JUSTICE RESTORED: ENDING FORCED ARBITRATION AND PROTECTING FUNDAMENTAL RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

THURSDAY, FEBRUARY 11, 2021

Serial No. 117–2

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C O N T E N T S

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APPENDIX

RESPONSES TO QUESTIONS FOR THE RECORD

JUSTICE RESTORED: ENDING FORCED ARBITRATION AND PROTECTING FUNDAMENTAL RIGHTS

Thursday, February 11, 2021

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY
Washington, DC

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry "Hank" Johnson Jr. of Georgia presiding.

Present: Representatives Nadler, Neguse, Jones, Deutch, Jeffries, Jayapal, Demings, Scanlon, McBath, Johnson of Georgia, Buck, Issa, Johnson of Louisiana, Steube, Bishop, Fischbach, Spartz, Fitzgerald, Bentz and Owens.

Staff Present: Madeline Strasser, Chief Clerk; John Williams, Parliamentarian; Amanda Lewis, Counsel; Joseph Van Wye, Professional Staff Member; Slade Bond, Chief Counsel; Phillip Berenbroick, Counsel; Doublas Geho, Minority Chief Counsel for Administrative Law; Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Good morning, and welcome to today's hearing on the impact of forced arbitration on the fundamental rights of hardworking Americans and our system of laws. Before we begin, I would like to remind the Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as a part of today's hearing. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices, and we will circulate the materials to the Members and staff as quickly as we can.

I would also remind all Members that guidance from the Office of Attending Physician states that face coverings are required for all meetings in an enclosed space, such as Committee hearings. I expect all Members on both sides of the aisle to wear a mask for the duration of today's hearing.

I now recognize myself for an opening statement. I want to thank the esteemed Witnesses for agreeing to offer testimony at this important hearing today.

I would also like to extend a sincere thanks to Chair David Cicilline for allowing me the honor of chairing this hearing in his absence, as he is disposed as an impeachment manager now in trial in the Senate. This was to be Chair Cicilline's first Subcommittee hearing of this new Congress, and its subject happened to concern the issue of forced arbitration, which is an issue that I have championed since I have first came to Congress back in 2007. So, I am particularly honored to Chair this hearing in his absence.

Forced arbitration is an underhanded maneuver that corporations use to trick consumers, workers, and small businesses out of their right to go to court and seek damages from a jury of their peers when they get injured or cheated. From consumer purchases to nursing home contracts for the elderly, and even when you accept a job offer, corporations use small print to put arbitration clauses into the paperwork that you sign. Without ever knowing it, you have signed away your right to seek justice in court. Instead, you have been tricked into a secret, for-profit dispute resolution process known as binding arbitration.

In forced arbitration, the deck is stacked against the little guy, and most often the corporation comes out on top. Consumers, workers, and small-business people shouldn't need a law degree to be able to go about their daily lives without giving up their constitutional rights. That is exactly what is happening in our society today.

Every day when you are trying to get a job, or you want to purchase a car, or even to buy a TV online, you find yourself pitted against a multimillion-dollar corporate legal department and their 10-page small print contract that forces you to choose between foregoing a necessity or signing away your Seventh amendment constitutional right to a trial by jury. The truth is you really don't have a choice because everywhere you go to make a purchase or seek employment, you run right into a forced arbitration clause. It has gotten to a point where it is a take-it-or-leave-it situation. You can't get a cell phone or a credit card or even a job nowadays unless you sign away your rights because that is what every corporation requires. They force you into binding arbitration because it benefits them, and it is at your expense. It is not fair, and it is not right.

I am also not just talking about traditional pen-and-paper contracts. Arbitration clauses are hidden in the terms and conditions when you download an app. They are hidden in employment paperwork when you get a new job, in packaging for all your devices, and in software updates you don't even realize you are getting. Forced arbitration clauses have even been found enforceable when employees are forced to sign a nonnegotiable contract update during their midyear review. If you signed an arbitration clause, you no longer have a right to take your dispute to court for a trial. Instead, you are forced into the secret, for-profit forced arbitration setup where the corporation that puts you into the arbitration process also chooses where your case will be handled, the judge to hear your case, and the law the judge will apply. With a setup like that,

it is no wonder that most of the time the corporations come out on top. If this sounds unfair, well, it is.

Big businesses that already had all the power in the relationship between themselves and someone like you or me stacked the deck so that they can avoid the only thing out there that could hold them accountable, the United States justice system. It is about accountability, or the lack thereof. That is why this arbitration issue matters, because without accountability, without access to the courthouse, the tragic stories of Americans harmed by corporations can never become a force for good.

Class actions can stop banks from defrauding thousands of their customers. They can thwart corporations from having a culture of sexual abuse of women. Public court cases can close nursing homes, perpetrating widespread abuse. Federal judges can ensure that laws protecting the jobs of working people are obeyed. This balancing of the scales of justice can never happen if forced arbitration clauses continue to shield corporations from you having your day in court.

I have been a proud sponsor of the Forced Arbitration Injustice Repeal Act, also known as the FAIR Act, which was filed today with 155 cosponsors. If it passes, it would secure the accountability that is so lacking today by banning the enforcement of forced arbitration clauses in consumer, antitrust employment, and civil rights disputes.

Corporations have proven time and again that when given the power, they will take more. We need to lay down rules of the road to ensure that people going about their daily lives are not forced to give up their constitutional rights.

With that, I would like to welcome the new Members to the Subcommittee.

I now recognize the distinguished gentleman from Colorado, Ranking Member Buck, for his opening statement.

Mr. BUCK. Thank you, Mr. Chair. I want to thank you and Mr. Cicilline and Mr. Nadler for calling this important hearing.

There are a number of issues that I think are really fascinating and need to be explored, and I am really looking forward to hearing the testimony of the Witnesses today.

The idea that we will do away with arbitration clauses in the contracts and not have a serious impact on our judicial system is something that we need to explore and probably in a separate hearing, since it doesn't appear that these Witnesses are necessarily in a position to talk about the impact of that kind of change to our judicial system.

There are some discrete areas, and sexual harassment is one of them, that I think needs to really be explored to decide whether we take that out of arbitration clauses or not. There are so many, literally, millions of contracts that are entered into every year that contain arbitration clauses. If we do away with those, it would have a serious impact.

Arbitration is a fair system. It is a system that many, many consumers, and others have benefited from the speed that arbitration—that the process—how quickly the process occurs. Oftentimes, the individuals that are involved, the plaintiffs, in the arbitration

clauses receive awards, and they don't have to pay exorbitant attorney's fees with those awards.

So, I am particularly interested in hearing Ms. Carlson's testimony today.

As a FOX News viewer and a FOX News participant or guest sometimes, I have followed that organization somewhat closely. I am really heartened by the fact that they have dealt with a very serious problem. They have gotten rid of a number of predators, people that I would consider predators in their organization. They have tried to clean that organization up, and I think have, to a certain extent, really moved forward on those issues.

I am also very proud that I am a big fan of Ms. Carlson's and she, with her courage, really changed, not just an organization, but the way a number of people in this country look at sexual harassment in the workplace.

So, I am particularly interested in hearing the testimony of these Witnesses and how we can balance the needs of dealing with certain areas.

I think one of the things when I read the testimony of the Witnesses and some other materials last night, what struck me was the difference between doing away with arbitration clauses and doing away with the secrecy provisions in contracts. Obviously, I think all of us or at least most of us would agree, that if there is a predator in the workplace, there should not be secrecy, that person should not be staying in the workplace. The person should be outed, and people should be warned about that kind of behavior for that employer and in other areas. That doesn't mean that arbitration by itself is a problem. So, I think that those are two issues that I want to make sure we distinguish in the employment context of arbitration clauses and are able to make a good judgment about that.

I look forward to this testimony and the hearing, and I thank the gentleman from Georgia for recognizing me.

Mr. JOHNSON of Georgia. I thank you Ranking Member Buck.

The Chair now recognizes the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Thank you, Mr. Chair, for holding today's important hearing on forced arbitration. Nearly a century ago, Congress enacted the Federal Arbitration Act to allow merchants to resolve run-of-the-mill contract disputes through a system of private arbitration that would be legally enforceable. The system that Congress envisioned was to be used voluntarily and only between merchants of equal bargaining power.

Thanks to a series of disastrous Supreme Court decisions, however, this system has been turned entirely on its head. Private arbitration has been transformed from a voluntary form for companies to resolve commercial disputes into a legal nightmare for millions of consumers, employees, and others who are forced into arbitration and are unable to enforce fundamental rights in court. Many companies used forced arbitration as a tool to protect themselves from consumers and workers who seek to hold them accountable for alleged wrongdoing. By burying a forced arbitration clause deep within the fine print of take-it-or-leave-it consumer and employment contract, companies can effectively evade the court sys-

tem where plaintiffs have far greater legal protections and hide behind a one-sided process that is tilted in their favor.

For example, arbitration generally limits discovery. It does not adhere to Rules of Civil Procedure, can prohibit class actions, may preclude the right of appeal and the proceedings and often the results must they seek it. For millions of other small businesses, consumers, and employees, the precondition of obtaining a basic service or product, such as a bank account, a cell phone, or even a job is that someone must agree to resolve any disputes in private arbitration, whether they know it or not. That means that their ability to enforce civil rights, consumer, employment, and antitrust laws are subject to the wins of a private arbitrator, who is not required to provide plaintiffs with any of the fundamental protections guaranteed in the courts.

We have bedrock principle in this country, and that is that all Americans deserve a day in court. We make a mockery of this principle, however, when we allow individuals to be stripped of this right and to be forced into private arbitration proceedings without the safeguards that our judicial system affords. Yet, that is where we find ourselves today.

This problem began in earnest in the 1980s with a series of Supreme Court decisions that misapplied the clear legislative intent of Congress and dramatically expanded the ability of companies to limit the rights of consumers and workers through forced arbitration.

In 1984, the court granted corporations the right to enforce arbitration clauses even when State law rendered them null and void. Strikingly, in 1985, the court had allowed arbitration proceedings to be used not just to settle contracts but also to interpret laws enacted by Congress that implicate fundamental rights.

Most recently, a conservative majority on the Supreme Court reached new heights in misreading what Congress intended. In a 5–4 decision in the Epic Systems case, the court held that employers can combine forced arbitration clauses with class action bans to prevent workers from banning together to hold lawbreaking employers accountable, despite clear authority for workers to bring their claims under the National Labor Relations Act.

That is why shortly I will be reintroducing the Restoring Justice for Workers Act, legislation that would end forced arbitration in employment contracts and would protect workers' rights to pursue work-related claims in court.

Just as Ruth Bader Ginsburg stated in her dissent in Epic Systems, "a congressional correction is urgently in order." I strongly agree.

I also strongly support the Forced Arbitration Injustice Repeal Act, or FAIR Act, introduced by the gentleman from Georgia, Mr. Johnson, which would prohibit forced arbitration in consumer, employment, civil rights, and antitrust disputes. This legislation passed with overwhelming support last Congress by a bipartisan vote of 225–186.

I applaud Congressman Johnson for his leadership on this legislation, and I look forward to passage of this legislation again this Congress.

The widespread use of forced arbitration is serious threat to our entire legal system and to the basic tenets of our democracy. For many companies, arbitration has been a get-out-of-jail-free card to circumvent the basic rights of consumers and workers.

It is up to Congress to reverse this dangerous trend, and I look forward to hearing from our distinguished panel of Witnesses about how best to address this important issue. I thank the Chair for holding today's hearing, and I yield back the balance of my time.

Mr. JOHNSON of Georgia. I thank the gentleman from New York.

With that, it is now my pleasure to introduce today's Witnesses. Our first Witness is Professor Myriam Gilles, who has been the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law since 2003. Before being appointed the Paul Verkuil Chair, Ms. Gilles served as an associate professor and lecturer of law at the Benjamin N. Cardozo School. Additionally, Ms. Gilles sits on the boards of both the Justice Resource Center and Public Justice where she is an executive Committee member of the Class Action Preservation Project. She received her Bachelor of Arts at Harvard College and her law degree at Yale Law School.

Welcome, Ms. Gilles.

Our second Witness is Gretchen Carlson, an acclaimed journalist, best-selling author, filmmaker, and advocate. Ms. Carlson hosted The Real Story and co-hosted Fox & Friends for more than 7 years on Fox News. In 2016, Ms. Carlson was forced out of Fox after her workplace harassment complaint became public and has since focused her energy on advocating for important legislative changes to protect sexual assault and sexual harassment survivors. She has written two New York Times bestsellers and has been recognized by the New York Women in Communications, the National Organization for Women, and YWCA Greater Los Angeles for her advocacy work. Ms. Carlson is the former first Miss America to serve as chair of the organization. She received her Bachelor of Arts at Stanford University and serves as a national trustee for the March of Dimes.

Welcome back, Ms. Carlson.

Today's third Witness is Jacob Weiss, the founder and President of OJ Commerce. Mr. Weiss has a long career as a successful business owner and entrepreneur. In 1998, he founded Baby Age.com, a premier online pregnancy and juvenile product marketplace that has often been featured on Internet Retailer as one of the top 500 internet companies. Most recently, Mr. Weiss founded OJ Commerce, a successful online retailer focused on selling home and office goods. OJ Commerce does a great deal of their business on other platforms, especially Amazon.com.

When Mr. Weiss had a dispute with Amazon regarding their unfair market practices, he learned that buried in the small print of his contract was a forced arbitration clause. Mr. Weiss has spent years attempting to reach a settlement with Amazon through arbitration.

Welcome, Mr. Weiss.

Our last Witness at today's hearing is G. Roger King, the senior labor and employment counsel at the HR Policy Association. He recently retired from the Jones Day law firm where he was a partner. Previously, Mr. King served as professional staff counsel with

the United States Senate Labor Committee. Mr. King has extensive experience with labor, employment, healthcare contract, Administrative, and collective bargaining law. He has represented dozens of clients over the course of his career, including the United States Chamber of Commerce, the National Manufacturers Association, Verizon, General Motors, and Promedica. Mr. King received his undergraduate degree from Miami University, and his J.D. from Cornell University Law School.

Welcome, Mr. King.

We welcome all our distinguished Witnesses, and we thank them for their participation. I want to remind our Witnesses they have an obligation to provide truthful testimony today and that making a false statement to Congress is potentially punishable under section 1001 of title 18 of the United States Code.

I will note at this time that I have opening statements from Chair of the Subcommittee David Cicilline, along with a Member of the Subcommittee Congressman Joe Neguse, who along with David Cicilline are impeachment managers—or is an impeachment manager—and they are working on trial before the Senate right now. I have their statements for entry into the record without objection.

Hearing none, the documents are admitted.

[The information follows:]

MR. JOHNSON OF GEORGIA FOR THE RECORD

Statement of the Honorable David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law

Hearing on "Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights"

Thursday, February 11, 2021 at 10:00 a.m.
2141 Rayburn House Office Building

Buried deep within the fine print of everyday contracts, forced arbitration clauses block American consumers and workers from their day in court to hold corporations accountable for breaking the law before a dispute even arises.

This private system does not have the same procedural safeguards of our justice system, is not subject to oversight, has no judge or jury, and is not bound by laws passed by Congress or the states.

And when forced arbitration is combined with non-disclosure agreements, it effectively silences the victims of rampant corporate misconduct.

For example, Kevin Ziober—who appeared before the Subcommittee last Congress—has served in the U.S. Navy Reserves since 2008. But, in the fall of 2012, he was called into active duty for deployment to Afghanistan.

Kevin notified his employer and conveyed his desire to resume working upon his return. But on his last day of work before his deployment—following his farewell party—he was fired for serving his country.

When he attempted to hold his employer accountable for violating his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), his company forced his claim into arbitration, citing an arbitration clause in the contract that Kevin was required to sign for employment at the company, and consequently waiving his constitutional right to a jury trial.

Unfortunately, Kevin is not alone.

The Military Coalition, which represents more than 5.5 million current and former servicemembers, notes that "service members have been unable to exercise their USERRA rights due to increased use of forced arbitration clauses buried in the fine print of employment contracts."

As the Coalition explains, these clauses "funnel service members' employment discrimination or wrongful termination USERRA claims into private, costly arbitration systems set up by the same employers."

This is nothing short of a corporate takeover of our nation's system of laws, and the American people have had enough. The overwhelming majority of voters—including 83% of Democrats and 87% of Republicans—support ending forced arbitration. It's time to act.

With that in mind, I plan to reintroduce the Justice for Servicemembers Act, which ends the use of forced arbitration to erode these important statutory rights for servicemembers, veterans, and their families.

The Justice for Servicemembers Act will also prevent the enforcement of forced arbitration clauses in contracts covered under the Servicemembers Civil Relief Act (SCRA). This important legislation provides those serving our country with critical financial protections.

It prevents landlords from enacting eviction proceedings, mortgage holders from foreclosing on a home, and lenders from repossessing a vehicle while a member of our armed forces is on active duty. However, forced arbitration clauses embedded in mortgages and titles prevent accountability for bad actors taking advantage of active duty servicemembers.

As a nation devoted to protecting our brave men and women in uniform, we must ensure that their rights to keep their jobs and homes while serving our country—rights Congress has expressly established by law—are actually enforceable in court.

This legislation passed through the House on a bipartisan basis last Congress as part of the National Defense Authorization Act. I look forward to working with my colleagues on both sides of the aisle to continue fighting to restore the rights of those who have sacrificed so much for our country.

I also strongly support the FAIR Act—legislation introduced by Congressman Johnson that would end forced arbitration across the board in consumer, worker, civil rights, and antitrust disputes.

This legislation successfully passed out of the House last Congress with overwhelming support, and I look forward to its passage again this Congress.

Finally, I would like to thank Congressman Johnson for chairing today's hearing. My role as a manager for the impeachment trial in the Senate prevents me from fully attending today's hearing, and I appreciate my good friend Mr. Johnson's leadership on this issue.

In closing, I thank our panel of distinguished witnesses for appearing at today's important hearing, and I look forward to their testimony.

I yield back.

Congressman Joe Neguse
Statement for the Record
ACAL Subcommittee Hearing
"Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights"
February 11, 2020

Thank you, Chairman Nadler and Chairman Cicilline, for holding the subcommittee's first hearing on such a critical topic. A large focus of our work last Congress was consumer protection, and I am grateful to see that continue into the 117th Congress.

It can sometimes be lost on the American public as we address topics like forced arbitration, how it connects back to the everyday lives of Americans. But we know that ending forced arbitration clauses is fundamentally about protecting consumer rights.

Before I came to Congress, I spent several years in the cabinet of then-Governor, now Senator Hickenlooper, where I led our state's consumer protection agency, the Department of Regulatory Agencies, DORA. It is an agency filled with over 600 civil servants, dedicated to protecting Coloradans each and every day, similar to the Consumer Financial Protection Bureau and Federal Trade Commission's work on the federal level.

During my time at DORA, and in the years since, forced arbitration clauses have spread fast across the consumer and workplace landscape, making their way into virtually every consumer contract, and by some estimates, found in roughly half of all private-sector non-union employee contracts and used by 81 of Americans top 100 largest companies. The prevalence of forced arbitration used in workplace and consumer claims is the result of U.S. Supreme Court judicial developments that over the last three decades have greatly expanded the reach of the Federal Arbitration Act.

Whether Americans realize it or not, the chances are they have agreed to dozens of arbitrations – which are usually tucked sneakily into cell phone or credit card contracts, hidden in student loan agreements, and buried in employee contracts. These arbitration clauses, more often than not, strip individuals of their right to pursue redress in court. And instead, sends them to a closed-door, practically unappealable proceeding, where, research shows, they are far less likely to prevail.

By being pushed into arbitration, consumers and workers are often forced to give up their right to have full and fair discovery, an impartial judge and jury, an ability to rely on legal precedent, and a full right to appeal the decision.

This must end. That's why I'm incredibly proud of the work we accomplished last Congress in passing the Forced Arbitration Injustice Repeal (FAIR), led by Congressman Johnson (D-GA), a far-reaching bill which would prohibit forced arbitration clauses in consumer, antitrust, employment, and civil rights disputes unless they were agreed to voluntarily after a dispute arises. I look forward to continuing that work this Congress to help push the bill across the finish line so that we can restore fundamental rights to millions of American workers and consumers and create a more even playing field.

Thank you.

Mr. JOHNSON of Georgia. Please note, Witnesses, that your written statements will be entered into the record in their entirety.

Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that timeframe, there is a timing light in WebEx. When the light switches from green to yellow, you will have one minute to conclude your testimony. When the light turns to red, it signals that your 5 minutes have expired.

I would also note that Mr. Weiss' counsel is participating in the WebEx platform today pursuant to section G of the House Rules Committee's remote Committee proceedings regulations.

I now recognize Professor Gilles for 5 minutes.

STATEMENT OF MYRIAM GILLES

Ms. GILLES. Chair Nadler, Chair Johnson, Ranking Member Buck, distinguished Members of the Subcommittee, thank you for inviting me back to address this important issue. It is a privilege to come before you. In my few minutes, I would like to briefly explain how forced arbitration clauses strip us of our legal rights.

Forced arbitration clauses are, as many of the opening statements have already described, these are provisions buried in the fine print of take-it-or-leave-it contracts that require all disputes to be resolved in private one-on-one arbitrations. What this really means is that if a company rips off its customers or employees, those customers or employees are essentially powerless to do anything about it. They can't go to court. They can't ban together to bring a class action. They can't even proceed as a group in arbitration. The only thing an individual can do is take on all the costs and time of going against the company one on one, which, let's be honest, most rational people simply won't do. The data shows this quite clearly.

For example, one study estimated that 98 percent of workers who suffer harm in the workplace abandon their claims rather than file individual arbitrations. What this reveals, I think, is that forced arbitration clauses do not encourage workers to bring claims but only serves squelch those claims.

As such, these provisions have allowed companies to immunize themselves accepts from all forms of legal accountability by simply adding some magic words to their contracts, their standard form contracts, click wrap agreements, envelope stuffers, all methods of conveyance designed to obscure or minimize the immensity of the rights that are being forfeited.

Not surprisingly, study after study has also shown that workers, veterans, consumers, and small business owners often have no idea they entered into contracts that deprive them of the right to go to court before a jury of their peers.

Given this reality, it won't surprise you that over the past decade, class-banning forced arbitration clauses have become so commonplace that it is impossible to find a product, a service, an amenity of modern life that doesn't require us to first sign away our rights—rights under consumer, employment, civil rights, antitrust statutes, rights that this Congress and your State counterparts enacted to protect American citizens.

Now, to give you a sense of just how enthusiastically companies have embraced forced arbitration in an employment, over 60 mil-

lion American workers are currently subject to forced arbitration. That is more than half the nonunionized workforce. Economists predicts that by 2024, 80 percent of workers will be bound to these provisions.

I just want to stop there for a moment to really think about this: Eighty percent of all workers will not have the right to resolve claims for sexual harassment, racial discrimination, wage theft, and wrongful termination. Eighty percent of employers simply declining to be bound by Federal and State workplace protection laws.

Worse yet, and I think this is also important, the costs of forced arbitration are disproportionately born by low-wage workers and those critical frontline jobs, such as education and healthcare, that are largely comprised of women and African Americans.

In consumer transactions, probably every single person on this call, in this country is subject to a forced arbitration clause in some aspect of their consumer lives. To use a credit card, open a checking account, get a loan, join a gym, send your kid to camp, put your mom in a nursing home, you have to first sign away your rights to seek legal redress for violations of privacy, product liability, data breaches, fraud, illegal trading activity, and more.

Despite what the Chamber of Commerce, or Mr. King, the next Witness, may tell you, forcing arbitration on an unknowing public is not about achieving fair, expeditious, or cost-effective resolutions. It is about suppressing legal claims all together. Well, you don't have to take my word for it, you can just look at the actions of companies like Chipotle, Uber, and DoorDash, these companies impose class-banning forced arbitration clauses on their workers.

When thousands of workers actually tried to bring single-file individual arbitrations, these companies bulked at the time and expense of honoring their own contracts. Then they tried to do everything they could to escape arbitration, including going to court to argue that worker claims should actually be brought as a class action. This is the very thing, of course, that air contracts prohibit. The hypocrisy here is incredible—

Mr. JOHNSON of Georgia. Ms. Gilles, if you would wrap up. You are beyond your 5 minutes.

Ms. GILLES. Oh, I am so sorry. I will just wrap up by saying that it is abundantly clear the Federal legislation is needed to halt this worsening situation. I am happy to answer any questions I can. Thank you so much for your time.

[The statement of Ms. Gilles follows:]

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TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

Justice Restored:
Ending Forced Arbitration and Protecting Fundamental Rights

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Chairman Cicilline, Ranking Member Buck, and distinguished members of the subcommittee:

Thank you for inviting me to participate in this important hearing. My name is Myriam Gilles, and I am a Professor at the Benjamin N. Cardozo School of Law. I have spent sixteen years of my academic career researching and writing on the effects of class-banning forced arbitration provisions on consumers, employees, and other groups, and offer my testimony in support of the Forced Arbitration Injustice Repeal ("FAIR") Act.

I testified in support of the FAIR Act in 2019 and was gratified to see this Chamber pass that bill on September 20, 2019, giving effect to the strongly held views of a majority of the American public. Americans across the political spectrum believe that the cases of employees, consumers and small businesses should rise or fall based on whether those cases have merit, and not based on the fine print Terms & Conditions that big companies incorporate in their standard form contracts, agreements, or terms and conditions. That **is what this legislation about. Forced arbitration is nothing more than a "get out** of jail **free" card for companies that have enough market power to get employees, consumers** and small businesses to sign **or click "agree" to their** standard form contracts.

I am proud to once again testify in support of this legislation. First, the bill accomplishes precisely what it promises: it eliminates forced arbitration, restoring the rights of millions of Americans to enforce the laws meant to protect them. Second, the data clearly show that this legislative intervention is crucial to stemming the tide of forced arbitration clauses. Today, more than 60 million U.S. workers and untold millions of consumers are subject to these rights-stripping provisions. Workers, for example, are less likely to bring their

cases in arbitration, less likely to win the cases they do bring, and in the small number of cases they win, tend to be awarded far lower compensatory awards than they would recover in court. Consumers face similar obstacles: as the Consumer Financial Protection Bureau reported to Congress, of the tens of millions of American consumers that entered into transactions between 2010-2011, only 52 brought individual arbitrations and *only four* were awarded relief by arbitrators. By contrast, between 2008 and at least thirty-four million consumers of the same universe of companies received over than $2 billion in cash relief and more than $600 million in in-kind relief.

None of these data points is particularly surprising. When individual employees or consumers suffer small but discernible and serious injuries, joining a collective lawsuit to spread litigation costs and equal the playing field is often the only viable path to attaining corporate accountability. Through class and collective actions, citizens have recovered – in the aggregate – billions of dollars wrongly stolen from workers and consumers and, perhaps most important, the threat of litigation has deterred companies from engaging in wrongful conduct in the future. Class-banning forced arbitration clauses undermine these rights by eliminating the only cost-effective path that many claimants have, which is collective litigation, and by forcing litigants to resolve their cases in a forum with no judge, no jury, and practically no oversight. By furtively imposing these provisions in the small print of job applications, employment contracts, and consumer transactions, corporate executives have written their own rules, opting out of liability by shunting all cases against them into a private system of single-file arbitration, where they know most cases will simply be abandoned.

In this moment of partisan factionalism where we seem to agree on little, the vast majority of Americans all across the political spectrum oppose forced arbitration, and support legislation that would restore rights protected under the 7th amendment, as well as countless federal and state laws. In the last Congressional term, this body passed H.R. 1423, the FAIR Act, by a sound majority. The need for legislative action is even more dire today, as forced arbitration clauses have grown more pervasive and audacious.

Accordingly, I offer for your consideration my views on this critical topic. Part I reviews the Supreme Court decisions misinterpreting and vastly expanding the Federal Arbitration Act of 1925 (**"FAA"**) that have brought about the current crisis in American law. Part II describes how companies have exploited forced arbitration clauses to deny consumers their legal rights, and Part III focuses on the plight of the over 60 million American workers now subject to these rights-stripping provisions. Finally, Part IV briefly sketches the response by some companies when workers or consumers try to bring serial, individual arbitrations – a response that reveals that claim suppression rather than cost-effective dispute resolution is at the heart of this debate.

I.
THE OMINOUS RISE OF FORCED ARBITRATION

In 2005, I began studying the effects of forced arbitration clauses on consumers, employees and small businesses. That year, I published an article warning that class-banning arbitration provisions could become ubiquito**us, blocking citizens' access to** judges and juries.[1] Three split decisions by the Supreme Court of the United States brought to life all my dire predictions. In its 2011 decision in *AT&T Mobility v. Concepcion*, a 5-4 Court held that the FAA preempts, not only state law rules that ban arbitration in some category of cases, but also any rule that requires the availability of collective procedures for the resolution of disputes.[2] This misreading of the FAA has forestalled many subsequent attempts by states to regulate arbitration clauses in consumer and employment contracts.[3]

The Court expanded the reach of the FAA in its 2013 divided decision in *American Express v. Italian Colors*.[4] There, a class of small business owners brought an antitrust class action against American Express challenging various anticompetitive practices. The case had important **implications for millions of small merchants who felt abused by Amex's high fees, and whose theory** of antitrust injury sought important changes in the electronic payments industry. By dint of Congressional intent and statutory enactment, these are precisely the types of claims that small businesses are meant to pursue.[5] Yet five Justices the Supreme Court enforced **Amex's** class-banning arbitration clause buried in its merchant service agreement, prohibiting these small businesses from pursuing their cases collectively.[6] Given that the cost of an individual small business bringing an antitrust action against a huge company like American Express was prohibitive, this ruling all but ensured that Amex and other big companies that impose forced arbitration on small businesses are rendered immune from liability and free to engage in whatever anti-competitive conduct they want.[7]

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[1] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

[2] 563 U.S. 333 (2011).

[3] *See, e.g.*, **Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia,** 136 S. Ct. 463 (2015); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012).

[4] 559 U.S. 1103 (2013).

[5] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 634 (1985) (declaring the **"fundamental importance [of antitrust law] to American democratic capitalism"); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) ("A claim under the antitrust laws is not merely a private matter.** The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-**general who protects the public's interest."); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826**-27 (2d Cir. 1968) (observing **that an antitrust violation "can affect hundreds of thousands** -- perhaps millions – of people and inflict staggering **economic damage," such that arbitration of such "issues of great public interest" was ill advised).**

[6] 559 U.S. 1103 (2013).

[7] *See* Testimony of Alan Carlson, Named Plaintiff in *Italian Colors et al. v. American Express,* U.S. Senate Committee on the Judiciary, Dec. 17, 2013, available at https://www.judiciary.senate.gov/imo/media/doc/12-17-13CarlsonTestimony.pdf (**"Normall**y, every American has the right to join with others to fight to hold **corporate giants accountable. But I don't, because of a forced arbitration clause buried in the fine print of terms**

Finally, in its May 2018 decision in *Epic Systems v. Lewis*, a 5-4 Court extended this dangerous trend by blocking workers from banding together to redress the full range of workplace legal violations.[8] In *Epic*, employees sought to band together to hold their employers accountable for wage theft -- cases that are impossible to pursue on an individual basis. But a 5-4 Court upheld the class-banning arbitration clauses in their employment contracts, notwithstanding the federally-guaranteed **right to "collective action" protected by the National Labor Relations Act.**[9] According to the **majority's view, it "makes no difference" whether a plaintiff argues that a forced arbitration clause is "'illegal' as a matter of federal statutory law [or] 'unconscionable' as a matter of state common law" –** incredibly, neither argument is sufficient to overcome a contractual arbitration provision drafted by the defendant employer.[10] Among her last dissents, in *Lamps Plus v. Varela*, Justice Ginsburg recognize**d that the Court's misreading of the FAA had** reached a critical tipping point, and **"urgently" pled for "Congressional correction of the Court's elevation of the FAA over the rights of employees and consumers to act in concert."**[11]

Justice Ginsburg was right: **the Court's endorsement of** class-banning arbitration clauses has strayed far from the original goals of the 1925 statute.[12] In case after case, slim majorities have held

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and conditions imposed upon me years after I started taking American Express cards. If I cannot be part of a class **action to enforce my rights against American Express, I have no way of enforcing those rights. I don't have the money to take on American Express by myself.").**

[8] The drafters of the FAA clearly did not intent this statute to reach the claims of workers, as both the text and legislative history make clear. *See* **FAA §1 ("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**"); *see also* A Bill To Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214, 67th Cong. 9-10 (1923) (statement W.H.H. Piatt, American Bar Association) (**"It** is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do **it. Now, that is all there is in this.**").

[9] *Epic Systems* **grew out of a decision by the National Labor Relations Board ("NLRB") that class**-banning **arbitration clauses violate the National Labor Relations Act's guarantee of a right to "collective action." D.R. Horton, 357 N.L.R.B. No. 184, at * 16 (2012) (holding that the employer's forced arbitration agreement violated** the National Labor Relations Act by leading employees reasonably to believe they cannot file charges with NLRB); *see also* Murphy Oil USA, Inc., 361 N.L.R.B. No. 72 (Oct. 28, 2014), *6 (reaffirming D.R. Horton). Circuit courts **split over whether the NLRB's rul**ing was correct. *Compare* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013) (disagreeing with the NLRB), *with* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1159 (7th Cir. 2016) **(affirming the NLRB's logic).**

[10] **138 S.Ct. at 1619 ("In fact, this Court has rejected every such effort to date … with statutes ranging from** the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt **Organizations Act.") (internal citations omitted).**

[11] Lamps Plus v. Varela, 139 S.Ct. 1407 (2019) (Ginsburg, J., dissenting). The majority in *Lamps Plus* held, **illogically, that workers are assumed to have "consented" to individualized arbitration even if their employment** contract does not clearly waive the right to join in collective arbitrations.

[12] 9 U.S.C § 2. By my count, since 2010, the Supreme Court has decided seventeen cases interpreting the FAA. *See, e.g.*, **Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia,** 136 S. Ct. 463 (2015); BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014); Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); CompuCredit

that it does not matter that individual citizens are unable to vindicate their statutory rights in a one-on-one arbitrations – *i.e.,* that countless cases will **"slip through the legal system,"** leaving serious corporate wrongdoing unaddressed.[13] As Justice Kagan wrote in her blistering dissent in *Amex,* **"the nutshell version" of the majority's** approach to the reality that forced arbitration is being employed to suppress cases brought by injured consumers and workers is **simply this: "Too darn bad."**[14]

These Supreme Court decisions have enabled companies to suppress legal claims and avoid liability by simply adding a few magic words to their standard-form contracts – knowing full well that most people simply **won't** comprehend the magnitude of what **they've surrendered in the fine** print.[15] And corporate America has been paying attention: observers note that, in recent years, companies that had not yet imposed arbitration on their consumer or employees have quickly done so in order to take full **advantage of the immunity from liability promised by the Court's decision**s.[16] Forced arbitration clauses now appear in job applications, employee handbooks, nursing home admissions forms, credit card and cell phone bills, insurance contracts, leases, and myriad other **"agreements."**[17] Today, nearly every American is subject to a class-banning forced arbitration clause in some aspect of their lives -- and, going forward, we should expect that there will be few transactions and interactions that are not accompanied by these remedy-stripping provisions.

Corp. v. Greenwood, 565 U.S. 95 (2012); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); AT&T Mobility LLC v. **Concepcion, 563 U.S. 333 (2011); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010); Rent**-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen S.A. **v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); New** Prime v. Oliviera, 138 S.Ct. 1164 (Jan. 16, 2019); Lamps Plus v. Varela, 139 S.Ct. 1407 (2019); Henry Schein, Inc. v. Archer & White Sales Co., 139 S.Ct. 534 (2019).

[13] *Concepcion,* 563 U.S. at 341.

[14] *Amex*, 559 U.S. at 1111 (Kagan, J., dissenting).

[15] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS (2015) at pp. 19-24 (reporting that **"less than 7% of consumers whose credit card agreements included pre**-dispute **arbitration clauses stated that they could not sue their credit card issuers in court" and most consumers bound to these clauses "wrongly believe that they can participate in class actions."**). *See also* Amy J. Schmitz, ***"Consideration of 'Contracting Culture' in Enforcing Arbitration Provisions,"*** 81 ST. JOHN'S L. REV. 123, 160 (2007) (when researcher pointed consumers to a class-banning **arbitration clause and asked them to read it, only "approximately 13%** understood that the contract they had just been shown prohibited them from participating in a class action **lawsuit").**

[16] Jess Bravin, *Supreme Court Imposes Limits on Workers in Arbitration Cases*, WALL ST. J., May 21, 2018 (reporting **that lawyers expect that companies will now impose forced arbitration clauses "on millions more" workers, and** that the *Epic Systems* **decision could affect "worker claims against Amazon, Grubhub, Lyft and Uber," among other** large companies).

[17] Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. **623, 631 (2012) ("[A]bsent broad legal invalidation, it is inevitable that the waiver will find its way from the agreements of 'early adopter' credit card, telecom, and e**-commerce companies into virtually all contracts that could even remotely form the predicate of a class action someday.); Jean Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015) (reporting that Amazon, AT&T, Comcast, Wells Fargo, Ticketmaster, Dropbox, Goldman **Sachs, P.F. Chang's, and Uber are just some of the many companies that have modified their** contracts with consumers or workers to include these terms).

II.
RESTORING THE RIGHTS AND REPAIRING THE TRUST OF CONSUMERS

Over the past decade, class-banning forced arbitration clauses have permeated every corner of the consumer universe. Back in 2015, **the Consumer Financial Protection Bureau ("CFPB")** reported to Congress that nearly all mobile wireless providers imposed forced arbitration on their subscribers – meaning that nearly 290 million cell phone users were barred from going to court.[18] The same was true for the vast majority of credit card users, checking account holders, payday borrowers, student loan recipients, and users of countless other consumer financial products.[19]

Today, the situation is significantly worse. One study found that 81 of the Fortune 100 U.S. companies use forced arbitration in connection with consumer transactions, virtually all of which ban class actions.[20] Similarly, Consumer Reports examined the top-selling brands in the 10 product categories that received the most traffic on its website and, of the 117 brand/category combinations examined, 60% foist arbitration clauses on consumers.[21] Of the most popular products on the Consumer Reports website, over two-thirds came with forced arbitration as a term of purchase. Nor should we expect this trend to abate as more American consumers shop online: today, over 60% of U.S. retail e-commerce sales are subject to forced arbitration, and that number is on the rise.[22] Indeed, online transactional activity increases the risks of identity theft and data breaches; but even in this instance, forced arbitration clauses blocked consumer lawsuits against companies that negligently exposed the personal information of millions of Americans.[23]

Given the ubiquity of these provisions, one might expect some significant number of consumers to arbitrate their disputes. But the opposite is true: only a tiny percentage of consumers file arbitrations annually.[24] In 2018, there were an estimated 826,537,000 consumer arbitration

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[18] *See* CFPB ARBITRATION STUDY at 22. *See also* Theodore Eisenberg et al., ***Arbitration's Summer Soldiers: An*** *Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts,* 41 U. MICH. J.L. REF. 871, 882–84 (2008) (reviewing internet, phone, and data service contracts finding that 75% contained mandatory arbitration clauses and 80% contained class action bans).

[19] *Id.*

[20] Imre Szalai, ***The Prevalence of Consumer Arbitration Agreements by America's Top Companies***, 52 U.C. DAVIS L. REV. 233 (2019).

[21] Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS (2020).

[22] *Id.*

[23] *See, e.g.,* Orman v. Citigroup, 2012 WL 4039850 (S.D.N.Y. 2012) (dismissing class action alleging that **Citigroup failed to "adequately secure their computer systems against intrusion," resulting in data breach and** identity theft, because of class-banning arbitration clause). *See also* Diane Hembree, *Consumer Backlash Spurs Equifax to Drop 'Ripoff Clause' in Offer to Security Hack Victims*, FORBES, Sept. 9, 2017 (reporting that Equifax tried to limit its **exposure by offering data breach victims "free" credit monitoring in exchange for agreeing to an arbitration clause** containing a class action ban).

[24] *See, e.g.,* CFPB ARBITRATION STUDY (finding that from 2010 to 2011, only a handful of consumers who filed individual arbitrations were awarded affirmative relief – while nearly 10 million consumers were represented in comparable class actions during the same period); *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. **2680, 2812 (2015) (reporting that only "134** individual claims were filed against AT&T between 2009 and 2014 – despite the company having over 120 million wireless customers and being the subject of numerous investigations and public enforcement actions for violations of consumer laws).

provisions in force. Yet, the two largest arbitration providers (AAA and JAMS) recorded an average of only 6,000 consumer arbitrations per year.[25] Even data provided by the AAA reveals that, in the first quarter of 2019, it resolved only 895 consumer arbitrations for the thousands of companies for which it is a designated arbitral provider.[26] Worse yet, consumers who individually brave these arbitral waters are unlikely to prevail due to the well-documented repeat-player bias that corporate clients enjoy in arbitration.[27] Of the 30,000 AAA/JAMS consumer arbitrations between 2014-18, only 6.3% resulted in consumers winning a monetary award.[28]

One **reason consumers don't arbitrate** their disputes is that it would be too costly to do so: under class-banning arbitration clauses, a consumer must bear 100% of all the costs charged to her in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks. Rational consumers are unwilling to take on the cost and hassle of an individual arbitration to recover de minimis damages, nor can they find attorneys to represent them.[29] Companies are banking on this rational response: for example, in a consumer case against Fitbit alleging it sold defective devices**, the company's lawyer** admitted to a federal judge that it was betting that no rational litigant would pay arbitration fees, which start at $750, to litigate a claim over a $160 device.[30]

But these cases can involve much higher stakes and far more egregious conduct. Take, for example, the recent trading frenzy involving shares of video game retailer, GameStop. An army of traders using the Robinhood trading app drove **a meteoric rise in GameStop's stock price** and upending the short-selling strategy of some hedge funds and institutional investors.[31] Just when trading was reaching record highs, Robinhood – whose website promises to **"democratize finance"**

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[25] *See* Szalai, *supra* note 16.

[26] *See* Alison Frankel, *Consumer Arbitration is on the Rise -- But the Numbers are Still Puny*, REUTERS, May 9, 2019.

[27] *See, e.g.*, CFPB ARBITRATION STUDY, at 41-45 (reporting that businesses won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits and received ninety-eight cents for every dollar they had claimed; in disputes initiated by consumers, by contrast, arbitrators provided relief to consumers in 27% of cases and awarded them an average of thirteen cents for every dollar claimed); whole, consumers won an average of thirteen cents for every dollar); Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2356-**57 (2012) (discussing how "selection bias" of the stronger party in a mandatory arbitration** setting may prejudice the weaker party by selecting favorable arbitrators or arbitration groups); Katherine V.W. Stone and Alexander J.S. Colvin, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights, (Economic Policy Institute 2015) (finding that, when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% of winning but if the employer had appeared before the arbitrator four times, the employee in the fifth case only had a 15.3% chance of winning, and if the employer had appeared before the same arbitrator 25 times, the 26th employee only had a 4.5% chance of winning).

[28] American Association for Justice, *The Truth About Forced Arbitration* (2019).

[29] *Concepcion*, **584 U.S. 849 (2011) (Breyer, J. dissenting) ("What rational lawyer would have signed on** to **represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?")**; *see also* **Muhammad v. Cty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006)** ("[C]lass-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action waivers prevent an aggregate recovery that can serve as a source of contingency **fees for potential attorneys.").**

[30] *See* Alison Frankel, ***Fitbit Lawyers Reveal "Ugly Truth" About Arbitration***, REUTERS, June 4, 2018.

[31] Juliette Chung, *Short Bets Pummel Hot Hedge Fund Melvin Capital*, WALL ST. JOURNAL, Jan. 22, 2021.

and "make trading accessible" to everyone – halted trading of GameStop on its app.[32] Robinhood claims the stoppage was necessary to raise enough capital to cover certain clearing requirements associated with the trades, but many of its users believe the company was merely giving hedge funds and other large institutional investors time to fix their positions before suffering greater losses. Multiple legal actions have been filed against Robinhood. In one, injured investors allege that, by halting trading **"for no legitimate reason," the company "**purposefully and knowingly **[…]** manipulate[d] the market for the benefit of people and financial institutions who were not Robinhood's customers.**"**[33] But the arguments made by individual investors may never see the light **of day because, buried deep in Robinhood's** online, click-**through "terms and conditions"** agreement is a forced arbitration provision that prevents **individual investors'** cases from being heard in court and all but ensures that thousands of individuals will never be able to enforce their rights.[34] Robinhood is just the latest example of a company using forced arbitration to immunize itself from legal accountability to its consumers, and in so doing, rendering the laws enacted by this body and its state counterparts worthless.

III.
IMPROVING CONDITIONS FOR AMERICAN WORKERS

In recent years, thousands of companies have imposed class-banning arbitration clauses on their employees, silencing aggrieved workers and eliminating corporate accountability for systemic workplace violations.[35] In 2018, the study by the Economic Policy Institute estimated that 56.2% of private-sector, non-union workers – nearly 60.1 million workers in all – were bound to forced arbitration clauses.[36] Today, economists project that by 2024, more than 80% of private-sector non-union workers will be subject to forced arbitration and class/collective-action waivers.[37]

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[32] *See, e.g.*, Marcia Brown, *How the Supreme Court Protects Robinhood*, THE AMERICAN PROSPECT, Feb. 2, 2021.

[33] Nelson v. Robinhood Financial LLC et al., No. 21-cv-00777 (S.D.N.Y, Jan. 28, 2021).

[34] Robinhood Financial, LLC & Robinhood Securities, LLC Customer Agreement at Section 38 (effective as **of June 22, 2020) ("By signing an arbitration agreement, the part**ies agree as follows: (1) All parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided **by the rules of the arbitration forum in which a claim is filed."). Under the applicable** FINRA arbitration regime, class actions may be exempted from the arbitration reqirement. However, the class device is arguably not realistic in a case where some investors benefited from the defendants actions (e.g. because they would only have purchased more stock at the top of the bubble) and others were harmed.

[35] *See* Lauren Weber, *More Companies Block Employees From Filing Suits*, WALL ST. J., Mar. 31, 2015 (reporting **that CVS, Kmart, Nordstrom, and Halliburton are "among the largest employers that require or ask employees to waive their rights to sue as a class"); Kriston Capps, *Sorry: You Still Can't Sue Your Employer*,** CITYLAB, July 11, 2017 (reporting that Wells Fargo, Citibank, Comcast, AT&T, Time-**Warner Cable, Olive Garden, T.G.I. Friday's, Applebee's, Macy's, Target, Amazon, Uber, and Lyft** all impose arbitration and class action bans in employment contracts).

[36] A.S. Colvin, Economic Policy Institute, The Growing Use of Mandatory Arbitration (2018). *See also* CARLTON FIELDS 2015 CLASS ACTION SURVEY, available at (finding that the percentage of companies using arbitration clauses to preclude employment class actions jumped from 16.1% in 2012 to 42.7% and that the number of employment class action suits filed decreased precipitously between 2011 and 2014).

[37] Kate Hamaji et al., Center for Popular Democracy & Economic Policy Institute, Unchecked Corporate Power: Forced Arbitration, The Enforcement crisis, and How Workers are Fighting Back (2019).

Disturbingly, the costs of forced arbitration are disproportionately borne by lower-wage workers and those working in critical, frontline jobs (such as education and healthcare) that are largely comprised of women and African-American workers.[38] One study estimates that low-wage workers (those paid $13 or less per hour) suffered $12.6 billion in wage theft in 2019 — but because the vast majority of these estimated 6.13 million workers are subject to class-banning forced **arbitration, they can't access the courts to resolve these** disputes.[39] So, too, do these provisions enable companies to cover-up widespread workplace sexual misconduct, protecting serial harassers.[40]

Not only have we witnessed an unprecedented rise in employer-drafted arbitration clauses, **fueled by the Supreme Court's decision in** *Epic Systems*, but so too have these clauses become increasingly draconian. A typical arbitration clause today requires workers to resolve all disputes in individual private arbitration, including payment of wages and benefits, provision of breaks and rest periods, rights in termination, and prohibitions against discrimination or harassment. But many companies go further, explicitly highlighting federal statutes that they are denying their workers the right to enforce in court – listing, for example, that alleged violations of the Civil Rights Act of 1964, the Family Medical Leave Act, the American with Disabilities Act, and the Age Discrimination in Employment Act can only be resolved in private, one-on-one arbitration. Others preclude workers from bringing private attorney general claims under state employment protection laws.[41]

Yet, despite the large chunk of the U.S. workforce bound to individually arbitrate their disputes, study after study shows that few workers initiate arbitrations.[42] An EPI study estimated that only 1 in 10,400 workers subject to these provisions has filed a claim in arbitration – putting a lie to the claim that arbitration is preferable.[43] The remaining workers with potentially valid cases – somewhere between 315,000 to 722,000 each year – are left to suffer in silence, unwilling to shoulder the expense of individual arbitration and unable to be heard by a judge and jury. [44] One legal scholar estimates that, as a result of the unprecedented implementation of class-banning arbitration clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned.[45] And when employees do bring individual arbitrations, they are far less likely to succeed against repeat-player employers: of the 11,114 AAA/JAMS employer arbitrations between 2014-18, only 2.5% of

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[38] Colvin, *supra* note 33 (estimating that 57.6% of working women, 59.1% of African Americans, and 54.3% of Hispanic workers are subject to forced arbitration); *see also* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1542 (2016) (discussing the claim-suppressing effects of forced arbitration clauses and class action bans low-income workers).

[39] Hugh Baran, Forced Arbitration Enabled Employers to Steal $12.6 Billion From Workers In Low-Paid Jobs in 2019 **(Nat'l Employment Law Project 2020)**.

[40] *See, e.g.*, Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, CONSUMER LAW & POLICY BLOG, Oct. 23, 2017; Drew Harwell, *Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation*, WASH. POST, March 1, 2017.

[41] *See* Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489 (2020).

[42] Colvin, *supra* note 33.

[43] *Id.*

[44] *Id.*

[45] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

cases resulted in an employee monetary award (that was not outweighed by an even larger employer award).[46]

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The damage caused by class-banning forced arbitration clauses extends far beyond individual consumers and employees: we are *all* harmed when corporations escape accountability and the cases of individuals are silenced. For one, forced arbitration keeps crucial cases of worker protection and consumer rip-offs secret and largely out of public view.[47] A key characteristic of most forced arbitration clauses is that the proceedings and decisions are confidential – i.e., arbitrators hear disputes behind closed doors and render decisions without being bound to follow legal precedents and often without publishing a written decision that explains their reasoning.[48] This culture of secrecy prevents consumers and employees who are having a dispute from learning whether others have experienced a similar problem before and how that problem was resolved. It also leads to arbitrary and inconsistent results in the arbitral forum because arbitrators, unlike judges, are not required to follow precedents created by earlier-decided cases with similar facts. This directly undermines the principles that are central to the rule of law, such as stare decisis and the development of legal precedents.[49] By forcing disputes into hermetically-sealed, secret proceedings, companies deny all citizens the transparency, openness and accountability necessary for the operation of a fair and democratic civil justice system.[50] And, of critical importance to this lawmaking body, forced arbitration undermines law enforcement and deterrence because, once blocked from going to court as a group, most people drop their cases entirely. If Congress passes **laws that can't** be enforced in the real world, what good are those laws?

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[46] AAJ, *The Truth About Forced Arbitration*, *supra* note 25.

[47] A particularly notorious example is the fraud committed by Wells Fargo employees in 2017, which effected nearly 3.5 million customers -- some of whom are still trying to get their money back and repair their credit. Injured customers began suing the bank for opening fake accounts as far back as 2013, but these claims were quickly forced into the black box of arbitration, *See, e.g.*, Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES, Dec. 6, 2016. The profound secrecy afforded by arbitration allowed Wells Fargo to avoid both liability and bad press, and allowed wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light.

[48] *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

[49] *See id.*; *see also* Lillian Howan, *The Prospective Effect of Arbitration*, 7 BERKELEY J. EMP. & LAB. L. 60, 62 (1985) **("In contrast to the judicial doctrine of stare decisis, an arbitrator's interpretation of the contractual relation is not** technically binding on a future arbitrator. Instead, the arbitrator must exercise independent and impartial judgment **in each case.").**

[50] *See* AAA CONSUMER DUE PROCESS PROTOCOL, **Principle 12.2 (arbitrator must "maintain the privacy of the hearing to the extent permitted by applicable law"); AAA Commercial Rule 25** (directing arbitrators to **"maintain the privacy of the hearings unless the law provides to the contrary").** *See also* Michelle Andrews, *Signing a Mandatory Arbitration Agreement With a Nursing Home Can Be Troublesome*, WASH. POST., Sept. 17, 2012 (reporting **that nursing home arbitration hearings "are conducted in private and [these] proceedings and materials are often** protected by confidentiality rules").

Despite these collective harms, large corporations and lobbying groups like the Chamber of Commerce have spent over a decade advocating for forced arbitration on the grounds that it is **"better, cheaper, faster" for ordinary Americans.**[51] As the next section reveals, these arguments have been proven false as many big-name companies have recently sought to evade their own unilaterally-imposed arbitration provisions.

IV.
THE PROOF IS IN: COMPANIES DO NOT WANT TO ARBITRATE DISPUTES

Class-banning forced arbitration clauses are not designed to achieve fair, expeditious or cost-effective resolutions. And proof is in the pudding, or rather, is visible in the dodginess of companies faced with large numbers of costly individual arbitrations.[52] For example, in 2015, a group of Chipotle employees alleged their employer had violated the wage-and-hour provisions of **the Fair Labor Standards Act ("FLSA").**[53] Chipotle sought to enforce the class-banning arbitration clauses buried in the fine print of its online employee "welcome pack" – knowing that workers with backpay claims ranging from about $100 to $3000 would be unlikely to expend the resources filing an individual claim. The company won its motion to compel arbitration, but the **plaintiffs' lawyers** then did something unexpected: instead of dropping these cases, they began filing individual **arbitrations on behalf of injured employees. Chipotle soon found itself "f**acing thousands of individual arbitration cases spread across the country, almost all the expenses of which it may have to shoulder itself – potentially tens of thousands of dollars per case."[54] **While "thousands of individual arbitrations" is precisely what Chipotle's arbitration clause invites, the company balked** at the expense and time involved: it returned to court and pleaded with the federal judge to suspend

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[51] *See, e.g.* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees); Archis Parasharami, Testimony before Senate Committee on the Judiciary, **Dec. 17, 2013 ("Arbitrat**ion before a fair, neutral decision-maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—**and that are achieved faster and at lower expense.")**

[52] As background, most forced arbitration clauses delegate the AAA or JAMS as the arbitral provider. These entities, in turn, have promulgated rules governing individual consumer arbitrations, and recognizing that the costs associated with pursuing arbitration could discourage individual plaintiffs from filing claims, have imposed higher arbitral fees be paid by corporate defendants than individual plaintiffs. *See, e.g.*, AAA Consumer Arbitration Rules, Costs of Arbitration, at 33 (imposing $200 filing fee upon individual claimant and total of $3,200 in fees to be paid by Business-respondent).

[53] Turner v. Chipotle Mexican Grill, Inc., 123 F.Supp.3d 1300 (D. Co. 2015). A federal district judge in Colorado initially allowed 2,814 employees to proceed in a collective action, but while the action was pending, the Supreme Court issued its decision in *Epic Systems v. Lewis* upholding the legality of arbitration clauses that prohibit collective employment actions. Accordingly, the judge dismissed the cases brought by employees who had **previously "agreed" to resolve their disputes through arbitration and granted defendant Chipotle's motion to** compel individual arbitration of these claims. *See* Dave Jamieson, *The Supreme Court Just Helped Chipotle Boot 2,814 Workers From a Wage Theft Lawsuit*, HUFFINGTON POST, Aug. 10, 2018. More than 7,000 employees who were not required to sign mandatory arbitration agreements remained in the federal court opt-in case.

[54] Michael Hiltzik, *Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft*, LOS ANGELES TIMES, Jan. 4, 2019.

the arbitral filings and disqualify plaintiffs' counsel.[55] The judge denied both motions, chastising Chipotle **for its "attempts to delay and obfuscate" the workers' claims.**[56]

Executives at Uber faced a similar crisis in the wake of serial arbitrations brought against the ride-sharing company by 12,501 individual drivers seeking to be classified as employees instead of independent contractors.[57] **Uber was so "overwhelmed" by the prospect of these individual** arbitrations that, according to its designated arbitral provider, JAMS, the company initially refused to pay its share of the filing fees in an effort to stem the tide.[58] When that failed, Uber (in the height of hypocrisy) tried to argue that some issues were common across the cases and should therefore be decided in a consolidated proceeding – despite the fact that its own arbitration clause prevents *any* consolidation of claims.[59] And when that gambit failed -- and after calculating that it would cost more to defend itself in individual arbitrations -- **Uber ultimately settled the drivers'** cases en masse.

Similar efforts by plaint**iffs' lawyers to bring mass, individual arbitrations have plagued** Postmates and DoorDash.[60] In the case of DoorDash thousands of couriers filed individual arbitrations with the AAA, which informed the company that it owed about $12 million in nonrefundable **fees to launch its workers' cases**. Like Uber, DoorDash ran to court for help, but Northern District of California Judge William Alsup was unsympathetic: **"Faced with having to** actually honor its side of the bargain, DoorDash now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually **seek arbitration."**[61] Consumers too have filed arbitrations en masse when blocked from going to court.[62] But, lest we grow confident that en masse arbitrations are the wave of the future, large corporate actors and their savvy defense counsel are already finding ways to avoid their exposure,

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[55] Dave Jamieson, *Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly*, HUFFINGTON POST, Dec. 20, 2018.

[56] Turner et al. v. Chipotle Mexican Grill, Inc., No. 1:14-cv-02612 (D. Co. 2018).

[57] Abadilla v. Uber Techs., No. 18-cv-7343-EMC (N.D. Cal. Dec. 5, 2018) (asserting that more than twelve thousand individual arbitration demands have been filed against Uber after the Ninth Circuit determined that Uber drivers were required to arbitrate, and that little progress has been made in arbitrating those claims).

[58] Alison Frankel, *JAMS to Uber: Our Rules and Your Contracts Demand Individual Arbitrations*, REUTERS, Jan. 25, 2019 (quoting **JAMS notice to Uber that "[w]hile it is not our preference to force the parties to litigate these issues** seriatim, our policies and procedures, absent party agreement otherwise, require that we collect a filing fee in each **case to be pursued").**

[59] *Id.*

[60] *See, e.g.*, Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal. 2019); Abernathy v. DoorDash, Inc., No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020).

[61] *Id.* **("This hypocrisy will not be blessed.")**

[62] *See, e.g.*, Alison Frankel, *FanDuel Wants NY State Court to Shut Down Mass Consumer Arbitration*, REUTERS, Jan. 14, 2020.

rewriting contractual provisions to designate different arbitration providers that are even more friendly to corporate interests[63] or unilaterally terminating contracts containing forced arbitration.[64]

The resistance by Chipotle, Uber, DoorDash and other companies to individually arbitrating these cases — **after** unilaterally forcing these provisions on their workers and consumers — makes clear that their alleged preference for arbitration was never about fairness and efficiency, but about suppressing legal claims and avoiding accountability at all costs. This stunning hypocrisy underscores the need for immediate legislative action. The Supreme Court has made plain that it will continue to **"rigorously enforce" all the remedy**-stripping terms that private companies insert in their arbitration clauses – never mind the consequences – **unless the FAA's mandate is "overridden by congressional command."**[65] Only this body can act to remedy the obvious injustice of class-banning forced arbitration.

Thank you again for the opportunity to testify. I am happy to answer any of your questions.

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[63] *See* Amir Alimehri, *The Table-Turning Rise of Mass Arbitration*, Lowey Dannenberg, Mar. 30, 2020 (reporting **that DoorDash's counsel, Gibson Dunn has worked with the International In**stitute for Conflict Prevention & **Resolution "to develop a mass arbitration system that would be friendly to corporations" and DoorDash has now "changed its terms of service to require couriers to agree to arbitrate all disputes using the new CPR rules, in**stead **of the AAA rules that would require DoorDash to pay a larger share of fees").**

[64] *See* Alison Frankel, *Chegg Tries New Way to Avert Mass Arbitration: Cancel Users' Contracts*, REUTERS, July 2, 2020.

[65] *American Express*, 133 S.Ct. at 2309, *citing CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668–669 (2012). *See also* Gilles, 104 MICH. L. REV. **at 395 ("[T]he Supreme Court's arbitration jurisprudence over the past thirty years** have evinced an incredibly expansive view of the FAA, and while the full import of this national policy favoring arbitration has been criticized by many – including members of the Court itself – there is no reason to believe the **Court will swing back to a more nuanced interpretation of the FAA.").**

Mr. JOHNSON of Georgia. Thank you. Welcome back to the Committee Ms. Gilles.

Next, we will hear from Ms. Carlson. Ms. Carlson, you may begin. You are recognized for 5 minutes.

STATEMENT OF GRETCHEN CARLSON

Ms. CARLSON. Chair Cicilline, Chair Johnson, Ranking Member Buck, other distinguished Members of the Committee, thank you so much for providing me the opportunity to be back in front of this Committee to testify about my experience with forced arbitration.

Four and a half years ago, on July 6th, 2016, I jumped off the cliff all by myself, and I sued my boss, former FOX News chairman and CEO Roger Ailes, for sexual harassment. It was the biggest decision of my life. Once public, the story ran like wildfire all around the world. Back then, I could have never imagined my story would help ignite the #MeToo movement and that I would become one of the prominent faces fighting against forced arbitration in the workplace. Here is what I found out: Courage is contagious, and the cultural revolution we are still experiencing is long overdue.

The first step for me was telling the truth. The next step was to passionately work to change the system for all women and men across our country. So, I spent much of the last 4 years walking the halls of Congress, encouraging legislators to take real meaningful action to help workplace harassment victims, to take the issue out of the shadows of secrecy. In December 2017, I proudly joined legislators from both parties, Congresswoman Bustos and Stefanik and Senators Gillibrand and Graham to introduce the Ending Forced Arbitration of Sexual Harassment Act. In February 2019, the bill was reintroduced in the House.

Here we are again with a new Congress, and here I am again talking about my bill in forced arbitration because, quite honestly, I truly believe that this legislation will change the landscape of the American workplace, retaining women and people of color while at the same time making it safer for everyone.

So, why is this bill so important to me? Because it is actually not about me. This is about the thousands of women who reached out to me after their story became public, making me realize that almost every woman in our country has a story, and that is shameful. So, many of these women have shared their emotional stories of pain, but mostly about how they were silenced because that is what forced arbitration does. It turns out that silencing is the harasser's best friend because it perpetuates the systemic problem of protecting predators and pushing women out of the workforce.

Sadly, my story is not unique. Sexual harassment in the workforce is not a new problem, neither is use of forced arbitration to deal with it, to cover up the dirty laundry. You have Dov Charney, the founder and former CEO of American Apparel, sexually harassing people for years, but nobody ever knew about it because of secret arbitration.

Another horrifying example is the more than 180 people who reported sexually being assaulted by a massage therapist when they simply went to get a massage at Massage Envy spas. These women put their trust into a company and its employees only to suffer the trauma of being forced back into secrecy.

One case, in particular, that really resonated with me was Lilly Sibert from California because she says she was sexually assaulted by her therapist, and then when she went to cancel her Membership with Massage Envy, simply going to do that in the app she agreed to forced arbitration. That doesn't seem to be fair.

There is a story of Danny Masterson, the actor and well-known Scientologist who allegedly raped several women, but because there is a forced arbitration clause in the Scientology contract, one of the women say they were coerced into signing, these cases will probably never see the public eye.

It is impossible to know exactly how many women have faced this kind of situation. You just heard from the other Witness, 60 million Americans have these clauses in their employment contract. By 2024, 80 percent, 80 percent of the private sector nonunion workers will be forced into arbitration.

That is why I aim to change this. My going public opened the floodgates to shed a light on a pervasive epidemic—Weinstein, Cosby, O'Reilly, Moonves, Matt Lauer, Charlie Rose, Mark Halperin, and so many more.

Since my movement started, I helped States to pass these eradicating arbitration laws as well, but here is what is happening when those laws go to be tested at the State level. The judges feel compelled to honor the Federal law, and so they are still putting these cases back into arbitration.

I want to leave you with this and have you understood just for a moment what it feels like to have the courage to come forward because this could be your wife, your daughter, or your granddaughter.

A woman decides to go to HR to complain. If she has an arbitration clause, the reaction will be, phew, good, no one will ever know about this. Her case is promptly thrown into the secret chamber. The woman will likely be blacklisted, demoted, and fired from her job. In arbitration, she gets no appeals. So, the cycle continues. It is a repeat business thing. We have lost millions of women in the workforce due to this and just in the last year due to COVID—

Mr. JOHNSON of Georgia. Ms. Carlson, if you could wrap up, please.

Ms. CARLSON. Thank you to brave Members of Congress from both sides for drawing the line in the sand because this is not partisan; this is apolitical. It is my great hope that we can get something done that is bipartisan to help women in this country. Thank you.

[The statement of Ms. Carlson follows:]

TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE: Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

Gretchen Carlson
Submitted February 11th, 2021

Chairman Cicilline, Ranking Member Buck, and other distinguished members of the Committee, thank you for providing me with the opportunity to testify about my experience with forced arbitration.

Four and a half years ago, on July 6, 2016, I jumped off the cliff and sued my boss former Fox News Chairman and CEO Roger Ailes for sexual harassment. It was the biggest decision of my life. Once public, the story ran like wild fire on twitter feeds and breaking news alerts all around the world. Back then, I could have never imagined my story would help ignite the #metoo movement 15 months alter and that I would become one of the prominent faces fighting against forced arbitration in the workplace, or that since my case, a tidal wave of women would have joined me in courageously speaking out against workplace harassment. But here's what I've found out: Courage is contagious...and the cultural revolution we're still experiencing ... is long overdue.

The first step for me was telling the truth. The next step ... was to passionately work to change the system ... for *all* women (and men) across our country. So I've spent much of the last four years walking the halls of Congress, encouraging legislators to take real, meaningful action to help workplace harassment victims — to take the issue out of the shadows of secrecy. So in December 2017, I proudly joined legislators from both parties—Congresswomen Bustos and Stefanik – and Senators Gillibrand and Graham—to introduce the "Ending Forced Arbitration of Sexual Harassment Act". In February, 2019 my bill was reintroduced in the House -- a bill to restore workplace harassment victims' Constitutional 7th Amendment right to a jury trial instead of the secrecy of forced arbitration.

And here we are again with a new Congress. And here I am again talking about my bill and forced arbitration, because quite honestly I believe this legislation will change the landscape of the American workplace, retaining women and people of color while at the same time making it safer for everyone. So why is this bill so important to me?

Because it's not about me. This is about the thousands of women who reached out to me after my story became public – making me realize that almost every woman in our country has a story. That's shameful. So many of these women have shared their emotional stories of pain and humiliation with me -- but mostly about how they've been silenced – because that's what forced arbitration does. Turns out – silencing is the harasser's best friend — and perpetuates the systemic problem of protecting predators and pushing women out of the workforce.

Sadly, my story is not unique. Sexual harassment of women in the workforce isn't a new problem, and unfortunately neither is the use of forced arbitration to cover up the dirty laundry. For years, Dov Charney, the founder and former CEO of American Apparel sexually harassed

and assaulted employees of the company. These were young women, teenagers – some as young as 17 years old.[1] But it wasn't until 2014 that Mr. Charney was held accountable for his actions and he was fired by the company's board. The sexual misconduct was able to be hidden for years because the company required all employees to sign employment agreements that included a forced arbitration clause.[2] The purpose of which was clear: to keep any disputes secret and away from public scrutiny. Had the company not used forced arbitration, they would have faced public accountability and been forced to act years sooner and many of his victims would have been spared.

Another horrifying example is the more than 180 women who have reported being sexually assaulted by massage therapists at Massage Envy spas.[3] These women put their trust into a company and its employees, only to suffer the trauma of being sexually assaulted and then made to suffer more as the company did little to help them – instead tried to silence them. When these women tried too seek public accountability in court, the company tried to force them into arbitration, because hidden in the fine print of the terms and conditions of the company's app and iPads (used to check in for services) was a forced arbitration clause.[4]

Take the case of Lilly Silbert from California. Lilly says she was sexually assaulted by her Massage Envy therapist, but because she used the company's app to try and cancel her membership *after* she was sexually assaulted, the company tried to force her, and many women like her, into arbitration.

Then there's the story of thousands of women who were employed by Sterling Jewelers who suffered widespread sexual harassment and pay discrimination for years.[5] A New York Times article describes the conduct the women were subjected to – groping, sexual coercion, sexual degradation and even rape. For years, the conduct was covered up, because the women being forced into arbitration. As the article describes "[t]he benefit to the company was that it was resolved in secret. The secrecy was the point."[6] In 2008, many of the women decided to come forward and seek legal action against the company, filing a class action lawsuit comprised of

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[1] Katie Baker, *Dov Charney 'Sex Slave' Lawsuit Will Settle Out of Court*, Jezebel, March 22, 2012: https://jezebel.com/5895487/dov-charney-sex-slave-lawsuit-will-settle-out-of-court

[2] Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, July 15, 2014: https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide- misconduct/

[3] Katie Baker, *More Than 180 Women Have Reported Sexual Assaults at Massage Envy,* BuzzFeed News, November 26, 2017: https://www.buzzfeednews.com/article/katiejmbaker/more-than-180- women-have-reported-sexual-assaults-at

[4] Brooks Jarosz, *Fears loom that sexual assault cases involving Massage Envy will remain private,* FOX KTVU, December 21, 2018, http://www.ktvu.com/news/fears-loom-sexual-assault-cases-involving- massage-envy-will-remain-private.

[5] Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret,* New York Times Magazine, April 23, 2019: https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual- harassment.html

[6] i.d.

69,000 women.[7] However, because Sterling Jewelers required their employees to sign arbitration agreements the company wanted to dismiss the lawsuit and force all of the women into private, secretive arbitration, creating a wall of silence even between the women.[8] This prevents women from gathering important evidence about a pattern of behavior, and from supporting one another in stressful litigation against a large corporation.

How about the story from just this past January regarding Robinhood and Game Stop and the novel phenomenon in the investing world where retail investors organized on Reddit and used the trading platform Robinhood to buy targeted stocks. Class action lawsuits were filed but the case may never see the light of day because Robinhood has a forced arbitration clause in its user agreement. This clause buried in the fine print has the potential to ensure that thousands of individuals will never be able to enforce their rights and get public accountability.
It's impossible to know exactly how many women have been sexually assaulted or harassed in the American workforce, pushed out, never to work again. The latest statistics say 60 millions American workers are subject to forced arbitration — with women workers and African American workers the most likely to be subjected to it. (A.S. Colvin Economic Policy Institute study) And that by 2024, predictions are that more than 80 percent of private-sector nonunion workers will be subject to forced arbitration. (CPD/EPI forced arbitration growth 2019, Kate Hamaji Center For Popular Democracy & Economic Policy Institute).

I aim to change that.

My going public opened the floodgates to shed a light on this pervasive epidemic – the Weinstein allegations, the Bill Cosby allegations, the Bill O'Reilly allegations, the Les Moonves allegations, the Matt Lauer allegations, the Charlie Rose allegations, the Mark Halperin allegations ... and so many more.

I want you to just for a moment feel what it's like to find the courage to come forward.
A woman finally decides to go to HR to complain — and if she has an arbitration clause – the reaction will be — phew! Good! "No one will ever know about this!" Her case is promptly thrown into the "secret chamber" of arbitration. Then the way we handle these things goes into effect. The woman will likely be blacklisted, demoted and fired from her job. In arbitration she'll find out there are limits on discovery and no appeals. There is no legal precent being set because none of it is actually taking place in a court. She may receive a paltry reward but in arbitration cases, employees only win less than 3 parent of the time. Meantime, large corporations with lots of complaints can keep an arbitrator paid for years. It's that repeat business thing. Wink wink. Our woman will never work again, and notably, no one at her place of employment will know what happened to her, and worst of all, her perpetrator will likely stay on the job – free to harass again and again. And so the cycle continues.

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[7] Drew Harwell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company,* Washington Post, February 27, 2017: http://wapo.st/2mEkm1F?tid=ss_mail&utm_term=.03d00fdedcd3

[8] [8] Nick Brown, *Sterling Motion to Disallow Class Action Rejected,* Law360, January 5, 2010: https://www.law360.com/articles/141374/sterling-motion-to-disallow-class-action-rejected

We've lost a million women in the workforce in the last year just due to Covid. And everyone knows retaining women and people of color increases the bottom line. So, are we willing to continue losing even more — because we're not brave enough as a nation to finally come together and say enough is enough?

This silencing is unjust and un-American.

Thank you to companies getting on the right side of history and taking action after learning about my bill: Microsoft, Uber, Lyft, Google, Ebay, Airbnb, Facebook, and Vox Media along them. Thank you as well to the brave members of Congress — from both sides — for drawing a line in the sand. Thank you for doing what's right for women.

Now its time for all members of Congress to show the same kind of courage.

Because sexual harassment is not a partisan issue. Before somebody decided to harass you they don't ask you what party you're in.

And that's why we should all care. It's my great hope that we will get this done in a bi-partisan way – for women, for men, for our children and our country.

Thank you.

Gretchen Carlson
Journalist, Author, Advocate

Mr. JOHNSON of Georgia. Thank you, Ms. Carlson. We have seen and heard you walk in the halls of Congress for years, and I thank you for your diligence.

With that, I would like to now recognize Mr. Weiss, who is recognized for 5 minutes.

Mr. Weiss, unmute yourself.

STATEMENT OF JACOB WEISS

Mr. WEISS. Sorry. Good morning, Chair Johnson, Ranking Member Buck, and the Subcommittee Members. My name is Jacob Weiss, and I have been a business owner in e-commerce for the last 20 years. In 2010, I started OJ Commerce, a business that sells home goods to online marketplaces and on our own website. We sell thousands of brands and over a half million items. A significant part of our business is done through Amazon's marketplace.

I am here today to share my experience trying to hold Amazon accountable for the harm it has caused my business.

OJ Commerce has a team of hardworking employees who have grown OJ Commerce into a successful business. Amazon's forced arbitration clauses have made it impossible to get a fair shake. The system is rigged against small and mid-sized business owners.

Amazon controls so much of the online retail market that it is impossible for an e-commerce company to succeed without selling on its website. Before Amazon would let me sell on its site, it forced me to sign an agreement. I couldn't negotiate the terms of that agreement, and I couldn't sell on Amazon without signing that agreement. Since no e-commerce company can survive without Amazon, I had no choice but to sign that agreement.

Amazon's agreement forbids lawsuits and forces arbitration to resolve disputes. The agreement also forbids class actions, which means businesses can't share the cost of arbitrating against Amazon. This class action waiver alone has insulated Amazon from even having to face justice, because justice is cost-prohibitive. It simply makes no sense to risk tens of thousands of dollars in arbitration, legal, and expert fees, to recover a few thousand dollars. As a business owner, those few thousand dollars can mean the difference for making payroll.

Forced arbitration puts businesses like OJ Commerce at a severe disadvantage:

(1) The filing fees are thousands of dollars.
(2) You have to pay arbitrators hundreds of dollars an hour to hear your case.
(3) Arbitration severely limits the scope of discovery which makes obtaining the evidence you need to prove your case nearly impossible.
(4) Amazon has mastered the art of driving up the cost of arbitration through motions, objections, and hearings.

So, while proponents of arbitration tout its speed and efficiency, my experience shows the process is slow, expensive, and financially infeasible for many claims.

(5) Arbitration rulings are not published, which means we cannot see what Amazon has done to other businesses or how those businesses have fared in arbitration. We are left in the dark, but Amazon has all the information.
(6) Parties can strike potential arbitrators and rank others, which means arbitrators have a financial incentive to Rule in Amazon's favor so as to keep the more likely repeat arbitration player happy and be selected again.

For Amazon, this creates the perfect storm. Companies give up before they even start, because they do not have the budget for this expensive process. The proof is in the excellent report the Subcommittee created on digital markets. Despite millions of businesses on Amazon's website, despite internet message boards teeming with thousands of complaints against Amazon, over a 5-year period, only 163 arbitrations against Amazon. That statistic is mind-blowing.

I have seen this firsthand through two forced arbitrations against Amazon. The first arose when Amazon overcharged OJ Commerce for shipping costs. Amazon fixed the problem when we notified them of the error but refused to refund the overcharged amounts. Left with no choice, we initiated forced arbitration. Amazon took us all the way through a very expensive arbitration proceeding where OJ Commerce eventually prevailed on some of its claims, but the process cost us over $50,000 in just arbitration fees, not even attorney's fees. OJ Commerce had to pay those fees just to have its day in arbitration court. After all those fees, I have recovered very little of what I have lost.

The second arbitration against Amazon is ongoing. So, I cannot go into detail, but I can tell you it has been 9 months so far. So much for quick and efficient resolutions.

Small businesses are the lifeblood of the American economy. Historically, companies like OJ Commerce used the antitrust laws and court system to stop marketplace bullies like Amazon. Forced arbitration—

Mr. JOHNSON of Georgia. Mr. Weiss, if you would wrap up, please. You are beyond your 5 minutes.

Mr. WEISS. Yes, Mr. Chair.

Forced arbitration and class-action waivers have replaced that with a system that allows Amazon to avoid facing justice.

I urge you to pass the Forced Arbitration Injustice Repeal Act. It will restore balance to the marketplace and stop abuse of an unworkable system. Businesses are not looking for handouts. We are just looking for a fair system. Thank you.

[The statement of Mr. Weiss follows:]

Testimony of Jacob Weiss,
President and CEO
OJCommerce LLC

Before the

Subcommittee on Antitrust, Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

Hearing on

Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

February 11, 2021

Good morning Chairman Cicilline, Ranking Member Buck, and members of the Subcommittee. Thank you for inviting me to testify today. My name is Jacob Weiss. I have been a business owner for the last 20 years, specializing in e-commerce. In 2010, I started a company called OJ Commerce, named for my wife "Odelia" and myself, "Jacob."

OJ Commerce sells home goods online through a variety of online marketplaces and our own website. We sell thousands of different brands with a catalogue of over half-a-million items. As you can imagine, like many other online retailers, a significant amount of our business is conducted through Amazon.com's marketplace as a third-party seller.

I am here today to share the experiences I've had trying to hold Amazon responsible for the harm it's caused my business.

OJ Commerce has a team of dedicated and hardworking employees who have grown OJC into a successful business with a modest amount of resources at its disposal. Despite that success and those resources, it's been impossible to get a fair shake against Amazon in light of forced arbitration. The system is completely rigged against us and other small to mid-sized business owners.

There's no way for an e-commerce company to be successful today without selling on Amazon's marketplace – it simply has too much of the online retail market under its control. But before Amazon would let me sell anything on its marketplace, it forced me to sign what it calls a Business Seller Agreement. I had no ability to negotiate the terms of that agreement and I had no ability to sell on Amazon without signing that agreement. And as I just mentioned, you simply can't survive in e-commerce without access to Amazon's marketplace. Obviously, this left me, and thousands of others like me, with only one choice: to sign Amazon's agreement.

Amazon's seller agreement forbids lawsuits and, instead, forces arbitration as the only method to resolve any dispute between a seller like us and Amazon. The seller agreement also forbids any class arbitration or class actions, which means that we cannot join together with other businesses to share the cost of arbitrating against Amazon. This provision alone means many cases

are never even brought to arbitration because it's cost prohibitive. It simply makes no sense for a business to risk tens of thousands of dollars in arbitration, legal, and expert fees to recover a few thousand dollars. But as a business owner, recovering a few thousand dollars can sometimes be the difference between making payroll or having to shut down. In sum, Amazon's class action waiver effectively insulates Amazon from ever even having to face justice.

Forced arbitration also puts businesses like OJC at a severe disadvantage. First, forced arbitration is much more expensive than filing a court case because the filing fee is thousands of dollars. Second, you have to pay one to three arbitrators four to six hundred dollars an hour to hear your case. Third, arbitration severely limits the scope of discovery, which makes obtaining the evidence or data you need to prove your case against a massive company all but impossible. Fourth, Amazon has mastered the art of driving up the cost of this process through motions, objections, and hearings to drive the cost of arbitration outside the reach of its online sellers like my company. Of course, while proponents of arbitration tout its "speed and efficiency," my experience shows the process is slow, expensive, and financially infeasible for many claims. Finally, arbitration rulings are not published, which means there is no transparency into what Amazon has done to other businesses or how those business have fared in the arbitration process. That lack of transparency means that businesses are left with no insight into whether initiating arbitration is a sound recourse in any particular situation. In essence, every third-party seller is forced to start from scratch in its arbitration against Amazon, with little to no precedent from previous rulings, while Amazon holds all the information and all of the cards.

At the end of the day, forced arbitration puts third-party sellers in a lose / lose situation, where we are left with the dismal choice of doing nothing in response to Amazon's wrongful actions or being subjected to the issues I've just described.

For Amazon, this creates the perfect storm. Companies generally don't have the budget to go through this expensive process, especially when the risks outweigh the potential gains. It therefore didn't surprise me that the excellent report on digital markets issued by this subcommittee reported that *only 163* sellers, out of the *millions* of businesses that sell on the site, have initiated forced arbitration proceedings against Amazon during the five years from 2014-

2019. That is an incredible statistic – only 163 sellers out of many millions over five years! And yet, if you go on the Internet chat sites, there are hundreds and hundreds of businesses complaining about Amazon's business practices. But they are left with no recourse because of forced arbitration.

Unfortunately, I've had the opportunity to learn these facts firsthand. OJ Commerce has been in two forced arbitrations against Amazon.

The first forced arbitration arose because Amazon charged OJC more for shipping than my agreement with Amazon allowed. By the time I realized this had happened, OJC had been wrongfully overcharged by quite a bit of money. Amazon agreed to fix the problem going forward, but refused to reimburse OJC for wrongful overcharges. Left with no other choice, OJC initiated a forced arbitration to recover the improper overcharges. Amazon took the case all the way through an expensive arbitration proceeding. OJC eventually prevailed on some of its claims in the arbitration, but the arbitrator only awarded OJC half of its actual damages because he ruled OJC should have realized the error earlier. This process cost OJ Commerce about $50,000 in arbitration-related fees – not counting attorney fees – which we had to pay in advance. In other words, OJC had to risk $50,000 to make itself whole under Amazon's forced arbitration system. And even after the arbitration, Amazon played games with payment that eventually forced me to go to court to enforce the arbitration award. After arbitration and legal fees, I'd recovered very little of what I'd lost.

The second forced arbitration against Amazon is currently active and I'm therefore not at liberty to discuss the details. I can say that it was initiated in May 2020 and is still ongoing. So much for quick and efficient resolutions.

The system for choosing forced arbitration providers also inherently favors Amazon, because Amazon is a more likely repeat player then OJC. Under the rules Amazon chose, the parties can strike certain arbitrators from the list. Then the parties rank the arbitrators in order of preference. Arbitrators have an enormous financial incentive to rule in favor of Amazon so they

can rank high on the list, and to ensure they are not struck entirely. Since previous arbitration awards are not published, only Amazon knows who has ruled in its favor and who has not.

Small businesses are the lifeblood of the American economy. But, increasingly, mega-companies like Amazon are exploiting their market power to suppress competition and prevent smaller companies from reaching our full potential. Once upon a time, a company like ours could use the nation's powerful antitrust laws and open access to the courts to bring an unfair competition claim against a marketplace bully like Amazon. That time has ended because of forced arbitration and class action waivers. Forced arbitration allows Amazon to write the rules under which it is judged, and to prevent small businesses from banding together to fight back. It is a license to steal.

I urge you to pass the Forced Arbitration Injustice Repeal Act as soon as you can. The FAIR Act will restore the right of small businesses to stand up for ourselves, and win back the right to compete in a fair marketplace. We aren't looking for any handouts. We just want a fair system.

Mr. JOHNSON of Georgia. Thank you, Mr. Weiss.
Now, I recognize Attorney King for 5 minutes.

STATEMENT OF G. ROGER KING

Mr. KING. Thank you, Mr. Chair and Mr. Nadler, thank you also for joining us this morning. Ranking Member Buck, and distinguished Members of the Subcommittee, thank you for also accepting my written testimony and I would ask the appendices to the testimony also be made part of the record.

Mr. Chair, I am the only practitioner testifying today. I have spent 50 years, if you will, involved in arbitration. I have drafted arbitration agreements. I have appeared in arbitration hearings. I have followed the policy developments regarding arbitration, and I believe I have a perspective that would be helpful for the subcommittee.

First, I would like to level set the discussion. Proponents of arbitration are not here to condone any type of sexual harassment, hostility in the workplace, or the like.

Ms. Carlson, you have our support. We do not condone those activities. I would note, I don't even think you ever went through the arbitration process. You were able to get your story out without any impediment, and indeed it made news and news that was followed, and we concede that. That is not the discussion.

Arbitration has many, many, positive attributes. It is quicker, notwithstanding [inaudible]. It is undisputed that it is much more expeditious than going to court. It is less expensive.

Mr. Weiss, I don't know your case, but I would suggest to you if you took your issues to court, you would be paying much more than you have paid today, much, much more, and you would still be in court, and you would still be waiting probably for that first even discovery proceeding.

With respect to the direction of this testimony and this hearing, I would submit to you we have it backwards. Every suggestion I am hearing—and we have heard from proponents to do away with arbitration is to put everybody in the court system. I would call this the Forced Litigation Act, if you will, pushing everybody, even those that can't afford it, into somehow a judicial contentious relationship in a court. There I would submit to you employers are going to have even more advantages, and it is going to cost even more for the consumer of the employee.

Let's break this down. Mr. Buck, you noted this in your opening remarks. Our court systems today are overrun, totally overrun. If any Member of this Committee would spend at least a week in a courthouse in their district or in their State, they would readily see the problems faced with our judicial system. The solution is not to push everybody into the courts. The courts can't handle it. The courts aren't equipped to do it. So, the intelligent, thoughtful approach I would suggest here is to look to the positive attributes of arbitration, which are many.

Now, in the professor's testimony and other remarks today, I note the criticism of the United States Supreme Court. Well, let's step back here just for a moment. We have decision after decision by various Members of the court from various ideological approaches. These are not all 5–4 cases. Virtually, every member of

the United States Supreme Court has supported at one time or another arbitration. There is good reason for that, because the system works.

As I note in my written testimony, Justice Breyer has stated the many positive attributes of arbitration. So, let's not mislead people. There is consensus, even though the harshest critics of arbitration may push back, that there are positive attributes of arbitration. That is a given.

Second, let's also concede that our courts are not equipped to handle whatever the multimillion-dollar figures that were suggested. We cannot have a flood of people simply going into courts. That won't work. Furthermore, most litigants, most individuals find their court system is not friendly.

Next, I would like to really rebut the continuing misinformation that there is secrecy attached to all arbitration proceedings. That is not correct. The discussion regarding nondisclosure agreements and confidentiality agreements, as Mr. Buck stated, is a totally different discussion. Those types of clauses are not in every arbitration agreement, nor should they be.

Furthermore, the thoughtful way to go to is the way the American Arbitration Association is going that permits anyone involved in arbitration to disclose the issues that were discussed and the resolutions of the same. Indeed, in California, arbitration decisions are reported by State law.

So, there is not the equation of secrecy in arbitration. That is just flat wrong. We can talk about NDAs and confidentiality perhaps in another hearing.

Furthermore, it is incorrect to suggest that the slow legal regress—it is wrong to suggest that the Equal Employment Opportunity Commission, the National Labor Relations Board, et cetera, do not have a role in vindicating employee rights. You cannot foreclose individuals in arbitration from going to those Federal agencies and State agencies, and many more. It is a violation of law to do so.

Mr. JOHNSON of Georgia. Mr. King, if you could wrap up. You are beyond your 5 minutes.

Mr. KING. Sure. Thank you, Mr. Chair. There is absolutely no way to prohibit that. That is against the law. Finally, claimants do better in arbitration than they do in the courts. That is established. So, I would be happy to carry on this dialogue, Mr. Chair, as we proceed with this hearing. Thank you.

[The statement of Mr. King follows:]

STATEMENT OF G. ROGER KING[1]

"Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights"

HEARING BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY

February 11, 2021

Mr. Chairman, and Ranking Member Buck, and Members of the Subcommittee:

Thank you for the invitation to testify this morning. I have been involved professionally in the field of arbitration my entire professional career. I have had considerable experience during this 50-year period in drafting arbitration agreements, serving as counsel in arbitration hearings, and analyzing arbitration issues from a policy perspective. I have also served as counsel to employers in class action litigation. Finally, I have closely followed the discussions and debates in this body and the United States Senate regarding the FAIR Act and related legislative proposals.

I have also included a number of supplemental materials in an appendix to my testimony that I would request be made part of the record for today's hearing.

A summary of my testimony regarding the issues before the Subcommittee today is perhaps best captured in part by a quote by U.S. Supreme Court Justice Stephen Breyer, where he stated as follows:

> [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.[2]

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[1] Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King acknowledges the assistance of Gregory Hoff, Associate Counsel, HR Policy Association in the preparation of his testimony. Mr. King's testimony is being presented on his own behalf and not on behalf of any other party.

[2] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

Justice Breyer's opinion[3] emphasizes certain of the numerous constructive features of arbitration. I hope that the Subcommittee would consider his thoughts and that of his fellow justices, and also carefully examine the important role that arbitration plays in our nation's jurisprudence and conflict resolution system. Arbitration from both a legal policy and practical administrative law perspective has tremendous merit and has served all stakeholders – except perhaps plaintiff class-action attorneys – exceedingly well. Unfortunately, there are a number of myths, misunderstandings, and erroneous assumptions associated with arbitration. Some of these involve the inappropriate intertwining of confidentiality and nondisclosure agreement issues in the discussion of the merits of arbitration. Confidentiality and nondisclosure agreement discussions present separate and distinct matters. Unfortunately, such discussions are being used as "weapons" to inappropriately undermine the numerous favorable aspects of arbitration. I will address confidentiality requirements, including review of the use of nondisclosure agreements, in my testimony.

In addition to the numerous positive aspects of arbitration, I endorse the inclusion of due process rights for claimants following the procedures that have been adopted by the American Arbitration Association, JAMS, and other arbitration service providers. Notably, contrary to what some have argued, current law permits public disclosure of discrimination, harassment, retaliation, and sexual abuse practices, and regulatory filings with the appropriate federal and state agencies. Many arbitration agreements expressly guarantee these rights. And this approach has been utilized for a considerable period of time in settlement agreement language between claimants and employers.

I would also urge the Subcommittee to review the increasingly important emergence of alternative dispute resolution procedures ("ADR") in addressing consumer, employee, and other claimants interests in dispute resolution. Finally, the Subcommittee should prioritize a review of the issues associated with class action litigation, which touch upon many of the issues associated with mandated arbitration being examined by the Subcommittee.

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[3] Other Supreme Court Justices of the so-called "liberal wing" of the Court have similarly expressed support for arbitration and the wide scope of the FAA. For example, in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), the Court upheld arbitration agreements and invalidated state laws imposing restrictions on such agreements. The majority opinion for this case was written by Justice Kagan and joined by Justices Breyer, Kennedy, Ginsburg, Sotomayor, Alito, and Roberts. The majority of these justices have also written or joined majority opinions in other Supreme Court cases upholding arbitration agreements, including *DIRECTV, Inc., v. Imburgia* 136 S. Ct. 463 (2015).

- **Positive attributes of arbitration cannot objectively be dismissed.**

The evidence is overwhelming that there is merit in mandated arbitration. Even the harshest critics of arbitration appear to accept certain of its various virtues, including the ability of arbitration procedures to flexibly address individualized grievances and complaints, its ability to resolve disputes expeditiously, its cost-effective structure as compared to court litigation, and the equitable results that it provides to all stakeholders. These attributes have been recognized from a wide spectrum of sources. A limited sampling of support for arbitration includes the following quotes from Supreme Court justices and excerpts from research studies and scholarly sources:

  - "The point of affording discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute…and the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-45 (2011).
  - "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010).
  - "Arbitration…does not require the 'time consuming procedures that must be adhered to in court proceedings,' instead allowing for a more customizable, abbreviated process that is more directly tailored to the type of dispute." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2353 (2012).
  - "[Banning mandatory arbitration] would…undermine the central efficiency advantage that such arbitration provides. Banning mandatory arbitration would also create an additional burden for federal courts…could disincentivize international commerce with the United States…and could create problems regarding the enforceability of current arbitration agreements." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2363 (2012).
  - A statistical analysis conducted in 2019 found that "employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court." NAM

D. PHAM & MARY DONOVAN, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 5 (2019).

- **Justice delayed – or eliminated – is justice denied.**

The increased burden that could be placed on our already strained court system by elimination of mandated arbitration should be considered. Any member of Congress favoring the elimination of mandated arbitration should visit, for at least a week, courthouses in their districts and states. Such visits would provide the unfortunate picture of overcrowded dockets, ongoing discovery disputes, delayed and continued hearings and trials, and mountains of electronic and paper filings. Judges, magistrates, court clerk officials, and other judicial representatives would readily attest in such visits to the constant and at times overwhelming pressures on our nation's judicial system. Examples of such conditions include the following:

- As of March 2020, the number of civil cases pending more than three years is nearly 30,000. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MARCH 2020 CIVIL JUSTICE REFORM ACT REPORT (2020).
- Dating back to 2015, monthly case filings in federal district courts increased by the tens of thousands in four of the last five years, including an increase of 150,000 between 2019 and 2020 alone. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- As of September 30, 2020, more than 650,000 cases were pending in federal district courts. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- Between 2019 and 2020, the total number of civil filings in federal district and circuit courts increased by more than 40 percent. U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY – JUNE 2020 (2020).
- "Delay is one of the largest problems in our legal system. In the last several decades, the state and federal courts have seen increasing caseloads and have resolved disputes at slower and slower rates…the median civil case no takes over seven months to be resolved, and many cases take more than three years to reach a resolution." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2352 (2012).

The elimination of mandated arbitration will certainly compound the problems faced by our court system, as the courts will have to deal with an increased number of disputes, particularly in the class action area. Time periods between filing of complaints and resolution of the same will be even greater than the delays already faced by litigants. Unfortunately, these types of delays of justice have only increased due to the current pandemic. Such delays of justice will increase litigation expenses and harm all stakeholders, including especially individuals who need to have their complaints expeditiously resolved.

Further, as a practical matter, elimination of mandated arbitration will deprive many individuals of any opportunity to have their complaints resolved. Numerous studies clearly establish that a vast majority of disputes are individualized grievances that do not fit into even liberally defined "commonality" and "numerosity" class certification standards. Further, many of such individualized disputes for low and middle income individuals will not attract qualified legal representation, and as noted by Professor Samuel Estreicher, such individuals will have little or no "consumer protections" and be the unfortunate victims of the so-called arbitration reform movement.[4]

- **The Supreme Court and other courts have consistently upheld mandated arbitration agreements.**

Arbitration issues have been thoroughly litigated and reviewed in numerous precedent-setting Supreme Court decisions. The Court has extensively examined the legislative history of the Federal Arbitration Act ("FAA" or "the Act") and the issues associated with the interpretation and enforcement of the Act. In virtually every case involving arbitration issues, the Court has not only upheld the enforcement of the arbitration agreement in question, but also broadly endorsed policies supporting the use of arbitration arrangements. A sampling of these court decisions includes the following:

  - *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (holding that under the FAA an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration).

[4] *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 (2001).

- *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that nothing in the NLRA overrides the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (holding that a state law imposing more stringent requirements for a power of attorney to enter into an arbitration agreement than required for other contracts was preempted by the FAA).
- *DIRECTV, Inc.*, *v. Imburgia* 136 S. Ct. 463 (2015) (holding that a state law interpretation of choice of law that invalidated an arbitration agreement was preempted by the FAA).
- *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (holding that the Sherman Act does not override the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012) (holding that a state law rule invalidating arbitration agreements involving wrongful death and personal injury claims was preempted by the FAA).
- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the FAA bars states from refusing to enforce arbitration agreements that contain class action waivers).
- *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (holding that an arbitrator cannot read a class arbitration requirement into an arbitration agreement absent an explicit agreement by the parties to such a requirement).
- *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (holding that nothing in the ADEA precluded an individual's termination-of-employment claim under the ADEA from being subjected to compulsory arbitration under the FAA).

It is thus clear from the above decisions that the Supreme Court not only supports an expansive interpretation of the FAA, but also the right of parties to retain the benefits of their bargain, including the often-required utilization of arbitration procedures. Indeed, these decisions of the Court reflect support from a wide spectrum of judicial philosophy, including support from Justices Breyer, Kagan, and Kennedy. The Subcommittee should not ignore the strong precedent established by such decisions and the positive public policy considerations in such decisions. Further, the Subcommittee should acknowledge the Congressional

endorsement of arbitration as evidenced in the enactment of the FAA and the substantial, decades-long precedent of leaving the Act intact – without amendment – since its passage in 1925.

- **Bad facts make bad laws, and emphasis on bad arbitration procedures lead to bad arbitration policy.**

Critics of mandated arbitration rely on procedures that have in the past, in certain situations, imposed onerous requirements on claimants. Such critics are correct to point out these deficiencies – consumers, employees, and others have, in certain instances, not been treated properly by the imposition of some mandated arbitration approaches. Such deficiencies in mandated arbitration can and should be addressed. Arbitration agreements should contain due process protections for claimants and should not contain limitation on public disclosure of issues being addressed. Specifically, as noted above, it may be best practice for arbitration agreements to provide language that reiterates existing law that claimants may report, communicate, and disclose disposition of Title VII discrimination claims, as well as harassment, retaliation, and sexual abuse claims. Further, best practices for drafters of arbitration claims should include language that is found in settlement agreements that reminds claimants of the existing legal right to communicate with appropriate federal and state agencies and file charges of discrimination and other violations of employee rights and protections with the same.

Leading arbitration dispute entities in the country have already proceeded in this direction. For example, the American Arbitration Association requires the following due process procedural safeguards in its proceedings, among others:

- Arbitrators must be neutral and disclose any conflict of interest
- Both parties have an equal say in selecting the arbitrator
- Employees and consumers' fees are limited to $300 and $200 respectively
- Arbitrators are empowered to order any necessary discovery
- Damages, punitive damages, and attorneys' fees are awardable to the claimant to the same extent that they would in traditional litigation
- Claimants have the right to choose their own representation

- Claimants have access to all information reasonably relevant to their claims[5]

JAMS and other arbitral providers have incorporated other similar due process requirements.[6] Thus, due process protections for claimants exist in the majority of arbitration proceedings, and should be applied to all such proceedings.

- **Federal and state courts provide protection from arbitration agreements that infringe upon claimants' rights.**

The text of the FAA itself provides protections for consumers and/or employees against enforcement of unfair arbitration agreements, with a "savings clause" that preserves common law defenses to contractual agreements such as fraud, duress, or unconscionability. Specifically, Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, claimants have recourse in federal and state courts for inequitable arbitration agreements. Indeed, the courts have not hesitated to invalidate those arbitration agreements that unfairly impair the claimants' rights.[7] To the extent that certain arbitration agreements may unfairly impair the rights of consumers and employees, such rights are adequately protected by federal and state courts. Accordingly, there is not a proper legal premise upon which to proceed to justify the entire elimination of mandated arbitration procedures.

- **Confidentiality-related arguments to support the elimination of mandated arbitration are without merit.**

One of the most frequent criticisms of mandated arbitration pertains to the so-called secretive nature of arbitration and the perceived lack of public transparency in such proceedings. Such arguments are erroneous. While nonparties can be excluded from arbitration hearings and arbitrators and arbitration service providers cannot disclose information regarding such proceedings, there is nothing to prevent claimants from disclosing the issues addressed in the proceeding and the resolution of their claims. Claimants can also disclose to regulatory authorities, law

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[5] *Employment Arbitration under AAA Administration*, AMERICAN ARBITRATION ASSOCIATION, https://adr.org/employment (last visited Feb. 9, 2021).

[6] *See JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS, (https://www.jamsadr.com/employment-minimum-standards/) (last visited Feb. 9, 2021).

[7] *See, e.g. Ziglar v. Express Messenger Sys.* 2017 U.S. Dist. LEXIS 220460 (D. Ariz. 2019); *Ramos v. Superior Ct.*, 28 Cal. App. 5th 1042 (2018); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d (2006); *see also* Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus* 56 Am. Bus. L.J. 815, 830-38 (2019).

enforcement officials, co-workers and friends, and the media the issues that were presented for resolution and the disposition of same. Indeed, in this internet/platform world we all now live in, dissemination of such information can occur quickly and receive wide attention. Further, California, for example, requires arbitration service providers to publish certain aspects of arbitration proceedings.[8] So-called "gag orders" attempting to prevent public disclosure of such information considered in an arbitration proceeding, including reporting relevant information to regulatory agencies and law enforcement officials, can be set aside in court.[9]

Another area in the arbitration discussion that merits attention is the utilization of nondisclosure agreements ("NDAs"). First, it needs to be understood that the utilization of NDAs and the use of same should not be confused with the question of whether mandated arbitration should be permitted to continue. These are two entirely different issues. NDAs are ancillary in nature to the underlying arbitration agreement. They are the result of negotiations between parties and are self-imposed by such parties. To the extent that such agreements raise confidentiality issues, such issues should be separately discussed. Further, such agreements are often secured between the parties with enhanced economic sums to claimants in return for confidentiality. Indeed, in certain instances, it may be the desire of all parties to have the issues in dispute be kept confidential.

Finally, as noted above, if criminal conduct, or egregious patterns of conduct such as widespread sexual harassment, are uncovered in arbitration proceedings, such NDAs can be set aside by the courts or safeguards can be incorporated into mandated arbitration agreement procedures that would permit the claimant, the arbitrator, or a court to void or disregard the NDA in question. Indeed, many states have already taken action on this issue, passing laws limiting the use of NDAs in employment agreements or otherwise providing protections against potentially problematic use of NDAs, making the discussion of NDAs as they relate to wider arbitration issues perhaps moot in these jurisdictions.[10]

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[8] California Code of Civil Procedure 1281.96 requires arbitration service providers to publish quarterly reports containing information related to arbitration proceedings.

[9] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007) (overruled on other grounds), *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, No. c 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

[10] California, New Jersey, Tennessee, Vermont, and Washington have all enacted legislation prohibiting or otherwise limiting the use of NDAs in certain contexts. There may, however, be federal preemption issues presented by such statutes, depending on their scope and whether they arguably conflict with the FAA.

- **Do not discard the positive experience of mandated arbitration in employment dispute settings.**

For the approximate 6% of the country's private sector employees that work under collective bargaining agreements, mandated arbitration has been in place for decades. These procedures have worked relatively well and have successfully served the interests of employees, unions, and employers. Lessons can be learned from this successful model and should be considered by the Subcommittee.[11]

Additionally, many employers that operate on a union-free basis have successfully implemented mandated arbitration procedures or similar protocols. Indeed, some of these approaches include peer review panels and various labor-management problem solving procedures that expeditiously and successfully resolve workplace conflict issues. The success of these types of approaches should also be studied by the Subcommittee as it analyzes arbitration and dispute resolution issues.

- **Increased development and use of ADR procedures is the desirable policy path to follow.**

Significant positive advancements have been made in the development and implementation of ADR procedures in the last ten years. These ADR concepts involve such procedures as implementation of user-friendly complaint filing systems, expedited fact finding, early case assessments, neutral case evaluation, utilization of ombudsmen, mediation, conciliation, mini-trials, and other options.[12] As noted in the comprehensive Harvard Negotiation Law Review article by Professor Thomas J. Stipanowich and Professor J. Ryan Lamare:

> Businesses were motivated [to move towards implementing these types of dispute resolution procedures] not only by the risk of excessive judgments or settlements, but also by significant transaction costs, including the expenses of legal counsel, supporting experts, preparation time and discovery – costs that were often a multiple of the settlement amount.[13]

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[11] The previously proposed FAIR Act (H.R. 1423) exempted the restriction of use of mandated arbitration found in collective bargaining agreements. This approach appears to be inconsistent with the prohibition of mandated arbitration in any other setting. This inconsistent approach also appears to show that proponents of the FAIR Act clearly recognize, at least in part, the benefits of mandatory arbitration, but also unfortunately evinces an apparent bias towards increasing class action litigation in all disputes arising out of any area except collective bargaining situations.

[12] Thomas J Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 100 Corporations*, 19 Harv. Negotiation L. Rev. 1 (2014).

[13] *Id.* at *9.

These types of ADR options are not mutually exclusive of the use of mandated arbitration models. Indeed, incorporation of such ADR approaches in a layered or integrated manner, with ADR options to be pursued in succeeding steps prior to the potential need for mandated arbitration, should be encouraged. Such an approach should provide significant opportunities for settlement without ever reaching the alleged negative aspects of mandated arbitration.

- **Reform of class action procedures is needed and elimination of mandated arbitration will impede such efforts.**

Misuse and abuse of the class action system in our courts in this country is well documented and troubling. For example, consider the following observations from research studies, scholarly articles, and statements from members of Congress:

  - "Class-action settlements are more effective in transferring money from the defendant to class counsel than in compensating class members…class action settlements may be at best problematic on deterrence grounds." Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 7 (2017).
  - "A 2015 study by the Consumer Financial Protection Bureau found that only 13 percent of class actions resulted in a payout for consumers. And even then, the average award for consumers is about $32, while plaintiffs' attorneys got about $1 million." *The Mass Arbitration Racket: Unscrupulous Abuse of the Arbitration Ecosystem*, U.S. CHAMBER INST. FOR LEGAL REFORM (Dec. 18, 2020), https://instituteforlegalreform.com/the-mass-arbitration-racket-unscrupulous-abuse-of-the-arbitration-ecosystem/.
  - "Too many class actions are litigated today such that the victims of unlawful conduct often receive only pennies on the dollar, if anything at all, when their trial lawyer representatives amass millions of dollars in compensation. Many times, the damages in class action lawsuits are so tiny that it is impossible to even identify the victims. In many such cases, awards are given to entities that are not part of the lawsuit whatsoever." *Examination of Litigation Abuses: Hearing before the Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary*, 113th Cong.

(2013) (statement of Rep. Trent Franks, Chairman, Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary).

- "The unfortunate continuing irony, however, is that in many class actions, particularly those that go on in state courts, the plaintiffs are not the real winners in the case. A number of high-profile cases continue to result in class members 'winning' coupons worth maybe a few dollars while the lawyers walk away with millions." *Class Actions: A Distortion of Justice and Continued Threat to America's Prosperity*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 16, 2011), https://instituteforlegalreform.com/class-actions-a-distortion-of-justice-and-continued-threat-to-americas-prosperity/.
- In one study, the average time of class action litigation from filing to settlement was found to be three years. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 820 (2010).
- "The data principally show that (i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys' fee awards even when class members receive little to no monetary recovery." *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020).

The Subcommittee should examine these concerns and explore solutions to this unfortunate type of "procedural coercion" of employers in the country. The direction that the Subcommittee took in the last Congress, and the direction that the majority is apparently taking in this Congress to eliminate mandated arbitration is troubling, as it fails to focus on the connection between eliminating mandated arbitration and the expected corresponding increase in class action filings. This is a bad result for all stakeholders.

Even a cursory review of class action procedures by non-lawyers readily discloses the problems with our current system. For example, class members in a certified class often receive notification of the litigation issues being contested through documents that are written in "legalese" and that are difficult to understand and follow. If the class action is an "opt-in" proceeding, many class members simply discard the notice and never pursue the matter further. Even in "opt-out" situations, when class members receive notice of their "winnings," the procedures to follow to either receive such payments or procedures to follow to opt out of the settlement

are exceedingly difficult to understand or too onerous to follow. Presented with these obstacles, and given the frequent de minimis nature of the financial payment for class members, they often decide never to participate in the "settlement."[14] The only "winners" in this litigation lottery system, as noted above, are the trial lawyers bringing such class actions. While the "inside the beltway" political influence of such attorneys may be strong, they no doubt do not make up the majority of constituents in your districts or represent their best interests. Reform of the class action system in this country should be the priority of this Subcommittee, not the elimination of mandated arbitration.

Finally, the criticism directed at employers for including class action waivers in arbitration agreements is misguided. Such criticism misses the primary reason for inclusion of such waivers – the goal is to prevent the numerous deficiencies and inequities as outlined above in the class action litigation process from becoming integrated into the arbitration process. It simply is not rational to permit such a flawed system to be incorporated into the arbitration process. In addition to such flaws, the considerable expense involved in defending against such protracted litigation is also another valid reason for excluding class action options in arbitration procedures. Finally, as a practical and administrative matter, arbitrators and related arbitration procedures in general do not lend themselves well to the various administrative and procedural requirements of class action litigation. As Justice Scalia has noted, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[15]

Concluding Thoughts

The Subcommittee should undertake a bipartisan policy approach to discuss and resolve mandated arbitration issues. This discussion should involve an emphasis on the inclusion of due process protections in arbitration agreements. Strict elimination, however, of mandated arbitration procedures, especially if done on a retroactive basis, will adversely and unnecessarily disrupt untold numbers of established and well-functioning dispute resolution systems, including contractual arrangements that provide for such procedures. This extreme approach does not protect claimants and should be rejected. Entities that desire to continue, at least in

[14] *See, e.g. Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, FTC (2019); *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020); *Securities Class Actions in the United States*, MORGAN LEWIS (2016).
[15] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

part, mandated, due process-oriented arbitration procedures, should be permitted to do so while concurrently encouraging the development of effective ADR programs. Finally, the Subcommittee should prioritize a thorough examination of the increasingly discredited class action litigation system in this country. As noted above, this system does not benefit class members, places unnecessary and excessive litigation costs on employers, and only unjustly enriches class action plaintiff-oriented law firms.

Mr. Chairman, thank you again for the opportunity to testify. I would be happy to answer any questions you or other members of the Subcommittee may have.

APPENDIX

Statement of Andrew J. Pincus
on behalf of the
U.S. Chamber Institute for Legal Reform

"Justice Denied: Forced Arbitration and the Erosion of Our Legal System"

Hearing before the Subcommittee on Antitrust, Commercial and Administrative Law of the House Committee on the Judiciary

May 16, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee:

It is an honor to appear before you today to present the views of the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce and is dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

The Chamber and ILR strongly support arbitration as a fair, less-complex, and lower-cost alternative to our overburdened court system.

The arbitral process is overseen by impartial decision-makers, and subject to strict fairness rules. Courts are obligated to consider claims that an arbitration agreement contains provisions that are unconscionable under generally-applicable contract law, and they can and do invalidate arbitration agreements that specify unfair procedures.

Empirical studies show that consumers and employees do ***as well or better*** in arbitration as in litigation: they prevail on their claims at the same rate or more frequently, and they recover as much or more when they do prevail.

Arbitration is much simpler and less costly than court litigation—in terms of the money, time, and effort required by the dispute-resolution process. All parties benefit from the reduced expense and complexity—but, most importantly, consumers and employees are able to seek redress for claims that could not practically be brought in court.

Critics of arbitration contend that it enables wrongdoers to conceal their offenses by barring public discussion of claims and arbitrators' decisions. In fact, arbitration does not inherently impose a "gag rule": employees and consumers are free to discuss their claims with law enforcement authorities, the public, and other employees and consumers. Importantly, arbitration agreements that provide otherwise are typically invalidated by the courts.

Critics also cite the fact that arbitrations typically decide claims on an individual basis and that there generally are no class actions. But, as Justice Kagan has recognized, "non-

class options abound" for vindicating small injuries through arbitration. And, class actions typically deliver little to anyone other than lawyers, who reap huge fees.

In sum, arbitration provides significant benefits to claimants as well as companies, and courts already have the tools needed to prevent abuses of the arbitration process. For that reason, ILR believes that legislation eliminating or restricting pre-dispute arbitration provisions is not necessary and would harm claimants and companies.

Claimants In Arbitration Do Better—Or At Least As Well—As Plaintiffs In Court

One common assertion by arbitration critics is that claimants do worse in arbitration than in court, but the facts point strongly in the opposite direction. Multiple empirical studies have concluded that "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true."[1]

Most recently, NDP Analytics compared results of employment claims that were arbitrated and employment claims that were litigated in federal court. The study examined more than 100,000 cases, using data from the nation's leading arbitration providers and litigation data from the federal courts.

NDP Analytics found that employees won more often and won more money in arbitration than in court:

- The overwhelming majority (75%) of employment cases are settled in both arbitration and court litigation, but for the cases decided by the arbitrator or court, employee-plaintiffs won three times as often in arbitration compared to wins in court—32% compared to 11%.

- Employee-plaintiffs also recovered larger amounts in arbitration than in court: employees whose claims were arbitrated generally recovered approximately double the amount recovered by employees in court. The median award in arbitration was $113,818, compared to $51,866 in court, and the mean award was $520,630 in arbitration compared to $269,885 in court.[2]

Studies of consumer arbitration have reached similar conclusions. For example, a 2010 study found that consumers won relief 53.3% of the time in arbitration, compared with a success rate of roughly 50% in court.[3] And just as in court, plaintiffs who win in

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[1] David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (Apr. 2005); *see also, e.g.*, Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017).

[2] NDP Analytics, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 5-10 (May 2019). These results are consistent with other empirical analyses of employment arbitration. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004).

[3] Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal*

arbitration are able to recover not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest."[4]

In the healthcare industry, the Kaiser Foundation Health Plan uses arbitration to resolve disputes with its more than eight million California members, and an independent review found that 96% of those who used the system said it was better than or the same as court. Awards to successful claimants ranged from $4,500 - $3,469,778.[5]

Moreover, these studies probably understate the effectiveness of arbitration, compared with litigation, as a means of vindicating plaintiffs' claims, because of "selection effects." Arbitration claims typically come from middle-income claimants with claims too small to attract the legal representation needed to proceed in the court system—thus, studies that compare the average amount obtained by prevailing parties in arbitration and litigation probably tilt in favor of litigation. And, because of arbitration's relatively streamlined procedures as compared with litigation, "relatively weaker claims . . . are more likely to go to an arbitration hearing on the merits than in litigation" given the additional procedural hurdles present in litigation.[6]

In short, the caricature of arbitration as a system rigged against plaintiffs simply isn't accurate. Most claimants in arbitration do as well, and likely better, than in court.

Arbitrations Employ Fair Procedures

The legal rules governing arbitration require fair procedures. The nation's largest arbitration providers accept cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards. ***Most importantly, courts invalidate arbitration agreements that contain unfair provisions.***

The American Arbitration Association (AAA), the country's largest arbitration provider, developed fairness rules for employment and consumer arbitrations more than two decades ago. The AAA will not accept a case for arbitration unless the arbitration agreement complies with those due process standards.[7] Specifically, these rules:

Courts: A Statistical Portrait, 19 Seattle U. L. Rev. 433, 437 (1996); *see also* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005).

[4] Drahozal & Zyontz, *Empirical Study*, *supra* n.3 at 902.

[5] Office of the Independent Administrator, Annual Report of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System (2018), https://www.oia-kaiserarb.com/2059/-reports/annual-reports/annual-report-for-2018.

[6] *See* Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers U.L. Rev. 375, 389-93 (2018).

[7] Am. Arbitration Ass'n, *Employment Due Process Protocol* (May 9, 1995), perma.cc/93NR-TXQP; Am. Arbitration Ass'n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), perma.cc/VPW4-KXUV.

- require that arbitrators must be neutral and disclose any conflict of interest and that both parties have an equal say in selecting the arbitrator;
- limit the fees paid by employees and consumers to $200 for consumers and $300 for employees—amounts that are less than the filing fee in federal court;
- empower the arbitrator to order any necessary discovery; and
- require that damages, punitive damages, and attorneys' fees be awardable to the claimant to the same extent as they would be in court.

And the AAA rules require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, requires similar protections—as do other arbitration providers.[8]

The courts provide another layer of oversight. If an arbitration provision is unfair, courts can and do step in and declare the arbitration agreement unconscionable and unenforceable. For example, courts invalidate limits on recovery of damages that would not be permissible if the claim were litigated in court[9]; excessive fees for accessing the arbitral forum[10]; requirements that the arbitration take place in inconvenient locations for claimants[11]; attempts to shorten the applicable statutes of limitations that would be

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[8] JAMS, *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness* (July 15, 2009), perma.cc/WC48-KP8G; JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), perma.cc/HN4C-RN23; Nat'l Arbitration and Mediation, *Employment Rules and Procedures* (2017), perma.cc/F2XD-TCHJ.

[9] *See, e.g.*, *Ziglar v. Express Messenger Sys. Inc.*, No. CV-16-02726-PHX-SRB, 2017 WL 6539020, at *3 (D. Ariz. Aug. 31, 2017), *vacated on other grounds*, 739 F. App'x 444 (9th Cir. 2018) (arbitration agreement was unconscionable because it purported to prevent employees from recovering treble damages under state employment law); *Smith v. D.R. Horton, Inc.*, 790 S.E.2d 1, 5 (S.C. 2016) (arbitration agreement that prevented claimants from recovering damages was unconscionable); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (arbitration agreement that barred punitive damages was unconscionable); *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (same).

[10] The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. *See, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (reaffirming that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable" for a plaintiff). Courts also have reached the same conclusion under state unconscionability law.

[11] *See, e.g.*, *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (travel from Oregon to California); *Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (travel from Virginia to California).

invalid if the claim were litigated in court[12]; "loser pays" provisions under which a claimant might have to pay the full costs of the arbitration,[13] or must pay the drafting party's costs regardless of who wins;[14] unreasonable limits on discovery;[15] and unfair procedures for selecting arbitrators.[16]

This judicial oversight ensures that companies have an incentive to craft arbitration agreements that are fair to their customers and employees—and that arbitration agreements that are not fair to claimants will not be enforced.

Arbitration Is Quicker And Easier To Navigate Than Court Adjudication

Everyone recognizes that litigation in court is extremely expensive, immensely time-consuming, and highly complicated. By contrast, as the Supreme Court has explained in an opinion written by Justice Breyer, arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices."[17]

Flexibility is one of arbitration's greatest advantages. An arbitration plaintiff need not ever make a personal appearance to secure a judgment; claims often can be adjudicated based solely on written submissions or on the basis of a telephone conference.[18] In court, by contrast, a claimant is often obligated to appear, wait in line, and perhaps return another day if the court is unable to get through its docket. Even for those

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[12] *See, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, No. C 12–05109 SI, 2013 WL 1363568 (N.D. Cal. Apr. 3, 2013); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 138 (Cal. Ct. App. 1997) (rejecting provision that imposed shortened one-year statute of limitations).

[13] See *Gandee*, 293 P.3d at 1197; *Alexander*, 341 F.3d at 256; *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

[14] *See, e.g.*, *In re Checking Account Overdraft Litig.*, 485 F. App'x 403 (11th Cir. 2012); see also *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012) (attorneys' fees).

[15] *See, e.g.*, *Narayan v. Ritz-Carlton Dev. Co.*, 400 P.3d 544, 555 (Haw. 2017).

[16] *See, e.g.*, *Chavarria*, 733 F.3d at 923-26 (arbitration agreement was unconscionable and unenforceable when it "would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]"and barred selection of "institutional arbitration administrators"); *Ruiz v. Millennium Square Residential Ass'n*, 156 F. Supp. 3d 176, 182 (D.D.C. 2016) (refusing to enforce arbitrator selection provision that "gives [the claimant] no say in the arbitrator-selection process"); *Magno v. Coll. Network, Inc.*, 204 Cal. Rptr. 3d 829, 840 (Cal. Ct. App. 2016) (arbitration provision was unconscionable because, among other things, it allowed the defendant to select the arbitrator and "contain[ed] no assurances of neutrality").

[17] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)); *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

[18] *See, e.g.*, Am. Arbitration Ass'n, *Consumer Arbitration Rules* 22 (Sept. 1, 2014) ("A hearing may be by telephone or in person."), perma.cc/E8JN-FQE4.

litigants who can afford to take time off from work or family obligations—and many cannot—these inconveniences can erode the benefits of any possible recovery.

Arbitrations are also resolved quickly—which means that claimants receive relief faster. The recent NDP study found that arbitration cases in which the employee-plaintiff prevailed took, on average, 569 days to complete, while cases in court required an average of 665 days. Ten percent of the court cases took an average of 1,283 days—50% longer than the longest 10% of arbitration proceedings.[19] Another study found that awarded arbitrations took an average of just 11 months to decision, versus an average of 26.6 months to verdict in state court jury trial cases.[20]

Arbitration Expands Access To Justice By Enabling Consumers And Employees To Pursue Claims That They Would Be Unable To Litigate In Court

Arbitration's speed, efficiency, and flexibility make it a lower-cost means of resolving disputes—which, in turn, expands consumers' access to justice by providing a forum in which they can realistically prosecute low-dollar-value claims.

Most harms suffered by employees and consumers are relatively small in economic value and are individualized. A key obstacle to pursuing an individualized, small-value claim in court is the cost of hiring counsel. Unrepresented parties have little hope of navigating the complex procedures that apply to litigation in court, yet a lawyer's hourly billing rate may itself exceed the amount at issue in many claims. Many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospective of a substantial payout is slim. Studies indicate that a claim must exceed $60,000, and perhaps $200,000, in order to attract a contingent-fee lawyer.[21]

Arbitration thus empowers individuals because they can realistically bring a claim in arbitration without the help of a lawyer.[22] Although a party always has the choice to retain an attorney, arbitration procedures are sufficiently simple and streamlined that in many cases no attorney is necessary.[23] And even if a consumer or employee retains a lawyer, costs may well be lower because of the increased speed and efficiency of arbitration. As the Supreme Court put it: "[a]rbitration agreements allow parties to

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[19] NDP Analytics, *supra* n. 2, at 11-12.

[20] Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019).

[21] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003). In some markets, this threshold may be as high as $200,000. Minn. State Bar Ass'n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), perma.cc/VJ8L-RPEY.

[22] While one study found that pro se plaintiffs "struggle" in arbitration, *see* Chandrasekher & Horton, *supra* n.20, at 2, 52, a *pro se* plaintiff who can afford a lawyer is nonetheless far better off in arbitration than litigation.

[23] St. Antoine, *supra* n.1, at 15 ("it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer").

avoid the costs of litigation, . . . which often involves smaller sums of money than disputes concerning commercial contracts."[24]

Indeed, a study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf.[25] These employees were often able to pursue their arbitrations without an attorney and won at the same rate as individuals with representation.[26]

Without arbitration, as Justice Breyer explained in a Supreme Court opinion, "the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[27]

In short, for a very large percentage of the harms suffered by consumers and employees, arbitration is the only realistic opportunity for obtaining relief. One law professor explained why:

> In a world without employment arbitration as an available option, we would essentially have a "cadillac" system for the few and a "rickshaw" system for the many. The unspoken (yet undeniable) truth is that most claims filed by employees do not attract the attention of private lawyers because the stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources. These claims have only one place to go: filings with administrative agencies where they essentially languish, for the agencies themselves lack the staffing (and often even the inclination) to serve as lawyers for average claimants. The people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a law suit undertaken by competent counsel; these are the folks who are likely to derive benefit from the considerable upside potential of unpredictable jury awards. Very few claimants, however, are able to obtain a position in this "litigation lottery."[28]

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[24] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasis added).

[25] Hill, *supra* n.21, at 794.

[26] *Id.*

[27] *Allied-Bruce Terminix Cos.*, 513 U.S. at 281.

[28] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001).

As another commentator puts it in the context of employment disputes, "a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist."[29]

Arbitration Agreements Cannot Prevent Consumers Or Employees From Discussing Claims With Government Agencies Or The Public—And Arbitrators' Decisions Cannot Be Kept Secret

Critics of arbitration contend that arbitration imposes confidentiality obligations that allow wrongdoers to cover up their offenses. That is simply false. As a leading law professor has explained, "under U.S. law, the privacy of arbitration typically does ***not*** extend to precluding a party's disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding."[30]

Thus, claimants in arbitration are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.[31] If an arbitration agreement purported to impose a "gag order," or to prevent a claimant from publicly disclosing misconduct or reporting that misconduct to law enforcement authorities, that restriction would be invalidated in court.[32]

The same is true of arbitrators' decisions. Indeed, state laws require disclosure of arbitration outcomes by arbitral forums such as the AAA,[33] and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.[34]

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[29] St. Antoine, *supra* n.1, at 16.

[30] Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 Berkeley J. Emp. & Lab. L. 153, 167 (2014). The American Arbitration Association's rules provide that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." Am. Arbitration Ass'n, *Commercial Arbitration Rules and Mediation Procedures* 31 (Apr. 1, 1999), perma.cc/5U92-5PQF. This rule applies only to the hearings themselves; nothing in the rules requires that the outcome be kept confidential.

[31] *See, e.g.*, Christopher C. Murray, *No Longer Silent: How Accurate are Recent Criticisms of Employment Arbitration*, 36 Alternatives to the High Cost of Litigation 65, 78 (2018). The only even possible exception is one-off arbitration agreements individually negotiated with highly-paid, high-ranking executives or similar employees, which could bar public disclosure of confidential information. But even in that context, confidentiality obligations face a high bar.

[32] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, No. c 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

[33] *E.g.*, Cal. Code Civ. Proc. § 1281.96.

[34] Courts have invalidated on unconscionability grounds arbitration agreement provisions requiring that outcomes be kept confidential. *See, e.g.*, *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017); *Davis*, 485 F.3d at 1079.

In sum, the claim that arbitration allows businesses to avoid public disclosure of disputes with employees or consumers is simply false; consumers and employees retain the ability to make these disputes public even if they are resolved in arbitration.

Banning Pre-dispute Arbitration Agreements Will Eliminate All Arbitration

Arbitration critics often assert that if arbitration is beneficial for both sides of a dispute, businesses and employees will agree to arbitrate after disputes arise and that a ban on pre-dispute arbitration agreements therefore will not eliminate all arbitration. In reality, post-dispute arbitration agreements are as rare as unicorns.

The reasons for this are simple. Once a particular dispute has arisen, the parties "often have an emotional investment in their respective positions," built up over the course of the events that led to the dispute.[35] And especially at the beginning of a dispute, parties are "reluctan[t] . . . to evaluate their cases pragmatically."[36] The emotional investment in a case thus tends to skew the preferences of one party or another in favor of "refus[ing] to arbitrate"[37] and instead opting to litigate in court.

The lawyers for one or both sides also have financial incentives to induce their clients to opt for litigation in court rather than arbitration. Litigation in court—which takes much longer than arbitration and involves many more procedural hurdles—offers lawyers the opportunity to earn much higher fees than they could earn in arbitration. Consciously or not, they may advise clients to choose a judicial forum that is really in the lawyers' own best interest rather than in the clients' interest.

As one law professor explained: "I know, from personal experience representing clients and in my work drafting postdispute arbitration rules for the Center for Public Resources (a consortium of companies and lawyers that promotes various forms of ADR), that postdispute arbitration agreements are almost never negotiated. It is a chimerical alternative to predispute arbitration agreements."[38] In reality, post-dispute arbitration agreements simply do not happen.

Finally, even if parties were willing to negotiate post-dispute arbitration agreements, it would not make economic sense for businesses to do so. Maintaining a top-quality arbitration system requires a business to shoulder virtually all of the costs of arbitration, including filing fees and arbitrator expenses. Companies willingly bear these costs because, on average, they pay less in legal fees to resolve disputes in arbitration than to litigate cases in court. But if companies could not ensure that most or all of their dispute resolution proceedings would take place in arbitration rather than litigation, they would simply relegate all disputes to the court system—rather than paying both the

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[35] Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol. J. 32, 37 (2012).

[36] Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 326 (2003).

[37] *Id.* at 327.

[38] Samuel Estreicher, *Saturns for Rickshaws, supra* n.28, at 567.

high litigation costs for court proceedings ***and*** virtually all of the fees associated with arbitration. That result would be harmful to plaintiffs, who would lose the ability to access arbitration for low-value claims that cannot be brought in court.

Arbitration's Individualized Process And Lack Of Class Procedures Does Not Justify Banning Arbitration

Opponents of arbitration often complain that arbitration agreements require resolution of disputes on an individual basis and preclude class action lawsuits. But while the features of class actions—aggregation of claims and spreading of litigation costs over many class members—may sound appealing in theory, these benefits are very rarely, if ever, realized. Most class actions provide little or no benefit at all to class members. The indisputable beneficiaries of class actions, rather, are the plaintiffs' attorneys who file them and receive large fees if the cases are settled.

Importantly, most claims asserted by consumers and employees are individualized and cannot be brought as class actions. When an employee argues that his or her pay or benefits were wrongly calculated, or that he or she was unfairly denied a raise or promotion, or claims injury from harassment, those claims in the overwhelming majority of situations cannot be brought as class actions. And on the consumer side, a study of claims asserted by consumers—and not by lawyers—found that the overwhelming majority could not be litigated in a class action.[39]

Thus, while it is often claimed that class actions are necessary to allow certain low-value claims to be brought in court, the reality is that abandoning arbitration in order to allow for class actions would be the surest way to *prevent* many low-value claims from being prosecuted, because most low-value claims are not eligible for class treatment.

Moreover, the benefits of class actions are greatly overstated. Most class actions do not produce any recovery for absent class members. Class action studies consistently find that the overwhelming majority of these cases are resolved with no benefit to class members—87% in one study, 66% in another, and 60-80% in a third.[40]

Even in the small percentage of cases that settle, the benefits for class members are largely illusory:

- Most class action settlements do not involve automatic distribution of settlement payments and the vast majority of class members do not file claims for payment from these settlement funds.

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[39] Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Notice of Proposed Rulemaking on Arbitration Agreements*, Dkt. No. CFPB-2016-0020-3941 at 3, Appendix A 13-14 (Aug. 22, 2016).

[40] Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015* section 6, page 39 (Mar. 2015), perma.cc/8AX5-AYWN (hereinafter *CFPB Study*); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), goo.gl/3B27FQ (hereinafter *Mayer Brown Study*); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Colum. Bus. L. Rev. 1 (2017).

- One study reported a "weighted average claims rate" in class actions of just 4% -- in other words, 96% of the class members got nothing.[41]

- That figure comports with academic studies, which regularly conclude that only "very small percentages of class members actually file and receive compensation from settlement funds."[42]

- A recent empirical study explains that "although 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total." The author concluded that class actions "clearly do[] not achieve their compensatory goals . . . . Instead, the costs . . . are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation."[43]

While class members get little benefit from class actions, the lawyers who file these cases profit handsomely. These payments to lawyers, of course, are subtracted from the funds available to class members, and therefore are highly relevant in assessing the benefit that class actions provide to class members. One study found that the average settlement payment was no better than $32.35 per class member,[44] but attorneys' fees averaged $1 million per case.[45] And the average fee paid to plaintiffs' lawyers—as a percentage of the announced settlement (not the smaller amount actually distributed to class members)—was 41%, with a median of 46%.[46]

Class actions also typically take significantly longer to resolve than arbitrations. That means employees must wait much longer to obtain relief. One study found that class actions that produced a class-wide settlement took an average of nearly two years to resolve.[47] And that two-year average duration, moreover, may not even include the time needed for class members to submit claims and receive payment *after* a settlement is reached. Another study found that 14% of the class actions were still pending *four years* after they were filed, with no end in sight.[48]

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[41] *CFPB Study* at section 8, page 30; *see also Mayer Brown Study* at 7 & n.20 (in the handful of cases where statistics were available, and excluding one outlier case involving individual claims worth, on average, over $2.5 million, the claims rates were minuscule: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%).

[42] Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014).

[43] Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 2, 5, 21 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16-402, Feb. 1, 2016), perma.cc/TU9R-UDSM.

[44] *CFPB Study* at section 8, pages 27-28; *see also* Statement of the U.S. Chamber of Commerce to House Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (May 18, 2016) at Appendix, page 5 (explaining calculation), perma.cc/TJ92-CE9G.

[45] *CFPB Study* at section 8, page 33.

[46] *CFPB Study* at section 8, page 34.

[47] *CFPB Study* at section 8, page 37.

[48] *Mayer Brown Study* at 1.

Moreover, arbitration can provide an efficient means of effectively litigating small injuries shared by a large number of employees or consumers. Parties with related claims can use the same lawyer and (if needed) the same expert in order to share costs. Justice Kagan (in an opinion for herself and Justices Ginsburg and Breyer) has recognized that groups of claimants can vindicate their rights in arbitration without class procedures—through "informal coordination among individual claimants, or amelioration of arbitral expenses,"[49] both of which are features of virtually all arbitration agreements. And one study suggested that plaintiffs' lawyers may be able to "create a simulacrum of the class action by initiating dozens or even hundreds of two-party arbitrations against the same defendant" and thereby pursue class-action style cases in the employment arbitration arena.[50]

Thus, the notion that the only way for employees and consumers to band together to bring small claims is in class actions is incorrect—arbitration provides an effective way to act collectively, while also giving employees with individualized claims the opportunity to bring those claims (an opportunity that class actions do not provide).

* * * * *

Thank you again for the opportunity to testify today. I look forward to answering your questions.

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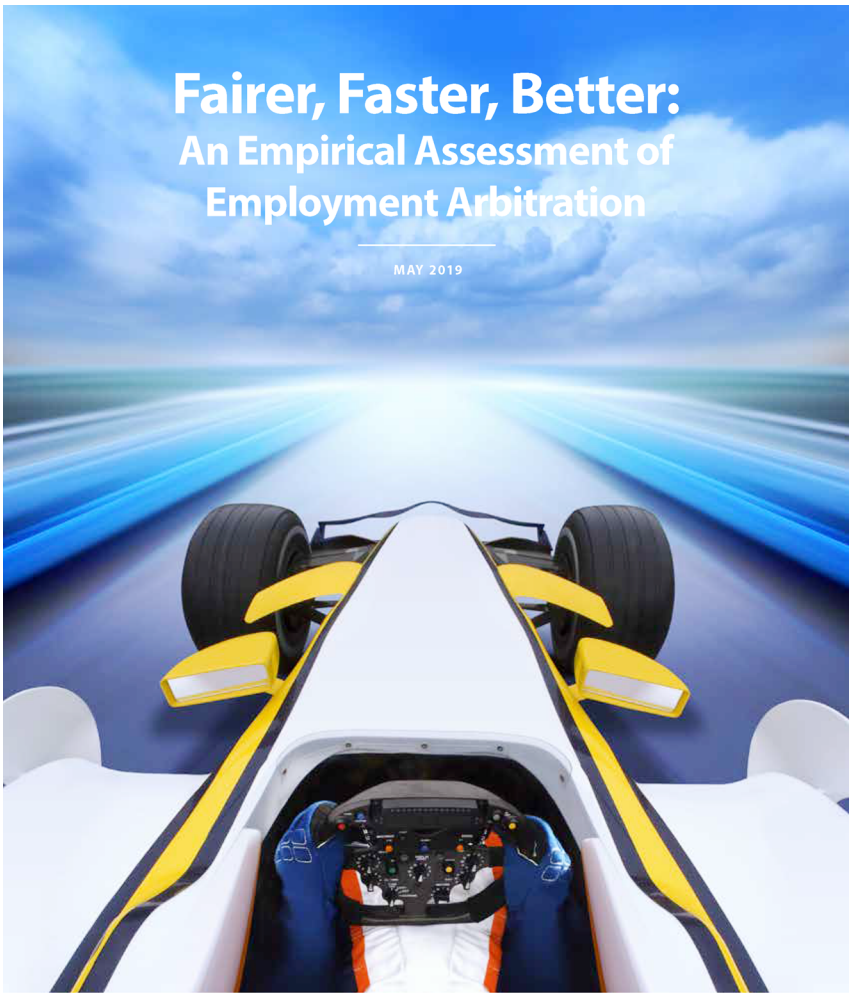
[49] *Italian Colors*, 570 U.S. at 249 (Kagan, J., dissenting).

[50] Chandrasekher & Horton, *supra* n.20, at 2, 9, 52-54.



ndp analytics
turning data into action

Fairer, Better, Faster:
An Empirical Assessment of Employment Arbitration

Nam D. Pham, Ph.D. and Mary Donovan[1]

Table of Contents

1 Nam D. Pham is Managing Partner and Mary Donovan is a Principal at ndp | analytics. Lea Lassoued and Davide Sonzogni provided research assistance. The U.S. Chamber Institute for Legal Reform provided financial support to conduct this study. The opinions and views expressed in this report are solely those of the authors.

EXECUTIVE SUMMARY

Alternative dispute resolution (ADR) procedures have become more common over the last couple of decades as a means to resolve employment disputes in the workplace. One ADR method, employment arbitration, is an alternative to having a judge or jury decide an employment dispute through proceedings in court.

Arbitration has a long history as a method of resolving employment-related disputes. Arbitration has been recognized as a lawful method of dispute resolution at least since the Federal Arbitration Act was enacted in 1925. The Act requires federal and state courts to enforce and uphold arbitration agreements to the same extent as other types of contracts.

In 1995, the American Arbitration Association (AAA) developed the Employment Due Process Protocol, a new set of arbitration rules tailored for the employment context. Other ADR providers, such as Judicial Arbitration and Mediation Services, Inc. (JAMS), have followed suit and established their own employment arbitration procedures.

Employment arbitration is an adjudicative proceeding. Similar to the traditional litigation process, each party presents evidence and arguments to an arbitrator or a panel of arbitrators at a hearing. Unlike litigation, plaintiffs and defendants in arbitration typically are not limited to state or federal rules of evidence and the process can be more informal than traditional court-based litigation. After the evidence is presented, the arbitrator provides a written opinion. That decision, called an award, is final and is subject to deferential review in court.[2] The U.S. Supreme Court has noted that the arbitration process has many advantages compared to litigation, because it is faster, simpler, less expensive, less disruptive, and more flexible.[3] However, only a limited number of empirical studies have fully assessed and compared similar arbitrations and litigation.

Arbitration has a long history as a means of resolving employment-related issues, and it has gained popularity as a forum for resolving employment disputes since the mid-1990s. But there have been few empirical studies of the arbitration process. This report compiles, analyzes, and compares over 10,000 employment arbitrations with over 90,000 employment lawsuits in federal courts that terminated between 2014-18. These arbitrations and litigations exhibited a similar outcome pattern, in which three quarters were settled and only between 10%-14% ended with prevailing and losing parties. However, when cases proceeded to adjudication, plaintiffs, who almost always were employees, were more likely to prevail in arbitration than in litigation. During 2014-18, in decided cases, employee-plaintiffs prevailed in more than 32% of arbitrations but only 11% of litigations. Furthermore, prevailing employees typically won twice as much money in arbitration than in litigation. Employment arbitration also was faster than litigation.

2 See 9 U.S.C. §§ 10-11.

3 See, e.g., Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985); Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 123 (2001); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

This study compiled a large dataset of over 100,000 employment disputes to undertake an empirical analysis of employment arbitration in comparison to court-based employment litigation. We first compared the outcome pattern of all employment arbitration and employment litigation cases, whether initiated by employees or employers, that were terminated between 2014 and 2018. Then we compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018. The employment arbitration data came directly from AAA and JAMS, and the employment litigation data indirectly came from Lex Machina, a data provider that compiles litigation data from Public Access to Court Electronic Records (PACER)—the federal courts' system for accessing information about federal court cases.

Key findings of the report are:

1. **In general, the way most employment disputes are ultimately resolved does not vary between arbitration and litigation.** Nearly three-quarters of all employment disputes, whether instituted by employees or employers, or in arbitration or litigation, were settled. About half of the remaining cases were either dismissed, abandoned, or withdrawn; and the remaining cases were terminated with monetary and/or non-monetary awards. Only a small fraction (1.5%) of employment litigation cases filed in court reached trial.

2. **Employees are three times more likely to win in arbitration than in court.** Employees initiated and prevailed in 32% of all employment arbitrations that were terminated with awards during 2014-18. In contrast, employees initiated and prevailed in only 11% of all employment litigations that were terminated with judgments during the same period.

3. **Employee-plaintiffs receive higher monetary awards in employment arbitration than in litigation.** Employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court. The median award to employee-plaintiffs was $113,818 in arbitration compared to $51,866 in litigation. The average award to employee-plaintiffs was $520,630 in arbitration compared to $269,885 in litigation. Furthermore, the award of the top 90th percentile was $668,998 in employment arbitration compared to $539,574 in litigation.

4. **Employment arbitration is quicker than litigation.** Employee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days (523 days in median). In contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days (532 days in median).

In sum, employees have a better chance of winning in arbitration than in litigation. Employees initiated and prevailed in 32.3% of all arbitration cases that terminated with awards during 2014-18 compared to only 11.3% in litigation. Employee-plaintiffs in arbitration received monetary awards approximately two times the amounts received in litigation, both in average and median values. And employment arbitration cases were resolved faster than court cases, both in average and median number of days. (Table 1)

Table 1.
Employee-plaintiffs had better chances to win, had higher monetary award values, and spent less time in arbitration than in litigation

	Cases that employees initiated and prevailed as % of all winning cases	Amount awarded	Time spent from initiation to termination with monetary awards
Arbitration	32.3%	$520,630 (average) $113,818 (median)	569 days (average) 523 days (median)
Litigation	11.3%	$269,885 (average) $51,866 (median)	665 days (average) 532 days (median)

OUTCOMES OF EMPLOYMENT ARBITRATION AND LITIGATION

An employment dispute, resolved either by arbitration or litigation, has three potential outcomes: (1) the dispute is settled at some point during the process on terms that can include monetary payments and/or non-monetary promises (the settlement details may or may not be disclosed publicly); (2) the dispute is dismissed, abandoned, or withdrawn during the process; or (3) the dispute ends in a decision by the adjudicator in favor of one or both sides. We analyzed and compared the outcome pattern between employment arbitration and litigation cases that were initiated by employees or employers and were terminated during 2014-18.

Arbitration. Among 10,486 employment arbitration cases that were terminated during 2014-18, 7,664 cases (73%) were settled; 1,792 cases (17%) were dismissed, abandoned, or withdrawn; and 1,030 cases (10%) resulted in decisions with monetary and/or non-monetary elements. (Table 2)

Table 2.
More than 73% of employment arbitration cases were settled and 10% terminated with decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	10,486	100.0%
Decision	1,030	9.8%
Settlement	7,664	73.1%
Dismissed/Withdrawn	1,792	17.1%

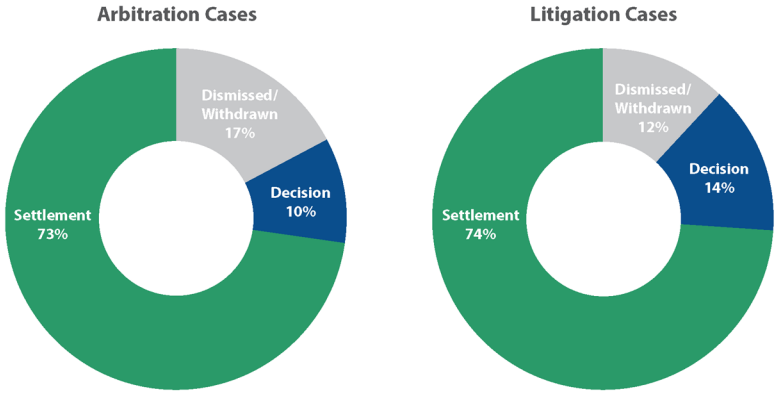
Litigation. During 2014-18, 90,758 employment cases were terminated in federal courts. Among these terminated cases, 66,927 (74%) cases were settled, 10,768 (12%) cases were dismissed, abandoned, or withdrawn, and 13,063 (14%) cases were terminated by court or jury determinations. (Table 3)

Table 3.
Similarly, nearly 74% of federal court employment litigation cases were settled and 14% resulted in decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	90,758	100.0%
Decision	13,063	14.4%
Settlement	66,927	73.7%
Dismissed/Withdrawn	10,768	11.9%

Overall, the resolution pattern of employment disputes is similar between arbitration and litigation. Nearly three-quarters of all employment disputes (whether initiated by employees or employers) were settled regardless of the process (arbitration or litigation). Of the remaining cases, about half were either dismissed, abandoned, or withdrawn. About 10% of arbitration cases and 14% of litigation cases resulted in decisions, with monetary and/or non-monetary elements. (Figure 1)

Figure 1.
The general pattern of outcomes is similar between employment arbitration and litigation



DECIDED CASES

Employment disputes can be initiated by either the employee or employer and can be terminated with a decision in favor of the plaintiff, the defendant, or both. We reviewed all cases that terminated in a decision (in arbitration or in court) and calculated the share of employee-initiated cases in which the employee prevailed.

Arbitration. Among the 1,030 employment arbitration cases terminated by decisions during 2014-18, 776 cases identify a prevailing party. The information regarding the prevailing party in the remaining 254 cases was unknown or indicated that there were awards to both plaintiffs and defendants. Among these 776 cases identifying a single prevailing party, employees initiated and prevailed in 251 cases, accounting for 32.3%. (Table 4)

Table 4.
Employees initiated and won 32% of employment arbitration cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	776	100.0%
Employees initiated and prevailed	251	32.3%

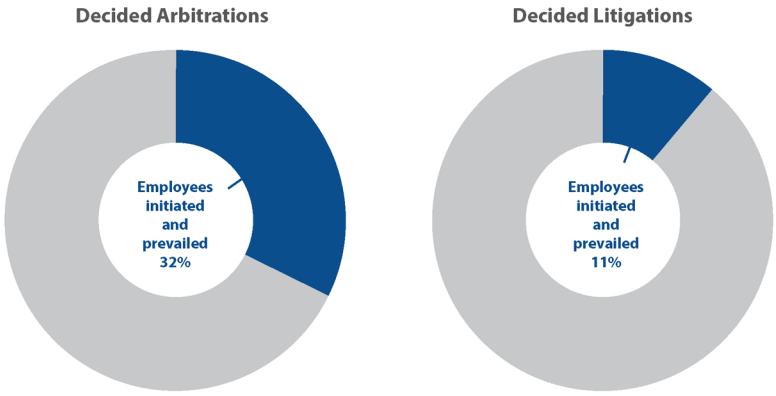
Litigation. All 13,063 federal court employment cases that terminated with decisions during 2014-18 have information regarding the prevailing party. Among these 13,063 cases, employees initiated and prevailed in 1,456 cases, accounting for 11.1%. (Table 5)

Table 5.
Employees initiated and won only 11% of employment litigation cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	13,063	100.0%
Employees initiated and prevailed	1,456	11.1%

Overall, both employment arbitration and litigation cases had a small chance of terminating with decisions: 10% for arbitration and 14% for litigation. However, an employee is much more likely to win in arbitration than in litigation. For employment disputes that terminated with awards to one party during 2014-18, employees initiated and prevailed 32% of the time in arbitration compared to only 11% in litigation. In other words, the chances for employees to win in employment arbitration were three times higher than in court. (Figure 2)

Figure 2.
The chances for employees to win in employment arbitration were three times higher than in litigation



AMOUNT AWARDED

Employment arbitration and litigation can be resolved with monetary and non-monetary awards to plaintiffs, defendants, or both. We calculated and compared the distribution of monetary award amounts to employees who prevailed in employee-initiated cases in arbitration and litigation.

In employee-plaintiff arbitration cases that terminated with monetary awards, prevailing employees received approximately two times the amount that employee-plaintiffs received in cases litigated in court. Among employment arbitration cases that terminated during 2014-18, the median and average awards to employee-plaintiffs were $113,818 and $520,630, respectively. The first and third quartile of award amounts were $23,118 and $295,936, respectively. The award amounts were at least $668,998 for the top 10% of employment arbitration cases awarded to employees who initiated the claims. During the same period, the median and average amounts awarded to employees who initiated employment litigation were $51,866 and $269,885, respectively. The first and third quartile of award amounts were $15,750 and $178,440, respectively. The award amounts were at least $539,574 for the top 10% of employment litigation cases awarded to employees who initiated the claims. (Table 6)

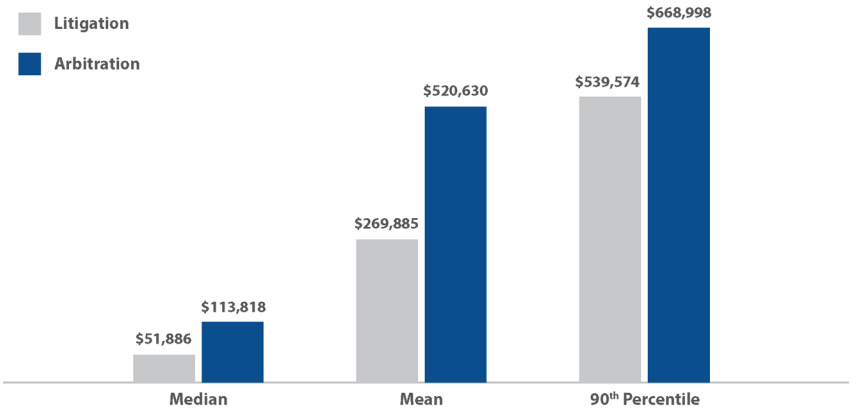
Table 6.
Award amounts to employee-plaintiffs were higher in arbitration than in litigation

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration (247 cases)	$520,630	$23,118	$113,818	$295,936	$668,998
Litigation (1,446 cases)	$269,885	$15,750	$51,866	$178,440	$539,574

Overall, employee-plaintiffs received higher awards, both in median and mean values, in arbitration than in litigation: (Figure 3)

- The median award for employee-plaintiffs in employment arbitration was nearly 120% higher than litigation, $113,818 compared to $51,866.
- The average award for employee-plaintiffs in employment arbitration was 93% higher than litigation, $520,630 compared to $269,885.
- The top 10% of awards to employee-plaintiffs in employment arbitration was 24% higher than litigation, beginning at $668,998 compared to $539,574.

Figure 3.
Employees received higher awards in employment arbitration than in litigation



TIME TO RESOLUTION

Another important feature of arbitration is that it resolves cases faster than litigation. We calculated and compared the dispute-processing time from initiation to termination for disputes initiated by employees in arbitration and litigation. Time was measured by days from the filing date to the termination.

Arbitration. The median and average number of days from initiation to termination were 523 and 569, respectively, in cases where employees initiated and prevailed during 2014-18. The bottom quartile and the third quartile were 397 days and 686 days, respectively. 10% of arbitration cases that employees initiated and in which they prevailed with awards required at least 844 days. (Table 7)

Table 7.
The average employment arbitration case terminated with awards in 569 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration cases where employees initiated and prevailed (251 cases)	569	397	523	686	844

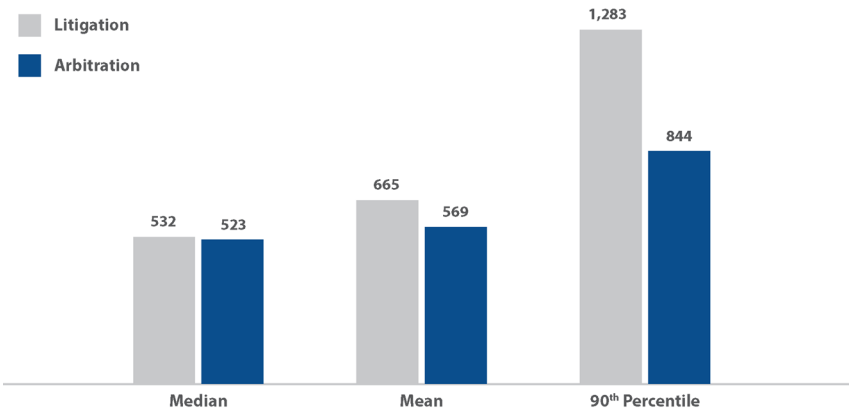
Litigation. The litigation process has many steps and therefore requires time. Half of cases that employees initiated in litigation in federal courts and prevailed during 2014-18 required at least 532 days, with an average of 665 days. 10% of litigation cases that employees initiated and terminated in courts with awards required at least 1,283 days. (Table 8)

Table 8.
The average time for litigation to terminate with monetary awards was 665 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Litigation cases where employees initiated and prevailed (1,453 cases)	665	274	532	867	1,283

Overall, the processing time for employees to win awards in arbitration is less than in litigation. The average processing time from initiation to completion was 569 days in employee-plaintiff arbitration cases compared to 665 days in employee-plaintiff litigation cases. The median processing time was 523 days in employee-plaintiff arbitration cases compared to 532 days in employee-plaintiff litigation cases. The processing time of the 90th percentile started from 844 days in arbitration compared to 1,283 days in litigation. (Figure 4)

Figure 4.
Employee-plaintiff employment disputes required fewer days in arbitration than in litigation

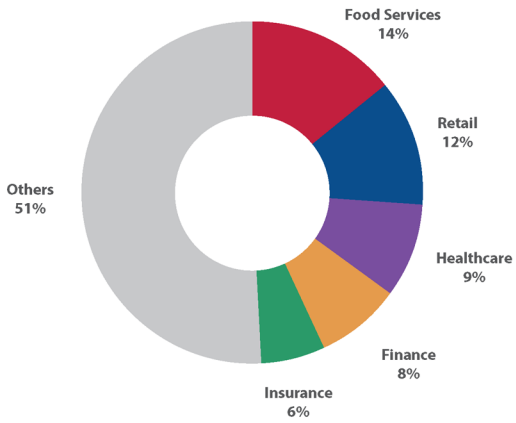


CHARACTERISTICS OF EMPLOYMENT ARBITRATION CASES

Half of the employment arbitration cases that were terminated during 2014-18 were concentrated in five industries: food services, retail, healthcare, finance, and insurance.

Both food services and retail industries have higher numbers of small businesses, part-time employees, and lower-income employees. (Figure 5)

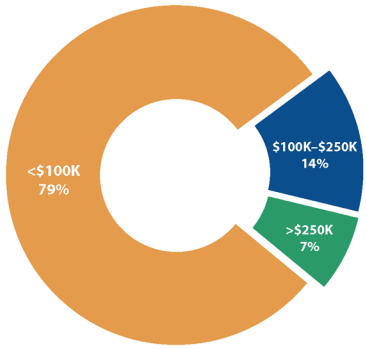
Figure 5.
Employment arbitration spans across industries, with more than 25% of arbitrations concentrated in food services and retail industries



Employees across salary levels use arbitration to resolve their employment disputes. Over 79% of employees who initiated employment arbitration had annual salaries under $100,000 at the time of the dispute. For comparison, over 70% of U.S. households earned less than $100,000 per year in 2017.[4] About 14% of employees involved in employment arbitration had annual salaries between $100,000 and $250,000 and 7% had annual salaries above $250,000. (Figure 6)

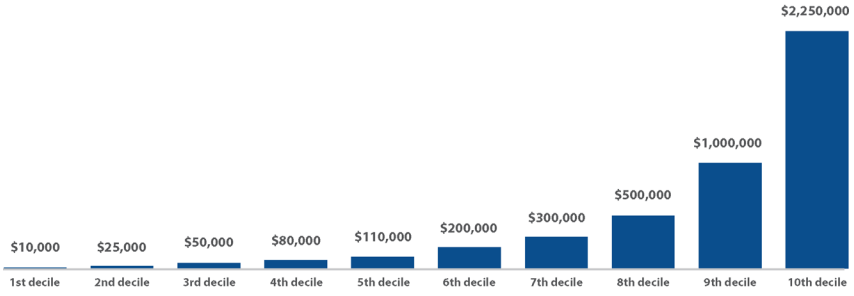
4 U.S. Census Bureau, Households by Total Money Income, Race, and Hispanic Origin of Household: 1967 to 2017.

Figure 6.
79% of employees who initiated employment arbitration earned less than $100,000 a year



Among those 10,486 employment arbitration cases terminated during 2014-18, AAA and JAMS reported the amount claimed for about one-third of all cases. The dollar amount claimed in these 3,550 cases ranges from several thousands of dollars to tens of millions of dollars. The median claim amount was $150,000 and the mean was $947,000. The median amount claimed of the lowest 10% was $10,000 and the top 10% was $2.25 million. (Figure 7)

Figure 7.
Employment arbitration claims ranged from several thousands to tens of millions of dollars



METHODOLOGY

This study compiled employment arbitration data from AAA and JAMS reports and employment litigation data in federal courts from PACER records to construct a large database to compare employment arbitration and employment litigation. Our dataset contains arbitration and litigation cases that were initiated by either employees or employers and were terminated during 2014-18. Using the data, we first compared the outcomes (decisions, settlement, or dismissed/withdrawn) of all employee-initiated and employer-initiated cases between arbitration and traditional employment litigation. We then compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018.

Arbitration Data. Our analysis of employment arbitration cases relies on two data sources – American Arbitration Association (AAA), the largest provider of employment arbitration services, and Judicial Arbitration and Mediation Services, Inc. (JAMS).[5]

We downloaded data directly from the AAA and JAMS websites in January 2019. We combined both AAA and JAMS employment arbitration data for our analysis. Both AAA and JAMS provide data for arbitration cases terminated during 2014-18. AAA does not provide data of employment arbitration terminated prior to 2014. JAMS employment arbitration data prior to 2014 are incomplete and we therefore did not include them in our analysis. AAA and JAMS do not provide data for on-going employment arbitration cases. We removed employment arbitration cases with missing data on the initiating party and/or outcome.

Our dataset contains 7,601 employment cases from AAA and 2,885 employment cases from JAMS, totaling 10,486 arbitration cases that terminated during 2014-18. The employer and employee in each case were assigned as plaintiff and defendant depending on the initiating party. 1,030 cases were recorded as terminating in awards, of which 776 had awards either only to the plaintiff or only to the defendant; the remaining cases had awards to both parties or failed to indicate which party prevailed. Of those 776 cases, 251 were initiated by employees. When analyzing award amounts, cases with the amount recorded as "0" are included and cases where the value is missing are excluded.

Litigation Data. Our analysis of litigation cases relies on 90,758 federal court cases that terminated during 2014-18. We downloaded litigation data from the Lex Machina portal in January 2019. Lex Machina is a database that collects and organizes federal court data from the federal courts' Public Access to Court Electronic Records (PACER) system.

Our analysis excludes class actions and cases where the plaintiff was a government agency, as these claims are not comparable to private party employment arbitration. Additionally, cases terminated with a consent judgment were classified as "settled cases" instead of "awarded cases" because they embody settlements between the parties. This reclassification was applied to 144 cases (1.1% of all awarded cases). After removing consent judgments, we identified 13,063 awarded cases (i.e., defendant or plaintiff wins). Of these,

5 AAA Consumer and Employment Arbitration Statistics, available at https://www.adr.org/consumer and JAMS Consumer Case Information, available at https://www.jamsadr.com/consumercases/

4,303 cases have monetary damage amounts. These damages are referred to as "monetary awards" throughout the report. Due to missing data, there is a negligible discrepancy between the total number of cases used to analyze the award amount and the total number of cases used to analyze the duration from initiation to award. Of the 13,063 awarded cases, plaintiffs won 1,711. To determine the number of employee-initiated cases, we manually classified cases won by the plaintiff based on the names of the plaintiff and defendant. Plaintiffs or defendants with companies or organizations in the name were labeled "company," individuals were labeled "employee."

CONCLUSION

The empirical evidence shows that employment arbitration is an effective process for resolving employment disputes. While litigation is a long and often burdensome process with many rules and requirements, arbitration is simpler and more flexible. We used a large dataset from the largest employment arbitration providers and a national litigation database to analyze and compare arbitration and litigation in recent years. Analysis of that evidence shows that arbitration yields better results for employee-plaintiffs. Arbitration is faster than litigation, taking 569 days, instead of 665 days, on average for employee-plaintiffs to obtain an award. Importantly, employee-plaintiffs fare better in arbitration, winning 32% compared to 11% of awarded cases for litigation. Moreover, monetary awards for employee-plaintiffs in arbitration were 93% higher than litigation on average. In sum, arbitration is faster and more favorable to employees than litigation.

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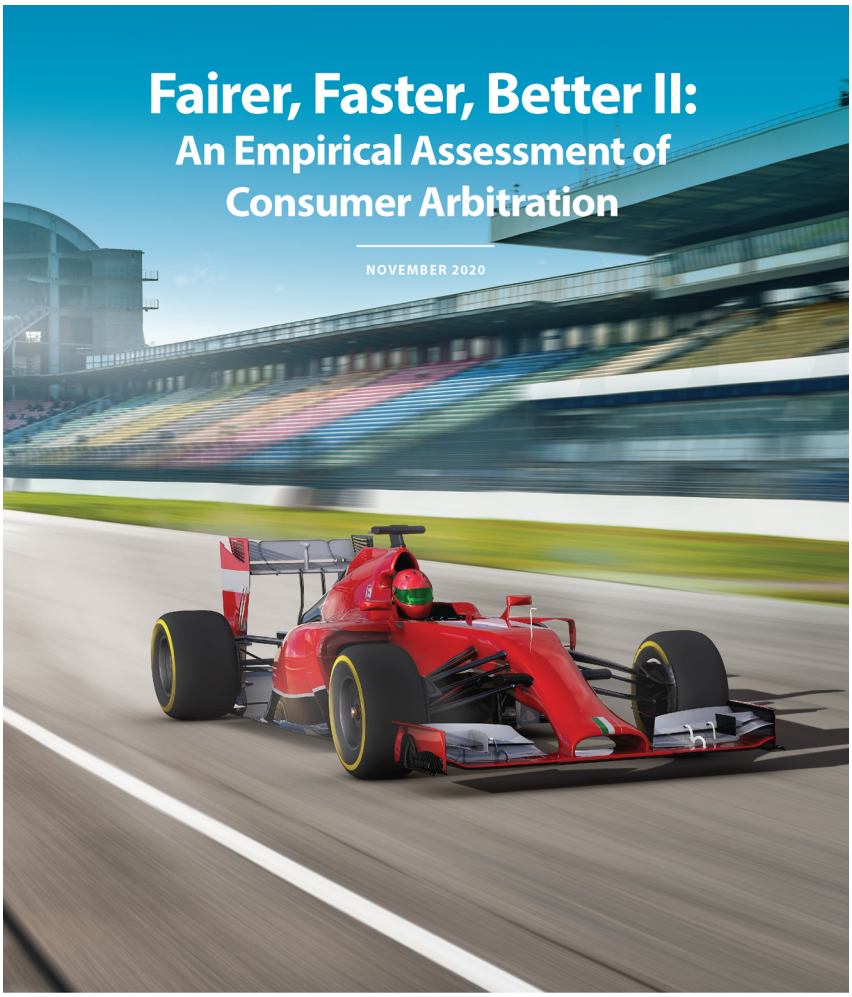
About ndp | analytics
Founded in 2000, ndp | analytics produces reports and products through the rigor of quantitative analyses. Our work is rooted in economic fundamentals that construct deliverables that appeal to a broad audience through clear messaging. Our firm has advised the business community on the economic impacts of a wide-range of public policies, developed comprehensive research-based advocacy programs, established benchmarks across industries, and assessed the costs and benefits of major legislation and regulations. The work our team has conducted has been prominently cited in numerous channels including the Economic Report of the President to Congress, national media outlets, reports from government agencies, Congressional testimonies, and by Members of Congress. We provide support to a diverse group of clients including trade associations, corporations, law firms, multilateral organizations, and government agencies.



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turning data into action

Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration

Nam D. Pham, Ph.D. and Mary Donovan[1]

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1 Nam D. Pham is Managing Partner and Mary Donovan is Principal at ndp | analytics. Davide Sonzogni provided research assistance. The U.S. Chamber Institute for Legal Reform provided financial support to conduct this study. The opinions and views expressed in this report are solely those of the authors.

EXECUTIVE SUMMARY

Arbitration has been recognized as a lawful and efficient method of dispute resolution at least as early as 1925 when the Federal Arbitration Act was enacted. The Act requires federal and state courts to enforce and uphold arbitration agreements to the same extent as other types of contracts. Arbitration has become more popular over the past couple of decades to resolve disagreements between consumers and businesses, as it is usually faster and cheaper for both parties than going to court.

This report is based on a dataset of 101,244 disputes involving consumers that terminated between January 1, 2014 and June 30, 2020, which we constructed to analyze the differences between consumer arbitration and litigation processes. We first compared the outcomes of arbitrations and litigation involving consumers. We then compared the win rate, award amount, and dispute processing time from initiation to termination for consumer arbitrations and consumer litigation cases that were initiated by consumers and were terminated with awards. Consumer arbitration data came directly from the two largest arbitration service providers—American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS). Consumer litigation cases came from Public Access to Court Electronic Records (PACER) and were compiled and provided by Lex Machina, a third-party data provider.

Key findings of the report are:

1. **Consumers are more likely to win in arbitration than in court.** Consumers initiated and prevailed in 44% of all consumer arbitrations that were terminated with awards during January 2014 – June 2020. During the same period, consumers initiated and prevailed in 30% of all consumer litigation cases that were terminated with judgments.

2. **Consumers receive higher awards in arbitration than in litigation.** The median award in arbitrations that consumers initiated and won was $20,019, compared to just $6,565 in litigation they initiated. The mean award to consumers was $68,198 in arbitration compared to $57,285 in litigation.

3. **Consumer arbitration is faster than litigation.** It took a mean time of 299 days for consumers to initiate and terminate a dispute with an award in arbitration compared to 429 days in litigation. The median number of days for consumers to initiate and complete a dispute with an award was 251 days in arbitration compared to 311 days in litigation.

4. **The majority of disputes involving consumers are settled.** In arbitration, 57% of disputes involving consumers were settled, 22% were dismissed or withdrawn, and 21% terminated with awards during January 2014 – June 2020. In litigation, 85% of cases involving consumers were settled, 9% were dismissed or withdrawn, and 6% terminated with awards during the same period.

In sum, consumers who initiated cases and prevailed during January 2014 – June 2020 had a better chance of winning in arbitration than in litigation. Consumers initiated and prevailed in 44% of all arbitrations that terminated with one prevailing party compared to 30% in litigation. Consumers who initiated and prevailed in arbitration also received higher monetary awards than in litigation. In addition to having better chances to win and higher monetary awards, consumers who initiated and prevailed had their cases resolved more quickly in arbitration than in litigation, both in mean and median number of days. (Table 1)

Table 1.
Consumers who initiated cases and prevailed had better chances to win, had higher award amounts, and required less time in arbitration than in litigation during January 2014 – June 2020

	Cases that consumers initiated and prevailed		
	As % of cases terminated with one prevailing party	Amount awarded to consumers	Time spent from initiation to completion
Arbitration	44.3%	$68,198 (mean) $20,019 (median)	299 days (mean) 251 days (median)
Litigation	30.2%	$57,285 (mean) $6,565 (median)	429 days (mean) 311 days (median)

OUTCOMES OF ALL ARBITRATIONS AND LITIGATION CASES INVOLVING CONSUMERS

A consumer dispute, resolved either through arbitration or litigation, has three potential outcomes: (1) the dispute is settled at some point during the process on terms that can include monetary payments and/or non-monetary relief (the settlement details may or may not be disclosed publicly); (2) the dispute is dismissed, abandoned, or withdrawn during the process; or (3) the dispute ends in a decision by the adjudicator in favor of one or both sides. We analyzed and compared the outcome pattern between consumer arbitration and litigation cases that were initiated by consumers or businesses and were terminated during January 2014 – June 2020.

Arbitration. Among 24,629 of all arbitrations involving consumers that were terminated during January 2014 – June 2020, 14,024 cases (56.9%) were settled; 5,476 cases (22.2%) were dismissed, abandoned, or withdrawn; and 5,129 cases (20.8%) resulted in decisions with monetary and/or non-monetary elements. (Table 2)

Table 2.
Nearly 57% of arbitrations involving consumers were settled and over 20% terminated with decisions during January 2014 – June 2020

	Number of Cases	As % of Terminated Cases*
Terminated cases	24,629	100.0%
Decision	5,129	20.8%
Settlement	14,024	56.9%
Dismissed/Withdrawn	5,476	22.2%

*Note: totals in this and other tables may not sum exactly due to rounding.

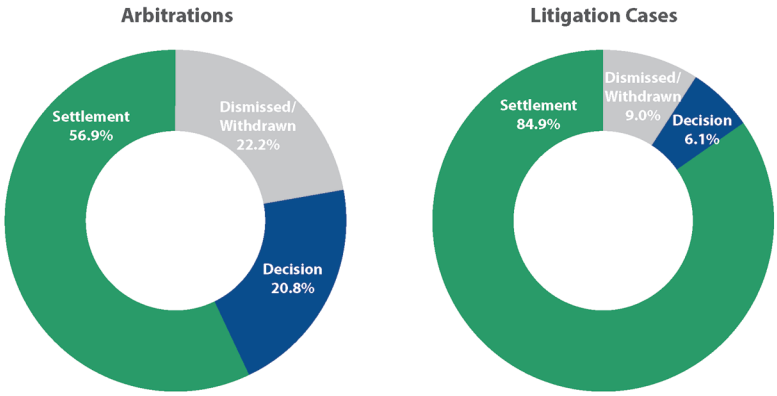
Litigation. During January 2014 – June 2020, 76,615 cases involving consumers were terminated in federal courts. Among these terminated cases, 65,038 cases (84.9%) were settled, 6,890 cases (9.0%) were dismissed or ended with other procedural resolutions, and 4,687 cases (6.1%) were terminated by court or jury determinations. (Table 3)

Table 3.
Nearly 85% of litigation cases involving consumers were settled and just over 6% terminated with decisions during January 2014 – June 2020

	Number of Cases	As % of Terminated Cases
Terminated cases	76,615	100.0%
Decision	4,687	6.1%
Settlement	65,038	84.9%
Dismissed/Withdrawn	6,890	9.0%

Overall, the majority of all consumer disputes, whether in arbitration or in litigation, end in settlement. However, the distribution is widely different between the arbitration process and the litigation process. While less than 60% of arbitrations were settled, almost 85% of litigation cases were settled (a 28-percentage-point difference). While only 9% of litigation cases were dismissed or withdrawn, over 22% of arbitrations were dismissed or withdrawn (a 13-percentage-point difference). Only 6% of all litigation cases involving consumers were terminated with a court decision, but nearly 21% of all arbitrations involving consumers were terminated with a decision. (Figure 1)

Figure 1.
Most arbitration and litigation cases involving consumers settle, but arbitrations were more likely to result in a decision on the merits during January 2014 – June 2020



DECIDED CASES

Consumer disputes can be initiated by either a consumer or a business and can be terminated with a decision in favor of the plaintiff, the defendant, or both. We reviewed all cases that terminated in a decision (in arbitration or in court) and calculated the share of consumer-claimant cases in which the consumer prevailed. In this report, we use the term "consumer-claimants" to refer to consumers who initiated claims in arbitration or litigation processes.

Arbitration. Among the 5,129 consumer arbitrations terminated by decisions during January 2014 – June 2020, 4,113 identified a prevailing party. The information regarding the prevailing party in the remaining 1,016 arbitrations was unknown or indicated that there were awards to both parties. Among these 4,113 arbitrations identifying a single prevailing party, consumers initiated and prevailed in 1,821 cases, accounting for 44.3% of decisions. (Table 4)

Table 4.
Consumers initiated and won 44% of all arbitrations that terminated with awards to one party during January 2014 – June 2020

	Number of Cases	As % of Decided Cases with One Prevailing Party
Decided arbitrations with one prevailing party	4,113	100.0%
Consumers initiated and prevailed	1,821	44.3%

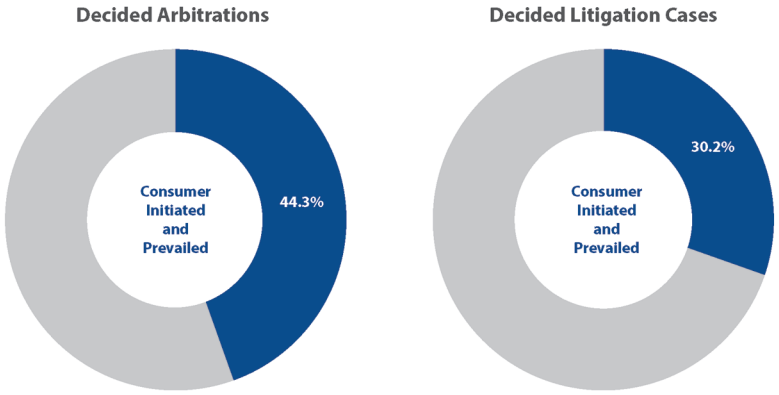
Litigation. All 4,687 federal court consumer cases that terminated with decisions during January 2014 – June 2020 have information regarding the prevailing party. Among these cases, consumers initiated and prevailed in 1,417 cases, accounting for 30.2% of decided cases. (Table 5)

Table 5.
Consumers initiated and won 30% of all litigation cases that terminated in federal court with decisions during January 2014 – June 2020

	Number of Cases	As % of Awarded Cases
Decided cases in federal courts with one prevailing party	4,687	100.0%
Consumers initiated and prevailed	1,417	30.2%

In sum, consumer-claimants were more likely to win in arbitration than in litigation. For consumer disputes that terminated with awards to one party during January 2014 – June 2020, consumers initiated and prevailed 44% of the time in arbitration compared to 30% in litigation. In other words, the chances for consumers to win in arbitration were almost 1.5 times higher than in court. (Figure 2)

Figure 2.
Consumer-claimants won more often in arbitration than in litigation during January 2014 – June 2020



AMOUNT AWARDED

Consumer arbitration and litigation can be resolved with monetary and non-monetary awards to consumers, businesses, or both. We calculated and compared the distribution of monetary award amounts to consumers who prevailed in consumer-claimant cases in arbitration and litigation.

In consumer-initiated claims that terminated with monetary awards, prevailing consumers received higher awards in arbitration than in litigation. Among consumer-claimant arbitrations that terminated during January 2014 – June 2020, the median and mean awards to consumers were $20,019 and $68,198, respectively. The first and third quartiles of award amounts were $6,740 and $58,582, respectively. The award amounts to consumers were at least $150,000 for the top 10% of consumer-claimant arbitrations in which consumers prevailed. During the same period, the median and mean amounts awarded to consumers who initiated litigation were $6,565 and $57,285, respectively. The first and third quartiles of award amounts were $4,108 and $17,555, respectively. The award amounts to consumers were at least $64,448 for the top 10% of consumer-claimant litigation cases. (Table 6 and Figure 3)

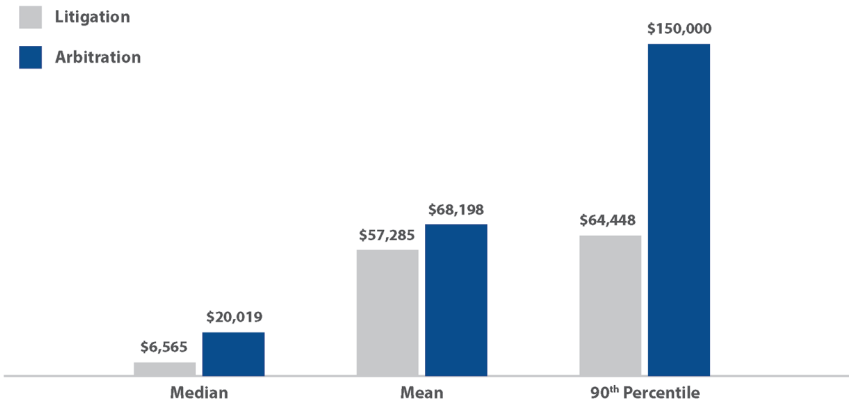
Table 6.
Award amounts to consumer-claimants in arbitrations and litigation cases during January 2014 – June 2020

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration (1,688 cases)	$68,198	$6,740	$20,019	$58,582	$150,000
Litigation (1,263 cases)	$57,285	$4,108	$6,565	$17,555	$64,448

Overall, consumer-claimants received higher awards in arbitration than in litigation:

- The median award for consumer-claimants in arbitration was over three times the dollar amount in litigation, $20,019 compared to $6,565.
- The 90th percentile of awards to consumer-claimants in arbitration was over 2.3 times the dollar amount in litigation, $150,000 compared to $64,448.
- The mean award for consumer-claimants in arbitration was 19% higher than litigation, $68,198 compared to $57,285.

Figure 3.
Consumer-claimants received higher awards in arbitration during January 2014 – June 2020



TIME TO RESOLUTION

Another important feature of arbitration is that it resolves cases faster than litigation. We calculated and compared the dispute-processing time from initiation to termination for disputes initiated and won by consumers in arbitration and litigation. Time was measured by days from the filing date to the date of termination.

Arbitration. The mean and median number of days from initiation to termination were 299 and 251, respectively, where consumers initiated and prevailed in arbitration during January 2014 – June 2020. The first and third quartiles were 168 days and 368 days, respectively. The top 10% of arbitrations where consumers initiated and prevailed with awards required at least 515 days. (Table 7)

Table 7.
The mean consumer-claimant arbitration terminated with an award in 299 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitrations where consumers initiated and prevailed (1,821 cases)	299	168	251	368	515

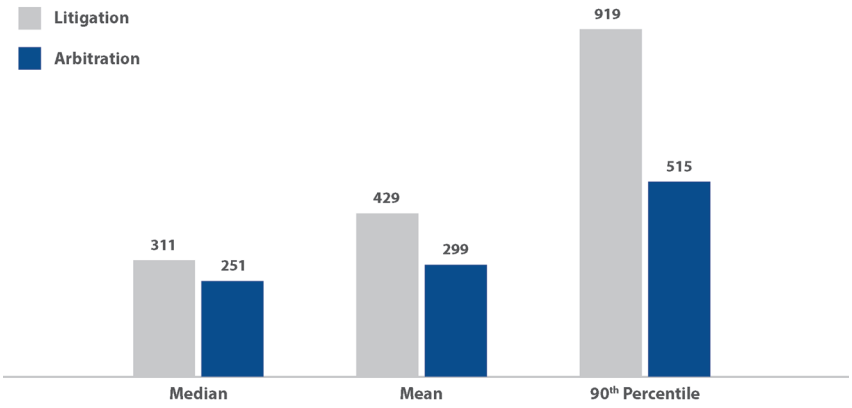
Litigation. The litigation process has many steps and therefore usually requires considerably more time than arbitration to resolve a dispute. Half of cases that consumers initiated in litigation in federal court and prevailed during January 2014 – June 2020 required at least 311 days, with a mean duration of 429 days. The top 10% of litigation cases that consumers initiated and terminated in courts with awards required at least 919 days. (Table 8)

Table 8.
The mean consumer-claimant litigation case terminated with an award in 429 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Litigation cases where consumers initiated and prevailed (1,417 cases)	429	167	311	553	919

Overall, the processing time for consumer-claimants to win awards in arbitration is considerably less than in litigation. The mean processing time from initiation to completion was 299 days in consumer-claimant arbitrations compared to 429 days in consumer-claimant litigation cases. The median processing time was 251 days in consumer-claimant arbitrations compared to 311 days in consumer-claimant litigation cases. The processing time of the 90th percentile was at least 515 days in arbitration compared to 919 days in litigation. (Figure 4)

Figure 4.
Consumer-claimants received an award faster in arbitration than in litigation



METHODOLOGY

This report compiled consumer arbitrations from AAA and JAMS reports and consumer litigation cases in federal courts from PACER, through Lex Machina, to construct a database to assess consumer disputes in arbitration and litigation. Using this large dataset, we compared the outcomes between consumer arbitration and traditional consumer litigation during the same time period. We also compared the monetary award amount and time spent on consumer disputes in these fora where consumers initiated and prevailed in the dispute.

Arbitration Data. Our analysis of consumer arbitrations relies on two data sources—American Arbitration Association (AAA), the largest provider of consumer arbitration services, and Judicial Arbitration and Mediation Services, Inc. (JAMS).[2]

We downloaded data directly from the AAA and JAMS websites in August 2020 and in January 2018 to compile a database of arbitrations. Currently, AAA and JAMS provide data for arbitrations terminated through June 30, 2020. Our combined dataset contains arbitrations that terminated between January 1, 2014 and June 30, 2020. Data prior to 2014 are not available. AAA and JAMS do not provide data for ongoing consumer arbitrations. We removed consumer arbitrations with missing data on the initiating party and/or outcome.

Our dataset contains 21,562 consumer arbitrations from AAA and 3,067 consumer arbitrations from JAMS, totaling 24,629 arbitrations that terminated during January 2014 – June 2020. The business and consumer in each case were

2 AAA Consumer and Employment Arbitration Statistics, available at https://www.adr.org/consumer and JAMS Consumer Case Information, available at https://www.jamsadr.com/consumercases/.

assigned as plaintiff and defendant depending on the initiating party. 5,129 arbitrations were recorded with awards, of which 4,113 cases involved awards to only one party. The remaining arbitrations either involved awards to both parties or it was not apparent which party prevailed. Of the 4,113 arbitrations resulting in awards to only one party, consumers initiated and received awards in 1,812.

Litigation Data. Our analysis of litigation cases relies on 76,615 federal court cases that terminated between January 1, 2014 and June 30, 2020. We downloaded litigation data from the Lex Machina portal in September 2020. Lex Machina is a database that collects and organizes federal court data from the federal courts' PACER system.

Our analysis excludes class actions and cases where the plaintiff was a government agency, as these claims are not comparable to individualized consumer arbitrations involving private parties. Additionally, cases terminated with a consent judgment were classified as "settled cases" instead of "awarded cases" because they embody settlements between the parties. This reclassification was applied to 684 cases. After removing consent judgments, Lex Machina identified 4,687 awarded cases (defendant or plaintiff wins). Of the 4,687 awarded cases, plaintiffs won 1,465 cases. To determine the number of consumer-claimant cases, we manually classified cases won by the plaintiff based on the names of the plaintiff and defendant. Plaintiffs or defendants with companies or organizations in the name were labeled "company," individuals were labeled "consumer." We identified 1,417 cases where the consumer-claimant won. Of these, 1,263 cases have monetary damage amounts. These damages are referred to as "monetary awards" throughout the report. Due to missing data, there is a small discrepancy between the total number of cases used to analyze the award amount and the total number of cases used to analyze the duration of the case from initiation to award.

Our arbitration and litigation datasets exclude insurance cases, healthcare cases, and personal injury cases.

CONCLUSION

The empirical evidence shows that consumer arbitration is an effective process for consumers to resolve disputes. While litigation is a long and often burdensome process with many rules and requirements, arbitration is simpler and more flexible. Using publicly available data from two of the largest consumer arbitration providers and a national litigation database, we constructed a comprehensive dataset to analyze and compare arbitration and litigation matters involving consumers in recent years. Analysis of that evidence shows that arbitration yields better results for consumers who initiate claims. Arbitration is faster than litigation, taking 299 days instead of 429 days on average for consumers to obtain an award. Importantly, consumers fare better in arbitration, winning 44% compared to 30% of awarded cases for litigation. Moreover, the median monetary award for consumer-claimants in arbitration was over three times the award for consumers in litigation. All told, the arbitration process is faster and more favorable to consumers than the litigation process.

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Nam D. Pham is Managing Partner of ndp | analytics, a strategic research firm that specializes in economic analysis of public policy and legal issues. Prior to founding ndp | analytics in 2000, Dr. Pham was Vice President at Scudder Kemper Investments in Boston. Before that he was Chief Economist of the Asia Region for Standard & Poor's DRI; an economist at the World Bank; and a consultant to both the Department of Commerce and the Federal Trade Commission. Dr. Pham is an adjunct professor at the George Washington University. Dr. Pham holds a Ph.D. in economics from the George Washington University, an M.A. from Georgetown University; and a B.A. from the University of Maryland. He is a former member of the board of advisors to the Dingman Center for Entrepreneurship at the University of Maryland, Smith School of Business and the Food Recovery Network.

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Searle Civil Justice Institute

CONSUMER ARBITRATION
Before the American Arbitration Association

Preliminary Report

March 2009

Searle Center on Law, Regulation, and Economic Growth

Northwestern University School of Law

SEARLE CIVIL JUSTICE INSTITUTE

Founded in early 2008 as a division of the Searle Center on Law, Regulation, and Economic Growth, the Searle Civil Justice Institute (SCJI) aims to become the preeminent national source of large scale, empirical studies on public policy issues related to our nation's civil justice system. An operating premise of the Searle Civil Justice Institute is that hard data is a powerful and necessary tool in public policy debates.

SCJI expands and furthers the mission of the Searle Center on Law, Regulation, and Economic Growth. The Searle Center studies the impact of laws and regulation on economic growth and communicates the results of that research to academic, public policy, and judicial leaders. The Searle Center was founded in 2006 as a unit of Northwestern University School of Law with a generous grant from Daniel C. Searle, longtime philanthropist and Northwestern University trustee.

A Board of Overseers advises and reviews the activities of the Searle Civil Justice Institute. The Board is composed of a balanced group of leading legal, economic, business, and public policy experts. The Board of Overseers has approved the SCJI Research Protocol to ensure the quality, objectivity, and independence of all SCJI work product. In accordance with the SCJI Research Protocol, all research projects are subjected to independent peer review prior to widespread dissemination. SCJI work products do not necessarily reflect the opinions or policies of the research sponsors or the SCJI Board of Overseers.

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Foreword

Arbitrations between businesses and consumers arising out of pre-dispute arbitration agreements have increasingly come under attack. Proposed federal legislation, the Arbitration Fairness Act of 2009, would make pre-dispute arbitration clauses unenforceable in consumer, employment, and franchise contracts. Critics assert that arbitration providers do not adequately enforce minimum procedural safeguards, or Due Process Protocols, to ensure the fairness of arbitration. Moreover, critics question the impact of cost on access to arbitration, the speed of the process, and how well consumers fare relative to businesses in such proceedings. In contrast, supporters of consumer arbitration maintain that such proceedings actually increase access to justice and are conducted in a fair, timely, and cost-effective manner.

An operating premise of the Searle Civil Justice Institute (SCJI) is that public policy debates should be informed by systematically collected and rigorously analyzed empirical data. Despite the importance of empirical evidence to discussions of the Arbitration Fairness Act, the record as it relates to consumer arbitration is limited in important respects. To begin with, arbitrations are privately managed procedures for which data are generally not available. In addition, while a number of studies have examined other types of arbitration, far fewer studies have examined consumer arbitration in any systematic way. Finally, there is no empirical evidence examining enforcement of Due Process Protocols by arbitration providers.

To better understand the issues surrounding consumer arbitration and to begin developing a factual record for policy discussion, SCJI commissioned a Task Force on Consumer Arbitration. Christopher R. Drahozal, John M. Rounds Professor of Law at the University of Kansas, was asked to chair this ongoing initiative for SCJI. SCJI approached the AAA requesting access to its case files and related data for research purposes. This request was conditioned on the requirement that SCJI be able to conduct its research and analysis in a manner that was independent and impartial. The results contained in this Preliminary Report fully and accurately reflect the results of SCJI's data collection and analysis.

This report is denoted as preliminary for two reasons. First, SCJI intends to continue its empirical work on consumer arbitration by developing a comparison with similar claims brought in traditional court proceedings. Second, SCJI is prepared to refine its work based on future studies, critiques, and ongoing debate.

Henry N. Butler, Executive Director
Searle Center on Law, Regulation, and Economic Growth

Geoffrey J. Lysaught, Director
Searle Civil Justice Institute

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Executive Summary

Issues and Background

Empirical evidence has become a central focus of the policy debate over consumer and employment arbitration. Both supporters and opponents of the proposed Arbitration Fairness Act, which would make pre-dispute arbitration clauses unenforceable in consumer and employment (and franchise) agreements, have recognized that empirical evidence on the fairness and integrity of consumer and employment arbitration proceedings is essential to making an informed decision on the bill. Yet the empirical record, particularly on consumer arbitration, has critical gaps.

One set of issues on which further empirical research would be helpful is the costs, speed, and outcomes of consumer arbitrations. How much do consumers pay to bring claims in arbitration? How long do consumer arbitrations take to resolve? How do consumers fare in arbitration, particularly against businesses that are repeat users of arbitrators and arbitration providers? While a number of important studies on employment arbitration have been provided, the empirical record on these issues in consumer arbitrations is sparse.

A second set of issues of interest involves the enforcement of arbitration due process protocols -- privately created standards setting out minimum requirements of procedural fairness for consumer and employment arbitrations. Due process protocols commonly require independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court. Leading arbitration providers have pledged not to administer arbitrations arising out of arbitration clauses that violate the protocols. But empirical evidence on the effectiveness of these private enforcement efforts is lacking.

Searle Civil Justice Institute Task Force on Consumer Arbitration

To shed light on these issues, the Searle Civil Justice Institute (SCJI) undertook a large-scale study of consumer arbitrations administered by the American Arbitration Association (AAA). The AAA is a leading provider of arbitration services, including arbitrations between consumers and businesses. SCJI commissioned a Task Force to advise and lead this study of consumer arbitrations. Although the study will ultimately examine many aspects of AAA consumer arbitrations, the initial research inquiries were directed at two topics:

1. *Costs, Speed, and Outcomes of AAA Consumer Arbitrations.* This aspect of the Preliminary Report assesses key characteristics of the AAA consumer arbitration process. In particular, it examines the following research questions:

    - General characteristics of AAA consumer arbitration cases including claimant type (i.e., consumer or business), types of businesses involved, and amounts claimed.

- Costs of consumer arbitration (arbitrator fees plus AAA administrative fees), including the impact of the arbitrator's power to reallocate such fees in the award.
- Speed of the arbitration process from filing to award, in the aggregate and by claimant type (i.e., consumer or business).
- Various measures of outcomes such as win-rates, damages awarded, and evidence of as well as possible explanations for any repeat-player effects.

In addition to these broad research questions, SCJI also examined the extent to which consumer arbitrations are resolved ex parte; the frequency with which arbitrators award attorneys' fees, punitive damages, and interest; and results for consumers proceeding pro se.

2. *AAA Enforcement of the Consumer Due Process Protocol.* This aspect of the Preliminary Report provides an empirical analysis of how effectively the AAA enforces compliance with the Consumer Due Process Protocol. It considers a number of key research questions including:

    - To what extent do the consumer arbitration clauses comply, in their own right, with the Due Process Protocol?
    - How effective is AAA review of arbitration clauses for compliance with the Due Process Protocol?
    - To what extent does the AAA refuse to administer consumer cases because of the failure of businesses to comply with the Due Process Protocol?
    - How do businesses respond to AAA enforcement of the Protocol?

In addition to these research questions, SCJI examined several other issues that arise in connection with the Due Process Protocols.

Data and Methodology

SCJI reviewed a sample of AAA case files involving consumer arbitrations. The primary dataset consists of 301 AAA consumer arbitrations that were closed by an award between April and December of 2007. (The focus on cases closed by an award during this particular timeframe is based on the availability of the original case files.) This sample of cases was then coded for approximately 200 variables describing various aspects of the arbitration process, including a review of the arbitration clause in the file. In addition, when possible a broader AAA dataset comprising all consumer cases closed between 2005 and 2007 was utilized. The AAA maintains this dataset in the ordinary course of its business, collecting data for internal purposes but not recording all variables of interest to SCJI. The data were analyzed using standard statistical methods in order to describe and evaluate consumer arbitrations as administered by the AAA.

Key Findings – Costs, Speed, and Outcomes of AAA Consumer Arbitrations

The upfront cost of arbitration for consumer claimants in cases administered by the AAA appears to be quite low.

In cases with claims seeking less than $10,000, consumer claimants paid an average of $96 ($1 administrative fees + $95 arbitrator fees). This amount increases to $219 ($15 administrative fees + $204 arbitrator fees) for claims between $10,000 and $75,000. These amounts fall below levels specified in the AAA fee schedule for low-cost arbitrations, and are a result of arbitrators reallocating consumer costs to businesses.

AAA consumer arbitration seems to be an expeditious way to resolve disputes.

The average time from filing to final award for the consumer arbitrations studied was 6.9 months. Cases with business claimants were resolved on average in 6.6 months and cases with consumer claimants were resolved on average in 7.0 months.

Consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255; business claimants won some relief in 83.6% of their cases and recovered an average of $20,648.

The average award to a successful consumer claimant in the sample was 52.1% of the amount claimed and to a successful business claimant was 93.0% of the amount claimed. This result appears to be driven by differences in types of claims initiated by consumers and business. Business claims are almost exclusively for payment of goods and services while consumer claims are seeking recovery for non-delivery, breach of warranty, and consumer protection violations.

No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business.

Consumer claimants won some relief in 51.8% of cases against repeat businesses under a traditional definition (i.e., businesses who appear more than once in the AAA dataset) and 55.3% against non-repeat businesses – a difference that is not statistically significant.

Utilizing an alternative definition of repeat player, some evidence of a repeat-player effect was identified; the data suggests this result may be due to better case screening by repeat players.

Consumer claimants won some relief in 43.4% of cases against repeat businesses and 56.1% against non-repeat businesses under an alternative definition (based on the AAA's categorization of businesses in enforcing the Consumer Due Process Protocol) – a difference that is statistically significant at the 10% level. However, 71.1% of consumer claims against repeat businesses so defined were resolved prior to an award, while only 54.6% of claims against non-repeat businesses were resolved prior to an award. This suggests that such effect is attributable to better

case screening by repeat players (i.e., settling stronger consumer claims and arbitrating weaker claims).

Arbitrators awarded attorneys' fees to prevailing consumer claimants in 63.1% of cases in which the consumer sought such an award.

Consumer claimants sought to recover attorneys' fees in over 50% of the cases in which they were awarded damages and were awarded attorneys' fees in 63.1% of those cases. In those cases in which the award of attorneys' fees specified a dollar amount, the average attorneys' fee award was $14,574.

Key Findings – AAA Enforcement of the Due Process Protocol

A substantial majority of consumer arbitration clauses in the sample (76.6%) fully complied with the Due Process Protocol when the case was filed.

Most arbitration clauses in consumer contracts that come before the AAA are consistent with the Consumer Due Process Protocol as applied by the AAA. The same is true for cases in which protocol compliance was a matter for the arbitrator to enforce.

AAA's review of arbitration clauses for protocol compliance was effective at identifying and responding to clauses with protocol violations.

In 98.2% of cases in the sample subject to AAA protocol compliance review, the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

The AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses.

In 2007, the AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its consumer case load), because the business failed to comply with the Consumer Due Process Protocol. The most common reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business's failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.

As a result of AAA's protocol compliance review, some businesses modify their arbitration clauses to make them consistent with the Consumer Due Process Protocol.

In response to AAA review, more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. This is in addition to the more than 1550 businesses identified by the AAA as having arbitration clauses that comply with the Protocol. By comparison, AAA has identified 647 businesses for which it will not administer arbitrations because of Protocol violations.

Policy Implications and Next Steps

The empirical findings in the SCJI Preliminary Report on AAA consumer arbitrations have important implications for those interested in discussing and formulating public policy regarding arbitration.

1. Not all consumer arbitrations, arbitration providers, or arbitration clauses are alike. Differing results from empirical studies of arbitration may reflect variations associated with case mix, type of claimant, or provider review processes. This suggests the need for a nuanced approach to pubic policy concerning arbitration.

2. Private regulation complements existing public regulation of the fairness of consumer arbitration clauses. Policy makers should not ignore the role that arbitration providers can play in promoting fairness on behalf of consumers.

3. Courts could usefully reinforce the AAA's enforcement of the Consumer Due Process Protocol by declining to enforce an arbitration clause when the AAA has refused to administer an arbitration arising out of the clause or by otherwise reinforcing the role of the Due Process Protocol.

4. Arbitration may be less expensive for consumers than sometimes believed. For many consumers, the AAA arbitration process costs less than the amount specified in the AAA rules because arbitrators often shift some portion of the costs to businesses. Moreover, arbitrators award attorneys' fees to a substantial proportion of prevailing consumers in AAA consumer arbitrations.

5. Empirical studies have tended to find that repeat players fare better in arbitration than non-repeat players. To the extent such a repeat-player effect exists in arbitration, the critical policy question is what causes it. Our findings are consistent with prior studies in suggesting that any repeat-player effect is likely caused by better case screening by repeat players rather than arbitrator (or other) bias in favor of repeat players. A further as yet unresolved question is whether a repeat-player effect exists in litigation, and, if so, how litigation compares to arbitration in this regard.

While the empirical results presented in the SCJI Preliminary Report on Consumer Arbitration may usefully inform the policy debate on consumer arbitration, the Report nonetheless has limitations. First, its findings are limited to AAA consumer arbitrations. Empirical results from studying AAA consumer arbitration do not necessarily apply to other arbitration providers. Second, its findings on the costs, speed, and outcomes of AAA consumer arbitrations are difficult to interpret without a baseline for comparison, such as the procedures and practices in traditional court proceedings. A future phase of this research project by the Searle Civil Justice Institute's Task Force on Consumer Arbitration will undertake that comparison. It will seek to compare the procedures in AAA consumer arbitration with procedures available for consumers in court as well as comparing empirically key process characteristics of courts and arbitration.

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CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION

Preliminary Report

Consumer Arbitration Task Force
Searle Civil Justice Institute

INTRODUCTION

Empirical research has become a central focus of the policy debate over consumer and employment arbitration. The congressional hearings on the proposed Arbitration Fairness Act[1] ("Act") are replete with empirical assertions about the conduct of consumer and employment arbitrations.[2] Both supporters and opponents of the proposed Act raised empirical issues and analyzed empirical studies in their testimony before Congress, on topics such as the cost of arbitration,[3] the speed of the process,[4] and the outcomes for consumers and employees.[5] Other issues involved in the debate, such as how effectively arbitration providers enforce due process protocols[6] – privately developed fairness standards for consumer and employment arbitrations[7] – likewise raise important empirical questions. Indeed, the disagreement over the state of the empirical record has continued outside of the congressional forum,[8] with both sides recognizing the importance of relying on sound empirical research rather than anecdotal evidence.[9]

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[1] Arbitration Fairness Act, H.R. 1020, 111th Cong. § 4 (2009) (making predispute arbitration agreements unenforceable if they require arbitration of any "employment, consumer, or franchise dispute," or "a dispute arising under any statute intended to protect civil rights"); *see also* Consumer Fairness Act of 2009, H.R. 991, 111th Cong. § 2 (2009) (making predispute arbitration agreements in consumer contracts unenforceable and "an unfair and deceptive trade act or practice").

[2] *See* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess. (Dec. 12, 2007) [hereinafter Senate Hearings]; H.R. 3010, the Arbitration Fairness Act of 2007, Hearing Before the Comm'l and Admin. Law Subcomm. of the House Comm. on the Judiciary, 110th Cong., 1st Sess. (Oct. 25, 2007) [hereinafter House Hearings], *available at* http://judiciary.house.gov/hearings/hear_102507.html.

[3] Senate Hearings, *supra* note 2, at 4 (Statement of Sen. Sam Brownback); Senate Hearings, *supra* note 2, at 2 (Statement of Sen. Russell Feingold).

[4] Senate Hearings, *supra* note 2, at 8 (Statement of Professor Peter B. Rutledge).

[5] Senate Hearings, *supra* note 2, at 17-18 (Statement of F. Paul Bland, Jr.); Senate Hearings, *supra* note 2, at 15 (Statement of Mark A. de Bernardo); Senate Hearings, *supra* note 2, at 4 (Statement of Sen. Sam Brownback); Senate Hearings, *supra* note 2, at 26 (Testimony of Tanya Solov); House Hearings, *supra* note 2, at __ (Testimony of Laura MacCleery) (ms. at 2-6).

[6] House Hearings, *supra* note 2, at __ (Testimony of Laura MacCleery) (ms. at 5).

[7] *E.g.*, National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019; *see* Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 985 (2005) ("The Consumer Due Process Protocol, for example, calls for a 'fundamentally fair process' in arbitration that stipulates adequate notice, an opportunity to be heard, and an independent decisionmaker. These procedural ingredients are comparable to those that would be provided pursuant to the informal due process requirements of the Constitution or under the fair procedure requirements of private associations like the NCAA or universities.").

[8] In particular, see the exchange between Public Citizen and Professor Peter B. Rutledge. *Compare* Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on

But despite the importance of systematic empirical evidence to Congress's (and other policymakers') consideration of consumer and employment arbitration, the available empirical evidence is limited in important respects. A number of studies have analyzed employment arbitration (particularly as administered by the American Arbitration Association ("AAA")) and securities arbitration.[10] But far fewer studies have examined consumer arbitration in any detail.[11] Moreover, data are wholly lacking on "how consistently the AAA or other providers enforce their due process protocols,"[12] which, as one scholar concludes, "is an area worthy of further study."[13]

This Report extends our knowledge of consumer arbitration by presenting results from the first detailed empirical study of consumer arbitration as administered by the AAA. It first looks at key characteristics of the AAA consumer arbitration process. Primarily using a sample of 301 AAA consumer arbitrations that resulted in an award between April and December 2007, it considers such issues as the costs incurred by consumers in arbitration, the speed of the arbitral process, and the outcomes of the cases – the very topics of most interest in the policy debate. It then examines in detail the AAA's enforcement of the Consumer Due Process Protocol, using the same sample of AAA consumer arbitrations and a variety of other data sources.

Our focus on AAA consumer arbitration is both a benefit of and a limitation on our study. The AAA is a well-known and widely-used provider of arbitration services, for consumers and others. Our findings thus provide insights into consumer arbitrations administered by an important provider of such services. Conversely, our findings necessarily are limited to consumer arbitrations administered by the AAA. Other arbitration providers may administer cases differently. They may attract different types of cases and different types of businesses. Accordingly, one cannot assume that our results are representative of all consumer arbitrations, just as one cannot assume that results from studies of other providers are representative of all

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Arbitration (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf [hereinafter Public Citizen, Arbitration Debate Trap] *and* Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf *with* Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091. *See also* Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. PUB. POL'Y 549 (2008) [hereinafter Rutledge, *Whither Arbitration?*]; Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008).

[9] *See* Rutledge, *Whither Arbitration?*, *supra* note 8, at 589 (concluding that "[i]ncreased congressional attention" to consumer and employment arbitration "can be valuable, for it promotes discussion and study about this valuable dispute resolution tool" but also "can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study"); Public Citizen, Arbitration Debate Trap, *supra* note 8, at 2 ("Rutledge concludes *Whither* with the warning that congressional scrutiny of arbitration 'can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.' We agree.")

[10] *See infra* Appendix 2.

[11] *See infra* Appendix 1.

[12] W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 107 (2007*)*; *see also id.* at 93 n.138.

[13] *Id.* at 107.

consumer arbitrations. To the extent policy makers are deciding whether and how to regulate consumer arbitration, however, additional empirical information on the consumer arbitration process will enable them to make more informed decisions.

Part I of this Report provides background on prior empirical studies of consumer arbitration and on the development and criticisms of arbitration due process protocols. Part II describes the AAA's consumer arbitration rules and its practices and procedures in administering the Consumer Due Process Protocol. Part III sets out the research questions we analyze and describes in detail our datasets and research methodologies. Finally, Part IV presents our research results on two topics: (1) the costs, speed, and outcomes of AAA consumer arbitrations; and (2) AAA enforcement of the Consumer Due Process Protocol. As this research project is ongoing, we hope to have additional results to report in the future.

I. BACKGROUND

This Part provides general background material on each of the empirical research topics addressed later in this Report. It first summarizes prior empirical research on consumer arbitration, focusing on the cost and speed of the process as well as the outcomes for consumers and businesses. It then provides an overview of arbitration due process protocols, private initiatives that regulate the terms of arbitration agreements and the procedures in arbitration.

A. Prior Empirical Research on Consumer Arbitration – Cost, Speed, and Outcomes

In this Part, we summarize the current empirical literature on consumer arbitration.[1] Because our focus in this Report is on consumer arbitration, we do not discuss empirical studies on securities arbitration or employment arbitration (with one exception).[2] We focus on studies of the arbitration process itself, which address issues such as the cost, speed, and outcome of the arbitration proceeding.[3] To the extent those studies seek to compare arbitration to litigation, we focus only on the arbitration portion of the study, deferring comparison to the litigation process for the future.[4]

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[1] For a more detailed description of the empirical studies of consumer arbitration discussed in this part, see Appendix 1.

[2] For surveys of empirical research on consumer and employment arbitration, see Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG., Fall 2008, at 31; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 405, 412-37 (2007); Kirk D. Jensen, *Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L.Q. REP. 631 (2006); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. PUB. POL'Y 549, 556-86 (2008) [hereinafter Rutledge, *Whither Arbitration?*]; David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563-78 (2005); *see also* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REF. 813 (2008) (surveying empirical studies of arbitration costs). For a list of empirical studies of employment and securities arbitration, see Appendix 2. For an empirical study of franchise arbitration (and litigation) outcomes, based on disclosures in franchise disclosure documents, see Edward Wood Dunham & David Geronemus, *Lessons from the Resolution of Franchise Disputes*, JAMS DISP. RESOL. ALERT, Summer 2003, *available at* http://www.wiggin.com/db30/cgi-bin/pubs/JAMS%20article%20J%20Dunham.pdf.

[3] We do not consider studies of the provisions of consumer or employment arbitration clauses; *e.g.*, Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer Experience*, 67 LAW & CONTEMP. PROBS. 55, 73-74 (2004); Theodore Eisenberg, Geoffrey Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871 (2008); studies of outcomes of court cases involving challenges to arbitration agreements; *e.g.*, Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 752-59 (2006); or studies of outcomes of court cases involving challenges to arbitration awards, *e.g.*, Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 29 J. DISP. RESOL. ___ (forthcoming 2009).

[4] A future phase of this research project will seek to compare the characteristics of the consumer arbitration cases described in this Report to characteristics of comparable court cases.

1. Cost

Commentators express conflicting views about the costs of arbitration. A commonly stated view is that arbitration is cheaper than litigation.[5] Arbitration often is less formal than litigation, with less discovery and less motions practice.[6] Awards are subject to limited court review, which may reduce the likelihood of a challenge to an award.[7] On this view, the costs of arbitrating a dispute may be lower than the costs of litigating a comparable dispute. If so, arbitration may be a more accessible forum for consumers to resolve disputes.[8]

An alternative view is that arbitration is too expensive – that the high costs of arbitration preclude consumers from bringing claims.[9] A report from Public Citizen issued in 2000 asserted that arbitration is substantially more expensive than litigation, citing the need to pay the arbitrator and any provider of administrative services for the arbitration.[10] By comparison, of course, parties do not pay judges (except through their tax dollars) and pay solely a flat, low filing fee to file suit in court.[11] Under this view, the high upfront costs make arbitration a less accessible forum for consumers.[12]

Most of the empirical evidence on arbitration costs addresses the upfront costs of arbitration and does not consider costs such as attorneys' fees, internal expenses, and opportunity costs associated with resolving the dispute itself.[13] The Public Citizen report on the *Costs of*

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[5] 153 CONG. REC. S4614 (daily ed. Apr. 17, 2007) (statement of Sen. Sessions) ("Arbitration is one of the most cost-effective means of resolving disputes."); Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, *in* HOW ADR WORKS 915, 926 (Norman Brand ed. 2002) ("The greatest strength of arbitration is that the average person can afford it.").

[6] Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90.

[7] *Id.*

[8] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation"); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

[9] Public Citizen, Arbitration More Expensive than Court (May 1, 2002), http://www.citizen.org/pressroom/print_release.cfm?ID=1098 (statement of Joan Claybrook) ("[F]or people who are victims of consumer rip-offs and workplace injustices, arbitration costs much more than litigation – so much more that it becomes impossible to vindicate your rights."); *see also* Reginald Alleyne, *Arbitrator's Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U PA. J. LAB. & EMPL. L. 1, 30 (2003); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161 (2004); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 781 (2002).

[10] *E.g.*, Public Citizen, Costs of Arbitration 1 (2002) ("The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs*—the costs charged by the tribunal that will decide the dispute—can be up to five thousand percent higher in arbitration than in court litigation.").

[11] Christopher R. *Drahozal, Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736-37 (2006).

[12] For a reconciliation of these competing views about arbitration costs, see *id.* at 734-35.

[13] For empirical evidence on business cost savings from arbitration (including attorneys' fees in handling the

Arbitration presented a series of case studies together with an analysis of the costs of arbitrating and litigating four hypothetical cases, in reaching its conclusion that arbitration costs "have a deterrent effect, often preventing a claimant from even filing a case."[14]

By comparison, Mark Fellows reported that consumer claimants in National Arbitration Forum ("NAF") arbitrations in 2003-2004 paid arbitration fees averaging $46.63 while business claimants paid arbitration fees averaging $149.50.[15] Similarly, Navigant Consulting, relying on NAF data from January 2003 through March 2007, concluded that consumers paid no fee in 99.3% of the cases (presumably those brought by businesses) and a median fee of $75 in the remaining 246 cases.[16] Ernst & Young reported in 2004 that the average fee paid in consumer "banking" arbitrations administered by the American Arbitration Association ("AAA") was $1935, but the data were incomplete as to how the fees were allocated between consumers and businesses.[17] A study by the California Dispute Resolution Institute ("CDRI"), looking at data disclosed by six arbitration providers from January 2003 to February 2004, found a mean arbitrator's fee of $2256 and a median arbitration fee of $870.[18] But the data used by the CDRI were incomplete, did not separate out the fees paid by consumers from the fees paid by businesses,[19] and included both consumer and employment cases.[20]

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cases), see the studies discussed in Drahozal, *supra* note 2, at 829-30; *see also* Herbert M. Kritzer & Jill K. Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUSTICE SYS. J. 6, 17 (1983) (studying fees received by attorneys in sample of AAA commercial arbitrations and uninsured motorist arbitrations, state court cases, and federal court cases) ("The AAA is the least expensive for small cases, and most expensive for the remaining three categories.... At the same time, in a sense, one gets 'more' for the money in terms of the amount of institutional processing, with the AAA, because a much larger proportion of cases go through the 'complete process,' including a hearing and an award.").

[14] Public Citizen, *supra* note 10, at 1, 6-51.

[15] Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32.

[16] Jeff Nielsen et al., Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data 3 (July 11, 2008), *available at* http://www.instituteforlegalreform.com/index.php?option=com_ilr_docs&issue_code=ADR&doc_type=STU.

[17] Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16-17, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf.

[18] California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure 21 (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_aug_6.pdf. The six providers were the AAA, ADR Services, Arbitration Works, ARC Consumer Arbitrations, JAMS, and Judicate West. *Id.* at 14.

[19] *Id.* at 18 ("In general, inconsistencies, ambiguities and the lack of reported data limit this study's utility for the purposes of informing policy."); *see also* Lisa Blomgren Bingham et al., Arbitration Data Disclosure in California: What We Have and What We Need 20 (Apr. 15, 2005) (concluding that "the private arbitration service providers in question are not providing the information that is critical to an analysis of how the consumer party fare[s] in commercial arbitration.").

[20] California Dispute Resolution Institute, *supra* note 18, at 17, 22 Figure 1.

2. Speed

Arbitration also is commonly perceived to be a faster dispute resolution process than litigation.[21] The reasons are at least twofold. First, again, arbitration is less formal than litigation, with less discovery and fewer motions, and appellate review of awards is limited.[22] Second, arbitration may have less of a queue than litigation – parties can choose an arbitrator who does not have a backlog of cases, and so they may not have to wait behind other parties to have their dispute resolved.[23]

The empirical evidence shows consumer arbitration to be an expeditious process.[24] In 2007, the AAA reported that on average its consumer cases took four months to resolve on the basis of documents and six months to resolve on the basis of in-person hearings.[25] For 2006, the numbers were similar: an average of 3.8 months for document only cases and 7.4 months for cases decided after in-person hearings.[26] Mark Fellows found that the NAF's average disposition time in 2003-2004 for consumer claimants was 4.35 months and for business claimants was 5.60 months.[27] The CDRI study of six arbitration providers from January 2003 to February 2004 found a mean disposition time of 116 days and a median disposition time of 104 days,[28] although as noted above the data are incomplete and problematic.[29]

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[21] H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules ...."), *quoted in* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).

[22] *Id.*

[23] Diane P. Wood, *Snapshots from the Seventh Circuit: Continuity and Change, 1966-2007*, 2008 WIS. L. REV. 1, 6 ("to the extent that litigants wish to avoid these queues, they are opting out of the judicial system altogether and turning to arbitration and mediation"); Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe – And for the United States*, 32 TULSA L.J. 1, 15 (1996) ("The longer the queue, the greater the incentive of the parties to a dispute to substitute arbitration or other nonjudicial methods of dispute resolution for the courts.").

[24] *See* Kritzer & Anderson, *supra* note 13, at 17 (finding that "the American Arbitration Association offers the possibility of *relatively* fast *adjudication* (compared to the relatively slow nonadjudication in the courts)").

[25] American Arbitration Association, Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007, *available at* http://www.adr.org/si.asp?id=5027 [hereinafter AAA, 2007 Caseload Analysis].

[26] Statement of the American Arbitration Association, Annex D, *in* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess., at 135 (Dec. 12, 2007) [hereinafter, AAA, 2006 Caseload Analysis].

[27] Fellows, *supra* note 15, at 32.

[28] California Dispute Resolution Institute, *supra* note 18, at 19. Actually, the CDRI data on time of disposition is more complete than on many other variables, covering 1559 of 2175 cases. *Id.*

[29] *See supra* text accompanying notes 19-20.

3. Outcomes

An important subject of empirical research is how consumers fare in arbitration. Several ways to measure outcomes have been used – the win-rate; the amount of damages recovered; and the amount of damages recovered as a percentage of the amount claimed. Two points of particular interest are how arbitration outcomes compare to outcomes in court, which is beyond the scope of this Report; and whether outcomes are biased in favor of repeat players.

Win-Rates. Studies have most commonly looked at the win-rate in arbitration – i.e., the percentage of cases won by the consumer or the business. But the absolute win-rate itself is not a particularly meaningful number. Instead, the absolute win-rate must be compared to some sort of baseline. Some commentators have focused on fifty percent as that baseline;[30] others have suggested that an extremely high business win-rate shows a process that is unfair to consumers.[31] Neither view necessarily is correct.

At least two possible approaches are available for coming up with a baseline for comparison. One possible approach is to use a theoretical model of case settlement, which generates predictions about expected outcomes.[32] Some models lead to predictions of a fifty percent win-rate, providing some support for using that figure as a baseline.[33] Other models, based on different assumptions, lead to predictions of extremely high (or low, depending on the perspective) win-rates.[34]

A second approach is to compare outcomes in arbitration to outcomes in litigation. A business win-rate of over ninety percent in arbitration does not show arbitration is unfair if the win-rate for comparable cases in court is similar.[35] But doing a proper comparison can be

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[30] Rutledge, *Whither Arbitration?*, *supra* note 2, at 559-60 ("the only reported data showing a win-rate of less than 50 percent is William Howard's study of securities arbitration"); Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 16 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf [hereinafter Public Citizen, Arbitration Debate Trap] ("In fact, at least five other studies have found win rates of less than 50 percent for individual claimants").

[31] Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 13 (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf [hereinafter Public Citizen, Arbitration Trap] (referring to "truly staggering success rate" of businesses in NAF arbitrations).

[32] Joel Waldfogel, *Selection of Cases for Trial*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 419, 419 (Peter Newman ed., 1998) ("any model of the settlement decision is also at least implicitly a model of the selection of cases for trial").

[33] *E.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17-20 (1984).

[34] *Id.* at 24-29; *see also, e.g.*, Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993); Luke Froeb, *Adverse Selection of Cases for Trial*, 13 INT'L REV. L. & ECON. 317 (1993).

[35] *See* Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen 11 (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091 ("Studies of debt collection actions in major cities reveal that the lender typically wins between 96% and 99% of the time, right in line with the lender win-rate data cited in the Public Citizen Report.").

difficult.[36] Certainly, care must be taken to ensure that the types of cases are reasonably comparable, as well as to control for other differences between arbitration and litigation, such as the much greater use of summary judgment and other dispositive motions in litigation.[37] (In this Report, we will be presenting the raw win-rate and other outcome numbers, reserving the comparison to litigation for a future Report.)

Studies of win-rates in consumer arbitrations show various degrees of consumer and business success. Two studies by the AAA of its consumer arbitration caseload in 2006 and 2007 found that consumer plaintiffs won 48% of awarded cases they brought.[38] The 2007 study found that business claimants won 74% of awarded cases they brought.[39]

Most of the data on outcomes in consumer arbitration have come from studies of the caseload of the NAF. Unusual among the leading arbitration providers,[40] NAF's consumer caseload consists almost exclusively of debt collection actions, the majority brought by a single credit card company.[41] Although there is some disagreement on how properly to treat cases dismissed before an award,[42] studies consistently show a high win-rate for business claimants in NAF arbitrations, ranging from 67.9% to over 99%.[43] By comparison, the win-rate for consumer claimants before the NAF is much higher than the win-rate for consumer respondents, although

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[36] *E.g.*, W. Mark C. Weidemaier, *From Court Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REF. 843, 852-56 (2008); Stephen J. Ware, *The Effects of* Gilmer*: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 755-56 (2001).

[37] Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, DISP. RESOL. MAG., Fall 1999, at 23, 24; Weidemaier, *supra* note 36, at 853.

[38] AAA, 2007 Caseload Analysis, *supra* note 25, at 1; AAA, 2006 Caseload Analysis, *supra* note 26, at 135.

[39] AAA, 2007 Caseload Analysis, *supra* note 25, at 1.

[40] By comparison, see the AAA consumer caseload described *infra* Part IV(1).A.1. *See also* W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 674 (2007) (reporting that 98.7% of JAMS consumer arbitrations from 2003-2006 were brought by the consumer as claimant, as compared to 0.4% of NAF consumer arbitrations during the same period).

[41] Public Citizen, Arbitration Trap, *supra* note 31, at 15 ("all but 15 of the 33,948 cases are labeled 'collection' cases"); *id.* at 17 ("MBNA's NAF arbitration cases, including those filed by debt buyers who purchased MBNA accounts, totaled 18,101 and represented 53.3 percent of the NAF California cases.").

[42] *Compare* Nielsen et al., *supra* note 16, at 1 (including dismissals with cases in which consumers prevailed outright) *with* Public Citizen, Arbitration Debate Trap, *supra* note 30, at 10 (arguing that dismissals before an arbitrator is appointed "can hardly be used as evidence of the fairness of NAF arbitration," and that dismissals after an arbitrator is appointed might have resulted from "any number of manipulative practices" and should not be counted as consumer wins).

[43] Fellows, *supra* note 15, at 32 (business claimants "prevail in 77.7% of the cases that reach a decision"); Nielsen et al., *supra* note 16, at 1 (businesses prevailed in 67.9% of NAF arbitrations either heard by an arbitrator or dismissed); Public Citizen, Arbitration Trap, *supra* note 31, at 15 ("In 19,294 cases in which an arbitrator was appointed, the business won in 18,091 (or 93.8%)"); Answers and Objections of First USA Bank, N.A. to Plaintiff's Second Set of Interrogatories, Ex. 1, Bownes v. First U.S.A. Bank, N.A. et al., Civ. Action No. 99-2479-PR (Ala. Circuit Ct. 2000), *available* at http://www.tlpj.org/briefs/McQuillan%20exhibits%2016-19%20(300dpi).pdf (last visited Dec. 10, 2008) [hereinafter First USA Interrogatory Answers] (bank prevailed in 19,618 NAF arbitrations, while credit cardholder prevailed in 87).

again there is disagreement over the actual win-rate (with reports ranging from 37.2% to 65.5%).[44] Moreover, consumers bring only a handful of NAF arbitrations each year.[45]

Monetary Recoveries. A frequent criticism of studies of win-rates in arbitration (and litigation) is that the usual measure of party wins is too simplistic. In many studies, a claimant "win" is defined to include any case in which the claimant was awarded some amount of money, while a respondent "win" is defined to include only cases in which the respondent is held liable for zero damages.[46] Such an approach may understate the number of respondent wins and overstate the number of claimant wins because a claimant with a strong claim for a large amount is treated as "winning" even when it is awarded an amount that is far less than its claim is worth.[47]

But it is difficult to value claims for purposes of empirical research. Ordinarily, researchers do not have complete information about the claims, and, even if they did, it would be extremely difficult to evaluate objectively how much a claim is worth at the time it is brought. As a result, some studies have used the amount sought by the claimant as a proxy for the value of the claim, calculating the amount recovered as a percentage of the amount claimed.[48]

Even that approach is difficult to implement. First, plaintiffs in court often do not demand a specific amount in any court filing; they may simply plead that the minimum jurisdictional amount is satisfied. Arbitration would seem to be less subject to this problem because arbitration fees typically are based on the amount of compensatory damages sought.[49] But even in arbitration, as discussed below, determining a single dollar amount claimed can be difficult.[50]

Second, in both settings, merely because a party claims an amount does not mean that the claim is worth that amount. Plaintiffs may seek amounts of damages that they have only a small likelihood of recovering.[51] The fact that they do not recover such amounts thus can mean the process is working properly, not that the process failed.

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[44] Ernst & Young, *supra* note 17, at 8 (win-rate for consumer claimants of 54.6%); Fellows, *supra* note 15, at 32 (win-rate for consumer claimants of 65.5%); Public Citizen, Arbitration Debate Trap, *supra* note 30, at 10 (win-rate for consumer claimants of 37.2%).

[45] Public Citizen, Arbitration Trap, *supra* note 31, at 15 (reporting that 0.35% of all NAF arbitrations involved consumer claimants).

[46] *E.g.*, AAA, 2006 Caseload Analysis, *supra* note 26, at 135.

[47] Rutledge, *Whither Arbitration?*, *supra* note 2, at 557. That said, as discussed *infra* text accompanying notes 49-56, the fact that the claimant recovered a small percentage of the amount claimed does not necessarily mean that the outcome was somehow incorrect. *See* Public Citizen, Arbitration Debate Trap, *supra* note 30, at 12 (asserting that definition of claimant "win" is "unreliable" when it classifies a "claimant who sought $50,000 and received only $5" as a win for claimant). Whether that is so depends not merely on the amount of the claim, but also on the strength of the claim.

[48] *E.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

[49] *See infra* Part II.A.

[50] *See infra* Part IV(1).A.2.

[51] This is the case even if the plaintiff has a meritorious claim because some elements of the plaintiff's damages recovery may be highly uncertain.

Third, the incentives of the parties to claim damages differ between courts and arbitration. In court, subject to credibility constraints, the plaintiff's incentive is to claim higher rather than lower damages amounts. Court filing fees are a flat amount that do not increase with the amount claimed.[52] Meanwhile, claiming higher damages amounts may increase the amount the plaintiff recovers. Laboratory studies have found that the amount sought by a plaintiff – even if ridiculously large – can act as an anchor and increase the amount of damages awarded by a mock jury.[53] By comparison, because of the way arbitration fees are structured, the claimant in arbitration often has to pay more to claim more.[54] As a result, amounts claimed in arbitration may be more realistic than amounts claimed in court.[55] If so, this complicates comparisons between arbitration and litigation, because a higher percentage recovery in arbitration may be due to more realistic amounts claimed rather than any difference in the amount awarded.[56]

A few studies have examined amounts awarded in consumer arbitrations.[57] The CDRI found that the mean amount awarded in a sample of California cases administered by six different providers (including the AAA) was $33,112, while the median award was $7615.[58] But data were available on the amount awarded in only 540 of the 2175 cases in the sample, "limit[ing] this study's utility for purposes of informing policy."[59]

Navigant Consulting found that the arbitrator reduced the amount of the business's claim in 16.4% of the NAF arbitrations studied, with a median reduction of $636 and a median percentage reduction of 8.6%.[60] In the remaining 83.6% of the cases, presumably the business was awarded the full amount claimed. According to data presented by Public Citizen, NAF arbitrators who decided more than 100 cases in California awarded businesses 92.4% of the total amount they sought.[61] Note that Public Citizen apparently included amounts sought in cases in which the consumer prevailed outright in the total amount sought.[62]

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[52] Drahozal, *supra* note 11, at 736-37.

[53] *E.g.*, Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 526-27 (1996). *See generally* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 110-11 & n.28 (2004) (describing studies).

[54] Drahozal, *supra* note 53, at 129.

[55] *Id.* In addition, parties may be subject to countervailing (or reinforcing) incentives to the extent the success rate in arbitration varies depending on the amount sought.

[56] *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 7 (2d ed. 2006).

[57] By comparison, many more studies of employment arbitration report the amounts of awards, including some that report the amount awarded as a percentage of the amount claimed. *See infra* Appendix 2.

[58] California Dispute Resolution Institute, *supra* note 18, at 20.

[59] *Id.* at 18.

[60] Nielsen et al., *supra* note 16, at 3.

[61] Public Citizen, Arbitration Trap, *supra* note 31, at 16 (those arbitrators awarded businesses $185,479,341 of $200,736,495 sought).

[62] Navigant used the same dataset as Public Citizen, *see* Nielsen et al., *supra* note 16, at 1, and its reported reductions otherwise would be much too small relative to the amounts of the awards.

Repeat-Player Effect. Unlike judges, arbitrators get paid only when selected to serve on a case. This economic reality of arbitration has given rise to fears of "repeat-arbitrator bias" – that arbitrators will decide cases in favor of the repeat player in arbitration, which is the party more likely to be in a position to appoint the arbitrator to serve again.[63] In consumer arbitration, consumers are unlikely to be repeat players (although their attorneys may be).[64] Thus, the fear is that arbitrators will tend to favor businesses in the hopes of being appointed more often in future cases. More broadly, commentators have expressed concerns about what might be called "repeat-player bias" (rather than repeat-arbitrator bias) – that businesses, through their control of process of dispute system design, will structure the dispute resolution process in their favor.[65]

Several factors may reduce the likelihood or consequences of repeat-arbitrator or repeat-player bias. First, arbitration providers, as well as individual arbitrators, may seek to maintain a reputation for fair and unbiased decision making.[66] Such reputational constraints may reduce the risk that repeat-arbitrator or repeat-player bias will occur. Second, even if arbitrators (and arbitration providers) have an incentive to make decisions that businesses want, it is not necessarily the case that those decisions will be unfavorable to consumers. As Gordon Tullock explains, while "a bias toward the retailer might be the arbitrator's profit-maximizing course of action," it might not be. Instead, "the retailer might be interested in his general reputation and want an arbitrator who was either impartial or, for that matter, actually procustomer."[67] Tullock cites return desks at retailers, which seek to help resolve disputes between businesses and their customers, as an illustration. Even though the workers at return desks are employed by the business, "their usual reaction is not one of making a fair judicial decision between themselves and [the customer] but of giving [the customer] every benefit of the doubt."[68]

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[63] *E.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256 (2001); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60-61; *see also* Public Citizen, Arbitration Debate Trap, *supra* note 30, at 24-26. In addition to concerns that arbitrators might be biased in favor of repeat businesses, the same argument is directed at arbitration providers. *E.g.*, Arbitration Fairness Act, H.R. 1020, 111th Cong. § 2(4) (2009) (finding that "[p]rivate arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business").

[64] Budnitz, *supra* note 9, at 138 n.22; Carrie Menkel-Meadow, *Ethical Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 956 (2002). *Compare* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 566 (2001) ("[T]he real repeat players in arbitration are not the parties themselves but the lawyers involved.") *with* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189, 198-99 (1997) ("There is reason to believe that most individual members of the plaintiffs' bar may never successfully emerge as repeat players in employment arbitration.").

[65] Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 231-39 (2004); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 889-92 (2002) [hereinafter Bingham, *Self-Determination*].

[66] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 769-70; *see also* Weidemaier, *supra* note 40, at 661-62 (arguing that arbitration providers may "confer legitimacy" by "adopt[ing] or enforc[ing] due process or 'fairness' rules").

[67] GORDON TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE 127-128 (1980).

[68] *Id.*

In the consumer context, Public Citizen has argued that debt collection arbitration before the NAF is affected by repeat-arbitrator bias. It cites both anecdotal reports[69] and evidence that the arbitrators most commonly appointed by the NAF are more likely to rule in favor of business claimants than other arbitrators.[70]

Other studies, examining outcomes of employment arbitration (the one exception where this Report discusses such studies), have not found evidence of repeat-player bias, although several have identified a "repeat-player effect": consumers win less often against repeat businesses – businesses that arbitrate on a repeat basis – than against non-repeat businesses. This repeat-player effect might be due to repeat-arbitrator or repeat-player bias, but it might also be due to better screening of cases by repeat businesses, who are more used to dealing with disputes than non-repeat businesses.

In a study of 270 AAA employment arbitration awards from 1993 and 1994, Lisa Bingham found that employees won in 63% of all awards but only 16% of awards against repeat employers.[71] Similarly, employees recovered 48% of their amount claimed against non-repeat employers but only 11% of their amount claimed against repeat employers.[72] Bingham's results from a subsequent study of 203 AAA employment awards from 1993 to 1995 were similar.[73] But Bingham's evidence indicated that the repeat-player effect was a result, not of repeat-arbitrator or repeat-player bias, but of differences in the cases arbitrated.[74] The same is true of yet another study by Bingham, this one co-authored with Shimon Sarraf, which examined AAA employment awards from 1996 and 1997.[75] Bingham and Sarraf found an employee win-rate of 29% against repeat employers as compared to an employee win-rate of 62% against non-repeat employers. But they found no evidence this was due to repeat-arbitrator or repeat-player bias; rather, the repeat-player effect was likely the result of case screening by employers with in-house dispute

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[69] Public Citizen, Arbitration Trap, *supra* note 31, at 30-32; Public Citizen, Arbitration Debate Trap, *supra* note 30, at 24-25.

[70] Public Citizen, Arbitration Trap, *supra* note 31, at 16.

[71] Bingham, *supra* note 64, at 189-90 (defining repeat employer as one involved in more than one case in her sample).

[72] *Id.* at 213. For discussions of methodological issues in Bingham's studies, see Sherwyn et al., *supra* note 2, at 1570.

[73] Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRA 50TH ANN. PROC. 33, 38-39 (1998) [hereinafter Bingham, *Unequal Bargaining Power*]; Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. 223, 223 (1998); *see also* Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, N.Z. J. INDUS. REL., June 1998, at 5, 15 (reporting an employee win-rate of 25.0% in cases with a repeat arbitrator as compared to an employee win-rate of 55.5% in cases with a non-repeat arbitrator).

[74] Bingham, *Unequal Bargaining Power*, *supra* note 73, at 39-40. Bingham found that "repeat player employers get to arbitration based on an implied contract stemming from a personnel manual or employee handbook," cases in which the employee "may have a substantively weaker legal claim." *Id.*

[75] 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* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 320-28 (Samuel Estreicher & David Sherwyn eds. 2004); *see also* Bingham, *Self-Determination*, *supra* note 65, at 899-901.

resolution programs.[76] Nonetheless, Bingham's studies continue (incorrectly) to be cited as evidence of repeat-arbitrator bias.[77]

Elizabeth Hill found what she described as an "appellate effect" in her study of 200 AAA employment awards from 1999 to 2000.[78] Of the 34 cases with repeat employers in her sample, 25 (or 74%) involved employers with an in-house dispute resolution program. The employee win-rate in those cases was substantially below the employee win-rate in the other cases in the sample, and, indeed, substantially below the win-rate in cases involving the other repeat employers.[79] (The differences were not statistically significant, but her sample size was too small for reliable statistical testing.[80]) Based on her data, Hill attributes the repeat-player effect to "the selection processes of larger employers' in-house dispute resolution programs," rather than "merely the by-product of larger employers' repeat appearances at arbitration."[81] Hill found no evidence of repeat-arbitrator bias, as there were only two cases in her sample involving the same arbitrator and employer.[82]

Most recently, Colvin examined a sample of 836 awards in employment arbitrations administered by the AAA from January 1, 2003 to September 30, 2006.[83] Because the data were from the AAA's disclosures as required by California law, the cases involved arbitrations "based

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[76] Bingham & Sarraf, *supra* note 75, at 323 tbl. 2; *see* Sherwyn et al., *supra* note 2, at 1571 (describing Bingham & Sarraf's results and concluding that "[t]hese results suggest that the availability of an internal review process and the employer's experience with employment cases likely explains the repeat player effect. Bingham found no support for arbitrator bias.").

[77] David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1152 (2007) ("in many contexts, arbitrators have been shown to develop a bias in favor of so-called repeat players") (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189 (1997)).

[78] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 807-808 (2003) [hereinafter Hill, *Due Process*]; Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 9 [hereinafter Hill, *Fair Forum*].

[79] Hill, *Due Process*, *supra* note 78, at 817; Hill, *Fair Forum*, *supra* note 78, at 15. Rather than reporting an employee win-rate, Hill reports an employer win-loss ratio – dividing the number of employer wins by the number of employer losses. For repeat employers with an in-house dispute resolution program, the employer win-loss ratio was 3.2; for repeat employers without an in-house dispute resolution program, the employer win-loss ratio was 1.25. For all employers, the employer win-loss ratio was 1.3. Hill, *Due Process*, *supra* note 78, at 817; Hill, *Fair Forum*, *supra* note 78, at 15.

[80] Colvin, *supra* note 2, at 428-29 ("Hill did not provide any tests of the statistical significance of the difference between the in-house program and no in-house program groups; however a simple chi-squared test on the results presented indicates that the difference is not statistically significant."); *see also* Sherwyn et al., *supra* note 2, at 1572 ("Of course, samples of thirty-four, twenty-five, and nine are too small to yield reliable conclusions.").

[81] Hill, *Fair Forum*, *supra* note 78, at 15; *see also* Hill, *Due Process*, *supra* note 78, at 817 (same).

[82] Hill, *Due Process*, *supra* note 78, at 814-15; Hill, *Fair Forum*, *supra* note 78, at 15. Hill also argues that "the total number of arbitrators on the AAA panel in contrast to the annual number of arbitrations shows that it is unlikely that any individual arbitrator would have appeared with sufficient frequency to seek to reward 'repeat player' employers," pointing out that "[t]here were 560 arbitrators on the AAA's employment arbitration panel in 1999-2000" and "only 432 awards rendered in 1999 and 410 rendered in 2000." Hill, *Due Process*, *supra* note 78, at 815.

[83] Colvin, *supra* note 2, at 408.

on employer promulgated agreements," rather than "individually negotiated contracts."[84] Colvin found an employee win-rate of 13.9% in cases against repeat employers as compared to an employee win-rate of 32.0% in cases against non-repeat employers, a statistically significant difference.[85] The employee win-rate in cases involving a repeat employer appearing before the same arbitrator (a "repeat employer-arbitrator pair" was 11.3% as compared to an employee win-rate of 21.2% in cases not involving a repeat employer-arbitrator pair.[86] Colvin then limited the sample to cases with repeat employers. In those cases, the employee win-rate was 11.3% in cases with a repeat-employer arbitrator pair and 14.7% in the rest of the cases. But the difference was not statistically significant.[87]

Overall, then, the empirical evidence tends to support the existence of a repeat-player effect, but suggests that the effect may be due to case screening by repeat businesses rather than repeat-arbitrator or repeat-player bias.

B. Overview of Arbitration Due Process Protocols

Each of the major arbitration providers has its own due process protocol or protocols.[88] The AAA adheres to the Employment Due Process Protocol, the Consumer Due Process Protocol, and the Health Care Due Process Protocol. JAMS has set out Minimum Standards of Procedural Fairness for both employment arbitration and consumer arbitration. NAF has promulgated an Arbitration Bill of Rights. This Part describes the history of due process protocols, summarizes their contents, and discusses several criticisms of the protocols.

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[84] *Id.* at 419.

[85] *Id.* at 430.

[86] *Id.*

[87] *Id.* at 430-31.

[88] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019 [hereinafter Consumer Due Process Protocol]; *see also* Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 9, 1995), *available at* www.adr.org/sp.asp?id=28535 [hereinafter Employment Due Process Protocol]; Commission on Health Care Dispute Resolution, Health Care Due Process Protocol (July 27, 1998), *available at* www.adr.org/sp.asp?id=28633 [hereinafter Health Care Due Process Protocol]; JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness (revised Jan. 1, 2007), *available at* www.jamsadr.com/rules/consumer_min_std.asp [hereinafter JAMS Consumer Minimum Standards]; JAMS, JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness (revised Feb. 19, 2005), *available at* www.jamsadr.com/rules/employment_Arbitration_min_stds.asp [hereinafter JAMS Employment Minimum Standards]; National Arbitration Forum, Arbitration Bill of Rights (2007), *available at* www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf [hereinafter NAF Arbitration Bill of Rights].

1. History of Due Process Protocols

The origins of the due process protocols have been described in detail by other authors.[89] This Section summarizes those origins briefly, focusing on the Employment Due Process Protocol and the Consumer Due Process Protocol and their implementation by the AAA.

The due process protocols trace back to the work of the "Dunlop Commission," which was established in 1993 to "investigate the current state of worker-management relations in the United States."[90] Among the issues considered by the Commission was whether to enhance the ability of the parties themselves to resolve workplace disputes, rather than relying on the courts and regulators.[91] Accordingly, the Commission examined the use of employment arbitration, finding that while some employers adopted "serious and fair" arbitration programs,[92] others established programs that did not meet accepted standards of "fairness."[93]

Thereafter, the Chair of the Commission, John T. Dunlop, requested Arnold M. Zack, president of the National Academy of Arbitrators, to develop a list of private due process standards that would "extend the negotiated due process protections of union management arbitration to this expanding non-union setting."[94] Zack ended up as co-chair of the Task Force on Alternative Dispute Resolution in Employment, which drafted the Employment Due Process Protocol.[95] The members of the Task Force included representatives of an array of interest groups involved in employee-employer relations,[96] although the members made clear that "the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations."[97] The Task Force issued the Employment Protocol in May 1995. Zack summarized the Task Force's view of its work as follows: "All the Task Force members will acknowledge that the Protocol does not contain all the protections and assurances that each of us as individuals would have liked to include, but the achievement of agreement on the components of the document did mark a substantial step forward in providing due process protections in procedures where many such protections had been lacking."[98]

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[89] In particular, see Margaret M. Harding, *The Limits of Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 373-416 (2004). For a personal account of the origins of the Employment Due Process Protocol, see Arnold M. Zack, *The Due Process Protocol: Getting There and Getting Over It*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 257, 257-59 (2007).

[90] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT xi (1994).

[91] *Id.*

[92] THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 51 (1995).

[93] *Id.* at 73.

[94] Zack, *supra* note 89, at 258.

[95] Employment Due Process Protocol, *supra* note 88.

[96] The Task Force included representatives of the AAA, several committees of the American Bar Association, the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution, the National Employment Lawyers Association, Federal Mediation & Conciliation, and the Workplace Rights Project of the American Civil Liberties Union. *Id.*

[97] *Id.*

[98] Zack, *supra* note 89, at 260. For example, the Task Force members agreed to disagree on whether pre-

In July 1995, the AAA established a pilot program in California to administer arbitrations using new rules incorporating the Employment Due Process Protocol.[99] Based on its experience in California, and drawing on a national Employment Conclave it sponsored in September 1995,[100] the AAA promulgated new Employment Arbitration Rules (effective June 1996) reflecting the principles of the Employment Protocol.[101] The AAA later announced that it would refuse to administer employment arbitrations if the plan failed materially to comply with the Protocol; the AAA also established a process by which employers could obtain advance review of their dispute resolution programs for protocol compliance.[102]

The Employment Due Process Protocol in turn served as the "primary model" for the Consumer Due Process Protocol.[103] In 1997, the AAA established the National Consumer Disputes Advisory Committee, which like the Employment Task Force consisted of an array of individuals from interested groups.[104] In May 1998, the Committee issued the Consumer Due Process Protocol, which is described in more detail below.[105] Thomas J. Stipanowich, the Academic Reporter for the Protocol, explained that although the AAA established the Advisory Committee, its "representatives did not play an active role in the Committee's deliberations or drafting process."[106] The AAA thereafter incorporated the principles of the Consumer Protocol into its Consumer Arbitration Rules, as well as announcing (as with the Employment Protocol) that it would refuse to administer cases that materially failed to comply.[107]

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dispute arbitration clauses should be enforceable in employment contracts. *See infra* text accompanying note 120.

[99] American Arbitration Association, Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration 12 (Jan. 2003) [hereinafter AAA, Fair Play].

[100] Zack, *supra* note 89, at 260-61 ("The critical first step in the effort toward recognition of the validity of the proposals inherent in the Protocol was the decision of William Slate, President of AAA, to convene a Conclave on Employment Arbitration in Washington, D.C., on September 22-23, 1995.").

[101] AAA, Fair Play, *supra* note 99, at 13. JAMS likewise adopted the Employment Protocol. *JAMS/Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. & MED. REP. 50, 50 (1995).

Some have suggested that another factor playing a role in both providers' adoption of the Employment Due Process Protocol was a threatened boycott by the National Employment Lawyers Association. *E.g.*, Harding, *supra* note 89, at 403 n.193; Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58-59 ("[The Employment Protocol] largely languished until NELA issued an ultimatum to AAA and JAMS."); *see National Employment Lawyers Association Will Boycott ADR Providers*, 6 WORLD ARB. & MED. REP. 240, 240 (1995); *JAMS/Endispute Clarifies Position on Mandatory Employment Arbitration*, 7 WORLD ARB. & MED. REP. 512, 512 (1996).

[102] AAA, Fair Play, *supra* note 99, at 13; *see also infra* Part II.B.

[103] Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 907.

[104] The Task Force included representatives of the AAA, the Federal Trade Commission, Freddie Mac, Fannie Mae, the American Association of Retired Persons, Consumer Action, Consumers Union, the American Council on Consumer Interests, the National Association of Consumer Agency Administrators, the National Association of Attorneys General, Duke University, two lawyers in private practice who formerly were attorneys for large corporations, as well as academics and a retired judge. National Consumer Disputes Advisory Committee, *Introduction: Genesis of the Advisory Committee*, *in* Consumer Due Process Protocol, *supra* note 88, at 46.

[105] *Id.*; *see infra* Part I.B.2.

[106] Stipanowich, *supra* note 103, at 896 n.383.

[107] AAA, Fair Play, *supra* note 99, at 14. The protocols have influenced the arbitration of consumer and employee disputes in other ways as well. Businesses have incorporated the provisions of the Protocols into their

Shortly after the Consumer Due Process Protocol was issued, the Commission on Health Care Dispute Resolution issued a Health Care Due Process Protocol as well.[108] As discussed below, the Health Care Due Process Protocol differs from the Employment and Consumer Protocols because it requires a post-dispute agreement to arbitrate health care disputes involving patients.[109] The AAA likewise has announced that it will follow the Health Care Protocol and refuse to administer cases arising out of pre-dispute agreements to arbitrate disputes within its scope.[110]

2. Content of the Protocols

The due process protocols of the leading arbitration providers are broadly consistent in content. This Section describes key features the protocols have in common as well as highlighting some important differences.[111]

First, several of the protocols set out an overarching principle of "fundamental fairness."[112] The protocols do not make clear whether "fundamental fairness" is an independent requirement that must be satisfied or whether complying with the other requirements of the protocols constitutes fundamental fairness. The Commentary to the Consumer Due Process Protocol suggests the latter, explaining that the other principles in the Protocol "identify specific minimum due process standards which embody the concept of fundamental fairness."[113] Likewise, the Commentary to the NAF Arbitration Bill of Rights explains how the NAF's process and outcomes are fair to all parties.[114] Nonetheless, the requirement of fundamental

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arbitration clauses. *E.g.*, First Victoria, TIB – The Independent Bankersbank Visa Gift Card Terms and Conditions (Associate Program) (2005), *available at* www.firstvictoria.com/PDFs/VISAGiftCard Terms.pdf ("All disputes between you and the Bank in connection with your Gift Card and these Terms and Conditions will be resolved by BINDING ARBITRATION in accordance with the Consumer Due Process Protocol ...."); AT&T, BellSouth Service Agreement for Residential Services in Alabama (2006), *available at* http://cpr.bellsouth.com/pdf/al/al_res_sa.pdf ("[I]n the event that the AAA determines that any provision of this Agreement does not comply with applicable standards stated in the AAA's Consumer Due Process Protocol, the standards in the protocol shall control."). Courts have relied on the protocols in evaluating the fairness of an arbitration clause. *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, 178-84 (2005) (discussing cases). Proposed federal legislation (not the Arbitration Fairness Act) has been modeled on the protocols. Fair Arbitration Act, S.1135, 110th Cong. (2007).

[108] The Commission was comprised of representatives of the AAA, ABA, and the American Medical Association. Health Care Due Process Protocol, *supra* note 88, at 3-4.

[109] *Id.* princ. 3.

[110] *See infra* Part IV(2).E.3.

[111] Appendix 3 contains excerpts from the Employment Due Process Protocol, the Consumer Due Process Protocol, the Health Care Due Process Protocol, as well as the JAMS Minimum Standards of Procedural Fairness for employment arbitration and for consumer arbitration, and the Arbitration Bill of Rights of the National Arbitration Forum. *See infra* Appendix 3.

[112] *E.g.*, Consumer Due Process Protocol, *supra* note 88, princ. 1.

[113] *Id.* Reporter's Comments to princ. 1.

[114] Commentary to NAF Arbitration Bill of Rights, *supra* note 88, princ. 1 ("Fairness for various classes of

fairness might be construed to have independent force as a constraint on procedures in consumer arbitrations.[115]

Second, several of the protocols address the contract formation process. The Consumer Due Process Protocol and the JAMS Minimum Standards for consumer arbitrations require businesses to provide consumers with "full and accurate information" on the arbitration program.[116] The NAF Arbitration Bill of Rights provides that "[i]nformation about arbitration should be reasonably accessible" to consumers "before they commit to an arbitration contract."[117] It adds that arbitration agreements "should conform to the legal principles of contract and applicable statutory law."[118]

As noted above, one important difference between the Health Care Due Process Protocol and the other due process protocols is that the Health Care Protocol precludes enforcement of pre-dispute arbitration agreements.[119] By comparison, the drafters of the Employment Due Process Protocol agreed to disagree on whether pre-dispute arbitration clauses should be enforceable; the drafters of the Consumer Due Process Protocol did likewise.[120] The effect of the disagreement was that both of those protocols permit enforcement of predispute arbitration agreements. The same is true for the JAMS Minimum Standards and the NAF Arbitration Bill of Rights.[121]

Third, the Consumer Due Process Protocol and the JAMS Minimum Standards of Procedural Fairness for consumer arbitrations permit claimants to bring claims in small claims court rather than arbitration, even if the claims are subject to a pre-dispute arbitration agreement.[122] The NAF Arbitration Bill of Rights contains no comparable provision, even though it applies to consumer arbitrations.[123] Neither the Employment Due Process Protocol nor the JAMS Minimum Standards for employment arbitrations contain opt outs for small claims court,[124] presumably due to the sorts of claims that typically arise out of the employment relationship.

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litigants can be evaluated by the standards of the process, and examined by its results.").

[115] And, in fact, the AAA does so in examining arbitration clauses for protocol compliance. *See infra* Part II.C.

[116] Consumer Due Process Protocol, *supra* note 88, princs. 2 & 11; JAMS Consumer Minimum Standards, *supra* note 88.

[117] NAF Arbitration Bill of Rights, *supra* note 88, princ.2.

[118] *Id.* princ. 5.

[119] Health Care Due Process Protocol, *supra* note 88, princ. 3.

[120] Consumer Due Process Protocol, *supra* note 88, Scope ("As was the case with the task force which developed the *Employment Due Process Protocol*, opinions regarding the appropriateness of binding pre-dispute arbitration agreements in consumer contracts were never fully reconciled.").

[121] JAMS Employment Minimum Standards, *supra* note 88, Introduction ("JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses").

[122] Consumer Due Process Protocol, *supra* note 88, princ. 5; JAMS Consumer Minimum Standards, *supra* note 88, Standard 1(B).

[123] NAF Arbitration Bill of Rights, *supra* note 88.

[124] Employment Due Process Protocol, *supra* note 88; JAMS Employment Minimum Standards, *supra* note 88.

The JAMS Minimum Standards (for both consumer arbitrations and employment arbitrations) contain an additional limitation on the scope of arbitration agreements -- that arbitration agreements must be "reciprocally binding."[125] Under the JAMS Minimum Standards, an arbitration clause is "reciprocally binding" when a business is bound to arbitrate to the same extent as the consumer or employee.[126] None of the other protocols has a similar requirement.[127]

Fourth, the bulk of protocol provisions address procedural aspects of arbitration. Here, the requirements of the protocols are broadly similar. The protocols typically require: (1) independent and impartial arbitrators; (2) reasonable arbitration costs; (3) a reasonably convenient hearing location; (4) reasonable time limits for the proceeding; (5) the right to representation; (6) adequate discovery; and (7) a fair hearing.[128] Not all of the provisions of the protocols on these topics are identical, but they are broadly consistent.

Fifth, the protocols all address the remedies available in arbitration and the arbitration award itself. Every protocol requires that all remedies available in court also be available in arbitration.[129] In addition, the protocols typically require the arbitrator to follow the law in making a decision and to issue a written award (with reasons on request).[130]

3. Criticisms of the Protocols

A common criticism of the due process protocols is that they lack a mechanism for ensuring compliance with their provisions.[131] While the protocols set out minimum standards for consumer and employment arbitrations, they do not specify how the standards are to be enforced. Arbitration providers like the AAA and JAMS state that they will refuse to administer a case when the arbitration clause materially fails to comply with the relevant protocol. But the private nature of arbitral dispute resolution makes it difficult to verify whether providers in fact refuse to administer such cases.

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[125] JAMS Consumer Minimum Standards, *supra* note 88, Standard 1(A); JAMS Employment Minimum Standards, *supra* note 88, Standard 7 ("Both the employer and the employee must have the same obligation (either to arbitrate or go to court) with respect to the same kinds of claims.").

[126] JAMS Consumer Minimum Standards, *supra* note 88, Standard 1(A) (defining an arbitration clause as "reciprocally binding" when if a consumer or employee is "required to arbitrate his or her claims or all claims of a certain type, the company is so bound" as well).

[127] Courts likewise are split on whether nonmutual arbitration clauses are enforceable. Christopher R. Drahozal, *Non-Mutual Arbitration Clauses*, 27 J. CORP. L. 537, 542-52 (2002).

[128] *See, e.g.*, Consumer Due Process Protocol, *supra* note 88, princs. 3, 6-9, 12 & 13.

[129] *See, e.g.*, *id.* princ. 14.

[130] *See, e.g.*, *id.* princ. 15.

[131] Harding, *supra* note 89, at 372 ("The lack of [monitoring and enforcement] provisions makes it impossible to determine if the due process protocols are in fact being followed by individual arbitrators and arbitration service providers in actual cases."); Jean R. Sternlight, *Consumer Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 174 (Edward Brunet et al. eds. 2006) ("Because the protocols are simply policies adopted by arbitration providers, there is no clear enforcement mechanism.")

Some critics allege that the AAA fails to ensure compliance with the protocols. For example, Laura MacCleery, Director of Public Citizen's Congress Watch Division, testified before Congress that "[w]hile AAA touts its internal protocols, it does not pledge to always follow them."[132] The plaintiffs in *Ting v. AT&T* alleged in their complaint in California federal court that "despite its representations to the contrary, AAA regularly administers arbitrations or otherwise endorses the validity of mandatory pre-dispute arbitration clauses that do not comply with its Due Process Protocol."[133]

To evaluate the criticisms requires empirical evidence on AAA protocol compliance review. But no direct evidence of the nature and extent of protocol compliance review by the AAA is yet available.[134] As Mark Weidemaier states: "With respect to the AAA, for example, we do not know whether it routinely conducts an adequate, independent review of the governing agreement before accepting a case for arbitration."[135] Without systematic empirical study, the only evidence consists of occasional anecdotal reports of alleged violations of the protocols.[136]

An additional criticism of the protocols is that they are incomplete.[137] As Rick Bales puts it (in the context of the Employment Due Process Protocol), the protocols have "largely been left behind by ongoing legal developments" -- that is, they "no longer provide[] the kind of

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[132] H.R. 3010, the Arbitration Fairness Act of 2007, Hearing Before the Comm'l and Admin. Law Subcomm. of the House Comm. on the Judiciary, 110th Cong., 1st Sess. (Oct. 25, 2007) [hereinafter House Hearings], *available at* http://judiciary.house.gov/hearings/hear_102507.html (Testimony of Laura MacCleery) (ms. at 5) (*citing* Declaration of Robert E. Meade, senior vice president, American Arbitration Association *in* Stahle v. Blue Cross of California, Case No. BC 218082 (Cal. Super. Ct. Feb. 17, 2000) ("[Health Care Due Process Protocol] consists of recommended procedures and compliance with the procedures is voluntary.")).

[133] Class Action Complaint ¶ 59, Ting v. AT&T (Cal. Super. Ct. July 31, 2001), *available at* www.consumer-action.org/press/articles/ting_consumer_action_sues_atampt_over_binding_arbitration_clause/. Some of these criticisms are misdirected, however. For example, Public Citizen cites evidence that many franchise agreements include remedy limitations as showing the ineffectiveness of the Consumer Due Process Protocol. Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 33 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).
pdf. But the Consumer Protocol does not apply to franchise agreements, so the comparison misses the mark.

[134] There is indirect evidence of compliance with the Employment Due Process Protocol, in the form of a study by Lisa Bingham and Shimon Sarraf finding that employee win-rates in AAA employment arbitration increased after adoption of the Protocol. Bingham & Sarraf, *supra* note 75.

[135] W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 93 n.138 (2007); *see also* Weidemaier, *supra* note 40, at 659 ("Another possibility is that the company knows that JAMS and AAA often do not enforce their rules. This cannot be ruled out, in part because providers are reluctant to provide the data needed to evaluate this possibility. There have been allegations that actual practices sometimes conflict with providers' public stances. Providers, however, are under no small amount of scrutiny, and I am not aware of supported allegations of under- or non-enforcement of these providers' due process rules.").

[136] *See* Paul Bland, CL&P Blog, AAA Breaks Its Promise Not to Hear Pre-Dispute Arbitrations in Health Care Cases (Feb. 22, 2007), http://pubcit.typepad.com/clpblog/2007/02/aaa_breaks_its.html.

[137] Bales, *supra* note 107, at 185 (identifying "twenty unresolved issues" in the Employment Due Process Protocol, which "may be broadly divided into six major categories: contract formation issues, barriers to access, remedies issues, FAA issues, and conflicts of interest"). We do not address all the asserted substantive shortcomings of the protocols in this study.

prospective guidance that [they] did a decade ago."[138] The most frequently litigated provision that the protocols do not address is the class arbitration waiver.[139]

Arbitration clauses themselves prevent a case from proceeding as a class action in court.[140] Because the parties' contract includes an arbitration clause, the case instead goes to arbitration.[141] Following the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,[142] the AAA promulgated rules for the administration of class arbitrations -- cases that proceed on a class basis in arbitration.[143] In response to the availability of class arbitration, some or many businesses (depending on the type of business) now include "class arbitration waivers" -- clauses that preclude arbitration from proceeding on a class basis -- in their arbitration clause.[144] The combined effect of an arbitration clause and an enforceable class arbitration waiver -- precluding the availability of class relief altogether -- might prevent claimants with

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[138] *Id.* at 184.

[139] *Id.* at 188 ("[One] issue is the enforceability of arbitration clauses that forbid employees from bringing claims as an arbitral class action."); Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMPLOYEE RTS. & EMPL. POL'Y J. 363, 402 (2007) ("[T]he neutral community has failed to address the common practice in employer-imposed arbitration systems that prohibit not only class actions but also joinder of claims of even two individuals."); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CINN. L. REV. 383, 424 (2008) ("A more substantive failing of the Employment Protocol and similar ventures is that they either do not address remedial issues such as the availability of class actions or expressly exclude standard litigation remedies from mass arbitration."); Sternlight, *supra* note 131, at 175 ("By contrast [to the Health Care Protocol], the Consumer Protocol neither bans mandatory arbitration nor clauses that would eliminate consumers' rights to proceed in class actions.").

[140] Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. __, __ (forthcoming 2008).

[141] John F. Dienelt & Margaret E.K. Middleton, *Settling Franchise Class Actions*, 21 FRANCH. L.J. 113, 158-59 (2002) (describing series of cases that "illustrate how arbitration clauses may be used to diminish drastically the size of the class, and, in some instances, to block class litigation altogether"); Kevin M. Kennedy & Bethany Appleby, Green Tree Financial Corp. v. Bazzle*: A New Day for Class Actions?*, 23 FRANCH. L.J. 84, 84 (2003) ("[D]uring the past decade, arbitration clauses have repeatedly enabled franchisors to 'break up' attempts by franchisees to assert class or consolidated claims."); Robert S. Safi, Note, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1724 (2005) ("The CAP [class arbitration preclusion clause] is an invention of fairly recent vintage, born of necessity. Historically, defendants could rest assured that a binding arbitration clause buried within the terms of a contract of adhesion would foreclose the possibility of classwide exposure, because courts perceived the class mechanism and arbitration as incompatible.")

[142] 539 U.S. 444 (2003) (plurality opinion) (deciding that arbitrator is to determine whether arbitration clause that is silent on class relief in arbitration permits class arbitration).

[143] American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), *available at* www.adr.org/sp.asp?id=21936. Under its current policy, the AAA will administer arbitrations on a class basis "if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." American Arbitration Association, AAA Policy on Class Arbitrations (July 14, 2005), *available at* www.adr.org/sp.asp?id= 28779. If, however, the arbitration agreement "prohibits class claims, consolidation or joinder," the AAA will not administer a class arbitration "unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association." *Id.*

[144] *See infra* Part IV(2).E.2.

small claims from bringing an action, and is frequently cited as a reason for making pre-dispute arbitration agreements unenforceable in consumer and employment contracts.[145]

Again, empirical evidence would be valuable in evaluating this criticism. While several empirical studies have examined the use of class arbitration waivers, most have focused on a narrow class or classes of consumer contracts.[146] Timely data on the use of class arbitration waivers in a range of consumer contracts could usefully inform consideration of this issue as well.

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[145] Drahozal & Wittrock, *supra* note 140, at __. For a discussion of the case law, see *id.* at ___-___.

[146] *See infra* Part IV(2).E.2.

II. AAA CONSUMER ARBITRATION PROCEDURES

For consumer arbitrations administered by the American Arbitration Association ("AAA"), the starting point for understanding the arbitration process is the AAA's Supplementary Procedures for Resolution of Consumer-Related Disputes.[1] Accordingly, this Part first describes briefly key features of those procedures. It then discusses in detail the AAA's review of consumer arbitration clauses for compliance with the Consumer Due Process Protocol, beginning with the review process and then addressing the substance of the AAA's review. Throughout this Part, we describe the AAA's procedures as set out in its rules and other publications, or as explained to us in discussions with knowledgeable AAA personnel. The extent to which the AAA's actual practices are consistent with this description is a subject of our empirical findings in Part IV.

A. AAA Procedures for Consumer Arbitration

Under the AAA's rules, a case is classified as a consumer case when it meets three requirements. First, it must arise out of "an agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers."[2] Second, "the terms and conditions of the purchase of standardized, consumable goods or services [must be] non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices."[3] Third, "[t]he product or service must be for personal or household use."[4] The AAA makes the initial determination whether a case is a consumer case, subject to redetermination by the arbitrator.[5]

When a case is designated as a consumer case, the AAA's Supplementary Procedures for Resolution of Consumer-Related Disputes generally will apply.[6] A central feature of those procedures is their discounted fee schedule, designed to satisfy the requirement of the Consumer Due Process Protocol that arbitration be available to consumers at a reasonable cost.[7] For consumer claims administered by the AAA, fees are based on a three-tiered structure. For claims

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[1] American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014 [hereinafter AAA, Consumer Rules].

[2] *Id.*

[3] *Id.*

[4] *Id.*; *see also* JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness n.1 (revised Jan. 1, 2007) [hereinafter JAMS Consumer Minimum Standards] ("These standards are applicable where a company systematically places an arbitration clause in its agreements with individual consumers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause. A consumer is defined as an individual who seeks or acquires any goods or services, including financial services, primarily for personal family or household purposes.").

[5] AAA, Consumer Rules, *supra* note 1, Rule C-1(a) ("The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator.").

[6] *Id.*

[7] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, princ. 6 (April 17, 1998) [hereinafter Consumer Due Process Protocol].

seeking less than $10,000, the consumer must pay $125.[8] The full amount is applied toward the arbitrator's fees and none to the AAA's administrative fees. For claims seeking between $10,000 and $75,000, the consumer must pay $375.[9] Again, the AAA pays the full amount toward the arbitrator's fees and none to its administrative fees. For claims over $75,000, the consumer pays administrative fees based on the regular fee schedule in the AAA Commercial Rules, and arbitrator's fees based on the arbitrator's usual rates (with a deposit of one-half the arbitrator's fee due on filing).[10] The consumer may seek a deferral or waiver of the administrative fees on a showing of financial hardship and request an arbitrator willing to serve pro bono.[11]

Under the AAA's rules, the business respondent pays all the administrative fees and the remaining arbitrator's fees for small consumer claims, both for claims brought by the consumer as well as claims brought by the business. For claims of $10,000 or less, the business pays $750 in administrative fees and an additional $200 if a hearing is held.[12] In addition, the business is responsible for the remaining $125 in arbitrator's fees.[13] For claims seeking between $10,000 and $75,000, the business pays $950 in administrative fees and $300 if a hearing is held.[14] In addition, the business is responsible for the remaining $375 in arbitrator's fees.[15] For business claims seeking over $75,000, the business pays administrative fees based on the regular fee schedule in the AAA Commercial Rules, and arbitrator's fees based on the arbitrator's usual rates.[16]

Beyond the fee structure, a number of other features of the AAA Consumer Rules also are worth noting. Even though the parties have agreed to arbitrate, a party retains the right to seek relief in small claims court instead.[17] In most cases, the entire proceeding is to be conducted on an expedited basis.[18] The AAA appoints the arbitrator from its consumer panel, subject to the

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[8] AAA, Consumer Rules, *supra* note 1, Rule C-8 ("Fees and Deposits to be Paid by the Consumer").

[9] *Id.*

[10] *Id.* If, however, the arbitration agreement provides for the consumer to pay a lower share of the costs than otherwise would be applicable, the lower contractual amount controls.

[11] American Arbitration Association, Administrative Fee Waivers and Pro Bono Arbitrators ("Pro Bono Service by Arbitrators"), *available at* www.adr.org/si.asp?id=22040 ("A number of arbitrators on the AAA panel have volunteered to serve pro bono for one hearing day on cases where an individual might otherwise be financially unable to pursue his or her rights in the arbitral forum.").

[12] AAA, Consumer Rules, *supra* note 1, Rule C-8 ("Fees and Deposits to be Paid by the Business: *Administrative Fees*").

[13] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Arbitrator Fees*").

[14] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Administrative Fees*").

[15] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Arbitrator Fees*").

[16] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Administrative Fees*"); *see* American Arbitration Association, Commercial Arbitration Rules, Rules R-49 and R-51 (amended and effective Sept. 1, 2007) [hereinafter AAA, Commercial Rules].

[17] AAA, Consumer Rules, *supra* note 1, Rule C-1(d); *see* Consumer Due Process Protocol, *supra* note 7, princ. 5.

[18] *E.g.*, AAA, Consumer Rules, *supra* note 1, Rules C-1(b) ("The Expedited Procedures will be used unless there are three arbitrators."), C-2(b), C-4, C-6, & C-7(a); *see* Consumer Due Process Protocol, *supra* note 7, princ. 8 ("Reasonable Time Limits").

parties' right "to submit any factual objections to that arbitrator's service."[19] For claims seeking $10,000 or less, the default rule is that the case will be resolved on the basis of documents only.[20] Either party may request a telephone or in-person hearing, however.[21] Likewise, the arbitrator may hold a telephone or in-person hearing if he or she decides one is necessary. For claims seeking over $10,000, the default rule is that the arbitrator will hold either a telephone or in-person hearing unless the parties agree otherwise.[22] The arbitrator's award "shall be in writing,"[23] and in making the award "[t]he arbitrator may grant any remedy, relief or outcome that the parties could have received in court."[24]

B. Process of AAA Protocol Compliance Review

If a consumer case involves a claim for compensatory damages of $75,000 or less, the AAA's procedure is for the AAA itself to review the arbitration clause for compliance with the Consumer Due Process Protocol.[25] After undertaking this review, "[i]f the Association determines that ... a dispute resolution clause on its face, substantially and materially deviates from the minimum due process standards of this Protocol, the Association may decline to administer cases arising under this clause."[26] If the claim is seeking over $75,000, issues of protocol compliance are for the arbitrator.[27]

AAA review of consumer arbitration clauses for protocol compliance can take place both before and after a dispute arises. Before a dispute arises, the AAA has set up an "advance review" procedure similar to the procedure under its Employment Arbitration Rules.[28]

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[19] AAA, Consumer Rules, *supra* note 1, Rule C-4; *see* Consumer Due Process Protocol, *supra* note 7, princ. 3 ("Independent and Impartial Neutral") and princ. 4 ("Quality and Competence of Neutrals").

[20] AAA, Consumer Rules, *supra* note 1, Rule C-5.

[21] Consumer Due Process Protocol, *supra* note 7, princ. 12 ("Arbitration Hearings").

[22] AAA, Consumer Rules, *supra* note 1, Rule C-6.

[23] *Id.* Rule C-7(b); *see* Consumer Due Process Protocol, *supra* note 7, princ. 15 ("Arbitration Awards").

[24] AAA, Consumer Rules, *supra* note 1, Rule C-7(c); *see* Consumer Due Process Protocol, *supra* note 7, princ. 14 ("Arbitral Remedies").

[25] American Arbitration Association, Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses, *available at* http://www.adr.org/sp.asp?id=24714&printable=true (last visited Aug. 13, 2008) [hereinafter AAA Rules Updates].

[26] *Id.*

[27] American Arbitration Association, Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration 33 (Jan. 2003) [hereinafter AAA, Fair Play]. Likewise, "issues that are not clearly substantial and material deviations will be presented to the arbitrator for determination." AAA Rules Updates, *supra* note 25.

[28] AAA, Fair Play, *supra* note 27, at 33 ("[B]usinesses] are asked to obtain advance review by AAA of the program to determine compliance with the protocols."); AAA Rules Updates, *supra* note 25 (describing advance review process); *see* American Arbitration Association, Employment Arbitration Rules, Rule 2 (amended and effective July 1, 2006), *available at* http://www.adr.org/sp.asp?id=32904 [hereinafter AAA, Employment Rules] ("An employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least 30 days prior to the planned effective date of the program: (i) notify the Association of its intention to do so and, (ii) provide the Association with a copy of the employment dispute resolution plan.").

According to the AAA, "[i]f a business intends to use the arbitration services of the Association in a predispute arbitration clause that involves consumers, it shall, at least thirty (30) days before the planned effective date of the clause (1) notify the Association of its intention to do so; and (2) provide the Association with a copy of the clause."[29] If the business does not do so, the AAA "reserves the right to decline its administrative services."[30] The description of the AAA's process for advance review of consumer arbitration clauses, while available on the AAA web site,[31] is not included in either the AAA's Commercial Arbitration Rules[32] or its Supplementary Procedures for Resolution of Consumer-Related Disputes.[33] By comparison, the provision providing for advance review of employment arbitration clauses is set out in the AAA's Employment Arbitration Rules.[34]

The potential benefits of advance review are at least twofold. First, advance review permits the business and the AAA to resolve any issues of protocol compliance before a dispute arises, so that the compliance review process does not interfere with resolution of the dispute between the business and a consumer. Second, advance review extends the benefits of the Protocol to all consumers who agree to a form contract with the business, not just those who are party to an arbitration before the AAA.

Post-dispute protocol review is to occur once a claimant files a demand for arbitration with the AAA. Under the AAA's arbitration rules, the demand must include a copy of the arbitration clause.[35] The parties need not attach the entire contract. Accordingly, in conducting its review for protocol compliance, the "AAA reviews the parties' arbitration clause only, and not the entire contract."[36]

Before undertaking administration of the case, the AAA case intake staff is to review the arbitration clause for compliance with the Consumer Due Process Protocol[37] (the substance of that review is described in the next section).[38] The case intake staff also is to check the name of the business against the AAA "business list" ("AAA business list") – a list of all businesses of

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[29] AAA, Rules Updates, *supra* note 25.

[30] *Id.*

[31] *Id.*

[32] AAA, Commercial Arbitration Rules, *supra* note 16.

[33] AAA, Consumer Rules, *supra* note 1.

[34] AAA, Employment Rules, *supra* note 28, Rule 2.

[35] AAA, Consumer Rules, *supra* note 1, Rule C-2(a).

[36] American Arbitration Association, AAA Review of Consumer Clauses 1, *available at* http://www.adr.org/si.asp?id=4453 (last visited Sept. 9, 2008); *see also* JAMS, JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness (revised Feb. 19, 2005), *available at* www.jamsadr.com/rules/employment_Arbitration_min_stds.asp [hereinafter JAMS Employment Minimum Standards] ("In assessing whether the standards are met and whether to accept the arbitration agreement, JAMS, as the ADR Provider, will limit its inquiry to a facial review of the clause or procedure. If a factual inquiry is required, for example, to determine compliance with the Minimum Standards, it must be conducted by an arbitrator or court.").

[37] AAA Fair Play, *supra* note 27, at 33-34 ("[S]pecially designated AAA staff members review clauses submitted in consumer cases ... to check protocol compliance.").

[38] *See infra* Part II.C.

which the AAA is aware that mention (or at least at some point mentioned) the AAA in their consumer arbitration clauses. If the business is one that has refused either to waive an objectionable provision or to pay its share of arbitration costs in a prior consumer case, it should be classified as "unacceptable" on the AAA business list so that the AAA will refuse to administer future cases involving the business.[39] Otherwise, the business should be classified as "acceptable."

If the clause complies with the Protocol, the business is to be classified as "acceptable" on the AAA business list. Provided that the business pays its share of the arbitration fees, the case will proceed to arbitration.[40] If the clause does not comply, the AAA's procedure is to contact the business to determine whether the business will waive the offending provision or provisions -- not only for this dispute, but for future disputes.[41] Moreover, the AAA will advise the business regarding the changes that can be made to bring the clause into compliance with the Protocol. If the business does not waive the provision, AAA policy is to refuse to administer the case.[42] If the company is listed as "unacceptable" on the AAA business list, or if the business fails to pay the required fees, the AAA likewise should refuse to administer the case.

If questions arise, the case intake staff can consult with a designated AAA employee who maintains the AAA business list. Note that protocol review in consumer cases differs from protocol review in employment cases, in which review is handled centrally by a single AAA employee.[43] In the consumer setting, by comparison, the case intake staff conduct the review,

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[39] The list is described in more detail *infra* Part III.B. Note that review of the AAA business list is not to replace reviewing the arbitration clause itself, as the clause may have changed since the most recent entry on the AAA business list.

[40] Assuming, of course, that the other requirements for AAA administration are met, such as that the consumer paid his or her share of the arbitrator's fees.

[41] *See* Ragan v. AT&T Corp., 824 N.E. 2d 1183, 1194 (Ill. Ct. App. 2005) (quoting letter from AAA employee to AT&T dated Oct. 29, 2002) ("The AAA's willingness to administer disputes under AT&T's arbitration agreement is contingent upon AT&T's continued willingness to have all past, present[,] and future consumer-related disputes administered in accordance with the Consumer Rules and the Protocol."). For a sample letter that is in the public domain, see Letter from Molly A. Bargenquest to Melissa Hoag Sherman & Kevin Mason dated Dec. 19, 2003, included in CD-ROM Appendix to NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS (5th ed. 2007).

[42] AAA, Rules Updates, *supra* note 25; *see also* JAMS Employment Minimum Standards, *supra* note 36 ("If JAMS becomes aware that an arbitration clause or procedure does not comply with the Minimum Standards, it will notify the employer of the Minimum Standards and inform the employer that the arbitration demand will not be accepted unless there is full compliance with those standards."); JAMS Consumer Minimum Standards, *supra* note 4 ("JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.").

[43] 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* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 321 (Samuel Estreicher & David Sherwyn eds. 2004) ("The internal mechanism the AAA uses to enforce the Protocol is for a single employee to review each and every employer arbitration plan in which the AAA is named as third-party administrator. If the plan does not comport with the Protocol, the AAA advises the employer to revise it, and the AAA refuses to administer any arbitration under the plan until it comports with the Protocol. The fact that a single employee centrally reviews

with the employee who maintains the AAA business list available for consultation in individual cases.

C. Substance of AAA Protocol Compliance Review

The Consumer Due Process Protocol sets out fifteen principles it describes as "embodiments of fundamental fairness" in dispute resolution.[44] In deciding whether to administer a consumer case, the AAA reviews the arbitration clause submitted with the arbitration demand for compliance with the Due Process Protocol. This review is subject to several important constraints.

First, as noted above, the AAA reviews the text of the arbitration clause, not the entire contract, to determine protocol compliance.[45] To the extent a problematic provision is not located in the arbitration clause but rather is located elsewhere in the contract, the provision is not subject to the AAA's review.[46]

Second, evaluating compliance with some principles of the Due Process Protocol may require factual determinations rather than simply a review of the text of the arbitration clause. To the extent factual inquiries are necessary in a particular case, the matter becomes one for the arbitrator rather than for the AAA's review process.[47]

Third, it has been the longstanding policy of the AAA to comply with any court order directing that the administration of an arbitration proceed in a particular manner.[48] Typically, the AAA is not a party to such a court proceeding; rather, only the parties to the arbitration clause are parties to the court order. Nonetheless, the AAA's policy is to defer to the court order compelling arbitration and to administer the case, even if the clause includes provisions that are inconsistent with the Consumer Due Process Protocol. However, AAA policy is to administer the case consistently with the Protocol, unless the court order directs otherwise.

Fourth, administrative review is limited to cases seeking $75,000 or less – the same cutoff the AAA uses for the reduced fee schedule in its Consumer Arbitration Rules.[49] In determining the amount of the claim, the AAA's rules provide for it to consider only compensatory damages.[50] Amounts sought as punitive damages, interest, or attorneys' fees are

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all plans ensures a certain consistency in internal administration.").

[44] Consumer Due Process Protocol, *supra* note 7, princ. 1.

[45] *See supra* Part II.B.

[46] Presumably challenges to such a provision could still be made to the arbitrator.

[47] *Cf.* JAMS, Employment Minimum Standards, *supra* note 36.

[48] The description in this paragraph is based on discussions with AAA personnel knowledgeable of its policies and practices in administering consumer cases.

[49] *See supra* Part II.A.

[50] AAA, Consumer Rules, *supra* note 1, Rule C-8 ("Administrative Fees").

not to be considered. The Protocol still applies in cases in which the claimant seeks more than $75,000, but in those cases decisions on application of the Protocol are for the arbitrator.[51]

In our empirical analysis below,[52] we evaluate the effectiveness of the AAA's review for protocol compliance. To do so, we examine the arbitration clauses in the cases in the case file sample under the same standards the AAA seeks to apply in its review. The rest of this Section describes our understanding of those standards.[53]

- Principle 1. Fundamentally-Fair Process: As discussed above, the text of the Protocol is not clear whether Principle 1 states a separate requirement of fundamental fairness or whether it merely indicates that the remaining principles of the Protocol protect fundamental fairness.[54] Nonetheless, in reviewing clauses, the AAA is to consider whether the procedures set out in the arbitration clause are unduly one-sided – that is, whether they unduly favor the business in ways not addressed in other principles of the Protocol.

- Principle 2. Access to Information: The AAA's review is limited to the arbitration clause itself; it does not examine the surrounding circumstances to evaluate whether the consumer was able to obtain "full and accurate information" regarding the ADR program.[55] As a result, the AAA's protocol compliance review does not consider this Principle. Presumably, the consumer could raise the issue of compliance before the arbitrator.

- Principle 3. Independent and Impartial Neutral: Various contract provisions might violate the requirement that the arbitrator be independent and impartial. Certainly a provision permitting the business to select the arbitrator unilaterally, or to control the list of prospective arbitrators, would violate this Principle.[56] In addition, provisions setting out required qualifications for arbitrators likewise might be problematic. For example, a requirement that the arbitrator work at a company that sells the good or service at issue would be objectionable under this Principle.[57]

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[51] *See supra* Part II.B.

[52] *See infra* Part IV(2).B.

[53] The description below is based on discussions with AAA personnel knowledgeable about its protocol compliance review and on guidance given to case intake staff who conduct that review.

[54] *See supra* Part I.B.2.

[55] Consumer Due Process Protocol, *supra* note 7, princ. 2.

[56] *E.g.* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999) ("The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters.").

[57] *Cf.* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 733 (provision in franchise agreement).

- Principle 4. Quality and Competence of Neutrals: This Principle focuses on the quality of the arbitrators named by the AAA. The AAA views it as directed at the AAA's screening and training of potential arbitrators (so that the AAA's policy is to appoint only attorney arbitrators for consumer arbitrations, for example), rather than at the parties' arbitration clause. On this view, there is nothing for the AAA to review in the arbitration clause with respect to this Principle.

- Principle 5. Small Claims: This Principle requires that the arbitration agreement "should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."[58] The AAA's Supplementary Procedures for Resolution of Consumer-Related Disputes provide that "[p]arties can still take their claims to a small claims court."[59] As such, unless the arbitration clause expressly precludes the consumer from going to small claims court, the AAA treats this Principle as satisfied.

- Principle 6. Reasonable Cost: The AAA addresses the Principle in part through its arbitration rules, which provide for the business to pay all administrative costs for claims of $75,000 or less, and the parties to share equally the arbitrator's fees, capped at $125 or $375 for consumers.[60] In addition, the AAA reviews clauses for provisions that would increase arbitration costs above the amounts provided under its rules. Thus, a clause that requires the parties to share equally all arbitration costs (not just the arbitrator's fees) would be objectionable under this Principle. Similarly, a clause that requires three arbitrators rather than one likewise would be objectionable because it would increase (potentially triple) the consumer's costs.

- Principle 7. Reasonably Convenient Location: This Principle addresses clauses that would require the consumer to travel unreasonably long distances to attend an in-person arbitration hearing.[61] A clause that requires arbitration to take place at the business's location would be problematic for a business that provides goods or services nationally. For businesses that typically sell locally, however, the AAA will not find such a clause to violate the Protocol because the location of the business would be convenient for most consumers, although the arbitrator may find a violation in a particular case, based on the particular circumstances of that case.

- Principle 8. Reasonable Time Limits: This Principle requires that arbitration take place "without undue delay."[62] The AAA interprets this Principle as primarily applicable to its rules and procedures, which set out the time limits for the arbitration process. Only if the

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[58] Consumer Due Process Protocol, *supra* note 7, princ. 5.

[59] AAA, Consumer Rules, *supra* note 1, Rule C-1(d).

[60] *See supra* Part II.A.

[61] *See also* American Arbitration Association, Locale Determinations: AAA (2007), *available at* www.adr.org/sp.asp?id=22025 ("For consumer disputes, if the claim is under $75,000 then AAA will require the business to waive the locale if the locale is not reasonably convenient for the consumer.").

[62] Consumer Due Process Protocol, *supra* note 7, princ. 8.

arbitration clause unduly lengthens those time limits so as to unreasonably delay the arbitration proceeding would there be an issue for the AAA's review.[63]

- Principle 9. Right to Representation: This Principle provides that the consumer has the right to the representative of his or her choice. An arbitration clause that precluded the consumer from being represented by counsel (or other representative) would violate this Principle.

- Principle 10. Mediation: This Principle encourages but does not require the use of mediation. As a result, in the AAA's view there is nothing for it to review.

- Principle 11. Agreements to Arbitrate: See discussion above of Principle 2.[64]

- Principle 12. Arbitration Hearings: The sorts of provisions that would violate this Principle include a provision that requires the arbitrator to decide on the basis of documents only (i.e., bars an in-person hearing) or otherwise restricts the arbitrator's discretion as to how to resolve the case.

- Principle 13. Access to Information: By "Access to Information," the Protocol means discovery. Thus, contract provisions that unduly restrict the amount of discovery in the arbitration would violate this Principle.

- Principle 14. Arbitral Remedies: This Principle requires that the same remedies be available in arbitration as are available in court. This Principle can be interpreted in two ways. The broader interpretation is that the remedies generally available in court -- such as punitive damages and injunctive relief -- also must be available in arbitration. Under that interpretation, contractual limitations on remedies would not be permitted. The narrower interpretation is that a contractual limitations on remedies would be permissible in a particular case so long as the limitation was enforceable under the applicable state law. In applying this principle, the AAA has adopted the broader interpretation.[65] As

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[63] Interestingly, in Martinez v. Master Protection Corp., 12 Cal. Rptr. 3d 663 (Cal. Ct. App. 2004) (alternate holding), the AAA evidently applied the comparable principle of the Employment Due Process Protocol in refusing to enforce a provision that shortened the statute of limitations for bringing a claim. *Id.* at 667 ("AAA's policy was against conducting arbitrations on employment plans such as [the employer's], which gave parties less time to assert claims than would otherwise be available by statute."); *see* Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 9, 1995), *available at* www.adr.org/sp.asp?id=28535. By contrast, Principle 8 of the Consumer Due Process Protocol focuses solely on eliminating delays in the arbitration process, rather than on provisions that reduce the time for bringing a claim. Consumer Due Process Protocol, *supra* note 7, Reporter's Comments to princ. 8 ("[I]t is not enough that the agreement places strict time limitations on procedural steps if these limitations are not effectively enforced.").

[64] *See supra* text accompanying note 55.

[65] W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 90 (2007) ("[O]n one occasion, the AAA asserted that an agreement violated the Consumer Protocol by allowing only recovery of direct damages in most cases and barring recovery of punitive and other damages in all cases, without suggesting

interpreted by the AAA, clauses that preclude the recovery of punitive damages or consequential damages violate this Principle. In addition, clauses that cap the amount of damages to something less than full compensatory damages or preclude any award of attorneys' fees would be objectionable.

- Principle 15. Arbitration Awards: The AAA interprets this Principle as generally addressing (and dealt with by) its rules on the making of an award, although a provision that bars written awards, for example, presumably would violate this Principle.[66]

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that its decision depended on whether a court would enforce a similar limitation.") (*citing* Affidavit of Neil B. Currie on Behalf of the American Arbitration Association in Response and Objection to a Subpoena for Documents Issued by Plaintiff, Ragan v. AT&T Corp., No. 92-L-168 (Ill. Cir. Ct. July 15, 2002)); *see also* Ragan v. AT&T Corp., 824 N.E. 2d 1183, 1194 (Ill. Ct. App. 2005) (quoting Currie affidavit).

[66] Weidemaier, *supra* note 65, at 89 ("To be sure, businesses might forbid reasoned, written awards in the arbitration agreement itself; it is unclear whether providers like the AAA would view such contract terms as consistent with the due process protocols").

III. RESEARCH METHODOLOGY

This Part describes our research methodology in this study. It begins by outlining the research questions of interest, and then describes the case file sample and other data sources.

A. Research Questions

1. Costs, Speed, and Outcomes of AAA Consumer Arbitrations

We examine a variety of aspects of the American Arbitration Association's ("AAA's") consumer arbitration caseload in this Report. Our focus is on the AAA arbitration process itself, rather than on comparing arbitration to litigation.

First, we describe the general characteristics of AAA consumer arbitration cases, as reflected in the case file sample. Which are more common, cases brought by consumers or cases brought by businesses? How much do claimants seek? What types of businesses are claimants or respondents in consumer arbitrations? To what extent are cases resolved ex parte – i.e., without one party (presumably the consumer) participating? What proportion of arbitration cases are resolved by an award?

Second, we consider the costs of consumer arbitration, in particular the arbitrator's fees and the AAA's administrative fees. The AAA's arbitration rules set out the basic framework, subject to the arbitrator's power to reallocate fees in the award.[1] To what extent do arbitrators use that power, and how does it affect the amount of arbitrator's fees and administrative costs assessed to consumers? Moreover, how does the amount of arbitration fees compare to the amounts sought in arbitration?

Third, we look at the speed of the arbitration process – how long does a case take to resolve from filing to award? How does the speed of the process compare for consumer claimants and business claimants? For cases resolved on the basis of documents as opposed to telephone and in-person hearings?

Fourth, we examine various measures of outcomes in arbitration – in particular, consumer and business win-rates, compensatory damage awards, and compensatory damage awards as a percentage of the amount claimed. How do consumers and businesses fare in arbitration under each of these measures? To what extent do arbitrators also award attorneys' fees, punitive damages, and interest to prevailing parties? Do outcomes differ in cases in which consumers are represented by an attorney as compared to cases in which they proceed pro se? Is there any evidence of a repeat-player effect, with repeat businesses faring better in arbitration than non-repeat businesses? If so, is the repeat-player effect due to arbitrator (or other) bias in favor of repeat businesses or is it due to case screening by repeat businesses?

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[1] *See supra* Part II.A.

2. AAA Enforcement of the Due Process Protocol

We also are interested in how effectively the AAA enforces compliance with the Consumer Due Process Protocol. In answering that question, we consider a series of subsidiary questions.

First, to what extent do arbitration clauses giving rise to AAA consumer arbitrations comply with the Due Process Protocol of their own right? The greater the extent to which clauses comply on their own, the less need for the AAA to enforce compliance.[2] Conversely, if many arbitration clauses are problematic under the Protocol, effective AAA compliance review becomes even more important.

Second, how effective is AAA review of arbitration clauses for compliance with the Consumer Due Process Protocol? Does the AAA identify and respond appropriately to problematic provisions? Or are there systematic gaps in the AAA's review efforts?

Third, to what extent does the AAA refuse to administer consumer cases because of Protocol issues? The AAA has indicated that when it identifies an issue of protocol compliance, it will refuse to administer the case unless the business waives the objectionable provision.[3] How often does the AAA refuse to administer a case and under what circumstances?

Fourth, how do businesses respond to AAA enforcement of protocol compliance? A business might respond in several ways. First, the business might waive the objectionable provision and/or change its arbitration clause to remove the objectionable provision. Second, the business might refuse to waive or change the provision, resulting in the AAA declining to administer the case and future cases involving the business. Third, the business might obtain a court order compelling arbitration of the dispute. Fourth, the business might modify its arbitration clause for future disputes, either by switching to another arbitration provider (that perhaps will administer cases under the objectionable provision) or by removing the pre-dispute arbitration clause altogether.[4]

These varying responses have different implications for the need for public (rather than private) regulation of consumer arbitration. To the extent businesses respond to AAA compliance review by removing objectionable provisions, AAA review benefits not only the parties to the immediate dispute but also future consumers who deal with the business under the revised clause. Conversely, to the extent businesses respond to AAA protocol review by

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[2] Of course, the fact that a clause currently complies with the Protocol does not mean that it always did so. Its current compliance may be due to prior AAA enforcement actions. Thus, an additional question we consider is the extent to which the AAA's protocol compliance efforts have resulted in changes to the terms of consumer arbitration agreements.

[3] *See supra* Part II.B.

[4] *See* W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 670 (2007) ("I have heard anecdotally from provider employees that businesses and employers often waive terms that conflict with the due process protocols. I know of no other evidence to support this assertion.").

switching to other arbitration providers, or by avoiding the AAA altogether, the Consumer Due Process Protocol becomes less effective as a means of private regulation.[5]

In addition to these research questions, we examine several other issues that arise in connection with the due process protocols. In particular, we look at how frequently parties arbitrate their disputes based on post-dispute (rather than pre-dispute) arbitration agreements; how often businesses include class arbitration waivers in their consumer arbitration clauses; and how the AAA administers disputes arising out of the health care industry in its consumer caseload.

B. Data & Methodology

1. Our primary data set consists of 301 AAA consumer arbitration cases closed by an award between April 2007 and December 2007 ("the case file sample"). The cases in the case file sample were drawn from a broader AAA dataset consisting of all consumer arbitration cases coded as closed from 2005 through 2007. We reviewed all 313 consumer cases that were awarded from April through December 2007,[6] the period for which files were still available under AAA file retention policies.[7] We excluded from the case file sample two cases from April 2007 for which the files had by accident been destroyed prematurely, one case for which the case file could not be located, two cases that had been reopened, and seven cases that were improperly labeled as closed, awarded consumer cases in the original AAA dataset. The case file sample consists of the remaining 301 cases.

We then coded those cases for approximately 200 variables that describe various aspects of the arbitration process, including: the identity and characteristics of the parties; the identity of

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[5] This possibility has been described as a "race to the bottom" in consumer and employment arbitration. Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 842-43 (2002) ("Moreover, not all arbitrators and arbitral organizations have signed on to the Due Process Protocols, so there is some risk that arbitrators will engage in a race to the bottom in order to secure large numbers of arbitration contracts."); Jean R. Sternlight, *Consumer Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 174 (Edward Brunet et al. eds. 2006) ("[M]any have raised concerns that if major and reputable arbitration providers all choose to adopt fairness protocols, other less reputable providers may enter the field, offering companies an alternative that is beneficial to the company, but not its opponents. That is, the Protocols could prompt a classic 'race to the bottom.'").

[6] In addition to these 313 consumer case files, the AAA included in its broader dataset thirty-two cases in which students challenged the cancellation of test scores. Because those cases were different in kind from the other consumer cases in the case file sample, in that they revolved around the cancellation of test scores and involved no claim for damages, we excluded those cases from the case file sample.

[7] Under AAA file retention policies, awarded case files are retained for fifteen months after the date the filed is closed, and all other case files (e.g., files for settled cases and cases dismissed by the parties) are retained for six months after the closed date. The AAA informs parties of these document retention policies in its correspondence notifying them of the closing of the case file. *See*, *e.g.*, Letter from Elizabeth Cominole to Richard E. Molan & Mark T. Broth dated May 20, 2008, *available at* http://www.aaup-unh.org/docs/AAA_AAUP.pdf ("[I]t is the AAA's policy to retain awarded cases for a maximum period of fifteen (15) months from the date of the transmittal letter. Therefore, please take note that the above referenced case file will be destroyed 15 months from the date of this letter.").

the parties' representatives, if any; the AAA office and case manager that administered the case; the type of case and amounts claimed; key dates in the arbitration process; information on arbitrator selection; hearing information (including the type and location of the hearing); amounts awarded, if any; and fees paid to the AAA and the arbitrator. We also examined the arbitration clause giving rise to the case as part of a review of the AAA's enforcement of the Consumer Due Process Protocol, as discussed in more detail below.[8] The variables coded and the coding instructions can be found in Appendix 4.

The Task Force members double checked each other's work using the original case files. Finally, we corrected any inconsistencies across and within variables. Once the data was cleaned, we aggregated variables for multiple parties into single claimant and respondent variables to use in the data analysis below.

2. The case file sample is subject to several possible selection biases. First, the case file sample is limited to consumer arbitrations administered by the AAA. Arbitrations arising out of clauses that specify other arbitration providers are not included in the case file sample. To the extent providers differ in how they administer cases, or in the types of cases or businesses they attract, the case file sample will not be representative of all consumer arbitrations. In particular, businesses that seek to avoid application of the Consumer Due Process Protocol would presumably be less likely to provide for AAA arbitration. Arbitrations arising out of clauses drafted by such businesses will accordingly be less likely to be included in the case file sample.

Second, the case file sample is limited to AAA consumer arbitrations giving rise to an award in the last nine months of 2007. For much of our data analysis, we do not include cases that were closed without an award, such as by settlement or otherwise.[9] Moreover, due to constraints on the availability of original case files and time constraints in collecting the data,[10] the time period covered by the cases is not a full calendar year. We know of no reason why awards from the nine months studied would differ from other periods of similar length, and no reason why awards from 2007 would differ from awards in nearby years. One consequence of the time period studied, of course, is that it necessarily limits the number of cases in the case file sample.

3. In addition to the case file sample, when possible we also use a larger dataset ("AAA consumer dataset") comprising all 3220 AAA consumer cases closed between 2005 and 2007.[11] The AAA maintains this dataset in the ordinary course of its business, collecting data for its internal purposes on some but not all of the variables in which we are interested. Case managers collect and enter the information in the AAA consumer dataset to track case progress and to

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[8] *See infra* text accompanying notes 14-18.

[9] For an exception, see, *e.g.*, Part IV(2).A.

[10] Our ability to examine older case files was limited by the AAA's document retention policy, described *supra* note 7. Our ability to examine newer case files was limited by time and resource constraints in completing data collection for this study.

[11] Before using the AAA consumer dataset in this study, we excluded the cases identified in the file review that were not consumer arbitrations or not currently closed, as well as the cases in which students challenged the cancellation of test scores.

make sure the parties are charged the correct fees. Because the AAA consumer dataset is used on an ongoing basis, the AAA makes updates as case information changes.[12] Moreover, case managers tend to focus on the information they need to monitor the case. As a result, data central to the AAA's operations, such as the names of the parties, the key dates in the case, and the total fees charged to all parties are more likely to be entered consistently than other data on the case.

Because the AAA consumer dataset was updated by many different case managers at different times, we expected the coding of certain variables to be somewhat inconsistent. To determine the degree of that inconsistency, we compared the data we collected for the 301 cases in the case file sample to the data the AAA maintained for those same 301 cases in the AAA consumer dataset.

Certain information was almost completely consistent between the AAA consumer dataset and the case file sample. For example, distinguishing between businesses and consumers is always possible, which made it reasonably straightforward to identify the type of business involved. Further, cases were consistently coded as either awarded or non-awarded, although it was not possible to verify whether the non-awarded cases were properly coded as settled or withdrawn.

Other information is less accurate, but is still reasonably reliable. Because of the way information was entered into the AAA consumer dataset, it was not always possible to distinguish claimants from respondents easily. However, in 295 out of the 301 cases (98.0%), the claimant was the first listed party and could be reliably identified. In 6 of 301 cases (2.0%) could we not correctly categorize the parties as claimants or respondents by using the order of appearance. Further, the key dates seem reasonably accurate as well. The AAA did not enter the date a case was filed, instead using the date the case was assigned in its system. We could not determine the assignment date in our review of the files, but instead recorded the filing dates. The differences between the filing and assignment dates averaged 5.2 days with a median of 1 day. Although we could not verify the date the AAA administratively closed a case, we were able to determine the award dates. For the cases in the case file sample, the award date entered by the AAA was different from the closed date in fourteen cases (4.7%). The differences for these fourteen cases had a mean of 17.5 days and a median of 1 day. The differences were likely due to minor typos and the fact that on occasion a case manager recorded the date of a partial award rather than the date of the final award.

We also find similar accuracy in the identification of claims $75,000 or less and claims of more than $75,000. Of the 301 cases, 13 (4.3%) differed in their categorization. Less consistent is the association of exact AAA administrative fee amounts with each party. For the first party, the AAA administrative fees recorded were different 33 out of 301 times (11.0%) and for the second party they were different 40 out of 301 times (13.3%). As mentioned above, the sums of the AAA administrative fees were consistent, however.

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[12] For example, the recorded information on the case manager responsible for the case was changed whenever a new case manager was assigned to the case. Thus, the name of the case manager recorded in the dataset is the name of the case manager with responsibility for the case at the time the case was closed.

Finally, the amount claimed and the amount awarded were much less consistent than the other data we compared.[13] Specifically, the amount sought by the first party listed in the AAA consumer dataset differed in 59 out of 301 cases (19.6%) between the AAA consumer dataset and the case file sample. In many of these cases, it appeared that the parties or the AAA case managers included attorneys' fees, interest, punitive damages, or other damages together with the compensatory damages sought in a single amount claimed. Or else the case managers entered the amount claimed by a different party. The amount sought by the second party listed (the majority of which were counterclaims) was entered differently in 39 out of 301 cases (13.0%). In most of the 301 cases, however, the second party did not assert a claim. In those cases in which the second party did assert a claim, the data was entered differently in 34 out of 48 cases (70.8%).

The inconsistencies in award amounts are similar. The amount of compensatory damages awarded to the first party listed differed in 88 out of the 301 cases (29.2%) between the AAA consumer dataset and the case file sample. In many of these cases, the parties or the AAA case managers combined the compensatory damages awarded with the amount of attorneys' fees, interest, punitive damages, or other damages awarded. In other cases, the case managers entered the amount awarded to a different party or did not enter the amount awarded at all. The amounts of compensatory damages awarded to the second party listed (the majority of which were from counterclaims) were entered differently in 31 out of 301 cases (10.3%). Again, however, in most of the 301 cases the second party did not assert a claim. In those cases in which the second party did assert a claim, the data was entered differently in 30 out of 48 cases (62.5%).

4. The AAA consumer dataset does not include information on the arbitration clause or on the details of AAA protocol compliance review. To obtain that information, we reviewed the original case files for the cases in the case file sample. For each of the cases, we examined the arbitration clause attached to the arbitration demand for compliance with the Consumer Due Process Protocol.[14] In evaluating compliance, we applied the standards used by the AAA as described above. We also determined from the file whether the AAA case intake staff identified any protocol violation and, if so, whether the AAA obtained a waiver of the violation from the business.

One file was missing the arbitration clause.[15] The business in the case appeared in at least one other case in the case file sample; the clause in that case contained no provisions violating the protocol. Because we could not be certain that same clause was involved in the two cases, however, we treated the clause as missing. For another file, the arbitration clause appeared to be

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[13] Since most of the cases in the case file sample only had claims from the first two parties listed, we discuss the results as they relate to the first two parties.

[14] Thus, we examined all arbitration clauses that gave rise to a consumer arbitration before the AAA that was resolved by an award from April to December 2007. The arbitration clauses in the case file sample are not a random sample of all consumer arbitration clauses, nor are they even a random sample of all consumer arbitration clauses specifying the AAA as arbitration provider.

[15] The file clearly had included the arbitration clause at one point, but by the time we obtained the case file for review the clause was no longer included.

incomplete. While the file included a lengthy portion of the arbitration clause, it appeared that the claimant may not have provided a copy of the entire clause. Although the clause had no problematic provisions in the portion we were able to review, we excluded it from the case file sample because we could not be certain what provisions were included in the rest of the clause. Accordingly, the case file sample as used to evaluate AAA protocol enforcement consists of 299 AAA consumer arbitration clauses.[16]

We used the case file sample to evaluate the extent to which arbitration clauses in the case file sample complied with the Consumer Due Process Protocol and how well the AAA applied its standards in reviewing arbitration clauses for protocol compliance. We also used it to obtain information on the relative frequency of pre-dispute and post-dispute arbitration agreements and on the use of class arbitration waivers in the clauses.[17] Finally, we looked at those cases in the case file sample involving the health care industry to evaluate AAA compliance with the Health Care Due Process Protocol.[18]

5. The case files contained no indication of whether the business had sought advance review (i.e., pre-dispute review) of its arbitration clause for protocol compliance. To obtain information on business use of advance review, we examined the AAA business list,[19] which included a notation when the business sought advance review of its arbitration clause. We verified those notations against AAA files documenting the request for advance review. We also examined a sample of other entries on the AAA business list to ensure that requests for advance review had not been misclassified.[20]

6. The AAA does not maintain a list of the cases it refuses to administer for failure to comply with the Consumer Due Process Protocol. To estimate the number of cases the AAA refused to administer during 2007, we started with a list of "pre-filing" cases provided by the AAA ("AAA pre-filing cases"). "Pre-filing" cases are cases submitted to the AAA that do not satisfy the filing requirements of the AAA Consumer Rules. Such requirements include a completed demand for arbitration, a copy of the arbitration clause, and payment of the appropriate fee,[21] as well as the business's payment of its share of the fees and waiver of any protocol violations.[22]

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[16] Because the rest of the file that was missing the arbitration clause was complete, we are able to use this case in examining other aspects of AAA consumer arbitrations.

[17] We did not review all of the provisions in the consumer arbitration clauses in the case file sample, and thus do not have comprehensive data on those provisions. But because of the high visibility of the issue of class arbitration, we did collect data on the use of class arbitration waivers in the consumer arbitration agreements in the case file sample.

[18] Commission on Health Care Dispute Resolution, Health Care Due Process Protocol (July 27, 1998), *available at* www.adr.org/sp.asp?id=28633.

[19] *See supra* Part II.B. We used the AAA business list as of April 25, 2008.

[20] We found one additional case in which the business had sought advance review.

[21] American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes, Rule C-8 (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014.

[22] *See supra* Parts II.A & II.B.

Cases the AAA refused to administer because of protocol violations should be included in the AAA pre-filing cases. But also included would be cases brought by a consumer (or business, for that matter) that did not meet the requirements for filing the claim.[23] To distinguish between these types of cases, we cross-checked the AAA pre-filing cases against the AAA business list. If the business was listed as "unacceptable" on the AAA business list, we presumptively treated the case as one that the AAA refused to administer because of a protocol violation. In such cases, we further examined the AAA files documenting the business's status on the AAA business list. In a number of cases, we were able to confirm from those files that the AAA refused to administer a particular case because of protocol noncompliance.[24]

7. Finally, we obtained data on how businesses respond to AAA enforcement of the Consumer Due Process Protocol. As described above, a business might respond to AAA enforcement actions in several ways.[25] We again used the AAA business list (and supporting files) as the best available source of data on such actions.

As discussed above, the AAA classifies the businesses on the AAA business list either as "acceptable" – i.e., the AAA will administer consumer arbitrations involving the business – or "unacceptable – i.e., the AAA will not administer consumer arbitrations involving the business.[26] For each entry, the AAA business list also includes a short explanation of the businesses' current status as acceptable or unacceptable.[27] We used those explanations to provide an initial characterization of how the business responded to AAA protocol compliance review. We then sought to verify that characterization by reviewing the AAA's files supporting the AAA business list entry. For some types of entries, we examined all available supporting files. For others, time constraints limited us to examining a random sample of the supporting files.[28] We also collected data on the underlying protocol issue, if any, involved.

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[23] This may occur because the claimant decides not to pursue the case, or because the parties settle before the filing requirements are met.

[24] If the business's status on the AAA business list changed because of some action during the case we were examining, the correspondence relating to that case would be in the files. For example, if the AAA added the business to the AAA business list because it refused to waive a problematic provision or failed to pay its share of arbitration fees, that correspondence would be in the AAA business list file. If, however, the AAA declined to administer the case because the business was already listed as unacceptable because of prior events, we would find no evidence of the later refusal (only the prior one) in the AAA business list file.

[25] *See supra* Part III.A.

[26] The AAA also includes a sub-category of "acceptable businesses" on the AAA business list – typically large entities for which in the past there had been some confusion over the appropriate contact person when a consumer brought a claim against the business. For those businesses, the AAA business list typically identifies the appropriate contact person to receive the demand for arbitration.

[27] If the business's arbitration clause complied with the protocol at the time it was first reviewed, and if the business had always paid its share of the arbitration fees, the business would be listed but only with the date of the first review.

[28] For AAA business list entries indicating that the business did not respond to the initial case filing, we originally examined a random sample of supporting files. When that examination revealed that in some of the cases businesses failed to pay their share of the arbitration fees while in others they failed to waive protocol violations or update their arbitration clauses to remove protocol violations, we expanded our examination to include supporting files for all of those entries. For AAA business list entries indicating that the business did not respond to a follow-up contact by the AAA to update its arbitration clause or to waive protocol violations in all future cases, we examined a

Using this data, we sought to estimate how frequently businesses responded to AAA protocol review by: (1) waiving the objectionable provision for future cases and/or updating their clauses to eliminate problematic provisions; (2) refusing to update their clauses or simply not responding to the AAA; or (3) updating their clauses to replace the AAA with a different arbitration provider (or to remove the arbitration clause altogether).[29]

8. Our access to all of the sources of data from the AAA is subject to a non-disclosure agreement entered into with the AAA. The non-disclosure agreement protects the parties' expectation to privacy in their contractually specified dispute resolution process. As required by the non-disclosure agreement, we report aggregate results about the arbitration process; we do not include any information in this Report that might identify a particular case or party.

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random sample of supporting files. Because those files confirmed that the business failed to waive a protocol violation or update its arbitration clause, we did not expand our review. We examined a handful of files in which the AAA listed the business as acceptable with no further comment. (Our examination of the cases in the case file sample provides a more satisfactory test of the effectiveness of AAA protocol compliance review because it includes cases that might not be listed on the AAA business list.) For all other types of AAA business list entries, we examined all the supporting files.

[29] The AAA business list files contain no information on how frequently businesses seek court orders compelling arbitration of cases the AAA refuses to administer.

IV. EMPIRICAL RESULTS

TOPIC 1. COSTS, SPEED, AND OUTCOMES OF AAA CONSUMER ARBITRATIONS

This Part sets out our empirical findings, which are based on American Arbitration Association ("AAA") data from the 301 cases in the case file sample, supplemented when possible with data from the 3220 cases in the AAA consumer dataset. Our findings address the following: (1) general characteristics of the cases in the case file sample; (2) the costs incurred by the parties in arbitrating their case; (3) the speed of the arbitration process; and (4) outcomes of AAA consumer arbitrations, including data on outcomes in cases with pro se consumer claimants and repeat-player businesses.

A. General Case Characteristics

Because our purpose is to describe comprehensively the AAA's consumer arbitration caseload, this Section gives a general overview of case characteristics for the 301 cases in the case file sample, supplemented when possible with data from the AAA consumer dataset.

1. Business Claimants v. Consumer Claimants

In the substantial majority of AAA consumer arbitrations, the consumer is the claimant in the arbitration proceeding.[1] Of the cases in the case file sample, consumers were claimants in 240 of 301 (or 79.7%) of the cases, while businesses were claimants in 61 of 301 (or 20.3%) of the cases. Because we can reasonably rely on the coding accuracy of the AAA consumer dataset for business and consumer claimants, we used this dataset as a check on the case file sample for this variable. The results from the AAA consumer dataset are similar. Assuming, based on our data consistency analysis,[2] that the first named party in that dataset is the claimant, consumers were claimants in 2765 of the 3220 (or 85.9%) of the cases, while businesses were claimants in 455 of 3220 (or 14.1%) of the cases. Figure 1 shows the similarity between the two data sources.

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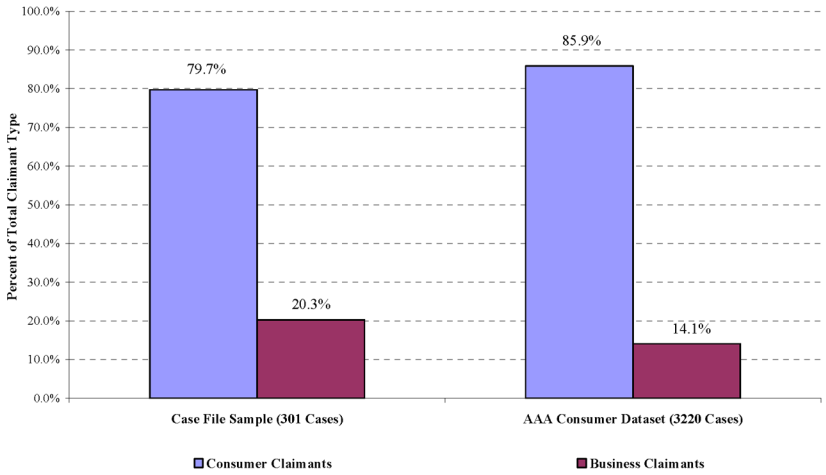
[1] Thus, the AAA's consumer caseload more closely resembles the JAMS consumer caseload than the NAF's caseload, which consists almost exclusively of arbitrations brought by businesses against consumers to collect debts. *See supra* Part I.A.3.

[2] *See supra* Part III.B.

Figure 1:
Comparison of Claimant Types



As a general matter, the types of cases brought by businesses in the case file sample differed from the types of cases brought by consumers. In most cases brought by businesses, the business claimants sought payment for goods delivered or services rendered but usually little else. In contrast, the issues raised in cases brought by consumer claimants were much more diverse, with consumers asserting claims for nondelivery of goods or services, claims for breach of warranty for defective goods or services, claims under state consumer protection acts, claims under federal consumer protection statutes, and the like. Because of these sorts of differences between the cases, we examine cases with business claimants separately from cases with consumer claimants in the rest of our data analysis.

2. Amounts Claimed

The amount sought by the claimant is an important variable for several reasons. First, arbitration fees vary depending on the amount claimed, with low-cost arbitration available under the AAA's consumer rules for claims seeking $75,000 or less. (Accordingly, in the rest of this analysis we examine cases seeking $75,000 or less separately from cases seeking more than $75,000.) Second, as discussed above,[3] the extent of the AAA's review of arbitration clauses for

[3] *See supra* Part II.B.

compliance with the Due Process Protocol depends on the amount claimed. Third, empirical studies of arbitration outcomes use the amount claimed as a rough proxy for the value of the claim.[4]

But determining the amount claimed turns out to be more difficult than sometimes assumed.[5] First, claimants sometimes combine various elements of damages into a single claim amount, which includes not only compensatory damages, but also interest, punitive damages, and attorneys' fees. Because the AAA bases its fees only on the amount of compensatory damages claimed, excluding interest, punitive damages, and attorneys' fees, we treat those individual items of damages separately as well. In this Section, we discuss only amounts of compensatory damages sought as the amount claimed.[6] Moreover, when we categorize results in this Report by the amount claimed (usually in two categories, $75,000 or less and more than $75,000), we likewise use the amount of compensatory damages sought in calculating the amount claimed.

Second, although claimants must specify a claim amount in their demand for arbitration,[7] some claimants specify the claim amount not as a single number but as a range of numbers.[8] Other claimants specify the amount claimed as an inequality, seeking less than or more than a specified amount. For example, a demand for arbitration might claim damages of between $10,000 and $75,000, or damages greater than $10,000. Specifying the amount claimed as a range or inequality ordinarily does not cause problems for the AAA in determining arbitration fees or in its enforcement of the Due Process Protocol because the ranges or inequalities typically are tied to the relevant threshold amounts.[9] For purposes of using claim amounts in our empirical analysis, however, demands specifying damages as a range or an inequality are much more problematic.

For business claimants, one case out of 61 (1.6% of cases) presented the claim amount as an inequality. Consumer claimants, however, were much more likely to use inequalities or ranges in their arbitration demand. In 22 cases out of 235[10] (9.4% of cases seeking a monetary amount), consumer claimants presented the claim amount as an inequality (16 of 22) or bounded range (6 of 22).

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[4] *See supra* Part I.A.3.

[5] *E.g.*, Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 12 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap (Final).

[6] While claimants often assert a claim for interest, punitive damages, and attorneys' fees in their demand, rarely do they quantify those claims. For further discussion, see *infra* Part IV(1).D.2.

[7] American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes, Rule C-2(a) (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014 [hereinafter AAA, Consumer Rules]; American Arbitration Association, Commercial Arbitration Rules, Rule R-4(a)(i) (amended and effective Sept. 1, 2007) [hereinafter AAA, Commercial Rules].

[8] We discuss here initial claims only, not counterclaims.

[9] In consumer cases, arbitration fees are a flat amount within certain ranges (less than $10,000 and between $10,000 and $75,000), and the threshold for the AAA's administrative review of clauses for protocol compliance is $75,000.

[10] We exclude the five cases seeking non-monetary remedies from these calculations.

We considered several options for dealing with demands specifying the claim amount as an inequality or a range: (1) dropping all cases specifying a claim amount as a range or inequality from the case file sample; (2) taking the mid-point of all ranges (treating inequalities as one end of a range bounded on the other end by the claim threshold); or (3) using the base number of claim amounts specified as inequalities and the mid-point for all claim amounts specified as bounded ranges.

To enhance comparability to the AAA consumer dataset, we use the third option.[11] For claim amounts given as inequalities, we simply ignore the inequality and use the base amount as the amount of the claim. For example, if the claim amount was written "greater than $10,000," we used $10,000 as the claim amount; if the claim amount was written "less than $75,000," we used $75,000 as the claim amount.[12] For claim amounts given as bounded ranges, we used the mid-point of the range as the claim amount. For example, if the claim amount was written as "$10,000 to $75,000," we used $42,500 as the claim amount. Because only sixteen cases with consumer claimants have claim amounts specified as inequalities and only six cases have claim amounts specified as bounded ranges, the choice among the options for measuring claim amount rarely affects the results.[13]

Overall, the vast majority of cases in the case file sample involved claims for $75,000 or less. For business claimants, 95.5% of cases (58 of 61) involved claims for $75,000 or less. For consumer claimants, 91.5% of cases (215 of 235) involved claims for $75,000 or less. Indeed, 39.1% of cases (92 of 235) brought by consumer claimants involved claims for less than $10,000.

Because the coding of claims as greater than $75,000 and less than or equal to $75,000 in the AAA consumer dataset is reasonably reliable, we use that dataset to check this variable in the case file sample. Again, the results are similar. In the AAA consumer dataset, excluding non-monetary and unspecified claims, 94.5% of business claimants brought claims of $75,000 or less (359 of 380 cases). By comparison, 88.5% of consumer claimants brought claims of $75,000 or less (2190 of 2475 cases).

Consumers tend to seek larger amounts than businesses in AAA consumer arbitrations. The average claim for business claimants in the case file sample was $22,037 and for consumer claimants was $46,131, a statistically significant difference.[14] There also is a statistically

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[11] The AAA uses the base amount of the inequality in its consumer dataset.

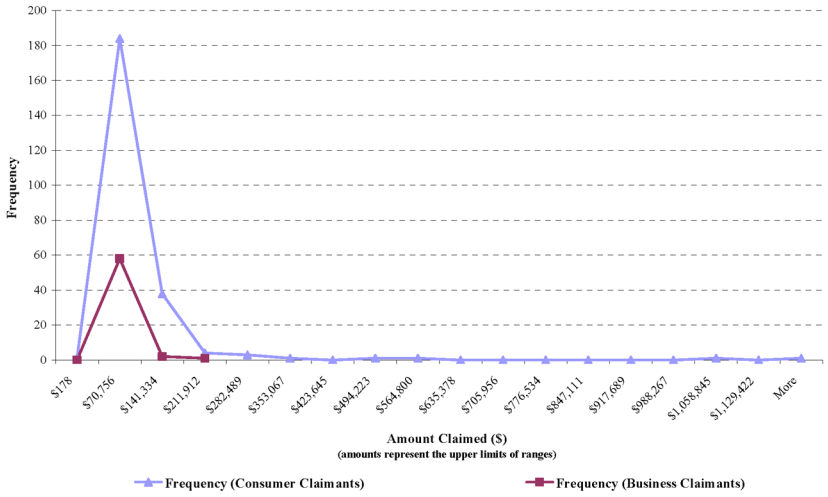
[12] Selecting the lower end of the range in cases not specifying the claim amount will increase the recovery rate discussed below, but the effect should be minimal due to the small number of cases affected by this choice.

[13] Option 1 resulted in higher average claim amounts than either option 2 or option 3. Further, using option 2 rather than option 3 resulted in an average difference of less than $100 for both business and consumer claimants. The claim amount changes for one case with a business claimant and sixteen cases with consumer claimants between options 2 and 3.

[14] We used a two-group t-test for averages in claims made by business claimants and consumer claimants excluding non-monetary claims and adjusting for unequal variances. The t-statistic was -2.9338 (DF = 290.932 and p = 0.0036), allowing us to reject the null hypothesis that the averages between the two groups were the same.

significant difference in the variance of claim amounts between the two groups.[15] Figure 2, a frequency distribution with equally distributed bins, shows that almost all business claims fall between $178 and $70,756, with a short tail. Almost all consumer claims also fall between $178 and $70,756. However, at least 12 cases fell outside that range, including one claim of $1,200,000. Thus, consumer claims have a longer tail than business claims.

Figure 2:
Frequency of Amounts Claimed by Consumer and Business Claimants
(Cases = 296)



Because the case file sample includes only awarded cases, it is possible that there are differences in claim amounts between awarded cases and other types of closed cases. In order to test whether case resolution was related to claim amounts, we truncated the AAA consumer dataset to all cases with specified monetary claims and closed in the same time frame as the case file sample, namely April 2007 through December 2007, which added 46 business cases and 345 consumer cases.[16] Because the case file sample comprised almost all of the awarded cases in this time period, the added cases were mostly settled, withdrawn, or closed in some other way.

For business claimants, the average claim was $22,037 for the awarded cases in the case file sample and $18,313 for all other cases; the means are not significantly different from one

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[15] We used a two-group F-test for variances in claims made by business claimants and consumer claimants excluding non-monetary claims. The f-statistic was 0.0504 (DF = 60, 234 and p = 0.0000), allowing us to reject the null hypothesis that the variances between the two groups were the same.

[16] We note that the individual claim amounts coded in the AAA consumer dataset are less reliable than the binary coding for claims of $75,000 or less and claims greater than $75,000. *See supra* Part III.B.

another.[17] Claim amounts for consumer claimants are similar. The average claim was $46,131 for the awarded cases in the case file sample and $66,367 for all other closed cases. Although the other closed cases had a slightly higher average claim, the difference between the two groups is not statistically significant.[18]

Counterclaims were somewhat rare in the case file sample – only 57 out of 301 cases (or 18.9% of cases) involved a counterclaim at all. Eleven consumer respondents brought counterclaims: five sought compensatory damages of $75,000 or less, two sought more than $75,000, and the remaining four sought non-monetary relief or the remedy sought was unspecified. Business respondents were more likely to bring a counterclaim. The remaining forty-six counterclaims were brought by business respondents: thirty-three sought compensatory damages of $75,000 or less, one sought more than $75,000, and the remaining twelve sought non-monetary relief or the remedy sought was unspecified. Counterclaims were not recorded consistently in the AAA consumer dataset so a comparison is not possible.

3. Types of Businesses

The types of businesses involved in the cases in the case file sample included motor vehicle dealerships, credit card issuers, insurance companies, home builders, finance companies, mobile home dealers, and real estate brokers. As shown in Figure 3, different types of companies were claimants than respondents. Business claimants were mostly service providers: home builders (13 or 61, or 21.3% of the cases), real estate brokers (12 of 61, or 19.7% of the cases), and other service providers such as law and accounting firms (20 of 61, or 32.8% of the cases). In contrast, the most common business respondents were motor vehicle dealerships (66 of 240, or 27.5% of the cases) and insurance/warranty companies (44 of 240, or 18.3% of the cases). The differing types of businesses reflect the different nature of cases brought by business and consumer claimants. Businesses were mostly looking to collect fees owed for services performed while consumers were bringing claims for faulty cars and faulty products, among others.

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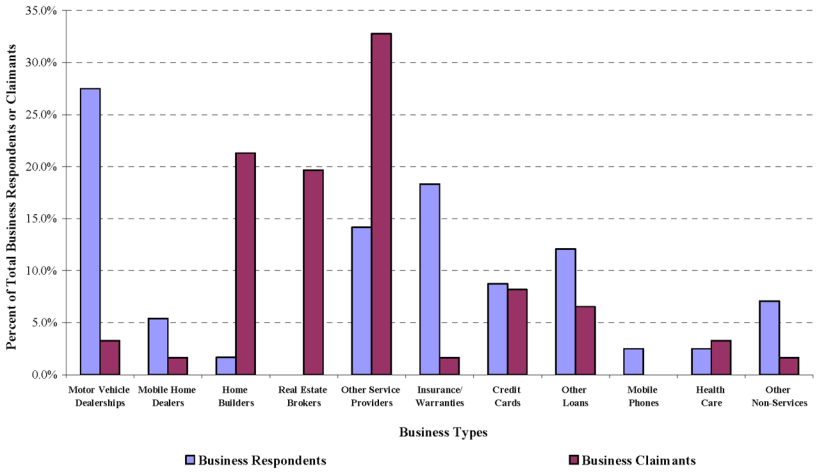
[17] The two-group t-test accounting for unequal variances resulted in t = -0.9056 (DF = 102.497 and p = 0.3673). The variances between the two groups are significantly different however. The f-statistic was 0.4083 (DF = 45, 60 and p = 0.0021), allowing us to reject the null hypothesis that the variances between the two groups were the same.

[18] The two-group t-test accounting for unequal variances resulted in t = 1.0948 (DF = 466.817 and p = 0.2741). The variances between the two groups are significantly different, however, owing to several large claims in cases that were eventually settled. The f-statistic was 7.4138 (DF = 344, 234 and p = 0.0000), allowing us to reject the null hypothesis that the variances between the two groups were the same.

Figure 3:
Business Types as a Percent of Total Business Respondents and Total Business Claimants
(Cases = 301)



The entries for business type in the AAA consumer dataset are less reliable than for the case file sample. However, we generally find the same business types for business claimants and respondents in both datasets. Business claimants were mostly service providers: home builders (59 of 455, or 13.0% of cases), real estate brokers (53 of 455, or 11.6% of cases), and other service providers such as law and accounting firms (84 of 455, or 18.5% of cases). Common types of business respondents were motor vehicle dealerships (451 of 2765, or 16.3% of cases) and insurance/warranty companies (207 of 2765, or 7.5% of cases). Note that in the AAA consumer dataset, the type of business as a percentage of the total was generally lower than in the case file sample. This is mostly due to a higher proportion of cases involving credit card issuers and other creditors in the AAA consumer dataset, most of which never went to an award.

4. Ex Parte Proceedings

Of the 301 cases in the case file sample, 26 cases (8.6%) were resolved on an ex parte basis – i.e., in the absence of one of the parties. All twenty-six cases involved claims of $75,000 or less, and in all twenty-six cases the absent party was the consumer. Interestingly, however, not all of the ex parte cases involved a business claimant. Twenty-two of the ex parte cases were brought by business claimants. The remaining four cases were brought by consumers, who then either did not appear at the hearing or submit documents. Three of the four consumers originally

were represented by counsel, who filed the claim but then withdrew from representing the consumer. Ex parte cases were not recorded in the AAA consumer dataset, so a comparison is not possible.[19]

5. Case Resolutions – Awarded Versus Non-Awarded

The case file sample is limited to awarded cases, so to examine the frequency of other case resolutions (and the relative frequency of awarded cases) we use the AAA consumer dataset. The AAA consumer dataset categorizes cases consistently into awarded and non-awarded categories.

In cases involving business claimants, 227 (or 49.9%) were resolved by an award and 228 (or 50.1%) were otherwise closed.[20] Of the 227 awarded cases, 214 had claims of $75,000 or less, 9 had claims of more than $75,000, and 4 sought non-monetary relief or sought an unspecified remedy. Of the 228 non-awarded cases, 145 had claims of $75,000 or less, 12 had claims of more than $75,000, and 71 sought non-monetary relief or sought an unspecified remedy.

In cases involving consumer claimants, 887 (or 32.1%) were resolved by an award and 1878 (or 67.9%) were otherwise closed. Of the 887 awarded cases, 57 had claims of more than $75,000, 793 had claims of $75,000 or less, and 37 sought non-monetary relief or sought an unspecified remedy. Of the 1878 non-awarded cases, 228 had claims greater than $75,000, 1397 had claims of $75,000 or less, and 253 sought non-monetary relief or sought an unspecified remedy. Figure 4 below shows the relative differences between case dispositions by amount claimed.

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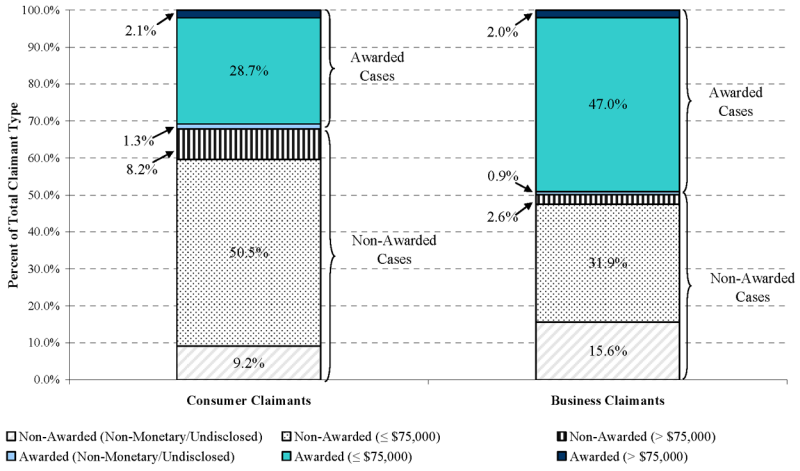
[19] As discussed *infra* Part IV(1).D.2, the number of ex parte awards likely is related to the win-rate for business claimants.

[20] The AAA database does distinguish among withdrawn, settled, and administratively closed cases, however those distinctions are not always accurate since the AAA relies on the parties to report a settlement or withdrawal. As such, we distinguished only between awarded and non-awarded cases in our analysis.

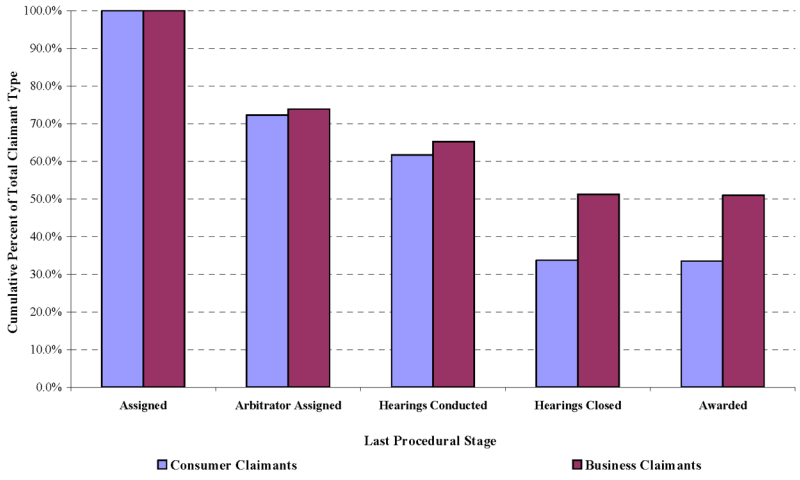
Figure 4:
Percent of Awarded and Non-Awarded Cases by Claimant Type and Amount Claimed
(Cases = 3220)



Using the key dates (which were reliably recorded in the AAA consumer dataset), we were also able to estimate how far in the arbitration process cases progressed before being resolved. We categorized the procedural stages using the Assignment Date (the date the case was entered into the AAA's system), the Arbitrator Assignment Date (the date an arbitrator was appointed), Hearing Dates (the date or dates of any hearings, including preliminary hearings), Hearing Closed Date (the date the hearing, if any, was declared closed), and Award Date (the date of the award). Cases were categorized by the last listed date in the database before the case was closed. For business claimants, 26.2% (or 119 out of 455) of the cases were closed before an arbitrator was appointed; for consumer claimants, the percentage was similar (766 out of 2765, or 27.7% of cases). But cases with consumer claimants are much less likely than cases with business claimants to be resolved by an award. Figure 5 below shows the comparison in case progression between consumer and business claimants.[21]

[21] We note that a small number of cases (1.1% of cases with business claimants and 1.4% of cases with consumer claimants) have awarded dates but are categorized in the AAA consumer dataset as settled or otherwise closed. We do not have an explanation for this seeming discrepancy. It does not, however, materially affect our findings.

Figure 5:
Cumulative Percent of All Cases by Procedural Stage by Claimant Type
(Cases = 3220)



B. Cost of AAA Consumer Arbitrations

As described above,[22] the AAA has a tiered fee structure based on the amount of compensatory damages claimed.[23] The fees are not based on other amounts such as punitive damages, interest, or attorneys' fees.[24] Table 1 summarizes the AAA's fees for consumer cases.

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22 *See supra* Part II.A.
23 AAA, Consumer Rules, *supra* note 7, Rule C-8.
24 *Id.* Rule C-8.

Table 1: AAA Consumer Arbitration Fees

Amount Claimed	Fees Owed By Consumer	Fees Owed By Business
< $10,000	• Half of arbitrator's fees up to $125	• $750 in AAA administrative fees • $200 in Case Service Fees if a hearing is held • Remaining arbitrator's fees (usually $125)
$10,000 - $75,000	• Half of arbitrator's fees up to $375	• $950 in AAA administrative fees • $300 in Case Service Fees if a hearing is held • Remaining arbitrator's fees (usually $375)
> $75,000 (or Non-Monetary)	• AAA administrative fees according to the Commercial Fee Schedule • Half of arbitrator's fees at usual rates	• AAA administrative fees according to the Commercial Fee Schedule • Remaining arbitrator's fees at usual rates

This Section describes the amount of arbitration costs assessed, how these arbitration costs are allocated in practice in AAA consumer arbitrations, and how arbitration costs relate to the amount sought in cases in the case file sample. We have data on arbitrators' fees and the AAA's administrative fees, but we do not have comparable data on amounts the parties paid to their own attorneys, if any.[25] We do not provide comparisons to the AAA consumer dataset in this Section because we are unable to break down the data in analogous ways.

1. Fees Assessed to Consumers and Businesses

The AAA fee schedule and fee allocations by arbitrators in awards interact to determine the total amount of fees assessed to consumers and businesses.[26] In this section, we summarize the total amounts of administrative and arbitrator's fees assessed to consumers and businesses as well as their respective shares of those fees in the case file sample.[27]

In cases with business claimants, the business is assessed an average of $958 in AAA administrative fees and $751 in arbitrator's fees, as shown in Figure 6. In these same cases, consumers are assessed an average of $215 in AAA administrative fees and $256 in arbitrator's fees. Thus, on average, consumer respondents are responsible for 18.3% of total AAA administrative fees and 25.4% of total arbitrator fees in those cases. At the tail of the distribution,

[25] Although Elizabeth Hill used awards of attorney's fees as a proxy for attorney's fees paid by the parties, *see* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 798-99 (2003) [hereinafter Hill, *Due Process*], we do not believe we have enough data to make reliable statements regarding attorney's fees paid by the parties in the case file sample. For further discussion of attorney's fee awards, see *infra* Part IV(1).D.2.

[26] In addition, on occasion contract provisions provide that consumers are to pay a lower fee than set out in the AAA fee schedule.

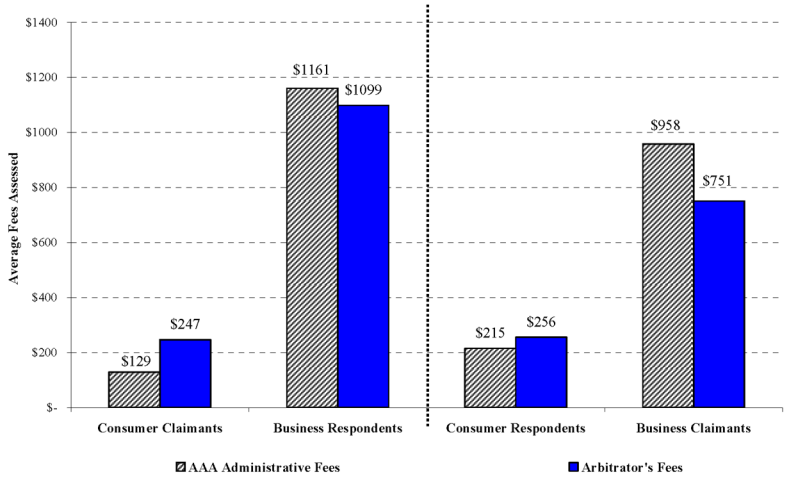
[27] We describe the fees as "assessed" to businesses and consumers because the parties did not necessarily pay the fees as assessed. Further, we do not have systematic data on the extent to which consumers receive fee waivers or deferrals from the AAA, and so we report no results on that issue.

three consumer respondents were assessed AAA administrative fees in excess of $1000 and/or arbitrator's fees in excess of $1000. All three brought counterclaims of $75,000 or more.

In cases with consumer claimants, the consumer is assessed an average of $129 in AAA administrative fees and $247 in arbitrator fees, as shown in Figure 6. In these same cases, businesses are assessed an average of $1161 in AAA administrative fees and $1099 in arbitrator's fees. Thus, on average consumer claimants are responsible for 10.0% of total AAA administrative fees and 18.4% of total arbitrator's fees in those cases. Note that these amounts include fees from cases with claims over $75,000, so we would expect that on average consumers pay some AAA administrative fees, even though for claims under $75,000 the business is to pay all administrative fees under the AAA consumer rules.[28] At the tail of the distribution, ten consumer claimants were assessed AAA administrative fees in excess of $1000 and/or arbitrator's fees in excess of $1000. All but one brought claims of $75,000 or more.

Overall, then, consumers are responsible for a larger share of AAA administrative and arbitrator's fees when they are respondents, but never more than approximately one-fourth of the total.

Figure 6:
Average AAA Administrative Fees and Arbitrator's Fees Assessed by Party Type
(Cases = 301)



[28] *See supra* Part II.A.

If we break down the fees assessed to consumers and businesses by claim size, using the categories used by the AAA in determining fees, we find that consumer claimants on average are assessed less than the amount specified by the fee schedule. By comparison, consumer respondents are assessed more on average, but this is mostly due to the fact that in a few cases the arbitrator allocated all of the fees to the consumer respondent.[29]

In cases with claims of less than $10,000, consumer claimants are assessed on average $1 in AAA administrative fees (or 0.1% of the total, with the business assessed the rest);[30] for cases with claims between $10,000 and $75,000 they are assessed on average $15 (or 1.2% of the total);[31] and for cases with claims greater than $75,000 they are assessed on average $1,448 (or 38.6% of the total).

For arbitrator's fees, consumer claimants pay on average $95 in arbitrator's fees (or 23.4% of the total) in cases seeking less than $10,000, noticeably less than the $125 in arbitrator's fees charged under the AAA fee schedule.[32] In cases with claims between $10,000 and $75,000, consumer claimants are assessed on average $204 in arbitrator's fees (or 16.9% of the total), again, substantially below the $375 charged under the AAA fee schedule.[33] Finally, in cases with claims greater than $75,000, consumer claimants are assessed on average $1256 in arbitrators' fees (or 18.8% of the total). Figure 7 summarizes these findings.

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[29] See *infra* Part IV(1).B.2.

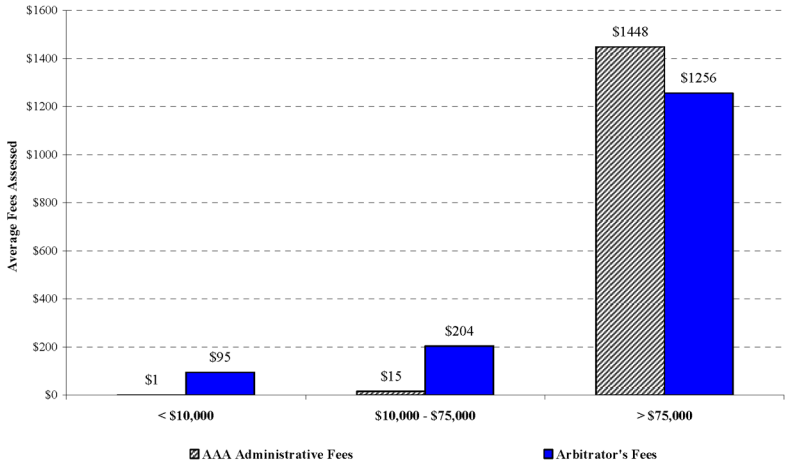
[30] There is one case with a claim under $10,000 for which a consumer was assessed any AAA administrative fees. The fees were allocated "as incurred" by the arbitrator after an in-person hearing, but it is not clear from the file why the consumer was assessed these fees.

[31] There are three cases with claims between $10,000 and $75,000 for which a consumer was assessed AAA administrative fees. In all three cases, the arbitrator allocated the AAA administrative fees equally between the parties in the award.

[32] *See supra* Part II.A. This is largely due to the fact that in 21 cases (22.8% of the time), the arbitrators allocated arbitrator's fees to the business respondent in the award.

[33] *See supra* Part II.A. This is largely due to the fact that in 47 cases (38.2% of the time), the arbitrators allocated arbitrator's fees to the business respondent in the award.

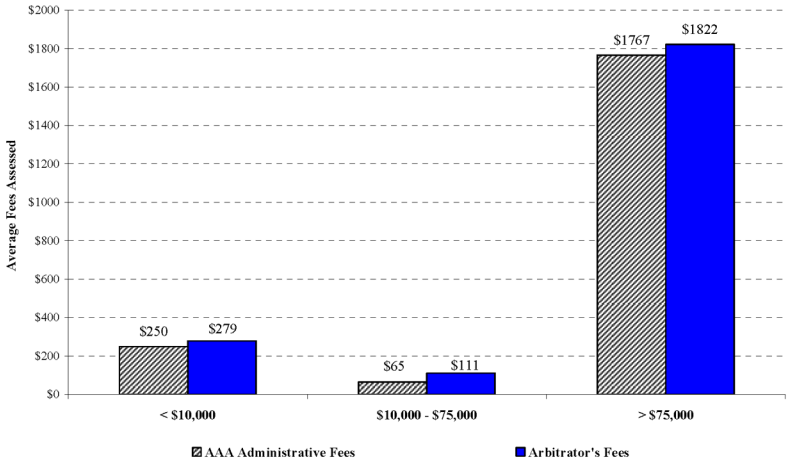
Figure 7:
Average Fees Assessed to Consumer Claimants by Amount Claimed
(Cases = 235)



Consumer respondents were generally assessed higher fees on average than consumer claimants, as shown in Figure 8. On average, consumer respondents were assessed $250 in AAA administrative fees and $279 in arbitrator's fees for cases with claims less than $10,000. These average fees are influenced by a single case in which the consumer respondent asserted a counterclaim for over $75,000, and was assessed over $8000 in total arbitration fees. Excluding that outlier, consumer respondents were assessed on average $71 in AAA administrative fees and $100 in arbitrator's fees for cases with claims less than $10,000. For cases with claims between $10,000 and $75,000, on average consumer respondents were assessed $65 in AAA administrative fees and $111 in arbitrator's fees.[34] Finally, for cases with claims greater than $75,000, on average consumer respondents were assessed $1767 in AAA administrative fees and $1822 in arbitrator's fees.

[34] In 10 cases (27.8% of the time) arbitrators allocated arbitrator's fees to consumer respondents equally, partially, or solely.

Figure 8:
Average Fees Assessed to Consumer Respondents by Amount Claimed
(Cases = 61)



Because we have no data on the financial situation of individual consumer claimants, we are unable to evaluate how affordable these costs of arbitration are to consumers. Of course, all of the cases in the case file sample are ones in which the consumer was able to bring the case, and hence cases in which arbitration costs did not preclude the consumer from asserting his or her claim.

2. Fee Allocations in Awards

As discussed in the previous subsection, the fees assessed to a party are determined in part by how the arbitrator allocates fees in the award. Under the AAA's rules, the arbitrator has the power to apportion the AAA's administrative fees and arbitrator's fees among the parties in the award as he or she deems appropriate.[35] Arbitrators can direct that fees be borne "as incurred," specify that fees be shared equally by the parties, or require one party to bear most or all of the fees. The arbitrator can allocate administrative fees in the same or in a different manner from the arbitrator's fees.

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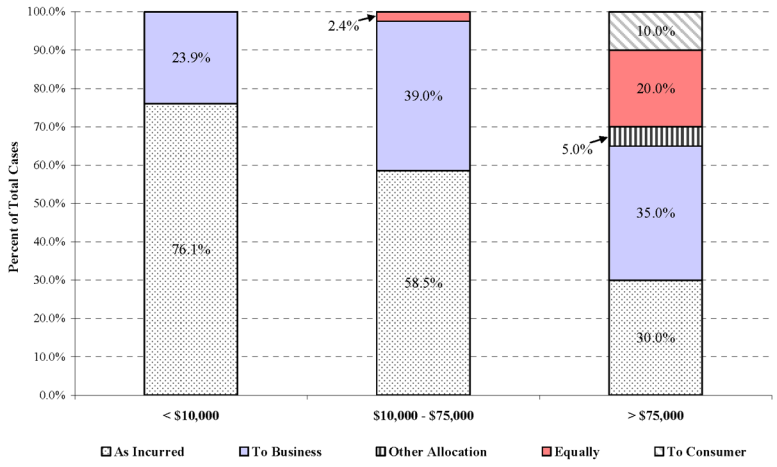
[35] AAA, Commercial Rules, *supra* note 7, Rule R-43(c).

In the majority of the 301 cases in the case file sample, the arbitrator directed that fees be borne "as incurred." For business claimants, the award provided that AAA administrative fees be borne "as incurred" in 55.7% of the cases and that arbitrator's fees be borne "as incurred" in 42.6% of the cases. Of the remaining cases with business claimants, AAA administrative fees were allocated solely to the businesses 36.1% of the time and solely to the consumer respondents 8.2% of the time (5 cases).[36] Likewise, arbitrator's fees were allocated solely to the business 18.0% of the time, allocated equally or disproportionately to the business 31.2% of the time, and allocated solely to the consumer 8.2% of the time.[37]

For consumer claimants, fee allocations in awards varied depending on the amount sought – i.e., whether the case was subject to the AAA's low-cost arbitration procedures. Specifically, AAA administrative fees were allocated solely to consumer claimants twice, both in cases with claims seeking over $75,000. Arbitrators allocated AAA administrative fees equally or partially to consumers another eight times. Otherwise, arbitrators allocated AAA fees as incurred or solely to the business as shown in Figure 9.

Figure 9:
Percent Allocated AAA Administrative Fees in Consumer Claimant Cases by Amount Claimed
(Cases = 235)

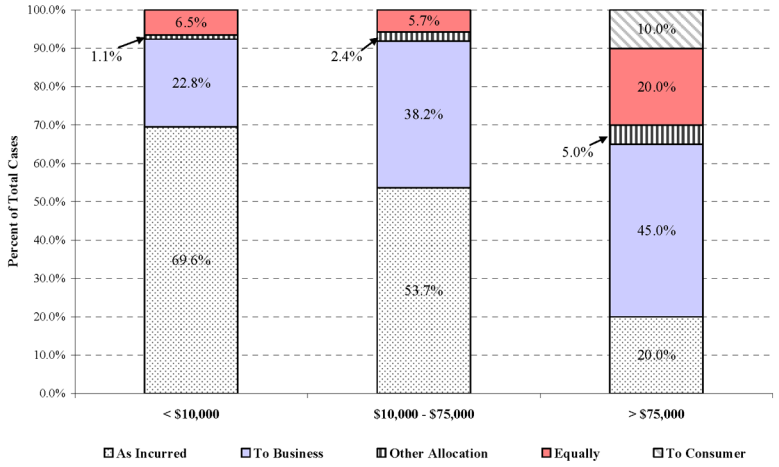


[36] It is not clear why the arbitrator allocated all AAA administrative fees to the consumer respondents in these five cases, but in two cases the consumers did bring counterclaims.

[37] The same five cases allocated both AAA administrative fees and arbitrator's fees solely to the consumers.

The allocation of arbitrator's fees for cases with consumer claimants was similar to the allocation of AAA administrative fees. In the two cases in which the arbitrator allocated AAA administrative fees to the consumer, the arbitrator also allocated arbitrator's fees to the consumer. In twenty-two cases the arbitrator allocated the arbitrator's fees equally or partially to the consumer, while in another 137 cases the arbitrator ordered the arbitrator's fees to be borne as incurred.[38] In the remaining 79 cases, the arbitrator allocated arbitrator's fees solely to the businesses. Figure 10 shows the breakdown by claim type of arbitrators' fees owed by consumer claimants.

Figure 10:
Percent Allocated Arbitrator's Fees in Consumer Claimant Cases by Amount Claimed
(Cases = 235)



3. Fees as Percent of Amount Claimed

Finally, we calculated the total arbitration fees (i.e., AAA administrative fees and arbitrator's fees assessed to the consumer) as a percentage of the amount claimed. In the majority of the 235 cases in the case file sample with consumer claimants, total arbitration fees were one percent or less of the amount claimed, as shown in Figure 11.

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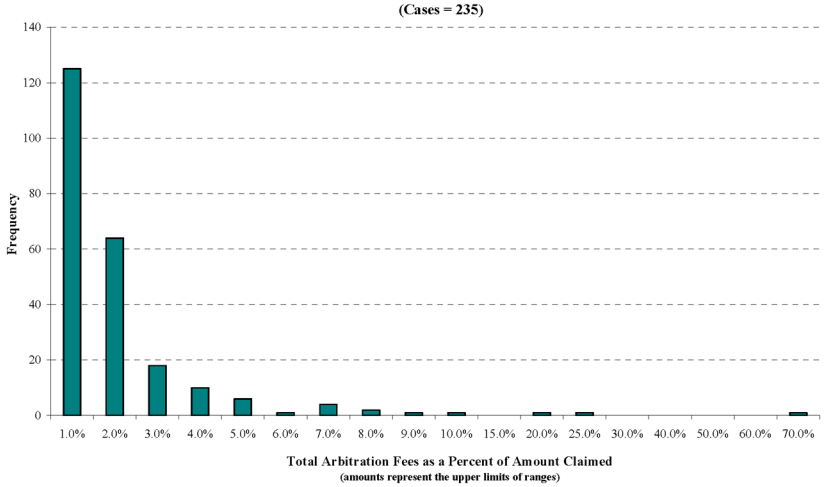
[38] Consumers must pay half of the arbitrator's fees under the AAA's low-cost arbitration rules. *See supra* Part II.A. An order that arbitrator's fees be borne as incurred thus has the effect of maintaining that original allocation. An order that the consumer share the arbitrator's fees with the business equally likely has that same effect as well.

Figure 11:
Frequency of Total Arbitration Fees as a Percent of Amount Claimed
in Cases with Consumer Claimants
(Cases = 235)



The range has a long tail, due largely to a single outlier: total arbitration fees (i.e., both administrative and arbitrator's fees) ranged from 0.0% of the amount claimed to 65.1% of the amount claimed. The outlier was a case in which the amount sought was less than $200. In no other case did the total arbitration costs exceed 25.0% of the amount claimed. The mean for the entire case file sample of total arbitration fees as a percent of amount claimed by consumers was 0.8%. On average, for claims of $10,000 or less, the ratio of total fees to amount claimed for consumer claimants was 1.6%;[39] for claims between $10,000 and $75,000 the average ratio was 0.6%; and for claims greater than $75,000 the average ratio was 1.0%.

Overall, then, the fees paid by consumer claimants typically constitute less than two percent of the amount claimed.

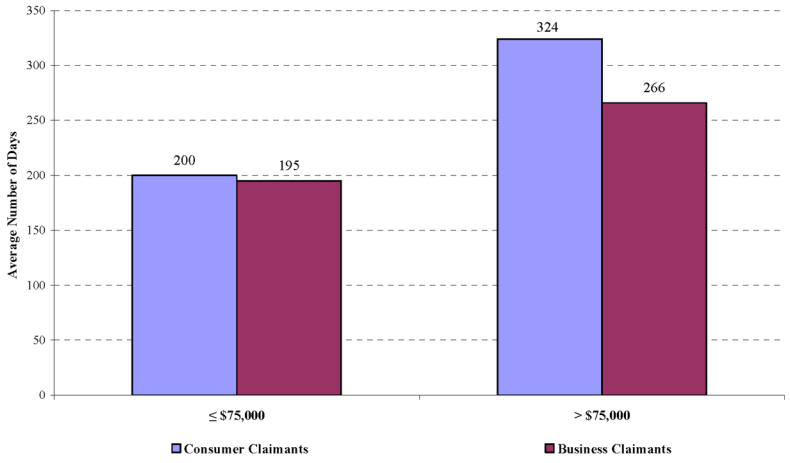
C. Speed of AAA Consumer Arbitrations

Generally arbitration is considered a relatively quick form of dispute resolution. Our results do not appear to contradict that impression, and are consistent with prior empirical studies

[39] Note that this result is due to the same outlier mentioned above.

on the issue.[40] On average, for the 301 cases in the case file sample, the time from filing to final award was 207 days (6.9 months).[41] The median time from filing to final award was 168 days (5.6 months), with a range of 64 to 992 days (2.1 months to 2.8 years). Cases with business claimants were about 10 days shorter on average than cases with consumer claimants (198 days, or 6.6 months, instead of 209 days, or 7.0 months). The median duration for cases brought by business claimants likewise was about 10 days shorter than for cases brought by consumer claimants (160 days, or 5.3 months, instead of 169 days, or 5.6 months). However, the range was greater for cases brought by business claimants (68 to 992 days, or 2.3 months to 2.8 years, as compared to 64 to 763 days, or 2.1 months to 2.1 years, for cases brought by consumer claimants). The upper tails of the ranges for business and consumer claimants were driven by a few outliers. Four cases involving consumer claimants lasted more than a year-and-a-half; and three cases involving business claimants lasted more than a year-and-a-half. Not surprisingly, cases with higher amounts claimed tended to take longer to resolve, as shown in Figure 12.

Figure 12:
Average Number of Days from Filing to Award by Amount Claimed
(Cases = 296)



The time from filing to award changes substantially depending on the type of hearing involved in the case. In the majority of cases in the case file sample (187 of 301, or 62.1%), the

[40] *See supra* Part I.A.2.

[41] We were not able to find the filing date for one of the cases so we used the assignment date as a reasonable proxy. See Part III.B for a discussion on the consistency tests of the AAA dataset.

arbitrator held either an in-person or telephone hearing. The remaining cases were resolved on the basis of documents only.[42] Cases brought by consumer claimants whose claims were resolved on the basis of documents only were awarded in 139 days (4.6 months) on average, or 125 days (4.2 months) at the median. Cases brought by consumer claimants and resolved by an in-person hearing were awarded in 235 days (7.8 months) on average for claims of $75,000 or less and 336 days (11.2 months) on average for claims greater than $75,000.[43] The comparable median times to award are 188 days (6.3. months) for claims of $75,000 or less and 291 days (9.7 months) for claims greater than $75,000. For consumer claims of $75,000 or less, the difference in time from filing to award between cases resolved by documents only and cases resolved by in-person hearings is statistically significant.[44] Figure 13 below shows the relative differences in average time from filing to award for consumer claimants by claim size.

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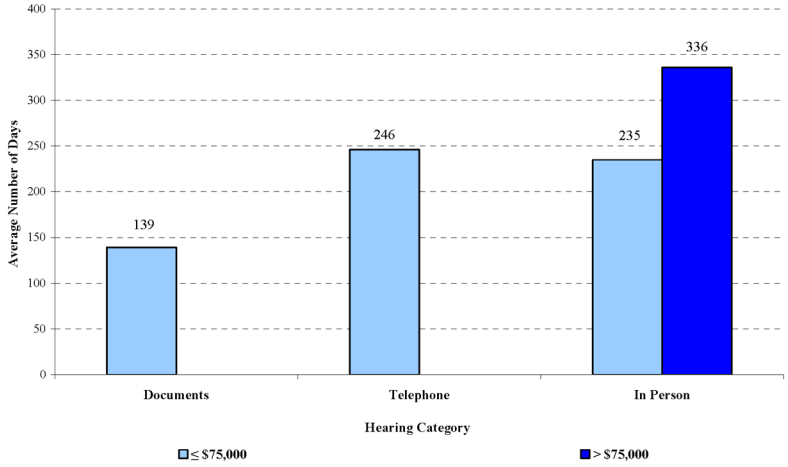
[42] In two cases, the arbitrator issued the final award pursuant to motions for summary disposition; we did not include those two cases in the results for cases resolved on the basis of documents.

[43] Clearly, it is not the time of the hearing itself that results in the greater time to an award. On average, in-person and telephone hearings lasted 1.23 days for cases with claims of $75,000 or less, 1.91 days for cases with claims of more than $75,000, and 1 day for non-monetary claims. Instead, presumably, the greater complexity of the cases and the difficulties of scheduling in-person or telephone hearings account for the added time.

[44] We used a two-group t-test for averages in number of days from filing to final award for cases resolved by documents only and for cases resolved by an in-person hearing. All cases were brought by consumer claimants seeking less than or equal to $75,000. The t-statistic was 7.1718 (DF = 200.151 and p = 0.0000 and accounting for unequal variances), which indicates that we may reject the null hypothesis that the averages between the two groups were the same.

Figure 13:
Average Number of Days from Filing to Award for Consumer Claimants
by Amount Claimed and Hearing Type
(Cases = 233)



The milestone dates in the AAA consumer dataset were generally reliable, which permits us to use that dataset as a check on our findings from the case file sample.[45] On average, the cases in the AAA dataset that were closed by an award from 2005 through 2007 (1114 cases) took 219 days (7.3 months) from filing to award, with a median case length of 176 days (5.9 months). Individual cases ranged in length from 55 days to 1203 days (or 1.8 months to 3.3 years). Overall, then, the results from the AAA consumer dataset are broadly consistent with the results from the case file sample.[46]

There is some potential for selection bias in both the case file sample and the AAA consumer dataset. The case file sample is limited to cases awarded from April 2007 through December 2007, and hence does not include cases that were filed during that period but awarded after December 2007. Similarly, the AAA consumer dataset does not include cases filed from 2005 through 2007 but resolved after December 2007. Thus, it is possible that, on average, our

[45] For the AAA consumer dataset, we use the assignment date as a proxy for filing date because the filing date is not captured. As discussed in Part III.B, however, assignment date is a reasonable proxy for filing date.

[46] The AAA consumer dataset did not track consistently whether the case was decided only by a review of documents or otherwise, so we could not use that dataset to check the results on type of hearing from the case file sample.

results understate somewhat the time to award. The amount of any understatement is not likely to change our results substantially, however.[47]

As such, the average time from filing to award for AAA consumer arbitration cases is approximately seven to eight-and-a-half months. By comparison, the median time from filing to award for AAA consumer arbitration cases is approximately five-and-a-half to seven months.

D. Outcomes of AAA Consumer Arbitrations

In this Section, we present the results of our analysis on outcomes in AAA consumer arbitrations. First, we describe limitations of the data as to outcomes. Second, we present general data on outcomes – win-rates for consumer claimants and business claimants; amounts of compensatory damages, interest, punitive damages, and attorneys' fees awarded; and the amount of compensatory damages awarded as a percentage of the amount claimed. Third, we examine the relationship between outcome and whether the consumer was represented by counsel. Finally, we look at what our data suggest about the existence of a repeat-player effect and, if there is such an effect, whether it results from bias in favor of repeat businesses or from case screening by repeat businesses.

1. Limitations of the Data

We use data from the 301 cases in the case file sample in analyzing outcomes because the AAA consumer dataset does not permit reliable tracking of party wins and award amounts. The case file sample has several limitations. First, as discussed above, claimants (particularly consumer claimants) do not always specify an exact amount demanded, sometimes seeking less

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[47] Using cases filed and/or awarded in 2005 in the AAA consumer dataset as a reasonable proxy for the mix of cases filed and/or awarded in other years, we can examine the extent of any likely selection bias. Based on a review of case characteristics, we find no reason to believe that cases filed and/or awarded in 2005 would be systematically shorter or longer than cases filed and/or awarded in 2007. We also know of no exogenous event that might cause a difference in the types of cases filed in either year. We relied on the AAA consumer dataset and supplementary information from the AAA on cases still pending as of May 16, 2008, and February 18, 2009, to construct the set of cases filed and/or awarded in 2005. Specifically, we looked at (1) all cases filed in 2005 and awarded by December 2007; (2) all cases awarded in 2005; and (3) any cases filed in 2005 and listed as still pending as of May 16, 2008 and February 18, 2009. (There might be some cases that were filed in 2005 but closed between January 1, 2008 and May 15, 2008, that we may not have captured in this analysis. But the number of such cases is likely to be very small, if any exist at all.) For the resulting 520 awarded cases, the average length of time from filing to award was 252 days (8.4 months), and the median length of time from filing to award was 206 days (6.9 months). Individual cases ranged in length from 65 to 1151 days (2.2 months to 3.2 years). Additionally, according to the AAA, there were 57 cases filed in 2005 that were pending as of May 16, 2008. These same 57 cases were still pending as of February 18, 2009. Of those cases, 53 are held in abeyance due to party agreement or court order. Should any of these cases be awarded, the time to award in the case will be greater than 1000 days. However, in the AAA consumer dataset, only four cases were pending for more than 1000 days prior to an award; thus few, if any, of these 57 cases will likely be awarded. These cases are approximately five percent of the total cases filed in 2005. As such, they will not likely change the average of 252 days by a substantial amount.

than or more than a particular amount or a bounded range of amounts.[48] Our approach for dealing with this issue is described above.[49] Because only twenty-two cases with consumer claimants are affected, alternative approaches do not drastically change the results below.

Second, claimants sometimes include interest, punitive damages, attorneys' fees or other damages in the amount claimed in the demand for arbitration, instead of only including the amount of compensatory damages sought.[50] In order to mitigate this problem, when collecting the data we segregated those other damage amounts from the amount of compensatory damages when possible. However, there may be some claim amounts that include interest or other damages or were amended without evidence in the file. In the calculations below (unless otherwise noted) we report percent recoveries using claims and awards of compensatory damages. Because claimants often did not claim specific amounts for other kinds of damages, calculating those percent recoveries was not possible.

Similar issues arise on the award side as well, although not as frequently. In general, arbitrators specified in the award the types of damages being awarded, although the award was not clear as to the breakdown of the amount awarded in a few cases. Again, this could overstate the amount of compensatory damages awarded.

Third, we consider any time the arbitrator found for the claimant and awarded damages of some kind to be a win for the claimant and a loss for the respondent, regardless of the amount awarded. (We do not, however, treat the reallocation of arbitration costs alone as making the case a win for the claimant.) We use this definition of a win for both initial claims and counterclaims. We recognize, as discussed above, that this definition may overstate the extent to which the claimant truly prevails on its claim.[51] We deal with that possibility by presenting data on win-rates as well as on the amount awarded.

2. General Outcomes

Because of the differing nature of the respective claims,[52] we present win-rates for consumer claimants and business claimants separately.[53] For cases with consumer claimants, the consumer won some relief in 53.3% (128 of 240) of the cases, as shown in Table 2. By comparison, for cases with business claimants, the business won some relief in 83.6% (51 of 61)

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[48] *See supra* Part IV(1).A.2.

[49] *See supra* Part IV(1).A.2.

[50] On some of the demand for arbitration forms used by the AAA, claimants can check a box to indicate whether they are seeking recovery of attorneys' fees, punitive damages, interest, arbitration costs, or other damages. See AAA, Form Demand for Arbitration, *available at* http://www.adr.org/si.asp?id=3807 (last visited December 31, 2008). Because it is not clear that those items of damages should not be included in the line item for "Dollar amount of claim" on the form, it is possible that some claimants included those items of damages in the amount claimed.

[51] *See supra* Part I.A.3.

[52] *See supra* Part IV(1).A.1.

[53] Note that we do not consider settlements in our win-rates since we do not have enough data to determine whether their inclusion would be appropriate in this context.

of the cases.[54] The higher win-rate for business claimants may be due to the fact that businesses tend to bring debt collection actions and other similar cases in which the likelihood of success for the business is high.[55] Although we cannot reach any definitive conclusions about the success of consumer claimants, because we have no baseline for comparison, we can at least say that the consumer claimants won some relief more often than they lost against businesses in AAA consumer arbitrations.

Table 2: Win Rates by Case Type and Party

	Cases with Consumer Claimants Only		Cases with Business Claimants Only	
Party	**Consumer**	**Business**	**Consumer**	**Business**
Wins	128	112	10	51
Total Cases	240	240	61	61
Win Rate	**53.3%**	**46.7%**	**16.4%**	**83.6%**

Consumer claimants who bring large claims tend to do better than consumers who bring smaller claims, although the number of consumers bringing large claims is small. As Table 3 shows, consumer claimants won some relief in 60.0% of cases (12 of 20) seeking more than $75,000, and won some relief in 52.1% of cases (112 of 215) seeking $75,000 or less. In both types of cases, the consumer claimant won some relief against the business more than half the time.

Table 3: Consumer Claimant Win Rates by Amount Claimed

	Cases with Consumer Claimants Only	
Claim	**≤ $75,000**	**> $75,000**
Consumer Wins	112	12
Total Cases	215	20
Consumer Win Rate	**52.1%**	**60.0%**

[54] If we include the fifty-seven counterclaims in the case file sample in the above analysis, consumer claimants won some relief in 53.4% (134 of 251) of the cases and business claimants won some relief in 80.4% (86 of 107) of the cases.

[55] *See* Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen 10-11 (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091.

We also analyzed the amounts awarded to business and consumer claimants. Our results are summarized in Table 4.[56] The mean amount awarded to business claimants in the case file sample was $20,648 and the mean percent recovery was 93.0%.[57] The median amount awarded to business claimants was $11,110 and the median percent recovery was 100.0%. For consumer claimants, the mean amount awarded was $19,255 and the mean percent recovery was 52.1%, while the median amount awarded was $5000 and the median percent recovery was 41.7%.

Table 4: Compensatory Damages Recovered by Consumer Claimants and Business Claimants

	Prevailing Consumer Claimants			Prevailing Business Claimants		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$419,259	$500,000	**100.0%**	$156,048	$156,048	**100.0%**
Minimum	$0	$178	**0.0%**	$873	$1,215	**16.3%**
Average	$19,255	$40,955	**52.1%**	$20,648	$21,420	**93.0%**
Median	$5,000	$16,530	**41.7%**	$11,110	$12,827	**100.0%**
Std. Dev.	$50,592	$67,056	**38.9%**	$26,732	$27,138	**16.0%**
Cases	119	119	**119**	51	51	**51**

We also examined the amounts awarded to consumers based on the whether the consumer claimed more or less than $75,000, as shown in Table 5. The mean amount awarded to consumers claiming $75,000 or less in the case file sample was $8871 and the mean percent recovery was 51.6%. The median amount awarded to consumers claiming $75,000 or less was $4800 and the median percent recovery was 41.6%. For consumers claiming more than $75,000, the mean amount awarded was $111,847 and the mean percent recovery was 56.2%, while the median amount awarded was $78,062 and the median percent recovery was 72.7%. Thus, prevailing consumers who claimed amounts in excess of $75,000 tended to receive awards in excess of $75,000. The average percent recovery between the two groups is similar, however.

[56] Consumer claimants prevailed in an additional nine cases, but in those cases either the claim sought non-monetary relief or the dollar amount awarded was not available in the case file. Accordingly, we excluded those cases from our analysis. Since our definition of a win includes the claimant recovering any part of the claim, we did include two cases with consumer claimants who were awarded attorneys' fees but no compensatory damages.

[57] In this section, all average percent recoveries were calculated as the average from a distribution of each claimant's percent recovery.

Table 5: Compensatory Damages Recovered by Consumer Claimants by Amount Claimed

	Prevailing Consumer Amount Claimed ≤ $75,000			Prevailing Consumer Amount Claimed > $75,000		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$60,000	$75,000	**100.0%**	$419,259	$500,000	**100.0%**
Minimum	$0	$178	**0.0%**	$784	$80,000	**0.8%**
Average	$8,871	$23,816	**51.6%**	$111,847	$193,785	**56.2%**
Median	$4,800	$12,378	**41.6%**	$78,062	$150,000	**72.7%**
Std. Dev.	$12,108	$23,069	**38.7%**	$125,071	$121,527	**42.2%**
Cases	107	107	**107**	12	12	**12**

Because we have no baseline for comparison, we cannot evaluate whether these recoveries are favorable or unfavorable for consumers.[58] We can say that the differing outcomes between business claimants and consumer claimants do not necessarily show that the process is unfair to consumers. Instead, the differing outcomes appear likely to be due to the types of cases brought by business claimants and consumer claimants rather than any form of systematic bias. Business claimants usually bring claims for specific monetary amounts representing debts for goods provided or services rendered. Many of the cases are resolved ex parte, with the consumer failing to appear.[59] By comparison, cases with consumer claimants are much less likely to involve liquidated amounts and more likely to be contested by businesses.

Figure 14 further illustrates the variation in awards of compensatory damages to business claimants and consumer claimants. In 41 of the 51 cases in which a business claimant prevailed, the business recovered between 90.0% and 100.0% of the amount claimed. In contrast, the distribution of outcomes for prevailing consumer claimants is bimodal. In the 119 cases in which consumer claimants received monetary awards, the consumer recovered 20.0% or less of the amount claimed in 36 cases and between 90.0% to 100.0% of the amount claimed in 37 cases. This bimodal distribution is consistent with studies of AAA commercial arbitration awards[60] and international arbitration awards.[61] It also suggests that arbitrators do not commonly make compromise awards in AAA consumer arbitrations.[62]

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[58] Again, we hope to develop such a baseline in a future report.

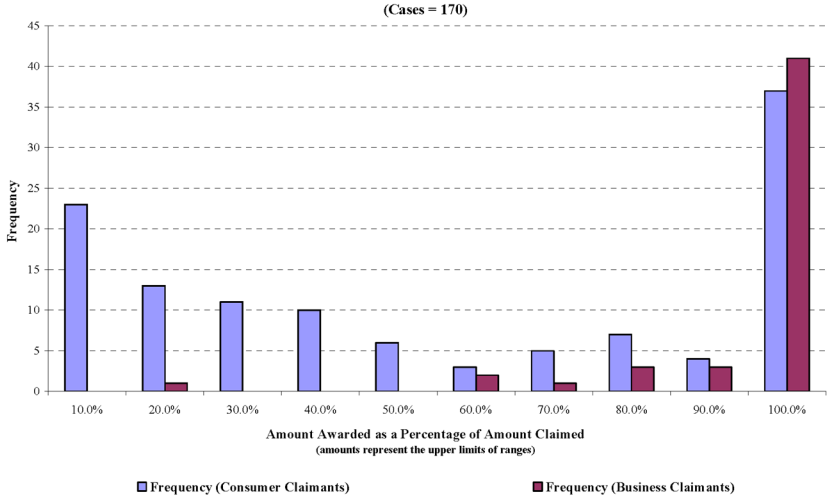
[59] Twenty-two out of the sixty-one cases (or 36.1%) brought by business claimants were resolved on an ex parte basis. The business won some relief in 100.0% of those 22 cases, and on average recovered 94.1% of the amount claimed.

[60] American Arbitration Association, *Splitting the Baby: A New AAA Study* (Mar. 9, 2007), *available at* www.adr.org/sp.asp?id=32004.

[61] Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do not "Split the Baby" – Empirical Evidence from International Business Arbitration*, 18 J. INT'L ARB. 573 (2001).

[62] *See* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1260-61 (2005); Alan Scott Rau, *Integrity in Private Judging*, 38 SO. TEX. L. REV. 485, 523 (1997).

Figure 14:
Amount Awarded as a Percent of Amount Claimed by Consumer and Business Claimants
(Cases = 170)



In addition to compensatory damages, prevailing claimants also were awarded other types of damages, including attorneys' fees, punitive damages, and interest.

In the case file sample, consumer claimants made a claim for attorneys' fees in 65 of the 128 cases (or 50.8%) in which they prevailed. In 41 of those 65 cases (or 63.1%), the arbitrator awarded attorneys' fees to the consumer.[63] In those cases in which the award of attorneys' fees specified a dollar amount (35 cases), the average attorneys' fee award was $14,574 and the median award was $9000. Of course, in 44 of 63 (or 69.8%) of the cases in which prevailing consumer claimants did not seek attorneys' fees, they were proceeding pro se and did not have to pay an attorney anything.[64]

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[63] Because claimants sometimes amended their claims without formal indication in the AAA file, there are occasions where the claimant was awarded damages they had not originally requested. Since we understand from the AAA that the arbitrators are not to award damages beyond those claimed, we assume that claims for those damages were made.

[64] There are four cases in which consumer claimants proceeded pro se but asked for attorneys' fees. In two of those cases, the arbitrator did not award attorneys' fees and the claim may have been a misunderstanding on the part of the claimant in filling out the arbitration demand form. The other two pro se consumer claimants were awarded attorneys' fees. However, both of theses cases came to arbitration from state courts, so the attorneys' fees claims may have resulted from fees incurred in state court or some other involvement of an attorney in the process.

Of the 51 cases in which the business claimant prevailed, the business made a claim for attorneys' fees in 41 cases and was awarded those fees in 16 cases (or 39.0%). The mean attorneys' fee award was $2302 and the median fee award was $1534. The data in the files were not sufficient to determine the basis on which business claimants' recovered attorneys' fees from consumers.

Awards of punitive damages were less common. Prevailing consumer claimants were awarded punitive damages in 12 of the 46 (26.1%) cases in which they were sought. The mean punitive damages award was $39,557, while the median punitive award was $2100. The higher mean is due to one case in which the consumer claimant received a punitive damages award of $427,500. In contrast, prevailing business claimants almost never sought punitive damages. Of the 51 cases in which business claimants prevailed, the business sought punitive damages in three, and was awarded punitive damages in two. The average amount of punitive damages awarded in those two cases was $10,778.

Arbitrators also awarded interest to prevailing parties that requested it in their claims. Prevailing consumer claimants were awarded interest in 19 of the 36 cases (or 52.8%) in which it was sought. Prevailing business claimants were awarded interest in 21 of the 27 cases (or 77.8%) in which it was sought. Because interest is often awarded without a specific dollar amount in the written awards, it is difficult to determine the magnitude of the amounts awarded.

3. Pro Se Consumers

In almost half (150 of 301, or 49.8%) of the cases in the case file sample, consumers arbitrated the case themselves – i.e., without an attorney. (In the other half of the cases, of course, that means that consumers were represented by attorneys in the arbitration proceeding.) As Table 6 shows, consumer claimants were far more likely to be represented by counsel than consumer respondents. This difference may be due to the different type of claim involved,[65] or to the fact that consumer claimants, unlike consumer respondents, might be represented on a contingency fee basis.

[65] For a more detailed discussion of ex parte cases, see *supra* Part IV(1).A.4.

Table 6: Consumer Representation by Case Type

	Cases with Consumer Claimants Only	Cases with Business Claimants Only*
Consumer Represented by Attorney	133 (55.4%)	18 (29.5%)
Consumer Proceeded Pro se	103 (42.9%)	22 (36.1%)
Consumer Did Not Appear (Ex Parte Case)	4 (1.7%)	22 (36.1%)
Total Cases	240	61

* Note that one consumer respondent was represented by an attorney but eventually did not appear. This case appears twice in the above table in the Business Claimants column - once in the first row and again in the third row. Accordingly, the total number of cases in which consumers proceeded pro se (150) consists of the entries in the table above for consumers proceeding pro se and consumers who did not appear, less the one case in which a consumer was represented by an attorney but did not appear.

As a general matter, pro se consumers have a lower win-rate than consumers represented by attorneys, both in cases in which the consumers are claimants and in cases in which businesses are claimants. As Table 7 shows, pro se consumer claimants won some relief in 44.9% of the cases they brought, while consumer claimants with counsel won some relief in 60.2% of the cases they brought. By comparison, pro se consumers won in 7.0% of the cases brought by businesses, while consumer respondents with counsel won in 38.9% of such cases.

Table 7: Consumer Win Rates by Case Type and Consumer Representation

	Cases with Consumer Claimants Only			Cases with Business Claimants Only		
Consumer Representation	**All**	**Attorney**	**Pro se**	**All**	**Attorney**	**Pro se**
Consumer Wins	128	80	48	10	7	3
Total Cases	240	133	107	61	18	43
Consumer Win Rate	**53.3%**	**60.2%**	**44.9%**	**16.4%**	**38.9%**	**7.0%**

The results are similar if we take into account the amount claimed. As Table 8 shows, consumer claimants fare better when represented by an attorney both for cases in which the

claimant seeks $75,000 or less and for cases in which the claimant seeks more than $75,000, although pro se claimants are much less common in the latter category.

Table 8: Consumer Claimant Win Rates by Amount Claimed and Representation

	Consumer Amount Claimed ≤ $75,000		**Consumer Amount Claimed > $75,000**	
Consumer Representation	**Attorney**	**Pro se**	**Attorney**	**Pro se**
Consumer Wins	67	45	11	1
Total Cases	115	100	16	4
Consumer Win Rate	**58.3%**	**45.0%**	**68.8%**	**25.0%**

At least two explanations are possible for the higher success rate of consumers with attorneys.[66] First, hiring an attorney may increase the consumer's likelihood of success because of the specialized advocacy skills of an attorney.[67] Second, in deciding whether to take on a client, attorneys accept only cases that are more likely to prevail, screening out less meritorious cases. From our data, we are unable to distinguish between these two explanations.

In addition to a higher win-rate, consumer claimants who are represented by attorneys also tend to receive higher damages awards. As shown in Table 9,[68] consumer claimants with attorneys received an average award of $27,233 and a median award of $6702, while pro se claimants received an average award of $5656 and a median award of $3029. [69]

Similar explanations are possible here as with win-rates – either attorneys are able to obtain higher recoveries for their clients, or attorneys screen cases for those with higher potential

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[66] Prior empirical studies on employment arbitration report mixed results on the question. *Compare* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 405, 433 (2007) ("the employee win rate was 22.6 percent where represented by counsel and only 13.7 percent where the employee was self-represented, a statistically significant difference") *with* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 15 ("The win-loss ratio for both lower-income employees with representation and those who proceeded *pro se* was .50"); Hill, *Due Process*, *supra* note 25, at 819 (reporting similar results).

[67] Because of the less formal nature of arbitration, this explanation seems somewhat weaker than it would as applied to a case in court, although clearly at least some of an attorney's skills are transferable from court to arbitration.

[68] The outcomes results are only for those cases with known amounts of compensatory damages claimed and awarded.

[69] We used a two-group t-test for averages in compensatory damages awards to pro se consumer claimants and consumer claimants with counsel, excluding non-monetary claims and awards and accounting for unequal variances. The t-statistic was 2.9591 (DF = 78.6227 and p = 0.0041), which indicates that we may reject the null hypothesis that the averages between the two groups were the same.

recoveries. Our data again are unable to distinguish definitively between these two explanations, although they are suggestive. All consumer claimants who filed claims and were represented by attorneys sought an average of $57,529 in compensatory damages, while pro se claimants sought an average of $31,774, amounts that are statistically different albeit at the 10% level.[70] Likewise, median claim amounts are higher for consumer claimants with attorneys ($32,000 versus $8576 for pro se claimants). While higher claim amounts may in part reflect value added by attorneys, it seems likely that a substantial part of the difference reflects the underlying value of the claim. As such, the data at least suggest that consumer claimants are more likely to be represented by counsel in cases with higher stakes.[71]

Table 9: Compensatory Damages Recovered by Consumer Claimants by Consumer Representation

	Prevailing Consumer Claimants with Attorneys			Prevailing Pro se Consumer Claimants		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$419,259	$500,000	**100.0%**	$44,472	$99,898	**100.0%**
Minimum	$0	$2,770	**0.0%**	$0	$178	**0.0%**
Average	$27,233	$57,659	**44.9%**	$5,656	$12,483	**64.3%**
Median	$6,702	$33,905	**31.3%**	$3,029	$7,342	**72.8%**
Std. Dev.	$62,171	$78,760	**38.4%**	$8,472	$18,650	**37.0%**
Cases	75	75	**75**	44	44	**44**

Two additional results are worth noting. First, pro se consumer claimants recovered a higher percentage of the amount claimed than consumers who were represented by attorneys. Prevailing pro se consumer claimants averaged a 64.3% recovery of the amount claimed, while prevailing consumer claimants with attorneys averaged a 44.9% recovery of the amount claimed. We have no clear explanation for this finding.[72]

Second, consistent with findings reported in the previous section,[73] of the 80 cases in which prevailing consumer claimants were represented by attorneys, the claimant was awarded attorneys' fees in 39 of the 61 cases in which they were sought (a success rate of 63.9%). The

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[70] We used a two-group t-test for averages in claims made by represented and pro se consumer claimants, excluding non-monetary claims and accounting for equal variances. The t-statistic was 1.7093 (DF = 233 and p = 0.0887), which indicates that we fail to reject the null hypothesis that the averages between the two groups were the same at higher than the 10% level.

[71] Attorneys will be more likely to accept cases with higher stakes, while cases with lower stakes may encourage consumers to minimize their costs and forego legal representation.

[72] One possibility is that attorneys are more aggressive in formulating damages claims than pro se claimants. A second possibility is that attorneys are less precise in their demands, specifying ranges rather than precise amounts of damages.

[73] *See supra* Part IV(1).D.2 & n.65.

frequency with which attorneys' fees are awarded in arbitration provides at least some incentive for attorneys to agree to represent consumers in arbitration.

4. Repeat-Player Effect

As discussed above, previous research on employment arbitration has found a "repeat-player effect," in which businesses that arbitrate on a regular basis tend to have a higher win-rate than businesses that arbitrate less often.[74] Several possible explanations for the repeat-player effect have been offered. The first is that the repeat-player effect is due to bias on the part of arbitrators and arbitration service providers, seeking to curry favor with businesses that are more likely to provide future business. The second is that businesses are able to structure the arbitration process in a favorable manner through their control of dispute systems design. The third is that the repeat-player effect is due to case selection by repeat businesses, who are more sophisticated in their case screening than non-repeat businesses. We first look at whether there is a repeat-player effect in the AAA's consumer cases. Finding some evidence of such an effect, we then test for whether the effect is likely due to bias (of arbitrators or otherwise) or case selection.

To test for the presence of a repeat-player effect, we used two different definitions of repeat business. First, we defined a business to be a repeat business when it appeared more than once in the AAA consumer dataset.[75] We refer to a business that meets this definition of a repeat business as a "repeat(1) business." Second, we used information from the AAA business list (which it maintains to help in administering the Consumer Due Process Protocol[76]) to identify a category of repeat businesses. As explained above,[77] on the AAA business list the AAA identifies a sub-category of "acceptable businesses" (businesses for which it will administer consumer arbitrations). The businesses in this sub-category typically are large entities for which in the past there had been some confusion over the appropriate contact person when a consumer brought a claim against the business. For those businesses, the AAA business list typically identifies an appropriate contact person to receive the demand for arbitration. The fact that those businesses have had additional dealings with the AAA in administering their consumer arbitrations may make it appropriate to treat them as repeat businesses. We refer to businesses that meet this definition of repeat business as "repeat(2) businesses."

Using the first definition of repeat business (businesses who appear more than once in the AAA consumer dataset), we do not find statistically significant evidence of a repeat-player effect in the cases in the case file sample. As shown in Table 10, consumer claimants won some relief in 51.8% of cases against repeat(1) businesses and 55.3% of cases against non-repeat businesses,

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[74] *See supra* Part I.A.3.

[75] This definition is similar to that used in other studies in that it focuses on the number of times the business appears in cases in the case file sample. *E.g.*, Colvin, *supra* note 66, at 430; Hill, *supra* note 66, at 15. It differs from other studies in that we are able to use a broader sample of cases in determining the number of times the business appears.

[76] *See supra* Part II.B.

[77] *See supra* Part II.B.

a difference that is not statistically significant.[78] In cases in which the business is the claimant, consumers won some relief in 13.3% of cases against repeat(1) businesses and 25.0% of cases against non-repeat businesses. But in this latter case the sample size is too small to reliably test the difference statistically. Again, using this definition of repeat business we do not find a statistically significant repeat-player effect, and consumer claimants still recover some amount against both repeat(1) and non-repeat businesses over half the time in the case file sample.

Table 10: Consumer Win Rates by Case Type and Presence of a Repeat(1) Business

	Cases with Consumer Claimants Only			Cases with Business Claimants Only		
Business Type	**All**	**Repeat(1)**	**Non-Repeat**	**All**	**Repeat(1)**	**Non-Repeat**
Consumer Wins	128	71	57	10	6	4
Total Cases	240	137	103	61	45	16
Consumer Win Rate	**53.3%**	**51.8%**	**55.3%**	**16.4%**	**13.3%**	**25.0%**

The results are similar when we categorize consumer claimants by amount claimed. The difference in Table 11 is that consumers tend to do better against repeat(1) businesses when claiming more than $75,000, although again the sample size is too small for reliable statistical analysis.

Table 11: Consumer Claimant Win Rates by Amount Claimed and Presence of a Repeat(1) Business

	Consumer Amount Claimed ≤ $75,000		Consumer Amount Claimed > $75,000	
Business Type	**Repeat(1)**	**Non-Repeat**	**Repeat(1)**	**Non-Repeat**
Consumer Wins	60	52	7	5
Total Cases	121	94	11	9
Consumer Win Rate	**49.6%**	**55.3%**	**63.6%**	**55.6%**

As shown in Table 12, consumers who prevail against a repeat(1) business recover a higher percentage of the mean (and median) amount of compensatory damages claimed than consumers who prevail against non-repeat businesses. Prevailing consumer claimants recover on average 60.9% of compensatory damages claimed against repeat(1) businesses (and 75.6% of compensatory damages claimed at the median) and on average 41.4% of the amount claimed against non-repeat businesses (and 31.4% of the amount claimed at the median), a statistically

[78] The Pearson's Chi-squared statistic is 0.2919 (DF = 1 and p = 0.589), which fails to allow us to reject the null hypothesis that consumer wins are not associated with whether the respondent is a repeat(1) business.

significant difference.[79] Although we have no clear explanation for these results, at a minimum they seem inconsistent with the existence of a repeat-player effect.[80]

Table 12: Compensatory Damages Recovered by Consumer Claimants by Presence of a Repeat(1) Business

	Prevailing Consumer Claimants Repeat(1) Business Present			Prevailing Consumer Claimants Non-Repeat Business Present		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$250,000	$300,000	**100.0%**	$419,259	$500,000	**100.0%**
Minimum	$1	$178	**0.0%**	$0	$538	**0.0%**
Average	$20,084	$39,467	**60.9%**	$18,256	$42,746	**41.4%**
Median	$6,000	$12,000	**75.6%**	$4,475	$22,742	**31.4%**
Std. Dev.	$43,407	$59,386	**39.4%**	$58,494	$75,805	**35.8%**
Cases	65	65	**65**	54	54	**54**

Using the second definition of repeat business (based on a sub-category of businesses on the AAA business list), we find a greater repeat-player effect, at least as to win-rates, albeit one that is weakly statistically significant. As Table 13 shows, consumer claimants won some relief in 43.4% of cases against repeat(2) businesses and 56.1% of cases against non-repeat businesses, a difference that is statistically significant at the 10% level.[81] In cases in which the business is the claimant, consumers won in none of the cases against repeat(2) businesses and 16.4% of cases against non-repeat businesses. But in this latter case the sample size is too small for reliable tests of statistical differences.

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[79] We used a two-group t-test for averages in percent recoveries between consumer claimants arbitrating against repeat(1) businesses and non-repeat businesses, excluding non-monetary claims and awards and accounting for equal variances. The t-statistic was -2.7983 (DF = 117 and p = 0.0060), which indicates that we may reject null hypothesis that the averages between the two groups were the same.

[80] Some other studies include zero dollar awards (i.e., claimant losses) in calculations of the percentage recovery, which makes comparisons to those studies difficult. *See* Colvin, *supra* note 66, at 429-31. We exclude zero dollar awards from Table 12 so that we can examine percentage recovery separately from win-rate; including zero dollars awards conflates the two measures.

[81] The Pearson's Chi-squared statistic is 2.6987 (DF = 1 and p = 0.100), which fails beyond the 10% level to allow us to reject the null hypothesis that consumer wins are not associated with whether the respondent is a repeat(2) business or not.

Table 13: Consumer Win Rates by Case Type and Presence of a Repeat(2) Business

	Cases with Consumer Claimants Only			Cases with Business Claimants Only		
Business Type	**All**	**Repeat(2)**	**Non-Repeat**	**All**	**Repeat(2)**	**Non-Repeat**
Consumer Wins	128	23	105	10	0	10
Total Cases	240	53	187	61	7	54
Consumer Win Rate	**53.3%**	**43.4%**	**56.1%**	**16.4%**	**0.0%**	**18.5%**

The results are similar when we categorize consumer claimants by amount claimed, as Table 14 indicates. The win-rate for consumer claimants seeking $75,000 or less is 39.1% against repeat(2) businesses and 55.6% against non-repeat businesses, a statistically significant difference at the 5% level.[82] By comparison, consumers seeking more than $75,000 won some relief more often against repeat(2) businesses than against non-repeat businesses, but the number of such cases is too small to reliably test the results statistically.

Table 14: Consumer Claimant Win Rates by Amount Claimed and Presence of a Repeat(2) Business

	Consumer Amount Claimed ≤ $75,000		Consumer Amount Claimed > $75,000	
Business Type	**Repeat(2)**	**Non-Repeat**	**Repeat(2)**	**Non-Repeat**
Consumer Wins	18	94	4	8
Total Cases	46	169	5	15
Consumer Win Rate	**39.1%**	**55.6%**	**80.0%**	**53.3%**

Again, as Table 15 shows, if consumer claimants do prevail on their claim, they recover on average an almost identical percent of the amount claimed against repeat(2) businesses (52.4%) as against non-repeat businesses (52.0%).[83] The results are reversed for the median, with prevailing consumer claimants recovering at the median a lower percentage of the amount claimed against repeat(2) businesses (39.5%) than against non-repeat businesses (41.7%).

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[82] The Pearson's Chi-squared statistic is 3.9402 (DF = 1 and p = 0.0470), which fails beyond the 5% level to allow us to reject the null hypothesis that consumer wins for cases with claims of less than $75,000 are not associated with whether the respondent is a repeat(2) business.

[83] We used a two-group t-test for averages in percent recoveries between consumer claimants arbitrating against repeat(2) businesses and non-repeat businesses, excluding non-monetary claims and awards and accounting for equal variances. The t-statistic was -0.0485 (DF = 117 and p = 0.9614), which indicates that we fail to reject null hypothesis that the averages between the two groups were the same.

Table 15: Compensatory Damages Recovered by Consumer Claimants by Presence of a Repeat(2) Business

	Prevailing Consumer Claimants Repeat(2) Business Present			Prevailing Consumer Claimants Non-Repeat Business Present		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$250,000	$250,000	**100.0%**	$419,259	$500,000	**100.0%**
Minimum	$15	$178	**0.3%**	$0	$192	**0.0%**
Average	$26,693	$46,803	**52.4%**	$17,568	$39,629	**52.0%**
Median	$4,500	$23,313	**39.5%**	$5,000	$15,893	**41.7%**
Std. Dev.	$56,537	$62,958	**40.1%**	$49,309	$68,193	**38.8%**
Cases	22	22	**22**	97	97	**97**

Overall, then, we find some evidence of a repeat-player effect when using our second definition of repeat business, and even then only as to win-rates and not as to percentage recoveries. But as discussed above,[84] the existence of a repeat-player effect does not necessarily show arbitrator (or other) bias in favor of repeat businesses. Instead, a repeat-player effect also may result from case selection by repeat businesses, who settle meritorious claims and arbitrate only weaker claims, while non-repeat businesses are more likely to arbitrate all claims, even meritorious ones.

Our evidence tends not to support the hypothesis that arbitrator (or other) bias is the likely explanation for any repeat-player effect in the case file sample. First, cases with repeat player combinations of any kind make up a small portion of the case file sample. Second, and perhaps more importantly, we find that case screening by businesses may explain any repeat-player effect in the case file sample. Specifically, we find that repeat businesses are more likely to settle or otherwise close cases before an award than non-repeat businesses.

First, a small percentage of cases in the case file sample involved any combination of repeat players, such as repeat pairs of arbitrators and businesses, arbitrators and attorneys for businesses, arbitrators and consumers, arbitrators and attorneys for consumers, as well as businesses and consumers. In the case file sample, 35 of 301 cases (11.6%) involved repeat pairs of any kind (see Table 16).[85] Of those 35 cases, 7 involved business claimants and 28 involved consumer claimants.

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[84] *See supra* Part I.A.3.

[85] Multiple repeat pairs were present in many of the cases. Hence, the numbers in Table 16 add to significantly more than the total thirty-five cases with repeat pairs.

Table 16: Cases with Repeat Combinations

Combination Type	Number of Cases
Arbitrator and Business	27
Arbitrator and Business Attorney	29
Arbitrator and Consumer	2
Arbitrator and Consumer Attorney	11
Business and Consumer	4

In all of the cases with repeat combinations that were brought by business claimants, the business won some relief (7 of 7, or 100.0%), which may be due to the types of cases involved. However, in two of those cases the consumers asserted counterclaims and won some relief on those counterclaims both times.

In the 28 cases with consumer claimants, consumers won some relief in 12 (or 42.9% of the cases), a slightly lower win-rate than for the entire case file sample.[86] This lower win-rate might be due to the fact that the majority of the consumers in the cases with repeat combinations were proceeding pro se (16 out of 28 cases, or 57.1%), a higher rate than for the entire case file sample.[87] Because pro se consumers tend to have a lower win-rate than consumers with attorneys,[88] it may be the lack of legal representation rather than the presence of a repeat pair that explains the lower win-rate in these cases.[89]

Second, if the repeat-player effect were due to case screening rather than arbitrator bias, one might expect that repeat businesses would be more likely to settle or otherwise resolve cases before an award than non-repeat businesses. To test for this possibility, we used the AAA consumer dataset, limited to the same period (April-December 2007) as the case file sample. Table 17 summarizes case dispositions (either as awarded or non-awarded) for cases in which consumer claimants brought claims against repeat(2) businesses.[90] Of consumer claims against repeat(2) businesses, 71.1% (133 of 187) were resolved prior to an award, while 54.6% (226 of

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[86] Thirteen of the 28 cases involved the same business respondent; consumers won some relief in roughly half of those cases (6 of 13, or 46.2%). Due to the small number of cases, we cannot reliably test this difference statistically.

[87] Due to the small number of cases, we cannot reliably test this difference statistically.

[88] *See supra* Part IV(1).D.3.

[89] The presence of a repeat business-arbitrator pair cannot explain the consumer's pro se status because the arbitrator would not be appointed until after the consumer filed the claim.

[90] We used the second definition of repeat business because only for repeat businesses so defined did we find any evidence of a repeat-player effect.

414) of consumer claims against non-repeat businesses were resolved prior to an award, a statistically significant difference.[91] Thus, consistent with the hypothesis that the repeat-player effect is due to case screening, we find that repeat businesses are much more likely to resolve cases prior to an award.

Table 17: Disposition of Cases by Consumer Claimants Against Repeat(2) and Non-Repeat Businesses

	Repeat(2) Business	Non-Repeat Business
Awarded	54 (28.9%)	188 (45.4%)
Non-Awarded	133 (71.1%)	226 (54.6%)
Total Cases	187	414

In short, while we find some indication of a repeat-player effect, the evidence seems to suggest that the repeat-player effect is more likely due to case screening by repeat businesses than arbitrator (or other) bias.

[91] The Pearson's Chi-squared statistic is 14.6401 (DF = 1 and p = 0.000), which allows us to reject the null hypothesis that whether a case is awarded is not associated with whether the respondent is a repeat(2) business.

TOPIC 2. AAA ENFORCEMENT OF THE CONSUMER DUE PROCESS PROTOCOL

This Part presents our findings on each of the research questions of interest concerning the American Arbitration Association's ("AAA's") enforcement of the Consumer Due Process Protocol: (1) to what extent do the consumer arbitration clauses in the case file sample comply with the Consumer Due Process Protocol? (2) how effective is AAA review of arbitration clauses for protocol compliance? (3) how frequently does the AAA refuse to administer consumer cases because of noncompliance with the Protocol? and (4) how do businesses respond to AAA enforcement efforts? In addition, we address several related questions: how frequent are post-dispute (as opposed to pre-dispute) agreements to arbitrate? how often do arbitration clauses contain class arbitration waivers? and how does the AAA administer cases arising out of the health care industry? Our focus is solely on the AAA. Although other providers also have promulgated due process protocols, we have no data on their enforcement practices.

A. Problematic Clauses

The substantial majority of arbitration clauses we examined contained no provisions that violated the Consumer Due Process Protocol as applied by the AAA. Consistent with the AAA's treatment of the cases, we examined cases seeking $75,000 or less separately from cases seeking more than $75,000 (a much smaller group) and cases seeking non-monetary relief.

Of the 271 clauses in cases seeking $75,000 or less in the case file sample, 208 (or 76.8%) had no provision that violated the Protocol, as shown in Figure 1. Of the 23 clauses in cases seeking more than $75,000, 18 (or 78.3%) had no provisions that violated the Protocol. An additional five cases sought no monetary remedy; three of those five clauses (or 60.0%) had no problematic provisions. Overall, then, 229 of 299[1] clauses (or 76.6%) had no provisions that violated the Protocol.[2]

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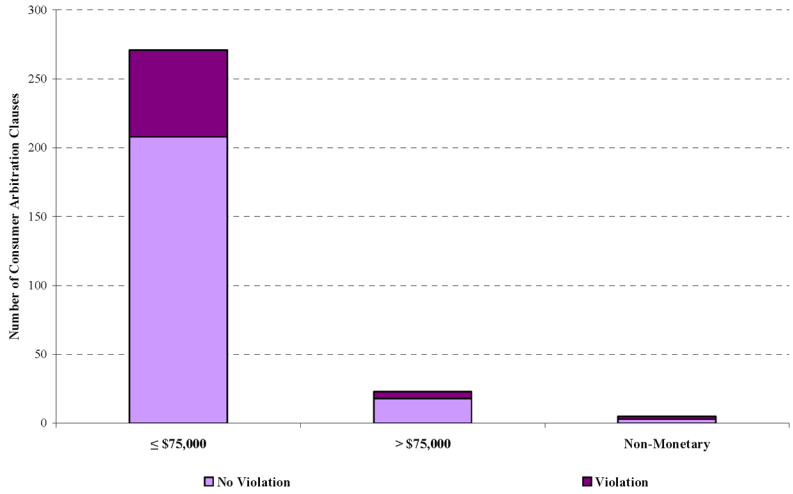
[1] As discussed above, two files for cases in the case file sample did not contain complete arbitration clauses. *See supra* Part III.B.

[2] A number of businesses appeared in the case file sample more than once, so that their arbitration clauses were counted multiple times. That may be the better approach, since it weights the clauses according to the frequency with which they gave rise to disputes that were arbitrated to an award. By comparison, 78.1% (150 of 192) of the clauses in the case file sample (counting each business's clause only once) included no problematic provisions under the Protocol.

Figure 1:
Number of Consumer Arbitration Clauses with Protocol Violations by Amount Claimed
(Cases = 299)



There was no statistically significant difference in the frequency of protocol violations across categories of amount claimed[3] – even though the AAA does not review clauses for protocol compliance in cases seeking more than $75,000. This likely is true for several reasons. First, the Consumer Due Process Protocol applies to all consumer arbitrations, not just those seeking $75,000 or less. The difference is that protocol compliance is an issue for the arbitrator to decide in cases seeking more than $75,000 rather than a matter for review by the AAA. Second, businesses are unlikely to be able to differentiate in their standard form contract terms between consumers based on the amount of any likely claim. Third, to the extent businesses seek to develop a reputation for fair dealing, they will not distinguish between consumers in their contracting practices.

A total of seventy (or 23.4%) of the clauses in the case file sample contained at least one provision that violated the Consumer Due Process Protocol as applied by the AAA. Of those clauses, sixty-three (90.0%) included one problematic provision, five (7.1%) included two problematic provisions, and two (2.9%) included three problematic provisions.

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[3] The Pearson's Chi-squared statistic is 0.0271 (DF = 1 and p = 0.8690), which means we fail to reject the null hypothesis that protocol violations are not associated with amount claimed if categorized into claims $75,000 or less and greater than $75,000. Including cases seeking non-monetary relief resulted in cells with a minimum expected count of less than five.

By far, the most common problematic provision was one that dealt with arbitration costs in a manner inconsistent with Principle 6 of the Protocol, which requires that arbitration be available at reasonable cost to the consumer.[4] Of the seventy clauses with at least one problematic provision, forty-eight (68.5%) contained a provision inconsistent with Principle 6. Typically, the provisions either required three arbitrators to resolve the dispute (thus increasing the cost over the cost of a single arbitrator) or specified that the consumer was to share the administrative fees with the business. (Under the AAA consumer procedures, the consumer pays a share of the arbitrator's fees but does not pay any of the AAA's administrative fees.[5]) The second most common type of problematic provision was one that limited the available remedies contrary to Principle 14,[6] usually by precluding or limiting the recovery of punitive damages. Of the seventy clauses, seventeen (or 24.3%) included such a provision. Other problematic clauses were much less common: eight clauses (or 11.4%) specified a potentially inconvenient location for the hearing contrary to Principle 7;[7] four clauses (or 5.7%) were inconsistent with the requirement of an impartial arbitrator under Principle 3;[8] and one clause (1.4%) limited discovery contrary to Principle 13.[9] Figure 2 summarizes the results. (Note that the totals here sum to more than the total number of cases because a few clauses contained more than one provision that violated the Protocol.)

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[4] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol princ. 6 (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019 [hereinafter Consumer Due Process Protocol].

[5] *See supra* Part II.A.

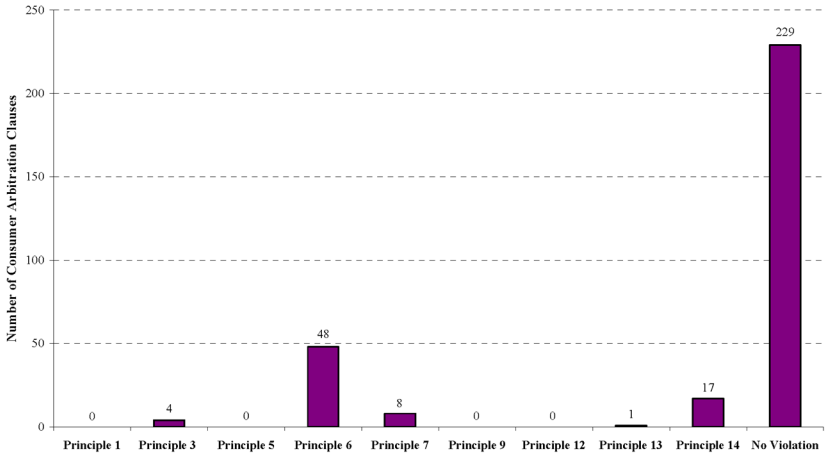
[6] Consumer Due Process Protocol, *supra* note 4, princ. 14.

[7] *Id.* princ. 7.

[8] *Id.* princ. 3.

[9] *Id.* princ. 13.

Figure 2:
Types of Protocol Violations in Consumer Arbitration Clauses
(Cases = 299)



Further description of the four clauses that were problematic under Principle 3 may be of interest, given that an impartial arbitrator is central to the fairness of an arbitration proceeding.[10] None of the clauses gave the business control over arbitrator selection or the pool of prospective arbitrators. Instead, all of the clauses were problematic because they required the arbitrator to have qualifications that might give rise to questions about the arbitrator's impartiality. Three of the clauses were in car sales contracts and required, at least under some circumstances, that the arbitrator be a certified master mechanic.[11] The other clause was in a home inspection contract and required that the arbitrator be an experienced member of one or another association of home inspectors.

Presumably, the concern is that to meet the qualification provisions would require prospective arbitrators to be employed by or engaged in the type of business involved in the arbitration. In addition, these required qualifications conflict with the AAA's policy of appointing only attorneys (with ten or more years of experience) or retired judges as arbitrators

[10] *E.g.*, Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669, 682 (Cal. 2000) (stating that the requirement of a "neutral arbitrator ... is essential to ensuring the integrity of the arbitration process") (*citing* Graham v. Scissor-Tale, Inc., 623 P.2d 165, 176 (Cal. 1981)).

[11] Two of the clauses required the presiding arbitrator to be a certified master mechanic when three arbitrators were selected; the requirement of three arbitrators itself is problematic under Principle 6 (reasonable cost) of the Protocol.

in consumer cases, unless the parties agree otherwise post-dispute. Although the AAA properly identified the provisions as ones that violated Principle 3 of the Protocol,[12] the provisions illustrate well the trade-off between expertise and impartiality that commonly arises in arbitration.[13]

Here, again, we face possible selection bias in the case file sample. Initially, clauses with provisions that violate the Consumer Due Process Protocol might discourage consumers from bringing claims (as might provisions that were waived by the business but never modified in the contract), so our results might understate the frequency of problematic provisions. We have no data on how frequently consumers fail to bring claims, so we cannot test for this possibility. As an imperfect proxy, we can examine whether damages limitations seem to deter consumers from asserting claims for punitive damages. In the case file sample, consumers sought punitive damages in 6 of 17 (or 35.3%) cases in which the arbitration clause contained a damages limitation, and in 72 of 282 (or 25.5%) cases in which the arbitration clause did not. Thus, consumers were more likely to assert a claim for punitive damages when facing a damages limitation than when not facing a damages limitation (although the number of cases with damages limitations is too small for reliable statistical testing). Certainly asserting a claim for punitive damages after having brought a claim in arbitration is a much lower cost activity than bringing a claim in the first place. Thus, as noted, this is an imperfect proxy but the results suggest at least one circumstance in which a standard form contract provision may not discourage consumers from asserting a claim.

We also considered carefully the possibility that arbitration clauses may have had more (or fewer) problematic provisions, and that AAA compliance review might have been less (or more) effective, in non-awarded cases than in awarded cases – i.e., that our results are subject to selection bias because we studied only awarded cases. Several considerations give us some degree of confidence that this source of selection bias is not a serious problem with our results.

First, using the AAA consumer dataset for all cases closed from April through December 2007, we are able to determine that the non-awarded cases appear to have been administered properly under the Protocol, at least so far as the administrative fees assessed to consumers.[14] The most common type of protocol violation in the case file sample (awarded cases) was a violation of Principle 6, which requires that the cost of arbitration to consumers be reasonable.[15] The contract provisions that violated this Principle either sought to impose on the consumer a

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[12] Consumer Due Process Protocol, *supra* note 4, princ. 3 ("Independent and Impartial Neutral").

[13] Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002) ("The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1022 (1996) (describing "technical areas" such as medicine in which "[t]hose who can understand the facts will be found disproportionately among specialists in the field, i.e., those with a presumed bias").

[14] Although the AAA consumer dataset has slightly lower accuracy rates for AAA administrative fees assessed per party than other variables, it is the only data available for this purpose.

[15] Consumer Due Process Protocol, *supra* note 4, princ. 6.

greater share of costs than permitted under the AAA Consumer Rules, or required three arbitrators to resolve the dispute.[16] In 353 out of 361 (97.8%) of the non-awarded cases with claims seeking $75,000 or less, consumers paid no administrative fees (as provided in the AAA Consumer Arbitration Rules). In seven of the eight cases in which the consumer paid fees, it appears that the business may have failed to pay its share of fees and that the consumer chose to advance the fees in order to proceed with the case. In one case the consumer and the business shared the fees.[17] Moreover, in all of the non-awarded cases with claims seeking $75,000 or less, one arbitrator (rather than three) was appointed.[18] In short, the cases appear to have been administered properly under the cost provisions of the Protocol and the AAA Consumer Rules. For other principles of the Protocol, evaluating compliance is difficult, if not impossible, without examining the parties' arbitration clause.

Second, we compared the businesses involved in the non-awarded cases from the AAA consumer dataset closed from April through December 2007 to the businesses involved in the awarded cases in the case file sample, as well as to the AAA business list. Of the 361 non-awarded cases seeking $75,000 or less, 158 involved businesses that matched those in the case file sample. None of the clauses in those cases included unwaived protocol violations. Another 144 cases involved businesses that were classified as acceptable on the AAA business list. As to these 302 cases (83.7% of the 361 non-awarded cases), all indications are that the arbitration clause did not include an unwaived protocol violation. Another thirty-nine cases involved businesses that did not appear on the AAA business list.[19] For the case file sample, thirty-eight cases involved businesses that did not appear on the AAA business list, a larger percentage than for the non-awarded cases. The remaining twenty cases involved businesses that were classified as unacceptable on the AAA business list. Based on the date of their most recent status change on the AAA business list, fifteen of those businesses appear to have been added after the non-awarded case we were considering was filed. For the other five, it is possible that they could have been administered under a court order or a post-dispute arbitration agreement. But even assuming that the AAA should have refused to administer all of those cases, the percentage of unwaived violations among the non-awarded cases would have been 5 out of 361, or 1.4%.

Obviously, we cannot be certain that the frequency of protocol violations and (more importantly) unwaived protocol violations is the same in non-awarded cases as awarded cases. But we have no reason to believe that our focus on awarded cases results in any significant bias to our results.

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16 *See supra* Part II.C.

17 We have no data on the share of the arbitrator's fees paid by the consumer.

18 If any; many cases were closed before any arbitrators were appointed.

19 The businesses likely should have been reported so that they could be added to the AAA business list. But the failure to do so should not have affected parties in future cases because the case intake staff in each case is to review the arbitration clause without regard to the businesses' status on the AAA business list.

B. AAA Review of Protocol Compliance

As discussed above, AAA review for protocol compliance is limited to cases seeking $75,000 or less in compensatory damages.[20] We have 271 such cases in the case file sample, 63 of which involved an arbitration clause with a problematic provision. The next question is the extent to which the AAA properly identified and responded to those problematic provisions by requiring a waiver from the business.[21]

Initially, we examined the type of procedure by which the AAA made the determination of protocol compliance -- i.e., how often did businesses obtain advance review of their arbitration clause for compliance with the Consumer Due Process Protocol? We found that in the vast majority of cases, AAA review for protocol compliance occurs after a dispute arises. Very few businesses obtained approval of their consumer arbitration clauses before a dispute arose. Of the 1706 businesses listed as acceptable on the AAA business list,[22] 15 (or 0.9%) obtained AAA approval of their arbitration clause before a dispute arose.[23] The potential benefits of advance review were rarely obtained in consumer cases.[24]

We then evaluated the effectiveness of AAA post-dispute review for protocol compliance. Of the 271 consumer cases from the case file sample with a demand amount of $75,000 or less, five (1.8%) included an arbitration clause that violated the Consumer Due Process Protocol as applied by the AAA but had not been waived by the business.[25] Table 1 summarizes the findings. Most cases (76.8%) arose out of clauses that did not violate the Protocol, as noted above.[26] Of those cases with clauses that did violate the Protocol, the AAA obtained a waiver from the business before administering the case in 51 cases (18.8%). The

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[20] In other cases, the Protocol continues to apply, but application of the Protocol is a matter for the arbitrator. *See supra* Part II.B.

[21] For discussion of the possibility of selection bias due to our focus on awarded rather than non-awarded cases, see *supra* Part IV(2).A.

[22] In our review of the documentation supporting the AAA business list, we identified a number of businesses that were on the AAA business list but for which there were no supporting files. This was either because the business was no longer treated as a consumer business (70 businesses, typically involving the home construction industry) or else because the business had been added to the AAA business list before the AAA began maintaining the supporting files (10 businesses). We excluded both types of businesses from the analysis. Because we did not perform a similar review of many of the files of businesses listed as acceptable, the number of such businesses (1706) may be slightly overstated. Any such difference is immaterial here, however.

[23] The AAA business list shows only businesses that obtained advance approval of their consumer arbitration clause. It does not show businesses that sought approval but were turned down because their clause violated the Protocol. We have no information on how many clauses the AAA refused to approve through the advance review process.

[24] We do not include as advance review cases those cases in which the party sought and obtained AAA approval of changes to its arbitration clause in response to the AAA's determination that a prior version of the clause violated the Protocol. Those types of cases are relatively common, as discussed *infra* Part IV(2).D.

[25] An alternative measurement would be to calculate a false negative rate – the number of unwaived violations (false negatives) as a percentage of all clauses with protocol violations. FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 482 (2d ed. 2002). So calculated, the false negative rate here is 5 out of 63 cases, or 7.9%.

[26] *See supra* Part IV(2).A.

AAA handled the protocol violation in three cases (1.1%) administratively.[27] In four cases (1.5%), the AAA administered the case without a waiver because the case had been ordered to arbitration by a court.[28] Again, only five cases involved an unwaived protocol violation. Stated otherwise, in 266 out of 271 cases (98.2%), the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

Table 1: AAA Review of Protocol Compliance

	Number of Cases (% of Total Cases)
No protocol violation	208 (76.8%)
Provision waived by business	51 (18.8%)
Violation handled administratively	3 (1.1%)
Case administered per court order	4 (1.5%)
Unwaived violation	5 (1.8%)
Total Cases (seeking $75,000 or less)	**271**

We examined the case files for those five cases to determine what happened in the case.[29] Table 2 summarizes key characteristics of the cases.

[27] In all three cases, the AAA case intake staff identified the provision that violated the protocol. In two cases, the provision raised a cost issue (in one, by requiring three arbitrators for claims above $20,000, and in the other by requiring the parties to share the costs of arbitration equally). In both cases, the AAA administered the case under the Protocol and contacted the business separately to request it to update the clause. In the other case, the parties had entered into two arbitration agreements, one of which provided for AAA arbitration but included a punitive damages waiver and required the hearing to be held at the business's location. The other clause did not mention the AAA but also did not contain any provisions problematic under the Protocol. The AAA administered the case under the Protocol and contacted the business separately to address the protocol issues.

[28] The AAA's usual practice in such cases is to administer the case pursuant to the Protocol, *see supra* Part II.C, so that the unwaived violation may have had little effect on the proceedings.

[29] Mark Weidemaier raises the possibility that the consumer might waive the protections of the protocol and permit the arbitration to go forward despite the objectionable term. W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 662 & n.26 (2007). He indicates that JAMS permits such waivers, and that such a waiver is equivalent to a post-dispute agreement to arbitrate, which should be permissible. *Id.*; *see also* Consumer Due Process Protocol, *supra* note 4, Reporter's Comments to princ. 1 ("Assuming they have sufficient knowledge and understanding of the rights they are waiving, however, Consumers may waive compliance with these Principles after a dispute has arisen."). We found no cases in the case file sample in which the AAA permitted a case to go forward based on a consumer waiver of the protections of the Protocol when a provision in an arbitration clause violated the Protocol. We did find seven cases in which the consumer voluntarily paid the business's share of the arbitration fees when the business failed to do so, cases in which the business's behavior rather than the arbitration clause was problematic.

Table 2: Unwaived Protocol Violations

	Type of Violation	Events in Case
Case 1	Location provision	Consumer did not respond to demand for arbitration
Case 2	Remedy limitation	No claim for punitive damages in case
Case 3	Remedy limitation	No claim for punitive damages in case
Case 4	Location provision and remedy limitation	AAA identified location provision; issue not resolved prior to hearing. AAA did not identify remedy limitation; no claim for punitive damages in case
Case 5	Remedy limitation	Arbitrator relied on consequential damages exclusion as alternative basis for award

In Case 1, the clause provided that the arbitration hearing was to be held at the business's location, which was distant from the consumer's home.[30] The consumer did not respond to the business's demand for arbitration.[31] In Cases 2 and 3, the arbitration clause contained a punitive damages waiver;[32] the claimant in the cases did not seek punitive damages.[33]

Case 4 was complicated. The arbitration clause contained two provisions that violated the Due Process Protocol: a provision limiting the recovery of punitive damages and a provision selecting the business's home as the location for the arbitration hearing. The AAA did not identify the remedy limitation. The business claimant was not seeking punitive damages and the consumer did not bring a counterclaim.

The AAA identified the location provision as a Protocol violation. The business objected, arguing that the dispute was not a consumer dispute so the Protocol did not apply. The AAA concluded that the arbitrator would have to decide whether the Protocol applied, and proceeded to appoint an arbitrator from the state in which the business was located. Meanwhile, the consumer filed suit in her home state challenging the enforceability of the arbitration agreement, resulting in the arbitration being held in abeyance for over a year. Eventually, the trial court held that the dispute had to be arbitrated, and the state appellate court affirmed. Meanwhile, the consumer changed counsel. The result was that no one raised the location issue until right before the hearing was held, at which point the arbitrator deemed it too late to reschedule the hearing.

In the award, the arbitrator did hold that the case was a consumer case and that the Protocol applied. Relying on the Protocol, the arbitrator then refused to enforce a "loser-pays" provision in the arbitration clause, which would have required the consumer (who lost in the

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[30] *See* Consumer Due Process Protocol, *supra* note 4, princ. 7.

[31] The business was the claimant in the case, and was seeking to recover the amount it allegedly was owed for its services.

[32] *See* Consumer Due Process Protocol, *supra* note 4, princ. 14.

[33] On whether consumers might be discouraged from seeking punitive damages by the presence of a punitive damages waiver, see *supra* Part IV(2).A.

arbitration) to pay all the business's attorneys' fees. In so holding, the arbitrator went beyond the AAA's administrative application of Principle 6 of the Protocol, under which the AAA does not deem loser-pays provisions to violate the Protocol.[34]

The provision in Case 5 that violated the Protocol was a remedy limitation – a provision that precluded the recovery of consequential or special damages. It appears that the AAA identified the violation and handled the issue administratively,[35] but there is no evidence that it obtained a waiver of the provision in the arbitration proceeding itself. In the award, the arbitrator relied on the remedy limitation to preclude the consumer's recovery in part, finding no gross negligence by the business that would have made the remedy limitation inapplicable. The arbitrator also concluded that the consumer had failed to establish the business's liability for damages in the first place, so that the remedy limitation was only an alternative basis for the business to prevail.

One final note: as Table 2 illustrates, the most common type of unwaived violation was a provision limiting in some way the amount of damages the consumer could recover in arbitration. Typically, but not always, these provisions preclude the award of punitive damages in arbitration. There are several possible explanations for why remedy limitations are the most commonly overlooked protocol violation. First, the provisions vary widely in language – ranging from a waiver of all punitive damages recovery to some sort of cap on (but not waiver of) damages recovery. The variations in the type of the provision may make problematic provisions more difficult to identify. Second, it may not always be clear whether the remedy limitation is in the arbitration clause (and hence subject to protocol compliance review) or merely near the arbitration clause and perhaps not subject to AAA review. Third, as discussed above, the AAA has adopted a broad interpretation of Principle 14 of the Consumer Due Process Protocol.[36] Under a narrow reading of the Protocol, a remedy limitation would be permissible so long as the limitation was lawful under the governing law. But the AAA applies the Protocol more broadly, refusing to administer arbitrations arising out of clauses with remedy limitations even if the remedy limitation would be permitted under the governing law. If consumers (or arbitrators) are not aware of the broader interpretation, they may not raise the protocol issue in cases in which the AAA does not itself raise the issue.[37]

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[34] Except in cases from California, in which AAA policy is to follow California law on loser-pays provisions. *See infra* App. 3, n.8.

[35] The AAA eventually classified the business as unacceptable on the AAA business list when it failed to respond to requests that it update its arbitration clause.

[36] *See* American Arbitration Association, Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration 34 (Jan. 2003) ("There may be circumstances where AAA will not provide administration even if a provision may be legally enforceable, as the standard followed by AAA may be higher than the law allows.").

[37] That said, cases in which the consumer or the consumer's attorney assert a protocol violation appeared to be rare in the case file sample, although if the issue was raised with the arbitrator there may have been no record of it in the files we reviewed. Case 4 above, *see supra* text accompanying note 34, was unusual in this regard.

C. Refusal to Administer Cases

When a business refuses to waive a provision that violates the Consumer Due Process Protocol, or when the business fails to pay its share of the arbitration costs in an arbitration,[38] the AAA's policy is to refuse to administer the case.[39] The result is that the case filings and fee are returned to the claimant, and the business is classified as unacceptable on the AAA business list. In addition, the AAA refuses to administer future consumer cases involving the business, at least until the business provides a blanket waiver of any provisions that violate the Protocol.

From the AAA pre-filing cases[40] we identified 129 cases that likely were cases the AAA had refused to administer because of protocol violations in 2007.[41] Of those cases, we were able to confirm that eighty-five (65.9%) in fact were protocol-related refusals to administer.[42] The other forty-four cases (34.1%) likely also were protocol-related refusals to administer, but we were unable to confirm the status of the cases definitively.[43] Moreover, there may be other refusals to administer that our methods did not uncover. Accordingly, we can confidently say that in 2007 the AAA refused to administer at least 85 cases, and probably at least 129 cases, due to violations of the Consumer Due Process Protocol. We did not examine data from other years, but we have no reason to believe the results from 2007 are atypical.

Those cases constitute 9.4% of the 1378 consumer cases closed by the AAA during 2007.[44] The total consumer cases closed in 2007 consisted of 439 cases (31.9%) that resulted in an award;[45] 544 cases (39.5%) that did not result in an award; and 395 pre-filing cases (28.7%)

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[38] If the business refuses to pay its share of the arbitration fees, the consumer has the option of paying the fees and then trying to collect them later from the business. American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes, Rule C-8 ("Arbitrator Fees") (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014 ("If a party fails to pay its fees and share of the administrative fee or the arbitrator compensation deposit, the other party may advance such funds. The arbitrator may assess these costs in the award.") If the consumer pays the arbitration fees, the AAA will administer the case. As noted previously, *see supra* note 29, we found seven cases in the case file sample in which the consumer paid some or all of the business's arbitration costs when the business had failed to do so. Thus, only if the business refuses to pay its share of the fees and the consumer declines to advance the amount of the fee will the case be rejected while in pre-filing status.

[39] *See supra* Part II.B.

[40] *See supra* Part III.B.

[41] We identified the cases by comparing the businesses involved in the case to those classified as unacceptable on the AAA business list. *See supra* Part III.B.

[42] We confirmed the status of the cases by examining the AAA files documenting the AAA business list.

[43] The primary distinction between the cases we could confirm and those we could not was whether the business was or was not already listed as unacceptable. For businesses that were not already on the AAA business list, the AAA created a file containing the documentation of the Protocol violation. That documentation included the name of the case, which enabled us to verify the entry on the list of AAA pre-filing cases. For businesses that already were listed as unacceptable, the AAA does not add additional documentation to the files for subsequent refusals to administer. Accordingly, for those cases we were unable to determine definitively the reason the AAA refused to administer the case. Nonetheless, it is quite likely that the cases are ones that the AAA refused to administer under the Protocol.

[44] The cases closed in 2007 consist of the cases in the AAA consumer dataset and the AAA pre-filing cases.

[45] The case file sample includes 301 of these cases, closed between April and December 2007. The number for all of 2007 is adjusted for several exclusions from the case file sample, as described *supra* Part III.B.

that never met the AAA's filing requirements, either because they settled very early on, because the claimant failed to meet the filing requirements, or because the AAA refused to administer the case due to protocol violations.

Various types of protocol violations gave rise to the refusals to administer, as shown in Table 3. The AAA refused to administer forty-four cases (of 129, or 34.1%) because the business already was classified as unacceptable on the AAA business list. The remaining cases (85 of 129, or 65.9%) involved businesses that were not already classified as unacceptable. Of those cases, the AAA refused to administer fifty-five because the business failed to pay its share of the arbitration fees and the rest (thirty cases) because the arbitration clause violated the Protocol.[46]

Table 3: AAA Refusals to Administer, 2007

Reason for Refusal to Administer	Number of Cases (% of Total Cases)
Business failed to pay fees	55 (42.6%)
Business already classified as unacceptable	44 (34.1%)
Cost issue	11 (8.5%)
Remedy limitation	8 (6.2%)
Location issue	6 (4.7%)
Multiple violations	5 (3.9%)
Total	**129**

Although we are able to estimate with some degree of confidence the number of cases that the AAA refused to administer for protocol violations, we have no information on what happened to the cases afterwards. In some cases the dispute might nonetheless end up in AAA arbitration. If a business subsequently resolves the protocol issue, the case may be refiled with the AAA. Or a party might obtain a court order requiring the case to be arbitrated, which the AAA will honor.[47] We have no evidence, however, whether any of the 2007 refusals to administer were refiled with the AAA or were administered pursuant to a court order.

Another possibility is that the case was subsequently filed with another arbitration provider. Some arbitration clauses give the claimant the choice among several alternative

[46] The provisions violated were Principle 6 ("Reasonable Cost") (11 cases); Principle 14 ("Arbitral Remedies") (8 cases); Principle 7 ("Reasonably Convenient Location") (6 cases); and multiple provisions (5 cases). A business's failure to pay its share of the arbitration fees has the same effect in that case as a contract term that imposes all costs on the consumer while permitting the consumer to recover the fees from the business. The failure to pay differs from such a contract clause, however, because it is limited to the particular consumer dispute. Accordingly, we classify the failure to pay separately from other protocol violations.

[47] *See supra* Part II.B.

arbitration providers, and specify that if one will not administer the case it should be filed instead with a different one.[48] Again, we do not know whether any of the 2007 refusals to administer were subsequently filed with another arbitration provider.

A third possibility is that the case might end up in court. A handful of reported cases have addressed whether a party can litigate when the AAA has refused to administer the arbitration, with divided results. In *Brown v. Dillard's, Inc.*[49] the Ninth Circuit held that a business that refuses to pay its share of arbitration fees materially breaches the arbitration agreement, permitting the consumer to file suit in court.[50] The facts of *Dillard's* match the most common type of case in which the AAA refuses to administer a consumer arbitration.[51] In those cases, under *Dillard's*, the consumers could assert their claim against the business in court.[52]

A more difficult question is whether a consumer can go to court when the AAA refuses to administer a case because of a provision in the arbitration clause that violates the Protocol. The courts are split. In *Martinez v. Master Protection Corp.*,[53] the AAA had refused to administer an employment arbitration agreement because of provisions inconsistent with the Employment Due Process Protocol.[54] The employee then sought to assert his claim in court, while the business sought to have the court appoint an arbitrator. The California Court of Appeal held that the trial court had erred in appointing an arbitrator, stating that California arbitration law "does not permit the trial court to choose an alternative forum when the chosen forum refuses to hear the case."[55]

Similarly, in *Mathews v. Life Care Centers of America, Inc.*,[56] the AAA relied on the Health Care Due Process Protocol to refuse to administer a negligence and elder abuse claim against a nursing home. But in this case, the Arizona Court of Appeals affirmed the trial court's order compelling arbitration. The court of appeals explained that the trial court correctly relied on Arizona arbitration law to appoint an arbitrator when the AAA would not do so because "the record contains no evidence that an AAA arbitration panel was a significant or material term to [the claimant] when she executed the Agreement."[57] If future courts were to follow the approach

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[48] Again, we have no data on the extent to which such clauses are used in consumer contracts; we only know anecdotally that they exist.

[49] 430 F.3d 1004 (9th Cir. 2005).

[50] *Id.* at 1010.

[51] *See supra* text accompanying note 46.

[52] In Cox v. Ocean View Hotel Corp., 533 F.3d 1114 (9th Cir. 2008), the Ninth Circuit distinguished *Dillard's* on the ground that the employee in *Ocean View* never filed a demand for arbitration with the AAA. *Id.* at 1123-24. Instead, the employee had merely written to the employer asserting a claim of sex discrimination and requesting the employer to "provide the date and time of the arbitration hearing" to the employee's attorney. *Id.* at 1118.

[53] 12 Cal Rptr 3d 663 (Cal. Ct. App. 2004) (alternate holding)

[54] *Id.* at 674.

[55] *Id.* at 675; *see also In re* Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554, 561 (2d Cir. 1995) ("None of these cases, however, stands for the proposition that district courts may use § 5 to circumvent the parties' designation of an exclusive arbitral forum.").

[56] 177 P.3d 867 (Ariz. Ct. App. 2008).

[57] *Id.* at 872. *Cf.* Brown v. ITT Consumer Fin'l Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) (stating that when chosen forum is unavailable, arbitration agreement is not void unless the chosen forum "was an integral part of the

of the Ninth Circuit in *Dillard's* and the California Court of Appeal in *Martinez*, rather than that of the Arizona Court of Appeals in *Mathews*, they would reinforce the AAA's enforcement of the Protocols and give businesses a greater incentive to comply.

Finally, the case may end up not being brought at all. We have no data on how frequently cases end up being dropped after the AAA refuses to administer the arbitration.[58]

Overall, then, we find that in enforcing the Consumer Due Process Protocol, the AAA refused to administer at least 85 consumer cases, and likely 129 consumer cases – amounting to 9.4% of its consumer caseload – in 2007. We have no information, however, on what happened to those cases after the AAA refused to administer them.

D. Business Responses to AAA Compliance Review

This Section addresses how businesses respond to the AAA's enforcement of the Due Process Protocol. Of course, most cases in the case file sample do not present a protocol violation in the first place; most businesses comply with the protocol in advance of AAA review. Thus, as explained above, 76.6% of the cases in the case file sample contained no provision that violated the Protocol as applied by the AAA. Similarly, the number of businesses classified as "acceptable" on the AAA business list (i.e., the 1706 businesses for which it will administer consumer arbitrations) is more than two-and-one-half times as large as the number of businesses (647) classified as "unacceptable."[59]

One possibility is that the business might respond by waiving the violation in the pending case and/or revising the clause for future cases.[60] Since the AAA began reviewing consumer clauses for protocol violations, over 150 businesses have updated their arbitration clauses to remove a protocol violation and/or have waived such provisions for future cases, as shown in Table 4.[61] In a handful of those cases (five), the business waived future violations but then

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agreement to arbitrate").

[58] The court of appeals in *Dillard's* asserted that "[m]any people in Brown's position would simply have given up." Brown v. Dillard's, Inc., 430 F.3d 1004, 1030 (9th Cir. 2005).

[59] As discussed above, while we examined occasional files of businesses classified as acceptable on the AAA business list, we did not subject those businesses to the same comprehensive review as those classified as unacceptable. As a result, there may be businesses so classified that no longer arbitrate using the AAA's consumer arbitration rules. *See supra* Part III.B. Conversely, however, AAA case intake staff may be less likely to make sure that acceptable businesses are added to the AAA business list than unacceptable businesses; clauses from acceptable businesses need to be reviewed again each time the business is involved in a consumer arbitration in any event. *See supra* Part II.B. Thus, the number of businesses that have been involved in AAA consumer arbitrations with clauses that fully comply with the protocol may be either more or less than 1706, although likely not materially so in either direction.

[60] As between the two, revising the clause would seem preferable, as it reduces the possibility consumers might not file a claim and thus not learn of the waiver.

[61] As Mark Weidemaier explains, businesses may have an incentive to waive violations and change their clause to comply with the Due Process Protocol because of the "legitimacy" provided by arbitrating with a well-respected arbitration provider. Weidemaier, *supra* note 29, at 661 ("providers may also sell legitimacy. Arbitration

indicated it would remove the AAA from its arbitration clause. In one case the business waived future violations and then informed the AAA it was eliminating its arbitration clause altogether. Those businesses are in addition to over 1550 businesses with arbitration clauses that did not violate the Protocol.

By far the most common protocol issue in these cases involved arbitration costs. Sixty of the clauses presented only cost issues and a number more raised cost issues together with other protocol violations.[62] Eliminating provisions raising cost issues (either by waiver or updating the clause) likely would benefit all consumers who arbitrate against the company under the revised clause. Otherwise the consumer would either have had to pay a larger share of the arbitration costs or else contribute toward the fees of three arbitrators instead of one. In Mark Weidemaier's words: "these are cases in which the due process rules yield a clear benefit to individual claimants."[63] By comparison, not every consumer will benefit from the elimination of a remedy limitation or a location provision (requiring the hearing to be held at a distant location); not every consumer will have a claim for punitive damages and not every consumer will want an in-person hearing. Nonetheless, for those consumers who do, the AAA's protocol review process again has clear benefits.

Table 4: Business Responses to AAA Protocol Compliance, On Business List As "Acceptable"

Business Response	Total Cases
No Response Necessary	1539
Updated Clause	95
Waived Violation for Future Cases	51
Waiver and Removed AAA	5
Waiver and Removed Arbitration	1
Sought Advance Review	15
Total "Acceptable" Businesses	**1706**

A second possibility is that the business might respond by doing nothing -- either not participating in the case or not updating its clause for future cases. A number of businesses simply fail to pay their share of arbitration fees in a case or do not respond to requests by the AAA to waive any problematic provisions under the Protocol. As shown in Table 5, 358

clauses are often challenged by parties who would prefer to litigate their disputes in court, and the designation of a recognized provider may help immunize the arbitration agreement from challenge.").

[62] *See infra* Part IV(2) Annex A.

[63] Weidemaier, *supra* note 29, at 670 (distinguishing between cases in which "the offending term serves no function" and "'meaningful' waivers" of provisions that violate the protocols).

businesses are classified as unacceptable on the AAA business list for these reasons. Most commonly, the business failed or refused to pay its share of arbitration costs even though its arbitration clause fully complied with the Protocol. Somewhat less commonly, the business failed to pay arbitration fees and to waive a problematic provision under the Protocol as well.[64]

Table 5: Business Responses to AAA Protocol Compliance, On Business List As "Unacceptable"

Business Response	Total Cases
Did Not Respond to Case Initiation	358
Did Not Respond to AAA Contact	201
Refused to Pay, Update Clause, or Waive	61
Notified Removing AAA	13
Removing Arbitration Clause	1
Out of Business	10
Unable to Locate	3
Total "Unacceptable" Businesses	**647**

Another 201 businesses are classified as unacceptable because they did not respond to a subsequent contact by the AAA seeking to have the business update its arbitration clause to remove a protocol violation. An additional 61 businesses refused to comply with the protocol, either by refusing to pay their share of arbitration fees or refusing to waive a protocol violation or update their arbitration clause.[65]

A third possibility is that the business might remove the arbitration clause altogether from its consumer contracts or replace the AAA with a different arbitration provider. We have limited ability to determine the extent to which companies in fact switched to other arbitration providers or removed arbitration clauses from their consumer contracts. A business that changes its clause in either of these ways presumably would no longer show up in the case file sample. But we would be unable to determine whether their failure to show up was due to their switching arbitration providers or whether they simply did not have any disputes with consumers go to arbitration during the period we studied.[66]

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[64] The types of provisions that businesses most commonly refused to waive or change were provisions addressing arbitration costs, specifying the location of the arbitration hearing, and limiting remedies. *See infra* Part IV(2) Annex B.

[65] Although we attempted to follow the classification scheme in the AAA business list by distinguishing between cases in which the business did not respond and cases in which the business refused to comply, one should not place too much significance on these differing classifications. As a practical matter, the result is the same in both types of cases: the business does not pay its share of fees and/or the problematic provision remains.

[66] The remaining categories shown in Table 5 are that the business went "out of business" (ten cases) or that

The AAA does record on the AAA business list those businesses that inform the AAA they have removed or will be removing the AAA (or arbitration in general) from their dispute resolution clause. The number of such businesses is quite small. Of the 647 businesses listed on the AAA business list as unacceptable, thirteen (or 2.0%) informed the AAA that they had removed or would be removing the AAA from their clause, and one (or 0.15%) informed the AAA that its dispute resolution clause no longer provided for arbitration. Another five businesses (of 1706, or 0.3%) listed as acceptable waived any protocol violations but then informed the AAA they would no longer provide for AAA arbitration in their dispute resolution clause. And one business (0.05%) listed as acceptable waived any protocol violations but then removed arbitration altogether from its consumer contracts. Overall, then, eighteen businesses (0.8%) of those on the AAA business list informed the AAA that they would no longer provide for AAA arbitration, and two businesses (0.08%) removed their arbitration clause altogether.

But of course not all businesses that switch dispute resolution providers (or remove arbitration altogether from their contract) necessarily inform the AAA that they are doing so. Any number of businesses classified as unacceptable by the AAA might have changed their contracts without informing the AAA.

Another way to identify businesses that switch away from the AAA is to look at data from other arbitration providers. California law requires arbitration providers to disclose basic information about their consumer arbitration cases, including the name of the business party.[67] As others have noted, the disclosure documents are not always in the most useful format for researchers.[68] But Public Citizen has compiled data from the National Arbitration Forum's ("NAF's") California disclosures into a spreadsheet available on Public Citizen's web site.[69] We matched the businesses that brought NAF arbitrations in California against the AAA's list of unacceptable businesses to try to identify businesses that might have switched from the AAA to NAF.

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the AAA was unable to locate the business (three cases).

[67] CAL. CODE CIV. PROC. § 1281.96.

[68] California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure 27 (Aug. 2004) ("Many providers posted required information on their websites. However, a number of data points were not provided. Some providers, however, posted data that resulted in inconsistent, incomplete and/or ambiguous data.").

[69] *See* NAF California Data Jan. 2003 to Mar. 2007, *available at* www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls. Public Citizen describes the spreadsheet as follows:

> This spreadsheet consists of the information on 33,948 National Arbitration Forum cases conducted in California between Jan. 1, 2003 and Mar. 31, 2007. It was compiled from quarterly reports that the National Arbitration Forum posted in a difficult-to-find place on its Web site in Adobe Systems' Portable Document Format (PDF). Public Citizen converted them to an Excel spreadsheet so California residents and others interested in binding mandatory arbitration may do their own analysis of NAF arbitrations in California and of the records of NAF arbitrators.

Public Citizen, Binding Mandatory Arbitration and Access to Courts, www.tradewatch.org/congress/civjus/arbitration/ (last visited Nov. 10, 2008).

Of the 647 businesses classified as unacceptable on the AAA business list, we found five (or 0.8%) that were subsequently listed as arbitrating cases using the NAF during the period covered. The combined caseload of those businesses before the NAF was small; they were not major contributors to the NAF caseload.[70] Interestingly, three of the five businesses were ones that had informed the AAA that they would no longer use AAA arbitration in future cases. Two businesses classified by the AAA as unacceptable showed up in the NAF cases that had not already informed the AAA they were switching providers. And one of those two appeared before the AAA because of a claim it had acquired from another business, arising out of a contract providing for AAA arbitration.

The NAF data have various limitations. First, obviously they only involve arbitrations administered by the NAF. If the business switched from the AAA to a provider other than the NAF, it would not show up in the NAF data. Second, the disclosures are limited to California.[71] To the extent businesses switching from AAA arbitration do not operate in California, they would not show up in the NAF data. That said, one would expect that a major business operating nationally might have at least one case in California during the period covered by the NAF disclosures. Third, we do not have access to the arbitration clause giving rise to the NAF arbitrations. Some arbitration clauses permit the claimant to choose either the AAA or the NAF (or sometimes JAMS) to administer their arbitration.[72] It might be that the arbitrations before the NAF were brought under such a clause, rather than a clause that removed the AAA as provider. Thus, the mere fact that the business appears both on the AAA business list and in the NAF spreadsheet does not necessarily mean that the business is one that switched from the AAA. Subject to those caveats, however, we find little evidence that businesses have switched from the AAA to the NAF as an alternative arbitration provider.[73]

E. Other Issues

The case file sample also permits us to address several other issues related to the Due Process Protocols. First, to what extent do consumer arbitrations arise out of post-dispute versus pre-dispute agreements? Second, how common are class arbitration waivers -- which are not addressed by the Protocols -- in consumer arbitration agreements? Third, how did the AAA

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[70] To avoid the possibility of identifying any of the businesses, we do not quantify the percentage of the NAF caseload provided by the businesses, although it was small. We can say that neither MNBA Bank nor Banc One – which with their assignees and successors accounted for a substantial majority of the NAF caseload in the Public Citizen spreadsheet – was one of the businesses that switched from the AAA to the NAF.

[71] *See supra* text accompanying note 67.

[72] *See*, *e.g*, J.P. Morgan Chase & Co. Arbitration Agreement (2005), *available at* www.citizen.org/congress/images/JPMorgan.05.jpg ("The party filing a Claim in arbitration must choose one of the following two arbitration administrators: American Arbitration Association or National Arbitration Forum.").

[73] *See* Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMPLOYEE RTS. & EMPL. POL'Y J. 363, 399 (2007) ("To the extent those rogue arbitration agencies and opportunistic employers represent a significant share of the market, they could place competitive pressure on AAA and JAMS to deviate from their rules and policies. There are reasons to believe that this is not a widespread problem.").

handle cases in the case file sample involving the health care industry, which might be subject to the Health Care Due Process Protocol?

1. Pre-Dispute v. Post-Dispute Agreements

The Consumer Due Process Protocol does not bar enforcement of pre-dispute arbitration agreements, although the matter was controversial among the drafters of the Protocol.[74] Thus, it is not surprising that arbitrations arising from pre-dispute clauses are common in the case file sample. Indeed, virtually all of the 301 cases in the case file sample -- 290 (or 96.3%) -- arose out of pre-dispute agreements; 11 (or 3.7%) arose out of post-dispute agreements to arbitrate.[75] These results are consistent with prior studies of employment and international arbitration.[76]

The more interesting question is what, if anything, can be learned from the dramatically greater number of arbitrations arising from pre-dispute as opposed to post-dispute agreements. A common argument by critics of pre-dispute consumer arbitration agreements is that if arbitration were fair, parties would agree to it post-dispute even if they could not agree to it pre-dispute.[77] The usual response is that parties are unlikely to agree post-dispute to arbitrate, even if arbitration would make them both better off ex ante. Once parties know of their claim, they often will be unable to agree to arbitration, either because of limitations on the bargaining process[78] or because an uncertainty that would have permitted the parties to make a beneficial bargain earlier has been resolved.[79]

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[74] *See supra* Part I.B.2. By comparison, the Health Care Due Process Protocol does preclude enforcement of pre-dispute arbitration agreements "in cases involving patients." Commission on Health Care Dispute Resolution, Health Care Due Process Protocol, princ. 3 (July 27, 1998), *available at* www.adr.org/sp.asp?id =28633 [hereinafter Health Care Due Process Protocol] ("In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.").

[75] Although we treated two of the clauses as missing for purposes of evaluating AAA protocol compliance review, *see supra* Part III.B, those clauses plainly were predispute clauses, and we treat them as such here, even though we could not determine all of the provisions.

[76] Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC INT'L CT. ARB. BULL. 14 (1990), *reprinted in* CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 67 (2005) ("Of the cases submitted to the ICC Court, only four [of 237] in 1987 and six [of 215] in 1989 resulted from *a compromis*, that is, an agreement to submit an already-existing dispute to arbitration."); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) ("AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).").

[77] *E.g.*, Charles Knapp, *Common Sense and Contracts Symposium: The Gateway Thread – AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1173 (2000) ("[I]f arbitration is so economically sound for everybody, then let the consumer be persuaded 'once the dispute has arisen' that arbitration is in her best interests too.").

[78] Christopher R. *Drahozal, Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 747 (2006).

[79] *E.g.*, Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 278-80 (2008); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 262-64 (2006).

While our results do show that arbitrations arising out of post-dispute agreements to arbitrate are rare, they do not resolve the disagreement over the implications of that rarity. If pre-dispute agreements to arbitrate consumer disputes are made unenforceable, it seems likely that the number of consumer arbitration proceedings would decline dramatically. But the data provide no evidence on the reason for that decline.

2. Use of Class Arbitration Waivers

As noted above, one criticism of the Consumer Due Process Protocol is that it is underinclusive – i.e., it does not include all provisions in arbitration clauses that some see as unfavorable to consumers.[80] The most frequently litigated such clause, and one central to the policy debate over consumer arbitration, is the class arbitration waiver.

The existing empirical evidence is mixed on how frequently consumer arbitration clauses include class arbitration waivers. Eisenberg, Miller, and Sherwin found that in a sample of contracts from consumer financial services companies and telecommunications companies,[81] twenty of twenty-six (76.9%) consumer contracts included arbitration clauses[82] and all twenty of the contracts with arbitration clauses included class arbitration waivers.[83] Based on this "fairly narrow" sample,[84] they concluded that "apart from the role of arbitration clauses in shoring up the validity of class action waivers, it is not clear why consumer arbitration would appeal to companies… [F]rom the perspective of corporate self-interest, concern over class actions remains the most likely explanation for the prevalence of arbitration clauses in consumer agreements."[85]

By contrast, in end user license agreements (EULAs) for computer software, Florencia Marotta-Wurgler found almost no use of arbitration clauses and no use of class arbitration waivers.[86] Her conclusions are in stark contrast to those of Eisenberg, Miller, and Sherwin: "Although much analysis remains to be done, these results immediately cast doubt on casual

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[80] *See supra* I.B.3.

[81] Theodore Eisenberg, Geoffrey Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 881-82 (2008) (describing their sample as consisting of the following types of companies (with the number of such companies in parentheses): "Telecommunications (7); Cable services (CATV, Internet, phone) (5); Securities services (4); Commercial banks (3); Retail credit card issuers (2); and Financial credit company (1)").

[82] *Id.* at 883.

[83] *Id.* at 884.

[84] *Id.* at 891 ("Our study is limited to a fairly narrow range of industries. As described above, only six major groups appear in our sample.").

[85] *Id.* at 894. The study is unclear whether its conclusions apply to businesses generally or apply only to the types of businesses studied.

[86] Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado about Nothing?*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 45, 51 (Omri Ben-Shahar ed. 2007) ("Not a single EULA out of 597 includes a class-action waiver."). Of the consumer EULAs she studied, only 15 or 259 (or 5.8%) included an arbitration clause. *Id.* at 52.

claims that sellers' rampant use of choice of forum and arbitration clauses deprive buyers of their day in court, or that sellers are shielding themselves from liability by making it impossible for buyers to aggregate low-value claims."[87]

An older study found only limited use of class arbitration waivers in a variety of consumer contracts. Linda Demaine and Deborah Hensler examined dispute resolution clauses in a sample of contracts from businesses that an average consumer "was most likely to patronize."[88] Of the 161 contracts they examined, 57 (or 35.4%) included an arbitration clause.[89] The use of arbitration clauses varied widely across their industry groups, from a high of 69.2% in financial businesses to none in food and entertainment businesses.[90] They also found that a minority (30.8%) of the arbitration clauses included class arbitration waivers, but they did not provide a breakdown by industry type.[91] Demaine and Hensler collected their data in 2001,[92] however – prior to *Bazzle* – and so their results do not provide any insight into the post-*Bazzle* use of class arbitration waivers.

We also find varied use of class arbitration waivers in consumer contracts giving rise to AAA consumer arbitrations in 2007. Overall, of the clauses we examined in the case file sample, 109 of 299 (or 36.5%) included class arbitration waivers. The use of class arbitration waivers varied widely across contract types, as shown in Figure 3. Consistent with Eisenberg, Miller, and Sherwin, we found that all cases involving cell phone companies (5 of 5, or 100.0%) and all cases involving credit card issuers (26 of 26, or 100.0%) arose out of arbitration clauses with class arbitration waivers. By comparison, just over half of cases arising out of car sale contracts (34 of 64, or 53.1%) and contracts with home builders (11 of 17, or 64.7%) included class arbitration waivers. Meanwhile, none of the cases arising out of insurance contracts or real estate brokerage agreements included class arbitration waivers.[93] Thus, while some types of consumer contracts in the case file sample commonly included class arbitration waivers, other types did not.

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87 *Id.*

88 Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 59 (2004). The businesses were from the following types of industries: "housing and home services," "retail services," "transportation," "health," "food and entertainment," "travel," "financial," and "other." *Id.* For a more detailed listing of the types of businesses they studied, see *id.* tbl. 1.

89 *Id.* at 63-64 tbl. 2.

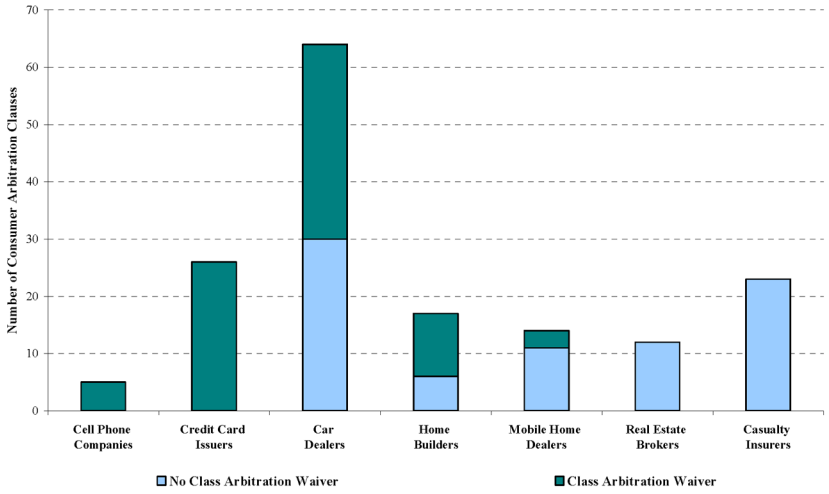
90 *Id.*

91 *Id.* at 65.

92 *Id.* at 60.

93 We should note that almost all of the insurance cases involved a single insurer.

Figure 3:
Use of Class Arbitration Waivers by Type of Contract
(Cases = 161)



One caveat to these findings: the case file sample of arbitration clauses is limited to those giving rise to AAA consumer arbitrations closed in 2007. Clauses selecting other providers may differ in how frequently they include class arbitration waivers.[94] Moreover, many of those arbitrations (180 of 301, or 59.8%) were filed in 2007, although a number were filed earlier. We do not have data on the date on which the arbitration agreements giving rise to those arbitrations were entered. For some types of contracts, such as car sales agreements, one would expect a dispute to arise relatively close in time to when the sales contract was signed. But for others, there may have been a time lag between the time the arbitration agreement was entered and when the case arising out of the arbitration agreement was closed. So we cannot exclude the possibility that the arbitration clauses we examined might have changed subsequently to include class arbitration waivers.

That said, the evidence suggests that many consumer arbitration clauses may not include class arbitration waivers. Studies that have found widespread use of class arbitration waivers focused on types of businesses that most commonly used class arbitration waivers. The evidence

[94] The AAA has promulgated rules governing the administration of class arbitrations and has a well established class arbitration docket. *See* American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), *available at* www.adr.org/sp.asp?id=21936; *see also supra* Part I.B.3. We do not know whether the availability of class arbitration before the AAA makes it less likely or more likely that arbitration clauses specifying the AAA will include class arbitration waivers.

here suggests that those businesses may not be representative of all the businesses that include arbitration clauses in their consumer contracts.

3. Health Care Cases

Although the focus of this Report is on the Consumer Due Process Protocol, the case file sample provides a limited opportunity to consider the AAA's application of the Health Care Due Process Protocol as well. As discussed above, unlike the other due process protocols, the Health Care Due Process Protocol provides that "[i]n disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises."[95] In its Healthcare Policy Statement, the AAA has indicated that it would not administer "cases involving individual patients" unless the parties agreed to arbitrate after the dispute arose.[96] The AAA distinguishes cases involving a "patient undergoing health care treatment" from "other situations involving an individual," in which the AAA "will continue to administer pre-dispute agreements to arbitrate."[97] Thus, under the AAA's Healthcare Policy Statement, if the dispute involves treatment of the patient, a post-dispute arbitration agreement is necessary; but for other disputes, such as those involving the payment of money, the AAA will still administer pre-dispute arbitration agreements, even in the health care field.

The case file sample included seven health-care-related cases. Three of the cases were disputes between a health insurance company and its insured. In two cases, the claimant sought coverage of treatment that had not yet been provided. In both of those cases, the parties entered into a post-dispute arbitration agreement. In the other case, the claimant sought coverage for treatment that already had been provided; in other words, the dispute was over reimbursement of money to the consumer. The parties arbitrated that case pursuant to a pre-dispute arbitration agreement.

The other four health-care-related cases were brought by or against nursing homes. In one case, a consumer sought damages against the nursing home for negligence in the care it provided. In that case, the parties entered into a post-dispute arbitration agreement. One of the other claims was a claim by a consumer for overcharges against the nursing home. The other two cases were collection actions brought by the nursing home against the patient or a family member. All three of those cases were brought pursuant to pre-dispute arbitration agreements.

Overall, then, the AAA's administration of the small number health care cases in the case file sample seems to have followed the line it draws between cases involving treatment of a patient and cases involving other types of disputes (e.g., the recovery of money).

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[95] Health Care Due Process Protocol, *supra* note 74, princ. 3.

[96] American Arbitration Association, Healthcare Policy Statement (effective Jan. 1, 2003), *available at* www.adr.org/sp.asp?id=32192.

[97] *Id.*

ANNEX A. BUSINESS RESPONSES TO AAA PROTOCOL COMPLIANCE, ON THE AAA BUSINESS LIST AS "ACCEPTABLE"

Business Response	Protocol Issue	Number of Cases	Total Cases
No Response Necessary			
	No issues	1539	
	Total No Response Necessary		1539
Updated Clause			
	Cost issue	44	
	Location issue	9	
	Remedy limitation	16	
	Cost issue and location issue	3	
	Cost issue and remedy limitation	13	
	Others	9	
	Unspecified	1	
	Total Updated Clause		95
Waived Violation for Future Cases			
	Cost issue	16	
	Location issue	4	
	Remedy limitation	5	
	Cost issue and location issue	2	
	Cost issue and remedy limitation	7	
	Unpaid fees	9	
	Others	3	
	Unspecified	5	
	Total Waived Violation for Future Cases		51
Waiver and Removed AAA			
	Cost Issue	4	
	Remedy Limitation	1	
	Total Waiver and Removed AAA		5
Waiver and Removed Arbitration			
	Hearing Issue	1	
	Total Waiver and Removed Arbitration		1
Sought Advance Review			
	Approved as submitted	14	
	Approved after revision (various protocol issues)	1	
	Total Sought Advance Review		15
	Grand Total "Acceptable" Businesses		**1706**

ANNEX B. BUSINESS RESPONSES TO AAA PROTOCOL COMPLIANCE, ON THE AAA BUSINESS LIST AS "UNACCEPTABLE"

Business Response	Protocol Issue	Number of Cases	Total Cases
Did Not Respond to Case Initiation			
	Unpaid fees	252	
	Cost issue	41	
	Location issue	20	
	Remedy limitation	15	
	Cost issue and location issue	2	
	Cost issue and remedy limitation	6	
	Cost issue and arbitrator selection issue	5	
	Location issue and remedy limitation	3	
	Other	10	
	Unspecified	4	
	Total Did Not Respond to Case Initiation		358
Did Not Respond to AAA Contact			
	Cost issue	30	
	Location issue	12	
	Remedy limitation	23	
	Cost issue and location issue	1	
	Cost issue and remedy limitation	4	
	Cost issue and arbitrator selection issue	2	
	Location issue and remedy limitation	2	
	Other	5	
	Unspecified	2	
	Did not examine	120	
	Total Did Not Respond to AAA Contact		201
Refused to Pay			
	Unpaid fees	29	
	Unpaid fees and cost issue	2	
Refused to Update Clause			
	Remedy limitation	2	
Refused to Waive			
	Cost issue	9	
	Location issue	6	
	Remedy limitation	9	
	Cost issue and remedy limitation	2	
	Other	1	
	Unspecified	1	
	Total Refusals		61
Removing AAA			
	Unpaid fees	3	
	Cost issue	6	
	Remedy limitation	2	
	Cost issue and remedy limitation	1	
	Unspecified	1	
	Total Removing AAA		13
Removing Arbitration Clause			
	Remedy limitation	1	
	Total Removing Arbitration Clause		1
Out of Business			
	Unavailable	10	
	Total Out of Business		10
Unable to Locate			
	Unavailable	3	
	Total Unable to Locate		3
	Grand Total "Unacceptable" Businesses		**647**

CONCLUSIONS

A. Empirical Findings

TOPIC 1. COSTS, SPEED, AND OUTCOMES OF AAA CONSUMER ARBITRATIONS

Our central empirical findings on this topic are as follows:

- Consumer claimants brought the substantial majority (approximately 86.0%) of cases in the American Arbitration Association ("AAA") consumer dataset from 2005 through 2007. Of the cases brought by consumer claimants, 32.1% were resolved by an award, while in cases brought by business claimants, 49.9% were resolved by an award. The remaining cases typically were either settled or dismissed voluntarily by the parties.

- Overall, in the case file sample of consumer cases awarded from April 2007 through December 2007, consumer claimants were assessed an average of $129 in AAA administrative fees and $247 in arbitrator's fees. Consumer claimants seeking less than $10,000 were assessed an average of $1 in AAA administrative fees and $95 in arbitrator's fees, while consumer claimants seeking between $10,000 and $75,000 were assessed an average of $15 in AAA administrative fees and $204 in arbitrator's fees. Consumer claimants seeking more than $75,000 were assessed an average of $1448 in administrative fees and $1256 in arbitrator's fees. For cases subject to the AAA's low-cost consumer arbitration rules (i.e., with a claim amount of $75,000 or less), consumers almost never paid more than the amount specified in the rules and often paid less – as a result of the arbitrator reallocating some portion of the consumer's share of costs to the business in the award.

- The average time from filing to final award for the AAA consumer arbitration cases in the case file sample was 207 days (6.9 months), subject to some possible degree of case selection bias. Cases with business claimants were resolved in 198 days (6.6 months) on average; cases with consumer claimants were resolved in 209 days (7.0 months) on average.

- Of the cases in the case file sample, consumer claimants won some relief in 53.3% of the cases (128 of 240) they brought. On average, successful consumer claimants were awarded $19,255 in compensatory damages and recovered 52.1% of the amount they sought; the median amount awarded was $5000 and the median percent recovery was 41.7%. Business claimants won some relief in 83.6% of the cases (51 of 61) they brought. On average, successful business claimants were awarded $20,648 and recovered 93.0% of the amount they sought; the median amount awarded was $11,110 and the median percent recovery was 100.0%. We cannot evaluate whether these recoveries are favorable or unfavorable for consumers.

- Consumer claimants sought to recover attorneys' fees in 65 of the 128 cases in which they were awarded damages. In 41 of those 65 cases (or 63.1%), the arbitrator awarded attorneys' fees to the consumer. In those cases in which the award of attorneys' fees

specified a dollar amount (35 cases), the average attorneys' fee award was $14,574 and the median award was $9000.

- Under the usual definition of a repeat business, we find no statistically significant repeat-player effect: consumer claimants won some relief in 51.8% of cases against repeat businesses so defined and 55.3% of cases against non-repeat businesses, a difference that is not statistically significant.[1] Under an alternative definition of a repeat business, based on the AAA's categorization of businesses in enforcing compliance with the Consumer Due Process Protocol, we find some evidence of a repeat-player effect as to win-rate (claimants won some relief in 43.4% of cases against repeat businesses and 56.1% of cases against non-repeat businesses, a difference that is weakly statistically significant)[2] but not as to the percentage of claim amount recovered by consumer claimants (claimants actually recover a higher percentage of the amount claimed against repeat businesses than against non-repeat businesses). But the evidence suggests that any repeat-player effect is not due to arbitrator (or other) bias in favor of repeat businesses. Instead, it appears to result from case screening by repeat businesses, with those businesses resolving consumer claims prior to an award at a much higher rate than non-repeat businesses.

TOPIC 2. AAA ENFORCEMENT OF THE CONSUMER DUE PROCESS PROTOCOL

Our central empirical findings on this topic are as follows:

- In the case file sample of AAA consumer arbitrations, the majority of consumer arbitration clauses (229 of 299, or 76.6%) fully complied with the Consumer Due Process Protocol as applied by the AAA. We found no statistically significant difference in how frequently clauses violated the Protocol between cases seeking $75,000 or less (which were subject to AAA protocol compliance review) and those cases seeking over $75,000 (which were not).

- The AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations. Of the 271 cases in the case file sample subject to the AAA's protocol compliance review, five (or 1.8%) included an arbitration clause with an unwaived violation of the Consumer Due Process Protocol. Stated otherwise, in 266 out of 271 cases (98.2%), the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

- The AAA in the time period studied refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (or 9.4% of its total consumer caseload), because the business failed to comply with the Consumer Due Process Protocol. The most common

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1 See *supra* Part IV(2).D.4.
2 See *supra* Part IV(2).D.4.

reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business's failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.

- In response to AAA protocol compliance review, over 150 businesses have either waived problematic provisions or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. Those businesses are in addition to over 1550 businesses with arbitration clauses that did not violate the Protocol. By comparison, the AAA has identified 647 businesses for which it will refuse to administer arbitrations. The most common reason (358 of 647, or 55.3%) for the AAA to refuse to administer consumer arbitrations for a business is the business's failure to pay its share of the arbitration costs.

- Of the clauses in cases in the case file sample, 109 (36.5%) included class arbitration waivers -- provisions that waive the availability of class relief in arbitration. The results varied significantly by industry. All arbitration clauses in cases involving cell phone companies (5 of 5, or 100%) and credit card issuers (26 of 26, or 100%) included class arbitration waivers. By comparison, no arbitration clauses in insurance contracts and real estate brokerage agreements included class arbitration waivers.

B. Policy Implications

These empirical findings have important implications for the debate over consumer arbitration – for Congress, for state legislatures, for the courts, and for others seeking to help formulate policy about consumer arbitration.

1. Not all consumer arbitrations are alike. In the case file sample of AAA consumer arbitrations, for example, the types of claims brought by consumer claimants differed from the types of claims brought by business claimants. Arbitration clauses in some types of contracts commonly included class arbitration waivers, while arbitration clauses in other types of contracts did not. Likewise, not all arbitration providers are alike. Some administer claims that are predominantly brought by businesses, while others have a higher proportion of claims brought by consumers. Policy makers should not assume that empirical findings for one type of consumer arbitration necessarily will be the same for other types. Nor should policy makers assume that empirical findings for arbitrations administered by one arbitration provider necessarily will be the same for arbitrations administered by other providers. Of course, the same holds true for the empirical findings in this Report – that they do not necessarily hold for other types of arbitration or for other arbitration providers. These variations suggest the need for a nuanced approach to pubic policy concerning arbitration.

2. Private regulation complements existing public regulation of the fairness of consumer arbitration clauses. Our evidence indicates that the AAA effectively reviews arbitration clauses for protocol compliance and appropriately responds to clauses that do not comply. A number of

businesses have responded to AAA compliance efforts by changing their arbitration clauses to comply with the Protocol. Any consideration of the need for legislative action should take into account such private regulation of consumer arbitration.

Courts and policymakers usefully could consider ways to reinforce the AAA's enforcement of the Consumer Due Process Protocol. For example, courts could give businesses additional incentive to waive violations of the Protocol (or pay their share of arbitration fees) by making clear that the consumer can bring the case in court if the business does not do so. The rationale could be that the identity of the provider was "material" to the agreement to arbitrate; hence, the inability to arbitrate before the AAA would result in invalidation of the entire arbitration clause. Congress, state legislatures, and the courts also might consider ways to extend the protections of the Consumer (or Employment) Due Process Protocols to arbitration clauses that do not provide for AAA arbitration.

Although our evidence indicates that the AAA effectively reviews clauses for protocol compliance, that review process could nonetheless be improved in several ways. First, the process of reviewing consumer clauses might be centralized in a single person, as it is for the Employment Due Process Protocol. Centralization might reduce further the number of unwaived protocol violations, although at some resource cost to the AAA. Second, the AAA might provide additional training for case intake staff, particularly on how to identify problematic remedy limitations, the most commonly overlooked type of violation. Third, the AAA might publish the standards it uses in reviewing clauses for protocol compliance. Publication would give businesses better information on what provisions are problematic, and could enlist consumer claimants and their attorneys in enforcement of the Protocol. Finally, the AAA might give more prominent notice of the availability of advance review, such as by incorporating advance review into its Consumer Arbitration Rules.

3. For several reasons, consumers may pay less to arbitrate disputes than the cost shown in arbitration rules. When arbitrators in the case file sample exercised their authority to reallocate costs in their award, they did so most often to reallocate costs from consumers to businesses – i.e., to reduce the costs of arbitration to consumers. In addition, arbitrators awarded attorneys' fees to prevailing consumer claimants in almost two-thirds of the cases in which they sought such an award (and in over half the cases in which consumer claimants were awarded any compensatory damages). The widespread availability of attorneys' fee awards in arbitration further reduces the effective cost of arbitration to consumers.

4. Empirical studies have tended to find that repeat players fare better in arbitration than non-repeat players. To the extent such a repeat-player effect exists in arbitration, the critical policy question is what causes it. Is the repeat-player effect due to arbitrator bias in favor of repeat players? Is it due to bias resulting from control by repeat players over the design of dispute resolution systems? Or is it due to better case screening by repeat players, who settle stronger cases and arbitrate weaker cases against them? Our findings are consistent with prior studies in suggesting that any repeat-player effect is likely caused by better case screening by repeat players rather than arbitrator (or other) bias in favor of repeat players. A further as yet

unresolved question is whether a repeat-player effect exists in litigation, and, if so, how litigation compares to arbitration in this regard.

5. Finally, despite the insights that empirical research can provide, it nonetheless has important limitations. First, our results are limited to AAA consumer arbitrations. Our data do not address arbitrations administered by other arbitration providers. Second, one must have a baseline for comparison to evaluate the cost, speed, and outcomes of consumer arbitrations; data on arbitration proceedings alone are not enough. Accordingly, this Report's findings are only a beginning. While they provide a look into consumer arbitrations administered by the AAA, further work remains to be done – work that we hope to undertake in a future phase of this project.

APPENDIX 1. EMPIRICAL STUDIES OF CONSUMER ARBITRATION

This appendix lists the empirical studies of consumer arbitration discussed in the body of this Report. For each study, it describes the sample and summarizes the central findings of the study. It also briefly describes criticisms of the study, if any.

A. AAA Consumer Arbitration

1. American Arbitration Association, Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007, *available at* http://www.adr.org/si.asp?id=5027

Sample: 310 AAA cases resulting in an award from January 2007 through August 2007.[1]

Findings: 41% of the cases were decided on the basis of documents only, while 59% were resolved after a telephone or in-person hearing. Cases on average took about four months to resolve on the basis of documents and about six months to resolve on the basis of an in-person hearing. Consumer claimants won 48% of awarded cases they brought; business claimants won 74% of awarded cases they brought.[2]

Criticisms: Public Citizen criticized the AAA's analysis on several grounds. First, it found the win-rate calculated by the AAA "unreliable because any arbitrator award was counted as a win, regardless of its relation to the amount sought. This means for example that AAA would deem victorious a claimant who sought $50,000 and received only $5."[3] Second, Public Citizen faulted the AAA because Public Citizen was unable to duplicate the AAA's findings from the AAA's public disclosures.[4] Third, Public Citizen pointed out that business claimants had a higher win-rate than consumer claimants.[5]

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[1] American Arbitration Association, Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007, *available at* http://www.adr.org/si.asp?id=5027.

[2] *Id.*

[3] Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 12 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf [hereinafter Public Citizen, Arbitration Debate Trap].

[4] *Id.* ("[W]e could discern the victorious party only in approximately 7 percent of the cases. AAA left the 'prevailing party' field – a required disclosure – blank in more than 90 percent of the cases it has reported.").

[5] *Id.*

2. Statement of the American Arbitration Association, Annex D, *in* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess. 135 (Dec. 12, 2007)

Sample: 987 cases brought by consumer claimants before the AAA that were resolved in 2006.[6]

Findings: The AAA reported that 42% of the cases were resolved by an award, while 58% were resolved prior to award. The consumer was awarded some monetary amount in 48% of the cases resolved by an award. Cases awarded on the basis of documents (34% of all awarded cases) took on average 3.8 months; cases awarded following an in-person hearing (66% of all awarded cases) took on average 7.4 months.[7]

3. Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf

Sample: As part of its study of NAF arbitrations described below,[8] Ernst & Young examined forty-four AAA consumer cases classified as involving "banking" disputes. The cases were among those included on the AAA web site as part of its required disclosures under California law.[9]

Findings: Ernst & Young reported that: (1) the average amount claimed was $81,371; (2) the average fee paid (in the 31 cases for which such information was available) was $1935; (3) 50% of the cases settled, 11% were withdrawn by the claimant, and in the remaining 39% the arbitrator issued a decision; and (4) no information was provided for the amount awarded and rarely was the prevailing party identified.[10]

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[6] Statement of the American Arbitration Association, Annex D, *in* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess., at 135 (Dec. 12, 2007).

[7] *Id.*

[8] *See infra* text accompanying notes 30-36.

[9] Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf.

[10] *Id.*

B. Other Consumer Arbitration

1. Jeff Nielsen et al., Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data (July 11, 2008), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212

Sample: Same as in Public Citizen, The Arbitration Trap (see study no. 2, below).[11]

Findings: Of the 33,948 total NAF arbitrations, 26,665 were either heard by an arbitrator or dismissed (the excluded cases were settlements). Navigant concluded that "[o]f these 26,665 arbitrations, consumer parties were reported to have prevailed outright or had the case against them dismissed in 8,558 cases (32.1%). Claims against consumers were reduced by NAF in an additional 4,376 cases (16.4%)."[12] According to Navigant, "the median reduction was $636 and the median percentage reduction was 8.6%."[13] Of the 33,935 cases in which an arbitration fee was paid, the consumer paid no fee in 33,689 cases (99.3%). In the remaining 246 cases, the median fee paid by the consumer was $75.[14]

Criticisms: Public Citizen criticized the Navigant report on several grounds. First, the vast majority (8534 of 8558, or 99.6%) of the cases that Navigant treated as cases in which the consumer prevailed were dismissals, rather than awards. And of the dismissals, almost all (7783, or 91.2%) occurred before an arbitrator was appointed. According to Public Citizen: "These cases can hardly be used as evidence of the fairness of NAF arbitration. They scarcely involved arbitration at all."[15] Second, the 700 dismissals after appointment of an arbitrator, according to Public Citizen, might have occurred "for any number of manipulative reasons," such that "it is possible that the consumers who 'won' the cases ... lost the very same cases later."[16]

2. Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf

Sample: Relying on the National Arbitration Forum's California disclosures (which it reformatted into an Excel spreadsheet[17]), Public Citizen analyzed outcomes in 33,948 NAF

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[11] Jeff Nielsen et al., Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data 1 (July 11, 2008), *available at* http://www.instituteforlegalreform.com/index.php?option=com_ilr_docs&issue_code=ADR&doc_type=STU; *see infra* text accompanying notes 17-18.

[12] Nielsen et al., *supra* note 11, at 1.

[13] *Id.* at 3.

[14] *Id.*

[15] Public Citizen, Arbitration Debate Trap, *supra* note 3, at 10.

[16] *Id.* at 11.

[17] *See* Public Citizen, NAF California Data Jan. 2003 to Mar. 2007, *available at* http://www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls ("This spreadsheet consists of the information on 33,948 National Arbitration Forum cases conducted in California between Jan. 1, 2003 and Mar. 31, 2007. It was compiled from quarterly reports that the National Arbitration Forum posted in a difficult-to-find place on its Web site in Adobe Systems' Portable Document Format (PDF). Public Citizen converted them to an Excel spreadsheet so California residents and others interested in binding mandatory arbitration may do their own analysis of NAF

consumer arbitrations between January 1, 2003 and March 31, 2007. The vast majority of cases were filed by businesses against consumers; only 118 (0.35% of the cases) were brought by consumers against businesses.[18]

Findings: In the cases with consumer claimants, businesses prevailed in 61 cases and consumers in 30 cases; in the remaining cases the prevailing party was listed as "N/A." In 14,654 cases, no arbitrator was ever appointed and the case was either settled or dismissed. In the 19,294 cases in which an arbitrator was appointed, the business won in 18,091 (or 93.8%) – most of which were resolved on the basis of documents only with the consumer not appearing – while the consumer won in 781 (4.0%).[19] Public Citizen also provided information on the arbitrators who decided the cases: 28 arbitrators decided 89.5 percent of the cases in which an arbitrator was appointed, with the busiest according to Public Citizen deciding 68 cases in a single day.[20]

Criticisms: Professor Peter B. Rutledge criticized Public Citizen's data analysis on several grounds. First, the focus of the report was narrow, addressing a single arbitration provider (NAF) and a single type of business (consumer credit).[21] Second, the high win-rate for businesses was due to the type of claim involved – debt collection actions – which tend to have "very little to dispute."[22] He notes: "Studies of debt collection actions in major cities reveal that the lender typically wins between 96% and 99% of the time, right in line with the lender win-rate data cited in the Public Citizen Report."[23] Rutledge also states that Public Citizen misinterpreted the NAF data in estimating the number of cases decided by arbitrators in a single day.[24]

3. Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32

Sample: Mark Fellows of the National Arbitration Forum reported information about NAF arbitrations from 2003-2004. The data was compiled from disclosures made by NAF as required by California law.[25]

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arbitrations in California and of the records of NAF arbitrators.").

[18] Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 15 (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf [hereinafter Public Citizen, Arbitration Trap].

[19] *Id.*

[20] *Id.* at 16.

[21] Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen 10 (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091.

[22] *Id.* at 11.

[23] *Id.*

[24] *Id.* at 11-12 ("This argument mischaracterizes the California data. Those data include a field for the date of the award. The Public Citizen Report treats this listed date as the day when the arbitrator actually rendered an award. This is incorrect. Rather, the California data reflect the date that the award was entered into NAF's system. An arbitrator may render a series of awards over several days, yet NAF enters those awards into its system in a single day.").

[25] Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32.

Findings: Fellows found that consumer claimants "prevail in 65.5% of the cases that reach a decision," while business claimants "prevail in 77.7% of the cases that reach a decision." The time from filing until disposition averaged 4.35 months for consumer claimants and 5.60 months for business claimants. On average, consumer claimants paid $46.63 in arbitration fees while business claimants paid $149.50 in arbitration fees.[26]

Criticisms: Public Citizen criticized Fellows' analysis on several grounds. First, Fellows treats a business withdrawing a claim as a win for the consumer. But "[t]hese claims are not comparable to judicial decisions after bench trials.[27] When only cases decided by an arbitrator are considered, businesses prevail at a much higher rate. Second, Public Citizen was not able to duplicate Fellows' estimate of consumer claimants' win-rates, finding instead that "consumers prevailed in only 37.2 percent of consumer-initiated cases that reached a decision."[28] Regardless, cases with consumer claimants "account for a miniscule percentage of NAF arbitrations and therefore are not representative of NAF arbitrations."[29]

4. Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf[30]

Sample: 226 NAF arbitrations brought by consumers between January 2000 and January 2004.[31] The study did not include information on arbitrations brought by businesses.

Findings: The largest category of disputes involved credit card fees and charges (38.9% of the cases), with other significant case types including disputes over credit card chargebacks (8.4%), mortgage loans (8.4%), and other loans (7.5%).[32] The substantial majority of claims (73.0%) sought $15,000 or less; only 7.0% of claims were for more than $75,000.[33] Overall, 129 of the 226 cases (or 57.1%) were dismissed before hearing, either due to settlement or on request of the plaintiff. Ernst & Young classified all but four of those cases as cases in which the consumer prevailed.[34] Of the cases that reached a decision by the arbitrator, the consumer

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[26] *Id.*

[27] Public Citizen, Arbitration Debate Trap, *supra* note 3, at 9.

[28] *Id.* at 10.

[29] *Id.*

[30] *See also supra* text accompanying notes 8-10.

[31] Ernst & Young, *supra* note 9, at 7. Of the 250 casefiles provided by the NAF, Ernst & Young excluded 24 employment-related cases from the study. *Id.* at 7.

[32] *Id.* at 8.

[33] *Id.*

[34] *Id.* ("Under the first measure, a claimant is said to prevail if the arbitration decision favored the claimant, or if the case was dismissed at the claimant's request or per party agreement. This measure assumes that the consumer was sufficiently satisfied with the settlement to dismiss the arbitration proceedings."). The four dismissals in which the consumer did not prevail, according to Ernst & Young, were ones in which either the NAF dismissed the case due to some deficiency or the consumer dismissed the case because he or she could not afford to continue. *Id.* at 9 & n.11.

prevailed in 53 out of 97 cases (or 54.6%).[35] Ernst and Young concluded: "Consumers appear to be satisfied with settlements accomplished prior to hearings and if a hearing takes place, consumers are not losing a disproportionate number of cases. Therefore, the findings from this analysis do not support claims that the arbitration process is harmful to consumers."[36]

Criticisms: Bland et al. have criticized the Ernst & Young study on several grounds.[37] First, the study examined only the arbitration process and did not compare arbitration to litigation. Second, it included dismissals, whether by claimant request or party agreement, as wins by the claimant. It also included any case in which a claimant prevailed, regardless of the amount recovered, as a win. Third, the study focused only on the claims filed by consumers, "disregarding more than 100,000 filed by corporations against consumers during the same four-year period."[38]

5. California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_aug_6.pdf

Sample: 2175 arbitration cases from January 2003 through February 2004, posted on websites of six different arbitration providers as required by California law. The six providers were the AAA, ADR Services, Arbitration Works, ARC Consumer Arbitrations, JAMS, and Judicate West.[39] Although the study included data on both consumer and employment arbitration, the reported results did not distinguish between the two.[40]

Findings: The CDRI prefaced its findings with the statement that "[i]n general, inconsistencies, ambiguities and the lack of reported data in some areas limit this study's utility for the purposes of informing policy."[41] Data on both filing and disposition dates was available for 1559 cases. For those cases, the mean disposition time was 116 days, while the median was 104 days.[42] The amount of arbitrator's fee was available for 1404 cases; the mean fee was $2256 while the median fee was $870.[43] The prevailing party was identified for 302 cases. The consumer prevailed in 215 (or 71.2%) of those cases, while the business prevailed in the

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[35] *Id.* at 9.

[36] *Id.* at 10. In addition to its case analysis, Ernst & Young surveyed 29 of the consumers involved in the cases (25 of whom had prevailed in their cases). Of those responding, 25 (or 69%) either "were satisfied or very satisfied with the arbitration process." *Id.* at 11-12.

[37] F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 11 (5th ed. 2007); *see also* Public Citizen, Arbitration Trap, *supra* note 18, at 20.

[38] BLAND ET AL., *supra* note 37, at 11.

[39] California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure 14 (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_aug_6.pdf.

[40] *Id.* at 22 fig. 1.

[41] *Id.* at 18. For a detailed description of the problems, see *id.* at 27-32.

[42] *Id.* at 19.

[43] *Id.* at 21.

remaining 87 cases (or 28.8%).[44] The amount of the award was reported for 540 cases; the mean amount awarded was $33,112 while the median amount awarded was $7615.[45]

Criticisms: Bland et al. identified the following criticisms of these results. First, as the CDRI itself recognized, the data it was reviewing were too incomplete to reach any firm conclusions.[46] Second, the study "appears to exclude collection actions brought by creditors against consumers and any arbitrations from the National Arbitration Forum, a lightning rod concerning the fairness of consumer arbitration."[47]

6. Answers and Objections of First USA Bank, N.A. to Plaintiff's Second Set of Interrogatories, Ex. 1, Bownes v. First U.S.A. Bank, N.A. et al., Civ. Action No. 99-2479-PR (Ala. Circuit Ct. 2000), *available* at http://www.tlpj.org/briefs/McQuillan%20 exhibits%2016-19%20(300dpi).pdf

Sample: Data on NAF arbitration outcomes between 1998 and 2000, produced by First USA Bank in response to interrogatories in an Alabama lawsuit.[48]

Findings: The data showed that of the 51,622 NAF arbitrations in which First USA was involved with consumers, it prevailed in 19,618 while the cardholder prevailed in 87. Of the cases in which First USA prevailed, the substantial majority (17,293 of 19,618, or 88.1%) were cases in which the consumer did not respond. Another 28,248 cases expired, typically for failure to serve the cardholder within ninety days, and another 3666 were pending at the time the discovery response was made. Consumers brought four cases against First USA, prevailing in

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[44] *Id.* at 25.

[45] *Id.* at 20.

[46] BLAND ET AL., *supra* note 37, at 12; *see also* Public Citizen, Arbitration Debate Trap, *supra* note 3, at 11-12.

[47] BLAND ET AL., *supra* note 37, at 12.

[48] Answers and Objections of First USA Bank, N.A. to Plaintiff's Second Set of Interrogatories, Ex. 1, Bownes v. First U.S.A. Bank, N.A. et al., Civ. Action No. 99-2479-PR (Ala. Circuit Ct. 2000), *available* at http://www.tlpj.org/briefs/McQuillan%20exhibits%2016-19%20(300dpi).pdf (last visited Dec. 10, 2008).

two of the cases and settling a third; the fourth was still pending.[49] These results are commonly cited as showing that "First USA prevailed in an astonishing 99.6 percent of cases."[50]

Criticisms: The NAF responded that collection cases in court have a similar success rate for businesses ("creditors win about 98 percent of collection actions brought against debtors in federal courts") and that "'expired' cases should be counted as victories for consumers."[51]

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[49] *Id.* at 38 ex. 1.

[50] Public Citizen, Arbitration Trap, *supra* note 18, at 13.

[51] Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E01 (quoting Ed Anderson, NAF managing director).

APPENDIX 2. EMPIRICAL STUDIES OF EMPLOYMENT ARBITRATION AND SECURITIES ARBITRATION

This appendix lists empirical studies of employment and securities arbitration, organized by type of arbitration and author name.

A. Employment Arbitration

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* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303 (Samuel Estreicher & David Sherwyn eds. 2004)

Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002)

Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRA 50TH ANN. PROC. 33 (1998)

Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998)

Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, N.Z. J. INDUS. REL., June 1998, at 5

Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189 (1997)

Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996)

Lisa B. Bingham, *Is There a Bias in Arbitration of Non-Union Employment Disputes?*, 6 INT'L J. CONFLICT MGMT. 369 (1995)

Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 405 (2007)

Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 56

Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov.2003/Jan. 2004, at 44

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

Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003)

Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 9

William M. Howard, *Mandatory Arbitration of Employment Disputes: What Really Does Happen? What Really Should Happen?*, 50 DISP. RESOL. J. 40 (1995)

William M. Howard, Mandatory Arbitration of Employment Arbitration Disputes: Can Justice Be Served? (May 1995) (unpublished PhD. dissertation, Arizona State University)

Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105 (2003)

Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, *in* HOW ADR WORKS 915 (Norman Brand ed. 2002)

Lewis L. Maltby, *Arbitrating Employment Disputes: The Promise and the Peril*, *in* ARBITRATION OF EMPLOYMENT DISPUTES 530 (Daniel P. O'Meara ed., 2002)

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998)

National Workrights Institute, Employment Arbitration: What Does the Data Show?, *available at* http://www.workrights.org/current/cd_arbitration.html

HOYT N. WHEELER, WORKPLACE JUSTICE WITHOUT UNIONS 47-68 (2004)

B. Securities Arbitration

Stephen B. Choi, Jill E. Fisch, and A.C. Pritchard, Attorneys as Arbitrators (Nov. 2008), *available at* http://www.law.northwestern.edu/searlecenter/papers/Choi_attorneys_final.pdf

General Accounting Office, How Investors Fare, Rep. No. GAO/GGD-92-74 (May 1992)

General Accounting Office, Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards, Rep. No. GAO/GGD/00-115 (June 2000)

Jiro E. Kondo, Self-Regulation and Enforcement in Financial Markets: Evidence from Investor-Broker Disputes at the NASD (Dec. 25, 2007)

Edward S. O'Neal & Daniel R. Solin, Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare (2007), *available at* http://www.slcg.com/pdf/news/Mandatory%20Arbitration%20Study.pdf

Michael A. Perino, Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations 32-33 (Nov. 4, 2002)

APPENDIX 3. SUMMARY OF DUE PROCESS PROTOCOLS[1]

PRINCIPLE 1. FUNDAMENTALLY-FAIR PROCESS

AAA Employment:[2] No provision
AAA Consumer:[3] "All parties are entitled to a fundamentally-fair ADR process."
AAA Health Care:[4] "All parties are entitled to a fundamentally-fair ADR process."
JAMS Consumer:[5] No provision
JAMS Employment:[6] No provision
NAF:[7] "All parties in an arbitration are entitled to fundamental fairness."

PRINCIPLE 2. ACCESS TO INFORMATION REGARDING ADR PROGRAM

AAA Employment: No provision
AAA Consumer: "Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs."
AAA Health Care: "Full and accurate information regarding the program, in writing, should be provided by the plan to patients and providers in plain, easily understood language."
JAMS Consumer: "The consumer must be given notice of the arbitration clause. Its existence, terms, conditions and implications must be clear."
JAMS Employment: No provision
NAF: "Information about arbitration should be reasonably accessible before parties commit to an arbitration contract."

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[1] The organization of this Appendix is based on the Consumer Due Process Protocol. The provisions of the other protocols are reproduced under the heading included in the Consumer Protocol, with the goal of facilitating comparison of the different protocols. Those protocols, of course, do not use the same numbering scheme, and may well not include a similar heading. Moreover, the Appendix does not reprint the complete text of the protocols, although it aims to capture the key portions of the various provisions of the protocols.

[2] Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 9, 1995), *available at* www.adr.org/sp.asp?id=28535.

[3] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019.

[4] Commission on Health Care Dispute Resolution, Health Care Due Process Protocol (July 27, 1998), *available at* www.adr.org/sp.asp?id=28633.

[5] JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness (revised Jan. 1, 2007), *available at* www.jamsadr.com/rules/consumer_min_std.asp [hereinafter JAMS Consumer Minimum Standards].

[6] JAMS, JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness (revised Feb. 19, 2005), *available at* www.jamsadr.com/rules/employment_Arbitration_min_stds.asp [hereinafter JAMS Employment Minimum Standards].

[7] National Arbitration Forum, Arbitration Bill of Rights (2007), *available at* www.adrforum.com/users/naf/resources/ ArbitrationBillOfRights3.pdf.

PRINCIPLE 3. INDEPENDENT AND IMPARTIAL NEUTRAL; INDEPENDENT ADMINISTRATION

AAA Employment: "Our recommendation is for selection of impartial arbitrators and mediators.... Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party."

AAA Consumer: "All parties are entitled to a Neutral who is independent and impartial.... If participation in ... arbitration is mandatory, the procedure should be administered by an Independent ADR Institution.... The Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute."

AAA Health Care: "All parties are entitled to a Neutral who is independent and impartial.... Administration of the ADR program should be neutral, and independent of the parties.... All parties should have an equal voice in the selection of neutrals in connection with a specific dispute."

JAMS Consumer: "The arbitrator(s) must be neutral and the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s)."

JAMS Employment: "The arbitrator(s) must be neutral, and an employee must have the right to participate in the selection of the arbitrator(s)."

NAF: "The arbitrators should be both skilled and neutral.... An arbitration should be administered by someone other than the arbitrator or the parties themselves."

PRINCIPLE 4. QUALITY AND COMPETENCE OF NEUTRALS

AAA Employment: "Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment."

AAA Consumer: "All parties are entitled to competent, qualified Neutrals."

AAA Health Care: "All parties are entitled to competent, qualified neutrals."

JAMS Consumer: No provision

JAMS Employment: No provision

NAF: "The arbitrators should be both skilled and neutral."

PRINCIPLE 5. SMALL CLAIMS

AAA Employment: No provision

AAA Consumer: "Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."

AAA Health Care: No provision

JAMS Consumer: "[N]o party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction."

JAMS Employment: No provision
NAF: No provision

PRINCIPLE 6. REASONABLE COST[8]

AAA Employment: "We recommend ... a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees."
AAA Consumer: "Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute .... In some cases, this may require the Provider to subsidize the process."
AAA Health Care: "Nonbinding arbitration may be required, as can binding arbitration in cases not involving patients, in which case the plan should pay the costs of at least one day of hearing before a single arbitrator, including the arbitrator's fees and expenses."
JAMS Consumer: "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 Employment: "An employee's access to arbitration must not be precluded by the employee's inability to pay any costs or by the location of the arbitration. The only fee that an employee may be required to pay is JAMS' initial Case Management Fee. All other costs must be borne by the company ...."
NAF: "The cost of an arbitration should be proportionate to the claim and reasonably within the means of the parties, as required by applicable law."

PRINCIPLE 7. REASONABLY CONVENIENT LOCATION

AAA Employment: "The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating authority, including the authority to determine the time and place of the hearing ...."
AAA Consumer: "In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances."
AAA Health Care: "The place of the proceedings should be reasonably accessible to the parties and to the production of relevant evidence and witnesses. In cases involving a patient, the place should be in close proximity to the patient's place of residence."

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[8] In addition, the JAMS Minimum Standards for both consumer and employment arbitrations incorporate the prohibition on "loser pays" provisions of California law. *See* JAMS Employment Minimum Standards, *supra* note 6, Standard 6; JAMS Consumer Minimum Standards, *supra* note 5, ¶ 8; *see* CAL. CODE CIV. PROC. § 1284.3(a) ("No neutral arbitrator or private arbitration company shall administer a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider, organization, attorney, or witnesses."). Not surprisingly, neither the Employment Due Process Protocol nor the Consumer Due Process Protocol refer to the California law because it had not been enacted at the time they were promulgated.

JAMS Consumer: "The consumer must have a right to an in-person hearing in his or her hometown area."

JAMS Employment: No provision

NAF: "Hearings should be convenient, efficient, and fair for all."

PRINCIPLE 8. REASONABLE TIME LIMITS

AAA Employment: "The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating authority, including the authority to determine the time and place of the hearing ...."

AAA Consumer: "ADR proceedings should occur within a reasonable time, without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR process ...."

AAA Health Care: "ADR proceedings should occur within a reasonable time, and without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR process ...."

JAMS Consumer: No provision

JAMS Employment: No provision

NAF: "A dispute should be resolved with reasonable promptness."

PRINCIPLE 9. RIGHT TO REPRESENTATION

AAA Employment: "Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing."

AAA Consumer: "All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing."

AAA Health Care: "All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by an attorney or other spokesperson of their own choosing."

JAMS Consumer: "The clause or procedures must not discourage the use of counsel."

JAMS Employment: "The agreement or clause must provide that an employee has the right to be represented by counsel. Nothing in the clause or procedures may discourage the use of counsel."

NAF: "All parties have the right to be represented in arbitration, if they wish, for example, by an attorney or other representative."

PRINCIPLE 10. MEDIATION

AAA Employment: "The members of the task force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged ...."

AAA Consumer: "The use of mediation is strongly encouraged as an informal means of assisting parties in resolving their own disputes."

AAA Health Care: No provision

JAMS Consumer: No provision

JAMS Employment: "JAMS encourages the use of mediation and of voluntary arbitration that is not a condition of initial or continued employment."

NAF: "The preferable process is for the parties themselves to resolve the dispute."

PRINCIPLE 11. AGREEMENTS TO ARBITRATE

AAA Employment: "The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such disputes be knowingly made."

AAA Consumer: "Consumers should be given: (a) clear and adequate notice of the arbitration provision and its consequences ...; (b) reasonable access to information regarding the arbitration process ...; (c) notice of the option to make use of applicable small claims court procedures ...; and, (d) a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process."

AAA Health Care: "The agreement to use ADR should be knowing and voluntary.... In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises."

JAMS Consumer: No provision

JAMS Employment: "JAMS encourages the use of mediation and voluntary arbitration that is not a condition of initial or continued employment. JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses ...."

NAF: "An agreement to resolve disputes through arbitration is a contract and should conform to the legal principles of contract and applicable statutory law."

PRINCIPLE 12. ARBITRATION HEARINGS

AAA Employment: "The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating authority, including the authority to determine the time and place of the hearing ...."

AAA Consumer: "All parties are entitled to a fundamentally-fair arbitration hearing.... [T]he Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party."

AAA Health Care: "The pre-hearing and hearing should be conducted with adequate notice and with a fair opportunity to be heard and to present relevant evidence and witnesses. There should be a right to examine and cross-examine witnesses, and to argue orally and/or in writing."

JAMS Consumer: "The consumer must have a right to an in-person hearing in his or her hometown area."

JAMS Employment: "At the arbitration hearing, both the employee and the employer must have the right to (a) present proof, through testimony and documentary evidence, and (b) to cross-examine witnesses."

NAF: "Hearings should be convenient, efficient, and fair for all."

PRINCIPLE 13. ACCESS TO INFORMATION

AAA Employment: "Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims."

AAA Consumer: "Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration."

AAA Health Care: "After a dispute arises, participants should have access to all information necessary for effective participation in ADR."

JAMS Consumer: "The arbitration provision must allow for the discovery or exchange of non-privileged information relevant to the dispute."

JAMS Employment: "The procedures must provide for an exchange of core information prior to the arbitration."

NAF: "The parties should have access to the information they need to make a reasonable presentation of their case to the arbitrator."

PRINCIPLE 14. ARBITRAL REMEDIES

AAA Employment: "The arbitrator should be empowered to award whatever relief would be available in court under the law."

AAA Consumer: "The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."

AAA Health Care: "The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."

JAMS Consumer: "Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the available remedies in court."

JAMS Employment: "All remedies that would be available under the applicable law in a court proceeding, including attorneys fees and exemplary damages, must remain available in the arbitration."

NAF: "The remedies resulting from an arbitration must conform to the law."

PRINCIPLE 15. ARBITRATION AWARDS

AAA Employment: "The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim."

AAA Consumer: "In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes, and legal precedents.... At the timely request of either party, the arbitrator should provide a brief, written explanation of the basis for the award."

AAA Health Care: "The arbitration award should be in writing, and should be accompanied by an opinion, where requested by an party."

JAMS Consumer: "An Arbitrator's Award will consist of a written statement stating the disposition of each claim. The award will also provide a concise written statement of the essential findings and conclusions on which the award is based."

JAMS Employment: "An arbitration award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, awarded as to each claim. The Arbitrator will also provide a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the award is based."

NAF: No provision

OTHER PROVISIONS

JAMS Consumer: "The arbitration agreement must be reciprocally binding on all parties ...."

JAMS Employment: "JAMS will not administer arbitrations pursuant to clauses that lack mutuality. Both the employer and the employee must have the same obligation (either to arbitrate or go to court) with respect to the same kinds of claims."

APPENDIX 4. DATA CODING INSTRUCTIONS FOR THE CASE FILE SAMPLE

Variable Name	Variable Description	Coding Instructions
Case Identification		
Numb_Orig_Parties	Total number of parties originally involved in the arbitration	Enter the number of parties in the suit, even if one was dropped later.
CaseID	Internal AAA case ID number	Enter the AAA case ID number (12-digit number): first two digits are the region, sixth digit is the last digit of the filing year, and last five digits are the sequence number of the case
Party1_2	Short case identifier	Enter the information in the variables Party1 and Party 2 as "Party1_Party2"
Center	AAA Center that administered the case	Enter the location of the AAA Center that administered the case
Case_Manager	AAA Case Manager	Enter the name of the AAA Case Manager responsible for the case
Parties		
Party1	Name of first party listed	Enter the name of the first party listed on the demand for arbitration
Party_Type1	Type of Party1 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party1
Party_Addr1	Address of Party1	Enter the city and state listed for Party1
Party2	Name of second party listed	Enter the name of the second party listed on the demand for arbitration
Party_Type2	Type of Party2 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party2
Party_Addr2	Address of Party2	Enter the city and state listed for Party2
Party3	Name of third party listed	Enter the name of the third party listed on the demand for arbitration
Party_Type3	Type of Party3 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party3
Party_Addr3	Address of Party3	Enter the city and state listed for Party3
Party4	Name of fourth party listed	Enter the name of the fourth party listed on the demand for arbitration
Party_Type4	Type of Party4 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party4
Party_Addr4	Address of Party4	Enter the city and state listed for Party4
Party5	Name of fifth party listed	Enter the name of the fifth party listed on the demand for arbitration
Party_Type5	Type of Party5 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party5
Party_Addr5	Address of Party5	Enter the city and state listed for Party5
Party_Numb_Claimant	Parties who are the case claimants	Enter the party number of each claimant. If there is more than one, separate with semicolons (;)
Party_Numb_Respondent	Parties who are the case respondents	Enter the party number of each respondent If there is more than one, separate with semicolons (;)

Variable Name	Variable Description	Coding Instructions
Party Representatives		
Rep_Name1	Name of representative for Party1	Enter the name of the representative, if any, listed for Party1 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr1	Address of representative for Party1	Enter the address (city, state) of the representative of Party1
Rep_Name2	Name of representative for Party2	Enter the name of the representative, if any, listed for Party2 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr2	Address of representative for Party2	Enter the address (city, state) of the representative of Party2
Rep_Name3	Name of representative for Party3	Enter the name of the representative, if any, listed for Party3 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr3	Address of representative for Party3	Enter the address (city, state) of the representative of Party3
Rep_Name4	Name of representative for Party4	Enter the name of the representative, if any, listed for Party4 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr4	Address of representative for Party4	Enter the address (city, state) of the representative of Party4
Rep_Name5	Name of representative for Party5	Enter the name of the representative, if any, listed for Party5 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr5	Address of representative for Party5	Enter the address (city, state) of the representative of Party5
Demand for Arbitration - Party# (1 through 5)		
Counterclaim#	Is the claim by Party# a counterclaim?	=1 if yes; 0 otherwise
Amt_Sought#	Dollar amount of damages sought in demand	Enter the dollar amount of compensatory damages sought by Party#; do not include punitive damages. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Atty_Fees#	Were attorneys' fees sought in the demand?	=1 if yes; 0 otherwise
Atty_Fees_Amt#	Dollar amount of attorneys' fees sought.	Enter amount of attorneys' fees sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Arb_Costs#	Were arbitration costs sought in the demand?	=1 if yes; 0 otherwise
Arb_Costs_Amt#	Dollar amount of arbitration costs sought.	Enter amount of arbitration costs sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Interest#	Was interest sought in the demand?	=1 if yes; 0 otherwise
Interest_Amt#	Dollar or percentage amount of interest sought.	Enter amount of interest (including percentage) sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Punitives#	Were punitive damages sought in the demand?	=1 if yes; 0 otherwise
Punitive_Amt#	Amount of punitive damages sought in demand	Enter amount of punitive damages sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Other_Relief#	Was other relief sought in the demand?	=1 if yes; 0 otherwise
Other_Relief_Des#	Other relief sought in demand	Describe any other relief sought in the demand
LocaleRqtd#	Hearing locale requested by Party# demand	Enter the location sought by Party# in the demand for any hearing to be held
Dispute Description		
Dispute_Des	Subject matter of dispute between the parties	Briefly describe the subject matter of the dispute between the parties

Variable Name	Variable Description	Coding Instructions
Arbitration Clause		
Pre-Dispute	Was the case submitted to arbitration on the basis of a pre-dispute agreement to arbitration?	=1 if yes; 0 otherwise
Principle1	Does the clause give the business more control over arbitration process than the consumer?	=1 if yes; 0 otherwise
Principle3	Does the clause give the business more control over arbitrator selection than the consumer?	=1 if yes; 0 otherwise
Principle5	Does the clause prohibit consumers from going to small claims court?	=1 if yes; 0 otherwise
Principle6	Would the clause result in the consumer paying more than provided in the AAA consumer fee schedule?	=1 if yes; 0 otherwise
Principle7	Does the clause provide for a locale for the business's benefit?	=1 if yes; 0 otherwise
Principle9	Does the clause restrict the consumer's freedom to pick a representative?	=1 if yes; 0 otherwise
Principle12	Does the clause restrict the manner in which a consumer can provide evidence?	=1 if yes; 0 otherwise
Principle13	Does the clause restrict discovery?	=1 if yes; 0 otherwise
Principle14	Does the clause limit the remedies available to the consumer?	=1 if yes; 0 otherwise
Protocol_Waiver	Does the file contain a waiver by the business of any violation of the Due Process Protocol?	=1 if yes; 0 otherwise
ClassArb_Waiver	Does the arbitration clause contain a class arbitration waiver?	=1 if yes; 0 otherwise
Nonseverability	Does the arbitration clause contain a provision making the class arbitration waiver nonseverable?	=1 if yes; 0 otherwise
Arbitrators		
Case_Manager_Arb	Name of the case manager who chose the arbitrator or arbitrator list.	Enter the name of the case manager appearing on the initial correspondence with the arbitrators during the arbitrator selection.
Arbitrator_Final	Name of the arbitrator used in the arbitration	Enter the name of the arbitrator used in the arbitration
Arb_Final_Notes	Any notes regarding the Final Arbitrator	Note any ground for objection to the arbitrator used in the arbitration and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice1	Name of the first prospective arbitrator notified	Enter the name of the first prospective arbitrator
Arbitrator_Choice1_Notes	Any notes regarding the first choice arbitrator	Note any ground for objection to the first prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice2	Name of the second prospective arbitrator notified	Enter the name of the second prospective arbitrator
Arbitrator_Choice2_Notes	Any notes regarding the second choice arbitrator	Note any ground for objection to the second prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice3	Name of the third prospective arbitrator notified	Enter the name of the third prospective arbitrator
Arbitrator_Choice3_Notes	Any notes regarding the third choice arbitrator	Note any ground for objection to the third prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice4	Name of the fourth prospective arbitrator notified	Enter the name of the fourth prospective arbitrator
Arbitrator_Choice4_Notes	Any notes regarding the fourth choice arbitrator	Note any ground for objection to the fourth prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arb_Alt	Any comments on arbitrators or arbitrator selection	Note any indication in the file on how the arbitrators were selected this includes ranking information and other arbitrators considered but not necessarily notified

Variable Name	Variable Description	Coding Instructions
Proceedings		
Ex_Parte	Did the case proceed on an ex parte basis (i.e., in the absence of one of the parties?)	=1 if yes; 0 otherwise
Hearing	Was there a hearing?	=1 if yes; 0 otherwise
Hearing_Type	Type of hearing	Enter the type of hearing that occurred (if any) – phone or in-person
Hearing_Days	Number of days of hearing time	Enter the number of days of in-person hearings that were conducted
Hearing_Locale	If in person, the place where the hearing took place	Enter the location (city, state) of any in-person hearing that was conducted
Disposition	How did the case get resolved?	Enter how the case got resolved, using one of the following categories: award, settlement, mediation settlement, withdrawn, closed administratively
Awards - Party# (1 through 5)		
Prevail#	Did Party# prevail in its claim?	=1 if yes; 0 if no; "no claim" if Party# did not make a claim.
Award_Amt#	The amount of any award of compensatory damages	Enter the amount of any compensatory damages awarded to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Punitive_Awd#	The amount of any award of punitive damages	Enter the amount of any punitive damages awarded to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
AdminFee_Awd#	The reimbursement of AAA administrative fees in the award	Describe how administrative fees were reimbursed to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
ArbFee_Awd#	The reimbursement of arbitrators' fees in the award	Describe how arbitrator fees were reimbursed to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
AttyFee_Awd#	The amount of any award of attorneys' fees	Enter the amount of any award of attorneys' fees to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Interest_Awd#	The amount of any award of interest	Enter the amount of any award of interest to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Other_Awd#	The amount of any other award	Enter the amount of any other award to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Reason_Awd#	Did the arbitrator give reasons for his/her award to Party#?	=1 if yes; 0 otherwise
Reason_Awd#_Des	The reason given for the award and/or other relevant notes	Enter the reason given for the award or any other relevant notes to the award

Variable Name	Variable Description	Coding Instructions
	Costs	
Ruling_AdminFee	The allocation of AAA administrative fees as given in the arbitrator's ruling	Enter the arbitrator's ruling on AAA administrative fees
AdminFee_Pd1	Admin Fee paid by Party1 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party1 in accordance with the arbitrator's ruling
AdminFee_Pd2	Admin Fee paid by Party2 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party2 in accordance with the arbitrator's ruling
AdminFee_Pd3	Admin Fee paid by Party3 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party3 in accordance with the arbitrator's ruling
AdminFee_Pd4	Admin Fee paid by Party4 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party4 in accordance with the arbitrator's ruling
AdminFee_Pd5	Admin Fee paid by Party5 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party5 in accordance with the arbitrator's ruling
Ruling_ArbFee	The allocation of arbitrator fees as given in the arbitrator's ruling	Enter the arbitrator's ruling on arbitrator fees
ArbFee_Pd1	Arb Fee paid by Party1 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party1 in accordance with the arbitrator's ruling
ArbFee_Pd2	Arb Fee paid by Party2 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party2 in accordance with the arbitrator's ruling
ArbFee_Pd3	Arb Fee paid by Party3 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party3 in accordance with the arbitrator's ruling
ArbFee_Pd4	Arb Fee paid by Party4 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party4 in accordance with the arbitrator's ruling
ArbFee_Pd5	Arb Fee paid by Party5 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party5 in accordance with the arbitrator's ruling
Total_AdminFee	Total administrative fee paid by the parties	Enter the total amount paid by the parties for administrative fees
ArbComp	Arbitrator compensation billed by the AAA	Enter the total amount of arbitrator compensation billed by the AAA
MedComp	Mediator compensation billed by the AAA	Enter the total amount of mediator compensation billed by the AAA
	Dates	
Date_Filed	The date the claimant filed the demand for arbitration	Enter the date (mm/dd/yyyy) the claimant filed the case with the AAA (based on the date stamp on the demand for arbitration)
Date_Assigned	The date the AAA entered the case in its system	Enter the date (mm/dd/yyyy) the AAA entered the case in its system
Date_ArbList1	The date the AAA entered the first list of arbitrators in its system	Enter the date (mm/dd/yyyy) the AAA entered the first list of arbitrators in its system
Date_ArbList2	The date the AAA entered the second list of arbitrators in its system	Enter the date (mm/dd/yyyy) the AAA entered the second list of arbitrators in its system
Date_ArbList3	The date the AAA entered the third list of arbitrators in its system	Enter the date (mm/dd/yyyy) the AAA entered the third list of arbitrators in its system
Date_Arb_Apptd	The date the AAA appointed the arbitrator	Enter the date (mm/dd/yyyy) the AAA appointed the arbitrator
Date_PrelimHng	The date of the preliminary hearing	Enter the date (mm/dd/yyyy) of the preliminary hearing
Date_FirstHng	The date of the first hearing	Enter the date (mm/dd/yyyy) of the first hearing
Date_LastHng	The date of the last hearing	Enter the date (mm/dd/yyyy) of the last hearing
Date_HngClosed	The date the arbitrator closed the hearing	Enter the date (mm/dd/yyyy) the arbitrator closed the hearing
Date_Award	The date the arbitrator issued the award	Enter the date (mm/dd/yyyy) the arbitrator issued the award
Date_CaseClosed	The date the AAA administratively closed the case	Enter the date (mm/dd/yyyy) the AAA administratively closed the case
	Comments	
Database	The AAA database from which the record originated	Enter "Under $75" or "Over $75"
Comments	Any other comments about the case file	Enter any other comments about the case file not covered in one of the previous entries

Mr. JOHNSON of Georgia. Thank you, Mr. King.

It is now my pleasure to recognize the Chair from the Full Committee of the Full Committee, Mr. Nadler, for questions, 5 minutes.

You are recognized, Mr. Nadler. You may want to unmute.

Chair NADLER. Okay. Am I unmuted now?

Mr. JOHNSON of Georgia. You are.

Chair NADLER. Can you hear me? Okay.

Thank you. Thank you, Mr. Chair.

Professor Gilles, forced arbitration has proliferated in the workplace. According to the Economic Policy Institute, more than half of working Americans are subject to forced arbitration, up from just 7.6 percent of workers in 1995. As a result, workers are often funneled into an arbitration trap that is expensive, time-consuming, and secretive. How does forced arbitration favor employers over workers?

Ms. GILLES. Thank you, Chair Nadler, for the question. I think that there are a number of ways in which employers are advantaged. For example, they pick the arbitral provider. Many of you are lawyers. If you could pick the judge and the jury without meaningful input from your adversary, that is a huge advantage. So, right off the bat, the system is not to be advantage of employees and to the advantage of repeat player employers.

They also write the rules. So, while, Mr. King sadly described this as misinformation, the truth is that employment arbitration, each arbitration is itself secret, right? You are not supposed to talk about the arbitration. That is why Mr. Weiss is not talking about ongoing arbitration with Amazon. That means that employees do not know when they have claims that are common with other employees. They don't know about the practices that might be firmwide, employerwide. That is something we don't see in the court system.

I mean, there are lots of other aspects of arbitration that don't benefit employees. I think you talked about them, Chair Nadler, in your opening statement: No discovery, no rules of evidence, no right of appeals, no class actions or collective actions, and hugely expensive. There are tons of problems, and that is why we see so few employees actually go into arbitration.

Chair NADLER. Thank you. Now, forced arbitration is even more common in low-wage workplaces and in industries that include a disproportionate number of women and minority workers. This has dramatically eroded the ability of these workers to collectively hold their employers accountable for systemic workplace violations, such as widespread harassment and discrimination. How does forced arbitration suppress the ability of workers to file claims?

Ms. GILLES. Well, I think you just sort of said it. The truth is that for low-wage workers, especially low-wage workers who are in frontline critical industries, healthcare, education, workers we really need, these workers already face tons of disadvantages in accessing justice. Forced arbitration puts a barrier between them and the courthouse that is often impenetrable. They can't get lawyers to represent them because their claims are often not a significant enough value. They can't brave class arbitrations because the employers have barred those in the contractual provisions.

It can be very hard to try to prove claims that are by their nature systemic, right? How do you prove workplace harassment? That is a claim where you need evidence about the entire workplace. So, for an individual employee, that is a tough, tough row to hoe.

Chair NADLER. How would you say that forced arbitration undermines the rights of women and minority workers as it relates to access to counsel?

Ms. GILLES. Well, first off, I just want to step back and say that women and minorities, low-wage workers, these vulnerable groups already have massive underrepresentation problems. I think even in the courthouse, getting to the courthouse, it can be very hard to find a lawyer. So, we have to deal with the justice gap, even once we get rid of forced arbitration, knock on wood.

It is true that in arbitration, these issues are compounded because, again, the employer is controlling the arbitral forum, and often picking the arbitrators, they have a lot more access to information about the arbitrator and about the arbitral provider. So, they are going to pick providers and arbitrators that benefit them. That is really hard for an employee who knows very little about an arbitral regime to try to go up against.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

At this time, I will recognize the gentleman, the Ranking Member, Mr. Buck, for 5 minutes.

Mr. BUCK. Mr. Chair, with your permission, I would ask that you move down the line to other Republicans, and I will ask questions last, if that is okay?

Mr. JOHNSON of Georgia. That will be fine. I am doing the same thing, Ranking Member Buck.

So, at this time, we shall recognize the gentleman from California, Mr. Issa, for 5 minutes.

Mr. ISSA. Thank you, Mr. Chair. The question I have for Mr. King or a series of them, is there any prohibition on States limiting secrecy and/or limiting what can be in other words contract law regulated by the State? Are there are implementations from the States? Do some States already have provisions? I will just give the example of California, where a race or sex discrimination, notwithstanding binding arbitration, you still have a State remedy?

Mr. KING. You are absolutely correct, Congressman. Not only in California, but other States have outlawed or prohibited nondisclosure agreements.

This is not a discussion about secrecy or confidentiality. We should be talking about arbitration and its attributes or criticisms if people have them. It is a total misnomer. It is a red herring.

Mr. ISSA. Now, this Committee and the Oversight Committee have done extensive hearings over the years about the various major league football, baseball, and so on. Don't they all on a mutual basis choose binding arbitration? Isn't that a choice of the very powerful players' union and the, if you will, the billionaires and millionaires?

Mr. KING. Absolutely. I mean, arbitration is so well-accepted at so many different levels in our society, and it is the only way to proceed. Our court systems are not equipped to handle the millions

of claims that are being suggested to be thrown into court litigation.

Mr. ISSA. So, let me see if we can get some consensus here in 5 minutes. It seems like all the Witnesses, yourself included, have serious concerns about forced secrecy in binding arbitration. If we were to break out the FAIR Act, we were to break out, if you will, a little bit of what everyone is talking about, if we bifurcated, if you will, all of the these, we will call them forced arbitration into damages and restitution versus secrecy and require that any secrecy be a separate consideration voluntarily entered into a not part of, if you will, the first decision, the arbitrator, would that improve the current law as to sex and race discrimination, but as to a myriad of other violations?

Mr. KING. Yeah, absolutely. That is a much more thoughtful way to proceed. We can talk separately about confidentiality and secrecy and talk about how that should or should not be handled and talk about then how damages are pursued.

We have not mentioned yet in this hearing, Congressman, ADRs, alternative dispute resolution procedures. That is what I would really suggest this Committee look at. There are so many ways that consumers, employees, and others can benefit by not being in the courts and getting their issues resolved. That is the direction we ought to be headed.

Mr. ISSA. Can I also maybe get a second—I am hoping everyone agrees on this part—can we also agree that if there are a series of arbitrations and they are concluded and there is no secrecy, that there is no prohibition on either Federal or State laws being passed that would allow separate class action for a pattern of behavior? Would that be correct? In other words, rather than the individual who gets his arbitrated, the group could still be allowed to form, but form based on, if you will, the disclosure of a series of wrongdoings in which, whether you win or lose in arbitration, you would be able to make that case, specifically, that it was a constant pattern. In other words, we could pass a separate law for that kind of bad actor.

Mr. KING. You certainly could. I would welcome that. I think others on this side of discussion would welcome a very thorough and thoughtful discussion about class actions. There are a lot of misuses and abuses. We would like to have that discussion on a bipartisan basis.

Let's not suggest that class actions are good for consumers. The data goes on and on and on. They go on forever. They are very expensive. At the end of the day, you get that little notice in the mail that you are going to get $5.50 or something, and most people just disregard it. That is such a racket, if you will, Congressman, that has been portrayed as a savior for the American consumer. Not true.

Mr. ISSA. I have been the victim of class action—well, SEC abuse, if you will, in the past. So, I am aware that there are a lot of attorneys that make all the money in those cases. As my time is expiring, on the first secrecy—

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. ISSA. —is there anyone that would like to—that would say anything different from the other Witnesses as to the questioning related to secrecy?

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. JOHNSON of Georgia. I now recognize the gentleman from New York, Congressman Jones, for 5 minutes.

Mr. JONES. Thank you, Mr. Chair. Professor Gilles, thank you for your illuminating and, frankly, shocking testimony. Before I ran for Congress, I was a lawyer for Westchester County, in which capacity I was a legal adviser to the Westchester County Human Rights Commission, which I hope Mr. King would consider to be a practitioner.

In that capacity, I saw how the ability of Westchester County residents to have their fundamental rights vindicated was hampered by these forced arbitration agreements. My experience as a practitioner and as a former law clerk in the Southern District of New York, causes me to be shocked for that reason by his inaccurate statement that these forced arbitration clauses do not prevent people from getting their rights vindicated by the EEOC or, in my case, by the Westchester County Human Rights Commission.

In any event, I want to make sure my colleagues and the American people appreciate how the situation became so bad in the first place, and that is the far-right majority on the United States Supreme Court.

Professor Gilles, hasn't the Roberts Court consistently supported forced arbitration in a series of predominantly 5–4 decisions along ideological lines?

Ms. GILLES. Oh, that is an easy one. Thank you for the softball.

Yes, of course, I don't actually even understand what Mr. King is saying here. Since 2011 when the Supreme Court decided *AT&T* v. *Concepcion*, the Court has decided by my count about 17 decisions enforcing arbitration clauses and the vast majority of those cases have been 5–4, with the conservatives in the majority. The dissents are growing ever more [inaudible] for Congress to Act because, at some point, it becomes difficult for lower court judges to do anything other than follow the Supreme Court's law, even if they disagree. Many, many courts have expressed that they disagree.

So, this is a real crisis in American law, and it is a crisis brought on by what many scholars think is a misinterpretation of the Federal Arbitration Act.

Mr. JONES. Thanks to that far right majority, can corporations use arbitration to get away with discriminating against seniors, for example, violating the Age Discrimination in Employment Act?

Ms. GILLES. Sorry about that. Yes, they can. In fact, corporations can violate all the statutes that Congress and the State legislatures enact, and we might not ever know about it because, again, despite what Mr. King has said, these cases are shunted into hermetically sealed private arbitrations.

Those arbitrations are not made public. There is no recording of those arbitrations. There is no court reporter. There is no precedent from an arbitration decision. So, violations of law are happening, and they are going undetected, and so I think this is, again—I will just keep saying—a real crisis in American law at this moment.

Mr. JONES. Thank you. This Congress, my colleagues and I, on the Democratic side, are fighting to pass the Equality Act, which is sponsored by Subcommittee Chair Cicilline. The Equality Act is personal to me. One of the things it would do is hold corporations accountable for discriminating against LGBTQ plus people like me in housing credit and other areas of public life.

Thanks to the Roberts Court, could corporations exploit forced arbitration to keep discriminating against LGBTQ plus folks with impunity?

Ms. GILLES. Thank you for the question. I think this is really worrisome because as you and your colleagues seek to enact protections—and I applaud you for doing so—those protections, those laws mean nothing if they can't actually be enforced. The way that most law in this country is enforced is through private rights of action that you include in these statutes that allow people who have been harmed by violations of those statutes to bring claims.

When we instead require or when corporations instead require that these people bring claims in arbitration, most will not do so, and those violations are never heard about. While it is true we have public agencies who can engage in enforcement actions and investigations, you know as well as I do, agencies are—it is impossible for agencies to monitor every transaction—

Mr. JONES. Professor Gilles?

Ms. GILLES. Yes, sorry.

Mr. JONES. I just want to ask you another question. Now, that we have a 6–3 far-right majority—

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. JONES. Thank you.

Ms. GILLES. Sorry about that.

Mr. JONES. It is all right.

Mr. JOHNSON of Georgia. I shall now recognize the gentleman from Louisiana, Mr. Johnson, for 5 minutes.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair.

I just have to say at the outset here, your opening statement this morning seemed to portray all American companies somehow as the bad guy and that they have sinister motives aimed at scamming consumers and eviscerating their constitutional rights. Sometimes, it feels like that narrative and that broad brush have really gotten old and tired. Then we were just told a few moments ago that there is a far-right Supreme Court that is creating a crisis in American law and somehow abusing the Arbitration Act.

This is the first time, by the way, I have heard Chief Justice Roberts referred to as a far-right jurist in quite some time. Look, arbitration is a key part of the American judicial system. It is advantageous to litigants on all sides, and we would abandon it at our peril. I was a practitioner for 20 years before I got to Congress. I engaged in a lot of arbitration, both on behalf of plaintiffs and defendants, and it worked really well. That has been my experience.

As Mr. King pointed out this morning, he summarized: Arbitration is quicker, less expensive. It keeps our court system from being overwhelmed with vexatious litigation that doesn't behoove anybody. Frankly, it is a system that works pretty well.

Now, could there be some improvements in it? Yeah. Of course, for example, in the area of sexual harassment claims, such as the tragic ordeal that Gretchen Carlson experienced and summarized a little bit this morning. We can reform those things, and hopefully we can bypass the partisanship and reach some consensus on those points.

Let me ask just a few questions of Mr. King.

Mr. King, I think your testimony has been mischaracterized here the last couple moments, but can you just summarize briefly for folks who may be following this at home, what are just some of the pros and cons of the typical arbitration as opposed to the typical lawsuit? You mentioned cost and efficiency, but can you articulate that a little bit more.

Mr. KING. Certainly, Congressman. You are going to get to a hearing much quicker in arbitration than you will in our courts. The court systems are bogged down in discovery and all types of motion practice. Arbitration is more expeditious for sure. As far as cost, I don't know where this information is coming from, but there are very low filing fees, if any, in arbitration. The Triple A, the American Arbitration Association, has led the way. So, it is much easier to get into this system of justice than it is in the courts. Furthermore, to suggest that everybody is going to get a jury trial or have a lengthy trial is really misleading the American public. Very few cases go to trial. Very few cases even go to verdict in any way, shape, or form if it comes from a judge.

So, you are going to get a decision from an arbitrator much quicker, and I would submit just as fair if not fairer. It is wrong to suggest that the employer picks the arbitrator. You have been involved in arbitration. I have too. It is someone in the middle. You go back and forth to pick a neutral. I wish I had the opportunity just to pick who I wanted. Not true. Absolutely not true.

Also, in arbitration, the claimants do better. The facts are the facts. On the whole, they do better than class action or in litigation. So, I don't know what the push back is here other than perhaps the direction to push people into class action litigation, and that is not an efficient way to do business.

Mr. JOHNSON of Louisiana. In fact, in my experience, as you pointed out, arbitrators who are fair and judicious earn that reputation, and the American Arbitration Association, is the group where they are Members of. When the litigants or the parties go to choose their arbitrators, it was my experience that we always tended to go to those who had a great reputation for being fair to both sides.

So, they get more work. They get to be arbitrators on more cases, and that helps overall the system. It is almost kind of like a free-market analysis that people get to make when they choose those. I am situated right now as we speak just a few miles away from a very active State district court that I used to practice in on occasion. I looked at the stats for 2019. They literally had less than five jury trials in that entire civil district court over the period of that year. Almost everything is decided by a judge, and so I think there is just a lot of misinformation.

Just really quick. I think I have got a couple seconds left, but some plaintiff's attorneys, even those that are paid on contingent

fee structure, won't bring cases that seek low volume damage amounts. Does arbitration help claimants in that situation?

Mr. KING. No, absolutely not. This so-called arbitration reform movement that the professor talks about harms low-income workers particularly because they don't have the wherewithal; they don't have the money to get into court. They have relatively low claims. They can't attract counsel. If they don't have an ADR, if they don't have some type of arbitration provision to take part in, they are left out in the cold.

This whole discussion was turned around. We are backwards. We are pushing people into a system that is overcrowded, not working, and not available.

Mr. JOHNSON of Georgia. If the gentleman would wrap up; 5 minutes is over.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. Thank you, Mr. King.

I yield back.

Mr. JOHNSON of Georgia. Thank you.

I will now recognize the gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you. Thanks, Mr. Chair.

Mr. Chair, I want to point out what we just heard one of our colleagues talk about arguments being old and tired. I would actually like to talk about the old and the tired. Real people. Because in September of 2017, Hurricane Irma cut off power across south Florida, and the outage turned the Hollywood Hills Nursing Home in Broward County into a death trap. Without air conditioning, the temperature climbed, and in the end, 12 residents died, dozens were injured in the sweltering heat.

Surviving family Members, Mr. Chair, went to court to seek justice for their vulnerable loved ones who they thought would be safe. Plaintiffs in one suit allege that it took 3 days before anyone called 911, but the nursing home tried to keep the case out of court using predispute arbitration clause. The families of those whose hearts gave out in that oppressive heat never got a day in court. They also didn't choose to have this wonderful arbitration govern; it was forced upon them.

The overly broad and unfair arbitration clause that was forced upon the residents and their families prevented them from exercising their right to have their claims heard by a judge.

So, Professor Gilles, if you could speak very specifically in instances like this about the risk to nursing home residents and their families, when they are presented with an arbitration agreement when they first move into a nursing home or long-term care facility, what does that exchange look like? What is the discussion that takes place? What is offered to them at that moment?

Ms. GILLES. Thank you for the question. So, I am not there yet personally, although my parents are getting older, and they live in your district. So, thank you for your representation, but this is how I think it works: You are looking for a nursing home for mom and dad, and you are thinking about a lot of things. There is a lot going on in that decision, and when you bring them in and you are filling out these admission forms, the last thing you are thinking about

is that this place that you are entrusting with your parents is going to engage in harmful or negligent behavior.

So, as with so many of these situations, arbitration is forced upon us at the moment when we need the service or the product or the job. We are not thinking that something terrible is going to happen down the line that is going to require us to go to court.

If I could just take a moment, I just feel like Mr. King keeps saying that I am misrepresenting his views and I just have to say I think he is misrepresenting the facts. There is no argument that any serious economist believes that arbitration is better, faster, cheaper for consumers and employees as compared to class actions. Even the CFPB, as well as lots of economists, have proven that, but this—talk about old and tired, this old and tired Chamber of Commerce view continues to infect this conversation despite just so much data on the other side. I guess I just wish Mr. King would read the real studies as opposed to the studies that the chamber gives him.

Mr. DEUTCH. Professor Gilles, I just want to get back to this moment when the family is making a decision about a long-term care facility, the arbitration clause, is it a separate document? Is it inside something else? There is an admission packet obviously that has lots of paperwork, and this is a difficult time for someone who needs nursing care and their family, correct? How does that impact the fairness of agreeing to keep disputes out of court?

Ms. GILLES. Right. Well, so we are not thinking about the court at that moment, right; we are thinking about mom and dad. So, these provisions, like all forced arbitration provisions, are hidden in the fine print of really long documents that you have to read, but none of us really read. So, I think even lawyers don't really read these documents as carefully as we should because we need to do this thing, this really traumatic emotional thing of putting our parents in to what we hope is a safe place.

So, again, I think it is a fraught situation, and I don't think that most people know the rights that they are giving up at that moment.

Mr. DEUTCH. Professor Gilles, I appreciate that. I thank the Chair for shining a bright light on the abuse of arbitration, the unfairness of these agreements that are forced upon American consumers, and I thank Congressman Johnson for introducing the FAIR Act to remedy this injustice.

I yield back the balance of my time.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

I will now recognize the gentleman from Florida, Mr. Steube, for 5 minutes. I am sorry.

Mr. STEUBE. That is fine. Thank you, Mr. Chair.

First, my questions are for Mr. King, but what I would kind of like to address is something that I don't feel is accurate that Ms. Gilles had stated that we are forcing an arbitration clause on an unknowing person. We have freedom of contract in this country. You are entering into a contract that has arbitration clause, so the statement that the person is unknowingly entering into these arbitration clauses is not factually accurate.

Now, they may not read the clause in the contract that they are signing, but that is not to say that they are unknowingly entering

into these agreements. So, first, Mr. King, I would like to, if you could address those issues as it relates to—these are parties on both sides of a contract that are entering into an agreement pursuant to contract law where these arbitration clauses are housed, so they are not unknowingly, unwillingly entering into these agreements. So, if you could address that first.

Mr. KING. Well, I think you are absolutely right. People enter into all kinds of agreements, and they do so on a willing basis. You don't have to purchase X, Y, or Z. You can go to another vendor. Congressman, if I might just one moment, I want to rebut what was misinformation here about the United States Supreme Court.

Mr. STEUBE. Absolutely.

Mr. KING. The Kindred case was decided 7–1; DIRECTV, 6–3, Justice Breyer; American Express, decided 5–3, Justice Kennedy in the majority; the Nielsen case, 5–3, Kennedy in the majority; the Gilmer case, 6–2. It is just inaccurate. We are getting so much inaccurate information here. I will put my stats up against anybody's. I am not relying on the U.S. Chamber of Commerce, although I think they have done a great job in this area.

Back to your question, let's not take away the freedom of contract. People have a right to sit down and negotiate agreements. They cannot negotiate illegal agreements, and they cannot force people to give up rights. It is just inaccurate to say that you don't have a right to take your case to the EEOC, the NLRB. I dispute the Congressman's position that those agencies don't care about people that file charges. They do. They do a much better job in many cases than the courts, frankly.

So, we need to preserve the ability of people to work out disputes without being forced into a morass of discovery, expensive litigation, and all the like.

Mr. STEUBE. Yeah. Here in Florida, we haven't had litigation in trials due to COVID for over a year. They are setting trial dates right now in my district that are in 2022 and 2023 because litigation has been suspended in court, and trials have been suspended in court due to COVID. So, to say that you can quickly get into court and litigate those cases, especially with what is going on with COVID in our country right now, is also not factually accurate.

Could you give us, Mr. King, a sense of the pros and cons of a typical arbitration compared to a typical lawsuit from the standpoint of the average American so they can understand the differences?

Mr. KING. Certainly. Lower filing fees if no filing fee to file arbitration. Filing fees to get in court, expensive retainer agreements even to retain counsel. So, just the entry in the system is much higher in the judicial system. Second, speed to get to trial. As you have noted, in my written testimony on page 4, I note the overwhelming burden on our Federal courts, let alone COVID–19, as you point out. So, you get to a hearing much quicker. It is inaccurate, as the professor noted, to say that there is no discovery. Just the opposite. The American Arbitration Association rules permit discovery, but you don't get bogged down in these motion fights.

If you want to see a waste of time and money, look at some of the discovery fights—and I am sure you are aware of this—that go

on in courts. So, you get through discovery quicker. You get to a hearing quicker, and you get to the judgment quicker, and you do better. The Consumer Benefit Protection Board clearly showed that class actions are a sham, that the average amount of recovery was minuscule, $32 in the 2015 report, and only 13 percent of class action participants even got a payout.

In arbitration, as the other Congressman said in his practice in this area, arbitrators tend to split the middle. They are much more friendly, frankly, to the claimant. So, the claimant does better, but by and large, it is a system they can participate in. They don't need a lawyer. They don't need to hire expensive counsel, and we ought to be talking about ADRs.

I am, again, surprised that none of the other Witnesses are even recognizing the advances that are being made outside of the judicial system to solve cases. So, the Supreme Court and many, many other courts have recognized the attributes of arbitration. Final point I would make on publicity and public disclosure. California now requires all arbitration outcomes to be filed. Other states are moving in that direction. There is not secrecy here. There is efficiency, cost savings, and certainty of getting a result.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

I will now recognize the gentleman from New York, Mr. Jeffries, for 5 minutes.

Mr. JEFFRIES. I thank the distinguished Chair for recognizing me, as well as for your leadership in this very important area.

Mr. King just made an observation about individual litigants in an arbitration hearing not needing a lawyer. That seems to me to be laughable. If you are up against a Fortune 500 company, a Fortune 1,000 company, a mega-corporation who will be lawyered up to the T, how can an individual litigant in an arbitration context even expect justice without an advocate on their behalf?

Professor Gilles, is it fair to say that, in many instances, these arbitration clauses, which are buried in take-it-or-leave-it contracts, are akin to what we might refer to in the law as contracts of adhesion?

Ms. GILLES. Yes, they are. This is forced arbitration. It is tucked into the fine print. The last Congressman said, it is a contract, but I think that is a fiction. Standard form contracts are not consensual. When I need to get the newest version of iTunes and I get a pop-up on my screen that says, "Do you agree to these terms and conditions," and the terms and conditions include an arbitration clause, it is really complex. I click "accept" because I want that new version of iTunes.

To call that consent, I think that is what is laughable, frankly. That is a fiction. It is a convenient legal fiction for big business, but when it harms consumers and employees, I think we really have to step back and be clear that this is no longer consent.

Mr. JEFFRIES. I think Mr. Weiss spoke to this in terms of your experiences, and so, Mr. Weiss, do you feel as though you had a choice in terms of your small business and the online platform that you were utilizing as it relates to declining to participate because of an objection that you had to being compelled to resolve disputes in arbitration.

Mr. WEISS. Thank you, Congressman, for the question. No, the answer is clearly not. I had no choice as I described in my testimony. If I wanted to sell on Amazon, which any e-commerce company has to be viable with the amount of control that Amazon has over the e-commerce space, I only had one choice: To accept or to go out of business.

I also wanted to speak for a moment in terms of what you allude to in terms of going into an arbitration without an attorney. I can tell you in my experience, Amazon came with four—five very seasoned attorneys practicing 20 or 30 years, senior partners at one of the largest law firms in Seattle. There would have been absolutely no chance that I had if I had been representing myself without an attorney.

Mr. JEFFRIES. I thank you.

Mr. King, I presume that you believe, as I believe you indicated in your opening statement, that women have a right not to be sexually harassed in the workplace, correct?

Mr. JOHNSON of Georgia. Mr. King, put your microphone on, sir.

Mr. KING. Pardon me, Mr. Chair. To even suggest that those proponents of pre-dispute arbitration procedures condone any type of that activity is repugnant to me. I certainly don't condone that activity, period.

Mr. JEFFRIES. You may not have heard my question. I am not sure if your audio was also not working. I said I presume you believe that women have a right not to be harassed in the workplace, and I also presume that you believe that people of color have a right not to be discriminated against.

Part of the concern, as I understand it, Ms. Carlson, is that these provisions actually foster a toxic culture where this type of activity is buried underneath the sand as opposed to being addressed in a more compelling, comprehensive, and public way, which is why it does facilitate the continuation of this type of aberrant behavior.

Ms. Carlson, can you speak to that particular concern that I believe many advocates of this legislation have?

Ms. CARLSON. Congressman, thank you so much for the question. One hundred percent correct because other women don't know that it is happening to other people because of the secrecy. I would also just like to rebut what Mr. King said, apparently, he knows personally about my particular arbitration contract with FOX News, but I would like to read from that to prove the point about confidentiality.

It says right in the agreement, such arbitration, all filings, evidence of testimony connected with the arbitration and all relevant allegations and events leading up to the arbitration shall be held in strict confidence. It also says that any papers filed will be filed under seal.

To that end, my story could not be public. So, I want to make sure that I State that, and that is what thousands of other people are facing as well—

Mr. JOHNSON of Georgia. The gentleman's time has expired, but the gentlelady will be allowed to wrap up her answer.

Ms. CARLSON. Thank you. Thank you, Congressman. I would just say this comes down to choice, and you don't hear anyone on the

other side describing that. Why do we have to force this? Why do we have to force this on people? Why don't we give them a choice?

Mr. JEFFRIES. Thank you very much. I appreciate your advocacy and your testimony and that of the other Witnesses.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

I now recognize the gentleman from North Carolina, Mr. Bishop, for 5 minutes.

Mr. BISHOP. Thank you, Mr. Chair. I have listened with interest to the hearing thus far, and I think one of the things that seems to be at play is that this is a question that requires some balance, and I think the panelists as a whole—I am not sure we are getting all the perspectives that are at hand. Let me explore just a little bit.

Mr. Weiss, I am going to pick on you just a little bit you, sir. By the way, there is no love lost by me for your nemesis Amazon. It is operated by one of the most generous far-left donors in politics, but—and I celebrate, sir, your success in creating a business. I pulled up your website, though, and you have got terms and conditions there. They don't contain an arbitration clause, but they do have provisions—there is a provision that forum selection clause that would require somebody using your site to bring their lawsuit in a Massachusetts Federal or State court. There is a contractual limitations period requiring them to bring their lawsuit within a year. You got disclaimers of warranties to limit your liability.

You are not trying to abuse consumers in having those sorts of provisions in your terms and conditions, are you, sir?

Mr. WEISS. No, of course, not.

Mr. BISHOP. I think, if you were susceptible to being sued in State or Federal Court in 50 States, would that make it harder for you to be able to survive as a startup business building your enterprise?

Mr. WEISS. Look, I am not an attorney. So, I am not exactly sure how it would play out. So, I don't exactly know how to answer that question, but to your point, we are set up to do business and try to service our consumers and try to offer the best service, and hopefully we never have to be sued. We don't have arbitration. We haven't been sued a lot. We have been sued, not by consumers, primarily collections, partners stuff like that. We are clearly in business to try to offer a service and a product for our consumers.

Mr. BISHOP. Mr. Weiss, obviously, you are building something that people value. I have to pick on you because the point is, many times if you are a consumer to Amazon, but you are a seller to others. So, the utility of some of these things can get lost where the people are focusing on highly emotional, just on one side. So, as I said, sir, I don't mean to pick on you because I do, I think we need to celebrate people who are building businesses that service all.

I think it is important for us to reflect on the fact that—take the nursing home example Mr. Deutch used. How many people would be harmed if there were no nursing home because the risk environment was such that the business couldn't exist? So, there is great utility—arbitration agreements—I have been litigating with arbitration agreements for 30 years, and I have seen some situations in which I didn't think it was great, but I think you have to proceed with great caution when you are throwing all this to the wind.

There is a risk of throwing the baby out with the bath water. I wondered, Mr. King, just on that perspective, I ask you if you have any comment on the point I just made that you would like to offer in my time remaining.

Mr. KING. Absolutely. The disruption factor for millions of individuals that do use arbitration, businesses that use them, would be tremendous, particularly if the FAIR Act is construed to be retroactive.

I just want to share a figure. As of September 30th, there were more than 650,000 cases pending in our Federal district courts. Now, the nursing home example brought up earlier. The presumption is, if you took those cases to arbitration, the claimants would be treated unfairly. How do you know that? You don't know that. In fact, they may have received even more money. See, that is the presumption we are dealing with here.

People presume that they are not going to get a fair deal in arbitration, yet they have no experience with it, or they make assumptions that are not supported by facts. Claimants do better in arbitration. So, I would suggest to you in the arbitration setting for nursing homes or other situations, arbitration can and will work.

We can take secrecy out of it. I have already addressed that. That is a misnomer. That is a red herring. Secrecy and mandatory arbitration are not one in the same.

Ms. Carlson's situation is a perfect example. Yes, I know of your clause. I read it carefully. I know a lot about your case. The fact is you were able, notwithstanding that case, to publicize your situation throughout the world.

In this day and age, we live in and the platform economy and the ability to instantly communicate, people know if they are being treated fairly or not. So, to suggest that you were muzzled, of course, is incorrect. We know that is not the facts.

We need to get people involved in litigating disputes in a way that makes sense, is less costly, more efficient, and more expeditious. Alternative dispute resolution procedures and arbitration are the way to go.

Mr. JOHNSON of Georgia. The gentleman's time has expired. The gentleman's time has expired.

For the record, the FAIR Act applies only to forced predispute resolutions as opposed to after the dispute arises.

With that, I will now recognize the gentlelady from Washington, Ms. Jayapal, for 5 minutes.

Ms. JAYAPAL. Thank you, Mr. Chair.

I just would like to remind everyone who may be listening out there about what forced arbitration really is. When was the last time you read the fine print of the paperwork required to buy a cell phone, to rent a car, or to accept a job? For most people, the answer is probably never, not because of negligence or irresponsibility as Mr. Steube suggested, but because people don't know that these forced arbitration clauses are there, and it would take hundreds of hours for anyone to actually read and understand these provisions on top of the fact that they are in these agreements that people desperately need like job agreements.

So, these provisions that powerful corporations have tucked into the fine print have forced workers, consumers, and small busi-

nesses to waive their constitutional right to seek justice in a court of law and allowed for the stealing of $12.6 billion from workers in 2019.

As Ms. Carlson has so powerfully pointed out, these forced arbitration clauses allow women who face sexual harassment to have few alternatives to fight back. Thank you, Ms. Carlson, for your work. I was proud to be a lead cosponsor of the bill in both of the last two Congresses.

Meanwhile, the regulatory agencies are so influenced by the corporations they are supposed to regulate that they haven't exercised their authority to fix the situation, contributing to the worst levels of economic and political inequality in over a century.

Mr. Weiss, in your testimony, you describe how your business was forced to spend thousands of dollars, tens of thousands of dollars in a costly and lengthy arbitration proceeding after Amazon charged you significantly more for shipping than your agreement with the company allowed. Forced to go through arbitration, you recovered very little of what you lost. How difficult is it for anyone, much less someone with even less resources than you, to be successful in forced arbitration against a giant company like Amazon?

Mr. WEISS. Thank you, Congresswoman.

The answer is it is probably almost impossible because it was very difficult for us, with the limited resources that we do have, to go up against a very large organization with a very powerful group of lawyers that was very successful in being very litigious at every stage of the game.

So, from the very beginning, arguing about at which table we should we sit, everything caused a hearing. Should we sit in Florida? Should we sit in Washington? Then—and it just continued to go on and on and on in what was a very, very simple dispute—we agreed to A, you charged me B, and you owe me the difference.

It dragged out for over 16 months and tens of thousands of dollars in costs, not even costs—when I said over $50,000, that was just the arbitration cost. The Triple A charges you based on a sliding scale of the value of your damage. So, if your damage is 100,000, you pay a lot more than if your damage is 50,000. It is almost like you have another partnership. The arbitration is a partner in your claim. So, I can't even imagine how somebody without the resources or a much lower amount of resources than we have, how they can even begin the process.

Ms. JAYAPAL. Thank you, Mr. Weiss.

Ms. Gilles, as one of the foremost experts on class action litigation, how does Mr. Weiss's experience compare to what you see across the country? How easy would you say it is for the average employee or consumer or small business to file a lawsuit by themselves against a powerful corporation when their rights are infringed?

Ms. GILLES. I think Mr. Weiss is exactly right. It is difficult. Even if we set aside forced arbitration, there are problems with accessing justice in our ordinary civil justice system. Maybe Mr. King and I can agree on this, that the court system is not perfect, but it is our system that we have used for a couple of centuries, so I am confused by why other Members of Congress want to reform this other system called private arbitration.

We should be fixing the system we have that taxpayers actually subsidize and make it easier for people, ordinary people, to access that system. I think there are lots of ways we can do that, but I am not sure why we should put energy into this big corporate arbitration procedure when we have a system of our own that is public and available and reformable. We can fix it.

Ms. JAYAPAL. Thank you. A 2020 study by the national employment law project projects that by 2024, 80 percent of all private sector nonunion employees will be subject to forced arbitration requirements like the ones Mr. Weiss was subject to.

Mr. JOHNSON of Georgia. The gentlelady's time is expired.

Ms. JAYAPAL. Thank you, Mr. Chair. I think this is a very important issue that we are taking on.

I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady.

We will next hear from the gentleman from Indiana—excuse me—the gentlelady from Indiana, Congresswoman Spartz, for 5 minutes.

Ms. SPARTZ. Thank you so much. Thank you, Mr. Chair. I think it is interesting because I have a little bit different explanation and definition of forced arbitration. I personally CPA so I am not an attorney, but I have been a legislator for some time, and I get very surprised to see when report arbitration in our law that forced their stakeholders to go to arbitration [inaudible] court system, and a great example is a recent surprise bill in law where we forced arbitration on stakeholders, and I do not like it, and I have seen it in our State code. I generally look at arbitration as being [inaudible] contract and a very important freedom if we want to have a free society and have free markets, but I have to agree with some people here that there is some monopoly power. I have been involved in Fortune 500 laws, and I can tell, Amazons, Googles, and Facebooks have a lot of power.

So, we need to make sure that the contracts are transparent. So, I really feel that the court system generally does not enforce on fair clauses, but is there assumption in the law—and I would like to ask Mr. King since he is a professional and a practioner—is there assumption in the Federal Arbitration Act that needs to be improved to make sure that unreasonable, unfair, and biased clauses are not enforceable and make sure that we can improve transparency versus eliminating arbitration because if we think that this big monopoly, oligopolies have less power in the court system, we are very naive because the same attorneys are going to be there, and it is a complicated and expensive system. It is going to hurt the little guy at the end, and someone like the gentleman was talking dealing with Amazon, he will have even less ability to deal with them, but as a small business owner, it wouldn't to actually deal in the court system, too. So, is there anything that could be improved in the act, Mr. King?

Mr. KING. Good question. Right now, the law is quite clear, I would submit. If you are forced into an agreement by adhesion, coercion, subterfuge, deceit, fraud, those agreements can be set aside and are set aside. I am not sure we need to amend the law, but that is certainly something we can look at. I also want to just build on your question. We keep hearing about this fine print and people

being subject to things they have not read or don't understand. How many people in this discussion we are having today could point to anyone that has read the Federal Rules of Civil Procedures and all the procedural rules at the State level and the courts?

You talk about legalese and difficulty in understanding the complexity of arbitration agreements. There are far more in the Federal courts and the State courts than you ever see in arbitration agreements. I don't understand Mr. Weiss' situation. Is he suggesting he would have been better off to go with the court? Does he think, as you just mentioned, that the company would not come with good legal talent to a court? Does he think that somehow, he is going to be advantaged in a court? I would suggest just the opposite. He is going to get a much better situation with an arbitrator.

The final thing I would like to say about the Amazon case just to make sure we have a level-set discussion here. I was told early on in my legal career by one of my best law professors: If you only hear one side of the case, you are not doing justice to the discussion.

I am sure there is another side to this discussion that we haven't heard, but let's not fool ourselves. You are absolutely right. We need to look at alternatives, Congresswoman. We need to look at ways of improving the system. Let's not eliminate it. If we put 80 million people in our court systems to try to have a day in court with jury trials or even judge trials, it is not going to work. So, let's be realistic in this discussion.

Ms. SPARTZ. Thank you. Maybe if, Professor Gilles, is there something from your perspective you can say, to improve transparency and so we don't have a distortion of—if you can comment on that.

Ms. GILLES. I am sorry, Congresswoman. Can you repeat the question? You were fading in and out.

Ms. SPARTZ. Sorry. I need to have bad internet connection. I am just saying, do you believe in the Federal Arbitration Act? Is there something need to be improved to make sure that unfair clauses are not enforceable and there is no distortion of power from large monopolies in this clause, or you think it is addressed in that act?

Ms. GILLES. No. I think we can fix arbitration and the only way I can see to do it to make it fair is to offer consumers and employees the right to go to arbitration after a dispute has arisen. Providing choice post-dispute is voluntary. At that point, it is not forced upon us. We are reading the print, and we can make an educated decision about whether to go into arbitration—which, if Mr. King is right; it is awesome, and we should go to an arbitration—or to go to court and be represented in a class action. It might also provide individuals with the ability to negotiate for better arbitral procedures because they are choosing to go to arbitration.

Mr. JOHNSON of Georgia. The gentlelady's time has expired.

Ms. GILLES. Thank you.

Ms. SPARTZ. Thank you.

Mr. JOHNSON of Georgia. With that, I would like to now recognize the gentlelady from Florida, Congresswoman Demings, for 5 minutes.

Ms. DEMINGS. Thank you so much, Mr. Chair. Let me say you are doing an exceptional job.

As someone who has worked hard a large portion of my life to take care of people and to protect people, I struggle when I hear some of my colleagues push so hard to put the interests of corporations over the interests of people who work hard to make those corporations great, especially when we know, just listening to this hearing but others as well, that many of those corporations are not operating in good faith.

As a former police chief, I have participated in numerous arbitrations, but the decision to go to arbitration was solely that of the employees in consultation in that case with their union representative. I think when decisions in arbitrations are final and binding, it does make a difference when they are voluntary.

Professor Gilles, thank you so much for your testimony today, and I would just like to ask you, does a person forced into arbitration have a right to appeal an arbitrator's decision when it is incorrect as a matter of law or fact?

Ms. GILLES. There are very limited grounds for challenging an arbitral decision under section 10 of the Federal Arbitration Act, but you have to show that the arbitrator acted in, quote, "manifest disregard of the law." I am sure as you can see from the way I describe it, that it is a really high hurdle. Given that arbitrators don't even often tell us what they are basing their decisions on, they don't write written decisions, they are not paid to write, precedential decisions, it can be almost impossible to meet that standard. So, I think this is not a real appellate right.

Ms. DEMINGS. Thank you so much, Dr. Gilles. It is interesting that I heard earlier that many times in arbitration, you get a fairer deal and so that just makes me wonder why the arbitration has to be forced if you can 9 times out of 10 get a fair deal.

Ms. Carlson, I want to thank you so much for your very powerful testimony and thank you for being with us today. In your view, would requiring that arbitration as truly voluntary address some of the concerns that you have addressed with us today?

Ms. CARLSON. I do think that this comes down to, choice Congresswoman, so thank you so much for the question. Let's just be realistic. Companies don't want you to know their dirty laundry so that is why they force arbitration on to women especially with sexual harassment. So, if it was a choice, that would be a totally different power balance, you know.

Here you have the person who is forcing arbitration and here you have the woman down here without a voice. I would also just like to respond to Mr. King, again, that, yes, I had the platform and the resources to make my case public, but I wasn't forced into arbitration, Mr. King, unless the courts wanted to do something incredibly provocative 4 and a half years ago. It is also interesting, Congresswoman Demings, that Mr. King does not bring up the statistics with regard to sexual harassment victims who go into arbitration, because, number one, we have no way of knowing how many thousands of women have been forced into arbitration and silenced for forever. We do know that the stats show that employees only win less than 3 percent of the time. That does not sound to me like it is fair.

Ms. DEMINGS. Ms. Carlson, I know that this Committee, the Full Committee, perhaps, does not want to hear this, but I want to, and

I think it is very important as a Nation we come so far as it pertains to women's rights and fighting against discriminatory practices, but we are nowhere near where we need to be. Please tell us, again, so we can have a clear understanding, how does the arbitration process silence sexual assault and harassment survivors? I want to hear it, again.

Ms. CARLSON. Congresswoman, thank you. The minute that you go to HR, you have an arbitration clause, they go: Whew. No one is going to know about this. Immediately they go into action. They put you into the secret chamber, and you are all alone, and you have no way of knowing that there is anyone else at work going through what you are going through.

So, what ends up happening is, you get fired and the perpetrator gets to stay on the job, and the woman never works again. Especially during these times when we have lost a million women to the workforce during COVID and we know that retaining women increases the bottom line of companies, that is why I am asking this Committee to take this seriously.

Ms. DEMINGS. Ms. Carlson, thank you so much, and we know that any company that would practice that is not operating in good faith.

Mr. Chair, I yield back.

Thank you so much.

Mr. JOHNSON of Georgia. Thank you, gentlelady.

We will next hear from the gentleman from Oregon Mr. Bentz, for 5 minutes.

Mr. BENTZ. As a practicing lawyer up until just a couple of months ago for well over 30 years, I can share with you the many, many, many times I have sadly told prospective clients that we could not take their case because the amount involved was simply too little to justify the amount they would have to spend. Over the 30-plus years that I have practiced, I watch the cost of litigation go through the roof, and this is why we see so few cases actually making their way into court, not to mention the fact that the level of competence required to try cases has dramatically increased, and you better know what you are doing if you are going to go into court.

Having said that, we have heard a lot of really interesting things today. I am much more knowledgeable now about arbitration than I was before, even though, I served as an arbitrator. I would like to turn the balance of my time over to Mr. King to let him address issues that perhaps he thinks could use a little more elaboration, and in particular, I would like Mr. King to address this concept of why or why not we should wait until after a dispute has arisen before making a choice to arbitrate or not.

So, thank you, Mr. King, if you could take it away.

Mr. KING. Thank you very much, Congressman.

Post-dispute arbitration doesn't work. It is a nonstarter. I know at first glance, it may sound attractive, but once the dispute has developed and once the parties are in adversarial positions, trying to put the pieces back together again just doesn't work. So, it sounds good, but it doesn't work. That has been proven time and time, again.

You need to have some orderly way that is agreed upon upfront. You can't change the game. You can't change the rules as the dispute is evolving and going to some type of contested action.

Second, filing fees. There is a lot of misinformation so far being shared, unfortunately, with the Subcommittee.

The American Arbitration Association limits filing fees for consumers and employees to $300 or $200 or even lower. Many company arbitration systems pay for the filing fee all together and, also, pay for the attorneys' fees if an attorney is needed by the claimant. In fact, in the professor's testimony, on one hand she criticizes companies and the cost of getting into arbitration, but then she shows how the arbitration system can work where there is a lot of arbitrations filed and companies are having to pay these fees. You can't have it both ways.

So that is a misnomer. There is a very low entry level financially to get into arbitration. As far as limited opportunity for appeal, that is one area that I can agree with the professor on, but it works both ways. If the employer doesn't do well in arbitration, isn't pleased with results, it also has very limited opportunity to appeal.

As you know as an arbitrator, the arbitrator has tremendous authority to set an award that generally will not be set aside. The win rate issue here really needs to go back into the discussion. We don't have to have litigation. We don't have to have jury trials. We don't have to have mandated arbitration necessarily. Why not talk again—and nobody seems to want to talk about this—about alternative dispute resolution. As a former arbitrator, I am sure you probably also used mediation, and there are other ways that consumers and employees can successfully resolve issues including in the union environment is a perfect example.

People can sit down and work out their differences, and conflicts can be resolved. Putting everybody into the courts, let alone a class action system, isn't going to work, and no one seems to want to address that. I just shared a stat with you. I can share stat after stat that are verifiable, that our Nation's courts are overburdened. You know this from your practice, I am sure.

Filing a complaint is the first step in a lengthy, perhaps multiyear process. To suggest that there is any kind of swift justice is just not accurate. As I say in my testimony, justice delayed or justice not available is certainly justice denied.

Arbitration can work. It has worked, and it will work. To paint it as some type of system that promotes discrimination against women is absolutely dead wrong. I really take offense at that. Somehow to suggest that employers in this country that use mandated arbitration condone any type of sexual harassment, hostile work environment situation, or unfair treatment of consumers, is absolutely unfair. That is not where we are.

In this society we live in today, if an employer mistreats an employee or a consumer, word gets out on the internet instantly. Companies are concerned about their reputation. They are doing what is right. We are very involved in diversity initiatives, inclusion initiatives, so, let's not paint the picture in an incorrect way here.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

I will now recognize the gentlelady from Pennsylvania, Congresswoman Scanlon, for 5 minutes.

Ms. SCANLON. Thank you, Representative Johnson, and thank you for your introduction of the FAIR Act, a bill I have cosponsored and enthusiastically support. I am really happy that we are dealing with the subject of ending forced arbitration because it is, particularly in this financial climate, it is an important issue for my constituents.

Predispute arbitration agreements are now in all our lives, and many of us don't even know of every instance in which we have agreed to them. A 2015 study by the Consumer Financial Protection Bureau found that 53 percent of credit card issuers, 88 percent of mobile wireless providers, and 99 percent of payday lenders include forced arbitration in their contracts with consumers.

American markets are so saturated with these unfair contracting terms that, in many instances, consumers have limited, if any, other options for fairly contracted products or proper judicial recourse if something goes awry. In a world built increasingly around mobile phones and credit, giving up your fundamental right to trial by jury, is all but mandatory to participate in our modern economy.

My colleague, Ms. Jayapal, highlighted the fact that many of these contractual clauses are contained in fine print, but what really is a problem to me is the fact that there is just no choice. As a lawyer, we call it a contract of adhesion, but in plain English, basically, the company has you over a barrel.

So, I am particularly concerned about the use of forced arbitration agreements in private student loan contracts. That same Consumer Finance Protection Bureau study that I mentioned found that 86 percent of the largest student lenders in the private student loan market employ the use of predispute arbitration clauses in their contracting.

So, American borrowers have over $1.7 trillion in student debt at this point. My home State, Pennsylvania, has one of the highest per capita debt loads in the U.S., an average of $36,000 of debt for our student borrowers. So, we are left with a system in which students who need private loans are forced to decide between waiving their rights or getting a degree.

Now, the Obama Administration and the CFPB issued a set of rules banning the use of forced arbitration, including in private student loan contracts, but the Trump Administration and the then-Republican majority in Congress repealed those protections in 2017.

Although I expect the Biden Administration to lead a shift back towards protecting students, we need to legislate permanent protections for those borrowers, and that is why this morning I reintroduced our Justice for Student Borrowers Act, which would codify the ban on predispute arbitration clauses and predispute joint action waivers in private student loans. I would like to thank my colleagues, many of whom are on this Committee for joining me in introducing this legislation.

So, Ms. Gilles, you talked about the ubiquitous of forced arbitration clauses in private student loans in your testimony. While we know that many private student lenders are failing, if not bilking, their borrowers, is it wise to allow those lenders to shield liability with forced arbitration clauses?

Ms. GILLES. No, it is not, and I want to thank you for reintroducing—or introducing the Justice for Student Borrowers Act. This is incredibly important, in large part because it has effects that are disproportionately felt among low-income and minority communities who are trying to improve their lives by, by getting these degrees, by moving up, and then saddled with terms that are often unfair. When they try to dispute those terms, try to get relief, they are shunted off into arbitration.

I just want to spend a second going back to something Mr. King said when asked about why post-dispute arbitration is not workable. I think he sort of punted and said, "Well, it just doesn't work." Well, there is no reason to think it doesn't work. If arbitration is as great as people like Mr. King say it is, then maybe some employees, consumers, student borrowers would choose it after a dispute arises. I don't think it is fair to simply say that it won't work and the only way to make arbitration work is to force it on an unknowing public.

I will just continue to say that we are indeed forcing, companies are forcing these provisions on the public. So, Congresswoman, thank you again for your leadership on this issue. I think it is really important.

Mr. JOHNSON of Georgia. The gentlelady's time has expired.

With that, we will now hear from the gentlelady from Minnesota, Ms. Fischbach, for 5 minutes.

Ms. FISCHBACH. Mr. Chair, thank you very much. I will yield my time to Congressman Issa for as much time as he may use.

Mr. ISSA. I thank the gentlelady. Having worked with Ms. Carlson for so long and watching what happened, I think all of us saw a terrible series of events that depicts a lot of what goes on behind closed doors, not just at her employer, but employers all over the country. Certainly, the so-called casting couch in Hollywood is famous for sexual harassment that went unreported for years.

So, Ms. Carlson, let me ask a couple of questions in light of that. I am not trying to be harsh on you, but I just want to frame your situation versus so many people that find themselves in a similar situation. In your particular case, you had a contract with your employer, correct?

Ms. CARLSON. Yes, I did.

Mr. ISSA. You had renewed that contract at least once, right?

Ms. CARLSON. Yes.

Mr. ISSA. You were represented by attorneys when you negotiated that contract?

Ms. CARLSON. An agent, yes.

Mr. ISSA. Okay. So, you were a sophisticated negotiator, but you still found yourself with provisions that limited your ability to seek remedies when you were sexually harassed?

Ms. CARLSON. Exactly, and even with a Stanford and Oxford education, I did not understand the ramifications of arbitration when I signed the last contract when they put the clause in there.

Mr. ISSA. Well, having gone to Kent State, I am not going to badmouth Stanford. I am just not going to do it here.

Let's go through a couple of things that are related to your case, but I think it may be part of the solution that we all need to look at in Congress.

In your particular case, you made a decision rather than to sue your employer where you did have the nondisclosure and so on, you sued the individual who harassed you and attempted to get your day in court. Is that correct?

Ms. CARLSON. Correct, because there happened to be a law in the books in that particular State that allowed my attorneys to do that. That law does not exist anywhere else.

Mr. ISSA. So, to a great extent, since sexual harassment is by definition primarily an Act of somebody to somebody else, although it can include a company, if you will, culture, but the individual acts or individuals, if Congress viewed that as a right, a right to sue an individual that would not be and could not be placed in your employment contract with a company, that would have put you into a situation on a national basis where you would have had rights to go after the individual for their individual acts.

Ms. CARLSON. Potentially.

Mr. ISSA. So, as we are looking at remedies, is that a remedy that you would be maybe think a little bit about and opine on it at a later date? Because I would like your input because I do think that there is such a difference between what companies try to protect themselves from, which is often class action suits, versus both the secrecy that they are not entitled to and the individual acts that offer and protect. I will note that it is often protected at EPA, at OSHA, at government agencies because it's not just private corporations, but our Federal government and State governments often have rampant wrongdoing by individuals who are sheltered?

Ms. CARLSON. Yes, but I would just want to point out that this is pervasive across the board from every socio-economic class in every profession, which I didn't even know about until I filed my case. That is reason I didn't know about this is, because it is all in secrecy. I mean, that is why you don't know about it.

Mr. ISSA. Again—

Ms. CARLSON. I would also say that the companies have a huge responsibility to make sure that they are not allowing you this behavior to continue. As long as it can continue to go to secrecy, they are allowing it to be systemic. So, it is much more than just the individual.

Mr. ISSA. I want to join you in trying to stop the secrecy. I think we have certainly had hearings in the past on priests in the Catholic Church. I certainly think if we are going to go after individual priests, we need to go after individuals wherever they are.

One last question for Mr. King, what is the, if you will, the history or the quantity of people who do have a choice to opt for arbitration, choosing to do so, both plaintiffs and defendants, both employers and employees, when that is an option? Is it chosen with a great deal of regularity and also mediation? Would you opine on the good of those programs?

Mr. JOHNSON of Georgia. The gentleman's time has expired, but I will allow Mr. King to give a short answer to that question.

Mr. KING. There is a very heavy use of arbitration, mediation for represented employees. Under union contracts, it is pervasive. The same is true for nonunion employee situations. The usage factor has gone up considerably in the consumer area.

Mr. ISSA. Thank you. I thank the gentlelady from Minnesota for yielding.

Mr. JOHNSON of Georgia. Thank you. I now recognize the gentlelady from Georgia, Ms. McBath, for 5 minutes.

Ms. MCBATH. Thank you so much, Mr. Chair. Thank you to each of you that are here today. I want to start by being really crystal clear in what we are talking about today.

The FAIR Act is about ending forced arbitration. My office is still being contacted by groups that are spreading so much misinformation. I want all my constituents, if they are listening today, the employees, the small business owners, and consumers that I represent, I want you to know this. Passing the FAIR Act is about making sure that you have a choice. It is about making sure our courthouse doors remain open to all as a place to seek justice.

So, nothing in the FAIR Act will prevent you from seeking some other dispute resolution process, including arbitration, if you so choose that. It is critical that no one is forced out of court before their case, their claim, or their mistreatment even arises.

So, now turning to you, Mr. Weiss, you built your business from the ground up, as you told us. In your written testimony, you said that before Amazon would let you sell anything on its marketplace, it forced you to sign what it calls a business seller agreement. You added that you had no ability to negotiate the terms of that agreement and no ability to sell on Amazon without signing that agreement. Can you explain—and you did kind of touch on this a little bit earlier, that you felt you were forced into signing the agreement, that you felt you didn't have really any leverage to reject the forced arbitration section of the contract. So, what do you think would have happened if in your outcome, if you agreed to accept all the terms in Amazon seller agreement, except for the forced arbitration provision?

Mr. WEISS. Thank you, Congresswoman.

There wasn't even such an option. It is a take it all or leave it all. So, I didn't even have an option to take any portion of the agreement out to be able to sell on Amazon.

Ms. MCBATH. Thank you. Also, in your written testimony you said that forced arbitration puts third-party sellers in a lose-lose situation where they are left with a dismal choice of doing nothing in response to Amazon's wrongful actions or being subjected to the issues. How does it feel to be faced with a choice of doing nothing or continuing to be subject to the problems that you were facing? What effect does your inability to obtain any meaningful relief have on your business and your employees?

Mr. WEISS. Not a very good effect. As I also mentioned in my testimony, there are many claims that we have experienced as a seller and I have discussed with other sellers, we have experienced very similar issues, but because of the financial component, we just had to accept that outcome without even having a way to rectify it because the cost of pursuing arbitration to right that wrong was going to be so much more expensive. It doesn't make financial sense. So, you just have to drop it and just live with all the issues that you have to deal with that are completely unfair and unjust.

Ms. MCBATH. I sense that grave unfairness that you are speaking about. So, do you agree that the FAIR Act is necessary to stop

the dominant companies, like Amazon, from facilitating and covering up any mistreatment of individuals in small businesses who are dependent on these companies for their very survival?

Mr. WEISS. Absolutely.

Ms. MCBATH. Well, thank you so much, and I yield back the balance of my time.

Mr. JOHNSON of Georgia. The gentlelady yields back.

At this time, I will now recognize the gentleman from Wisconsin, Mr. Fitzgerald, for 5 minutes.

Mr. FITZGERALD. Mr. Chair, I do not have any questions at this time.

Mr. JOHNSON of Georgia. Thank you. At this time, I would recognize the gentleman from Utah, Mr. Owens, for 5 minutes. Mr. Owens? Going once? Going twice?

So, at this time, I will now yield to the distinguished Ranking Member of the Subcommittee, Mr. Buck, for 5 minutes.

Mr. BUCK. Thank you, Mr. Chair.

Ms. Carlson, I want to visit with you about something, and I think that many of us agree that the area of sexual harassment is absolutely disgusting in terms of the scope and nature of it. Yet, I find this particular legislation to be sort of a one-size-fits-all. It applies to a contract with a credit card company, a contract with a wireless carrier. Yet, we have some really serious situations like sexual harassment that may be pulled out of—and I think the bill that you are actually advocating for and the bill that Ms. Stefanik is advocating for in the Republican Conference is a more limited area of this particular arbitration issue that we are trying to address.

I think many of us would—and I want to ask Mr. King next to comment—but I think many of us are interested in finding discrete areas that are so important that we should ban arbitration clauses, do it in a fair way to the employer and the employee, but at the same time not burden the courts and create additional costs for corporations and businesses in America that are sometimes unnecessary and would really increase costs for cell phones and other things. Would you agree with that generally?

Ms. CARLSON. Well, Congressman Buck, I appreciate your comments and being willing to have an open discussion about this because, as I said earlier, this isn't a political issue. When somebody decides to harass you, they don't ask you what party you are in first, they just do it because it is really about power. That is what I have been advocating so much to bring the parties together to try and solve this issue.

I would just say that the day that I found out what my arbitration clause meant was one of the darkest days of my life because my lawyers told me you don't have a case anymore. That was incredibly difficult to digest. I mean, if it hadn't been for their strategy to at least make my case public, I wouldn't be having this conversation right now. We arguably wouldn't be having this moment right now.

So, I want to be clear that I would have still been forced into arbitration. My case would have been not settled.

So, I really believe that we have no way of knowing how many women this has affected and how many have been forced out of the

workplace. That is what is so concerning to me is that all the thousands of women who reached out to me, they had one common theme, which was they were silenced.

Mr. BUCK. I don't mean to interrupt you, but I want to make sure we talk about one other thing that I think is really important here. I find that the secrecy component of your testimony to be very disturbing. I think that when there is a predator in the workplace, that person should be outed, the company should be responsible and make sure that whatever line of business it is, that doesn't happen again. Avoiding secrecy, making sure that there is publicity one way of dealing with predators.

The arbitration area is a little bit different than the secrecy area. I just want to make sure you recognize and are willing to tell people who are listening today that there is a difference between the secrecy and the arbitration. The secrecy is really what is so offensive to me. From your testimony—I am pointing to you—the arbitration we have got to find ways of dealing with. I think we can agree that there is no place for secrecy agreements when it comes to very, very serious conduct, like sexual harassment.

Ms. CARLSON. Yes. Secrecy is the central element. However, as I just read from my contract, that was part of the arbitration. There are other women that I know of right now that are in arbitration, which you never, ever hear—it is like they become invisible because they are not allowed to tell their story. That is how this problem continues.

Mr. BUCK. I think they can be separated. I have run out of time. Thank you very much for your testimony.

I yield back.

Ms. CARLSON. Thank you.

Mr. JOHNSON of Georgia. The gentleman yields back. I recognize myself for 5 minutes.

Ms. Carlson, with the forced arbitration clause being buried in the fine print of your contract, would you have signed that contract if you had known that you were signing away your right to go to court for redress on your sexual harassment claim?

Ms. CARLSON. Never.

Mr. JOHNSON of Georgia. Mr. Weiss, you have testified that you were forced into your agreement because there was no alternative, no alternative platform, and it was a take-it-or-leave-it situation for you and that is why you ended up in arbitration. Is that correct? You need to unmute.

Mr. WEISS. Sorry about that. Yes, Congressman, that is correct.

Mr. JOHNSON of Georgia. Thank you.

Mr. King, you stated in response to the 3½ minutes that Mr. Bentz gave you, you stated that corporations pay for the aggrieved person's lawyer if they need one. You also stated that the corporation pays for the arbitrator. When the corporation is paying for the arbitrator and the attorney for the claimant, is that possibly why, in arbitration, only 3 percent of employees win their cases?

Mr. KING. Well, there are many reasons for the outcome. In court—

Mr. JOHNSON of Georgia. Well, could it be that there is a setup, and the employer has paid for the result that they want, and they get that result?

Mr. KING. Absolutely not. Absolutely not, Congressman.

Mr. JOHNSON of Georgia. Well, tell me this, Mr. King. What is so bad about allowing employees and consumers to choose whichever form of alternative dispute resolution, be it arbitration, be it mediation or litigation, why not leave it up to the parties to decide that, once the dispute arises, as opposed to burying the terms, a waiver of your constitutional right to a jury trial, burying that in the terms of an agreement on the front end? What is so wrong with giving people the right to do things fairly with knowledge of what they are doing?

Mr. KING. On the surface, that is a very appealing question. Mr. Chair, the fact of the matter is that they have those options today. In discrimination cases, they can file—

Mr. JOHNSON of Georgia. So, when they have signed a contract that waives their right to go to court and they are bound to arbitration, how could they get out of that once they have signed the contract?

Mr. KING. Well, it depends on the fact pattern, Mr. Chair. As I was starting to say, if there is a discrimination case, individuals can file with a State or Federal agency such as the EEOC. There is no gag order. There is no confidentiality clause that would prohibit that. I mean, they have options today.

The problem I am having with this conversation is, what is the alternative? Everybody on the panel, except for me, is saying arbitration doesn't work. Well, what is your alternative? Are you going to put everybody in the court system? No, that doesn't work. What I would respectfully suggest, is that perhaps we could have another hearing on judicial reform issues.

Mr. JOHNSON of Georgia. Why doesn't it work?

Why doesn't it work to go to an article III court created by the Framers of our Constitution as a means of protecting and preserving justice in this country? Why not go to court? What is wrong with that?

Mr. KING. Because you can't get to court, Mr. Chair, or you can't get there in an efficient way.

Mr. JOHNSON of Georgia. Well, I will tell you something, Mr. King, it has been 30 years, 1990, since Congress expanded the Federal court system and created new judgeships.

It has been 30 years, and you and I know that commerce has exploded; the global economy has expanded. There are more disputes, and the courts remain essentially with the same numbers that they had 30 years ago. Aren't you in favor of congressional action today that would expand the Federal judiciary and create more judgeships?

Mr. KING. Well, that is certainly an option—there are other options.

Mr. JOHNSON of Georgia. Would you support that?

Mr. KING. Alternative dispute resolution—

Mr. JOHNSON of Georgia. Would you support that, Mr. King?

Mr. KING. It depends on what else is in the package. I would want alternative dispute resolution procedures to be endorsed by this Committee and explored. I also would want Federal district court vacancies that are currently unfilled to be filled. I also would like to see a reformation of the discovery system that we have and

the Rules of Civil Procedure. There is a lot that can be done to reform our current judicial system, Mr. Chair. I think we can reach consensus on that. So, there are a number of areas. Te answer is not just to eliminate predispute arbitration. You are going down the wrong path.

Mr. JOHNSON of Georgia. All right. Thank you, Mr. King.

I want to thank all our Witnesses for their appearances and for their testimony today. I seek unanimous consent to add a number of letters and statements into the record from organizations in support of ending forced arbitration and passing the FAIR Act. Statements for the record fromValerie Haney;one from Tanuja Gupta;a statement from Remington Gregg, counsel for Public Citizen;a letter for the record from Leadership Conference on Civil and Human Rights;a statement for the record from Heidi Silton, President, Committee to Support Antitrust Laws;a statement for the record from Chrissie Carnell-Bixler;a letter for the record from Consumer Reports;and a plaintiff brief in the case of *Newton* v. *Hennessy Louis Vuitton*.

For the record, without objection, it is so ordered.

[The information follows:]

MR. JOHNSON OF GEORGIA FOR THE RECORD

Valerie Haney
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Statement for the Record
Submitted on February 9, 2021, to:

The House Subcommittee on
Antitrust, Commercial and Administrative Law

For the Hearing Entitled:

Justice Denied: Forced Arbitration and the Erosion of our Legal System

February 11, 2021

My name is Valerie Haney and I am a former Scientologist who was a victim of abuse and human trafficking while trapped within Scientology and after I was able to escape I have been continuously and systematically stalked, harassed and threatened at the direction of Scientology.

I decided it was time to seek justice and fight back. I retained counsel and have a current case filed against Scientology in Los Angeles, CA.

To provide some context, I was born to Scientologist parents in 1979. From 1985 until 1991, from ages 5 – 12, I lived at the Church of Scientology's Spiritual Headquarters, or "Flag Land Base" in Clearwater, Florida. I also attended "school" in Clearwater, Florida where I was instructed on Scientology's practices, rather than being provided with the minimum compulsory education required under law.

From a young age, I was told what I could and could not say publicly about Scientology, and was taught never to question Scientology's teachings and practices. I could not speak publicly about Scientology without a direct order from another high-ranking member in Scientology. I was told that I could never go to the police and/or any government agency, because they were the enemy of Scientology. I was also not permitted to meet or speak with a "wog" (civilian) attorney.

As a Scientologist, I was told and raised to believe that I only had rights that were afforded to me by Scientology. I was never told or had any information that I was allowed to view regarding what rights I had as a citizen of the United States. I was made to "sign over" my rights to Scientology or else it would be a sin against the "Church."

Scientology brainwashed me so that I did not understand or appreciate that I had rights as an individual. I was educated in Scientology "schools." I was not taught that individuals outside of Scientology had rights afforded to them by the government and the law or that rights could come from any source but Scientology.

I was told that the police were hostile and enemies of and to Scientology and that "wog" (civilian) law enforcement was hostile to Scientology and that they could not and would not help me under any circumstances and that I would be punished by the Church for even attempting to speak with them.

Signing documents was a required and non-negotiable part of receiving any services or taking any position within Scientology. Being born into Scientology there was no option other than to sign whatever was put in front of me. I was never given a choice whether or not to sign any agreements, including any forced arbitration agreements. Every time I signed a document, it was in front of a high-ranking Scientology official. I was not permitted time to review any of these documents. The official who handed me these documents to sign would summarize the contents in their own words and I would then be required to sign with the official standing over me. If I took too long or attempted to read these documents, I would be told, "are you are done yet, just sign it." I sometimes asked if I could take these documents home with me to review and I was told that was "not possible."

In 1995 when I was 15 years old, I joined the Sea Org in Clearwater, Florida and in approximately 2002 or 2003 as a Sea Org member I moved to Gold Base, located in California. When I joined the Sea Org, I was forced to sign a "billion-year contract" dedicating my life to serving Scientology. From my arrival until my escape, I was forced to live in communal housing and subjected to laborious and back- breaking work for an average of 100 hours per week. I was paid less than fifty dollars per week.

I was verbally, physically, and psychologically restricted from leaving the Gold Base. I had little to no contact with family or friends, including my husband, throughout my time at Gold Base. Scientology was my sole source of security, survival, information and human contact. Scientology also heavily censored any and all of my communication with relatives, friends, and the outside world, including reading my mail and listening to my phone calls.

Eventually, I was sent to work on filming promotional videos for Scientology. The non-Scientologist actors hired for the promotional videos were my only "life-line" to the world outside Scientology.

In 2016, I submitted written requests to leave the Sea Org to my superiors seven times. All requests were denied. On one occasion, I was physically restrained and prevented from leaving. In November 2016, I learned that filming would be moved off Gold Base to a location where I would lose the non-Scientologist "life-line" to the outside world. I decided to make an escape attempt and hid in the trunk of an actor's car to leave Gold Base. I was then able to reunite with my father.

My father, who was a Scientologist, encouraged me to return and complete the Church's official exit procedure, known as "routing out." The Church assured me this process would take no more than three weeks. Instead I was held for three months and again Scientology treated me like a prisoner. I was forced to do everything with a "handler," including using the bathroom, showering, and sleeping. I was made to do videotaped interrogations in which I was forced to make false confessions about myself and provide false positive testimonials about my experiences with CSI.

During the routing out process, I was made to sign the departure documents in a room with only Scientology's general counsel and a man armed with a gun. I do not know the contents of any of the documents I signed. I was not given copies of the documents. I signed any document that was given to me because I just wanted it to be over and to get out of there.

It was under these conditions that I was coerced to sign agreements with the Church of Scientology, under the constant threat of imprisonment. I was not given time to read the agreements before I signed them and I signed agreements with Scientology, particularly the Staff Departure Release Agreement, because I was desperate to escape Scientology and I would be further punished or imprisoned if I did not comply.

I never had any opportunity or chance to negotiate any of the terms of the arbitration agreements or any documents that I signed while a Scientologist.

Moreover, if you speak about Scientology in any way that Scientology deems negative, regardless of the truth, you are deemed a suppressive person and an enemy of Scientology. As such, if this case is arbitrated by a panel of Scientologists there is no way that I will receive a fair, unbiased and neutral panel of individuals who will decide my case in arbitration. Instead, the panel chosen will be Scientologists who have been trained and taught by Scientology that any person who speaks out, regardless of the truth, is evil and a sinner. It will be in that light and with those biases that I will "judged" when I am forced by the court to engage in what even the Judge has said is forced "religious arbitration."

Currently the California Courts are enforcing the forced religious arbitration decide the circumstances described above. I will be forced to reenter a Scientology building be judged by Scientologists despite being a victim of numerous crimes. In other words, I am being forced by the judicial system to be revictimized by going through religious arbitration which is known in Scientology as a committee of evidence. This is yet another way that Scientology attempts to silence those they have victimized and wronged. The psychological warfare and damage that Scientology has already done to me has resulted in me being diagnosed with PTSD and me having to see a trauma specialist for the abuse I endured and have continued to endure. A court subjecting me to this torture again is inhumane.

I humbly ask that Congress pass the FAIR Act so that victims and those wronged by large organizations like Scientology and others will have a voice and be properly judged by a jury of their peer with a fair and neutral judge presiding over the case. Again, I urge you to pass the FAIR Act to restore equal access to justice for people like me.

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Statement for the Record Submitted to
The House Subcommittee on Antitrust, Commercial and Administrative Law

For the Hearing Entitled:
Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

Submitted February 09, 2021

Dear Chairman Cicilline, Ranking Member Buck, and distinguished members of the subcommittee:

Thank you for holding this hearing today. My name is Tanuja Gupta and I am an engineering program manager at Google. While I work in the tech sector and am the person officially submitting this statement, I am writing on behalf of *all* workers in *all* sectors. And on behalf of all workers in America, I ask you to make arbitration **optional** and not forced by passing the Forced Arbitration Injustice Repeal Act, or FAIR Act.

While I submit this statement in a personal capacity and not on behalf of my employer, I cannot pretend that my path to today didn't start with my own employment at Google. In 2018, the mood of the country and my company were deeply affected by a number of factors. The MeToo movement had gone global, revealing just how much predatory behavior had been hidden by powerful corporations everywhere. A member of my company's leadership seemed to have gotten away with reprehensible behavior. And tech workers everywhere were starting to realize how unprotected they really were. We realized we were subject to the same imbalanced power structures that had been present in all other forms of labor in the past.

One of those structures is the practice of forced arbitration. The Federal Arbitration Act was passed in 1925 and for 60 years worked as intended. But starting in the 1980s, it has been reinterpreted to make it increasingly difficult for workers to hold their employers accountable for any form of wrongdoing. Today, the FAA tells workers they no longer have a choice as to whether or how they may hold their employers responsible for violating their rights. It tells workers "never mind your rights, your employer has already made this choice for you".

I ask you to remember this term 'choice', a real '**meaningful** choice'. The debate around the FAIR Act often shifts to the merits of arbitration. But today is not about whether arbitration is good or bad. It is about whether arbitration is forced or a choice. And I'm asking, on behalf of all workers in all sectors, to give us that choice back.

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When we as workers face sexual harassment, racial discrimination, wage theft or wrongful termination, we want the choice on how to hold our employers accountable for their illegal practices. The longer we are denied this choice, the louder our voices will get.

I know this because in 2018, I helped organize a walkout of 20,000 people who refused to let their voices be unheard any longer. That year, when news broke about the sexual harassment at our company, something in me and many of my colleagues snapped. Any practice, such as forcing arbitration, that allowed this kind of behavior to flourish in secrecy could simply not be tolerated anymore. I want to fully acknowledge my privilege of deciding time was up for me at that particular moment, especially when it was up a long time ago for many Black and Latino workers. It was also an incredible privilege to think I could walk out on my job and be allowed to walk back on. Most workers don't have that privilege.

I realized that privilege in organizing the walkout, which made me even more ashamed that it took me so long to speak out against the practice of forced arbitration.

But assuming later really is better than never, I kept organizing. And after the walkout, Google immediately changed its policy to end forced arbitration for individual cases of sexual harassment. This was good, but not good enough. A company cannot pick and choose its way through harms like sexual harassment, racial discrimination or wage theft, deciding when workers get a choice to hold their wrongdoers accountable and when they do not. Never mind the absurdity of being half-way through a court case, only to be forced to bring the racial discrimination portion of your sexual harassment claim separately in arbitration.

So after the walkout, a group of us formed Googlers for Ending Forced Arbitration. We spent months educating our colleagues and executives on how forcing arbitration erodes the system of checks and balances created by our government. We reminded tech workers that we were part of the 60 million workers and counting who have lost their choice when it comes to fighting discrimination, harassment and illegal practices in the workplace. And in the process, our group met workers across the country whose lives had been permanently altered by forced arbitration. We amplified the voices of these workers to anyone who would listen, and in February 2019, Google ended forced arbitration for all types of claims for all its full-time employees. This changed policy finally reflected how interwoven harassment, discrimination, privacy, wage theft and retaliation are with one another, ensuring that all employees could hold the company accountable for rights violations.

But the thought of going company by company to advocate for workers rights is untenable. And I have only so much time on this Earth. So let me tell you about the workers I have met in my journey, and why you should end forced arbitration for all of them.

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Congressman Issa and Congressman Swalwell, I met Navy reservist Lieutenant Kevin Ziober from your state of California who was fired after attending his own going away party from BLB Resources because of his military deployment, which is illegal under USERRA, the Uniformed Services Employment and Reemployment Rights Act of 1994. When he tried to hold his employer accountable in a court of law, he was forced into arbitration. Congressman Swalwell, this is why your vote to pass the FAIR Act in 2019 was so important. Congressman Issa, a Captain in the military yourself, what would you have done if that had happened to you?

Vice Chairman Neguse and Ranking Member Buck, have you met the women from your state of Colorado who were sexually harassed, paid less than their male counterparts and / or denied career advancement opportunities at Sterling Jewelers for years, only to have their reports of these civil rights violations forced into arbitration? Or be fired? Please remember these names: Kim Lavely, Elsie Pinson, Kayla Simons and Melinda Small.They were all gagged from being able to speak about what happened to them due to the confidentiality requirements of forced arbitration. I have sat with multiple women from Sterling Jewelers who have waited over a decade to have their claims of systemic discrimination even *heard* in a courtroom.

Just ask Congressman Gaetz, who met Heather Ballou from the same group of 70,000 women who worked at Sterling Jewelers. Congressman Gaetz, I want to thank you for listening to her and for putting party differences aside to support the FAIR Act. If I may quote you back to yourself, you summarized the FAIR Act best in 2019 when you said, "If people want to choose arbitration they still have that right. It is not accurate to say that this bill cuts off access to voluntary arbitration."

Congressman Steube, my sincere hope is that you will align with Congressman Gaetz, especially after I tell you the experience of Florida residents Glenda and Peter Perez. I met Peter, Glenda and their three kids a year into their arbitration battle with Cigna. Glenda was accused of a data error with a large financial impact to the company. Her husband Peter, who also worked at the company, helped her investigate the error to realize that it was caused by other non-Hispanic workers. Glenda filed a complaint of racial discrimination that was forced into arbitration. Getting a lawyer to take an arbitration case is incredibly difficult because the settlement awards are significantly lower in arbitration than in court, so they eventually went pro se. Meanwhile, Cigna had assigned three lawyers to the case. A few days before the scheduled hearing, Glenda received an email from the arbitrator giving in favor of Cigna for a judgement. It was a near copy and paste of what Cigna's attorneys originally filed and Glenda got nothing, not even having an arbitration hearing. A few weeks later, Peter found a picture of the lead Cigna attorney embracing the arbitrator at his 50th birthday party. So Glenda filed

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a petition to vacate the award. One week after Cigna was served, Peter was fired. Congressman Steube, Glenda and Peter put everything into their case and drained their life savings. They had to foreclose on their home and depend on the government for services to live. Congresswoman Demings and Congressman Deutch, I thank you for already supporting the FAIR Act in 2019. Your support not only helps the Perez family, but also Angela Gessa who could not hold her Florida nursing home, Manor Care, accountable for negligence and all the residents in your district.

Congresswoman Spartz, have you met with Maurice Bradley from your home state of Indiana? You may have not because his wage theft claims were silenced by forced arbitration. He filed claims about how the home improvement store Menards violated the Fair Labor Standards Act by requiring him and his fellow workers to clock out for time to use the bathroom or get a drink of water. Menards compelled cases like his into arbitration time and time again until investigations by the National Labor Relations Board caused the company to drop forced arbitration clauses. But we can't do this company by company - and my sincere hope is that you will pass the FAIR Act for all workers in Indiana.

Congressman Jones and Congressman Jeffries, we are all New Yorkers. Our state is full of restaurants and fast food workers who live paycheck to paycheck. Richard Heggins is a fellow New Yorker, and is one of the thousands of workers Chipotle auto-clocked out of shifts without pay while he continued working & cleaning. Chipotle has been fighting claims of wage theft lodged in federal court by current and former workers since 2013. But in 2019, more than 2,800 of those workers were ejected from the court proceedings because their employment agreements contained a forced arbitration clause. That was not their choice. Congressman Jeffries, thank you for recognizing the importance of the FAIR Act by voting to pass it last session. Congressman Jones, I hope you'll join him.

To all members of the committee, I could tell you about workers in all of your states affected by forced arbitration all day. I can't tell you about all the workers we don't know about because they were unable to even find a lawyer to represent them in a forced arbitration case. But the other just as important reason to pass the FAIR Act is because no law matters until the FAIR Act is law. When companies are allowed to force arbitration, they create a 'legal moat' that lets them continue violating rights without being held accountable. They prevent precedent from being established so other workers do not find out what behavior is legally unacceptable. We know this by reviewing the increasingly broad scope of forced arbitration clauses in employment agreements today. Most arbitration clauses today typically include 7 things:

- First, a gag rule that prohibits a worker from publicly talking about her claim

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- Second, a time frame by when a claim must be submitted
- Third, a payment structure that often requires the worker to pay an arbitration filing fee that's higher than the filing fee of a small claims court
- Fourth, the state of jurisdiction, which may differ from the worker's state
- Fifth, a requirement that the arbiter be picked and paid for by the very company the worker is complaining against
- Sixth, a ban on forming any kind of collective or class action lawsuit, which severely restricts workers' ability to piece together patterns of system wrongdoing
- And seventh, a laundry list of the types of claims that cannot be filed in court and must go through arbitration, such as any form of harassment, discrimination, wage theft, retaliation or other civil rights violations. And I'll note that for consumer clauses, this list turns to violations of privacy, product liability, public health, data breaches, fraud, illegal trading activity, overdraft fees and more.

So for example, Congressman Johnson, last year you sponsored the *Improve Well-Being for Veterans Act* to tackle the devastating problem of veteran suicides in this country. The bill explicitly listed environmental risks such as "unemployment, stressful life events, legal and financial troubles" as factors of suicide. Now as you already heard, forcing arbitration denies military members access to their USERRA rights and their ability to retain their employment. So what good would the *Improve Well-Being for Veterans Act* be if companies are harming service members at the same time with forced arbitration?

Congresswoman Fischbach, you're cosponsoring H.R.649 which seeks to authorize the Office on Violence Against Women to improve the handling of crimes of domestic violence, dating violence, sexual assault, and stalking by incorporating a trauma-informed approach into the initial response to and investigation of such crimes. You don't need to wait for that bill to pass when you can reform the response to sexual harassment simply by passing the FAIR Act. You can give survivors like Gretchen the choice to pursue their violators and the companies that employ them in a court of law. It is precisely because forced arbitration denies access to the court system, laws are enforced by the press and larger and larger federal agencies like OVAW.

To all the Democratic members of this subcommittee who passed the *Raise the Wage Act l*ast year, I ask you - what does it matter if Congress raises the minimum wage when companies cannot be held accountable for wage theft in a court of law? The FAIR Act must become law for any other law to matter.

I've heard arguments that workers choose their employer and can walk away if they don't like an offer letter. But these forced arbitration clauses are ubiquitous. By 2024, just three years

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from now, more than 80 percent of private-sector, nonunion workers will have forced arbitration clauses in their employment agreements. As workers, we do not choose our employers based on arbitration policies, we capitulate.

I had the luxury of a walkout and submitting this testimony without fear of retaliation. But others do NOT have this same privilege. It is for the millions of them I ask you - please, give workers their right to choose back. Pass the FAIR Act to end forced arbitration.

Submitted Testimony of

Remington A. Gregg

Public Citizen

Counsel for Civil Justice and Consumer Rights

to the

Subcommittee on Antitrust, Commercial, and Administrative Law

Committee on the Judiciary

United States House of Representatives

on

Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

February 11, 2020

I. Introduction

Public Citizen appreciates the opportunity to submit this testimony. Public Citizen is a non-profit organization with more than 500,000 members and supporters nationwide. We represent the public interest through legislative and administrative advocacy, litigation, research, and public education on a broad range of issues including fair and equitable access to justice for all people.

Thank you for scheduling today's hearing to explore how forced arbitration erodes legal rights. Today, workers, consumers, servicemembers, patients, and small businesses nationwide are shut out of court and instead forced into a secretive, privatized system of justice. Congress must address this by banning predispute, forced arbitration clauses. Public Citizen has been fighting for 50 years to protect access to justice for all. We stand ready to help you in any way as you explore this issue in greater detail.

II. Forced Arbitration Clauses, Which Usually Are Not Voluntary, Harm Workers, Consumers, Patients, Servicemembers, and Small Businesses

Predispute binding arbitration clauses and class action waivers, together known as forced arbitration clauses, are typically buried in "take-it-or-leave it" agreements that waive an individual's fundamental rights to seek redress in court when they are harmed or when their legal rights are violated. Forced arbitration clauses have become ubiquitous in such varied settings as agreements governing bank accounts, student loans, cell phones, employment, and nursing home admissions. These clauses deprive people of their day in court when they are harmed by violations of the law, no matter how widespread or egregious the misconduct may be. The contracts that contain forced arbitration clauses are oftentimes written by corporate entities, so it is unsurprising that their terms are corporate friendly.

Defenders of arbitration sometimes refer to this legal regime as a mandatory arbitration "agreement." But in reality, that agreement is a legal fiction. Arbitration clauses are often contained in non-negotiable contracts, and a consumer, worker, patient, servicemember, or small business who refuses to sign would have to give up goods, services, or employment. Moreover, few know that forced arbitration clauses are included in their contract, much less understand just how it impacts one's ability to seek redress in court if harmed.

According to the Economic Policy Institute (EPI), 60.1 million workers—more than half of non-union, private-sector employees—have signed away their right to go to court if

harmed by their employer.[1] By 2024, EPI and the Center for Popular Democracy project that more than 80% of private sector nonunion workers will be subject to forced arbitration clauses (including class/collective-action waivers).[2]

In consumer contracts, a majority of credit cards, prepaid cards, storefront payday loans, cell phone companies, and private student loan contracts, along with a large segment of banks, include arbitration clauses in non-negotiable contracts. According to Consumer Reports, more than two-thirds of its most popular reviewed products included a forced arbitration clause as a term of purchase. Currently, more than 60% of US retail e-commerce sales are subject to forced arbitration.[3] Eighty-one of the 100 largest U.S. companies, moreover, use arbitration in their dealings with consumers,[4] with no indication that this pace will slow.

Servicemembers are also impacted by forced arbitration clauses. A Public Citizen report found that federal laws and policies designed to protect servicemembers are undermined by forced arbitration clauses.[5] While the Servicemembers Civil Relief Act temporarily suspends "judicial and administrative proceedings and transactions" while a servicemember is on active duty overseas, [6] Public Citizen's report shows that creditors were nonetheless illegally forcing servicemembers into arbitration. The Military Lending Act (MLA) is intended to protect servicemembers from certain lending practices including protections from outrageous interest rates. Because the MLA's ban on forced arbitration for servicemembers is narrow, and the Department of Defense has further interpreted it even narrowly, servicemembers are still subject to forced arbitration for many uncovered products like installment loans or predatory rent-to-own contracts.[7]

Families around the country have now experienced how nursing homes use forced arbitration clauses to suppress claims of neglect and abuse.[8] While the Obama

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[1] *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. 2 (2018), https://www.epi.org/files/pdf/144131.pdf.
[2] *See* Kate Hamaji, et al., *Unchecked Corporate Power: Forced Arbitration, the enforcement Crisis, and How Workers are Fighting Back*, CTR. FOR POPULAR DEMOCRACY (2019), https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf.
[3] *See* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L.R. ONLINE 233, 234 (2019).
[4] *Id.*
[5] *See* Christine Hines, *Armed Forced and Forced Arbitration*, PUBLIC CITIZEN (2012), https://www.citizen.org/wp-content/uploads/armed-forces-and-forced-arbitration-report.pdf.
[6] JENNIFER K. ELSEA, CONG. RESEARCH SERV., R45283, THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): SECTION-BY-SECTION SUMMARY 2 (2019), CONG. RESEARCH SERV.
[7] *See* Hines, *supra* note 6.
[8] *Nursing Homes*, FAIR ARBITRATION NOW (Aug. 31, 2015), https://fairarbitrationnow.org/nursing-home-arbitration/.

administration sought to bar nursing homes from using predistpute arbitration agreements, the Trump administration successfully limited those critical protections.[9]

Small businesses have also been on the losing end of forced arbitration clauses. Many small businesses are forced to agree to arbitrate disputes with larger companies, even when those companies steal money, price-fix, and otherwise violate antitrust laws that harm the small business. Those agreements also prohibit small businesses from banding together via class action even when litigating on an individual basis would not be economically feasible.[10]

III. Forced Arbitration Clauses Are Designed to Give Corporate Entities an Advantage

Justice Hugo Black summed up the unfairness of arbitration well:

> "For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited."[11]

Arbitration clauses generally limit the type of damages that a person can receive, such as punitive or compensatory damages. They prohibit individuals from banding together in a class or collective action, which may be the only realistic avenue for bringing small claims. Arbitration clauses, moreover, often limit discovery and other attempts to obtain evidence. For example, a Public Citizen report detailed that "54 percent of arbitration clauses discussed discovery or evidentiary standards, in most instances to 'alert consumers that discovery may be limited and evidentiary standards may be relaxed by comparison to litigation.'"[12] In addition, arbitration fees "are dramatically higher than court costs."[13] Arbitrators are paid a daily rate and "typically paid $1,000–$2,000 a day, on top of the cost

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[9] Remington Gregg, *Trump Administration Places Company Profits Over Quality Care for Seniors,* FAIR ARBITRATION NOW (July 19, 2019), https://fairarbitrationnow.org/trump-administration-places-company-profits-over-quality-care-for-seniors/.
[10] *See, e.g.*, American Express v. Italian Colors Restaurant, 563 U.S. 333 (2011); Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).
[11] Republic Steel Corp. v. Maddox, 379 U.S. 650, 664 (1965) (Black, J., dissenting).
[12] Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration*, PUBLIC CITIZEN 38 (2008), *available at* https://www.citizen.org/sites/default/files/arbitrationdebatetrapfinal.pdf.
[13] *Id.* at 39.

of travel, meals, and other expenses associated with a hearing."[14] An arbitration clause, moreover, may also include a "loser pays" provision, which creates a significant disincentive for an individual to bring a claim out of fear that they will be on the hook for all fees if they do not prevail.

For these reasons and others—including relationships that corporate entities have with arbitration providers and arbitrators so that they become "repeat players" in the arbitration system—arbitration disadvantages consumers, workers, patients, servicemembers, and small businesses. The Economic Policy Institute has also found that "[c]onsumers obtain relief regarding their claims in only 9 percent of disputes. On the other hand, when companies make claims or counterclaims, arbitrators grant them relief 93 percent of the time—meaning they order the consumer to pay."[15]

If a worker, consumer, patient, servicemember, or small business brings a claim in arbitration and loses—and the odds are very high that they will—an arbitrator's decision is given "limited judicial review."[16] "Under the [Federal Arbitration Act], courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" [17] These circumstances include:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[18]

Thus, it is clear why corporate entities prefer this venue to the court system where each party is provided with basic procedural rights before a neutral, open court.

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[14] *How Much Does Arbitration Cost? And Who Pays For It?*, ARBITRATION INFO (2015), https://law.missouri.edu/arbitrationinfo/2015/10/11/how-much-does-arbitration-cost/
[15] Heidi Shierholz, *Correcting the Record,* Economic Policy Institute (Aug. 1, 2017), https://www.epi.org/files/pdf/132669.pdf.
[16] Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013).
[17] *Id.* (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).
[18] 9 U.S.C. § 10 (2012).

IV. Forced Arbitration Clauses Allow Corporations to Evade Full Accountability for Misconduct

Forced arbitration clauses allow corporate entities to escape public accountability for misconduct because the proceedings are often held in secret, and the arbitration clause may prohibit parties from disclosing what transpired in, or the outcome of, the arbitration proceeding. This lack of accountability will only get worse as more people are subject to arbitration clauses.

Worse still, forced arbitration suppresses claims, preventing many workers from ever bringing claims related to workplace abuses. According to Professor Cynthia Eastland, a staggering 98 percent of workers abandon their claims if they are denied access to courts rather than moving forward with private arbitration proceedings.[19] It is no surprise, then, that the National Employment Law Project projected that employers have pocketed $12.6 billion in wages from private-sector non-union workers earning less than $13 an hour who have abandoned claims for wage theft rather than proceeding in arbitration.[20] As a result, employers have received billions in ill-gotten gains that made them wealthier while low-income families continue to struggle.

Forced arbitration clauses also allow companies to hide systemic harassment and discrimination, including sexual harassment. That is why thousands of Google workers around the world walked off the job in late 2018 to protest, among other things, Google's use of forced arbitration clauses to hide mistreatment of workers who alleged harassment and discrimination against high-level executives.[21] In sum, forcing individuals into arbitration has played a significant role in hiding systemic wrongdoing and allowing corporate wrongdoers to evade accountability for bad acts.

V. Congress Must Act

Public Citizen highlights the ubiquity of forced arbitration in all sectors of the economy in its forced arbitration "Wall of Shame"—a list that seemingly only increases. In 2019, Amtrak amended the terms and conditions for purchasing tickets or traveling on Amtrak to add an arbitration clause under which disputes with Amtrak must be submitted to binding arbitration before a private arbitrator. The only way that riders can escape agreeing to its terms is forgoing using Amtrak—the only national rail service in the

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[19] Cynthia L. Estlund, *The Black Hold of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018).
[20] Hugh Baran, *Forced Arbitration Enabled Employers to Steal $12.6 Billion From Workers in Low-Paid Jobs in 2019*, NAT'L EMPLOYMENT LAW CTR. (2020), https://www.nelp.org/publication/forced-arbitration-cost-workers-in-low-paid-jobs-12-6-billion-in-stolen-wages-in-2019/.
[21] Claire Stapleton et al., *We're the Organizers of the Google Walkout. Here Are Our Demands*, N.Y. MAG. (Nov. 1, 2018).

country. Public Citizen is currently litigating this issue, seeking injunctive relief against forcing riders to agree to arbitration.[22]

Recently, the stock trading and investment app Robinhood gained notoriety for its use of forced arbitration. Robinhood claims that it was founded on a quest to "democratize" trading by making trades easy and the market's processes transparent.[23] Yet, like so many other companies, Robinhood is insulated from accountability in the courts because it requires users to agree to binding arbitration.[24] This month, as Robinhood feared a loss of liquidity as customers bought shares of GameStop in droves, the company limited traders' ability to buy and sell GameStop stock. In response, several traders sued Robinhood in a class action. Whether the traders will be able to proceed in a timely manner depends on whether they will be able to proceed to court, or be required instead to arbitrate through the FINRA arbitration system.[25]

Congress must comprehensively reform arbitration law by limiting the application of the Federal Arbitration Act, whose sway the courts have steadily expanded. Forced arbitration weakens federal and state laws that are intended to protect consumers and workers by removing individuals' ability to enforce those laws in court. In 2011, the U.S. Supreme Court dealt a devastating blow to consumers and workers, ruling that companies could ban individuals from joining together to enforce their rights.[26] In 2018, the Court held that workers may be forced, as a condition of employment, to waive their right to act collectively to enforce their legal rights.[27] Because these cases turn on the Court's interpretation of federal law, Congress has the power to correct the legal fiction that workers, consumers, servicemembers, patients, and small businesses have consented to signing away their rights. Until Congress does so, forced arbitration will continue to endanger individuals and small businesses. Judge Jed S. Rakoff recently said:

> "…while appellate courts still pay lip service to the 'precious right' of trial by jury, and sometimes add that it is a right that cannot readily be waived, in actuality federal district courts are now obliged to enforce what everyone recognizes is a totally coerced waiver of both the right to a jury and the right of access to the courts — provided only that the consumer is notified in some passing way that in purchasing the product or service she is thereby 'agreeing' to the accompanying voluminous set of 'terms and conditions.' This being the

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[22] *Public Citizen v. National Passenger Railroad Corporation, d/b/a Amtrak*, PUBLIC CITIZEN, https://www.citizen.org/litigation/public-citizen-v-national-passenger-railroad-corporation-d-b-a-amtrak/.
[23] *About Us*, ROBINHOOD, https://robinhood.com/us/en/about-us/.
[24] Marcia Brown, *How the Supreme Court Protects Robinhood*, AM. PROSPECT (Feb. 2, 2021), https://prospect.org/justice/how-the-supreme-court-protects-robinhood/.
[25] *Id.*
[26] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).
[27] Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).

> law, this judge must enforce it — even if it is based on nothing but factual and legal fictions."[28]

The FAIR Act does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily post-dispute. It would allow workers, consumers, patients, servicemembers, and small businesses to choose arbitration after being harmed if they truly perceived arbitration to have benefits over proceeding in court. It would not affect collective bargaining agreements that require arbitration between unions and employers. Rather, the FAIR Act's sole aim is to end the practice of individuals into secretive, one-sided arbitration proceedings that bind people long before they are harmed.

Thank you for the opportunity to share our views.

[28] Meyer v. Kalanick, 200 F.Supp.3d 408 (S.D.N.Y. 2016).

The Leadership Conference
on Civil and Human Rights

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The Leadership Conference

February 10, 2021

The Honorable Jerrold Nadler, Chair
The Honorable Jim Jordan, Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable David Cicilline, Chair
The Honorable Ken Buck, Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

RE: Support the Forced Arbitration Injustice Repeal (FAIR) Act

Dear Chair Nadler, Ranking Member Jordan, Chair Cicilline, and Ranking Member Buck:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 220 organizations to promote and protect the civil and human rights of all persons in the United States, **we urge you to support the Forced Arbitration Injustice Repeal (FAIR) Act**.

The FAIR Act would prohibit corporations from forcing working people and consumers into pre-dispute forced arbitration agreements and class action waivers, which are hidden in many non-negotiable employment and consumer contracts. These agreements allow large employers, insurers, lenders, and financial services companies to consistently tip the scales in their favor at the expense of everyday working people and consumers by forcing individuals to give up their right to access to the courts if they wish to begin a job, open a credit card account, obtain a loan, receive nursing home services, use a cell phone, or access other critical goods and services.

Pre-dispute forced arbitration agreements and class action waivers harm working people and consumers while allowing corporations to escape accountability for wrongdoing. Forced arbitration clauses are written to benefit corporations: they select the arbitrators, pick the rules, choose the state in which the proceeding will occur, and decide the payment terms. Private arbitration lacks guaranteed due process protections and proceedings are secret. Given this context, it is unsurprising that employees and consumers are less likely to obtain relief through arbitration and generally receive lower damage awards than in court.[i] Yet, current law allows corporations to force hundreds of millions of people to give up their right to access the courts, making it difficult, if not impossible, for everyday people to enforce the federal and state laws that were enacted to protect them from abuse and discrimination.

Faced with these hurdles, many individuals decide not to try to enforce their rights at all, leaving corporations with no incentive to follow the law or to address consumer or worker claims quickly and fairly.

In addition to making people more vulnerable to abuse by bad corporate actors, forced arbitration agreements and class action waivers are an impediment to the enjoyment of basic civil and human rights. More than half of non-union, private-sector employers require their employees to enter into forced arbitration agreements.[ii] As a result, millions of working people do not have access to the courts to enforce their rights under all types of employment and civil rights statues, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and more.

These employment and civil rights statutes are more important than ever for women and communities of color during the coronavirus pandemic. The pandemic has caused a national public health and economic crisis, but not everyone in America has been impacted the same way. Communities that were already marginalized by structural barriers to equal opportunities — Black and Brown people, women, immigrants, seniors, people with disabilities, and other groups — have been hardest hit by the pandemic and are otherwise particularly vulnerable to discrimination, fraud, unsafe working conditions, and abuse. This makes our nation's federal civil rights and worker protection laws even more essential to safeguard fairness, safety, and dignity.

Yet, the most vulnerable working people are also the most likely to be trapped into forced arbitration agreements that undermine the ability to enforce these very laws. Forced arbitration is much more common among the lowest-paid workforces, and industries that have disproportionate numbers of women workers and African-American workers are more prone to impose forced arbitration. Overall, a pre-pandemic study showed that 59 percent of African-American workers and 58 percent of women workers have no way to enforce their rights outside of arbitration processes that are controlled by their employers.[iii]

Forced arbitration has also played a role in allowing sexual harassment and violence to fester. In recent years, thousands of individuals have been inspired by #MeToo to share their experiences and demand justice, but too often, when victims spoke up about misconduct, harassment, and sexual violence experienced at work,[iv] or at the spa,[v] or while a patient in a nursing home,[vi] or while using app-based transportation services,[vii] they discovered that they had unknowingly given up their right to access the courts and would be forced into secret, private arbitration proceedings. We know, however, that when individuals share their experiences, and when bad actors are held accountable, it gives others the courage to come forward and incentivizes corporations to remedy abuse and engage in prevention. Forced arbitration, however, impedes transparency by forcing victims into arbitration when their rights have been violated.

Additionally, the use of class action waivers also substantially diminishes access to justice. Of employees subject to forced arbitration, nearly half are also subject to a class action waiver, making it nearly impossible to address systemic discrimination or widespread violations of law.[viii] Class actions have

helped to level the playing field against bad actors for thousands of women and people of color and can provide relief specifically designed to remedy large scale rights violations and change how corporations do business.[ix] Without the availability of class actions, many individuals are unlikely to file claims to enforce their rights, preventing accountability and transparency and blocking a pathway for reform.

Given the harm of pre-dispute forced arbitration agreements and class action waivers, it is imperative that Congress act to protect access to justice in the courts. We urge you to support the FAIR Act and restore the ability of working people and consumers to choose how to enforce their rights. If you have any questions, please contact Gaylynn Burroughs, senior policy counsel, at burroughs@civilrights.org.

Sincerely,

Wade Henderson
Interim President and CEO

LaShawn Warren
Executive Vice President for Government Affairs

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[i] Heidi Shierholz, Economic Policy Institute, Correcting the Record: Consumers Fare Better under Class Actions than Arbitration (Aug. 1, 2017), https://www.epi.org/publication/correcting-the-record-consumers-fare-better-underclass-actions-than-arbitration/. Katherine V.W. Stone & Alexander J.S. Colvin, Economic Policy Institute, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumer of Their Rights (Dec. 7, 2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf.

[ii] Alexander J.S. Colvin, Economic Policy Institute, The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-formore-than-60-million-american-workers/.

[iii] *Id.*

[iv] *See e.g.*, Erin Mulvaney, New York's #MeToo Arbitration Law Faces Appeals Court Battles, Bloomberg Law (Jan. 11, 2021), https://news.bloomberglaw.com/daily-labor-report/new-yorks-metoo-arbitration-law-faces-appeals-court-battles.

[v] *See e.g.*, Brooks Jarosz, Fears Loom that Sexual Assault Cases Involving Massage Envy Will Remain Private, KTVU Fox 2 (Dec. 22, 2018), https://www.ktvu.com/news/fears-loom-that-sexual-assault-cases-involving-massage-envy-will-remain-private.

[vi] *See e.g.*, Haley Sweetland Edwards, An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here's Why She Couldn't Sue., Time (Nov. 16, 2017), https://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/.

[vii] *See e.g.*, Yuki Noguchi, Under Pressure, Uber Drops Arbitration Requirement for Sexual Assault Victims, NPR (May 15, 2018), https://www.npr.org/2018/05/15/611230115/under-pressure-uber-drops-arbitration-requirement-for-sexual-assault-victims.

[viii] Heidi Shierholz, Economic Policy Institute, Correcting the Record: Consumers Fare Better under Class Actions than Arbitration (Aug. 1, 2017), https://www.epi.org/publication/correcting-the-record-consumers-fare-better-underclass-actions-than-arbitration/.

[ix] Center for Justice & Democracy, Civil Rights Class Actions: A Singularly Effective Tool to Combat Discrimination (Jan. 6, 2014), https://centerjd.org/content/fact-sheet-civil-rights-class-actions-singularly-effectivetool-combat-discrimination.

The Committee to Support the Antitrust Laws Urges Congress to Pass the Forced Arbitration Injustice Repeal Act (FAIR Act)

Statement of Heidi Silton, President of COSAL, Partner in Lockridge Grindal Nauen:

"Forced arbitration clauses with class action bans give antitrust criminals a license to steal. Price-fixers, monopolists and other antitrust violators can slip forced arbitration clauses in the fine print of contracts, leaving the consumers and small businesses who are the victims of their crimes with no ability to hold the perpetrators accountable. Congress should pass the FAIR Act and restore rights to individuals and honest businesses that are the victims of marketplace abuse."

For more information, contact Pamela Gilbert, pamelag@cuneolaw.com, (202) 253-3561.

Chrissie Carnell-Bixler

Statement for the Record
Submitted February 9, 2021, to:

The House Subcommittee on
Antitrust, Commercial and Administrative Law

For the Hearing Entitled:

Justice Denied: Forced Arbitration and the Erosion of our Legal System

February 11, 2021

My name is Chrissie Carnell-Bixler and I am a wife and mother living in Los Angeles, California. I am also a rape and cult survivor. I respectfully submit this statement for the record on the hearing for the FAIR Act on February 9, 2021. I have omitted my address purposefully due to the repeated and horrific acts of intimidation, harassment and stalking I have experienced described more fully below.

When I was eighteen years old, I started a six year relationship with a man who was a member of the church of Scientology. This man was extremely abusive both emotionally and physically and this man brought me into his religion of Scientology. I was told I was broken and damaged and Scientology was the only answer. I was an active Scientologist throughout my relationship with this man.

When the abuse began to escalate, and the sexual abuse became more violent, I went to his church to report the rapes and sexual abuses I suffered hoping they would help him. Instead I was punished. I was told by Scientology officials that I cannot say the word "rape" as it's not rape if I'm in a relationship with the person. I was also told that I did something to deserve the abuse so I would be the one getting "handled." I was shown in the Scientology Ethics Book that it is a High Crime in Scientology to report another Scientologist to the law enforcement agencies. I was told that I could be declared a Suppressive Person and then I was shown the handling of Suppressive Persons by the Church of Scientology and that I would be lied to, tricked, sued, and ultimately destroyed. I understood what that meant and I was terrified so I never again told anyone what my rapist had done to me until years later when I married my husband.

Then in 2016 I found out that my rapist had also raped other young Scientologist women (and later other non-Scientologist women.) It was in 2016 that I called RAINN and told them the things this man did to me and how the church of Scientology told me it's not rape. The person I spoke with at RAINN informed me that it was, in fact, rape, and that I should file a police report. I filed a police report with the LAPD in December of 2016. I also emailed the officials at Scientology letting them know that I know now their role in silencing the rape victims of this man they protected and that I am no longer a Scientologist.

Immediately they made good on their threats to me back when I reported the rape and abuses. Under Scientology's Ethics and Justice I was to be considered a Suppressive Person and my "handling" was to be "Fair Game" under Scientology order. Since December of 2016 until this present day my husband Cedric Bixler-Zavala, my two young sons, and I have been living in terror! We have been constantly surveilled, followed, filmed, harassed, attacked, threatened. All of our accounts have been hacked, our WiFi, home security system, home cameras, etc have been hacked and disabled. Two of our beloved family pets have been killed.

While our criminal case had been thoroughly investigated, in June of 2020 my rapist was charged by the LADA's office on 3 counts of rape by force or fear and is looking at 45 years to life in prison.

In 2019, three of his rape survivors along with myself and my husband filed a civil lawsuit in the hopes that the church of Scientology would end its terror campaign over all of us. The church of Scientology argued that we all had signed an agreement with Scientology that should we have any disputes with the church that we agree to an internal "religious arbitration." I never knew I had signed this agreement. Apparently any person who signs up for a Scientology service (even if you are not a member and only want to do one service like my husband) you are forever beholden to the church of Scientology's justice system.

Judge Steven Kleifield of the Los Angeles Superior Court agreed that our arbitration agreements are valid and ordered us to Scientology's version of arbitration under the rules and justice of Scientology. The same Scientology justice who told me it wasn't rape. The same Scientology justice who believes I am the one who committed High Crimes by going to the police. The same Scientology justice that has mercilessly stalked, harassed, threatened me and my family for years. The same Scientology justice that thought it a good "handling" for me that they murdered my beloved dogs. I am ordered to go to my abusers for justice now pursuant to a system that is set up to condemn me, all because I signed something I was never allowed to read while in Scientology many, many years ago, even though I do not subscribe to this "religion" nor believe in any of its beliefs. I am terrified of them. I am ordered to go back to my abusers even though I have a criminal protective order in place with my rapist and any of his "agents," which Scientology agrees they are. Judge Kleifield also ruled that our rapist gets to participate in the arbitration, and under Scientology's rules our rapist could even be our arbiter.

The thought of having to return to my abusers to beg them to stop harassing me and my family is crippling. Since Judge Kleifield's ruling, I've not been able to leave my home out of indescribable fear. I have debilitating panic attacks. My husband is suffering. My poor children who are 7 years old now, have been witnessing the attacks on their family and home since they were 3 years old. As much as I've tried to shield my children from these horrific attacks, they are deeply affected by everything that's happened to us.

I beg you on hands and knees to pass the FAIR Act to restore equal justice. No one should be beholden to any organization especially when some of the disputes are of criminal nature. No one should be beholden to any organization for life.

February 11, 2021

The Honorable David N. Cicilline, Chairman
The Honorable Ken Buck, Ranking Member
Subcommittee on Antitrust, Commercial Law, and Administrative Law
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Buck:

Consumer Reports is pleased you are holding a hearing on the important topic of the impact of imposing forced arbitration on consumer, employment, civil rights, and antitrust disputes. This is a spreading injustice in the marketplace, in which corporations are forcing consumers, workers, and small family businesses to relinquish fundamental legal protections as a pre-condition for obtaining a product, service, or even a job. We urge the Committee to correct this harm by approving the Forced Arbitration Injustice Repeal (FAIR) Act.

Forced arbitration is being slipped into the fine print of standard-form contracts and terms of service that are presented to consumers as a take-it-or-leave-it pre-condition for obtaining such basic products and services as a credit card, bank loan, student loan, apartment lease, mobile phone, video subscription, or nursing home admission – and a wide range of everyday consumer products. Forced arbitration is also in the fine print of contracts that workers and small family businesses are being required to sign.
.

Congress never intended this. The Federal Arbitration Act was enacted in 1925 to give *businesses* – with relatively equal bargaining power – options for resolving their *business* disputes. But ill-conceived Supreme Court rulings[1] have warped that statute into a weapon that is being used against people who have *no* bargaining power. There is no meaningful sense in which these people have "agreed" to give up bedrock legal protections. Their only "choice" is to decline the product or service – or job – altogether. Many times, that is just not a practical option. And it is never fair.

[1] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); DirectTV Inc. v. Imburgia, 136 S. Ct. 463 (2015); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

When forced on consumers – and on workers and small businesses – in this way, the arbitration process, designed by corporations and their lawyers, inherently tends to be one-sided, tilted to favor the corporation that has arranged for it. The process is a "black hole," where the law does not apply, there is no right of appeal, and too often, the outcome is required to be kept secret. The arbitrator, chosen by the corporation, has a skewed incentive to heed the interests of the corporation, in hope and expectation of repeat business. The corporation can also choose where the arbitration will take place, what the rules will be, and how the costs will be borne. There are none of the fundamental safeguards that are the hallmarks of a fair, impartial, and accessible court proceeding to protect people and hold accountable a corporation that has committed widespread abuse, or has marketed an unsafe product or service.

Justice Ginsburg has stated that the Court's forced arbitration rulings "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and turning the coin, they have insulated powerful economic interests from liability for violations of consumer protection laws."[2]

In an interview with the New York Times, former Federal District Judge William G. Young, appointed in 1985 by President Reagan, was even blunter: "Ominously," he said, "business has a good chance of opting out of the legal system altogether and misbehaving without reproach."[3]

Contrary to the claims of forced arbitration defenders, the FAIR Act would in no way "ban" arbitration when it is really agreed to. It would stop *forced* arbitration from *being imposed* as a pre-condition for obtaining a product, or for obtaining or continuing service or employment, and closing off access to the courts for consumer law claims, employment law claims, civil rights claims, and antitrust claims by small businesses. Once a dispute actually arises, and the stakes are clear, consumers (or workers or small businesses) could freely choose arbitration if they determine it to be actually fair, and to actually be a better option for them than the courts.

Consumer Reports reviewed consumer products in the most popular product categories we rate – and in two additional categories where safety is a paramount concern, bike helmets and child car seats – and published our findings last year.[4] We examined 117 brand/category combinations, and the results were striking: 60 percent included arbitration clauses.

In the absence of effective legal protection, our article advises consumers to look for arbitration clauses, and when they are choosing between comparable products, to choose one that does not force them into arbitration. But that is often not a practical option. And it is not a satisfactory solution.

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[2] DirectTV Inc. v. Imburgia, 136 S. Ct. at 477 (Ginsburg, J., dissenting).
[3] Jessica Silver-Greenberg and Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, NY Times, Oct. 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.
[4] https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/.

Isolated pledges by individual corporations to forswear forced arbitration in specific contexts are no substitute for a comprehensive law to prohibit it. Indeed, those isolated pledges reflect a recognition that forced arbitration is fundamentally unfair and needs to stop.

We look forward to working with you to correct this spreading injustice.

Sincerely,

George P. Slover
Senior Policy Counsel
Consumer Reports

Syed Ejaz
Policy Analyst
Consumer Reports

cc: Members, Subcommittee on Antitrust, Commercial Law, and Administrative Law

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To be argued by Stephen Bergstein
Time requested: 10 minutes

Supreme Court of the State of New York
Appellate Division First Department

Andowah Newton,

Plaintiff-Respondent,

Dkt No. 2020-03198

v.

LVMH Moet Hennessy Louis Vuitton Inc.,

Defendant-Appellant.

Brief of Plaintiff-Respondent

Megan Goddard Goddard Law PLLC 39 Broadway, Suite 1540 New York, New York 10006 (646) 504-8353	Stephen Bergstein Bergstein & Ullrich 5 Paradies Lane New Paltz, New York 12561 (845) 469-1277
	Counsel for Plaintiff-Respondent

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Introduction

Plaintiff Andowah Newton, currently Vice President, Legal Affairs at LVMH Moët Hennessy Louis Vuitton ("LVMH"),[1] suffered sexual assault and extensive sexual harassment from a senior-level management employee who was approximately 30 years her senior, had worked for LVMH for many years longer than Ms. Newton, and reported directly to a Senior Vice President of LVMH. Despite Ms. Newton's complaints about the hostile work environment, LVMH ignored and dismissed her complaints, failed to take remedial action, tried to intimidate her into silence, instructed her to confront the harasser herself, and once she followed LVMH's instructions, repeatedly retaliated against her.

When, as permitted by New York law and LVMH's Amended Policy, Ms. Newton filed this action in State Supreme Court, New York County, alleging that LVMH violated the New York State and New York City Human Rights laws, Defendant moved to compel arbitration, relying on an arbitration clause in Ms.

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[1] LVMH's subsidiaries, brands, and affiliates include Louis Vuitton, Christian Dior, DFS, Le Bon Marché, La Grande Épicerie, Fendi, Marc Jacobs, Fenty Beauty by Rihanna, Givenchy, Sephora, Starboard Cruise Services, Berluti, Charles & Keith, Bulgari, Céline, Emilio Pucci, House of Bijan, Kenzo, Loewe, Loro Piana, Moynat, Nicholas Kirkwood, Rimowa, Thomas Pink, Chaumet, FRED, Guerlain, Kenzo, Fresh, Make Up For Ever, Hublot, TAG Heuer, Zenith, Acqua di Parma, Benefit Cosmetics, Givenchy Parfums, Kenzo Parfums, Make Up For Ever, Parfums Christian Dior, Perfumes Loewe, Maison Francis Kurkdjian, Marc Jacobs Beauty, Kat Von D Beauty, Cheval Blanc (hotels), Caffe-Pasticceria Cova, Feadship, Les Échos, Hennessy, Belvedere, Veuve Clicquot, Dom Pérignon, Krug, Ruinart, and Moët & Chandon, among others.

Newton's employment agreement with the company. Supreme Court denied that motion, holding that (1) CPLR 7515 renders "null and void" any contractual provision mandating arbitration of "any allegation or claim of discrimination," (2) CPLR 7515 applies retroactively, (3) the court, and not an arbitrator, determines the threshold question of arbitrability where, as here, strong New York policy is at stake, (4) the Federal Arbitration Act does not apply to the claims in this action, and (5) the arbitration agreement was superseded by LVMH's 2018 revised employee policy, which contains an addendum that expressly allows employees to litigate their sexual harassment claims in court.

In its continued effort to silence Ms. Newton and force her to arbitrate her claims, LVMH challenges Supreme Court's ruling. That challenge must fail. Supreme Court's thorough ruling is faithful to the public policy recently expressed by the New York State Legislature in the wake of numerous high-profile sexual harassment and assault cases that were adjudicated behind closed doors in forced arbitration, enabling perpetrators to continue their harassment and assault, undeterred, against others.

Statement of Facts

1. Ms. Newton's professional background.

Andowah Newton is a Black and Latina woman who graduated from Georgetown University with a Bachelor of Science in Business Administration

with a minor in French. She also received a diploma for her studies in Business from Université de Lyon III (Jean Moulin) in France. During college, Ms. Newton interned at Johnson & Johnson, working in its Paris offices. (R. 10 ¶ 10). After earning her license as a Certified Public Accountant and working for four years as a senior associate and auditor for PricewaterhouseCoopers and as an auditor at Estée Lauder, Ms. Newton earned dual law degrees in U.S. and French law from Cornell Law School and Université de Paris I Panthéon-Sorbonne, a.k.a. La Sorbonne. (R. 26 ¶ 11). After law school, Ms. Newton clerked for the First Vice President Judge at the International Criminal Court before spending eight years as an attorney at major law firms in New York City. (*Id.* at ¶ 12).

2. Ms. Newton's employment at LVMH.

Ms. Newton began working for LVMH in 2015 as Director, Litigation Counsel, where she manages litigations and legal disputes for more than 25 luxury brands, directs legal strategy, and advises senior executives and general counsel in the United States, Europe, and Asia on U.S. legal disputes and litigations. (*Id.* at ¶¶ 14-15).

In March 2017, Ms. Newton was eventually promoted to Vice President, Legal Affairs. (R. 27 ¶ 18). In that role, she manages all non-employment

litigations on behalf of LVMH and most of its U.S. subsidiaries and affiliates. (*Id.* at ¶ 19). Plaintiff was also selected by her supervisor, the General Counsel, to spearhead LVMH's first pro bono program, which she continues to do. (*Id.*) Throughout her employment, until she formally raised sexual harassment and assault claims, Plaintiff had received excellent performance reviews, and LVMH's General Counsel had described her as "a client's dream; she is attentive to their needs, handles all matters efficiently with a calm demeanor, yet she is tough with outside counsel on her clients' behalf. . . . [Ms. Newton] reflects the highest degree of honesty and ethics in all she does." (R. 26 ¶ 17).

3. The hostile work environment at LVMH.

Despite her educational credentials and professional accomplishments, Ms. Newton has endured unwanted sexual assault and pervasive sexual harassment at LVMH. From almost the start of her employment with the company, a senior-level management employee 30 years Ms. Newton's senior, who had a decade-long tenure at the company, was not a subordinate, and who reported directly to a Senior Vice President, engaged in a persistent and invasive campaign of sexual harassment against her. (R. 27 ¶ 20). He also assaulted Ms. Newton. (*Id.*) In Ms. Newton's first encounter with the harasser in May 2015, upon arriving at her office to discuss making repairs and

hanging framed artwork, the harasser lingered in the hallway, stared at her and said, "You are so pretty. And that beautiful smile . . . I just can't get enough of it." (R. 27-28 ¶ 22). After this initial encounter, "the harasser began to linger outside of Ms. Newton's office regularly despite the fact that his office was on a different floor (though in the same building). At these times, he would leer at [Ms.] Newton in a manner that made Ms. Newton feel as though he was undressing her with his eyes." (R. 28 ¶ 23).

A few months later, without warning and while Ms. Newton was seated at her desk, the harasser lunged at her in her office, "thrusting his pelvis and genitals into her face and pressing his body firmly against hers," pinning her against her chair. (*Id.* at ¶ 24). Despite her rebuke, following this incident, the harasser would lurk near Ms. Newton's office, leer at her, strategically enter and invade her space at company events and around the building, sometimes in full view of other employees, and expressed disappointment when she rejected his attempts to kiss her at a company event in late 2015 or early 2016. (R. 28-29 ¶¶ 25-29). On one occasion, when the LVMH headquarters flooded and Ms. Newton joined other employees in rushing to protect important business documents from destruction, the harasser leered at Ms. Newton without offering to provide any assistance. (R. 29 ¶ 31). Although Ms. Newton

repeatedly rejected the harasser's advances and recoiled at his invasive behavior, he continued this harassment, forcing Ms. Newton to spend less time at her office building and in her office, close her office door more frequently, and devise ways to avoid seeing or interacting with him in the office building. (*Id*. at ¶ 30).

4. LVMH reluctantly conducts wholly deficient "investigations."

From 2015 through 2018, Ms. Newton reported the sexual harassment to LVMH senior management, including to the company's in-house Vice President, Legal Affairs, Employment Counsel. (R. 30 ¶ 33). LVMH ignored, dismissed, and failed Ms. Newton every time. (*Id*. at ¶ 34). When Ms. Newton again told Employment Counsel about the harassment following an incident in May 2018 when the harasser lingered outside her office and leered at her, Employment Counsel falsely (and contrary to company policy that he had created), told Ms. Newton that he could not report the conduct because he worked for the legal department. (R. 30-31 ¶¶ 34, 36). Instead, he instructed Ms. Newton to tell the harasser "in no uncertain terms" to stop his behavior and stay away from her. (*Id.*) Following this advice, Ms. Newton sent the harasser an email that recounted some of his past incidents and told him to stop his inappropriate conduct. (R. 31 ¶ 38). After Ms. Newton forwarded this email to Vice President, Legal Affairs, Employment Counsel, he called Ms. Newton

in a state of rage, stating repeatedly that he now "ha[d] to report this," initially denying but then later admitting that he had advised her to confront the harasser, "but not in writing." (R. 31-32 ¶ 41).

In response to Ms. Newton's email to the harasser, LVMH commenced an internal investigation into Ms. Newton rather than the perpetrator or the sexual harassment and assault that Ms. Newton had experienced. The investigation was targeted to place blame on Ms. Newton rather than the perpetrator. Ms. Newton was summoned to the senior executives' floor and made to wait for the Director of Talent outside the CEO and SVP HR's offices for an extended period of time. In conducting the investigation, the Director of Talent was uninterested in hearing Ms. Newton's complaints and asked her no follow-up questions about the harassment. (R. 32 ¶¶ 42-44). Instead, the Director of Talent was more concerned about how Ms. Newton's email could reflect on LVMH's "branding" and reprimanded her for having emailed the perpetrator. (*Id.* at ¶ 44). The next day, the Director of Talent told Ms. Newton that she had spoken to the harasser and another employee who had witnessed some of the harassment and had concluded that this was all just a "misunderstanding" or "miscommunication." (R. 32-33 ¶ 45). Not only did the Director of Talent describe the harasser's conduct as "mere flirting," referring to the incident where the harasser tried to kiss Ms. Newton, she said this was

"what executives do in a French company." (R. 33, 42 ¶¶ 46, 86). The Director of Talent ignored the witness's comments and other instances of harassment, including when the harasser had physically assaulted Ms. Newton in her office shortly after she began working for LVMH. (*Id.*) The Director of Talent instead reprimanded Ms. Newton for the email that she sent to the harasser pursuant to the Employment Counsel's instructions, and suggested that Ms. Newton apologize to the harasser. (R. 33 ¶ 47). Echoing the Employment Counsel's comments to Ms. Newton the preceding day, the Director of Talent also said (1) the email placed the company in a bad light, (2) Ms. Newton needed to understand how the harasser feels, (3) the harasser cannot sleep and fears losing his job, and (4) the email had unjustifiably "attacked" him. (*Id.*)

During the investigation, the Director of Talent expressed no concern for Ms. Newton, who said the harasser's conduct had disrupted her sleeping and eating and her ability to work and concentrate. (*Id.* at ¶ 48). And, when Ms. Newton asked if the harasser could be instructed to stay away from her, the Director of Talent said the harasser had to perform his job as he saw fit. (R. 34 ¶ 49).

The investigative report prepared by the Director of Talent was riddled with inaccuracies and altered Ms. Newton's statement to suit LVMH's narrative, reprimanding and shaming Plaintiff and describing her conduct as

unprofessional. (*Id.* at ¶¶ 51-52). Equally disturbing, LVMH's General Counsel, Employment Counsel, and the company's outside counsel wanted Ms. Newton to apologize to the harasser for sending him the email requesting that he stop harassing her (*id.* at ¶ 53), even though it was Employment Counsel who had instructed Ms. Newton to confront the harasser "in no uncertain terms" after he had repeatedly declined to report or investigate the sexual harassment.

On June 3, 2018, Ms. Newton filed a formal sexual harassment complaint with Human Resources, requesting that LVMH hire an unbiased, outside investigator. (R. 35 ¶ 56). LVMH's General Counsel took offense at Ms. Newton's request, insisting that (1) the Director of Talent's investigation proved there was no violation of company policy or the law, (2) it was Ms. Newton's fault that Director of Talent did not conduct a better investigation, (3) women had to expect these types of incidents at work, and (4) an outside investigation would be waste of time. (*Id.* at ¶ 58).

LVMH reluctantly and eventually proceeded to hire an outside investigator. But the investigator tried to intimidate Ms. Newton into abandoning her claims and (1) suggested that Ms. Newton's claims could affect her employment and she might be viewed as a "trouble-maker" and a "son of a bitch" who got the harasser fired, (2) minimized the nature of the

harassment and said Ms. Newton was assaulted only once, (3) suggested that Ms. Newton should have been "flattered" by the harasser's attention, (4) said LVMH is part of "a French company" and they "look at things differently," and (5) the "#MeToo movement reminded [her] of McCarthyism." (R. 36-37 ¶¶ 63-64). Not surprisingly, the investigator identified no violation of company policy or the law, and the company refused to provide Ms. Newton with a copy of the investigator's report. (R. 37 ¶¶ 65-66). Contrary to LVMH's assertions, the investigator did not find Ms. Newton's claims "meritless" or "baseless." Rather, the investigator asked Ms. Newton during the investigation whether she would be satisfied with an internal cease and desist letter.

LVMH promoted the harasser and publicly announced the harasser's promotion to all employees at a company event in late June 2018, in the midst of the investigation, before it had even communicated the investigator's findings to Ms. Newton.

5. LVMH retaliates against Ms. Newton.

After Ms. Newton complained about the sexual harassment, LVMH's General Counsel, Plaintiff's supervisor, began treating her differently than other employees, chipped away at her autonomy in the office, and tried to take control of her cases. (R. 38 ¶¶ 69-71). After several years of glowing performance reviews that championed Ms. Newton's judgment, organizational

skills, teamwork, and litigation judgment, in March 2019, General Counsel falsely accused her of poor performance, criticizing her for actions and professional relationship strategies that General Counsel had previously encouraged her to undertake. (R. 40-41 ¶¶ 77-83). These negative reviews, repeated in March 2020, were false and retaliatory. (R. 41 ¶ 84).

6. Procedural history.

Pursuant to the New York City and the New York State Human Rights Laws, and the company's policy, on April 23, 2019, Plaintiff filed this action in Supreme Court, New York County, seeking a trial by jury. The complaint details "severe distress and anxiety" caused by the sexual harassment and retaliation, including uncontrollable shaking, tightness in Ms. Newton's chest, panic, and disrupted sleeping and eating patterns, which required her to seek therapy and caused a pre-existing medical condition, as well as another medical condition, to resurface. (R. 43-44 ¶¶ 90-94).

LVMH immediately filed a motion to compel arbitration and moved for sanctions against Ms. Newton personally. (R. 49-50). In support of their motion, Defendant cited the arbitration clause in her employment agreement with the company, which reads, in part:

> [A]ll disputes and claims of any nature that Employee may have against Company, or any of its . . . employees . . . in their capacity as such, . . . including any and all statutory, contractual, and common law claims (including all employment discrimination claims) . . . will

> be submitted exclusively to mandatory arbitration in New York. . . . Absent agreement to the contrary, the mandatory arbitration will be conducted under the JAMS Employment Arbitration Rules & Procedures ("JAMS Rules") and will be submitted before a single arbitrator selected in accordance with the JAMS Rules. The arbitrator shall have the same authority to award remedies and damages as a judge and/or jury under state or federal law.

(R. 60).

In denying LVMH's motion to compel arbitration, Supreme Court stated, "[w]ere this court to stay this action and remit the parties to binding arbitration, Ms. Newton would lose her right to trial by jury. She would also be unable to avail herself of the rules of evidence governing actions at law in this state, by virtue of Rule 22 of the JAMS Rules which provides that '[s]trict conformity to the rules of evidence is not required.'" (R. 6-7). The Court held as follows:

1. CPLR 7515, enacted by the State Legislature in 2018, renders "null and void" any contractual provision mandating arbitration of "any allegation or claim of discrimination," precisely the contractual provision invoked by LVMH on the motion to compel arbitration. (R. 7) (citing CPLR 7515(a)(2), (b)(iii)).

2. The Court, and not an arbitral tribunal, determines the threshold question of arbitrability in this case. (R. 8-9) (citing *Merrill Lynch, Pierce, Fenner & Smith v. Benjamin*, 1 A.D.3d 39, 43-44 (1st Dept. 2003), and *Dr. Alex Greenberg, DDS, PC v. SNA Consultants, Inc.,* 55 A.D.3d 418, 418 (1st Dept. 2008)).

3. CPLR 7515 retroactively renders the arbitration provision null and void. (R. 14-15). Applying traditional principles of statutory construction, Supreme Court stated,

> unlike subdivision (b) (i) of [CPLR 7515], where the language specifically provides that the prohibition applies only to contracts "entered into on or after the effective date," subdivision (b) (iii) of the statute contains no such limitation. Rather, that subdivision broadly states that "any clause or provision in *any* contract" that forces sexual harassment victims to arbitrate their claims "shall be null and void." Thus, the statute's plain language indicates that the "null and void" clause also applies to arbitration clauses already in existence.

(R. 15) (emphasis in original).

4. While CPLR 7515 prohibits mandatory discrimination-related arbitration clauses "[e]xcept where inconsistent with federal law," the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, does not govern claims asserted in this action because the FAA only applies to "a transaction involving commerce." (R. 10). Supreme Court reasoned,

> Because claims for sexual harassment, or other discrimination-based claims, cannot reasonably be characterized as claims concerning or "arising out of" "a transaction involving commerce," and additionally because the instant case involves purely intrastate activity, the FAA cannot reasonably be said to apply to the Arbitration Agreement's reference to arbitration of sexual harassment or other discrimination-based claims. Nor can the Arbitration Agreement itself be reasonably characterized as "a contract evidencing a transaction involving commerce," particularly insofar as it seeks application to sexual harassment or other discrimination-based claims. Thus, we are left with the express and unambiguous provisions of CPLR 7515, which prohibit and nullify clauses mandating arbitration of such claims.

(R. 10-11).

5. In November 2018, subsequent to the parties' 2014 arbitration agreement, and after the State Legislature enacted CPLR 7515, LVMH published and distributed to its employees, including Ms. Newton, a "Non-discrimination and Anti-Harassment Policy" stating that employees with sexual harassment claims could "fil[e] a complaint in state court." (R. 17). This language reflects the policies promoted under § 7515. The revised policy, which Ms. Newton signed and dated pursuant to LVMH's request, states that "[t]hese policies fully replace and supersede any and all written Company policies on these subjects." (R. 18). Supreme Court concluded that "the foregoing circumstances, involving the timing and promulgation of the Company's November 2018 policy, allowing – indeed, encouraging – an option of plenary New York State Supreme Court litigation of sexual harassment and workplace discrimination claims, compel the conclusion that the 2014 Arbitration Agreement's mandate of arbitration of such claims became nullified of the Company's own accord." (*Id.*)

Argument

Point I

Supreme Court properly determined the threshold issue that statutory, constitutional, and public policy precludes arbitration of this case

"[T]he courts play the 'gatekeeping' role of deciding certain 'threshold' issues before compelling or staying arbitration." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39, 43 (1st Dept. 2003) (citing CPLR 7503). While the CPLR provides that these gatekeeping issues include (1) whether a valid agreement was entered into, (2) whether the agreement was complied with, and (3) whether the claim is time-barred, "while not specifically enumerated in the statute, there is another threshold issue which is reserved for decision by the court -- that is, whether public policy precludes arbitration of the subject matter of a particular dispute." *Id.* at 43-44 (citing *Matter of City of New York v. Uniformed Fire Officers Assn.*, 95 N.Y.2d 273, 281 (2000) ("We have recognized limited instances where arbitration is prohibited on public policy grounds alone")); *see generally Matter of Cnty. of Chautauqua v. Civil Service Employees Local 1000*, 8 N.Y.3d 513, 519 (2007) ("The threshold determination of whether a dispute is arbitrable is well settled . . . [W]e first ask whether the parties may arbitrate the dispute by inquiring if 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance'"); *id.* ("[a] dispute is [] nonarbitrable, if a court can

conclude without engaging in any extended factfinding or legal analysis that a law prohibits, in an absolute sense, the particular matters to be decided by arbitration"); *Matter of Wertheim & Co. v. Halpert*, 48 N.Y.2d 681, 683 (1979) ("Although arbitration is a favored method of dispute resolution, arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced . . . This is especially true in the area of discrimination").

In *Merrill Lynch*, this Court identified some of the compelling public policy areas that courts, and not arbitrators, should resolve, including "the disqualification of an attorney from representing a client" and "the enforcement of state antitrust law." *Id.* at 44 (citing *Bidermann Indus. Licensing v. Avmar N.V.*, 173 A.D.2d 401, 402 (1st Dept. 1991), and *Matter of Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 625 (1968)). The interpretation of a landmark state law that prohibits arbitration in employment discrimination cases is comparable to the exceptions in *Merrill Lynch*. As Supreme Court observed, New York maintains a strong public policy against sexual harassment (R. 7), as demonstrated by the State Legislature's comprehensive overhaul of the hostile work environment standards in 2019, which brought the liability tests in line with the remedial New York City Human Rights Law, rejecting Title VII's "severe or pervasive" threshold in favor of the definition that includes any differential conduct based on sex that rises above the level of

"petty slights or trivial inconveniences." Exec. Law § 296(1)(h). Recent amendments to the State HRL also cover all employers, not just those with more than four employees; protect independent contractors and domestic workers; authorize mandatory attorneys' fees for prevailing parties; eliminate the *Faragher-Ellerth* affirmative defense under Title VII; prohibit employers from entering into certain nondisclosure provisions in settlements of sexual harassment claims; require management to provide employees with written notice of its sexual harassment policy and sexual harassment training; and enlarge the statute of limitations for sexual harassment claims. As Supreme Court stated, "[b]ecause of the profound policy interest underlying the enactment of CPLR 7515, . . . this court concludes that the threshold question of arbitrability of the claims in this lawsuit rests within the exclusive province of this New York State court, and is not referable to JAMS or any other arbitral forum that is not a constitutionally established court of record of the State of New York." (R. 9) (citing *Alex Greenberg, DDS, PC v. SNA Consultants, Inc.*, 55 A.D.3d 418, 418 (1st Dept. 2008) ("In New York, any threshold issue of arbitrability is a matter for the court") (citing *Cheng v. Oxford Health Plans, Inc.*, 15 A.D.3d 207, 208 (1st Dept. 2005)); *see also Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 372–73 (1st Dept. 2004) ("The initial question of arbitrability is reserved to the judiciary") (citing *Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y. 91, 95

(1975) (citing in turn, *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960) (Brennan & Harlan, JJ., concurring)).

In challenging Supreme Court's holding, LVMH glosses over the cases holding that "profound public policy" concerns require the court, and not an arbitrator, to determine the question of arbitrability. Nor does LVMH address cases holding that, "[i]n New York, any threshold issue of arbitrability is a matter for the court." (R. 9). Instead, LVMH relies on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), which states that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.'" *Id.* at 529 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010)). But these cases addressed specific exceptions to the threshold rule governing arbitrability, such as whether that rule applies when a party makes a "wholly groundless" demand for arbitration (*Henry Schein, Inc.*). These cases do not address the "strong public policy" exception that applies in New York, and the bright-line rule that LVMH proposes cannot upend settled New York cases that apply that exception.

Even the New York cases cited by LVMH do not undercut Supreme Court's reasoning. LVMH's reliance on *Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 26 N.Y.3d 659 (2016), is misplaced. That case states that "where

a contract contains a valid delegation to the arbitrator of the power to determine arbitrability, such a clause will be enforced absent a specific challenge to the delegation clause by the party resisting arbitration." *Id.* at 675-76. But that general language does not address the policy exceptions in the cases cited above, including *Alex Greenberg*. As these cases demonstrate that New York does not apply a bright-line rule guiding which tribunal initially determines arbitrability, this Court should affirm Supreme Court's analysis.

Point II

New York has prohibited mandatory arbitration in sexual harassment cases and directed that all pre-existing arbitration clauses in these cases are "null and void."

A. The State Legislature has prohibited mandatory arbitration of sexual harassment cases.

In 2018, in the wake of high-profile sexual harassment cases where victims were forced to adjudicate their claims in secret, thereby enabling perpetrators to continue to harass multiple victims, New York prohibited the formation of new contracts mandating arbitration of sexual harassment claims, and declared existing mandatory arbitration clauses "null and void." CPLR 7515.

"Except where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section." CPLR 7515(b)(i). Subdivision (a) defines "prohibited clause" as "any clause or provision in any

contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law." CPLR 7515(a)(2). The statute also renders all such pre-existing arbitration clauses "null and void." CPLR 7515(b)(iii).

As Supreme Court noted, CPLR 7515 is consistent with "a well-defined and dominant public policy" in New York "against sexual harassment in the work place." (R. 7) (citing *Phillips v. Manhattan & Bronx Surface Transit Operating Auth.*, 132 A.D.3d 149, 155 (1st Dept. 2015)). In *Phillips*, this Court vacated a CBA arbitration award that prohibited the Transit Authority from disciplining an employee who had undisputedly created a hostile work environment. *Id.* at 155-57. "It is against this public policy backdrop that our Legislature enacted CPLR 7515 in 2018, eradicating mandatory arbitration of sexual harassment claims." (R. 7-8); *see generally Matter of Cnty. of Chautauqua,* 8 N.Y.3d at 519; *Matter of Wertheim & Co.*, 48 N.Y.2d at 683.

In passing this law, legislators observed that "victims of sexual harassment have been forced to remain silent for far too long" and that there "is no place in our government, or society as a whole, for sexual assault or harassment." *See* New York State Senate, *Senate Passes Comprehensive Strengthening of New York's*

Sexual Harassment Laws (March 12, 2018).[2] The senators explained that "bans [of] secret settlements" and "prohibit[ion] [of] mandatory arbitration for sexual harassment complaints" further the societal goal of "giv[ing] [victims] a voice" because when an individual faces a hostile work environment, "laws and policies must be in place to empower individuals to speak out and to hold offenders accountable for their wrongdoing." (*Id.*) Victims must "not only feel safe enough to come forward, but also to ensure their voice will be heard." (*Id.*)

These concerns are reflected in the position taken by the National Association of Attorneys General, which stated in 2018 that "[a]ccess to the judicial system, whether federal or state, is a fundamental right of all Americans" and "should extend fully to persons who have been subjected to sexual harassment in the workplace." National Association of Attorneys General, February 12, 2018 Letter to Congressional Leadership, Re: Mandatory Arbitration of Sexual Harassment Disputes.[3] The Attorneys General further explained why society cannot tolerate mandatory arbitration of sexual harassment claims:

> While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified

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[2] https://www.nysenate.gov/newsroom/articles/2018/senate-passes-comprehensive-strengthening- new-yorks-sexual-harassment-laws.

[3] https://tinyurl.com/yxfgr49h

> to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.
>
> Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.

Id. at 2.

New York's commitment to preventing and remedying sexual harassment is unmistakable and reflected in the Legislature's enactment of CPLR 7515. As the arbitration agreement violates § 7515, Supreme Court properly denied LVMH's motion to compel arbitration.

B. CPLR 7515 applies retroactively to nullify pre-existing mandatory arbitration clauses in sexual harassment cases.

LVMH cannot dispute that CPLR 7515 codifies state policy against mandatory arbitration of sexual harassment claims. Instead, it argues that, even if the FAA does not preempt § 7515, Supreme Court improperly held this provision applies retroactively. Since Ms. Newton signed the arbitration agreement in December 2014, effective February 2015, and CPLR 7515 "was signed in April 2018 and became effective on July 11, 2018," LVMH argues that Supreme Court should not have applied it in this case at all. (Def. Br. at 22-23). LVMH's argument

ignores settled principles of statutory construction that require the courts to interpret statutes as a whole to determine legislative intent. Under that interpretative model, the arbitration agreement is a nullity.

The "literal language of a statute" is generally controlling unless "the plain intent and purpose of a statute would otherwise be defeated." *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018). In *Friedman v. Connecticut Gen. Life Ins. Co*., 9 N.Y.3d 105 (2007), the Court of Appeals restated black-letter law in this area: "A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent and, where possible, should 'harmonize[ ] [all parts of a statute] with each other . . . and [give] effect and meaning . . . to the entire statute and every part and word thereof.'" *Id.* at 115 (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 97-98 and *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979) ("It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other")).

CPLR 7515 contains separate provisions guiding the enforceability of mandatory arbitration provisions in sexual harassment cases. First, "no written contract, *entered into on or after the effective date of this section* [July 11, 2018] shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section." CPLR 7515(b)(i) (emphasis supplied). Subdivision (a) refers to

mandatory arbitration clauses to resolve any allegation or claim of employment discrimination. Had the Legislature intended that § 7515 only apply prospectively and not retroactively, it would not have enacted a second provision, § 7515(b)(iii), entitled "Mandatory arbitration clause null and void." Under (b)(iii), "the provisions of such prohibited clause as defined in paragraph 2 of subdivision (a) of this section shall be null and void." This provision incorporates the definition of "prohibited clause": "*any* clause or provision in *any* contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of [employment] discrimination." CPLR 7515(a)(2) (emphases supplied). The question is what effect § 7515(b)(iii) has on the statute in light of the mandatory arbitration prohibition set forth under § 7515(b)(i).

If, as LVMH argues, CPLR 7515 only applies prospectively, then the language in § 7515(b)(iii) is superfluous, merely restating what the Legislature had already prohibited under § 7515(b)(i). Yet, as demonstrated above, courts presume that no statutory provision is superfluous, and statutes must be analyzed as a whole to divine legislative intent. When used in a contract or statute, "null and void" is "often construed as meaning 'voidable.' 'Null and void' means that which binds no one or is incapable of giving rise to any rights or obligations under any circumstances, or that which is of no effect." Blacks's Law Dictionary, Abridged

Fifth Edition, at 553 ("null"). "Void" means "Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended." *Id.* at 812 ("void"). Applying that meaning, § 7515(b)(iii)'s "null and void" provision can only mean that pre-existing mandatory arbitration clauses in employment discrimination cases are not enforceable. Not only does the plain meaning of "null and void" compel this result, but § 7515(a)(2) refers to "any" mandatory arbitration provision in "any" contract in employment discrimination claims. As Supreme Court stated,

> Thus, unlike subdivision (b) (i) of the statute, where the language specifically provides that the prohibition applies only to contracts "entered into on or after the effective date," subdivision (b) (iii) of the statute contains no such limitation. Rather, that subdivision broadly states that "any clause or provision in *any* contract" (emphasis added) that forces sexual harassment victims to arbitrate their claims "shall be null and void." Thus, the statute's plain language indicates that the "null and void" clause also applies to arbitration clauses already in existence.

(R. 15) (emphasis in original).

If the Legislature had intended to make § 7515 prospective only, the provision would not have protected most employees, many of whom already have employment agreements. The statute would in effect take years to apply to most employees because they would have to change jobs and sign a new employment agreement in order to avail themselves of § 7515. If 90% of employees cannot avail themselves of the statute, that result would be inconsistent with the

Legislature's intent to prevent the perpetuation of harassment and assault against other employees.

Interpreting the statute as LVMH proposes would also create an unusual dichotomy in within the same company: only newer employees could sue for sexual harassment, but those who had been working there prior to November 2018 could not sue for these civil rights violations.

LVMH argues that Supreme Court's reasoning is "at odds with several other opinions on the matter," including *Murphy v. Citigroup Glob. Mkts.*, 185 A.D.3d 486 (1st Dept. 2020), and *Rodriguez v. Perez*, No. 158376/2019, 2020 WL 888485 (Sup. Ct. N.Y. Co. Feb. 19, 2020). (Def. Br. at 23). In *Murphy*, this Court stated in a footnote that "Effective October 11, 2019, well after the facts of plaintiff's discrimination claims were adjudicated in arbitration, the New York State Discrimination Laws were amended to prospectively prohibit mandatory arbitration clauses, except where inconsistent with federal law." 185 A.D.3d at 487 n.1. This language is *dicta*, buttressing this Court's primary holding that res judicata precluded the plaintiff's discrimination claims because he asserted claims that a prior arbitration had already resolved. *Id.* at 560. The footnote engages in no statutory analysis. Nor does *Rodriguez* compel a different result. As Justice Nock held in distinguishing *Rodriguez*, that case focused solely on § 7515(b)(i) "without

targeted analysis of subdivision (b)(iii) -- the 'null and void' subdivision of the statute." (R. 16).

In November 2020, this Court decided *Altman v. Salem Media of New York, LLC*, __ A.D.3d ___, 2020 WL 6731859 (1st Dept. Nov. 17, 2020), holding that CPLR 7515 only applies prospectively. *Id.* at *1. But, like *Murphy*, upon which *Altman* relies, this Court did not engage in the extended statutory analysis that Justice Nock provided in denying LVMH's motion to compel arbitration.

LVMH relies on the executive branch interpretation of CPLR 7515's retroactivity. But, as Supreme Court noted, "[a]part from the somewhat doubtful implication proffered by defendant's counsel that such entries enjoy the force of law, this court observes that said question and answer do not address the 'null and void' subdivision of CPLR 7515(b)(iii)." (R. 16 n. 11). While LVMH also cites a floor comment from Sen. Krueger, who stated that "[t]he new law would ban the use of mandatory arbitration clauses signed after the effective date except where inconsistent with federal law" (Def. Br. at 23-24),[4] that was an offhand comment in which Sen. Krueger was asking about an entirely different matter: federal preemption. *See id.* ("So there are many sections of Part B addressing sexual harassment. The new law would ban the use of mandatory arbitration clauses signed after the effective date except where inconsistent with federal law. In what

[4] Citing https://legislation.nysenate.gov/pdf/transcripts/033018.txt/

ways would these prohibitions against mandatory arbitration clauses be inconsistent with federal law?"). Such a comment cannot govern the careful statutory interpretation that this case requires in light of the strong statutory, constitutional, and public policy at stake.

The retroactive denunciation of mandatory arbitration in sexual harassment cases is not only consistent with the statutory construction of CPLR 7515, it also dovetails with the legislative intent to eliminate such arbitration root and branch, and to prevent the further enabling of perpetrators through the lack of accountability resulting from forced arbitrations. This Court should affirm Justice Nock's reasoning.

Point III

As sexual harassment and assault claims are distinct from traditional employment discrimination claims, the parties did not reasonably contemplate these claims would be arbitrated

LVMH argues that Supreme Court ignored and otherwise misapplied U.S. Supreme Court precedents governing the Federal Arbitration Act, as well as the Act's plain language that, if the parties agree to an arbitration clause, disputes arising from employment contracts that affect interstate commerce must be arbitrated. LVMH further argues that Justice Nock "misread the FAA to require that *the allegations being arbitrated* must involve commerce." (Def. Br. at 19) (citing 9 U.S.C. § 2) (emphasis supplied).

Defendant's argument would render CPLR 7515 a nullity. It also overlooks how sexual harassment and assault claims, while often brought against employers, are not traditional "employment claims" and should not be treated as such. For example, in *Lichon v. Morse*, 327 Mich. App. 375 (Ct. App. 2019), *lv. to appeal granted*, 504 Mich. 962 (2019), applying two dispute resolution agreements that mandated arbitration for all employment-related disputes, including discrimination claims, *id*. at 381-82, 386, the Michigan Court of Appeals noted the general rule that "an agreement to arbitrate presents a contractual matter between parties." *Id*. at 390. However, the Court stated, "those parties are not required to submit matters [to arbitration] any dispute which he has not agreed so to submit." *Id*. (quoting *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83 (2002)). Moreover, "[i]n this endeavor, as with any other contract, the parties' intentions control." *Id*. (quoting *Stolt-Neilson S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 682 (2010)). The Court in *Lichon* concluded,

> Despite the fact that the sexual assaults may not have happened but for plaintiffs' employment with the Morse firm, we conclude that claims of sexual assault cannot be related to employment. The fact that the sexual assaults would not have occurred but for Lichon's and Smits's employment with the Morse firm does not provide a sufficient nexus between the terms of the MDRPA and the sexual assaults allegedly perpetrated by Morse. To be clear, Lichon's and Smits's claims of sexual assault are unrelated to their positions as, respectively, a receptionist and paralegal. Furthermore, under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm. Accordingly, the circuit courts erroneously granted defendants' motions to dismiss these actions and compel

> arbitration of plaintiffs' claims. Both Lichon and Smits shall be permitted to litigate their claims in the courts of this state because the claims fall outside the purview of the MDRPA.

Id. at 393-94.

The Court further held that, in the absence of any authority directly on point, "central to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." *Id.* at 394. While "[t]he general policy of this State is favorable to arbitration, . . . the idea that two parties would knowingly and voluntarily agree to arbitrate such a dispute over such an egregious and possibly criminal act is unimaginable." *Id.* at 394-95. The Court added, "[t]he effect of allowing defendants to enforce the MDRPA under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. Such a result has no place in Michigan law." *Id.* at 395. As demonstrated above, this reasoning mirrors New York's strong policy against sexual harassment, and its determination to prohibit mandatory arbitration in sexual harassment cases.

Other courts have adopted similar reasoning. In *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009), the Court held that an employee's claims of assault, battery, and negligent supervision by her employer were not "related to" her employment and could not be forced into arbitration. *Id.* at 236 (citing *Smith v.*

Captain D's, LLC, 963 So. 2d 1116 (Miss. 2007) (plaintiff's claim against her employer for negligent hiring, supervision, and retention of her manager, who allegedly sexually assaulted plaintiff, was "unquestionably" beyond the scope of the arbitration clause, which provided that all "claims, disputes, or controversies arising out of or relating to [her] . . . employment" would be resolved through arbitration); *see also Hill v. Hilliard*, 945 S.W.2d 948, 950, 952 (Ky. Ct. App. 1996 (holding that assault and battery and false imprisonment claims were not covered under the arbitration clause and that "[t]he only connection those torts and crimes have with [plaintiff]'s employment is that they were committed by a co-worker and occurred while on a business trip," and "[t]he mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative. What [the supervisor] is accused of doing is independent of the employment relationship")); *Washington v. CentraState Healthcare Sys., Inc.*, Civ. No. 10-6297, 2011 WL 1402765, at *4-5 (D.N.J. Apr. 13, 2011) (notwithstanding the FAA, and noting the "strong federal policy in favor of the resolution of disputes through arbitration," holding an arbitration provision within the employment agreement which covered "any dispute . . . arising out of or relating to this Agreement" could not reasonably be read to include a state law discrimination claim as it did not arise out of or relate to the employment); *Arnold v. Burger King*, 48 N.E.3d 69, 84 (Ohio Ct. App. 2015)

(plaintiff's claims arising from the sexual assault existed independent of the employment relationship, in part because (1) they could be "maintained without reference to the contract or relationship at issue," and (2) "ongoing verbal and physical contact culminating in sexual assault as well as retaliation, harassment, or other detrimental acts against Arnold based on the unlawful conduct is not a foreseeable result of the employment"); *Deering v. Graham*, 14-cv-3435 (NLH/JS), 2015 WL 424534, at *9 (D.N.J. Jan. 30, 2015) ("The reference to 'all claims' within the subject arbitration provision cannot be reasonably interpreted to include plaintiff's claims of assault and sexual battery"); *Abou–Khalil v. Miles,* 2007 WL 1589456, at *2 (Cal. Dist. Ct. App. June 4, 2007) (unpublished) (noting that "sexual assault is not normally within the course and scope of employment"). These types of arbitration agreements are therefore not "employment agreements" that fall under the FAA. Instead, they constitute agreements to arbitrate gender-based violence and harassment that have no relationship to interstate commerce.

Relatedly, sexual harassment and assault claims are not subject to arbitration because the parties could not have contemplated that these claims might arise in the course of the employment relationship. Defendant cites *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), in asserting that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA." *Id.* at 289 (Def. Br. at 19). But that reasoning does not address whether claims of

sexual harassment and assault are the kind of employment "disputes" that fall under the FAA. The other U.S. Supreme Court cases cited in Defendant's brief, including *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), do not address this issue. *Circuit City* held only that employment contracts are not exempt from the FAA. 532 U.S. at 119. *Gilmer* held that federal age discrimination claims may be subjected to mandatory arbitration. 500 U.S. at 27-28. But statutory discrimination cases involving adverse personnel decisions, such as demotions, terminations, and promotion denials, which directly implicate the employment relationship, are quite unlike sexual harassment and assault claims, in which the offending supervisors and co-workers are not advancing the employer's interests, and for which the employer cannot assert any legitimate, nondiscriminatory, business-related justification. While it might be foreseeable that an employment dispute will turn on whether management harbored discriminatory intent in assignments or even termination, the same cannot be said about sexual harassment and assault claims, which cannot implicate any of the business justifications that management might assert in defending a traditional disparate treatment claim. Employment discrimination claims that arise from tangible personnel actions may directly implicate the formal employment relationship. But sexual harassment and assault claims are another matter entirely.

The nonbinding trial court cases in Defendant's brief that hold the FAA preempts CPLR 7515 only further highlight the need for this Court to clarify that § 7515 is not a dead-letter law in sexual harassment cases. (Def. Br. at 16-17). For example, Defendant cites *Latif v. Morgan Stanley & Co.*, No. 18-cv-11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019), where the Court stated that § 7515 applies "[e]xcept where inconsistent with federal law" as evidence the statute is purportedly preempted by the FAA. Defendant cites other nonbinding cases for the same proposition. (Def. Br. at 16-17). Yet, as Supreme Court observed, this argument would implausibly suggest that the Legislature included this language intending to nullify the statute. (R. 12). This Court cannot presume that the Legislature "knowingly engaged in a futile exercise by enacting its statute nullifying mandatory arbitration for discrimination claims and then, in the same breath, eviscerated it with the words '[e]xcept where inconsistent with federal law.'" (*Id.*); *see also* R. 13 ("to suggest that the Legislature toiled to promulgate the general rule of CPLR 7515 only to have it immediately swallowed up by a 'federal law' exception, would be to suggest an 'objectionable, unreasonable or absurd consequence[]") (citing *Roberts v. Tishman Speyer Properties, L.P.*, 62 A.D.3d 71, 80-81 (1st Dept. 2006)). Instead, as Supreme Court noted, courts are authorized to interpret state laws to effectuate legislative intent. (R. 12). In this instance, the Legislature intended that sexual harassment cases cannot be the

subject of mandatory arbitration. As for the proviso that § 7515 applies "[e]xcept where inconsistent with federal law," the Legislature likely included this language to preserve the statute even if a plaintiff's claims fall within the ambit of the FAA. But, since Ms. Newton's claims occurred wholly intrastate (as further demonstrated in Point IV, *ante*), they had no relationship to commerce, and they fall outside the scope of the FAA, the arbitration agreement is not enforceable as to her sexual assault and harassment claims.

Point IV

As sexual harassment and assault claims do not arise from interstate commerce, the Federal Arbitration Act does not govern this dispute

LVMH argues that CPLR § 7515 cannot override the arbitration agreement because the statute is preempted by the Federal Arbitration Act. This argument would eviscerate a state law that promotes a policy objective of the highest order: protecting employees from private sexual harassment arbitrations. But as Supreme Court properly held, § 7515 is not preempted by the FAA because it applies to contracts forcing sexual harassment victims to arbitrate claims that are not "transactions involving commerce." 9 U.S.C. § 2. The agreement to arbitrate sexual harassment claims here, and any similar agreements contemplated by § 7515, do not fall under the FAA's umbrella. No appellate court has examined § 7515 in a reported opinion, and Justice Ginsburg cited the statute as one that is intended to "safeguard employees' opportunities to bring sexual harassment suits

in court." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting).

Under 9 U.S.C. § 2, the FAA applies to contracts "evidencing a transaction involving commerce." Supreme Court recognized that an agreement to arbitrate sexual harassment claims, however, is not such a contract. Such an agreement is instead governed by CPLR 7515, which prohibits pre-dispute agreements forcing sexual harassment victims to arbitrate their claims. This is because, as Supreme Court recognized, sexual harassment has no effect on, and nothing to do with, interstate commerce. (R. 10). Ms. Newton's claims relate to the sexual assault and harassment that she experienced in New York, and all conduct relating to her claims occurred in New York. The sexual harassment therefore "involves purely intrastate activity." (*Id.*) To the extent Ms. Newton's arbitration agreement requires forced arbitration of her sexual harassment and assault claims, it is outside the scope of the FAA.

Although federal courts have interpreted "involving [interstate] commerce" broadly to mean "affecting [interstate] commerce," *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003), "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000); *see also Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474

(1989) (the FAA's policy in favor of arbitration "does not confer a right to compel arbitration of any dispute at any time"). In *Morrison*, the Supreme Court held that Congress exceeded its authority under the Commerce Clause in attempting to regulate "[g]ender-motivated crimes of violence" which "are not, in any sense of the phrase, economic activity." 529 U.S. at 613. The Court further explained that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613-18 (rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States").

Assault and harassment, particularly when they occur exclusively in one state, do not involve interstate commerce, and are "not, in any sense of the phrase, economic activity." Nor are they activities directed at the "instrumentalities, channels, or goods involved in interstate commerce." (*Id.*) Rather, they evidence transactions involving sexual violence and harassment wholly unrelated to commerce. As § 7515 differs from other state laws that have been found to be preempted by the FAA, in that it governs arbitration agreements related to entirely

non-economic activity, *i.e.*, sexual harassment, the FAA does not preempt this provision.

Point V

As revised in 2018, LVMH's policy supersedes the 2014 arbitration agreement

Even if this Court determines that CPLR 7515 is a nullity and that the Legislature knowingly engaged in a futile effort to bar mandatory arbitration of sexual harassment claims, this case remains unsuitable for arbitration for another reason: management repudiated the mandatory arbitration provision in 2018, when its new policy told employees they can litigate their sexual harassment disputes in State Supreme Court.

The 2014 arbitration provision in this case states that "[t]his agreement may not, on behalf of the Company, be changed, modified, amended, waived, released, discharged, abandoned or otherwise terminated, in whole or in part, except by an instrument in writing signed by the Company." (R. 58). However, while the arbitration agreement was executed before New York enacted its policy against mandatory arbitration of discrimination claims in July 2018, LVMH distributed a revised employee policy, dated November 26, 2018. The revisions are fatal to LVMH's arguments.

The policy revisions comprise company policy; they are not mere guidelines or traditional, nonbinding handbook language. The revisions note that "the

following policies supersede and fully replace the policies of the same name or that address the same subject matter" set forth in the policy dated April 1, 2015. (R. 96). This document further outlines the "Non-Discrimination and Anti-Harassment Policy." (*Id.*) The subsections also refer to "this policy" *See e.g.* R. 97 ("As used in this policy, harassment is defined as disrespectful or unprofessional conduct"). All the revisions relevant to this appeal are set forth under this policy.

Not only do the provisions in the 2018 policy statement "supersede and fully replace the polices of the same name or that addresses the same subject matter as contained in the LVMH Moet Hennessy Louis Vuitton Inc. Employee Handbook dated April 1, 2015" (R. 96), but "[a]ll Company employees and applicants are covered under this policy, whether related to conduct engaged in by co-workers supervisors, managers, or someone not directly connected to the Company[.] . . . This policy extends to conduct with a connection [to] an employee or applicant's work, even when the conduct takes place away from the Company's premises such as a business trip or business-related social function." (R. 97). This statement alone demonstrates the company's commitment to preventing sexual harassment in every context that relates to the workplace, buttressed by the robust and comprehensive definition of "sexual harassment" set forth in the policy. (R. 97-98).

The policy goes beyond ensuring that women can work in peace without unwanted sexual advances, offensive sexual talk, touching, and other forms of

harassment that Ms. Newton herself experienced while employed by LVMH. The policy also advises employees how to enforce their right to work in a harassment-free environment. In addition to notifying the company about the harassment (which Ms. Newton did) so the company can undertake a thorough and good-faith investigation (which LVMH did not do and its Employment Counsel refused to do) (R. 99-100), "employees and applicants may file formal complaints of discrimination, harassment, or retaliation with federal or state agencies," including the EEOC, which "investigates and prosecutes complaints of prohibited harassment, discrimination, and retaliation in employment." (R. 101). In addition, the policy states, "[y]ou may also file a complaint in state court." (*Id.*) Under the policy, employees may also file a complaint with a government agency or in court under federal, state or local antidiscrimination laws. (*Id.*) Moreover, "[t]he . . . Policy applies to all employees" (*id.*), including Ms. Newton. While employees may now comply with "the internal process at the Company," employees "may choose to pursue legal remedies with the following governmental entities." (R. 106). Those entities include the State Division of Human Rights, which has authority to hold a "public hearing" into the allegations and impose civil fines (*id.*), the EEOC, which may "pursue cases in federal court on behalf of complaining parties" (R. 107), and the New York City Commission on Human Rights, a public agency. (*Id.*) The policy also states that sexual harassment and retaliation victims

may file suit "in New York State Supreme Court." (R. 106). That is what Ms. Newton did.

While the company amended its sexual harassment policies in 2018 to comply with state law, comprehensively promising employees that sexual harassment will not be tolerated and they can bring suit in State Supreme Court, the company is now running away from that policy. The company is also repudiating its training issued in 2019 and 2020 informing employees of the same, claiming that it does not apply in this case because of the 2014 arbitration provision that, the company says, mandates the private arbitration of this dispute. Not only is this position contrary to state policy as expressed in § 7515, but it signals to LVMH employees that the 2018 employee policy revisions – laudatory as they are – are meaningless and unenforceable. The majority of employees who joined the company before November 2018 would not be able to avail themselves of these options.

Recognizing the anomaly presented by LVMH's argument that the 2018 policy language cannot circumvent the 2014 arbitration provision in Newton's employment agreement, Justice Nock concluded that "the parties' Arbitration Agreement was superseded and replaced by the Company's subsequent 'Non-Discrimination and Anti-Harassment Policy' and 'New York Sexual Harassment Prevention Policy' insofar as the Arbitration Agreement sought to remit the parties

to binding arbitration in connection with the claims asserted in this lawsuit." (R. 19-20). On this basis alone, Supreme Court ruled, LVMH cannot compel arbitration.

LVMH challenges Supreme Court's holding on the basis that the November 2018 employee policy revisions "do not specifically reference the Arbitration Agreement or expressly revoke any prior arbitration clause." (Def. Br. at 26). However, the cases that LVMH cites for this proposition, *Ecopetrol S.A. v. Offshore Expl. & Prod., LLC*, 46 F. Supp. 3d 327 (S.D.N.Y. 2014), and *Jamieson v. Sec. Am., Inc.*, No. 19 CV 1817, 2019 WL 6977126 (S.D.N.Y. Dec. 20, 2019), are consistent with Supreme Court's analysis. As the Court noted in *Jamieson*, "[a]n obligation to arbitrate may of course be superseded and displaced by a subsequent agreement between the parties." *Id.* at *6 (citing *Ruiz v. New Avon LLC*, 2019 WL 4601847, at *8 (S.D.N.Y. Sept. 22, 2019)). This reflects Second Circuit law. In *Goldman Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210 (2d Cir. 2014), the Court stated, "[i]n this Circuit, an agreement to arbitrate is superseded by a later-executed agreement containing a forum selection clause if the clause 'specifically precludes' arbitration, *but there is no requirement that the forum selection clause mention arbitration.*" *Id.* at 215 (emphasis supplied). Accordingly, contrary to LVMH's argument, the policy revisions in the 2018 policy did not have to expressly reference the 2014 arbitration agreement in order

for them to repudiate it. Moreover, as demonstrated above, the 2018 policy contains a forum selection clause, allowing employees to litigate their claims in court. For this reason, *Ecopetrol* also supports Ms. Newton's position, as the Court noted that "courts determining 'whether an agreement to arbitrate has been supplanted by a later accord . . . look to whether the subsequent agreement specifically preclude[s] or provides positive assurance that a dispute is no longer subject to arbitration.'" *Ecopetrol S.A.*, 46 F. Supp. 3d at 342.

LVMH further argues that Supreme Court overlooked how "Plaintiff's employment agreement states that it can only be 'changed, modified, amended, waived, released, discharged, abandoned, or otherwise terminated . . . by an instrument signed in writing by the Company.'" (Def. Br. at 26) (citing R. 58). This argument elevates form over substance. There was no reason for LVMH to formally sign-off on the policy revisions adopted in November 2018, in which the company repudiated the arbitration agreement between the parties. Indeed, the company twice requested that Ms. Newton sign the policy revisions. (R. 110). There is no doubt that LVMH endorsed the policy revisions, as they bear the company's imprimatur throughout the document.

As LVMH notes, when "the subsequent writing can be construed in harmony with the original contract, there is no need to alter the original." (Def. at 28) (citing *Intercontinental Packaging Co. v. China Nat. Cereals, Oils & Foodstuff Imp. &*

Exp. Corp., Shanghai Foodstuffs Branch, 159 A.D.2d 190, 195 (1st Dept. 1990)). The 2018 policy revisions replace the 2014 arbitration provisions because they cannot be reconciled. Reconciliation is impossible because the 2018 language tells the employee that her sexual harassment and assault complaints may be litigated in Supreme Court and, as demonstrated above, LVMH designated the revisions as company policy.

Defendant's reliance on *Zendon v. Grandison Mgt., Inc.*, No. 18 CV 4545, 2018 WL 6427636 (E.D.N.Y. Dec. 7, 2018), is misplaced. Defendant claims this case supports their position because it holds that the second employment agreement did not contain any arbitration provision and "makes no mention of arbitration or dispute resolution[.]" (Def. Br. at 29) (citing *id.* at *2). However, the 2018 LVMH policy revisions make reference to dispute resolution, allowing employees to litigate their disputes in court. (R. 106). Moreover, in *Zendon*, the arbitration agreement remained in effect because "the 2017 Agreement does not specifically preclude arbitration and can be read as complementary to the 2015 Agreement's arbitration provision[.]" 2018 WL 6427636, at *2. That is not the case here. As demonstrated above, the 2014 arbitration provision and 2018 policy revisions are not complementary and cannot be reconciled. LVMH adopted the revised language in 2018 for a reason. The company should embrace its own policy revisions, not repudiate them.

Point VI

The arbitration provision is substantively unconscionable

Clauses mandating arbitration of sexual harassment claims have been rejected by society at large, and they are illegal under state law. The parties' purported agreement that Ms. Newton mandatorily arbitrate claims of sexual harassment is substantively unconscionable, and its outrageous and immoral terms are sufficient by themselves to find that an agreement to arbitrate sexual harassment and assault claims was never formed, even without a showing of procedural unconscionability.

Courts must perform "an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged." *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 12 (1988). An unconscionable contract is "one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforc[ea]ble according to its literal terms." *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 381 (S.D.N.Y. 2002) (quoting *Gillman*, 73 N.Y.3d at 10).

The arbitration provision in Ms. Newton's contract, silencing her claims of sexual harassment and assault and forcing her to adjudicate such harm outside of the courts, is substantively unconscionable. Requiring victims of sexual harassment

to maintain confidentiality over their claims and waive their constitutional right to trial before a jury of their peers is unreasonably favorable to employers and the harassers employed by the employers, both of whom avoid public disclosure of their mistreatment, neglect and abuse of employees, permitting continued harassment by the harassers. *See Brennan*, 198 F. Supp. 2d at 384 (holding a contract was unreasonably favorable to an employer because it "denied [the employee] the right to proceed in court on her pending sexual harassment claim against the company"). Victims of sexual harassment whose claims are forced into arbitration also do not receive an equivalent process as they would in the court system.[5]

In fact, these terms are not just favorable to LVMH, but benefit only LVMH. Although the arbitration agreement claims valid consideration due to mutuality—as the company also agrees to arbitrate any disputes it may have against Ms. Newton—there is no mutuality. LVMH is a corporation that will never be the victim of sexual harassment and will never have to experience an assault on its

[5] The Economic Policy Institute estimates that workers subject to mandatory arbitration win just 38 percent as often as they would in state court, and 59 percent as often as they would in federal court. Even when workers do win, they only get a fraction of the damages, 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. Economic Policy Institute, *The arbitration epidemic* (Dec. 7, 2015). https://www.epi.org/publication/the-arbitration-epidemic/.

person. There is nothing mutual about an agreement in which Ms. Newton is forced to remain silent and lose her right to be heard by the courts regarding a harm that she has suffered but that LVMH can never experience and will never be forced to arbitrate.

It is also apparent that mandatory arbitration of sexual harassment is in direct contravention of societal "mores" and is no longer standard business practice. As demonstrated above, New York has a longstanding and "strong public policy against sexual harassment in the workplace." *See Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO.*, 915 F.2d 840, 845 (2d Cir. 1990) ("[T]here is an explicit, well-defined, and dominant public policy against sexual harassment in the work place"); *Phillips*, 132 A.D.3d at 155 (vacating an arbitration award reinstating an employee accused of sexual harassment because the arbitrator interpreted the collective bargaining agreement "in a manner that conflicts with a well-defined and dominant public policy. The public policy against sexual harassment in the workplace"). This longstanding policy corresponds with societal interest in giving victims of sexual harassment a voice and ensuring that victims have access to the courts. *Johnson v. Medisys Health Network*, No. 10-CV-1596 (ERK) (WP), 2011 WL 5222917, at *29 (E.D.N.Y. June 1, 2011) ("[T]he interest in public access to court records militates against sealing the entire record, especially where plaintiff has asserted serious

claims of defamation and sexual harassment that do not rest on confidential information"). Consistent with these principles, as Justice Ginsburg recently noted,

> Recent developments outside the judicial arena ameliorate some of the harm this Court's decisions have occasioned. Some companies have ceased requiring employees to arbitrate sexual harassment claims, *see* McGregor, Firms May Follow Tech Giants on Forced Arbitration, Washington Post, Nov. 13, 2018, p. A15, col. 1, or have extended their no-forced-arbitration policy to a broader range of claims, *see* Wakabayashi, Google Scraps Forced Arbitration Policy, N.Y. Times, Feb. 22, 2019, p. B5, col. 4. And some States have endeavored to safeguard employees' opportunities to bring sexual harassment suits in court. *See, e.g.*, N. Y. Civ. Prac. Law Ann. § 7515 (West 2019) (rendering unenforceable certain mandatory arbitration clauses covering sexual harassment claims). These developments are sanguine, for "[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights . . . to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

Lamps Plus, 139 S. Ct. at 1422 (Ginsburg, J., dissenting).

Conclusion

This Court should affirm Supreme Court's order denying LVMH's motion to compel arbitration and remand this case for discovery under the CPLR.

Dated: December 8, 2020

Respectfully submitted,

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Stephen Bergstein

Mr. JOHNSON of Georgia. So, ladies and gentlemen, this concludes today's hearing. I want to thank you again for appearing as Witnesses.

Without objection, all Members will have 5 legislative days to submit additional written questions for the Witnesses or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 12:42 p.m., the Subcommittee was adjourned.]

APPENDIX

Submitted Testimony of

Laura M. Flegel

National Employment Lawyers Association

and

The Employee Rights Advocacy Institute For Law & Policy

Legislative & Public Policy Director

to the

Subcommittee on Antitrust, Commercial, and Administrative Law

Committee on the Judiciary

United States House of Representatives

on

Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

February 19, 2021

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I. Introduction

Founded in 1985, the National Employment Lawyers Association (NELA) is the largest bar association in the country focused solely on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a combined membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. For more than two decades, NELA has called on Congress to end the insidious corporate practice of forcing workers and consumers to address disputes in secret, one-sided arbitration proceedings because the evidence demonstrates that forced arbitration is harmful to workers.

Founded in 2008, The Employee Rights Advocacy Institute For Law & Policy ("The Institute") is the related charitable public interest organization of NELA. The Institute advances workers' rights through research, thought leadership, and education for policymakers, advocates, and the public. Since its inception, The Institute has studied the effects of forced arbitration on working people and has published several works exposing the harms of forced arbitration.

NELA and The Institute welcome the opportunity to support passage of this important legislation. If you have questions or wish to discuss NELA's engagement with this bill, **please do not hesitate to contact NELA's Legislative & Public Policy Director, Laura Flegel, lflegel@nelahq.org**.

The FAIR Act is critical to justice for working people in all sectors of the economy. If passed, it would level the playing field for workers who face wage theft, discrimination, harassment, or other illegal treatment in the workplace and who are seeking to enforce their rights under law. NELA urges Members of Congress to pass the FAIR Act in the 117th Congress.

II. Millions Of Workers Are Forced To Accept Arbitration Clauses, Often As A Condition Of Employment

The arbitration clauses that would be made invalid and unenforceable by the FAIR Act are clauses that working people are effectively forced into. Some are signed by employees as a condition of employment and others are buried in fine print of onboarding documents in workplace or employee handbooks. Often, the worker isn't even aware that she or he "agreed" to this unless and until there is a dispute. Some forced arbitration clauses are shared in an email, in a letter to all employees, or through a company's internal computer network. Forcing workers to choose between signing or accepting a forced arbitration clause or losing their jobs is not a real choice at all. Burying such a clause in employee onboarding documents is a practice that is common, but should be abhorrent to anyone who believes that informed consent is the correct model when one waives one's rights or enters into a contract.

According to a 2017 report, over 60 million employees are required to forgo their constitutional right to take their employer to court – regardless of the severity of employer misconduct - if they want to get or keep their job.[i] More than 60 percent of the non-unionized workforce is bound by a forced arbitration clause and that number is still on the rise.[ii] A 2019 report projected that by the year 2024 more than 80% of all non-union private-sector employees will be required to sign away their right to sue in court if they want to keep earning a paycheck.[iii] No one starts a new job anticipating that she or he will have to

litigate a discrimination, harassment, or wage theft claim. But all of these things happen to working people and when they do, an employee should be able to vindicate his or her rights under the law.

III. Forced Arbitration Clauses Allow Corporations To Evade Accountability For Illegal Misconduct

Forced arbitration clauses allow employers to cheat workers while protecting themselves from accountability. They allow companies to hide systemic harassment and discrimination, including sexual harassment. Class action bans are ubiquitous in forced arbitration clauses, and the combination of class action bans and forced arbitration virtually guarantees that many individual employees will drop valid claims because they lack the resources as well as the less measurable support of others who are facing or have faced the same wrongdoing.

Since 1938, when the Fair Labor Standards Act was enacted, the United States Congress has recognized the need for a range of employee protections, and enacted important laws to foster safe, fair, and equitable workplaces. Federal workplace protections, such as the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Uniformed Services Employment and Reemployment Rights Act, aim to eradicate discrimination, retaliation, and wage theft in the workplace. These statutes represent hard-fought efforts to address pervasive mistreatment of different groups of workers. They have a broad social purpose and provide remedies for individual workers. But these laws are only effective if they can be enforced in a meaningful way—which includes individuals and groups of workers having the ability to seek enforcement in a court of law. Forced arbitration denies workers access to meaningful enforcement of the workplace rights established by Congress.

Up to 722,000 otherwise valid claims of employer wrongdoing "go missing" each year because of forced arbitration.[iv] Data shows that forced arbitration results in massive claim suppression, changing the course of the law on important issues. The effect of claim suppression is that individual workers who litigate their claims in arbitration get a process that is far less fair than the process would be in a court of law. Some forced arbitration clauses deter the filing of claims by imposing extremely short time frames to file a complaint, limiting the employee's access to crucial evidence, restricting the damages that the employee can seek, or requiring high arbitrator fees. Many forced arbitration clauses also prohibit collective arbitrations.

Collective action bans make it impossible for low-wage workers to hold lawbreaking employers accountable because often an individual's claims, even though legitimate, are too small to justify the costs of an arbitral proceeding.[v] Forced arbitration clauses "dramatically reduce[] an employee's chance of securing legal representation, as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf."[vi] Additionally, the threat of a class legal action is a powerful tool to deter many companies from breaking employment laws or to persuade violators to begin complying with workplace protections. Workers all across the nation with little other bargaining power must retain this mechanism so they may continue to organize their workplaces, fight for better working conditions, and have an effective means to vindicate their workplace rights.

Forced arbitration lacks the transparency and accountability checks inherent in our public justice system. Because the practice is confidential, taking place behind closed doors, forced arbitration enables employers to shield their misconduct from public scrutiny and precludes meaningful judicial review of arbitrators' rulings. The secret nature of forced arbitration enables patterns of widespread workplace abuse to continue with no protection for current or future employees.

IV. Workers Forced Into Arbitration Are Less Likely To Win, Receive Smaller Awards, And Are Severely Disadvantaged

In all aspects of the proceedings, the deck is stacked against every employee upon whom forced arbitration is imposed. A forced arbitration clause means that employment claims are decided by private arbitrators. The employer unilaterally chooses the arbitrator who not only makes the final decision in the case, but establishes the procedural rules for the arbitration. In other words, the arbitrator and the rules are chosen by the employer with no input from the employee. Moreover, unlike America's civil justice system that was developed through centuries of jurisprudence, forced arbitration does not provide important procedural guarantees of fairness and due process that are the hallmarks of courts of law.

Further, unlike a judge and jury in a public courtroom, arbitrators charge the parties for their services. Because arbitrators in the context of forced arbitration are chosen solely by the employer, the arbitrator has ongoing financial reliance on the employer. In contrast, the arbitrator's relationship with the worker is a one-time relationship. This asymmetry undermines fundamental fairness. In some cases, costs must be paid up front. Finally, arbitrators' decisions happen in a vacuum, with no lasting precedential impact, no public record of outcomes, and no trace left as to how arbitrators arrived at their decisions.

V. Forced Arbitration Uniquely Harms Gig Workers By Enabling Misclassification And Stripping Them Of Workplace Protections And Due Process Rights

Forced arbitration allows gig companies to continue to misclassify their workers with impunity. Employees are covered by a range of laws that protect workers, including minimum wage, anti-discrimination, and laws supporting the right to join a union. Employees are also covered by social insurance protections, such as unemployment insurance, workers compensation, Social Security, retirement and disability benefits. However, because many gig workers are classified as independent contractors, they are not protected by these labor laws. Gig workers do not have an economic safety net if they become sick, injured, or laid off. They also do not have legal recourse if they face wage theft, discrimination, and other abuses during the course of their work. Moreover, because gig companies are circumventing these laws, they have no incentive to comply with them.

Critically, most courts find the issue of classification to be arbitrable under the terms and conditions of employment for gig workers.[vii] By 2016, nearly two-thirds of gig companies included a forced arbitration clause, and almost all such clauses included a class action waiver.[viii] The prevalence of forced arbitration clauses and class action bans enables misclassification of gig workers to continue in many ways. First, forced arbitration precludes workers from resolving their employment status in the courts, and it is unlikely they can resolve this particular issue in an arbitral proceeding. Second, even if misclassification is addressed in arbitration, the underlying systemic problem of misclassification will

persist because any decision in this setting is non-precedential, secret, and only applicable to the individual workers arbitrating the claim. Finally, class action bans remove the deterrent effect of class litigation on misclassification. Simply put, the confluence of these factors makes it cheap for employers to misclassify their workers in ways that benefit the company at the expense of its workers.

The Supreme Court has consistently upheld forced arbitration and based their decisions largely on the premise that arbitration does not deprive claimants the ability to vindicate their due process rights as effectively as if they were in court. There is ample data showing that this premise is simply wrong. Workers lose more often, win smaller awards when they do prevail, and spend more money in arbitration than in court.[ix] Gig workers are often even denied arbitration, and thus are not afforded *any* due process rights. Currently, companies like Postmates and DoorDash that rely on gig workers are refusing to pay arbitration fees and are barring claimants from proceeding with their claims, even in arbitration.[x]

If forced arbitration was eliminated from the workplace, gig workers would be able to litigate issues like wage theft and misclassification in court. Instead, and at best, these workers are forced into arbitration, or at worst, denied any form of due process because they are denied access to any forum. Even if a gig worker is able to arbitrate their claims, and in the rare event that the worker wins, the win offers no deterrent effect to gig employers, who will continue to misclassify employees with impunity as long as forced arbitration and secrecy are permitted in gig employment contracts.

The COVID-19 pandemic has exposed and exacerbated the unjust and unequal conditions of the gig economy. Gig workers are subjected to significant health risks. Vulnerable workers in need of cash must expose themselves to a deadly virus. Higher wage earners are able to work from home, providing them with the privilege of safety through social distancing, while still earning a paycheck. Embedded in this unjust system is the fact that misclassified gig workers who are routinely exposed to these risks are never provided employer-sponsored healthcare (or often any healthcare at all), sick pay, or worker's compensation. Most are not even provided basic protective gear at the employee's expense. Unlike many other workers, gig workers do not get additional hazard pay despite their increased exposure to risk. At a time when access to healthcare and to a basic income are paramount, gig workers are exposed to enormous risks in jobs that often do not pay a living wage and offer no benefits. And these workers have no recourse. This is profoundly unjust. Eliminating forced arbitration and permitting gig workers to fight for their rights in court is an important first step in achieving justice for all workers.

VI. Congress Must Act

It is imperative for the well-being of, and to ensure justice for, everyday working people that Congress restore the original intent of the Federal Arbitration Act (FAA) and stop the misuse of the FAA to create advantages for corporations at cost to working people. Because the FAA has been contorted into something it was never intended to be by recent U.S. Supreme Court rulings[xi], the federal legislature is the only governing body empowered to restore the workers' access to the courts.

Forced arbitration is a system that was intentionally developed by corporate America to avoid accountability and circumvent laws that were enacted to protect working people. Workers who are

forced to address disputes in private arbitration are denied the fundamental fairness, due process, and transparency that are the hallmarks of any court proceeding, while employers avoid public accountability. Congress has enacted legislation to protect workers from wage theft, workplace harassment, discrimination on the job, and many other harms. Forced arbitration makes enforcement of our laws nearly impossible for employees who have suffered harm.

Until Congress corrects the legal fiction—that workers with little to no bargaining power provided meaningful consent to the deprivation of their rights in exchange for a job—these clauses will continue to endanger individuals, the workplace, and the rule of law.

Voters and advocates overwhelmingly support ending forced arbitration in the American workplace. A national survey conducted in February 2019 found that 84% of voters supported ending forced arbitration in consumer and employment contracts.[xii] Among those asked, 87% of Republicans, 83% of Democrats, and 80% of Independents supported legislation stopping companies from requiring the use of arbitration when a consumer or employee has a dispute or claim, and preserving consumers' and employees' choice to take their claims to court.[xiii]

NELA and The Institute strongly support the FAIR Act. We commend Congressman Hank Johnson (D-GA) and the 155 co-sponsors of the bill. NELA urges Congress to move quickly to pass the FAIR Act in the House and the Senate in the 117th Congress.

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[i] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf.

[ii] *Id.*

[iii] *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back*, Center For Popular Democracy & Economic Policy Institute (May 2019), https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf.

[iv] Cynthia Estlund, *The Black Hole Of Mandatory Arbitration*, 101 N.C. L. REV. 96, 113 (2018) (identifying as "missing" those claims we would expect to enter the arbitration process, based on the general rate of employment litigation and the number of employees covered by forced arbitration clauses, but that are never actually filed).

[v] *See Forced Arbitration Gives Dishonest Employers A License To Steal*, The Employee Rights Advocacy Institute For Law & Policy, http://employeerightsadvocacy.org/wp-content/uploads/2017/12/The-Institute-Faces-of-Forced-Arbitration-Wage-Theft-Fact-Sheet.pdf (last visited March 8, 2018).

[vi] *Id.*

[vii] Carissa Laughlin, *Arbitration Clause Issues in Sharing Economy Contracts*, J. Disp. Resol. 197, 199, 2017.

[viii] Elizabeth C. Tippett and Bridget Schaaff, *How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 170 Rutgers U. L. Rev. 459 (2018).

[ix] *Taking "Forced" Out of Arbitration*, The Employee Rights Advocacy Institute for Law & Policy, http://employeerightsadvocacy.org/wp-content/uploads/2016/06/Taking-Forced-Out-Of-Arbitration_English_Final.pdf.

[x] *See* Adam, et. al., v. Postmates, Inc., Case No. 3:19-cv-03042 (N.D. 2019*);* Postmates Inc. v. 10,356 Individuals, Case No. 2:20-cv-02783 (C.D. 2020); Abernathy et al. v. DoorDash Inc., Case No. 3:19-cv-07545 (N.D. 2019).

[xi] *See Justice Denied: How The U.S. Supreme Court Forced America's Workers Into Arbitration*, The Employee Rights Advocacy Institute for Law & Policy, http://employeerightsadvocacy.org/our-work/ending-forced-arbitration-in-the-workplace/justice-denied/.

[xii] Hart Research Associates, *National Survey On Required Arbitration*, February 28, 2019 https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf.

[xiii] *Id.*

CBA | CONSUMER BANKERS ASSOCIATION

February 10, 2021

The Honorable Jerrold Nadler, Chair
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jim Jordan, Ranking Member
U.S. House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, D.C. 20515

The Honorable David Cicilline, Chair
U.S. House Subcommittee on Antitrust,
Commercial and Administrative Law
6240 O'Neill House Office Building
Washington, D.C. 20515

The Honorable Ken Buck, Ranking Member
U.S. House Subcommittee on Antitrust,
Commercial and Administrative Law
6240 O'Neill House Office Building
Washington, D.C. 20515

Dear Chairman Nadler, Chairman Cicilline, Ranking Member Jordan, and Ranking Member Buck:

I write on behalf of the Consumer Bankers Association (CBA) regarding the hearing scheduled for Thursday, February 11, 2021: "Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights." CBA is the voice of the retail banking industry whose products and services provide access to credit for consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

CBA remains opposed to legislative proposals to eliminate Americans' right to negotiate enforceable pre-dispute arbitration agreements, which has been guaranteed for nearly a century under the Federal Arbitration Act of 1925.[1] Abolishing the ability to willingly enter into pre-dispute arbitration agreements is contrary to the public interest and 95+ years of experience and evidence demonstrating that arbitration is a convenient, simple, and efficient dispute resolution alternative. The Consumer Financial Protection Bureau (CFPB) found as much in a comprehensive empirical study of arbitration outcomes in 2015, concluding that arbitration is consistently faster and less expensive than litigation, and results in significantly higher returns for consumers.[2] In 2017, Congress used the Congressional Review Act (H.J. Res. 111) to reaffirm its longstanding support and reject the elimination of arbitration agreements that would deprive consumers of a well-established alternative dispute resolution process, increase legal costs, and reduce opportunities for recovery.

Supreme Court Justice Stephen Breyer stated in a 1995 opinion that without arbitration, "the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[3] We urge Congress to not limit options for consumers and preserve the ability to choose alternative dispute resolution methods instead of forcing all future parties into expensive and time-consuming court battles.

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[1] Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925).
[2] CFPB, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (Mar. 2015), *available at* https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/.
[3] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

Thank you for your consideration and we remain eager to work with you on these important issues.

Sincerely,

Richard Hunt
President and CEO

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

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February 19, 2021

The Honorable David Cicilline, Chair
U.S. House Subcommittee on Antitrust, Commercial and Administrative Law
6240 O'Neill House Office Building
Washington, D.C. 20515

The Honorable Ken Buck, Ranking Member
U.S. House Subcommittee on Antitrust, Commercial and Administrative Law
6240 O'Neill House Office Building
Washington, D.C. 20515

Dear Chairman Cicilline and Ranking Member Buck:

On behalf of the American Arbitration Association (AAA), I write to share our experiences in connection with the Subcommittee on Antitrust, Commercial and Administrative Law's hearing on arbitration issues that took place on February 11, 2021. As a not-for-profit, non-partisan, public service organization with a 95-year history administering alternative dispute resolution (ADR) proceedings, we have spent considerable time and resources considering issues of fairness in arbitration and developing effective solutions to enhance fairness, transparency, and cost-effectiveness. It is important to note that although the AAA is regarded as the best known and largest arbitral institution, we are not a trade association, and other arbitral institutions may have different practices or policies.

The AAA has taken a leadership role in drafting and implementing codes of ethics for arbitrators and mediators, due process protocols, and rules that have been recognized by various courts and legislative bodies. We administer arbitrations in a wide variety of areas, including labor, commercial, international, construction, employment, and consumer matters in addition to class action arbitrations. The AAA's rules, procedures, standards of fairness, and transparency often exceed statutory requirements. We are in an ideal position to provide information, data, and expertise on approaches and alternatives to address many of the concerns raised regarding consumer and employment arbitration.

Alternative Approaches to Employment and Consumer Arbitration Would Address Some Legitimate Concerns Raised by the Subcommittee

The debate about consumer and employment arbitration is often presented as two opposing positions, either an outright ban on pre-dispute arbitration or maintaining the status quo. However, there are a number of alternative approaches that would provide

meaningful changes to the dispute resolution process. We believe the way to move forward is to first develop a deeper understanding of the underlying concerns about arbitration, and then to consider a number of viable improvements to address them. In addition, any changes to arbitration law must take into account the impact they would have on the already overburdened courts.

We urge you to consider alternatives, such as the Consumer Financial Protection Bureau's (CFPB) approach, the development of federal arbitration standards, or legislation narrowly tailored to address these legitimate concerns for specific types of cases. Important concerns regarding confidentiality related to sexual harassment can be addressed through legislation on the use of non-disclosure agreements and confidentiality for all such cases, whether in judicial or arbitral forums. The same is true regarding class action waivers. Whether or not class action waivers should be permitted in a litigation or arbitration setting is a policy issue that should be considered independently. Broad legislation, such as the FAIR Act, even if well-intentioned, can wreak havoc on court systems and have unintended consequences on significant sectors of our recovering economy.

Congress, federal agencies such as the Department of Justice and the FCC, state agencies, and local governments have come to the AAA for our expertise in developing and implementing fair and efficient alternative dispute resolution systems. The AAA is named in hundreds of state and federal statutes, and we work extensively with federal and state legislatures and government agencies to develop alternative dispute resolution systems. For example, we worked with state agencies to provide alternative dispute resolution for claims arising from Superstorm Sandy, Hurricane Katrina, and other major disasters. We are also currently administering the North Carolina Disaster Mediation Program, which provides mediation of disputed residential property insurance claims arising out of damages caused by declared disasters. Another prominent example is the AAA Automobile Industry Special Binding Arbitration Program, developed with the House and Senate Judiciary committees in 2010, which successfully resolved over 1500 disputes between automobile manufacturers and dealers. We also worked closely on what was arguably the most comprehensive and balanced study on consumer arbitration, by the CFPB, which resulted in a regulatory regimen allowing for the use of arbitration, with some reporting requirements. Arbitration works, especially when adapted to address the specific issues and unique characteristics of a particular type of dispute.

Prohibiting Pre-Dispute Arbitration Agreements Would Severely Impact the Courts

State and federal courts are facing unprecedented backlogs as a result of COVID-19, so it is critical that Congress take into account the impact that arbitration-related legislation would have on the courts. Over 90,000 consumer and employment cases were filed with the AAA in 2020, in addition to the class action arbitrations that are publicly available on our class arbitration docket[1]. Many of these cases will be resolved through negotiation, mediation, or settlement, while others will proceed to arbitration and award.

[1] Available at: https://www.adr.org/classarbitration

More importantly, arbitration provides greater flexibility than courts can generally provide, and the AAA was able to quickly set up systems to allow virtual hearings to take place.[2] As a result, the AAA has administered thousands of virtual proceedings since March 2020, with the number of virtual proceedings taking place steadily increasing through the year. The expeditious nature of arbitration as compared to litigation is even more pronounced given the significant court backlogs due to COVID-19.

The Consumer and Employment Due Process Protocols Could Be Codified to Address the Subcommittee's Concerns

The use of arbitration to resolve employment and consumer disputes has resulted in some legitimate questions about the need to provide parties with assurances that they will be able to vindicate their rights and access the arbitral forum. To address many of those questions, the AAA and other leading organizations, including consumer and employment advocates as well as government, legal, business and academic experts, developed a series of due process protocols. Two of those protocols, the Employment Due Process Protocol ("Employment Protocol")[3] and the Consumer Due Process Protocol ("Consumer Protocol")[4], are particularly relevant to the issues under consideration.[5] Importantly, these protocols are intended to provide guidance not only to others involved in ADR but also to legislative and regulatory policymakers. The AAA administers employment and consumer arbitrations in accordance with the requirements established by the Protocols, and we believe that the principles contained in these Protocols should be mandatory for all consumer and employment cases, whether administered by the AAA, *ad hoc*, or by other arbitral organizations. Codification at the federal level of minimum standards and procedural rights is one approach that could address a significant number of concerns in the use of arbitration for consumer and employment disputes.

The Consumer Protocol provides for common sense "fair play" requirements that include reasonable fees for the consumer, equal voice in the selection of the arbitrator, a convenient hearing location, the availability of all remedies that would otherwise be available in court, an opt-out of arbitration to small claims court, and a neutral and impartial arbitrator. The AAA will not administer an arbitration that does not materially comply with the provisions of the Consumer Protocol, and, in fact, the AAA has declined to administer hundreds of companies' arbitrations resulting from arbitration clauses that deviate from the Consumer Protocol. To make it easy for consumers to know which companies' arbitration agreements comply with the Consumer Protocol, the AAA maintains a Consumer Clause Registry that is publicly available online.[6]

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[2] The AAA's virtual hearing capabilities and guidelines are available at: https://go.adr.org/covid-19-virtual-hearings.html

[3] Available at: https://www.adr.org/employment

[4] Available at: https://www.adr.org/consumer

[5] Pursuant to the AAA's Healthcare Due Process Protocol, the AAA does not administer healthcare arbitrations between individual patients and healthcare service providers that relate to medical services unless all parties agree to submit the matter to arbitration after the dispute arises, or under court order. The Healthcare Due Process Protocol is available at: https://adr.org/sites/default/files/document_repository/Healthcare-Due-Process-Protocol.pdf

[6] The AAA's Consumer Clause Registry is available online at: https://www.adr.org/clauseregistry

The Employment Protocol similarly outlines the essential fairness requirements for employment arbitration agreements, including the employee's right to be represented by an individual of the employee's choosing, access to sufficient discovery that is reasonably related to an employee's claims, a neutral arbitrator with particular knowledge of employment law, the availability of all remedies that would otherwise be available in court, and reasonable fees. And, similar to the consumer context, the AAA will not administer an employment arbitration that does not materially comply with the provisions of the Employment Protocol.

The AAA's Consumer and Employment Arbitration Rules and Procedures Provide Individuals With Effective and Fair Access to Justice

The principles contained in the Protocols are incorporated into the AAA's rules and procedures, and provide a framework for the appropriate use of arbitration in the consumer and employment contexts.

The AAA's Consumer Arbitration Rules ("Consumer Rules") provide detailed procedures designed to facilitate these cases, and require businesses that intend to incorporate the Consumer Rules in a consumer arbitration agreement to notify the AAA to allow us to review the agreement for material compliance with the Consumer Protocol and the Consumer Rules. The Consumer Rules also include guidelines for consumers to request waiver of fees. Under the Consumer Rules, the consumer's costs to file a case are capped at a $200 filing fee, or $0 for cases in which a business files a case against the consumer. All other costs, including administrative fees and arbitrator compensation costs, are borne by the business. Under the Consumer Rules, cases may proceed through a "documents-only" hearing, telephonic hearing, videoconference hearing, or in-person hearing options (subject to state and local restrictions during the pandemic). A notable element of both the Consumer Protocol and the Consumer Rules is the ability to opt out of arbitration and seek relief in small claims court for disputes or claims within the scope of the small claims court's jurisdiction.

The AAA's Employment Arbitration Rules ("Employment Rules") similarly conform to and implement the Employment Protocol. Under these rules, the filing fees payable by the employee are capped at $300. No other costs associated with the administration of the arbitration are charged to the employee, including arbitrator compensation (regardless of whether there are one or three arbitrators), case management fees, and hearing room rental. All such costs are borne by the employer. The AAA's Employment Rules also allow for waiver of the employee's fees in hardship situations.

As noted above, both the Consumer Rules and the Employment Rules allow for waiver of fees to the consumer or employee. In 2020, the AAA granted over $4,000,000 in fee waivers to employees and consumers.

Employment and consumer arbitrations conducted by the AAA under its rules have proceeded in an orderly and efficacious manner for many years and have provided

redress for tens of thousands of parties. The AAA also provides extensive user-friendly information on the consumer and employment arbitration processes, filing procedures, costs, and related issues, as well as helpful resources, videos, and information for self-represented/*pro se* parties. In addition, the AAA has a dedicated *pro se* case administration team, with case administrators skilled in handling cases involving self-represented parties.

Arbitration of consumer and employment disputes is generally the final step in an alternative dispute resolution process. Mediation, settlement discussions, and other intermediate steps often result in settlement or resolution of the dispute before the final arbitral decision. Having an easy-to-use, accessible, fair, timely, and reasonably priced process is important, and it resolves a high proportion of cases before the final arbitral step, though it is difficult to quantify cases resolved earlier in the ADR continuum.

The AAA's Consumer and Employment Rules Do Not Prohibit Parties From Speaking About Their Cases

A widespread but incorrect belief is that all arbitration proceedings are secret and confidential. In fact, a significant amount of information on employment, consumer, and class action arbitrations is readily available. Although AAA arbitrators and staff must adhere to confidentiality requirements unless otherwise required by law, the AAA's Rules do not impose any limitations on the parties or their representatives to speak publicly or share information about their cases. To the extent that confidentiality provisions are applied in an arbitration, it is a result of the parties separately incorporating confidentiality or non-disclosure clauses into their contracts. In the AAA's experience, the majority of employment arbitration provisions do not impose confidentiality obligations on the parties.

AAA Consumer and Employment Caseload Information is Publicly Available

Further, information about every consumer and employment arbitration administered by the AAA for at least the past five years is publicly available in a report that is posted on the AAA's website.[7] The report includes a significant amount of information about each arbitration, including the name and the number of times each company has been a party to a consumer or employment arbitration, the claims asserted, whether the case was settled or awarded, relevant dates, the identity of the arbitrator, the dollar amount of the award or how the matter was resolved, and the date a case was filed and resolved. This information database, made available on our website in spreadsheet form, is useable by parties, counsel, researchers, and others in a variety of ways. The AAA also provides information on class arbitrations on its website, including case information, documents, awards, and other data.

[7] The AAA's Consumer and Employment Arbitration Statistics Report can be found online under the AAA Consumer and Employment Arbitration Statistics heading at https://www.adr.org/consumer

In addition, actual AAA arbitration awards for employment and consumer arbitrations are widely available on Westlaw, LexisNexis, and other online resources. Lastly, case law has made clear that an employee's arbitration agreement does not limit that employee's ability to file a charge or complaint with administrative or regulatory bodies such as the EEOC.

Conclusion

While much of the debate on consumer and employment arbitration issues has been driven by anecdotal evidence, statistical evidence supports the fairness and effectiveness of protocol-driven arbitration processes.

The most in-depth and comprehensive data collection, review, and analysis of consumer arbitration is arguably the study undertaken in 2015 by the CFPB, covering consumer agreements for certain financial disputes. After extensive analysis of the data, various policy considerations, and a number of other factors, the CFPB determined that arbitration agreements should be permitted, though with certain reporting to and oversight by the agency.

We appreciate the opportunity to present the AAA's recommendations and suggestions on the appropriate use of arbitration for the resolution of consumer and employment disputes. Based on our over 95 years of experience, we believe that if properly designed and executed, arbitration can provide a prompt, effective and fair forum for the resolution of these disputes. As it responds to concerns about the use of arbitration, Congress should consider a variety of options, such as the CFPB regulatory approach, limiting or barring the use of nondisclosure agreements for sexual harassment claims in both litigation and arbitration, codifying due process protections, and narrowing the scope of legislation to address concerns in a particular area. The AAA stands ready to assist Congress in this important undertaking.

Sincerely,

Eric P. Tuchmann
Senior Vice President,
General Counsel and Corporate Secretary

February 11, 2021

The Honorable Jerrold Nadler, Chairman
The Honorable Jim Jordan, Ranking Member
Committee of the Judiciary
U.S. House of Representatives
Washington, DC 20515

RE: Support for the Forced Arbitration Injustice Repeal (FAIR) Act

Dear Chairman Nadler and Ranking Member Jordan:

We, the undersigned organizations, strongly support the Forced Arbitration Injustice Repeal (FAIR) Act. The legislation would ensure that workers, consumers, servicemembers, nursing home residents, ordinary investors, and small businesses harmed by bad actors will be able to bring valid claims in court, and would not be forced into private, secretive, corporate-controlled arbitration systems required by nonnegotiable contracts. The FAIR Act would cover cases involving consumer, civil rights, employment, or antitrust violations, and would ensure that harmed individuals in these cases can enforce related federal and state protections.

During this period in the midst of a pandemic when working families have become even more vulnerable to deception, fraud, abuse, and discrimination, it is even more critical that Congress restores and upholds every person's ability to seek relief when harmed.

I. Forced Arbitration Requirements Hurts Workers, Consumers, Patients, Servicemembers, and Small Businesses

Forced arbitration clauses undermine fundamental rights. Often hidden in "take-it-or-leave-it" corporate-written contracts, the terms require claims to be heard in private, secret arbitration proceedings and prevent people from seeking justice in court before an impartial judge or jury. Also prevalent in forced arbitration clauses are provisions prohibiting consumers, patients, servicemembers, small businesses, or workers from banding together in class actions to address widespread, systemic harm. Forced arbitration clauses, particularly those with class action bans, deter many harmed individuals from even attempting to take legal action to seek remedies.

A forced arbitration clause typically dictates the rules for an arbitration, including specifying the arbitration provider, the location for the arbitration, and the payment terms, all written for the benefit of the corporation. Private arbitration also lacks due process protections that are normally assured in our courts, including the ability to obtain key evidence necessary to prove one's case. And arbitration proceedings are secret and provide virtually no right to appeal. Moreover, corporations benefit even more due to the repeat business that they deliver to private arbitration firms, providing incentive for arbitrators to rule in their favor.

Studies have shown that those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. According to the Economic Policy Institute, "Consumers obtain relief regarding their claims in only 9 percent of disputes. On the other hand, when companies make

claims or counterclaims, arbitrators grant them relief 93 percent of the time—meaning they order the consumer to pay."[1]

II. Forced Arbitration Clauses Are Everywhere

Hundreds of millions of individuals are subject to forced arbitration clauses. They are ubiquitous in terms and conditions governing bank accounts, student loans, cell phones, employment, small business merchant accounts, nursing home admissions, and even newer online product application technologies. Because the restrictive terms are typically included in nonnegotiable contracts, consumers, workers, patients, and small businesses are hardly given a "choice," when they sign away their rights, because refusing to sign effectively means they have to forego critical goods, services, or employment. According to the Economic Policy Institute, over 60 million workers, more than half of non-union, private-sector employees, have surrendered their right to go to court if harmed by their employer.[2]

For consumers, a majority of credit cards, prepaid cards, storefront payday loans and online lenders, cell phone and cable companies, for-profit college admissions, and big banks include arbitration clauses in their one-sided contracts. According to a 2019 study, 81 corporations in the Fortune 100, including subsidiaries or related affiliates, have used arbitration clauses in consumer transactions, and 78 of those arbitration requirements include class action bans.[3] Meanwhile, many small businesses are also forced to agree to arbitrate disputes with larger corporations, even when the more powerful parties steal, price-fix, or engage in other illegal behavior that stifles smaller players in the market.

III. Forced Arbitration Clauses Allow Corporations to Evade Accountability for Illegal Misconduct

The broad corporate use of forced arbitration in the marketplace stems from the U.S. Supreme Court's continuous expansive interpretation of the Federal Arbitration Act, enacted in 1925 to facilitate arbitration of disputes between sophisticated commercial entities of equal bargaining power. In a sweeping 2011 decision, the Court in *AT&T Mobility v. Concepcion* held that corporations could ban individuals from joining together to enforce their rights even when consumers' individual claims are too small for the forum and are more suitable for class actions.[4] In 2018, the Court held that workers may be forced, as a condition of employment, to surrender their right to band together to enforce their legal rights.[5]

Consequently, forced arbitration has become a tool to eviscerate statutory and common law rights. It allows big corporations to exploit customers with virtually no accountability because consumers are too often unable to go to court to enforce longstanding laws against predatory or discriminatory practices, unfair and deceptive conduct, and even pervasive fraud. It allows corporate employers to quash serious claims of systemic misconduct, such as harassment and discrimination, misclassification of workers, and wage theft.

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[1] Heidi Shierholz, *Correcting the Record,* Economic Policy Institute (Aug. 1, 2017), https://www.epi.org/files/pdf/132669.pdf.
[2] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf.
[3] Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).
[4] *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).
[5] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

In sum, forcing consumers, workers, and small businesses into arbitration has played a significant role in allowing corporate wrongdoers to evade accountability because it allows them to keep systemic corporate misconduct secret and out of the public eye.

IV. Congress Must Act

Until Congress acts to correct the legal fiction — that workers, consumers, servicemembers, patients, ordinary investors, and small businesses have consented to the deprivation of their rights — these clauses will continue to endanger individuals and small businesses.[6]

The FAIR Act would make arbitration fair. It would not ban arbitration but rather make it truly voluntary, allowing aggrieved individuals and businesses the opportunity to choose it or the courts after they have been harmed. And it would not change collective bargaining agreements that require arbitration between unions and employers.

Congress can act now to protect working families from forced arbitration, particularly in light of the economic crisis so many are facing as we embark on COVID-19 recovery. With passage of the FAIR Act, Congress will restore access to our courts and will reinvigorate important civil rights, employment, and consumer protections. We urge you to pass it quickly.

Please contact Remington A. Gregg at rgregg@citizen.org or Christine Hines at christine@consumeradvocates.org with questions.

Sincerely,

A Better Balance
AKPIRG
Alliance for Justice
American Association for Justice
Americans for Financial Reform
Association of Late Deafened Adults (ALDA)
Autistic Self Advocacy Network
Bayard Rustin Liberation Initiative
Better Markets
California Employment Lawyers Association
California Reinvestment Coalition
Center for Auto Safety
Center for Economic Integrity
Center for Justice & Democracy
Center for Popular Democracy
Center for Responsible Lending
Citizen Works
Committee to Support the Antitrust Laws
Consumer Action

[6] *See*, *Meyer v. Kalanick*, 200 F.Supp.3d 408 (S.D.N.Y. 2016).

Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
Consumer Watchdog
D.C. Consumer Rights Coalition
Demos
Delaware Community Reinvestment Action Council, Inc.
Disability Rights Advocates
Disability Rights Legal Center
Disability Rights Texas
Earthjustice
Economic Policy Institute
Every Texan
Googlers for Ending Forced Arbitration
Impact Fund
Justice for Migrant Women
KGACLC
Lawyers' Committee for Civil Rights Under Law
Legal Aid Center of Southern Nevada
Legal Aid Justice Center
Long Term Care Community Coalition
Make the Road New York
Maryland Consumer Rights Coalition
NAACP
NACA-Ohio
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Association of the Deaf
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
The National Consumer Voice for Quality Long-Term Care
The National Disabled Law Students Association
National Disability Rights Network (NDRN)
National Employment Law Project
National Employment Lawyers Association
National LGBTQ Task Force Action Fund
National Network to End Domestic Violence
National Organization for Women
National Women's Health Network
National Women's Law Center
New Economy Project
New Georgia Project
New Jersey Citizen Action
Northwest Workers' Justice Project
Oregon Communications Access Project
People's Parity Project

Public Citizen
Public Good Law Center
Public Justice
Public Justice Center
Public Law Center
Rights & Democracy, NH & VT
S.C. Appleseed Legal Justice Center
Sikh Coalition
SPLC Action Fund
Strategic Organizing Center
Student Borrower Protection Center
Texas Watch
Towards Justice
Veterans Education Success
Virginia Organizing
VOICE-OKC
The Washington State Communication Access Project (www.Wash-CAP.com)

cc: Members of the Committee

RESPONSES TO QUESTIONS FOR THE RECORD

CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

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Answers to Questions from
Rep. Mary Gay Scanlon

Prof. Myriam Gilles
Submitted March 31, 2021

Questions: Ms. Gilles, you cited the ubiquity of forced arbitration clauses in private student loans in your testimony.

1. When we know that private student lenders [like Navient] are intentionally failing borrowers, is it wise to allow these lenders to shield their liability with forced arbitration clauses?

2. If these loans are truly above board and fair, what reason would a lender have for restricting a student's right to trial?

3. If arbitration is a better option than going to trial for the student, than why don't these lenders simply offer it as an option? Why make it mandatory?

1. According to the Consumer Financial Protection Bureau, forced arbitration clauses appear in over 86% of private student loan contracts. These provisions prohibit students who have a complaint about abusive loan practices or onerous repayment terms to have their day in court. Instead, borrowers are forced to resolve disputes through a secretive process that prevents information from becoming public through the court system – ultimately shielding bad actors from accountability.

To make matters worse, the majority of private lenders bar students from bringing class or collective actions, demanding instead that all disputes be resolved in one-one-one arbitrations. The practical reality is that no student borrower with a small-to-mid value grievance would undertake a costly individual arbitration – nor could she hope to find a lawyer willing to represent her on a contingency basis. As a result, class-banning arbitration clauses immunize defendants against aggregate liability for all sorts of harmful activity, and prevent regulators from determining whether loan servicers are deceiving or abusing borrowers.

Case in point: A Washington state judge recently found that Navient (the nation's largest student loan servicer, managing over $300 billion of private and federal student loans for 12 million student loan borrowers) had systematically deceived student borrowers and their cosigners who sought to be released from their student loans. The lawsuit against Navient was brought by the

Washington state Attorney General on behalf of injured borrowers who were prevented from suing because of a forced arbitration clause in their loan agreements. While the Washington AG's office should be applauded for its efforts, relying solely on state AGs to bring episodic enforcement actions will not sufficiently deter wrongdoing or ensure that student borrowers are treated fairly. Rather, private enforcement is necessary to both deter corporate misconduct and enforce consumer protection laws.

2/3. Pre-dispute, class-banning arbitration clauses operate with brutal efficiency, suppressing *all* legal claims long before a student borrower becomes aware of a problem with their loan. This blunt instrument enables lenders to protect themselves from accountability for any actions they take, whether fair or abusive. Jessica Silver-Greenberg & Michael Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. TIMES, Dec. 22, 2015, http://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blockedfrom-suing-back.html (reporting that defense lawyers believe "they may have found…the 'silver bullet' for killing off legal challenges [by] using arbitration to quash consumers' lawsuits" and that "[t]he beauty of the clauses is that often the lawsuit 'simply goes away'").

To secure this almost-absolute immunity from legal liability, lenders impose arbitration provisions at the front-end of the loan transaction in the boilerplate of non-negotiable contracts. This all but ensures that student borrowers will not understand the rights they are giving up in order to obtain an educational loan. For this reason, federal legislation aimed at restoring access to justice distinguishes between pre-dispute, mandatory arbitration and post-dispute arbitration offered as a voluntary choice to borrowers and other consumers. The latter allows borrowers to make an educated decision about the rights they give up by choosing to arbitrate disputes.

RE: Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

DATE: Thursday, 2/11 @ 10:00am EDT

QUESTIONS

President and CEO, OJCommerce LLC

1. The Subcommittee's Report on Competition in Digital Markets found that Amazon has significant market power over many of its business partners including monopoly power over third party sellers. And at a July hearing that was part of this Subcommittee's digital markets investigation, I questioned Jeff Bezos about how Amazon abuses its market power over many of its so-called business "partners."
    a. Are the forced arbitration provisions in Amazon's business seller agreements a symptom of the immense power that Amazon holds over third-party sellers?

Answer:

Yes. As I stated in my testimony, there is no way for an e-commerce company to be successful today without selling on Amazon's marketplace – Amazon simply has too much of the online retail market under its control. I had no ability to negotiate the terms of the agreement that Amazon forced me to sign and I had no ability to sell on Amazon without signing that agreement. A company like mine simply can't survive in e-commerce without access to Amazon's marketplace. This left me, and thousands of others like me, with only one choice: to sign Amazon's agreement as it was presented to me, with no changes. And that agreement contains a forced arbitration clause that requires every dispute with the company to be decided in a private arbitration conducted by the arbitration provider of Amazon's choosing. The clause also prohibits me from joining with other businesses that have similar problems, either in court or in arbitration. No matter how many other companies may be experiencing the same problems with Amazon that my company is facing, I am prohibited from joining with them to share expenses or information. That makes it impossible to bring claims against Amazon, such as antitrust claims, that are too expensive for one firm to bring alone. And since the arbitrations are confidential, I can't learn the outcomes of any arbitrations

brought by other Amazon sellers who may have similar claims and they can't learn about mine. We are left in the dark, but Amazon knows all.

b. If you had a choice in the matter would you have agreed to surrender your right to hold Amazon accountable in open court?

Answer:

No. If I had a choice, I would not choose forced arbitration. Forced arbitration puts third-party sellers like me in a lose / lose situation, where we are left with the dismal choice of doing nothing in response to Amazon's wrongful actions or being subjected to high fees and costs, delays, limited legal rights, no ability to appeal, and no ability to join with others. I have been a plaintiff and a defendant in court and I have been a plaintiff in arbitration, and I can tell you without doubt, I would rather resolve my business disputes in a court, with an impartial judge whom I do not have to pay, the rule of law, well-established legal procedures, transparency, and the ability to join with others who are similarly situated.

c. As a business owner, why is it so important for you and other businesses in a similar situation as yours be able to hold Amazon accountable for its actions?

Answer:

If we cannot hold Amazon accountable for its actions, the company can make it very difficult and expensive for companies like mine to do business on its site. Remember – Amazon is a platform and it is also a competitor to third-party sellers like me. It is in Amazon's interest to hike our fees and engage in unfair practices that make it difficult for us to operate. And forced arbitration makes it virtually impossible for most of us to hold Amazon accountable, which is why they can get away with so many unfair and anti-competitive practices.

2. Mr. Weiss, in your written testimony you said that, in addition to forcing arbitration as the only method to resolve any dispute, Amazon's seller agreement also forbids any class arbitration or class actions. You further stated in your testimony that "Amazon's class action waiver effectively insulates Amazon from ever even having to face justice."
    a. Can you explain how the class action ban allows Amazon to escape justice?
    b. If you could join together with other businesses in a class action how would that alleviate the burden of going it alone, as you're forced to do in arbitration?
    c. Do you think more businesses would be willing to come forward and stand up to large companies with virtually unlimited resources, such as Amazon, if they were able to team up in a class action suit?

Answer:

a. Arbitration is very expensive. As business owners, we have to pay a fee to the arbitration provider chosen by Amazon. On top of that fee, we have to pay the arbitrator by the hour, and there can be more than one arbitrator, depending on the size of the claim. And in addition to that, we have to pay our own lawyers. The first arbitration I had with Amazon cost me $50,000, not including my lawyer's fee. And that dispute was a relatively simple one!

   Companies generally don't have the budget to go through this expensive process, especially when the risks outweigh the potential gains. It therefore didn't surprise me that the report on digital markets issued by this subcommittee reported that *only 163* sellers, out of the *millions* of businesses that sell on the site, have initiated forced arbitration proceedings against Amazon during the five years from 2014-2019. That is an incredible statistic – only 163 sellers out of many millions over five years! And yet, if you go on the Internet chat sites, there are hundreds and hundreds of businesses complaining about Amazon's business practices. But they are left with no recourse because of forced arbitration.

   If sellers could join together with other businesses to share the cost of arbitrating or litigating against Amazon, it could make it affordable for small businesses to assert our rights against Amazon. But the class action ban means many cases are never even brought to arbitration

because it's cost prohibitive. It simply makes no sense for a business to risk tens of thousands of dollars in arbitration, legal, and expert fees to recover a few thousand dollars. Amazon's class action waiver effectively insulates Amazon from ever even having to face justice.

b. If we could join with other businesses in a class action, we could share costs and information with each other, which would make an action against a mega-corporation like Amazon feasible. We could bring disputes over unfair business practices that affect all sellers. If we could join together, we could also bring an antitrust lawsuit over the anti-competitive actions that Amazon can take because of its dominance over the market. As it is, forced arbitration and the class action waiver allow Amazon to write the rules under which it is judged, and to prevent small businesses from banding together to fight back. It is a license to steal.

c. Yes, I believe more businesses would be willing to come forward and stand up to large companies with virtually unlimited resources, such as Amazon, if they were able to team up in a class action suit. When a huge company like Amazon abuses its market power, small businesses lose out. The antitrust laws were written to protect the victims of this kind of abuse, but with forced arbitration and class action bans, Amazon is able to use that very same market power to keep small businesses from being able to join together and fight back. I know there are hundreds, maybe thousands, of businesses that feel that they don't get fair treatment from Amazon. I am confident they would join together in a class action against Amazon but for the forced arbitration clause in the contracts we are forced to sign.

3. At a July hearing that was part of this Subcommittee's digital markets investigation, I questioned Jeff Bezos about how Amazon abuses its monopoly power in e-commerce to continuously hike up the fees that it charges businesses such as yourself to sell on its platform. In your written testimony, you described a situation where you experienced significant overcharges from Amazon for shipping, for which you were forced into arbitration to try and recover.

a. Can you explain how you were forced into arbitration to try and get Amazon to reimburse you for the wrongful overcharges and how that process ended up?

Answer:

Amazon was charging my company, OJC, more for shipping than my agreement with Amazon allowed. By the time I realized this had happened, OJC had been wrongfully overcharged by quite a bit of money. Amazon agreed to fix the problem going forward, but refused to reimburse OJC for wrongful overcharges. Left with no other choice, we initiated a forced arbitration to recover the improper overcharges. We would have taken a case like this to court, but we had to use forced arbitration because of the Amazon contract. Amazon took the case all the way through an expensive arbitration proceeding. We eventually prevailed on some of our claims in the arbitration, but the arbitrator only awarded us half of the actual damages because he ruled OJC should have realized the error earlier. This process cost OJ Commerce about $50,000 in arbitration-related fees – not counting attorney fees – which we had to pay in advance. In other words, OJC had to risk $50,000 to make itself whole under Amazon's forced arbitration system. And even after the arbitration, Amazon played games with payment that eventually forced me to go to court to enforce the arbitration award. After arbitration and legal fees, I'd recovered very little of what I'd lost.

Let me get this straight. You wanted to go into court in the first place but were blocked from doing so by Amazon's forced arbitration clause. You then went through the whole ordeal of arbitration, played their game, by their rules, and somehow were able to obtain an award of some money, for about half of your losses—despite the deck being entirely stacked against you. And then, as you described in your written testimony, "Amazon played games with payment that eventually forced you to go to court to enforce the arbitration award." Is that right?

b. So after blocking you're access to courts and forcing you into the purportedly faster and more efficient dispute resolution process that arbitration supposedly offers, when Amazon lost and didn't like the outcome, the company forced you into court to collect your arbitration award. Is that right?

c. Doesn't it seem to the be the case that Amazon's mandatory arbitration clause is not about efficiency at all, but actually

about putting up as many roadblocks as possible for a business owner, such as yourself, to obtain relief?

Answer:

That is exactly what happened to me. Forced arbitration is not more efficient, cheaper or faster. It is the opposite – more expensive, slow and very unfair. Amazon uses forced arbitration to keep sellers from being able to assert their rights *anywhere*. The proof is in the fact that only 163 sellers initiated forced arbitration against Amazon in a five-year period. That is an incredibly small number, considering there are millions of sellers transacting business on their site every year. Forced arbitration works for Amazon – it suppresses claims against them and allows them to continue their unfair, and possibly illegal, practices with no fear. When a company like mine does bring an arbitration action, we don't get a fair deal and we have to keep it confidential so nobody else can know of the alleged wrongdoing by the company. Forced arbitration literally gives mega-corporations like Amazon a license to steal.

○