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Martin H. Malin

IIT Chicago-Kent College of Law, mmalin@kentlaw.iit.edu

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The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition[†]

MARTIN H. MALIN^{*}

INTRODUCTION

The proposed Arbitration Fairness Act (AFA) would prohibit provisions in employment, consumer, and franchise agreements that obligate a party to arbitrate claims that arise out of those relationships.¹ Following the election of President Obama and substantial Democratic majorities in both houses of Congress, it appeared that the bill had a reasonable chance of passage.² Although changes in the political winds now make passage unlikely, Congress has enacted mini-AFAs on a piecemeal basis. For example, the 2010 Department of Defense Appropriations Act bans pre-dispute agreements to arbitrate sexual harassment claims under Title VII of the Civil Rights Act of 1964 or in tort. The act applies to employment contracts of defense contractors whose business with the Department of Defense (DOD) exceeds \$1 million.³ More recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act prohibits pre-dispute agreements to arbitrate claims under the statute's commodities and securities whistleblower provisions.⁴

The debate over pre-dispute arbitration agreements has been polarized with proponents opposing any legislative regulations and opponents seeking a complete prohibition.⁵ Although the AFA would ban such agreements in consumer and

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^{*} Professor and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology. The author is also an arbitrator and serves *inter alia* on the Employment Arbitration Roster of the American Arbitration Association (AAA) and also serves as co-chair of the National Academy of Arbitrators (NAA) Committee on Issues in Employment Dispute Resolution. The views expressed in this article are those of the author and not necessarily those of the AAA or NAA. The author gratefully acknowledges helpful comments on a prior draft from Sharon Henderson Ellis, Theodore St. Antoine, and Barry Winograd; excellent research assistance from Jacqueline Zablocki, Chicago-Kent Class of 2011; and financial support from the Marshall-Ewell Research Fund at Chicago-Kent.

1. See Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

2. See Sharon Henderson Ellis, *Improving Due Process in Employment Arbitration*, in ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE: PROCEEDINGS OF THE SIXTY-SECOND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 41, 48 (Paul D. Staudohar ed., 2010); Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 856-58 (2010).

3. Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454 (2009).

4. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 748(n)(2), 124 Stat. 1376, 1739 (2010) (to be codified at 7 U.S.C. § 26(n)(2)); *id.* §§ 922(b), (c), 124 Stat. at 1841 (to be codified at 18 U.S.C. §§ 1514A(e)(1), (2)).

5. Compare, e.g., Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008), with David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009).

franchise transactions as well as in employment, my focus is exclusively on employment. Proponents of employer-imposed arbitration systems hail such measures as providing relatively inexpensive vehicles for addressing employee claims that are more accessible than the courts and in which employees fare at least as well as they do in court.⁶ Opponents approach such claims with deep skepticism. They observe that these plans are imposed unilaterally by employers and are uniformly opposed by plaintiffs' lawyers. They reason that this polarized approach to employer-imposed pre-dispute arbitration mandates must reflect a tilting of the playing field to the advantage of the employer doing the imposing.⁷

In this Article, I take the middle ground in the legislative debate. I advocate that legislative reform is needed to curb employer abuses and to ensure fairness in employer-imposed pre-dispute arbitration mandates. In Part I, I review the current state of our knowledge about the experience in employment litigation and employment arbitration. The picture that emerges is not very clear, although I ultimately conclude that while increased clarity would be helpful, it is not necessary in resolving the debate over legislative reform. In Part II, I consider employer motives for imposing pre-dispute arbitration mandates on employees. I find a mixed bag of abusive and legitimate motives. In Part III, I demonstrate how courts have abdicated their responsibility to police employer-imposed pre-dispute arbitration mandates and have undermined efforts by arbitrators and arbitration service providers to self-regulate. In Part IV, I propose legislative reforms to curb employer abuses and argue that such reforms are superior to the AFA's absolute prohibition on employer-imposed pre-dispute arbitration mandates.

I. EMPLOYMENT LITIGATION AND EMPLOYMENT ARBITRATION: WHAT DO WE REALLY KNOW?

Empirical studies are the current rage in the legal academy. It is therefore not surprising that we can find many empirical analyses of litigation and arbitration. In this Part, I survey some of the most revealing analyses, integrating their results with generally understood characteristics of litigation and arbitration.

6. See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RES. 559 (2001); Peter B. Rutledge, *Whither Arbitration?*, 6 GEORGETOWN J. L. & PUB. POL'Y, 549 (2008); Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. LAB. & EMPL. L. 411 (2010) [hereinafter St. Antoine, *ADR*]; Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM. 783 (2008) [hereinafter St. Antoine, *Mandatory Arbitration*].

7. See, e.g., Schwartz, *supra* note 5, at 1259–60 (“[A]ll indications are that arbitration agreements are enforced almost uniformly by defendants and rarely, if ever, by consumers or employees. . . . Unless we assume that the parties are acting on bad information, and ultimately contrary to their interests, it gives rise to an inference that arbitration favors defendants.” (footnote omitted)).

A. Employment Litigation

AFA proponents decry the enforcement of employer-imposed pre-dispute arbitration mandates for allowing “corporate defendants [to] opt out of the court system by the simple expedient of writing arbitration agreements into their standard form contracts.”⁸ Yet when one considers the employer advantage in employment litigation in federal court, one is left wondering why an employer would ever want to leave the federal court system. A study by Kevin Clermont and Stewart Schwab published in 2009 comparing data from the Administrative Office of the United States Courts to similar data they had studied five years earlier paints a graphic picture of a federal court playing field that is anything but level for plaintiffs in employment cases. They summarized their findings:

Today employment discrimination plaintiffs still must swim against a strong tide—in the federal district court and on appeal. Findings for these cases compared to other civil cases include fewer early terminations and more trials; lower success rates for plaintiffs by settlement and lower plaintiff win rates at pretrial adjudication and trial, especially judge trial; and more appeals. Maybe the situation has not gone from bad to worse in the last five years. But those plaintiffs may have gone from merely faring badly to feeling bad about their chances for success, which would affect their litigation behavior.⁹

Professors Clermont and Schwab found that from 1998 to 2006, plaintiffs won 10.88% of Title VII cases, 9.12% of Americans with Disabilities Act (ADA) cases, 11.24% of § 1983 cases, 11.67% of Age Discrimination in Employment Act (ADEA) cases, 10.96% of § 1981 cases, and 19.55% of Family and Medical Leave Act (FMLA) cases.¹⁰ From 1979 to 2006, plaintiffs won 15% of employment cases in federal district courts, whereas plaintiffs in other types of cases won 51% of the time.¹¹ In cases resolved by pre-trial motions, plaintiffs in employment cases won only 3.59% of the time, compared to a plaintiff win rate in other cases of 21.05%.¹² The employment plaintiff win rate at trial was 28.47%, compared to a win rate of 44.94% for plaintiffs in other types of cases.¹³ The difference in plaintiff win rates was particularly dramatic in bench trials, where the employment plaintiff win rate was only 19.62% versus plaintiffs in other cases who won 45.53% of the time.¹⁴

When plaintiffs did win in the trial court, their victories were often fleeting. When defendants appealed plaintiff victories at trial, they secured reversals 41.10% of the time.¹⁵ In contrast, where defendants won at trial, plaintiffs secured reversals

8. Schwartz, *supra* note 5, at 1254.

9. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 131 (2009).

10. *Id.* at 116–17.

11. *Id.* at 127.

12. *Id.* at 128.

13. *Id.* at 129.

14. *Id.* at 130.

15. *Id.* at 110.

on appeal only 8.72% of the time.¹⁶ Professors Clermont and Schwab suggested that the dramatic success rate that defendants enjoyed in the courts of appeals may have made them more reluctant to settle cases. “Defendants may be marginally less willing to settle, early or at all, when they know they can get a favorable second chance in the courts of appeal should they lose at trial.”¹⁷ Regardless of the reasons, employment cases in federal court were significantly less likely to settle than other types of cases, with 37% of employment cases ending early in the litigation as opposed to 59% of other cases.¹⁸

Litigation is a particularly inhospitable forum for claims of moderate value. A 1995 survey of plaintiffs’ employment lawyers revealed that an employee required a minimum of \$60,000 in damages, not including consequential or punitive damages, for the case to be worthwhile to a lawyer to litigate.¹⁹ A fall 2010 update suggests that accounting for inflation, the current minimum amount would be \$84,000, which contrasts with the average \$14,000 economic loss for employees who lose their jobs.²⁰ The inhospitable nature of litigation toward claims of modest value has not been lost on the courts. For example, in *Gentry v. Superior Court*,²¹ the California Supreme Court held that a class action waiver contained in an arbitration agreement was invalid under state law because it effectively exculpated the employer from liability under state wage and hour laws because wage and hour awards tended to be modest, particularly in light of the practical difficulties and length of time involved in adjudicating them.²² However, unlike systematic wage and hour claims, most claims of modest value are not likely to lend themselves to class action treatment.

B. Arbitration

A number of studies have compared how employees fare in arbitration versus litigation. They have examined employee win rates and amounts recovered. Almost all of the early studies focused on outcomes in employment arbitrations

16. *Id.*

17. *Id.* at 124.

18. *Id.* at 122. Some state courts might provide a more hospitable forum for certain types of wrongful discharge claims. See David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 535–49 (2003) (finding much higher plaintiff win rates in jury verdicts in California state courts, particularly in sexual harassment cases, but also finding that state court win rates were significantly lower for racial discrimination cases brought by African Americans and for discrimination claims brought by black women).

19. William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.–Dec. 1995, at 40, 44–45.

20. Brief for National Workrights Institute as Amicus Curiae Supporting Respondents at 12–13, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-839).

21. 165 P.3d 556 (Cal. 2007).

22. See *id.* at 563–64. *Gentry*’s holding is likely no longer valid in light of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

administered by the American Arbitration Association (AAA).²³ These studies engendered debates over their methodologies²⁴ as is often the case with empirical studies. Regardless of the merits of their methodology, however, a key drawback of these studies is that they all relied on data from arbitrations decided prior to the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*.²⁵ Prior to that decision, the lower courts were divided over whether section 1 of the Federal Arbitration Act (FAA), which excludes "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce,"²⁶ excluded most employment contracts from FAA coverage. In *Circuit City*, the Court interpreted the exclusion narrowly to apply only to employees in interstate transportation.²⁷ The uncertainty in this area of the law inhibited many employers from imposing pre-dispute arbitration mandates on their employees. The Court's decision in *Circuit City* undoubtedly led to a significant increase in the use of pre-dispute arbitration mandates.

More recent empirical analysis comes primarily from Alexander Colvin.²⁸ Professor Colvin has analyzed data filed by AAA as required by the California Code of Civil Procedure that reflects all arbitrations under employer-imposed arbitration plans administered by AAA nationwide. He initially reported his findings at a national conference sponsored by the National Academy of Arbitrators, "Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution," ("NAA Due Process Conference") held in April 2007.²⁹ He updated his research in a paper published in 2011.³⁰ His results appear to confirm

23. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777 (2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998). The major exception was Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 A.B.A. CONFLICT MGMT. 1 (2003), which used data from the New York Stock Exchange and National Association of Securities Dealers.

24. See, e.g., Schwartz, *supra* note 5, at 1287–1307 (critiquing the earlier studies, particularly Eisenberg & Hill); W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 848–58 (2008) (detailing methodological shortcomings of empirical studies on employment arbitration).

25. 532 U.S. 105 (2001).

26. 9 U.S.C. § 1 (2006).

27. *Circuit City*, 532 U.S. at 115–19.

28. See, e.g., Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) [hereinafter Colvin, *Case Outcomes*]; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405 (2007) [hereinafter Colvin, *Empirical Research*].

29. Colvin, *Empirical Research*, *supra* note 28.

30. Colvin, *Case Outcomes*, *supra* note 28.

some of the presumed favorable characteristics of employment arbitration while raising intriguing questions about others.

One of the most often repeated presumed advantages of arbitration is its relative speed compared to litigation. The early studies of employment arbitration seemed to support this belief.³¹ Professor Colvin's work confirmed the speed advantage of arbitration. He found that the mean time to resolve a case that proceeded to hearing and award was approximately one year;³² in contrast, litigation takes at least twice as long.³³ Moreover, simply comparing time from filing of the claim to a decision by the adjudicator may understate the speed advantage of arbitration, particularly in cases in which the employee prevails. Given that employers who lose in federal district courts win on appeal almost half the time, one can reasonably expect that a victorious plaintiff will be met with a notice of appeal. In contrast, the grounds for judicial review of arbitration awards are extremely narrow.³⁴

A second characteristic urged by arbitration proponents is its greater accessibility relative to litigation, especially for lower income claimants and lower value claims. Professor Colvin's work provides support for this claim. In his 2011 paper, which analyzed all AAA administered cases under employer-imposed plans from January 1, 2003 through December 31, 2007, Professor Colvin found that 82.4% of the claimants for whom such information was available had salaries under \$100,000.³⁵ The median amount claimed was \$106,151,³⁶ and 25% of the claims were for \$36,000 or less,³⁷ with 10% for \$10,000 or less.³⁸ This compares very favorably to estimates that an employment claim must involve economic damages alone, that is, not including consequential or punitive damages, of at least \$60,000–\$84,000 to be worth litigating.³⁹ AAA rules go a long way to ensuring accessibility by providing that, except for a modest filing fee paid by the employee, all costs including AAA fees and arbitrator fees must be paid by the employer.⁴⁰ Thus, it is not surprising that Professor Colvin found that employers paid 100% of arbitration fees 97% of the time.⁴¹

Earlier studies found employee success rates in arbitration that were comparable to or better than employee success rates in litigation. Professor Colvin's analysis of AAA data shows considerably lower employee success rates. In particular, he

31. See Eisenberg & Hill, *supra* note 23, at 51; Hill, *supra* note 23, at 822; Maltby, *supra* note 23, at 55.

32. Colvin, *Case Outcomes*, *supra* note 28, at 8 (361.5 days); Colvin, *Empirical Research*, *supra* note 28, at 426 (332 days).

33. See Colvin, *Empirical Research*, *supra* note 28, at 426; Eisenberg & Hill, *supra* note 23, at 51 tbl.3.

34. See *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (discussing some courts' willingness to review arbitral legal conclusions for manifest disregard of the law).

35. Colvin, *Case Outcomes*, *supra* note 28, at 10–11 tbl.2.

36. *Id.* at 10.

37. *Id.*

38. *Id.*

39. See *supra* notes 19–20 and accompanying text.

40. *Employment Arbitration Rules and Mediation Procedures: Costs of Employment Arbitration*, AM. ARB. ASS'N (2009), <http://www.adr.org/sp.asp?id=32904#cost>.

41. Colvin, *Case Outcomes*, *supra* note 28, at 9.

found that in the period January 1, 2003, through December 31, 2007, employees won 21.4% of the cases that proceeded to arbitral award.⁴² Professor Colvin compared this to other researchers' estimates of employee success rates in litigation and concluded that there is an "arbitration-litigation gap," with employees faring less well in arbitration.⁴³ On the other hand, even this low employee success rate in arbitration compares favorably to the employee success rates in federal court found by Professors Clermont and Schwab.⁴⁴ Regardless of whether the arbitration gap exists, as Professor Colvin points out, considerable research is needed to determine what may account for that gap.

There are many factors that may serve to depress the employee success rate in arbitrations that produce final awards relative to litigations that produce final judgments. Professor Colvin found that employee success rates varied with employee salaries. Employees with salaries below \$100,000 won 22.7% of the time, those with salaries between \$100,001 and \$250,000 won 31.4% of the time, and those with salaries above \$250,001 won 42.9% of the time.⁴⁵ Employees with higher incomes will generally have claims that are worth more because of higher back pay amounts and will generally have greater resources to invest in their cases. Thus, it is not surprising that higher income employees have a greater success rate than their lower income counterparts. To the extent that arbitration is a more accessible forum for lower income employees, that accessibility might depress the employee win rate relative to litigation.

Claims are also far less likely to be dismissed or adjudicated on summary judgment in arbitration than in litigation. At one time, it was thought that summary disposition was completely unavailable in arbitration. Noted plaintiffs' attorney Paul Tobias touted arbitration because "[t]he employer can't get summary judgment in arbitration. . . . The employee gets an absolute right to tell the story to a neutral party."⁴⁶ Although the absolute bar has been lifted, summary disposition remains relatively rare in arbitration. Under AAA Employment Arbitration Rules, a party must obtain leave from the arbitrator to even file a dispositive motion. The rules provide that for the arbitrator to allow the filing there must be a showing of "substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."⁴⁷ If arbitration weeds out fewer weak claims through dispositive motions than litigation does, we would expect the claimant success rate following hearing to be lower.

42. *Id.* at 5–6.

43. *Id.* at 6.

44. *See supra* note 10 and accompanying text.

45. Colvin, *Case Outcomes*, *supra* note 28, at 10. Note that all of these figures exceed the overall 21.4% employee win rate. I assume that this is because employee salary data was missing from a substantial number of cases in Professor Colvin's data set, and thus his analysis based on employee income level could not consider every case that he considered in calculating overall employee win rate.

46. Paul Tobias, *Proceedings of the 1997 Annual Meeting Association of American Law School Sections on Employment Discrimination Law and Alternative Dispute Resolution*, 1 EMP. RTS. & EMP. POL'Y J. 269, 283 (1997).

47. *Employment Arbitration Rules and Mediation Procedures: Rule 27*, AM. ARB. ASS'N (2009), <http://www.adr.org/sp.asp?id=32904#27>.

Professor Colvin's 2007 paper reported that in 25.1% of the arbitration cases, employees proceeded pro se.⁴⁸ Not surprisingly, the win rate for employees represented by counsel was significantly higher than the win rate for those who represented themselves.⁴⁹ To the extent that arbitration is more amenable to self-representation than litigation, this too may depress relative employee success rates.

Another factor that may depress employee success rates in arbitrations that go to award arises from the way in which many employers use arbitration. Many employers incorporate arbitration as a final step in a multi-step employee dispute resolution process. Many require mediation prior to resorting to arbitration and many provide incentives for resolution at the mediation stage. To the extent that such dispute resolution systems encourage settlement, it may be that the claims that proceed to arbitral hearing are, as a group, weaker than the claims that proceed to trial in court.

Ultimately, however, whether an arbitration-litigation gap exists and the reasons for such a gap are not particularly relevant to questions of statutory reform. Even if we assume the existence of a gap that can be attributed to employer abuses, before we decide to prohibit all pre-dispute arbitration mandates, we need to ask whether there is anything worth preserving in employer-imposed pre-dispute arbitration mandates and, if so, how to preserve it. With this inquiry in mind, I turn to the question of why employers impose such mandates on their employees.

II. WHY DO EMPLOYERS IMPOSE ARBITRATION?

As previously noted, AFA supporters infer that employment arbitration likely tilts the playing field to the advantage of employers because only plaintiffs seek to avoid it and only employers seek to enforce employer-imposed pre-dispute arbitration mandates.⁵⁰ Although this makes for good rhetoric, when more closely scrutinized the argument lacks substance. It is true that the reporters are filled with cases where employee-plaintiffs sought to litigate and employer-defendants moved to dismiss or compel arbitration. It is also likely that reported cases where employers sought to litigate and employees sought to compel arbitration are non-existent. Furthermore, many, perhaps most, plaintiffs' attorneys are opposed to employer-imposed pre-dispute arbitration mandates. But these facts do not support an inference that employer-imposed arbitration tilts the playing field in favor of employers.

It is not surprising that virtually all reported litigation consists of plaintiffs resisting defense efforts to compel arbitration. I would not expect to find anything else. If plaintiff's counsel determines that it is strategically better to be in court rather than before an arbitrator, counsel will file suit and resist arbitration. If defense counsel shares plaintiff's counsel's preference for litigation, defense counsel will not move to compel arbitration and the matter will proceed in court. A court has no authority to compel arbitration sua sponte. If defense counsel, however, considers it strategically better to arbitrate, counsel will move to compel

48. Colvin, *Empirical Research*, *supra* note 28, at 432.

49. *Id.* at 433.

50. *See supra* note 7 and accompanying text.

arbitration. What the reported cases do not tell us is how often employees' counsel simply file arbitration demands.

Of course if we had data on how often employees' counsel file arbitration demands, the data would not lend itself to any inference. What we would not know is how often counsel filed the demand after determining that arbitrating was in the employee's interest and how often counsel filed the demand because, as the law has developed, resisting arbitration would not likely be successful. We simply cannot draw any inferences from the conduct of parties in litigation or otherwise.

AFA proponents point to the position of the plaintiffs' bar. I will assume that the plaintiffs' employment bar is unified in its opposition to employer-imposed pre-dispute arbitration mandates, although there is no way to prove it. At most, this opposition shows that lawyers who represent employee-plaintiffs have concluded that employer-imposed pre-dispute arbitration mandates are not in the lawyers' interests. No inference may be drawn that such plans are not in the interests of employees.

Clyde Summers, after analyzing data from studies of wrongful discharge litigation in California, found that there was a large disparity in recovery among litigants. Even for litigants who received high jury verdicts, post-trial appeals and settlements substantially reduced final payments, and attorney contingency fees and reimbursement of litigation costs reduced the employee's net recovery even further.⁵¹ Professor Summers found that most wrongfully discharged employees received modest or inadequate awards, often little more than half their economic losses, and had to wait three to five years after their discharges for any recovery.⁵² He further found that the wide disparity in awards bore little resemblance to the plaintiffs' economic losses.⁵³ He concluded that the litigation system resulted in "a lottery in which many receive nothing, most receive less than their economic loss, while a lucky few win the jackpot."⁵⁴

We know that plaintiffs' attorneys carefully screen employment cases and reject the overwhelming majority of cases that come their way.⁵⁵ They have to do so to maximize the likelihood that the cases they pick will win the lottery. Prohibiting pre-dispute arbitration mandates in employment may very well be in the interests of plaintiffs' attorneys who can cherry pick the best and most valuable cases and who can aim, over a wide spectrum of cases, to settle most, lose some, and win the lottery enough times to make it worthwhile; but the plaintiffs' bar's support for the AFA says nothing about whether the AFA is in the best interests of employees generally, particularly those whose claims or resources preclude their securing counsel.

On the other hand, if imposing pre-dispute arbitration mandates so thoroughly advantages employers as AFA proponents contend, we would expect to find a large majority of employers adopting such plans. But the evidence is clear that this has

51. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 464–65 (1992).

52. *Id.* at 466.

53. *Id.*

54. *Id.*

55. *See, e.g.,* St. Antoine, *Mandatory Arbitration*, *supra* note 6, at 790–91.

not occurred. Professor Colvin estimated that 15–25% of employers imposed arbitration mandates.⁵⁶ Professor St. Antoine reported:

At a recent meeting of labor and employment lawyers in Michigan, I could not find a single top management attorney who was currently advising clients to start or retain a mandatory arbitration system. Three reasons were given: Employees win too often; it is hard to get summary judgment in arbitration; and full appellate review is not available.⁵⁷

Citing, among other things, the absence of appeals and the rarity of dismissals or summary judgments in arbitration, the senior counsel of Raytheon Company reported that his company had discontinued its imposed pre-dispute arbitration mandate.⁵⁸

Sophisticated plaintiffs' class counsel have recognized the advantages of arbitration for individual claims that may not be of high value and may be brought by pro se claimants. In the famous *Shakman* cases against patronage hiring practices by the City of Chicago and Cook County, the most recent Agreed Settlement Order and Accord in the city case provides for post-Accord claimants to submit their claims of unlawful political discrimination in employment to the city's Inspector General's Office, which investigates and sustains or does not sustain the claim.⁵⁹ In either case, the inspector general notifies the claimant of the finding and his or her right to demand arbitration before one of ten arbitrators appointed by the court.⁶⁰ The arbitrator conducts the proceedings in accordance with AAA Employment Arbitration Rules and renders a decision that is final.⁶¹ A consent decree in the litigation with Cook County contains similar provisions.⁶² Although claimants retain their right to bypass the inspector general and arbitration processes and file suit in federal court, the expectation is that most will not do so given that many will appear pro se and the monetary values of their claims will not be high enough to justify litigating.

Evidence concerning employer motivation for imposing pre-dispute arbitration mandates presents a mixed picture. Employers are more likely to mandate arbitration following their own encounters with the litigation system.⁶³ Usually,

56. Colvin, *Empirical Research*, *supra* note 28, at 411.

57. St. Antoine, *ADR*, *supra* note 6, at 421.

58. Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. LAB. & EMP. L. 227 (2010).

59. Agreed Settlement Order and Accord, *Shakman v. Democratic Org. of Cook Cnty.*, No. 69 C 2145 (N.D. Ill. 2007).

60. *Id.* at 26–27.

61. *Id.* at 27–29.

62. Supplemental Relief Order for Cook County, *Shakman v. Democratic Org. of Cook Cnty.*, No. 69 C 2145, at 24–26 (N.D. Ill. Nov. 30, 2006).

63. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-157, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 8 (1997) [hereinafter GAO, ALTERNATIVE DISPUTE RESOLUTION]; Richard A. Bales & Jason N.W. Plowman, *Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example*, 26 HOFSTRA LAB. & EMP. L.J. 1, 10 (2008).

employers impose arbitration as the final step in a broader dispute resolution program. Their aim is to resolve employee claims quickly and relatively inexpensively. Indeed, speed and cost savings often go hand-in-hand. The faster a claim is resolved, the lower the employer's attorney fees and the lower the exposure to back pay liability.⁶⁴

But significant abuses exist. The poster child for an abusive arbitration system was the one that Hooters imposed on its employees.⁶⁵ The Hooters arbitration rules required the employee to state the nature of her claim and the specific acts or omissions on which the claim was based and to provide a list of witnesses with a summary of the facts known to each, but imposed no similar requirements on the employer.⁶⁶ The rules restricted the supposedly neutral arbitrator to those on a list completely controlled by Hooters.⁶⁷ Furthermore, the rules allowed Hooters to seek summary judgment, to record the hearing, and to sue to vacate the award if the arbitration panel exceeded its authority, but gave no similar rights to the employee.⁶⁸ Lastly, the rules allowed the employer to amend them at any time without notice to the employee and allowed the company, but not the employee, to cancel the agreement to arbitrate by giving thirty days' notice.⁶⁹

The arbitration-happy Fourth Circuit characterized the system that Hooters established as "a sham system unworthy even of the name of arbitration."⁷⁰ It concluded that Hooters had breached its duty to establish a fair and impartial system and ordered the agreement to arbitrate rescinded.⁷¹

Employers need not go as far as Hooters did to impose pre-dispute arbitration mandates on their employees that tilt the playing field to the employer's advantage. One way to tilt the playing field is to include in the arbitration provision a prohibition on maintaining a class action or even a consolidated action, leaving any employee to bring the case as an individual claim. Such abusive provisions are prevalent in certain consumer contracts. For example, Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin examined the contracts of leading companies in the telecommunications, financial services, and credit industries.⁷² They

64. For example, Professors Sherwyn, Estreicher, and Heise studied one company that imposed pre-dispute arbitration mandates on its employees as the final step in a multi-step dispute resolution process. They found that most claims were resolved in the earlier steps of the process, that most claimants remained employed by the company even after the dispute was resolved, and that the company was able to cut its attorney fees in half. David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1581–89 (2005). For other examples, see GAO, ALTERNATIVE DISPUTE RESOLUTION, *supra* note 63; Bales & Plowman, *supra* note 63; Michael Z. Green, *Ethical Incentives for Employers in Adopting Legal Service Plans to Handle Employment Disputes*, 44 BRANDEIS L.J. 395, 409–10 (2006).

65. See *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

66. *Id.* at 938.

67. *Id.* at 938–39.

68. *Id.* at 939.

69. *Id.*

70. *Id.* at 940.

71. *Id.*

72. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer*

compared the companies' consumer, employment, and material contracts and found that 76.9% of the companies' consumer contracts and 92.9% of their employment contracts mandated arbitration, but only 23.7% of their materials contracts, that is, the contracts with other businesses, did so.⁷³ All of the consumer contracts with arbitration provisions also prohibited class action arbitrations and 80% prohibited all class actions.⁷⁴ In contrast, none of the consumer contracts without arbitration mandates prohibited class actions.⁷⁵ A study by the Searle Civil Justice Institute of AAA consumer arbitrations found that every arbitration agreement involving cell phone services and credit cards prohibited class actions.⁷⁶ In these contracts, consumer claims are likely to be of extremely low value and simply will not be pursued without the ability to bring class actions. Professors Eisenberg, Miller, and Sherwin concluded that the companies imposed arbitration agreements as a vehicle for precluding class actions.⁷⁷

Interestingly, Eisenberg and his colleagues found that although employment pre-dispute arbitration mandates were almost universal among the companies they studied, none of the companies prohibited class actions.⁷⁸ Nevertheless, there is considerable evidence that some employers impose arbitration mandates as a vehicle for prohibiting class actions.⁷⁹ Although the percentage of employment claims that are too low value to be worth litigating or arbitrating other than on a class-wide basis is undoubtedly much lower than for claims arising out of cell phones and credit cards, there are many employment claims that fall into this

Contracts, 41 U. MICH. J.L. REFORM 871 (2008).

73. *Id.* at 882–83 & tbl.2.

74. *Id.* at 884–85 & tbls.3, 5.

75. *Id.* at 890.

76. SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION PRELIMINARY REPORT 103 (2009).

77. Eisenberg et al., *supra* note 72, at 888–92.

78. *Id.* at 884, tbl.3.

79. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 427 & n.121 (2006). Sometimes these provisions may backfire on employers. I presided over an arbitration administered by AAA that was initially brought as a class action in state court. The court enforced the arbitration provision and class action waiver in the employment contract and compelled the employee to arbitrate on an individual basis. Over the next few months approximately forty other individuals filed similar arbitration demands. All were represented by the same law firm who represented the first claimant. They were assigned to different arbitrators. In case management conferences, defense counsel complained frequently of duplicative discovery demands made in the cases and of claimants' counsel noticing the same managers for deposition in every case. Moreover, under AAA rules, in arbitrations under employer-promulgated plans, the employer pays all costs except for a nominal filing fee paid by the employee. AAA requires employers to deposit an amount equal to the arbitrator's estimate of his or her fee in the event the case proceeds to hearing and award. Arbitrators tend to estimate on the high side to ensure that the deposits will not fall short of the entire fee. I do not know what other arbitrators required but using my own required deposit as a guide, it is quite likely that the employer was required to deposit more than \$500,000 in up front arbitrator fees to cover the forty cases. A global settlement of all cases was reached. Although I cannot know this for a fact, it seems reasonable to me that the claimants had considerable leverage in settlement precisely because each case was proceeding as an individual arbitration with the employer paying all arbitration fees.

category.⁸⁰ Moreover, there is simply no reason for a class action waiver other than to insulate an employer from liability for breaches of its statutory or common law duties. The incorporation of class action waivers is a clear abuse of employer-imposed pre-dispute arbitration mandates.

Two other provisions that can only be characterized as abuses of employer-imposed pre-dispute arbitration mandates are those that limit remedies and that reduce the limitations period for bringing a claim. Neither one serves any purpose other than to tilt the playing field to the employer's advantage. They preclude claims that could have proceeded in court because they were filed within the statutory limitations period but outside the contractual limitations period.⁸¹

One provision that could have legitimate justifications but has come to be regarded as an abusive provision requires the parties to share equally the costs of the arbitration, including the arbitrator's fees. At one time, it was thought that fee sharing was important to ensure arbitral impartiality and the Due Process Protocol for employment arbitration provided for such fee splitting for this reason.⁸² However, it has come to be recognized that fee-splitting provisions can actually serve to render the arbitral forum inhospitable to employee claims. Billing rates for employment arbitration tend to be considerably higher than billing rates for labor, that is, union-management, arbitration.⁸³ Furthermore, most employment arbitrators require payment up front of the estimated total fee for the proceeding. Consequently, requiring employees to be responsible for an equal share of the arbitrator's fees can deter the bringing of claims.⁸⁴ On the other hand, it has also been recognized that most arbitrators will not care who is paying them, only that they are being paid, and thus providing for the employer to absorb the full costs of the arbitration proceeding does not endanger arbitrator impartiality.⁸⁵

There is an acute need to police against abusive provisions in employer-imposed pre-dispute arbitration mandates because it is the employer that unilaterally drafts the provisions. Unfortunately, as demonstrated in the next Part, the courts have largely abdicated their policing responsibilities.

80. See, e.g., Brief for National Workrights Institute as Amicus Curiae Supporting Respondents at 5–13, *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (giving examples).

81. For a particularly abusive example, see Mary Kay Morrow, *Binding Mandatory Arbitration of Employment Claims: The Story of Mary Kay Morrow*, in Hearing on H.R. 3010 Before the H. Subcomm. on Comm. and Admin. Law, Comm. on the Judiciary, 110th Cong. 87 (2007) (describing enforcement of a provision that required employee to file arbitration demand within thirty days of the conclusion of the employer's internal dispute resolution process).

82. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, DISP. RES. J., Oct.–Dec. 1995, at 39.

83. See Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 160 (2002).

84. For example, in *Brady v. Williams Capital Grp., L.P.*, the arbitrator fees that AAA required be deposited totaled \$42,300. 928 N.E.2d 383, 385 (N.Y. 2010). Thus, under a fee-splitting arrangement, the employee would have to deposit \$21,150 up front just to proceed with the case.

85. See *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997).

III. THE INADEQUACY OF JUDICIAL POLICING

At the NAA Due Process Conference, I documented the failure of judicial policing of due process in employment arbitration and the need for self-regulation by the arbitration community.⁸⁶ In this Part, I draw on and update that analysis. I find that the situation has only worsened in the intervening four years. Indeed, as developed below, the courts have gone beyond abdicating their policing responsibilities and have endangered the ability of the arbitral community to self-regulate.

There are two primary vehicles for judicial policing of abusive provisions in employer-imposed arbitration mandates: the requirement that the arbitral forum be one in which employees are able to vindicate their claims effectively, and the common law contract doctrine of unconscionability. The first has effectively failed, and the Supreme Court has recently dealt the second two blows that could turn out to be fatal.

In *Cole v. Burns International Security Services*,⁸⁷ the D.C. Circuit seized the requirement that employees be able to vindicate their claims effectively in the arbitral forum as a mandate for courts to police the procedural fairness of the arbitration system. The court set forth guidelines against which it would measure an employer-imposed arbitration mandate, enforcing it only if it:

- (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.⁸⁸

Unfortunately, the Supreme Court has completely undermined judicial policing of employer-imposed arbitration mandates by placing a heavy burden on an employee resisting arbitration to prove in the employee's individual case that the system impedes his or her ability to vindicate effectively the statutory claim in the arbitral forum and by deferring most such issues to the arbitrator for resolution. In *Green Tree Financial Corp. v. Randolph*, the Court rejected *Cole's* bright line requirement that the employer pay all arbitral fees except for a nominal filing fee and held, instead, that whether a requirement that a consumer (or employee) pay a percentage of the arbitrator's fee impeded effective vindication of claims in the arbitral forum must be evaluated on a case-by-case basis, with the burden on the party resisting arbitration to prove the impediment.⁸⁹

A rule that requires employers to limit employees to paying only a nominal amount of forum costs if they want their arbitration agreements enforced is largely self-enforcing, as employers must provide in their plans for employees to pay only nominal fees. In contrast, *Randolph* effectively mandates pre-arbitration litigation

86. Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363 (2007).

87. 105 F.3d 1465 (D.C. Cir. 1997).

88. *Id.* at 1482 (emphasis omitted).

89. 531 U.S. 79 (2000).

over fee allocation. The prospect of costly and uncertain litigation likely deters many claimants from challenging a plan's allocation of arbitral fees, even where the prospect of being assessed large fees deters them from bringing their claims to arbitration.⁹⁰

In *PacifiCare Health Systems v. Book*, the Supreme Court began signaling lower courts to refer to arbitrators questions concerning the adequacy of an arbitral forum to vindicate statutory rights.⁹¹ In *PacifiCare*, the Court held that whether an arbitration clause precluding “punitive or exemplary damages” precluded treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), and was thus unenforceable, was for the arbitrator to decide.⁹² It characterized the contracts' limitations on the arbitrator's remedial authority as “ambiguous” and reasoned, “[W]e should not, on the basis of ‘mere speculation’ that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved.”⁹³ The Court held that the lower courts should have compelled arbitration.⁹⁴

To resolve the issue of arbitral remedial authority, the arbitrator will, of necessity, have to decide whether RICO treble damages are punitive or compensatory. Significantly, the Court did not hold in *PacifiCare* that RICO treble damages are not punitive in nature. It merely observed that, in prior decisions, it had characterized various statutory treble damage provisions as serving remedial as well as punitive functions.⁹⁵ Thus, the Court left it to the arbitrator in *PacifiCare* to interpret RICO in the context of the arbitration agreements' limitations on arbitral remedial authority. Furthermore, if the arbitrator determined that the agreement precluded an award of treble damages, the arbitrator would have to decide whether such a prospective waiver of treble damages is allowed under RICO.

In *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court held that the question of whether a contract containing an arbitration clause was void under state law was an issue for the arbitrator and not the court.⁹⁶ Almost forty years earlier, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court held that issues of fraud in the inducement of the contract were issues for the arbitrator, in contrast to issues of fraud in the inducement of the arbitration clause, which were issues for the court.⁹⁷ The Court in *Buckeye Check Cashing* concluded that *Prima Paint* controlled the issue before it and rejected the distinction established in contract law between void and voidable contracts as irrelevant, interpreting the word “contract,” as used in section two of the FAA to include contracts that are

90. See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 100–01 (2004) (making a similar point with respect to case-by-case adjudication of validity of class action prohibitions in consumer arbitration agreements).

91. 538 U.S. 401 (2003).

92. *Id.* at 405–06.

93. *Id.* at 406–07 (citation omitted).

94. *Id.* at 407.

95. *Id.* at 405–07.

96. 546 U.S. 440 (2006).

97. 388 U.S. 395, 403–05 (1967).

later held to be void.⁹⁸ Thus, the Court again deferred interpretation and application of the public law to the privately selected and privately accountable arbitrator.

Most recently, in *Rent-A-Center, West, Inc. v. Jackson*, the Court held that whether an arbitration clause was unconscionable was a decision for the arbitrator where the arbitration agreement provided for arbitral resolution of that issue.⁹⁹ As a condition of employment, Jackson agreed to arbitrate all claims arising out of his employment. The arbitration agreement further provided, “The Arbitrator, and not any federal, state, or local court or agency, shall have 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 any part of this Agreement is void or voidable.”¹⁰⁰ Jackson maintained that the agreement to arbitrate was unconscionable, and Rent-a-Center sought to compel arbitration of the unconscionability issue.¹⁰¹

The Court applied *Prima Paint* in a most peculiar manner. The Court considered the provision delegating issues of enforcement of the arbitration clause as a separate provision from the provision that the plaintiff would arbitrate all claims arising out of his employment. The Court read *Prima Paint* to mean that issues of unconscionability of the agreement to arbitrate all claims arising out of the employment relationship were arbitrable; only issues of unconscionability of the agreement to arbitrate the validity of the clause that provided for arbitral resolution of the unconscionability issue were for judicial resolution.¹⁰²

The issue the Court held arbitrable in *Rent-a-Center*, however, was very different from the issue the Court held arbitrable in *Prima Paint*, or even from the issue the Court held arbitrable in *Buckeye Check Cashing*. In *Prima Paint*, the issue held arbitrable was whether the contract as a whole was voidable because it was fraudulently induced.¹⁰³ The voidability of the contract goes to the merits of the underlying action on the contract; it does not go to the arbitrator’s jurisdiction. In this regard, a claim that the contract as a whole is void is similar to a claim that it is voidable.

In contrast, because an arbitrator’s authority derives from the parties’ agreement to arbitrate, an allegation that the arbitration clause, as opposed to the contract as a whole, is voidable goes to the arbitrator’s authority to act at all. The arbitrator has an interest in finding the arbitration clause valid because a finding that the arbitration clause is not valid defeats the arbitrator’s jurisdiction and ensures that the arbitrator will earn a fee limited to ruling on the threshold jurisdictional issue. In other words, the arbitrator will earn no fee for adjudicating the merits of the underlying dispute. Submitting a matter to an adjudicator who has such a personal financial interest in the resolution of the issue is a basic denial of due process.¹⁰⁴

98. *Buckeye Check Cashing*, 546 U.S. at 448.

99. 130 S. Ct. 2772 (2010).

100. *Id.* at 2775 (quotation marks omitted) (citation omitted).

101. *Id.*

102. *Id.* at 2777–78.

103. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

104. See, e.g., *Ward v. Village of Monroe*, 409 U.S. 57 (1972) (holding that having the mayor adjudicate traffic offenses violates the Due Process Clause of the Fourteenth Amendment where the municipality derives a substantial portion of its budget from traffic

The Court's decision in *Rent-a-Center* may be the high water mark of the Court's deferral of critical threshold issues of public law and procedural fairness to arbitrators and its abdication of judicial responsibility for policing the arbitral process to ensure that arbitration is a forum in which claimants may effectively vindicate statutory claims.

The message of these recent Supreme Court decisions to the lower courts is clear. They are to avoid deciding most issues concerning the validity of the arbitration provision and instead refer those issues to the arbitrator. Furthermore, whether the apparent impediments in the arbitration provision will deny the plaintiff a forum in which to effectively vindicate his or her statutory rights is speculative until the arbitrator rules. Consequently, under *Randolph*, the plaintiff cannot sustain the burden of proof on this issue. This message was not lost on then Circuit Judge, now Chief Justice, Roberts who, considering *Randolph* and *PacifiCare*, opined:

We take from these recent cases two basic propositions: *first*, that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and *second*, that this burden cannot be carried by "mere speculation" about how an arbitrator "might" interpret or apply the agreement.¹⁰⁵

At common law, adjudicators have the authority to deny enforcement of contracts and contract provisions that are illegal or contrary to public policy.¹⁰⁶ The Supreme Court has recognized, in the context of labor arbitration, that an arbitrator also has such authority.¹⁰⁷ Consequently, taken to its logical extreme, the Court's most recent arbitration jurisprudence suggests that a court should not rule on even the most patently illegal characteristics of the arbitration agreement because it is "mere speculation" whether the arbitrator will enforce or strike them. The Eighth Circuit has come close to this approach. In *Bailey v. Ameriquest Mortgage Co.*,¹⁰⁸ the district court refused to compel arbitration of the plaintiffs' claims under the Fair Labor Standards Act (FLSA),¹⁰⁹ because the arbitration agreement imposed "procedural terms and remedial limitations [that] appear to be facially inconsistent with the FLSA statutory claims . . ."¹¹⁰ The Eighth Circuit chided the district court for reflecting "outmoded judicial hostility to arbitration that the Supreme Court has consistently rejected in construing the FAA."¹¹¹ The court held that the validity of

finances and the mayor is responsible for the budget).

105. *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) (emphasis in original).

106. *See generally* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1 (3d ed. 2004).

107. *See* *W. R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber*, 461 U.S. 757, 767 n.10 (1983) (suggesting that under the contract doctrine of impossibility of performance, an arbitrator may refuse to enforce a collective bargaining agreement provision that conflicts with external law).

108. 346 F.3d 821 (8th Cir. 2003).

109. 29 U.S.C. §§ 201–19 (2006).

110. *Bailey*, 346 F.3d at 823.

111. *Id.*

the contractual limitations was for the arbitrator to decide, reasoning, “When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply.”¹¹² The Eighth and Eleventh Circuits have refused to invalidate contractual provisions limiting the statutory right of a prevailing plaintiff to recover attorney fees, reasoning that how the arbitrator will adjudicate the issue is too speculative to justify the conclusion that arbitration will not allow plaintiffs to vindicate effectively their statutory rights.¹¹³ Some courts have deferred the validity of shortened limitations provisions to the arbitrator.¹¹⁴ Under this approach, about the only issue that a court might consider policing is control over selection of the arbitrator.¹¹⁵

Against this background, the Court’s decision in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*¹¹⁶ sticks out like a sore thumb. In *Stolt-Nielsen*, a shipper’s contract with shipping companies required arbitration of the shipper’s claims. The shipper, Animalfeeds, served the shipping companies with a demand for class action arbitration of claimed antitrust violations. The parties stipulated that their contract was silent as to class arbitration, which Animalfeeds represented to mean that no agreement had been reached on the issue.¹¹⁷ The parties agreed to submit the issue to a panel of arbitrators that issued a finding that the matter could proceed as a class action arbitration.¹¹⁸ The Supreme Court, however, did not defer

112. *Id.* at 824.

113. *See* *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004); *Summers v. Dillard’s, Inc.*, 351 F.3d 1100, 1100 (11th Cir. 2003); *see also* *Siebert v. Amateur Athletic Union, Inc.*, 422 F. Supp. 2d 1033 (D. Minn. 2006) (similar holding with respect to contractual provision prohibiting award of punitive damages).

114. *See* *Kristian v. Comcast Corp.*, 446 F.3d 25, 43–44, 64 (1st Cir. 2006). Even before these Supreme Court decisions, the Third Circuit had held that the validity of a shortened limitations period was for the arbitrator to resolve. *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir. 1997) (“As to the waiver of state law rights unrelated to the provision of a judicial forum, we hold only that the inclusion of such waivers in a document described as an “Arbitration Agreement” cannot be asserted to avoid the *arbitration* agreed to therein. Rather, the party challenging the validity of such waivers must present her challenge to the arbitrator, who will determine the validity and enforceability of the waiver of asserted state law rights. Thus, here we leave it to the arbitrator to determine whether Peacock has waived her right to attorney’s fees to a two-year statute of limitations.”).

115. *See, e.g.*, *McMullen v. Meijer, Inc.*, 355 F.3d 485, 492–94 (6th Cir. 2004); *see also* *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000). Even here, however, some courts have refused to invalidate suspect arbitrator selection provisions on the ground that the plaintiffs did not meet their burdens under *Randolph* to show that the provisions impeded their abilities to effectively vindicate their rights. *See* *Lyster v. Ryan’s Family Steak Houses, Inc.*, 239 F.3d 943, 947 (8th Cir. 2001) (enforcing Ryan’s Family Steak House arbitration agreement finding that plaintiff failed to establish undue harshness, citing *Randolph*); *see also* *Penn v. Ryan’s Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001) (refusing to enforce agreement to arbitrate because of lack of consideration but suggesting that attack on arbitrator selection procedure would not meet burden under *Randolph*).

116. 130 S. Ct. 1758 (2010).

117. *Id.* at 1765–66.

118. *Id.* at 1766.

to the arbitrators' ruling. Rather, the Court interpreted the FAA as containing a presumption against class-action arbitration. The Court reasoned that "class-action arbitration chang[ed] the nature of arbitration to such a degree that it cannot be presumed [that] the parties consented to it by simply agreeing to submit their disputes to an arbitrator."¹¹⁹ Although generally a court reviewing an arbitration award must enforce it as long as the award is arguably based on the contract and as long as there is any rationale supporting the award,¹²⁰ the Court chose to ignore references in the award to the intent of the parties and concluded that there was only one possible enforceable outcome—denial of class-action arbitration.¹²¹ Even though the Court has generally swept issues of public law to arbitrators for resolution, in the one case before it where the arbitrators determined that a particular procedure (class-action arbitration) was appropriate for enforcing effectively statutory rights, the Court held that the determination was beyond the arbitrators' authority.¹²²

The Supreme Court has made mincemeat of the rationale that arbitration merely shifts the forum for adjudication and does not waive underlying substantive rights as long as the claimant can effectively vindicate the claims in arbitration as a tool for policing employer-imposed pre-dispute arbitration mandates. But what of the state law contracts doctrine of unconscionability? In *Doctor's Associates, Inc. v. Casarotto*, the Supreme Court drew a line between "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability, [which] may be applied to invalidate arbitration agreements," and "state laws applicable only to arbitration provisions,"¹²³ which may not because they are preempted by the FAA.¹²⁴

*Brewer v. Missouri Title Loans, Inc.*¹²⁵ illustrates how powerful a policing tool the doctrine of unconscionability can be. Brewer brought a class action alleging violations of numerous Missouri consumer protection statutes.¹²⁶ Her loan agreement with Missouri Title contained arbitration and class action waiver provisions.¹²⁷ The trial court held the class action waiver unconscionable, severed it, and ordered the matter to arbitration to determine whether it was suitable for class arbitration.¹²⁸ The Missouri Supreme Court agreed with the trial court that the class action waiver was unconscionable because Brewer had no opportunity to

119. *Id.* at 1775.

120. *See, e.g., Brentwood Med. Assocs. v. United Mine Workers*, 396 F.3d 237, 241 (3d Cir. 2005).

121. *Stolt-Nielsen*, 130 S. Ct. at 1770.

122. *See id.* ("[T]he arbitration panel imposed its own policy choice and thus exceeded its powers.")

123. *Id.* at 687 (emphasis omitted).

124. *Id.*

125. 323 S.W.3d 18 (Mo. 2010) (en banc), *rev'd* 131 S. Ct. 2875 (2011). As discussed *infra* notes 133–45 and accompanying text, the Supreme Court has since held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that the FAA preempts state law of unconscionability as applied to class action waivers in arbitration agreements. Not surprisingly, the Court vacated the decision in *Brewer* and remanded for further proceedings in light of *Concepcion*. *Missouri Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011).

126. *Brewer*, 323 S.W.3d at 20.

127. *Id.*

128. *Id.*

negotiate over it and because the claims were so small that they could not practically be brought individually.¹²⁹ But the court read *Stolt-Nielsen* to preclude it from simply severing the unconscionable class action waiver because Title Loan had manifested its objection to arbitrating on a class basis. Consequently, in the court's view, its only option and the one it pursued was to strike the entire arbitration agreement as unconscionable.¹³⁰

At the NAA Due Process Conference, I highlighted several drawbacks to reliance on the doctrine of unconscionability to police employer-imposed pre-dispute arbitration mandates. These include the wide variation among the jurisdictions in applying the doctrine, the ability to use choice of law clauses to avoid application of the law of jurisdictions that take a liberal approach to unconscionability, and the need to navigate a minefield of potential FAA preemptions of state unconscionability law.¹³¹ Since then, the Court has dealt two blows to the unconscionability doctrine that could turn out to be fatal.

As previously discussed, the Court's decision in *Rent-a-Center* allows an employer to avoid judicial determination of the unconscionability issue completely by inserting a clause providing for arbitral resolution.¹³² More recently, in *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA preempted the application of California's unconscionability doctrine to a provision in an arbitration mandate that prohibited class actions.¹³³

The *Concepcions* brought a class action alleging false advertising and fraud when AT&T charged them sales tax on the retail value of phones that it had advertised as free.¹³⁴ The arbitration agreement that AT&T imposed on all of its customers required arbitration on an individual basis.¹³⁵ Under California law, such prohibitions on class actions, whether coupled with arbitration provisions or free standing, were unconscionable in contracts of adhesion involving predictably small amounts of damages.¹³⁶ The Ninth Circuit held that the FAA did not preempt California law because the California rule applied to contracts generally, not just to contracts for arbitration.¹³⁷ The Supreme Court reversed.

Although the FAA permits holding arbitration agreements unenforceable on "such grounds as exist at law or in equity for the revocation of any contract,"¹³⁸ the Court declared that a primary purpose of the FAA is to enforce arbitration agreements in accordance with their own terms.¹³⁹ It further maintained, "Requiring

129. *Id.* at 23.

130. *Id.* at 21, 24.

131. Malin, *supra* note 86, at 380–85.

132. *See supra* notes 99–101 and accompanying text.

133. 131 S. Ct. 1740 (2011).

134. *Id.* at 1744.

135. *Id.*

136. *Id.* at 1746 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

137. *AT&T*, 131 S. Ct. at 1745.

138. *Id.* (citing 9 U.S.C. § 2 (2006)).

139. *Id.* at 1748.

the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹⁴⁰

The Court considered arbitration to be a forum poorly suited to class actions. In the Court’s view, class actions in arbitration would make confidentiality more difficult.¹⁴¹ The Court was skeptical that arbitrators would have sufficient expertise to safeguard the rights of absent class members.¹⁴² The Court further found it “odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied.”¹⁴³ It urged that “[t]he absence of multilayered review” made arbitration a poor forum for class actions.¹⁴⁴ The Court continued:

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award “was procured by corruption, fraud, or undue means”; “there was evident partiality or corruption in the arbitrators”; “the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced”; or if the “arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made.” . . . [R]eview under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.¹⁴⁵

The Court’s analysis is remarkably similar to its analysis of arbitration in *Alexander v. Gardner-Denver Co.*, where the Court held that an employee who arbitrated his discharge grievance under a collective bargaining agreement was not precluded from litigating the same discharge under Title VII.¹⁴⁶ The Court reasoned, in part, that the arbitral forum was poorly suited for resolving Title VII claims. It opined that arbitrators lacked the expertise necessary to interpret and apply Title VII,¹⁴⁷ and that arbitration procedures were too informal for the adjudication of statutory claims.¹⁴⁸ But the Court has since derided *Gardner-Denver* as reflecting now-discredited judicial hostility toward arbitration.¹⁴⁹ That

140. *Id.*

141. *Id.* at 1750.

142. *Id.*

143. *Id.* at 1752.

144. *Id.*

145. *Id.* at 1752 (first three alterations in original) (emphasis in original) (citation omitted).

146. 415 U.S. 36 (1974).

147. *Id.* at 56–57.

148. *See id.* at 57.

149. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1470 (2009); *see also* Gilmer v.

arbitrators lack the expertise of judges and that arbitration is an informal process is no longer a basis for preventing adjudication of statutory rights in the arbitral forum but it is a basis for preventing class-wide arbitration. Hostility, it appears, is in the eyes of the beholder.

The FAA does not expressly define “arbitration.” The Court has taken it upon itself to craft a vision of arbitration and attribute that vision to the Congress that enacted the FAA. The Court’s vision can now be manipulated to render state contract law impotent in policing employer-imposed arbitration mandates. For example, consider an employer-imposed arbitration mandate that drastically limits discovery.¹⁵⁰ Under state contract law, such an agreement might be considered unconscionable. Yet, under *AT&T Mobility*, the FAA’s command that arbitration agreements be enforced according to their terms coupled with the Court’s view that envisions arbitration as an informal, fast, and inexpensive method of dispute resolution could lead the Court to hold such state law preempted.¹⁵¹

At the NAA Due Process Conference, I called for increased self-regulation as a partial antidote to judicial abdication of the policing role.¹⁵² I recognized the limitations of self-regulation but suggested that because the arbitration service providers with the largest shares of the employment arbitration market, AAA and JAMS, had adopted numerous due process protections and because AAA, notably, provided that where there was a conflict between its rules and the arbitration agreement the AAA rules would govern, self-regulation could go a long way to filling the need for due process protections.¹⁵³ I specifically noted that AAA and JAMS continue to require employers to pay all arbitration costs outside of a nominal filing fee in spite of the Court’s decision in *Randolph* as an example of what self-regulation could accomplish.¹⁵⁴ I called for further self-regulation, including a refusal to enforce class action waivers and an insistence that arbitration provisions not reduce limitations periods.¹⁵⁵ Similarly, the NAA has issued guidelines for arbitrators to use in determining whether to accept an appointment in an employment case.¹⁵⁶

Unfortunately, a recent decision of the New York Court of Appeals threatens to undermine such self-regulation completely. In *Brady v. Williams Capital Group, L.P.*, Williams imposed on its employees a requirement that they arbitrate their claims arising out of their employment in accordance with AAA rules “except as provided in this Agreement.”¹⁵⁷ The arbitration agreement further provided that the employee and Williams share equally the arbitrator’s fee.¹⁵⁸

Interstate/Johnson Lane Corp., 500 U.S. 20, 34 n.5 (1991).

150. See, e.g., Ellis, *supra* note 2, at 44 (discussing Ryan’s Family Steak Houses arbitration agreement, which limited discovery to one deposition).

151. See *AT&T*, 131 S. Ct. at 1747 (discussing preemption of state unconscionability doctrine when applied to mandate a certain level of discovery).

152. Malin, *supra* note 86, at 396–403.

153. *Id.* at 398–99.

154. *Id.* at 401.

155. *Id.* at 401–03.

156. *Policy Statement on Employment Arbitration*, NAT’L ACAD. OF ARB. (May 20, 2009), http://naarb.org/due_process.asp.

157. 928 N.E.2d 383, 384 (N.Y. 2010) (emphasis omitted).

158. *Id.*

Brady filed an arbitration demand with AAA over Williams's termination of her employment. AAA determined that the demand was filed under an employer-promulgated plan, that Williams was responsible for the entire arbitrator's fee, and invoiced Williams for a deposit of \$42,300 to cover the arbitrator's anticipated fee.¹⁵⁹ When Williams repeatedly refused to pay, insisting that Brady pay half, AAA cancelled the arbitration.¹⁶⁰ Brady sued to compel Williams to pay or for the entry of a default judgment against Williams, but the court held that the provision in the arbitration agreement adopting AAA rules except as otherwise provided in the Agreement required Brady to pay half of the arbitrator's fee despite AAA rules to the contrary.¹⁶¹ Consequently, the court held, under *Randolph*, Brady had the burden to prove that the requirement that she pay half of the arbitrator's fee precluded her from arbitrating the case.¹⁶²

If *Brady* is followed in other jurisdictions, employers can avoid due process guarantees required by arbitration service providers such as AAA by simply inserting "except as otherwise provided in this agreement" language into their pre-dispute arbitration mandates. Then they can provide in their agreements for fee sharing, limitations on remedies, shortened limitations periods, limitations on discovery, and other provisions that tilt the playing field to their advantage. The only option for the arbitration service provider is to refuse to administer the arbitration, and there is evidence that AAA does refuse to administer arbitrations where a party does not comply with AAA required due process protections.¹⁶³ Unfortunately, that is not likely to prevent arbitration under the employer's terms. There is evidence that where AAA has refused to administer consumer arbitrations due to protocol violations, the merchant took the case to the National Arbitration Forum, which administered it.¹⁶⁴ Some courts have still compelled arbitration even though the designated arbitration provider had refused to administer the case on due process grounds.¹⁶⁵

IV. LEGISLATIVE REFORMS

The abdication by courts of their policing responsibilities and the inadequacy of a system of self-regulation leads to the inescapable conclusion that legislative reform is needed to curb employer abuses of pre-dispute arbitration mandates that they impose on their employees. Congress should amend the FAA not by

159. *Id.* at 385.

160. *Id.*

161. *Id.* at 387.

162. *Id.* at 387–88.

163. See SEARLE CIVIL JUSTICE INST., *supra* note 76, at 93–94 (discussing AAA refusals to administer consumer arbitrations for failure to comply with the Consumer Due Process Protocol). But, there is evidence that AAA does not catch all protocol violations, and even when it does catch them, AAA will administer the case if arbitration is ordered by a court. *See id.* at 89–90 & n.28, 92.

164. *See id.* at 100.

165. *See, e.g.,* Great W. Mortg. Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997); Mathews v. Life Care Ctr. of Am., Inc., 177 P.3d 867 (Ariz. Ct. App. 2008). *But see* Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663 (Cal. Ct. App. 2004).

prohibiting all pre-dispute arbitration provisions in employment contracts but by prohibiting those provisions that do not ensure basic due process. Such assurances include that the employee may be represented by counsel of his or her choice, that the arbitration demand may be filed at any time within the applicable statute of limitations, that the arbitrator have authority to order such discovery as is necessary to ensure a full and fair proceeding, and that the arbitrator have authority to award any remedy that a court could order.

Beyond these obvious due process guarantees, statutory reform should focus on the arbitrator appointing agencies and the arbitrator selection process. The employer unilaterally selects the arbitrator appointing agency when it designs the arbitration system. An employer who mandates arbitration under AAA rules, for example, has unilaterally selected AAA as its arbitrator appointing agency.

The enormous importance of the identity and impartiality of the arbitrator appointing agency is obvious. AAA and other arbitration service providers actively market their services to employers. The desire to attract and retain employer business can have a negative effect on the way in which the arbitration appointing agency administers the arbitration system. For example, in the early development of the AAA Employment Disputes Panel, employers believed that labor arbitrators would favor employees and expressed strong preferences for excluding them from the panel. The initial AAA Employment Disputes Panel excluded most labor arbitrators.¹⁶⁶ To its credit, AAA no longer does this, but more recently JAMS abandoned its refusal to administer arbitration agreements with class action waivers because of pressure from its business clients.¹⁶⁷

There are two ways in which an arbitrator appointing agency can slant the process to favor employers. First, the agency decides who it will list on its roster of arbitrators. Thus, the amended FAA should require that agencies employ objective and neutral criteria for determining whether to admit an arbitrator to their rosters. Agencies should bear a heavy burden of justifying the systematic exclusion of certain types of individuals from their rosters.¹⁶⁸ Employer-promulgated mandatory arbitration systems that employ appointing agencies who fail to use uniform objective neutral criteria for listing arbitrators on their rosters should be prohibited.

166. Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671, 674 (2000).

167. See Adam Klein & Nantiya Ruan, *Mandatory Arbitration of Employment Class Action Disputes: From the Perspective of Plaintiffs' Counsel*, in ARBITRATION 2008: U.S. AND CANADIAN ARBITRATION: SAME PROBLEMS, DIFFERENT APPROACHES, PROCEEDINGS OF THE SIXTY-FIRST ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 142, 150 (Patrick Halter & Paul D. Staudohar eds. 2009) [hereinafter NAA 61ST ANN. MTG. PROC.].

168. Employers often fear that labor arbitrators will fail to distinguish between the just cause standard commonly employed in labor arbitrations over discipline and discharge from the narrower, less employee-protective standards involved in employment cases. Professors Bingham and Mesch found no basis for the assumption that labor arbitrators could not distinguish between the two types of cases and standards. Bingham & Mesch, *supra* note 166, at 687–88. However, they also found that labor arbitrators were more likely to reinstate an employee than employment arbitrators faced with the same facts. *Id.* at 683. Arguably, a systematic exclusion of labor arbitrators from an agency's roster skews the roster against employees without any substantive justification.

Doing so will eliminate the temptation for agencies to curry favor with repeat customer employers by making their biased systems legally useless.

The second way in which an agency can slant the process to favor employers is by controlling the composition of the specific panel of arbitrators given to the parties in a specific dispute. The desire for repeat business can be a powerful incentive for agencies to give their customers what the agencies think the customers want. In labor cases, for example, AAA tailors its panels in an effort to meet the needs of the parties in light of the particular dispute.¹⁶⁹ Such tailoring may be appropriate where the agency has been selected mutually by the union and the employer. Like an arbitrator, the agency must curry favor with both adversaries to ensure their repeat business. Such tailoring is entirely inappropriate where the employer is the only party that controls whether the agency will see repeat business.

Random selection from the overall roster is a method of composing a specific panel that reduces a repeat player's ability to select the same arbitrator for multiple cases.¹⁷⁰ The amended FAA should require, as a condition of enforcing mandatory arbitration provisions, that the arbitration system use random selection or a similar unbiased method for composing the panel from which the parties will select their arbitrator.

The FAA amendment should also mandate strict disclosure rules for employment arbitrators. Professor Colvin found a significant repeat-arbitrator effect where employers were significantly more likely to prevail when appearing before an arbitrator multiple times.¹⁷¹ This does not necessarily reflect arbitrator bias. However, it is relevant to parties selecting an arbitrator. Consequently, arbitrators should be required to disclose prior dealings with parties, their lawyers, and their lawyers' firms.¹⁷²

Finally, the amendment should address class actions. Class action waivers serve no purpose other than to insulate employers from liability for low value claims, but the Supreme Court has now insulated such waivers from state law invalidation when they are paired with an arbitration mandate.¹⁷³ In one sense, the Court got it right. Class actions do not belong in arbitration. Space constraints do not allow me to elaborate fully on the problems encountered when arbitrating class actions, and others have already done so.¹⁷⁴ As is universally recognized, in class actions, due

169. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 217 (1997).

170. See *id.* Of course if both the employer and the plaintiff's counsel have had positive experiences with the same arbitrator, there is nothing to stop them from agreeing to use that arbitrator in another case. In such circumstances, the repeat player effect is balanced in much the same way as it is balanced in labor arbitration.

171. Colvin, *Empirical Research*, *supra* note 28, at 430–31.

172. See *Alim v. KBR-Halliburton*, 331 S.W.3d 178 (Tex. App. 2011) (vacating award because arbitrator failed to disclose that six years earlier he presided over a case with a related company represented by the same counsel who represented the employer in the current case).

173. See *supra* notes 132–51 and accompanying text.

174. See, e.g., Scott L. Nelson, *Bazzle, Class Actions, and Arbitration: An Unfinished Story*, in 1 PRAC. LAW INST., 10TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION

process concerns are heightened because absent class members can be bound by the outcome. In class action arbitrations, the arbitrator has the burden to ensure due process and protect the rights of absent class members.¹⁷⁵ But the arbitrator has been mutually selected by the named claimants and the respondent, raising the question why should absent class members who have had no role in arbitral selection be forced to rely on the arbitrator to protect them. The problem is illustrated graphically when we consider class settlements. The adjudicator must ensure that the settlement is fair, reasonable, and adequate for all class members. Moreover, absent class members must be given notice of a proposed settlement and an opportunity to raise objections. Consider what would occur in class-action arbitration when absent class members raise objections to a proposed settlement. The named claimants and the respondents who agreed to and will advocate for the settlement are the same parties who chose the arbitrator who will now rule on the absent class members' objections. From the objectors' perspective, the deck is stacked against them because they are litigating their objections before an arbitrator selected by their opponents. There is no way to cure this appearance of arbitrator bias. Class actions belong in court and not in arbitration. Any legislative solution should ban the waiver of the right to bring a class action in court.

Proponents of the AFA argue that if the abuses are eliminated and arbitration procedures are truly fair, they will be no faster and no cheaper than litigation and employers will no longer use them. The Raytheon experience suggests that they may be right.¹⁷⁶ But that would only mean that regulation would have the same effect as prohibition. That is not an argument against regulation.

When the Due Process Protocol was adopted, it provided valuable guidance to all parties trying to get employment arbitration right, including employers, arbitration service providers, and arbitrators.¹⁷⁷ Experience since the Protocol has revealed numerous shortcomings.¹⁷⁸ Amending the FAA to ensure fair employment arbitration processes would pick up where the Protocol left off.¹⁷⁹

A complete prohibition on pre-dispute arbitration mandates in employment contracts will not serve the interests of employees in having an accessible forum in which to adjudicate their claims. It will not serve the interests of employers in

INSTITUTE 307, 307 (2005); Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006); Klein & Ruan, *supra* note 167; Andrew Remy Norton, Note, *Rules for a New Game: Finding a Workable Solution for Applying Class Actions to the Arbitration Process*, 2 J. DISP. RESOL. 495 (2005); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006).

175. For a discussion from an arbitrator's perspective, see Barry Winograd, *An Introduction to Mandatory Arbitration and Class Action Waivers*, in NAA 61ST ANN. MTG. PROC. 127, 138–40.

176. See Coleman, *supra* note 58.

177. See Jacquelin F. Drucker, *The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions*, 11 EMP. RTS. & EMP. POL'Y J. 345, 349 (2007).

178. See Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005).

179. I am not the only one to call for such amendments to the FAA. See, e.g., Ellis, *supra* note 2, at 47–50; Letter from William H. Holly, Jr., President, National Academy of Arbitrators, to Senator Russ Feingold App. 7 (Oct. 13, 2009), available at <http://naarb.org/documents/SenatorFeingoldMaterialsHolley.pdf>.

having an adjudication procedure that can resolve claims quicker and cheaper. It will only serve the interests of that segment of the plaintiffs' bar that wish to continue to play the lottery. We will not know whether statutory reform will preserve the accessibility, speed, and cost-effectiveness of the arbitral forum, but it is worth trying—the worst we end up with is a de facto ban.