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Overview & History: The Alternate Universe of Forced Arbitration

Is Judicial Acceptance Of Arbitration A Return To "Liberty Of Contract?"
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Forced Arbitration In The Workplace: A Symposium
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Lochner v. New York, 198 U.S. 45 (1905), elevating the "right and liberty of the individual to contract" over regulations limiting working hours, introduced what is often known as the Lochner era. Interference with the "right to contract," often was invalidated by courts that were willing to find regulatory efforts "unreasonable, unnecessary and arbitrary." The Lochner era continued through the middle of the Roosevelt New Deal, and finally disappeared in 1937 when the Court reversed its previous thinking and allowed regulation in many areas of health and safety.

Today, judicial regulation of mandatory arbitration is rare in most jurisdictions. Arbitration seems to be founded on the same fictitious "right and liberty of the individual to contract." The means of entry into the contract seem to make no difference. The one-sided terms of the contract are routinely upheld unless they can be successfully challenged against a high "unconscionability" burden of proof. There is no effective appeal of arbitral decisions, in the very large majority of cases.

Arbitration really is a parallel universe of justice, that many call "justice lite." For a number of years, because of the strange things I perceived to be happening in the system of arbitration, I wrote columns providing examples of the parallel universe. Some of the columns follow, and I hope they give real life examples of how this relatively unfettered "liberty of contract" really does work. The articles begin with what little it takes to enter into an arbitration contract, continue with the reality of terms and conditions in the contracts, then explore whether you can get out of the contracts, and finally (for a little balance) tell a consumer-friendly arbitration story.
WHAT ARBITRATION CLAUSE?
ILLITERACY AS A DEFENSE TO ARBITRATION

I admit I was surprised to find that a person can agree to a written arbitration clause, even though he or she is illiterate. I was even more surprised to find that illiteracy is no defense to enforcement of an arbitration clause under Mississippi law, but it is under Texas law. (Like you, I'm already thinking of the elitist Northeast jokes, but I'm not going there.)

WARNING: THOSE OF YOU WHO CAN'T READ, STOP NOW! Why it helps to put something in capital letters, if a person can't read it anyway, is a bit mystifying, but it does help save a contract from unconscionability, in Mississippi. Last summer, I spent some time in Hungary. I can promise you that it made no difference whether the Hungarian language was capitalized - I had no idea what it was conveying.

So, the 5th Circuit would respond, get someone to read the contract in Hungarian to you, and translate it to English, before you sign it. It's true, that would work fine as long as the translator was honest. It really wouldn't be much help if the translator were looking to deceive me, or help sell me something I didn't want. If I believed the translator was honest, and only found out later that he wasn't, I would be in trouble if my Hungarian contract was somehow subject to Mississippi law.

The 5th Circuit case, decided in March and construing Mississippi law, involved Washington Mutual Finance Group, as plaintiff, seeking to compel arbitration against a group of people collectively lumped as "the Illiterate Appellees." The District Court, after hearing the evidence, held that illiteracy coupled with a lack of oral disclosure, made the arbitration agreement procedurally unconscionable. The case involved the Illiterate Appellees obtaining loans from the finance company, and also purchasing credit, life, disability and property insurance. Presumably, when they started to receive bills, they found out they were paying for insurance they did not need or want. They had never been informed that they were signing arbitration agreements. To the contrary, when they did ask about the nature of the documents they were signing and said they could not read them, the salesperson told them they were signing insurance and finance papers.

Who becomes accountable: the salesperson who stood to earn commissions on these insurance contracts by giving a vague answer, or the people who said they couldn't read and needed help? You already know. The Illiterate Appellees are accountable because they never directly asked about the arbitration agreement itself. You see, "any inaccurate impressions WM Finance's statements may have created would indubitably have been cleared up had the Illiterate Appellees simply complied with their legal obligation to read the contract or have it read to them."
In Texas, to the contrary, two different cases determined that the plaintiff who could not read an arbitration agreement because (1) he was functionally illiterate or (2) he could not read English, did not have to arbitrate their personal injury cases. The Hispanic plaintiffs, alleging that the documents were not translated nor did they know what they were signing when their boss told them not to worry about it and sign quickly so they could get back to work, were injured in an explosion. The functional illiterate was seriously injured when a 65-ton hydraulic crane which he was operating toppled. His evidence also proved that the employees who presented him with the arbitration document did not themselves understand it and therefore no one could explain it. Besides, throughout the opinion, the judge called him Tommy.

There may be some result orientation in these cases. State courts have a great deal of expertise in adjudicating personal injury cases, and do not believe that these cases should be disappearing from their dockets. Although it was not argued in the Texas cases, there is a Seventh Amendment Constitutional right to a jury trial in personal injury cases, and the waiver of that right must be knowing, voluntary and intelligent. On the other hand, there is no jury trial right under most consumer protection statutes, and the federal courts seem happy to have these cases diverted to a different forum.

Finally, the 5th Circuit may have sensed that there is a slippery slope if John Q. Public can argue that he cannot be forced into arbitration unless he can understand the contract language. Even literate people cannot understand standard boilerplate language in many contract clauses. If these clauses were held unenforceable, lawyers might have to rewrite them in plain English.
I LOST MY RIGHT TO A JURY TRIAL?

The notice it takes to evaporate a jury trial right is minimal. Blind people, by not asking the right questions of an unscrupulous lender, "consented" to arbitration. Envelope stuffers announce that by continuing to use credit cards or other services, you "consent" to arbitration. Generally, you are on notice of an arbitration plan if you sign papers (whether you can read them or not) or if you get your mail (whether you open it or not).

You can have notice of arbitration and "consent" even when you don't have notice but you naughty boys or girls haven't gone to some length to get the notice that a company neglected to provide. A case illustrating how it is your fault, even though Big Company has failed to send the document containing your "consent," is Schafer v. AT&T Wireless Services from the Southern District of Illinois. Ms. Schafer ordered a cell phone. It came in a box, which was supposed to include the AT&T Wireless Welcome Guide. All the terms and conditions of her cell phone usage were in the Welcome Guide. The problem was, she alleged, her box didn't have a Welcome Guide. The lack of instructions didn't matter to Ms. Schafer, who knew how to activate her phone. But it was a careless, naughty thing to do, activating a cell phone without reading all the terms and conditions. I certainly can't imagine any faithful Law Tribune reader who would use a cell phone without thoroughly reading the Welcome Guide, and neither could Judge Foreman in Illinois.

Judge Foreman, probably a person who never could figure out how to use his VCR, made it apparent he couldn't credit Ms. Schafer's claim that she could activate her phone without the Guide. Besides, Ms. Schafer conceded that she received the box. The box said the terms and conditions were in the Guide, so if AT&T neglected to enclose them, well - she should go get them. She just had to find an AT&T salesperson, or maybe, if she called AT&T and the menu let her talk to a real person, that person could send a Welcome Guide. When she didn't do these tasks, she "assumed the risk" of accepting whatever terms were in the document. "Assuming the risk" is an interesting way to put it. She was lucky she only consented to arbitration, and wasn't required to give up her firstborn, to use her cell phone.

So, since you needn't read a contract to assume the risk of its contents, clever companies could include, with their consumer products, instructions on activation by notice that to receive additional important terms and conditions, you could take more steps. Then, they could really make it like a scavenger hunt, the last step staying on hold for an hour hearing why this process improves service to you, their valued customer.

There is one recent surprise in the march toward arbitration without notice. The 1st Circuit, in Campbell v. General Dynamics, decided an e-mail announcement to an entire workforce implementing a new ADR policy was inadequate. Unlike what Ms. Schafer was supposed to do, a General Dynamics employee who received the e-mail only had to click on two links to learn: first click - the new policy; second click - the complete
program. No one had to signify receipt. Mr. Campbell alleged in an average day he was "inundated with between 10 and 100 e-mails," and no one told him that he should read them to continue to understand changes in his employment terms. He alleged he did not click the links, and had no clue about required arbitration. The 1st Circuit held that a mass e-mail can be adequate communication. But this Court placed responsibility on the employer to be sure that an e-mail changing employment terms would actually be read. Not surprisingly, it found there were easy ways to ensure such reading: (1) require the employee to check a box confirming receipt and/or reading, or (2) put language in the original e-mail that the links contain an arbitration agreement waiving the employee's jury trial right.

Placing responsibility for adequate notice on the party desiring to alter the relationship seems right. If the company doesn't give fair notice, it is the one which should "assume the risk" of the alteration having no effect.
IT'S MY GAME, BUT I'M NOT PLAYING

I love the names companies use to label the mandatory arbitration programs they impose on their employees. Today, we can enjoy the workings of the "Fairness in Action Program" used by the Dillard's Department Store chain.

In July, 2001, Stephanie Brown was one of a number of workers who were summoned to a supervisor's office. They were told that Dillard's was starting the "Dillard's Fairness in Action Program" which they were accepting by continuing to work. As the brochure describing the program said: "...the Fairness in Action Program assures that each party gets a fair deal - that's what justice is about, after all." Each worker, however, had to sign the "agreement."

So then, one of Stephanie's co-workers asked to take the "agreement" home with her to discuss it with her parents. The supervisor, exemplifying "fairness in action" from the get-go, told her she might be fired if she did not sign the form immediately. Naturally, they all signed up.

The Dillard's concept of "fairness" reared its head in a number of places in this store. For example, employees were required to clock in and out, but when the computer was (often) down paper time sheets were used. Evening shift employees like Stephanie, who were scheduled to leave at 9:15 p.m., were required to stay until the store was fully cleaned. If cleaning took until, say, 9:45, they were required to falsify their time sheets showing they left on schedule - so Dillard's could avoid overtime pay.

In May, 2002, on a day she was not scheduled, she was requested to work for another employee who was sick. She was told not to report before 6 p.m., because otherwise she qualified for overtime, which Dillard's did not want to pay. She said, and produced corroborating evidence, that she had clocked in at 5:58. Store officials, alleging that the computer had not worked properly, called her in the next day to fill out a paper time sheet. When she did, the store manager told her she was being immediately terminated for falsifying her time, alleging that she had actually arrived at 6:10. She was sympathetically advised "people like you cost the company money." When she began to cry, the store manager reminded her "you already got another job, right?" (Which was true - she was saving money to attend air traffic control school.)

Feeling she was wrongfully terminated, Stephanie filed her arbitration claim. Dillard's, evidencing its superior knowledge of "what justice is about, after all," decided that her claim "had no merit" and refused to participate in its own arbitration program. Her repeated attempts to contact Dillard's were useless. After almost one year of no progress, she filed her lawsuit in state court. Incredibly, Dillard's removed to federal court and moved to compel arbitration.

Shortly before Christmas, 2005, after Dillard's had lost in District Court, Ms. Brown received, at least, a modicum of procedural justice in action. The 9th Circuit, correctly analyzing Dillard's tactics, noted that if Dillard's succeeded it would "set up a
pervasive incentive scheme." Employers would have an "incentive" to refuse to participate hoping the employee would get frustrated and drop the effort. And, refusal would carry no cost because if the employee filed a lawsuit, then the employer could appear and move to compel arbitration.

Three and one-half years later Stephanie Brown can pursue her state court lawsuit. As the 9th Circuit aptly found: "Many people in Brown's position would simply have given up." I would hope that other courts, if confronted in the future with this tactic, more severely punish such a hypocritical company. At the minimum, the CEO should have to write, 1000 times on the blackboard, what the "Fairness in Action Program" assures. That would provide a bit of justice.
THE TROUBLE WITH ARBITRATION

Some recent developments are making me wonder whether arbitration is just an alternative forum to resolve disputes, as the courts are so fond of saying. Or, on the other hand, is arbitration really a get out of jail free card which allows a wrongdoer to write rules which will virtually exempt it from liability for those wrongs, as critics are fond of saying?

One cardinal, unwritten black-letter rule of law seems to be re-emerging in some of the court decisions trumpeting the "public policy favoring arbitration." That rule is: "Rich is better than poor; money talks." The re-emerging trend is most apparent in the cases where poor people "agree" to illegal, usurious interest rates, combined with arbitration clauses providing the forum for eventual collection, in exchange for "payday loans," that is, advances against paychecks. When the advances plus interest are not paid in full, compounded interest rates and other fees begin to mount up in a way similar to the way plantation workers could not get out from under the company store.

The scheme becomes "legalized" by the use of arbitration clauses. A couple of plaintiffs, however, went after one such check-cashing outfit, and persuaded the Florida Supreme Court to hold that an arbitration clause in an illegal contract could not survive any more than the contract itself could survive. As that court saw it, enforcing the arbitration clause "could breathe life into a contract that not only violates state law, but is also criminal in nature." Sounds pretty elementary, doesn't it?

Not when the Federal Arbitration Act is subject to interpretation. The Supreme Court of the United States, in Buckeye Check Cashing, Inc. v. Cardegna, recently decided in this term, made the case into a "who decides" issue, and held that a challenge to the validity of the contract must be resolved by an arbitrator. Indeed, how could anyone have thought that a state Supreme Court should be able to interpret its own statutes and public policy, when the illegal contract, despite its illegality, provides for arbitration?

It is not much of a step for the illegal business to decide that, since the "agreement of the parties" under the contract will govern the arbitrator's jurisdiction and powers, it might as well include a ban on class actions. That way, even if an arbitrator found that an individual contract was void as against public policy, and therefore the debt in the individual case was unenforceable, it could continue going on its merry way collecting all the other illegal debts as long as those debtors did not find lawyers to challenge them. This tactic is starting to work. One of the New York state Appellate Division courts recently affirmed a class action waiver for New York borrowers by the County Bank of Rehoboth, Delaware, an out-of-state bank to which these payday loans
are immediately assigned.

Is it just me who naively believes that this kind of unconscionable tactic could not possibly work in our court system? Is there any judge in our District Court, or on the state Appellate or Supreme Court, who would not allow class actions to invalidate usurious loans to working people who don't make enough to get out of poverty? And if I am right about that, what is it about the existence of an arbitration clause that allow these illegal businesses to indirectly accomplish what they could not accomplish directly?

Unfortunately, because the agencies administering arbitration don't have the stomach to refuse to enforce class action waivers, and because states are preempted from doing so because of the conflict with the Federal Arbitration Act - which has turned into the King Kong of statutes - the only hope for relief is the United States Congress.

Don't hold your breath.
CAN COMPANIES GRANT THEMSELVES "GET OUT OF JAIL FREE" CARDS BY USING MANDATORY ARBITRATION?

John Szetela got a credit card from Discover Bank in 1993. In 1999, the Bank amended his earlier Cardholder Agreement by adding a mandatory arbitration section, inserted into an envelope stuffer, which among other things prohibited class actions. If Mr. Szetela did not want to accept these terms, his only choice was to close his account. In 2000, Mr. Szetela filed a class action alleging that Discover improperly charged overlimit fees of $29. Discover's motion to compel individual arbitration was granted; Szetela arbitrated and recovered $29. Then, he appealed and alleged that his class action should be allowed. Essentially, he argued that the no class action provision was unconscionable.

Procedurally, the California Appellate Court held that Szetela was required to "take it or leave it" with no opportunity for meaningful negotiation, establishing procedural unconscionability. He proved substantive unconscionability as well. Although the no class action prohibition was purportedly mutual, the court could not imagine any circumstances in which Discover Bank would sue its own customers in a class action lawsuit. Instead, "Discover has create[d] for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.... Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect.... it violates public policy by granting Discover a "get out of jail free" card."

This line of authority, i.e., that public policy favoring arbitration is outweighed by public policy favoring the class action device to allow an effective redress of grievances, has been echoed in other state court jurisdictions.

On the other hand, the federal courts to date (with the exception of the Western District of Washington in Luna v. Household Finance in 2002) have held that arbitration clauses are not unconscionable when they exclude class actions. For example, Patricia Snowden and six other plaintiffs claimed that Checkpoint Check Cashing charged them usurious interest rates, in part violating the Truth in Lending Act. Checkpoint, in its contract, barred class actions. The 4th Circuit, in a 2002 holding, compelled individual arbitration. It dispensed with her argument that the small damages available to her would preclude legal representation, by noting that if she prevailed in a TILA case, she was entitled to attorney's fees. It summarily dismissed the argument that a no class action clause is inconsistent with public policies protecting consumers, stating that the AAA is a reputable organization and places no limits on remedies available. I assume that means that in the 4th Circuit arbitrators have the power to issue broad injunctive relief consistent with consumer protection. See also, Johnson v. West Suburban Bank (3d Cir. 2000) (no class action arbitration does not suffer "inherent conflict" with TILA, as individual rights may be fully protected).
Finally, Larketta Randolph, who purchased her mobile home through Green Tree Financial Corporation, a transaction which landed her in the United States Supreme Court, returned to the 11th Circuit after remand. She argued that the prohibition of classwide arbitration was unenforceable, but her case was also a Truth in Lending claim. The TILA specifically contemplates class actions, because it caps statutory damages available to a class. Nevertheless, apparently the statute was not "intended to create a non-waivable right to bring TILA claims in the form of a class action," presumably because Congress did not explicitly say so when it passed the TILA well before mandatory arbitration began to catch on. After her years of struggle, I hope her individual case was a winner.

Now that the administering agencies, such as AAA, have promulgated class action procedures, I think these cases can often be reconciled by severing the no class action clauses from the arbitration agreement (as long as the agreement is not otherwise unconscionable). Then all the policies, those protecting consumer rights and those protecting arbitration, would be enforced. Whether arbitrators will adequately deal with class actions is another question altogether, but requiring severance would, at least, present these issues to the arbitrators for resolution.
MAFIA SHOULD HAVE USED BINDING CLASS ACTION WAIVERS

"Payday loans" are a modern device intended to avoid interest rate regulations and financial disclosure laws. So-called "salary lenders" who engage in these predatory loan arrangements concentrate on low income families who live paycheck-to-paycheck. To circumvent state consumer protection legislation, they partner with obscure national banks which are not subject to state law. People who receive the "payday loans" are usually both desperate and unsophisticated. Charlene Jenkins was a good example. Between June 7, 2002 and September 6, 2002, she received eight loans, each for under $500, from First American Cash Advance of Georgia. If a dispute arose, she agreed to arbitrate, and of course she "agreed" not to "serve as a representative, as a private attorney general, or in any other representative capacity... or... participate as a member of a class." To nail it down completely she "agreed" that "the arbitrator shall not conduct class arbitration." First American included in these "agreements," as a co-participant, the First National Bank in Brookings. Brookings, Georgia? No way. Brookings is not in Georgia, not even near Georgia, but in South Dakota. Naturally, Ms. Jenkins' eight separate promissory notes were all governed by South Dakota law.

By teaming up with this genuinely obscure national bank, First American charged annual percentage rates between 438% to 939%. By teaming up with an arbitration agency, First American figured it would avoid class actions. In fact, without class relief First American might be lucky enough to avoid litigation altogether, because of the difficulty that a poor person like Ms. Jenkins would have finding an attorney to represent her in an individual capacity only.
The Chief Judge of the Southern District of Georgia, however, concluded that "enforcing the arbitration clause... against the payday consumers would lead to an unjust result." When First American moved for reconsideration, Judge Bowen highlighted the invaluable assistance that "unconscionable mandatory arbitration agreements" offered "to circumvent state laws [and] enable stronger parties to force weaker parties into binding arbitration."

Judge Bowen probably believed his decision would be affirmed in a heartbeat. Maybe, like me, he thought it was only the Mafia who charged interest rates of 900% or so. The Mafia's big mistake was to threaten physical violence if the borrower didn't pay on time. All they really needed was a bit of interstate commerce to get federal jurisdiction, and a mandatory arbitration clause waiving class actions. In the 11th Circuit, Mafia Cash Advance Services would be well protected.

Judge Bowen's decision was, disgustingly, reversed. The 11th Circuit panel held that class actions can be precluded, because under the Georgia RICO statute attorney's fees are recoverable. Supposedly, that would make Ms. Jenkins' individual case an attractive proposition. Just think, for example, of all the civil RICO cases that have been brought in Connecticut! Why, with only a couple of years of discovery, Ms. Jenkins' $1000 usurious interest recovery could be proved to be a product of racketeering, and therefore Ms. Jenkins can vindicate all her individual substantive rights. That is, if the arbitrator in his or her discretion will award the hugely disproportionate attorney's fees required to obtain the evidence to prove a RICO violation. At any rate, since arbitration is generally confidential, we will probably never know.
If the Mafia is not smart enough to get the case into federal court, however, there is hope. Florida's Supreme Court, in January, held that Mr. John Cardegna could bring a class action against Buckeye Check Cashing, Inc. because the contract containing the mandatory arbitration clause was illegal and therefore void from the beginning. The same kind of financial scheme was at issue. Florida's Supreme Court correctly put the horse before the cart in deciding that a court first had to determine whether the usury laws were violated, because otherwise it would "breathe life into a contract that not only violates state law, but is also criminal in nature, by use of an arbitration provision. This would lead to an absurd result. Legal authorities from the earliest time had unanimously held that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. Illegal promises will not be enforced in cases controlled by federal law." No contract, no arbitration clause. No public policy exists, in Florida anyway, to let an arbitration clause subvert the usury laws.

The Mafia will be closely watching continued developments.
THEY JUST CAN'T HELP IT

A highly regarded California arbitrator, who also designs mandatory arbitration plans for employers, has stated: "A desire to gain the advantage may be irresistible. Employers just can't help it."

Mandatory arbitration, as a condition of employment or a condition of doing or continuing to do business with a company, presents an extraordinary opportunity to the company to design a system which is a binding alternative to court. When the two major arbitration organizations (AAA and JAMS) are chosen to administer company plans, both publicly announce that, for them to agree to administer a proposed plan, it must comply with due process provisions which will assure fairness to all parties. AAA's basic proposal, known as the Due Process Protocol, may be found on its web site at www.adr.org. The Due Process Protocol has been favorably cited by many courts as, in fact, providing protections which allow the speed and efficiency of arbitration to continue in effect without depriving parties of their rights.

Some companies, however, look for the edge. They write plans which are calculated either to bar access to the arbitration form altogether, or else to tilt the scales to their advantage. What follows are three current examples:

1. Fleet Bank maintains a Conflict Resolution Policy, which includes mandatory arbitration. Fleet Bank continues to preserve its own right to use the courts for provisional remedies or interim relief, but for its employees arbitration is the exclusive remedy for all claims. Although Fleet purports to govern its process by the employment dispute rules and procedures of the AAA (which would include the Due Process Protocol), it requires the loser to pay the attorney's fees of the prevailing party: "the prevailing party shall be entitled to payment from the non-prevailing party of the costs and expenses incurred by the prevailing party... including without limitation the prevailing party's reasonable attorney's fees."

This provision would likely act as a bar to any prospective claimant against Fleet. Trial lawyers know that even the most favorable case, if liability is in dispute, might have a 70% to 30% chance of success, which means that even this best case will still lose three times out of ten. Approximately one year ago, our office completed a five-day arbitration, during which time we kept track of our fees, which by completion amounted to slightly over $100,000. Defense fees would have been as high, or higher. We would, of course, be compelled (had the case been against Fleet) to advise any client that if he or she lost the arbitration, it could also include losing his or her house. Only the very richest clients, or conversely those who are judgment-proof, could afford to enter an arbitration with Fleet.

2. SFX Broadcasting, owned by Clear Channel Communications (a huge broadcaster owning many radio and television stations across the country), mandates...
arbitration which must be initiated "within one year of the conduct giving rise to the claim." Thus, in Connecticut, where under a written contract a claimant would have six years to sue, the same claimant must arbitrate with a written demand filed within one year. If it is not, "the claimant waives any entitlement to arbitration and to any other legal or equitable remedy." This shortened statute of limitations applies to future claims. Incredibly, however, an already-employed employee who must, as a condition of continued employment, sign this agreement, waives all pending claims unless he or she acts within 3 days: "I acknowledge and confirm that I have no claims against the company... unless I deliver written notice of any such claims... to the President of the company, within three (3) business days of executing this agreement." This wholly unconscionable waiver is administered by JAMS.

3. Finally, another media group, Sinclair Media, mandated arbitration with the following provisions: (1) the loser pays all costs of the arbitration; (2) Sinclair exempts itself from the arbitration requirement if it seeks a remedy, and includes a loser-pays provision for any such court proceeding; (3) a statute of limitations shortened to three months from the event or occurrence giving rise to the dispute and, most incredibly, (4) a provision that if the employee did not "respond within fourteen (14) calendar days to each communication regarding the selection of an arbitrator and the scheduling of a hearing and other matters relating to arbitration proceedings... Employee agrees Employee will have waived any right to raise any claims arising out of any dispute or controversy... in arbitration or in any court or other forum." No continuances, no equitable tolling, and no application mutually to the company, Sinclair.

These mandated programs are unconscionable. If they survive court scrutiny, employees and others will lose countless basic rights. It is up to the courts to strike these systems down, and ensure basic due process when arbitration is mandated.
ENFORCEMENT OF "CUSTOMIZED" ARBITRATION AGREEMENTS

One benefit of arbitration is that parties of equal bargaining power can provide for a method of settling disputes which is alternative to the court system. A negotiated arbitration agreement, which allows parties to resolve disputes quickly and at reduced cost, can dispense with many procedures which apply in court. An expedited, more informal process can allow businesses who have commercial disputes to continue doing business together, or can allow construction projects to proceed while specific questions are being resolved. In general, the theory is that a relationship can be preserved if the dispute resolution process is sensible for both parties. Equal negotiating power, in general, insures an outcome which is sensible, as neither party can impose unreasonable terms or conditions on the other.

Arbitration in the employment and consumer sectors of our economy, however, is different. Most employees (with the exception of highly-compensated executives) do not have much power to negotiate the terms and conditions of employment. Consumers buying products have no negotiating power. The theory in these areas is that employees and consumers can "vote with their feet" by refusing to accept the job or refusing to buy the product.

In the real world, however, consumers won't find out about an "arbitration agreement" until they have opened the box and (perhaps) read the manual enclosed in it. Since most consumers believe that the product is going to work, it is the rare one indeed that will return it just to protest an arbitration provision.

In the real world, however, the employee who has successfully interviewed for an interesting job may have been the one who was selected over 100 other applicants, in a tough job market. That employee also believes that the future will be fine at the workplace. Almost no one would quit a job, before it even starts, in protest that arbitration is the method the new employer has chosen to resolve disputes, which may never arise.

Because the "vote with your feet" concept is unrealistic in these venues, manufacturers and employers have, in some instances, tried to "customize" the arbitration process to their benefit only. One method which has had mixed results is to shorten the statute of limitations.

Ten or fifteen years ago, a few employers successfully inserted six-month limitations periods in arbitration agreements. In a race discrimination case brought in 1992 under Section 1981 in the 7th Circuit, for example, the court upheld a six-month statute of limitations. At that time, however, it was not settled that the section 1981 statute of limitations was four years, so there was a reasonable argument that six months approximated the most analogous state limitations period. In general, many courts in those years saw the issue as whether the shorter statute of limitations was unreasonable or oppressive, giving undue advantage to one party.
Not content with shortening a limitations period to six months, more recently some companies have provided that all claims must be made within as short a time period as 30 days. These attempts have not succeeded. In particular, courts have been offended that a private employer has sought to modify statutory limitations periods which are part and parcel of public policies against discrimination or other employee-protective statutes. Since 2000, various attempts to shorten the statute of limitations have failed, whether the shortened period was 30 days, 90 days, six months or even one year.

Of course, one can search forever for the case in which a company has allowed a longer statute of limitations for claims. To my knowledge, no such case exists. Fooling with the statute of limitations is always one-sided, and is always meant to benefit the drafter. A statute of limitations is part and parcel of a right itself. "Customizing" it should always be unconscionable, and never enforceable, when the contract is of the "take it or leave it" variety.
OPTING OUT OF ARBITRATION - LIKE REBATES, ONLY WORSE?

All by itself, Circuit City Stores is responsible for more mandatory arbitration rulings than probably the next ten companies put together. More allegations of unconscionability have engaged appellate courts in Circuit City cases than with any other employer. How bad can it be working at Circuit City? Does every discharged employee threaten to sue?

Perhaps so. And, as a result, faced with the deluge of disgruntled discharges, Circuit City has tried almost everything to insure that it will have the edge in the arbitrations it mandates. One of the more interesting things they have done, in the true retailing philosophy, is to give their new employees thirty days to decide if they want to opt out of the mandatory arbitration program. The opt out option has been intended to avoid findings of procedural unconscionability. This little trick has, in fact, thus far beguiled the judges who have reviewed it.

Circuit City Stores, Inc. v. Ahmed, which the 9th Circuit decided in 2002, describes how it works. Think of yourself as a new Circuit City employee. You are welcomed with the usual battery of forms to sign, which include the terms of an "arbitration agreement." The arbitration program is introduced in a videotape presentation. Maybe the videotape is like the most recent Phillip Morris ad which informs you that you can visit their web site to learn how using their product will kill you. I imagine, however, that it probably tells new employees that arbitration is good for them: cheaper, faster, easier to use in the unlikely event that a dispute would ever arise. But, included with the papers and the videotape is "a simple one-page form" which allows these new employees "a meaningful opportunity to opt out of the arbitration program." Not only that, the new Circuit City employee is encouraged to contact Circuit City representatives before deciding whether to participate in the program. If the new employee desires to show how much he or she wants to be part of the Circuit City team, he or she can even consult an attorney to help with the decision. Consider the benefit that an attorney's letter to Human Resources would have for the new employee trying to decide the opt out issue.

Mr. Ahmed, who for some reason did want to sue Circuit City two years into his employment, did not contact representatives, nor consult an attorney, nor mail in the opt out form within 30 days. He argued he was not sophisticated enough to recognize the meaning of the provision, and claimed the 30-day period was too short, because according to him "an employee is thinking positively about the employment relationship in the first 30 days." This argument does sound sort of reasonable.

The 9th Circuit, though, struck it down. Mr. Ahmed cited no cases in support of these arguments.

These days, there may be no cases in support of a proposition that an employee joins a new company thinking positively about the future. But it certainly has some common sense behind it. And, in real life, no one who wants to succeed with a new company starts the relationship by letting the company know that he or she has a lawyer monitoring the situation.

To me, this "option to opt out" is like a rebate. When people buy products and get their
rebate coupons, apparently only 10% to 15% actually return the coupons and receive the rebate. People act this way even though the rebate may have been a factor in buying the product, and they will get money back. They still don't send in the forms.

When people don't return forms that will result in an actual return of money, why should they be expected to return a form for which the result is purely abstract? The answer is, there is no such expectation. And, since unconscionability requires both proof of procedural and substantive unfairness, courts don't reach the question of substantive unfairness if the procedures are okay.

We don't yet know if other companies will be as clever as Circuit City, nor can we predict if the judiciary will continue its benign treatment of this manipulative device.
WHAT'S SAUCE FOR THE GOOSE...

Consumers and employees often believe that mandatory arbitration clauses drag them into a forum they didn't choose, to be heard before an arbitrator whose powers are virtually unreviewable, who will award them a minimum of nothing and a maximum of less than they wanted. Once in a while, however, a "runaway arbitrator" appears, to let us all know that the arbitration system also can produce capricious, functionally unreviewable, results which favor down-and-out individuals. The $6 million punitive damages award in Stark v. Sandberg, Phoenix & Von Gontard and EMC Mortgage Corporation is a great example.

The Starks ran a business which was failing. To rescue it, they borrowed $56,900 and secured the loan with a mortgage on their house. Not too much later, the business failed anyway. They filed for bankruptcy. The original lender sold the note to the defendant EMC Mortgage Corporation. The couple moved out of their house into an apartment, anticipating the foreclosure which EMC commenced.

Maybe foreseeing publication of their case as a hypothetical question for law school examinations in the future with their lawyer named prominently in it, the Starks hired attorney Roy B. True (six degrees of separation, perhaps, from the former basketball player World B. Free). He notified EMC's counsel, Scott Greenberg of the Sanders firm, that he represented the Starks and that EMC should not contact them directly. Nevertheless, while the arbitration was pending, EMC contacted Mrs. Stark at her apartment, contacted Mr. Stark at work, and wrote to them directly about keeping their insurance coverage. There were at least ten such contacts. In addition, EMC hired someone to forcibly enter the Starks' home and put a sign in the front window, stating: "Property has been secured and winterized. Not for sale or rent. In case of emergency call 1st American (732)-363-3626."

Those actions, and only these, cost the defendants $6 million. The arbitrator, justifying the award which amounted to one-tenth of one percent of EMC's shareholder equity, wrote that it was "not great punishment but it should act as a deterence [sic]." The arbitrator was particularly emphatic about the forcible entry, which he found "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights." (The 8th Circuit added both the [sics].)

Can anyone imagine that this punitive damages award, if given by a jury in a federal district court, would have remained intact through an appeal to the 8th Circuit? The award of statutory damages for EMC's violation of the Fair Debt Collection Practices Act was $1000 to each plaintiff, along with $1000 to each for actual damages. Costs and attorneys fees were assessed against the defendants, as well. Under the circumstances, defendants argued that the punitive award evidenced a manifest disregard for the law, because it conflicted with recent Supreme Court case law invalidating high ratios of punitive to compensatory damages, such as BMW v. Gore where a 500:1 ratio was
vacated. A showing of manifest disregard, however, requires that a party had to make the controlling case known to the arbitrator during the arbitration, thus giving him a chance to disregard it. Here, probably relying on a clause in the arbitration agreement which precluded an award of punitive damages (the arbitrator correctly found that such a restriction was unconscionable), the law firm never argued how a proper punitive damages award should be measured.

The 8th Circuit panel concluded that EMC had mandated this form of dispute resolution for itself and its customers. It should have realized that "although this result may seem draconian... arbitration is not a perfect system of justice, nor is it designed to be." Indeed, EMC itself had compelled the case (originally filed in court) into arbitration. So, it "got exactly what it bargained for."

One rationale for imposing mandatory arbitration is that it avoids the "runaway jury." Time will tell whether this rationale will hold up. If a jury in the 8th Circuit had awarded $6 million on these facts, it is more probable than not that the Starks would have been fortunate to retain $60,000. That is because the "runaway jury's" award is subject to full appellate review. The "runaway arbitrator's" award is not.
More than Class Action Killers: 
The Impact of Concepcion and American Express on Employment Arbitration

Imre Stephen Szalai

Introduction

The Supreme Court recently issued two important decisions involving the enforceability of class waivers in arbitration agreements, AT&T Mobility LLC v. Concepcion (“Concepcion”)\(^1\) and American Express Co. v. Italian Colors Restaurant (“Amex”).\(^2\) Observers can easily contextualize these decisions as part of a broader trend of Supreme Court cases limiting the availability of class actions.\(^3\) Indeed, Justice Kagan wrote a spirited dissent in Amex criticizing the majority as being obsessed with eliminating class actions: “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”\(^4\) In the wake of these Supreme Court decisions, several courts have in effect ended class or collective actions by compelling the named plaintiff to submit his or her claim to individual arbitration.\(^5\) Armed with these decisions, companies can use arbitration agreements to immunize themselves from class action liability.

Concepcion and Amex can significantly impact the availability of class actions, and the decreasing availability of class actions is problematic. However, the reach of

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\(^1\) 131 S.Ct. 1740 (2011).
\(^2\) 133 S.Ct. 2304 (2013).
\(^4\) Amex, 133 S.Ct. at 2320.
these decisions goes far beyond the class action context. These Supreme Court rulings can also undermine the fairness of individual arbitration proceedings. As explained in this Article, Concepcion and Amex threaten to have a destabilizing effect on the legal framework supporting individual arbitration proceedings in the United States, an impact observable in the context of employment disputes.

Through judicial review of arbitration agreements, courts in the past could generally invalidate skewed, one-sided, unfair arbitration clauses drafted by employers and imposed on employees, but some courts have begun to construe Concepcion and Amex as narrowing the scope of judicial review of arbitration agreements.\(^6\) If the judiciary is giving less scrutiny to arbitration agreements because of Concepcion and Amex, such limited judicial review can open the door for employers to tilt the scales more in their favor by drafting arbitration clauses with questionable procedures. One-sided arbitration clauses with burdensome procedures or a lack of procedural protections can in turn undermine the enforcement of critical legislation protecting employees, such as wage and hour and civil rights statutes.

The judicial review of employment arbitration agreements for fairness is particularly important because of grievous errors made by the Supreme Court. The Supreme Court, completely ignoring the rich history behind the Federal Arbitration Act (“FAA”), has held that the FAA covers employment disputes.\(^7\) However, the history of the FAA’s enactment establishes that the FAA was never intended to force employees into arbitration.\(^8\) The judicial fairness review of employment arbitration agreements helps counterbalance some of the unjustness of the Supreme Court’s flawed decision to apply the FAA in the employment context, but judicial review is shrinking because of Concepcion and Amex.

Moreover, the Supreme Court has made other fundamental errors when interpreting the FAA over the years. For example, through flawed Supreme Court interpretations, the FAA now binds state courts and broadly preempts many state laws.\(^9\) However, the FAA was never intended to apply in state court.\(^10\) Additionally, the Court pushed the boundaries of the FAA in a way that makes it more challenging for parties to invalidate arbitration agreements in court. For example, in Rent-A-Center, West, Inc. v. Jackson, which involved an employment dispute, the Supreme Court found that an arbitration agreement can delegate a dispute about the enforceability of the arbitration agreement to an arbitrator, and such delegation clauses are generally enforceable unless a party specifically challenges the delegation clause.\(^11\) In effect, because of the delegation clause, a court can be easily stripped of the ability to review an arbitration agreement for fairness. Grouped together, Rent-A-Center, Concepcion, and Amex arguably narrowed

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\(^6\) See infra notes 110-139 and accompanying text.
\(^8\) See infra notes 178-79 and accompanying text.
\(^11\) 130 S.Ct. 2772 (2010); see also In re Checking Account Overdraft Litigation, No. 09-MD-02036-JLK (S.D. Fla. Aug. 27, 2013) (order enforcing delegation clause and sending to arbitration all arguments regarding arbitration clause’s enforceability).
the scope of judicial review of individual arbitration agreements, and now courts can enforce arbitration agreements in an increasingly rubberstamp-like manner. Through the Supreme Court’s expansion of the FAA, the FAA is becoming a virtually all-powerful, docket-clearing tool for the judiciary.12

This Article highlights how the Supreme Court’s Concepcion and Amex decisions, can impact individual employment arbitration proceedings and destabilize the broader legal framework supporting arbitration in the United States. The shrinking scope of judicial review of arbitration agreements should prompt a broader debate about the relationship between the courts and a system of arbitration. If employment arbitration is to have any legitimacy, judicial review of arbitration agreements should be increasing in scope rather than decreasing, to ensure that employees knowingly and voluntarily entered into arbitration agreements.

Part I of this Article provides an overview of the Supreme Court’s Concepcion and Amex decisions. Part II of this Article explores how courts construe these decisions as changing the scope of judicial review of individual arbitration agreements, with a particular emphasis on cases involving employment disputes. Part III then discusses the implications of this changing nature of judicial review, how parties and courts can address these implications, and how the legislature can alleviate some of the problems arising from Concepcion and Amex by adding a definition of arbitration to the FAA.

I. The Supreme Court’s Concepcion and Amex Decisions

In both Concepcion and Amex, the arbitration agreements at issue contained class waivers requiring claims to be brought in an individual capacity and not as part of a class or representative proceeding.13 The plaintiffs in Concepcion were consumers who had entered into cell phone agreements with AT&T,14 and the plaintiffs in Amex were merchants who had entered into agreements with American Express.15 In both cases, the plaintiffs filed class actions in court against the companies, AT&T and American Express respectively. The underlying claims of the consumers in Concepcion involved allegations that AT&T engaged in fraud and unfair business practices by charging sales taxes on

12 The Supreme Court’s arbitration cases are also part of a larger trend of Supreme Court cases limiting the availability of litigation. Andrew M. Siegel, The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 Tex. L. Rev. 1097 (2006) (the Rehnquist Court “acted aggressively and explicitly to limit the scope or availability of litigation [in the areas of] remedies and rights of action, qualified immunity and attorney’s fees, the enforceability of mandatory arbitration agreements, and limitations on the permissible scope of punitive damage awards”). The Roberts Court has continued this trend of limiting the availability or scope of litigation, especially through the Court’s controversial heightening of pleading standards. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).
14 Concepcion, 131 S.Ct. at 1744.
15 Amex, 133 S.Ct. at 2308.
phones that were advertised as free.\textsuperscript{16} In \textit{Amex}, the merchants alleged that American Express violated antitrust laws by using its monopoly power to force merchants to accept credit cards subject to significantly higher fees than the fees associated with competing credit cards.\textsuperscript{17} In both of these class action lawsuits, the corporate defendants moved to compel individual arbitration pursuant to the FAA.\textsuperscript{18}

A. \textit{Concepcion}

The district court in \textit{Concepcion} denied AT&T’s motion to compel arbitration because the court found the class waiver to be unconscionable under California law.\textsuperscript{19} The California Supreme Court had previously articulated an unconscionability test which classified most class waivers as unconscionable.\textsuperscript{20} Under this test, referred to as the “\textit{Discover Bank} rule,” class waivers are unlawfully exculpatory and unconscionable if they are found in a consumer adhesion contract and the party with the superior bargaining power allegedly engaged in a scheme to defraud large numbers of consumers out of small sums of money.\textsuperscript{21} The district court found that under California’s \textit{Discover Bank} rule, the class waiver at issue was not enforceable, and the Ninth Circuit affirmed.\textsuperscript{22}

The Supreme Court framed the issue in \textit{Concepcion} as “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”\textsuperscript{23} Justice Scalia, joined by Justices Kennedy, Thomas,\textsuperscript{24} Alito and Chief Justice Roberts, explained that under section 2 of the FAA, courts may refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{25} Thus, while generally applicable contract defenses, such as unconscionability, could invalidate an arbitration agreement, according to the Court the FAA does not permit “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”\textsuperscript{26}

The \textit{Concepcion} Court next determined whether California’s \textit{Discover Bank} rule was a generally-applicable contract defense, which would be a valid defense under the FAA, or a defense targeting arbitration, which the FAA would preempt.\textsuperscript{27} Justice Scalia, writing for the majority, explained that the FAA preempts state laws that expressly

\begin{thebibliography}{9}
\bibitem{16} \textit{Concepcion}, 131 S.Ct. at 1744.
\bibitem{17} \textit{Amex}, 133 S.Ct. at 2308.
\bibitem{18} \textit{Concepcion}, 131 S.Ct. at 1744-45; \textit{Amex}, 133 S.Ct. at 2308.
\bibitem{19} \textit{Concepcion}, 131 S.Ct. at 1745.
\bibitem{20} \textit{Id.} at 1746 (citing \textit{Discover Bank} v. Superior Court, 113 P.3d 1100 (2005)).
\bibitem{21} \textit{Id.}
\bibitem{22} \textit{Id.} at 1745.
\bibitem{23} \textit{Id.} at 1744.
\bibitem{24} Justice Thomas joined the majority’s opinion in \textit{Concepcion}, and he also wrote a separate concurring opinion setting forth a textual argument why the FAA’s savings clause should not permit courts to consider the \textit{Discover Bank} rule. \textit{Id.} at 1753-56.
\bibitem{25} \textit{Id.} at 1746.
\bibitem{26} \textit{Id.}
\bibitem{27} \textit{Id.}
\end{thebibliography}
prohibit the arbitration of a claim.\textsuperscript{28} However, the FAA can also preempt other laws or court rulings that, although appearing to be generally-applicable on their face, “have been applied in a fashion that disfavors arbitration.”\textsuperscript{29} Additionally, the majority determined that the FAA can preempt rules having a “disproportionate impact on arbitration,” and that a court could not “rely on the uniqueness of an agreement to arbitrate” as a ground for refusing to compel arbitration.\textsuperscript{30} For example, the FAA would preempt a court’s finding of unconscionability if the court based its decision on the agreement’s failure to allow full discovery, failure to incorporate the Federal Rules of Evidence, or failure to provide for a jury of “twelve lay arbitrators.”\textsuperscript{31} Such findings of unconscionability by a court would rely on the uniqueness of arbitration and improperly attack arbitration for not conforming to litigation procedures.

The majority in \textit{Concepcion} explained that the FAA does not permit “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”\textsuperscript{32} The majority found that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”\textsuperscript{33} The majority pointed out that the differences between class and bilateral arbitration are “fundamental,” and it is unlikely that Congress intended an arbitrator to apply class procedures protective of class members.\textsuperscript{34} Under this reasoning, the majority held that the FAA preempted California’s \textit{Discover Bank} rule.\textsuperscript{35} Therefore, the class waiver in \textit{Concepcion} was enforceable, and the parties had to submit their disputes to individual, not class, arbitration.

Justice Breyer wrote a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.\textsuperscript{36} Justice Breyer found that because California’s \textit{Discover Bank} rule applied equally to class waivers in “any contract,” the savings clause in section 2 of the FAA permitted application of the rule.\textsuperscript{37} Breyer also emphasized the \textit{Discover Bank} rule did not establish a “blanket policy” against class waivers, noting that some California courts had enforced class waivers when such agreements satisfied the unconscionability doctrine.\textsuperscript{38}

Breyer’s opinion also criticized the majority for characterizing individual arbitration, as opposed to class arbitration, as a “fundamental attribute” of arbitration under the FAA.\textsuperscript{39} Breyer explained that the majority focused too much on the potential disadvantages of class arbitration while ignoring countervailing advantages. Instead, Breyer believed that California should be entitled to make its own decision in weighing

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\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 1747.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} (citation omitted).
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} at 1748.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} at 1750-51.
\item \textsuperscript{35} \textit{Id.} at 1753.
\item \textsuperscript{36} \textit{Id.} at 1756-62.
\item \textsuperscript{37} \textit{Id.} at 1757 (emphasis in original).
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.} at 1759.
\end{itemize}
the pros and cons of class proceedings. Breyer stressed that under the FAA, courts must treat arbitration agreements on the same footing as other agreements, and the Discover Bank rule did not offend this principle since it applied equally to class waivers in any contract. Under the dissent’s reasoning, the savings clause of section 2 of the FAA would permit courts to apply the Discover Bank rule and invalidate class waivers.

B. Amex

The plaintiff merchants in Amex resisted the motion to compel arbitration by asserting that individual claims would be prohibitively costly. Relying on an economist’s declaration, the plaintiffs reported that the cost of obtaining an expert analysis to prove the antitrust claims would be “at least several hundred thousand dollars, and might exceed $1 million,” but that each merchant would only recover between about $12,000 and $38,000. Therefore, it was impractical for each merchant to bring individual proceedings. Despite this declaration, the district court granted the motion to compel arbitration and dismissed the lawsuit. However, the Second Circuit reversed, finding that the class waiver was not enforceable because the merchants had demonstrated they would “incur prohibitive costs” if forced into individual arbitration.

The Supreme Court framed the issue in Amex as “whether a contractual waiver of class arbitration is enforceable under the [FAA] when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.” Justice Scalia, again writing for the majority, which again consisted of Justices Kennedy, Thomas, Alito, and Chief Justice Roberts, explained that under the FAA, courts must rigorously enforce the terms of an arbitration agreement, even with respect to statutory claims unless a “contrary congressional command” overrides the FAA. Turning to the antitrust laws, the majority found that nothing in these laws required the Court to override the FAA and reject the waiver of class proceedings. The majority also reasoned that the antitrust laws cannot preclude class waivers because they were enacted before the advent of modern class actions, and thus individual proceedings should be considered acceptable for resolving antitrust claims.

The merchants argued that an arbitration agreement cannot be enforced if the agreement prevents the “effective vindication” of a federal statutory right. The

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40 Id. at 1759-61.
41 Id. at 1761-62.
42 Amex, 133 S.Ct. at 2308.
43 Id.
44 Id.
45 Id.
46 Id. at 2307.
47 Justice Thomas also wrote a concurring opinion relying on a textual analysis of the FAA to show why the merchants’ arguments should be rejected. Id. at 2312.
48 Id. at 2309 (citations omitted).
49 Id.
50 Id.
51 Id. at 2310.
merchants contended that enforcing the class waivers in this case would prevent the effective vindication of their rights since they would have no economic incentive to pursue their antitrust claims in individual arbitration. However, the majority rejected these arguments and dismissed the "effective vindication" doctrine as mere dictum from prior Supreme Court cases. The Court explained that this doctrine was intended "to prevent prospective waiver of a party's right to pursue statutory remedies." Properly understood, the effective vindication doctrine would thus apply if arbitration agreements expressly forbid the assertion of certain statutory rights. The majority opined that the doctrine "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." However, the majority reasoned that the high cost in proving a statutory claim is distinct from the "elimination of the right to pursue that remedy." The majority reasoned that under Concepcion, the "FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of law-value claims."  

Justice Kagan wrote a dissenting opinion in Amex, joined by Justices Ginsburg and Breyer. The dissenters explained that the majority gave an overly-cramped, narrow reading to the effective vindication doctrine, which, according to the majority, applied only in a few, discrete situations. The dissenters, however, argued that the effective vindication doctrine was much broader. According to the dissenting Justices, the doctrine barred the enforcement of an arbitration clause whenever the clause would operate to confer immunity from federal claims, regardless of the procedural devices used to confer that immunity. The dissent reasoned that an exculpatory clause explicitly insulating a company from antitrust liability would not be enforceable. Similarly, an arbitration clause could have the same unlawful effect pursuant to a wide variety of procedural devices. For example, a clause could be exculpatory if it established excessive filing or administrative fees, removed the arbitrator's authority to grant relief, or prohibited certain testimony. Under the arbitration clause at issue, which prohibited class proceedings and imposed confidentiality provisions preventing the merchants from sharing information or producing a common expert report, the merchants would have to spend ten times more in proving their claims than the claims were worth. The

52 Id.
53 Id. at 2310.
54 Id. (citation omitted).
55 Id. at 2310-11 (citation omitted).
56 Id. at 2311.
57 Id. at 2312 n.5.
58 Id. at 2313-20. Justice Sotomayor did not participate in the decision.
59 Id. at 2317.
60 Id. at 2317-18.
61 Id.
62 Id.
63 Id.
64 Id. at 2316.
dissenters reasoned that because such costs are prohibitive and trigger the effective vindication doctrine, the arbitration agreement should not be enforced.65

II. Concepcion and Amex Are Changing Judicial Review of Individual Arbitration Agreements

After Concepcion and Amex, a party subject to an arbitration clause with a class waiver may have to pursue claims in individual arbitration, or otherwise forego them. It will become more difficult to pursue class proceedings because these cases make it more challenging for parties to invalidate class waivers in arbitration agreements.66 Lower courts can no longer refuse to enforce class waivers as a matter of public policy.

Because class actions have played a major role in American society,67 and because they can be controversial,68 it is easy to focus on how Concepcion and Amex can in effect limit the availability of class proceedings. However, the doctrines and analyses set forth in these decisions may potentially reach far beyond the class action context. As demonstrated below, these decisions impact the judicial review and enforceability of individual arbitration agreements. The next two Parts provide an overview of how some courts, particularly in the employment context, have engaged in a fairness review of individual arbitration agreements both before and after the Supreme Court’s decisions in Concepcion and Amex.

A. Judicial Review of Employment Arbitration Agreements Before Concepcion and Amex

Prior to Concepcion and Amex, a line of authority in the employment context permitted courts to engage in a fairness review of the arbitral procedures set forth in an arbitration agreement before compelling an employee to submit his or her dispute with an employer to arbitration. This line of authority, which ultimately derived from the Supreme Court’s decision in Gilmer v. Interstate/Johnson Lane Corp.,69 primarily took root in California, though courts in other jurisdictions also engaged in this type of review.

65 Id. at 2316-17.
66 See supra note 5.
67 See, e.g., Suzette M. Malveaux, The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-Mart v. Dukes, 62 DEPAUL L. REV. 659, 660 (2013) (explaining that class actions “have been the basis for the most important civil rights cases [in American history], addressing school desegregation, prisoners’ rights, and employment discrimination, among other issues,” and the Supreme Court’s landmark Brown v. Board of Education case involved a class action).
68 See, e.g., Antonio Gidi, Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against Class Defendants, 66 SMU L. REV. 1 (2013) (“Class actions are a politically charged and controversial topic because their judgments dispose of the rights of a large number of people who are not present in the litigation.”).
Under this review, courts would sometimes strike down and carve out unfair, one-sided arbitration procedures before compelling arbitration of employee’s disputes. In some situations, courts would invalidate the entire arbitration agreement. This judicial fairness review of bilateral arbitration agreements helped ensure a fair arbitration proceeding, and through this review, courts played an important role in helping to police arbitration procedures in the employment context. This Part provides an overview of the judicial fairness review that occurred before Concepcion and Amex, illuminating the important ways in which Concepcion and Amex altered the playing field.

In Gilmer, the Supreme Court addressed whether an employee’s statutory claims under the Age Discrimination in Employment Act (“ADEA”) could be subject to compulsory arbitration under the FAA. The Supreme Court ultimately found that such claims are subject to arbitration because “[b]y 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 Supreme Court found that Congress did not intend to preclude arbitration of ADEA claims. The Court reasoned that as long as “the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,” arbitration is appropriate, and arbitration would not undermine a statute’s remedial and deterrent functions.

The plaintiff employee in Gilmer raised several challenges to the adequacy of the arbitration procedures at issue. The employee argued that arbitration would be deficient because of the potential bias of the arbitrators, limited discovery, the lack of written opinions, and limited relief. However, the Court rejected all of these challenges. It found that both the applicable arbitration rules and the FAA provided protection against biased decision-makers. According to the Court, the plaintiff failed to show how the limited discovery allowed by the arbitration rules would undermine a fair opportunity to present a claim. Furthermore, the arbitration rules at issue required written awards, and the arbitrators could award equitable relief.

In the employment arbitration case Cole v. Burns International Security Services, the United States Court of Appeals for the District of Columbia Circuit used four of the employee’s challenges in Gilmer and developed a list of fairness factors to help courts

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72 Id. at 23.
73 Id. at 26 (citing Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
74 Id. at 26-29.
75 Id. at 28 (citation omitted).
76 Id. at 30-32.
77 Id.
78 Id.
79 Id. at 30-31.
80 Id. at 31.
81 Id. at 31-32.
analyze the enforceability of an employment arbitration agreement under the FAA. In finding that the arbitration agreement at issue satisfied “minimal standards of procedural fairness” and allowed employees to effectively vindicate statutory rights, the Court of Appeals observed that the arbitration agreement at issue satisfied the following factors: (1) it provided for neutral arbitrators, (2) it provided for more than minimal discovery, (3) it required a written award, (4) it provided for all relief that would otherwise be available in court, and (5) it did not require employees to pay unreasonable costs, fees, or expenses as a condition of accessing the arbitration forum. The Cole court noted in connection with this last factor that an employee could not be forced to arbitrate “public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator’s fees and expenses.”

Other courts have adopted these Cole factors to assess the fairness of an employment arbitration agreement. For example, in Armendariz v. Foundation Health Psychcare Services, Inc., the California Supreme Court applied the Cole factors when it addressed the arbitrability of antidiscrimination claims under the California Fair Employment and Housing Act. The California Supreme Court held that such claims are arbitrable provided that the arbitration agreement permits the employee to vindicate his or her rights. In order to help police the fairness of an employment arbitration agreement, the California Supreme Court in Armendariz borrowed the five fairness factors from the Cole decision and explained that an employee could vindicate his or her statutory rights only if the arbitration agreement satisfied these minimum fairness factors.

Many lower courts, particularly those in California, have applied these Armendariz fairness factors when reviewing the enforceability of an arbitration agreement in the employment context. The Armendariz court did not discuss these fairness factors as linked to the FAA’s savings clause; instead, the Armendariz court viewed these factors as arising from the effective vindication doctrine. However, some lower courts have treated these fairness factors as part of general contract law or have applied an unconscionability analysis, as permitted by the savings clause of the FAA.

Several pre-Concepcion court decisions invalidated employment arbitration agreements with one-sided or unfair arbitration procedures because the agreements failed to satisfy the Armendariz fairness factor analysis and/or a general unconscionability

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82 Id. at 1481-83. In developing these fairness factors, the court also relied in part on due process protocols drafted by a task force representing arbitration service providers, employees, and employers. See generally Richard A. Bales, The Employment Due Process Protocols at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest, 21 OHIO ST. J. DISP. RESOL. 165 (2005).
83 Cole, 105 F.3d at 1482-83.
84 Id. at 1485.
85 6 P.3d 669 (Cal. 2000).
86 Id. at 674, 680-82.
87 Id. at 682 n.8.
88 See infra notes 115-16 and accompanying text.
89 See, e.g., Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 94 (Cal. Ct. App. 2004) (“The Armendariz requirements are an application of general state law contract principles regarding the unwaivability of public rights in the arbitration context.”).
analysis. For example, in *Fitz v. NCR Corp.*, an employee filed a wrongful termination lawsuit in court against her employer, and the employer responded by asking the court to enforce an arbitration agreement in the employer’s dispute resolution policy. The arbitration agreement limited discovery “to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing.” Additionally, the agreement required the parties to exchange exhibits and a list of witnesses to be used during arbitration at least two weeks prior to the hearing, while no other discovery was permissible unless the arbitrator determined there was a compelling need for additional discovery.

The *Fitz* court, recognizing that “arbitration agreements must ensure minimum standards of fairness,” engaged in a fairness review of the procedures set forth in the arbitration agreement. As a result of this review the court ultimately found that the agreement was void in its entirety on the grounds of unconscionability. During the course of its fairness review, the *Fitz* court observed that the discovery limits were not mutual because the employer was likely to be in possession of the vast majority of the evidence, and that allowing only two depositions would not be fair to the employee. According to the court, the discovery limits were also overly harsh considering the “complexity of employment disputes, the outcomes of which are often determined by the testimony of percipient witnesses, as well as written information about the disputed employment practice.” The court also found that the arbitrator’s discretion to allow for additional discovery was an insufficient safeguard against unfairness because the party seeking additional discovery would have to satisfy a high burden and demonstrate a compelling need to justify additional discovery. As a result of these findings, the *Fitz* court held that the arbitration agreement was not enforceable because the discovery procedures failed to satisfy “minimum standards of fairness.”

In *Ontiveros v. DHL Express, Inc.*, an employment case similar to *Fitz*, a California appellate court refused to enforce an arbitration clause after engaging in a fairness review of the arbitration agreement. The agreement permitted a party to make a request for production of documents and to depose one individual and any expert witnesses. The agreement also provided that an arbitrator could permit additional discovery “upon a showing of substantial need.” The court found that the one deposition limit was inadequate to allow the plaintiff to prove her claims, given that the alleged misconduct involved two different worksites and numerous employees over the

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90 *Id.* at 90.
91 *Id.* at 97.
92 *Id.*
93 *Id.*
94 *Id.* at 96-100, 107.
95 *Id.* at 96-100.
96 *Id.* at 98.
97 *Id.*
98 *Id.* at 99-100.
100 *Id.* at 486.
101 *Id.*
course of four years.\textsuperscript{102} The \textit{Ontiveros} court reasoned that the discovery limits made the arbitration agreement substantively unconscionable.\textsuperscript{103}

In its review of the arbitration agreement, the \textit{Ontiveros} court also found that the arbitration agreement’s cost-sharing provisions—which required the employee to pay for half of the costs of the arbitrator—made the arbitration agreement unconscionable.\textsuperscript{104} The court reasoned that the payment of such expenses, which were unique to arbitration and imposed by the employer, would deter employees from pursuing important statutory claims.\textsuperscript{105} As a result of the problematic discovery and cost provisions, the \textit{Ontiveros} court refused to enforce the arbitration agreement.\textsuperscript{106}

Like the \textit{Fitz} and \textit{Ontiveros} courts, several other courts have found particular arbitration procedures to be inappropriate or insufficient, and such courts either refused to compel arbitration or invalidated the problematic procedures on the grounds of the \textit{Armendariz} fairness factors and/or a general unconscionability analysis.\textsuperscript{107}

\begin{flushright}
\textsuperscript{102} \textit{Id.} at 487.
\textsuperscript{103} \textit{Id.} at 487-88.
\textsuperscript{104} \textit{Id.} at 484-86.
\textsuperscript{105} \textit{Id.} at 485.
\textsuperscript{106} \textit{Id.} at 489.
\end{flushright}
B. Judicial Review of Employment Arbitration Agreements After Concepcion and Amex

As discussed above, many court opinions pre-Concepcion and pre-Amex reviewed the fairness of arbitration procedures in the employment context and invalidated procedures or the entire arbitration agreement on the basis of the Armendariz factors, a general unconscionability analysis, or both.\(^{108}\) Courts are still navigating how Concepcion and Amex are changing the landscape of arbitration law. However, some courts construe Concepcion and Amex as undermining earlier authority and requiring a more circumscribed scope of judicial review of arbitration agreements.

Although Concepcion involved the validity of a class waiver, the Supreme Court interpreted the FAA as embodying a very broad, and arguably vague, preemptive power. According to the Court, the FAA would preempt “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives” or that “interfere[] with fundamental attributes of arbitration.”\(^\text{109}\) After the Court’s ruling, courts are not permitted to “rely on the uniqueness of an agreement to arbitrate” when invalidating an arbitration agreement on the grounds of unconscionability,\(^{110}\) and the FAA can preempt a state rule of general applicability that has a “disproportionate impact” on arbitration or “disfavors” arbitration.\(^{111}\)

Some courts construe Concepcion’s broad preemption analysis to undermine the Armendariz fairness factors and even to invalidate a more general unconscionability analysis used before Concepcion. For example, in James v. Conceptus, Inc., a whistleblower-retaliation lawsuit against a former employer, a federal district court in Texas found that the Armendariz fairness factor analysis was “in serious doubt following Concepcion.”\(^{112}\) To help understand the district court’s reasoning, it is helpful to recall that the Armendariz fairness factors arose from the effective vindication doctrine and the non-waivable nature of important statutory claims that further fundamental public interests; they did not arise from the FAA or general contract law.\(^{113}\) The California Supreme Court in Armendariz distinguished between the fairness factor analysis and the separate doctrine of unconscionability:

In the previous section of this opinion [discussing the fairness factors], we focused on the minimum requirements for the arbitration of unwaivable statutory claims. In this section, we will consider objections to arbitration that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the

\(^{108}\) See supra notes 69-109 and accompanying text.
\(^{109}\) Concepcion, 131 S.Ct. 1740, 1748.
\(^{110}\) Id. at 1747 (citation omitted).
\(^{111}\) Id.
\(^{113}\) Armendariz, 6 P.3d at 682.
type of claim being arbitrated. These objections fall under the rubric of “unconscionability.”\(^{114}\)

Thus, based on the Armendariz court’s introduction to the unconscionability analysis, it seems that the California Supreme Court viewed the five fairness factors from Cole as a distinct public policy requirement, separate from the general unconscionability analysis applicable to any contract. As the Conceptus court explained, these Armendariz fairness factors therefore cannot be considered grounds that “exist at law or in equity for the revocation of any contract, 9 U.S.C. § 2, because they ‘apply only to arbitration [and] derive their meaning from the fact that an agreement to arbitrate is at issue.’”\(^{115}\) The Conceptus court reasoned that the Armendariz fairness factors are “categorical, per se requirements specific to arbitration clauses,” not generally applicable contract law.\(^{116}\) Consequently, the Conceptus court ruled that under Concepcion, the FAA would preempt the Armendariz fairness factor analysis, and these fairness factors can no longer automatically invalidate an otherwise valid agreement to arbitrate.\(^{117}\)

The Conceptus court then analyzed the arbitration agreement at issue, particularly its cost-splitting provisions. The court found that under the old, and now preempted, Armendariz fairness factor analysis, the agreement’s cost-splitting provisions would have been automatically “unconscionable on a per se basis . . . without further inquiry.”\(^{118}\) As noted above, pre-Concepcion court decisions relied on the Armendariz fairness factors to strike down arbitration provisions requiring employees to bear the costs of arbitration.\(^{119}\) However, the Conceptus court recognized that post-Concepcion, it could not apply Armendariz to strike down fee provisions as a categorical rule.\(^{120}\)

In Mercado v. Doctors Medical Center of Modesto, Inc., a California appellate court also recognized that Concepcion and Amex “cast doubt on the continued validity of Armendariz.”\(^{121}\) The Mercado court explained that under Concepcion, a court cannot “rely on the uniqueness of an agreement to arbitrate” to invalidate an agreement as unconscionable.\(^{122}\) The Mercado court, which described Armendariz as setting forth special minimum requirements for an arbitration agreement, concluded that such special requirements “appear to be the type of state rule Concepcion condemned.”\(^{123}\) Moreover,

\(^{114}\) Id. at 689.
\(^{115}\) Conceptus, 851 F. Supp. 2d at 1033 (citing Concepcion, 131 S.Ct. at 1746).
\(^{116}\) Id.
\(^{117}\) Id.
\(^{118}\) Id.
\(^{119}\) See supra notes 105-09 and accompanying text.
\(^{120}\) Conceptus, 851 F. Supp. 2d at 1034 (“To the extent Armendariz invalidates all cost-splitting provisions in arbitration agreements as a categorical rule, it likely is abrogated by Concepcion.”).
\(^{122}\) Id. at *6.
\(^{123}\) Id. See also Ruhe v. Masimo Corp., No. SACV-11-00734-CJC(JCGx), 2011 WL 4442790, *2 (C.D. Cal. Sept. 16, 2011) (Armendariz fairness factors “appear to be preempted by the FAA under the Supreme Court’s reasoning in Concepcion”); Baeza v.
as recognized by the Mercado court, the Supreme Court’s Amex decision also casts serious doubt on the continued validity of Armendariz. In Amex, the Supreme Court explained that the effective vindication doctrine was mere dictum, and the Armendariz fairness factors arose out of this effective vindication doctrine. Thus, Amex undermines the foundation of Armendariz.

Previously, under Armendariz, a court could invalidate an arbitration provision requiring an employee to pay any part of an arbitrator’s fees. However, courts are construing Amex as “mak[ing] it more difficult for Plaintiffs to show that [an arbitration agreement] is unenforceable due to high fees associated with arbitration.” As explained by one court:

After [Amex], if there is any situation in which provisions in an arbitration agreement increasing the cost of arbitration are unenforceable, it appears that the increased costs must do more than merely create a situation in which “it is not worth the expense involved in proving a statutory remedy,” because “the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.” Rather, it appears that the increased costs must be “so high as to make access to the forum impracticable,” such that the costs effectively “constitute the elimination of the right to pursue that remedy.”

Thus, Amex’s limiting of the effective vindication doctrine and Concepcion’s broad preemption doctrine seriously undermine Armendariz.

While some courts have focused on Concepcion’s preemption of the Armendariz fairness factors, the impact of Concepcion goes beyond these Armendariz factors. Some courts are treating Concepcion as changing and limiting the scope of a general unconscionability analysis. For example, in Lucas v. Hertz Corp., a federal district court in California addressed an unconscionability challenge to an arbitration agreement that did not permit discovery. The court described how pre-Concepcion courts used to invalidate limited discovery provisions in arbitration agreements:

Prior to the Supreme Court’s ruling in Concepcion, numerous courts, at both the state and federal level, found arbitration agreements substantively unconscionable where the rules of the arbitral forum allowed for only
minimal discovery or where the affect [sic] of the discovery rules operated solely to one side’s benefit.131

The Lucas court then stated that under Concepcion’s broad preemption analysis, “limitations on arbitral discovery no longer support a finding of substantive unconscionability.”132 Under this court’s application of Concepcion, an unconscionability analysis that relies on the “uniqueness of an arbitration agreement” is inappropriate and preempted.133 A pre-Concepcion court may have found the discovery limits at issue in the Lucas case to be unconscionable.134 However, the Lucas court found that Concepcion foreclosed such a conclusion.135 The Lucas court held that “in this post-Concepcion landscape, the arbitration agreement [at issue with its limited discovery provisions] is not substantively unconscionable.”136

State-specific standards developed specifically for arbitration agreements—like the Discover Bank rule in Concepcion and the Armendariz fairness factors for employment arbitration—seem doomed under Concepcion’s broad preemption analysis. Furthermore, cases like Lucas show that in addition to preempting arbitration-specific rules, Concepcion can even threaten generally applicable state law defenses such as unconscionability if applied in a way that results in a “disproportionate impact” on arbitration or that “interfer[e] with fundamental attributes of arbitration.”137 Additionally, the Amex case, by limiting the effective vindication doctrine, threatens to undermine the foundation supporting the Armendariz factors. In sum, many courts are construing Amex and Concepcion as circumscribing the prior, more expansive scope of judicial review of arbitration agreements.

III. Looking Forward: The Potential Consequences of the Changing Nature of Judicial Review of Arbitration Agreements and How to Respond to These Changes

The changing scope of judicial review of arbitration agreements in the wake of Concepcion and Amex can have significant consequences for employment arbitration.

131 Id. at 1007.
132 Id.
133 Id.
134 See supra notes 69-109 and accompanying text.
135 875 F. Supp. 2d at 1007.
136 Id. at 1009.
137 Mortensen v. Bresnan Communications, LLC, 722 F.3d 1151, 1159 (9th Cir. 2013) (“We take Concepcion to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA.”); see also Dean v. Draughons Jr. College, Inc., 917 F. Supp. 2d 751, 762 (M.D. Tenn. 2013) (Concepcion preempts a Kentucky cost-prohibitiveness defense, even if the defense were based on general unconscionability principles, because such a defense is arbitration-specific and would frustrate the FAA’s objectives).
The next two Parts of this Article discuss these consequences and suggest some ways to respond to the changing nature of judicial review.

A. The Potential Consequences of the Changing Nature of Judicial Review of Arbitration Agreements

The potential implications of this changing nature of judicial review of arbitration agreements are far-reaching. An employee may now lose the benefit of the Armendariz fairness factors, which provided at least a minimum guarantee of procedural protections for employment arbitration. Additionally, employees may have difficulty relying on unconscionability defenses if such arguments have a “disproportionate impact” on arbitration. Furthermore, a more circumscribed scope of judicial review opens the door for unscrupulous employers to engage in greater overreaching when drafting arbitration agreements. For example, if an employer adds language to an arbitration agreement severely limiting or banning discovery, employees may have a harder time challenging such limits, previously challengeable under Armendariz. Even under a general unconscionability analysis, the discovery limits may be unassailable because some courts construe Concepcion as preempting an unconscionability analysis that disfavors arbitration. Moreover, if an employer adds a broad delegation clause, which was endorsed by the Supreme Court in Rent-A-Center, West, Inc. v. Jackson, judicial review of an arbitration agreement would be closer to an almost automatic rubberstamping of orders compelling arbitration. The more limited nature of judicial review of arbitration agreements endorsed by these cases may lead to employer overreaching and more one-sided arbitration agreements.

Without the procedural protections of Armendariz, with a more circumscribed unconscionability analysis, and with a weakened effective vindication doctrine, employees can be forced to arbitrate in a proceeding with very limited procedural rights. This in turn may undermine the enforcement of critical statutory rights embodied in civil rights and wage and hour legislation. The rights and obligations created by such legislation are meaningless if employees can no longer access the judicial system and are relegated to a private system of arbitration governed by increasingly one-sided arbitration provisions.

Cases like Concepcion, Amex, and Rent-A-Center are destabilizing the relationship between courts and the system of arbitration supported by the FAA. The FAA is not solely about resolving disputes between two parties. Rather, it was enacted, at least in part, to assist the judiciary by alleviating overcrowded dockets. At the time

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140 130 S.Ct. 2772 (2010).
141 See, e.g., In re Checking Account Overdraft Litigation, No. 09-MD-02036-JLK (S.D. Fla. Aug. 27, 2013) (order enforcing delegation clause and sending to arbitration all arguments regarding arbitration clause’s enforceability).
of the FAA’s enactment, the judicial system was overwhelmed with congested dockets and overly technical, confusing procedural court rules slowing down the resolution of cases.\textsuperscript{143} The FAA provided a safety valve to alleviate the burdens of the judiciary, but the FAA simultaneously provided a special, continuing role for the judiciary in connection with the enforcement of arbitration agreements and review of arbitration awards.\textsuperscript{144} Thus, the FAA sets forth and defines a relationship between the government and its people. Changing the scope of judicial review therefore not only impacts the two parties to a dispute; it also changes the relationship between the judiciary and the privately-run system of dispute resolution. By shrinking the scope of judicial review of arbitration agreements, the Supreme Court is further closing the courthouse door and providing for less oversight regarding arbitration.\textsuperscript{145} Moreover, if courts are moving closer to rubberstamping one-sided arbitration agreements, such minimized judicial review threatens to undermine the public’s confidence in the judicial system. And in the employment setting, where there is typically a large disparity in bargaining power between employers and employees, a decreasing level of judicial review can undermine the legitimacy of arbitration proceedings involving key public laws like civil rights and wage legislation.

B. How to Respond to the Changing Nature of Judicial Review of Arbitration Agreements

The next two sub-Parts discuss possible responses to the changing scope of judicial review. Employees who are currently litigating and challenging the enforceability of an arbitration agreement can seek to limit a court’s application of Concepcion and Amex through various arguments described below, and in the longer run, there are some possible legislative solutions.

1. Limiting the Reach of Concepcion and Amex in Litigation

The changing nature of judicial review of arbitration agreements should prompt a broader debate about the proper role of the judiciary, the level of judicial review that should occur in connection with arbitration, and the types of claims that should be subject to arbitration. These are fundamental questions related to accessing justice through the court system. Ideally, such fundamental choices should be debated and made through Congress or through the rulemaking process of an administrative agency, but not through a unilateral decision by five Justices of the Supreme Court. However until legislative action or rulemaking takes place, how should an employee who files a lawsuit respond when an employer seeks to compel arbitration and rely on Concepcion and Amex to reject an employee’s challenges to an individual arbitration agreement? One possibility is for employees in litigation to distinguish Concepcion and Amex and to argue for a limited application of these two cases.

\textsuperscript{143} Id.

\textsuperscript{144} See generally 9 U.S.C. §§ 1-16 (2012).

\textsuperscript{145} The Supreme Court’s recent arbitration cases are part of a larger trend of Supreme Court decisions limiting the scope and availability of litigation. See supra note 12.
An employee can distinguish *Concepcion* as not applicable to employment arbitration agreements in several ways. First, *Concepcion* focused on the enforceability of a class waiver in a consumer setting, not an employment setting. Additionally, the plaintiff consumers in *Concepcion* knew the core, relatively simple facts of their case: they were charged $30 for a phone that was advertised as free. Employees, on the other hand, may often lack key evidence which is in the hands of an employer, and broad discovery rights can help employees uncover such evidence. Furthermore, there is arguably more at stake in the employment setting when compared to a consumer setting. In the employment setting, an arbitration agreement can affect one’s entire livelihood and almost every conceivable dispute that could arise at the workplace over a long time span with a particular employer. A significant part of one’s daily affairs can be beyond the reach of the judiciary as a result of employment arbitration agreements, and low-wage earners may have little choice but to accept an arbitration agreement in order to remain employed. However, in the consumer setting, an arbitration agreement may have a small scope or reach and may only cover the purchase of a non-essential item. The *Concepcion* decision did not address the employment setting, where greater supervision of arbitration is arguably more justified. Similarly, the arbitration agreement at issue in *Amex* involved relatively sophisticated parties, merchants and the American Express Company. *Amex* did not consider the employment context.

Moreover, an employee trying to distinguish *Concepcion* and *Amex* can seek to limit application of these two cases by arguing that they involve the enforceability of class waivers, not other provisions, such as discovery, in arbitration. Although *Concepcion* discussed special provisions in arbitration, such as judicially-monitored discovery or the required use of the Federal Rules of Evidence, such statements in the opinion are mere dicta because these arbitration provisions were not before the Supreme Court in *Concepcion*. Moreover, the dicta involved extreme fact patterns, such as an arbitration clause requiring full discovery permitted in courts or application of the Federal Rules of Evidence. For these extreme fact patterns where an arbitration clause required court-like proceedings, the Court opined in dicta that the FAA would preempt such rules. However, clauses involving the opposite of these extremes, such as those providing for little to no discovery, are more likely to appear in arbitration agreements. Similarly, many statements in *Amex* about the effective vindication doctrine are mere

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147 *Id.* at 1744.
148 See, e.g., Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 98 (Cal. Ct. App. 2004) (relying on *Armendariz* and finding that discovery limitations in an arbitration agreement were inappropriate in light of the “complexity of employment disputes, the outcomes of which are often determined by the testimony of percipient witnesses, as well as written information about the disputed employment practice”).
149 133 S.Ct. 2304 (2013).
150 Hill v. Garda CL Northwest, Inc., 308 P.3d 635, 639 (Wash. 2013) (en banc) (limiting *Concepcion* to class waivers, not other types of arbitration provisions).
151 *Concepcion*, 131 S.Ct. at 1747.
152 *Id.*
153 *Id.* at 1747-48.
dicta. For example, the Court briefly noted that “perhaps” the effective vindication doctrine would cover high administrative or filing fees.\textsuperscript{154} However, the Court in \textit{Amex} did not explore the detailed contours of the effective vindication doctrine because it was not necessary to do so. \textit{Amex}, like \textit{Concepcion}, involved the enforceability of class waivers. Neither \textit{Amex} nor \textit{Concepcion} involved other severe procedural restrictions.

Furthermore, the dispute resolution agreement at issue in \textit{Concepcion} was unusual because its provisions were consumer friendly. For example, the Court found that under the agreement, any “aggrieved customers who filed claims would be essentially guaranteed to be made whole.”\textsuperscript{155} Also, consumers would be guaranteed at least $7,500 and twice their attorney’s fees if they obtained an arbitration award greater than AT&T’s last settlement offer.\textsuperscript{156} Thus, \textit{Concepcion} did not involve a heavily one-sided arbitration agreement with harmful procedures.

Employees can also argue that a general unconscionability defense can still invalidate an arbitration agreement pursuant to the savings clause of section 2 of the FAA. Although some courts, such as the \textit{Lucas} court,\textsuperscript{157} use \textit{Concepcion} to limit the scope of an unconscionability defense, other courts reject such a broad interpretation of \textit{Concepcion}. For example, in \textit{Brown v. MHN Government Services, Inc.}, the Washington Supreme Court found that \textit{Concepcion} should be interpreted narrowly.\textsuperscript{158} Under this narrow reading, \textit{Concepcion} would only preempt arbitration-specific state rules, like the \textit{Discover Bank} rule at issue in \textit{Concepcion}, but not general unconscionability arguments. The employer in \textit{Brown} argued that under \textit{Concepcion}, an unconscionability defense cannot interfere with fundamental attributes of arbitration.\textsuperscript{159} However, the Washington Supreme Court rejected the employer’s broad interpretation of \textit{Concepcion} and found that courts could still apply a general unconscionability analysis to examine whether a particular arbitration provision is “overly harsh or one-sided.”\textsuperscript{160} Thus, while the \textit{Lucas} court believed it could not find a discovery limit unconscionable under its broad reading of \textit{Concepcion}, a court following the Washington Supreme Court’s narrower reading of \textit{Concepcion} could consider the discovery limit at issue in the \textit{Lucas} case under a general unconscionability analysis and potentially find the provision “overly harsh.”

Similarly, in \textit{Chavarria v. Ralphs Grocery Co.}, the Ninth Circuit limited the broad scope of FAA preemption under \textit{Concepcion}.\textsuperscript{161} The \textit{Concepcion} decision contains broad language regarding the FAA’s preemptive powers; it suggested that the FAA can preempt state laws having a “disproportionate impact” on arbitration.\textsuperscript{162} The agreement in \textit{Chavarria} contained a problematic cost provision, where the arbitrator would apportion significant fees to both the employer and employee at the beginning of the

\textsuperscript{154} \textit{Amex}, 133 S.Ct. at 2310-11.
\textsuperscript{155} \textit{Concepcion}, 131 S.Ct. at 1753.
\textsuperscript{156} \textit{Id}.
\textsuperscript{157} \textit{See supra} notes 130-36.
\textsuperscript{158} 306 P.3d 948 (Wash. 2013).
\textsuperscript{159} \textit{Id} at 953.
\textsuperscript{160} \textit{Id} at 953-54.
\textsuperscript{161} No. 11-56673, 2013 WL 5779332 (9th Cir. Oct. 28, 2013).
\textsuperscript{162} \textit{Concepcion}, 131 S.Ct. at 1747.
arbitration, regardless of the merits of the underlying dispute.\textsuperscript{163} The Ninth Circuit explained that any state law invalidating this provision would clearly have a “disproportionate impact” on arbitration because this provision is arbitration specific.\textsuperscript{164} However, the Ninth Circuit reasoned that invalidating this term would not disfavor arbitration; invalidating this term would simply help make arbitration fair.\textsuperscript{165} The Ninth Circuit suggested that the broad preemptive language from \textit{Concepcion} cannot be read to invalidate state rules requiring some level of fairness in arbitration.\textsuperscript{166} In other words, the FAA cannot preempt a state law that merely has a “disproportionate impact” on arbitration; in order to be preempted, the law must also disfavor arbitration and not seek to make arbitration fairer. In sum, not all courts are construing \textit{Concepcion} as narrowing the scope of unconscionability review, and parties can still rely on unconscionability arguments to invalidate an arbitration agreement.

2. Legislative Solutions

Trying to argue in litigation that \textit{Concepcion} and \textit{Amex} should not be applied in the employment setting is likely an uphill battle, and even if this strategy may be successful in a few cases, there are likely to be conflicting court decisions on this issue. To offer better and consistent protection for employees, legislation solutions are a better option. As explained below, the current state of arbitration doctrine can undermine the enforcement for several critical laws, and the legislative branch should respond.

When arbitration agreements are voluntarily entered into, arbitration can be fair and mutually beneficial to both parties. However, in the employment context, employees with little bargaining power may have no real choice and may be forced to submit to arbitration. Courts have enforced arbitration agreements even where it appears employees did not knowingly agree to arbitration. In one case, two employees were required to attend a two-hour orientation session where “they were told to sign their names approximately seventy-five times on a variety of documents without anyone explaining the contents of said documents and without an adequate opportunity to read most of them.” One of these documents contained an arbitration clause.\textsuperscript{167} This mandatory orientation meeting was described as “intimidating, hurried and tense,” and the court found that the employees were completely unaware one of the documents contained an arbitration clause.\textsuperscript{168} However, the court, relying on a strong federal policy favoring arbitration, enforced the arbitration clause and compelled the employees to submit civil rights claims to arbitration.\textsuperscript{169}

Employees are generally subject to the dynamics of employment relationships involving employers with stronger bargaining power, and in such relationships, arbitration can be forced onto the weaker party and used to the disadvantage of

\begin{itemize}
  \item \textsuperscript{163} \textit{Chavarria}, 2013 WL 5779332, at *5.
  \item \textsuperscript{164} \textit{Id.} at *8.
  \item \textsuperscript{165} \textit{Id.} at *8-*9.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} \textit{Maye v. Smith Barney Inc.}, 897 F. Supp. 100, 106 (S.D.N.Y. 1995).
  \item \textsuperscript{168} \textit{Id.} at 107.
  \item \textsuperscript{169} \textit{Id.} at 108, 110.
\end{itemize}
employees. For example, employers can draft arbitration clauses that shorten statutes of limitations, limit discovery, or include other provisions making it more challenging for an employee to bring a claim. Such overreaching in the drafting of arbitration clauses can undermine the enforcement of critical laws for which there is a strong public interest, such as wage and hour laws and civil rights laws.

Moreover, Concepcion and Amex have the potential to exacerbate the above-described problems. They make it more challenging for employees to proceed collectively if an arbitration agreement contains a class waiver. Also, as discussed in prior sections of this Article, some courts are beginning to construe Concepcion and Amex as limiting the scope of judicial review of arbitration agreements, and a more circumscribed judicial review carries several negative implications for employees. For example, if judicial review of arbitration agreements is becoming more limited, employers can engage in greater overreaching when drafting arbitration agreements with very limited procedural rights.

To provide the greatest protections for employees, Congress should enact the proposed Arbitration Fairness Act of 2013, which, among other things, would ban pre-dispute arbitration agreements in the employment context. All of the policies underlying wage and hour and civil rights legislation, which protect vulnerable workers, also justify the adoption of the Arbitration Fairness Act, which would help employees access a public court with broad procedural opportunities, including class procedures, to enforce these critical rights. If Congress passes the Arbitration Fairness Act, an employee with a dispute would still have the option to submit disputes to arbitration, and under such circumstances, there would be less concern about one-sided arbitration provisions. A post-dispute submission by an employee would arguably be fairer because the submission would be voluntary and knowing.

The history of the FAA’s enactment supports the Arbitration Fairness Act of 2013. The FAA was never intended to apply in the employment context; the FAA was designed for routine contract disputes between two merchants, not complex, public statutory claims between parties of unequal bargaining power. Moreover, reformers who pushed for the FAA generally had a sincere belief in the use of arbitration to resolve disputes; they did not express a desire to use arbitration as a means of hindering the resolution of a dispute or making it more challenging to resolve a dispute. The FAA

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171 See supra notes 110-39 and accompanying text.
172 See supra notes 140-47 and accompanying text.
175 Id. at 91-95; 199-200.
was never designed for the employment setting or for statutory claims.\textsuperscript{176} To provide the greatest procedural protections for employees, Congress should pass the Arbitration Fairness Act of 2013 and restore the FAA to its original meaning.

Unfortunately, several bills that would establish broad bans on pre-dispute employment arbitration agreements have been introduced in Congress over the last few years, and none have been successful.\textsuperscript{177} If a complete ban on pre-dispute employment arbitration agreements is not politically possible, legislative solutions should try to preserve a stronger role for the judiciary in policing arbitration agreements for fundamental fairness. A wider adoption of the \textit{Armendariz} fairness factors would be preferable to the circumscribed judicial review of arbitration agreements occurring as a result of \textit{Amex} and \textit{Concepcion}. If the Arbitration Fairness Act is not politically feasible,

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\textsuperscript{176} Understanding the historical background of the FAA’s enactment also helps one understand the rise and development of the effective vindication doctrine and the \textit{Armendariz} fairness factors discussed above. When the Supreme Court expanded the scope of the FAA beyond its original meaning by holding that statutory antitrust claims are arbitrable in \textit{Mitsubishi}, the Court relied on the effective vindication doctrine as a way to counterbalance or justify the expansion of the FAA to cover statutory claims. Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The effective vindication doctrine would help ensure that arbitration is used as a sincere, effective method of dispute resolution, and not as a way to thwart or hinder the resolution of statutory disputes. Similarly, when the Supreme Court expanded the FAA to cover statutory claims under the Age Discrimination in Employment Act in \textit{Gilmer}, it was also important for the Court to address the effective vindication doctrine and various factors relevant to the fairness of arbitrating employment disputes. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The Supreme Court’s analysis in \textit{Gilmer} provided the foundation for the \textit{Armendariz} fairness factors. See supra notes 72-88 and accompanying text. One can understand the development of the effective vindication doctrine and the \textit{Armendariz} fairness factors as a judicial attempt to counterbalance or alleviate concerns with the flawed judicial expansion of the FAA to cover statutory claims and employment disputes, which was never the original intent behind the FAA. If Congress is not politically able to ban pre-dispute arbitration agreements in the employment context, to provide some legitimacy, courts should be increasing, not decreasing, judicial review of employment arbitration agreements for fundamental fairness. In light of the history of the FAA and the Supreme Court’s transformative expansion of the statute, it is highly inappropriate for courts to cut back on the scope of the effective vindication doctrine, the \textit{Armendariz} fairness factors, or a more general review of arbitration agreements.

another possible legislative solution to deal with this more circumscribed judicial review would be to regulate the arbitration process in more detail by codifying the *Armendariz* fairness factors for the employment setting, perhaps by including a definition of employment arbitration under the FAA.

Strikingly, the FAA focuses on arbitration, and yet the statute never defines this key term. This lack of a definition has given rise to problems. *Concepcion*, for example, strikes at the heart of the FAA by raising the fundamental issue of the meaning of arbitration covered by the statute. A majority of Justices in *Concepcion* found that bilateral arbitration, and not classwide arbitration, was a “fundamental attribute” of arbitration under the FAA. However, as pointed out by the dissenting Justices in *Concepcion*, “[w]here does the majority get its contrary idea—that individual, rather than class, arbitration is a ‘fundamental attribute’ of arbitration? The majority does not explain.” The FAA is simply silent as to the meaning of arbitration. Thus, one can view *Concepcion* as a case struggling with the definition of arbitration, and the case invites lower courts to speculate as to the “fundamental attributes” of arbitration when considering preemption arguments.

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178 The history behind the FAA’s enactment helps explain why the statute never provides a definition of arbitration. The FAA arose in part as a response to a highly technical and broken court system with confusing procedural rules from the early 1900s, and the reformers who wanted a modern arbitration law desired to break free from this extremely complex system. See supra note 144-45 and accompanying text. Understanding that the arbitration reform movement grew out of a procedural nightmare in the court system is a key to understanding why the reformers did not want to get bogged down with a technical, detailed, highly-regulated definition of arbitration. The reformers did not want to create another system that reminded them of the highly technical judicial procedure of the courts of that time. In the process of drafting the FAA, one of the main proponents of the FAA desired a more detailed description of arbitration in the statute, but the main drafter of the FAA rejected this request to get more detailed. SZALAI, supra note 144, at 123. Also, progressive values influenced the arbitration reformers, and progressives generally preferred indeterminate, flexible processes to deal with changes in an indeterminate society. Id. at 98-99, 173-79, 188, 199-200. Under progressive beliefs, it was important to have an expert decision-maker, freed from any restrictions, to cope with a fluid society instead of trying to define the decision-making process or provide detailed standards for a decision-maker. Id. The lack of a clear definition of arbitration in the FAA can be understood as reflecting this progressive belief in the power of an expert-decisionmaker operating with flexibility and unhindered by detailed procedural rules. Furthermore, the FAA was designed for simple contract disputes between merchants, not complex statutory claims of a public nature between parties of unequal bargaining power. Id. at 192-98. For such simple contract disputes between co-equals, it was probably not necessary for the statute to contain detailed regulations about the arbitration process.

179 *Concepcion*, 131 S.Ct. at 1748-53.

180 Id. at 1759.

181 The FAA’s lack of a definition of arbitration causes other problems as well. There are conflicting court decisions concerning whether the FAA covers hybrid mediation-arbitration agreements. Compare *Advanced Bodycare Solutions, Inc. v. Thione Int’l*, 524
If enactment of the Arbitration Fairness Act is not possible, another possible legislative solution to help alleviate concerns regarding the fairness of employment arbitration would be to adopt a statutory definition of arbitration for employment disputes. A definition of employment arbitration could codify, for example, the Armendariz fairness factors or some version thereof, and a court could not enforce an employment arbitration agreement under the FAA unless the agreement satisfied this definition. Arbitration could be defined as a bundle of certain core procedures that must exist in the employment context in order for an employment arbitration agreement to be covered by the FAA. A legislative codification of the Armendariz fairness factors would provide at least some procedural protections for employees. Also, an amendment to the FAA could require courts to engage in an Armendariz fairness factor analysis before compelling arbitration or confirming an arbitration award. In other words, the amendment could prohibit delegating this analysis to arbitrators. Requiring judicial decisions would help foster the development of case law on the subject, which could help ensure uniform application of these fairness factors and provide guidance for future parties in drafting agreements and for courts in analyzing agreements.

**Conclusion**

The original drafters of the FAA would not recognize the statute as it is construed today. Flawed Supreme Court decisions changed the meaning of the statute, and the FAA appears to be in a continuing state of flux following the Supreme Court’s Concepcion and Amex decisions. These decisions appear to be swinging the pendulum closer towards a judicial rubberstamping of arbitration agreements. These decisions could lead to overreaching by employers and threaten to undermine the enforcement of important statutory rights of employees. Stronger judicial review of employment arbitration agreements should resume, either by judicial limitation of Concepcion and Amex, or through legislative action.

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182 In 2007, and again in 2011, Senator Jefferson Sessions of Alabama introduced bills called the Fair Arbitration Act. These bills guaranteed certain procedural rights in arbitration, and these rights generally tracked the Armendariz fairness factors. See S. 1135, 110th Cong. (2007); S. 1186, 112th Cong. (2011). These bills died in committee. If a complete ban on forced employment arbitration is not politically feasible, new bills similar to the Fair Arbitration Act could alleviate some concerns arising from the more circumscribed judicial review resulting from Concepcion and Amex.
Developing Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration Proceedings

By Barry Winograd

Introduction

The curtain rose on a new era of employment law with the U.S. Supreme Court’s 1991 decision in *Gilmer v. Interstate/Johnson Lane* approving mandatory arbitration of statutory discrimination claims. The *Gilmer* case has had significant policy and practice implications in the decades that followed, including a multi-front legal battle over efforts to reform, if not eliminate, mandatory proceedings arising out of employer-promulgated agreements that are a condition of employment. After a brief review of this recent history, this Article offers a proposal for heightened standards of professional responsibility for arbitrators serving in these cases.

This proposal is drawn from work already undertaken by a special committee of the National Academy of Arbitrators (NAA). The NAA is an organization with a primary interest in the arbitration of labor-management disputes under collective bargaining agreements. However, NAA members also have long served as neutrals in resolving other employment disputes in the non-union setting. The proposal outlined below is presently being considered for adoption by the NAA as a set of guidelines (“the Guidelines”) for arbitrators serving in mandatory employment arbitration cases.

I. Recent History of Arbitration Doctrine and Reform

As a starting point in this analysis, the U.S. Supreme Court is unlikely to change its direction on arbitration issues. The Court in the past several years has reiterated that it will

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1 The author is an arbitrator and mediator based in Oakland, California, and a member of the National Academy of Arbitrators. The author also has served on the adjunct law school faculty at the University of California, Berkeley, and the University of Michigan. The views expressed in this article are those of the author alone, and should not be attributed to the National Academy of Arbitrators or to any other organization.


enforce mandatory arbitration in a variety of settings, even if there is protective state legislation or an administrative procedure available for aggrieved individuals.\(^4\)

The Supreme Court’s perspective has fueled the legal debate after *Gilmer*, which has continued virtually nonstop in law journals and the popular press. This includes critical commentary about changes in jurisprudence in the 1980s and 1990s that forms the background to the *Gilmer* decision under the Federal Arbitration Act (FAA).\(^5\) Among other points, this commentary has expressed apprehension about the potential adverse impact of mandatory arbitration on public law dealing with discrimination and employee rights. Contrasting views have argued that, compared to the courts, mandatory employment arbitration offers greater and more effective access to employees seeking resolution of their claims.\(^6\)

Since *Gilmer*, debate also has extended to empirical assessments.\(^7\) Some research suggests that claimants have experienced favorable decisions at rates comparable to civil trials.\(^8\) However, research also suggests significant concerns about mandatory arbitrations, such as more limited damage recoveries, less success for unrepresented plaintiffs, and undue influence for repeat employer participants.\(^9\)


In addition to legal scholarship, there have been challenges in the courts to the enforcement of mandatory arbitration agreements. In the decade after *Gilmer*, federal cases established that excessive employer control over the arbitration process would be viewed as a violation of basic principles of due process and fairness undermining statutory protections for employees.10 Under state law, the unconscionability doctrine has been advanced as a means of protecting employee rights, applying the proviso contained in section 2 of the FAA that bars enforcement of arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.”11

These decisions aside, problems have persisted on the judicial front and the Supreme Court has expanded the reach of mandatory arbitration in the employment context. As one example, the U.S. Supreme Court in *Circuit City v. Adams*12 rejected an effort to exclude employees from coverage under the FAA by applying a narrow construction to exclusionary language in section 1 of the statute that precludes enforcement for “contracts of employment for workers engaged in interstate commerce.”13 In *14 Penn Plaza v. Pyett*,14 the Supreme Court gave a green light to collective bargaining agreements permitting unions to waive an individual’s right to litigate a discrimination claim in court and to authorize individual arbitration instead.

Opponents of mandatory arbitration also face problems in other areas of the law. For example, mandatory arbitration opponents were defeated when the U.S. Supreme Court approved class action waivers in consumer agreements as a bar to anti-trust class actions, even where the facts demonstrate it would be too costly to effectively vindicate a complaint in an individual arbitration.15 One observer of arbitration developments, critical of judicial inaction, appealed

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12 *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). On remand, the employment arbitration agreement nevertheless was deemed unconscionable: *Circuit City v. Adams*, 279 F.3d 1104 (9th Cir. 2002).


Apart from legal writing and judicial challenges, opponents have sought relief in legislative and administrative forums, but with limited success. The most significant legislative drive has died on the vine, year after year. The Arbitration Fairness Act, which has been introduced in Congress for several sessions, seems to be going nowhere.\footnote{The legislative proposals introduced in 2013 are S.B. 878 and H.R. 1844; also see Malin, The Arbitration Fairness Act, supra, 87 Ind. L. J. 289 (2012).} In an administrative forum, the Equal Employment Opportunity Commission issued a policy declaration in 1997 disapproving mandatory arbitration agreements for discrimination cases, but this position statement lacks the authority of a formal rule.\footnote{http://www.eeoc.gov/policy/docs/mandarb.html.}

For its part, the National Labor Relations Board (NLRB) has ruled that mandatory arbitration agreements cannot prohibit the right to file charges with the agency.\footnote{U-Haul Co. of California, 347 NLRB No. 34 (2006); Utility Vault, 345 NLRB No. 4 (2005).} More recently, the NLRB held that arbitration programs barring employees from seeking class-wide relief interfere with the right under federal labor law to engage in protected, concerted activity.\footnote{D. R. Horton, 357 NLRB No. 184 (2012).} So far, however, the appellate courts disagree with this position.\footnote{See D.R. Horton v. NLRB ___ F.3d ___(5th Cir., Dec. 13, 2013); also see Owen v. Bristol Care, Inc., 702 F.3d 850 (8th Cir. 2013).}

\section*{II. The Gap in Professional Standards}

A major gap in the field of mandatory employment arbitration concerns professional and ethical standards for arbitrators. There is a precedent for such standards. Decades ago, a code of professional responsibility was adopted for arbitrators of labor-management disputes arising out of collective bargaining relationships.\footnote{http://naarb.org/code.asp.} This code, the product of a three-party project...
involving the NAA, the AAA, and the Federal Mediation and Conciliation Service, deals largely with arbitration of traditional labor law disputes under collective bargaining agreements and does not provide a comprehensive set of standards for non-union employment arbitration.

Aside from a code for labor arbitrators, designating agencies such as the American Arbitration Association (AAA) have had ethical rules for commercial arbitration in place for many years. These long-standing rules cover voluntary, bilateral arbitration agreements in a wide variety of business fields, but not the mandatory cases we now encounter. The AAA’s ethical rules were developed with a committee of the American Bar Association decades ago, with only modest revision since.

Following *Gilmer*, the organizations with administrative responsibility for such disputes have attempted to regulate the administration of non-union employment cases. An early post-*Gilmer* development in the mid-1990s was the Due Process Protocol. The Protocol was drafted under the auspices of the American Bar Association’s labor section with contributions from individuals associated with different groups in the employment field, including plaintiff and defense counsel, as well as leaders in the NAA. The Protocol spelled out minimum standards for mandatory arbitration proceedings, among them protection of statutory rights, bilateral selection of arbitrators, and fair hearing procedures. Similarly, the AAA and the Judicial Arbitration and Mediation Service (JAMS) have both adopted employment arbitration rules to ensure minimum standards of fair procedure, including employer fee responsibilities for plans promulgated as a condition of employment. At times, however, agency actions reveal conflicting forces at work, as in rules that have been approved for class-action proceedings.

California took a major step in developing rules for arbitration a decade ago when it established several ethical standards to regulate the conduct of arbitrators and appointing

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23 http://www adr org/aaa/ShowProperty?nodeId=2FUCM%2FADRSTG_003867&revision=latestreleased.


The California standards impose broad disclosure obligations on arbitrators and appointing agencies for all types of contractual proceedings, provide parties with disqualification rights, and permit awards that violate those rights to be vacated. The California standards, however, have not been adopted nationally, are preempted in certain fields, such as the securities industry, and are not crafted to address specific problems arising in employment cases.

For the NAA, its history with negotiated, voluntary arbitration systems for labor-management disputes under collective bargaining agreements has spurred the organization to go on record as favoring voluntary arbitration. Nevertheless, recognizing that mandatory arbitration is now firmly in place in the non-union setting, the NAA has proposed practice recommendations for arbitrators and procedural reforms to be incorporated in legislation, if any is forthcoming.

III. Proposed Guidelines for Professional Standards

To fill the regulatory gap for arbitrator conduct in mandatory employment arbitration proceedings, members of a special committee of the NAA have proposed formal Guidelines to establish standards of professional responsibility for arbitrators. Although the Guidelines as presently proposed are subject to organizational modification and approval, several principal elements have evolved through internal discussion.

If the Guidelines are adopted by the NAA later in 2014, individual arbitrators will be

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28 Orvitz v. Schulman, 133 Cal.App.4th 830 (2005). In this respect, California law may be at odds with federal practice in reviewing arbitration awards. (See, e.g., Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240 (3rd Cir. 2013); Merit Ins. v. Leatherby Ins., 714 F.2d 673 (7th Cir. 1983).)

29 Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119 (9th Cir., 2005); Jevne v. Superior Court, 35 Cal.4th 935 (2005).

30 http://naarb.org/due_process.asp.

31 Id.

encouraged to advise parties in employment cases of the arbitrator’s commitment to adhere to the Guidelines. In addition, the Guidelines can be adopted by other agencies and organizations active in the field, such as the AAA and JAMS. Advocates and law firms also can press arbitrators to adhere to the Guidelines as a requirement for appointment.

In advancing these standards, members of the NAA involved in their development are mindful that, as a general, threshold principle, arbitrators following the Guidelines will remain subject to applicable federal and state law and administering agencies’ rules, where those laws and rules govern the course and conduct of a proceeding.

Among the Guidelines being considered within the Academy are the following:

1. To assure procedural fairness and minimum standards of due process, arbitrators must be attentive to employer-promulgated arbitration plans that are a condition of employment. An arbitrator must insist upon correction of any deficiency, or decline to take the case.

2. Arbitrators must make a reasonable effort to address public law governing the workplace when it is at issue. An arbitrator unwilling or unable to do so, based on personal inclination or insufficient experience, should refuse an appointment.

3. Arbitrators must know the source of an appointment. Once informed, an arbitrator must decline to take a case from a panel created by one party or when only one side has selected the arbitrator.

4. After appointment, and as a continuing duty, arbitrators must promptly provide a written disclosure to the parties recounting any personal, professional, financial, or social relationship to a party, representative, or known witness. The nature and extent of the relationship must be described, and this duty extends to past and present connections. The disclosure obligation also applies to an advocate’s law firm and to an employer, as well as to other arbitrators when there is a tripartite panel. Further, arbitrators must disclose service in past proceedings, or in another neutral dispute resolution capacity, with the parties or their representatives.

5. Within a reasonable time after a disclosure, arbitrators should permit parties an automatic disqualification of an arbitrator without specific cause needing to be shown, and must otherwise abide by applicable law or agency procedures regarding objections to service.
6. Prehearing discovery must permit the fair and full exploration of issues consistent with the circumstances of the case, while also maintaining the expedited nature of arbitration.

7. Ex parte communications are prohibited, including any communications with one party regarding compensation or disclosure of a prospective award.

8. One party may be solely responsible for the arbitrator’s fees in accord with applicable law, agency rules, or agreement of the parties.

9. Monetary deposits for arbitrator fees may be required as a condition of going forward with an arbitration. Fee deposits must be secured and set aside until fees are earned.

10. Arbitrators must give notice to all parties, and an opportunity to respond, if an arbitrator believes a case should be decided on the basis of a rationale or position not previously presented.

11. Arbitrators cannot publish an award without the consent of the parties.

12. A post-award clarification regarding the merits of a decision can only be provided if both parties have provided consent to clarify.33

The Guidelines listed above are not offered as a complete set, although they should be sufficient as a starting place. In the future, other issues can be reviewed based on a track record assessing initial implementation of the Guidelines. One potential issue might be whether arbitrators should provide notice to parties at the time of selection of an intent to accept—or not accept—subsequent appointment in another case with the same advocates or parties while the original appointment is in effect. Another example is whether there are ethical implications affecting the consideration of motions for summary judgment in proceedings in which the extent and scope of discovery is limited. A third example might be how an arbitrator should handle a case when an advance deposit is not paid, including whether non-payment should be treated as a material breach of an arbitration agreement resulting in dismissal of the arbitration and the option to pursue further relief in court.

Ultimately, a question for those active in the field is whether the Guidelines should, at some point, be transformed into an enforceable code. If the Guidelines evolved into a code, the

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33 The Guidelines, while pending within the NAA, were presented for discussion at Forced Arbitration: A Symposium at Berkeley Law on February 27, 2014.
NAA could enforce the code against its arbitrator-members, though not against advocates. If the code was widely adopted, administrative agencies and organizations could subject arbitrators to discipline.

While there are issues to be addressed in the future, several members of the NAA’s special committee are of the view that we need not wait to take at least initial steps to fill an important regulatory gap. Further, a set of professional standards with points such as those described above hopefully will find substantial support in the employment law community of practitioners and organizations. Granted, there are current laws and rules that apply to mandatory proceedings, but these laws and rules do not fully address arbitrator conduct and do not preclude heightened standards of professional responsibility in the field. In the absence of reform legislation, improved professional standards can insure greater confidence that those serving as decision-makers in mandatory employment arbitration cases are adhering to fair procedures for the protection of all parties.
REPORT TO THE JUDICIAL COUNCIL
For business meeting on: October 25, 2013

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Rules, Forms, Standards, or Statutes Affected
Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration

Recommended by
Civil and Small Claims Advisory Committee
Hon. Dennis M. Perluss, Chair

Executive Summary
All persons serving as neutral arbitrators under an arbitration agreement are required to comply with ethics standards adopted by the Judicial Council under Code of Civil Procedure section 1281.85. The Civil and Small Claims Advisory Committee recommends amendments to these ethics standards in response to recent appellate court decisions concerning the standards and suggestions received. Among other things, these amendments would: (1) codify the holdings in decisions on the inapplicability of the standards to arbitrators in securities arbitrations and on the time for disclosures when an arbitrator is appointed by the court; (2) require new disclosures about financial interests a party or attorney in the arbitration has in an administering arbitration provider or the provider has in a party or attorney and about any disciplinary action taken against an arbitrator by a professional licensing agency; (3) clarify required disclosures about associations in the private practice of law and other professional relationships between an arbitrator’s spouse or domestic partner and a lawyer in the arbitration; (4) require arbitrators in consumer arbitrations to inform the parties in a pending arbitration of any offer of employment
from a party or attorney for a party in that arbitration; and (5) prohibit arbitrators from soliciting appointment as an arbitrator in a specific case or specific cases.

**Recommendation**

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, effective July 1, 2014, as follows:

1. Amend standard 2 to:
   - Codify case law holding that, in the context of the standards, “proposed nomination” does not include the court’s “nomination” of a list of potential arbitrators for consideration by the parties under Code of Civil Procedure section 1281.6; and
   - Fill a gap in the definition of an arbitrator’s “extended family,” which currently covers spouses of an arbitrator’s relatives but does not specifically cover the domestic partners of these relatives.

2. Amend standard 3 to:
   - Exempt from application of the standards arbitrators serving in a type of automobile warranty arbitration program authorized by federal regulation and in which the arbitrator’s award is not binding;
   - Codify case law holding that the standards are preempted for arbitrators serving in the security industry arbitration programs governed by rules approved by the Securities and Exchange Commission; and
   - Provide that the amendments to the standards do not apply to arbitrations in which the arbitrator was appointed before the effective date of the amendments.

3. Amend standard 7 to:
   - Reflect the proposed amendments to standard 12 by providing that offers of employment from a party or attorney in a pending consumer arbitration need not be disclosed under this standard if the arbitrator has complied with the requirements in standard 12 that arbitrators in consumer arbitrations inform parties of such offers;
   - Clarify that standard 7 governs both initial disclosures (those made before final appointment of an arbitrator) and supplemental disclosures (those made after the initial disclosures have been made);
   - In response to case law, clarify that arbitrators must disclose if their spouse or domestic partner was associated in the practice of law with a lawyer in the arbitration within the preceding two years;
   - Also in response to case law, clarify that the standards include a separate obligation to disclose professional relationships between an arbitrator or an arbitrator’s family.
members and party or a lawyer for a party in the arbitration that are not specifically covered by other subparts of standard 7(d);

- Add a new requirement that arbitrators disclose whether:
  - They were disbarred or had their license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board;
  - They resigned their membership in the State Bar or another professional or occupational licensing agency or board while public or private disciplinary charges were pending; or
  - Within the preceding 10 years other public discipline was imposed on them by a professional or occupational disciplinary agency or licensing board; and

- Make other nonsubstantive clarifying changes.

4. Amend the comment to standard 7 to:
   - Reflect the proposed amendments to the text of the standard that would add a new obligation to disclose professional discipline and clarify the standard’s application to both initial and supplemental disclosures;
   - Clarify that the supplemental disclosure requirement applies to matters that existed at the time the arbitrator made his or her initial disclosures but of which the arbitrator only subsequently became aware and also to matters that arise because of developments during the course of an arbitration;
   - Clarify that just because a particular matter is not among the examples of matters specifically listed in 7(d) does not mean that it need not be disclosed—it still needs to be evaluated under the general standard relating to disclosures concerning the arbitrator’s impartiality; and
   - Correct several cross-referencing errors, update other cross-references to reflect the proposed amendments to the standard, and make other nonsubstantive clarifying changes.

5. Amend standard 8 to:
   - Add new requirements that arbitrators in a consumer arbitration administered by a provider organization disclose whether:
     - The provider organization has a financial interest in a party; or
     - A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated has a financial interest in the provider organization.
   - Provide that an arbitrator may rely on information supplied by a provider organization to make required disclosures under this standard only if the provider organization represents that the information is current as of the preceding calendar quarter;
   - Clarify that, if an arbitrator is relying on information from a provider organization’s website to make required disclosures under this standard, the web address of the provider
organization must be provided in the arbitrator’s initial disclosure statement and the web address provided must be for the specific web page at which the information is located;

- Clarify that disclosures relating to relationships with provider organizations must be made as part of the initial disclosure; and
- Make the language of this standard consistent with the proposed amendments to the introductory sentence of standard 7.

6. Amend standard 12 to provide that, in consumer arbitrations, the arbitrator must inform parties of any offers of employment or new professional relationships from a party or a lawyer for a party in the arbitration and of the acceptance of any such offers.

7. Amend standard 16 to provide that the information an arbitrator must provide to parties about the terms of their compensation must include information about any requirements regarding advance deposit of fees and any practice concerning situations in which a party fails to timely pay the arbitrator’s fees, including whether the arbitrator will or may stop the arbitration proceedings.

8. Amend the comment to standard 16 to clarify that this standard is not intended to affect any authority a court may have to make orders with respect to the enforcement of arbitration agreements or arbitrator fees.

9. Amend standard 17 to:
   - Provide that arbitrators may advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment;
   - Provide that arbitrators must not solicit appointment as an arbitrator in a specific case or specific cases; and
   - Add a definition of “solicit.”

The text of the proposed standards is attached at pages 28–45.

**Previous Council Action**

Code of Civil Procedure section 1281.85, enacted in 2001, required the Judicial Council to adopt ethics standards effective July 1, 2002, for all neutral arbitrators serving in arbitrations under an arbitration agreement.¹ In November 2001, then Chief Justice Ronald M. George appointed the Blue Ribbon Panel of Experts on Arbitrator Ethics—which included law school faculty; sitting

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¹ This section also established parameters for the scope and content of the ethics standards: “These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter [ch. 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95]. The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships.”
and retired judges; legislative and executive branch representatives; business, consumer, and labor representatives; and practicing arbitrators—to review and provide input on drafts of the ethics standards for arbitrators prepared by the Administrative Office of the Courts (AOC). In April 2002, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (arbitrator ethics standards) developed by the AOC in consultation with the Blue Ribbon Panel. At that time, the council also directed the AOC to recirculate the adopted standards for public comment. In December 2002, the AOC, after consulting with the Blue Ribbon Panel, recommended amendments to the standards based on the additional public comments received and the Judicial Council adopted these amendments effective January 1, 2003. The standards have not been amended since then.

At its February 28, 2012 meeting, the Judicial Council considered a proposal from the AOC to amend the arbitrator ethics standards in response to appellate court decisions and other input concerning the standards accumulated during the decade since the enactment of the standards. At that meeting, Mr. Cliff Palefsky addressed the council concerning the arbitrator ethics standards, including suggesting additional amendments to the standards. The council did not vote on the substance of the proposed amendments to the standards at that meeting, but instead referred the proposal to the council’s Rules and Projects Committee (RUPRO) to assign it to an appropriate Judicial Council advisory body for its review and recommendation. RUPRO referred the proposal to the Civil and Small Claims Advisory Committee (CSCAC) with a recommendation that the committee create a working group including individuals with experience and expertise in the area of contractual arbitration. In addition to considering the possible amendments to the arbitrator ethics standards included in the February 2012 proposal, RUPRO asked that this working group consider: (1) whether any amendments to the arbitrator ethics standards should be proposed to the council; and (2) the suggestions raised by Mr. Palefsky.

Rationale for Recommendation

Background

Legislation and adoption of current standards

In 2001 the Legislature enacted Code of Civil Procedure section 1281.85, which required the Judicial Council to adopt ethics standards for all neutral arbitrators serving in arbitrations under an arbitration agreement—that is, arbitrators in private, contractual arbitrations. Among the concerns that motivated this legislation was the fact that these private arbitrators, while subject to fairly detailed statutory disclosure requirements, were not subject to any comprehensive set of mandatory ethics standards like the Code of Judicial Ethics provisions that apply to judges and

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2 The full text of the standards is available on the California Courts website on the same page as the California Rules of Court at: www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf.

arbitrators in the judicial arbitration program.\textsuperscript{4} The goals of requiring compliance with these ethics standards included ensuring that parties can have confidence in the integrity and fairness of private arbitrators.\textsuperscript{5} Both to provide parties with a remedy and to encourage compliance with the disclosure requirements in the arbitration statutes and the standards, in this same legislation the Legislature also clarified that a private arbitrator’s failure to disclose in a timely fashion a ground for disqualification of which the arbitrator was then aware is a ground for vacation of an arbitrator’s award.\textsuperscript{6}

As required by this legislation, the Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration. The stated goals of these standards are to “guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process.” Among other things, these standards address arbitrators’ general duty to uphold the integrity and fairness of the arbitration process, required disclosures, disqualification, duty to refuse gifts, limitations regarding future professional relationships or employment, compensation, and marketing.

\textit{Development of current proposal}

In the decade since the Judicial Council adopted these standards, there have been several appellate court decisions addressing the standards’ application in various circumstances. The Judicial Council has also received some suggestions for amending the standards. In 2011, the AOC, with input from former members of the Blue Ribbon of Experts on Arbitrator Ethics, developed a proposal to amend the standards in response to these appellate decisions and

\textsuperscript{4} See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended August 20, 2001, p. 4, “While lawyers who act as arbitrators under the judicial arbitration program are required to comply with the Judicial Code of Ethics, arbitrators who act under private contractual arrangements are, surprising to many, currently not required to do so. . . . Because these obligations do not attach to private arbitrators, parties in private arbitrations are not assured of the same ethical standards as they are entitled to in the judicial system.” See also Sen. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended April 16, 2001, p. 4, which states: “However, any person, whether a retired judge, active or inactive lawyer, or layperson, when deciding a private arbitration matter is not required to comply with the Judicial Code of Ethics. This shortcoming is a problem, asserts the author, because parties to private arbitrations deserve the same fairness, integrity and impartiality from their private judges as they would receive from a public judge in a public case.”


\textsuperscript{6} With regard to this provision, the Assembly Judiciary Committee report on the bill stated: “Vacation of an arbitrator’s award is the only mechanism for enforcement of the arbitrator’s duties. . . .This provision appears appropriate not only to provide a remedy to consumers, who are often forced into private arbitration and who have suffered the arbitrator’s non-disclosure, but equally important to provide arbitrators with an incentive to self-regulate. As the author explains, this self-regulation incentive is central to the purpose of the bill, given the continuing absence of any other public oversight of the arbitration industry. As the U.S. Supreme Court has commented, ‘We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. (\textit{Commonwealth Coatings Corp. v. Continental Casualty Co.}, 393 U.S. 145, 149 (1968)).’” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001–2002 Reg. Sess.), as amended August 20, 2001, p. 8).
suggestions. That earlier proposal was circulated for public comment between April 21 and June 20, 2011, and, as noted above, a modified version of the proposal was recommended for adoption in February 2012. The Judicial Council decided that the earlier proposal should be considered by one of its advisory committees. The proposal was referred by RUPRO to the CSCAC with a recommendation that it form a working group including individuals with experience and expertise in the area of contractual arbitration.

In response to this directive, CSCAC formed the Arbitrator Ethics Standards Working Group. This working group, a roster of which is attached, includes all of the individuals who were members of the CSCAC’s Alternative Dispute Resolution (ADR) subcommittee as of late May 2012 when the group was formed. It also includes former members of the Blue Ribbon Panel of Experts on Arbitrator Ethics, a representative designated by the California Judges Association, Mr. Palefsky (the individual who submitted suggestions to the Judicial Council in February 2012 concerning the arbitrator ethics standards), and several others with expertise in the area of contractual arbitration.

The Arbitrator Ethics Standards Working Group considered and made recommendations to CSCAC on all of the issues referred to the committee by RUPRO. The attached revised proposal to amend the arbitrator ethics standards was developed by the working group and recommended for adoption by CSCAC. Some of the recommended amendments are intended to conform the arbitrator ethics standards to case law. Others are intended to modify or clarify the standards in light of case law or suggestions received by the Judicial Council. This proposal contains all of the same proposed amendments to standards 2 and 3 and most of the same amendments to standards 7 and 8 as were contained in the proposal presented to the Judicial Council in February 2012. It also contains some new proposed amendments to standards 7, 12, 16, and 17. The description of the proposal below includes information about whether each proposed amendment was part of the proposal previously presented to the Judicial Council or is new.

**Application to arbitrators in securities arbitrations**

In 2005, both the California Supreme Court in *Jevne v. Superior Court* (2005) 35 Cal.4th 935 and the United States Court of Appeals for the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119 held that the federal Securities Exchange Act preempts application of the California arbitrator ethics standards to arbitrators for the National Association of Securities Dealers (NASD). The courts concluded NASD arbitrators are governed by arbitration rules that were approved by the U.S. Securities and Exchange Commission (SEC) under federal law and that the California standards relating to disqualification are in conflict with the SEC-approved rules.

To reflect these court decisions, CSCAC recommends amending standard 3, which addresses the application of the standards, and its accompanying comment, to explicitly exempt arbitrators

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7 In 2007, the NASD merged with the New York Stock Exchange’s regulation committee to form the Financial Industry Regulatory Authority, or FINRA.
serving in an arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the SEC under federal law. This proposed amendment was included in the proposal presented to the Judicial Council in February 2012.8

**Disclosure of public professional discipline**

In *Haworth v. Superior Court of Los Angeles* (2010) 50 Cal.4th 372, the California Supreme Court considered whether an arbitrator was obligated to disclose that, when he was a judge, he had been publicly censured by the Commission on Judicial Performance.9 Because neither the California Arbitration Act nor the arbitrator ethics standards specifically required disclosure of such professional discipline, the court based its determination on whether, under the particular facts of the case, that public censure was a matter that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.10 Based on a variety of factors, including that the conduct that was the basis of the public censure was directed at court staff, not litigants; was not the same type of conduct that was the subject of the arbitration; had occurred 15 years before the arbitration took place; and that there was no indication of similar conduct in the 10 years since the censure had been imposed, the court held that disclosure of the public censure was not required under the general impartiality standard.

To help support the broad goals of the ethics standards— to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process—CSCAC recommends adding a new requirement, separate from the requirement for disclosures relating to the arbitrator’s impartiality, that an arbitrator make disclosures to the parties about certain public professional disciplinary actions. Specifically, arbitrators would be required to disclose if:

- They were disbarred or had their license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board;

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8 These same changes were also previously circulated for public comment in late 2005, along with a request for comments on all the standards.

9 In the underlying case before the arbitrator, a female patient filed an action for battery and medical malpractice against a male doctor who had performed cosmetic surgery on her. Two months after the arbitration panel, in a split decision, issued its award in favor of the doctor, the patient learned that the arbitrator who authored the award had been publicly censured while he was a judge for engaging in “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” The conduct that was the basis for this judicial discipline included making sexually suggestive remarks to and asking sexually explicit questions of female staff members; referring to a staff member using crude and demeaning names and descriptions and an ethnic slur; referring to a fellow jurist’s physical attributes in a demeaning manner; and mailing a sexually suggestive postcard to a staff member addressed to her at the courthouse. The patient then filed a petition in the superior court seeking to vacate the arbitration award on the ground, among others, that the arbitrator had failed to disclose this public censure.

10 See 50 Cal.4th 372, 381 [“Neither the statute nor the Ethics Standards require that a former judge or an attorney serving as an arbitrator disclose that he or she was the subject of any form of professional discipline. At issue here is the general requirement that the arbitrator disclose any matter that reasonably could create the appearance of partiality.”]
• They resigned their membership in the State Bar or another professional or occupational licensing agency or board while public or private disciplinary charges were pending; or
• Within the preceding 10 years other public discipline was imposed on them by a professional or occupational disciplinary agency or licensing board.

The information that would be required to be disclosed under this proposed amendment is similar to information that must be disclosed by many other ADR neutrals, lawyers, and applicants for judicial office:

• Arbitrators serving in securities arbitrations under the FINRA rules are currently required to disclose information about professional discipline to the parties in those arbitrations;¹¹
• Mediators serving in court-connected mediation programs for general civil cases must report to the court if they have been subject to professional discipline;¹²
• Members of the State Bar of California must report such disciplinary matters to the State Bar;¹³ and
• Prospective judges are required to disclose such information to the Governor before they are appointed as superior court judges.¹⁴

CSCAC recommends that this new disclosure obligation be kept separate from the requirement for disclosures relating to the arbitrator’s impartiality, which is located in subdivision (d) of standard 7. This information, like the similar information reported by judicial applicants, attorneys, and court-connected mediators, is not intended to assist in assessing the arbitrator’s ability to be impartial but to help assess other characteristics that may be important in an arbitrator, such as the individual’s integrity. This new disclosure requirement would therefore be placed in subdivision (e) of standard 7, which currently requires disclosure of other information.

¹¹ See the FINRA arbitrator disclosure checklist at http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009442.pdf. This checklist requires arbitrators in that program to disclose whether “any professional entity or body with licensing authority cited you for malpractice; denied, suspended, barred, or revoked your registration or license (e.g., insurance, real estate, securities, legal, medical, etc.); or restricted your activities in any way.” Any affirmative responses are provided to the parties in the arbitration.

¹² See Cal. Rules of Court, rule 3.856(c). Among other things, rule 3.856 requires such mediators to inform the court if (1) public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency; or (2) the mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending.

¹³ See Bus. & Prof. Code, § 6068(o). This code section requires State Bar members to report the imposition of discipline against them by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

¹⁴ See Application for Appointment as Judge of the Superior Court at http://www.gov.ca.gov/docs/Judicial_application_Worksheet.txt. Among many other things that must be disclosed on this application is information about (1) whether the applicant has ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group; and (2) whether, as a member of any organization or as a holder of any office or license, the applicant has been suspended or otherwise disqualified or had such license suspended or revoked; been reprimanded, censured or otherwise disciplined; or had any charges, formal or informal, made or filed against them.
about the arbitrator’s ability to conduct the arbitration that is unrelated to the arbitrator’s ability to be impartial, but is important to assessing whether a person should serve as an arbitrator in a case.

The proposed amendment to the ethics standards, like the FINRA rules, would require disclosure of this disciplinary information to the parties in the arbitration. In contrast, in the case of court-connected mediators, lawyers, and prospective judges, the disclosures are not made to parties, but to a public officer or entity responsible for determining the eligibility of individuals to serve in these capacities. Unlike for these occupations, however, there is no public officer or entity responsible for determining the eligibility of individuals to serve as arbitrators in contractual arbitration. In contractual arbitration, it is generally the parties who decide who will serve as the arbitrator in their case. Therefore, to enable the parties to make an informed decision about who will serve as their arbitrator, the proposed amendment would require the information about public professional discipline be disclosed to the parties.

By establishing a clear disclosure requirement, this amendment should reduce uncertainty for arbitrators and parties about what professional disciplinary actions must be disclosed, avoid possible protracted litigation over whether such actions should have been disclosed under the general impartiality standard, support the finality of arbitration awards, and enhance public confidence in the integrity of private arbitrators and the arbitration process.

This proposed amendment was included in the proposal presented to the Judicial Council in February 2012. However, the current proposal makes clear that the resignations that must be disclosed include those in which either public or private disciplinary charges are pending and clarifies what information about the professional discipline must be disclosed.

**Disclosure of relationships with a lawyer in the arbitration**

In another case decided in 2010, *Johnson v. Gruma Corporation* (9th Cir. 2010) 614 F.3d 1062, the Ninth Circuit Court of Appeals considered whether the ethics standards required an arbitrator to disclose that his wife had been a partner in the law firm of an attorney who was hired to represent one of the parties in the arbitration. Finding no provision in the ethics standards specifically identifying prior association in the practice of law between the arbitrator’s spouse and a lawyer in the arbitration as a relationship that must be disclosed, the court held that the arbitrator was not required to disclose this relationship.

To clarify that the ethics standards are intended to require disclosure of an arbitrator’s spouse’s prior association in the practice of law with a lawyer in the arbitration as well as other professional relationships that the arbitrator or a member of the arbitrator’s immediate family has

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15 The *Haworth* case went twice from the superior court to the Court of Appeal to the Supreme Court before it was finally resolved, four years after the arbitration award was rendered and the petition to vacate the award was initially filed.
or has had with a lawyer for a party, CSCAC recommends making the following changes to standard 7:

- Moving the current provision relating to the arbitrator’s past association in the practice of law with a lawyer in the arbitration from standard 7(d)(8) (which relates to professional relationships that the arbitrator or a member of the arbitrator’s immediate family has or has had with a party or a lawyer in the arbitration) to 7(d)(2) (which relates to family relationships with a lawyer in the arbitration). While this provision could logically be placed in either subdivision, because 7(d)(2) already addresses situations in which the arbitrator is currently associated in the practice of law with a lawyer in the arbitration, readers may expect that past relationships of this type would also be addressed in the same subdivision. Moving this provision to 7(d)(2)(B) ensures it appears in the first location in which readers might logically look for it.

- Expanding this provision to specifically address situations in which the arbitrator’s spouse or domestic partner had a past association in the practice of law with a lawyer in the arbitration. Explicitly listing such past relationships will eliminate any doubt about whether these relationships must be disclosed.

- Removing the introductory language about other professional relationships from standard 7(d)(8) and place it in its own separate subdivision as proposed standard 7(d)(9). Placing this provision in its own subdivision would emphasize that it establishes disclosure obligations distinct from, and in addition to, those established by the other provisions in standard 7(d). The existing provisions of 7(d)(8)(B) and (C) relating to disclosure of employee, expert witness, and consultant relationships would remain in standard 7(d)(8), but would be consolidated into a single provision.

These proposed amendments were included in the proposal presented to the Judicial Council in February 2012.

**Disclosures relating to administering provider organizations**

When the ethics standards were originally adopted by the Judicial Council in April 2002, they included a requirement that, in consumer arbitrations administered by a provider organization, the arbitrator was required to disclose, among other things, whether that provider organization had a financial interest in a party or whether a party or lawyer in the arbitration had a financial interest in the provider organization. After the ethics standards were adopted, a new statutory provision, Code of Civil Procedure section 1281.92, was enacted that prohibits provider organizations from administering any consumer arbitration where such a relationship exists. In December 2002, in recognition of this statutory provision, the Judicial Council deleted the obligation to make such disclosures from the standards.

During the succeeding 10 years, it was discovered that a major provider of consumer arbitration services in California, National Arbitration Forum (NAF), was purchased by one of the major users of its arbitration services. Despite this, NAF continued to provide arbitration services in
consumer arbitrations in violation of section 1281.92. Because disclosure of this type of relationship was no longer required, arbitrators in these consumer arbitrations were not obligated to disclose this relationship between NAF and one of the parties in the arbitration.

CSCAC recommends reinstating the provisions, which were removed from the standards by the council in 2002, requiring that in consumer arbitrations administered by a provider organization, the arbitrator disclose whether that provider organization has a financial interest in a party or whether a party or lawyer in the arbitration has a financial interest in the provider organization.

This proposed amendment was not included in the proposal presented to the Judicial Council in February 2012.

Initial and supplemental disclosures

The ethics standards address both initial disclosures (those made when an arbitrator is notified that he or she has been nominated by the parties or appointed by the court to arbitrate a dispute) and supplemental disclosures (those made any time after the initial disclosures are made). Under standard 7(c), both initial and supplemental disclosures are required to include any matters listed in standards 7(d) and (e). The appellate briefs filed in Johnson v. Gruma Corporation, however, reflect some confusion about whether the ethics standards address initial disclosures and about what matters must be disclosed in supplemental disclosures.

To clarify that the standards are intended to govern both initial and supplemental disclosures and what must be disclosed in each, CSCAC recommends several changes to the standards:

- Amend standard 7(c) to include separate headings identifying the requirements for initial and supplemental disclosures; and
- Amend the references to the persons who must make disclosures in the introductory provision of standard 7(d), in standard 7(e), and in the introductory provision of standard 8(b) to clarify whether the disclosures must be made only by proposed arbitrators (initial disclosures) or by both proposed arbitrators and arbitrators (supplemental disclosures).

In 2008, in Jakks Pacific, Inc. v. Superior Court (2008) 160 Cal.App.4th 596, the Court of Appeal addressed the time frame for initial disclosures in situations in which the court appoints the arbitrator under Code of Civil Procedure section 1281.6. The court in that case held that it is the appointment of the arbitrator under that statute, not the “nomination” of a list of potential arbitrators for consideration by the parties, that triggers the requirement for disclosure under the standards and related statutes. The proposed amendment to standard 2(a)(2) reflects the holding in Jakks.

These proposed amendments were included in the proposal presented to the Judicial Council in February 2012.
**Offers of employment from parties or attorneys in a pending arbitration**

Standard 12(b) currently requires that a proposed arbitrator must disclose to all parties in writing if, while that arbitration is pending, he or she will entertain offers from a party or a lawyer for a party of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant,\(^\text{16}\) including offers to serve as a dispute resolution neutral in another case, and provides that a party may disqualify the arbitrator based on this disclosure. Standard 7(b)(2) provides that if an arbitrator makes this disclosure and is not disqualified by any party, the arbitrator is not required to disclose to the parties in that arbitration any offer of employment that the arbitrator subsequently receives or accepts from a party or lawyer for a party while that arbitration is pending.

Concerns have been expressed about whether the disclosure and ability to disqualify an arbitrator under standard 12(b) provides sufficient protection for parties, particularly consumer parties, against the possibility of arbitrator bias or the appearance of bias that may arise when the arbitrator receives offers of employment from another party or attorney in the arbitration. Among other things, it has been suggested that it may be unclear to parties that an arbitrator who has disclosed that he or she will entertain such offers of employment will not subsequently inform the parties if and when he or she actually receives such an offer.

To address these concerns, this proposal would amend standard 12 to require that the arbitrator must inform parties in a pending consumer arbitration of any such offer of other employment from a party or attorney for a party in that arbitration and of the acceptance of any such offer. The proposed amendments would further provide that if the arbitrator complies with this requirement, the receipt or acceptance of the offer, by itself, is not grounds for disqualification of the arbitrator, does not constitute corruption in or misconduct by the arbitrator, and need not also be disclosed by the arbitrator under standard 7. If, however, the arbitrator fails to inform the parties as required, that would constitute a failure to comply with the arbitrator’s obligation to make a disclosure required under these ethics standards.

These proposed amendments were not included in the proposal presented to the Judicial Council in February 2012.

**Arbitrator fees**

Standard 16(b) requires that, before accepting appointment, an arbitrator must inform all parties in writing of the terms and conditions of the arbitrator’s compensation. The standard specifically requires that this information include any basis to be used in determining fees and any special fees for cancellation, research and preparation time, or other purposes.

\(^{16}\) Standard 12(a) specifically prohibits an arbitrator from entertaining or accepting any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration.
There is other information about arbitrator fees that may also be very important for parties to receive before an arbitrator is appointed, including information about requirements for advance deposit of fees and about the arbitrator’s practice if a party fails to timely pay the arbitrator’s fees. To ensure that parties receive this important information, this proposal would amend standard 16 to specifically require that information about these issues be included in the fee information provided before an arbitrator accepts appointment. This proposed amendment was not included in the proposal presented to the Judicial Council in February 2012.

**Marketing**

Standard 17 addresses marketing by arbitrators. This standard prohibits arbitrators from making any representation in their marketing that directly or indirectly implies favoritism or a specific outcome, and from soliciting business from a participant in the arbitration while the arbitration is pending.

Concerns have been raised about the potential appearance of bias that may arise if an arbitrator solicits work as an arbitrator in a specific case or cases from an individual or entity that is not currently a participant in an arbitration, but that ultimately would or might be one of the parties before that arbitrator if the individual or entity chose to arbitrate the solicited case or cases. To address these concerns, this proposal would prohibit arbitrators from soliciting appointment in a specific case or specific cases. This proposed amendment was not included in the proposal presented to the Judicial Council in February 2012.

**Other proposed changes**

In addition to the amendments described above, CSCAC recommends several other amendments to the standards based primarily on suggestions received by the Judicial Council:

**Standard 2(o).** This provision, which defines “extended family,” currently covers spouses of an arbitrator’s relatives but does not specifically cover the domestic partners of these relatives. The proposal includes an amendment designed to fill this gap.

**Standard 3(b)(2)(D).** The recommended amendment to this provision would make a substantive change by exempting arbitrators serving in a type of automobile warranty arbitration authorized by federal regulations. This program is similar to the automobile warranty and attorney-client fee arbitration programs already exempted in (b)(2)(D) and (b)(2)(C) in that, under the applicable regulations, the decisions rendered are not binding on the consumer party.

**Standard 7(d)(5).** This recommended amendment would delete an obsolete provision. Standard 7(d)(5)(A) defines “prior case” for purposes of this provision as “any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator’s proposed nomination or appointment, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002.” The last clause in this provision was included because, at the time this standard was adopted in 2002, arbitrators had not necessarily been keeping the records about their service as dispute resolution neutrals who would
be required to make the disclosures required under (d)(5), and so disclosures of such service concluded before 2002 were not required. Because the standard only requires disclosure of service in cases concluded within the preceding two years, this provision is no longer necessary.

**Comment to standard 7.** The recommended amendments to this comment would, among other things:

- Correct cross-references to renumbered or relettered provisions;
- Clarify that the requirement to make supplemental disclosures applies to matters that existed at the time the arbitrator made his or her initial disclosures but of which the arbitrator only subsequently became aware and also to matters that arise because of developments during the course of an arbitration, such as when a party hires a new lawyer (as occurred in the *Johnson v. Gruma* case); and
- Clarify that just because a particular matter is not specifically listed among the examples of matters in standard 7(d) does not mean it need not be disclosed; it still needs to be evaluated under the general disclosure standard.

**Standard 8(a).** This proposed amendment is intended to do two things:

- Provide that an arbitrator may only rely on information from a provider organization’s website to make required disclosures under this standard if the provider organization represents that the information on that website is current as of the most recent quarter. This provision reflects the requirement in Code of Civil Procedure section 1291.96 that provider organizations post quarterly information on the consumer arbitrations they have administered.
- Clarify that if an arbitrator is relying on information from a provider organization’s website to make required disclosures under this standard, the web address of the provider organization must be provided in the arbitrator’s initial disclosure statement. This is important because there are time limits specified for the submission of that disclosure statement.

With the exception of the first amendment to standard 8(a) described above, all of these proposed amendments were included in the proposal presented to the Judicial Council in February 2012.

**Comments, Alternatives Considered, and Policy Implications**

**Comments**

This proposal was circulated for public comment between April 19 and June 19, 2013, as part of the regular spring 2013 comment cycle. Sixteen individuals or organizations submitted comments on this proposal. One commentator agreed with the proposal and one agreed with the proposal if modified. The remaining commentators did not indicate a position on the proposal as a whole, but provided comments on specific proposed amendments. The Arbitrator Ethics Standards Working Group and the full CSCAC reviewed the public comments. The full text of
the comments received and the committee responses are set out in the attached comment chart at pages 46–110. The main substantive comments and the committee’s responses are discussed below.

Standard 3—Application and effective date
Several commentators provided input on the effective date of the proposed amendments. Two commentators indicated that the 2-month period between the Judicial Council’s October 25, 2013 meeting and the originally proposed January 1, 2014 effective date would not be sufficient to implement the proposed changes. Based on these comments, the committee recommends that the proposed amendments take effect July 1, 2014, rather than January 1, 2014. This will give arbitrators and arbitration provider organizations additional time to implement these changes, including making necessary changes to conflict-checking programs and other software.

Two other commentators suggested that a clarification was needed about whether the rule amendments would be applicable only to new cases after the effective date of the amendments or to cases already under way. To avoid confusion and disruption of pending arbitrations, when the ethics standards were originally adopted, they were specifically made inapplicable to cases in which the arbitrator was appointed before the effective date of the standards. For similar reasons, the committee recommends that these proposed amendments to the ethics standards only apply to arbitrators in arbitrations in which they are appointed on or after the proposed effective date of the amendments.

Standards 7(b) and 12—Disclosures and limitations relating to offers of future professional relationships or employment from parties or attorneys in a pending arbitration
The portion of the proposal that received the most comments was the proposed amendments to standards 7(b) and 12 relating to offers of future professional relationships or employment from a party or attorney in a pending arbitration.

Proposal circulated for public comment—As noted above, standard 12(b) currently requires arbitrators to disclose before appointment whether they will entertain offers for future professional relationships or employment from a party or attorney for a party in that arbitration while the arbitration is pending and allows parties to disqualify an arbitrator based on this disclosure. Standard 7(b), in turn, provides that if the arbitrator complied with standard 12(b), the arbitrator is not required to disclose any such offer of employment he or she subsequently received or accepts. The proposal circulated for public comment would have further required that, in consumer arbitrations, the arbitrator inform the parties in the pending arbitration before accepting any such offer from a party or attorney for a party in that arbitration and give the parties an opportunity to object to the arbitrator accepting the offer. The proposed amendments to standard 7(b), in turn, recognized this proposed requirement to inform the parties in the pending arbitration of such offers.

Public comments—Thirteen of the sixteen commentators provided input on these proposed amendments:
• One commentator agreed with the proposal as a whole, including this provision.
• One commentator indicated that it did not disagree with the amendments, but suggested that the language of the proposed amendment to standard 7(b) be clarified.
• Two commentators expressed the view that the proposed amendments did not go far enough in addressing offers of employment.
• Six commentators did not explicitly state a position on the proposed amendments but expressed concerns about the amendments or suggested narrowing their application.
• Three commentators specifically indicated that they opposed these amendments. Two of these also suggested that the proposed amendments, if not eliminated from the proposal, should be modified.

The concerns raised by these commentators about the proposal circulated for comment include:
• There is insufficient justification provided for amending the standards. There is no information indicating that the advance disclosure and disqualification procedure established by standard 12(b) is not providing sufficient protection for consumer parties.
• The right to object to the arbitrator taking a new case or other offer of employment will not be effective in protecting consumer parties. Even if a party does not want an arbitrator to accept new employment from the other side, the party will be reluctant to exercise the right to object for fear of angering the arbitrator. As a result, the right to object is an essentially illusory protection.
• If a party did object to an arbitrator accepting a new case or other business from a party or attorney in the pending arbitration, it could result in actual or perceived bias on the part of the arbitrator, thus expanding the grounds for motions to vacate awards. If a party does object and the arbitrator subsequently rules against that party, the party may, legitimately or not, claim that the arbitrator was biased against him or her because of the objection. This may be used as the basis for seeking vacatur of an unfavorable award.
• The objection procedure can lead to gamesmanship—parties who think that the arbitrator is likely to rule against them may have an incentive to object to the arbitrator accepting offers either because they want to punish the arbitrator or because the arbitrator might choose to withdraw when such an objection is filed.
• The amendments will discourage arbitrators, particularly full-time, well-respected arbitrators, from serving as arbitrators in consumer arbitrations because:
  o The proposed procedure places the arbitrator in the uncomfortable position of seeking a favor from the parties and attorneys in the pending arbitration, in the form of asking those parties for permission to accept an offer;
  o Arbitrators will not want to deal with the potential administrative burdens and delays associated with these cases;
Arbitrators will not want to be prevented from accepting new cases that are the core of their practice, including commercial and potentially even labor arbitrations, by taking an occasional consumer case.

These amendments will delay appointment of arbitrators in new arbitrations. Even if no party in the pending arbitration objects to the arbitrator serving in a new case, there will be additional time needed to inform the parties and give them an opportunity to object. There will be even more time needed to redo the arbitrator selection process in those new arbitrations in which the arbitrator originally agreed to by the parties is unavailable because the parties in a pending arbitration objected to the arbitrator taking a new case. Delay in reaching resolution may harm the parties in the new arbitrations, including consumer parties.

Implementing the objection procedure will be particularly difficult in situations, such as in the Kaiser dispute resolution program, where there is a panel of arbitrators who serve in cases in which one or more entities is a party in all or most cases.

The suggestions made by these commentators include:

- Remove the circulated amendments to standard 7(b) and standard 12 from the proposal.
- If there is a concern that parties do not understand when they receive the initial disclosure from an arbitrator that they will not be informed of subsequent offers, then:
  - Make this clearer in the initial disclosure; and
  - Impose a requirement of disclosure of future offers—but without imposing a consent requirement.
- If the notice and objection procedure is retained:
  - In standard 7(b), separate the provisions relating to consumer arbitrations and other arbitrations; and
  - In standard 12, clarify what information the arbitrator must provide about the offer.

Committee response to comments—In light of the concerns raised by commentators, the committee made the following changes to the proposal:

- Eliminated the proposed requirement to give parties in the pending consumer arbitration the right to object to the arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required:
  - Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;
  - The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer; and
  - The arbitrator is not also required to disclose that offer or its acceptance under standard 7.
These provisions are intended to make clear that receiving or accepting such an offer does not, by itself, create grounds for either disqualification of the arbitrator or vacatur of the arbitrator’s decision.

The committee concluded that these changes should address the majority of the concerns raised by the commentators, which were focused on the objection procedure in the proposal circulated for comment, while ensuring that parties in consumer arbitrations have full information about relationships between the arbitrator that will be rendering a decision about their dispute and other parties in the case. This openness should also serve as a deterrent to any effort by a party in a consumer arbitration to influence an arbitrator through offers of additional employment.

- Exempted offers to serve as a labor arbitrator or to serve as a dispute resolution neutral without compensation from the requirement to inform parties in consumer arbitrations when an offer is made. This change is intended to address some of the commentators’ concerns about discouraging arbitrators from serving in consumer arbitrations. As several commentators noted, arbitrators in labor arbitrations are not covered by the ethics standards and such arbitrations are not required to be disclosed under standard 7. Similarly, arbitrators are not required to disclose uncompensated service as a dispute resolution neutral under standard 7 and such offers do not raise concerns about potential economic influence on the arbitrator.

- Revised the initial disclosure requirement to separately address consumer arbitrations and other arbitrations:
  - For consumer arbitrations, the disclosure would be required to indicate that the parties would be informed of any offer made while the arbitration is pending; and
  - In other arbitrations, the disclosure would be required to indicate that the parties will not be informed of any such offers.

These changes should make the initial disclosure requirement easier to understand and more effective in making clear the consequences if parties choose not to exercise their right to disqualify a proposed arbitrator based on this disclosure.

There was not unanimity among the members of the Arbitrator Ethics Standards Working Group or the Civil and Small Claims Advisory Committee with regard to this proposed amendment. A minority of the working group members supported the adoption of additional measures, including more broadly applying the duty to inform parties of offers to all arbitrations, rather than just to consumer arbitrations, further strengthening the initial disclosure by requiring arbitrators to obtain a written acknowledgement of this disclosure signed by the parties, or keeping the objection procedure that was in the proposal circulated for public comment. Two members of the working group, and one member of the committee, Mr. Thomas Brandi, urged that arbitrators be prohibited from entertaining offers of employment from a party or attorney while the arbitration is pending. Mr. Brandi opposed the recommendation with respect to standard 12 for this reason.
Standard 7(e)—Disclosure of professional discipline

When the earlier proposal to amend the standards was circulated for public comment in 2011, these amendments garnered the most public comment. This time, there was little comment on these amendments and no opposition. One commentator suggested the proposal should be more specific about what information must be disclosed about professional discipline. In response to this comment, the committee revised the proposal to require the disclosure specify the date of the disciplinary action, what professional or occupational disciplinary agency or licensing board took the action, and the charge made or reasons given by that professional or occupational disciplinary agency or licensing board for the disciplinary action.

Standard 8—Disclosures relating to administering provider organizations

Reliance on information provided by provider organization in making additional disclosures in consumer arbitrations administered by a provider organization—The proposal circulated for public comment included proposed amendments to standard 8(a) that would provide an arbitrator may only rely on information from a provider organization’s website to make required disclosures under standard 8 if the provider organization represents that the information on that website is current as of the most recent quarter. This provision was intended to reflect the requirement in Code of Civil Procedure section 1291.96 that provider organizations post quarterly information on the consumer arbitrations they have administered and the text of the proposed amendment specifically referenced Code of Civil Procedure section 1291.96.

Two commentators provided input on this proposed amendment. One commentator noted that the Legislature is currently considering possible amendments to section 1291.96 and therefore suggested the cross-reference to this section could create uncertainty. Another commentator suggested it would be clearer if the standard simply referred to the web information being current as to the immediately preceding calendar quarter. Based on these comments, the committee revised the language of this proposed amendment to eliminate the reference to Code of Civil Procedure section 1291.96 and to refer to the immediately preceding calendar quarter. This modified language is still consistent with the quarterly data publication requirement of Code of Civil Procedure section 1291.96; in order for an arbitrator to rely on any information a provider supplied under section 1291.96 in making a disclosure under standard 8, the arbitration provider organization would still be required to represent that the data were current up to the end of the preceding calendar quarter.

Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization—The proposal circulated for public comment included proposed amendments requiring that, in consumer arbitrations administered by a provider organization, the arbitrator disclose whether that provider organization has a financial interest in or relationship with a party or whether a party or lawyer in the arbitration has a financial interest in or relationship with the provider organization. In the invitation to comment, these proposed amendments were described as reinstating provisions previously removed from the standards in 2002 when the Legislature adopted Code of Civil
Procedure section 1291.92 prohibiting an arbitration provider organization from administering an arbitration where any such relationship exists.

Several commentators pointed out, while Code of Civil Procedure section 1291.92 does address situations in which a provider organization has a financial interest in a party or a party or lawyer in the arbitration has a financial interest in the provider organization, it does not address situations involving a “financial relationship” between a provider organization and a party or attorney. They also correctly pointed out the provisions that were in the ethics standards from April through December 2002 and were removed in response to the adoption of section 1291.92 similarly did not address “financial relationships” between a provider organization and a party or attorney. Finally, they noted, while “financial interest” is defined in the standards through a cross-reference to Code of Civil Procedure section 170.5, there is no definition of “financial relationship” in the standards, which could result in uncertainty about what must be disclosed. Several suggested modifying this proposed amendment to eliminate, limit, or clarify the proposed disclosure obligations with respect to financial relationships.

Based on these comments, the committee revised the proposal to delete the references to “financial relationship” in the proposed amendments to standard 8(b)(1)(A) and (B). Eliminating these references will not mean an arbitrator in a consumer arbitration administered by a provider organization has no obligation to make disclosures with respect to financial relationships between the provider organization and a party or attorney. The introductory sentence of standard 8(b)(1) currently requires disclosure of:

Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration.

As in standard 7, 8(b)(1)(A) and (B) simply provide examples of matters that must be disclosed under this broader standard. Note, however, the introductory sentence of standard 8 specifies the disclosure obligation only applies to “significant” financial or professional relationships or affiliations. The amendments to standard 8(b)(1)(A) and (B) circulated for public comment would have broadened this to require disclosure of any financial relationship between an administering provider organization and a party or attorney, which appears to be the main source of the commentators’ concerns.

**Standard 16—Arbitrator compensation**

To ensure that parties receive information about requirements for advance deposit of fees and about the arbitrator’s practice if a party fails to timely pay the arbitrator’s fees that may be important to them in selecting an arbitrator, the proposal circulated for public comment included proposed amendments to standard 16 to specifically require information about these issues be included in the fee information provided before an arbitrator accepts appointment.
Two commentators expressed concern that this provision would require or encourage arbitrators to adopt a set policy regarding advance deposit of fees or failure to pay fees. In response to these comments, the committee revised the proposal to include an amendment to the comment accompanying standard 16 to clarify that this provision is not intended to require that arbitrators establish a fixed policy or practice in this regard, only that, if an arbitrator or administering provider organization has such a policy or practice, the parties be informed of that policy or practice.

**Standard 17—Marketing**

*Proposal circulated for public comment*—The proposal circulated for public comment would have prohibited arbitrators from soliciting a particular case or “caseload” for themselves or for a “closed panel” of which they are a member. The invitation to comment specifically sought input on whether the language of the proposed amendment was sufficiently clear.

*Public comments*—This portion of the proposal received the second largest number of comments. Seven commentators suggested the language used in the proposed amendment, including specifically “solicit,” “caseload,” and “closed panel,” was unclear. Four of these commentators expressed opposition to this amendment as drafted.

The main concern raised by these commentators was that, absent clear definitions, specific exemptions for certain activities, and/or examples of prohibited activities, this amendment could be construed very broadly to prohibit arbitrators from engaging in activities that the commentators suggested are not unethical or do not raise concerns about actual or perceived bias and should be permissible, including:

- Responding to a request for a preappointment interview by parties in a dispute who are trying to select an appropriate individual to arbitrate their dispute or participating in such an interview;
- Seeking appointment in specific types of cases, such as medical malpractice or employment cases, in which the neutral has expertise;
- Sending marketing material to attorneys who specialize in a particular type of case and seeking to be considered as an arbitrator in future disputes of that type;
- Contacting provider organizations that maintain a panel of arbitrators with expertise in a subject area, such as Kaiser, about being placed on their panel;
- Helping to staff a provider organization’s booth at a professional conference;
- Providing an attorney, law firm, or business with the business card of a provider organization or information about the provider’s procedures or services;
- Suggesting a particular provider organization would be suitable to handle a particular case or caseload; and
- Helping to prepare a response on behalf of a provider organization to a request for proposals to provide dispute resolution services for a series of disputes.
The suggestions made by these commentators include:

- Remove this requirement from the proposal (commentators who opposed this amendment);
- Define “solicit,” “caseload,” and “closed panel” or otherwise clarify this proposed amendment; and
- Add a comment to make it clear the standard does not preclude ordinary marketing activities or providing examples of what is permitted and what is not.

Committee response to comments—In light of the concerns raised by commentators, the committee revised the proposed amendments to standard 17 to:

- Narrow the amendment to prohibiting solicitation of appointment as an arbitrator in a specific case or specific cases. This revision eliminates the use of the terms “caseload” and “closed panel,” which commentators found problematic. The proposed new language should also be familiar to arbitrators because it is based on the language of the Ethics for International Arbitrators of the International Bar Association, which provides that “it is inappropriate to contact parties in order to solicit appointment as an arbitrator” and the language of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes in effect from 1977–2003, which provided that “it is inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves.”
- Add a definition of “solicit.” The basic definition recommended is modeled on the definition in Rule 1-400 of the Rules of Professional Conduct of the State Bar of California, with the addition of language about online communication from the Model Rules of Professional Conduct of the American Bar Association. It should therefore be familiar to attorney arbitrators. The recommended provision also identifies specific activities that are not considered solicitation, including responding to a request for proposals from all parties in a case to submit a proposal to provide arbitration services in that case and responding to inquiries concerning the arbitrator’s availability, qualifications, experience, or fee arrangements.
- Consolidate the language relating to marketing activities in subdivision (a).

Other alternatives considered
In addition to the alternatives considered in response to the public comments on the proposal circulated for public comment in 2013, CSCAC also considered other alternatives.

Not proposing any amendments to the standards
CSCAC considered the option of not proposing any changes to the ethics standards at this time. This would mean that standards would not reflect recent decisions about their application, arbitrators would continue to have no specific obligation to disclose public professional discipline, and there would be inconsistencies between the intended scope of disclosures about past professional relationships between an arbitrator’s spouse and a lawyer in the arbitration and
the case law concerning these disclosures. The committee concluded the recommended changes will provide helpful clarifications of the standards in light of recent case law and help ensure that the standards better serve their goals of guiding the conduct of arbitrators, informing and protecting participants in arbitration, and promoting public confidence in the arbitration process.

**Not recommending the addition of a new requirement for disclosure of professional discipline**

CSCAC considered not recommending the addition of a new requirement that arbitrators disclose public professional discipline. Factors that support not recommending such a requirement include:

- Arbitrators are already required to disclose any professional discipline the arbitrator believes could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;
- Parties in an arbitration can access information about public professional discipline imposed on an arbitrator by contacting the appropriate professional or occupational disciplinary agency or licensing board for the profession of which the arbitrator is or was a member;
- The length and complexity of the disclosure requirements for arbitrators would be increased if this requirement were added; and
- Arbitrators and arbitration provider organizations would need to modify their disclosure checklists or practices if this requirement were added.

Factors that support adding such a requirement to the ethics standards include:

- Requiring disclosure by arbitrators will place the burden of obtaining and sharing information about public professional discipline on the person who is most knowledgeable about whether any such discipline has been imposed, rather than on parties, including self-represented parties, who may be unaware of the complete professional background of an arbitrator or lack knowledge about how to access information about public professional discipline;
- The parties who must decide who will serve as a neutral arbitrator in their case will receive disclosures about public professional discipline imposed on the arbitrator that are consistent with disclosures that currently must be made to parties by arbitrators in securities arbitrations conducted under FINRA rules and by potential judges, attorneys, and mediators in court-connected mediation programs to the public officials or body that determines whether individuals can serve in those capacities. This should improve public confidence in the integrity of private arbitrators and the arbitration process; and
- It will be clearer that certain public professional discipline must be disclosed. This should:
  - Reduce burdens on arbitrators of having to assess every public professional disciplinary action based on whether it could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;
o Reduce situations in which public professional discipline is not disclosed, resulting in parties questioning the integrity of the arbitration process and potentially filing requests to vacate arbitration awards;
o Reduce burdens on courts by reducing the number of requests to vacate arbitration awards based on failure to disclose public professional discipline and reducing the circumstances in which courts will have to assess such requests based on the fact-intensive criterion of whether the undisclosed professional discipline could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial; and
o Support the finality of arbitration awards.

Evaluating these factors, the CSCAC concluded the reasons to include a requirement for disclosure of public professional discipline in the ethics standards outweigh the reasons not to include it. CSCAC therefore recommends amending the standards to include such a requirement.

**Alternative limitations on future professional relationships or employment**

CSCAC also considered proposing the following alternative amendments to standard 12, regarding future professional relationships or employment:

- Prohibiting an arbitrator from entertaining or accepting any offer of employment from a party or lawyer for a party in a pending arbitration; or
- Requiring that an arbitrator who wishes to entertain or accept any offers of employment from a party or lawyer for a party in a pending arbitration, before accepting appointment, not simply disclose this but obtain the written consent of all parties.

The committee ultimately decided to focus on consumer arbitrations, rather than all arbitrations, because the consumer parties in these arbitrations are typically more vulnerable, have less information and knowledge about the arbitration process, and are less able to exercise choices with regard to that process. The committee decided not to propose a prohibition on accepting offers of employment in these arbitrations for a combination of reasons, including that the parties already have the right to disqualify an arbitrator based on the initial disclosure the arbitrator would entertain offers of employment from a party or attorney in the pending arbitration and that most other relationships between an arbitrator and a party or attorney are not prohibited, but subject to disclosure under the standards.

**Implementation Requirements, Costs, and Operational Impacts**

Because the ethics standards apply to arbitrators in contractual arbitration, not court-connected arbitration programs, this proposal should not result in appreciable implementation requirements, costs, or operational impacts on the courts. There will be impacts on arbitrators and arbitration provider organizations, however, including a need to update existing disclosure checklists and practices.
Attachments

1. Roster of Arbitrator Ethics Standards Working Group at page 27
2. Standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration at pages 28–45
3. Comment chart at pages 46–110
<table>
<thead>
<tr>
<th>Name</th>
<th>Title/Position</th>
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<tbody>
<tr>
<td>Hon. Ramona G. See, Co-Chair</td>
<td>Judge of the Superior Court of California, County of Los Angeles</td>
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<tr>
<td>Mr. Jay Folberg, Co-Chair</td>
<td>JAMS</td>
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<tr>
<td>Mr. Kevin Baker</td>
<td>Deputy Chief Counsel, Assembly Judiciary Committee</td>
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<tr>
<td>Mr. William B. Baker, P.E.</td>
<td>Civil Engineer, Arbitrator/Mediator</td>
</tr>
<tr>
<td>Hon. Helen Bendix</td>
<td>Judge of the Superior Court of California, County of Los Angeles</td>
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<tr>
<td>Mr. Saul Bercovitch</td>
<td>The State Bar of California</td>
</tr>
<tr>
<td>Hon. Lorna H. Brumfield</td>
<td>Judge of the Superior Court of California, County of Kern</td>
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<tr>
<td>Mr. Harry W. R. Chamberlain II</td>
<td>Buchalter Nemer, A Professional Corporation</td>
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<td>Mr. Richard Chernick</td>
<td>JAMS</td>
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<tr>
<td>Ms. Deborah Decker</td>
<td>Court Operations Manager, Superior Court of California, County of Butte</td>
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<tr>
<td>Hon. Michele E. Flurer</td>
<td>Judge of the Superior Court of California, County of Los Angeles</td>
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<tr>
<td>Mr. Robert A Holtzman</td>
<td>Loeb &amp; Loeb LLP</td>
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<tr>
<td>Mr. Paul R. Kiesel</td>
<td>Partner, Kiesel, Boucher, Larson</td>
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<tr>
<td>Hon. Ronni B. MacLaren</td>
<td>Judge of the Superior Court of California, County of Alameda</td>
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<tr>
<td>Mr. James Madison</td>
<td>Attorney, Arbitrator</td>
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<tr>
<td>Ms. Suzanne Martindale</td>
<td>Staff Attorney, Consumers Union</td>
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<tr>
<td>Mr. Cliff Palefsky</td>
<td>McGuinn Hillsman &amp; Palefsky, 535 Pacific Ave</td>
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<tr>
<td>Ms. Elizabeth Strickland</td>
<td>ADR Administrator, Superior Court of California, County of Santa Clara</td>
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<tr>
<td>Mr. William T. Tanner</td>
<td>Directing Attorney, Legal Aid Society of Orange County</td>
</tr>
<tr>
<td>Mr. Gene Wong</td>
<td>Chief Counsel, Office of the Senate President Pro Tempore</td>
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</tbody>
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Standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration would be amended, effective July 1, 2014, to read:

**Standard 2. Definitions**

As used in these standards:

(a) **Arbitrator and neutral arbitrator**

(1) * * *

(2) Where the context includes events or acts occurring before an appointment is final, “arbitrator” and “neutral arbitrator” include a person who has been served with notice of a proposed nomination or appointment. For purposes of these standards, “proposed nomination” does not include nomination of persons by a court under Code of Civil Procedure section 1281.6 to be considered for possible selection as an arbitrator by the parties or appointment as an arbitrator by the court.

(b)–(n) * * *

(o) “Member of the arbitrator’s extended family” means the parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator’s spouse or domestic partner or the spouse or domestic partner of such person.

(p)–(s) * * *

**Standard 3. Application and effective date**

(a) * * *

(b) These standards do not apply to:

(1) Party arbitrators, as defined in these standards; or

(2) Any arbitrator serving in:

(A) An international arbitration proceeding subject to the provisions of title 9.3 of part III of the Code of Civil Procedure;

(B) A judicial arbitration proceeding subject to the provisions of chapter 2.5 of title 3 of part III of the Code of Civil Procedure;
(C) An attorney-client fee arbitration proceeding subject to the provisions of article 13 of chapter 4 of division 3 of the Business and Professions Code;

(D) An automobile warranty dispute resolution process certified under California Code of Regulations title 16, division 33.1 or an informal dispute settlement procedure under Code of Federal Regulations title 16, chapter 1, part 703;

(E) An arbitration of a workers’ compensation dispute under Labor Code sections 5270 through 5277;

(F) An arbitration conducted by the Workers’ Compensation Appeals Board under Labor Code section 5308;

(G) An arbitration of a complaint filed against a contractor with the Contractors State License Board under Business and Professions Code sections 7085 through 7085.7;

(H) An arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements; or

(I) An arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the United States Securities and Exchange Commission under federal law.

(c) The following persons are not subject to the standards or to specific amendments to the standards in certain arbitrations:

(1) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2002, are not subject to these standards in those arbitrations.

(2) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to standard 8 in those arbitrations.

(3) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2014, are not subject to the amendments to standards 2, 7, 8, 12, 16, and 17 that took effect July 1, 2014 in those arbitrations.
Comment to Standard 3

With the exception of standard 8 and the amendments to standards 2, 7, 8, 12, 16, and 17 that took effect July 1, 2014, these standards apply to all neutral arbitrators appointed on or after July 1, 2002, who meet the criteria of subdivision (a). Arbitration provider organizations, although not themselves subject to these standards, should be aware of them when performing administrative functions that involve arbitrators who are subject to these standards. A provider organization’s policies and actions should facilitate, not impede, compliance with the standards by arbitrators who are affiliated with the provider organization.

Subdivision (b)(2)(I) is intended to implement the decisions of the California Supreme Court in Jevne v. Superior Court ((2005) 35 Cal.4th 935) and of the United States Court of Appeals for the Ninth Circuit in Credit Suisse First Boston Corp. v. Grunwald ((9th Cir. 2005) 400 F.3d 1119).

Standard 7. Disclosure

(a) Intent

This standard is intended to identify the matters that must be disclosed by a person nominated or appointed as an arbitrator. To the extent that this standard addresses matters that are also addressed by statute, it is intended to include those statutory disclosure requirements, not to eliminate, reduce, or otherwise limit them.

(b) General provisions

For purposes of this standard:

(1) * * *

(2) Offers of employment or professional relationship

(A) Except as provided in (B), if an arbitrator has disclosed to the parties in an arbitration that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12, the arbitrator is not also required under this standard to disclose to the parties in that arbitration any such offer from a party or lawyer for a party that he or she subsequently receives or accepts while that arbitration is pending.

(B) In a consumer arbitration, if an arbitrator has disclosed to the parties that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12 and has informed the parties in the pending arbitration about any such offer and the acceptance of any such offer as required by subdivision (d) of standard 12, the arbitrator is not also required under this standard to disclose that offer or the acceptance of that offer to the parties in that arbitration.
(3) ***

(c) Time and manner of disclosure

(1) **Initial disclosure**

Within ten calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing all matters listed in subdivisions (d) and (e) of this standard of which the arbitrator is then aware.

(2) **Supplemental disclosure**

If an arbitrator subsequently becomes aware of a matter that must be disclosed under either subdivision (d) or (e) of this standard, the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter.

(d) **Required disclosures**

A person who is nominated or appointed as an arbitrator or a proposed arbitrator or arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial, including, but not limited to, all of the following:

(1) **Family relationships with party**

The arbitrator or a member of the arbitrator’s immediate or extended family is:

(A) A party;

(B) A party’s spouse or domestic partner, of a party; or

(C) An officer, director, or trustee of a party.

(2) **Family relationships with lawyer in the arbitration**

(A) **Current relationships**

The arbitrator, or the spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator or the arbitrator’s spouse or domestic partner is:

(A)(i) A lawyer in the arbitration;
(B)(i) The spouse or domestic partner of a lawyer in the arbitration; or

(C)(ii) Currently associated in the private practice of law with a lawyer in the arbitration.

(B) Past relationships

The arbitrator or the arbitrator’s spouse or domestic partner was associated in the private practice of law with a lawyer in the arbitration within the preceding two years.

(3) Significant personal relationship with party or lawyer for a party

The arbitrator or a member of the arbitrator’s immediate family has or has had a significant personal relationship with any party or lawyer for a party.

(4) Service as arbitrator for a party or lawyer for party

(A) The arbitrator is serving or, within the preceding five years, has served:

(i) As a neutral arbitrator in another prior or pending noncollective bargaining case involving a party to the current arbitration or a lawyer for a party.

(ii) As a party-appointed arbitrator in another prior or pending noncollective bargaining case for either a party to the current arbitration or a lawyer for a party.

(iii) As a neutral arbitrator in another prior or pending noncollective bargaining case in which he or she was selected by a person serving as a party-appointed arbitrator in the current arbitration.

(B)–(C) ***

(5) Compensated service as other dispute resolution neutral

The arbitrator is serving or has served as a dispute resolution neutral other than an arbitrator in another pending or prior noncollective bargaining case involving a party or lawyer for a party and the arbitrator received or expects to receive any form of compensation for serving in this capacity.

(A) Time frame

For purposes of this paragraph (5), “prior case” means any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator’s proposed nomination or
appointment, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002.

(B)–(C) **

(6) **Current arrangements for prospective neutral service**

Whether the arbitrator has any current arrangement with a party concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in or, within the last two years, has participated in discussions regarding such prospective employment or service with a party.

(7) **Attorney-client relationship**

Any attorney-client relationship the arbitrator has or has had with a party or lawyer for a party. Attorney-client relationships include the following:

(A) An officer, a director, or a trustee of a party is or, within the preceding two years, was a client of the arbitrator in the arbitrator’s private practice of law or a client of a lawyer with whom the arbitrator is or was associated in the private practice of law;

(B) In any other proceeding involving the same issues, the arbitrator gave advice to a party or a lawyer in the arbitration concerning any matter involved in the arbitration; and

(C) The arbitrator served as a lawyer for or as an officer of a public agency which is a party and personally advised or in any way represented the public agency concerning the factual or legal issues in the arbitration.

(8) **Employee, expert witness, or consultant relationships**

The arbitrator or a member of the arbitrator’s immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party or for a lawyer in the arbitration.

(8)(9) **Other professional relationships**

Any other professional relationship not already disclosed under paragraphs (2)–(7)(8) that the arbitrator or a member of the arbitrator’s immediate family has or has had with a party or lawyer for a party, including the following:

(A) The arbitrator was associated in the private practice of law with a lawyer in the arbitration within the last two years.
(B) The arbitrator or a member of the arbitrator’s immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party; and

(C) The arbitrator or a member of the arbitrator’s immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a lawyer in the arbitration.

(9)(10) Financial interests in party

The arbitrator or a member of the arbitrator’s immediate family has a financial interest in a party.

(10)(11) Financial interests in subject of arbitration

The arbitrator or a member of the arbitrator’s immediate family has a financial interest in the subject matter of the arbitration.

(11)(12) Affected interest

The arbitrator or a member of the arbitrator’s immediate family has an interest that could be substantially affected by the outcome of the arbitration.

(12)(13) Knowledge of disputed facts

The arbitrator or a member of the arbitrator’s immediate or extended family has personal knowledge of disputed evidentiary facts relevant to the arbitration. A person who is likely to be a material witness in the proceeding is deemed to have personal knowledge of disputed evidentiary facts concerning the proceeding.

(13)(14) Membership in organizations practicing discrimination

The arbitrator’s membership in is a member of any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation. Membership in a religious organization, an official military organization of the United States, or a nonprofit youth organization need not be disclosed unless it would interfere with the arbitrator’s proper conduct of the proceeding or would cause a person aware of the fact to reasonably entertain a doubt concerning the arbitrator’s ability to act impartially.

(14)(15) Any other matter that:

(A) Might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;
(B) Leads the proposed arbitrator to believe there is a substantial doubt as to his or her capacity to be impartial, including, but not limited to, bias or prejudice toward a party, lawyer, or law firm in the arbitration; or

(C) Otherwise leads the arbitrator to believe that his or her disqualification will further the interests of justice.

(e) **Inability to conduct or timely complete proceedings** Other required disclosures

In addition to the matters that must be disclosed under subdivision (d), an arbitrator must also disclose:

(1) **Professional discipline**

(A) If the arbitrator has been disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. The disclosure must specify the date of the revocation, what professional or occupational disciplinary agency or licensing board revoked the license, and the reasons given by that professional or occupational disciplinary agency or licensing board for the revocation.

(B) If the arbitrator has resigned his or her membership in the State Bar or another professional or occupational licensing agency or board, whether in California or elsewhere, while public or private disciplinary charges were pending. The disclosure must specify the date of the resignation, what professional or occupational disciplinary agency or licensing board had charges pending against the arbitrator at the time of the resignation, and what those charges were.

(C) If within the preceding 10 years public discipline other than that covered under (A) has been imposed on the arbitrator by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. “Public discipline” under this provision means any disciplinary action imposed on the arbitrator that the professional or occupational disciplinary agency or licensing board identifies in its publicly available records or in response to a request for information about the arbitrator from a member of the public. The disclosure must specify the date the discipline was imposed, what professional or occupational disciplinary agency or licensing board imposed the discipline, and the reasons given by that professional or occupational disciplinary agency or licensing board for the discipline.
(2) **Inability to conduct or timely complete proceedings**

(A) If the arbitrator is not able to properly perceive the evidence or properly conduct the proceedings because of a permanent or temporary physical impairment; and

(B) Any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner.

(f) **Continuing duty**

An arbitrator’s duty to disclose the matters described in subdivisions (d) and (e) of this standard is a continuing duty, applying from service of the notice of the arbitrator’s proposed nomination or appointment until the conclusion of the arbitration proceeding.

**Comment to Standard 7**

This standard requires proposed arbitrators to disclose to all parties, in writing within 10 days of service of notice of their proposed nomination or appointment, all matters they are aware of at that time that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial as well as those matters listed under subdivision (e), and to disclose. This standard also requires that if arbitrators subsequently become aware of any additional such matters, they must make supplemental disclosures of these matters within 10 days of becoming aware of them. This latter requirement is intended to address both matters existing at the time of nomination or appointment of which the arbitrator subsequently becomes aware and new matters that arise based on developments during the arbitration, such as the hiring of new counsel by a party.

Timely disclosure to the parties is the primary means of ensuring the impartiality of an arbitrator. It provides the parties with the necessary information to make an informed selection of an arbitrator by disqualifying or ratifying the proposed arbitrator following disclosure. See also standard 12, concerning disclosure and disqualification requirements relating to concurrent and subsequent employment or professional relationships between an arbitrator and a party or attorney in the arbitration. A party may disqualify an arbitrator for failure to comply with statutory disclosure obligations (see Code Civ. Proc., § 1281.9(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which the arbitrator was then aware is a ground for vacatur of the arbitrator’s award (see Code Civ. Proc., § 1286.2(a)(6)(A)).

The arbitrator’s overarching duty under subdivision (d) of this standard, which mirrors the duty set forth in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial. While the remaining subparagraphs of subdivision (d) require the disclosure of specific interests, relationships, or affiliations, these are only examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The absence of the particular fact that none of the interests, relationships, or affiliations specifically listed in the subparagraphs of (d) are present in a particular case does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator’s ability to be impartial and that therefore must be disclosed. Similarly, the fact that a particular interest, relationship, or affiliation present
in a case is not specifically enumerated in one of the examples given in these subparagraphs does not
mean that it must not be disclosed. An arbitrator must make determinations concerning disclosure on a
case-by-case basis, applying the general criteria for disclosure under paragraph subdivision (d); is the
matter something that could cause a person aware of the facts to reasonably entertain a doubt that the
arbitrator would be able to be impartial?

Code of Civil Procedure section 1281.85 specifically requires that the ethics standards adopted by the
Judicial Council address the disclosure of interests, relationships, or affiliations that may constitute
conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity.
Section 1281.85 further provides that the standards “shall be consistent with the standards established for
arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and
disqualification requirements established by this chapter [chapter 2 of title 9 of part III, Code of Civil
Procedure, sections 1281–1281.95].”

Code of Civil Procedure section 1281.9 already establishes detailed requirements concerning disclosures
by arbitrators, including a specific requirement that arbitrators disclose the existence of any ground
specified in Code of Civil Procedure section 170.1 for disqualification of a judge. This standard does not
eliminate or otherwise limit those requirements; in large part, it simply consolidates and integrates those
existing statutory disclosure requirements by topic area. This standard does, however, expand upon or
clarify the existing statutory disclosure requirements in the following ways:

- Requiring arbitrators to disclose make supplemental disclosures to the parties regarding any
  matter about which they become aware after the time for making an initial disclosure has expired,
  within 10 calendar days after the arbitrator becomes aware of the matter (subdivision (f)(c)).
- Expanding required disclosures about the relationships or affiliations of an arbitrator’s family
  members to include those of an arbitrator’s domestic partner (subdivisions (d)(1) and (2); see also
  definitions of immediate and extended family in standard 2).
- Requiring arbitrators, in addition to making statutorily required disclosures regarding prior
  service as an arbitrator for a party or attorney for a party, to disclose both prior services both
  as a neutral arbitrator selected by a party arbitrator in the current arbitration and prior compensated
  service as any other type of dispute resolution neutral for a party or attorney in the arbitration
  (e.g., temporary judge, mediator, or referee) (subdivisions (d)(4)(C)(ii) and (5)).
- If a disclosure includes information about five or more cases, requiring arbitrators to provide a
  summary of that information (subdivisions (d)(4)(C) and (5)(C).
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or,
  within the preceding two years, was an employee, expert witness, or consultant for a party or a
  lawyer in the arbitration (subdivisions (d)(8)(A) and (B)).
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family has an
  interest that could be substantially affected by the outcome of the arbitration (subdivision
  (d)(14)(12)).

If a disclosure includes information about five or more cases, requiring arbitrators to provide a
summary of that information (subdivisions (d)(4) and (5).

- Requiring arbitrators to disclose membership in organizations that practice invidious
  discrimination on the basis of race, sex, religion, national origin, or sexual orientation
  (subdivision (d)(14)(14)).
• Requiring the arbitrator to disclose if he or she was disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, resigned membership in the State Bar or another licensing agency or board while disciplinary charges were pending, or had any other public discipline imposed on him or her by a professional or occupational disciplinary agency or licensing board within the preceding 10 years (subdivision (e)(1)). The standard identifies the information that must be included in such a disclosure; however, arbitrators may want to provide additional information to assist parties in determining whether to disqualify an arbitrator based on such a disclosure.

• Requiring the arbitrator to disclose any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner (subdivision (d)(e)(2)).

• Clarifying that the duty to make disclosures is a continuing obligation, requiring disclosure of matters that were not known at the time of nomination or appointment but that become known afterward (subdivision (e)(f)).

It is good practice for an arbitrator to ask each participant to make an effort to disclose any matters that may affect the arbitrator’s ability to be impartial.

Standard 8. Additional disclosures in consumer arbitrations administered by a provider organization

(a) General provisions

(1) Reliance on information provided by provider organization

Except as to the information in (c)(1), an arbitrator may rely on information supplied by the administering provider organization in making the disclosures required by this standard only if the provider organization represents that the information the arbitrator is relying on is current through the end of the immediately preceding calendar quarter. If the information that must be disclosed is available on the Internet, the arbitrator may comply with the obligation to disclose this information by providing in the disclosure statement required under standard 7(c)(1) the Internet address of the specific web page at which the information is located and notifying the party that the arbitrator will supply hard copies of this information upon request.

(2) Reliance on representation that not a consumer arbitration

An arbitrator is not required to make the disclosures required by this standard if he or she reasonably believes that the arbitration is not a consumer arbitration based on reasonable reliance on a consumer party’s representation that the arbitration is not a consumer arbitration.
(b) Additional disclosures required

In addition to the disclosures required under standard 7, in a consumer arbitration as defined in standard 2 in which a dispute resolution provider organization is coordinating, administering, or providing the arbitration services, a person proposed arbitrator who is nominated or appointed as an arbitrator on or after January 1, 2003 must disclose the following within the time and in the same manner as the disclosures required under standard 7(c)(1):

(1) Relationships between the provider organization and party or lawyer in arbitration

Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration. Information that must be disclosed under this standard includes:

(A) The provider organization has a financial interest in a party.

(B) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of or has a financial interest in the provider organization.

(C) Within the preceding two years the provider organization has received a gift, bequest, or favor from a party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated.

(D) The provider organization has entered into, or the arbitrator currently expects that the provider organization will enter into, an agreement or relationship with any party or lawyer in the arbitration or a law firm with which a lawyer in the arbitration is currently associated under which the provider organization will administer, coordinate, or provide dispute resolution services in other noncollective bargaining matters or will provide other consulting services for that party, lawyer, or law firm.

(E) The provider organization is coordinating, administering, or providing dispute resolution services or has coordinated, administered, or provided such services in another pending or prior noncollective bargaining case in which a party or lawyer in the arbitration was a party or a lawyer. For purposes of this paragraph, “prior case” means a case in which the dispute resolution neutral affiliated with the provider organization concluded his or her service within the two years before the date of the arbitrator’s proposed nomination or appointment, but does not include any case in which the dispute resolution neutral concluded his or her service before July 1, 2002.
(2) **Case information**

If the provider organization is acting or has acted in any of the capacities described in paragraph (1)(D)(E), the arbitrator must disclose:

(A) The names of the parties in each prior or pending case and, where applicable, the name of the attorney in the current arbitration who is involved in the pending case or who was involved in the prior case;

(B) The type of dispute resolution services (arbitration, mediation, reference, etc.) coordinated, administered, or provided by the provider organization in the case; and

(C) In each prior case in which a dispute resolution neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge appointed under article VI, § 4 of the California Constitution, or a referee appointed under Code of Civil Procedure sections 638 or 639, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties’ attorneys.

(3) **Summary of case information**

If the total number of cases disclosed under paragraph (1)(D)(E) is greater than five, the arbitrator must also provide a summary of these cases that states:

(A) The number of pending cases in which the provider organization is currently providing each type of dispute resolution services;

(B) The number of prior cases in which the provider organization previously provided each type of dispute resolution services;

(C) The number of such prior cases in which a neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge, or a referee; and

(D) The number of prior cases in which the party to the current arbitration or the party represented by the lawyer in the current arbitration was the prevailing party.

(c) **Relationship between provider organization and arbitrator**

If a relationship or affiliation is disclosed under paragraph subdivision (b), the arbitrator must also provide information about the following:

(1) Any financial relationship or affiliation the arbitrator has with the provider organization other than receiving referrals of cases, including whether the
arbitrator has a financial interest in the provider organization or is an employee of the provider organization;

(2) The provider organization’s process and criteria for recruiting, screening, and training the panel of arbitrators from which the arbitrator in this case is to be selected;

(3) The provider organization’s process for identifying, recommending, and selecting potential arbitrators for specific cases; and

(4) Any role the provider organization plays in ruling on requests for disqualification of the arbitrator.

(d) ***

Comment to Standard 8

This standard only applies in consumer arbitrations in which a dispute resolution provider organization is administering the arbitration. Like standard 7, this standard expands upon the existing statutory disclosure requirements. Code of Civil Procedure section 1281.95 requires arbitrators in certain construction defect arbitrations to make disclosures concerning relationships between their employers or arbitration services and the parties in the arbitration. This standard requires arbitrators in all consumer arbitrations to disclose any financial or professional relationship between the administering provider organization and any party, attorney, or law firm in the arbitration and, if any such relationship exists, then the arbitrator must also disclose his or her relationship with the dispute resolution provider organization. This standard does not require an arbitrator to disclose if the provider organization has a financial interest in a party or lawyer in the arbitration or if a party or lawyer in the arbitration has a financial interest in the provider organization because even though provider organizations are prohibited under Code of Civil Procedure section 1281.92 from administering any consumer arbitration where any such relationship exists.

Subdivision (b). Currently expected relationships or affiliations that must be disclosed include all relationships or affiliations that the arbitrator, at the time the disclosure is made, expects will be formed. For example, if the arbitrator knows that the administering provider organization has agreed in concept to enter into a business relationship with a party, but they have not yet signed a written agreement formalizing that relationship, this would be a “currently expected” relationship that the arbitrator would be required to disclose.

Standard 12. Duties and limitations regarding future professional relationships or employment

(a) Offers as lawyer, expert witness, or consultant

From the time of appointment until the conclusion of the arbitration, an arbitrator must not entertain or accept any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration.
(b) **Offers for other employment or professional relationships other than as a lawyer, expert witness, or consultant**

(1) In addition to the disclosures required by standards 7 and 8, within ten calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing if, while that arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case.

(2) If the arbitrator discloses that he or she will entertain such offers of employment or new professional relationships while the arbitration is pending:

   (A) In consumer arbitrations, the disclosure must also state that the arbitrator will inform the parties as required under (d) if he or she subsequently receives an offer while that arbitration is pending.

   (B) In all other arbitrations, the disclosure must also state that the arbitrator will not inform the parties if he or she subsequently receives an offer while that arbitration is pending.

(3) A party may disqualify the arbitrator based on this disclosure by serving a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91(b).

(c) **Acceptance of offers under (b) prohibited unless intent disclosed**

If an arbitrator fails to make the disclosure required by subdivision (b) of this standard, from the time of appointment until the conclusion of the arbitration the arbitrator must not entertain or accept any such offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral.

(d) **Required notice of offers under (b)**

If, in the disclosure made under subdivision (b), the arbitrator states that he or she will entertain offers of employment or new professional relationships covered by (b), the arbitrator may entertain such offers. However, in consumer arbitrations, from the time of appointment until the conclusion of the arbitration, the arbitrator must inform all parties to the current arbitration of any such offer and whether it was accepted as provided in this subdivision.

(1) The arbitrator in a consumer arbitration must notify the parties in writing of any such offer within five days of receiving the offer and, if the arbitrator accepts the offer, must notify the parties in writing within five days of that acceptance.
The arbitrator’s notice must identify the party or attorney who made the offer and provide a general description of the employment or new professional relationship that was offered including, if the offer is to serve as a dispute resolution neutral, whether the offer is to serve in a single case or multiple cases.

(2) If the arbitrator fails to inform the parties of an offer or an acceptance as required under (1), that constitutes a failure to comply with the arbitrator’s obligation to make a disclosure required under these ethics standards.

(3) If an arbitrator has informed the parties in a pending arbitration about an offer as required under (1):

(A) Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;

(B) The arbitrator is not also required to disclose that offer or its acceptance under standard 7; and

(C) The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer.

(4) An arbitrator is not required to inform the parties in a pending arbitration about an offer under this subdivision if:

(A) He or she reasonably believes that the pending arbitration is not a consumer arbitration based on reasonable reliance on a consumer party’s representation that the arbitration is not a consumer arbitration;

(B) The offer is to serve as an arbitrator in an arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements; or

(C) The offer is for uncompensated service as a dispute resolution neutral.

(e) Relationships and use of confidential information related to the arbitrated case

An arbitrator must not at any time:

(1) Without the informed written consent of all parties, enter into any professional relationship or accept any professional employment as a lawyer, an expert witness, or a consultant relating to the case arbitrated; or

(2) Without the informed written consent of the party, enter into any professional relationship or accept employment in another matter in which information that
he or she has received in confidence from a party by reason of serving as an arbitrator in a case is material.

Comment to Standard 12

Subdivision (d)(1). A party may disqualify an arbitrator for failure to make required disclosures, including disclosures required by these ethics standards (see Code Civ. Proc., § 1281.91(a) and standard 10(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which the arbitrator was then aware is also a ground for vacatur of the arbitrator’s award (see Code Civ. Proc., § 1286.2(a)(6)(A)).

Subdivision (d)(4)(B). The arbitrations identified under this provision are only those in which, under Code of Civil Procedure section 1281.85(b) and standard 3(b)(2)(H), the ethics standards do not apply to the arbitrator.

Standard 16. Compensation

(a) An arbitrator must not charge any fee for services or expenses that is in any way contingent on the result or outcome of the arbitration.

(b) Before accepting appointment, an arbitrator, a dispute resolution provider organization, or another person or entity acting on the arbitrator’s behalf must inform all parties in writing of the terms and conditions of the arbitrator’s compensation. This information must include any basis to be used in determining fees; and any special fees for cancellation, research and preparation time, or other purposes; any requirements regarding advance deposit of fees; and any practice concerning situations in which a party fails to timely pay the arbitrator’s fees, including whether the arbitrator will or may stop the arbitration proceedings.

Comment to Standard 16

This standard is not intended to affect any authority a court may have to make orders with respect to the enforcement of arbitration agreements or arbitrator fees. It is also not intended to require any arbitrator or arbitration provider organization to establish a particular requirement or practice concerning fees or deposits, but only to inform the parties if such a requirement or practice has been established.

Standard 17. Marketing

(a) An arbitrator must be truthful and accurate in marketing his or her services. An arbitrator may advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment and but must not make any representation that directly or indirectly implies favoritism or a specific outcome. An arbitrator must ensure that his or her personal marketing activities and any activities carried out on his or her behalf, including any activities of a provider organization with which the arbitrator is affiliated, comply with this requirement.
(b) An arbitrator must not solicit business from a participant in the arbitration while the arbitration is pending.

(c) An arbitrator must not solicit appointment as an arbitrator in a specific case or specific cases.

(d) As used in this standard, “solicit” means to communicate in person, by telephone, or through real-time electronic contact to any prospective participant in the arbitration concerning the availability for professional employment of the arbitrator in which a significant motive is pecuniary gain. The term solicit does not include: (1) responding to a request from all parties in a case to submit a proposal to provide arbitration services in that case; or (2) responding to inquiries concerning the arbitrator’s availability, qualifications, experience, or fee arrangements.

Comment to Standard 17

Subdivision (b) and (c). Arbitrators should keep in mind that, in addition to these restrictions on solicitation, several other standards contain related disclosure requirements. For example, under standard 7(d)(4)-(6), arbitrators must disclose information about their past, current, and prospective service as an arbitrator or other dispute resolution for a party or attorney in the arbitration. Under standard 8(b)(1)(C) and (D), in consumer arbitrations administered by a provider organization, arbitrators must disclose if the provider organization has coordinated, administered, or provided dispute resolution services, is coordinating, administering, or providing such services, or has an agreement to coordinate, administer, or provide such services for a party or attorney in the arbitration. And under standard 12 arbitrators must disclose if, while an arbitration is pending, they will entertain offers from a party or attorney in the arbitration to serve as a dispute resolution neutral in another case.

This provision is not intended to prohibit an arbitrator from accepting another arbitration from a party or attorney in the arbitration while the first matter is pending, as long as the arbitrator complies with the provisions of standard 12 and there was no express solicitation of this business by the arbitrator.
## List of All Commentators, Overall Positions on the Proposal, and General Comments

<table>
<thead>
<tr>
<th>Commentator</th>
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<th>Comment</th>
<th>Committee Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. ADR Services, Inc.</td>
<td>NI</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>By: Lucie Barron, President Los Angeles, California</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. American Arbitration Association</td>
<td>NI</td>
<td>The American Arbitration Association (“AAA”) is supportive of the Council’s desire to review the Standards periodically to consider changes to bring them into conformance with practice and legal developments. However, some proposed amendments would create such administratively cumbersome recordkeeping requirements that the AAA may be unable to continue to administer consumer arbitrations in California.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>By: Eric P. Tuchman, General Counsel and Corporate Secretary New York, New York</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. California Dispute Resolution Council</td>
<td>NI</td>
<td>For the most part, the CDRC supports the proposed amendments. However, it has the following comments on certain of the proposed revisions.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>By: Douglas E. Knoll, President Glendora, California</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>4. Committee on Alternative Dispute Resolution, State Bar of California</td>
<td>NI</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>By: Gemma George, Chair</td>
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<td></td>
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<tr>
<td>5. Consumer Attorneys of California</td>
<td>NI</td>
<td>Our Position: In general, we support the proposed changes to the Ethics Standards for Neutral Arbitrators in</td>
<td></td>
</tr>
<tr>
<td>By: Jacqueline Serna</td>
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Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
### List of All Commentators, Overall Positions on the Proposal, and General Comments

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<tbody>
<tr>
<td><strong>Contractual Arbitration. However, with regards to Amendment No. 4, CAOC believes the proposal does not go far enough in protecting the neutrality of arbitrators. Our comment focuses on this amendment which we propose should be strengthened.</strong></td>
<td>NI</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>6. Ruth Glick</td>
<td>NI</td>
<td>I wish to weigh in on the proposed amendments to the Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Although I am Chair-Elect of the Dispute Resolution Section of the American Bar Association and a Fellow of the College of Commercial Arbitrators, these comments are made by me individually, and not on behalf of these organizations.</td>
<td>See comments on specific provisions below.</td>
</tr>
<tr>
<td>Hon Arnold H. Gold (ret.)</td>
<td>NI</td>
<td>I am a retired Judge of the Superior Court for Los Angeles County. I provide dispute resolution services through Alternative Resolution Centers, headquartered in Los Angeles.</td>
<td>See comments on specific provisions below.</td>
</tr>
<tr>
<td>JAMS</td>
<td>NI</td>
<td>JAMS is pleased to provide the following comments to the proposed changes and amendments to the Ethical Standards for</td>
<td></td>
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**Spr13-01**

*Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration* (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

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<tbody>
<tr>
<td>Counsel JAMS</td>
<td></td>
<td>Neutral Arbitrators in Contractual Arbitration. We will only comment on those proposals which we question. You may assume that if there is no specific mention of a proposal in this letter, JAMS has no objection to the proposed change.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>See comments on specific provisions below.</td>
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</table>
| 9. Judicate West     | NI       | As requested, this response addresses the impacts on arbitrators and arbitration provider organizations, including a need to update existing disclosure checklists and practices, in addition to the specific requests for comment: * * *  
Judicate West has great concerns about the purpose, need for and specific language used in the proposed amendments. * * *  
As is discussed in greater detail herein, Judicate West is very concerned that the application of the proposed amendments may serve to increase both the potential for the appearance of bias and create actual bias. In addition, Judicate West suggests that before these amendments are finalized further discussion and revisions are advisable. Judicate West is willing to work with the Judicial Council to aid in this process. We all want the Standards to provide further clarity for arbitrators on what must be done to be in compliance with the standards. We certainly do not want to create new ways for attorneys or |

Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
**SPR13-01**

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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<tr>
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<td>parties to increase the financial burden on their opposing counsel in attempts to get around unfavorable rulings by finding new ways to attack an award.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>John Kagel, Attorney-at-Law Palo Alto</td>
<td>NI</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>William McGrane Attorney at Law San Francisco, California</td>
<td>NI</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>Luella Nelson Arbitrator/Mediator</td>
<td>NI</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>Office of the Independent Administrator By: Sharon Oxborough Independent Administrator Los Angeles, California</td>
<td>NI</td>
<td>The OIA has reviewed the proposed amendments to the Ethic Standards for Neutral Arbitrators in Contractual Arbitration. Some of the changes respond to recent appellate court decisions and we support those changes.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>Orange County Bar Association By: Wayne R. Gross, President Newport Beach, California</td>
<td>AM</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>Superior Court of San Diego County By: Michael Roddy, Executive Officer</td>
<td>A</td>
<td>No additional comments</td>
<td>No response required</td>
</tr>
</tbody>
</table>

49 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
**SPR13-01**

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration**

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

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<tbody>
<tr>
<td>16. Thomas D. Weaver</td>
<td>AM</td>
<td>See comments on specific provisions below.</td>
<td>See responses to specific comments below.</td>
</tr>
<tr>
<td>Tustin, California</td>
<td></td>
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50 Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
### Standard 2 – Definitions

<table>
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<tr>
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<th>Committee Response</th>
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</table>
| Judicate West  
By: Var Fox, Co-Founder  
Santa Ana, California | Proposed Change to 2(o)  
Judicate West is concerned about the ever expanding disclosures that an arbitrator is supposed to make. Many of our arbitrators have grown children, nieces and, even, grandchildren. It is inconceivable that an arbitrator is going to stay in daily contact with all these members of his family to know if they have had any contact with a person or company that would need to be disclosed, if he or she had known about it. Because a neutral doesn’t always know every activity of every person in his/her extended family, the standard should be based on actual bias, not just the appearance of bias. The requirements for an arbitrator should mirror those that are required for sitting judges. | The committee acknowledges that this proposed amendment may expand the disclosure obligations of arbitrators. However, the committee’s view is that this expansion is appropriate and in keeping with the current disclosure obligations created by statute and the ethics standards. The current definition of “member of the arbitrator’s extended family” includes the spouses of the parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator’s spouse or domestic partner, but does not include the domestic partner of such a person. It is the committee’s view that domestic partners who have registered as required under the Family Code have a relationship to each other that is sufficiently similar to spouses that the same requirements regarding disclosure should apply. The committee notes that the ethics standards do not require that arbitrators know every activity of their extended family members. Standard 7 requires disclosure of matter of which the arbitrator is “aware.” Subdivision (b) of standard 9, which addresses the arbitrator’s duty of inquiry with regard to matters that must be disclosed, provides that: “An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships or other matters involving his or her extended family and former spouse that are required to be disclosed under standard 7 by: (1) Seeking information about these relationships and |
### SPR13-01

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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<table>
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<tr>
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<tbody>
<tr>
<td>Luella Nelson</td>
<td>The revision to add “domestic partner” adds such interesting problems of another sort that it requires a definition, at a minimum. Is this only legally registered domestic partners, or does it include informal shacking up or, for that matter, just roommates with no commitment whatsoever? Both same-sex and opposite-sex couples? Does it matter if they're not having sex? (In other words, do you want to go beyond formally recognized relationships?)</td>
<td>Current standard 2(h) provides that “domestic partner” means a domestic partner as defined in Family Code section 297.</td>
</tr>
</tbody>
</table>
| Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair | The ADR Committee supports the following Standard 2 and Standard 3 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existing Standards. These proposals are:  
- Standard 2(a)(2) regarding the nomination of an arbitrator.  
- Standard 2(o) including “domestic partner” as a member of arbitrator’s family | No response required |

Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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## Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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### Standard 3 – Application and effective date

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| Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair | The ADR Committee supports the following Standard 2 and Standard 3 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existing Standards. These proposals are: * * *  
- Standard 3(b)(2)(D) regarding the exclusion of automobile warranty dispute from the Standard.  
- Standard 3(b)(2)(I) regarding the preemption of SEC proceedings from state regulation. | No response required |
| Hon Arnold H. Gold (ret.) Studio City | Even though the preamble to the proposal states that the amended Standards will not become effective until January 1, 2014, there needs to be a provision that the amendments are not applicable to existing cases. Otherwise, chaos and much litigation will arise over questions such as: (A) Do they apply retroactively? (B) If they do, what is the significance on an ongoing case of, say, a disclosure (or compliance with some other requirement) that met the then existing standards but didn't meet the new standards?  

I suggest a grace period, such as: "These amendments are not applicable to any case in which the selection of the arbitrator was made by agreement, order or otherwise prior to [perhaps March 1, 2014]." | Based on this and other comments, the committee has revised the proposal to clarify that the proposed amendments will not apply to persons who are serving in arbitrations in cases in which they were appointed to serve as arbitrators before July 1, 2014. |
| Judicate West By: Var Fox, Co-Founder Santa Ana, California | Application to Arbitrators in Securities Arbitrations  
Judicate West supports this amendment and finds the wording and rationale well supported in the case law and within the real life practicalities of arbitration. The suggested wording of the | No response required |
### Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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<tr>
<td>standard seems to achieve the stated purpose.</td>
<td><strong>Proposed Change to 3(b)(2)(D)</strong></td>
<td>Judicate West supports this amendment and finds the wording and rationale well supported in the case law and within the real life practicalities of arbitration. The suggested wording of the standard seems to achieve the stated purpose.</td>
<td>No response required</td>
</tr>
<tr>
<td>* * *</td>
<td><strong>Proposed Change to Standard 8(a)</strong></td>
<td>Judicate West opines that the allowance of 2 months is insufficient to allow most provider organizations to update their websites, as needed, and more time should be allowed. Attempting to capture all this information on a website is a huge job and will require additional employees to create and maintain it.</td>
<td>Based on this and other comments, the committee has revised its proposal to recommend that the proposed amendments to the ethics standards take effect July 1, 2014.</td>
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<tr>
<td>* * *</td>
<td><strong>Offers of Employment from Parties or Attorneys in a Pending Arbitration</strong></td>
<td>Developing the staff, personnel, and computer tracking to be in compliance with this proposed amendment will take Judicate West more than the two months allotted in the proposed amendments.</td>
<td></td>
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John Kagel, Attorney-at-Law  
Palo Alto

As a footnote, I assume if adopted, this amendment [to standard 12] will not have retroactive effect?

Based on this and other comments, the committee has revised the proposal to clarify that the proposed amendments will not apply to persons who are serving in arbitrations in cases in which they were appointed to serve as arbitrators before July 1, 2014.

Office of the Independent Administrator

**Implementation Time**  
The Judicial Council asked if two months is sufficient time for

Based on this and other comments, the committee has revised its proposal to recommend that the proposed
### Standard 3 – Application and effective date

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<td>By: Sharon Oxborough</td>
<td>implementation. It is not. For the OIA, the Arbitration Oversight Board would have to meet to amend the current Rules, the OIA would create new procedures to implement the changes, and then inform all the neutral arbitrators on the OIA panel so they can implement the changes. Doing this in November and December would only add to the confusion and difficulties. The OIA needs at least four months to implement the amendments.</td>
<td>amendments to the ethics standards take effect July 1, 2014.</td>
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SPR13-01
Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)
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<td>ADR Services, Inc.</td>
<td>This comment pertains to proposed Standard 12(d) regarding “consumer arbitrations.” The proposed Standard requires an arbitrator to solicit parties who are appearing before him/her in one arbitration, for the purpose of seeking permission to accept assignment of a second arbitration, if the second arbitration involves a party, attorney or law firm that is also involved in the first arbitration. The proposal is at least ostensibly aimed at promoting arbitrator neutrality in consumer arbitrations. Arbitrator neutrality is an important aspect of any arbitral system, perhaps the most important; maybe rivaled only by other components of Due Process. However, the proposal under consideration will not promote arbitrator neutrality in consumer arbitrations. Instead it will tend to reduce the level of arbitrator neutrality. The reason the proposal would tend to reduce, rather than to promote, arbitrator neutrality in consumer arbitrations is that the proposed Standard would reduce the pool of arbitrators available for consumer arbitrations. Many arbitrators would opt out of consumer arbitration (for reasons which are discussed later below). The arbitrators opting out of consumer arbitrations would tend to be those most likely to be impartial, and least likely to be tempted to engage in biased conduct. These would be the busiest, most market-selected, most in-demand arbitrators. The elimination of this in-demand cohort of arbitrators from the available-arbitrator pool would reduce consumer choice and relegate consumer arbitrations to arbitrators less in demand. Arbitrators less in demand would tend to be more susceptible to temptations to curry favor by departures from strict neutrality. An in-demand arbitrator by</td>
<td>Based on this and other comments, the committee revised the proposal to: • Eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: o Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator; o The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer; and o The arbitrator is not also required to disclose that offer or its acceptance under standard 7. • Exempt offers to serve as a labor arbitrator or to serve as a dispute resolution neutral without compensation from the requirement to inform parties in consumer arbitrations when an offer is made. • Revise the initial disclosure requirement to separately address consumer arbitrations and other</td>
</tr>
<tr>
<td>By: Lucie Barron, President</td>
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<tr>
<td>Los Angeles, California</td>
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## Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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### Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment

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|             | contrast will have no reason to depart from strict neutrality, and hence be more likely to act solely on the merits with complete Due Process. Thus reducing the pool of available arbitrators would not serve the cause of arbitrator neutrality. | arbitrations:  
  o For consumer arbitrations, the disclosure would be required to indicate that the parties would be informed of any offer made while the arbitration is pending; and  
  o In other arbitrations, the disclosure would be required to indicate that the parties will not be informed of any such offers. |
|             | One reason many arbitrators would leave the pool of arbitrators available for consumer arbitrations is the dubious ethical quality of a requirement that an arbitrator "request a favor" from parties who are contemporaneously appearing before that arbitrator. Yet this is precisely what Standard 12(d) requires. Standard 12(d)(3) requires that the arbitrator must have "sought the parties' consent as required by this subdivision." The busiest and most ethically sensitive arbitrators would be reluctant to request favors from parties appearing before them. Instead, this group of arbitrators would simply cease accepting assignments on "consumer arbitrations." Hence this cohort of arbitrators – those most sought after in the marketplace – will be removed from the pool of arbitrators available for consumer arbitrations. This reduction in consumer choice would not benefit consumers, or the arbitral process generally. | |
|             | A second, perhaps even more telling reason why the proposal will reduce arbitrator availability, and hence tend to reduce the general level of neutrality, is that many arbitrators will decline to entangle their calendars in the administrative work, delays, regulatory risks, etc. which the proposal contemplates. The requirement to seek permission from parties in currently-pending "consumer arbitrations" would create a time-consuming case review requirement each time a new matter was proposed, followed by an unseemly requirement to solicit consents, followed by a waiting period, etc. The short-term needs of other cases – such as mediation needs arising shortly | |

57 Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
**SPR13-01**  
*Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration* (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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| | before trial, urgent discovery matters, etc. – could not be accommodated. Unless an arbitrator had a pressing need for consumer arbitration work, logic would dictate devoting efforts elsewhere. Many former arbitrators have already opted to confine their practices to other ADR processes even without additional burdens of the type being contemplated here. Further burdening the arbitration of "consumer arbitrations" will simply further reduce the arbitrator pool available for these arbitrations. ADR Services, Inc., supports the maintenance of the integrity of the arbitral process. The present proposal, however, even though perhaps well-intentioned, will not serve that objective. Instead, it will only tend to diminish the quality of services available for consumer arbitrations. Other, less harmful, procedures are available to preserve and promote the integrity of the arbitral system. Thus we urge that this proposal be rejected. | California Dispute Resolution Council  
By: Douglas E. Knoll, President Glendora, California | Standard 7(b)(2). The CDRC does not disagree with the substance of the proposed revision to this Standard, but suggests that it would be more clear if revised to read as follows:  
If an arbitrator has disclosed to the parties in an arbitration that he or she will entertain offers of employment or of professional relationships from a party or a lawyer for a party while the arbitration is pending as required by subdivision (b) of Standard 12, the arbitrator is not also required to disclose such an offer to the parties in a pending arbitration, except that in a consumer arbitration the arbitrator must inform the parties in the pending arbitration of any such offer and seek their consent as required by subdivision (d) of Standard 12. | Based on this and other suggestions, the committee has modified the proposal to amend standard 7(b) to distinguish between the obligations in consumer arbitrations and other arbitrations. |
## Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment

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| Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair | For the reasons discussed more fully below, the ADR Committee opposes the proposed amendment to Standard 12 that would require informed consent in consumer arbitrations before accepting offers of employment or new professional relationships from a party or a lawyer for a party in a pending arbitration. For the same reasons, the ADR Committee opposes the parallel disclosure that would be required under Standard 7(b)(2). If, however, the proposed amendment to Standard 12 is adopted, the ADR Committee believes the language of Standard 7(b)(2) should be clarified. As drafted, the same sentence discusses 1) consumer arbitrations; 2) non-consumer arbitrations; 3) informing parties in a consumer arbitration about an offer under Standard 12(d); and 4) the absence of the need to disclose the offer under Standard 7 (which would need to be disclosed under Standard 12 in a consumer arbitration but not a non-consumer arbitration). The ADR Committee believes this Standard would be clearer if it were divided into two separate provisions. The first would apply to non-consumer arbitrations and the second would apply to consumer arbitrations. * * * The ADR Committee opposes the addition of Standard 12(d) - Informed consent required in consumer arbitrations before accepting offers. | Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required:  
* Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;  
* The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer; and  
* The arbitrator is not also required to disclose that offer or its acceptance under standard 7. The committee has also revised the initial disclosure requirement to separately address consumer arbitrations and other arbitrations:  
* For consumer arbitrations, the disclosure would be required to indicate that the parties would be informed of any offer made while the arbitration is pending; and |
SPR13-01
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<td><strong>Commentator</strong></td>
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<td>The ability of the parties to disqualify an arbitrator under Standard 12(b) upon the disclosure that the arbitrator intended to accept new appointments and employment during the pendency of the arbitration. This was viewed as providing sufficient protection for the parties to the consumer arbitration. (See “Executive Summary and Origin,” page 9, Drafter’s Notes, page 31)</td>
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<tr>
<td>The ADR Committee believes the informed consent proposal is flawed for several reasons. First, assuming the arbitration process has already begun and the arbitrator has been appointed, the parties are no longer able to disqualify the arbitrator using Standard 12(b). If only one party objects to the new business and declines to provide consent, any ruling against that party could be challenged during a vacatur proceeding by that party alleging that the ruling was a reflection of the arbitrator’s ire at losing income as a direct result of that party’s refusal to consent to the new business. The technical basis would be “arbitrator misconduct” or “a failure to disqualify or disclose bias against that (non-consenting) party because of changed circumstances.” This potential basis for challenge is an ongoing characteristic of this informed consent scheme.</td>
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<tr>
<td>Second, arbitrators involved with various consumer panels may be assigned numerous cases at various stages of processing at any given time, making it difficult at best to fully comply with all provisions of the proposed Standard. This would also present issues for arbitrators on a single panel. If, for example, an arbitrator is on the Kaiser panel, it would appear as though the arbitrator could not take any additional matters from Kaiser without obtaining the informed consent of all parties in all of</td>
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### Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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| Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment |
|---------------------------------------------------------------|---------------------------------------------------------------|
| Commentator | Comment | Committee Response |
|---------------------------------------------------------------|---------------------------------------------------------------|
| the pending Kaiser matters in which he or she is serving as an arbitrator. |
| Third, arbitrators are required to disclose relationships and pending cases with the same parties and attorneys before they are appointed. To allow consumer parties to disallow arbitrators from seeking new business would have a chilling effect on encouraging qualified and popular arbitrators to handle consumer arbitrations. This Standard could literally require arbitrators to handle only one case at a time, regardless of how far along in the process that arbitration is. Its ultimate effect may drive experienced practitioners away from consumer arbitration and leave the resolution of these disputes to arbitrators who have very little business or are inexperienced. |
| Fourth, there is the added complexity this proposal would place on arbitrators and providers. Assuming an arbitration hearing is in session when a new request for employment is made, the arbitrator must disclose the new offer within five days and then wait seven days for the parties to respond. If a recess is taken pending this decision, the arbitration process is delayed nearly two weeks. For every new offer during the pendency of the arbitration, there would be a separate twelve day delay. In addition, arbitration offers usually contain time limits for acceptance which are often shorter than this twelve day period. Consequently, the arbitrator would effectively be prevented from making a timely acceptance due to the Standard’s informed consent schedule. |
| In conclusion, this proposal was tried and rejected previously. The ADR Committee sees no new information that would justify its resurrection. |
### Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment

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<tr>
<td>Consumer Attorneys of California</td>
<td>Amendment No. 4 Is a Step in the Right Direction, but does Not Go Far Enough: Currently, an arbitrator can accept an offer of employment on another matter from a party in a pending arbitration without disclosing that new relationship to the other party. (Standard 7(b)(2)). Amendment 4 would require arbitrators to obtain the parties’ consent before accepting an offer of employment. While we applaud the enhancement of the current standards, we believe this amendment is insufficient. Although the amendment appears to give parties the freedom to determine whether they believe the prospective employment would create bias, parties could feel compelled to give their consent in fear of retaliation by their arbitrator. Simply requiring the consent of the parties may allow a strong potential for bias or retaliation if the party objects to the new employment of the arbitrator. A party that is uncomfortable with the arbitrator accepting an offer from another party during the pending arbitration would be forced to weigh their concerns over a potentially biased arbitrator, now employed by an involved party, against their fear of retaliation. Permitting these additional employment relationships forces parties to choose between two adverse possibilities and question the propriety of their arbitrator which many people are unwilling to do. Furthermore, consumers will generally be one-time participants in arbitration, but the party who formed the contract typically chooses the arbitration provider and is much more likely to be a repeat-player. Thus, the forming party, or their attorney, will almost always be the party offering further employment. This amendment creates an illusory consent requirement and...</td>
<td>Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. Although, under the proposed amendments, the arbitrator would not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer, under the existing standards, an arbitrator can be disqualified based on the initial disclosure that he or she will entertain offers of employment from a party or attorney while the arbitration is pending.</td>
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<tr>
<td>By: Jacqueline Serna</td>
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<td>Associate Legislative Counsel</td>
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| Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment |
|---|---|
| Commentator | Comment | Committee Response |
| Ruth Glick  
Attorney at Law  
Burlingame, California | does not allow parties to freely object to conflicts with their arbitrator.  
In regard to the amendments concerning consumer arbitrations, I have some concern about these new requirements being inadvertently directed to possible commercial arbitration situations or encouraging some commercial arbitrations to become consumer arbitrations to take advantage of the perceived benefit of giving a losing party additional opportunities to overturn an award. Standard 2(d) defines consumer arbitration as a contract drafted by the non-consumer party with the consumer party being required to accept it. Standard 2(e) defines a consumer party as an individual who seeks, or acquires, including by lease, any goods or services primarily for personal, family or household purposes including, but not limited to, financial services, insurance and other goods and services as defined in section 1761 of the Civil Code, an enrollee or subscriber in a health care service plan, an individual with a medical malpractice claim, and an employee or applicant for employment in a dispute subject to an arbitration agreement. Yet, there is still a big gray area on what constitutes a consumer or commercial arbitration.  
For example, with the codification of cases on the inapplicability of standards to arbitrators in securities arbitrations, would very wealthy hedge fund investors, trading primarily in commodities, be considered consumers under this amendment? Second, would a CEO, or similarly other highly paid executive whose attorney negotiated an employment agreement with an arbitration clause, be considered a consumer? Third, would legal malpractice claims brought by individuals be considered consumer arbitrations? I suspect | The committee is not aware of current problems and does not anticipate that the proposed amendments will lead to future problems either with respect to appropriately identifying consumer arbitrations or with non-consumer parties attempting to characterize themselves as consumer parties or arbitrations as consumer arbitrations. The committee also notes that the proposed amendments to standard 12 provide that: “An arbitrator is not required to inform the parties in a pending arbitration about an offer under this subdivision if he or she reasonably believes that the pending arbitration is not a consumer arbitration based on reasonable reliance on a consumer party’s representation that the arbitration is not a consumer arbitration.” (A similar provision also appears in standard 8) This allows an arbitrator to avoid confusion and gamesmanship by losing parties by asking parties, in advance of the arbitration, to indicate whether the arbitration is a consumer arbitration. If the arbitrator then reasonably relies on the parties’ representation that it is not a consumer arbitration, the obligation to seek consent in consumer arbitrations under the proposed amendments to standard 12 would not apply. |

63  Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)
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<td>these might be considered consumer arbitrations by default or request, as I don’t believe there has been any case law yet on these issues. However, I am concerned that the proposed amendment to Standard 12 requiring an arbitrator to obtain informed consent in consumer arbitrations before accepting any offer of other dispute resolution employment from a party or attorney in the arbitration would encourage litigation about consumer designation from losing parties seeking a new legal theory to overturn an award.</td>
<td>In addition, requiring an arbitrator to seek informed consent during a pending arbitration will give opportunities to the parties to thwart the arbitration process while it is pending resulting in a waste of time, money and resources for all parties involved. Standard 12 already gives consumer parties and their attorneys the power to prevent an arbitrator from accepting offers of employment or new professional relationships with parties and attorneys in the arbitration. They can simply disqualify arbitrators who indicate they will accept such employment as provided in Standard 12(b).</td>
<td>Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment.</td>
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<td>Furthermore, many arbitrators who hear employment cases also conduct labor arbitrations. In both the public and private sectors, large law firms whose attorneys also serve as advocates in employment arbitrations and mediations, often represent entities and unions in the labor arena. Even though the Ethics Standards exempt collective bargaining agreements, it is unclear to me what kinds of disclosures an arbitrator who is conducting a collective bargaining arbitration with a law firm that then represents a party in an unrelated employment arbitration or mediation must provide and from whom informed consent must be sought. Often these arbitrations are pending</td>
<td></td>
<td>Under standard 3, the ethics standards do not apply to arbitrations “conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.” Thus the obligation to seek parties consent established by the proposed standard 12 would not apply to arbitrators in such arbitrations. In addition, the committee has revised the proposal to provide that an arbitrator is not required to inform the parties in a pending arbitration about an offer if it is to serve as an arbitrator in an arbitration conducted under or arising out of public or private sector...</td>
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| Hon Arnold H. Gold (ret.) Studio City | for many months so that overlapping cases might be more frequent than anticipated.  
For all these reasons, I think that the proposed amendment to Standard 12 would create more problems than it would prevent, especially since consumer parties already have sufficient protection against the possibility of possible arbitrator bias. They can simply, at the outset, disqualify any arbitrator who indicates a willingness to accept additional employment from the parties or attorneys. | labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.  
Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required:  
• Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;  
• The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer; |

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| Hon Arnold H. Gold (ret.) Studio City | I am deeply troubled by the proposal to add to the Ethical Standards a requirement of disclosure of future offers of employment where the arbitrator’s initial disclosure stated that he or she will accept future offers of employment. (See proposed revisions to Standard 7(b)(2) and Standard 12(d).) I am even more troubled by the proposed addition of a requirement that the consent of the parties to the pending arbitration be obtained before an arbitrator whose initial disclosure stated that he or she will accept future offers of employment in fact proposes to accept a future offer of employment.  
With respect to the proposed new disclosure requirement:  
A. I am unaware that any substantial problem has arisen under the existing Standard, justifying imposing still another layer of administrative chores on the arbitrator.  
B. The language of the existing standard and the language of the disclosure of willingness to entertain future offers are quite clear, and it is also clear (notwithstanding the comment to the |

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Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)
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<td>contrary in the next-to-last sentence of the first paragraph on page 4 of the Invitation to Comment) that no existing Standard requires disclosure of future offers where willingness to entertain future offers is disclosed. If a party is unwilling to risk that a future employment might prejudice the arbitrator, that party can simply exercise his or her right under Standard 12(b) to disqualify the arbitrator at the outset.</td>
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<td>The proposed new consent requirement will wreak much mischief and is unnecessary:</td>
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<td>A. A party who doesn’t like the way a pending arbitration is progressing can simply withhold consent, unfairly penalizing the arbitrator, in a situation (by far the usual situation) where the new employment offered is extremely unlikely to cause arbitrator prejudice.</td>
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<td>B. Once the disclosure is made, if legitimate grounds for disqualification appear the party already has the right, under Standard 10(a)(5) and 10(c), to proceed to disqualify the arbitrator.</td>
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<td>I believe that it is clear from the absence of any disclosure requirement in the existing Standards that an arbitrator who indicates at the outset that he or she will accept future offers of employment from a party or attorney involved in the current case need not disclose those future offers. However, if the drafters of the proposed new/amended Standards continue to be concerned that the reader of the Standards might not realize that, that problem can be solved by simply amending the standards to impose a requirement of disclosure of future offers - but again, without imposing a consent requirement.</td>
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<td>• The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</td>
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## Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment

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<td>JAMS</td>
<td>Offers of employment from parties in a pending arbitration. First of all the use of the word &quot;employment&quot; is misleading. Really what we are talking about is the offer or acceptance of additional ADR related cases from either party. At the present time there is a safe harbor rule, in that if the arbitrator notifies the parties at the outset that she intends to accept other matters during the pendency of the case in question, the parties can make the decision at the outset whether they want to proceed with that arbitrator on that basis. As we understand the proposed amendment, this system would be continued for non consumer arbitrations but as to consumer arbitrations there is now the introduction of the notion of a mandatory disclosure of the new case and informed consent. We suggest that this only apply to in pro per consumers and not to consumers represented by counsel. Clearly, counsel should be able to agree to the safe harbor concept. We should note that this requirement potentially could have a chilling effect on the most qualified neutrals that have a busy practice in that many will not want to limit themselves in the manner suggested by the proposed amendment.</td>
<td>Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment.</td>
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<tr>
<td>Judicate West</td>
<td>Offers of Employment from Parties or Attorneys in a Pending Arbitration Judicate West understands the proposed amendment attempts to address a concern of the appearance of bias in favor of those who might bring repeat business to an arbitrator. The concern is not about “offers of employment,” but acceptance of additional ADR related cases from either party or counsel. The real problem is the proposed language in Standard 12, the new requirement of a mandatory disclosure of a new case and</td>
<td>Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to</td>
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<td>informed consent. Although the background of the proposed amendment does not address any litigation specifically, in our reading of recent litigation, the courts have routinely found that an arbitrator who competently informed the parties that he/she would be accepting other matters during the arbitral proceedings, and then did accept an unrelated, separate matter for a separate mediation or arbitration was not biased and had not erred. In essence, this proposed change is to attempt to eradicate the appearance of bias, not actual bias. Unfortunately, it is highly likely that this type of requirement, if put into effect would create actual bias. Currently, if an arbitrator will accept additional ADR related work he/she must notify the parties and counsel of that fact and then each party and their counsel may choose whether or not to accept that arbitrator at the beginning, before time and money have been spent in the process of arbitration. With the proposed changes, it is foreseeable that a party could prohibit an arbitrator from conducting an unrelated arbitration or mediation where no actual bias had existed. In such a situation would not the party be concerned that the arbitrator may very well end up biased against that party? If the arbitrator later decided against that party, wouldn’t they then move to vacate the award for bias? Also, one must question which party is going to interfere in their arbitrator’s conducting future arbitrations in an unrelated matter and not be concerned that the arbitrator might not be happy with that party in the present case. A party may feel compelled to give informed consent for an arbitrator to take another matter to avoid requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required: • Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator; • The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer; and • The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</td>
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<td>irritating the arbitrator. Application of this new standard would create the appearance of bias as even a signed informed consent would be suspect whether that party really wanted to give consent or felt unstated pressured to do so. Thus, a party’s use of this new rule, whether they give informed consent or not, may very well result in actual bias. It is suggested that the current disclosures and notifications are sufficient to eliminate the appearance of bias and actual bias, and the current proposed amendment, if utilized, will create actual bias. In addition, the process of tracking down parties and attorneys, obtaining informed consent, and keeping track of all that information for each case for each arbitrator is an administrative nightmare and will increase costs for arbitration many times over. Developing the staff, personnel, and computer tracking to be in compliance with this proposed amendment will take Judicate West more than the two months allotted in the proposed amendments. In addition, it is unclear whether arbitrations regarding motor vehicle accidents are included within the consumer arbitrations that require the informed consent and additional disclosures. It seems preposterous that an arbitrator handling one small matter for a large insurance company that is represented by a large attorney firm, may be precluded from taking on additional unrelated matters for a significant number of unrelated parties. The burden on the arbitrators and the provider organization seems unreasonably high for an attempt to eliminate a fear of a perception of bias.</td>
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<td>Judicate West, as a provider organization, coordinates the business end of assisting the parties with choosing arbitrators and calendaring, removes the neutrals from the process and effectively eliminates bias. Introducing the measures prescribed in this proposed amendment will create bias where none currently exists.</td>
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<td>John Kagel, Attorney-at-Law Palo Alto</td>
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<td>resolution neutral in another case where the lawyers’ law firm in the consumer arbitration case may be involved. Such a case might last nine months or a year, and might extend longer if further proceedings are needed on attorneys’ fees, or illness of a party. Assume also the employer is represented by a large law firm such as Littler Mendelson or Seyfarth Shaw, or the individual is represented by a large firm such as Weinberg, Roger and Rosenfeld. In some collective bargaining agreements I am a named arbitrator where those firms serve as counsel Does the proposed standard mean that any collective bargaining case involving those law firms which appoints me as arbitrator in the normal course of my practice must not only be disclosed, but also I cannot accept the appointment without the consent of the parties to the on-going consumer case?</td>
<td>The answer speaks for itself, for I will have no knowledge or control over whatever vagaries those parties may consider in giving such permission. And, if the proposed amendment means that they have such a veto, and I hope you will tell me if they do in this example, I will opt out of any consumer cases. This leads to the second point of this comment. I am no fan of consumer arbitration because I strongly believe that arbitration should be a two-sided voluntary process. But, since consumer arbitration exists I have taken such cases either on a pro bono basis on request of the American Arbitration Association, or otherwise served, on the grounds that the parties might be better off with an experienced neutral than otherwise. But the effect, as shown by my example above, will be to drive experienced arbitrators with busy practices away from consumer arbitration as defined, and that seems to be the</td>
<td>The committee has also revised the proposal to provide that an arbitrator is not required to inform the parties in a pending arbitration about an offer if it is to serve as an arbitrator in an arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.</td>
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<td>Office of the Independent Administrator By: Sharon Oxborough Independent Administrator Los Angeles, California</td>
<td>The OIA does not support changing standard 12 to require neutral arbitrators to allow parties in current cases to prevent them from accepting new work with the same parties. If that change is made, additional refinements are required, including deleting language in standard 7(b)(2) and standard 12 that refers to “informed consent.”</td>
<td>Based on this and other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment. The amendments recommended by the committee are now limited to requiring arbitrators in consumer arbitrations to inform parties of any such offer and, if the offer is accepted, of that acceptance. The recommended amendments would also provide that, if the arbitrator informs the parties of an offer or its acceptance as required:</td>
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<td><strong>Standard 7(b)(2) Offers of employment or professional relationship</strong></td>
<td>The new language in standard 7(b)(2) refers to neutral arbitrators having “informed the parties in the pending arbitration about any such offer and sought their consent as required by subdivision (d) of standard 12.” (Emphasis added.) Subdivision (d) of standard 12, however, does not require neutral arbitrators to seek the consent of the parties. Rather it requires the neutral arbitrators to allow the parties to object.</td>
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<td>• Receiving or accepting that offer does not, by itself,</td>
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**SPR13-01**

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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### Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment

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<td>The language should therefore be changed to “has complied with subdivision (d) of standard 12.” (Similar language occurs in standard 12, subdivisions (d) and (d)(3) and should be similarly changed.)</td>
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<td>constitute corruption in or misconduct by the arbitrator;</td>
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<td><strong>Standard 12 Duties and limitations regarding future professional relationships or employment</strong></td>
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<td>• The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator’s acceptance of that offer; and</td>
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<td>The OIA strongly urges the Judicial Council not to amend standard 12 and require that neutral arbitrators provide parties in open cases the opportunity to object to neutral arbitrators taking new cases with the same parties or attorneys. As discussed below, the reasons expressed for changing standard 12 are extremely speculative and amount to confusion, which could be cured by making the language in standard 12 or neutral arbitrator disclosures clearer. Moreover, the change would, in our opinion, accomplish little good but would encourage gameplaying by attorneys, cause neutral arbitrators to avoid accepting cases with pro per claimants, and delay cases for about 20 days. If, however, the Judicial Council decides to go forward with the change, further changes are necessary: 1) all references to “informed consent” must be deleted; 2) the standard must detail what information the neutral arbitrator’s notice to the parties is to include; 3) the standard should add a section that states if a party serves a timely objection, the neutral arbitrator cannot accept the new case unless he or she recuses him or herself from the prior case; and 4) the time period when neutral arbitrators have to provide notice should be changed as it currently lasts until 30 days after an award is made.</td>
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<td>• The arbitrator is not also required to disclose that offer or its acceptance under standard 7.</td>
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The rationale for the proposed change is, according to the Invitation to Comment, page 4,
### Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment

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<td>“Among other things, it has been suggested that it may be unclear to parties that an arbitrator who has disclosed that he or she will entertain such offers of employment will not subsequently inform the parties if and when he or she actually receives such an offer. It has also been suggested that it is difficult for parties to determine whether or not they are comfortable with their arbitrator entertaining or accepting offers of employment from the other side in an arbitration without knowing the nature of such offers.”</td>
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<td>Has anyone actually commented that he or she was confused? Pro pers in the OIA system have disqualified neutral arbitrators because of the current disclosure of taking future work, so it can work. But if the Judicial Council believes that the current standard or disclosure is confusing, the solution is to clarify the standard, not to change the present disclosure system to an objection to new work system, for the reasons discussed below.</td>
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<td>A new system will obviously delay the selection of the neutral arbitrator in the new case for 22 days, given the time prescribed in the standard as well as statutory time for mailing. Putting a neutral arbitrator in place quickly is the key to the successful administration of an arbitration. The new system also makes it possible that parties in the new case will not get the neutral arbitrator they want because a party in the first case objects or, more likely, because an attorney for the recurring party is reluctant to agree to a neutral arbitrator if he or she has an open case. In about 30% of OIA cases, the neutral arbitrator is jointly chosen by the parties deciding upon a particular arbitrator.</td>
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| The OIA does not believe, however, that very many attorneys would actually object to a neutral arbitrator taking a new case: the neutral arbitrators who serve on more than one case at a time do so because they are popular with both claimant and respondent attorneys. Moreover, attorneys are loath to take actions that they see as potentially upsetting to neutral arbitrators. (For example, we have been told by attorneys who are upset by a neutral arbitrator in a case that they do not want to submit a negative anonymous evaluation because the neutral arbitrator might discover it.) During the six months that the notice and objection system operated in 2002, notices were sent in 269 OIA cases: 1 party objected. Thus, it is unlikely that attorneys who do not disqualify a neutral arbitrator who discloses that he or she might take future work with a party would subsequently deny the neutral arbitrator the ability to take such work.

There is, however, one obvious exception to this rule: if an attorney believes that a neutral arbitrator is not sympathetic to his or her case, that the hearing is going badly, or - given the definition of “conclusion of the arbitration“ - the award is against the party, that attorney would have an incentive to object to the neutral arbitrator accepting a new case. The reason to object is that neutral arbitrator very likely would resign from the first case to take the second case. After all, if the neutral arbitrator remained on the first case, the objecting party could easily claim that the neutral arbitrator is biased because the party objected. Thus, an attorney could, for purely tactical reasons, object to a neutral arbitrator taking new work and force a new neutral arbitrator in his or her case to be selected, thus succeeding in gaming the system and slowing the results. |
### Standards 7(b)(2) and 12 - Disclosures and limitations regarding future professional relationships or employment

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<td>Pro pers would be much more likely to object to neutral arbitrators taking new work. Approximately 25% of OIA cases involve pro pers. Currently, 24% of OIA neutral arbitrators will not accept cases involving pro pers because they can involve much more work. The OIA believes that many more neutral arbitrators would refuse such cases if standard 12 is changed. These are the reasons for not changing standard 12. If the Judicial Council decides to require neutral arbitrators to inform the parties of offers of new work and give them the chance to object, the following changes are needed:</td>
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<td>1. “informed consent” needs to be removed from subdivision (d). It could be replaced with “the arbitrator may not accept any such offer until the time for the parties to object in the current arbitration has elapsed.”</td>
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<td>2. “the parties’ consent” in subdivision (d)(3) needs to be removed. It could be replaced with “if an arbitrator has complied with this subdivision, the arbitrator is not required to disclose that offer under standard 7.”</td>
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<td>3. “to obtain the informed consent of the parties” in the drafter’s notes for standard 12 must be deleted. It could be replaced with “to notify the parties of the offer and of the parties’ right to object.”</td>
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<td>4. The obligation to inform the parties and the parties’ right to object exists until 30 days after the neutral arbitrator has written the award. (See definition of “Conclusion of the arbitration”</td>
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<td>The committee respectfully disagrees with this suggestion. During the 30 days following service of an award, the arbitrator retains the authority to correct that</td>
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<td>standard 2(c)(1).</td>
<td>This makes no sense.</td>
<td>Once an arbitrator accepts an offer, the concerns about the potential bias or appearance of bias from offers of employment from a party or attorney in such an arbitration remain during the 30-day period. Based on this and other comments, the committee has modified the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending.— the “consent” aspect of the proposal that was circulated for public comment.</td>
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<td>5. Subdivision (1) requires the neutral arbitrator to “notify the parties in writing of the offer,” without specifying the content of the notice. Given that unsuccessful parties will claim that the notice was not valid because it did not provide enough information, the Judicial Council must be specific. Is it enough to say “I have been asked to serve as a neutral arbitrator in a new case involving party X or attorney Y”?</td>
<td>6. A new subdivision should be added that specifies that if a party serves a timely objection on the neutral arbitrator, the neutral arbitrator may not accept the new offer unless the neutral arbitrator resigns from the current arbitration.</td>
<td>As noted above, the committee has revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to offers.</td>
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<td>Orange County Bar Association&lt;br&gt;By: Wayne R. Gross, President&lt;br&gt;Newport Beach, California</td>
<td>As to offers of employment in a pending arbitration, it is suggested that language should require arbitrators in any arbitration, be it consumer or otherwise, to obtain the written consent of the parties.</td>
<td>Based on other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending — the “consent” aspect of the proposal that was circulated for public comment.</td>
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<td>Thomas D. Weaver&lt;br&gt;Tustin, California</td>
<td>It appears that an arbitrator must obtain informed consent from parties/attorneys in a pending arbitration, before accepting employment as a neutral, even if the subsequent employment is as a Mediator. Many arbitrators are also mediators, and in that regard generally handle many more mediations than</td>
<td>Based on other comments, the committee revised the proposal to eliminate the requirement to give parties in the pending consumer arbitration the right to object to arbitrator accepting an offer of a professional relationship or employment from a party or attorney for a party in that arbitration while the arbitration is pending — the “consent” aspect of the proposal that was circulated for public comment.</td>
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<td>arbitrations. I'm not sure whether applying the consent rule to subsequent employment as a neutral Mediator is necessary to protect the arbitration parties in the same manner as requiring consent for a subsequent Arbitration with one of the current parties/attorneys. Also, should &quot;informed&quot; consent be defined? Just what does that mean? Is there some special information which has to be conveyed to the current parties/attorneys other than the fact that you have been asked to be a neutral in a new matter with one of the current parties/attorneys? Generally, upon initial contact, the neutral knows very little, if anything, about the case for which he is being asked to serve.</td>
<td>a party in that arbitration while the arbitration is pending – the “consent” aspect of the proposal that was circulated for public comment. Based on this and other comments, the committee has modified the proposal to indentify the information that must be included in an arbitrator’s notice regarding an offer.</td>
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### Standard 7 – Disclosure - General

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<tr>
<th>Commentator</th>
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<th>Committee Response</th>
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<tbody>
<tr>
<td>Committee on Alternative Dispute Resolution, State Bar of California  By: Gemma George, Chair</td>
<td>Standard 7(c) - Time and manner of disclosure. The ADR Committee supports the proposed change.</td>
<td>No response required</td>
</tr>
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<td></td>
<td>Standard 7(d) - Required disclosures. The ADR Committee agrees with this rewording of subdivision (d) to clarify that the Standard applies to the proposed arbitrator as well as the appointed arbitrator. The proposed change reflects the ongoing duty to disclose new information of which the arbitrator becomes aware after the initial disclosures. ** * * * The ADR Committee supports the following Standard 7 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existent Standards. These proposals are: Standard 7(d)(1) - Family relationships with party. Standard 7(d)(5) - Compensated service as other dispute resolution neutral. ** * * * The ADR Committee supports the following Standard 7 proposals without further comment. They reflect renumbering and syntax modifications without changing the substance of the Standards. These proposals are: Standard 7(d) (10), (11), (12), (13), (14) and (15). ** * * * The ADR Committee questions part of the proposed amendment to the Comment to Standard 7. This extensive Comment describes the spirit as well as the precise provisions of the amended Standard dealing with disclosures. The ADR Committee believes, however, that the example used on page 135 is not the only matter that might need to be disclosed under the over-arching</td>
<td>No response required</td>
</tr>
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</table>
Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)
All comments are verbatim unless indicated by an asterisk (*).

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<td>mean that it must not be disclosed.” That should suffice to make the point. The proposed Comment, by using one specific example, blurs the distinction between the Standard and the Comment. The ADR Committee further believes the examples used in the Standard should provide a fairly definite line between what should and what need not be disclosed – leaving the specific to control over the general – and that the “examples” should not effectively be extinguished by an amorphous general rule.</td>
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|Judicate West | **Initial and Subsequent Disclosures**
Judicate West understands the desire for disclosure of bias where and when it might occur. The problem is that the language suggested, “including, but not limited to” is, again, very broad and opens up the flood gates of litigation within litigation. Judicate West has already been subject to these types of tactics, when a party is unhappy with the arbitral proceedings, and so sues the arbitrator and provider organization in an effort to create actual bias against that attorney. The goal of ADR is to provide swift resolution. Ambiguity and overly broad loopholes that allow for gamesmanship do not serve justice and the need that ADR fills. Again, since the information to be disclosed is not defined in this amendment, the method for satisfactory disclosure is completely undefined.  

**Standard 7d(5)**
Judicate West approves of the deletion of those few words: "but does not include any case in which the arbitrator concluded his or her service before January 1, 2002."|This proposed amendment is intended only as a clarification, not a substantive change. The initial sentence of standard 7(d) currently provides that a proposed arbitrator “must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial, including all of the following” (emphasis added). Thus the current language already indicates that the paragraphs that follow enumerate examples of matters that must be disclosed under this general standard, not an exclusive list of the matters that must be disclosed. The proposed addition of “not limited to” is merely intended to make this as clear as possible.  

No response required|
### Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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<tr>
<td>Luella Nelson Arbitrator/Mediator</td>
<td>The proposed language is overly broad, vague and ambiguous. The judicial Council is opening the floodgates of litigation and the allowing the losing party another metaphorical bite at the apple. The proposed amendment does not state what constitutes sufficient disclosure and what reasonable consequences a party can achieve for mistake in failure to disclose?</td>
<td>In response to the comments of the ADR Committee of the State Bar of California, above, the committee and has modified the proposed amendment to the advisory committee comment to eliminate the specific example of a matter not listed in the subparagraphs of standard 7(d) that might need to be disclosed under the over-arching disclosure standard. The committee’s view is that the amendments to the advisory committee comment in the revised proposal are simply clarifying changes that do not alter the substance of the comment or impact the substance of the disclosure obligations established by the standard.</td>
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<tr>
<td>Luella Nelson Arbitrator/Mediator</td>
<td>I write to add my comments to those already submitted by my colleague, John Kagel, which I heartily endorse and will try not to repeat. The &quot;Ethics&quot; standards should be written narrowly and focused on identified problems. Expansion in the manner done here is unwise and unwarranted by the underlying legislation for the reasons pointed out by Mr. Kagel, among others. By way of background, I have been a full-time arbitrator and mediator since 1986. At different times over the years, I have served as the Chair of the Labor and Employment Law Sections of the State Bar of California, the Bar Association of San Francisco, and the Oregon State Bar. Most of my work arises under collective bargaining agreements. My practice also includes employment arbitration in other states -- but I have declined all such cases in California ever since the &quot;Ethics&quot; standards went into effect, because those standards are unreasonable and administratively unworkable for a full-time neutral (and because life is short). The Judicial Council’s authority with respect to adoption of the ethics standards for neutral arbitrators is established by Code of Civil Procedure section 1281.85. That code section provides, in relevant part, that the Judicial Council must adopt: “ethical standards for all neutral arbitrators . . . . These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter.” Thus, the Judicial Council does not have the authority to adopt standards directed at parties in arbitration proceedings nor to limit the disclosure obligations established by the applicable chapter of the Code of Civil Procedure [ch. 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95]. In large part, the disclosure obligations set out in standard 7 simply consolidate and integrate the disclosure requirements already applicable to arbitrators in contractual arbitrations under Code of</td>
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### Standard 7 – Disclosure - General

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<td>One of many difficulties with the &quot;Ethics&quot; standards as written, and as proposed to be revised, is that they place the burden of disclosure on the participant who is least likely to know of the purported conflict -- the arbitrator. They place no burden on the parties or their advocates to notify the arbitrator (or each other) of pertinent facts or changes in those facts. They also presume a conflict when no reasonable person would believe that a conflict exists.</td>
<td>One of many difficulties with the &quot;Ethics&quot; standards as written, and as proposed to be revised, is that they place the burden of disclosure on the participant who is least likely to know of the purported conflict -- the arbitrator. They place no burden on the parties or their advocates to notify the arbitrator (or each other) of pertinent facts or changes in those facts. They also presume a conflict when no reasonable person would believe that a conflict exists.</td>
<td>The committee also notes that the ethics standards do not require that arbitrators know about every relationship with associates of lawyers in the arbitration. Standard 7 requires disclosure of matter of which the arbitrator is “aware.” Subdivision (c) of standard 9, which addresses the arbitrator’s duty of inquiry with regard to matters that must be disclosed, provides that: “An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships with any lawyer associated in the practice of law with the lawyer in the arbitration that are required to be disclosed under standard 7 by: (1) Informing the lawyer in the arbitration, in writing, of all such relationships within the arbitrator's knowledge and asking the lawyer if the lawyer is aware of any other such relationships; and (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the lawyer in the arbitration.</td>
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<tr>
<td>If these &quot;Ethics&quot; standards were designed to do anything other than make arbitration expensive and non-final, they would put the burden on the participants who have the most opportunity to learn and disclose pertinent details at the time the arbitrator is proposed and whenever the facts change during the pendency of the arbitration. To avoid gaming the system by a party or advocate who believes things didn't go well at hearing, they would also place a greater burden on the party seeking recusal where the conflict is theoretical or remote; where the purported conflict arises so far into the process that permitting one party to force a recusal would be inequitable; or where the non-disclosure was inadvertent or based on the arbitrator's lack of personal knowledge of the purported conflict.</td>
<td>If these &quot;Ethics&quot; standards were designed to do anything other than make arbitration expensive and non-final, they would put the burden on the participants who have the most opportunity to learn and disclose pertinent details at the time the arbitrator is proposed and whenever the facts change during the pendency of the arbitration. To avoid gaming the system by a party or advocate who believes things didn't go well at hearing, they would also place a greater burden on the party seeking recusal where the conflict is theoretical or remote; where the purported conflict arises so far into the process that permitting one party to force a recusal would be inequitable; or where the non-disclosure was inadvertent or based on the arbitrator's lack of personal knowledge of the purported conflict.</td>
<td>Since the actual effect of the &quot;Ethics&quot; standards is to make arbitration impossibly expensive and non-final, and since I have plenty of other work that keeps me from having the leisure time to chase down purported conflicts, I decline any case that remotely smells of a &quot;consumer&quot; arbitration (as defined in the &quot;Ethics&quot; standards) unless I receive written assurances from both parties that it is not such an animal. I am only one example, from many, of full-time neutrals who have</td>
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<td>Since the actual effect of the &quot;Ethics&quot; standards is to make arbitration impossibly expensive and non-final, and since I have plenty of other work that keeps me from having the leisure time to chase down purported conflicts, I decline any case that remotely smells of a &quot;consumer&quot; arbitration (as defined in the &quot;Ethics&quot; standards) unless I receive written assurances from both parties that it is not such an animal. I am only one example, from many, of full-time neutrals who have dismissed such &quot;consumer&quot; arbitrations.</td>
<td>Since the actual effect of the &quot;Ethics&quot; standards is to make arbitration impossibly expensive and non-final, and since I have plenty of other work that keeps me from having the leisure time to chase down purported conflicts, I decline any case that remotely smells of a &quot;consumer&quot; arbitration (as defined in the &quot;Ethics&quot; standards) unless I receive written assurances from both parties that it is not such an animal. I am only one example, from many, of full-time neutrals who have dismissed such &quot;consumer&quot; arbitrations.</td>
<td>Civil Procedure section 1281.9 and, though a cross-reference in that section, under section 170.1, and standards applicable to arbitrators in the judicial arbitration program, with which Code of Civil Procedure section 1281.85 requires the ethics standards must be consistent.</td>
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### Standard 7 – Disclosure - General

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<td>found it inadvisable to take employment arbitration cases in California because of the &quot;Ethics&quot; standards. I know this because, after declining an employment arbitration selection a few years after the &quot;Ethics&quot; standards went into effect, the advocates asked if I could suggest any full-time neutrals who were still taking employment arbitration cases in California. In an attempt to accommodate that request, I sent an e-mail out to about 40 California labor arbitrators whom I knew or believed had done employment arbitration in the past. 4 responded they were still taking such cases (2 of those no longer do). The others said &quot;not any more&quot; or didn't respond. For an example of the problem for full-time neutrals posed by the &quot;Ethics&quot; standards, let us assume that I still heard employment arbitrations in California in addition to my labor arbitration/mediation practice. Let us further assume that, within the disclosure period, I had employment cases with named partners of Dewey, Cheatham &amp; Howe, a boutique employer-side law firm. However, assume I have not had a case with anyone in DC&amp;H in the past year. Within that year, DC&amp;H dissolved. Dewey is now of counsel to Littler Mendelson; Cheatham has divorced, now uses her maiden name, and is now a partner at Seyfarth Shaw; after gender reassignment surgery, Henry Howe has changed the first name to Helen, and she is a partner at Morrison Foerster. [I select these firms' names only because they are large San Francisco Bay Area employer-side firms, not out of any knowledge about their attorneys' personal or professional histories, nor whether there is a transgender attorney in California named Henry or Helen Howe.] Let us further assume that I received no individual mailed announcements of these changes, and was out of town when the news of the DC&amp;H law firm dissolution was bandied.</td>
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84 Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
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<td>About. (That is often the case; I usually learn attorneys have changed firms when I encounter them at professional conferences and get their new cards. So far, I have not learned of any gender reassignments in that manner.) Under the above scenario, the &quot;Ethics&quot; standards would require me to disclose my past cases with DC&amp;H if I served as an arbitrator in employment cases with Littler, Seyfarth, or Morrison -- even if none of the former DC&amp;H partners had any involvement in the new or pending cases, and even if I was personally unaware of the DC&amp;H dissolution and diaspora. The attorneys at the Littler, Seyfarth, or Morrison firms would have no obligation to alert me that lawyers with whom I have had cases in the past are now with their firms. That is an irrational division of the responsibility for disclosure. Law firms maintain conflicts databases, and incoming attorneys add that data in the process of switching law firms. Unless the arbitrator changes his/her name, law firms can easily determine whether anyone already in the firm or later joining the firm has had a case with that arbitrator. The same cannot be said of arbitrators' access to information about law firm personnel changes. Is it reasonable or logical to expect an arbitrator to conduct recurrent checks of the rosters of attorneys at each law firm with whom s/he has pending or new cases while the case is pending? (Life is short.)</td>
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**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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| Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair | The ADR Committee supports the following Standard 7 proposals without further comment. They reflect clarifications of the Standards suggested by various cases interpreting the existent Standards. These proposals are:  
- Standard 7(d)(2) - Family relationships with lawyer in the arbitration.  
- Standard 7(d)(8) - Employee, expert witness, or consultant relationships.  

The ADR Committee questions the proposed amendments to Standard 7(d)(9) - Other professional relationships. In each of the previous disclosures, there is a “within the preceding two years” limitation placed on the disclosures. This limitation is absent from the catch-all category of “Other professional relationships.” It is not clear whether the intent is for this Standard to require a disclosure of a professional relationship that goes back even beyond the typical two year limit, and whether the disclosures in this category are in fact meant to be life long. There is no stated reason and appears to be no justification for treating “other professional relationships” in a manner that differs from the treatment of the specified professional relationships. The ADR Committee believes this category should be treated in the same manner as the other disclosures, and that the “within the preceding two years” language should be added to Standard 7(d)(9). | No response required |

The Judicial Council’s authority with respect to adoption of the ethics standards for neutral arbitrators is established by Code of Civil Procedure section 1281.85. That code section provides, in relevant part, that the “may expand but may not limit the disclosure and disqualification requirements established by this chapter.” Code of Civil Procedure section 1281.9 within this referenced chapter (ch. 2, Enforcement of Arbitration Agreements, Code Civ. Proc., §§ 1281–1281.95), requires that arbitrators disclose, among other things: “Any professional or significant personal relationship the proposed neutral arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding or lawyer for a party” (Code Civ. Proc., §1281.9(a)(6)). This statute does not limit the obligation to disclose professional relationships between a proposed neutral arbitrator or a member of the arbitrator’s immediate family and a party or lawyer for a party to those within the preceding two years. Under Code of Civil Procedure section 1281.85, the Judicial Council does not have the authority to so limit this statutory disclosure obligation. |
**SPR13-01**

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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<td><strong>Judicate West</strong></td>
<td><strong>Disclosure of Relationships with a Lawyer in the Arbitration</strong></td>
<td>No response required</td>
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<tr>
<td>By: Var Fox, Co-Founder</td>
<td>Judicate West supports this amendment in theory. If an arbitrator or a Judge knows of a relationship between himself/herself, his/her spouse, his/her domestic partner and a lawyer in the arbitration then those relationships should be disclosed. Judicate West finds the limitation to relationships within the last two years rational and workable. The problem, again, is in defining sufficient disclosure.</td>
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<tr>
<td>Santa Ana, California</td>
<td><strong>Proposed Change to Standard 7(d)(8)</strong></td>
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<td>Judicate West, again, is concerned about the real life application of these amendments. What is sufficient disclosure and what reasonable consequences for mistake in failure to disclose? If an estranged niece or grandchild of an arbitrator worked for a company a year before, could that fact then be used as grounds for vacating and award?</td>
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87 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
## Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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<td>California Dispute Resolution Council By: Douglas E. Knoll, President Glendora, California</td>
<td>Standard 7(e)(1). The CDRC supports this proposed standard as revised from the version circulated in 2011. It believes that parties should have the information required as relevant to evaluating the personal integrity of an arbitrator. Some individuals question whether the standards should require disclosure of personal history having no bearing on bias. However, a precedent for this type of disclosure was established in the original Standard 7(e)(13) which requires disclosure of membership in an organization that practices invidious discrimination, even if the membership does not indicate any potential bias in the case at hand.</td>
<td>No response required</td>
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<tr>
<td>Committee on Alternative Dispute Resolution, State Bar of California By: Gemma George, Chair</td>
<td>The ADR Committee supports the new provision, Standard 7(e) - Other required disclosures.</td>
<td>No response required</td>
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</table>
| Judicate West By: Var Fox, Co-Founder Santa Ana, California | **Disclosure of Professional Discipline**  
In Haworth v. Superior Court of Los Angeles (2010) 50 Cal.4th 372 the court pointed out that “[n]either the statute nor the Ethics Standards require that a former judge or an attorney serving as an arbitrator disclose that he or she was the subject of any form of professional discipline.” (Id. @ 381.) Judicate West supports this amendment to require disclosure of public discipline by the State Bar in concept, but has concerns about the wording and the effect of the proposed ambiguous language within the real life practicalities of arbitration.

The term “disclosure” is used throughout these proposed amendments. It is unclear what are the standards for disclosure and how little or much must be disclosed to be in compliance with the requirement. For example, if a list of disclosures for a | In response to this comment, the committee has revised the proposal to provide additional guidance concerning the minimum information must be provided in a disclosure concerning professional discipline. An |
**Standard 7(e)(1) – Disclosure of professional discipline**

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<td>neutral lists “public discipline” with a reference to the state bar web site, is that sufficient disclosure? If more is required, how much more? Without clarity and specificity, the door is opened for game playing attorneys, unsatisfied with a decision to seek vacatur. For Judicate West, records of professional discipline are not typically a concern, but the combined ambiguity and increased burdens on the arbitrators will only serve to decrease surety for the arbitrators of whether they are in compliance and decrease their willingness to fill these much needed positions. In addition, Judicate West also has concerns about the overly broad terms used in section (A) of this proposed amendment. The revocation of a license is not limited to the practice of law, is not limited in time, and is not limited to relevant jurisdictions. For example, if someone had a carpenter’s license removed for political or monetary reasons in another country more than 40 years before, the proposed language of this amendment would require disclosure. It is difficult to conceive of any situation where that fact may be relevant and certainly, would not, in and of itself, indicate incompetency to practice law in California. The language of this proposed amendment is overly broad and invites vacatur and litigation where none is needed. Also, it would seem logical that all arbitrators and Judges should have their public discipline be public if it could affect the appearance of bias in our judicial system. It is unclear whether this amendment applies to court-appointed arbitrators. Judicate West has deep respect for sitting Judges, Retired Judges and members of the California bar that all work in different ways to promote justice. Judicate West recommends that the requirements and burdens, for this and all of the arbitrator would be free to, and may want to, provide additional information to assist parties in determining whether to disqualify an arbitrator based on such a disclosure. Because the expertise sought by arbitration users and the professional backgrounds of arbitrators vary considerably from arbitration to arbitration, the committee’s view is that arbitrators should disclose not just disbarments, but any license revocation. This permits the parties to determine the relevance of the disclosed information given the particular circumstances of the dispute. Information about public discipline imposed on California judges from 1961 to the present is available on the website of the Commission on Judicial Performance at: <a href="http://cjp.ca.gov/pub_discipline_and_decisions.htm">http://cjp.ca.gov/pub_discipline_and_decisions.htm</a>. The ethics standards for neutral arbitrators in contractual arbitration do not apply to arbitrators serving the judicial arbitration program. Those arbitrators are subject to a separate set of ethical...</td>
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<td>proposed amendments, be the same for retired judges who work as neutrals, as they are on currently sitting Judges. The terms of this proposed amendment should be narrowly defined to address the concern brought up in Haworth, to make sure parties know if an arbitrator they are selecting has been subject to public discipline for conduct associated with the practice of law.</td>
<td>obligations established by the Code of Judicial Ethics, California Rules of Court, and local court rules. Although neither the Code of Judicial Ethics nor California Rules of Court require disclosure of professional discipline to the parties in a judicial arbitration, the local rules of many courts require that this information be provided to the court. The court then uses that information to determine whether to permit the individual to serve on the court’s panel of arbitrators. Similarly, potential judges must provide such information to the Governor in the application for appointment as a judge.</td>
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**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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<th>Standard 8(a) - Reliance on information provided by provider organization in making additional disclosures in consumer arbitrations administered by a provider organization</th>
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<td>California Dispute Resolution Council</td>
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<td>Committee on Alternative Dispute Resolution, State Bar of California</td>
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<td>Hon Arnold H. Gold (ret.) Studio City</td>
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| Judicate West  
By: Var Fox, Co-Founder  
Santa Ana, California | Judicate West opines that the allowance of 2 months is insufficient to allow most provider organizations to update their websites, as needed, and more time should be allowed. Attempting to capture all this information on a website is a huge job and will require additional employees to create and maintain it.  
In addition, the definition of sufficient disclosure is not to be found. There are real safety concerns if retired judges will have the names of their family members and their family members’ employers posted online. | The ethics standards do not require provider organizations to post any information on their websites. Standard 8(a) simply allows arbitrators, in making the disclosures required by standard 8, to rely on information supplied by the administering provider organization, including information that may be on the provider organization’s website, if certain requirements are met. The disclosures required under standard 8 relate primarily to relationships between the provider organization and the parties or attorneys. Standard 8 does not require any disclosures relating to family members of the arbitrator. Code of Civil Procedure section 1281.96 does require that each quarter, provider organizations make available information regarding the consumer arbitrations that they administered within the preceding five years and requires provider organizations above a certain size to make this information available on their website. None of the information required under Code of Civil Procedure section 1281.96 (either currently or as it is proposed to be amended) relates to family members of the arbitrator. |
**SPR13-01**

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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| American Arbitration Association  
By: Eric P. Tuchman, General Counsel and Corporate Secretary  
New York, New York | Specifically, the AAA has significant concerns about the proposed amendment to Standard 8 which would require that arbitrators make disclosures regarding financial interests or relationships between a party, their lawyer or their law firm, and the administering organization. Specifically, among other things, the proposed amendments to Standard 8 would require that arbitrators disclose if: 
“(A) The provider organization has a financial interest in or relationship with a party.  
(B) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of or has a financial interest in or relationship with the provider organization. . . .”(Emphasis in original.)  

The AAA has both practical and substantive concerns with these amendments. As a practical matter, it would be impossible for the AAA to capture every financial interest and relationship with every lawyer and law firm that might potentially be involved in a consumer arbitration in California. While the term “financial interest” is defined in the Standards, the terms “relationship with a party” and “relationship with the provider organization” are not defined in the Standards. Nor are there any materiality or temporal limitations contained within the amended Standards that would qualify those terms. As a result, the amendments would result in the requirement that the AAA capture an impossibly broad range of information.  

An explanation of some aspects of the AAA’s structure illustrate the scope of relationships that would need to be tracked under the amended Section 8, and the difficulties the

Based on this and other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: “Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration” The committee is not recommending any change to this existing provision.

93  Positions:  A = Agree;  AM = Agree if modified;  N = Do not agree;  NI = Not indicated.
### Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization

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<td>AAA would face in doing so. The AAA is a not for profit 501(c)(3) organization with offices throughout the United States and internationally, and with a roster of approximately 7,000 arbitrators and mediators. In addition, because of the breadth of dispute types administered by the AAA and the educational programs and other services that we provide, the AAA has interacted in some way with an extremely large number of organizations and individuals. In addition, the AAA has likely interacted with most large, medium and small law firms within the United States. The AAA’s Board of Directors, which plays no role in the AAA’s day to day administration of arbitrations, is composed of approximately 100 volunteer members, also located around the world and from a variety of entities. Organizationally, the AAA also interacts with a variety of companies and vendors necessary for the AAA’s ongoing operations. In addition, the AAA regularly convenes regional and national groups and committees to address timely policy issues impacting arbitration or mediation. As just one example, the AAA convened a task force to draft the Consumer Debt Collection Due Process Protocol Statement of Principles to consider whether arbitration should be used to resolve consumer debt collection disputes, and if so, what heightened due process standards should be implemented for those types of cases. The task force which drafted that Protocol included consumer advocates and representatives, business representatives, former judges, academics, government officials and representatives of the AAA. During the drafting process, the Task Force also sent out drafts.</td>
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**Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization**

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<td>of the Protocol for comment to another larger group of similarly interested advocates. Activities similar to the task force on Debt Collection are initiated by the AAA on a large and small scale on a regular basis.</td>
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Under the proposed amendments to Standard 8, the AAA would be required to capture, track all participants in these activities taking place nationally, and perhaps internationally, because of the possibility that one of these contacts would constitute a “relationship” that may need to be provided to an arbitrator in a California consumer arbitration, who would then disclose it to the parties. Because of the excessive time and cost that would be incurred creating a process for compliance with Standard 8 as proposed, the AAA may simply be unable to continue to administer consumer arbitrations in California.

As a substantive matter, it also appears that the sole problem the Standard 8 amendments are intended to address (the National Arbitration Forum’s administration of consumer debt arbitrations) are not actually solved by the amendments. As stated in the drafter’s notes, Code of Civil Procedure 1281.92 already prohibits provider organizations from administering a consumer arbitration where the provider has a financial interest in a party or an attorney for a party. Further, even if the content of CCP 1281.92 had been incorporated into the Standards previously, it is highly unlikely that expanded disclosure requirements would have changed or impacted NAF’s conduct.

In addition, the Executive Summary and the Drafters’ Notes to the Invitation to Comment imply that the proposed amendments merely incorporate the existing requirements of section 1281.92.
**SPR13-01**  
**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)  
All comments are verbatim unless indicated by an asterisk (*).

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| **Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization** | into the Standards. In fact, the amendments significantly expand the disclosure requirements currently provided for in section 1281.92, which states that sponsoring organizations are prohibited from administering a consumer arbitration where the sponsoring organization has a financial interest (as defined in section 170.5) in a party or attorney for a party, and vice versa. Section 1281.92 does not address in any way a provider organization’s other relationships with a party, lawyer or law firm appearing in an arbitration as the amendments to Standard 8 would do. For the reasons already explained, even using the AAA’s best efforts, it would be extremely difficult to comply with Standard 8 as amended. Furthermore, the amendments would have a disproportionately negative impact on the AAA due to our unique structure as a not for profit organization with a large geographical presence, and a roster of arbitrators that includes thousands of individuals.  
* * *  
For these reasons the AAA opposes the proposed amendments to Standards 8 and 17 in their entirety. |  
| Committee on Alternative Dispute Resolution, State Bar of California  
By: Gemma George, Chair | The ADR Committee supports the following Standard 8 proposals without further comment:  
Standard 8(b) – Additional disclosures required. | No response required |
| Ruth Glick  
Attorney at Law  
Burlingame, California | The proposed new addition to Standard 8(b)(1)(B) requires the arbitrator to disclose relationships between a provider organization and a party or lawyer in the arbitration. As a sole practitioner, I can tell you how hard it already is to keep track of all the parties and attorneys from arbitration and mediations I have conducted. I do not have the ability to discover whether a financial relationship exists.  
Based on other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: “Any significant past, present, or |  

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**Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization**

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<td>party or lawyer in the arbitration serves on a panel of the provider organization. Since this information is solely within the purview of the ADR organization, why must the arbitrator be responsible for the providing this information? In an administered arbitration, shouldn’t the primary responsibility for disclosure lie on the shoulders of the ADR provider?</td>
<td>currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration” The committee is not recommending any change to this existing provision.</td>
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<td>Hon Arnold H. Gold (ret.) Studio City</td>
<td>While seemingly not providing the basis for any new or amended standard, the statement in lines 16 and 17 on page 3 of the Invitation to Comment is incorrect. Code of Civil Procedure Section 1281.92 does not prohibit “provider organizations from administering any consumer arbitration where” the provider organization has a financial interest in or relationship with a party” or where a party or lawyer has “a financial interest in or relationship with the provider organization.” “Financial interest,” yes; but not just any “relationship.” The disqualification contained in Section 1281.92 only applies to financial interests. So, for example, if a neutral who provides services through a provider organization is an attorney for a party in the arbitration in question, that relationship must be disclosed, but the provider organization is not absolutely precluded from administering the arbitration in question. Accordingly, the proposed Drafters’ Note set forth at lines 41 - 43 on page 27 of the Invitation to Comment needs to be revised.</td>
<td>Based on this and other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: “Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration” The committee is not recommending any change to this existing provision.</td>
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**JAMS**  
By: Jay Welsh  
Disclosures relating to administering provider organizations.  
Based on this and other comments, the committee has revised its proposal to remove the references to financial
**SPR13-01**

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

### Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization

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<td>Executive Vice President, General Counsel JAMS</td>
<td>This relates to the requirement that the arbitrator disclose whether the provider organization has a financial interest or relationship with a party. We feel that this is overly broad and it would be helpful to add the word &quot;significant&quot; to this description as it appears in the Standard 8(b)(1) definition relating to relationships with a party or lawyer in arbitration and the arbitrator. We would also suggest that there be a specific exclusion for 1. Being written in as the arbitration provider in an agreement and 2. Any relationship which is open to the public, like a checking account or cell phone provider. That kind of relationship should not be subject to disclosure or be a reason for disqualification.</td>
<td>relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: “Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration” The committee is not recommending any change to this existing provision.</td>
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**Disclosures Relating to Administering Provider Organizations**

Judicate West supports this amendment in concept. The Background section of the Invitation To Comment identifies the goal is to force the disclosure if a “major user” of a provider organization was actually the owner of that service. However, the wording utilized is overly broad. “Financial interest or relationship,” is very broad and would arguably include incidental and harmless items, such as if an owner or shareholder of a provider organization had a few investments with a management company that had invested with a company that hires that provider organization for ADR work, or if an owner of a provider organization and an attorney in a law firm both invest in a third company. At Judicate West, neither of these situations would be known to the parties and would not result in any bias, nor the appearance of bias. Unfortunately, based on this and other comments, the committee has revised its proposal to remove the references to financial relationships with a party from the proposed amendments to 8(b)(1)(A) and (B). The committee notes that introductory sentence of standard 8(b)(1) currently requires disclosure of: “Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration” The committee is not recommending any change to this existing provision.
## Standard 8(b)(1) - Additional disclosures regarding financial interests and relationship with provider organization in consumer arbitrations administered by a provider organization

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<td>the term “relationship” is so broad and ambiguous that it will be used by attorneys who want to seek vacatur of an award, even when no appearance of bias nor actual bias exist.</td>
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<td>The amendment should be limited to the identified goal, “ownership interest.” The stated purpose is to disclose bias based on pecuniary interests by an attorney or law firm in a provider organization.</td>
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<td>The wording “professional relationship or affiliation” is broad and may be misinterpreted to encompass business activities of contact between the provider organization and a law firm during an arbitration, as the e-mails and telephone calls necessitated for scheduling of hearings and other matters would constitute a professional relationship or affiliation.</td>
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<td>As mentioned above, the form and detail needed to adequately disclose this information and the consequence for failure to disclose should be specifically stated for clarity and compliance.</td>
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## Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration

(Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

### Standard 16 - Compensation

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| California Dispute Resolution Council  
By: Douglas E. Knoll, President  
Glendora, California | Standard 16(b). The CDRC supports the proposed revision to Standard 16(b) in principle. However, the CDRC is concerned that the proposed language may, in effect, require an arbitrator to have a fixed policy with respect to the consequences of a party failing to pay the arbitrator’s fees. Thus, the CDRC must object to the proposal unless comment is added to make it clear that an arbitrator may comply with the requirement by disclosing a flexible policy that depends on the particular circumstances involved. | In response to this comment and others, the committee has revised its proposal to add a sentence to the comment accompanying standard 16 indicating that it not intended to require any arbitrator or arbitration provider organization to establish a particular requirement or practice concerning fees or deposits, but only to inform the parties if such a requirement or practice has been established. |
| Committee on Alternative Dispute Resolution, State Bar of California  
By: Gemma George, Chair | The ADR Committee supports the Amendments to Standard 16 - Compensation. This amendment is necessary to provide clarification to practitioners regarding the terms and conditions of their employment. This information, provided in advance of appointment, supports the integrity and openness of the process. | No response required |
| Ruth Glick  
Attorney at Law  
Burlingame, California | The addition to Standard 16, Compensation, advising whether there is any requirement for advance fee deposit or practice in which party fails to timely pay an arbitrator’s fees, may be informative but might also have unintended consequences. For example, wouldn’t arbitrators, as a result of this amendment, require full advance fee deposit even from individuals who can least afford it despite having made accommodations to slow payers, or financially challenged parties in the past? This amendment might also encourage financially stronger parties to increase costs by adding motions, discovery disputes, etc. to balloon expenses before a hearing and thereby hijack the arbitration procedure. | In response to this comment and others, the committee has revised its proposal to add a sentence to the comment accompanying standard 16 indicating that it not intended to require any arbitrator or arbitration provider organization to establish a particular requirement or practice concerning fees or deposits, but only to inform the parties if such a requirement or practice has been established. |
### Standard 16 - Compensation

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<td>Judicate West</td>
<td><strong>Arbitrator Fees</strong>&lt;br&gt;Judicate West already informs its clients of fees and its procedures for collection of fees. Judicate West accomplishes this by transmitting to the parties the actual fees charged for the selected arbitrator and Judicate West payment policies and by means of the Judicate West Commercial Arbitration Rules that restate the payment policies. Implementation of this proposed amendment will add a step in the process of arbitrator selection and, thereby, have an effect of increasing, to some degree, the costs of arbitration. As the requirements require transmission of information and not acknowledgment by the parties, implementation within the suggested 2 months should be sufficient for full implementation of any procedures needed to comply with this requirement.</td>
<td>No response required</td>
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**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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| American Arbitration Association By: Eric P. Tuchman, General Counsel and Corporate Secretary New York, New York | The AAA would also like to express an additional concern about the proposed amendment to Standard 17, which would prohibit an arbitrator from soliciting a specific case, or caseload for themselves or for a “closed panel” that they are a member of. As drafted, it is not clear what a “closed panel” is. In fact, it is extremely rare that any panel of arbitrators is completely open to any individual who seeks to join it. The AAA, for example, has stringent requirements that applicants must meet before they will be added to the roster. Accordingly, if the intent is to preclude any arbitrator from merely suggesting that a particular organization may be suitable to administer a case or caseload, then the proposed amendment to Standard 17 simply goes too far. Further, and in response to the Judicial Council’s questions, the meaning of “solicitation” and “caseload” would benefit substantially from adequate and reasonable definitions. Additionally, it is worth noting that the proposed amendments to the Standards will have another unintended consequence, which is to discourage some highly qualified arbitrators from serving. The Standards were originally drafted, among other reasons, to provide greater credibility and comfort to parties regarding the ethics of arbitrators. However, over time concerns about the ability, even after making a significant effort, to comply with the Standards and the possibility of collateral litigation resulting from a mistake have caused some arbitrators to simply decline potential appointments, and has also caused some parties to simply avoid California as a venue for arbitrations altogether. For these reasons the AAA opposes the proposed amendments to Standards 8 and 17 in their entirety. | Based on this and other comments, the committee revised the proposed amendments to:  
- Narrow the amendment to prohibiting solicitation of appointment as an arbitrator in a specific case or specific cases. This revision eliminates the use of the terms “caseload” and “closed panel” which commentators found problematic.  
- Add a definition of “solicit.” The basic definition recommended is modeled on the definition in Rule 1-400 of the Rules of Professional Conduct of the State Bar of California, with the addition of language about on-line communication from the Model Rules of Professional Conduct of the American Bar Association. The recommended provision also identifies specific activities that are not considered solicitation, including responding to a request for proposals from all parties in a case to submit a proposal to provide arbitration services in that case and responding to a request for a pre-appointment interview by parties.  
- Consolidate the language relating to marketing activities in subdivision (a). |
## Standard 17 - Marketing

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| California Dispute Resolution Council  
By: Douglas E. Knoll, President  
Glendora, California | Standard 17(c). The CDCR supports this proposed standard in principle. To the extent that soliciting appointment to a particular case or caseload may be regarded as implying an arbitrator will give preferential treatment to the party being solicited, this proposed standard is not unrelated to an appearance of potential bias. However, the CDRC is concerned that the particular proposed language may be construed overbroadly. The CDRC believes that this problem cannot be cured by attempting to define “solicit.” Instead, the CDRC must object to the proposed standard unless comment is added to make it clear that the standard does not preclude such ordinary activities as helping to staff a provider’s booth at a professional conference, responding to a request for a pre-appointment interview or including themselves among the candidates if asked for a recommendation about someone to serve in a particular case. Finally, the second sentence of this proposed standard contains a grammatical incongruity, to wit, “they are a member of.” This should be revised to read “of which they are members.” | Please see the response to the comments of the American Arbitration Association, above. |
| Committee on Alternative Dispute Resolution, State Bar of California  
By: Gemma George, Chair | The ADR Committee believes the proposed language in Standard 17(c) - Marketing is potentially problematic and needs further clarification concerning the meaning of “solicit a particular case or caseload.”  
The proposed Standard would specifically allow an arbitrator to “advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment.” Although the portion of the solicitation prohibition that refers to a “particular case” seems relatively clear – setting forth a prohibition against directly asking parties or their attorneys to be appointed to serve as an arbitrator in a | Please see the response to the comments of the American Arbitration Association, above. |
**Standard 17 - Marketing**

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<td><em>specific case – the reference to “caseload” is not at all clear, particularly given what is specifically allowed under the Standard.</em></td>
<td>Many arbitrators have expertise in specific fields, and refer to that expertise in one way or another as part of their biographical information in marketing and other materials. Does this Standard prohibit, for example, arbitrators from contacting employment law attorneys with that marketing material, seeking to be considered as arbitrators in future employment disputes? Would this be a permissible conveyance of “biographical information” or an impermissible solicitation of a particular “caseload”? Is the Standard meant to prohibit arbitrators who specialize in medical malpractice cases, for example, from contacting Blue Cross/Blue Shield or Kaiser Permanente with the aim of being placed on their panel of neutrals? Does the Standard place any limitations on arbitrators who are seeking appointment in specific types of cases? Does the Standard attempt to draw any distinction between “types of cases” and a particular “caseload”? If so, what is that distinction? Ultimately, the ADR Committee concluded that the phrase “solicit a particular case or caseload” is vague, ambiguous and overly broad, and may include legitimate marketing as well as improper conduct.</td>
<td>Please see the response to the comments of the American Arbitration Association, above.</td>
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Hon Arnold H. Gold (ret.)
Studio City

The wording of the last sentence of proposed new Standard 17(c) (at lines 33-35 on page 32 of the Invitation to Comment) is problematical. Would it, for example, preclude an arbitrator from applying to the Kaiser Office of Independent Administrator for inclusion on the list of arbitrators to whom that office assigns cases?

104 Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
**Standard 17 - Marketing**

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| **JAMS**  
By: Jay Welsh  
Executive Vice President, General Counsel JAMS | **Our last comment relates to Standard 17(c) on Marketing.**  
This is an unfair limitation on the right of a Neutral to market her practice. In addition, there is no relationship required in the proposal between the case being heard and the marketing activity. We will not comment on the Constitutional implications of such a limitation, but it is questionable as a prohibition of free speech. In addition, it is not clear that the Judicial Council has the jurisdiction to regulate private arbitrator activities unrelated to the enforcement of a judgment. Many of our Neutrals are asked by Counsel to respond to RFPs on handling major cases like distributions of settlement funds in Pharma related cases, or civil rights cases like the African American Farmer cases against the Department of Agriculture. The Neutrals are then intimately involved in working with JAMS in structuring the administration of the case and the response to the RFP. This ill conceived proposed prohibition would mean that the Neutral involved could be in violation of this ethical requirement even though the new case had no relationship or connection to any arbitration being handled by that Neutral. Accordingly, we request that the last sentence of Subparagraph (c) be stricken. Subparagraph (b) is sufficient to protect the public and not penalize the Neutral. | Please see the response to the comments of the American Arbitration Association, above. |
| **Judicate West**  
By: Var Fox, Co-Founder  
Santa Ana, California | **Marketing**  
Judicate West does not support the suggested change in Standard 17 and questions the necessity for this standard, altogether, since it is not based on specific responses to case law. Judicate West further suggests that the proposed wording as written does not address the proposed purpose.  
The first problem identified in this standard is that the wording used is too vague and ambiguous. The words “solicit”, “a | Please see the response to the comments of the American Arbitration Association, above. |

105 Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
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<td>caseload”, and “closed panel” are not defined.</td>
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In the field of marketing provider organizations, the role of the Judicate West staff and the competency and thoroughness of the staff is important to obtaining business. Communicating which neutrals are available to conduct mediation or arbitration is vital. Moreover, meeting neutrals may aide the parties in feeling confident about utilizing that neutral or another at any future mediation or arbitration. The success of Judicate West and the neutrals, especially those that conduct mediations, is the ability to give the personal touch. The attorneys and parties feel they know the mediator, the staff and their case matters to Judicate West staff and that neutral.

A second problem with the wording of the proposed standard as written is that it can include a neutral meeting an attorney or firm to generally inform them about the services Judicate West can provide. The wording “closed panel” is broad enough to encompass all neutrals at Judicate West. Therefore, if a neutral met with a law firm or an attorney for a law firm and suggested they utilize Judicate West, the entire panel of neutrals at Judicate West may be excluded. If a closed panel is intended to be limited to something smaller than the entire panel of neutrals for a provider organization then it must be defined.

In addition, the term “solicit” is so broad that it may encompass the handing out of a business card or a suggestion that somebody call Judicate West if they need a neutral. The distinguished attorneys and retired Judges and Justices at Judicate West are called upon to educate about the law. It is easy to conceive of a situation in which a Judge would participate in such a workshop or class and when asked about
**Standard 17 - Marketing**

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<td>ideas or methods for resolving a problem he or she suggests that neutrals at Judicate West are available to assist in resolving disputes. In that scenario if the neutral knows that attorney has problems he is looking to resolve, even if they have not discussed any specific case, the wording of the proposed amendment is broad enough that it is unclear whether that is allowed solicitation. The wording of what is the prohibited conduct should be stated explicitly. Currently, it is so vague we are just guessing at the intended meaning of “elimination of appearance of bias.” Also, the standard is so broad that it can envelope a multitude of ethical business practices designed to aid attorneys and parties in resolving disputes and reduce the caseloads in the courtrooms. It is of benefit to the attorneys and parties to meet neutrals, but the wording of this standard is so overly broad that any contact may be deemed solicitation. It is unclear how a neutral could communicate his willingness to serve as an arbitrator and not be soliciting “a case or caseload.” Judicate West questions what practices would be allowed under this ambiguous proposed amendment. If a neutral informs an executive at a company or a lawyer for a company about Judicate West’s Rules for Commercial Arbitration and the company decides to incorporate, when possible, an arbitration clause naming Judicate West, has that neutral “solicited a caseload”? Finally, Judicate West queries fairness and the right to limit a neutral’s ethical marketing practices that are not specifically related to the enforcement of a judgment. Obviously,</td>
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Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

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| Ruth Glick  
Attorney at Law  
Burlingame, California | Finally, I am hopeful that the Judicial Council would consider directing its time and resources to guiding well-intentioned arbitrators in their disclosures. For example, I have and written and spoken about arbitrator disclosures in the new age of Internet and social media. I noticed that Judicial Council has provided guidelines to California judges. However, there appears to be no discussion or consideration by the Council to provide similar guidelines to California arbitrators subject to these Ethics Standards. I welcome your thoughts about this topic. | The committee would welcome specific suggestions for improving the ethics standards. |
| William McGrane  
Attorney at Law  
San Francisco, California | As is evidenced by, inter alia, the attached Referee's Report, I was recently involved in a Haworth-type situation involving a judicial referee which resulted in that referee's disqualification. Your attached proposed changes to the disclosure rules for judicial arbitrators should be expanded to deal with the disclosures required by Canon 6, which is also within AOC purview. This is especially true given the increased popularity in the ADR community of judicial reference, which both waives jury and yet still preserves appeal rights. The consequences of not making universal changes are well illustrated by what happened in my case, i.e., a mistrial based on a non-disclosure of prior public discipline that will wind up setting the parties back collectively more than a million dollars in legal fees. There is no reason to allow persons who seek to act as private judges to conceal otherwise public discipline, and 10 years is a reasonable time within which to so require same be disclosed, though, since the discipline remains public record until death, even 10 years creates a dichotomy between what is knowable and what is disclosed. If it were me, I would require disclosure as long as the record remains otherwise public. But, in any case, 10 years is a lot better than what I just went | The ethics standards applicable to referees are in a different set of rules. This suggestion will be referred to the committee that considers amendments to those rules. |
**SPR13-01**

**Alternative Dispute Resolution: Ethics Standards for Neutral Arbitrators in Contractual Arbitration** (Amend standards 2, 3, 7, 8, 12, 16, and 17 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration)

All comments are verbatim unless indicated by an asterisk (*).

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<tr>
<th>Commentator</th>
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<th>Committee Response</th>
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<td>Luella Nelson</td>
<td>I close by noting that labor arbitration cases are almost universally heard by full-time neutrals. Labor arbitration moved in that direction after trying the alternative of having arbitrators who at times wore advocate hats -- which is where &quot;consumer&quot; arbitration is now in California, and is being forced further in that direction by the &quot;Ethics&quot; standards. Since at least the 1970's, labor arbitrator panels administered by most government agencies (e.g., the Federal Mediation &amp; Conciliation Service and the California State Mediation &amp; Conciliation Service) and private entities (e.g., AAA) have not included advocates. By excluding advocates, those panels vastly reduce the likelihood of actual (as opposed to theoretical or manufactured) conflicts; the rest of the risk is addressed by communication among advocates about labor arbitrators. When Senate Bill 1638 (which added the disclosure provisions in CCP 1281.9) was pending in 1994, union and employer advocates jointly and successfully lobbied to have arbitration under collective bargaining agreements excluded from the disclosure requirements. I know this because I was the Chair of the Labor and Employment Law Section of the State Bar of California at the time and gave a &quot;heads up&quot; to advocates on both sides of the table about the pending legislation. They carried the ball from there. I encourage the Judicial Council to use any revisions in the &quot;Ethics&quot; standards to nudge &quot;consumer&quot; arbitration toward sophistication. The standards as written, and even more so as revised, nudge it the other direction. The underlying legislation does not require this result.</td>
<td>The committee would welcome specific suggestions for improving the ethics standards.</td>
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**Other**

110 Positions:  A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.
CPR-GEORGETOWN COMMISSION
ON ETHICS AND STANDARDS
OF PRACTICE IN ADR

Principles for
ADR Provider
Organizations

May 1, 2002
Principles for ADR Provider Organizations

The CPR-Georgetown Commission on Ethics and Standards of Practice in ADR developed the following Principles for ADR Provider Organizations to provide guidance to entities that provide ADR services, consumers of their services, the public, and policy makers. The Commission is a joint initiative of the CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Commission, which is chaired by Professor Carrie Menkel-Meadow of the Georgetown University Law Center, has also developed the CPR-Georgetown Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002), and provided guidance to the ABA Ethics 2000 Commission in its reexamination of the Model Rules of Professional Conduct on ADR ethics issues.

The Principles for ADR Provider Organizations were prepared under the auspices of the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, sponsored by CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. CPR-Georgetown Commission members are noted on the final page of this document.

The Principles were drafted by a Commission committee co-chaired by Margaret L. Shaw and former staff director Elizabeth Plapinger, who also served as reporter. The Drafting Committee also included: Prof. Marjorie Corman Aaron, Howard S. Bellman, Christopher Honeyman, Prof. Carrie Menkel-Meadow, William K. Slate II (see note 5 infra), Thomas J. Stipanowich, Hon. John L. Wagner, and Michael D. Young. Eric Van Loon and Vivian Shelansky also provided invaluable assistance in the drafting effort.

A second committee of the Commission, chaired by Charles Pou, developed the definition of ADR Provider Organization used in these Principles, as well as a taxonomy of ADR Provider Organizations which helped guide this effort. See Taxonomy of ADR Provider Organizations, Appendix A.

The final version of the Ethics 2000 proposal specifically addresses the lawyer’s expanded role as ADR neutral and problem solver for the first time. It does so in four ways. First, the Ethics 2000 proposal recognizes the lawyer’s neutral, nonrepresentational roles in the proposed Preamble to the Model Rules of Professional Conduct. See Ethics 2000 Proposal at Preamble para. [3] (“In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals.”) Second, the proposal indicates that a lawyer may have a duty to advise a client of ADR options. The proposed language to Comment 5 of Rule 2.1 states: “...when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute alternatives to litigation.” Third, the Ethics 2000 proposal defines the various third-party roles a lawyer may play, including that of an arbitrator or mediator. See Proposed Rule 2.4. (“A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.”) Fourth, the proposal addresses the unique conflicts of interest issues raised when lawyers and law firms provide both representational and neutral services. See Proposed Rule 1.12 (conflicts of interest proposal including screening procedures for former judges, arbitrators, mediators or other third-party neutrals.) For a complete version of the Ethics 2000 report and status, see http://www.abanet.org/cpr/ethics2k.html.
The Principles for ADR Provider Organizations were developed by a committee of the CPR-Georgetown Commission, co-chaired by Commission member Margaret L. Shaw and former Commission staff director Elizabeth Plapinger, who also served as reporter. The Principles were released for public comment from June 1, 2000 through October 15, 2001. The final version reflects many of the substantive recommendations the Commission received during the comment period.

Ms. Plapinger is currently a CPR Fellow and Senior Consultant to the CPR Public Policy Projects, and a lecturer in law at Columbia Law School where she teaches ADR policy and process.

The CPR-Georgetown Principles for ADR Provider Organizations have been the subject of several articles and public discussions during the comment period. See, e.g., Special Feature: The CPR-Georgetown Ethical Principles for ADR Providers, Disp. Resol. Mag. (ABA Dispute Resolution Section, Spring 2001), including Margaret Shaw and Elizabeth Plapinger, The CPR-Georgetown Ethical Principles for Providers Set the Bar at 14; Michael D. Young, Pro: Principles Mitigate Potential Dangers of Mandatory Arbitration at 18; Cliff Palesfsky, Con: Proposed CPR Provider Ethics Rules Don’t Go Far Enough at 18. See also Carrie Menkel-Meadow, Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution, 28 Fordham Urban Law J., 979, 987-990 (April 2001); Reynolds Holding, Private Justice: Can Public Count on Fair Arbitration, The San Francisco Chronicle Francisco Chronicle, at A15 (October 8, 2001).

During the comment period, the CPR-Georgetown Provider Principles have also been used as guidelines for consideration of measurement of quality standards of dispute resolution programs in a variety of settings. For example, at the 2000 Annual Meeting of State Programs of Dispute Resolution sponsored by the Policy Consensus Institute in New Mexico, it was noted that a number of states have used the Principles for framing discussions and establishing standards and other evaluative criteria for assessing the quality of dispute resolution development. Additionally, it was suggested that the Provider Principles should serve broadly as templates for development and evaluation of state-sponsored dispute resolution programs. Internationally, during the comment period, the Provider Principles were translated into Italian and Spanish to provide guidance to relevant groups in Italy and South America.

Drafting committee member and President of the American Arbitration Association William K. Slate II has declined to fully endorse the CPR-Georgetown Principles for ADR Provider Organizations, stating that he does not believe the Principles are fully applicable to the American Arbitration Association (AAA) because of its “unique size and complexity.” While “endor[ing] the basic premises of the Principles which encourage transparency and disclosure” Mr. Slate explained his position in a letter of February 4, 2002 to Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution and also a drafting committee member. In the correspondence, which is on file at CPR, Mr. Slate stated, “I believe the [CPR-Georgetown] Principles will prove to be invaluable and [provide] appropriate guidelines for small provider organizations and for providers who serve in dual roles, by assisting in drafting agreements and then serving as neutrals. Although the AAA does not fall into either of these categories, the AAA endorses the basic premises of the Principles which encourage transparency and disclosure. As a result of my work with CPR on these Principles, the AAA has already developed an organizational ethical statement which has been posted for the past few months on the AAA website that we believe recognizes the unique size and complexity of the AAA in the ADR marketplace, while acknowledging and respecting the basic concerns that guided the CPR Principles.” Mr. Slate also thanked the CPR-Georgetown Commission, and its sponsoring institutions, for providing “a true service to the advancement and credibility of alternative dispute resolution by recognizing the serious issues of ADR providers with actual or apparent conflicts of interest and convening a group to address these issues. I was pleased to be a part of this group and appreciate the consideration given to my opinions and perspective.” Letter of 2/4/02 from William K. Slate to Thomas J. Stipanowich, on file at CPR.
Preamble

As the use of ADR expands into almost every sphere of activity, the public and private organizations that provide ADR services are coming under greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers. The growth and increasing importance of ADR Provider Organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel this effort by the CPR-Georgetown Commission to develop the following Principles for ADR Provider Organizations.

The Principles build upon the significant policy directives of the past decade which recognize the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services. Several core ideas guide the Commission's effort, namely that:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR Provider Organizations and to inform consumers, policy makers and the public generally.
- The most effective architecture for maximizing the fairness, impartiality and quality of dispute resolution services is the meaningful disclosure of key information.
- Consumers of dispute resolution services are entitled to sufficient information about ADR Provider Organizations, their services and affiliated neutrals to make well-informed decisions about their dispute resolution options.

6 Today, ADR processes or techniques are used in almost every kind of legal and nonlegal dispute and in almost all sectors, including family, school, commercial, employment, environmental, banking, product liability, construction, farmer-lender, professional malpractice, etc. In the past decade, ADR has become a familiar part of federal and state courts, administrative practice, and regulatory and public policy development. The development of ADR systems for public and private institutions, as well as the use of ADR to arrange transactions are also well established. See generally Stephen D. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, Dispute Resolution: Negotiation, Mediation and Other Process (Aspen Law and Business, 3rd ed., 1999).


Commentators also have begun to consider the role of ADR provider organizations in the delivery of private justice and the procedural fairness of ADR forums. See generally Carrie Menkel-Meadow, Do the ‘Haves’ Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, Behind the Neutral: A Look at Provider Issues, Currents 1 (AAA, December 1998)(“All providers, whether for-profit or non-profit, facilitate and implement ADR in one or more forms and for good or ill, they all compete in the marketplace without significant outside regulation.”); David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33.

8 In publishing these standards, the drafters also note the increasing recognition of entity or organizational ethical responsibility or liability. See generally Ted Schneyer, Professional Discipline for Law Firms?, 77 Cornell L. Rev. 1 (Nov. 1992); New York Bar Disciplinary Rules governing law firm conduct, adopted May 1996.

9 See supra 7.
• ADR Provider Organizations should foster and meet the expectations of consumers, policy makers and the public generally for fair, impartial and quality dispute resolution services and processes.

In addition to establishing a benchmark for responsible practice, the CPR-Georgetown Commission hopes that the Principles will enhance understanding of the ADR field’s special responsibilities, as justice providers, to provide fair, impartial and quality process. This document hopes also to contribute to the ADR field’s commitment to self-regulation and high standards of practice.

Scope of Principles

The following Principles were developed to offer a framework for responsible practice by entities that provide ADR services. In framing the nine Principles that comprise this document, the drafters tried to balance the need for clear and high standards of practice against the risks of over-regulating a new, diverse and dynamic field.

The Principles are drafted to apply to the full variety of public, private and hybrid ADR provider organizations in our increasingly intertwined private and public systems of justice.\(^\text{10}\) A single set of standards was preferred because the Principles address core duties of responsible practice that apply to most organizations in most settings. The single set of Principles may also help alert the many kinds of entities providing ADR services of their essential, common responsibilities. Additional sector-specific obligations will likely continue to develop for particular kinds of ADR provider organizations, depending on their sector, nature of services and operations, and representations to the public. The proposed Principles were developed to guide responsible practice and, like ethical rules, are not intended to create grounds for liability.

Definition

The proposed Principles are intended to apply to entities and individuals which fall within the following definition:

An ADR Provider Organization includes any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services.

\(^{10}\) For an overview of the array of organizations that offer dispute resolution services, see *Taxonomy of ADR Provider Organizations*, infra at Appendix A (“ADR provider organizations come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals, and in their resources and management philosophies.”). *See also* Thomas J. Stipanowich, *Behind the Neutrals: A Look at Provider Issues*, Currents 1 (AAA, December 1998) (Noting that “[t]he contemporary landscape of ADR ranges from complex, multi-faceted organizations of national and international scope to ad hoc arrangements among individuals” and includes “more specialized services marketing particular procedures, groups that have evolved to serve the special needs of a community, industry, or business sector; and mom-and-pop mediation services.”)

The *Taxonomy of ADR Provider Organizations*, included as Appendix A, analyzes these diverse organizations along three major continua: the organization’s structure, the organization’s services and relationships with neutrals, and the organization’s relationships with users or consumers.
Comment

This definition of an ADR Provider Organization includes entities or individuals that manage or administer ADR services, *i.e.*, entities or individuals who serve as ADR “middlemen.” The definition intends to cover all private and public entities, including courts and public agencies, that provide conflict management services, including roster creation, referral to neutrals, administration and management of processes, and similar activities. It is not intended to govern the individuals who provide direct services as neutrals; rather this definition addresses the entities (either organizations or individuals) that administer or manage dispute resolution services.

The definition excludes persons or organizations who do not hold themselves out as offering conflict management services, although their services may incidentally serve to reduce conflict. These may include persons or organizations whose primary activities involve representing parties in disputes, providing counseling, therapy or similar assistance, or offering other services that may incidentally serve to reduce conflict. Importantly, however, if a law firm, accounting or management firm, or psychological services organization holds itself out as offering conflict management services as defined herein, it would be considered an ADR Provider Organization and fall within the ambit of these Principles.

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11 See also Consumer Due Process Protocol, supra note 7 (“An Independent ADR Institution is an organization that provides independent and impartial administration of ADR Programs for Consumers and Providers, including, but not limited to, development and administration of ADR policies and procedures and the training and appointment of Neutrals.”)

12 There are a number of ethics codes for ADR neutrals promulgated by national ADR professional organizations (*e.g.*, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (1977, under revision); the CPR-Georgetown Commission’s Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); and the transdisciplinary ABA/AAA/SPIDR Model Standards of Conduct for Mediators (1995)), by state-wide regulatory or judicial bodies (*e.g.*, Florida Rules for Certified and Court-Appointed Mediators (Amended Feb. 3, 2000); Minnesota Rule 114; Virginia Code of Professional Conduct), as well as by individual court or community ADR programs (*e.g.*, D. Utah Code of Conduct for Court-Appointed Mediators and Arbitrators) and individual ADR provider organizations (*e.g.*, JAMS Ethics Guidelines for Mediators and Arbitrators).
Principles for ADR Provider Organizations

I. Quality and Competence of Services
The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary.

a. Absent a clear and prominent disclaimer to the contrary, the ADR Provider Organization should take all reasonable steps to maximize the likelihood that (i) the neutrals who provide services under its auspices are qualified and competent to conduct the processes and handle the kind of cases which the Organization will generally refer to them; and (ii) the neutral to whom a case is referred is competent to handle the specific matter referred.

b. The ADR Provider Organization’s responsibilities under Principles I and I.a decrease as the ADR parties’ knowing involvement in screening and selecting the particular neutral increases.

c. The ADR Provider Organization’s responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.

Comment
[1] With the growth of voluntary and mandatory ADR use in all kinds of private and public disputes, the Drafting Committee believes it is essential to hold the ADR Provider Organizations, which manage these forums and processes, to the highest standards of quality and competence. This Principle thus establishes that ADR Provider Organizations are responsible, absent specific disclaimer, for taking all reasonable steps to maximize the quality and competence of the services they offer.

The Principle holds ADR Provider Organizations responsible for the quality and competence of the services they render, but articulates a rule of reason in determining the precise contours of that responsibility for each Organization. The nature of this obligation will vary with the circumstances and representations of the organization. The Drafting Committee adopts this approach over a more prescriptive rule because of the vastly different organizations that currently provide ADR management services. 13

Understanding that ADR Provider Organizations come in a variety of forms and hold themselves out as offering different levels of quality assurance, this Principle permits the Organization to limit its quality and competence obligation by a clear and prominent communication to that effect to the parties and the public. Specifically, the Principle provides that the ADR Provider Organization can diminish these obligations by a clear and prominent representation that the Organization intends a minimal or no warranty of quality or competence. Such a disclaimer may be appropriate, for example, where a bar association assembles a roster of available neutrals as a public service, but establishes only minimal criteria for inclusion and engages in no screening or assessment of the listed neutrals.

[2] Maximum quality and competence in the provision of neutral services has two main components under this Principle. The Organization is required to take all reasonable steps to maximize the likelihood that neutrals affiliated with the organization are qualified and competent (1) to conduct the

13 See supra note 10 for a discussion of the varied landscape of ADR provider organizations; see also Taxonomy of ADR Provider Organizations, infra at Appendix A; Stipanowich, supra note 7, at 14 (“The provider’s ‘administrative’ role varies greatly; in NASD arbitrations, case managers routinely sit in on hearings; at the AAA, case managers facilitate many aspects of the ADR process, while the CPR Institute for Dispute Resolution offers ‘non-administered’ procedures with minimal involvement by its employees.”)
processes and handle the kind of cases which the organization will generally refer to them; and (2) to handle the specific matter referred.15

[3] This Principle advisedly uses the related concepts of both qualification and competency. In the multidisciplinary field of conflict resolution, where neutrals come from a variety of professions of origin, there is no bright line between the concept of qualifications and competence. Unlike single disciplinary fields, where there are specific entry qualifications and examinations that certify that a practitioner is generally qualified to work in the field, no such universal entry standard exists in the conflict resolution field. Accordingly, the Principle uses the twin concepts of qualification and competency, as they are generally understood in the field today, as including a combination of process training and experience, and substantive education and experience.16

[4] Principle I.b reflects, and is consistent with ADR standards honoring party autonomy and knowing choice.17 It provides that when knowledgeable parties have meaningful choice in the identification and selection of individual neutrals, the duty for assuring the quality or competence of the neutral chosen transfers in part from the administering Organization to the parties themselves. Where party choice is limited by contract, statute or court rules, the ADR Provider Organization retains responsibility for maximizing the likelihood of individual neutral competence and quality.

[5] Under Principle I.c, the ADR Provider Organization has a continuing duty to take all reasonable steps to oversee, monitor and evaluate the quality and competence of affiliated neutrals.18 Determination of the specific monitoring and evaluation measures needed to fulfill this obligation will turn on the circumstances of each ADR Provider Organization. Currently, a spectrum of organizational oversight practice exists from extensive to modest monitoring of neutral performance. Some oversight measures used by Organizations include user evaluations, feedback forms, debriefings, follow-up calls, and periodic performance reviews.19

14 As the dispute resolution field grows and becomes more specialized, ADR provider organizations are developing specialized panels or groups to handle disputes in particular subject areas, such as insurance or employment conflicts, or specific kind of processes, such as multiparty mediation. This Principle provides that neutrals be competent and qualified in their areas of general substantive and process expertise, as well being competent and qualified to serve in the specific matter referred. It does not suggest that all neutrals affiliated with an organization must be competent and qualified in all substantive areas and processes covered by the ADR provider organization.

15 While there continues to be limited understanding about the mix and types of training, personal attributes and experience that predict effective performance, there is a growing willingness in the field to contemplate some objective criteria for judging competence. See Howard S. Bellman, Some Reflections on the Practice of Mediation, Negotiation J. 205 (July 1998). The current best practices standard for promoting competence relies on "some combination of training, experience, skills-based education, apprenticeships, internships, mentoring and supervised experience" and that "the appropriate combinations must be linked to the practice context." SPIDR Report on Qualifications, supra note 7, at 11-12. See also Margaret Shaw, Selection, Training, and Qualifications of Neutrals, National Symposium on Court-Connected Dispute Resolution Research (1994); Christopher Honeyman, The Test Design Project: Performance-Based Assessment: A Methodology for Use in Selecting, Training, and Evaluating Mediators (NIDR, 1995); Consumer Due Process Protocol, supra note 7, ("Elements of effective quality control include the establishment of standards for neutrals, the development of a training program, and a program of ongoing performance evaluation and feedback.")

16 See, e.g., SPIDR Report on Qualifications, supra note 7 and note 15 generally. For an example of how these combined concepts are used in the development of a roster of neutrals, see the roster entry criteria established by the U.S. Institute for Environmental Conflict Resolution for environmental mediators, at www.ecr.gov/r_entry.htm.


18 See, e.g., National Standards for Court-Connected Mediation Programs, Standard 16, Evaluation ("Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes.")

19 See SPIDR Report on Qualifications, supra note 7, at 12 (ADR Provider Organization should "be assessed on a regular basis," through such means as "consumer input, review of complaints, self-assessment, trouble-shooting, regular audits, peer review and visiting committees from other programs.")
II. Information Regarding Services and Operations

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

a. The nature of the ADR Provider Organization’s services, operations, and fees;

b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;

c. The ADR Provider Organization’s policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;

d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and

e. The method by which neutrals are selected for service.

Comment

[1] Reasonable and meaningful disclosure of key information about the ADR Provider Organization is the cornerstone of this document. In conformity with established ADR standards,20 this Principle underscores the importance of clear, accurate and understandable information to informed decision-making by consumers of dispute resolution services and the public generally.

[2] This Principle, like this document generally, applies the rule of reason to the extent and form of the required disclosure. While some may prefer an absolute rule, the drafters believe that requiring reasonable disclosure consistent with the nature, structure and services of the organization and the knowledge base of the individual user, is more appropriate in this evolving field. Currently, ADR Provider Organizations come in a wide variety of organizational forms, provide a variety of services, and operate in an array of disparate settings.21 These entities can differ considerably in their services, policies, relationships with the affiliated neutrals, affiliation criteria, markets, and their approaches to listing and referring cases to affiliated neutrals. A principle establishing an affirmative obligation to provide key information should recognize these differences, as well as differences in effective means of disclosure.22

[3] This Principle calls for reasonable disclosure of information about relevant financial relationships between the affiliated neutrals and the ADR Provider Organization. Information about specific compensation arrangements is not contemplated under this section. Rather, general statements of the existence or absence of consequential financial links, either direct or indirect, between the affiliated neutral and the ADR Provider Organization that may have an impact on the conduct of the Organization or the neutral, or may be reasonably perceived as having such an effect, are expected.23

20 See, e.g., SPIADR Report on Qualifications, supra note 7, at 6 (“It is the responsibility of . . . programs offering dispute resolution services to define clearly the services they provide . . . and provide information about the program and neutrals to the parties.”); National Standards for Court-Connected Mediation, supra note 7, Standards 3.1-3.2.

21 See Taxonomy of ADR Provider Organizations, infra at Appendix A; see also supra note 10 and accompanying text.

22 We recognize that the kinds of disclosures advocated by this Principle will be different, for example, for a large international organization, like the American Arbitration Association, and a small mediation firm.

23 In some organizations, there is no financial relationship with affiliated neutrals other than their inclusion on a roster. In other entities, affiliated neutrals are owners, employees, contributors, franchisees, independent contractors or stand in other consequential economic relationship to the ADR organization. See Taxonomy of ADR Provider Organizations, infra at Appendix A.
III. Fairness and Impartiality

The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.

Comment

ADR parties and the public are entitled to fair processes and impartial forums. As justice providers, ADR Provider Organizations have an obligation to take all reasonable steps to ensure the impartiality and fundamental process fairness of their services. This mandate may have particular importance when the ADR Provider Organization undertakes to administer an in-house dispute resolution program, another organization’s process or policy, or processes designed or requested by one party to a dispute. Recent ADR policy directives and case law provide the field, courts and regulators with important baselines of fundamental fairness and impartiality. To date, key indicia of fair and impartial processes and forums include: competent, qualified, and impartial neutrals; rosters of neutrals that are representative of the community of users; joint party selection of neutrals; adequate representation; access to information; reasonable cost allocation; reasonable time limits; and fair hearing procedures. Building on these standards, this Principle establishes an across-the-board obligation on the part of the ADR Provider Organization to ensure the impartiality and fundamental process fairness of its services.

IV. Accessibility of Services

ADR Provider Organizations should take all reasonable steps, appropriate to their size, nature and resources, to provide access to their services at reasonable cost to low-income parties.

Comment

As the profession and business of dispute resolution grows, ADR Provider Organizations have a responsibility to provide services to low-income parties at reasonable or no costs. This access-to-services obligation can be satisfied in various ways, depending on the circumstances of the ADR Provider Organization. For example, the Provider Organization can offer pro bono neutral services or sliding scale fees. The entity could also require its affiliated neutrals to participate as neutrals in dispute resolution programs offered by the courts, government, nonprofit groups or other institutions at below market rates or as volunteers.

V. Disclosure of Organizational Conflicts of Interest

a. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a de facto stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

24 See supra note 7.
b. The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.

Comment

Reflecting the field’s longstanding reliance on reasonable disclosure to address the existence of interests or relationships which may effect fairness and impartiality, this Principle imposes an independent duty of disclosure on the Organization to provide information about significant organizational relationships with a party or other participant to an ADR process. As with these Principles generally, the rule of reason is intended to apply to this provision.

At issue is the potential for actual or perceived conflicts of interest involving ADR participants (such as, businesses, public institutions, and law firms) that have continuing professional, business or other relationships with the ADR Provider Organization. For example, an ADR Provider Organization may be under contract to an institutional party to provide a volume of ADR services; or a law firm may regularly choose a particular ADR Provider Organization to resolve disputes repeatedly, or represent a client or clients that does so; or a public institution may send most or all its employment disputes to a particular ADR Provider Organization by contract or de facto business relationship. Under this Principle, disclosure of such relationships between the Organization and repeat player parties or other repeat players to the other parties to the dispute would be required.

This Principle reflects the evolving concept of “organizational conflict and relationship.” Since ADR Provider Organizations perform functions which may have a direct or indirect impact on the dispute resolution process (in the creation of lists of neutrals for selection, scheduling or other administrative functions), concerns about organizational impartiality have begun to be raised by courts, policy makers and commentators. While the drafters understand that this disclosure obligation may impose some additional costs, particularly for large ADR Provider Organizations, we believe that disclosure of organizational relationships and interests is critical to preserving user and public confidence in the independence and impartiality of ADR Provider Organizations and services.

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26 See ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (1977, under revision); Commonwealth Coatings Corp. v. Continental Co., 393 U.S. 145, 151-52 (1968)(concurring opinion); Christopher Honeyman, Patterns of Bias in Mediation, J. of Dispute Resolution 141 (1985); CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002).

27 As with Principle II, we recognize that the extent and form of disclosures advocated by this Principle will be different depending on the nature of the ADR Provider Organization and is subject to the rule of reason. See generally Principle II, Comment [2].

28 For an analysis of recent case law and repeat player issues in ADR, see generally Carrie Menkel-Meadow, Do the ‘Haves’ Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, Behind the Neutral: A Look at Provider Issues, Currents 1, 15 (AAA, December 1988)(“providers should recognize that an ongoing, close connection between a provider and regular user may be a source of concern to the incidental user who is drawn into an ADR process by a pre-dispute ADR clause in a contract of the other party’s devising.”) See also JAMS Conflicts Policy, addressing both organizational conflicts and individual conflicts.

29 See, e.g., Consumer Due Process Protocol, supra note 7, at 18 (“The consensus of the Advisory Committee was that the reality and perception of impartiality and fairness was as essential in the case of Independent Arbitrator Institutions as it was in the case of Individual Neutrals. ... In the long term, ... the independence of administering institutions may be the greatest challenge of Consumer ADR.”) In Engalla v. Kaiser Permanente Medical Group, Inc., 15 Cal. 4th 951, 938 P 2d 903, 64 Cal. Rptr. 2d 843 (1997), the California Supreme Court strongly criticized the fairness and enforceability of Kaiser Permanente’s mandatory malpractice self-administered arbitration program, and remanded the case for further factual consideration of claims of fraud. For an analysis of Engalla, see Carrie Menkel-Meadow, California Court Limits Mandatory Arbitration, 15 Alternatives 109 (September, 1997). While the suit filed by the family of the deceased lung cancer patient has since settled, the Engalla case has led to a comprehensive assessment and restructuring of the Kaiser arbitration process. See The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration, The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement (January 5, 1998). Kaiser has since hired an independent ADR provider organization to administer its formerly in-house program. See Justin Kelly, Case Study Shows Consumer Confidence in Kaiser Arbitration Program, adrworld.com, April 22, 2002; Davan Maharaj, Kaiser Hires Outside to Oversee Arbitrations, Los Angeles Times, November 11, 1998, at C11.
VI. Complaint and Grievance Mechanisms

ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.

Comment

This Principle requires ADR Provider Organizations to establish and provide information about mechanisms for addressing grievances or problems with the Organization or individual neutral. Organizations should develop policies and procedures appropriate to their circumstances to provide this complaint review function. The organizational oversight provided through these mechanisms is concerned primarily with complaints about the conduct of the neutral, or deficiencies in process and procedures used. The complaint and grievance mechanisms are not intended to provide an appeals process about the results or outcome of the ADR proceeding.

VII. Ethical Guidelines

a. ADR Provider Organizations should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.

b. ADR Provider Organizations should conduct themselves with integrity and evenhandedness in the management of their own disputes, finances, and other administrative matters.

Comment

Absent a controlling statutory or professional code of ethics, this Principle directs the ADR Provider Organization to require its neutrals to adhere to a reputable code of conduct. The purpose of this Principle is to help ensure that neutrals affiliated with the ADR Provider Organization are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR. To this end, ADR Provider Organization should take reasonable steps on an ongoing basis to educate its neutrals about the controlling code and ethical issues in their practices. An ADR Provider Organization may elect to develop an internal code, which conforms to prevailing ethical norms, or to adopt one or more reputable external codes.

30 For example, an Organization may provide a complaint form, and/or designate an individual within the entity to receive and follow up on complaints. Another Organization may develop a more formal procedure for filing, investigating and resolving complaints. See, e.g., JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. In some states, disciplinary bodies have been established to review the conduct of state-certified ADR neutrals. For example, the Florida Mediator Qualifications Board was established by the Florida Supreme Court to govern the discipline of state-certified mediators in Florida. In the federal courts, the Northern District of California recently modified its local rules to provide that any complaint alleging a violation of ADR rules should be presented in writing and under seal directly to the U.S. Magistrate Judge who oversees the ADR programs in that court. (Local rule, effective May 2000).

31 For examples of codes of conduct developed by an ADR provider organization, see JAMS’s Ethical Guidelines for Mediators, Ethical Guidelines for Arbitrators, and the JAMS Conflicts Policy addressing both organizational and individual conflicts issues. See Principle V, Disclosure of Organizational Conflicts of Interest, supra. In addition, JAMS designated a senior executive as the organization’s arbiter of service complaints, and has developed procedures for handling ethics-based complaints against panelists. See JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. See also Principle VI, Complaint and Grievance Mechanisms, supra.
As the numbers of ADR Provider Organizations increase, it is particularly important that Organizations attend to issues of their own managerial, administrative and financial integrity. To this end, ADR Provider Organizations should consider adopting ethical guidelines for employees or other individuals associated with the Organizations who provide ADR management or administrative services, addressing such issues as impartiality and fair treatment in ADR administration, privacy and confidentiality, and limitations on gifts and financial interests or relationships.

VIII. False or Misleading Communications
An ADR Provider Organization should not knowingly make false or misleading communications about its services. If settlement rates or other measures of reporting are communicated, information should be disclosed in a clear, accurate and understandable manner about how the rate is measured or calculated.

Comment
As providers of neutral dispute resolution services, ADR Provider Organizations should be vigilant in avoiding false or misleading statements about their services, processes or outcomes. With ADR Provider Organizations assuming greater prominence in the delivery of ADR, it is important that organizations take care not to foster unrealistic public expectations about their services, processes or results. The reporting of settlement rates and other measures of reporting by ADR Provider Organizations and individual neutrals raises concern. Settlement rates can be calculated in various ways and reflect various factors (including the number of cases, the difficulty of cases, the time frame for inclusion, and the definition of settlement). This Principle calls for disclosure of how the settlement rates and other key reporting measures (such as “number of cases”) are determined when ADR Provider Organizations use these measures to market their services.

IX. Confidentiality
An ADR Provider Organization should take all reasonable steps to protect the level of confidentiality agreed to by the parties, established by the organization or neutral, or set by applicable law or contract.

a. ADR Provider Organizations should establish and disclose their policies relating to the confidentiality of their services and the processes offered consistent with the laws of the jurisdiction.

b. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the neutrals associated with the Organization.

c. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the ADR participants.

52 The American Arbitration Association recently adopted a Code of Ethics for Employees which addresses the ethical responsibilities of AAA employees in administering cases and other responsibilities. In the area of impartiality, for example, the Code provides, “[t]he appointment of neutrals to cases shall be based solely on the best interests of the parties.” In the areas of Financial Transactions, the Code provides, inter alia, “[e]mployees shall avoid any financial or proprietary interest in contracts which the employee negotiates, prepares, authorizes or approves for the Association and shall not contract with family members.” Additionally, the Code prohibits gifts to employees, stating: “Employees shall also observe the gift policy of the Association which prohibits the acceptance of gifts from neutrals, parties, advocates, vendors, or from firms providing services, regardless of the nature of the case or value of the intended gift.” Code of Ethics for Employees of the American Arbitration Association (1998).
Comment
This Principle establishes the protection of confidentiality as a core obligation of the ADR Provider Organization. Given the varied sources of confidentiality protections, unsettled case law, and diverse regulatory efforts, this Principle imposes a general obligation on the part of the ADR Provider Organization to establish, disclose and uphold governing confidentiality rules, whether set by party agreement, contract, policy or law. This Principle also makes it a core organizational obligation to communicate the Organization’s confidentiality policies to neutrals and parties.

33 See, e.g., Kathleen M. Scanlon, Primer on Recent Developments in Mediation, ADR Counsel In Box, No. 6, Alternatives (February 2001 and October 2001 Update)(overview of current ADR confidentiality policy, practice, case law and uncertainties)(October 2001 Update at www.cpradr.org, Members Only section); Special Issue: Confidentiality in Mediation, Disp. Resol. Mag., (Winter 1998) (for a review of policy issues and uncertainties, regulatory reforms, and case law); Christopher Honeyman, Confidential, More or Less: The Reality, and Importance, of Confidentiality is Often Oversold by Mediators and the Profession, Disp. Resol. Mag. 12, (Winter 1998); Proposed Model Rule 4.5.2 of the CPR-Georgetown Commission on Ethics and Standards in ADR’s Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); Uniform Mediation Act & Reporter’s Notes (jointly drafted by National Conference of Commissioners on Uniform State Law and ABA Section of Dispute Resolution) (adopted and recommended for enactment in all states by NCCUSL at 2001 Annual Meeting on August 10-17, 2001; adopted by ABA House of Delegates in February 2002).

34 For an example of a public ADR Provider Organization’s statement of confidentiality policy and rules, see U.S. Institute for Environmental Conflict Resolution, Confidentiality Policy and Draft Rule (1999).
Appendix A: Taxonomy of ADR Provider Organizations

I. Definition of “ADR Provider Organization”

See Definition and Comment in the Principles for ADR Provider Organizations, supra at 5-6.

II. Taxonomy of ADR Provider Organizations

ADR Provider Organizations come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve, and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals; and in their resources and management philosophies.

To help organize our understanding of this diverse and dynamic field, we believe it is useful to categorize ADR Provider Organizations according to (i) their organizational structures, (ii) the nature of their services and relationships with neutrals, and (iii) the nature of their relationships with users or consumers. The following discussion looks closely at each of these three main categories and tries to identify the major distinguishing factors in each area. We hope this discussion helps to provide a framework for understanding and guiding the diverse entities which manage or administer dispute resolution and conflict management services.

A. ORGANIZATIONAL STRUCTURES

Nine distinguishing factors related to the organizational structure of ADR Provider Organizations were identified:

- Overall Organizational Status
- Overall Organizational Structure
- How Neutrals Are Listed
- How Neutrals Are Referred
- Organization’s Role in Quality Control
- Organization’s Stake in Dispute or Substantive Outcome
- Organization’s Size
- Organization’s Resources
- Organization’s Operational Transparency

35 CPR-Georgetown Commission member Charles Pou headed the Commission’s effort to develop a taxonomy of ADR Provider Organizations, see Principles for ADR Provider Organizations, supra at note 1(hereinafter referred to as ADR Provider Principles). The Commission’s goal in developing the taxonomy was to describe, group and provide a framework for analysis of the many different kinds of entities that fall within the rubric of ADR Provider Organization. Mr. Pou is the primary author of the taxonomy. Commission members Bryant Garth and Michael Lewis also contributed to its development. The Taxonomy committee also played the lead role in formulating the definition of ADR Provider Organization included in the ADR Provider Principles.
1. Organizational Status:
Court • Public regulatory agency • Public dispute resolution provider agency • Other public entity (State dispute resolution agency, University, Administrative support agency, Office of Administrative Law Judges, Shared neutrals program) • Quasi-public (e.g., community dispute resolution programs) • Private not-for-profit • Self-regulatory entity • Private industry programs for intra-industry disputes, franchisee disputes, consumers, employees, clients • Private for-profit

A variety of different kinds of organizations currently provide dispute resolution services. In recent years, many public entities have been established, or extended their activities, to serve as ADR Provider Organizations. These include court-annexed systems individually or centrally managed by a judge or an administrator, programs run in-house by government agencies with regulatory duties, programs in government agencies that employ staff neutrals, shared neutrals programs, expedited government contracting vehicles, and activities at government, academic, or other public entities interested in conflict management. On the private side, Provider Organizations include private sector non-profit entities and for-profit entities. Some private groups also serve as contractors to assist public agencies or others wishing to employ ADR more effectively.

2. Organizational Structure:
Corporation • Limited liability company • Partnership • Franchise • Law firm • Membership organization • Other entities

A variety of structures are used to arrange the business or other dealings of private provider organizations, including corporations, limited liability companies, partnerships, franchises, law firms, and membership organizations.

3. How Neutrals Are Listed:
Pure clearinghouse • Selective listing (objective) • Selective listing (subjective)

The ADR Provider Organization may list all neutrals who provide required data and serve simply as a clearinghouse. Alternatively, it may employ objective criteria and list all who are found to comply; or it may selectively limit listed neutrals in explicitly or implicitly subjective ways.

4. How Neutrals Are Referred:
Nonselective • Random panel selection • Subjective panel selection • Party-identified panels • Assignor of neutral • Mixture

The Organization may refer all of its listed neutrals to users requesting a panel of neutrals, or all who meet users’ stated criteria, or a randomly selected subset of responsive neutrals; alternately, it may subjectively select a panel, or a single neutral, from among those that it (or the parties) deems appropriate for a given case. Some organizations employ a mix of these referral or selection techniques.

5. Organization’s Role in Quality Control:
Certification of listed neutrals • Qualifications and selection process • Conflicts check • Performance evaluation • Discipline • Training • No role

Some management entities certify or otherwise indicate that the neutrals to whom they refer cases or employ are qualified, or even superior. Others offer no warranties of qualifications beyond the general accuracy of the information they supply about potential neutrals. Whatever warranties or disclaimers are made, a variety of informal and formal approaches to quality control are used. These generally include one or more of the following: requiring affiliated neutrals to receive approved training courses; requiring neutrals to show that they have certain kinds of experience, training, or references; providing
ongoing in-service or other training and education to affiliated neutrals; offering informal, case-specific advice to neutrals; evaluating performance based on observation by the ADR Provider Organization’s personnel or users’ questionnaire responses; offering processes for receiving complaints, assessments, or other feedback from users; removing listed neutrals who, over time, are not selected by parties; and disciplining or removing neutrals who fail to meet ethical or other standards.

6. Organization’s Stake in Dispute or Substantive Outcome:
None • Full party to dispute • Good will, future business • Membership organization • Non-profit mission • Administrative charge for matchmaking • Portion of neutral’s fee • Other

Most ADR provider entities are explicitly independent and have no stake in the dispute. A few may be parties to cases for which they provide referrals, as in ADR programs that are managed internally by the private or public organization involved in the dispute (e.g., an internally-managed corporate, university or governmental dispute resolution). Other ADR Provider Organizations may have some attenuated or perceived interest (programs using collateral duty or shared neutrals from the same, or another, agency). Some managing organizations provide ADR services as a public service, pursuant to a statutory mandate, as a means of improving or supplementing other services or activities, or as a way to fulfill other non-profit missions. Others provide services primarily in return for fees. Several other benefits may accrue to an ADR Provider Organization: service to members, good will that may influence other activities, or access to additional cases or clients.

7. Organization’s Size:
Individual part-time solo • Individual full-time solo • Small entity • Large entity • Regional organization • National organization • International organization

ADR Provider Organizations may include a single individual for whom mediation, arbitration, or management or administrative services are a sideline, a full-time practitioner, a small specialized entity with several neutrals, a large entity that offers a diverse array of services and neutrals in several parts of the U.S., or a national or international organization with hundreds or thousands of available neutrals.

8. Organization’s Resources:
Substantial paid staff and related resources devoted to program • Limited volunteer staff and few other resources

Staff and other resources available for operating a program vary dramatically and can have an impact on the nature and quality of services. A few providers devote no full-or part-time staff to their activities; they may, for example, use volunteers, simply provide a list of neutrals without more, or respond to requests on a “catch-as-catch can” basis. At the other extreme, some have substantial full-time staffs devoted to one or more provider roles (e.g., setting standards for listing neutrals, admitting listed neutrals, furnishing panels, advising parties, assessing or disciplining listed neutrals).

9. Organization’s Operational Transparency:
Opaque • Open decision making • Rules of procedure defining required competencies, disclosing standards and/or methods for selecting neutrals in individual cases

Some ADR Provider Organizations operate as black boxes, with little or no provision for oversight or openness; others are relatively more open and explicit about the processes by which neutrals are selected, assigned, and monitored; a few seek explicitly to assure openness and regularity via rules, standards, or methodologies.
B. ORGANIZATION’S SERVICES AND RELATIONSHIPS WITH NEUTRALS

Five key attributes of ADR Provider Organizations were identified in this area:

- Nature of Organization’s Services
- Nature of Cases
- Nature of Process Assistance Furnished by Neutral
- Relation of Listed Neutrals to ADR Provider Organization
- Status of Neutral

1. Nature of Organization’s Services:

Neutral who assists disputants • Clearinghouse list of available neutrals • Management service • Full service administration • Assignor of neutrals • Advisor • System design • Other consultant • Mixture

Some ADR Provider Organizations offer only certain limited kinds of neutral services; others offer a menu of ADR options, which may include training and consulting. A few operate purely as clearing-houses that do little beyond offering a list of neutrals for users to review, perhaps accompanied by a short brochure or generalized advice. Some court programs, for instance, simply maintain a binder containing resumes sent in by local neutrals. Many ADR Provider Organizations, however, offer a range of administrative, management, and consulting services, including helping parties select or design appropriate processes, finding suitable neutrals, and managing the case during the ADR process. Some Provider Organizations offer set management choices, while others offer parties tailored management (from full-service to self-administration) depending on the users’ request. A few offer all of these neutral and management services, sometimes in settings where the Organization both manages a roster and provides neutrals’ services for the same client.

2. Nature of Cases:

Number of parties (multiparty or two-party) • Complexity • Length • Subject matter (environmental/policy • civil enforcement • mass tort, insurance, product liability, or similar litigation • commercial/business conflicts • small claims litigation • workplace/employment • family • consumer • labor-management • neighborhood • other)

ADR Provider Organizations assist parties in cases that vary in size, complexity, length, and number of parties, as well as in their subject matter. A few Provider Organizations offer services for cases involving a wide array of settings or subjects. Other Provider Organizations tend to specialize by subject matter. For instance, some Organizations deal mainly with environmental matters; others tend to focus primarily on a broad range of business, commercial, employment and public disputes. Most public Provider Organizations—for example, entities managing court-annexed ADR programs, state-wide court management organizations, and user-specific entities (like the FDIC’s roster of neutrals for litigation stemming from bank closings)—deal mostly, or exclusively, with the kinds of cases they were established to support, though this may encompass a broad array of subject areas.

3. Nature of Process Assistance Furnished by Neutral:

System design • Other consulting • Training • Facilitation • Mediation • Case evaluation • Binding arbitration • Private judging • Specialized expertise in specific subject area • Hybrid ADR Processes • Mixture

The ADR Provider Organization may refer listed neutrals who offer a range of ADR processes and related services. The neutral’s roles may also range from a brief consultations to extended conflict resolution interventions. Training and design consulting assignments may also include short or longer tenures.
4. Relation of Listed Neutrals to Organization:
Independent • Contractors • Franchisee • Staff • Other

Some management organizations have few, or no, dealings with neutrals beyond listing them. Other organizations work primarily, or exclusively, with neutrals who are contractors, subcontractors, employees, members or franchisees. Several provider organizations require most of their listed neutrals to pay a fee.

5. Status of Neutral:
Private full-time professional neutral • Private part-time • Public collateral duty • Public full-time • Judicial officer • Lawyer • Other professionals

An ADR Provider Organization may offer services from private full-time or part-time dispute resolution practitioners, public full-time practitioners, private individuals who serve occasionally as neutrals, public employees who offer neutral services on a collateral duty basis, or judicial officers whose activities as neutrals may be related to official duties. Apart from their employment status, neutrals referred by a Provider Organization may also come from a variety of professional or other backgrounds (e.g., lawyer, judge, engineer, environmental scientist, social worker, therapist, among others).

C. ORGANIZATION’S RELATIONSHIPS WITH USERS OR CONSUMERS

Two key factors were identified in this area:
• Characteristics of Parties or Representatives
• Organization’s Prior Relationship with a User or Representative

1. Characteristics of Parties or Representatives:
Unsophisticated/vulnerable/pro se/novice parties or representatives • Experienced/ fully represented parties or representatives • Individual v. Organization • Individual v. Individual • Other

ADR Provider Organizations deal with a variety of users. Organizations handling neighborhood, consumer, or family cases may often deal with cases involving exclusively first-time participants or similarly unsophisticated users. In many court programs and other settings, the Provider Organization may deal with some parties who are novices on one side and well-represented organizations, or ones that have great experience with ADR processes, on the other. These and other Provider Organizations—particularly in large commercial or labor disputes—deal largely with sophisticated repeat players (as parties and/or representatives) on one or all sides.

2. Organization’s Prior Relationship with a User or Representative:
None • Repeat contractor • Long-term contractor • Financial dealings • Other (e.g., board member)

An ADR Provider Organization may have had no dealings with any party or representative; may have worked one or more times with a party or with both parties, or their representatives; or may have a long-term service contract or other relationship with one party or law firm. A Provider Organization may also have certain types of prior, ongoing, or intermittent professional relations with parties or representatives, such as providing training, consulting, or systems design services. In some instances, a Provider Organization may have financial, business, professional or personal dealings with a party or representative.
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Mandatory Arbitration and Inequality of Justice in Employment

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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. 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. Declining unionization is itself one of the factors leading to greater wage inequality and a diminished political voice for workers. 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.

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

1 The survey research project that led to some of the results reported in this paper was supported by a research grant to Cornell University from the Robert L. Habush Endowment of the American Association for Justice. I also gratefully acknowledge the contributions of the National Employment Lawyers Association (N.E.L.A.) in providing access to its membership for the conduct of the survey and to its individual member attorneys who responded to the survey for their time and efforts in doing so. All claims, opinions, and errors in this paper are my own and do not represent those of the organizations that provided assistance for this research project.


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).

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. 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. 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. 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. 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.
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

judicial, forum.”\textsuperscript{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 \textit{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.”\textsuperscript{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

\textsuperscript{12} \textit{Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614 at 628 (1985)

\textsuperscript{13} \textit{Gilmer, supra}, at 31 (quoting \textit{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

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. 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. 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. 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, 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

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16 See Gough, this volume.
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.\(^\text{19}\) 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

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%. The same study reported a higher employee win rate of fifty-seven percent in a

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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. By contrast, my own research on outcomes of mandatory arbitration hearings found a 21.4% employee win rate amongst cases administered by the AAA. 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.

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. Meanwhile, Oppenheimer found a median damage award of $296,991 in California state court common law discharge trials. By contrast, I found a median award of $36,500 in mandatory arbitration cases administered by the AAA.

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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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. 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. 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. Employers succeeding in winning dismissal of the case in over half of these motions, 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.

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

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27 Ibid.
29 Colvin and Pike (2013).
30 Ibid.
31 See Gough – this volume.
prove. 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. Rates of pro se claims are higher in mandatory arbitration, but still represent only 24.9% of all mandatory arbitration claims. 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

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).
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

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. 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

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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. 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. But, conversely, perceptions of informal, interpersonal justice in the workplace increased after the adoption of the procedures. 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. 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. 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.

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. 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 arbitration on its own.

44 Ibid.
45 Ibid.
46 Ibid.
48 Sherwyn, Estreicher, and Heise, supra, note 28.
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.\textsuperscript{50} The company experienced an upsurge in employment litigation following the downsizing of its aerospace division in the early 1990s.\textsuperscript{51} In response to and inspired by the recent \textit{Gilmer} holding, it adopted mandatory arbitration for its employees beginning in 1994.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid at 86.
\textsuperscript{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, 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.

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

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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

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. 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. 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

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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. 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

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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. 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. 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.” 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

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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.
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. 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.

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.” 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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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


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. 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.

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. 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. Clermont and Schwab (2004) accessed the entire universe of employment discrimination cases,

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265,356 in total, heard before the federal docket between 1979 and 2000.\textsuperscript{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-\textit{Gilmer} environment. However, the win rates in arbitration are similar to the win rates discrimination plaintiffs experience in federal judge-only trials.

\textit{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.

\textit{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

\textsuperscript{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, 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. 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.

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. 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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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-\textit{Gilmer} arbitration studies and comprehensive reviews of the state and federal docket.

\textbf{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\textsuperscript{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\textsuperscript{23}: claim amount, claim amount, claim amount.

\textsuperscript{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.

\textsuperscript{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.” 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.

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.

Section IV: Data

Win Rates

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. 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 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](image)

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, 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.

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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**

![Summary Judgment Motion Filed](image)

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,” 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 cases. 

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28 Sherwyn et al (2005) page 1566
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**

![Employee Plaintiff Salary, by Forum](chart)

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

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.
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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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.\


\(^12\) See the FINRA Website, “Required Nasoc Arbitrator Training” (accessed February 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/Responsibilities/Disclosures/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

\(^{17}\) 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.


\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) Id.


\(^{26}\) Id.

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 about the 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 Rodríguez 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 purchase 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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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 analysis.

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

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. 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 (2014b), “The Repeat-Player Effect on Employment Arbitration Awards: Evidence from the Financial Industry” (working paper).
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. 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. 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).

Galanter’s repeat-player theory was first applied to the employment arbitration setting by Lisa Bingham, 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.

Alex Colvin’s work overcomes many of these problems. 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. 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. Colvin also finds a smaller, but still significant, repeat player-arbitrator effect, where employers selecting the

36 Id. at 98-103.
37 Id.
38 Id. at 103-104.
39 Id.
42 Id. at 12.
43 Id. at 21.
same arbitrator multiple times tend to receive favorable outcomes. 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.

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. 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

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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.\footnote{Id. at 21.} 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.\footnote{Id. at 21.} 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.


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

\footnote{Id. at 21.}
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. 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.

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 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.

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

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.

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


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.\textsuperscript{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.\textsuperscript{56} Many observers contend that sexism continues to plague the securities industry.\textsuperscript{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.\textsuperscript{58} Nevertheless, reports of “women fleeing Wall Street” have been abundant in the financial and business press.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,
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 \textit{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

Table 1: Repeat-Player Effects within the FINRA System

<table>
<thead>
<tr>
<th></th>
<th>Percent-Based Measure of Award Outcomes</th>
<th>Absolute Measure of Award Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>INCREASES IN EMPLOYER’S EXPERIENCE</td>
<td>Negative Effect on Employee Outcomes</td>
<td>Negative Effect on Employee Outcomes</td>
</tr>
<tr>
<td>INCREASES IN EMPLOYEE ATTORNEY’S EXPERIENCE</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>INCREASES IN EMPLOYER ATTORNEY’S EXPERIENCE</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>INCREASES IN ARBITRATOR’S EXPERIENCE</td>
<td>Negative Effect on Employee Outcomes</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>REPEATED PAIRS OF FIRMS AND ARBITRATORS</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
</tbody>
</table>

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

Table 2: Outcome Effects under Mandatory and Voluntary Systems

<table>
<thead>
<tr>
<th></th>
<th>Mandatory Arbitration for All Allegations</th>
<th>Voluntary for Discrim. without Rule Changes</th>
<th>Voluntary for Discrim. with Rule Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Discrim. Allegation</td>
<td>Other Allegations</td>
<td>Discrim. Allegation</td>
</tr>
<tr>
<td>N</td>
<td>220</td>
<td>593</td>
<td>18</td>
</tr>
<tr>
<td>Mean Monetary Award</td>
<td>$91,309</td>
<td>$146,364</td>
<td>$52,233</td>
</tr>
<tr>
<td>Mean Percent of Claim Awarded</td>
<td>-2.6%</td>
<td>18.9%</td>
<td>10.4%</td>
</tr>
<tr>
<td>Mean Monetary Award (Excluding Zeros)</td>
<td>$183,022</td>
<td>$229,164</td>
<td>$104,649</td>
</tr>
<tr>
<td>Mean Percent of Claim Awarded (Excluding Zeros)</td>
<td>20.7%</td>
<td>32.2%</td>
<td>20.8%</td>
</tr>
<tr>
<td>Mean Employee Win Rate (Award Greater Than Zero)</td>
<td>49.0%</td>
<td>65.2%</td>
<td>50.0%</td>
</tr>
</tbody>
</table>

Note: Monetary awards are deflated to 1986 dollars.
Table 3: Award Amounts and Win Rates for Discrimination and Other Cases

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

*** = significant at the .01 level
Note: Monetary awards are deflated to 1986 dollars.

Table 4: Gender Effects within the FINRA System

<table>
<thead>
<tr>
<th></th>
<th>Percent-Based Measure of Award Outcomes</th>
<th>Absolute Measure of Award Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>EMPLOYEE IS MALE</td>
<td>Positive Effect on Employee Outcomes</td>
<td>Positive Effect on Employee Outcomes</td>
</tr>
<tr>
<td>EMPLOYEE'S ATTORNEY IS MALE</td>
<td>Positive Effect on Employee Outcomes</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>EMPLOYER’S ATTORNEY IS MALE</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>ARBITRATOR IS MALE</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
</tbody>
</table>

Controls: Hearing location, case complexity, initial amount claimed, party characteristics, allegations, time.
HOW THE ARBITRATION-AT-ALL-COSTS REGIME IGNORES AND DISTORTS SETTLED LAW

Sarah E. Belton and F. Paul Bland, Jr. 1

Introduction

There is widespread recognition among commentators that a majority of Justices on the U.S. Supreme Court hold pre-dispute binding arbitration in exceptionally high regard and that in recent years the Court has greatly expanded the reach of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq. 2 The wisdom of FAA case law is the subject of great debate, but one issue not widely discussed is how the Court’s arbitration preference has led it and lower courts to ignore or rewrite a number of black letter rules that apply in other areas of law. Put another way, the drive to favor and expand the use of arbitration clauses has displaced or distorted a number of long-standing legal principles.

1 Sarah Belton is the Cartwright-Baron attorney and Paul Bland is a Senior Attorney at Public Justice, which has litigated numerous consumer and employee challenges to unfair pre-dispute arbitration clauses.

2 See, e.g., Judith Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 HARV. L. REV. 78, 113 (2011) (“Through its doctrine, the Court has moved the FAA from a limited role to a major source of regulation of both state and federal judges. . . .[T]he Court’s purposeful interpretation of the FAA has turned it into a new pillar.”); Maureen A. Weston, Preserving the Federal Arbitration Act by Reining In Judicial Expansion and Mandatory Use, 8 NEV. L.J. 385, 386 (2007) (“One problem with the FAA has resulted largely from the common law; that is, how courts, led by the Supreme Court since the early 1980’s, have broadly interpreted, and, arguably, misinterpreted the FAA as constituting a national policy favoring arbitration, and as a body of substantive law that preempts state law and that applies in state and federal courts to a broad range of statutory, employment, and consumer claims.”); David S. Schwartz, State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law, 16 WASH. U. J. L. & POL’Y 129, 153 (2004) (“It is an open secret that the ‘national policy favoring arbitration’ was not the creation of Congress in enacting the FAA in 1925, but is rather an ‘edifice of [the Court’s] own creation’ starting in the 1980s.”); Larry J. Pittman, The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change, 53 ALA. L. REV. 789, 854 (2002) (“[T]he Court’s current judicial philosophy is in favor of a broad application of arbitration agreements to statutory claims under federal statutes.”)
For example, in a variety of settings the U.S. Supreme Court has enunciated a strong presumption against federal preemption of state law. In cases decided under the FAA, however, the Supreme Court has never mentioned or acknowledged the presumption against preemption, even when its FAA decisions have preempted laws in areas traditionally governed by the States, such as the law of contracts.\(^3\) Similarly, a long-standing rule of law applicable to a wide range of constitutional rights provides that waivers of such rights must be voluntary, knowing, and intelligent.\(^4\) Yet in arbitration cases, courts regularly find waivers of the constitutional right to a jury trial on the basis of fine-print clauses that are buried in adhesion contracts and that consumers and employees rarely read, let alone understand. Indeed, the Supreme Court has instructed that if there is any doubt as to whether an arbitration clause waives a party’s right to a jury with respect to a particular claim, courts should indulge in a presumption that construes contracts in favor of requiring arbitration if possible.\(^5\) In other words, contrary to established legal principles, the Court finds a presumption in favor of the waiver of a constitutional right.

This Paper discusses in detail the casting aside of these and other long-standing rules.

First, we provide a brief overview of the FAA to emphasize that the modern, expansive sweep of

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3 In the recent case of *PLIVA v. Mensing*, writing for the Supreme Court, Justice Thomas contended the structure of the Constitution “suggests that federal law should be understood to impliedly repeal conflicting state law.” 131 S.Ct. 2567, 2580 (2011) (holding that federal regulations governing drug labeling requirements preempted state law tort actions alleging generic drug manufacturers had failed to warn of medical risks). Therefore, according to Justice Thomas, “courts should not train to find ways to reconcile federal law with seemingly conflicting state law.” Id. This section of the opinion, however, was not joined by Justice Kennedy. Taken together with the dissent articulating continued “respect for the States as independent sovereigns in our federal system” despite the majority’s “invent[ing of] new principles of pre-emption law out of thin air,” a five justice majority still adheres to the presumption against preemption of state law. *Id.* at 2582, 2591-92 (Sotomayor, J., dissenting).


5 See, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (holding that a consumer contract for termite prevention services can be subject to arbitration under the FAA); *see also id.* at 283 (O’Conner, J., concurring) (“Yet, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”)
the law is far from the modest purpose that Congress had when passing the law in the early twentieth century. We then turn in Part II to a discussion of the various legal principles that the Court’s FAA jurisprudence calls into question, including federal preemption of state laws, waiver of constitutional rights, basic contract doctrines, and the delineation between substantive and procedural laws.

I. The Supreme Court Has Expanded the Scope of the FAA.

The Supreme Court’s recent arbitration jurisprudence significantly departs from the congressional intent motivating the FAA. An abundance of scholarship establishes that the Congress that passed the FAA had fairly modest goals for the statute. For example, the principal author of the Act—who had also been the principal author of the New York Arbitration Act upon which the FAA was based and who was the lead witness in advocating for the Act—repeatedly stated that the Act was not intended to deal with statutory claims. In addition, the Act was intended to apply only to disputes between sophisticated commercial parties of relatively equal bargaining power. Nevertheless, in recent decades, the Supreme Court has dramatically


7 See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995) (holding that a consumer contract for termite prevention services can be subject to arbitration under the FAA); Thomas V. Burch, Regulating Mandatory Arbitration, 2011 UTAH L. REV. 1309, 1316-1319 (2011) (discussing statements made during hearings on the law, which “show that the reformers drafted, and that Congress intended to pass, an Act that applied to arbitration agreements between merchants with relatively equal bargaining power”); Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 WASH. U. L.Q. 637, 641 (1996)(“When Congress passed the FAA in 1925, it intended only to require federal courts to accept arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms’ length transactions.”).
reinterpreted and expanded the reach of the FAA. In a series of cases, the Court has found new rules and powers in the Act, often ones that preempt state laws or contradict earlier rulings of the Court, repeatedly bringing more types of disputes into arbitration with fewer checks and limitations.

This was not always the Court’s trajectory. For example, in the 1953 case of *Wilko v. Swan*, the Supreme Court considered the intersection of the Securities Act of 1933 with the FAA and concluded that claims under the Securities Act could not be the subject of pre-dispute binding arbitration agreements. Similarly, in *Alexander v. Gardner-Denver Co.*, the Court held that claims involving the civil rights statutes for employees could not be the subject of pre-dispute binding arbitration clauses. If an employee was required under the terms of a collective bargaining agreement to submit an employment discrimination dispute to arbitration, she maintained her statutory right to trial de novo for her discrimination claim.

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8 346 U.S. 427 (1953).
9 15 U.S.C.A. § 77a
10 At the time the case was decided, the law was known as the United States Arbitration Act.
11 *Id.* at 438. The Court construed the “Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose.” *Id.* (Jackson, J., concurring).
13 *Id.*
14 *Id.* at 59-60; see also *id.* at 56 (“Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. The “deferral rule” requiring employees to engage in arbitration before seeking recourse in court for discrimination claims “is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues.” *Id.* The Court “deem[ed] this supposition unlikely.” *Id.*
Today’s FAA is a remarkably more robust and all-encompassing statute than it was in 1953. The Supreme Court has pronounced a “national policy favoring arbitration,”15 and in a series of cases decided within the span of a few years, the Court held that the FAA preempts state laws restricting the arbitration of disputes16 and creates a presumption of the enforceability of arbitration agreements covering a wide variety of statutory claims.17 The Court also expressly overruled Wilko, holding that the right to select a judicial forum may be waived and an agreement to arbitrate Securities Act claims will be enforceable.18

Gardner-Denver, too, became a casualty of the Court’s changed views toward arbitration, as Gardner-Denver’s holding was undone in two subsequent cases. First, the Court held that a statutory claim for age discrimination can be subject to an arbitration agreement enforceable under the FAA.19 Although Congress provided a judicial forum for claims brought under the Age Discrimination and Employment Act of 1967 (ADEA)20—just as the legislature had done in the Title VII context—the Court found nothing in the law prohibiting arbitration as an alternative.21

16 Id. at 15-16 (judicial forum anti-waiver provision in California Franchise Investment Law held preempted).
17 With respect to the presumption in favor of arbitration, see Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (“any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”). With respect to the large number of statutory claims subject to the FAA, see, e.g., CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) (claims under the Credit Repair Organization Act may be compelled into arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing arbitration clause for Age Discrimination in Employment Act claims); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (claims under Racketeer Influenced and Corrupt Organizations Act may be the subject of pre-dispute binding arbitration clauses); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (enforcing arbitration clause to resolve claims under antitrust statutes).
18 Rodríguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989) (“We now conclude that Wilko was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.”).
21 Gilmer, 500 U.S. at 29.
Part of the Court’s reasoning distinguished arbitration provisions contained within a collective bargaining agreement.22 This distinction evaporated when, in the second case marking Gardner-Denver’s demise, the Court held that a provision in a collective bargaining agreement requiring union members to arbitrate ADEA claims is enforceable as a matter of law.23

In Circuit City Stores, Inc. v. Adams,24 the Supreme Court extended the FAA to provide that almost all employment contracts can be subject to arbitration.25 Only “contracts of employment of transportation workers,” which are expressly exempted under the FAA, are not subject to arbitration.26 As with some of the Court’s similar expansions of the FAA, the great weight of the evidence shows that the Congress that passed the Act never intended this expansion.27

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22 Id. at 35 ("[B]ecause the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.")
24 532 U.S. 105 (2001)
25 Id.
26 Id. at 119.
27 Circuit City, 532 U.S. at 126 (Stevens, J., dissenting) (“neither the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment”); Id. at 136 (Souter, J., dissenting) (noting that with the statutory language “Congress showed an intent to exclude to the limit [the Act’s] power to cover employment contracts in the first place” while it also “showed its intent to legislate to the hilt over commercial contracts at a more general level”); see also Moses, supra note 7, at 146-52 (advocating that the Supreme Court “should not, as it did in Circuit City, interpret the Commerce Clause broadly. . . so that the one purpose of the statute–excluding employment agreements from coverage–is completely rewritten by the Court”); Kelly Burton Beam, Administering Last Rights to Employee Rights: Arbitration Enforcement and Employment Law in the Twenty-First Century, 40 HOUS. L. REV. 499, 528 (2003) (“The Court’s selective use of historical reference. . . allowed the majority to remain willfully ignorant of the fact that the FAA was intended to relieve judicial prejudice against arbitration between merchants and was therefore not intended to cover employment contracts. Consequently, the Court’s analysis of whether its textual explanation corresponded with the legislative intent cannot be accurate because the Court was unwilling to assess the Act’s true purpose.”).
At the same time that the Court has expanded the reach of the FAA, it has also stripped away or substantially limited some of the protections that had earlier been in place to protect against abusive or overreaching arbitration clauses. For example, in 1996 the Supreme Court noted that state law protections against unreasonable contract terms, such as the law of unconscionability, applied to arbitration clauses.\(^{28}\) But in 2010, the Court held that arbitrators themselves can decide unconscionability challenges to arbitration clauses in many instances.\(^{29}\) Similarly, in 2011, the Court held that unconscionability challenges cannot be brought against terms that the Court deemed to reflect a “fundamental” attribute of arbitration.\(^{30}\) One such attribute is that arbitration is bilateral (that is, not on a class action or collective basis), unless the parties agree otherwise. Consequently, a large number of decisions holding class-action bans in arbitration clauses unconscionable under general principles of state contract law and unenforceable in settings where they would prove to be exculpatory no longer had force.\(^{31}\)

The effect of these decisions is that as the FAA forces more and more cases into arbitration, the protections available to individuals against abusive arbitration clauses have

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\(^{29}\) *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). In *Rent-A-Center*, the Court held that where an arbitration clause includes a “delegation clause” (a provision providing that challenges to the validity of the arbitration clause should be decided by the arbitrator), the delegation clause shall be enforced unless the party objecting to arbitration can bring an attack (such as unconscionability) against the delegation clause itself. *Id.* at 2780. As an indication of how this decision restricted contract law defenses for weaker parties resisting arbitration clauses, Justice Scalia, writing for a 5-4 majority, noted that the arguments remaining to plaintiffs, which must be narrowly tailored towards the delegation clause alone, would typically be “much more difficult . . .to sustain” than unconscionability arguments aimed at the arbitration clause as a whole. *Id.*

\(^{30}\) *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

\(^{31}\) *E.g.*, *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (overturning a district court that had refused to compel arbitration where, among other things, it had been proven that a class action ban would mean that only an infinitesimal” number of consumers could vindicate their rights under a state consumer protection statute); *Feeney v. Dell Inc.*, 466 Mass. 1001 (Mass. 2013) (overturning previous decision in the same case where the Court had struck down a class-action ban in an arbitration clause as unconscionable, in the wake of *Concepcion*); *Schnuerle v. Insight Commc’ns Co., L.P.*, 376 S.W.3d 561 (Ky. 2012) (same).
substantially contracted. The Supreme Court’s FAA jurisprudence has evolved in a few short
years from a rule that arbitration clauses are as enforceable as other types of contracts “but not
more so,”32 to a “national policy favoring arbitration,”33 and, even more recently, to a more
dramatic and powerful “emphatic federal policy in favor of arbitral dispute resolution.”34

II. The Policy in Favor of Arbitration Has Led to Distortions in the Law.

As the Supreme Court has expanded the FAA in the course of enacting its “emphatic”
policy favoring arbitration, it has brought the FAA into conflict with settled principles that apply
in a variety of other areas of law. The seeming imperative of enforcing arbitration clauses has led
the Supreme Court, and lower courts following its lead, to pen decisions that are not fairly
reconcilable with a number of doctrines that apply to nearly all contracts and, in some cases, to
most statutes. In short, the Supreme Court’s drive to make arbitration clauses more widely
enforceable has come at a significant cost to the principled nature of American law.

A. In Implementing a Policy in Favor of Arbitration, the Supreme Court Has Ignored
the Presumption Against Federal Preemption of State Laws.

A basic federalism rule in the United States, which the Supreme Court has repeatedly
recognized, is that there is a presumption against federal law preempting state law. This is

34 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (emphasis added); see also
especially true in areas of law that are traditionally left to state police powers. The presumption ensures that courts do not unnecessarily disturb the balance between federal and state power. Indeed, the Supreme Court has explicitly acknowledged “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” The Court regularly applies the presumption against preemption in a variety of contexts, among them products liability, banking, and others.

Without ever providing any principled reason for doing so, however, the Supreme Court appears to have exempted the FAA from this important background rule of law. There is no particular reason to treat the FAA as a statute with unusually potent preemptive force; the Supreme Court has acknowledged that “[t]he FAA contains no express pre-emptive provision,

35 See Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (holding that the Federal Warehouse Act manifested the intent of Congress to eliminate dual state and federal regulation of any grain warehouse that chose to obtain a federal license and therefore that Illinois Grain Warehouse Act was preempted).
37 Rice, 331 U.S. at 230; see also Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (where the text of a clause is susceptible to more than one reading, the Court recognizes “a duty to accept the reading that disfavors pre-emption”).
39 Cuomo v. Clearing House Assn., LLC, 557 U.S. 519 (2009) (holding that the National Bank Act did not preempt a New York Attorney General action against national banks to enforce the State’s fair lending laws because states “have always enforced their general laws against national banks–and have enforced their banking-related laws against national banks for at least 85 years”). Long-standing Supreme Court jurisprudence establishes that state regulation of banks is the “rule,” not the “exception.” McClellan v. Chipman, 164 U.S. 347, 357 (1896).
nor does it reflect a congressional intent to occupy the entire field of arbitration.41 Yet in case after case, the Supreme Court has held that the FAA preempts various rules of state law without even considering the presumption against preemption.

For example, in the seminal case of Southland Corp. v. Keating,42 the Court considered whether the FAA preempted California’s Franchise Investment Law.43 Southland Corporation was the owner and franchisor of 7-Eleven convenience stores, and the standard franchise agreement included an arbitration provision.44 Several 7-Eleven franchisees brought individual and class actions in state court against Southland for violations of the Franchise Investment Law.45 At the time, claims alleging such violations were not arbitrable under state law.46 In holding that the FAA preempted the California statute—thus mandating arbitration of the state law claims—the Supreme Court never mentioned that California’s Franchise Investment Law is presumed not to be preempted.47

A few years later, the Court again had occasion to consider the preemption by the FAA of the California Labor Code.48 The relevant section of the Code provided that a wage collection action could be maintained in court without regard to any private agreement to arbitrate.49 In a dispute between an employer and employee over commissions on sales of securities, the employer sought to compel arbitration pursuant to an arbitration provision in the Uniform

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43 Id.
44 Id. at 3-4.
45 Id. at 4.
46 Id.
47 Id. The opinion mentions only that the FAA represents "a national policy favoring arbitration." Id. at 10.
49 Cal. Lab. Code § 229; Id. at 484.
Application for Securities Industry Registration form the employee signed. 50 The Supreme Court held that the statute conflicted with the FAA and violated the Supremacy Clause. Accordingly, the Labor Code section was found preempted making the arbitration agreement enforceable. 51 Again, the Court made no mention of the presumption against preemption of state law. 52

Additional examples of the Supreme Court’s abandonment of the anti-preemption presumption in favor of arbitration are numerous. In one case, the Court struck down an Alabama statute that invalidated written, pre-dispute arbitration agreements in the context of a consumer dispute against a termite control company. 53 In another case, the Court struck down a California statute that provided that disputes involving talent scouts should be initially handled by an administrative body with specialized expertise in such disputes. 54 Florida had a rule of law that if the principal purpose of a contract was the commission of a crime, no provision of the contract could be enforced. The Supreme Court held the statute preempted with respect to arbitration clauses, 55 and again made no mention of the anti-preemption presumption.

Probably the most important decision in the Supreme Court’s FAA preemption jurisprudence is AT&T Mobility v. Concepcion, 56 in which the Court struck down a California rule that any contract term barring consumers from bringing or participating in a class action was

50 Id. at 485.
51 Id. at 491. The Supremacy Clause, U.S. CONST. art. VI, cl. 2, establishes the U.S. Constitution and federal statutes as “the supreme law of the land,” and requires “the judges in every state shall be bound thereby.”
52 The opinion does mention the “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” Id. at 489.
unenforceable if the term would be exculpatory with respect to a consumer protection law. The Court struck down the rule despite the large number of similar laws in other states and the Court’s acknowledgment that California law would invalidate a term banning class actions whether it was in an arbitration clause or not—in other words, that the California provision was not limited in its application to only arbitration. Again, as in the other arbitration cases preempting state laws, there was no discussion in Concepcion of the presumption against preemption.


59 The Court characterized California’s rule “[r]equiring the availability of classwide arbitration” as “interfer[e]ing with fundamental attributes of arbitration.” Concepcion, 131 S.Ct. at 1748. Writing for the majority in Concepcion, Justice Scalia noted that “[a]lthough [the FAA’s] saving clause preserves generally applicable contract defenses, nothing in [the statute] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” Id.

60 The decision does mention the “liberal federal policy favoring arbitration.” Id. at 1745.
At bottom, courts have long favored the presumption that federal statutes preempt state laws only in the rarest and most express circumstances. But today’s legal landscape suggests the canon has weakened vitality. At least in the context of a state law banning arbitration—and perhaps more broadly—the presumption against preemption has been silently overturned.

B. In Implementing a Policy in Favor of Arbitration, the Supreme Court and Lower Courts Have Abandoned the Presumption Against Waiver of Constitutional Rights.

It is settled law that although individuals may waive constitutional rights, a waiver is effective only when “knowing, voluntary, and intelligent.”61 In other words, courts will not infer the waiver of such rights.62 This standard has been applied to the Fifth Amendment protection against self-incrimination63 and the Sixth Amendment right to counsel in a criminal proceeding,64 among others.65

There is little doubt that, in almost all circumstances, courts would decline to enforce a contract containing a waiver of constitutional rights that fails to meet the foregoing standard. Imagine that a fine-print contract provision buried in a stack of lending documents stripped individuals of their constitutional rights to vote, to travel, to freely exercise their religion, to bear arms, or to speak out on matters of public concern. If a bank attempted to enforce such a provision, going to court to seek specific performance to bar a customer from speaking publicly,

62 Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (“For a waiver of constitutional rights in any context must, at the very least, be clear.”).
for example, the court would surely refuse on the grounds that there was no knowing, voluntary
and intelligent waiver of the right to free speech.66

That result makes the Court’s FAA jurisprudence all the more peculiar. Notwithstanding
the undisputed understanding of how contracts waiving constitutional rights are normally treated,
the Supreme Court’s jurisprudence under the FAA has led to a vastly differing outcome. By their
very nature, arbitration clauses entail the waiver of a party’s Seventh Amendment right to a trial
by jury.67 As one court has put it, the “loss of the right to a jury trial is a necessary and fairly
obvious consequence of an agreement to arbitrate.”68

Nonetheless, courts regularly enforce arbitration clauses in settings where there is no
meaningful consent.69 One particularly egregious illustration is Spring Lake NC, LLC v.
Holloway,70 where a 92-year-old person with a fourth-grade education, memory problems, and
increasing confusion, was held to have “agreed” to an arbitration clause—notwithstanding the

66 Individuals regularly do waive their right to free speech, such as in non-disparagement clauses included in
settlement agreements, but those waivers are only effective when and if they are sufficiently knowing, voluntary and
intelligent.
67 Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 307 (4th Cir. 2001); Pierson v. Dean, Witter, Reynolds,
Inc., 742 F.2d 334, 339 (7th Cir. 1984).
68 Pierson, 742 F.2d at 339. In arbitration, the arbitrator decides the merits of a claim. In Concepcion, the Supreme
Court used the example of “an ultimate disposition by a jury,” as one of the generally applicable doctrine that
“disfavors arbitration” and therefore conflicts with the FAA. 131 S. Ct. at 1747.
69 See, e.g., Morales v. Sun Constructors, 541 F.3d 218, 222 (3d Cir. 2008) (“Morales, in essence, requests that this
Court create an exception to the objective theory of contract formation where a party is ignorant of the language in
which a contract is written. We decline to do so. In the absence of fraud, the fact that an offeree cannot read, write,
speak, or understand the English language is immaterial to whether an English-language agreement the offeree
executes is enforceable.”); Berkeley v. Dillard’s, Inc., 450 F.3d 775 (8th Cir. 2006) (employee who refused to sign
arbitration clause assented to arbitration by continuing employment, when clause so provided); Hill v. Gateway
2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (arbitration agreement binding when consumer orders product by
telephone, the product can be returned within thirty days, and the product arrives with an arbitration agreement
included in the papers inside the box); In re Brown, 311 B.R. 702, 706 (Bankr. E.D. Pa. 2004) (enforcing an
arbitration clause against sick, elderly plaintiffs who “d[id] not know what an Arbitration Agreement is” and
received no explanation of papers they were asked to sign containing the arbitration clause).
70 110 So.3d 916 (Fla. Dist. Ct. App. 2013).
trial court’s factual finding that the individual “could not possibly have understood what she was signing.” The case is consistent with a great deal of law under the FAA, where the presence of an arbitration agreement somewhere in fine print is often taken as a waiver of the constitutional right to trial by jury. But the case emphasizes how the law in this area differs sharply from what would be required to constitute a waiver of other constitutional rights. Under the same set of facts, if the plaintiff in Holloway had allegedly waived her constitutional right to a jury trial in the criminal context, or, the right to remain silent, no waiver would be enforced.

It is particularly anomalous that the normal presumption against the waiver of constitutional rights is set aside in the arbitration context because outside of the arbitration setting, the normal requirement of a knowing and intelligent waiver applies to waivers of the Seventh Amendment right. Of interest to this Symposium is that the jury trial right is stated explicitly in certain employment statutes. The majority of the Supreme Court’s enormous reverence for arbitration is particularly evident in these settings. In a series of important statutes

71 Id. at 917.
72 United States v. Christensen, 18 F.3d 822, 826 (9th Cir.1994) (“the suspected presence of a mental or emotional instability eliminates any presumption that a written waiver is voluntary, knowing, or intelligent”).
73 Moore v. Ballone, 658 F.2d 218, 228-29 (4th Cir. 1981) (where defendant “unambiguously demonstrate[ed] his distorted mental condition” during questioning by police officers and remains “in continuous legal commitment to the state mental hospital,” then “[t]he evidence in the record of [his] mental condition, standing alone, should have sufficed for the state court to determine that he could not have knowingly and intelligently waived his rights”).
74 Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 811-12 (1937) (“[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.”); Seaboard Lumber Co. v. U.S., 903 F.2d 1560, 1563 (Fed. Cir. 1990) (“Waiver requires only that the party waiving such right do so ‘voluntarily’ and ‘knowingly’ based on the facts of the case.”). For more on how courts interpret the Seventh Amendment’s right to a jury trial in the civil context see Margaret L. Moses, What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence, 68 GEO. WASH. L. REV. 183 (2000).
75 Title VII and the Americans with Disabilities Act expressly provide for the right of a trial by jury. 42 U.S.C. § 1981a(c). Parties may also seek a jury trial for claims brought under the ADEA and the Fair Labor Standards Act (FLSA). Lorillard v. Pons, 434 U.S. 575, 580 (1978) (following the Congressional directive to interpret the ADEA “in accordance with” the FLSA, the Court found it significant that it is “well established that there was a right to a jury trial in private actions pursuant to the FLSA”).
protecting workers, Congress specifically made the important policy choice to provide that key causes of action could be tried to a jury.\textsuperscript{76} Notwithstanding this conscious and significant decision by the Congress, the Court has been very quick to find that those statutory rights may be waived in settings where there was no voluntary, knowing or intelligent waiver.\textsuperscript{77} It is troubling that the majority effectively is endorsing “unknowing” and “unintelligent” waivers of these rights.

Yet no court has ever articulated a serious or convincing rationale for why the Seventh Amendment right to a jury trial should be accorded reduced or no protection in the arbitration context. Instead, courts simply contend that the FAA ostensibly requires this result.\textsuperscript{78} Most scholars, however, have concluded that the waiver of a constitutional right is no less important in the arbitration context.\textsuperscript{79} Courts should not deviate from the long-standing rule that waiver of a right will not be inferred merely because an arbitration provision is involved.

\textsuperscript{76} Section 15 of the ADEA was amended by Congress in 1978 and unambiguously states that “a person shall be entitled to a trial by jury.” 29 U.S.C. § 626(c)(2); see also \textit{Lehman v. Nakashian}, 453 U.S. 156, 168 (1981) (“Congress expressly provided for jury trials in the section of the Act applicable to private-sector employees.”). And it wasn’t until 1991 that Congress amended Title VII to include the right to a jury trial found within the statute today. PL 102-166, § 102(c) Nov. 21, 1991, 105 Stat 1071, 1073 (1991); see also \textit{Landgraf v. USI Film Products}, 511 U.S. 244, 250 (1994) (“The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 an 1964” and “expressly identifies as one of the Act’s purposes “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”).


\textsuperscript{78} \textit{See, supra}, note 68.

\textsuperscript{79} Jean R. Sternlight, \textit{The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial}, 38 U.S.F. L. REV. 17, 33 (2003) (“State courts should recognize, though many have not, that those arbitration clauses that eliminate a pre-existing constitutional right to jury trial should be treated like civil jury trial waivers interpreted outside the arbitration context. Thus, to the extent that the state enforces civil jury trial waivers only if they are knowing, voluntary, and intelligent, that same standard should be applied to arbitration clauses.”).
The long term implications of this case law could conceivably extend beyond the arbitration context. As set forth above, the Court has been issuing decision after decision giving greater content to the FAA (whose operative section, 9 U.S.C. Section 2, is only a single sentence long) that make it easier and easier for corporations to strip workers of constitutional rights through unknowing “waivers” in arbitration clauses. It does not seem far-fetched to imagine that as the Court becomes increasingly comfortable holding that constitutional rights may be waived in an unknowing and unintelligent manner through hidden fine print contracts, that at some point the Court might also be more open to finding that corporations may strip workers of other constitutional rights (such as the right to speak out on matters of public concern, the right to petition the government, the right to privacy) as well.

C. The Policy in Favor of Arbitration Has Distorted the Law of Contracts.

The Supreme Court’s creeping extension of federal arbitration law has also slowly subsumed long-standing principles of contract law. Specifically, the FAA has displaced state law rules regarding contract formation.

States have traditionally governed the law of contracts, which includes, among other things, contract formation.\textsuperscript{80} At first blush, one would not expect the FAA to distort or rewrite

\textsuperscript{80} See, e.g., Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) (“Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law.”); \textit{Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.}, 458 U.S. 50, 84 (1982) (“the cases before us, which center upon appellant Northern’s claim for damages for breach of contract …, involve a right created by state law….”) (emphasis in original), \textit{id.} at 90 (Rehnquist, J. and O’Connor, J., concurring) (“[T]he lawsuit … seeks damages for breach of contract … which are the stuff of traditional actions at common law…. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims … arise entirely under state law.”); \textit{Aronson v. Quick Point Pencil Co.}, 440 U.S. 257, 262 (1979) ("[C]ommercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable. . . ."); \textit{Pan Am. Petroleum Corp. v. Super. Ct.}, 366 U.S. 656, 663 (1961) (contract dispute) (“The suits
state law contract principles, as the Act does not even define the term “contract.” Except for those instances where state law targets arbitration clauses for inferior treatment, the Court has properly recognized that it is state law, and not federal law, which governs arbitration clauses.81 It is unsurprising, then, that somewhat older FAA cases accord express respect to state contract law; in a 1995 case, for example, the Supreme Court stated that principles of state contract law provide the primary source of protection for consumers against corporate overreaching.82

One specific area where state law governs is contract formation. The FAA says nothing about when a contract is or is not formed. Under a common contract law principle, contracts that violate criminal laws or are against public policy are illegal and void ab initio.83 Thus, a contract entailing illegality cannot, and will not, be enforced.84 Such illegal contracts are unenforceable in their entirety.

Nonetheless, the Supreme Court has superimposed on state law contract formation its invented substantive rules of federal arbitration law. In Prima Paint Corporation v. Food &
Conklin Manufacturing Co., the Court held that the FAA requires that arbitration clauses be treated as though they are separable from the rest of the contract. In other words, even if a contract containing an arbitration clause is unenforceable for some reason (perhaps for fraudulent inducement), courts are to treat the arbitration clause as separate from the remainder of the contract and thus presumptively enforceable notwithstanding the broader contract’s problems. Hence, under Prima Paint, parties are required to arbitrate their challenges to other contract provisions.

The case of Buckeye Check Cashing, Inc. v. Cardegna, which relies on the Prima Paint rule, illustrates how the Court’s expansion of the substantive federal law of arbitration displaces standard rules of contract law. In Buckeye, borrowers brought a putative class action alleging that payday lenders violated state usury laws with the high finance charges associated with payday loans. The underlying contracts contained arbitration provisions that the Florida Supreme Court refused to enforce due to the contract’s illegality.

Whereas under state contract law the existence of a valid contract is decided by a court, the U.S. Supreme Court held that the borrowers’ claim of an unenforceable usurious contract—a

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85 388 U.S. 395 (1967).
86 Id. at 403-04.
87 Id.
88 546 U.S. 440 (2006). It should be disclosed that one of the authors of this article, Mr. Bland, was the Counsel of Record representing John Cardegna in the Buckeye case.
89 Id. at 442.
90 894 So.2d 860, 862 (Fla. 2005) (agreeing with the lower court that “[a] party who alleges and offers colorable evidence that a contract is illegal cannot be compelled to arbitrate the threshold issue of the existence of the agreement to arbitrate; only a court can make that determination”) (emphasis in original; citation omitted).
contract for illegal activity—was to be determined by an arbitrator.91 Thus, the holding in

_Buckeye_ conflicts with the ability of state courts to void contracts under state law on grounds that
apply, in general, to any other contract provision.92 This approach gives arbitration provisions a
special status above state contract law.93 The implications of this trend are important. For many
years, state law doctrines of unconscionability, duress, and public policy have provided floors of
protection for workers and individuals against over-reaching and unfair contract terms. Given the
modern reality that an employer may simply say “an employee may not work here unless she
signs an acknowledgement agreeing to a large number of fine print legalese terms that the
employee will predictably not read,” there is a strong argument that there needs to be some
protection against abuses of this great power.94 As the Court’s jurisprudence repeatedly chips
away at the state laws that protect against over-reaching, contract law threatens to be less of a
body of true law—with rules and limits—and more into a device for the powerful drafters of
contracts to demand and receive whatever they want.

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91 The Court saw this as a direct result of the _Prima Paint_ rule. _See Buckeye_, 546 U.S. at 448 (“it is true . . . that the
_Prima Paint_ rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be
void.”)

92 _See Doctors Assocs., Inc. v. Casarotto_, 517 U.S. 681 (1996); _see also_ Charles Davant IV, _Tripping on the
Threshold: Federal Courts’ Failure to Observe Controlling State Law Under the Federal Arbitration Act_, 51 DUKE
L.J. 521, 546 (2001) (noting that “[t]o the extent that a ‘federal contract law’ exists, it is an amorphous grab bag of
principles”).

93 Lawrence A. Cunningham, _Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court
Flaunts and Flunks Contracts_, 75 LAW & CONTEMP. PROBS. 129, 147 (2012) (nothing that “many of the Court’s
arbitration-law doctrines depart from general contract law so considerably that they achieve a different purpose—one
in service of social control, not freedom of contract”).

94 _See MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 145
(2013) (“Of course, Congress could just outlaw mandatory arbitration clauses in consumer contracts by amending
the Federal Arbitration Act to reverse the Supreme Court’s over-expansive interpretations. . . .”). Professor Rudin
notes that the prioritization of “freedom of contract” principles in case law has not resulted in “courts making a
distinction between how they evaluate such a clause in a commercial contract between parties who have apparently
engaged in cognizant risk allocation versus how they evaluate in a boilerplate rights deletion scheme.” _Id._ at 140.
D. The Policy in Favor of Arbitration Has Distorted the Law Distinguishing Procedural and Substantive Laws.

One final example of how the Supreme Court’s drive to expand the use of mandatory arbitration clauses has affected black-letter principles involves the distinction between procedural and substantive laws.

The distinction between procedure and substance is significant in a number of different settings. One area where the distinction is particularly important is cases where federal courts sit in diversity jurisdiction. In that setting, of course, federal law governs procedural issues—one would certainly not expect a U.S. district judge to apply state rules of procedure. But “rules that define the elements of a cause of action, affirmative defenses, presumptions, burdens of proof, and rules that create or preclude liability are . . . obviously substantive” and are governed by state law.95 So if a plaintiff in a diversity case brings claims under a state statute or using a state common law cause of action, issues such as “the allocation of burden of proof” are decided according to state law, not federal law, because those issues are “substantive in nature.”96

As with the other areas addressed in the foregoing Parts, however, the normal understanding of procedure versus substance is often abandoned when courts are working to enforce arbitration clauses. In Parisi v. Goldman, Sachs & Co.,97 where the plaintiff alleged that the defendant had violated Title VII by engaging in a pattern or practice of gender

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97 710 F.3d 483 (2d Cir. 2013). Mr. Bland was co-counsel for Ms. Parisi.
discrimination, the employer sought to have the case compelled to individual arbitration. The pattern-or-practice theory is a method by which disparate treatment can be shown; certain types of proof in pattern-or-practice cases give rise to a presumption that shifts the burden of proof to the employer. The district court had refused to enforce the employer’s arbitration clause, which banned class actions, on the grounds that “the clause effectively operated as a waiver of a substantive right under Title VII.” The district court so reasoned based upon the prevailing law in the Second Circuit, which held that pattern-or-practice claims could be brought only on a class action basis. The Second Circuit overturned the district court, and enforced the arbitration clause, citing the “liberal federal policy in favor of arbitration.”

In non-arbitration circumstances, the pattern-or-practice method of proof would undoubtedly be seen as a substantive, rather than procedural, body of law. But because applying the ordinary procedure-substance distinction would have led to the invalidation of an arbitration clause, in this case of first impression, the Second Circuit focused upon the connection between the pattern-or-practice method of proof and class actions, and held that there was no entitlement to bring such claims. Once again, in the area of arbitration, where courts focus on the Supreme Court’s emphatic policy in favor of arbitration, the normal rule of law was set aside. A body of law that would have been considered substantive in most settings has been viewed as procedural in this context. The boundaries of this trend are not yet settled, and are currently continuing to

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98 Id. at 485.
99 Id. at 487-88.
100 Id. at 485-86.
101 Id. at 488.
102 Id.
evolve, both in the general area of employment law and the intersection of arbitration clauses with substantive employment rights.

Conclusion

For the legal system to operate in a principled manner, its basic rules must be applied with consistency and reason. In too many instances, however, the Supreme Court’s enthusiasm for arbitration has led it and lower courts to abandon core and otherwise trans-substantive legal principles—or, at least, to cut odd, arbitration-sized holes in them. This Paper has highlighted a few of the principles and their respective holes, and it is clear that the Court has placed arbitration upon its own pedestal. Much as critics described the American legal system of the 1890s as a system in which “The Railroad Always Wins,” it seems fair today to criticize our legal system as one where “Arbitration Always Wins.”

103 See Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011). In Dukes, the defense relied on—and the court was persuaded by—an argument that the Rules Enabling Act, which states that the rules of civil procedure “shall not abridge, enlarge, or modify any substantive right,” 28 U.S.C. § 2072(b), prevented the use of Federal Rule 23 (governing class actions) to abridge their right to litigate statutory defenses to employment discrimination claims. Dukes, 131 S.Ct. at 2561.

104 See D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 356-57 (5th Cir. 2013) (overturning the decision of the NLRB that an employer violated the National Labor Relations Act (“NLRA”) by requiring its employees to sign an arbitration agreement that precluded the filing of joint, class, or collective claims because “the NLRA does not grant employees the substantive right to adjudicate claims collectively” and override the FAA).
FAA Preemption After Concepcion

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Forced Arbitration in the Workplace: A Symposium
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FAA Preemption After Concepcion

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In AT&T Mobility LLC v. Concepcion, the Supreme Court held that the Federal Arbitration Act (“FAA”) preempted California's use of unconscionability doctrine to invalidate an arbitration clause containing a class arbitration waiver.1 Much has been written on Concepcion, with most (but not all) focusing on its impact on the availability of class actions.2 While I touch on that issue in this Article, my main focus here is on a different issue: the implications of Concepcion for FAA preemption doctrine more generally. Concepcion was the Supreme Court's first decision interpreting the savings clause in FAA section 2, which provides that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”3 Commentators have expressed disparate views on the scope of the savings clause after Concepcion, including some who have suggested that unconscionability may no longer be available as a ground for refusing to enforce arbitration agreements.4 Courts have disagreed and have applied Concepcion more narrowly.5 In my view, the courts (largely) have it right. This Article will explain why.

Initially, Part I addresses some misconceptions about Concepcion. Concepcion is beyond doubt a very important (not to mention controversial) decision. But in several respects, the impact of Concepcion has been overstated. First, prior to Concepcion, a number of courts had held that class arbitration waivers were enforceable as a matter of state law, at least under some circumstances. Concepcion may have had little effect on the enforceability of arbitration clauses in those states. Second, despite predictions of a “tsunami” of businesses switching to arbitration after Concepcion, the use of arbitration clauses in several types of standard form contracts has increased only slightly. Third, at least some of the preemption holdings courts have attributed to Concepcion are due, not to Concepcion, but instead to well-established law predating Concepcion. Again, my purpose here is not to deny the importance of the decision in Concepcion, but rather to focus discussion on the actual effects of the case.

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1 131 S. Ct. 1740, 1750 (2011).
4 See infra text accompanying notes 64-65.
5 See infra text accompanying notes 69-78.
Part II then examines the implications of Concepcion for FAA preemption doctrine. It takes the decision and analysis in Concepcion as given and applies that analysis to other possible uses of unconscionability doctrine. I suggest a narrow view of FAA preemption after Concepcion, under which states can continue to use unconscionability doctrine to police the fairness of arbitration agreements unless the state rule is inconsistent with “fundamental attributes of arbitration,” as illustrated by the particular examples given by the Court. In fact, Concepcion might herald a narrowing of FAA preemption, at least to the extent it suggests that state laws may impose some conditions on the enforceability of arbitration agreements.

Finally, Part III addresses the outer limits of FAA preemption. Even if the Supreme Court were to hold that unconscionability is no longer available as a ground for challenging the enforceability of arbitration agreements, courts retain some ability to police the fairness of “arbitration” agreements—at least when those agreements are so one-sided as not to constitute “arbitration” (in which event the FAA would not apply). Thus, if the agreement does not provide for a neutral decision maker, or if it establishes a sham dispute resolution process, it would not be subject to the FAA and could be invalidated under state law.

I. Misconceptions About Concepcion

Without doubt, Concepcion is an important decision. It federalizes the rules on the enforceability of arbitration clauses with class arbitration waivers, overriding cases in a number of states holding such provisions unenforceable as unconscionable. The potential policy implications of the decision are important and should be analyzed and debated. But in several respects, Concepcion is being blamed for effects that either it did not cause or that have not occurred. This part highlights some of these misconceptions about Concepcion.

A. Concepcion and State Rules on Class Arbitration Waivers

As noted above, the decision in Concepcion federalized the rules governing the enforceability of arbitration clauses with class arbitration waivers, resulting in the preemption of state rules invalidating such provisions. Commentators have decried the effect of Concepcion on state autonomy and federalism.  

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6 For a more global perspective on Concepcion, see Peter B. Rutledge, Arbitration and the Constitution 79-100 (2012).
7 See infra text accompanying notes 50-63.
But to evaluate properly the effect of *Concepcion*, we need to examine both what the world looked like before *Concepcion* and what it would have looked like had *Concepcion* been decided the other way. Before *Concepcion*, the states were split over the enforceability of class arbitration waivers. While a number of states invalidated such provisions, many held arbitration clauses with class arbitration waivers enforceable as a matter of state law. If the Supreme Court had upheld the California rule at issue in *Concepcion*, the rules in states enforcing class arbitration waivers as a matter of state law would not have changed. A decision affirming the California Supreme Court in *Concepcion* would not have federalized the rules governing class arbitration waivers. It would not have made class arbitration waivers unenforceable in every state. Instead, states would have been free either to uphold or invalidate arbitration clauses with class arbitration waivers as a matter of state law.

This counterfactual has two implications. First, in a significant number of states, class arbitration waivers were enforceable without regard to how *Concepcion* was decided, at least under some circumstances. In those states that upheld the provisions as a matter of state law prior to *Concepcion* (or would have done so regardless of how *Concepcion* came out), *Concepcion* did not cause arbitration clauses with class arbitration waivers to be enforceable. True, the decision prevents those states from changing their rules if they want to. And perhaps those states would have ruled differently had the cases they were deciding been stronger on the facts. But if not, *Concepcion* had little effect on the enforceability of class arbitration waivers in those states.

To illustrate the point, consider the report issued by Public Citizen and the National Association of Consumer Advocates on the first anniversary of *Concepcion*. The report identified seventy-six cases from eighteen jurisdictions in which “judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable.” Of the eighteen jurisdictions, however, eight (and possibly ten) might have reached the same result as a matter of state law even without the decision in *Concepcion*. Attributing the dismissals of the class actions in those states to *Concepcion* potentially overstates the effect of the decision.

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9 For a high-end estimate, see Alan Kaplinsky, The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers 36 (Feb. 23, 2011), available at www.law.gwu.edu/News/2010-2011Events/Documents/Kaplinsky-%20Submission%20-%20Outline.pdf (“Courts applying the laws of 26 states and the District of Columbia) have held that class action waivers are enforceable under state law, at least when the arbitration agreement neither imposes higher arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration …”). The parties in *Concepcion* agreed that states had adopted varying approaches prior to *Concepcion*, although they disagreed about how to classify the decisions of some of the states. Compare Petition for Writ of Certiorari. 21-22 & 63a-69, AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (No. 09-893) with Respondents’ Brief in Opposition 10-11, AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (No. 09-893).


11 Id. at 4.

12 Id. at 32-34 app. Of the jurisdictions listed, the following are identified by Kaplinsky, supra note 9, as having cases that upheld class arbitration waivers prior to *Concepcion*: Colorado, D.C., Georgia, Illinois, Louisiana, Missouri, New York, Ohio, Oklahoma, and Tennessee. The respondents in *Concepcion* objected to two of the states (Georgia and Illinois) on the list. See supra note 9. Barely twenty percent (16 of 76) the decisions identified in the Public Citizen/NACA report were from these ten jurisdictions, which is not surprising: if the jurisdiction previously had upheld class arbitration waivers as a matter of state law, there would be little incentive to litigate the issue further in that jurisdiction. By comparison, close to half of the decisions (35 of 76) were from courts in California, where prior to *Concepcion* courts had refused to enforce class arbitration waivers.
Second, if the justification for enacting the Arbitration Fairness Act ("AFA") is to reverse \textit{Concepcion}, the Act is overbroad. Reversing \textit{Concepcion} would require returning the enforceability of class arbitration waivers back to the states (as it was before the decision), which is not what the AFA does. Indeed, to the extent \textit{Concepcion} is criticized on federalism grounds, the AFA is subject to the same criticisms. \textit{Concepcion} adopted a uniform federal rule permitting arbitration clauses with class arbitration waivers; the AFA would adopt a uniform federal rule prohibiting pre-dispute arbitration clauses (both with and without class arbitration waivers). The AFA is no friendlier to federalism and federalism values than is the FAA.

\textbf{B. \textit{Concepcion} and the Use of Arbitration Clauses}

After \textit{Concepcion} was decided, a number of commentators predicted that soon all businesses would include arbitration clauses with class arbitration waivers in their consumer, employment, and other standard form contracts. Every business would switch, according to these commentators, because there is no reason not to. Every business wants to avoid class

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15 Christopher Drahozal, \textit{Concepcion and the Arbitration Fairness Act}, SCOTUSBLOG (Sep. 13, 2011, 11:46 AM), http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/. For an article that fails to recognize this point, see Edward P. Boyle & David N. Cinotti, \textit{Beyond Nondiscrimination: AT&T Mobility LLC v. Concepcion and the Further Federalization of U.S. Arbitration Law}, 12 PEPP. DISP. RESOL. L.J. 373, 396 (2012) ("The effect that \textit{Concepcion} has on federalism may be used as an argument in favor of undoing the Court's decision through legislative action. Congress can use its Commerce Clause power to make class action waivers, or consumer arbitration agreements in general, unenforceable under the FAA…. In addition to citing the effect that \textit{Concepcion} may have on classwide dispute resolution, proponents of change may employ federalism arguments to support the call for amendments to the FAA.").

16 For an alternative proposal that would protect federalism values, see Ronald G. Aronovsky, \textit{The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?}, 42 SW. L. REV. 131, 181-82 (2012) ("Congress should amend the FAA to remove adhesion pre-dispute employment and consumer arbitration agreements from the scope of the statute…. This proposal would turn the AFA on its head and differ from it in one critical respect. Rather than invalidate all such pre-dispute arbitration agreements, it would leave their regulation to the states. Doing so would promote federalism values and allow the states to serve as more accountable laboratories for the evolution of non-commercial arbitration involving the types of disputes that can affect all segments of society.").

17 \textit{See, e.g.}, Ian Millhiser, \textit{Supreme Court Nukes Consumers’ Rights In Most Pro-Corporate Decision Since Citizens United}, THINKPROGRESS: JUSTICE (Apr. 27, 2011), available at http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/ ("After \textit{Concepcion}, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action."); Brian T. Fitzpatrick, \textit{Supreme Court Case Could End Class-Action Suits}, S.F. CHRON. (Nov. 7, 2010), available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL ("Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions [arbitration agreements with class waivers].").

actions, and it is cheap and easy for businesses to change their standard form contracts to include an arbitration clause with a class arbitration waiver.\(^{19}\)

So far, however, that has not happened. Some businesses, particularly large consumer technology companies, have started using arbitration clauses.\(^{20}\) But the predicted “tsunami” has not yet appeared.\(^{21}\)

Bo Rutledge and I examined changes in the dispute resolution provisions in franchise agreements since *Concepcion*, and found that “[t]he use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration.”\(^{22}\) Prior to *Concepcion*, 40.3% of a sample of major franchisors used arbitration clauses. By the end of 2013, that percentage had increased to 46.3%—the same level as in 1999.\(^{23}\) Moreover, of the four franchisors switching to arbitration since *Concepcion*, three had previously used arbitration clauses and switched away from arbitration; the fourth had previously used arbitration to resolve some but not all disputes with franchisees.\(^{24}\)

A preliminary report on the use of arbitration clauses in consumer financial services contracts released by the Consumer Financial Protection Bureau (“CFPB”) in December 2013 makes similar findings.\(^{25}\) According to the CFPB, “[t]he incidence of arbitration clauses in credit card contracts has increased since *Concepcion*, but only slightly,” with five credit card issuers switching to arbitration since *Concepcion* and three switching away.\(^{26}\) Banks switched to arbitration somewhat more frequently for their checking account agreements, with 47.7% of large banks using arbitration clauses as of summer 2013, an increase from 39.8% the previous year.\(^{27}\) Even so, as of summer 2013, “only 7.7% of banks use arbitration clauses for their checking account contracts” and only “44.4% of bank insured deposits are subject to arbitration.”\(^{28}\)

Professor Rutledge and I consider two possible explanations for the limited move to arbitration since *Concepcion*. One possibility is that standard form contracts are “sticky”—i.e., resistant to change—even when a rational party would make the change.\(^{29}\) Another possibility is that there are, in fact, reasons for parties not to use arbitration clauses (such as limited appeal

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21 See Gilles & Friedman, *supra* note 2, at 629.
22 Rutledge & Drahozal, *supra* note 20, at ___.
23 Id. at ___ & n.145.
24 Id. at ___.
26 Id. at 54. The CFPB reported “no additional issuers switching to arbitration between December 31, 2012, and June 30, 2013.” Id. at 54 n.125.
27 Id. at 56. Data on changes between the date of the decision in *Concepcion* and summer 2012 were unavailable.
28 Id. at 25-26.
rights), so that parties that face little perceived risk of a class action may have decided that an arbitration clause is not worth the cost.\textsuperscript{30} We find some evidence supporting both possible explanations,\textsuperscript{31} although more research remains necessary.

C. Concepcion and Other FAA Preemption Cases

Finally, some courts have cited \textit{Concepcion} as requiring them to change their prior FAA preemption decisions when, in fact, the preemption doctrine on which the courts relied was established long before \textit{Concepcion}. The best example is the Ninth Circuit’s decision in \textit{Ferguson v. Corinthian Colleges, Inc.}\textsuperscript{32} In \textit{Ferguson}, the Court of Appeals overruled circuit precedent applying the California Supreme Court’s \textit{Broughton-Cruz} doctrine to find state law public injunction claims not subject to arbitration,\textsuperscript{33} holding instead that the doctrine was preempted by the FAA\textsuperscript{34} In so holding, the Ninth Circuit stated that it was overruling its prior precedent because “it is clearly irreconcilable with intervening Supreme Court authority”—i.e., \textit{Concepcion}, among others.\textsuperscript{35}

The Ninth Circuit first relied on the Court’s statement in \textit{Concepcion} that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”\textsuperscript{36} But nothing in this statement reflects any change in the law or anything at all new about FAA preemption doctrine in \textit{Concepcion}. While it certainly is an accurate statement of the law, it is an accurate statement of well-established law, settled long before \textit{Concepcion}.

The Court of Appeals then cited \textit{Marmet Health Care Center, Inc. v. Brown}, in which the Supreme Court summarily reversed a decision of the West Virginia Supreme Court that recognized a new and unsupported exception to the FAA.\textsuperscript{37} But nothing in \textit{Marmet Health Care Center} was new or revolutionary, either. Indeed, the whole point of a summary reversal is that the decision below was so obviously incorrect that it should be reversed without the need for oral argument.\textsuperscript{38} By definition, a Supreme Court summary reversal involves the application of well-settled law.

\begin{thebibliography}{9}
\item See Christopher R. Drahozal & Quentin R. Wittrock, \textit{Franchising, Arbitration, and the Future of the Class Action}, 3 \textit{Entrepreneurial Bus. L.J.} 276, 300 (2009) (“[A]rbitration clauses bundle a variety of characteristics — including but not limited to acting as a class action waiver — into a single means of dispute resolution. Not all drafting parties will agree to arbitration, even if they might prefer individual arbitrations to class actions.”).
\item Rutledge & Drahozal, \textit{supra} note 20, at ___.
\item \textit{Ferguson}, 733 F.3d 928 (9th Cir. 2013).
\item \textit{Ferguson}, 733 F.3d at 937 (overruling \textit{Davis v. O’Melveny & Myers}, 485 F.3d 1066 (9th Cir. 2007)).
\item \textit{Id.} A Ninth Circuit panel had previously concluded that “Broughton–Cruz rule does not survive \textit{Concepcion}” in \textit{Kilgore} v. Keybank, N.A., 673 F.3d 947, 960 (9th Cir. 2012). But the Ninth Circuit vacated that decision and held en banc that, on its facts, \textit{Kilgore} did not implicate the \textit{Broughton-Cruz} doctrine because it did not involve a public injunction. \textit{Kilgore} v. \textit{KeyBank, Nat. Ass'n}, 718 F.3d 1052, 1061 (9th Cir. 2013) (en banc).
\item \textit{Ferguson}, 733 F.3d at 934 (quoting \textit{Concepcion}, 131 S. Ct. at 1747).
\item 132 S. Ct. 1201 (2012) (per curiam).
\item See, e.g., \textit{Mireles v. Waco}, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (explaining that summary reversal “is a rare and exceptional disposition, usually reserved by the Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error”) (quoting \textit{Eugene Gressman et al., Supreme Court Practice} 350 (9th ed. 2007)) (internal quotations omitted).
\end{thebibliography}
None of this is to say that the Ninth Circuit decision in <i>Ferguson</i> is wrong on the merits. To the contrary, I have long taken the position that <i>Broughton</i> and <i>Cruz</i> are preempted by the FAA. My point here is that nothing in <i>Concepcion</i> changed FAA preemption law so as to require the Ninth Circuit to overrule its prior precedent. Presumably the Ninth Circuit panel was seeking to avoid the need for en banc review by relying on <i>Concepcion</i> as “intervening” Supreme Court precedent. But while <i>Concepcion</i> was “intervening” in the sense that it was decided after the prior Ninth Circuit case and before <i>Ferguson</i>, again, nothing in <i>Concepcion</i> changed FAA preemption doctrine. The prior case was wrong when it was decided, and the Ninth Circuit in <i>Ferguson</i> was simply correcting its previous error.

Interestingly, the Ninth Circuit had previously used an “intervening” Supreme Court case to justify reversing prior circuit precedent when deciding whether Title VII claims were arbitrable. In <i>Duffield v. Robertson Stephens & Co.</i>, a panel of the Ninth Circuit held that Title VII claims were not arbitrable, based on a strained reading of federal law. After the Supreme Court’s decision in <i>Circuit City Stores, Inc. v. Adams</i>, which construed the employment exception of the FAA narrowly, a different panel held in <i>EEOC v. Luce, Forward, Hamilton & Scripps</i> that <i>Circuit City</i> had implicitly overruled <i>Duffield</i>. The reasoning in <i>Luce</i> was clearly wrong—<i>Circuit City</i> did not address whether federal statutory claims could be arbitrated. But the result was correct, and brought Ninth Circuit law on the arbitrability of Title VII claims in line with every other circuit to have addressed the issue. Eventually, the en banc Ninth Circuit rejected the reasoning in both <i>Duffield</i> and the panel’s decision in <i>Luce</i>, ruling that Title VII claims were arbitrable but without justifying its decision as required by <i>Circuit City</i>.

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40 See, e.g., United States v. Easterday, 564 F.3d 1004, 1010-11 (9th Cir. 2008) (“[E]n banc review is not required to overturn a case where ‘intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority.’”) (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)).
41 The only other intervening Supreme Court case addressing FAA preemption (that was not a summary reversal) was Preston v. Ferrer, 552 U.S. 346 (2008), which likewise added little to the doctrine (and was not even cited by the Ninth Circuit in <i>Ferguson</i>). Later in its opinion, the Ninth Circuit in <i>Ferguson</i> did cite Justice Kagan’s dissent in <i>Italian Colors Restaurant, Inc. v. American Express Co.</i> (Kagan, J., dissenting), as identifying “other ways” in which the <i>Broughton-Cruz</i> doctrine “is flawed.” <i>Ferguson</i>, 733 F.3d at 935-36. The point made by Justice Kagan in her dissent — that state policies are subservient to federal ones under the Supremacy Clause — likewise breaks no new ground (although it seems to have been forgotten by some courts in arbitration cases). Even so, again it was not <i>Concepcion</i> that was responsible.
44 303 F.3d 994, 996 (9th Cir.), reh’g en banc granted, 319 F.3d 1091 (9th Cir. 2003).
45 Indeed, the Supreme Court subsequently rejected the Ninth Circuit’s statutory interpretation in <i>14 Penn Plaza LLC v. Pyett</i>, 556 U.S. 247, 259 n.6 (2009).
46 EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 748-49 (9th Cir. 2003) (en banc).
47 Id. at 744-45.
II. Concepcion and FAA Preemption

Concepcion is the Supreme Court’s first decision interpreting the savings clause of FAA section 2, under which arbitration agreements are enforceable “save upon such grounds as exist in law or in equity for the revocation of any contract.” This Part first describes the Court’s reasoning in Concepcion, and then sets out the implications of that reasoning both for other applications of state unconscionability doctrine and for state statutes that regulate arbitration.

A. An Overview of Concepcion and General Contract Law Defenses

The Supreme Court’s reasoning in Concepcion consists of three steps: (1) recognizing that the savings clause is subject to some limit; (2) setting out a test for when that limit is exceeded; and (3) applying the test to the California rule conditioning the enforceability of arbitration clauses on the availability of class arbitration (as the Supreme Court characterized the rule in Concepcion).

Initially, the Concepcion Court properly recognized that there must be some limit on the use of general contract defenses to invalidate arbitration clauses. Stated otherwise, invalidating an arbitration clause based on a rule labeled as a general contract defense alone does not always preserve the rule from preemption by the FAA. Even the respondents in Concepcion conceded as much, acknowledging that “in light of the text and structure of Section 2, the ‘grounds’ available under the savings clause should not be construed to include a State’s mere preference for procedures that are incompatible with arbitration and ‘would wholly eviscerate arbitration agreements.’” Respondents gave as examples “a statute reviving the ouster doctrine,” “a rule forbidding jury-trial waivers,” and “a law mandating that arbitrators follow the court system’s rules of evidence, even when parties have chosen more flexible procedures.”

In its opinion, the Court largely adopted the respondents’ approach, changing the formulation of the test to whether the condition imposed by the court “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” It also cited respondents’ examples of a “rule classifying as unconscionable arbitration agreements that failed to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by

48 The Court has addressed the savings clause in dicta, in both Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987) (“Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what … the state legislature cannot.”); Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681, 687 n.3 (1996) (same).
50 Another limit, touched on but not discussed at length by the Court, is that the application of the general contract law defense must not discriminate against arbitration. 131 S. Ct. at 1746-47; see Hiro N. Aragaki, Equal Opportunity for Arbitration, 58 U.C.L.A. L. Rev. 1189 (2011); Hiro N. Aragaki, Arbitration’s Suspect Status, 159 U. Pa. L. Rev. 1233 (2011); see also infra text accompanying notes 86-88.
52 Id. at 33-34.
53 131 S. Ct. at 1748.
a jury (perhaps termed ‘a panel of twelve lay arbitrators’ to help avoid preemption).”54 To those examples, the Court added a third, “obvious illustration”: a “case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery.”55

So far, the Court’s opinion in Concepcion is a narrow one (as measured by its impact on FAA preemption doctrine). The Court did not adopt an all-purpose interpretation of the section 2 savings clause. It certainly did not accept Justice Thomas’s much narrower interpretation of the savings clause as precluding courts altogether from using unconscionability doctrine to invalidate arbitration clauses.56 Instead, the Court recognized (consistent with respondents’ brief) that the savings clause is subject to at least some limit and set out a test for determining when that limit has been exceeded.57

The remaining question was whether the California rule conditioning enforcement of an arbitration clause on the availability of class arbitration was enough like the examples above to be preempted. This was where the Court and the respondents disagreed. The Court stated that “[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”58 As such, “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”59

Conditioning the enforceability of arbitration agreements on the availability of class arbitration would frustrate both of these goals: expeditious dispute resolution and enforcing the parties’ agreement to arbitrate.60 The Court gave three reasons: (1) “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”; (2) “class arbitration requires procedural formality”; and (3) “class arbitration greatly increases risk to defendants” of aberrational awards that cannot be reviewed in court.61 The mere fact that parties might agree to particular procedures, the Court continued, did not save state rules requiring such procedures from preemption.62 Finally, the Court rejected the dissent’s argument “that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” concluding that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”63

54 Id. at 1747.
55 Id.
56 See infra text accompanying notes 64-65.
57 131 S. Ct. at 1747-48.
58 Id. at 1747.
59 Id.
60 An alternative rationale that might have avoided some of the broader readings of Concepcion was that relied on by the dissenting Justices in Green Tree Fin’l Corp. v. Bazzle, 539 U.S. 444, 458-59 (2003) (Rehnquist, C.J., dissenting) (arguing that class arbitration was inconsistent with parties’ agreement as to how arbitrator would be selected).
61 131 S. Ct. at 1751-52.
62 The Court does suggest that if the parties agreed to class arbitration, it would be consistent with the FAA to enforce that agreement. See id. at 1750-51 (“The conclusion follows that class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.”).
63 Id. at 1753.
B. Implications of Concepcion for Preemption of State Unconscionability Doctrine

On its facts, the Supreme Court in Concepcion held that application of unconscionability doctrine to invalidate an arbitration clause with a class arbitration waiver was preempted. The question here is the extent to which other applications of unconscionability doctrine also are preempted under Concepcion.

Some commentators have suggested that unconscionability doctrine may no longer be available at all after Concepcion. I disagree. Nothing in the majority opinion in Concepcion suggests that unconscionability is never available as a ground for refusing to enforce an arbitration agreement under FAA section 2. Instead, the Court held the California rule at issue in the case—which conditioned enforcement of the clause on the availability of class arbitration—to be preempted only because it “interfere[d] with fundamental attributes of arbitration.” As such, there is every reason to believe that, under Concepcion, the FAA does not preempt at least some applications of unconscionability doctrine.

A slightly narrower (but still very broad) way to read Concepcion is that any state contract law defense that conditions enforcement of an arbitration clause on some procedure that makes arbitration less expeditious is preempted. Under that interpretation, many applications of unconscionability doctrine would be preempted because (1) most would, to some degree at least, make arbitration less expeditious; and (2) all would be inconsistent with the parties’ agreement. But such an interpretation, in my view, ignores the context in which the discussion of the FAA’s purposes arises. That context is the Court’s identification of other examples of state rules that would be preempted by the FAA, even given the savings clause—rules conditioning the enforceability of an arbitration agreement on the use of a jury, court-monitored discovery, and the Federal Rules of Evidence. It is not simply that those procedures make arbitration less expeditious than it otherwise would be; it is that they are inconsistent with the “fundamental attributes of arbitration” in ways analogous to the examples given by the Court.

So viewed, the question then is what, if any, other applications of unconscionability doctrine “interfere[] with fundamental attributes of arbitration” so as to be preempted? The California Supreme Court got it partly right on the facts of Sonic-Calabasas A, Inc. v. Moreno. Certainly it was correct to repudiate its prior case law, which conditioned the enforceability of an

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64 See Stipanowich, supra note 8, at 380 (“In the wake of Concepcion, one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements.”); Arpan A. Sura & Robert A. DeRise, Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations, 62 U. Kan. L. Rev. ___ (forthcoming 2013) (arguing that “the potentially boundless reach of Concepcion “threatens to jeopardize a bevy of facially neutral contract laws merely because they are applied to arbitration agreements”).

65 131 S. Ct. at 1748.

66 Sura & DeRise, supra note 64, at ___.

67 Others have suggested that the problem in Concepcion is that the California rule required procedures inconsistent with bilateral arbitration. See Jacob Johnson, Barras v. BB&T: Charting A Clear Path to Apply Concepcion Through A Quagmire of Divergent Approaches, 64 Mercer L. Rev. 591, 600-01 (2013) (citing cases). But that standard also would not be consistent with the illustrations relied on by the Court. None of those rules changes bilateral arbitration to class arbitration; it is some other “fundamental attribute of arbitration” they are inconsistent with.

68 131 S. Ct. at 1748.

69 311 P.3d 184 (Cal. 2013).
arbitration agreement on the parties first participating in an administrative hearing before the Labor Commissioner (a “Berman hearing”). Such a rule interferes with a fundamental attribute of arbitration by requiring the parties to appear before another decision maker before proceeding to arbitration. But the court’s attempted modification of its rule, so that a comparison between arbitration and a Berman hearing is only a factor in evaluating unconscionability, does not save it from preemption. To the extent the court is simply reimposing its prior condition on a case-by-case basis, the rule should still be preempted.

Many other common applications of unconscionability doctrine, in my view, do not fail the “fundamental attributes” standard and so would not be preempted under Concepcion. For example, the decision in Chavarria v. Ralphs Grocery Co. (like the decision in Hooters of America, Inc. v. Phillips) conditioned enforcement of the arbitration agreement on the appointment of neutral arbitrators—which, if anything, is itself a fundamental attribute of arbitration, and certainly does not interfere with a fundamental attribute of arbitration. Under Concepcion, the decisions in Ralph’s Grocery and Hooters would not be preempted.

Courts have held arbitration agreements unconscionable because they impose excessive costs on consumers or employees or because they require the arbitration hearing to be held at a location inconvenient for the consumer or employee. Conditioning the enforcement of an arbitration agreement on reasonable (or even subsidized) cost-sharing would not seem to be inconsistent with any fundamental attribute of arbitration. While the parties in the aggregate typically bear the costs of arbitration, no fundamental attribute of arbitration dictates how those costs should be allocated between the parties. The same should be true about the hearing location, which also is not a fundamental attribute of arbitration. As such, neither of these applications of unconscionability doctrine should be preempted under Concepcion.

A more difficult line of cases are those holding arbitration agreements with nondisclosure provisions—i.e., contract provisions precluding the parties from disclosing the existence of the arbitration and such like—to be unconscionable. Confidentiality (or, more precisely, privacy) certainly is a fundamental attribute of arbitration, as the Court noted in Concepcion. Even so,

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70 Id. at 200.
72 311 P.3d at 206-07.
73 733 F.3d 916 (9th Cir. 2013).
74 173 F.3d 933 (4th Cir. 1999).
75 Moreover, as discussed infra Part III, cases like the Hooters case likely would come out the same way even if unconscionability were no longer available as a ground for challenging arbitration agreements. Thus, I strongly disagree with the suggestion by Sura and DeRise that “there is even a plausible case that Hooters may no longer be valid after Concepcion, despite its extreme underlying facts.” Sura & DeRise, supra note 64, at __.
76 See Christopher R. Drahozal, Arbitration Costs and Contingent Fee Contracts, 59 VAND. L. REV. 729, 750-52 (2006) (citing cases re excessive costs); Sura & DeRise, supra note 64, at __ (citing cases re location of hearing).
77 See In re Checking Account Overdraft Litigation, 685 F.3d 1269, 1277-79 (11th Cir. 2012) (holding that FAA does not preempt South Carolina’s application of unconscionability doctrine to invalidate fee-shifting provision).
78 For a contrary view, see Sura & DeRise, supra note 64, at __.
79 E.g., Schnuerle v. Insight Comm’ns Co., 376 S.W.3d 561, 578 (Ky. 2012) (concluding that “we are not persuaded that Concepcion compels that we uphold the confidentiality agreement in this case”).
80 See Amy J. Schmitz, Untangling the Privacy Paradox in Arbitration, 54 U. Kan. L. Rev. 1211, 1211, 1214 (2006) (“Arbitration is private but not confidential… Privacy … does not ensure confidentiality of arbitration proceedings. Information about and learned through domestic arbitration may become public unless the parties contractually
under U.S. law, the privacy of arbitration typically does not extend to precluding a party’s disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding. Indeed, the whole reason contracts with arbitration clauses include separate nondisclosure provisions is that the default view of arbitration—its fundamental attributes—does not extend as far as the nondisclosure agreements would require. Accordingly, while a much closer case, there is a good argument that these cases are not preempted under Concepcion, either.

A final application of unconscionability doctrine of note are cases that invalidate an arbitration clause that excludes (i.e., carves out) certain claims or remedies (potentially including punitive damages) or that requires one party but not the other to arbitrate. The argument here is that conditioning the enforceability of an arbitration agreement on arbitrating claims or remedies that the parties did not agree to arbitrate (those carved out) is inconsistent with a fundamental attribute of arbitration: that the agreement to arbitrate be based on the parties’ consent. If the parties have not agreed to arbitrate a claim, the FAA does not require them to arbitrate. On this view, invalidating an arbitration agreement because the parties have agreed to arbitrate certain claims or remedies but not others is inconsistent with the consensual nature of arbitration. On the other hand, nothing in the FAA precludes states from requiring parties to arbitrate claims that they have not agreed to arbitrate—to require true “mandatory” arbitration of particular claims. (There are potential constitutional limits on mandatory arbitration, but that is a different issue.) The counterargument, then, is that the FAA does not preempt such a condition.

Alternatively, these sorts of mutuality requirements could be (and, in many cases, should be) held preempted because they discriminate against arbitration. No state requires that all contracts be “mutual” in the sense that both sides undertake equal obligations (indeed, that would be contrary to the whole idea of exchange). So a special mutuality requirement applied to
arbitration clauses would single out arbitration and be preempted as discriminatory. Further, such a rule probably should be preempted even if imposed under the guise of unconscionability doctrine. If so, a court would not need to resolve whether such a mutuality requirement is preempted under Concepcion’s “fundamental attributes of arbitration” test.

In short, properly construed, Concepcion has only limited implications for the preemption by the F.A.A. of other applications of unconscionability doctrine. Concepcion’s preemption holding is limited to the use of unconscionability doctrine to invalidate arbitration clauses on grounds similar to the illustrations given by the Court. There may be other grounds for holding that the FAA preempts state attempts to regulate arbitration. But those grounds are not properly attributed to Concepcion.

C. Implications of Concepcion for State Statutes Regulating Arbitration

On its facts, Concepcion deals with the savings clause of FAA section 2—i.e., it involves the application of a general contract law defense to invalidate an arbitration clause. But the decision may have implications for FAA preemption of state statutes that invalidate arbitration clauses as well.

The Court does not indicate in Concepcion whether its analysis provides the only limitation on the use of general contract defenses under the savings clause. Nor does it explain how its analysis fits into or affects FAA preemption analysis more generally. That said, it would seem to follow that if an application of a general contract law defense is preempted despite the savings clause, a state statute invalidating an arbitration clause for that same reason would also be preempted. On this view, the FAA would preempt a state statute that, like the California rule at issue in Concepcion, “condition[s] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”

But, at least as I understood FAA preemption, such an implication already had been established long before Concepcion. Thus, I stated in 2004 that “if the state rule precludes the parties from arbitrating disputes they otherwise have agreed to arbitrate, in whole or in part,

87 Drahozal, supra note 39, at 411 n.138; see Easter v. Compucredit Corp., 08-CV-1041, 2009 WL 499384, at *3 (W.D. Ark. Feb. 27, 2009) (“find[ing] that the Arkansas law requiring independent mutuality in an arbitration clause is preempted by the FAA”); see also THI of New Mexico at Hobbs Ctr., LLC v. Patton, 2014 WL 292660, at *6 (10th Cir. Jan. 28, 2014) (invalidating mutuality requirement as contrary to Supreme Court precedent holding that “[a] court may not invalidate an arbitration agreement on the ground that arbitration is an inferior means of dispute resolution”). But see Noohi v. Toll Bros., 708 F.3d 599, 611-13 (4th Cir. 2013) (rejecting argument that FAA preempts Maryland requirement of separate consideration for arbitration agreement).

88 One difference in relying on a discrimination theory to hold mutuality requirements preempted by the FAA is that the same sort of analysis would not necessarily apply to decisions holding punitive damages waivers unconscionable.

89 I am not referring here to state statutes that invalidate arbitration clauses on the basis of codified “general contract defenses,” such as Article 2 of the Uniform Commercial Code, but rather state statutes that invalidate arbitration clauses explicitly.

90 As noted above, presumably the FAA would also preempt discriminatory applications of general contract defenses. See supra text accompanying note 86-88.

91 131 S. Ct. at 1744.
conditionally or unconditionally, the FAA preempts the state rule." The authority for the “conditionally” part of the statement was the Supreme Court’s decision in *Doctor’s Associates, Inc. v. Casarotto*, in which the Court held that the FAA preempted a Montana statute that made an arbitration clause “unenforceable unless ‘[n]otice that [the] contract is subject to arbitration’ is ‘typed in underlined letters on the first page of the contract.’” If a state statute conditioning the enforceability of an arbitration clause on conspicuous disclosure is preempted under *Doctor’s Associates*, it would seem to follow that a state statute conditioning enforceability on the availability of class arbitration would be preempted as well. If anything, the hypothetical statute based on *Concepcion* is more intrusive on the parties’ agreement to arbitrate than the one in *Doctor’s Associates*. Yet while *Concepcion* implicitly held such a state statute to be preempted, it seemed to have to work a lot harder at it than the Court did in *Doctor’s Associates*.

So how to reconcile *Concepcion* with *Doctor’s Associates*? One possibility is that *Concepcion* was a more difficult case only because it involved application of a general contract defense. On this view, the decision in *Concepcion* would have been a much easier in which to find preemption had it been a state statute rather than unconscionability doctrine that conditioned enforceability on the availability of class arbitration.

Alternatively, it may be that I previously read too much into the Court’s decision in *Doctor’s Associates*, and that not every state statute that precludes the parties from arbitrating only “conditionally” is preempted under that case. If so, perhaps *Concepcion* suggests that the scope of FAA preemption is narrower than previously perceived. At the very least, it raises questions about whether a state statute that makes an arbitration agreement conditionally enforceable necessarily is preempted by the FAA.

Footnote 6 in the *Concepcion* opinion also raises questions about the reach of *Doctor’s Associates*. In that footnote, the Court states:

> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

It is not clear what this footnote means. (It is, of course, only dicta, because the issue was not before the Court in *Concepcion*.) In *Doctor’s Associates*, the Court held that a state statute requiring arbitration clauses to be highlighted is preempted. Given that it is the arbitration clause itself that operates as a “class action waiver”—it removes the case from the possibility of

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92 Drahozal, * supra* note 39, at 415 (emphasis added).
94 *Doctor’s Associates* was an 8-1 opinion, written by Justice Ginsburg, with only Justice Thomas dissenting (on the ground that the FAA does not apply in state court).
95 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 n. 6 (2011).
96 517 U.S. at 688.
a class action in court—requiring conspicuous disclosure of a class action waiver arguably is simply inconsistent with the decision in *Doctor’s Associates*.\(^\text{97}\)

Alternatively, perhaps by “class-action-waiver provisions” the court means provisions other than the arbitration clause that waive the availability of class actions—in other words, class arbitration waivers.\(^\text{98}\) Maybe the footnote means that states can require conspicuous disclosure of contract provisions other than the arbitration clause itself without being preempted by the FAA.

Or maybe the disclosure has to be of class waivers generally—i.e., both arbitral and non-arbitral class waivers. That would be consistent with the position taken in the law professors amicus brief (in support of petitioner) in *Concepcion*, which stated: “For example, a state-law rule requiring particularized notice (e.g., minimum font size, boldface type) for jury-trial waivers in any contract would fall within Section 2’s savings clause because it would be ‘grounds . . . for the revocation of any contract.’”\(^\text{99}\) This latter interpretation would adopt the “doubling out” rationale for avoiding FAA preemption—i.e., states can regulate a provision in an arbitration clause as long as they also regulate comparable provisions that are not in an arbitration clause.\(^\text{100}\) But the Court rejected, implicitly if not explicitly, precisely such a rationale for upholding the California rule at issue in *Concepcion*.\(^\text{101}\)

At bottom, *Concepcion* raises more questions than it answers about its application to state statutes rather than general contract law defenses.

### III. An Outside Limit on FAA Preemption: “To Settle by Arbitration”\(^\text{102}\)

But perhaps I am wrong and *Concepcion* in fact restricts application of unconscionability doctrine much more broadly than I argue above. Or else maybe some day the Supreme Court will accept Justice Thomas’s argument in his *Concepcion* concurrence that “[c]ontract defenses unrelated to the making of the agreement—such as public policy [and including unconscionability]—could not be the basis for declining to enforce an arbitration clause.”\(^\text{103}\)

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\(^\text{97}\) See Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 875-76 (2012) (describing footnote 6 in *Concepcion* as “a truly embarrassing moment of judicial amnesia” and concluding that “any attempted distinction [between the *Concepcion* and *Doctor's Associates*] seems doomed to unpersuasiveness”).

\(^\text{98}\) *Concepcion*, 131 S. Ct. at 1750 n. 6.


\(^\text{100}\) See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 754 n.127 (1999) (“If the test is whether law ‘singles out’ arbitration, does that mean law becomes consistent with the FAA by ‘doubling out’ arbitration, i.e., precluding enforcement of arbitration agreements as just one other type of contract? If so, the FAA can be evaded just by finding some obscure, trivial type of contract and making it, along with arbitration agreements, unenforceable.’”).

\(^\text{101}\) Respondents argued, alternatively, that the California rule should be upheld as “applicable to all dispute-resolution contracts” because it also would apply to non-arbitral class waivers. *Concepcion*, 131 S. Ct. at 1746. The Court, after identifying a requirement of court-supervised discovery as preempted, stated: “In practice, of course, the [discovery] rule would have a disproportionate impact on arbitration agreements, but it would presumably apply to contracts purporting to restrict discovery in litigation as well.” *Id.* at 1747-48.


\(^\text{103}\) *Concepcion*, 131 S. Ct. at 1754. Justice Thomas based his argument on a textual interpretation of the savings clause of FAA section 2, which he construed as coextensive with language in FAA section 4 requiring a court to
either case, an important legal limitation on abusive arbitration clauses would no longer be available.

But regardless of how courts interpret the savings clause of FAA section 2, the scope of the FAA itself establishes an outside limit on FAA preemption: if the FAA does not apply, it cannot preempt state law.\textsuperscript{104} By its terms, the FAA makes enforceable pre-dispute agreements “to settle by arbitration a controversy thereafter arising out of such contract or transaction” and post-dispute agreements “to submit to arbitration an existing controversy.”\textsuperscript{105} If the parties agree to a process that is not “arbitration,” the FAA does not apply and state law rather than federal law will determine the enforceability of the agreement.

The FAA itself does not define “arbitration.” But an essential element of other definitions is that for a process to be “arbitration,” it must involve a decision by a neutral decision maker.\textsuperscript{106} If a dispute resolution process does not specify a neutral decision maker, it is not arbitration and the FAA does not apply.\textsuperscript{107} Accordingly, the dispute resolution process in the well known \textit{Hooters} case, in which the business set up a one-sided procedure in which it got to define the pool of prospective arbitrators, likely would not be considered “arbitration” within the meaning of the FAA.\textsuperscript{108} Likewise, the arbitrator selection process in the recent \textit{Ralph’s Grocery} case, in which the respondent always got to pick the arbitrator, would not be arbitration.\textsuperscript{109} In neither case did the parties’ dispute resolution process result in a decision by a neutral decision maker.

In addition, a number of courts have refused to enforce “sham” arbitration awards, awards arising from processes that look like arbitration but that are not, in substance, processes for resolving disputes. For example, a series of federal and state court cases have refused to enforce purported arbitral awards when the “arbitration” was a sham, nothing more than an


\textsuperscript{105} 9 U.S.C. § 2 (emphasis added).

\textsuperscript{106} \textit{See} BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “arbitration” as “[a] method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding”). The federal circuits are divided on whether courts should look to federal common law or state law for the definition of “arbitration” under the FAA. See Bakoss v. Certain Underwriters at Lloyds of London, 707 F.3d 140, 143-44 (2d Cir. 2013), \textit{cert. denied}, 134 S. Ct. 155 (U.S. 2013) (looking to federal common law for definition of “arbitration” under FAA, but recognizing circuit split on whether federal law or state law applies).\textsuperscript{107} Cf. Cheng-Canindin v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867 (Cal. Ct. App. 1996) (holding dispute resolution process was not “arbitration” within the meaning of California law; stating: “All of this authority confirms our strong view that a third party decision maker and some degree of impartiality must exist for a dispute resolution mechanism to constitute arbitration”).

\textsuperscript{108} 173 F.3d 933 (4th Cir. 1999).

\textsuperscript{109} 733 F.3d 916 (9th Cir. 2013).
attempt to evade state law restrictions on structured settlements.\(^{110}\) Under the reasoning of such cases, a dispute resolution clause that includes an exceedingly short statute of limitations on filing claims or requires payment of excessive fees might be held to be a sham and thus not arbitration within the meaning of the FAA.\(^{111}\)

Obviously, both these sets of circumstances (non-neutral decision makers and “sham” arbitration) involve extreme facts and arise only rarely. But at least in those rare cases, courts remain able to prevent enforcement of abusive arbitration clauses, whether or not unconscionability is available as a possible defense.

**IV. Conclusion**

*Concepcion* is an important case for its holding that the FAA preempts application of state unconscionability doctrine to invalidate an arbitration clause with a class arbitration waiver. But in a number of respects, the effect of *Concepcion* has been overstated, including its effect on application of state unconscionability doctrine as applied to arbitration clauses. *Concepcion* does not preempt all or even most state unconscionability doctrine as applied to arbitration agreements. Properly construed, *Concepcion* preempts state unconscionability doctrine only when that doctrine conditions enforcement of arbitration agreements on procedures inconsistent with “fundamental attributes of arbitration” of the sort illustrated in *Concepcion* itself—such as the use of juries, court-monitored discovery, evidentiary rules, and, of course, class arbitration.\(^{112}\) If, however, the Supreme Court were to construe *Concepcion* more broadly (or eliminate application of unconscionability to invalidate arbitration clauses altogether), courts would retain some residual authority to police the fairness of arbitration clauses, but only by finding a dispute resolution process not to be arbitration at all.

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\(^{110}\) See Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 567 F.3d 754, 754 n.2 (5th Cir. 2009) (per curiam) (“[W]e join numerous state and federal courts concluding that a sham arbitration cannot be used as a device to bring about an otherwise unlawful transfer.”) (citing cases).

\(^{111}\) Cf. American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2314 (Kagan, J., dissenting) (“The agreement might set outlandish filing fees or establish an absurd (e.g., one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum.”). The argument suggested here is not, however, coextensive with the vindication-of-rights theory addressed in *Amex* (hence the “sufficiently extreme case” modifier).

\(^{112}\) *Concepcion*, 131 S. Ct. at 1748.
Collective Actions and Joinder of Parties in Arbitration:
Implications of *DR Horton* and *Concepcion*

Catherine L. Fisk*

Introduction

Scholars of labor law and scholars of procedure have long emphasized the significance of a right to group action, and access to courts, legislatures, and other public forums, for the airing and resolution of disputes and the assertion of claims.¹ At least a century ago, legal and policy analysts realized that the days of purely individual action in matters of business and labor were over, and that legal rules must adapt to the social and economic power of large corporations. Among the rules that changed were archaic limitations on joinder of claims and parties in litigation and laissez faire “liberty of contract” doctrines invalidating labor legislation. Yet the twentieth century consensus view that labor and procedural law should best protect the wellbeing of labor and capital and industrial and political democracy by facilitating group action and public courts’ involvement in the development of rights has come under assault in both legal and political discourse. This Article assesses one facet of that assault at the intersection of labor and procedure: the question whether corporations can privatize and individualize all dispute resolution by requiring every worker to sign an agreement waiving the right to assert any claims in court and waiving the right even to proceed as a group in arbitration.

The individuation and privatization of employment dispute resolution has been aggressively pushed by lawyers representing large corporate employers. But, as this Article will show, it is not at all clear that their clients will benefit from the legal regime the lawyers have created. As long as employers have large workforces working under uniform policies, they will face dozens or hundreds of similar claims challenging pay practices, discrimination, and harassment. Group adjudication arose to address efficiently the many similar claims that arise when large institutions adopt uniform policies. Individual arbitration of such claims may result in fewer claims being filed, especially if confidentiality provisions keep co-workers from learning from each other about how to assert successful claims. But unless or until employers figure out a way to shift all the costs of dispute resolution onto the claimants (and thus far courts have resisted such efforts), and to silence all claimants and their lawyers, employers will face

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This Article addresses a specific facet of that larger phenomenon. The National Labor Relations Act (NLRA) protects the right of employees to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”\(^2\) The National Labor Relations Board (“the Board”) has long held that protected activity includes asserting claims in courts, agencies, and in arbitration. In *D.R. Horton*, the Board found the NLRA to prohibit enforcement of an employer-imposed requirement that employees waive their right to bring a collective action challenging their working conditions.\(^3\) On petition for review, a divided panel of the United States Court of Appeals for the Fifth Circuit rejected the Board’s determination, holding that the Federal Arbitration Act (FAA) requires enforcement of the mandatory arbitration agreement, including its class action waiver.\(^4\)

The question whether the NLRA prohibits mandatory arbitration agreements containing waivers of the right to proceed as a class or collective or the right to join two or three plaintiffs, has not been definitively resolved. Historically, the Board does not always change its rule simply because one court of appeals denies enforcement; the Board often will wait for a consensus among circuit courts or a Supreme Court decision before abandoning its considered judgment about the proper interpretation of the statute.\(^5\) The Board may be reluctant to regard the Fifth Circuit’s ruling as persuasive or definitive, particularly because the Fifth Circuit majority questioned the Board’s authority to construe its own statute. NLRB Administrative Law Judges continue to adhere to the *D.R. Horton* rule, and a number of decisions pending before the Board offer the newly reconstituted Board the opportunity to reaffirm its position in

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\(^4\) *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013). A number of articles published before the Fifth Circuit’s decision in *D.R. Horton* have explained why the right to proceed in arbitration or in litigation as a collective or class is protected concerted activity under the NLRA, why the NLRA prohibits employer policies requiring employees to forego that right, why mandatory arbitration agreements containing class action waivers are also unenforceable under the Norris-LaGuardia Act, and why the FAA does not trump these rights under the NLRA and the Norris-LaGuardia Act. See Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013); Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: the False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945 (2013); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled With Section 7 Rights?* 38 WAKE FOREST L. REV. 173 (2003). After finishing this writing article, I came across a fine article on the same subject as this one making a powerful defense of the right to group litigation and arbitration of employment claims; like the other articles on this topic, it was written before the Fifth Circuit decided *D.R. Horton*. Katherine V.W. Stone, *Procedure, Substance and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISC. 164 (2013).

\(^5\) See Iowa Beef Packers, Inc., 144 N.L.R.B. 615, 616 (1963) (“It has been the Board’s consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court’s opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise”); see also Int’l Ass’n of Machinists, District No. 9, 171 N.L.R.B.234 (1968) (noting that Board adhered to its position about illegality of certain conduct even though every court of appeals to consider the matter refused to enforce the Board’s order).
D.R. Horton with the possibility of review in circuits other than the Fifth.\textsuperscript{6} As of this writing, no circuit other than the Fifth has reviewed an NLRB decision on the D.R. Horton issue; although two circuits have issued dicta disagreeing with the Board, the issue remains pending in circuit courts around the country.\textsuperscript{7} So the issue is far from dead.

Moreover, regardless of the fate of the Board’s D.R. Horton rule, the legal limits on arbitration agreements waiving the right to proceed as a collective or class remain unclear. The Fifth Circuit only considered whether an agreement can prohibit collective actions under the Fair Labor Standards Act (FLSA)\textsuperscript{8} (which was at issue in the case) or class actions under Federal Rule of Civil Procedure 23 (which was not an issue in the case).\textsuperscript{9} No court, however, has considered whether an agreement can prohibit other forms of joinder of plaintiffs or defendants. The Supreme Court has upheld class action waivers against state law unconscionability challenges (in AT&T Mobility LLC v. Concepcion\textsuperscript{10}) and against the claim that they prevented effective vindication of substantive antitrust rights (in American Express Co. v. Italian Colors\textsuperscript{11}). But the Court has yet to address other arguments against the enforcement of class action waivers. Even if the Court were to conclude that class actions are always antithetical to arbitration, including in employment cases,\textsuperscript{12} it is another matter entirely to find that joinder of two, three, or twenty plaintiffs or two or three defendants is antithetical to arbitration. As scholars have shown, there are many different types of multiparty dispute resolution, of which nationwide class actions like Concepcion are only one. Multiparty arbitration is a well-established phenomenon and there is nothing necessarily antithetical between multiparty joinder and arbitration.\textsuperscript{13}

This Article explains why collective action waivers or requirements to arbitrate individually are unenforceable under the National Labor Relations Act and the Norris LaGuardia


\textsuperscript{7} Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053-1054 (8th Cir. 2013), is the only case to purport to decide the issue definitively, but the statement was dictum. The court of appeals reversed a district court order denying a motion to compel arbitration in a collective action under the FLSA, reasoning that court owes “no deference” to Board’s reasoning in D.R. Horton because the Board has “no special competence” in interpreting the FAA. The court was not, however, actually reviewing a Board decision. The only other circuit to address D.R. Horton is the Second, which likewise reversed the district court’s denial of a motion to compel arbitration in a collective action under the FLSA. The Second Circuit confined the discussion to footnote, provided no reasons, acknowledged that the class action waiver it addressed differed than the one at issue in D.R. Horton and said simply that it followed the Eighth Circuit. The Second Circuit also explained in the same footnote that D.R. Horton “may have been decided by the National Labor Relations Board without a proper quorum.” Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013). [Add citation to Ninth Circuit pending case.]

\textsuperscript{8} 29 U.S.C. § 216.

\textsuperscript{9} D.R. Horton, 737 F.3d at 357 (“the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims”).

\textsuperscript{10} 131 S.Ct. 1740 (2011).

\textsuperscript{11} 133 S. Ct. 2304 (2013).

\textsuperscript{12} 131 S. Ct. 1740, 1750-1752 (2011).

Act. The Fifth Circuit’s decision in *D.R. Horton* is wrong, the Board should adhere to its rule, and other courts of appeals should enforce the Board’s orders when the issue reaches them. The Article also explains why arbitration agreements requiring claims to be brought by individuals are not covered by the Court’s reasoning in *Concepcion* and *Italian Colors* to the extent they prohibit joinder of fewer parties than would be required to bring a large class action and, therefore, remain protected by labor law. The Article notes the inconsistency in the FAA cases about whether agreements can waive the right to file charges with some agencies and courts rather than others and therefore critiques the Fifth Circuit’s ruling that the FAA trumps the employees’ rights under section 7 and 8(a)(1) to file group actions in court or arbitration but does not trump section 8(a)(4), which protects the right to file unfair labor practice charges. Finally, the Article raises some questions about the practical wisdom of the courts’ willingness to allow employers to require employees to pursue claims only as individuals, although the full treatment of the joinder issues is beyond the scope both of section 7 protections and this Article. State and federal courts universally allow liberal joinder of plaintiffs and defendants because it is more efficient and avoids some truly thorny issues about the preclusive effect of judgments. The Fifth Circuit majority’s assumption, like the Supreme Court majority’s in *Concepcion*, that individual determination of claims is better suited to arbitration is simply wrong in many cases. Unless employers can opt out of the usual rules for the binding effects of judgments and the usual rules for joinder of claims and parties, the notion that individual arbitration is superior for everyone (including employers) is simply wrong.

I. *D.R. Horton*

In *D.R. Horton*, an employee of the home builder brought a nationwide class action challenging the company’s misclassification of its so-called superintendents as exempt from the wage and overtime protections of the FLSA.14 Horton insisted that the collective action was barred by its “mutual arbitration agreement,” which required that “all disputes and claims” be resolved by arbitration and that the arbitrator would not have “authority to consolidate the claims of other employees” or “the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.”15 The plaintiff then filed unfair labor practice charges asserting that the arbitration agreement’s prohibition on class and collective actions violated the NLRA. The Board held that the agreement’s prohibition on class or collective actions violated section 8(a)(1).

On Horton’s petition for review, a divided panel of the Fifth Circuit rejected the Board’s decision in part. In an opinion by Judge Southwick, the majority held that the class and collective action waiver was enforceable, although it upheld the Board’s ruling that an agreement may not waive employees’ rights to file unfair labor practice charges. Judge Graves dissented, reasoning that the Board had correctly interpreted both the NLRA and the Norris-LaGuardia Act

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14 *D.R. Horton*, 737 F.3d at 349.
15 *Id.* at 348.
and that the FAA did not override their protections. The majority’s reasoning proceeded in several steps, and the discussion that follows explores each.

A. Deference to the Board

The majority’s first step was to brush aside the argument for deference to the Board’s expertise in construing federal labor law. Reasoning that courts need not grant the usual deference to the Board’s authority and expertise to interpret the NLRA when its “preferences potentially trench upon federal statutes and policies unrelated to the NLRA,”16 the Fifth Circuit held that the Board’s usual entitlement to “considerable deference” in matters of labor relations was not implicated. In the court’s view, the validity of contractual waivers of section 7 rights is “unrelated to the NLRA.”17

The Fifth Circuit relied upon Hoffman Plastic Compounds, Inc. v. NLRB, and Southern Steamship Co. v. NLRB, which rejected the Board’s determinations of statutory remedies and the scope of section 7 protections in cases involving undocumented immigrants and sailors mutinying on board a vessel, respectively, on the ground that the Board’s determination in each case conflicted with federal immigration law and federal criminal maritime law, respectively. Whatever the merits of the Supreme Court’s cases declining to defer to the Board’s reconciliation of federal immigration or criminal law with federal labor law, the Board’s core responsibility is to decide whether contractual waivers of section 7 rights are enforceable and its decisions are entitled to deference.18 The Board determined that the NLRA prohibits contractual waivers of section 7 rights. The Supreme Court has long deferred to the Board’s interpretations of the scope of section 7 protections, especially in the context of determining the validity of employment and labor contracts. For example, in National Licorice Co. v. NLRB, the Court upheld the Board’s finding of unlawful and enforceable an employment contract restricting a discharged employee from presenting a grievance to the employer “through a labor organization or his chosen representatives, or in any way except personally.”19 The Court has also deferred to the Board’s interpretations of the scope of section 7 in cases in which it was alleged that other federal laws – such as federal antitrust law, criminal law, highway safety law, or other federal labor laws -- were implicated by the Board’s ruling.20 Board decisions from the very early days

16 Id. at 356.
18 See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002) (rejecting Board’s interpretation as being in conflict with federal immigration law)); Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) (rejecting Board’s determination that NLRA protects a strike by sailors on a vessel in port because it was a mutiny by sailors prohibited by federal criminal maritime law).
19 309 U.S. 350, 360 (1940).
20 For example, the Court deferred to the Board’s interpretation of the NLRA as protecting individual invocation of a collective bargaining agreement provision allegedly entitling an employee to refuse to drive an unsafe truck, NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984), and lower federal courts have since then have deferred to the Board’s rules regarding when individual invocation of federal or state statutory rights is protected. Similarly, the Court deferred to the Board’s judgment that union rules restricting resignations during a strike violated the NLRA,
of the NLRA found that arbitration agreements contained in individual employment agreements and that requires employees to arbitrate disputes on an individual basis were *per se* violations of the NLRA and courts deferred to that Board rule. As the Seventh Circuit explained in 1942 upholding a Board decision invalidating an arbitration agreement: “By the clause in dispute, the employee bound himself to negotiate any differences with the employer and to submit such differences to arbitration. … Thus the employee was obligated to bargain individually and, in case of failure, was bound by the result of arbitration. This is the very antithesis of collective bargaining.”

For over 70 years, the Board has considered the right to collective action, including collective arbitration and litigation, to be a core section 7 right and has held contractual provisions requiring individual arbitration to violate that right. This longstanding rule is entitled to deference.

**B. Collective Actions: Substantive or Procedural?**

The second step in the *D.R. Horton* majority’s analysis was to dismiss the right to seek collective legal redress as a *procedural* right. In contrast to non-waivable substantive rights, employers can demand employees waive their procedural rights as a condition of employment. The court noted NLRB, circuit, and Supreme Court authority holding that section 7 protects the right of employees to join together to file suit, but reasoned that the FAA “has equal importance” to the NLRA and that, under the FAA, neither the right to go to court nor the right to use a class or collective action is a substantive right. Immediately thereafter, the court conceded that “Rule 23 is not the source of the right to the relevant collective actions. The NLRA is.” But in the next paragraph, the court asserted that “there is no substantive right to proceed collectively under the FLSA.”

Despite having drawn the distinction between procedural and substantive rights, the court never addressed whether the right to engage in collective action, including group litigation or arbitration, is a *substantive* right under the NLRA even if it is a procedural right under Rule 23 (which was not relevant in the case) and the FLSA (which was). Although the Supreme Court has decided that mandatory arbitration agreements may waive statutory and constitutional rights notwithstanding the argument that the rule restricted union members’ rights under the federal Labor Management Reporting and Disclosure Act, which the Board does not enforce. *Pattern Makers’ League v. NLRB*, 473 U.S. 95 (1985). *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), and United States v. Hutcheson, 312 U.S. 219 (1941), both construing relationship between federal labor and antitrust law. *Cf.* Eastern Associated Coal Co. v. United Mine Workers, 531 U.S. 57 (2000) (arbitrator’s award enforceable under section 301 of the Labor Management Relations Act notwithstanding alleged conflict between the award and federal Omnibus Transportation Employee Testing Act and federal Department of Transportation regulations implementing it).

21 N.L.R.B. v. Stone, 125 F.2d 752, 756 (7th Cir. 1942).
22 *D.R. Horton*, 737 F.3d at 357.
24 *D.R. Horton*, 737 F.3d at 357.
25 *Id.* at 357.
to sue in court and to trial by jury because the Court regarded these as procedural rights under other statutes, it does not follow that the NLRA treats the right to seek improvements in working conditions as a group as a waivable procedural right. In fact, the NLRA treats the right to collective action to improve working conditions as a substantive right. Because the Fifth Circuit majority conceded that the NLRA and the Norris-LaGuardia Act protect such a right and prohibit employers from requiring employees to waive it, the majority should have explained why the FAA allows waivers of a right that the NLRA and the Norris-LaGuardia Act treat as non-waivable. The majority never did so.

The Board’s decision in D.R. Horton went to some lengths to explain why the right to bring group actions before arbitrators, agencies, and courts is a substantive right under section 7’s broad protection for “concerted activities for … mutual aid and protection.” As the Board explained, Congress envisioned and the Supreme Court has long held that seeking legal redress in arbitral, administrative and judicial tribunals is part and parcel of the labor relations regime. This type of redress has long been preferred by the NLRB and the federal courts in lieu of strikes, boycotts, and other forms of labor unrest. Indeed, a major purpose of federal labor law was to minimize the risk of commercial disruption by channeling labor disputes into tribunals rather than into the streets. Had the Fifth Circuit considered this long line of Supreme Court authority, it would have been forced to explain why section 7 protections for strikes, picketing, boycotts, filing unfair labor practice charges, collective bargaining, and a whole host of collective ways of seeking better working conditions are substantive (and, therefore, not waivable absent genuine employee consent) but the right to achieve the same ends through collective litigation under the FLSA is merely procedural and waivable as a condition of employment.

As Judge Graves pointed out in his dissent to D.R. Horton, collective action is first and foremost what the NLRA protects. As Congress stated in the first sentence of the NLRA section 1, “The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other

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27 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (finding federal labor law to contain a policy of promoting labor peace by encouraging enforcement of collective bargaining agreements, including their arbitration agreements and that a collectively bargained “agreement to arbitrate grievances is the quid pro quo for an agreement not to strike”); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960) (enforcing executory arbitration agreement because “arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under” a collective bargaining agreement); United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) (“In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife.”)
28 357 N.L.R.B. No. 184 at *4 (citing NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (concerted walkout to protest cold working conditions is protected even though employees were not represented by a union and did not attempt to bargain collectively), and Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (dissemination of newsletter encouraging employees to vote for labor issues in upcoming national election is protected). [ADD MORE CASES]
29 737 F.3d at 365 (dissenting opinion of Judge Graves).
forms of industrial strife or unrest . . . .”30 Congress continued, “Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.”31 The only rights the NLRA protects are the rights to act as a collective; the Supreme Court has specifically held that individual action aimed at improving only an individual’s wages or working conditions is unprotected under the NLRA. In Emporium Capwell, for example, the Court held that employees who sought to engage in individual bargaining over claims of race discrimination were unprotected by section 7 because they refused to act as part of the union.32 Similarly, in J.I. Case, the Court held that individual contracting over wages violated the NLRA because the statute authorizes only collective contracting.33

As the Board also observed in D.R. Horton, the NLRA is not the only federal labor statute that makes unenforceable contractual waivers of the right to engage in group action. The Norris-LaGuardia Act was enacted in 1932 precisely to invalidate contracts by which employers conditioned employment on the employee’s waiver of a right to concerted action. The Norris-LaGuardia Act declares the public policy of the United States to be that “the individual unorganized worker . . . shall have full freedom . . . to negotiate the terms and conditions of his employment, and that he shall . . . be free from the interference, restraint or coercion of employers of labor . . . in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”34 Moreover, the Norris-LaGuardia Act declares any “undertaking or promise in conflict with” that public policy “shall not be enforceable in any court of the United States.”35

Histories of the Norris-La Guardia Act emphasize that Congress prohibited contracts that waive right to engage in collective action because it considered group action to be an essential feature of the modern economy. As Daniel Ernst wrote in his classic intellectual history of the Norris-LaGuardia Act’s prohibition on yellow dog contracts, employers who used such contracts “sought to mobilize on their behalf old notions about the moral value of individual decision-making in the marketplace.”36 Then as now, employers used yellow dog contracts as a basis for obtaining injunctive relief against group action that employers considered a threat to their profit. Then, of course, the group action that the yellow-dog contract sought to forestall was unionization and collective bargaining. Now it is class action litigation in courts. But in both cases, employers seek to lower labor costs by forcing employees to resolve all disputes on an individual basis in which the employer enjoys the advantage of superior bargaining power. The

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31 Id.
33 J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).
proponents of bans on contracts requiring employees to foreswear group action pointed out that such agreements drove down labor costs because, as Ernst quoted, “‘the mass of wage earners can no longer be dealt with by capital as so many isolated units’ and that the individual worker could no longer be expected to pit ‘his single, feeble strength against the might of organized capital.’”37 As Ernst recounts, the primary drafter of the Norris-LaGuardia Act testified before Congress that “Through their deliberate and widespread policy of destroying the bargaining power of labor,” employers who insisted on yellow dog contracts “had forced workers to take whatever wages were offered them and had "beaten down the purchasing power of the people of this country.”38

As many scholars have noted, although the precise form of the yellow dog contract that the Norris-LaGuardia Act banned has faded from memory, today’s employers still seek to require their employees to waive by contract their rights to engage in group activity that the employer finds obnoxious. The Board recognized that arbitration agreements waiving the right to initiate group actions in courts, agencies, or arbitration are today’s yellow dog contract, and the “law has long been clear that all variations of the venerable ‘yellow dog contract’ are invalid as a matter of law.”39

The consequence of the Fifth Circuit’s position is that employees like D.R. Horton’s who are powerless as a practical matter to improve their wages through individual negotiation will be incentivized to strike, picket, or boycott as a group because they cannot use the peaceful and orderly methods of legal redress (such as filing a FLSA claim) that the NLRA specifically encourages and protects as preferred to industrial unrest. A simple example illustrates the problem. Imagine D.R. Horton’s employees believed they were entitled to be paid overtime and met to consider options to challenge the company’s refusal to pay them. They could have gone on strike to demand overtime. They could have organized a consumer boycott. They could have picketed D.R. Horton projects. They could have formed a union and bargained for overtime pay. All of these would clearly be protected by section 7.40 If D.R. Horton required them to sign a contract waiving their right to engage in these activities, the contract would have been unenforceable under the Norris-LaGuardia Act, and disciplining employees for refusing to sign would violate the NLRA.41 Instead, the employees chose to proceed as a group to file a legal action under the FLSA. The law is well settled that the choice to sue or to arbitrate as a group is

38 Id. at 272, quoting Defining and Limiting the Jurisdiction of Courts Sitting in Equity; Hearing before the Committee on the Judiciary, House of Representatives, Seventy-Second Congress, First Session, on HR 5315. ...25 February 1932 (Washington, DC, 1932), 62-63.
39 D.R. Horton, 357 N.L.R.B. at *8 (quoting Barrow Utilities & Elec., 308 N.L.R.B. 4, 11 n. 5 (1992)).
40 National Licorice Co. v. NLRB, 309 U.S. 350 , 360 (1940) (contract forbidding employees from presenting grievances to employer in any way except personally was unlawful); 29 U.S.C. § 103 (contracts in conflict with rights of employees to act concertedly are prohibited).
protected concerted activity just as is the choice to picket, strike, bargain, or boycott as a group. If the purpose of both the NLRA and the FAA is to promote arbitration over alternative forms of dispute resolution, it makes no sense to read them to give employees incentives to strike rather than to use arbitral methods to demand the wages they are owed under the FLSA.

The substantive nature of the right to group legal redress is what distinguishes the NLRA from every other statute the Supreme Court has addressed in its FAA jurisprudence. That the FAA allows arbitration of employment discrimination or other claims could be interpreted as solely procedural because the substantive right protected by these statutes is the right to be free from discrimination, price fixing, or unfair business practices in the pricing of mobile phones. In theory, arbitration of the claim preserves the plaintiffs’ statutory claim but simply forces resolution into an arbitral forum.

None of the Court’s class-action waiver jurisprudence under the FAA addresses a case in which the fundamental statutory protection is the right of employees to act as a group in improving their working conditions; all of them addressed situations in which the underlying right was an individual right to be free from unfair market behavior. In *Gilmer*, employees alleged age discrimination. In *Concepcion*, consumers alleged fraud and false advertising in the price of mobile phones. In *Italian Colors*, the restaurants alleged price fixing in credit card costs.

C. Reconciling the FAA and the NLRA

Conceding that the NLRA protects the right to institute group litigation and group arbitration, the Fifth Circuit held that the FAA’s policy favoring individual arbitration trumps the NLRA’s protections for group action. The FAA makes arbitration agreements “enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The purpose of the savings clause, the Supreme Court has explained, is to place arbitration agreements on the same footing as other contracts: they are enforceable but they may still be invalidated if they violate public policy or other law. The Board reasoned that the NLRA and

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42 Among the many cases the Board cited for this proposition are old cases such as Spandsco Oil & Royalty Co., 42 N.L.R.B. 942, 948-949 (1942); Salt River Valley Water Users Ass’n, 99 N.L.R.B. 849, 853-854 (1952), and recent cases governing class action litigation and lawsuits filed by groups of employees, such as United Parcel Serv., 252 N.L.R.B. 1015, 1018, 1022 n. 26 (1980), enforced 677 F.2d 421 (6th Cir. 1982) (section 7 protects filing class action lawsuit alleging employer violated state statute requiring rest breaks); Brady v. Nat’l Football League, 644 F.3d 661, 673 (8th Cir. 2011) (“a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’”) (emphasis in original).

43 [Respond to the argument that section 7 does not protect every form of concerted activity that is an alternative to core protected activity.]


45 131 S. Ct. at 1744.


Norris-LaGuardia Act prohibitions on employer policies or contracts waiving the right to engage in concerted activity were “grounds as exist at law . . . for the revocation of any contract.” The Board explained that these labor statutes treat all agreements equally and do not single out arbitration agreements: no contract requiring employees to forego their statutory rights to concerted activities is valid under the NLRA and the Norris-LaGuardia Act.

The Fifth Circuit majority found the FAA to invalidate any law, even a law neutral to arbitration, if it discourages arbitration. It thus read the savings clause out of the FAA entirely. Judge Southwick discerned this rule from the reasons given by the Supreme Court in Concepcion for finding class actions to be antithetical to arbitration. Class actions are “slower,” require greater “procedural formality,” are “more likely to generate procedural morass rather than final judgment, and increase risks to defendants of being held liable or having to settle claims for more money.” From that, the Fifth Circuit concluded that a prohibition on class action waivers in arbitration violates the FAA because “employers would be discouraged from using individual arbitration” and “requiring the availability of class actions interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”

In other words, employers seek to ban class actions because they believe doing so reduces the amount of money they must pay to resolve claims about illegal labor practices. Having defined the fundamental attribute of arbitration as being a process that reduces labor costs, the Fifth Circuit then found in the FAA a policy to invalidate any labor law that would create an obstacle to the employer preferences. In a word: “Requiring a class mechanism is an actual impediment to arbitration and violates the FAA.”

The Fifth Circuit majority fundamentally misunderstood the incentives its rule creates to avoid arbitration. Under its rule, employees have incentives to use economic weapons – strikes, boycotts, picketing – or to invoke the procedures of government agencies, because all of these remain legally protected. But they lose the right to use the very form of peaceful and privatized dispute resolution – group arbitration -- that the FAA is supposed to value.

Having decided that the FAA creates a right of employers to opt out of any sort of class or collective action, the Fifth Circuit then considered “whether the NLRA contains a congressional command to override the FAA.” The court found none in the text of the NLRA, none in its legislative history, and “no inherent conflict” between the two statutes. On the language, the court explained that the “NLRA does not explicitly provide for . . . a collective action” and “[t]hus there is no basis on which to find the text of the NLRA supports a congressional command to override the FAA.” On the legislative history, the entirety of the court’s analysis referred to the Chamber of Commerce’s amicus brief arguing that the NLRA

49 D.R. Horton, 357 N.L.R.B. No. 184 at *11.
50 737 F.3d at 359 (quoting Concepcion, 131 S. Ct. at 1751).
51 Id. at 359.
52 Id. at 360.
53 Id.
“only supports an intent . . . [to] empower unions to engage in collective bargaining.” Because Rule 23 and the collective action provision of the FLSA had not been adopted when the NLRA and the National Industrial Recovery Act of 1933 were enacted, “the legislative history . . . does not provide a basis for a congressional command to override the FAA.”

The Fifth Circuit majority also reasoned that the NLRA does not protect a right to engage in group litigation because it was “enacted and reenacted prior to the advent in 1966 of modern class action procedure.” The court got its history wrong, as well as the facts of the D.R. Horton case. The right to file a collective action under the FLSA (which is the right at issue in D.R. Horton) was in the statute when it was enacted in 1938, and the Board found group filing under the FLSA to be protected concerted activity as early as 1942. The changes to Rule 13 in 1966 are entirely irrelevant to the D.R. Horton case.

On the question whether the FAA is an implied repeal of the NLRA right to engage in concerted invocation of statutory rights, the Fifth Circuit also made a rather basic error. In the first place, the FAA as enacted specifically exempted the contracts of employees engaged in commerce, and it was not until Circuit City Stores, Inc. v. Adams in 2000 that the Court held that the FAA applied to employment contracts, notwithstanding the provision in section 1 of the FAA which specifically excepts from coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” As many scholars have explained, when the FAA was enacted in 1925, this exemption of contracts of employment covered all employment contracts over which Congress had regulatory power, as the Supreme Court had held that the Constitution forbade Congress from regulating the contracts of any other employee because its power under the Commerce Clause was limited to those who actually worked or traveled in interstate commerce. When Congress enacted the NLRA ten years later, it plainly would not have said anything about its effect on the FAA because at the time Congress only had the power to regulate employment of those who actually worked on the railroads, in interstate shipping, or in the actual channels of commerce. As Matt Finkin pithily observed, the Court read the FAA “to exclude from coverage those employees for whom Congress could legislate, but to include those employees for whom Congress had had no power

54 Id. at 361.
55 Id. at 362.
57 Spandsco Oil & Royalty Co., 42 NLRB 942 (1942).
59 Carter v. Carter Coal, 298 U.S. 238 (1936) (declaring unconstitutional federal law regulating wages and hours of employees as exceeding scope of Congress’ commerce power); Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935) (declaring unconstitutional pension system for railroad workers; finding the law was only to help “the social welfare of the worker, and therefore [was] remote from any regulation of commerce”); Hammer v. Dagenhart, 247 U.S. 251 (1918) (declaring unconstitutional under Tenth Amendment a federal law prohibiting shipment in interstate commerce of goods made by child labor because law controlled labor conditions that could be regulated only by states).
to legislate at the time, and had been excluded as a matter of practical reach, which, today, amounts to most of the workforce."  

But if the principle is that the later enacted statute is an implied repeal of the earlier one, the NLRA is the later one. The Fifth Circuit dithered – there really is no nicer way to put it – on whether the recodification of the FAA in July 1947 made it a later enactment than the recodification of the NLRA in June 1947. The court said that “reenactments were part of a recodification of federal statutes that apparently made no substantive changes” and it is “unclear” whether the recodification without substantive change can be treated as an implied repeal. The Fifth Circuit entirely overlooked that the NLRA was not merely recodified in 1947, but was substantively amended, and amended again in 1959, while the FAA was not.

Moreover, if, as the Fifth Circuit seemed to think, the question whether the FAA impliedly repealed the collective action protections of the NLRA (or vice versa) turns on the dates when the statutes were first enacted or recodified, the recodification (without substantive change) of the FAA occurred after the Board held that group filing of an FLSA claim was protected by the NLRA (1942), but before the NLRA was twice substantively amended (1947 and 1959) without Congress attempting to change the Board’s rule that the NLRA protects a right of concerted litigation under the FLSA. Moreover, when Congress amended the FLSA in the 1947 Portal-to-Portal Act, it specifically left untouched the right of employees to file actions on behalf of other similarly situated employees; it simply eliminated the right of employees to designate an uninterested third party (such as a labor union) to bring suit on the employees’ behalf. Given that representative actions, including those filed by unions, were commonplace between the enactment of the FLSA and the labor law amendments in 1947, and that the right of employees to institute such actions was well known to be concerted activity protected by the NLRA, the Fifth Circuit was simply wrong to suggest that Congress may have intended the FAA to repeal the NLRA protections for FLSA collective actions.

D. The Right to File Charges and the Right to Group Arbitration

One final anomaly in the Fifth Circuit’s reasoning deserves mention. The court held that the arbitration agreement could not waive the NLRA section 8(a)(4) right to file charges with the National Labor Relations Board. The court determined that D.R. Horton’s arbitration agreement could be read to prohibit filing unfair labor practice charges, discussed two prior Board decisions finding similar agreements to violate the NLRA, and then simply stated that the

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60 Matthew W. Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, unpublished manuscript revised and expanded from The Privatization of Workplace Justice and the Atomization of the American Worker, Henssler, Mietes & Preis eds (C.H. Beck, forthcoming) [ask Matt for a cite]

61 737 F.3d at 362.


63 D.R. Horton, 737 F.3d at 363 (quoting Cintas Corp. v. NLRB, 482 F.3d 463, 467 (D.C. Cir. 2007)).
Board validly ordered D.R. Horton to rewrite its agreement to make clear that employees retained the right to file NLRB charges.64

The court did not explain why employers can require employees to waive the right to sue in any court and the right to institute group arbitration, but not the right to file charges with an administrative agency. The Supreme Court has held that mandatory employment claim arbitration agreements may waive the right to litigate before other agencies, including the EEOC, although they do not waive the agency’s independent right to sue.65 Michael Green’s article in this Symposium explains the basis for the Board’s rule prohibiting waiver of the right to file charges with agencies.66

The Fifth Circuit’s approval of the contract prohibiting collective actions contradicts its holding that the FAA does not allow employers to impose arbitration agreements that prohibit filing unfair labor practice charges.67 The court explained that “the NLRA does not contain a congressional command exempting the statute from application of the FAA,” and therefore, the arbitration agreement “must be enforced according to its terms.”68 Its terms, as the court found, prohibited filing charges anywhere except as an individual in arbitration. On what basis does the statutory right to file charges with the Board survive the FAA while the statutory rights to file litigation or group arbitration do not? The difference between the NLRA and other labor and employment statutes, of course, is that only the NLRB has jurisdiction to adjudicate unfair labor practice charges whereas courts can adjudicate other federal and state statutory claims, subject to administrative exhaustion requirements.69 But why does that difference dictate a different result under the FAA?

II. When is Joinder of Parties Antithetical to Arbitration?

The primary purpose of section 7 of the NLRA is to protect the right of employees to improve their working conditions through collective action. According to the Fifth Circuit in *D.R. Horton*, employers can demand as a condition of employment that employees waive this right of collective action because the FAA’s policy favoring individual arbitration supersedes the NLRA’s protections. The basis of the argument that the FAA supersedes the NLRA is the Supreme Court’s determination in *Concepcion* that class actions are antithetical to arbitration.70 For the reasons explained below, nothing in the FAA allows employers to require employees to abandon their NLRA rights to seek legal redress in smaller groups, such as a collective action under the FLSA or through ordinary rules for joining multiple plaintiffs or multiple defendants in

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64 Id. at 364.
67 D.R. Horton, 737 F.3d at 363 (quoting Cintas Corp. v. NLRB, 482 F.3d 463, 467 (D.C. Cir. 2007)).
68 Id. at 362.
69 29 U.S.C. 160(a) (“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.”)
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a single action. Moreover, the notion that joint or group legal actions are inconsistent with the FAA policy of efficient dispute resolution makes absolutely no sense. Liberal joinder of claims and parties has been favored by state and federal courts for decades precisely because multiparty joinder is efficient.

As a threshold matter, it might be argued that Concepcion is irrelevant to D.R. Horton because it addressed the scope of FAA preemption of state laws limiting enforcement of arbitration agreements, not the validity under the FAA of federal laws limiting arbitration agreements. The Fifth Circuit did not read Concepcion simply as a preemption decision, and for good reason. The Court has applied its policy favoring arbitration and its reading of the FAA to allow waivers of statutory rights to sue equally in cases alleging preemption of state law restrictions on arbitration (as in Concepcion) and cases alleging violation of federal substantive rights, including antitrust, securities, age and race discrimination, fair credit laws, the federal Automobile Dealers Day in Court Act, and a host of other federal laws. The Court in Concepcion and Italian Colors made clear that it thinks that at least some forms of class action to be antithetical to some arbitration systems, and when contracting parties have agreed to an arbitration system that cannot accommodate class actions, the FAA trumps the federal law providing a right to a class action.

Going forward, therefore, it is important for courts to decide whether statutory rights to all forms of collective action can be waived by any arbitration agreement. Whatever the merits of the Court’s judgment about nationwide class actions and the highly informal dispute resolution process used by AT&T, nothing in Concepcion or in the FAA addresses the much different question whether all rules for joinder of parties are anathema to all forms of the arbitral process.

Consider two typical employment matters. Matter A involves two female coworkers who were sexually harassed and physically assaulted by a coworker and a supervisor while employed at Corporation A while the four were working alone in Corporation A’s warehouse late at night. The women reported the incidents pursuant to their employer’s workplace harassment policy; the person responsible for handling complaints did nothing, the harassment continued for two weeks, and the harassers threatened to severely injure the victims in retaliation for reporting. The victims wish to file a lawsuit under Title VII (which allows claims only against the employer, in this case a corporation), the state fair employment law (which allows claims against the employer as well as supervisory employees), and to assert tort claims for battery and intentional infliction of emotional distress against the individual harassers.

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A second matter, Matter B, involves six administrative assistants and twelve nurses working in identical jobs under identical schedules and pay for a corporate medical practice (Corporation B) owned by two doctors. The six administrative assistants and twelve nurses believe the employer misclassified them as exempt administrators and professionals and seek unpaid overtime under the FLSA and a state wage/hour law. When the doctors learn that their employees are demanding unpaid overtime, they fire all eighteen employees, dissolve the corporation, and transfer all its assets to a new corporation engaged in the same business in the same city under a different name (Corporation C).

Corporations A, B and C require employees to sign identical arbitration agreements providing, as D.R. Horton’s and AT&T’s did, that “all disputes and claims relating to the employee’s employment” will be determined by arbitration and the arbitrator “may hear only Employee’s individual claims” and “will not have the authority to consolidate the claims of other employees” or authority “to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” It then says, “YOU AND CORPORATION A [or B or C] MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY.” Imagine, further, that instead of saying, as D.R. Horton’s did, that the employee waived the “right to file a lawsuit or other civil proceeding relating to Employee’s employment with the company” and the right to resolve employment-related disputes before a judge or jury, the employee waived the right to file “any and all claims before a court or agency.”

Imagine, finally, that after filing charges with the state fair employment agency and receiving a right to sue letter, the two employees in Matter A join as plaintiffs to file a single suit and name as defendants Corporation A, the harassing supervisor, and the harassing coworker. In addition, they file criminal charges against the individual harassers. The eighteen employees in Matter B join as plaintiffs to file a single suit against Corporation B, the two doctors, and Corporation C. They also file charges with the state labor commissioner. What is the effect of the arbitration agreement and its prohibitions on joinder?

If Matter A were filed in state or federal court, it would be a simple suit: two plaintiffs, three defendants, and perhaps half a dozen claims. Because both plaintiffs allege they suffered the same conduct committed by both individual defendants, basic principles of civil procedure would suggest the appropriateness of joining both plaintiffs and all three defendants. Matter B would be slightly more complicated, but it is still quite feasible to join either the six assistants or the six assistants and twelve nurses in the same action. Even if the issue of whether the nurses are exempt professionals differs from the issue of whether the assistants are exempt

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72 D.R. Horton, 357 NLRB No. 184 at *1.
73 Fed. R. Civ. P. 20 provides: “All persons may join in one action as plaintiffs” or as defendants if the plaintiffs assert, or the defendants have asserted against them, “any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.”
administrators, if the major issue will be corporate veil piercing—an issue that likely would be the same across all eighteen plaintiffs—it would make sense to join all eighteen, especially if they all worked the same hours each week.

If the corporate defendants moved to compel arbitration, could they also compel the individual plaintiffs to proceed separately? The arbitration agreement would appear to prohibit joinder of plaintiffs. And if the agreement were the one at issue in Concepcion, it could even be read to prohibit joinder of defendants. Whether the individual defendants could be compelled to arbitrate the claims against them as individuals might depend on whether they had signed arbitration agreements like those signed by the plaintiffs. In Matter A, the individual harassers may indeed have signed such agreements, although they appear to contemplate arbitration only of claims by the employees against the company (or vice versa), not claims against employees by coworkers. In Matter B, if the doctors who own the corporations did not sign the arbitration agreement, it is unclear whether the principles of corporate veil piercing (which may be the major issue in the action, given that Corporation B is now judgment proof) would allow arbitration against them over their objection, and it is even more of a stretch to find that Corporation C is a party to any agreement with the eighteen former employees of Corporation B.

The FAA, even as interpreted by the Supreme Court, does not compel the conclusion that arbitration agreements may prohibit joinder of plaintiffs and that a plaintiff must arbitrate claims even if joinder of all claims against all defendants is not possible. In the first place, Concepcion involved two plaintiffs, Vincent and Liza Concepcion, who apparently purchased phones and sought to arbitrate together. At all levels of the litigation, the courts discussed only the validity of a class action waiver, not any other waiver of joinder rules, yet that agreement provided that the consumer and the company “may bring claims against the other only in you or its individual capacity.”

That agreement could be read to prohibit only class actions, representative actions, and consolidation ordered by the arbitrator, not joinder of multiple individuals asserting similar claims.

75 The language of the class action waiver is not reported in the Concepcion cases, although another case involving a version of the AT&T agreement reported that the agreement provided:

You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings of more than one person's claims, and may not otherwise preside over any form of representative or class proceeding, and that if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 980 (9th Cir. 2007).
More importantly, nothing in the Court’s reasoning in Concepcion suggests that multi-party joinder is inconsistent with the policy of the FAA. The Court said “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.” The Court contrasted “bilateral” with “class” arbitration, and found that the latter “sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly and more likely to generate procedural morass than final judgment.” The Court lamented that “class arbitration requires procedural formality,” and then noted that although “the parties can alter [the procedures of Rule 23] by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration,” because absent adequate representation, notice, and an opportunity to opt out, absent parties could not be “bound by the results of the arbitration.” Finally, the Court condemned a state law rule that allowed class arbitration because it “greatly increases risks to defendants” because “when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”

None of the Court’s concerns about class arbitrations apply to joinder of parties other than through a Rule 23 class action. First, the Court’s concern about procedural formality–notice and the right to opt out–does not apply to actions brought by multiple plaintiffs under the usual joinder rules. Concepcion involved a large class action involving millions of consumers and an arbitration procedure that was extremely informal because it was designed to deal with claims whose dollar amount was very small. Employment arbitration of statutory claims is nowhere near as informal as the system in Concepcion, nor could it be. Grave statutory and constitutional claims would be raised if an employer forced employees to adjudicate statutory and tort claims potentially worth tens or hundreds of thousands of dollars per plaintiff in a telephonic arbitration system like the one AT&T designed for customer complaints.

Second, there is no basis for the notion that arbitration is ill-suited to resolve moderately-sized FLSA collective actions. Under the FLSA, unlike under the class action procedure used in Concepcion, the collective action procedure can be implemented only if plaintiffs first opt in. Thus, the Court’s concern that absent plaintiffs cannot be bound by an arbitral judgment because the processes will be too informal to allow notice is unfounded. Under the FLSA, the only plaintiffs who will be bound are those who receive notice of the action and choose to join it.

76 Concepcion, 131 S. Ct. at 1749.
77 Id. at 1751.
78 Id.
79 Id. at 1752.
81
Third, the Court’s concern about the benefits of a final judgment rather than “procedural morass[,]” and its concern that arbitration decisions must be binding on the parties, suggest that plaintiffs should be allowed to join claims and parties as necessary to resolve the dispute without duplicative proceedings. In Matter A, efficiency would be served rather than thwarted by allowing both harassment victims to litigate their statutory and tort claims together—so that they only need to call the witnesses and assemble the documentary evidence once—and also that they be allowed to assert their claims against all three defendants. Similarly, in Matter B, why would an employer wish to litigate six identical claims with each assistant, twelve with each nurse, and to litigate whether the doctors are liable for the unpaid wages if the corporation is judgment-proof eighteen separate times? The procedural morass would be especially tricky if arbitrators ruled for one plaintiff and against another on the same issue.

Finally, the Court’s concerns about obtaining final and binding arbitration decisions and avoiding “procedural morass” also raise interesting issue preclusion concerns. Imagine one of the employees in Matter B arbitrates individually (as required by the agreement) and obtains an arbitral award against the Corporation and, for the sake of simplicity, the two doctors who own it. The arbitrator determines after a full and fair opportunity to litigate the issues that the administrative assistant was not salaried exempt under the FLSA, that she worked fifteen hours of unpaid overtime each week, fifty weeks per year for three years, that the doctors were personally liable for the unpaid wages, and that the violation was willful. Therefore the assistant is entitled to collect three years of backpay rather than just two. The remaining five administrative assistants institute arbitration proceedings asserting that the doctors be prohibited from re-litigating the issues that had already been litigated and decided against them. This is the basic rule of offensive non-mutual collateral estoppel as articulated by the Supreme Court in *Parklane Hosiery Co. v. Shore.*

If the first assistant to reach a final arbitration decision lost, however, each subsequent assistant would not be bound by the adverse ruling because the Court does not allow the use of issue preclusion against a person who was not a party to the prior litigation. The scope of issue preclusion in arbitration is a large topic well beyond the scope of this Article. The point is simply that requiring bilateral arbitration as a matter of contract is not necessarily a good idea for employers and will not simplify the resolution of disputes as the Court in *Concepcion* seemed to think.

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83 Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation, 402 U.S. 322-327 (1971) (it is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy to a party to prior litigation and therefore never had an opportunity to be heard); Hansberry v. Lee, 311 U.S. 32, 40 (1940).
If employees can be compelled to waive their right to seek collective legal redress, why can they not be required to waive their right to institute proceedings before the NLRB? And which other types of administrative claims can employees be required to forego? Although the Fifth Circuit did not explain its reasons for upholding the Board’s judgment that the FAA does not supersede the right to file ULP charges, presumably the rationale is the public interest in allowing the government agency to investigate, prosecute, and remedy unfair labor practices. Does a state labor agency with the authority to litigate claims have an independent right to proceed such that a waiver of the right to file the charge that would trigger that agency’s processes cannot be waived? If the employees in Matter A cannot waive their right to file criminal charges arising out of the battery and attempted rape, why can they waive their right to file tort claims seeking judicial determination of compensation for the exact same harms? Why is the right of the NLRB or a state prosecutor to litigate such charges, and the public interest in having courts adjudicate them, different from the public interest in having courts or agencies adjudicate tort claims or statutory claims for unpaid wages?

[Add a discussion of confidentiality provisions in arbitration agreements as a barrier to preclusion.]

**Conclusion**

In *D.R. Horton* a divided Fifth Circuit extended the Supreme Court’s FAA jurisprudence beyond its current boundaries, which holds that arbitration agreements are enforceable, notwithstanding contrary state or federal law, when they reflect only a change in forum rather than a waiver of substantive rights. *D.R. Horton* held that the section 7 right of employees to engage in concerted legal action to improve working conditions is not a substantive right but rather a mere procedural right and, therefore, that the FAA invalidates an NLRB rule prohibiting waivers of the right to institute group actions.

*D.R. Horton* was wrong as a matter of labor law: the right to engage in group actions, including invoking arbitration, administrative, and judicial proceedings is the core substantive right protected by federal labor law, and the FAA should not be read to trump or impliedly repeal this core right.

But in rejecting the Board’s protection in favor of a vision of the FAA allowing employers to contract around all the usual rules for joinder of claims and parties in litigation, the Fifth Circuit (and the Supreme Court cases which it extends) have opened up the very sort of procedural morass that the Court in *Concepcion* thought class action waivers were designed to avoid. If employers can require employees to sue only as an individual and only individual defendants, they invite employees to file duplicative arbitration, agency, or criminal charges. Of

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course, duplication can be avoided and the goals of efficiency can be obtained if the employees who are forced to sue individually can assert offensive non-mutual collateral estoppel. That will certainly be faster and cheaper for lawyers representing groups of employees (or consumers) than would be a class action.
# RETALIATORY EMPLOYMENT ARBITRATION

**DRAFT NOT FOR CITATION**

Michael Z. Green*

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INTRODUCTION

FORCED ARBITRATION IN 2014: EXPLORING THE WAFFLE HOUSE EXCEPTION

In 2014, we reach a key milestone with the fiftieth anniversary of the passage of Title VII of the Civil Rights Act of 1964 ("Title VII"). This landmark federal legislation, which prohibits discrimination in the workplace, also created the Equal Employment Opportunity Commission ("EEOC"). This Article focuses on the use of arbitration, a form of alternative dispute resolution ("ADR"), to decide federal employment discrimination claims brought under that and related statutes. Specifically, this Article addresses the use of so-called "mandatory," "forced,"

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3 A broader review of the use of ADR in deciding Title VII claims was conducted by this author at the fortieth anniversary of Title VII. See Michael Z. Green, Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence, 48 How. L.J. 937, 949 (2005). Unlike that article’s focus on ADR as a whole, this Article focuses on arbitration, a subset of ADR, at the time of the fiftieth anniversary of Title VII. Typically, with arbitration, the parties select a neutral outsider to resolve their dispute as the final decision maker. See Martin Malin, The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Position, 87 Ind. L.J. 289, 295 (2012) (quoting the benefits of arbitration from a plaintiff’s attorney, Paul Tobias, because the employee can “‘tell the story to a neutral party’” instead of being subjected to summary judgment”). Arbitration differs from other ADR methodologies, such as mediation, where typically the neutral outsider is not a decision-maker and only helps the parties craft their own resolution. Although there are other forms of ADR that may more closely resemble arbitration versus mediation or vice versa, the focus of this Article will be on arbitration as described. See infra note 4.

4 There is some debate about whether the term “mandatory” appropriately addresses
“employer-mandated,” or “pre-dispute” or “compelled” agreements to arbitrate that have garnered much attention and criticism over the past twenty years.\(^5\) The Supreme Court’s decisions under the Federal Arbitration Act (FAA)\(^6\) since 1991 have overwhelmingly endorsed arbitration\(^7\) as a dispute resolution tool to resolve statutory claims, including employment

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\(^5\) See generally Roger B. Jacobs, Fits and Starts for Mandatory Arbitration, 67 Disp. Resol. J. 39, 46-52 (2013) (describing the history of enforcement of employment contracts under the FAA); Bales, supra note 4, at 330 (describing the history of enforcement of these agreements to arbitrate); Michael Z. Green, Reading Ricci and Pyett to Deliver Racial Justice Through Union Arbitration, 87 Ind. L.J. 367, 380-91 (2012) (referring to “extremist” viewpoints for and against the Court’s broad enforcement of arbitration of employment disputes); see also Richard A. Bales & Mark B. Gerano, Oddball Arbitration, 30 Hofstra Lab. & Emp. L.J. 405, 405-06 (2013) (referring to broad judicial enforcement of agreements to arbitrate employment claims); Sternlight, supra note 4 at 1632-34 (describing the level of criticism of mandatory arbitration agreements and their expansive use).


\(^7\) See generally Sara Rudolph Cole, On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence, 48 Hous. L. Rev. 457, 481-91 (2011) (describing recent arbitration decisions by the Supreme Court under the FAA); Lawrence A. Cunningham, Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts, 75 Law & Contemp. Probs. 129, 139-145, 155-158 (2012) (describing jurisprudence under the FAA); Jeffrey Stempel, Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence, 60 U. Kan. L. Rev. 795, 821-881 (2012) (providing a detailed and critical discussion of the Supreme Court’s jurisprudence under the FAA and its overwhelming support of arbitration); Jodi Wilson, How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act, 63 Case W. Res. L. Rev. 91, 94-95, 102-107 (2012) (describing judicial favoring of arbitration); Michael J. Yelnosky, Fully Federalizing the Federal Arbitration Act, 90 Or. L. Rev. 729, 730-731 (2012) (“The Supreme Court’s Federal Arbitration Act (FAA) jurisprudence has been, to put it mildly, much maligned” as the FAA has arguably been “transformed by the Court into a substantive federal arbitration law that governs and favors the enforcement of virtually every arbitration agreement entered into in the United States and displaces otherwise applicable law.”).
discrimination claims brought pursuant to Title VII.\(^{8}\) Out of the key Supreme Court cases involving arbitration of statutory employment discrimination claims since 1991, only one of those decisions still represents a loss for the employer.\(^{9}\)

In 2002, the Supreme Court assessed the importance of the EEOC, the federal agency charged with enforcing the key statutes that regulate workplace discrimination,\(^{10}\) in conjunction with the strong policy of enforcing arbitration agreements to resolve statutory employment discrimination claims.\(^{11}\) In *EEOC v. Waffle House*,\(^{12}\) the key issue before the Court was whether a mandatory arbitration agreement between an employer and an individual employee precluded the EEOC from pursuing the employee’s charge in court. In answering the question, the Court reviewed policy concerns about the collective public rights that the EEOC must vindicate through its enforcement policies,\(^{13}\) and held that the EEOC could file a lawsuit against an employer and obtain individual relief despite the existence of an arbitration agreement.\(^{14}\) The ruling placed the significant public policy favoring the EEOC as the government agency that eradicates workplace discrimination ahead of any agreement between an employer and its individual employees to arbitrate statutory claims.\(^{15}\) The decision also addressed whether an agreement to arbitrate limited the EEOC to pursuing only equitable remedies because the individual employee had agreed to arbitrate legal relief. The Court held that the EEOC could still pursue all equitable and legal remedies available under Title VII, including back pay and reinstatement, along with compensatory and punitive damages.\(^{16}\)

The Supreme Court’s acknowledgment in *Waffle House* of the EEOC’s important role in enforcing employment discrimination laws establishes a

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\(^{8}\) Bales, *supra* note 4, at 330 (providing an overview of the Supreme Court’s enforcement of arbitration agreements as a condition of employment regarding statutory employment disputes); Jacobs, *supra* note 5, at 46-52 (describing enforcement of employment agreements under the FAA).

\(^{9}\) See *EEOC v. Waffle House*, 534 U.S. 279 (2002). The other cases, all involving employer wins, are discussed *infra* Part I, C., D., and E. Another case, Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998), did involve an employer loss. However, its reasoning was essentially changed by a subsequent decision, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009), discussed *infra* Part I, D, where the employer also won.

\(^{10}\) See Laws Enforced by the EEOC, *supra* note 2.


\(^{12}\) 534 U.S. 279 (2002).

\(^{13}\) See *id.* at 290.

\(^{14}\) *Id.* at 292.

\(^{15}\) *Id.* at 291-92.

\(^{16}\) *Id.* at 297-98.
clear, albeit narrow, path to maneuver around the Court’s wide endorsement of mandatory arbitration under the FAA. Because of Waffle House, an employer cannot completely force arbitration of all statutory employment discrimination claims with an employee. If the EEOC chooses to pursue those employment discrimination claims, the employer may still face a jury trial with the potential for compensatory and punitive damages awards, despite the employer’s attempt to circumvent those options through mandatory arbitration. As a result of Waffle House, the established “national policy favoring arbitration” under the FAA gives way to something else: the policy favoring EEOC vindication of statutory rights and the Agency’s public mandate to protect the overall interests of all employees.17

This Article’s review of several lower court decisions after Waffle House demonstrates that employers may have responded to that case by seeking to force arbitration after the EEOC become involved. These employer responses create a chilling effect that deters employees from further filing of discrimination charges. Moreover, as this Article asserts, forcing arbitration in these instances represents an illegal form of retaliation18 that is proscribed by statutory requirements and inconsistent with the Supreme Court’s jurisprudence providing enthusiastic support to enforcement of retaliation claims.19

This Article examines the use of retaliation claims to resolve employment discrimination matters as an effective response to an

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17 See Marion Crain & Ken Matheny, Labor’s Identity Crisis, 89 Cal. L. Rev. 1767, 1815 n.287 (2001) (discussing the implications of Waffle House and asserting that “[t]he underlying tension in Waffle House is between the federal pro-arbitration policy and the rights of individuals to contract freely with regard to the terms of their employment on one hand, and the public interest in eradicating employment discrimination on the other” because “[t]he EEOC functions as more than just an enforcer for individual employee rights against discrimination, it is the watchdog for the public’s interest” and “the EEOC makes resource allocation decisions about which claims it will pursue based on its assessment of the most significant impact for workers as a whole”).

18 In this Article, the focus of asserting retaliation is based upon an employer’s decision to enforce a mandatory arbitration policy to the detriment of allowing an agency to complete its process which the Article asserts will create a chilling effect in dissuading employees from filing charges with agencies. These employer actions also retaliate against employees who have filed charges by disadvantaging them with respect to other employees by preventing the agency from being directly involved in the resolution of their charges.

19 See generally Art Hinshaw, Sternlight: Tide Turning a Bit on Mandatory Arbitration Through Recognition that Process Suppresses Claims, ADRPROF BLOG, Dec. 16, 2003 (referring to arguments by Professor Jean Sternlight that federal legislation in 2014 may bode well for consumers and employees Federal Arbitration Undermines Enforcement of Federal Laws by Suppressing Consumers’ and Employees’ Ability to Bring Claims, (Congressional Testimony Dec. 17, 2013)).
employer’s action to force arbitration as a purported response to *Waffle House*. Also, the Article explains how decisions involving similar retaliation matters filed with the National Labor Relations Board (“NLRB”),\(^\text{20}\) the agency which enforces charges filed pursuant to the National Labor Relations Act (“NLRA”),\(^\text{21}\) may also help employees respond to forced arbitration actions.

In Part I, this Article reviews the Supreme Court’s vigorous enforcement of arbitration of statutory employment discrimination claims under the FAA and related matters regarding the EEOC’s policy during that timeframe. Part II explores the implications from the primary Supreme Court case, *EEOC v. Waffle House*, where employee interests prevailed over the Court’s pro-arbitration standards established pursuant to FAA jurisprudence. In examining lower court decisions since *Waffle House*, Part II also exposes employer efforts to circumvent the Court’s analysis through actions to compel employees to arbitrate after a charge with the EEOC has been filed and how this action retaliates against employees by deterring them from filing agency charges. Part III considers potential claims to be developed by agencies, through the courts, and by legislative action in Congress to combat employer efforts to chill employee filings of charges with the EEOC and the NLRB by trying to compel arbitration before final agency action can occur, what this Article terms “re retaliatory employment arbitration.”

In Part IV, this Article proposes that the EEOC and NLRB continue to adopt and enforce clear policies aimed at responding to retaliation from forced arbitration to achieve sufficient regulation of employer usage of arbitration. By reference to the terms of a consent order in a case that the EEOC settled in federal court, the Article’s thesis suggests the parameters that employees may use to frame a retaliation challenge to unfair employer efforts to force arbitration of statutory employment discrimination claims. Likewise, Part IV discusses a recent NLRB administrative law judge decision that identifies the parameters in which employees may challenge retaliation through forced arbitration efforts under labor law. In concluding, this Article suggests that if agencies and employees are not allowed to challenge retaliatory employment arbitration, then the public interest in eradicating discrimination in the workplace, as referenced in *Waffle House*, will be diminished.


I. OVERWHELMING SUPREME COURT ENFORCEMENT OF AGREEMENTS TO ARBITRATE STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS

At the dawn of the fiftieth anniversary of Title VII, employees face a daunting challenge in trying to challenge agreements for forced arbitration. Legal changes wrought between 1990 and 2014 explain the development of arbitration for statutory employment discrimination claims and how this form of arbitration has become pervasive. A number of circumstances converged in 1991, namely, the passage of the Civil Rights Act of 1991 ("CRA of 1991") and the Court’s decision in Gilmer v. Interstate/Johnson Lane Corp. As a result, that year saw landmark changes in the legal approach to the arbitration of statutory employment discrimination claims. Thereafter, as detailed in this Part, the FAA’s broad enforcement of arbitration clauses to resolve statutory employment disputes suggests that there remain almost no real legal options for individual employees who desire to circumvent forced arbitration.

A. The Civil Rights Act of 1991 and Gilmer v. Interstate/Johnson Lane Corp.

Before 1991, no employment law practitioner would have thought it possible that courts would enforce an agreement requiring arbitration of statutory employment discrimination claims. Even earlier when the FAA was passed in 1925, it is unlikely any “legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.” This quoted language from then-Supreme Court Justice John Paul Stevens explains the general thinking about arbitration of statutory employment discrimination claims before 1991. But the quote by Justice Stevens comes from his dissenting opinion in the landmark 1991 decision Gilmer v. Interstate/Johnson Lane Corp.24

In Gilmer, the Supreme Court first authorized the use of arbitration for resolving a statutory employment discrimination claim. As a condition of his employment as a financial manager for Interstate/Johnson Lane Corporation, the plaintiff in Gilmer had to sign a registration application

with the New York Stock Exchange ("NYSE"), which required that he agree to arbitration over any controversy with his employer. Because he signed the application with the NYSE containing the arbitration provision, the plaintiff’s employer filed a motion to compel arbitration several years later, when Gilmer filed a statutory age discrimination claim under the Age Discrimination in Employment Act ("ADEA").

Pursuant to the FAA, the Supreme Court in *Gilmer* compelled arbitration of the ADEA claim. However, the Court refused to answer whether section 1 of the FAA, which excludes “contracts of employment” from FAA coverage, applied to the ADEA claim. Because the Court found that the agreement to arbitrate was not part of a contract of employment between Gilmer and his employer, but instead an agreement between the NYSE and Gilmer, it saved for “another day” the resolution of that question. Despite the uncertainty as to whether a direct agreement to arbitrate between an employer and an employee would be enforceable under the FAA after *Gilmer*, employers began to require as a condition of employment an employment agreements requiring arbitration of all employment disputes. At the urge of employers and with the authority of *Gilmer* behind them, many lower courts enforced those agreements.

The CRA of 1991 also helped foster a move to arbitral resolution of statutory discrimination claims. Shortly after the *Gilmer* decision in May 1991, President George Herbert Walker Bush signed the CRA of 1991 into law. During its 1988-89 term, the Supreme Court had decided several controversial cases employment discrimination cases, including *Patterson v. McLean Credit Union*, *Lorance v. AT&T Technologies*, *Martin v. Wilks*, *Price Waterhouse v. Hopkins*, and *Wards Cove Packing Co. v. Atonio*. These decisions, among others, caused concern among civil rights

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25 *Gilmer*, 500 U.S. at 23.
26 *Id.* at 23–24. The ADEA can be found at 29 U.S.C. §§ 621-634 (2006).
27 9 U.S.C. § 1 (2000) (“[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).
28 *Gilmer*, 500 U.S. at 25 n.2.
29 See Green, *supra* note 24, at 411 & n.39, 412 & 42 (citing cases).
34 490 U.S. 228 (1989).
advocates, who mounted a successful legislative effort to reverse those decisions.  

Under the CRA of 1991, Congress granted employees the right to pursue compensatory and punitive damages along with the right to a jury trial for intentional discrimination claims brought under Title VII. These new remedies were included in the CRA of 1991 to align Title VII claims with section 1981 of the Civil Rights Act of 1866 (“section 1981”) claims that already allowed such remedies—but only for employment discrimination claims based on race. Because the new statutory regime now offered jury trials along with punitive and compensatory damages for certain claims, employers greatly feared that large and unpredictable jury verdicts would result. Accordingly, employers enthusiastically embraced


40 See Green, supra note 24, at 422-24, 454-59 (discussing concerns about nuisance settlement of employment discrimination claims due to unpredictable jury verdicts as a concern of employers that led to increase of mandatory arbitration); see also Leslie A. Gordon, Clause for Alarm, As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach, 92 ABA J. 19, 19 (Nov. 2006) (stating that “arbitration is ‘[t]raditionally praised for its flexibility, informality, confidentiality and ability to produce unique awards not available in traditional litigation’”); Frederick L. Sullivan, Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration, 26 W. New Eng. L. Rev. 281, 316 (2004) (“Much of the advocating for arbitration on the part of employers results from verdicts that have been pursued before sympathetic-to-employee and hostile-to-employer juries in proceedings that have become known as workplace lotteries.”) (footnote omitted); see also David T. Lopez, Realizing the Promise of Employment Arbitration, 69 TEX. B. J. 862, 62 (2006) (“Employers have opted for mandatory, binding arbitration of employment disputes as a way to avoid the fear of disproportionate jury awards or jury bias, among other reasons”).
the use of arbitration after Gilmer by requiring that their employees agree to arbitrate these and other disputes as a condition of being employed.\footnote{Green, \textit{supra} note 24, at 454-59 (describing concerns about jury verdicts--albeit based on little data--as the concern for employers that led the rush to the use of arbitration); \textit{But see} Gordon, \textit{supra} note 41, at 19 (suggesting that some employers are now moving away from arbitration due to unexpected results and because they see more value in mediation).}

\textbf{B. The EEOC Response to Gilmer: 1997 Policy Statement on Mandatory Arbitration}

As an initial response to mandatory arbitration, the EEOC issued a policy statement in 1997 that specifically criticized the use of mandatory arbitration for employment discrimination claims.\footnote{\textit{See EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment} (July 10, 1997) [hereinafter, \textit{EEOC Policy}] available at \url{www.eeoc.gov/policy/docs/mandarb.html} (last visited Dec. 31, 2013). For a more critical analysis of this policy, see Beth M. Primm, \textit{Comment, A Critical Look at the EEOC’s Policy Against Mandatory Pre-Dispute Arbitration Agreements}, 2 U. PA. J. LAB. & EMP. L. 151 (1999). \textit{But see} Joseph D. Garrison, \textit{The Employee’s Perspective: Mandatory Binding Arbitration Constitutes Little More Than A Waiver of A Worker’s Rights}, 52 DISP. RESOL. J. 15 (Fall 1997) (arguing that the EEOC’s position opposing mandatory arbitration was well-deserved). \textit{See also} Ellen J. Vargyas, \textit{EEOC Explains Its Decision: Verdict On Mandatory Arbitration In Employment}, 52 DISP. RESOL. J. 8, 10 (Fall 1997) (referring to further explanation of the EEOC’s policy).} That policy statement recognized that “[a]n increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve their disputes through binding arbitration.”\footnote{\textit{EEOC Policy, supra} note 43.} While remaining “[m]indful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court’s decision in \textit{Gilmer v. Interstate/Johnson Lane},”\footnote{500 U.S. 20 (1991).} the EEOC still found “that such agreements are inconsistent with the civil rights laws.”\footnote{\textit{EEOC Policy, supra} note 43.} In the policy statement, the EEOC ultimately concluded that mandatory arbitration agreements for employment discrimination claims should not be enforced.\footnote{\textit{Id}.}

Unfortunately, several more Supreme Court decisions have arisen after \textit{Gilmer}\footnote{\textit{See infra} Section II.C-E.} that further support the use of arbitration for statutory employment discrimination claims. With questions still lingering about the overall
fairness of mandatory arbitration on Title VII’s fiftieth anniversary, the EEOC’s continued failure to clarify or amend its 1997 policy statement at this important time for reflection on the effectiveness of the Agency only adds to the challenges faced by employees seeking to address workplace discrimination.

On March 8, 2011, after drafting a preliminary plan for comprehensive and retrospective review of its existing rules, the EEOC sought public comment on the plan and suggestions regarding specific rules that it ought to include. In its public comment, the Chamber of Commerce urged repeal of the EEOC’s 1997 Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment. The AARP and the National Employment Lawyers Association (“NELA”) disagreed.

On May 24, 2011, after considering public comments in light of certain legal and operational factors and its available resources, the EEOC identified five rules for review in its Preliminary Plan for Retrospective Analysis, none of which addressed its policy on mandatory arbitration. At its July 18, 2012 meeting to discuss its Strategic Enforcement Plan, NELA submitted a written document that included a November 7, 2011 e-mail attachment arguing that the EEOC should communicate “immediately to all EEOC offices reaffirming the commitment of the Commission to implement its 1997 guidance on mandatory pre-dispute arbitration to the maximum


\[^{49}\text{See Nancy M. Modesitt, Reinventing the EEOC, 63 SMU L. REV. 1237, 1238-39 (2010) (describing how “[t]he EEOC is an agency that has failed its mission to eradicate discrimination in the workplace” and referring to “several ways in which the EEOC has not fulfilled its promise”).}\]


\[^{51}\text{Id.}\]

\[^{52}\text{Id.}\]

\[^{53}\text{Id. at }\text{http://www.eeoc.gov/laws/regulations/retro_review_plan_final.cfm. As a result, there is no ongoing plan by the EEOC to update its 1997 policy on mandatory arbitration.}\]
extent permissible and consistent with current law." However, a lack of action indicates that these efforts fell on deaf ears.

Even in the year 2014, the EEOC has failed to clarify its policy on arbitration. Regardless of differences between the courts and the EEOC on the issue, compliance with employment discrimination law can be difficult and employers still tend to look to the EEOC for guidance on how to comply. Similarly, employees look to the EEOC to help explain the protections available under the law. Small businesses, lacking the time and resources needed to challenge the EEOC’s position, will likely follow

54 See Written Testimony of Daniel Kohrman, National Employment Lawyers Association http://www.eeoc.gov/eeoc/meetings/7-18-12/kohrman.cfm, (including Nov. 7, 2011 e-mail asking the EEOC to reaffirm 1997 policy to address “Forced Arbitration”).

55 Professor Rebecca Hanner White has stressed the importance the courts should give to the EEOC’s role in setting policy and the deference courts should give to the EEOC’s interpretations regarding key policy issues. See e.g., Rebecca Hanner White, Deference and Disability, 99 Mich. L. Rev. 532 (2000); Rebecca Hanner White, The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation, 1995 Utah L. Rev. 51.

56 See Jean R. Sternlight, In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis, 78 Tul. L. Rev. 1401, 1468-82 (2004) (suggesting that the following ten factors make individual employment discrimination claims difficult to resolve: complex laws; highly contested and confusing facts; involvement of significant non-legal as well as legal interests; societal need for correct determinations; societal need for clear and public precedents to guide future conduct and deter future misconduct; the need for adequate compensation of victims of discrimination; the societal need to punish wrongdoers; unavailability of a fair procedural mechanism to assert claims; the need for quick resolution of claims to allow parties to move forward with their lives and business; and alleged victims tend to have less resources than the alleged perpetrators); Susan Sturm, Lawyers and the Practice of Workplace Equity, 2002 Wis. L. Rev. 277, 277-82 (noting that workplace inequities are becoming more complex and moving to a “second generation” requiring unique collaborative problem-solving skills).

57 See Melissa Hart, Skepticism and Expertise: The Supreme Court and the EEOC, 74 Fordham L. Rev. 1937, 1953-54 (2006) (highlighting the complexities of the statutes that the EEOC administers; asserting how the EEOC developed necessary expertise on various related subjects involved in enforcement; and describing numerous policy guidance materials that the EEOC generates commensurate with its responsibility to track tendencies and be a “repository for a wealth of information about the discrimination-related trends and concerns in workplaces around the country”); Primm, supra note 43, at 160 (referring to employer guidance given by the EEOC). The EEOC lists more than twenty different policies and guidances for employees and employers to consider on its website including its policy against mandatory arbitration. See Enforcement Guidances and Related Documents, last modified April 2012 available at http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm (last visited Dec. 31, 2013).

58 Hart, supra note 58, at 1953-54 & n.95 (highlighting how employees can learn from the many guidance materials created by the EEOC to help understand some of the complexities of the law).
its guidance in developing compliance policies. In sum, the EEOC’s failure to clarify its position on mandatory arbitration deprives all of these actors the benefits of their guidance.

C. Circuit City Stores, Inc. v. Adams

The Gilmer Court left unanswered whether the FAA made enforceable arbitration agreements in the employment context. Language in section 1 of the FAA appeared to support the argument that “contracts of employment” were excluded from the FAA’s scope. Accordingly, for a decade after Gilmer, judges and scholars debated whether the Court’s increasingly strong endorsement of arbitration encompassed agreements entered into directly between employers and employees.

The Court’s 2001 Circuit City Stores, Inc. v. Adams decision answered that question, and made very clear that agreements to arbitrate employment disputes are enforceable. In Circuit City, the employee alleged discrimination and unfair treatment under the California Fair Employment and Housing Act and state tort law. The employer sought to compel arbitration under a forced arbitration agreement. The Court specifically held that section 1 of the FAA, which excludes from enforcement certain “contracts of employment”, only applied to contracts of employees who are transportation workers. The Court based its conclusion on its interpretation of language related to “workers engaged in foreign or interstate commerce.”

As a result of Circuit City, only a very narrow group of employees, those who literally work in commerce, would have their contracts of employment exempted from FAA coverage. Since the Gilmer decision, the Supreme Court has generally supported and endorsed the arbitration of all


60 See Gilmer, 500 U.S. at 25 n.2 (describing how the arbitration agreement was not part of a contract of employment between an employer and an employee since Gilmer’s agreement to arbitrate was with the N.Y.S.E., not with his employer).


63 See id. at 119.

64 Id. at 110.

65 Id. at 105.

66 Id. at 119.

67 Id. at 119.
forms of agreements, including many not involving employment discrimination matters. But Circuit City provided to date the strongest authority to use when employers seek to force their employees into arbitration agreements as a condition of employment.

D. 14 Penn Plaza v. Pyett

Several years later, in 2009, the Supreme Court decided 14 Penn Plaza LLC v. Pyett, where it held that a collective bargaining agreement (“CBA”) may waive an individual employee’s statutory rights to pursue age discrimination claims in court. The Pyett plaintiffs were three union members, all over forty years of age, who sued their employer for age discrimination after being reassigned to less desirable and lower paying jobs. The union initially pursued the age discrimination claims on behalf of the employee as grievances through the CBA’s preliminary dispute resolution procedures. However, the union declined to pursue arbitration of the claims when the grievance process failed because the union concluded that the claims lacked legitimate basis as the union had agreed with the employer to make the reassignments in question.

In considering whether to enforce of the CBA’s waiver of judicial remedy, the Court addressed complex issues that coalesce across various


70 Id. at 251, 274.
71 Id..
72 Id. at 252-53.
statutory regimes, including the FAA, the ADEA, and the NLRA, along with prior Court interpretations of those statutes. Ultimately, the court held that the claims could only be pursued through arbitration due to the CBA’s unusually clear language regarding discrimination claims.

Before Pyett, a strange anomaly existed where an individual employee with no bargaining power was subjected to mandatory arbitration as a result of Gilmer while employees represented by a union did not have to agree to mandatory arbitration. This result had raised questions as to whether an employer could force individual employees in a union setting to arbitrate their statutory claims despite the presence of a union. The individual employees in Pyett were being forced into arbitration by the employer’s argument that it had agreed with the union to arbitrate their claims even though the union in Pyett had refused to pursue the individual employees’ age discrimination claims in arbitration. The Pyett case represents another remarkable example of how the Supreme Court has enforced employer efforts to force individual employees to arbitrate their statutory claims rather than pursue those claims in court. In denying access to the courts for employment discrimination plaintiffs, the Pyett Court ruled that a waiver of an individual employee’s right to pursue claims in court must be clear and unmistakable, and can be achieved by a union’s explicit agreement in the CBA to resolve those claims under the CBA’s labor arbitration process.

Despite its precarious reasoning, Pyett is wonderful in illuminating the Court’s pro-arbitration stance over the last two decades. The decision

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76 Pyett, 556 U.S. at 255-60, 266-69.
77 Id. at 252. I consider this language as “unusually clear” because it literally refers to arbitration as the “sole and exclusive remedy” which is unusual language for a union and employer to agree to with respect to a nondiscrimination clause in a collective bargaining agreement. Such unusual language supported the intent of the parties to waive court access to remedy statutory claims. See id.
78 See Michael Z. Green, Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions, 10 Tex. Wesleyan L. Rev. 77, 85-86 (2003) (discussing the “anomaly” in broad bargaining power protections for union employees against enforcing mandatory arbitration agreements and no protection for non-union employees and how employers sought to force individual employees in the union setting into pursuing arbitration of statutory claims separate from labor arbitration under the collective bargaining agreement).
79 556 U.S. at 260.
80 For example, in my 2012 review of Pyett, I asserted that the decision was part and parcel of a plan to circumvent without overruling thirty-five years of precedent. See Green, supra note 5, at 392-93.
underscores the very real removal of judicial involvement in the resolution of statutory discrimination claims. The Court, in fact, declined to consider the “speculation” that the decision would insulate a union’s failure to pursue arbitration of an individual’s discrimination claim, thereby robbing employees of every forum or just resulting in another way in which individual employees, such as the plaintiffs in Pyett, are forced to arbitrate employment discrimination claims. This, among others, remains a key concern after Pyett.

E. Rent-A-Center, West, Inc. v. Jackson

In Rent-A-Center, West, Inc. v. Jackson, the Supreme Court added to a long line of precedent favoring the enforcement of pre-dispute agreements to arbitrate employment discrimination claims. The Jackson decision considered whether the court or the arbitrator rules on challenges to arbitration agreements as unconscionable, when the arbitrator obtains his or her authority to decide from the agreement itself. The Supreme Court held that the arbitrator makes the decision if the agreement so provides.

The arbitration agreement at issue provided for “arbitration of all ‘past, present or future’ disputes arising out of Jackson’s employment with Rent-A-Center, including ‘claims for discrimination’ and ‘claims for violation of any federal . . . law.’” The agreement also included a delegation provision stating that the “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all or part of this Agreement is void or voidable.” Before the Court, Jackson claimed that the agreement to arbitrate was unenforceable because it was unconscionable under state law. Rent-A-Center argued that the arbitrator must decide the issue, and pointed to the delegation provision for support.

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81 Pyett, 556 U.S. at 273-274 (“Respondents also argue that the CBA operates as a substantive waiver of their [statutory] rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. . . . [W]e are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from effectively vindicating their federal statutory rights in the arbitral forum. . . . [A] resolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.”) (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000)).
83 130 S.Ct. at 2779.
84 Id.
85 Id. at 2776.
The Supreme Court ruled that, because the parties had clearly and unmistakably delegated questions of arbitrability to the arbitrator, and Jackson had failed specifically to challenge the validity of that delegation provision, the unconscionability issue must be put to the arbitrator.\textsuperscript{86} The Court reasoned that the delegation provision was “an agreement to arbitrate threshold issues concerning the arbitration agreement” and “simply an additional, antecedent agreement” to arbitrate challenges to the overall arbitration agreement.\textsuperscript{87} Thus, the delegation provision could be severed from the overall agreement to arbitrate and may only be displaced by a specific challenge. Otherwise, the provision remained in effect and left the validity of the whole arbitration agreement to the arbitrator.

In a dissenting opinion, his last challenge to the Court’s expansive treatment of arbitration under the FAA before his retirement, Justice Stevens argued that the majority erred in its severability analysis, and asserted that Jackson’s unconscionability challenge to the overall arbitration agreement should have been addressed by the Court. He criticized the Court for adding “a new layer of severability—something akin to Russian nesting dolls,” by deciding to “pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator.”\textsuperscript{88} Justice Stevens also argued that this “new layer” erroneously carved out a court’s responsibility to decide whether an agreement to arbitrate was unconscionable before sending any matters to the arbitrator.\textsuperscript{89}

The \textit{Jackson} decision, as with \textit{Pyett},\textsuperscript{90} strongly supports the continued application of mandatory arbitration agreements to resolve statutory employment discrimination claims. Combined with earlier precedents like \textit{Gilmer} and \textit{Circuit City}, and the EEOC’s hesitance to get involved in meaningful way, forced arbitration provisions increasingly curtail employee access to the courts, often as a condition of employment. The \textit{Jackson} decision’s endorsement of removing judicial consideration at the outset of general contract defenses—such as fraud, duress, or unconscionability—that would defeat enforcement of an agreement to arbitrate statutory discrimination claims underscore that, today, employees facing forced arbitration have few places to turn.

\textsuperscript{86} Id. at 2779-81.
\textsuperscript{87} Id. at 2777.
\textsuperscript{88} Id. at 2786.
\textsuperscript{89} Id.
\textsuperscript{90} 556 U.S. 247 (2009).
II. **EMPLOYER EFFORTS TO CIRCUMVENT WAFFLE HOUSE AS RETALIATION**

In representing one of the key chinks in the FAA’s armor, the *Waffle House* decision seems to have rankled employers as they seek to tighten the vise grip they hold on mandatory arbitration of employee statutory disputes. In a review of mandatory arbitration five years after *Waffle House*, I argued that the EEOC had erred by failing to develop a coherent update to its arbitration policy in light of the powerful opportunity presented by the Court’s decision. At that time, the promise of *Waffle House* was still considered a significant check on employer exuberance for forced arbitration of statutory employment discrimination claims. As many speculated, the EEOC’s inability to pursue more than a small percentage of charges filed as court claims suggests that *Waffle House* may have had very little impact. Yet, with a change in the enforcement regime— signaled by Barack Obama assuming the Presidency in 2009— one would have hoped that the EEOC would finally update its arbitration policy as part of an overall enforcement regime that captured the broad implications of the *Waffle House* decision. Unfortunately, however, the EEOC has remained

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94 See Green, *supra* note 5, at 370 n.12 (discussing how many had hoped for the pursuit of an aggressive pro-employee legislative agenda during the Obama presidency and how delays and politics have prevented those pursuits).
silent. Absent any update to its official arbitration policy, a limited number
of cases discussing EEOC action involving an arbitration agreement provide
the only indications of whether Waffle House still offers some hope for
employees seeking to avoid forced arbitration. Those cases suggest that
employers have adopted a clear response to the Waffle House decision:
taking preemptive action against the prospect of litigation by forcing the
employee involved to arbitrate before the EEOC can take any official
action.95

In an era where the EEOC has been limited by politics, it is perhaps
unsurprising that the Agency has sent mixed messages as to the precise
content of its arbitration policy. Nevertheless, despite the uncertainty, the
possibility of using retaliation claims to circumvent forced arbitration has
been lurking in the background since at least 2004. In that year, the Ninth
Circuit held in EEOC v. Luce, Forward, Hamilton & Scripps96 that an
agreement to arbitrate was valid pursuant to Circuit City, but it remanded
the case to the trial court to address the EEOC’s “novel” claim that the
employer had retaliated by refusing to hire a job candidate who would not
agree to arbitration as a condition of employment.97 Rather than pursuing
the theory further, the EEOC supported a settlement agreement that allowed
a law firm to continue to enforce its mandatory arbitration policy. When
commenting on the eventual settlement of Luce, a spokesperson for the
EEOC admitted that the EEOC’s 1997 policy was “still technically in
effect,” but that there was “a lot of confusion” at the Agency about how the
policy applied.98

Accordingly, the EEOC bypassed a chance to establish this “novel”
retaliation theory. This may owe only to political circumstances at that time.
Cliff Palefsky, the attorney representing the plaintiff in Luce, asserted that
the EEOC’s decision to settle the case instead of pursuing its “novel”
retaliation claim in the district court was a “political one.”99 Supporting
Palefsky’s claim was the fact that the EEOC Chair, a Republican appointee,
ignored a letter by Democratic Senator Edward Kennedy and six other

95 See infra Part II.B.1.
96 345 F.2d 742 (9th Cir. 2003) (en banc).
97 For further discussion of the possible “novel” claim of retaliation from Luce, see
Kiran Dosanjh Zucker, Retrieving What Was Luce: Why Courts Should Recognize
Employees' Refusal of an Employer's Mandatory Arbitration Agreement As "Protected
Activity" Under Title VII's Antiretaliation Provision, 22 LAB. LAW. 233, 244-249 (2006).
98 See Nancy Montweiler, EEOC Accord Puts Its Stamp of Approval On Law Firm’s
Mandatory Arbitration Plan, DAILY LAB. REP. (BNA) No. 132, at AA-1 (July 12, 2004).
99 Id.
Democrats asking that the EEOC not drop the case after it was remanded. As the EEOC has not again pursued the retaliation theory of arbitration, one reading of these circumstances—supported by its settlement action—is that the EEOC now endorses employer-mandated arbitration, or does not consider efforts to compel arbitration as retaliatory. If this is the true result, the broader potential impact of Waffle House remains completely diffused by EEOC inaction. But the stronger possibility is that, given the political considerations, the EEOC has decided to challenge mandatory arbitration as a form of retaliation in court actions without adopting an express arbitration policy or expressly arguing the retaliation theory espoused by this Article.

A review of cases adjudicated after Waffle House featuring EEOC involvement demonstrates that, even where arbitration agreements are present, the EEOC is clearly focused on pursuing discrimination claims in court.

These cases also reveal that, although Waffle House allows the EEOC to seek victim-specific relief despite the existence of an individual agreement to arbitrate, whether employers may compel arbitration where the EEOC has taken the case remains an open question. The employer’s strategy in many of these cases—really, an attempt to effectuate res judicata—essentially arises from language in the Waffle House decision stating that “ordinary principles of res judicata, [and] mootness” may still apply. By compelling individual employees to arbitrate before the EEOC can complete its proceedings and obtain court

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100 Id.
101 Id.
102 McNiel, supra note 18, at 775.
103 See Matthew Kane, A Crack in the Waffle House Armor: U. S. Court of Appeals Holds Employers Can Enforce Arbitration Agreements Against Employees Who Intervene in EEOC Enforcement Actions, MCGUIRE WOODS NEWSLETTER (Mar. 7, 2007) (providing suggestion from management law firm that “even after the Supreme Court’s decision in Waffle House, having arbitration agreements with employees for employment-related claims can have strategic value for employers in EEOC enforcement actions” while referring to a case in the United States Court of Appeals for the Eighth Circuit that allowed the employer to require that an employee seeking to intervene in an EEOC action arbitrate his claims even if the EEOC could proceed in court) available at http://www.lorman.com/newsletters/article.php?article_id=680&newsletter_id=148 (last visited Dec. 31, 2013).
104 Waffle House, 534 U.S. at 298.
relief, the employer can assert that any relief won by the EEOC pursuant to *Waffle House* has been precluded due to the arbitration result.

Judicial response to these arguments varies. Some courts reject the employer’s attempts to compel arbitration by discussing the various problems involved in the conclusion that arbitration of the employee’s claim must be compelled.\(^{105}\) Other courts focus only on the EEOC’s right to pursue claims, consistent with *Waffle House*, and on allowing the employer to compel arbitration of the individual employee’s claims without allowing the employee to either intervene in the EEOC court action or stay the court proceedings until arbitration has been completed.\(^{106}\)

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\(^{105}\) See, e.g., *EEOC v. Ranir*, 2012 U.S. Dist. LEXIS 13972 (W.D. Mich. Feb. 6, 2012) (denying the employer’s motion to dismiss Intervenor and refusing to compel arbitration where employee signed an arbitration agreement and filed a charge of discrimination under the ADA with the EEOC and attempted to intervene in the EEOC’s court action,); *EEOC v. Gmri, Inc.*, 221 F.R.D. 562 (D. Kan. 2004) (finding employee who filed charge could intervene in EEOC’s suit for sex discrimination and denied employer’s motion arguing that the charging party’s complaints must be resolved through arbitration); *EEOC v. SWMW Mgmt.*, 2009 U.S. Dist. LEXIS 37996 (D. Ariz. Apr. 21, 2009) (refusing to compel arbitration and stay the EEOC’s enforcement action when the EEOC brought suit on behalf of Defendant’s former employees on the basis of race and gender discrimination, constructive discharge, and retaliation because the former employees were not parties to this action and pursuant to *Waffle House* the court may not stay the proceedings and could not order a stay even if some of the former employees had intervened); *EEOC v. Taco Bell of Am., Inc.*, 2007 U.S. Dist. LEXIS 4671 (M.D. Fla. Jan. 23, 2007) (refusing to compel arbitration when the EEOC brought suit against Taco Bell. Taco Bell sought to compel the EEOC to arbitrate but the court, citing *Waffle House*, denied Taco Bell’s motion because the EEOC was not a party to the arbitration agreement and the EEOC had not yet issued a “Right to Sue” letter to the charging party. The court held that the charging party had no jurisdiction and should not be compelled to arbitrate; *See also EEOC v. Riverview Animal Clinic*, 761 F. Supp.2d 1296 (N.D. Ala. 2010) (pregnancy discrimination case where employer argued that the claim was subject to arbitration and the court dismissed and allowed EEOC to proceed under *Waffle House* without addressing whether employee could intervene or had to arbitrate claim even if the EEOC did not have to arbitrate).

\(^{106}\) *EEOC v. Hooters of Am., Inc.*, 2007 U.S. Dist. LEXIS 2150 (W.D.N.Y. Jan. 9, 2007) (granting employer’s motion to compel arbitration of intervenor’s action where the EEOC filed an ADA discrimination claim based on plaintiff’s charge, but allowing the EEOC to proceed independently, as allowed under *Waffle House*); *EEOC v. Cheesecake Factory, Inc.*, 2009 U.S. Dist. LEXIS 41883 (D. Ariz. May 5, 2009) (compelling arbitration and staying individual’s trial to allow arbitration where the EEOC filed a suit on behalf of the charging parties under a sexual discrimination claim but charging parties had signed an arbitration agreement with their employer); *See also EEOC v. Fry’s Elecs., Inc.*, 2011 U.S. Dist. LEXIS 20407 (W.D. Wash. Feb. 14, 2011) (finding that once an employee intervenes, the employer may seek to compel arbitration even though the court granted the motion of the employee to intervene and denied the employer’s motion to compel arbitration and motion to stay because of the need to first resolve a factual dispute about whether the
For example, in *EEOC v. Circuit City Stores*, 107 the Sixth Circuit addressed the employer’s claim that the individual employee must be compelled to seek exclusive relief in arbitration because the employee had signed an agreement to arbitrate, notwithstanding that the EEOC alone had filed the lawsuit. The EEOC disagreed, arguing that only the signatory employee, and not the EEOC, agreed to forego a judicial resolution. 108 The court ruled in favor of the EEOC, rejecting the employer’s argument as “unpersuasive.” 109 Specifically, the court held that it and the district court lacked jurisdiction over Circuit City’s motion to compel arbitration, brought in a separate suit filed against the employee by Circuit City for that sole purpose, because the employee was not seeking to bring an individual claim. 110 Hence, there was no case or controversy in that suit and the district court had properly granted judgment on the pleadings. 111 That the EEOC had filed the lawsuit, not the employee 112 in the end made all the difference.

Several lower court cases support the *EEOC v. Circuit City Stores* result—that the EEOC may pursue an action even if the employee earlier agreed to arbitrate, and have even suggested that compelled arbitration is not required once the EEOC files suit. 113 In *EEOC v. Physicians Services*, 114 for example, the court denied the employer’s motion to compel arbitration in a suit involving the EEOC. It moved to compel arbitration and stay the court proceedings pending the resolution of claims in arbitration on the argument that the instant proceeding would be inefficient as all matters would be resolved in arbitration. By contrast, the EEOC argued that its court proceeding should not be stayed even if the arbitration proceedings went forward. Relying on *Waffle House* and other cases, the EEOC argued that its suit existed independently of the arbitration claims because the suit would be seeking vindication of the public interest. 115

The court accepted the EEOC’s position. It explained that the “*Waffle House* Court did not address [the] specific question of whether an

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107 285 F.3d 404 (6th Cir. 2002).
108 Id. at 406-07.
109 Id.
110 Id.
111 Id.
112 Id.
113 See supra note 140 (citing cases).
115 Id. at 860.
intervening plaintiff must arbitrate his or her claims pursuant to an arbitration agreement because the aggrieved party in Waffle House never intervened in the EEOC’s action.” According to the Court’s analysis of Waffle House, “the majority in Waffle House was aware of the dissent’s objection to the EEOC doing on behalf of an employee that which an employee has agreed not to do for himself and noted that the Waffle House Court accepted that consequence of its ruling.” As a result, the court denied the motion to compel arbitration.

The Eighth Circuit reached a contrary result in EEOC v. Woodmen of the World Life Insurance Society. There, the court addressed a motion by the employer to compel arbitration of an employee’s individual Title VII claims, as well as her cross-claims filed as an intervenor in a lawsuit filed by the EEOC in that action. The district court, which had allowed intervention, denied the employer’s motion to stay the cross-claims and compel arbitration. The district court supported that result because the employee “could not afford arbitration”; arbitration here “would interfere with the EEOC’s ability to pursue interests on behalf of the public”; and the employee had filed for bankruptcy.

The Eighth Circuit reversed and compelled arbitration. First, because the bankruptcy court lifted the bankruptcy stay on the Title VII proceedings, the court considered the district court bankruptcy concern alleviated. Second, the employer’s offer to pay for the arbitrator’s costs ameliorated any concern with expense. Finally, the court found no limitation on the EEOC’s ability to pursue interests on behalf of the public through an enforcement action if the employee were required to arbitrate her claims. Further, the court found that the Supreme Court’s caveat in Waffle House that “[i]t is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC’s claim or the character of the relief the EEOC may seek” suggested that the Supreme Court had not “intended to preclude an employee from asserting claims in arbitration against the employer concurrently with the EEOC enforcement action.”

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116 Id. at 861.
117 Id.
118 Id.
119 479 F.3d 561 (8th Cir. 2007).
120 Id. at 563-64.
121 Id. at 564.
122 Id. n.1.
123 Id. at 566-567.
124 Id.
125 Id. at 569-70 (citing Waffle House, 534 U.S. 296, 297 (2002)).
As with the competing line of cases, lower courts have followed the Eight Circuit’s approach and compelled arbitration at an employer’s motion, even though the EEOC had brought suit. For example, in *EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*\(^{126}\) the court compelled arbitration of the employee’s claims, and stayed the employee’s claims as an intervenor in the court action while allowing the EEOC to proceed with its court action.\(^{127}\) In so ruling, the court disagreed with the EEOC’s argument that “compelling an employee to arbitrate after the EEOC has filed suit interfered with the EEOC’s right to enforce the law.”\(^{128}\)

In short, the results from these post-*Waffle House* cases show the extent to which employees may be discouraged from filing EEOC charges if employers seek to compel arbitration while a charge is still pending with and unresolved by the EEOC. By attempting to compel arbitration before the EEOC has completed its process, the employer is seeking to prevent the employee from benefitting from the EEOC’s investigation and potential independent lawsuit. These employer efforts send a message to employees that the filing of the charge was useless and the employee, by being compelled to arbitrate, sits in the exact same position as he or she would have been had no charge been filed. As a result, immediately compelling arbitration before the EEOC can complete its process, dissuades employees from even filing a charge. Why file a charge if the employer will be able to immediately force the employee to arbitrate? Accordingly, the EEOC should be more concerned about this type of retaliation where employers send a message to employees that the only benefit of having filed a charge is that the employer will aggressively seek to arbitrate and attempt to cut the employee off from any relief that the EEOC may have obtained on behalf of the employee.

III. RETALIATION CLAIMS AS THE REMAINING OPTION FOR RESPONDING TO FORCED ARBITRATION AND SEEKING WORKER FAIRNESS

With the continued growth of mandatory arbitration,\(^{129}\) employees and


\(^{127}\) Id. at 264-65.

\(^{128}\) Id. at 263.

their advocates must determine the remaining options for bringing claims. Retaliation claims offer a viable option not yet rejected by the Supreme Court. This Part first considers prior actions by the EEOC and the NLRB in the arbitration context. Specifically, both agencies have already intimated or expressed that forcing arbitration may deter or prevent employees from filing charges with those agencies. These are the bases for possible retaliation claims in light of retaliation jurisprudence, which this Part next explores.

In light of the concerns identified by the EEOC and the NLRB, the Supreme Court’s strong Title VII retaliation rationale suggests that employees should attempt to file charges with those agencies and bring claims in court on the basis that employer efforts to force arbitration is, in fact, retaliation for protected activity under Title VII and the NLRA. Finally, this Part closes by urging legislative advocacy aimed at Congress, especially as it continues to discuss amending the FAA to expressly exclude employment and consumer claims. Adding language that would prevent the usage of arbitration as a form of retaliation could be included in pending legislation.

A. Agency Pursuits

Some recent EEOC and NLRB actions may offer options for employees seeking ammunition in the battle against forced arbitration. Going forward, both agencies should consider how employers’ mandatory arbitration policies, as well as their efforts to compel arbitration while charges are still pending, can represent a form of retaliation in deterring employees from filing charges.

1. Forcing Arbitration as Interference with Filing EEOC Charges

Employees with claims under Title VII asserting that they have been aggrieved because of employment discrimination must file a charge in

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130 See infra Part II.A.

131 See infra Part II.B.

132 See Hinshaw, *supra* note 22 (discussing Professor Jean Sternlight’s views on possible legislation); Sternlight, *supra* note 49 (testimony given to U.S. Senate Committee by Professor Jean Sternlight advocating for future legislation); see also infra Section III, Part A.
writing with the EEOC to exhaust administrative remedies. Employees may also file charges with state fair employment agencies where they exist. In those cases where the EEOC proceeds to a “cause” finding, the agency tries to “conciliate” or settle the charge with the employer. If no resolution is achieved, the EEOC may choose to file a lawsuit on behalf of the charging party. The charging party has the right to retain her own lawyer and intervene in the EEOC’s lawsuit.

The fiftieth anniversary of Title VII is the right time for the EEOC to analyze the pending legal issues that may affect employees’ abilities to vindicate their statutory employment discrimination claims through the arbitration process, and consider what more it might do in effecting its purpose. This Article asserts that the EEOC should adopt an aggressive policy of pursuing retaliation claims when employers seek to compel employees to arbitrate their statutory discrimination dispute when the EEOC is still involved in the matter, so as not to dissuade workers from pursuing charges that might be brought under Waffle House. As a start, the EEOC could update its 1997 arbitration policy to take the position that when an employee files a charge of discrimination, the EEOC will consider actions to compel arbitration with the employee as intended to be a form of retaliation by creating a chilling effect that will deter employees from filing charges with the EEOC. A cease and desist order would be the most likely remedy for such behavior if no other actions have been taken other than an attempt to compel arbitration.

Taking into account the broad standards for retaliation under White and dissuading a reasonable employee from filing a charge, the EEOC has an opportunity to effectuate the policy from Waffle House by not allowing employers to immediately force arbitration on employees who file EEOC charges. Then employers cannot attempt to create a res judicata end run around the recovery that the Supreme Court determined was so important for the individual employee in Waffle House. Further, employees will not be led to immediately believe that their filing of an EEOC charge was

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133 See 29 C.F.R. §§ 1601.7-.12 (2010).
136 A charging party may also obtain a right to sue letter and file suit in federal court first. In that instance, the EEOC may then intervene in the private lawsuit.
137 See Hart, supra note 58, at 1950 (describing how “EEOC statements do reflect considered judgment, informed by expert analysis and research, about application of open-ended or unclear statutory commands”).
138 See infra Section IV.
worthless if they are placed in the same position of facing arbitration as they would have held without filing the charge. Except now the employer is trying to force that arbitration to occur immediately.

2. Forcing Arbitration as Interference with Filing Unfair Labor Practice Charges

Section 7 of the NLRA provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 139 Under Section 8(a)(1) of the NLRA, it is an unfair labor practice that can be prosecuted by the NLRB if an employer acts to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 140 Section 7 of the NLRA has no temporal limitations. It applies: when a union is engaged in an organizing campaign; when a union is the collective bargaining representative of the employees; and also when there is no union present at all. 141

Given the limited number of employees who work in a union setting, the application of Section 7 to the non-union workplace represents an important right for all workers. Non-union employers are just starting to see the significance of Section 7 of the NLRA in their workplaces. The NLRB has started to examine various employer policies to determine whether they may chill employees in exercising their Section 7 right to mutual aid or protection. 142 To the extent an employer seeks to enforce a mandatory arbitration policy that is invalid under the NLRA for chilling employees in

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141 See Catherine L. Fisk and Deborah C. Malamud &., The NLRB in Administrative Law Exile: Problems With Its Structure and Function and Suggestions for Reform, 58 DUKE L.J. 2013, 2024 (2009)(asserting that “Section 7 could be read as providing general antiretaliation protection for all forms of worker activism, so long as the activism is “concerted” and for “mutual aid or protection.”). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. Triangle Electric Co., 335 N.L.R.B. 1037, 1038 (2001); Meyers Industries, 268 N.L.R.B. 493, 479 (1984).
142 See James McDonald, Jr., Has the NLRB Outlawed Courtesy? LAW 360 (Oct. 26, 2012) (referring to comments by management attorney regarding the NLRB’s decisions that have caused concern for employers); see also Michael Z. Green, The NLRB’s Key Role in Antidiscrimination Law Fifty Years After Title VII, 14 NEV. L.J. (forthcoming 2014) (describing several NLRB decisions involving non-union employers where the NLRB examined a broad range of policies to assess whether those policies would chill employees in the exercise of their Section 7 rights).
their exercise of their Section 7 rights, an employer may also violate the NLRA’s retaliation provision, Section 8(a)(4), which provides that an employer commits an unfair labor practice if it chooses: “4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.”

The NLRB made a splash into the mandatory arbitration debate in 2012 when it issued its decision in *D.R. Horton*. In that case, the Board found that employer efforts to compel individual arbitration and prevent class arbitration hampered employees’ abilities to exercise their rights to concerted activity under section 7 of the NLRA. The arbitration agreement, signed by non-union employees, required individual arbitration and expressly waived the right of employees to seek class arbitration. Furthermore, the arbitration agreement provided that an arbitrator may not consolidate employees’ claims or otherwise award relief to a “group” or “class” of employees in a single arbitration proceeding. The NLRB found that the class waiver language “reasonably would lead employees to believe that they were prohibited from filing charges with the Board” and thereby chill employees’ exercise of their statutory collective rights, and, moreover, did not conflict with the FAA.

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145 357 NLRB No. 184, 2012 WL 36274 (2012), enforced in part and reversed in part, 737 F.3d 344 (5th Cir. 2013).
146 2012 WL 36274, at * 17,
147 Id. at *5.
After the NLRB decision issued, several courts were asked to address the validity of the decision within their jurisdictions as cases involving arbitration policies that banned class or collective arbitration were subjected to challenge in light of *D.R. Horton*. Many of those courts refused to follow the NLRB’s decision, and so, too, did the Fifth Circuit when it was asked to review the *D.R. Horton* on appeal in December 2013.\(^{148}\) In rejecting the NLRB’s decision, the court held that the Board’s FAA analysis was flawed, and failed to accommodate the FAA’s broad policy requiring enforcement of arbitration agreements.\(^{149}\)

But embedded within its rejection of the Board’s decision in *D.R. Horton* is a silver lining: namely, the court’s statement that arbitration here “would lead employees to reasonably believe that they were prohibited from filing unfair labor practice charges.”\(^{150}\) This recognition affirmed a key proposition in *D.R. Horton* that certain employer policies can chill employee exercise of rights specifically addressed by a mandatory arbitration policy.\(^{151}\)

The Board had relied on its *U-Haul Co. of California*\(^{152}\) decision for that proposition. There, the Board found impermissible interference with section 7 rights by a broadly worded arbitration policy that was “reasonably read to require employees to resort to the [employer’s] arbitration procedures instead of filing charges with the board.”\(^{153}\) The NLRB was careful to limit its decision “to the specific clause at issue in this case, which we have

\(^{148}\) 737 F.3d 344 (5th Cir. 2013).

\(^{149}\) *Id.* at 362.

\(^{150}\) *Id.* at 363.

\(^{151}\) See David L. Hudson, Jr., *Arbitration Clause Can’t Block NLRB Complaints*, A.B.A. J. E-REPORT, (Fri. July 14, 2006) (discussing recent Board finding that mandatory arbitration agreement was unlawful in *U-Haul* decision and examining its impact). Pursuant to *U-Haul*, once a charge has been filed with the the Board, an employer’s action to compel arbitration could violate section 8(a)(4). See Nicole Cuda Perez, *Too Many Arbitrators Do Spoil the Soup: NLRB Charges Filed By Non-Unionized Employees Should Not Be Subject to Mandatory Pre-Dispute Arbitration Agreements*, 23. LAB. LAW. 285, 296-97 (2008) (arguing that non-union employees who file unfair labor practices should not be deemed to have waived those charges because of agreements to arbitrate (citing *U-Haul Co. of California*, 347 N.L.R.B. 375, at *4 (2006) (finding “that arbitration policy violates the Act because it would reasonably tend to inhibit employees from filing charges with the Board” and “employees could reasonably believe that they are precluded from filing such charges with the Board”)))


\(^{153}\) *U-Haul*, 347 N.L.R.B. at 378 n.11.
determined would be reasonably read to restrict the filing of unfair labor practice cases with the board.\textsuperscript{154}

Other Board decisions have also found that mandatory arbitration policies would violate the NLRA for discouraging employees from filing unfair labor practice charges including decisions in \textit{Supply Technologies},\textsuperscript{155} \textit{Bill’s Electric},\textsuperscript{156} and \textit{2 Sisters Food Group}.\textsuperscript{157} Because the Fifth Circuit in \textit{D.R. Horton} did not unsettle this understanding, a fair reading is that arbitration agreements, if not clearly worded to inform employees that they may still file charges with the NLRB will be in violation of the NLRA.\textsuperscript{158} To protect employees from being forced into arbitration, the NLRB must continue to enforce its decisions that make it unlawful to seek to compel enforcement of arbitration agreements that deter employees from filing NLRB charges.

\textbf{B. Retaliation Claims in the Courts}

The Supreme Court has an interesting history of enforcing retaliation claims, especially under Chief Justice John Roberts.\textsuperscript{159} For example, the Court has read a broadly worded civil rights statute, section 1981, to include

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\item\textsuperscript{154} Id.
\item\textsuperscript{155} 359 N.L.R.B. No. 38 (Dec. 14, 2012).
\item\textsuperscript{156} 350 N.L.R.B. 292, 296 (2007).
\item\textsuperscript{157} 357 N.L.R.B. No. 168 (Dec. 29, 2011).
\item\textsuperscript{158} Hudson, supra note 172 (discussing comments of Katherine Stone about possible mandatory arbitration clauses that may not be a problem, such as the clause at issue in \textit{U-Haul}).
\item\textsuperscript{159} See generally Michael Zimmer, \textit{A Pro-Employee Supreme Court? – The Retaliation Decisions}, 60 S.C. L. REV. 917 (2009); see also David Long-Daniels & Peter N. Hall, \textit{Risky Business: Litigating Retaliation Claims}, 28 ABA J. LAB. & EMP. L. 440-442 (2013) (describing a trio of Supreme Court cases expanding the scope of retaliation claims). Those three cases are: Burlington N. & Santa Fe Railway Co., 548 U.S. 53 (2006); Crawford v. Metropolitan Gov’t of Nashville & Davidson Cty., 555 U.S. 271 (2009); and Thompson v. North American Stainless, L.P., 131 S.Ct. 863 (2011). However, the Roberts Court may be losing its affection for retaliation claims. The only key Supreme Court case decided by the Roberts Court that denied victory for the employee was its most recent decision finding that Title VII’s retaliation provision is different from the discrimination provision in Title VII, at least with respect to the standard of causation required. \textit{See} University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 2534 (2013). Although retaliation scholars were already predicting that the Court’s support for retaliation claims would soon begin to wane. \textit{See}, e.g., Alex B. Long, \textit{Employment Retaliation and the Accident of Text}, 90 ORE. L. REV. 525, 526-529 (2011) (noting that going into the Supreme Court’s 2010 term, “nearly every case adopted an interpretation of a statutory antiretaliation provision that favors employees” while also asserting that these decisions may be “lulling proponents. . . into a false sense of security” as employees will “start losing” these claims).
\end{itemize}
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an anti-retaliation remedy.\footnote{160} In \textit{CBOCS West v. Humphries}, the Court held that section 1981\footnote{161}—which declares that all persons “shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”—prohibits not only racial discrimination but also retaliation against those who oppose it.\footnote{162} In another case, \textit{Gómez-Pérez v. Potter},\footnote{163} the Court likewise read an anti-retaliation remedy component into the broad wording of the federal-employee provisions of the ADEA.\footnote{164}

The Court’s 2006 decision in \textit{Burlington Northern & Santa Fe Railway Co. v. White} evinces a similar pro-employee stance of the Roberts Court with respect to retaliation.\footnote{165} Title VII’s express anti-retaliation provision, section 704(a), prohibits an employer from “discriminat[ing] against” an employee or job applicant because that individual “opposed any practice” made unlawful by Title VII, or “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation.\footnote{166} In \textit{White}, the Court addressed the type of retaliatory acts covered by section 704(a).\footnote{167}

As the court explained at outset, a retaliation claim is broadly aimed at “prohibiting employer actions that are ‘likely to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers.”\footnote{168} Accordingly, it held “that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to

\begin{itemize}
\item 553 U. S., at 445.
\item 553 U. S. 474 (2008).
\item \textit{See} \textit{42 U.S.C. § 2000e–3(a)}; \textit{Burlington N. & Santa Fe Ry. Co. v. White}, 548 U.S. 53, 56 (2006). Section 704 (a) provides: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. \textit{Id.}
\item \textit{Id.} at 56-57 (referring to 42 U.S.C. § 2000e-3a (2006)).
\item \textit{Id.} at 68.
\end{itemize}
employment or occur at the workplace." A section 704(a) plaintiff must show that the employer’s retaliatory action was “materially adverse” in that the action would have “dissuaded a reasonable person from making or supporting a charge of discrimination.” The focus is on the “materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position.”

In other words, as stated by Justice Breyer, “[c]ontext matters.” A supervisor’s refusal to invite an employee to lunch could be so trivial as to not be actionable, but excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might “well deter a reasonable employee from complaining about discrimination.”

In applying the broad retaliation standard of White to employer efforts to force arbitration when employees have pending charges before the EEOC or the NLRB, this approach would seem to yield the conclusion that these actions would deter reasonable persons from pursuing their statutory rights to file charges. Employees would have no incentive to file charges if they would ultimately be compelled to arbitrate their claims. Helpfully, some federal appeals courts have accepted that compelled, or pursued, arbitration can chill the exercise of legal rights.

For example, in EEOC v. Board of Governors of State Colleges and Universities, the Seventh Circuit held that the very language of a CBA dissuaded employees from pursuing administrative relief in violation of section 4(d) of the ADEA, which mirrors Title VII’s retaliation provision. Specifically, the CBA stated: “If . . . while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to . . . proceed further with the matter pursuant to this

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169 Id. at 57.
170 Id. at 68.
171 Id. at 69-70. The materially adverse analysis is not limited to materially adverse changes in the terms and conditions of employment, e.g., termination, demotion, reassignment, etc. Instead, the question is whether the retaliatory action would be materially adverse to a reasonable employee.
172 Id. at 69.
173 Id.
174 957 F.2d 424 (7th Cir.1992).
175 See Lorne Fienberg, Note, Retaliation Claims Under § 4(d) of the ADEA: EEOC v. Board of Governors of State Colleges, 34 B. C. L. REV. 413. 413 n.4 (1993) (citing Section 704(a) of Title VII and EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088 (5th Cir. 1987)).
Because the CBA effectively required an employee to choose between filing under the grievance process provided or with the EEOC, the language was retaliatory on its face because it penalized the employee for choosing to file with the EEOC by eliminating the employee’s right to use the internal grievance procedure. 176

In Goldsmith v. Bagby Elevator, 178 the Eleventh Circuit addressed whether illegal retaliation occurred where an employer terminated an employee for refusing to sign an arbitration agreement offered to the employee when he had a charge of discrimination pending with the EEOC. In a prior decision, Weeks v. Harden Manufacturing Corp., 179 the court had ruled that an employee’s refusal to sign an arbitration agreement as a condition of employment upon hiring failed to establish a retaliation claim because refusing to sign an arbitration agreement was not a protected activity. 180 Weeks similarly reasoned that terminating employees for their failure or refusal to sign an arbitration agreement who had not yet filed or threatened to file EEOC charges could not be retaliation because the plaintiffs could not have had an objectively reasonable belief that their refusal was a statutorily protected activity. 181

The Goldsmith court distinguished Weeks, however, on the grounds that the employee had a pending EEOC charge. 182 Hence, when the employer sought the employee’s agreement to arbitrate “all past, present, and future” claims against the employer as a condition of employment, the employee would have been giving up his ability to pursue his pending charge with the Agency and making it mandatorily arbitrable. 183 Perhaps influencing the court’s conclusion that the seeking to compel such arbitration was retaliatory was the employer’s rejection of the employee’s request to limit arbitration to only future disputes. 184 In any case, Goldsmith provides further support for the notion that courts recognize the potential of employer-compelled arbitration to interfere with statutory rights. In joining Goldsmith’s analysis with White, the employee would be able to receive all rights and remedies as a result of an employer’s retaliatory action of trying to force arbitration when the EEOC was still involved in handling a

176 957 F/2d at 426.
177 Id. at 429-30.
178 513 F.3d 1261 (11th Cir. 2008).
179 291 F.3d 1307 (11th Cir. 2002).
180 Id. at 1316-17.
181 Goldsmith, 513 F.3d at 1278 (discussing Weeks).
182 Id. at 1271.
183 Id. at 1278.
184 Id at 1271-72.
discrimination charge.

C. Congressional Reforms

Past congressional efforts to amend the FAA have not been effective, despite the many calls for legislative action to respond to the growing FAA Goliath.\(^{185}\) Despite this lack of legislative success, the ongoing debate about mandatory arbitration has continued to dovetail with the debate about the Arbitration Fairness Act (“AFA”), a piece of legislation that has repeatedly been reintroduced in Congress for the past half-decade and is still now pending before it.\(^{186}\) The AFA would make all pre-dispute agreements to arbitrate statutory employment discrimination claims unenforceable. It would also prohibit enforcement of arbitration provisions in agreements between unions and employers (as allowed by \textit{Pyett}) that waive individual employee rights to pursue claims in court.\(^{187}\)

With respect to reforms that ban the enforcement of mandatory arbitration for certain statutory disputes without directly addressing the FAA, Congress has already passed legislation. The Franken Amendment to

\(^{185}\) Examples of requests for Congressional action have been made by several commentators. See Hinshaw, \textit{supra} note 22; Sternlight, \textit{supra} note 49; see also Cole, \textit{supra} note 7.

\(^{186}\) See Arbitration Fairness Act of 2013, S. 878 and H.R. 1844, 113\textsuperscript{th} Cong. (2013) (introduced May 7, 2013 in U.S. Senate as S. 878 by Senator Al Franken (Dem.-Minn.) along with 24 cosponsors and identical bill was introduced in the U.S. House of Representatives as H.R. 1844 by Congressman Henry C. “Hank” Johnson (Dem.-Ga.) along with seventy-one co-sponsors). A prior version of this Act was introduced on March 8, 2012. See Arbitration Fairness Act of 2012, H.R. 4181, 112\textsuperscript{th} Cong. (2012) (introduced by Rep. Robert “Rob” Anderson (D.-NJ). A prior version of this Act was introduced in 2011. See Arbitration Fairness Act of 2011, S. 987, 112\textsuperscript{th} Cong. (2011) (introduced by Senators Al Franken (D.-Minn.) and Richard Blumenthal (D.-Colo.)); Arbitration Fairness Act of 2011, H.R. 1873, 112\textsuperscript{th} Cong. (2011) (Congressman, Hank Johnson (D.-Ga.)). A prior version of that Act was introduced in 2009 to the 111\textsuperscript{th} Congress, the Arbitration Fairness Act of 2009, S. 931, 111\textsuperscript{th} Cong. (2009); see also Sternlight, \textit{supra} note 22 (describing written testimony to the U.S. Senate Judiciary Committee in support of passage of the Arbitration Fairness Act of 2013, S. 878); Jean R. Sternlight, \textit{In Defense of Mandatory Binding Arbitration (If Imposed on the Company)}, 8 Nev. L.J. 82 (2007) (describing arguments for and against prior version of the Arbitration Fairness Act). Congress continues to take additional effort through annual hearings to raise discussion about this potential legislation. See Bales & Gerano, \textit{supra} note 5, at 416 (discussing renewed efforts, albeit unsuccessful, to have hearings about potential legislation after the Arbitration Fairness Act of 2012 was introduced).

\(^{187}\) The Arbitration Fairness Act of 2013, Section 3, creates a new section 402 (b) to be added to the FAA which precludes mandatory arbitration waivers in collective bargaining agreements. See \textit{supra} note 124.
the 2010 Department of Defense Appropriations Act prevents federal contractors with a contract of at least $100,000 from entering into pre-dispute agreements to arbitrate statutory or tort claims involving sexual harassment or assault. Also, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), passed by Congress and signed by President Obama in 2010, bans mandatory arbitration of retaliation claims by those who report securities fraud, commodities fraud, or other claims covered by the Dodd-Frank’s retaliation provisions. Further attempts to ban mandatory arbitration agreements involving customers and investor disputes may soon be addressed pursuant to the DFA. The results from both the Franken Amendment and the DFA underscore that the severity of the situation has not completely escaped congressional attention.

Hope springs eternal for those who want Congress to finally provide protection for employees to rival the effective protection the Supreme Court has afforded employers since 1991. At least one commentator, Professor Jean Sternlight, remains optimistic that legislative reform will occur in 2014. If the current version of the AFA passes, there will be no need for employees to assert retaliation claims in response to employer efforts to

191 Preliminary results from the Consumer Financial Protection Bureau, pursuant to Dodd-Frank, suggests that most large banks use arbitration, small banks use arbitration much less than large banks, most arbitration clauses include class waivers, and few consumers file claims in arbitration. See Paul Kirgis, CFPB Preliminary Results on Study of Arbitration Clauses in Consumer Contracts (Dec. 12, 2013), available at http://www.indisputably.org/?p=5283 (last visited Dec. 31, 2013); Arbitration Study Preliminary Results, Section 1028 (a) Study Results to Date (Dec. 12, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (last visited Dec.31, 2013); Ann Carns, Consumer Agency Looking into Mandatory Arbitration, N.Y. TIMES, BUCKS: MAKING THE MOST OF YOUR MONEY BLOG (Apr. 25, 2012) (referring to the requirement in section 1028(a) of the Dodd-Frank Act that the Consumer Financial Protection Bureau study and provide a report to Congress about agreements to arbitrate future disputes with consumers and how the Bureau requests public comments as part of its study), available at http://bucksblogs.nytimes.com/2012/04/25/consumer-agency-looking-into-mandatory-arbitration/ (last visited Dec. 31, 2013); Jill L. Gross, The End of Mandatory Securities Arbitration, 30 PACE L. REV. 1174, 1178 (2010) (describing Dodd-Frank provisions authorizing changes to mandatory arbitration for financial consumers); see also Hinshaw, supra note 22 (referring to report by Consumer Financial Protection Bureau and assessment by Paul Kirgis regarding activity related to Dodd-Frank Consumer Financial Protection Bureau’s findings about arbitration as support for legislative change according to Professor Jean Sternlight).
192 See Hinshaw, supra note 22.
force arbitration. Those agreements to arbitrate will no longer be enforced.

However, because President Obama’s political party does not have control of the House of Representatives and lacks a sufficient number of Senators to prevent legislation from being blocked in committees, passage of the AFA seems unlikely.193 Perhaps, at minimum, Congress could embrace the opportunity of Waffle House and pass narrower legislation to ensure that once a charge is filed with either the EEOC or the NRLB, no party can force arbitration until the agency process is completed.194 Such legislation would stop the retaliatory actions of employers to force arbitration that have been occurring as a response to Waffle House.

IV. DEFINING THE PARAMETERS OF RETALIATORY EMPLOYMENT ARBITRATION

Employers (and possibly politicians and employer-interest groups) could easily balk at the notion that their efforts to enforce clearly legal mandatory arbitration policies by attempting to compel an employee to arbitrate could result in a successful retaliatory employment arbitration action.195 Under the Supreme Court’s broad approach to retaliation in White and the Eleventh Circuit’s analysis in Goldsmith, the central question for a retaliation claim based on an employer’s motion to compel is whether the action would deter a reasonable person from pursuing their right to file a charge of discrimination. Filing an EEOC charge would, of course, be

193 See Green, supra note 5, at 370 n.12 (describing political difficulties that have derailed the development of employment legislation during President Obama’s first term); see also Rona Kaufman Kitchen, Off-Balance: Obama and the Work-Family Agenda, 16 EMPL. RTS. & EMPLOY. POL’Y 211, 269-70 (2012) (describing enforcement problems of the EEOC during President Obama’s first term and suggesting this result stems from the EEOC “being stubbornly resistant to change according to presidential political affiliation); But see Margaaret H. Lemos, The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 VAND. L. REV. 363, 425-27, 434-35 (2010) (describing how the EEOC has acted more independently as a pro-employee agency due to initial efforts to limit its enforcement powers and suggesting that the EEOC has been more responsive to changes by pro-employee special interest groups than to opposing changes posed by presidents or Congress).

194 As described earlier, narrower legislation aimed at the specific type of disputes that may be banned from mandatory arbitration rather than attempts to amend the FAA have already successfully occurred pursuant to the Franken Amendment and the Dodd-Frank Act. See supra text accompanying notes 208-210

195 See, e.g., Weeks v. Harden, 291 F.3d 1307, 1316-17 (11th Cir. 2002) (finding that there is no valid retaliation claim for an employer’s efforts to pursue what has clearly been endorsed by the Supreme Court as legal activity, entering into mandatory agreements to arbitrate).
useless if the employer could compel arbitration and remove the employee from the EEOC process. Hence, such an employer action would deter a reasonable employee from pursuing the EEOC process and therefore satisfies the White standard. The Waffle House decision refers to the importance of public interest vindication, and that public interest is harmed when employees are deterred from filing charges.

Employers may be left wondering what, if anything, they can do to prevent a retaliatory employment arbitration charge from being successful.\(^{196}\) The answer to that question is quite straightforward. If a dispute involves a charge that could be filed with a public agency such as the EEOC or the NLRB, the employer needs to make sure that employees are not prohibited from or deterred from filing charges with those agencies or from participating in those agencies’ actions as a result of the employer’s arbitration policy. Also, the employer cannot attempt to force an employee to arbitrate the dispute when the agency is still involved in reviewing the matter or has brought a further action to enforce the charge.\(^{197}\) If the agency has dismissed the charge and the employee is pursuing the matter independently, then the employer would have every right to compel

\(^{196}\) I thank Professor Catherine Fisk for suggesting that a response to the thesis in this Article may be that employers cannot be subject to retaliation for merely pursuing legal activity to enforce their valid mandatory arbitration agreements by seeking to compel arbitration. See Bill Johnson Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983) (finding that lawsuit filed cannot result in retaliatory action unless it is frivolous). However, NLRB decisions have clearly held that issues under Bill Johnson and the later BE&K Const. Co. v. NLRB, 536 U.S. 516 (2002) case that suggest the filing of a counterclaim or lawsuit that is not frivolous cannot be sanctioned as retaliatory, do not apply to illegal conduct under the NLRA which forms the basis for the legal action. As a result, if the NLRB finds that a particular practice such as an overly broad mandatory arbitration policy is illegal under the NLRA, then an action to compel enforcement of that policy is an exception to Bill Johnson as noted in footnote 5 of that case. See Bill Johnson, 461 U.S. at 738 n.5 (finding no protection for a law suit that is “Illegal under federal law). This was described recently by an ALJ decision applying D.R. Horton. See Neiman Marcus Group, ALJ Opinion, Feb. 6, 2014, 2014 WL 495797.

\(^{197}\) The NLRB has a policy of deferring disputes to be resolved through arbitration under its longstanding Collyer deferral policy. This policy would not affect the matters herein because in such actions the agency has decided to resolve the matter by deferring to arbitration instead of the employee being compelled to arbitrate to prevent the agency from pursuing the matter, the concern of retaliatory employment arbitration in this Article. Also, in 2012, the NLRB General Counsel changed the Board’s approach to Collyer by first asking whether the dispute could be resolved with a year and deciding not to defer to arbitration if the matter would not be resolved within that timeframe. See NLRB General Counsel Memorandum 12-01, Guideline Memorandum Concerning Collyer Deferral, Where Grievance Resolution Process is Subject to Serious Delay, available at http://www.crowell.com/files/GC_12_01_Guideline_Memorandum Concerning Collyer Deferral.doc[1].pdf (Jan. 20, 2013) (last visited Feb 14, 2014).
arbitration without raising a concern about retaliation.\textsuperscript{198}

\textit{EEOC v. Ralph’s Grocery Co.}\textsuperscript{199} is instructive with respect to developing the parameters of a retaliatory employment arbitration claim. In bringing such claims, employees and even the EEOC may benefit from pursuing the rationale employed by the EEOC in that case—and hence, employers would be wise to learn from it. Likewise, those seeking to bring such claims should frame their actions to be consistent with the concerns expressed in that case. Prior to that instant action in \textit{Ralph’s Grocery}, the employer had unsuccessfully sought in federal court to compel arbitration and enjoin a state human rights agency investigation of a discrimination charge filed by a former employee.\textsuperscript{200} The employer also sought the same result in a state court and sent the employee a letter indicating that she had to withdraw her state charge because of the arbitration agreement.\textsuperscript{201} She responded by filing a retaliation charge directly with the EEOC.\textsuperscript{202}

Before the state court ruled, however, the EEOC moved in \textit{Ralph’s Grocery} to enjoin the state court from granting the employer’s motion to compel and stay the investigation. The EEOC argued that a federal injunction was appropriate because the employer’s actions would “interfere with an individual’s right to file a charge” and “because such state court action is illegal retaliation that is contrary to public policy.”\textsuperscript{203} The court accepted the EEOC’s argument. It reasoned that the employer’s state court action and motion to compel, which would ultimately stay the state agency’s investigation (conducted in tandem with the EEOC), would create a “chilling effect on the many employees who have a statutory right to file a charge with the EEOC or its sister state agencies.”\textsuperscript{204}

Tellingly, the EEOC took the position in \textit{Ralph’s Grocery} that the employer’s state court injunction action and motion to compel arbitration was a form of retaliation against employees for exercising their right to file a charge.\textsuperscript{205} In accepting that contention, the court relied on \textit{Waffle House} to

\textsuperscript{198} See, e.g., Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 3-4 (1st Cir. 2005) (relying on \textit{EEOC v. Waffle House} to find that an employer has not waived its right to seek arbitration by waiting until after an EEOC charge has been dismissed and an employee has filed a court claim to be able to demand arbitration at that time).
\textsuperscript{199} 300 F. Supp. 2d 637 (N.D. Ill. 2004).
\textsuperscript{200} \textit{Id.} at 638.
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} Hudson, \textit{supra} note206.
\textsuperscript{204} \textit{Id.} at 640.
\textsuperscript{205} David L. Hudson, Jr., \textit{Don’t Stop Probes of Worker Complaints, EEOC Says, Two...
assert that the agreement to arbitrate could not prohibit the employee from filing a charge with the EEOC or the equivalent state agency. After the state court injunction proceedings were enjoined, the EEOC filed a subsequent federal court action to pursue the retaliation charge. However, the parties settled pursuant to a consent decree. As a result, the case gives no dispositive authority on the viability of these claims.

Nevertheless, the terms of the consent decree lend support to the retaliatory employment arbitration theory. It established an injunction against the employer and its employees for “retaliation against any person because such person has opposed any practice made unlawful under Title VII or the ADA, filed a charge . . . or coercing an employee who files a charge.” The employer agreed to “train employees on filing charges without retaliation and not use lawyers involved in creating its arbitration clause.” Finally, the employer could no longer “maintain an arbitration agreement that deters or interferes with employees’ right to file charges with the EEOC.”

The consent decree terms specified that the employer’s arbitration policy would have to provide specific language in “bold print as a separate paragraph in a font-size of at least twelve point the following language:

'Nothing in this Agreement infringes on an Employee’s ability to file a charge or claim of discrimination with the U.S. Equal Employment

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See EEOC v. Ralph’s Grocery, No. 07 C 5110 (N.D. Ill. May 5, 2008) (Consent Decree entered); see also EEOC v. Ralph’s Grocery, 2007 WL 5039322 (N.D. Ill. Nov. 9, 2007) (Defendant’s Memorandum in Support of Motion to Dismiss or Stay Proceedings) (noting that the underlying charge was eventually dismissed by the state agency and addressing the charge of retaliation that the EEOC filed under the ADA and Title VII for the employer’s actions in contacting the employee to compel arbitration after the employee filed the charge when the employer argued that its enforcement of its arbitration policy justified the retaliation claim).


Id.

Id.

Id.

Id.
Opportunity Commission or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such action.\textsuperscript{213}

As a result, the consent agreement terms highlights the importance of allowing the employee to participate in the EEOC’s process including court actions and suggests that employer efforts to compel arbitration to prevent the employee from participating would represent unlawful retaliation. The consent agreement terms from Ralph’s Grocery, as well as the way in which the court employed the analysis of White and Goldsmith, provides several takeaways for employers facing potential of retaliatory employment arbitration claims. First, employers should adopt clear language in agreements that informs employees it will not retaliate for pursuit of EEOC enforcement, as in Ralph’s Grocery. Second, once a dispute becomes known, the employer can offer arbitration as a voluntary recourse to the employee, rather than waiting for the employee to file an EEOC charge or waiting for an indication that the EEOC will be involved in the case. But, if the EEOC becomes involved, employers should refrain from moving to compel arbitration because it may lead to a retaliation charge—in addition to the underlying charge of discrimination. If employers act proactively, they can reduce their own liability potential while also respecting the rights of their employees and EEOC under federal law. However, when employers attempt to force employees to arbitrate as a means to circumvent an agency’s process, employees should be able to bring a successful claim of retaliatory employment arbitration.

Likewise, the NLRB’s Administrative Law Judge (“ALJ”) decision in The Neiman Marcus, Group, Inc.\textsuperscript{214} is instructive with respect to actions that an employee may take to get the NLRB to respond to an employer’s actions to compel arbitration. In Neiman Marcus, the ALJ, following D.R. Horton, found that an employer’s mandatory arbitration policy violated the NLRA.\textsuperscript{215} When the employee chose to file a class action lawsuit in state

\textsuperscript{213} Id. (original emphasis).

\textsuperscript{214} 2014 WL 495797 (Feb. 6, 2014) (decision by NLRB administrative law judge, Eleanor Laws, finding that an employer’s attempt to compel enforcement of its mandatory arbitration policy in state court action brought by employee was an unfair labor practice and the judge ordered, among other things, that the employer cease and desist from seeking to enforce its mandatory arbitration policy).

\textsuperscript{215} Id. (no page numbers available).
court against the employer, the employer responded by seeking to compel arbitration. Because the NLRB had clearly held in *D.R. Horton* that an arbitration policy banning an employee from pursuing collective arbitration and also failing to make it clear that employees could file charges with the NLRB violates the NLRA in coercing employees in the exercise of their Section 7 rights. The ALJ ordered as a remedy that the employer rescind its mandatory arbitration policy and cease and desist from attempting to enforce that policy by compelling arbitration in the state court proceeding. In another recent ALJ decision in January 2014, the ALJ, in adhering to *D.R. Horton*, found that an employer’s attempt to file a motion to compel arbitration in a state court proceeding violated the NLRA when based upon an arbitration agreement that was invalid for suggesting to employees that they could not file charges in *Leslie’s Poolmart, Inc.*

Although the *Ralph’s Grocery* and *Neiman Marcus* cases reflect actions involving two different agencies, the EEOC and the NLRB, the teaching from these cases is that mandatory arbitration policies that chill employees from exercising their rights under Title VII and the NLRA by discouraging the filing of charges represents an ongoing challenge that employees may pursue. Further, to the extent that an employer attempts to force an employee to arbitrate the dispute when the agency involved is still processing the claim, the employee may pursue actions by filing charges with those agencies to stop the employer from forcing arbitration.

**CONCLUSION**

This Article highlights an important and still-developing aspect of the Supreme Court’s *Waffle House* decision: the potential for retaliation by employers through compelling arbitration. The EEOC, as the agency charged with the enforcement of various statutory employment discrimination laws, must be allowed to pursue its statutory enforcement process regardless of whether the employee who filed the charge of discrimination had agreed to arbitrate her statutory discrimination claims. Although the EEOC rarely takes filed charges to litigation, the EEOC needs employees to file those charges to accomplish its enforcement objectives.

This Article proposes that once a charge is filed, any attempt to arbitrate

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216 *Id.*
217 *Id.* (citing D.R. Horton).
218 *Id.*
should be tabled until the agency proceedings can proceed as expected pursuant to the statutes that created those agencies. If the EEOC dismisses the charge, then the employer may seek to compel arbitration consistent with the Court’s FAA jurisprudence supporting the arbitration of statutory claims. But as the EEOC investigates and takes the case, employers who seek to compel arbitration should be deemed as retaliating against employees under the standard set by White as those actions dissuade employees from filing charges. In deterring the filing of charges, broader concerns materialize as legitimate charges that need to be brought to vindicate strong public interests will not be brought. Likewise, if the NLRB dismisses the matter or decides to defer to the arbitration process because it has determined that the arbitration policy involved does not violate the NLRA, then the employer may go forward with pursuing arbitration of the dispute.

Importantly, this Article’s proposed role for the EEOC—of investigating and pursuing claims for retaliatory employment arbitration—comports with the Agency’s goal as stated in Waffle House. The EEOC should not be limited in pursuing its statutory duties and must take every step to prevent employers from forcing arbitrations that will deter an employee from even filing a charge of discrimination with the EEOC. The EEOC can achieve this objective by pursuing retaliation claims—whether that pursuit ends in cease-and-desist orders or full-blown litigation.

Likewise, this Article’s proposed role for the NLRB—of continuing to expand upon the goals for managing the fair enforcement of mandatory arbitration policies within the boundaries of Section 7 activity and pursuing claims for retaliatory employment arbitration comports with the goals of NLRB decisions such as U-Haul Co. of California, Bill’s Electric, and Supply Technologies as they were highly publicized by D.R. Horton, should continue.

As discussed, the Ralph’s Grocery consent decree identifies certain parameters that employees and employers should consider before and after the filing of an EEOC charge when an agreement to arbitrate is involved. Employees may be able to circumvent the arbitration agreements if the employer fails to take safeguards to make sure that employers know that they can still pursue their EEOC charges despite agreements to arbitrate. Further, once the employee files a charge, any arbitration process should be delayed until a final EEOC action has occurred. Regardless, employers are still free to pursue enforcement of their mandatory arbitration agreements if the EEOC dismisses the charge.
Also, as discussed, the *Neiman Marcus* administrative law judge decision suggests certain parameters that employees and employers should consider before and after the filing of an NLRB charge when an agreement to arbitrate is involved. Employer failure to make sure the employees are not coerced in pursuing charges or other concerted activity under the arbitration policy could open the door to a valid NLRB charge by an employee preventing enforcement of the arbitration policy. Further, once a charge has been filed or when an employer seeks to compel arbitration of the dispute in some other jurisdiction without any final approval by the NLRB, an employee may be able to obtain an NLRB order stopping the employer from attempting to compel arbitration.

When employers use arbitration policies that make employees reasonably believe that they cannot bring charges with an agency or when employers respond to employee charges or other actions by seeking to compel or force arbitration, these employer efforts result in retaliatory employment arbitration actions. The chilling effect from retaliatory employment arbitration efforts that deters or dissuades reasonable employees from filing charges represents an important public and agency interest that must be protected despite the ongoing judicial support for enforcing arbitration agreements. As part of a comprehensive approach to responding to forced arbitration agreements at the fiftieth anniversary of Title VII, employees should pursue claims through the EEOC and NLRB agencies along with the courts to prevent employers from taking retaliatory employment arbitration actions while also continuing to seek narrowly-tailored legislative responses.
Forced Arbitration in the Workplace: A Symposium

University of California Berkeley School of Law
Berkeley, California
Thursday, February 27, 2014
Retaliatory Aspects of Compelling Employees to Arbitrate

Professor Michael Z. Green
Texas A&M Law School
Thursday, February 27, 2014,
3:45 – 5 p.m.
Viewing Employer Retaliation Under the Lens of Forced or Mandatory Arbitration:
My General Thesis – Employer Efforts to Pursue and Compel Mandatory Arbitration Can Represent a Form of Actionable Workplace Retaliation
The Federal Arbitration Act (FAA) approaching 90 as of 2014: Significant Judicial Amendment By Applying it to Statutory Employment Discrimination Claims Via Mandatory or Pre-Dispute Agreements to Arbitrate

“When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.

In recent years, however, the Court ‘has effectively rewritten the statute’ and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration.”

Employment Discrimination and Mandatory Arbitration: Supreme Court’s Overwhelming Approval Under the FAA

- **1991:** The landmark *Gilmer v. Interstate/Johnson Lane Corp.* case opened the door to the use of arbitration for statutory employment discrimination as a condition of employment -- mandatory arbitration under the FAA.

- **2001:** *Circuit City v. Adams* broadly expands FAA coverage to most employment disputes.

- **2002:** The landmark decision in *EEOC v. Waffle House* states that the EEOC may still pursue employment discrimination claims *despite the existence of individual mandatory arbitration agreements.*

- **2009:** *14 Penn Plaza v. Pyett.* Unions can agree to compelled arbitration on behalf of employees.

Employment Discrimination and Pre-dispute Arbitration: Supreme Court Approval Under the FAA Last Five Years

- **2009:** 14 Penn Plaza v. Pyett establishes that unions can create a clear and unmistakable waiver of an employee’s right to pursue a statutory discrimination claim in court and instead be forced to pursue arbitration.

- **2010:** Rent-A-Center v. Jackson establishes that even if there is a legitimate challenge to the validity of the agreement to arbitrate a statutory employment discrimination claim, the arbitrator, not the courts, should resolve the validity question.
Employment Discrimination and Pre-Dispute Arbitration in 2014? Is This Workplace Justice? Legislation/Legal Help?

- Should Congress regulate arbitration involving statutory discrimination claims and if so, what would that regulation look like?

- Absent such legislation which has languished for years, are there any legal maneuvers left to provide checks and balances on arbitration gone wild with discrimination claims and unbridled Supreme Court enforcement?
Employment Discrimination and Pre-Dispute Arbitration in 2014?
Is This Workplace Justice? Agency Help?

- The NLRB has attempted to help through its D.R. Horton decision finding it to be a chilling effect and coercive of employee section 7 rights to require arbitration but ban class arbitration.

- The EEOC has its July 1997 Policy Statement Criticizing Mandatory Arbitration but the EEOC has not responded to recent public efforts to either revoke or reaffirm that 1997 policy.

- With agency support, could employer efforts to compel arbitration after an employee files a charge with the EEOC or NLRB be a form of retaliation under the Roberts Court’s reading of retaliation?
What if Retaliation Cases Were the Only Ones That Employees Brought to the Roberts Supreme Court?

In the Words of Charlie Sheen?

- Burlington v. White. Broad right. 8+1
- Humphries v. CBOCS West. 1981. 7-2
- Gomez-Perez v. Potter. ADEA Fed. 6-3
- Crawford v. Nashville. 7+2
- Thompson v. North American Stainless. Scope of Plaintiff broad. 8-0
- No divisions except recent causation case loss for employees: Univ. of Texas Southwestern Medical Center v. Nassar. Retaliation is but-for causation. 5-4
Burlington Northern v. White (2006): Expands and Opens the Door to Retaliation Claims

• In evaluating retaliation claims, “context matters” as stated by Justice Breyer.

• The plaintiff must show that the employer’s retaliatory action was “materially adverse” and that it would have “dissuaded a reasonable person from making or supporting a charge of discrimination.”

• The focus is on the “materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position.”
**Burlington Northern v. White (2006):**
Expands and Opens the Door to Retaliation Claims

- Materially adverse analysis is not limited to materially adverse changes in terms and conditions of employment.
- Instead the question is whether the retaliatory action would be materially adverse to a reasonable employee.
- This standard does not focus on whether the employee actually received an adverse change in conditions of employment, i.e., termination, demotion, reassignment, etc.
Next Steps: Using Agency Action to Support Employee Efforts to Resist Arbitration as a Form of Retaliation

• National Labor Relations Board: Using employer efforts to compel individual arbitration and prevent class relief as a form of coercing employees in the exercise of their Section 7 rights to pursue concerted activities and more importantly 8(a)(4) retaliation. D.R. Horton.

• Equal Employment Opportunity Commission: Using employer efforts to compel individual arbitration and prevent court relief as a form of retaliation for filling EEOC charges that would deter reasonable employees from pursuing discrimination charges. Ralph’s Grocery.
NLRB and Section 7 Rights and Individual Arbitration as Retaliation – Horton Hears A Class!!!

• **D.R. Horton**, 357 N.L.R.B. No. 184 (1/6/2012), enforced in part and reversed in part (5th Cir. 12/3/2013).

• Individual Arbitration Agreement also provided a class action waiver stating only “individual” claims can be heard in arbitration.

• An arbitrator may not consolidate employees’ claims or otherwise award relief to a “group” or “class” of employees in a single arbitration proceeding.
Michael Cuda had alleged that D.R. Horton had misclassified him and other superintendents as exempt under the FLSA and sought overtime compensation and damages for him and the class through arbitration.

D.R. Horton responded to Cuda’s request for class arbitration by asserting that it was defective because the arbitration agreement prohibited arbitration of collective or class claims.
NLRB and Section 7 Rights and Individual Arbitration as Retaliation –

Horton Hears A Class!!!

• Cuda filed a ULP and GC issued a complaint alleging that D.R. Horton violated NLRA by coercing employees in the exercise of their Section 7 rights and retaliation.

• Section 7: Employees may “engage in. . .concerted activities for…mutual aid or protection.”

• ALJ found mandatory arbitration class waiver didn’t violate 8(a)(1) by coercing employees’ Section 7 rights.

• ALJ did find DR Horton’s mandatory arbitration policy “would lead employees reasonably to believe they could not file charges with the [NLRB]” in violation of Sections 8(a)(1) and (4) retaliation and citing prior NLRB cases.
NLRB and Section 7 Rights and Individual Arbitration as Retaliation – Horton Hears A Class!!

- NLRB reversed ALJ to find an 8(a)(1) violation for class arbitration waiver as “careful accommodation” of Section 7 rights and FAA’s pro-arbitration policy.
- Supreme Court’s FAA jurisprudence notes that parties cannot be required to forego the vindication of any substantive statutory rights.
- NLRB found Section 7 rights violation was substantive as the process of seeking a class is distinguished from the process of certifying a class which is procedural.
NLRB and Section 7 Rights and Individual Arbitration as Retaliation – Horton Hears A Class!!!

• NLRB also agreed with the ALJ that the arbitration policy included language that “reasonably would lead employees to believe that they were prohibited from filing charges with the Board” in violation of 8(a)(1) and did not need to rule on the similar 8(a)(4) violation as it would not affect the remedy.

• Specifically, Board found there was no evidence that the employer told employees “that they would still be able to bring complaints to the EEOC or similar agencies.”
NLRB and Section 7 Rights and Individual Arbitration as Retaliation – Horton Hears A Class!!

• 5th Circuit decision, 2013 WL 6231617, 12/3/2013 rejects the NLRB’s analysis with respect to the FAA and finds that the NLRB failed to accommodate the FAA’s broad policy requiring enforcement of arbitration agreements.

• 5th Circuit finds that arbitration agreement was procedural and not substantive and the NLRA does not have a provision requiring that it ignore the requirements of the FAA.
NLRB and Section 7 Rights and Individual Arbitration as Retaliation – Horton Hears A Class!!!

• Although 5th Circuit decision rejects the NLRB’s efforts to protect employees from forced arbitration with a class waiver, there is a powerful silver lining.

• The Court found the NLRB properly concluded that language in the arbitration agreement “would lead employees to reasonably believe that they were prohibited from filing unfair labor practice charges” and enforced the NLRB order requiring the employer take corrective action because the arbitration agreement violated Section 8(a)(1).
1997 EEOC Arbitration Policy

- The EEOC concluded that mandatory arbitration should not be enforced in its 1997 policy statement.
- 1997 statement reiterated the EEOC’s 1995 policy statement opposing the use of mandatory arbitration agreements as a condition of employment.
- The primary and only Supreme Court case involving enforcement of statutory discrimination claims in existence at the time of the 1997 EEOC policy statement was the 1991 Gilmer decision.
- The EEOC has never updated its view on mandatory arbitration since 1997.
EEOC Arbitration Policy After 1997: Inaction and Informality

• In 2004, the EEOC acknowledged it was evaluating its 1997 arbitration policy critical of mandatory arbitration which was still “technically in effect” but there was a “lot of confusion” about its application after a June 18, 2004, EEOC settlement of a 9th Circuit case, EEOC v. Luce, Forward.

• Even after landmark decisions including a 2001 decision in Circuit City v. Adams and the 2002 EEOC v. Waffle House decision which further explain the boundaries of mandatory arbitration of employment discrimination claims, the EEOC has not addressed the continuing vitality of its 1997 arbitration policy.
EEOC Arbitration Policy After 1997: Inaction and Informality

- Meanwhile the Court has continued to endorse broad mandatory arbitration of employment discrimination claims in the union setting, 14 Penn Plaza v. Pyett (2009), and the individual-employee setting, Rent-A-Center v. Jackson (2010).

- Circuit City, Waffle House, Pyett, and Jackson represent a decade of decisions during two different Presidential regimes without any EEOC effort to address these decisions in light of the 1997 policy.

- Despite Congressional activity, no successful bills have even been brought to the President to address enforcement of arbitration agreements to guide the resolution of employment discrimination claims.
EEOC Arbitration Policy After 1997: Inaction and Informality

• The Congressional inaction highlights political difficulties that may have played a critical role in the EEOC not taking any formal action as well.

• In 2011, the EEOC invited public comment as part of a preliminary plan to conduct a comprehensive review of its existing rules.

• The Chamber of Commerce urged repeal at that time of the EEOC’s 1997 mandatory arbitration policy.

• AARP and NELA responded by disagreeing with the Chamber of Commerce’s urged repeal of the arbitration policy.
EEOC Arbitration Policy After 1997: Inaction and Informality

• In July 2012 at an EEOC meeting to discuss its Strategic Plan, NELA continued to argue for reaffirming the 1997 arbitration policy.

• Instead, the EEOC identified five rules it would review and did not comment about any potential changes to the arbitration policy in response to the Chamber of Commerce’s request for revision and the NELA’s request to reaffirm that policy.

• This limits analysis of EEOC policy to reviewing its approach in lawsuits where the EEOC either raised or supported the position that mandatory arbitration agreements should not be enforced starting with its landmark 2002 decision in EEOC v. Waffle House.

- Can the EEOC seek both legal and equitable victim-specific relief against an employer in court for an individual under Title VII when there was a mandatory arbitration agreement?
- Yes. Even though individuals have signed agreements to arbitrate, the EEOC is seeking to vindicate the broader public interest through its enforcement action authority and may seek full relief in court as the EEOC did not agree to arbitrate.
- Court leaves consequences of prior adjudication in arbitration open by saying “ordinary principles of res judicata, [and] mootness” may still apply.
Ten Plus Years Later

• Consequences of the Waffle House decision?:
  – Mandatory arbitration agreements are not full-proof guarantees for employers to force employees out of court resolutions. But, chances that the EEOC will take the case for the employees are not high either.
  – A decade after Waffle House, the EEOC’s policy on mandatory arbitration enforcement is unclear and employers may be trying to compel arbitration to circumvent the EEOC’s actions via Waffle House.
  – This leaves a review of the EEOC’s informal positions and approaches in litigation activity as the only way to assess its real policy with respect to enforcement of mandatory arbitration agreements after Waffle House.
Hit and Miss Approaches of the EEOC to Addressing Mandatory Arbitration Via Litigation

• After Waffle House, Employers appear to have taken notice of the res judicata language (dicta?) in the case by responding to cases that involve EEOC action or potential action by seeking to prevent individual claimants from becoming involved in the EEOC action by compelling arbitration.

• Several cases since Waffle House have involved efforts to compel arbitration of individuals regardless of the EEOC’s involvement. See, e.g., EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C. (N.Y.); EEOC v. Woodmen of the World Life (Neb.); EEOC v. Ralph’s (Ill.); and EEOC v. Physician Services (Ky.).
Hit and Miss Approaches of the EEOC to Addressing Mandatory Arbitration Via Litigation

- EEOC has attacked a few employer actions to compel arbitration as retaliation. Bagby; Ralph’s
- Yet, all of these cases provide no clarity about the EEOC’s policy.
- Is the EEOC just concerned about proceeding independently under Waffle House or does it have broader concerns to challenge employer efforts to compel individuals to arbitrate after a charge is filed and pending or about to be filed?
- My thesis is that the EEOC policy should be broader and based upon the Supreme Court’s enthusiastic endorsement of retaliation claims when employers try to compel arbitration.
My Thesis: Intersecting *White* and *Waffle House* Leads to the Development of a Viable Claim of Retaliation When Employers Try to Compel Arbitration After An Employee Files A Charge

- **EEOC v. Bd of Governors**, 7th Circuit found retaliation in agreement to arbitrate that prohibits filing of EEOC charges.
- **EEOC v. Luce, Howard**, the EEOC alleged in a 9th Circuit case that it was retaliation when a law firm denied employment to the plaintiff who refused to sign an arbitration agreement. The court remanded it back to the district court allowing the EEOC to pursue its “novel theory” which had not been developed on appeal. But the EEOC settled that case on June 18, 2004.
- **Bagby Elevator**, the 11th Circuit court found it was retaliation to try to make an employee agree to arbitrate a claim as a condition of continued employment rather than pursuing the charge as filed with the EEOC.
My Thesis: Intersecting *White* and *Waffle House* Leads to the Development of a Viable Claim of Retaliation When Employers Try to Compel Arbitration After An Employee Files A Charge

- Now after *White*, one can ask would the act of attempting to compel arbitration deter a reasonable person from pursuing the right to file a discrimination charge?

- By trying to compel arbitration as a response to an EEOC charge filing, wouldn’t that deter a reasonable person from filing a discrimination charge under the belief that filing such a charge would be useless if the employer can just compel arbitration and remove the employee from the EEOC process?

- *Waffle House* talks about the importance of public interest vindication.

- That public interest would be harmed if employees are deterred from filing charges.

• At hire, she signed arbitration agreement.
• After being terminated Feb. 25, 2003, she filed a discrimination charge with the Illinois Department of Human Rights (IDHR) which was jointly filed with the EEOC.
• Ralph’s petitioned in federal court and then in state court to stay IDHR process and compel arbitration.
• EEOC moved to enjoin Ralph’s petition based primarily on Waffle House finding of the EEOC need to vindicate public interest and “chilling effect on other employees” if Ralph’s could prevent EEOC’s investigation. The motion was granted.

• Martinez filed two more charges in June 2003 and September 2003 alleging now that Ralph’s had retaliated against her by trying to compel her to arbitrate after filing her discrimination charge and by petitioning the IDHR to cease its process.

• In granting the injunction preventing Ralph’s efforts to compel arbitration and cease the IDHR investigation, the court focused on the chilling effect and the meaningless that filings would have for other employees who are covered by arbitration agreements.

• So can Ralph’s efforts to compel arbitration as an end-run to prevent the EEOC from pursuing the matter under Waffle House represent a valid claim of retaliation under Title VII.

• We don’t ultimately know because Ralph’s settled.

• But the terms of the consent decree are quite interesting:
• The EEOC alleged that Ralph’s retaliatory acts were:
  – “sending Martinez a threatening letter and filing suit against her in both federal and state court claiming that her filing of a charge…violated Defendant’s mandatory arbitration policy.”
  – “as to a class of employees…maintaining a mandatory arbitration policy that interfered with the right of employees to file charges of discrimination.”
• Ralph’s denied the allegations.
A Classic Example: EEOC v. Ralph’s
Consent Decree Entered May 22, 2008

• But the consent decree established an injunction against Ralph’s and its employees for “retaliation against any person because such person has opposed any practice made unlawful under Title VII or the ADA, filed a charge … or coercing an employee who files a charge.”
• Ralph’s had to pay Martinez $70,000.
• Ralph’s must train employees on filing charges without retaliation and not use lawyers involved in creating its arbitration clause.
• “Ralph’s…shall not maintain an arbitration agreement that deters or interferes with employees’ right to file charges with the EEOC….”
• Finally Ralph’s must modify its mandatory arbitration policy as follows:

• New required language in bold to be inserted into mandatory arbitration policy agreement: “Nothing in this Agreement infringes on an employee’s ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. *Employees retain the right to participate in such action.*” [italics added].
The Solution – Addressing Retaliatory Actions Through Employer Efforts to Compel Arbitration

• Agreements to arbitrate should have language banning retaliation as in Ralph’s as a matter of EEOC enforcement.
• Once a dispute becomes known, the employer should offer arbitration rather than waiting for an EEOC charge to be filed and certainly before any indications that the EEOC is going to pursue the case.
• If the EEOC is still in the picture, it is retaliation for the employer to pursue compelling individual arbitration.
• Likewise, it is a ULP to try to force arbitration rather than allowing the NLRB process to proceed.
CONCLUSION

• Pre-dispute or mandatory arbitration, as a substitute for court, should not deter or dissuade reasonable employees from filing charges of employment discrimination or else it will be unlawful retaliation.

• Now the EEOC can apply the merger of principles from White and Waffle House to suggest a clearer approach rather than an informal, ambiguous EEOC approach to enforcement of mandatory arbitration agreements.

• If arbitration is to maintain any value as a dispute resolution tool for statutory employment discrimination disputes, employers should not be allowed to pursue it in retaliation for filing a charge and as a shield to an EEOC-driven action allowed by Waffle House or NLRB resolution as identified by D.R. Horton.
For Additional Background


• Leslie A. Gordon, Clause for Alarm, As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach, 92 ABA J. 19 (Nov. 2006).

For Additional Background


• Charles A. Sullivan & Timothy P. Glynn, Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution, 64 Ala. L. Rev. 1013 (2013).
For Additional Background


For Additional Background


The End
Sarah Belton is the Cartwright-Baron Attorney at the Oakland, California office of Public Justice. She was an Equal Justice Works fellow and a staff attorney at Legal Services for Children in San Francisco, California, where she managed an active caseload representing minors in a variety of civil legal proceedings. Ms. Belton also served as a law clerk to the Honorable Algenon L. Marbley of the U.S. District Court of the Southern District of Ohio. She received her B.A. in International Relations from Stanford University and her J.D. from Harvard Law School, where she was the recipient of the James N. Smitzler Scholarship, Assistant Managing Editor of the Harvard Civil Rights-Civil Liberties Law Review, and a research assistant to Professor Lani Guinier.

F. Paul Bland, Jr., is a Senior Attorney for Public Justice and Of Counsel at Chavez & Gertler. He has argued or co-argued and won more than 25 reported decisions from federal and state courts across the nation, including cases in six of the federal Circuit Courts of Appeal and at least one victory in nine different state high courts. He has been counsel in cases which have obtained injunctive or cash relief of more than $1 billion for consumers, and was named the “Vern Countryman” Award winner in 2006 by the National Consumer Law Center, which “honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well-being of vulnerable consumers.” Mr. Bland is a co-author of a book entitled Consumer Arbitration Agreements: Enforceability and Other Issues, and numerous articles. In 2013, he received the Maryland Consumer Rights Coalition’s “Legal Champion” award. In 2010, he received the Maryland Legal Aid Bureau's “Champion of Justice” Award. In the late 1980s, he was Chief Nominations Counsel to the U.S. Senate Judiciary Committee. He graduated from Harvard Law School in 1986, and Georgetown University in 1983.

Stephen McG. Bundy has been a Professor of Law at the University of California, Berkeley School of Law (Boalt Hall) since 1984 and is an attorney at Taylor & Company Law Offices, LLP. Professor Bundy’s areas of academic expertise include civil procedure, complex litigation, and legal ethics. He graduated from Harvard University in 1973 and received his law degree in 1978 from the University of California, Berkeley School of Law (Boalt Hall). After graduation from law school, Professor Bundy clerked for the Honorable John J. Gibbons of the U.S. Court of Appeals for the Third Circuit and was associated with the New York law firm of Cravath Swaine & Moore, where he specialized in litigation.

Terisa E. Chaw is the Executive Director of the National Employment Lawyers Association (NELA), and the founding Executive Director of The Employee Rights Advocacy Institute For Law & Policy, NELA’s related charitable and educational public interest organization. Prior to joining NELA in 1991, Ms. Chaw worked as an attorney with a number of public interest law organizations including the Pension Rights Center, the NAACP Legal Defense and Educational Fund, Inc., and Equal Rights Advocates. In addition, she was a trial attorney for the Civil Rights Division of the U.S. Department of Justice, where she litigated cases under the Civil Rights of Institutionalized Persons Act. She has served on the board of directors of several non-profit organizations, including the Asian Law Caucus, Child Care Law Center, National Committee on Pay Equity, and the Organization of Pan Asian Women. She is a graduate of the University of California, Berkeley and the University of San Francisco School of Law.

Alexander J.S. Colvin is a Professor of Labor Relations and Conflict Resolution at the Cornell University School of Industrial and Labor Relations (ILR School). He is also the Associate Director of the Scheinman Institute on Conflict Resolution. His research and teaching focuses on employment dispute resolution, with a particular emphasis on procedures in nonunion workplaces and the impact of the legal environment on organizations. His current research projects include an empirical investigation of the outcomes of employment arbitration. He has published articles in journals such as Industrial & Labor Relations Review, Industrial Relations, British Journal of Industrial Relations, Academy of Management Journal, Personnel Psychology, Relations Industrielles, the Journal of Empirical Legal Studies, the Ohio State Journal on Dispute Resolution, and the Cornell Journal of Law & Public Policy. Professor Colvin is co-author of the textbook An Introduction to Collective Bargaining and Industrial Relations, 4th ed. (Irwin-McGraw-Hill). He received his J.D. in 1992 from the University of Toronto and his Ph.D. in 1999 from Cornell University. Before joining the faculty of the ILR School in 2008, he taught at Penn State University from 1999 to 2008.
Christopher R. Drahozal is the John M. Rounds Professor of Law and Associate Dean for Research and Faculty Development at the University of Kansas School of Law. He is an Associate Reporter for the Restatement (Third) of the U.S. Law on International Commercial Arbitration, and was the Chair of the Arbitration Task Force of the Searle Civil Justice Institute. He is serving as a Special Advisor to the Consumer Financial Protection Bureau, assisting with its statutorily-mandated study of arbitration clauses in consumer financial services contracts. Professor Drahozal has written extensively on the law and economics of arbitration. He has authored a casebook on commercial arbitration published by Lexis Publishing (now in its third edition) and a co-edited a book on empirical research on international commercial arbitration published by Kluwer Law International. His articles have appeared in Journal of Legal Studies, Journal of Empirical Legal Studies, Law and Contemporary Problems, Vanderbilt Law Review, Illinois Law Review, and International Review of Law and Economics, among others. He has made presentations on arbitration law and practice throughout the United States, Canada, Europe, and Asia. Prior to teaching, Professor Drahozal was in private law practice in Washington, D.C., and served as a law clerk for the Iran-U.S. Claims Tribunal, the United States Supreme Court, and the United States Court of Appeals for the Fifth Circuit.

Catherine Fisk is the Chancellor’s Professor of Law at the University of California, Irvine School of Law. Professor Fisk teaches and writes on the law of the workplace, legal history, civil rights and the legal profession and is the author of dozens of articles and four books, including the prize-winning Working Knowledge: Employee Innovation and the Rise of the Corporate Intellectual Property, 1800-1930, and Labor Law in the Contemporary Workplace. She is on the Service Employees International Union Ethics Review Board, the Board of Directors of the Wage Justice Center, and committees of the Law & Society Association. Prior to joining the founding faculty of the University of California, Irvine School of Law, Professor Fisk was a chaired professor at Duke Law School, and was on the faculty of the University of Southern California Gould School of Law and Loyola Law School in Los Angeles. She practiced law at a boutique Washington, D.C. firm and at the U.S. Department of Justice. She received her J.D. at the University of California, Berkeley School of Law (Boalt Hall), and an A.B., summa cum laude, from Princeton University.

Joseph D. Garrison, managing shareholder of Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, P.C., New Haven, Connecticut, focuses his practice on employee rights. He graduated from Wesleyan University in 1965 and Cornell Law School in 1968. He served as President of the National Employment Lawyers Association (NELA) and as a member of the Executive Board for 15 years. He was appointed to the American Arbitration Association Board of Directors in 2009. He was a founding Governor, Charter Fellow and President of the College of Labor and Employment Lawyers. Mr. Garrison has been a speaker at numerous national employment law seminars sponsored by the American Bar Association, BNA Books and NELA. He presently serves on the Council for the Labor and Employment Section of the American Bar Association, and is its liaison for the Equal Employment Opportunity Committee. In Connecticut, he served as President of the Connecticut Bar Association Labor and Employment Law Section, as Chairman of the Federal Court Grievance Committee, as the founding Chairman of the Connecticut Employment Lawyers Association, and on the Board of Governors of the Connecticut Trial Lawyers Association. He recently became a member of the American Board of Trial Advocates and The American College of Trial Lawyers. Mr. Garrison is increasingly active as a mediator and arbitrator, particularly in employment cases, and is list as a mediator and arbitrator on the AAA’s employment panels.

Michael Z. Green, professor of law, has been a member of the faculty of Texas A&M Law School since 2003 and a full professor with tenure since 2005. He became the inaugural Associate Dean for Faculty Research & Development in June 2008 and held that position through May 2012. A cum laude graduate of Loyola Chicago Law School where he also obtained a Master’s in Industrial and Labor Relations, Professor Green specializes in labor and employment law, discrimination, and dispute resolution matters. He worked as manager for a Fortune 500 company before law school and for a union law firm during law school. After law school, Professor Green represented employers for several years including being chief negotiator for a collective bargaining agreement. He entered academia as a Hastie Teaching Fellow at the University of Wisconsin Law School where he received his LL.M. in 1999. An experienced mediator and arbitrator, he serves on the Dallas Area Rapid Transit Trial Board, the American Arbitration Association’s National Labor Panel, and the Federal Mediation & Conciliation Services Roster of Labor Arbitrators. He was elected to the American Law Institute (ALI) in 2006 and serves on the ALI Consultative Group for the Restatement Third of Employment Law. He has authored numerous law journal articles and other publications that focus on labor and employment law.

Mark Gough is a Ph.D. candidate at Cornell University School of Industrial and Labor Relations. Mr. Gough’s areas of expertise include alternative dispute resolution, employment law, conflict management, and negotiations. His dissertation research explores the case selection practices of plaintiffs’ attorneys and how the institutional environment of claims, including employer personnel policies and mandatory arbitration clauses, affect access to justice for employment discrimination claimants. Mr. Gough’s research is supervised by Professor and Dean of Cornell Law School Stewart Schwab; Professor and Dean of Cornell School of Industrial and Labor Relations Harry Katz; and Professor Alexander Colvin of the Cornell School of Industrial and Labor Relations.
Gillian Lester is the Acting Dean and Alexander F. and May T. Morrison Professor of Law at the University of California, Berkeley School of Law (Boalt Hall). Dean Lester’s principal subject areas include employment law and policy, and contracts. Her research has explored topics including distributive justice and the welfare state, workplace intellectual property, and paid family leave. She holds a J.S.D. from Stanford Law School and LL.B. from the University of Toronto Faculty of Law, where she served as Editor-in-Chief of the University of Toronto Faculty of Law Review. Dean Lester began her teaching career in 1994 at the University of California, Los Angeles School of Law. She joined the Berkeley Law faculty in 2006. She has also held appointments as Sidney Austin Visiting Professor at Harvard Law School (2008-09) and Sloan Fellow and Visiting Professor at Georgetown University Law Center (2000). Her books include, Employment Law Cases And Materials, 5th Ed. (Lexis-Nexis, 2012), Family Security Insurance: A New Foundation for Economic Security (Workplace Flexibility, 2010, and Berkeley Center for Health, Economic and Family Security, 2010), and Jumping The Queue: An Inquiry Into The Legal Treatment Of Students With Disabilities (Harvard Press, 1997).

David Lipsky is the Anne Evans Estabrook Professor of Dispute Resolution in the Cornell University School of Industrial and Labor Relations (ILR School) and Director of the Scheinman Institute on Conflict Resolution. He served as the national president of the Labor and Employment Relations Association in 2006. Professor Lipsky served as Dean of the ILR School from 1988 until 1997 and has been a member of the ILR School faculty since 1969. He received his B.S. in 1961 from the ILR School and his Ph.D. in Economics from Massachusetts Institute of Technology in 1967. He was a member of the inaugural class of Fellows of the National Academy of Human Resources and has served on the its Board of Directors. Professor Lipsky is the author of over seventy articles and chapters in books, and the author or editor of fifteen books and monographs. He is the co-author of Emerging Systems for Managing Workplace Conflict (Jossey-Bass, 2003) and Negotiations and Change: From the Workplace to Society (Cornell University Press, 2003).

The Honorable P. David Lopez was sworn in on April 8, 2010 as General Counsel of the U.S. Equal Employment Opportunity Commission (EEOC). He was nominated by President Barack Obama and was confirmed by the Senate on December 22, 2010. Mr. Lopez is the first field trial attorney to be appointed as General Counsel. He has served in the Commission on various capacities for the past 17 years, including as Supervisory Trial Attorney and Special Assistant to then-Chairman Gilbert F. Casellas. As General Counsel, Mr. Lopez oversees the Commission's federal court litigation of the 15 EEOC district offices. During his tenure, Mr. Lopez has devoted significant time to develop a formidable systemic program nationwide as well as build a strong trial program. Mr. Lopez has extensive experience in this area, having developed large, high-impact cases and successfully trying several cases on behalf of the EEOC. He has won significant jury verdicts against Alamo Rent-a-Car (the first post-9/11 backlash religious accommodation case brought by the EEOC), Go Daddy (a national origin (Moroccan), religion (Muslim), and retaliation case), and AutoZone (an egregious sexual harassment case). In addition, Mr. Lopez is the Co-Chair of the committee charged with developing the Commission's Strategic Enforcement Plan. He is also the Chair of the Commission's Immigrant Worker Team, a team tasked with identifying ways to strengthen EEOC's enforcement and outreach on the cross-cutting issues affecting workers of foreign national origin or perceived to be of foreign national origin. Under his leadership, the Commission has been at the forefront of combating discrimination affecting immigrants and underserved communities, including victims of human trafficking. Mr. Lopez graduated from Harvard Law School in 1988 and graduated magna cum laude from Arizona State University in 1985, with a B.S. in Political Science. In 2011, Hispanic Business named Mr. Lopez to its list of 100 influentials in the Hispanic community.

Cliff Palefsky is a civil rights and employment lawyer. He is a partner in the San Francisco law firm of McGuinn, Hillsman and Palefsky. Mr. Palefsky was a co-founder of the National Employment Lawyers Association and is the Co-Chair of its Forced Arbitration Task Force and ADR Practice Group. Mr. Palefsky has been involved in many of the leading forced arbitration cases as either counsel or amicus, including Gentry v. Circuit City, Duffield v. Robertson Stephens, Armendariz v. Foundation Health Psychicare, Little v. Auto Stiegler, Circuit City v. Adams, and EEOC v. Luce Forward, in addition to many other cases across the country. He has also been deeply involved in both state and federal legislative efforts dealing with forced arbitration. Mr. Palefsky has written and spoken extensively on the subject of forced arbitration. He received his J.D. from the Georgetown University Law Center in 1977.

Lindbergh Porter is a shareholder in the law firm of Littler Mendelson. He represents employers in employment litigation and traditional labor proceedings. He practices throughout the U.S. in state and federal courts and before regulatory agencies, including the National Labor Relations Board and the Department of Labor. He has handled many dozens of arbitrations in union-management and non-union settings. In appellate practice, he has briefed or argued more than a dozen state and federal appellate cases, including several that set legal precedent. Mr. Porter serves as a neutral evaluator for the United States District Court and has served as a lawyer representative to the United States Court of Appeals. He is a Fellow in the College of Labor and Employment Lawyers and the Litigation Counsel of American Trial Lawyer Honorary Society. He received his J.D. at the University of San Francisco School of Law and his A.B. at the University of Illinois.

Robert B. Reich is the Chancellor's Professor of Public Policy at the University of California, Berkeley's Goldman School of Public Policy. Professor Reich has served in three presidential administrations, most recently under President Bill Clinton as Secretary of Labor. He was also a member of President Barack Obama's Transition Economic Advisory Board and is a co-founding editor of The American Prospect magazine. He received his B.A. from Dartmouth College, his M.A. from Oxford University where he was a Rhodes Scholar, and his J.D. from Yale Law School. Professor Reich's most recent work includes the documentary Inequality For All (2013), an exposé on America's widening income gap. His commentaries can be heard weekly on National Public Radio's Marketplace. In 2003, Professor Reich was awarded the prestigious Vaclav Havel Vision Foundation...
Michael Rubin is a partner in the San Francisco law firm of Altshuler Berzon LLP, where he specializes in labor and employment law, class actions, and appellate litigation. A graduate of Brandeis University and the Georgetown University Law Center, Mr. Rubin served as a law clerk to Justice William J. Brennan, Jr. of the U.S. Supreme Court during the 1980 Supreme Court Term, and previously clerked for Chief Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit and Judge Charles B. Renfrew of the U.S. District Court for the Northern District of California. He is a fellow of The College of Labor and Employment Lawyers and is a member of the Board of Directors of the AFL-CIO’s Lawyers’ Coordinating Committee. Mr. Rubin has won an four “California Lawyer of the Year” (CLAY) awards from California Lawyer Magazine, winning twice in the Employment Law Category and once each for False Claims Act Litigation and Criminal Law. He was also a 2003 recipient of a “Trial Lawyer of the Year” Award from the Trial Lawyers for Public Justice was American Lawyer Magazine’s “Litigator of the Week” in May 2013. Mr. Rubin has argued cases challenging the enforceability of mandatory arbitration clauses in the U.S. Supreme Court (Circuit City v. Adams, 532 U.S. 105 (2001)), the California Supreme Court (Gentry v. Superior Court, 42 Cal. 4th 443 (Cal. 2007), and Pearson Dental Supplies, Inc. v. Superior Court, 48 Cal. 4th 665 (Cal. 2010)), and the Ninth Circuit (Duffield v. Robertson Stephens, 144 F.3d 1182 (9th Cir. 1998)), among other courts. He also represents anic Service Employees International Union and Change to Win in D.R. Horton, Inc. (NLRB 2012), enforcement denied, 5th Cir. No. 12-60031 (5th Cir. 2013), and 24 Hour Fitness USA, Inc. (NLRB ALJ 2012), cross-exceptions pending, NLRB Case 20-CA-035419.

Jean R. Sternlight is the Michael and Sonja Saltman Professor of Law and the Director of the Saltman Center for Conflict Resolution at the University of Nevada - Las Vegas Boyd School of Law. She teaches courses on dispute resolution, including both litigation and alternatives thereto. Frequently cited by courts and the media, Professor Sternlight is co-author of Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision (ABA 2012), Dispute Resolution: Beyond the Adversarial Model, 2d ed. (Aspen 2011), Mediation Theory and Practice, 2d ed. (Lexis 2006), and Arbitration Law in America: A Critical Assessment (Cambridge Univ. Press 2006). She has published articles in numerous well-respected journals including Stanford Law Review, University of Pennsylvania Law Review, Journal of Law & Contemporary Problems, William & Mary Law Review, and the Ohio State Journal of Dispute Resolution. Professor Sternlight received her B.A. (High Honors) from Swarthmore College, and her J.D. (cum laude) from Harvard Law School. She then worked as a law clerk for the Honorable Marilyn Hall Patel (N.D. Cal.). After practicing law in Philadelphia at a plaintiff-side employment firm for eight years, she taught at Florida State University College of Law and the University of Missouri-Columbia before moving to the University of Nevada - Las Vegas in 2003.

Imre Szalai is a professor at Loyola University New Orleans College of Law. He graduated from Yale University, and he received his law degree from Columbia Law School, where he was named a Harlan Fiske Stone Scholar. Professor Szalai focuses his scholarship on arbitration law, and he has written several articles appearing in top ADR journals. He recently wrote a book setting forth a comprehensive legal history regarding the enactment of the Federal Arbitration Act, Outsourcing Justice: The Rise of Modern Arbitration Laws in America (Carolina Academic Press, 2013). His book, which is based on previously-unresearched archival materials from the drafters of the Federal Arbitration Act, explores why America’s arbitration laws radically changed during the 1920s. By examining this history, his book demonstrates how the Supreme Court has grossly misconstrued the Federal Arbitration Act and unjustifiably created an expansive, informal, private system of justice touching almost every aspect of American society. He also maintains a blog about arbitration law developments at www.outsourcingjustice.com.

Barry Winograd has maintained a full-time dispute resolution practice since 1988 as an arbitrator and mediator of labor and employment cases, as well as business and other civil disputes. He is a member and former Vice President of the National Academy of Arbitrators. Mr. Winograd has written articles on arbitration and mediation in legal journals; has taught labor law, arbitration, and mediation courses at the University of California, Berkeley, School of Law and at the University of Michigan Law School; and, is listed on dispute resolution rosters of neutral provider organizations and federal and state courts. He also serves as a permanent arbitrator on various labor-management contract arbitration panels in the private and public sectors. Before service as an arbitrator and mediator, Mr. Winograd was as an administrative law judge for the California Public Employment Relations Board and an attorney for the United Farm Workers of America. Mr. Winograd received his B.A. at the University of California, Santa Barbara, and his J.D. and LL.M. from the University of California, Berkeley, School of Law.

The Honorable Jenny R. Yang was unanimously confirmed as Commissioner of the U.S. Equal Employment Opportunity Commission by the Senate on April 25, 2013 to serve a term expiring July 1, 2017. She was a partner of Cohen, Milstein, Sellers & Toll PLLC. She joined the firm in 2003, and has represented thousands of employees across the country in numerous complex civil rights and employment actions. As chair of the firm's hiring and diversity committee, Commissioner Yang has experience with the myriad issues employers confront in making hiring and other personnel decisions. Prior to that, she served as a Senior Trial Attorney with the U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, where she enforced federal laws prohibiting discrimination in employment by state and local government employers from 1998 to 2003. Before that, she worked at the National Employment Law Project to enforce the workplace rights of garment workers. Commissioner Yang clerked for the Honorable Edmund Ludwig on the United States District Court for the Eastern District of Pennsylvania. She received her B.A. from Cornell University in Government and her J.D. from New York University School of Law, where she was a Note and Comment Editor of the Law Review and a Root-Tilden Public Interest Scholar.