

**TESTIMONY OF PHIL GOLDBERG**  
**BEFORE THE**  
**U.S. HOUSE COMMITTEE ON THE JUDICIARY**  
**SUBCOMMITTEE ON ANTITRUST, COMMERCIAL,**  
**AND ADMINISTRATIVE LAW**

**Hearing on**  
**Pre-Dispute Arbitration**  
**May 16, 2019**

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of this distinguished Committee, thank you for your gracious invitation and allowing me to testify today about pre-dispute arbitration agreements. It is a particular honor for me to be here. While I was attending law school at night in 1998-1999, I worked during the day for a member of Congress who served on the Judiciary Committee. I have high reverence for this Committee and the judiciary.

Currently, I am a partner at the law firm of Shook Hardy & Bacon, L.L.P. and co-chair the firm's Public Policy Group and National Amicus Practice. In 2015, I became the Director of the Progressive Policy Institute's Center for Civil Justice. The PPI Center for Civil Justice believes that the civil justice system is a keystone of American economic and political liberty because it provides a forum for aggrieved individuals and businesses to peacefully resolve their disputes. This ability to resolve disputes quickly and conclusively undergirds free enterprise by protecting economic and social rights. As is customary, the views I express today are my own.

A major reason that pre-dispute arbitration agreements have become more commonplace in our society is because they achieve this goal of peaceful, quick and conclusive dispute resolution often better than the civil justice system for many types of claims. As I will discuss below, the civil justice system over the past few decades has become much more expensive for the parties involved and much less responsive to consumers and employees. Agreeing ahead of time to avoid

the high cost and high stakes of prolonged litigation, which often serves the lawyers more than the parties, is increasingly making sense for many types of claims.

### **The Benefits of Pre-Dispute Arbitration vs. the Deficiencies of Litigation**

The primary benefit of pre-dispute arbitration agreements, and arbitration generally, for consumers, employees and other claimants is that it provides them with a more efficient, less costly, and less adversarial means to obtain redress than civil litigation. Filing and waging a lawsuit is not for everyone. It has been described as being to everyday life like “war is to peacetime.”<sup>1</sup> It can be costly, time-consuming and draining. In many cases, the lawyers on both sides operate from a position of mutually assured destruction, where the battles are contentious, expensive and focused on exerting pain to the other side. So, for many people, if they sustain an injury, litigation may be unrealistic and undesirable. Knowing that a path to resolve such a dispute has already been agreed to where, by law, you must be given a reasonable and fair path to redress, can be the deciding factor to pursue justice. Without a pre-dispute arbitration agreement, that person’s injury may go unaddressed and the defendant will not be held accountable.

Consumer, employment and business-to-business disputes often fall into the categories where pre-dispute arbitration provides the most benefits. An injury, no matter how important to the person, may be too financially modest to pursue in litigation. A lawyer may not have the financial interest in taking a low-stakes case if the injury is solely to an individual. About 20 years ago, studies found that lawyers may not take a case unless the expected value of the claim was at least \$60,000.<sup>2</sup> That number is now closer to \$200,000.<sup>3</sup> Litigation has simply become a lot more

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<sup>1</sup> Janet Malcolm, *The Journalist and the Murderer* 63 (2011).

<sup>2</sup> See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 *Disp. Resol. J.* May-Jul. 2003, at 8, 10-11.

<sup>3</sup> See, e.g., Minn. State Bar Ass’n, *Final Report: Recommendations of the Minnesota Supreme Court Civil Justice Task Force* 11 (Dec. 23, 2011), at [http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/Civil\\_Justice\\_Ref\\_Task\\_Force\\_Dec\\_2011\\_Rpt.pdf](http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf).

expensive and time-consuming, and many lawyers who take claims on contingency bases want to make sure they are going to be compensated for their time. So, where the contingency fee used to be seen as a mechanism to allow people to hire lawyers for questionable or small claims, that is no longer true. Most skilled plaintiffs' lawyers treat the contingency fee like a certainty fee. When a claim is below that threshold, arbitration may provide the only chance at redemption, especially for very modest claims where the defendant pays the costs and fees involved.

In the consumer setting, some low dollar cases may be brought as class actions. This may entice a lawyer to take the case, but class actions over small-scale injuries have proven to be poor dispute resolution methods for the parties. Experience has shown that often, few members of a class choose to redeem any award they may be owed.<sup>4</sup> For example, a study by the Consumer Financial Protection Bureau (CFPB) of consumer class actions reported a “weighted average claims rate” by class members of only about 4%.<sup>5</sup> Other studies report even lower rates of class member involvement.<sup>6</sup> As a result, class actions generally end up focusing on lawyer fees, coupon settlements, and *cy pres* awards to third parties to justify their fees and releasing the claims against the defendant—not providing injured people with any actual recoveries.

Further, class lawyers are increasingly coming up with the legal theories for suing companies and then finding plaintiffs on whose behalf to sue, not the other way around.<sup>7</sup> In these actions, the vast majority of the class has not experienced the harm alleged in the complaint, which is why they do not participate in any awards. In these cases, class litigation is becoming an abstract

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<sup>4</sup> See U.S. Chamber Inst. for Legal Reform, *Unstable Foundation: Our Broken Class Action System and How to Fix It* 3-5 (Oct. 2017), at [https://www.instituteforlegalreform.com/uploads/sites/1/UnstableFoundation\\_Web\\_10242017.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/UnstableFoundation_Web_10242017.pdf) (analyzing studies of recoveries under class actions and discussing specific case examples).

<sup>5</sup> See Consumer Fin. Pro. Bureau, *Arbitration Study: Report to Congress 2015* 30 (Mar. 2015).

<sup>6</sup> See, e.g., Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), at <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.

<sup>7</sup> See Victor E. Schwartz & Cary Silverman, *The Rise of Empty Suit Litigation*, 80 Brook. L. Rev. 599 (2015).

endeavor no longer focused on creating a path to compensate those who are actually injured. Also, the stakes for the litigation far outpace any actual harm. Plaintiffs' lawyers have similarly become skilled at inflating noneconomic damages in other types of cases.<sup>8</sup> Recent studies have shown that pain and suffering awards in the United States are more than ten times those in the most generous of other nations.<sup>9</sup> In inflation-adjusted numbers, for example, product liability awards were five times higher in 2005 than in 1992.<sup>10</sup> Pre-dispute arbitration agreements protect businesses from potential abuse and reduce the risk of losing a "jackpot" award, while at the same time allow actually aggrieved individuals to pursue justice and receive an appropriate recovery.

Further, arbitration is superior to litigation when it is important to try to resolve a dispute without compromising useful relationships that will need to endure after the dispute's resolution. This may not be a critical factor for consumers, but it often is for employees and vendors who know the people they are suing. In deciding whether to pursue justice, they may weigh the potential that litigation will adversely impact key relationships – not just with the defendant, but with colleagues, business partners, and customers. These dynamics can exist even when companies take significant measures to protect their employees from retaliation and particularly when the suits involve small or family-run businesses. Litigation by its nature is adversarial and can be highly personal for the people involved, either as parties or witnesses. The person who was wronged may have to decide that a dispute is important enough to take these risks, let alone go through the cost, time and hardship of litigation. Relying on litigation alone may mean that small or medium size issues will never get reported or remedied. That is not good for anyone – neither

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<sup>8</sup> See Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951) (observing the size of pain and suffering awards took its first leap after World War II as personal injury lawyers became adept at finding ways to enlarge these awards).

<sup>9</sup> See Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006).

<sup>10</sup> See Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, at 10 tbl. 11 (Bureau of Justice Statistics, Apr. 9, 2009).

the companies who want to provide employees with a good, safe place to go to work, nor employees who simply want to go to work and do their jobs.

Pre-dispute arbitration agreements provide a viable alternative to the civil justice system in each of these areas: it is focused on resolving disputes, not inflaming them. Arbitration is also much less expensive than litigation, which can allow claimants to keep more of any awards they are given. In employment cases, for example, the American Arbitration Association (AAA) procedures dictate that employees cannot pay more than \$300 in total arbitration costs.<sup>11</sup> In many situations, this fee is less than the filing fee in court. The employer pays all of the remaining fees. In fact, often the plaintiff or claimant pays nothing in arbitration and does not have to pay a 40% contingency fee to a lawyer.<sup>12</sup> Also, bearing the costs of the proceedings, which for employment litigation can include the employee's attorney fees, can motivate the company to settle quickly. That can be a good thing in many situations. Even when claims are taken through arbitration, they often reach conclusions far faster than had they pursued litigation. As this Committee can appreciate, many courthouses are overburdened, and after discovery battles, and escalating litigation tactics, it could take years to resolve disputes that arbitration can resolve in months. Discovery in arbitration is much more streamlined, the rules are less formal, and the claimant may never have to be deposed or testify. Again, the system is wired toward quick and fair resolutions.

Also, as pre-dispute arbitration has become more commonplace, the system has become more standardized and produces results often as good as litigation for the claimant. Arbitrators are generally skilled neutrals, many of whom are former judges. The AAA and JAMS have comprehensive rules and procedures to ensure independence and competence among arbitrators

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<sup>11</sup> Am. Arbitration Ass'n, *Employment/Workplace Fee Schedule: Costs of Arbitration* (Oct. 1, 2017), available at [https://www.adr.org/sites/default/files/Employment\\_Fee\\_Schedule.pdf](https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf).

<sup>12</sup> See, e.g., 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, 802 (2003).

and due process for claimants. Rather than preside over litigation, which can be an all-or-nothing dispute resolution method, arbitrators can have other, varied options. An arbitrator can work with the parties to reach a fair resolution for both sides. A study published in the Stanford Law Review found that, contrary to what we hear from the other side, plaintiffs or claimants generally get the same or better outcomes in arbitration than in litigation.<sup>13</sup> The U.S. Supreme Court has made these points in case law endorsing the use of pre-dispute arbitration agreements. “The advantages of arbitration are many: it 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; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”<sup>14</sup> Also, “the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”<sup>15</sup>

These benefits, though, cannot be achieved unless the arbitration path is agreed to before the injury or dispute arises. Once the parties become adversarial, they are unlikely to agree on a method for resolving their disputes. In addition to the hard feelings that are likely to infest these relationships, the parties’ incentives fundamentally change after a dispute has occurred, and they are diametrically opposed to each other. A business may not agree to arbitrate small claims because they know that the individual or other businesses may not want to take on the risks and burdens of litigation or be able to find a lawyer willing to take the case. The opposite may occur

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<sup>13</sup> See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (2005); see also Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56 (Nov. 2003 - Jan. 2004); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45, 47-50 (Nov. 2003-Jan. 2004); Hill, *supra* note 4, at 802; Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 13 (May/July 2003).

<sup>14</sup> *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

<sup>15</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

if the claim is for a substantial amount of money or if civil litigation, regardless of the merits or size of the claim, could create business and reputation risks for the company. Here, the company may prefer arbitration and the individual may not. This is why post-dispute arbitration agreements rarely occur, and when they do, it is often only when both sides are looking to buy down risks.

### **Conclusion**

For many people, pre-dispute arbitration may be their only path for achieving justice for many types of claims. The civil justice system has become exceedingly expensive and time-consuming over the past few decades, particularly in the types of cases where pre-dispute arbitration agreements are most often used. The title of this hearing refers to the erosion of the civil justice system, and I would agree that the civil justice system has been eroding for many people in many situations. Many plaintiffs' lawyers are highly skilled at trying to inflame juries and judges against corporate defendants, leverage out-of-court business and consumer pressures to generate settlements regardless of the merits of the claims, and use litigation gamesmanship and in-court techniques to drive up noneconomic and punitive damages. It is not a surprise that the parties – both claimants and defendants – find value in an alternative dispute resolution system that is not subject to this escalation and abuse, but focuses on ensuring aggrieved individuals get fairly compensated. There may be ways to improve the pre-dispute arbitration system, but it is providing the access to justice for plaintiffs and defendants that they can no longer find in the civil justice system.

Again, thank you for the honor of testifying before you today. I would be pleased to answer any questions you may have.