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**on behalf of the**
**U.S. Chamber Institute for Legal Reform**

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

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

## May 16, 2019

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Arbitrations Employ Fair Procedures**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Arbitration Is Quicker And Easier To Navigate Than Court Adjudication**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[26] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Banning Pre-dispute Arbitration Agreements Will Eliminate All Arbitration**

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

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

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

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

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

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

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

[37] *Id.* at 327.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[48] *Mayer Brown Study* at 1.

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

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

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

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

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