were exact duplicates except for "salary range" which was left blank in some cases.

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The American Association for Justice works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations.

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