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Mandatory Arbitration and Inequality of Justice in Employment[1]

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Introduction

Economic inequality is a central challenge of our time. Much attention has rightly been given to the growth in income and wealth inequality in the United States, reaching levels not seen since the 1920s.[2] This rise in economic inequality has occurred in conjunction with a shift in the governance of the workplace with a decline in union representation to only 12.5% of the workforce in 2012.[3] Declining unionization is itself one of the factors leading to greater wage inequality[4] and a diminished political voice for workers.[5] However it also has resulted in reduced access to justice in the workplace as fewer employees are now covered by the just cause provisions and strong grievance procedures traditionally provided by union negotiated collective bargaining agreements.[6]

In contrast to the growing concerns over income inequality, much less attention has been paid to the question of equality of justice in employment. By

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[2] T. Piketty and E. Saez. "Income Inequality in the United States, 1919-1998." 118(1) *Quarterly Journal of Economics* 1 (2003)

[3] Bureau of Labor Statistics (B.L.S.). 2013. Union members in 2012. *Press Release*, January 23, 2013, USDL-13-0105.

[4] Labor economic research finds that unions exert an equalizing effect on income by reducing the dispersion of wages: see David Card "The Effect of Unions on Wage Inequality in the U.S. Labor Market." 54(2) *Industrial and Labor Relations Review* 296 (2001).

[5] Frank Levy and Peter Temin emphasize the broader institutional and political role of unions and see their declining influence as a major factor increasing general economic inequality: Frank Levy and Peter Temin. "Inequality and Institutions in 20th Century America." Working Paper 07-17, MIT Department of Economics (2007).

[6] For discussions of the declining impact of union collective bargaining agreements and the resulting more limited coverage of the grievance and arbitration procedures found in unionized workplaces, see: Michael Piore and Sean Safford. "Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization, and the Challenge to Industrial Relations Theory." 45(3) *Industrial Relations* 299 (2006); and Alexander J.S. Colvin. "American Workplace Dispute Resolution in the Individual Rights Era." 23 *International Journal of Human Resource Management* 459 (2012).

equality of justice in employment, I refer to equality in the ability of employees to have access to due process in regard to employment decisions affecting them and the ability to challenge adverse decisions. With the decline in union representation, the provision of justice in the workplace is increasingly dependent on individual employment rights enacted through statutes. Substantive individual employment rights have expanded, albeit slowly, over recent decades.[7] The number of individual rights claims made through government agencies and the courts increased over the same period that union representation and strike rates declined.[8] This expansion of individual employment rights provides a new basis for employees to achieve fairness in workplace decisions affecting them, supporting greater equality of justice in employment. Yet against this trend are countervailing forces pushing towards greater inequality in justice in the workplace. In particular, this article will examine the question of how the expansion of mandatory arbitration of individual employment rights affects equality of justice in the workplace.

Alternative dispute resolution ("ADR") procedures are often held out as having the potential to enhance equality of access to justice for employees.[9] By providing a balance between the interests of efficiency, equity, and participant voice, well-designed ADR procedures hold the promise of avoiding the pathologies of the litigation system, where cost and inefficiency can create genuine barriers to many employees bringing claims, and instead providing a greater range of employees with accessible procedures.[10] However, it is important to recognize that ADR is not a generic category of procedures with identical or even similar effects on the processing of individual rights claims. Rather, the impact of ADR procedures on the process and outcomes of dispute resolution depends strongly on the institutional design and functioning of the procedures. When we examine a particular type of ADR procedure like mandatory arbitration, it is important to consider how the structure of the procedure affects the incentives and behaviors of the parties and the outcomes of the dispute resolution process.

In this Paper, I will examine the operation of mandatory arbitration as an employment dispute resolution system to investigate the degree to which it increases or decreases equality of access to justice in employment relations. To address this question, I will use a model of individual employment relations that encompasses four key components.

The first component is the structure of rights held by employees. This includes the substantive employment rights provided by federal or state law. It

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[7] Ibid.
[8] Ibid.
[9] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).
[10] John W. Budd and Alexander J.S. Colvin. "Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice." 47(3) *Industrial Relations* 460 (2008).

also includes the institutional structure of procedures for enforcement of these rights, such as the incidence and structure of mandatory arbitration procedures.

The second component is the sources of power available to employees. In the traditional labor relations realm, union collective bargaining and strike power provided employees with a source of countervailing power against employers. In the individual rights realm, the threat of litigation serves a similar role as a major source of employee power checking the workplace power and authority of employers. A key question regarding mandatory arbitration is to what degree it enhances or diminishes this source of employee power.

The third component is the mechanism of employee representation. To effectively articulate and enforce individual employee rights, a well-functioning mechanism for providing representation to employees is critical. The key question here for mandatory arbitration is how it affects the availability of representation by plaintiff-side employment attorneys who provide the primary mechanism of representation in the individual employment rights litigation system.

The fourth component of the model is the pattern of employment relations in the workplace. An effective individual employment rights system does not operate in a vacuum, but rather functions by altering employment relations behaviors in the workplace. Put alternatively, beyond providing remedies for violations of individual rights, the system should also exert a deterrent effect that encourages organizations to uphold these rights in the first place. Regarding mandatory arbitration, the question is whether or not it produces employment relation patterns in the workplace that better protect individual employment rights.

These four components of the employment relations system interact to determine its effectiveness in protecting individual rights in the workplace. In the following Parts, I examine each of these components of the individual employment rights system in turn, using them to analyze the degree to which mandatory arbitration is enhancing or diminishing equality of access to justice in the workplace.

I. The Structure of Rights

When the Supreme Court first gave its imprimatur to the use of arbitration to resolve statutory employment rights in *Gilmer v. Interstate/Johnson Lane*[11], it stated explicitly that the decision did not represent an alteration of the substantive rights protecting employees. Quoting its earlier decision from *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, the majority commented that: “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a

[11] 500 U.S. 20 (1991).

judicial, forum."[12] Through the subsequent debates and judicial decisions around mandatory arbitration, this idea that the same substantive rights are to be applied in arbitration and in the courts has generally stayed constant. Instead, the debates have focused more on the question of whether, in applying these substantive rights, the decision-making of employment arbitrators differs from that of the courts, an issue to which I will return in the next Part.

Whereas the Supreme Court in *Gilmer* stated that arbitration did not modify the substantive rights of employees, it was equally clear in its decision that arbitration altered the structure of procedural rights by providing for an alternative forum for the resolution of claims. Indeed, an important policy justification given by the majority for enforcing agreements to arbitrate statutory claims was that, in arbitration, a party "trades the procedures and opportunities for review of the courtroom for the simplicity, expedition, and informality of arbitration."[13] We see this procedural contrast between litigation and arbitration in such features as more limited discovery, less frequent use of summary judgment motions, and less stringent application of the rules of evidence. Indeed, a central characteristic of arbitration is that it provides less formal procedures than litigation.

In these and other respects, mandatory arbitration can be contrasted with litigation in terms of the structure of procedural rights. But mandatory arbitration also represents a structure of procedural rights different from other types of arbitration. Furthermore, there is substantial variation in procedures and structure within the landscape of mandatory arbitration itself.

As mandatory arbitration initially developed in the 1990s, a natural comparison was to the long-standing, well-established system of labor arbitration used in unionized workplaces. Labor arbitration has some similarities to mandatory arbitration in regard to its relative informality and speed of adjudication compared to the litigation system. Some labor arbitrators also serve as employment arbitrators. However, the institutional structures of these two types of arbitration differ substantially. Labor arbitration is the product of joint negotiation by the two parties to collective bargaining, whereas mandatory arbitration is implemented at the unilateral initiative of management. Further, the jointly negotiated provisions of the labor contract are the source of substantive rules in labor arbitration. The union also provides an institutionalized mechanism of representation in labor arbitration.

In many respects, the use of arbitration in individually negotiated employment contracts is a closer parallel to mandatory arbitration. Typically negotiated by executive-level or other highly compensated employees, many individual employment contracts contain arbitration clauses. Although similar to mandatory arbitration in their focus on individual employment relationships and

[12] *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 at 628 (1985)
[13] *Gilmer, supra,* at 31 (quoting *Mitsubishi Motors, supra*, at 628).

disputes, these arbitration agreements are different in origin in that they are jointly negotiated and particular to the individual employment relationship, rather than applied to a group of employees.

Although less common than mandatory arbitration, individually negotiated arbitration is a widespread and distinctive dispute resolution system. In a study of all employment arbitration cases administered by the American Arbitration Association (AAA) in 2008, Kelly Pike and I found that 124 of the 449 cases (27.6%) in our sample involved individually negotiated arbitration agreements, as opposed to the employer promulgated, mandatory arbitration procedures involved in the other 325 cases.[14] The individually negotiated arbitration cases were distinctive in featuring better paid employees, more contractual than statutory claims, and a higher likelihood of attorney representation of the employee. Employees bringing claims through individually negotiated procedures also had much higher win rates (64.6%) and received relatively high average damages ($220,736).

Overall, these differences between mandatory and individually negotiated arbitration indicate a very different and more advantageous system of individual rights dispute resolution for those employees who have the bargaining power to individually negotiate their employment contracts and arbitration agreements. From an inequality of access to justice perspective, this comparison represents one way in which inequality in the process of individual employment rights dispute resolution tracks the general income inequality in society.

The comparison to individually negotiated arbitration is also informative when considering which employees are covered by mandatory arbitration. Whereas individually negotiated arbitration arises by joint negotiation between the employer and the employee, the defining characteristic of mandatory arbitration is that it is the product of unilateral promulgation of the procedure by the employer as a term and condition of employment. As a result, the incidence of mandatory arbitration is not the product of calculation of desirability by the individual employee. Nor is it a product of general public enactment of a dispute resolution system to be available to all employees. Rather, whether any given employee must bring individual rights claims through a mandatory arbitration procedure depends on the decision of his or her employer to adopt the procedure for its employees.

If one views mandatory arbitration as a positive alternative to litigation, then this should suggest an overly-limited incidence of mandatory arbitration, as many employees would be denied its benefits due to the failure of their employers to adopt it. Conversely, if one views mandatory arbitration as an inadequate alternative to litigation, then many employees are denied the benefits of the public courts based on the particular, individual decisions of their employers. Whichever

[14] Alexander J.S. Colvin and Kelly Pike. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" Forthcoming at *Ohio State Journal on Dispute Resolution* (2013).

view one holds of mandatory arbitration, the resulting patchwork adoption of mandatory arbitration depending on the decisions of individual employers is producing a substantial degree of difference in the procedures available for resolving individual employment rights disputes.

Even amongst employers who have adopted mandatory arbitration, there is substantial variation in the structure of procedures. In designing the mandatory arbitration agreement, the employer chooses which, if any, arbitration service provider will administer the arbitration and the rules under which the arbitration will be conducted. Some arbitration service providers—notably the AAA which is currently the largest provider of employment arbitration services—have agreed to abide by certain due process protections in their procedures, including those set out in the Due Process Protocol.[15] The AAA will decline to administer mandatory arbitrations that are not based on its standard rules, which among other provisions require that the employer pay the arbitrator fees and administrative costs apart from a small filing fee. From the plaintiff's perspective, it is advantageous to have mandatory arbitration administered by an arbitration service provider with a standard set of rules that can serve as a basis for due process protections.

However, an employer need not designate any service provider to administer arbitration, nor need they adopt any standard set of rules and procedures for the conduct of arbitration. In a survey of attorneys that represent plaintiff employees conducted by Mark Gough and myself, we found that the second most common category of arbitration administration after administration by the AAA was ad hoc cases, i.e. cases in which there was no service provider at all.[16] In ad hoc arbitration, the employer can use control over the design of the mandatory arbitration procedure to establish procedures that best serve its own interests. In extreme cases, the courts have stepped in to hold some agreements unenforceable on the grounds of unconscionability, where the procedures were so lacking in due process as to be impermissibly one-sided.[17] But to date, only a small number of cases have held arbitration agreements unenforceable on due process grounds. Our results indicate that these cases have not deterred a significant number of employers from using ad hoc arbitration in place of using an established service provider.

The most recent illustration of how mandatory arbitration can change the structure of procedures comes from the Supreme Court's decision in *AT&T v. Concepcion*,[18] which enforced an arbitration agreement that barred class actions and required all claims to be brought individually before an arbitrator. There was some initial question of whether that decision extended to mandatory arbitration in employment cases, and particularly, whether it conflicted with the National

[15] Richard A. Bales, "The Employment Due Process Protocol at Ten: Twenty Unresolved Issues and a Focus on Conflicts of Interest" 21 *Ohio State Journal on Dispute Resolution* 165 (2005).
[16] See Gough, this volume.
[17] E.g. *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999).
[18] 489 U.S. 468 (2011).

Labor Relations Act's section 7 protections for concerted activity. However, with the Fifth Circuit's recent reversal of the NLRB's *D.R. Horton* decision, it appears clear that the ability of mandatory arbitration provisions to bar class actions holds in employment cases.[19] This further illustrates how the structure of rules for enforcing employment rights now depends on the employer's decision whether to require mandatory arbitration.

The picture that emerges overall is one in which the structure of rules for enforcement of individual employment rights does not parallel the general coverage of substantive rights found in the relevant statutes. Rather, the procedures used for enforcing these rights are the product of the calculations and decisions of individual employers as to how they wish to resolve conflict with their employees. Employees only participate in this decision if they possess unusually high levels of individual bargaining power, as do executive-level managers, or if they hold collective bargaining power through union representation. The result of this power imbalance is inequality between employees in the structure of their procedural rights for the enforcement of substantive employment rights.

II. Sources of Power

Labor relations theory and policy have been concerned historically about issues of relative bargaining power between employers and employees. A number of factors tend to result in employees having relatively less bargaining power than employers. Whereas any individual employee represents only a small part of the labor force of a large employer, that employee's job usually represents the major source of income and economic security for the employee. As a result, the impact on the employee of losing that job is vastly greater than the impact on the employer of losing any individual employee. Individual employees also have greater personal investment in their current jobs and the specific skills they have developed, rendering mobility more costly.

The New Deal system of labor relations sought to address this inequality of bargaining power between employers and employees through establishing the terms and conditions of employment through collective bargaining. Where an individual employee lacks bargaining power, a collective group of employees could exert sufficient bargaining power to balance that of the employer. This bargaining power was premised on the ability of the unionized group of workers to use the economic weapon of the strike. By withholding its collective labor, the strike allows the union to put sufficient economic pressure on the employer to obtain favorable compromises at the bargaining table.

In the present era, where relatively few workers have access to union representation and collective bargaining, individual employment rights have become the new source of bargaining power for employees. While we often think

[19] *D.R. Horton, Inc. v. National Labor Relations Board* ___ F.3d _____(5th Cir., Dec. 3, 2013).

of employment statutes as establishing a set of rules that determine what is or is not permissible in employment relations, translating the rights provided in these statutes into practices in the workplace involves a process of contested decision-making and negotiated implementation. For example, employers may not satisfy the legal requirement that employees cannot be terminated because of age by simply deciding not to terminate employees based on age. Rather, the employer may need to take additional steps to prevent age-based discrimination. In a complex modern organization, where multiple actors may be involved in employment decisions, who will ensure that termination decisions are not based on age? What documentation will the organization require in termination decisions to ensure they are not age based? Will there be training of managers on discrimination issues? Suppose an employee alleges that he or she is being terminated based on age—how will the organization respond? Will there be some type of internal complaint procedure? Should the organization make a practice of offering some type of severance payment with a release of potential liability?

How the organization answers these questions will depend in significant measure on the potential legal consequences for violating employee rights. There may be direct financial consequences if there is a legal judgment against the employer. Whatever the outcome of any proceedings, there are likely to be substantial legal costs in defending against a claim. The time and attention of the organization's management may be consumed by the process of litigation, particularly because of discovery requirements and potential for depositions. In addition to being costly, litigation also brings uncertainty. The employer will have to consider the chances of success or failure in litigation and the incentives for settlement to avoid these risks. Litigation may be a low-frequency event, but it is also one that is high-risk, with the potential for substantial costs if the employer is unsuccessful.

These characteristics of the litigation process create a strong incentive for employers to manage their employment relations in a manner that reduces the potential for legal risks. Employers will treat employees more favorably in employment relations than they otherwise might, out of a concern to protect the organization's own interests in avoiding legal pressures. In this way, litigation operates as a source of bargaining power for employees in the individual rights era that parallels the role of strikes as the source of bargaining power for employees in the collective bargaining system of the New Deal era.

How does mandatory arbitration affect this source of employee power? A basic starting point in answering this question is to look at how mandatory arbitration compares to litigation in terms of case outcomes. A number of authors have examined litigation outcomes. A 2003 study by Professors Eisenberg and Hill reported employee win rates in employment discrimination trials of 36.4%.[20] The same study reported a higher employee win rate of fifty-seven percent in a

[20] Theodore Eisenberg and Elizabeth Hill, "Arbitration and Litigation of Employment Claims: An Empirical Comparison." 58(4) *Dispute Resolution J.* 44 (2003).

sample of state court, non-civil rights based employment cases. This latter win rate is similar to the fifty-nine percent employee win rate in California state court trials involving common law discharge-based claims found in research by Professor David Oppenheimer.[21] By contrast, my own research on outcomes of mandatory arbitration hearings found a 21.4% employee win rate amongst cases administered by the AAA.[22] Around half of all mandatory arbitration cases administered by the AAA involve employment discrimination claims, with the majority of the remainder involving non-civil rights, common law-based claims.[23]

Turning to damage amounts, we find similar differences in outcomes. Eisenberg and Hill reported a median damage award of $150,500 in federal court employment discrimination trials and a median damage award of $68,737 in state court non-civil rights employment trials.[24] Meanwhile, Oppenheimer found a median damage award of $296,991 in California state court common law discharge trials.[25] By contrast, I found a median award of $36,500 in mandatory arbitration cases administered by the AAA.[26]

An employer faced with the prospect of a dispute in either litigation or arbitration will be concerned about both the likelihood that the employee will prevail and the potential damages that will be awarded. Across a number of potential cases that the employer may face, the combination of the employee win rate and the potential damages provides an indicator of the overall economic impact of resolving this set of cases. A useful measure of this outcome is the average award amount calculated across all cases, including those where the employee loses and those where no damages are awarded. Looking at the results reported by Eisenberg and Hill, we find that this mean outcome is $143,497 for federal court employment discrimination trials and $328,008 for state court non-civil rights employment trials. By contrast, I find that for mandatory arbitration cases administered by the AAA, the mean outcome across all awards is $23,548, approximately one-seventh of the mean outcome in the federal court trials and one-fifteenth the mean outcome in the state court trials. This much lower outcome reflects the combination of the lower employee win rate at arbitration hearings and the smaller awards to employees in arbitration.

The figures presented so far are the raw, unadjusted outcomes of trials and arbitration hearings. They do not reflect differences in the likelihood of settling cases before trial, effects of summary judgments or appeals, or selection effects

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[21] David Benjamin Oppenheimer, "Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities" 37 *U.C. Davis Law Rev.* 37: 535-549 (2003).
[22] Alexander J.S. Colvin "An Empirical Study of Employment Arbitration: Case Outcomes and Processes" 8 *Journal of Empirical Legal Studies* 1 (2011).
[23] Alexander J.S. Colvin and Kelly Pike. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" Forthcoming at *Ohio State Journal on Dispute Resolution* (2013).
[24] Colvin, supra, note 18.
[25] Ibid.
[26] Ibid.

on the types of cases employees bring. Before considering these other factors further, however, it is worth observing the relatively large differences in these raw outcomes. To the degree that employers are motivated by the likelihood of a relatively large damage award in a trial, this motivation will decrease with mandatory arbitration because those damage awards, for whatever reason, are much smaller. This may, in turn, significantly impact other resolution processes, particularly settlement, which is the most common way cases are resolved in both litigation and mandatory arbitration.[27] If the mean damage award for cases proceeding to a hearing in mandatory arbitration is much lower than the mean damage award at trial, this will reduce employee bargaining power in settlement negotiations and be likely to produce lower settlement amounts, because the likely award, and thus the risk for employers, is not as great.

The raw comparisons do not take into account procedural differences between litigation and mandatory arbitration. Employers may be more likely in litigation to defeat claims on summary judgment or to overturn unfavorable trial decisions on appeal. Research by Clermont and Schwab on employment litigation in the federal courts showed that, compared to other litigants, plaintiff employees tend to do relatively poorly in summary judgment motions and in appeals.[28] While summary judgment motions have historically been less common in arbitration, Kelly Pike and I found in recent research that they were used in one quarter of the mandatory arbitration cases that we examined.[29] Employers succeeding in winning dismissal of the case in over half of these motions[30], suggesting that the differences from litigation in this area are diminishing. Further evidence of this trend comes from a survey of plaintiff employment attorneys that Mark Gough and I conducted in 2013. We asked the respondents questions about the most recent case that they had handled in arbitration that resulted in an award. In fully fifty-four percent of the 148 cases that proceeded to arbitration, a motion for summary judgment was filed.[31]

A broader source of potential differences in trial and arbitration hearing outcomes is the possibility of selection effects in the types of cases that are brought through each forum. These selection effects arise on either the employee or the employer side. On the employee side, there may be a selection effect arising from the degree to which employees find mandatory arbitration to be a more or less amenable forum for bringing claims as compared to litigation. If mandatory arbitration is a relatively more accessible forum, then more employees might bring cases through it, and the overall pool of cases in arbitration might include cases with smaller damage awards at stake and claims that are harder to

[27] Ibid.
[28] Kevin M. Clermont and Stewart J. Schwab. "How Employment Discrimination Plaintiffs Fare in Federal Court," 1(2) *J. of Empirical Legal Studies* 429 (2004).
[29] Colvin and Pike (2013).
[30] Ibid.
[31] See Gough – this volume.

prove.[32] The relative accessibility of mandatory arbitration will, however, depend on how it affects the ability of employees to obtain and finance representation by counsel, or to act pro se, which will be the focus of the next Part.

There also may be selection effects on the type of cases brought in mandatory arbitration on the employer side. If mandatory arbitration is introduced in combination with internal grievance procedures and other preliminary ADR steps, then the cases that ultimately proceed to arbitration may represent weaker, lower-value claims. I will return to examine this possibility later in this Paper.

III. Mechanisms of Representation

For effective vindication of individual employment rights, there must be a mechanism of representation for employees bringing claims. In the litigation system, the plaintiffs' bar provides this basic function of expert advice and representation, assisting employees in bringing claims under the often complex structures of employment statutes. Certainly, the difficulties associated with establishing claims of employment discrimination typically require expert representation. But even seemingly straightforward claims such as wage and hour law violations can often implicate more legally complex issues, such as whether the claimant is in fact an employee or an independent contractor. In addition, many individual wage and hour claims are relatively small in size and so can only effectively be brought when aggregated with other similar claims in a class action. Such a suit would also require expert legal representation.

One of the hopes for mandatory arbitration was that it would increase accessibility by providing a relatively simple forum where employees would be able to bring claims effectively without representation. In litigation, around one fifth of claims are brought pro se. However, pro se claimants tend to have relatively low rates of success.[33] Rates of pro se claims are higher in mandatory arbitration, but still represent only 24.9% of all mandatory arbitration claims.[34] These pro se claims in mandatory arbitration tend to be smaller in size, and employees bringing them are less likely to obtain a settlement. If they do proceed to a hearing, pro se employees are also less likely to be successful than employees who are represented. While self-representation is an interesting issue, the

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[32] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001); David Sherwyn, Samuel Estreicher, and Michael Heise, "Assessing the Case for Employment Arbitration: A New Path for Empirical Research" 57 STANFORD L.REV. 1557 (2005).

[33] Nielsen, Nelson, and Lancaster find in a study of employment discrimination cases filed in federal district courts that 22.5% of cases were filed by pro se plaintiffs, though one third of these plaintiffs were later able to obtain representation by counsel at some point during their cases: Laura Beth Nielsen, Robert L. Nelson, and Ryon Lancaster. "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States." 7 *Journal of Empirical Legal Studies* 175 (2010).

[34] Alexander J.S. Colvin "An Empirical Study of Employment Arbitration: Case Outcomes and Processes" 8 *Journal of Empirical Legal Studies* 1 (2011).

evidence indicates that it only occurs in a minority of cases in mandatory arbitration. As in litigation, representation by legal counsel is the predominant way in which employees bring cases in mandatory arbitration. The key question, then, is how mandatory arbitration affects the ability of employees to obtain representation.

What do we know about who is representing employees in mandatory arbitration? In a recent study I conducted with Kelly Pike, we collected data on employee representation in 325 mandatory arbitration cases administered by the AAA in 2008.[35] We found that amongst the attorneys representing employees in these cases, 56.7% included employment law as one of their primary practice areas.[36] The remainder typically were general litigation practitioners that did not specialize in employment cases. By contrast, 76.6% of the employers' counsel in these same cases were primarily employment law practitioners.[37]

The lower degree of employment law specialization on the employee side suggests that employees may be receiving less expertise in representation than their employer counterparts. Further reinforcing this concern, in 54.6% of the cases we examined, the law firm representing the employer was also handling one or more additional cases in our sample.[38] By contrast, amongst the law firms representing employees, only 10.7% handled two or more cases in our sample.[39] Not only are employers more likely to be represented by employment law specialist counsel, they are likely to be represented by firms with greater experience with mandatory arbitration itself.

On the employee side, this data captures the wide variation in the nature of representation in mandatory arbitration. According to the data, one quarter of employees proceed pro se. Another third of employees are represented by counsel, but by an attorney for whom employment law is not his primary practice. Fewer than half of employees at arbitration hearings are represented by an attorney who specializes in employment law as a primary practice area.[40]

What drives the ability of employees to obtain representation in these cases? In employment litigation, the key mechanism is the availability of contingency fee arrangements. For most employees, paying for representation on an hourly-fee basis is beyond their financial means. This is particularly the case given that most employment cases arise in the context of termination, where the employee has just lost his or her primary source of income.[41] Under a contingency fee arrangement, the plaintiff attorney takes on the financing of the case by

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[35] Alexander J.S. Colvin and Kelly Pike. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" Forthcoming at *Ohio State Journal on Dispute Resolution* (2014).
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Nielsen, Nelson, and Lancaster, supra, note 29 at 200.

assuming the risk of the success or failure. There are obvious limitations to this mechanism. It requires that a case provide a sufficient prospect of success and potentially recoverable damages for the plaintiff attorney to make the investment in handling the case. However, it also provides a self-financing mechanism for bringing cases that extends representation to large numbers of employee plaintiffs who would otherwise be unable to proceed with claims.

How does mandatory arbitration affect the ability of employees to obtain representation through this mechanism? It is important to recognize that plaintiff attorneys look across the full set of cases they handle to consider the potential outcome of contingency fee arrangements. Since their payment is a percentage of the damages where successful, and therefore receive nothing if their advocacy is unsuccessful, they must consider the likely average recovery across all cases. As a result, the key outcome to consider for a contingency fee arrangement is the mean damages across all cases, i.e. the overall outcomes examined in the previous Part. For a plaintiff attorney contemplating contingency fee arrangements, the mean damage outcome cited of $143,497 for federal court employment discrimination trials and $328,008 for state court non-civil rights employment trials would be the relevant amounts on which to calculate the potential recovery. With these average economic outcomes, a contingency arrangement of thirty percent or forty percent would provide a recovery substantial enough (in the $50-100,000 range) to justify attorney financing of what could be a relatively long and complex employment case. By contrast, when we consider the mean outcome of $23,548 for mandatory arbitration cases, a similar contingency fee arrangement would only produce a potential return of approximately $10,000, a much smaller sum for the attorney. It might still be worthwhile for the attorney to take on the case if the forum and the case were simpler than in litigation, but if the case required an investment of more than a few thousand dollars, it would no longer be economically feasible for the plaintiff attorney to accept this case.

The danger is that relatively low win rates and damage amounts will discourage plaintiff attorneys from taking on many cases under mandatory arbitration procedures. As a result, we may see a negative selection effect in which the lack of accessible representation results in fewer cases brought where mandatory arbitration is required. To investigate whether mandatory arbitration has a negative effect on the likelihood of attorney representation, Mark Gough and I conducted a survey of employment attorneys who were members of either the National Employment Lawyers Association or the California Employers Association. Using the membership of these associations as our survey populations allows us to focus on attorneys who specialize in the representation of employees.[42] Using a combination of internet and mailed surveys, we collected 480 responses in the fall of 2013.

The survey asked attorneys responding what percentage of potential clients with employment claims they agreed to represent. On average, the

[42] See Gough, this volume.

attorneys accepted 15.8% of potential clients whose cases could proceed to litigation. By contrast, they only accepted 8.1% of potential clients who were covered by mandatory arbitration agreements. This finding supports the above analysis, suggesting that it is less financially feasible for attorneys to represent employees where there is a mandatory arbitration agreement due to the reduced likely damage outcomes. It indicates that rather than increasing accessibility, mandatory arbitration reduces the ability of employees to bring cases because they are less likely to find representation by attorneys.

These findings are concerning from an equality of access to justice perspective. One of the strongest public policy arguments in favor of ADR is that it may help reduce the barriers to access in the litigation system. Employment attorneys find that these barriers in litigation prevent them from taking many cases, due to the lack of provable damages that would allow them to make and recover the necessary investment. However, our results indicate that rather than increasing access, mandatory arbitration makes it less likely that plaintiff attorneys will be able to accept a case representing an employee. The reduced damages awarded and lower prospects of success common to arbitration cases appear to overwhelm any benefit from greater simplification of the procedures, with regard to whether representation will be available. While ADR would ideally reduce inequality in access to justice by allowing more employees to bring claims, what we have found is that it increases inequality in access to justice by reducing the effectiveness of the mechanism of representation by employment attorneys.

IV. Patterns of Employment Relations

The processing and resolution of individual cases is only a part of the role of employment litigation in employment relations. Enforcement of employment laws has a broader purpose, and impacts the patterns of employer behavior. For example, beyond providing retrospective justice to a victim of discrimination in the workplace, an important purpose of litigating a case is to deter future discriminatory conduct and encourage fairer employment practices. The characteristics of the American system of employment litigation described earlier are particularly suited to this objective. Cases are often long and procedurally complex to bring, but, as discussed, the prospect of relatively large damages provides a source of bargaining power on the employee side and creates a strong incentive for employers to take proactive measures to avoid the dangers of litigation.

How does mandatory arbitration affect the process through which enforcement of employment law produces changes in patterns of employment relations and management behavior in the workplace, especially where mandatory arbitration reduces legal pressures on the employer, as discussed earlier? Although there are no existing empirical studies that directly test this issue, a recent study by Zev Eigen and Adam Seth Litwin raises some interesting

questions.[43] Eigen and Litwin examined the workplace justice perceptions of employees before and after the adoption of an organizational dispute resolution procedure that included mandatory arbitration. They found mixed effects. Employee perceptions of procedural justice in the workplace decreased after the adoption of the procedure.[44] But, conversely, perceptions of informal, interpersonal justice in the workplace increased after the adoption of the procedures.[45] Eigen and Litwin ascribe these different reactions to employees reacting positively to individual manager efforts to handle problems at the workplace level, but negatively to the centrally implemented formal procedure.

As with many employers, the organization studied here did not introduce mandatory arbitration on its own, but rather as part of a system of internal grievance procedures that included a number of preliminary steps before arbitration.[46] This makes the assessment of the effect of mandatory arbitration itself more complex. A number of authors have written favorably of the potential for internal grievance procedures to enhance fairness when they include steps that must be taken prior to arbitration itself.[47] Some have argued that the potential for these procedures to produce settlement of meritorious claims prior to arbitration may account for lower employee success rates in mandatory arbitration, because only weaker cases proceed to arbitration.[48]

Some of my own research has examined the adoption and operation of internal grievance procedures and their relationship to mandatory arbitration. Many organizations that require mandatory arbitration of employment disputes also have multi-step internal grievance procedures. In an analysis of survey data of organizations in the telecommunications industry, I found that mandatory arbitration as the final step of a non-union grievance procedure was associated with higher usage by employees compared to procedures with only managerial decision-makers.[49] This provides some evidence in support of what has been dubbed the appellate effect, whereby internal procedures may be resolving cases before arbitration, affecting the mixture of cases that ultimately reach arbitration in the first place. However, there is no requirement that organizations adopt any particular type of internal grievance procedures in conjunction with mandatory arbitration. Indeed, an employer can simply require employees to agree to arbitrate any potential legal claim without providing any type of internal appeal procedure apart from arbitration. To the extent that employers adopt mandatory

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[43] Zev Eigen and Adam Litwin "Justice or Just Between Us? Empirical Evidence of the Tradeoff Between Procedural and Interactional Justice in Workplace Dispute Resolution." 67(1) *Industrial and Labor Relations Review* (2014).
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] E.g. Lipsky, Seeber, and Fincher, *Emerging Systems for Managing Workplace Conflict*, Jossey-Bass: San Francisco, CA (2003); Sherwyn, Estreicher, and Heise, supra, note 28.
[48] Sherwyn, Estreicher, and Heise, supra, note 28.
[49] Alexander J.S. Colvin, "The Dual Transformation of Workplace Dispute Resolution." 42 Industrial Relations 712 (2003).

arbitration without associated internal procedures, this will reduce the size of an appellate effect on the types of cases reaching mandatory arbitration.

It is also not obvious that the inclusion of mandatory arbitration is needed to promote effective internal grievance procedures. An organizational example is instructive here. One of the leading examples of a company adopting a particularly extensive internal grievance procedure including mandatory arbitration was the diversified auto parts and aerospace firm TRW.[50] The company experienced an upsurge in employment litigation following the downsizing of its aerospace division in the early 1990s.[51] In response to and inspired by the recent *Gilmer* holding, it adopted mandatory arbitration for its employees beginning in 1994.[52] However, in addition to adopting mandatory arbitration, it conducted a more general overhaul of its existing internal grievance procedures to ensure that all of its operating units had well-developed, effective procedures. These procedures included more informal lower level complaint procedures, peer review panels in some units, and mediation using external third-party neutrals.[53]

The result was a complex set of internal procedures that was used frequently by employees to resolve many workplace disputes. The enhancement of these internal procedures was certainly inspired in part by the organizational review process directed at adopting mandatory arbitration. Yet, in practice, this internal dispute resolution system operated with very little involvement of its arbitration element. In the initial three years of operation, only three out of seventy-two cases that reached the mediation stage subsequently proceeded to arbitration.[54] Furthermore, the form of arbitration that TRW adopted was one in which the decision was non-binding on the employee, allowing subsequent appeal to the courts.[55]

TRW provides a good example of a particularly effective internal grievance procedure. It retains arbitration in a form different from the standard type of mandatory arbitration that bars access to the courts, and in practice arbitration is rarely used to resolve cases. Well-designed internal grievance procedures can be a useful element in extending due process rights in the nonunion workplace, but the evidence from the best practices examples in this area suggests that it is not necessary to implement mandatory arbitration to have effective internal procedures.

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[50] The following description of TRW's procedure is based on the case study described in: Alexander J.S. Colvin, "Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace." 13 Advances in Industrial & Labor Relations 71 (2004).
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid at 86.
[55] Ibid.

More generally, one should not extrapolate too far from the types of best practice examples, examples for which it is often easier to gather data. In addition to examples like TRW and other companies that have included due process protections in arbitration and implemented well-developed internal grievance procedures,[56] there are also organizations that allow for substantial due process deficiencies in their arbitration procedures and lack pre-arbitration steps involving mediation and/or internal grievance procedures. As a general matter, we know much less about these organizations because they are less willing to be studied. As a result, we learn of their existence more often through cases challenging their procedures, such as the notorious Hooters arbitration procedure, which was held to be unenforceable due to its many due process deficiencies.[57]

The larger point is that there is wide variation in the practices and procedures that companies adopt. It is the case that some companies do adopt fair ADR procedures that should be encouraged. Others provide little or nothing in the way of internal due process rights for their employees. The problem with allowing the employer the discretion to decide whether or not to adopt procedures, and in what form these procedures should be adopted, is that it encourages variation in the quality of due process rights that employees enjoy, and promotes inequality of access to justice in the workplace. In practice, who an employee works for determines how that employee's rights to fair treatment in employment are protected.

Conclusion

I began by posing the question of how mandatory arbitration affects equality of access to justice in the workplace. Mandatory arbitration changes the landscape of employment dispute resolution in a number of important ways, including by altering the impact of employment laws. The analysis I present addresses how mandatory arbitration affects four key components of employment relations and individual rights in the workplace.

First, mandatory arbitration changes the structure of rules by which individual employment rights are enforced. The process of enforcing individual rights in the workplace becomes subject to the employer's choice of whether or not to adopt mandatory arbitration and of how any procedure that is adopted is structured. Beyond producing inequality in whether employees have access to the courts, the employer's decisions determine the type of arbitration procedure that is adopted, whether an arbitration service provider administers the procedure, the

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[56] E.g. David Sherwyn, Samuel Estreicher, and Michael Heise, "Assessing the Case for Employment Arbitration: A New Path for Empirical Research" 57 STANFORD L.REV. 1557 (2005); Richard A. Bales and Jason N.W. Plowman. 2008. "Compulsory Arbitration as Part of a Broader Dispute Resolution Process: The Anheuser-Busch Example" 26 Hofstra Labor & Employment Law Journal 1 (2008).

[57] E.g. *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

specific provider of the arbitration procedure, and even whether employees are able to bring a class action.

Second, mandatory arbitration changes the relative bargaining power of employees attempting to enforce their individual rights. Whereas a key feature of litigation is that it exposes the employer to the risk of potentially large damage awards, mandatory arbitration reduces the degree to which the employer is subject to this source of pressure. There are a number of important procedural differences that may affect the mixture of cases brought in arbitration versus litigation. But the overall picture in mandatory arbitration is that the risk of employees receiving large damage awards similar to those in litigation is substantially reduced.

Third, the smaller potential payoffs to employees disrupts the mechanism of representation in employment cases. In employment litigation, contingency fee arrangements allow a broader set of employees to obtain representation by attorneys who finance the cases themselves. Representation would be beyond the financial means of many individual employees if they had to pay standard hourly fees. In mandatory arbitration, the lower economic damages reduce the potential payoffs from contingency fee arrangements, creating a barrier to representation. We find evidence of this in lower rates of acceptance of potential cases by attorneys under mandatory arbitration.

Fourth, the adoption of mandatory arbitration has mixed effects on the organization of internal conflict resolution procedures. Some employers do choose to enhance their internal conflict resolution procedures alongside of adopting mandatory arbitration. Many of these procedures provide avenues for appeal that resolve significant numbers of potential cases without the necessity of invoking arbitration. But there is also substantial variation in whether employers adopting mandatory arbitration also use internal conflict resolution procedures, as well as variation within the types of procedures they adopt in the workplace.

Overall, the picture that emerges is one in which mandatory arbitration disrupts existing mechanisms for enforcement of individual employment rights. If arbitration provided a more effective and accessible mechanism of enforcement, then this might be a trade-off worth making. However, the evidence examined here suggests that it results in both wide variation in how employment rights are protected among companies and significant barriers to the effective bringing of claims against employers. The result is that, rather than enhancing equality, mandatory arbitration exacerbates inequality in access to justice in the workplace.

DRAFT. PLEASE DO NOT CITE OR QUOTE.

SURVEY DATA ANALYSIS STILL IN PROGRESS.

Comments are welcome.

The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation[1]

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Abstract:

This study investigates the effects of mandatory employment arbitration on employees' access to justice and the quality of justice received. It makes an inroad into the empirical desert surrounding mandatory employment arbitration by presenting data from a recently administered survey of approximately 1,900 practicing employment plaintiff attorneys. Specifically, by asking employment plaintiff attorneys directly about their most recent cases taken to verdict in civil litigation and arbitration, this article represents the first systematic comparison of case characteristics and outcomes found in arbitral and civil litigation forums. Consistent with previous research, employee win rates and award amounts in arbitration are lower compared to those found in federal and state court. Improving on extant empirical analyses, however, I find inferior outcomes cannot be explained by systematic differences in caseloads between the forums: while the use of summary judgment is more frequent in state and federal court, employee plaintiffs in arbitration, on average, have higher salaries, are employed by organizations of comparable size, allege similar discriminatory acts, and present cases of equal merit relative to plaintiffs pursuing claims through civil litigation.

INTRODUCTION

[1] I gratefully acknowledge the contributions of the National Employment Lawyers Association (NELA) to this article by providing access to its membership. For information about NELA, visit www.nela.org. Further, I owe a debt of gratitude to the individual attorney members comprising NELA, who generously donated their time and support and made this analysis possible. I would also like to thank Rhonda Clouse and my committee members Alexander Colvin, Harry Katz, and Stewart Schwab for their valuable oversight and feedback. Any findings, conclusions, interpretations, and errors contained herein are, of course, entirely my own responsibility.

Controversy has accompanied pre-dispute mandatory employment arbitration (referred to henceforth simply as "mandatory arbitration" or "employment arbitration") unabated since its use was sanctioned by the Supreme Court in *Gilmer* (1991). It is hardly surprising that an alternative dispute resolution procedure engendered by unilaterally-drafted contracts of adhesion requiring employees to waive their right to civil litigation has been mired in debate. And while *Gilmer (1991)* and subsequent supreme court decisions have resolved issues regarding arbitration's legality –courts will enforce mandatory arbitration agreements where certain due process criteria are met and the employee is not in the transportation industry—policy debates pertaining to the propriety of mandatory arbitration remain as contentious as ever.

Given the private nature of the forum, definitive figures on the use of employment arbitration are phantasmal, however, some commentators estimate as much as a quarter or more of all nonunion employees are covered.[2] In a survey of the US Fortune 1000, Lipsky *et al* (2003) reported that more than 80 percent of the responding companies used arbitration at least once within the past three years.[3] Given these figures, mandatory arbitration coverage likely exceeds that of unionization, yet our understanding of this alternative dispute resolution institution is severely underdeveloped compared to our understanding of labor-management relations and the nuances of grievance arbitration.

A landscape populated with mere saplings of empirical knowledge has allowed advocates and critics to present polarized views of mandatory arbitration. Proponents praise arbitration's speed, low cost, simplicity and accessibility while opponents raise concerns over second-class justice, due process, arbitrator bias, and the private, for-profit nature of the forum. Researchers should continue to evaluate the variety of claims and judicial pronouncements incident to arbitration, but a growing body of

[2] Colvin, Alex J. (2004) Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace. In D. Lewin and B.E. Kaufman, eds., *Advances in Industrial and Labor Relations* 13: 69-95.
[3] Lipsky (2003) Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Manager and Dispute Resolution Professionals

empirical research suggests arbitration's ultimate effect is to impose a diluted brand of justice on employee plaintiffs. Indeed, there is solid empirical support that disputes are resolved substantially faster in arbitration compared to litigation, but several studies show employee plaintiffs with employment claims win less often and receive inferior remedies in arbitration relative to civil litigation.

This article marshals data from a recent survey of employment plaintiff attorneys to engage one of the primary debates embroiling the use of mandatory arbitration: whether inferior outcomes experienced by employee plaintiffs in arbitration relative to civil court system can be attributed to the inherent injustice of the institution itself or simple variation in the populations of cases being adjudicated. By surveying attorneys directly about their most recent employment discrimination cases taken to verdict in arbitration and civil litigation, I present the first systematic empirical comparison of case characteristics and outcomes between the two forums. The ability to control for the alleged discriminatory act, defendant size, use of summary judgment, and merits of claims represents a significant improvement over previous empirical studies. Additionally, the methods were designed to provide a representative sample of employment cases in all 50 states and in multiple forums.[4] Access to this unique dataset avoids the pitfalls inherent in mandated disclosure reports and reliance on published decisions.

The article proceeds by: (1) providing a brief overview of the rise of mandatory arbitration; (2) reviewing the empirical research comparing arbitration and litigation, including its limitations; (3) describing the methods used for data collection; (4) conducting a systematic comparison of case characteristics and outcomes found between the two forums with respect to the alleged discriminatory

[4] More precisely, the survey was designed to provide a representative sample of employment discrimination claims taken to verdict by attorney members of the National Employment Lawyers Association (NELA) in arbitration, state and federal court, and administrative agencies within the past five years that can be generalized to the universe of cases heard nationally.

action, defendant size, employee salary, use of summary judgment, and merit of claims; and (5) summarizing main conclusions.

Section I: The Rise of Mandatory Arbitration

Beginning in the mid-1980s and continuing into the 1990s, a noticeable paradigm shift occurred in the Supreme Court's interpretation of the Federal Arbitration Act of 1926 (FAA), laying the legal groundwork for the ascension of employment arbitration. Notably, the Supreme Court's embraced a catholic interpretation of the FAA in *Gilmer v. Interstate/ Johnson Lane Corp. (1991)*, repeating *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc*. (1985) when writing: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

The *Gilmer* Court, however, determined the contract in dispute was not an employment contract and refused to decide whether the FAA applied to all employment contracts. The Supreme Court resolved this issue ten years later in *Circuit City Stores, Inc. v. Adams (2001),* in which the Court held that the exceptions enumerated in the FAA applied only to those directly involved in interstate or foreign commerce, meaning general employment contracts covering statutory claims were arbitrable under the FAA. *Circuit City* is notable for removing the legal uncertainty surrounding employment arbitration. And while subsequent cases have continued to clarify the law of arbitration, the premise of its general legality is no longer in dispute.

The *Gilmer* and *Circuit City* decisions may have resolved legal ambiguities, but the decisions of individual employers to adopt the practice elevated the debate from a legal obscurity to a matter of public policy. Multiple surveys spanning a decade show the prolific growth of the practice. At the same time as the *Gilmer* ruling, Feuille and Chachere (1995) found only four out of 111 firms, or 3.6 percent,

used outside arbitration in 1991.[5] In 1995, only four years later, the General Accounting Office (GAO) found that 7.8 percent of employers with 100 or more employees practiced mandatory arbitration with the non-union workforce and half of these employers imposed mandatory arbitration as a condition of employment.[6] A 1997 General Accounting Office publication reported that 19 percent of private company respondents used arbitration. In a 2001 survey specific to the telecommunications industry, Colvin (2004) reports that 41 out of 291, or 14.1 percent, of respondents indicated that they had adopted mandatory arbitration procedures. Adjusting for employer size, these 14.1 percent of employers covered 22.7 percent of the workforce. Finally, using data from a survey of the US Fortune 1000, Lipsky *et al* (2003) reported that more than 80 percent of the responding companies used arbitration at least once within the past three years.

Section II: Previous Empirical Research and Interpretive Difficulties

With respect to the ongoing legal and policy debates concerning the effects of mandatory arbitration, Sherwyn *et al* (2005) need no improvement when they state: "it makes little sense to answer empirical questions without empirical evidence."[7] To this end, the emergence of a phalanx of empirical research has colored contemporary academic discourse. While not without flaws, this body of empirical scholarship evaluates various claims incident to arbitration including its accessibility, speed, cost, repeat player effects, and the fairness of outcomes produced. Consistent with the main thrust of the present

[5] Feuille & Chachere (1995), *"*Looking Fair and Being Fair: Remedial Voice Procedures in Nonunion Workplaces. *J. MGMT*.

[6] General Accounting Office (1995). Employer Discrimination, Most Private Sector Employers Use Alternative Dispute Resolution, available at http://www.gao.gov/archive/1995/he95150.pdf . The GAO originally reported that 10 percent of employers used mandatory arbitration, but later reduced the figure to 7.8 percent after they contacted employers seeking clarification and additional information pertaining to their policies.

[7] Sherwyn, Estreicher, Heise (2005) Assessing the Case for Employment Arbitration: A New Direction for Empirical Research

analysis, this section summarizes empirical evidence related to the fairness of award amounts and win rates found in arbitration.

Win Rates

Early AAA case analyses from the 1990s provide surprisingly consistent results relative to employee win rates in arbitration. In her 1998 analysis of employment disputes among AAA employment arbitration awards in 1992, Lisa Bingham found that arbitrator awards favored employees in 74 percent of cases. In a later paper, Lisa Bingham analyzes the employee win rates in employment dispute cases heard by the AAA from 1993 to 1994 in which she found that employees won 70 percent of the time.[8] Corroborating Bingham's figures, Maltby (1998) found that employees won 66 percent of employment disputes heard by the AAA in the time period of 1993 through 1995.[9]

Though these studies produced similar results, it would be wise to question their relevance to the arbitration environment today, nearly two decades later. First, these initial studies predate the adoption of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (Due Process Protocol). The Due Process Protocol was established in 1995, "in order to assure some measure of fairness and due process to employer-promulgated schemes for private resolution of statutory disputes."[10] The Due Process Protocol recommends specific features and processes that should be present in mandatory arbitration agreements and hearings including: (1) freedom of representative choice; (2) adequate prehearing discovery; and (3) joint selection and compensation of the arbitrator, among others. It was supported and endorsed by multiple organizations including the National Academy of Arbitrations, American Arbitration Association, Society of Professionals in Dispute Resolution, National Employment Lawyers Association, Federal Mediation

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[8] Bingham, Lisa B. (1997). Employment Arbitration: Difference Between Repeat Player and Nonrepeat Player Outcomes. *Industrial Relations Research Association Series* pp 201-210.

[99] Maltby, Lewis (1998). Private Justice: Employment Arbitration and Civil Rights," 30 Colum. Hum. Rts. L. Rev. 46, 49.

[10] American Bar Association (1995). Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising Out of the Employment Relationship available at http://www.bnabooks.com/ababna/special/protocol.pdf

and Conciliation Service, and the American Civil Liberties Union. Theoretically, the adoption of the Due Process Protocol should make the arbitration process more friendly and fair to employees, and employee win rates, *ceteris paribus*, should be higher today than in the 1990s.

The Due Process Protocol, however, is just part of a larger question: are the cases of the early 1990s representative of the current employment arbitration forum that exists today? Colvin (2007) explains that a majority of the cases decided in the early 1990s involved claims by highly educated employees with the power to negotiate individual contracts, typically managers and executives; however, claims brought today are established under arbitration provisions from employment manuals or handbooks which can be forced upon employees and required as a condition of employment.[11]

Professor Lisa Bingham, in an analysis of 203 AAA awards between the years of 1993 and 1995, found that employee claimants won 68.8 percent of the time if the cases involved employees who had negotiated their contracts individually.[12] If, however, employee claimants brought a case resulting from personnel manuals or handbooks, they won 21.3 percent of the time. This represents a 47.5 percentage point difference between these two types of contracts.

The drastic disparity between the win rates on this single characteristic is cause for concern. Individual win rates should be much lower in today's arbitration environment because the majority of claims being brought today originate from employer-promulgated mandatory arbitration agreements as opposed to individually-negotiated arbitration agreements that were characteristic of the early 1990s.

To address the changing arbitration environment, with emphasis on the Due Process Protocol and the changing nature of arbitral cases themselves, researchers have continued mining available data on contemporary arbitrator decisions. Elizabeth Hill, in a 2003 study, found that employees won in

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[11] Colvin, Alex J. *(*2007). Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury? *Employee Rights and Employment Policy Journal, Vol. 12.*

[12] Bingham, Lisa B. (1998). An Overview of Employment Arbitration in the United States: Law, Public Policy and Data. *New Zealand Journal of Industrial Relations* 23(2): 5-19.

employment arbitration 43 percent of the time.[13] Hill found that the overall win rate of 43 percent could be broken down to a 34 percent win rate for employees under a personnel handbook-type contract, whereas individually-negotiated (employer-promulgates) contract win rates were 68 percent, or 34 percentage points greater. Lisa Bingham, along with co-author Shimon Sarraf, examined the outcomes of 58 AAA decisions in 1996 and 1997 in a 2000 study.[14] The pair found an overall employee win rate of 39.7 percent. If the employee claimant went to arbitration as a result of an individually-negotiated contract, the win rate was 61.3 percent; if, however, a personnel handbook engendered the arbitration proceeding, the employee win rate was 27.6 percent, or 34 percentage points lower. Lastly, Colvin (2011) found that the employee win rate in the AAA Consumer arbitration filings data was only 21.4 percent, well below the findings from the early 1990s.[15]

In contrast to the research on employment arbitration, Eisenberg and Hill (2003) were able to collect larger-scale datasets for state and federal litigation outcomes by using data gathered by government agencies.[16] Their analysis of 1430 employment discrimination cases heard in federal courts yielded an employee win rate of 36.4 percent. They report a slightly higher employee win rate of 43.8 in 160 state court employment state court discrimination cases. Cases involving non-civil rights disputes tried in state court produced an employee win rate of 56.6 percent. Oppenheimer (2003) reports a 59 percent employee win rate in a sample of 117 common law discharge cases heard in California State Court.[17] Clermont and Schwab (2004) accessed the entire universe of employment discrimination cases,

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[13] Hill, Elizabeth. (2003). AAA Employment Arbitration: A Fair Forum at Low Cost. *Dispute Resolution Journal* 58(2): 8-16.

[14] Bingham, Lisa B. and Sarraf, Shimon. (2000). 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.

[15] Colvin (2011) An Empirical Study of Employment Arbitration: Case Outcomes and Processes, Journal of Empirical Legal Studies, Volume 8, Issue 1, pp. 1-23 .

[16] Eisenberg, Theodore & Hill, Elizabeth (2003). Arbitration and Litigation of Employment Claims: An Empirical Comparison. *Dispute Resolution Journal* 58(4): 44-54.

[17] Oppenheimer, Marco (2003). Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities.

265,356 in total, heard before the federal docket between 1979 and 2000.[18] They found that discrimination plaintiffs won 37.77 percent of the time in jury trials but only 19.29 percent of the time in judge-only trials.

The employee win rates provided by the Eisenberg and Hill (2003) and jury trials in the Clermont and Schwab (2004) study are higher than employee win rates based on employer-promulgated agreements reported in the studies conducted by Colvin (2011), Bingham and Sarraf (2000), Hill (2003), and Bingham (1998), agreements which are characteristic of a developed post-*Gilmer* environment. However, the win rates in arbitration are similar to the win rates discrimination plaintiffs experience in federal judge-only trials.

Award Amounts

Like win rates, available empirical evidence suggests that employee plaintiffs receive lower award amounts in arbitration relative to litigation. Colvin (2011) reports the median award amount was $36,500 and the mean was $109,858 for 1,213 AAA employment arbitrations decided by an award between 2003 and 2007. Comparatively, Clermont & Schwab (2004) report federal jobs cases reaching verdicts between 1991 and 2001 receive a mean award size of $890,000. At the State level, Eisenberg & Hill (2003) find a 44 percent employee win rate and average award amount above $200,000. Additionally, Oppenheimer (2003) reports the mean damages awarded in 117 California State Court common law discharge cases was over $350,000.

Interpretive Difficulties

An inherent limitation on using the above studies to draw unassailable conclusions about case outcomes in arbitration and litigation is the unknown comparability of cases in the arbitrated and

[18] Clermont and Schwab (2004) How Employment Discrimination Plaintiffs Fare in Federal Court

litigated samples. Variation clearly exists in award amounts and employee win rates between the different forums, but there is no natural way to make cases heard in arbitration identical in all respects to cases heard in civil litigation. Can observed variance be attributed to inequities inherent in the arbitral forum or fundamental differences in cases being adjudicated between the forums (comparing apples with oranges)?

Some scholars suggest employment arbitration is more likely to be promulgated by large employers with developed human resource practices. It is plausible that arbitration is the terminal step in sophisticated internal conflict management systems, which provide numerous opportunities for settlement, and act to filter cases, leaving only the unmeritorious to be resolved through arbitration.

Likewise, with lower barriers to entry,[19] employees may be more likely to bring meritless cases to arbitration. Notably, Samuel Estreicher (2001) argued that the speed and lower costs of the arbitration forum provided a "Saturn" in a system otherwise characterized by "cadillacs" for the few and "rickshaws" for the many.[20] Where only individuals with high incomes or high value claims have

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[19] The same informality, lack of appeal, and due process concessions at the heart of critics' opposition to mandatory arbitration are virtues to arbitration's proponents, who argue these characteristics create a cheaper, faster, and more accessible forum over civil litigation.

Given uniform findings from multiple studies, arbitration's expediency cannot plausibly be questioned. Eisenberg and Hill (2003) report that it takes an average of 818 days, almost two and a half years, for state courts to decide a civil rights employment dispute. In federal court, employment discrimination claims languish on the federal docket for two years, or 709 days, on average, before they are ultimately disposed (Eisenberg and Hill (2003)). Looking at the universe of jobs cases filed in federal court from 1979 through 2001, Clermont & Schwab (2004) report mean docket time as 454 days.

Comparatively, Eisenberg and Hill report that civil rights employment disputes take only 262 days, on average, to reach disposition for employer-promulgated arbitrations conducted by the American Arbitration Association (AAA). Colvin (2007) found that the mean time to a decision for 849 AAA employment arbitration cases was 332 days. In an updated 2011 study, looking at the universe of employment arbitration conducted by the AAA between January 2003 and December 2007, Colvin reports the mean time to disposition was 284 days for settlements and 362, almost exactly a year, for those disposed of by an award. Employment disputes resolved by JAMS, formerly known as Judicial Arbitration and Mediation Services, Inc., during this same time period exhibit similar trends: the mean time to disposition was 285 days for settled cases and 380 days for awarded cases.

Taken collectively, arbitration is almost certainly faster than civil litigation. It is worth noting, however, that, though rarely mentioned in the literature, the same selection effects bedeviling the interpretation of award amount and win rate statistics need to be equally applied to empirical assessments of arbitration's relative expediency.

[20] Estreicher (2001) Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements

meaningful access to the civil litigation system, he argues, arbitration is more accessible for claimants with average (i.e., low value) claims. If low value and meritless cases that would never have been brought to court, because of cost barriers or internal filtering, are presented in the arbitration forum, it should be expected that employee win rates and award amounts are lower in arbitration, as the average arbitration case would have less merit than the average federal or state court case.

However, with characteristically lower awards, plaintiff's attorneys, typically working on contingency fee arrangements, may hold potential clients pursuing arbitration claims to stricter standards compared to clients heading for larger awards in litigation. The tension between these effects leaves the relative merits of initial cases presented in the forums theoretically unresolved.

Arbitration proponents contend that the availability of summary judgment in civil litigation excludes cases lacking merit from court summary statistics and results in deceptively inflated employee win rates (Sherwyn *et al,* 2005). This argument is significant but simple: a large proportion of litigated cases are dismissed prior to verdict through summary judgment, and assuming motions for summary judgment are rare in arbitration, win rates at judge or jury trials are not comparable to win rates at arbitration.

In recent years, policy-capturing studies have appeared in the literature to address the redoubtable task of controlling for merits of cases presented to decision-makers in various forums. In 2006, Klaas *et al* published one such study looking at decisions of 140 AAA employment arbitrators, 82 labor arbitrators from the National Academy of Arbitrators (NAA), and 83 jurors who had served in employment discrimination cases over the last five years.[21] The study analyzed participant responses on 32 hypothetical termination cases to see if there were systematic differences in the decision-making processes between the three groups. The authors conclude employee rights are likely to be affected by

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[21] Klaas, Brian S., Mahony, Douglas, and Wheeler, Hoyt N. (2006). Decision-Making about workplace Disputes: A policy-Capturing Study of Employment Arbitrators, Labor Arbitrators, and Jurors *Industrial Relations*. 45(1):68-93

increased use of employment arbitration, finding that labor arbitrators are most likely to rule in favor of the employee, followed by jurors, and then employment arbitrators. This finding is consistent with post-*Gilmer* arbitration studies and comprehensive reviews of the state and federal docket.

Section III: Methods

Given the persistence of comparability concerns, how similar are cases taken to arbitration and the civil litigation system? This paper addresses this lingering issue by presenting results from a survey of approximately 1,900[22] attorney members of the National Employment Lawyers Association (NELA) about their most recent employment discrimination cases disposed of in arbitration and litigation. Founded in 1985, NELA is the largest organization of practicing plaintiff-side employment attorneys in the country. Full membership requires attorneys to certify that a majority of their legal practice involving employment discrimination, illegal workplace harassment, wrongful termination, denial of employee benefits, and other employment-related matters is on behalf of employees. Data was initially collected through a web-administered survey, to which 521 practicing attorneys responded throughout October 2013. To increase the response rate, the survey was distributed by U.S. mail in December 2013 and January 2014, from which 175 additional responses were collected. This increased the overall survey response rate to 37 percent.

Respondents were asked to record the following information relating to their most recent employment discrimination cases taken to verdict/award in arbitration and litigation[23]: claim amount,

[22] Total NELA membership numbers 2,057. However, I excluded members who were not practicing employment attorneys or whose contact information was invalid. This reduced the sample size to 1,890.

[23] Respondents were first asked, "Within the last 5 years, have you taken an employment discrimination claim to verdict/award in private arbitration (e.g. AAA)? (labor arbitration does not apply)." If respondents answered "Yes," they were given the following instructions: "Please describe your most recent employment discrimination case taken to verdict/award through private arbitration, even if you feel the most recent case is atypical or not representative. If you cannot recall precise facts or figures, your best recollection should be recorded." Concerning cases adjudicated through civil litigation, respondents were asked, "Within the last 5 years, have you taken an employment discrimination claim to verdict in state court, federal court, or an administrative agency within the

award amount, winning party, employee salary, alleged discriminatory action, whether a motion for summary judgment was filed, defendant size, and the attorney's fee arrangement, among other variables. Responses were restricted to employment discrimination claims because they are the most common type of employment case filed in state court, federal court, and in arbitration. In total, we received information on 478 employment discrimination cases reaching verdict in state or federal courts or administrative agencies and 208 employment discrimination case adjudicated pursuant to mandatory arbitration clauses.

While previous studies have reviewed large databases of employment case dispositions, this is the first study to look at a representative sample of claims across multiple states, forums, and arbitration providers. It further provides insight into the broader institution of employment arbitration beyond what the limited public disclosure statements analyzed in previous research can provide. For example, the empirical scholarship on arbitration focuses almost exclusively on one arbitration provider: the American Arbitration Association (AAA). Additionally, current mandates do not require disclosure of the types or merits of cases resolved in arbitration, and even compulsory variables, such as salary, are left unreported in many cases. Kotkin (2007) further reports missing data issues with respect to salary information in Chicago courts, writing: "For 229 cases out of the employment discrimination dataset of 472 cases—almost exactly 50%--either no information about lost wages is entered or the amounts entered cannot be reliably interpreted because the entries simply indicate a gross dollar amount without differentiating between compensatory damages and back pay."[24] By bypassing such secondary data, the present study provides an unfiltered look at the state of employment discrimination in America as conducted across multiple forums, arbitration providers, and states.

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past five years?" If respondents answered "yes," they were again instructed to describe their most recent employment discrimination case taken to verdict even if it is atypical or not representative.

[24] Kotkin (2007) Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements

Section IV: Data

Win Rates

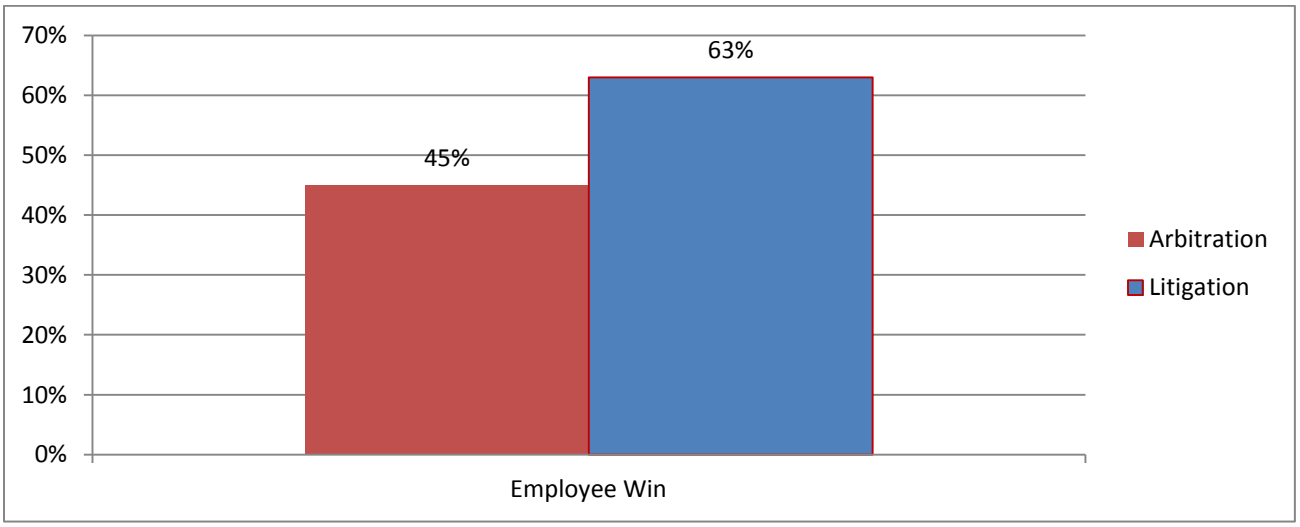

Figure 1: Employee Win Rates, by Forum

Figure 1 offers a comparison of differences between employment discrimination plaintiff win rates found in litigation and arbitration. With respect to their most recently adjudicated employment discrimination case in both forums, attorneys were asked to respond to the following question: "Was this case adjudicated in favor of the claimant, defendant, or other?" Of the 208 reported cases tried in arbitration, 94, or 45 percent, were adjudicated in favor of the employee claimant, 102 were adjudicated in favor of the employer defendant and in 12 cases the "Other" option was selected.[25] Of the 478 reported cases tried in civil litigation, 299, or 63 percent, were adjudicated in favor of the employee claimant, 170 were adjudicated in favor of the employer defendant and in 9 cases the "Other" option was selected. Employee win rates in litigation are substantially higher in litigation when compared to arbitration; precisely, employee win rates in litigation are 18 percentage points, or over 30 percent, higher relative to arbitration.

[25] Several respondents selecting "Other" indicated the verdict in their case was still pending.

Award Amounts

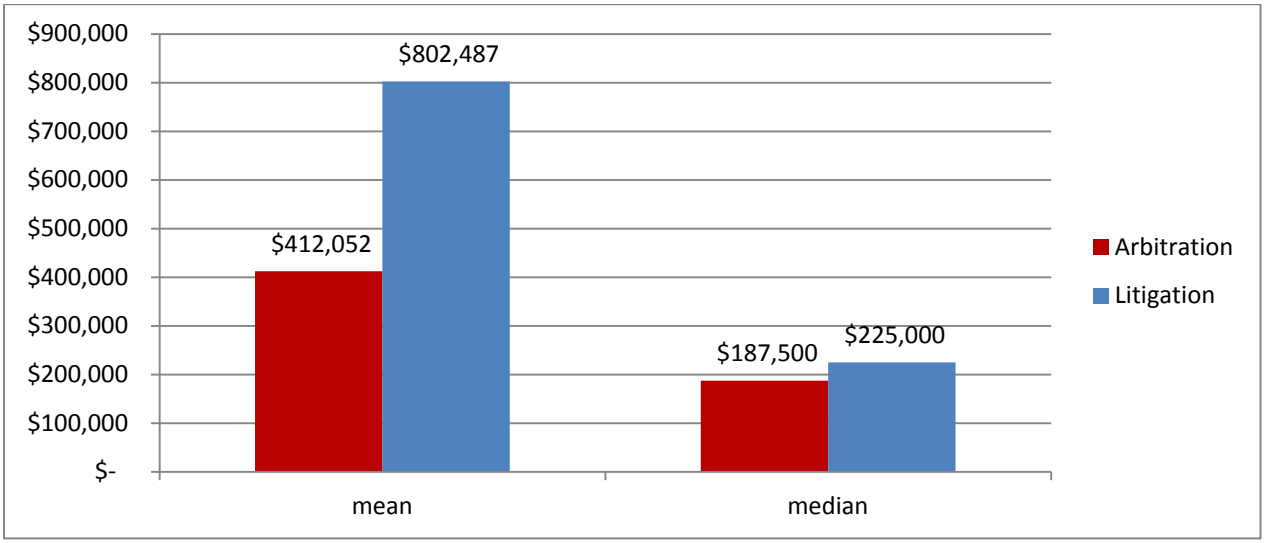

Figure 2: Mean and Median Award Amount, by Forum

Figure 2 graphically presents the mean and median monetary amounts[26] awarded to the 91 and 284 successful employee plaintiffs in arbitration and litigation, respectively. The average award amount rendered to successful discrimination plaintiffs is $412,052 in arbitration and $802,487 in litigation. The average award found in civil courts is 97 percent higher relative to the average award found in arbitration. Phrased alternatively, the average award found in litigation is twice that awarded to successful plaintiffs in arbitration. This disparity is less stark when one considers median award amounts. The median amount awarded in litigation is $225,000, which is 20 percent higher than the $187,500 median award found in arbitration. The substantial difference between the mean and median award amounts results from a right skewed distribution in both forums. The top 10 percent of awards in

[26] This metric does not account for nonmonetary or injunctive relief. Such relief is rare as reported by Clermont & Schwab (2004), who show it is given in less than 2 percent of employment discrimination cases on the federal docket, and Kotkin (2007), who reports injunctive relief in less than 3 percent of cases settled by federal magistrate judges in Chicago over a six-year period ending in 2005.

arbitration are greater than or equal to $900,000, while the top 10 percent of awards in litigation are no lower than $2,000,000.

The relationship between employee outcomes in litigation and arbitration seen in Figures 1 and 2 is consistent with existing empirical studies: employee win rates and award amounts are substantially lower in arbitration compared to those found in litigation. However, as explained in the preceding section, it is difficult to attribute such differences to an arbitration forum bias using raw win rates and award amounts. With this in mind, the proceeding sections investigate whether alternative factors can plausibly explain the statistical relationships evidenced in Figures 1 and 2.

Employer Size

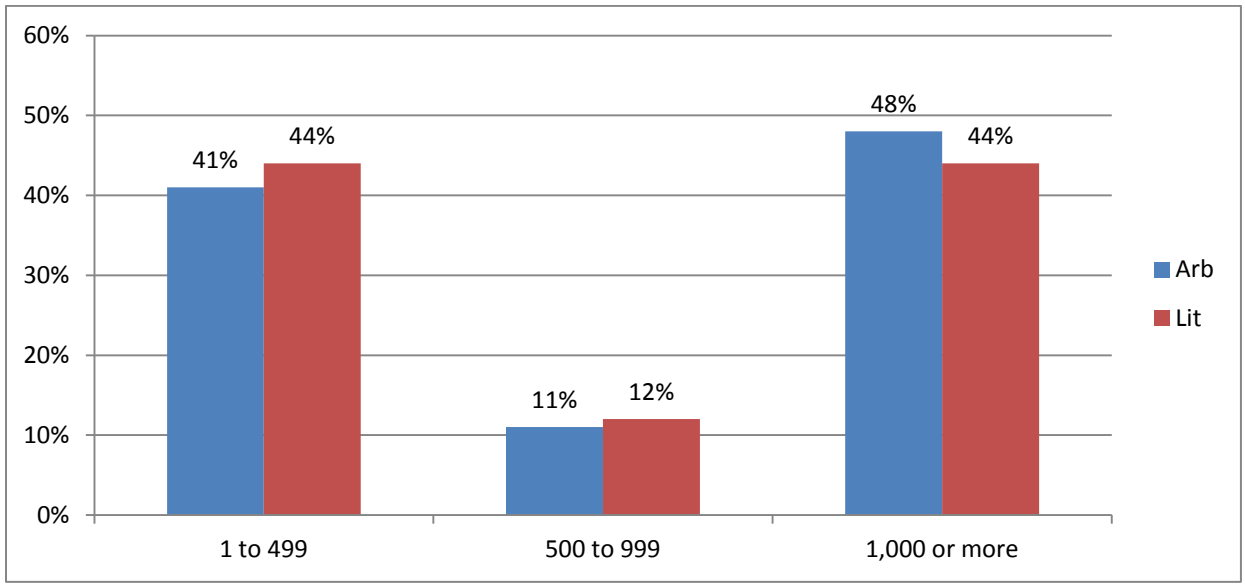

Figure 3: Distribution of Defending Employer Size, by Forum

Scholars have carefully noted that differences in the initial stock of cases filed in arbitration and civil forums, not differing institutional characteristics alone, may explain the differences in outcomes reported in empirical studies. Cases filed in arbitration pursuant to employer-promulgated mandatory arbitration clauses invariably flow from employers who promulgate mandatory arbitration clauses. Employers adopt such procedures for an array of reasons, be it litigation avoidance, union avoidance, or

as a genuine attempt to provide workers with a voice mechanism in the workplace. Independent of the calculus behind an individual employer's decision to adopt mandatory arbitration, as a sophisticated dispute resolution technique, adopters are presumed to be larger employers with developed conflict management systems. Prior to arriving at arbitration, the terminal step in the conflict management system, employees with disputes must progress through any number of lower steps which may include open door policies, ombudspersons, peer review panels, or mediation. Each step in these internal dispute resolution procedures provides an opportunity for meritorious cases to be identified and voluntarily resolved before being elevated to a legal claim. Having been filtered through ADR procedures, average merit or quality of a case filed in arbitration may well be lower than the typical case filed in state or federal court.

Again, this is a claim that can be, and should be, put to empirical scrutiny. Using employer size as a measure of formality of internal employment procedures,[27] we can investigate whether internal filtering is likely to occur more frequently in arbitration than litigation. In Figure 3, however, the data does not show significant differences in the size of defending employers involved in reported litigated and arbitrated cases.

In 41 percent of arbitration cases and 44 percent of litigation cases, attorneys reported defendants employed between one and 499 employees. In 11 percent of arbitrated cases and 12 percent of litigated cases, defending employers were reported to have between 500 and 999 employees. Finally, large defending employers, defined as those having 1,000 or more employees, were involved in 48 percent and 44 percent of reported arbitrated and litigated cases, respectively.

[27] Respondents were asked to answer the following question with respect to their most recent employment discrimination case taken to verdict in the two forums, if applicable: "How many employees worked for the defendant? (include both full-time and part-time workers)." I did not ask about formalization of personnel and evaluation procedures directly, rather, I exploit the well-established positive relationship between size and formalization reported in social science research (See Pfeffer (1977), Bridges and Villemez (1991), Hirsch (2008), Marsden, Cook and Kalleberg (1994), and Reskin, McBrier, and Kmec (1999))

The distribution of employer size between the forums is nearly identical, and given the positive relationship between formality and size, to attribute differences in outcomes to internal filtering mechanisms is dubious.

Summary Judgment

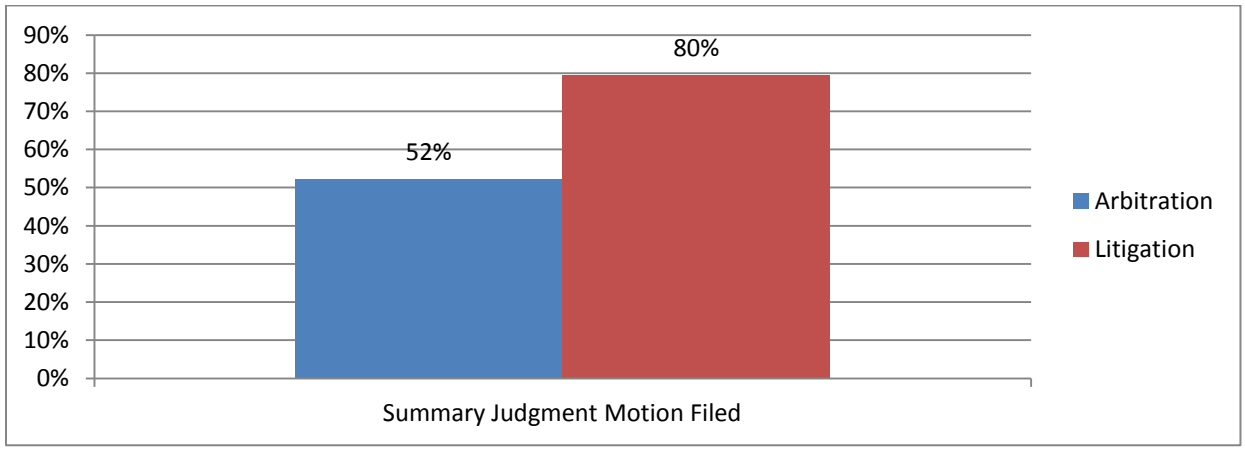

Figure 4: Survived Motion for Summary Judgment, by Forum

While figure 3 provides no evidence that the population of cases entering the forums are likely to vary to any substantial degree, legitimate concerns remain about the population of cases surviving to adjudication. As previously mentioned, the availability and pervasiveness of summary judgment in litigation is often given as a potential explanation for the disparate outcomes reported in empirical analyses. Contrary to claims of the "rarity of summary judgment motions in arbitration,[28]" however, Figure 4 shows motions for summary judgment were filed in over half of all arbitration proceedings and in four-fifths of all cases adjudicated in civil courts or administrative agencies. And though scholars have vastly underestimated the extent of summary judgment in arbitration, they are still correct to identify it as a potential confounding variable.

As cases reaching verdict in litigation are more likely to have survived summary judgment, we would expect them to be more meritorious and experience superior outcomes compared to arbitrated

[28] Sherwyn et al (2005) page 1566

cases. To test this theory, however, I compare win rates and award amounts *restricting the comparison to only those cases that have survived a motion for summary judgment*. Of the 369 and 106 cases in litigation and arbitration, respectively, reported to have survived summary judgment, employees received a ruling in their favor in 61 percent of cases in litigation but only 43 percent in arbitration. Even controlling for the use of summary judgment, the 18 percentage point difference between the two forums remains. Mean award amounts for cases reaching award after having survived summary judgment are $815,542 and $322,385 while median award amounts are $250,000 and $170,000 in litigation and arbitration, respectively. The maintenance of substantial disparities even when controlling for use of summary judgment suggests institutional characteristics of the arbitral forum itself, not the use of summary judgment, are responsible for inferior outcomes experienced by arbitration discrimination claimants.

Employee Salary

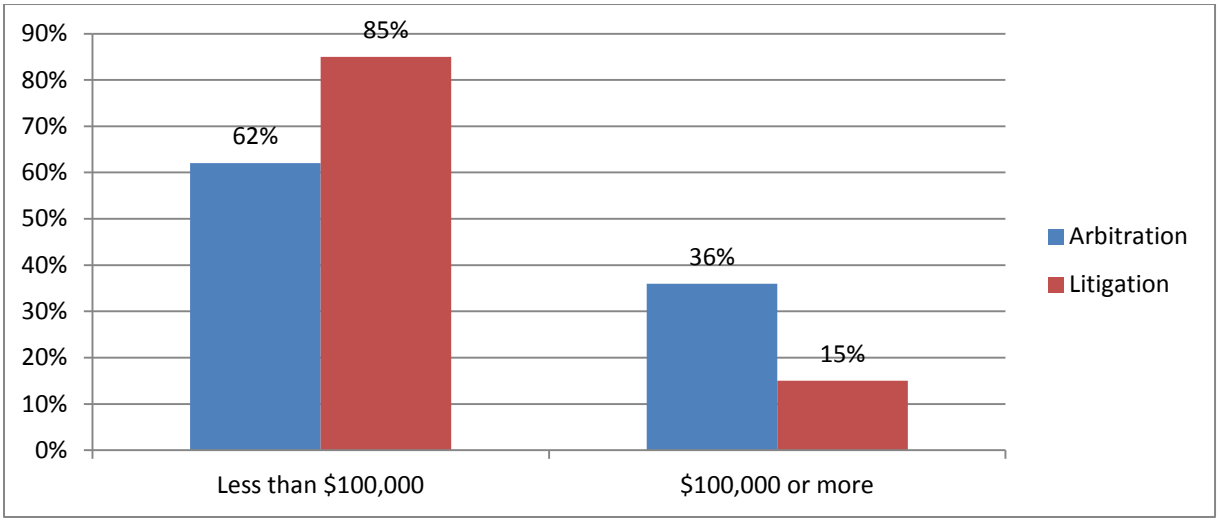

Figure 5: Employee Plaintiff Salary, by Forum

Figure 5 offers comparisons of differences in employment discrimination plaintiff salaries. With respect to their most recently adjudicated employment discrimination case in both forums, attorneys were asked to report whether the plaintiff's yearly salary was less than $100,000 or $100,000 or more.

Of the 203 cases tried in arbitration, 125, or 62 percent, involved employees making less than $100,000 a year and 72, or 36 percent, involved employees making more than $100,000 a year. Of the 464 cases tried in civil litigation, 382, or 85 percent, involved low salary employees, while 66, or 15 percent, involved high salaried employees.

Given that compensatory damages are tied to lost wages, and the fact that litigation plaintiffs are comparatively more likely to earn salaries less than $100,000, we would expect award amounts to be *higher* in arbitration. In Figure 2, however, the opposite is observed. Further, Figure 5 suggests that arbitration is not more susceptible to frivolous or low value claims leading to skewed outcome statistics. In fact, Figure 5 implies that arbitration has an undeserved reputation for accessibility; if arbitration is as accessible as proponents claim, where are the claims from plaintiffs with lower salaries?[29]

[29] Additional accessibility concerns are raised by data collected on attorney fee arrangements. Attorneys were asked, "What was your arrangement regarding attorney fees: Contingent, Hourly, Hybrid – Contingent and Hourly Mixed, or Other?" While 5 percent of claimants in litigation finance their case through hourly payments, 13 percent of claimants in arbitration pay their attorney representative on an hourly basis. The fact that hourly fee arrangements are almost three times as likely in arbitration relative to litigation calls to question arbitration's reputation as an accessible forum. True access to justice requires access to attorney representation. And if the ability of potential employee plaintiffs to secure representation under contingency fee arrangements is frustrated by mandatory arbitration agreements, this truth should be incorporated into public policy debates. Alternatively, if employee plaintiffs are willing to enter into hourly financial arrangements in higher proportions because arbitration proceedings are more efficient, accessibility claims would be vindicated.

Types of Discriminatory Acts Alleged

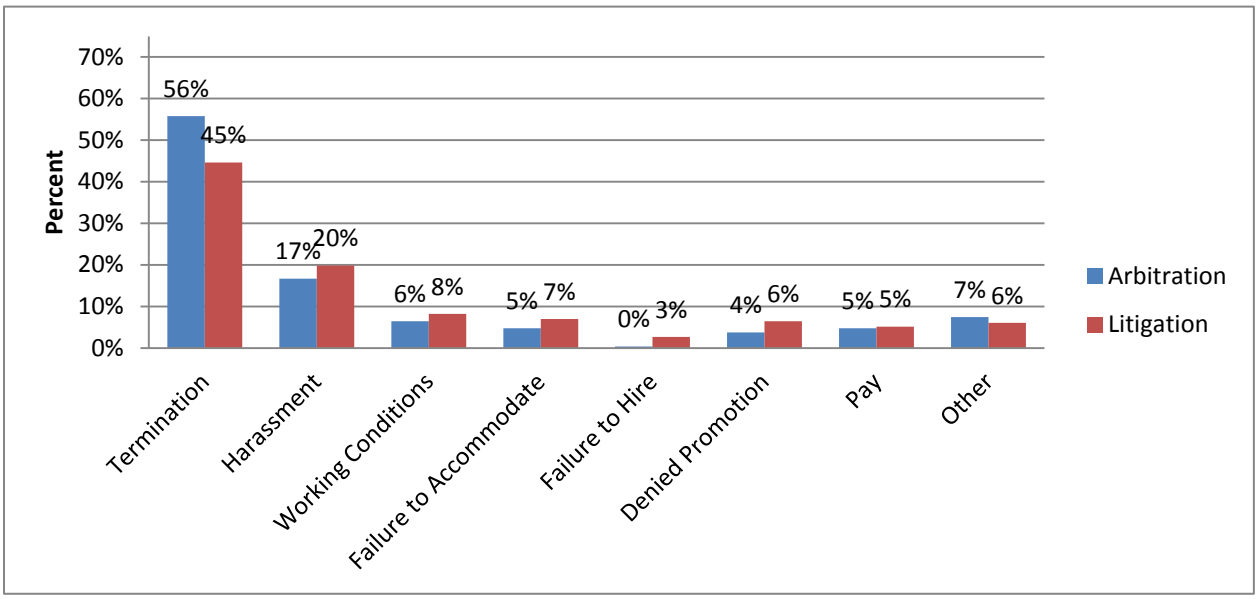

Figure 3: Frequency of Alleged Discriminatory Acts, by Forum

Pushing the analysis further, Figure 6 contains the frequency of the specific discriminatory acts alleged in reported employment cases. If formal personnel policies, procedural differences, or barriers to entry explain variation in employee outcomes, one would likely see observable differences in the distribution of alleged discriminatory acts. However, as seen in Figure 6, there is only minor variation in the distribution of discriminatory acts alleged in cases between the two forums. The largest difference, 11 percentage points, appears in cases alleging a termination motivated by illegal considerations, which cannot plausibly explain the stark inequality found between employee outcomes.

Case Merits

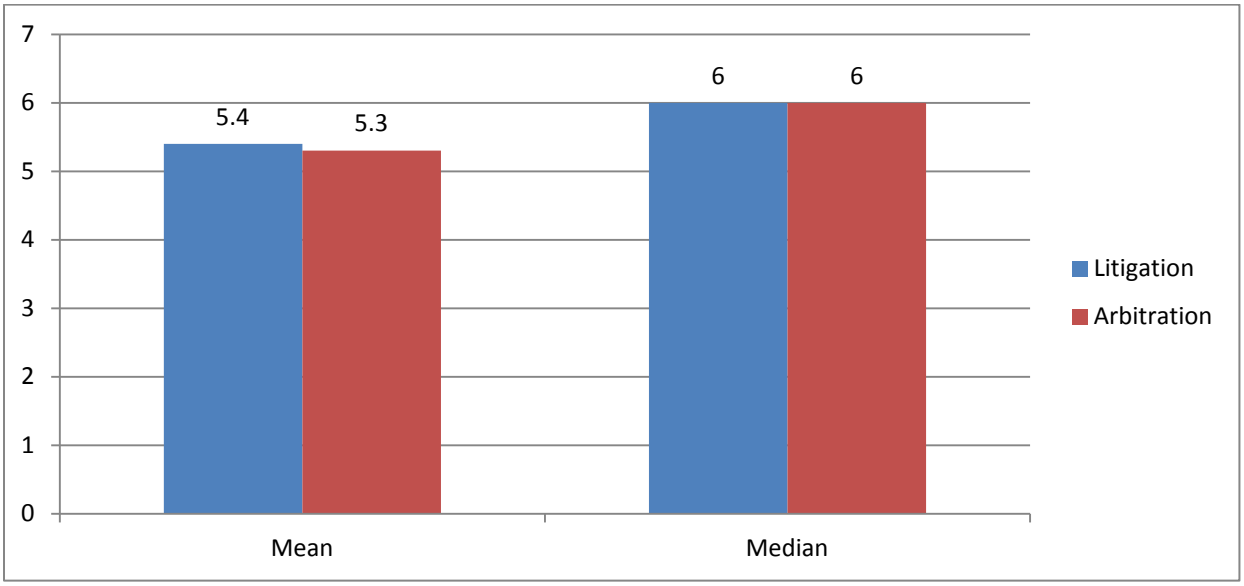

Figure 4: Attorney Assessment of Underlying Merits of Adjudicated Cases, by Forum

To directly test the proposition that there are systematic differences between the quality or merits of cases, attorneys were asked explicitly to evaluate the degree to which they agreed that individual cases were meritorious on a scale from 0 (Strongly Disagree) to 6 (Strongly Agree). As can be seen in Figure 5, there are no differences between the merits of cases adjudicated in arbitration and litigation. Specifically, the median response was a 6 (correlating to an answer of Strongly Agree) for cases heard in both forums and the mean response was a 5.44 and a 5.37 (correlating to an answer between Agree and Strongly Agree) for litigation and arbitration, respectively.

Concerns about formal personnel and grievance procedures and frequency of summary judgment are moot when the merit of the entire stock of adjudicated cases in both forums is directly measured. And, using this measure, we can definitively say that employment discrimination cases brought by employee plaintiffs and reported as equally meritorious are less likely to prevail in arbitration compared to litigation and, when they do prevail, are awarded smaller monetary damages.

Section V: Conclusion

An analysis of approximately 700 contemporary employment discrimination cases shows outcomes in arbitration are severely inferior to outcomes reported in state and federal courts and administrative agencies: employees are nearly 50 percent more likely to win and receive awards nearly twice as large in cases adjudicated in the civil litigation system compared to those that are arbitrated. And where previous scholars have suggested differing case characteristics could be the culprit behind such disparities, with the exception of summary judgment, the present data shows case characteristics are similar, and, where there is variation, theory suggests such variation would lead to *superior* outcomes being realized in arbitration. For example, employee claimants, on average, have higher salaries than claimants found in the civil litigation system, worked for employers of similar size, and have their claims evaluated as equally meritorious by their representing attorney. Further, the distribution of the alleged discriminatory acts for claims does not suggest systematic differences between caseloads in the two forums. And while summary judgment is more likely in litigation, the chasm between win rates and award amounts remains when controlling for this variable. Considering these findings, courts should reevaluate their permissive attitude towards mandatory arbitration procedures and acknowledge the high costs of this "inexpensive" forum.

Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research

J. Ryan Lamare[*] and David B. Lipsky[**]

In this article we use evidence gathered from employment arbitration cases arising in the securities industry to address several research questions that emanate from the debate over the arbitration of employment disputes. We empirically answer the following questions: (1) Are critics correct in asserting that employment arbitration favors repeat players? (2) Do employees fare better under voluntary arbitration than they do under mandatory arbitration? (3) Are employees who allege violations of their civil rights, through the filing of discrimination charges, treated differently from those filing other types of claims? (4) Does the gender of the parties involved in the arbitration process affect outcomes in any way? (5) Is there evidence that companies learn from, or are affected by, the results of prior arbitration awards when dealing with a current claim? Although the literature has offered some answers to these questions, this Article provides a holistic review and overview of the arbitration experience within the securities industry and a summation of quantitative evidence on the subject.

Introduction

The arbitration of employment disputes has been the subject of intense interest in recent years. Proponents of the practice maintain that arbitration provides a faster and cheaper means of resolving employment disputes than litigation, and several seminal Supreme Court decisions have reinforced support for the use of arbitration to resolve employment disputes.[1] Opponents of the practice argue that arbitration is not an adequate substitute for a judicial forum because it does not provide a level playing field for employment disputes. Among other concerns, for instance, critics of the practice maintain that experienced employers typically enjoy advantages in arbitration over inexperienced employees. The so-called repeat player effect holds that sophisticated employers, by virtue of their knowledge of and experience in the arbitration process, are likely to have an edge over employees, who are much less likely to have had any previous experience in arbitration.[2]

Critics have especially expressed their concerns about mandatory arbitration. Congress has recently considered a bill called the Arbitration Fairness Act ("AFA"), which would amend the Federal Arbitration Act to ban the use of mandatory pre-dispute

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[**] Anne Evans Estabrook Professor of Dispute Resolution, ILR School, Cornell University.

[1] Most notably, *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20 (1991) and *Circuit City Stores v. Saint Clair Adams*, 532 U.S. 105 (2001).

[2] For a discussion of the repeat-player effect, see, Ronald L. Seeber and David B. Lipsky, "The Ascendancy of Employment Arbitrators in U.S. Employment Relations: A New Actor in the American System?" *British Journal of Industrial Relations*, vol. 44, no. 4 (December 2006), pp. 729-735.

arbitration agreements in employment, consumer, franchise, and civil rights disputes.[3] A pre-dispute arbitration agreement results when Party *A* (for example, an employer) requires Party *B* (for example, an employee) to sign an agreement waiving Party *B*'s right to adjudicate future disputes arising out of their relationship, and instead requires Party *B* to submit those disputes to arbitration. The sponsors of the AFA, reflecting the views of several interest groups that have long criticized mandatory arbitration agreements, critique mandatory arbitration in the proposed legislation's findings. For example, the AFA sponsors assert that mandatory arbitration "undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions."[4] The sponsors maintain that "arbitrators enjoy near complete freedom to ignore the law and even their own rules because they know that their rulings will not be seriously examined by a court applying current law."[5]

In this Article, we use the evidence we have gathered from cases arising in the securities industry to address several research questions that emanate from the debate over the arbitration of employment disputes. The answers should contribute to our assessment of the validity of some of the claims made by both the proponents and opponents of mandatory employment arbitration. For example, are critics correct in asserting that employment arbitration favors repeat players? Do employees fare better under voluntary arbitration than they do under mandatory arbitration? Are employees who allege violations of their civil rights, through the filing of discrimination charges, treated differently from those filing other types of claims? Does the gender of the parties involved in the arbitration process affect outcomes in any way? Is there evidence that companies learn from, or are affected by, the results of prior arbitration awards when dealing with a current claim? Although empirical answers to each of these questions can be (and, in many cases, have been) explored in the literature, this Article provides a holistic review and overview of the arbitration experience within the securities industry and provides a summation of quantitative evidence on the subject.[6]

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[3] H.R. 1020 and S. 931, introduced in the House and the Senate, respectively, in 2009. The AFA is actually a series of amendments to the Federal Arbitration Act.

[4] See H,R,1020 – Arbitration Fairness Act of 2009, Sec. 2(5).

[5] *Id.*, at Sec. 2(5).

[6] In providing a holistic overview of current empirical research into securities arbitration, portions of this paper, in some instances, draw directly from a series of unique articles we have written over the past several years, or are currently writing but have not yet published, on the topic. In drawing on these sources, excerpts are either used verbatim or paraphrased from the following published and working papers: David B. Lipsky, Ronald L. Seeber and J. Ryan Lamare (2010), "Equity and Efficiency in Employment Arbitration: Lessons from FINRA," *Dispute Resolution Journal* (February); David B. Lipsky, J. Ryan Lamare, and Abhishek Gupta (2013), "The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry," *Industrial Relations*, 52(S1): 314-342; J. Ryan Lamare (2013), "The Arbitration of Employment Discrimination Cases in the Securities Industry," *Dispute Resolution Journal* (July); J. Ryan Lamare and David B. Lipsky (2014a), "Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry," (working paper); J. Ryan Lamare and David B. Lipsky (2014b), "The Repeat-Player Effect on Employment Arbitration Awards: Evidence from the Financial Industry," (working paper). Full citations to these published and unpublished manuscripts are provided whenever materials from these sources are used.

I. FINRA's Arbitration Program

The Financial Industry Regulatory Authority ("FINRA") regulates nearly 5,000 securities firms in the U.S., along with their 633,000 representatives.[7] One of FINRA's primary responsibilities involves the administration of an ADR program for the resolution of disputes between customers and brokers (seventy-five percent of all filings), brokers and brokers (two percent of filings), and employees and their firms (twenty-three percent of filings).[8] The FINRA employment dispute resolution program covers only "associated persons" in the securities industry; associated persons are employees who are registered with the Securities and Exchange Commission and can accept and execute customers' buy-and-sell orders.[9] It is estimated that about one-third of the employees in the industry are registered representatives.[10] When a claim is made under this system, a filing fee is required from the claimant. This can range from $50 (for claims of $1,000 or less) to $1,800 (for claims greater than $1 million). In cases alleging employment discrimination, the maximum claim fee is $200.

There are approximately 6,400 arbitrators on the FINRA roster.[11] Arbitrators are either public (who are not required to have knowledge of or connection to the securities industry) or non-public (who have a securities industry background). All arbitrators must complete at least a basic training course prior to becoming eligible to be listed on the FINRA roster.[12] Arbitrators must agree to abide by the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes as well as FINRA's Code of Arbitration Procedure.[13] In addition, before every case, arbitrators must provide a disclosure report, which gives information on all relationships the arbitrator might have with the parties and/or conflicts of interest.[14] The arbitrator must also sign an oath declaring his or her impartiality.[15] FINRA pays its arbitrators at most $200 per four-hour hearing session, with an additional maximum premium of $75 per day for chairpersons.[16] Cases are heard in seventy-two locations within all fifty states, plus Puerto Rico and

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[7] See Lipsky, Lamare, and Gupta, *The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry*, 52 Industrial Relations 314, 322 (2013),.
[8] *Id.* at 322-323.
[9] *Id.* at 323.
[10] *Id.* at 323. We use the term "employee" to refer only to registered representatives.
[11] See the FINRA website, "Dispute Resolution Statistics" (accessed February 6, 2014): http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/
[12] See the FINRA Website, "Reqiored Nasoc Arbitrator Training" (accessed Februayr 6, 2014): http://www.finra.org/ArbitrationAndMediation/Arbitrators/Training/RequiredBasicArbitratorTraining/index.htm
[13] See the FINRA website, "Arbitrators" (accessed February 6, 2014): http://www.finra.org/ArbitrationAndMediation/Arbitrators/
[14] See the FINRA website, "Arbitrator Disclosure" (accessed February 6, 2014): http://www.finra.org/ArbitrationAndMediation/Arbitrators/Responsibilites/Disclosures/index.htm
[15] See the FINRA website, "Oath of Arbitrator" (accessed February 6, 2014): http://www.finra.org/ArbitrationAndMediation/Arbitrators/Responsibilites/OathofArbitrator/index.htm
[16] See the FINRA website, "Honorarium" (accessed February 6, 2014): http://www.finra.org/ArbitrationAndMediation/Arbitrators/AdministrativeResources/Honorarium/index.htm

London. Arbitrators are assigned to primary locations based on their residence, and are included on the lists sent to parties in that location.[17]

The financial crisis that began in 2008 led directly to a dramatic increase in FINRA case filings, from 3,238 in 2007 to 4,982 in 2008 and to 7,137 in 2009.[18] In other words, the FINRA caseload more than doubled between 2007 and 2009, and it increased by forty-three percent between 2008 and 2009.[19] Although an analysis of the customer-broker cases would be valuable, our interest in employment relations led us to focus on the employment claims heard under FINRA auspices.

The FINRA system for arbitrator selection currently works as follows. If an employee claims $50,000 or less, a single arbitrator is appointed at random and a "simplified arbitration" occurs, wherein no hearing sessions will be held unless the claimant requests one.[20] For claims between $50,000 and $100,000, FINRA provides each party with a list of ten randomly-selected, "chair-qualified" public arbitrators.[21] Both parties strike at most four arbitrators from the list and rank the remainder; FINRA then selects the highest ranked available arbitrator, and a normal hearing is held.[22] Cases with higher claim amounts are heard by a tripartite panel; in these cases, parties each receive three lists of ten arbitrators: a chair-qualified public list, an additional public list, and a non-public list.[23] The parties then follow the same process of striking and ranking as outlined above.

The system provides different rules for arbitrations concerning statutory discrimination claims. For instance, the maximum filing fee for discrimination claims is $200, whereas the fee can rise as high as $1,800 for non-discrimination cases.[24] In addition, beginning in 2000, FINRA instituted stricter requirements regarding the composition of arbitration panels when discrimination has been alleged.[25] In these cases, tripartite panels must consist of all public arbitrators (rather than a mixture of public and industry arbitrators), and the chair (or sole) arbitrator cannot have primarily represented employers or employees in the past five years.[26]

Over the past twenty years, a substantial debate has arisen regarding the effectiveness and fairness of the arbitration process rules.[27] As a consequence, a

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[17] See the FINRA website, "Hearings" (accessed February 6, 2014): http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/Hearings/index.htm

[18] *Supra* note 13.

[19] *See id*.

[20] See the FINRA website, "Arbitrator Selection" (accessed February 6, 2014): http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/ArbitratorSelection/index.htm

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] See the FINRA website, Rule 13802 – Statutory Employment Discrimination Claims (accessed February 6, 2014): http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4284

[25] See the FINRA website, Rule SR-NASD-1999-008 (accessed February 6, 2014): http://www.finra.org/Industry/Regulation/RuleFilings/1999/P001284

[26] *Id*.

[27] See, for instance, Barbara Black and Jill I. Gross (2001), "Making It Up As They Go Along: The Role of Law in Securities Arbitration," 23(3) Cardozo Law Rev. 991; Edward Brunet and Jennifer J. Johnson (2008), "Substantive Fairness in Securities Regulation," 76 University of Cincinnati Law Rev. 459; Jill I. Gross and Barbara Black (2008), "When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration," 2008 J. of Dispute Resolution 349; Stephen J. Choi and Theodore Eisenberg (2010), "Punitive Damages in Securities Arbitration: An Empirical Study," 39 J. of

tremendous amount has been written on securities arbitration, including an array of opinion pieces, regulatory assessments, and scholarly articles. Within this vast literature, a primary complaint alleges that FINRA arbitration rules have tilted disputes in favor of the industry at the expense of investors and other claimants.[28]

The securities industry has often found itself at the forefront of the employment and consumer arbitration conversation, particularly discussions aboutthe changing availability and usage of arbitration over the past several decades. Several of the Supreme Court's most important decisions regarding employment and consumer arbitration originated in the securities industry. For example, *Shearson/American Express v. McMahon* held that investors who sign pre-dispute arbitration agreements with their brokers could be compelled to arbitrate claims arising under the Securities and Exchange Act,[29] and *Rodriguez de Quijas v. Shearson/American Express, Inc.*[30] overturned *Wilco v. Swan*, which held that claims arising under the Securities Act could not be compelled to arbitration by means of a contract.[31]

Most critically for employment relations, the Supreme Court's seminal decision in *Gilmer v. Interstate/Johnson Lane, Corp.*[32] held that a broker-employee who had signed a registration form with the SEC requiring the use of arbitration to resolve statutory claims had waived his right to take an age discrimination claim to federal court. The *Gilmer* case is widely credited with ushering in the widespread use of mandatory pre-dispute arbitration agreements in employment relations.[33]

II. Findings from Our Empirical Investigation into FINRA Awards

We provide the most comprehensive analysis of employment arbitration within the FINRA system to date. Our data cover the full spectrum of awards issued by FINRA from the implementation of securities employment arbitration through 2006. In 2007, we purchases data files from FINRA that provided information on: award amounts; claim amounts; characteristics of claimant-employees, respondent-employers, arbitrators, and attorneys; hearing length and location; claim filing and award issuance dates; allegations made by employees; any counterclaims made by employers. This information was included on an award-by-award basis over the lifespan of the FINRA system, totaling 3,200 cases. We cleaned and coded the data so that it was suitable for empirical analysis, either on our own or in conjunction with graduate students at Cornell University's ILR School.

Arbitrators in the FINRA system were tasked with handling a variety of different types of employment disputes over the period studied. Figure 1 shows the types of claims

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Legal Studies 497; Stephen J. Choi, Jull E. Fisch, and A. C. Pritchard (2010), "Attorneys as Arbitrators," 39 J. of Legal Studies 109.

[28] See Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C.L. REV. 123 (2005); Brunet & Johnson, *supra* note 8.

[29] See *Shearson/American Express v. McMahon*, 482 U.S. 220, 220 (1987).

[30] See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

[31] See *Wilko v. Swan*, 346 U.S. 427, 427 (1953).

[32] See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991), at 20.

[33] For a discussion of the significance of *Gilmer*, see David B. Lipsky, Ronald L. Seeber, and Richard D. Fincher, *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals*. (San Francisco, CA: Jossey-Bass, 2003), pp. 198-212.

made by employees in the 3,200 cases we analyzed: in 22.9 percent of the cases employees claimed their employer had denied them compensation they had been owed; in 35.2 percent of the cases employees claimed their employer had defamed them in some fashion (e.g., by alleging they had "churned" a customer's account); in 20.8 percent of the cases employees claimed they had been wrongfully terminated; and in 29.3 percent of the cases employees claimed their employer breached their contract. Cases involving a claim of statutory discrimination constituted 18.9 percent of the total.

In every case the employee (and his or her attorney) presented the arbitrator with a monetary figure representing the damages associated with the claim. The figure presented to the arbitrator usually included the claimant's demand for back pay and often punitive damages as well. The employers in these cases always denied that the employees' claims had merit and sometimes filed counterclaims.; The employer's position in each of these cases was that the arbitrator should not award the employee-claimant any money at all.

[Figure 1 about here]

Our analysis of the FINRA awards casts light on five major considerations for assessing the suitability of employment arbitration. First, do repeat players (usually employers) have an advantage over one-shot players (usually employees)? Second, are there differences in outcomes depending on whether the system is mandatory or voluntary? Third, are parties awarded different amounts depending on the gender of the employee, his or her attorney, the employer's attorney, or the chair arbitrator? Fourth, do arbitration outcomes differ depending on the employee's allegation? In particular, are employees treated differently if they take statutory discrimination claims to arbitration when compared against other types of allegations? Fifth, can we assess, using empirical measures, the extent to which companies treat each arbitration separately, or whether a given arbitration is influenced by a firm's prior outcome? Each of these questions will be fully answered in the following sections. In answering these questions, we rely on evidence gleaned from published articles, unpublished working papers, and new or previously unreported empirical anlaysis.

A. Evidence of a Repeat-Player Effect within the FINRA System[34]

Research assessing the adequacy and fairness of arbitration in resolving employment disputes has raised the problematic possibility that parties who engage in arbitration the most will enjoy inherent advantages over parties who are one-time users of the system. This has been termed the repeat-player effect. Although some empirical studies of repeat-player effects exist, many gaps remain in this literature. The first formal conceptualization of repeat players, compared against one-shot players, comes from Marc Galanter.[35] Galanter argues that in any legal system, repeat players garner advantages

[34] Portions of this section are drawn or paraphrased from the unpublished manuscript, J. Ryan Lamare and David B. Lipsky (20143b), "The Repeat-Player Effect on Employment Arbitration Awards: Evidence from the Financial Industry" (working paper).

[35] Marc Galanter (1974), "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law & Society Rev. 95.

over one-shot players for several reasons: repeat players are more knowledgeable about the forum in which they operate, having been there before; they have access to specialists on the issue; they are able to develop informal institutional relationships; they are viewed as more committed to certain bargaining positions; they are able to take more risks; they can use their influence to lobby for favorable rules; and they are more likely to invest greater resources in order to affect the rules.[36] Conversely, one-shot players have more to lose; may employ risk-averse strategies; have no interest in long-term gains or relationships; are unconcerned with precedent and future rule changes; have no institutional relationship; have no knowledge-experience base from which to draw; and have lesser access to advocates who are experts on the issue.[37] This, according to Galanter, contributes to a legal system in which the "haves" (typically large, well-resourced firms) enjoy significant advantages over the "have nots" (aggrieved individuals).[38]

Galanter's repeat-player theory was first applied to the employment arbitration setting by Lisa Bingham,[39] who determined that employers involved in multiple arbitration cases did better than those engaging in only a single case. In explaining this finding, Bingham suggested legitimate reasons related to arbitration policy distinctions between one-shot players and repeat players, as well as the possibility that experienced repeat players could more easily identify and settle unwinnable cases. Bingham also suggested that pro-employer bias might exist within employment arbitration, where arbitrators would favor firms in order to gain future business. However, these results have been challenged on grounds related to sample size and truncation problems, as well as concerns that her findings of possible arbitrator bias may have been conflated with issues related to employer size, experience, and institutional memory.[40]

Alex Colvin's work overcomes many of these problems.[41] He used a larger sample, a broader timeframe (2003 to 2007), and a more nuanced analysis of possible employer-arbitrator biases. Colvin maintains that repeat-player effects might be serving as a proxy for size effects. Larger employers are more likely to repeat. These firms may also enjoy certain advantages such as resource availability, legal expertise, and knowledge of the arbitral forum; might adopt HR practices that ensure fairer employment decisions; and could be more likely to settle meritorious cases using internal grievance systems.[42] Employing a quantitative analysis of American Arbitration Association (AAA) data, Colvin finds a considerable repeat-player effect, but attributes this to inherent advantages available to large employers, rather than systemic bias.[43] Colvin also finds a smaller, but still significant, repeat player-arbitrator effect, where employers selecting the

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[36] *Id.* at 98-103.
[37] *Id.*
[38] *Id.* at 103-104.
[39] *Id.*
[40] Elizabeth Hill (2003), "AAA Employment Arbitration: A Fair Forum at Low Cost," 58(2) Dispute Resolution J. 8; David Sherwyn, Samuel Estreicher, and Michael Heise (2005), "Assessing the Case for Employment Arbitration: A New Direction for Empirical Research," 57 Stanford Law Rev. 1557; Alexander J. S. Colvin (2011), "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," 8 J. of Empirical Legal Studies 1.
[41] Colvin (2011), *supra.* note 14.
[42] *Id.* at 12.
[43] *Id.* at 21.

same arbitrator multiple times tend to receive favorable outcomes.[44] Colvin argues that this finding does indeed indicate pro-employer arbitrator bias, attributable to both arbitrators' hope for future business from employers and also to repetitious firms' greater expertise in selecting pro-employer arbitrators.[45]

However, issues remain to be resolved within this literature. All repeat-player studies have faced problems of sample truncation, where the available data are unable to capture the full range of awards since the arbitration system's inception. Without including all awards over a system's lifetime, the data used to analyze repetition effects cannot ensure that parties identified as one-shot players did not participate in cases within the system prior to the timeframe chosen for analysis. In addition, published studies on repetition have treated the key independent variable in only a dichotomized manner; thus, all repeat players are treated equally when being measured against those who do not repeat.

Similarly, in terms of dependent variables, the most robust quantitative research into repetition effects on employment arbitration has measured only the total monetary amounts awarded and dichotomized "win/loss" outcomes, where any value over zero counts as an employee victory. As Colvin notes, this is an extremely narrow definition of what might constitute a "win" for one side and a "loss" for another.[46] Further, although studies suggest that access to expert lawyers may explain the repeat-player results, no work on the subject has fully accounted for attorney effects. Finally, all studies on the subject suffer from substantial omitted variable problems.

Our analysis of FINRA cases overcomes many of these issues and, in so doing, provides the most complete analysis to date of repeat-player effects on employment arbitration. For one, we have a non-truncated sample of all decisions rendered within the FINRA employment arbitration system since its beginning. For another, we are able to consider degrees of experience. This allows us to account for the effects of increasing levels of experience on arbitration outcomes. Additionally, we include attorney and chair arbitrator repetition in our final analysis, as well as employer repetition. Further, we are able to capture both relative (percent-based) and absolute (award sum-based) measures of awards. This overcomes concerns regarding the difficulty in determining what constitutes a "win" when absolute monetary values are used and also mitigates issues over the possibility of inflated claims artificially depressing relative award results. Finally, we control for an array of factors that might also affect outcomes, including the claim size, gender, location, year, case complexity, and allegations.

We find some evidence of repetition and experience effects within the FINRA system, as indicated by Table 1. After controlling for the location of the arbitration hearing, the complexity of the case, the size of the initial amount claimed by employees, time, and party characteristics, we find that, with every additional FINRA arbitration case in which an employer participates, employees are considerably less likely to win larger shares of their initial claim amounts. As arbitrators become more experienced in the FINRA system, they also tend to more heavily favor employers, at least with regard to awards relative to claim size. However, we find no significant effects of multiple

[44] *Id.* at 21.
[45] *Id.* at 12, 14-15.
[46] *Id.*at 5.

pairings of the same employer and arbitrator on relative awards. Nor does increasing attorney experience affect award outcomes for either party.

[Insert Table 1 about here]

These results do not necessarily suggest that the arbitration system under FINRA is biased to benefit employers. Colvin finds the most compelling empirical evidence of bias in employment arbitration by testing the effects of matched employer-arbitrator pairs on awards in the AAA system.[47] Colvin's outcomes support the assertions that arbitrators will unfairly favor employers in the hope that this will lead to future business, and that repeat employers are able to identify and select biased arbitrators.[48] Generally, our study finds a different result from that of Colvin. Our findings suggest that the FINRA system may have been largely successful in protecting against selection effects and overt employer bias. Throughout the twenty-year period we study, only 2.3 percent of cases involved employer-arbitrator pairs matched multiple times, considerably lower than the 15.9 percent Colvin finds in the AAA data. In 1998, FINRA introduced a system of automated panel selection, which may have adequately mitigated the possibility that employers are able to select arbitrators multiple times based on past history. Even when arbitrators and employers do have a prior relationship in the system, the safeguards FINRA has put into place to protect against bias (in the form of disclosure statements, sworn oaths, and a variety of other methods to preserve impartiality) arguably have proven to be effective. The repeat player problem raises two concerns: (1) that experienced parties in arbitration will be more successful than those that lack experience; and (2) that this success may be a product of systemic bias. Although we find evidence that there may be merit to the first concern, we find no support for the second claim. This result stands in contrast to previous work on the subject.

B. Effects of FINRA's Changed Procedural Rules[49]

In 1999 FINRA amended its rules to provide stricter policies regarding the arbitration of employment discrimination claims. The change in the handling of these claims after 1999 provides us with a unique opportunity to examine to what extent the procedures for handling such claims affect the outcomes of these types of cases. From the inception of the employment arbitration program through 1999, FINRA used mandatory arbitration for all claims, including those alleging discrimination. Since 1999, registered employees in the industry have had the option of using voluntary arbitration to resolve discrimination claims (but all other types of claims are still subject to mandatory

[47] *Id.* at 21.
[48] *Id.* at 21.
[49] Portions of this section are drawn or paraphrased from J. Ryan Lamare (2013), "The Arbitration of Employment Discrimination Cases in the Securities Industry," *Dispute Resolution Journal* (July), from David B. Lipsky, Ronald L. Seeber and J. Ryan Lamare (2010), "Equity and Efficiency in Employment Arbitration: Lessons from FINRA," *Dispute Resolution Journal* (February), and from the unpublished manuscript, J. Ryan Lamare and David B. Lipsky (2014a), "Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry" (working paper).

arbitration).[50] Critics maintain that mandatory arbitration has a significant effect on arbitration outcomes: claimants, they argue, are at a disadvantage under mandatory arrangements and are likely to receive lower awards than they would if they had the option of voluntary arbitration. Recall, also, that a year after FINRA switched from mandatory to voluntary procedures for handling discrimination claims, it enhanced the procedures used for those claims.[51] Accordingly, we have the opportunity to compare three distinct regimes governing employment discrimination claims: a mandatory regime with somewhat loose procedures, a voluntary regime with these same procedures, and a voluntary regime with enhanced procedures. Did the changes in regime type make a difference?

Table 2 provides the results. One major effect of the change was a dramatic decline in the number of discrimination cases after 1999. From the inception of the arbitration program through 1999, there were 220 discrimination awards. From 2000 through 2008 there were only 98 discrimination awards. There is no evidence that there was a sharp drop after 1999 in the number of employees who had discrimination complaints. Rather, the most reasonable explanation for the decline in discrimination awards is that after 1999, when employees in the securities industry were no longer compelled to arbitrate discrimination claims, most chose litigation over arbitration.

[Insert Table 2 about here]

We discovered that the shift from mandatory to voluntary arbitration did not seem to have an effect on the size of the awards in discrimination cases, whereas the enhanced procedures did affect the size of the awards. Through 1999, the mean award in discrimination cases was $91,309. In 1999 (the year when discrimination charges were voluntary but no rule changes had occurred), the mean award in discrimination cases in fact fell, to $52,233. After 2000, under a voluntary regime with enhanced rules, the mean award jumped to $157,890. We find similar evidence with regard to the percent of the initial claim that was awarded by the arbitrator and the mean employee win rate. In sum, our analysis of the FINRA data suggests that there is no other factor that can explain both the noteworthy drop in the number of discrimination cases and the significant increase in the size of awards in those cases after 1999 other than the changes FINRA made in its system of arbitration. By allowing discrimination cases to proceed to litigation and, most importantly, providing a fair and balanced system for those cases that went to arbitration—one that offered adequate due process protections for complainants and impartial, well-trained arbitrators knowledgeable about relevant statutes—FINRA brought about a dramatic change in the handling of discrimination complaints in the securities industry.

C. Discrimination Charges Compared with Other Allegations[52]

[50] See the FINRA website, Rule SR-NASD-1997-077 (accessed February 6, 2014): http://www.finra.org/Industry/Regulation/RuleFilings/1997/P009417

[51] See Lamare and Lipsky (2014a), *supra* note 51, at 8-9.

[52] Portions of this section are drawn or paraphrased from J. Ryan Lamare (2013), "The Arbitration of Employment Discrimination Cases in the Securities Industry," *Dispute Resolution Journal* (July) and from the unpublished manuscript, J. Ryan Lamare and David B. Lipsky (2014a), "Resolving Discrimination

How do cases arbitrated under the FINRA system involving allegations of discrimination compare with cases involving other types of allegations? Table 3 provides the results of comparisons between discrimination cases and other types of cases. When considering all awards, individuals taking discrimination cases to arbitration received monetary compensation that was 21.4 percent lower than those whose claims did not involve allegations of discrimination.

[Insert Table 3 about here]

Additionally, similar findings are uncovered when measuring the relative success rates of employees (as determined by the percentage of the individual's claim amount awarded by the arbitrator). Over the twenty-year period, only half of all employees taking discrimination cases won anything at all (compared with 64.8 percent of those alleging other claims). When an arbitrator found merit in an employee's case, an individual with a discrimination claim won about twenty-nine percent of the amount he or she initially demanded, whereas an individual with a non-discrimination claim received over thirty-six percent of his or her request. We discovered a similar difference when we looked at awards in which the arbitrator found for the employer. Each of the differences between outcomes for discrimination cases and outcomes for non-discrimination cases is statistically significant at the ninety-five or ninety-nine percent confidence level. In addition, the results remained robust when we applied regression analysis to the data and controlled for initial claim amounts, gender and repeat-player effects, case complexity, time, and geographic location. There is, on the whole, clear evidence that employees taking discrimination cases to arbitration received lower awards than those with other types of claims.

D. Gender of the Parties Involved in Arbitration[53]

The securities industry has not always been a hospitable place for women. Indeed, there is considerable evidence that for most of its history, the industry was a hostile environment for women. As Louise Marie Roth has written:

> Not so long ago—as recently as the mid-1980s—Wall Street was one big men's club of smoked-filled rooms and strippers on the trading floor. Women, to the degree that they were welcome at all, were relegated to roles as secretaries and sex objects. Firms blatantly discriminated against the few women who did fight to become traders, and court cases demonstrate a long history of groping, name calling, come-ons, blocked mobility, and sexual pranks.[54]

Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry" (working paper).

[53] Portions of this section are drawn or paraphrased from David B. Lipsky, J. Ryan Lamare, and Abhishek Gupta (2013), "The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry," *Industrial Relations*, 52(S1): 314-342.

[54] Louise Marie Roth (2006), *Selling Women Short: Gender and Money on Wall Street*, Princeton, NJ: Princeton University Press. For a thorough description of the discriminatory conditions women faced on

Over the last fifteen years, major class action lawsuits were brought against Smith Barney, Merrill Lynch, and Morgan Stanley charging those firms with the improper treatment of women. Each firm paid out more than $100 million to resolve these lawsuits, although each firm denied that it had engaged in any systematic discrimination against women.[55]

In 2006 the U.S. Equal Employment Opportunity Commission reported that about one-third of the "officials and managers" in the securities industry were women, compared to nearly one-half in the banking, credit, and insurance industries.[56] Many observers contend that sexism continues to plague the securities industry.[57] In 2010 women alleging sex discrimination filed class action lawsuits against both Goldman Sachs and Bank of America Merrill Lynch; both firms have denied that these suits have any merit.[58] Nevertheless, reports of "women fleeing Wall Street" have been abundant in the financial and business press.[59] In the first decade of this century 141,000 women, or 2.6 percent of the female workforce, left the industry, while the number of men working for Wall Street firms grew by 389,000, a 9.6 percent increase of the male workforce.[60] "The economic downturn produced a talent pool overflowing with highly-qualified candidates, both men and women, but evidence suggests that the bar for women to reenter Wall Street is disproportionately high."[61]

In the securities industry several reasons lead us to hypothesize that women will do less well than men in arbitration cases. It is possible that the reasons women fare poorly may stem from biases that exist in the arbitration process itself. Indeed, arbitrators themselves (whether male or female) may be affected by a subtle form of bias. They may be unconsciously influenced by deeply rooted cultural stereotypes about men and women. Without realizing it, arbitrators may find more merit in claims brought by men as compared to women, even when the claims are equally meritorious. Our argument,

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Wall Street through the early part of this century, see Susan Antilla (2002). *Tales from the Boom-Boom Room*, Princeton, NJ: Bloomberg Press.

[55] Roth (*supra* note 21).

[56] U.S. Equal Employment Opportunity Commission (2006), *Diversity in the Finance Industry*, Report prepared by the Office of Research, Information and Planning, U.S. Equal Employment Opportunity Commission, Washington, DC.

[57] See, for example, Ellen Joan Pollock (2000), "Deportment Gap. In Today's Workplace, Women Feel Freer To Be, Well Women, Floppy Bow Ties Give Way To More-Alluring Attire; Sex Banter Has Its Place. Flirting—or Good Business?" *Wall Street Journal*: A20, February 7; Melinda Ligos (2001), "MANAGEMENT; Escape Route From Sexist Attitudes on Wall St.," *New York Times*, May 30 (accessed on-line at http://www.nytimes.com/2001/05/30/business/management-escape-route-from-sexist-attitudes-on-wall-st.html).

[58] See Bob Van Voris and Christine Harper (2010), "Goldman Sachs Sued Over Alleged Gender Discrimination," *Bloomberg*, September 15 (accessed on-line at http://www.bloomberg.com/news/2010-09-15/goldman-sachs-sued-by-three-women-over-alleged-gender-discrimination.html); Mary Ellen Egan (2010), "Bank of America and Merrill Lynch Sex Discrimination Lawsuit," *Forbes*, March 31 (accessed on-line at http://www.forbes.com/sites/work-in-progress/2010/03/31/bank-of-america-and-merrill-lynch-sex-discrimination-lawsuit/).

[59] See, for instance, Anita Raghavan (2009), "Terminated: Why the Women of Wall Street Are Disappearing," *Forbes*, February 26 (accessed on-line at http://www.forbes.com/forbes/2009/0316/072_terminated_women.html).

[60] Charles Wallace (2010), "Women on Wall Street: As Many Leave the Industry, Some Live in Fear," *Daily Finance* (September 16).

[61] Sylvia Ann Hewlitt (2010), "Women on Wall Street and Their Hidden Challenges," Harvard Business Review, April 21.

however, does not necessarily rest on the premise that the arbitrators or other participants in the FINRA arbitration process are consciously or unconsciously biased against women. There are other factors, we maintain, that may influence the relative success of men and women in FINRA arbitration cases. These factors include, for example, the possibility that employers have greater willingness to settle early in the process with women to avoid potentially high-profile gender discrimination cases. Another factor might be that the gender of the claimant (and the gender of the claimant's attorney) serves as a proxy for experience. Brokers with greater experience tend to earn more than brokers with less experience, and awards are based largely on unpaid compensation. Therefore, since male brokers in general have more experience than female brokers, their back pay awards would be larger than the back pay awards obtained by female claimants.

Table 4 provides the results of gender effects on arbitration awards; the results are based on a regression analysis of our data that controls for other relevant variables. We find that female employees and female employee attorneys receive lower awards than do male employees and male employee attorneys. However, we do not conclude from this that the FINRA system is biased toward women. Consider our finding that the gender of the arbitrator does not affect the relative size of the award. We did not find, for example, that male employees obtained larger awards from male arbitrators, nor did we find that female employees obtained larger awards from female arbitrators. Rather, we found that male employees did better than female employees regardless of the gender of the arbitrator. In our view, this finding provides at least limited support for our belief that FINRA arbitrators do not overtly discriminate against women. We suspect that gender in our results might plausibly be a proxy for other factors that influence the experience of men and women in the FINRA arbitration process, but unfortunately we lack the data to test this assertion more fully.

E. Past Arbitration Awards' Effect on Current Cases

The final question we ask in this paper relates to the concept of independence between arbitration awards. To what extent are the employment arbitration awards obtained by employers independent of previous awards they have obtained? Are employers affected by the results of prior hearings, or do they treat each arbitration case as a unique event?

This question is difficult to answer empirically, and there is no literature of which we are aware that has attempted to study the issue. An initial assumption is that firms learn from their prior awards. The logic behind this assumption is that a company, acting strategically, will consider its institutional history when confronting a given arbitration case and its strategy for that case will depend on the company's prior experiences. This in part helps to explain the repeat-player findings reported earlier.

However, deeper consideration makes this theory more ambiguous. We might expect that a firm's overall experience with FINRA arbitration benefits that firm, as the theory suggests, but the idea that an award depends on the firm's immediate prior outcome may be illogical. Firms, and their employees, are highly diverse entities, and it is not necessarily the case that an arbitrator's ruling on, say, a breach of contract case filed at the firm's Kansas City office would have any bearing on a subsequent discrimination charge filed at the firm's New York City branch.

With our data, we are able to test explicitly the extent to which a company's given arbitration outcome is affected by the award preceding it. In essence, we can test whether companies learn from (or depend in any way on) the most recent past award when they go to arbitration. Although we cannot provide a more nuanced measure of corporate learning in this regard, we are at least able to introduce the concept through empirical analysis.

To answer this question, we rely on statistical tests for the presence of autocorrelation between the data. In the absence of autocorrelation, it is fair to assume that each of the arbitration awards obtained by a given firm operates independently of the firm's other awards. However, if autocorrelation is found to be present, this indicates that the company's arbitration outcome is affected by some earlier case. In this instance, we lag the results by one time period (that is, we measure the correlation at time one and compare it to the correlation at time two) to test whether the employer's immediate prior award shaped the employer's award in the current case.

We ran empirical tests and find no evidence for the presence of autocorrelation within our data. However, we do not interpret this finding as necessarily suggesting that each arbitration case should be viewed as a unique event in the company's arbitration experience. It may be that firms do indeed pay attention to earlier awards when handling a given case, but only when those earlier cases match the current case in specific ways. For instance, a firm's Los Angeles attorneys might examine the company's performance in discrimination cases in that region and learn from those specific experiences—a notion again supported by our repeat-player findings. Although we cannot perform such nuanced tests of this concept using our data, we encourage researchers to consider measuring for autocorrelation in their analyses of arbitration awards over time.

Conclusions

Our examination of employment arbitration in the securities industry produces a mixed picture—one that does not entirely support either the proponents or the opponents to mandatory workplace arbitration. For example, we find strong evidence of a repeat-player effect in the securities industry, to some degree replicating the findings of both Bingham and Colvin in their analyses of AAA cases. Our analysis has the advantage of avoiding some of the limitations of earlier studies of the repeat-player hypothesis. Because we have data on all employment arbitration cases arising in the securities industry from the inception of the program, our analysis avoids the truncation bias of earlier studies; also, we have been able to test whether the repeat-player effect is a phenomenon related to the experience of the firm or, on the other hand, a phenomenon related to the experience of the attorneys representing the disputants. Our findings strongly support the view that the repeat-player effect is a consequence of the experience of the firm and not the firm's attorney.

Opponents of employment arbitration may use this evidence to support their contention that employment arbitration does not provide a level playing field for the disputants but inherently favors employers. However, in contrast to Colvin, we find no evidence that the repeat pairings of an arbitrator and an employer-respondent in the securities industry results in outcomes that favor the employer. Our evidence suggests that the procedural safeguards that FINRA has put in place over the years have mitigated

the advantages of repeat players—a finding that should provide a lesson for other providers of arbitration services.

Similarly, our findings cast light on whether mandatory arbitration, compared to voluntary arbitration, puts employee-plaintiffs at a disadvantage. The significant change in the rules governing employment arbitration in the securities industry in 1999 and 2000 allowed us to test the effects of mandatory arbitration on outcomes in discrimination cases. On the one hand, we found that the change from a mandatory to a voluntary arbitration program for discrimination complaints significantly decreased the number of discrimination claims resulting in arbitration awards. Presumably after 1999 most discrimination cases were litigated rather than arbitrated.

On the other hand, consistent with our finding on the repeat-player effect, FINRA's rule changes in 2000, designed to enhance the fairness and due process protections of complaints in discrimination cases, proved to have a very significant positive effect on the outcomes obtained by complainants in arbitration cases. Again, the rules FINRA used to protect employee-disputants appear to have had dramatic effects on arbitration awards, suggesting that procedural safeguards may be more important than whether an arbitration program is mandatory or voluntary.[62]

But our analysis also suggests that employees in the securities industry with discrimination complaints fared less well than employees with other types of claims. Again, we lack the data to estimate what employees with discrimination complaints might have received had they litigated their claims. What we have uncovered, however, is *prima facie* evidence that, all other things considered, in the securities industry arbitrators treat employees with discrimination complaints less favorably than they treat employees with non-discrimination claims. This result may stem from the fact that arbitrators are more reluctant to find that an employer has violated a statute than they are to find that an employer has breached a contract.

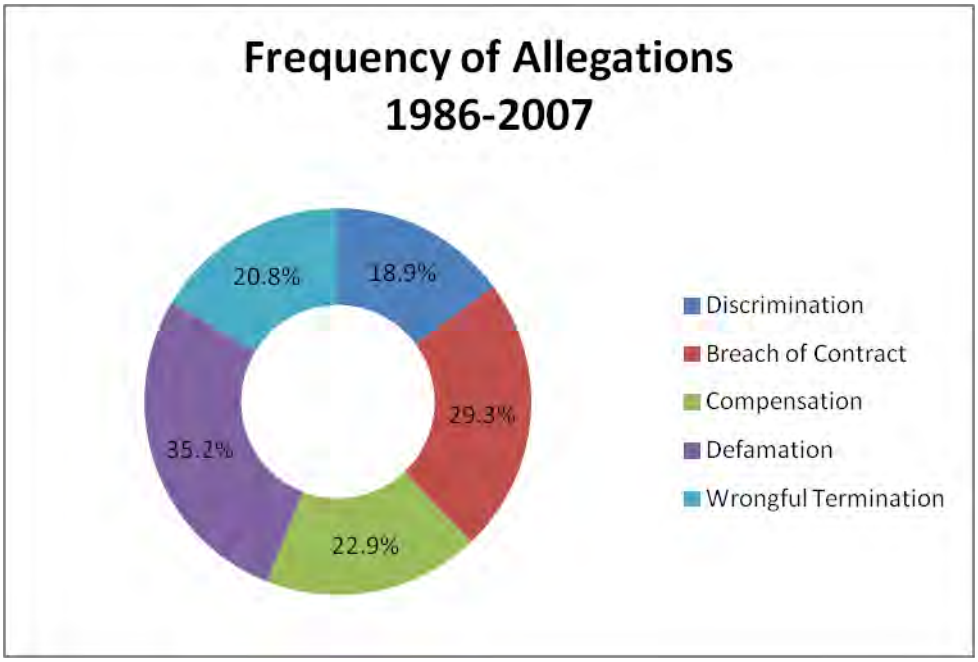
Lastly, we find that, controlling for other relevant factors, women have obtained lower arbitration awards than men in the securities industry. On the one hand, critics might add this finding to their arsenal of objections to employment arbitration. On the other hand, our evidence suggests that the effect of gender on arbitration awards probably results from long-standing employment practices in the securities industry and not from the nature of the arbitration process itself. Clearly, there is no evidence to support the proposition that arbitrators consciously discriminate against women complainants in the industry.

In sum, in common with other researchers, we find that employment arbitration in the securities industry potentially has defects identified by critics of the practice. However, we also find that the regime of rules used by the provider can substantially correct those defects. For instance, where other arbitral forums (namely, AAA) have been studied, evidence indicates that there is at least the potential for bias to affect arbitration outcomes. However, in our study of FINRA, using generally comparable data, we find no such evidence of bias. As such, we argue that employment arbitration systems should not be considered monolithic in nature – the problems with arbitration that might have occurred under one regime may be less present, or nonexistent, under a different system.

[62] We acknowledge that a more definitive answer to this question would require an examination of how securities employees with discrimination complaints fared in litigation; regrettably, we do not have the data to address this question.

Specifically, we maintain that the FINRA approach to arbitration serves as a useful template for designing a system that limits many of the concerns around employment arbitration. The FINRA system has strict arbitrator training and disclosure requirements (especially for discrimination claims), employs a randomized and automated selection process, and makes arbitrator decisions publicly available. Although we accept and indeed advocate for the position that ADR programs are not monolithic, we hold that, if other dispute resolution forums were to adopt some or all of these protocols, it is conceivable that they would find similar levels of success in promoting arbitration fairness.

Figure 1: Frequency Distribution of All FINRA Case Allegations



Source: J. Ryan Lamare (2013), "The Arbitration of Employment Discrimination Cases in the Securities Industry," *Dispute Resolution Journal* (July).

Table 1: Repeat-Player Effects within the FINRA System

	Percent-Based Measure of Award Outcomes	Absolute Measure of Award Outcomes
INCREASES IN EMPLOYER'S EXPERIENCE	**Negative Effect on Employee Outcomes**	**Negative Effect on Employee Outcomes**
INCREASES IN EMPLOYEE ATTORNEY'S EXPERIENCE	No Effect on Awards	No Effect on Awards
INCREASES IN EMPLOYER ATTORENY'S EXPERIENCE	No Effect on Awards	No Effect on Awards
INCREASES IN ARBITRATOR'S EXPERIENCE	**Negative Effect on Employee Outcomes**	No Effect on Awards
REPEATED PAIRS OF FIRMS AND ARBITRATORS	No Effect on Awards	No Effect on Awards

Controls: Hearing location, case complexity, initial amount claimed, party characteristics, allegations, time.

Table 2: Outcome Effects under Mandatory and Voluntary Systems

	Mandatory Arbitration for All Allegations		**Voluntary for Discrim. without Rule Changes**		**Voluntary for Discrim. with Rule Changes**	
	Discrim. Allegation	*Other Allegations*	*Discrim. Allegation*	*Other Allegations*	*Discrim. Allegation*	*Other Allegations*
N	220	593	18	78	98	739
Mean Monetary Award	$91,309	$146,364	$52,233	$156,690	$157,890	$129,226
Mean Percent of Claim Awarded	-2.6%	18.9%	10.4%	21.9%	17.1%	17.5%
Mean Monetary Award (Excluding Zeros)	$183,022	$229,164	$104,649	$238,329	$311,073	$218,837
Mean Percent of Claim Awarded (Excluding Zeros)	20.7%	32.2%	20.8%	30.8%	32.7%	35.4%
Mean Employee Win Rate (Award Greater Than Zero)	49.0%	65.2%	50.0%	73.2%	52.6%	63.6%

Note: Monetary awards are deflated to 1986 dollars.

Note: The first set of colums covers awards of cases filed between May 1989 and January 1999. The second set of colums covers awards of cases filed between January 1999 and January 2000. The third set of columns covers awards of cases filed between January 2000 and 2006.

Table 3: Award Amounts and Win Rates for Discrimination and Other Cases

	Mean $ Award	Employee Win Rate	% of Claim Awarded (Incl. Zeros)
Discrimination Cases	$108,488	50.2%	14.9%
Other Allegations	$138,003	64.8%	24.1%
Percent Difference between Discrimination and Other Allegations	*-21.4%***	*-29.1%***	*-61.7%***

*** = significant at the .01 level

Note: Monetary awards are deflated to 1986 dollars.

Table 4: Gender Effects within the FINRA System

	Percent-Based Measure of Award Outcomes	Absolute Measure of Award Outcomes
EMPLOYEE IS MALE	**Positive Effect on Employee Outcomes**	**Positive Effect on Employee Outcomes**
EMPLOYEE'S ATTORENY IS MALE	**Positive Effect on Employee Outcomes**	No Effect on Awards
EMPLOYER'S ATTORNEY IS MALE	No Effect on Awards	No Effect on Awards
ARBITRATOR IS MALE	No Effect on Awards	No Effect on Awards

Controls: Hearing location, case complexity, initial amount claimed, party characteristics, allegations, time.