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The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System

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Abstract

Opponents of strong enforcement of arbitration agreements, as authorized by the Federal Arbitration Act, contend that arbitration is unfair and biased. The evidence is to the contrary. Study after study shows that consumers and employees fare as well, if not better, in arbitration than in court. Moreover, arbitration's speed and low costs allow the resolution of many claims that would be impractical to litigate. While the arbitration process may not treat lawyers as well as drawn-out litigation does, it is a boon for consumers, and legislation or regulation to curtail it would only injure them by cutting off a fast and efficient means of dispute resolution.

> I should dread a lawsuit beyond almost anything else short of sickness and death.
>
> —Judge Learned Hand[1]

Over the past several years, there have been numerous attacks in the courts and in Congress on the Federal Arbitration Act (FAA) and the arbitration process. Critics want to eliminate the use of arbitration in consumer and employment disputes, claiming that it is unfair, is biased in favor of businesses, and does not provide adequate remedies. Critics also claim inaccurately that the FAA was meant to apply only to disputes between commercial entities and has been misinterpreted by the Supreme Court contrary to the intent of Congress.

This paper, in its entirety, can be found at **http://report.heritage.org/lm97**

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Key Points

- The attacks on arbitration and the attempts in Congress to restrict or entirely eliminate arbitration requirements are unjustified and risk hurting both consumers and businesses.
- Arbitration is generally faster, cheaper, and more effective than the litigation system. It is not affected by cutbacks in judicial budgets or the increases in court dockets that significantly delay justice.
- There is no empirical evidence that arbitration favors businesses over consumers or that its rules of procedure impinge on the rights of individuals or prevent them from receiving just compensation for their injuries.
- In fact, arbitration improves access to justice, and eliminating arbitration would make it very difficult for individuals to recover for many claims, particularly those that are relatively small, if they are forced to go to court.
- Legislation to curtail access to arbitration "would make worse off the very people whom Congress" is seeking to protect.

In truth, arbitration is an efficient and fair alternative to our costly and burdensome litigation system to resolve disputes, particularly between businesses and consumers. The attacks on arbitration are misguided, and proposed legislation and regulations risk eliminating a process that benefits both consumers and businesses by providing the remedies and compensation due to injured parties quickly, efficiently, and relatively inexpensively.

Given the arbitration process's many benefits over the only real alternative—expensive and time-consuming litigation that in many cases does more to line trial lawyers' pockets than redress consumers' injuries—any action to curtail arbitration would only injure consumers and workers.

Arbitration in Federal Law and the Courts

Congress enacted the Federal Arbitration Act in 1925 to establish a strong federal policy in favor of arbitration.[2] The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[3] To carry out that end, it requires that a court cease consideration of any litigation that is properly "referable to arbitration under an agreement in writing for such arbitration."[4] Parties can obtain a federal court order directing that "arbitration proceed in the manner provided for" in a written agreement when one of the parties to such an agreement refuses to comply with the arbitration provision.[5]

Congress has also codified into federal law the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides for the enforcement in federal courts of international arbitration agreements and awards.[6]

The Supreme Court has upheld the broad reach of the FAA in a long series of cases, including five in just the past three years.[7] As the Court has repeatedly explained, the FAA's purpose is "to ensure that 'private agreements to arbitrate are enforced according to their terms.'"[8]

The Court has also recognized that there is no doubt that "Congress, when enacting this law, had the needs of consumers, as well as others, in mind."[9] Indeed, Congress's clear understanding was that the FAA would apply to consumers, who would receive its benefits, directly contradicting the erroneous claim made by some that the FAA "was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power" or that the Supreme Court has "interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress."[10]

The advantages of arbitration to consumers are plain. To begin with, it is "helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[11] As described in a congressional report:

> 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

1. Learned Hand, *Deficiencies of Trials to Reach the Heart of the Matter*, in 3 Lectures on Legal Topics 89, 105 (Association of the Bar of the City of New York 1926).
2. *See* Andrew Kloster, *Why Congress and the Courts Must Respect Citizens' Rights to Arbitration,* Heritage Foundation Backgrounder No. 2784 (March 27, 2013); *available at* http://www.heritage.org/research/reports/2013/03/why-congress-and-the-courts-must-respect-citizens-rights-to-arbitration; 9 U.S.C. §§1–16 (1947).
3. 9 U.S.C. §2.
4. 9 U.S.C. §3.
5. 9 U.S.C. §§3, 4.
6. 9 U.S.C. §§201–208 (1970).
7. Stolt-Nielson S.A, v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011); CompuCredit Corp. v. Greenwood, 132 S.Ct. 665 (2012); Oxford Health Plans LLC v. Sutter, 569 U.S. ___ (2013); American Express Co. v. Italian Colors Restaurant, 570 U.S. ___ (2013).
8. *Stolt-Nielson S.A.,* 130 S.Ct. at 1773 (citations omitted).
9. Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 280 (1995).
10. Arbitration Fairness Act of 2013, S. 878, 113th Cong. §2 (2013).
11. *Allied-Bruce Terminix Companies*, 513 U.S. at 280.

> 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.[12]

In fact, "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."[13]

Despite the long history of arbitration as a successful, less expensive alternative to our cumbersome litigation system, a series of bills have been introduced in Congress to eliminate it from certain fields. These include:

- **The Arbitration Fairness Act**, which would render pre-dispute arbitration agreements unenforceable and invalid in employment, consumer, antitrust, and civil rights disputes and would specify that courts alone, and not arbitrators, could determine the validity and enforceability of an agreement to arbitrate;[14]
- **The Arbitration Fairness for Students Act**, which would prohibit colleges and universities that participate in federal student assistance programs from including pre-dispute arbitration agreements in student enrollment contracts;[15]
- **The Consumer Mobile Fairness Act**, which would invalidate pre-dispute arbitration clauses in contracts involving consumer mobile services or mobile broadband Internet access service;[16]
- **The Fairness in Nursing Home Arbitration Act**, which would invalidate pre-dispute arbitration clauses between long-term care facilities and their residents;[17] and
- **The Consumer Fairness Act**, which would amend the Consumer Credit Protection Act to define pre-dispute arbitration clauses in consumer contracts to be an unfair and deceptive trade practice.[18]

To date, none of these bills has been enacted into law. As explained below, their basic premise—that arbitration is somehow unfair to or bad for consumers—is false, and the evidence shows precisely the opposite: Arbitration's speed and low costs empower consumers to bring many claims that they would otherwise be unable to pursue.

Consumer Financial Protection Bureau Targets Arbitration

The new Consumer Financial Protection Bureau (CFPB) established by the Dodd–Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (Dodd–Frank Act) has authority to study and limit arbitration. Section 1028(a) of the Dodd-Frank Act directs the CFPB to conduct a study of the "use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services" and report to Congress.[19]

Unfortunately, Congress did not stop at requiring the Bureau to study arbitration. The Dodd–Frank Act also authorizes the Bureau to:

> prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of

12. H.R. Rep. No. 97-542, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 37897.
13. *AT&T Mobility LLC*, 131 S.Ct. at 1749.
14. See S. 878 and H.R. 1844, 113th Cong. (2013). *See also* H.R. 4181, 112th Cong. (2012) (barring arbitration agreements in employment contracts) and S. 2915, 111th Cong. (2009–10) (making an agreement between an employer and employee to arbitrate a claim of rape unenforceable).
15. S. 3557, 112th Cong. (2012).
16. S. 1652, 112th Cong (2011). This is clearly intended to overturn *AT&T Mobility LLC.*
17. H.R. 6351, 112th Cong. (2012).
18. H.R. 991, 111th Cong. (2009).
19. 12 U.S.C. §5518(a) (2010).

conditions or limitations is in the public interest and for the protection of consumers.[20]

This grant of authority imposes no clear constraint on the power of the CFPB to limit the use of arbitration agreements. What is in "the public interest" of protecting consumers is such a broad legal standard that it is almost no standard at all. The Act does specify that any such regulation imposed by the Bureau "shall be consistent with the study conducted" by the CFPB, but there already are concerns about the way the CFPB is designing its study.

The CFPB published a request for public comment on the scope, methods, and data sources for its study of arbitration on April 27, 2012.[21] That request noted that the CFPB would consider the prevalence of its use, its impact and its use in particular settings, the types of claims brought, and its impact outside of arbitral proceedings.

As one commenter has noted, there is a serious problem with this approach: The questions posed by the CFPB in its public notice "suggest that the Bureau contemplates a study that is far too narrowly focused on the prevalence and mechanics of predispute arbitration agreements."[22] The CFPB will be unable to determine whether arbitration agreements serve "the public interest" unless it gathers information on and studies the "advantages and disadvantages of arbitration" in consumer agreements, "as compared to the alternative method of resolving such disputes—litigation in court."[23]

Any study by the Bureau will be incomplete and inadequate if it does not examine whether a limit on arbitration that would shift more dispute resolution to litigation would:

- Drive up the costs of consumer products;
- Decrease the ability of consumers or businesses to pursue claims, particularly low-value claims;
- Increase the volume of frivolous litigation filed just to obtain settlements;
- Decrease the availability of consumer products; and
- Adversely affect consumers, whose only other remedy would be to participate in class-wide litigation that often provides large attorneys' fees but minimal recovery for consumers.

Empirical research on consumer arbitration cannot be meaningful unless it is compared "to some sort of baseline, most commonly comparable cases in court."[24] If the CFPB does not make these changes in the design of its arbitration study, any regulation it issues will be subject to challenge as arbitrary and capricious for its failure to properly "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[25]

20. 12 U.S.C. §5518(b).
21. Request of Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, Bureau of Consumer Financial Protection, Docket No. CFPB-2012-0017, 77 Fed. Reg. 82 (April 27, 2012).
22. Letter from Richard Samp, Washington Legal Foundation, to Monica Jackson, Bureau of Consumer Financial Protection, Comments Regarding the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements 2 (June 22, 2012).
23. Letter from David Hirschmann, U.S. Chamber of Commerce, & Lisa A. Rickard, U.S. Chamber Institute for Legal Reform, to Monica Jackson, Bureau of Consumer Financial Protection, Comments on Request for Information Regarding the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements 6 (June 22, 2012).
24. Christopher R. Drahozal, Comments on Request for Information Regarding the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements 4.
25. Business Roundtable v. S.E.C., 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citations omitted) (SEC rule on corporate proxy elections was arbitrary and capricious).

This is particularly true if the Bureau "duck[s] serious evaluation of the costs that could be imposed upon companies"[26] and consumers by forcing them into court to resolve disputes.[27]

Any action by the CFPB may also be subject to legal challenge because the agency lacks a constitutionally appointed director under a recent court of appeals decision now before the Supreme Court. On January 4, 2012, President Barack Obama "recess appointed" Richard Cordray to lead the CFPB, along with three individuals to serve on the National Labor Relations Board (NLRB), despite the fact that the Senate was in *pro forma* session. In a lawsuit contesting actions taken by the NLRB, the U.S. Court of Appeals for the D.C. Circuit held that the President's putative recess appointments of the NLRB members "were invalid from their inception"[28] because the Senate was not in recess at the time the vacancies arose and the appointments were made. Thus, all actions taken by the NLRB in reliance on those appointments were "void." Any action by the CFPB that relies on the lawfulness of Cordray's appointment would be subject to the same challenge.[29]

The False Narratives About Arbitration

Much of the momentum behind the efforts to limit or eliminate arbitration have been driven by two disingenuous narratives advanced in the public arena, one based on a specific, sensational employment claim that turned out to be false and another based on a misleading report by an advocacy organization opposed to arbitration.

The Jamie Leigh Jones Case. Illustrating "the fallacy of judging any dispute resolution system by one or two poster person cases where a victim can tell a potentially compelling story,"[30] a woman who claimed that she was unable to pursue a rape claim against her employer because of an arbitration clause was used to advance the effort to invalidate the enforceability of pre-dispute arbitration agreements for all employment-related claims and alleged violations of civil rights.

Senator Al Franken (D–MN) has been the chief sponsor of many of the bills seeking to curtail arbitration. His legislation, including an amendment attached to the Fiscal Year 2010 Defense Appropriations bill, would ban government funding of defense contractors that use arbitration to resolve employee civil claims regarding rape, assault, wrongful imprisonment, harassment, and discrimination. The bill, his office explained,

> was inspired by the story of Jamie Leigh Jones, a 20-yr-old employee of defense contractor KBR stationed in Iraq who was gang raped by her co-workers and imprisoned in a shipping container when she tried to report the crime. Her father and her local congressman worked together to secure her safe return to the United States, but once she was home, she learned a fine-print clause in her KBR contract banned her from taking her case to court, instead forcing her into an "arbitration" process that would be run by KBR itself.[31]

26. *Business Roundtable*, 647 F.3d at 1152.

27. Post-dispute arbitration is not a workable alternative because the parties' incentives are different, and they are "unlikely to agree to arbitration." *Arbitration: Is it Fair When Forced? Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Victor Schwartz at 12). As Victor Schwartz points out, "claimants with very modest (low dollar amounts) claims would likely prefer arbitration because it is less expensive than the court system; however, most defendants would likely prefer to litigate in the court system because the higher transaction costs serve to both weed out the more speculative claims and provide the defendant with greater settlement leverage.... The same outcome would also occur when the roles are reversed and the plaintiff has a relatively high dollar amount claim. Here, the defendant would likely prefer arbitration to minimize costs, but the plaintiff would want to proceed in the court system to either increase settlement leverage or potentially obtain a substantial jury award. The result in either case is that the litigation adversaries would be unlikely to agree to the others' preferred means of dispute resolution." *Id.*

28. Noel Canning v. National Labor Relations Board, 705 F.3d 490, 507 (D.C. Cir. 2013).

29. Cordray's appointment is at issue in *State National Bank of Big Spring v. Geithner*, No. 1:12-CV-01032 (D.C.D. filed June 21, 2012).

30. *Arbitration: Is it Fair When Forced? Hearing Before the S. Comm. on the Judiciary,* 112th Cong. (2011) (statement of Victor Schwartz at 12) [hereinafter Schwartz Testimony].

31. Press Release, Sen. Al Franken (D–MN), Statement on Passage of Jamie Leigh Jones Amendment (Dec. 19, 2009), *available at* http://www.franken.senate.gov/?p=hot_topic&id=520. See also Press Release, Sen. Al Franken, Proposal to Guarantee Sexual Assault Victims Their Day in Court (Oct. 6, 2009), *available at* http://www.franken.senate.gov/?p=hot_topic&id=569.

Jones's "harrowing story" made international headlines and was the subject of congressional hearings; she was even given "a starring role in the new [anti–tort reform] documentary Hot Coffee."[32] The problem with this "inspirational" story was that the whole narrative was actually untrue.

First, by the time Senator Franken's amendment to the defense appropriations bill was approved by the Senate on October 6, 2009, it had already been determined that the arbitration clause in Jones's employment contract did not apply to these claims. A federal district court held as much in a May 2008 decision. Moreover, the U.S. Court of Appeals for the Fifth Circuit affirmed that determination, holding that Jones's claims for assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision; and false imprisonment were not "related to" her employment and therefore fell "outside the scope of the arbitration provision."[33] Ultimately, therefore, arbitration was not even an issue in resolution of her claims.

Second, when Jones's case finally did go to a jury after a month-long trial, she lost. Inconsistencies in her medical records and statements to authorities supported KBR's claim that Jones had made a false accusation "because she wanted a way out of her one-year contract with KBR."[34] KBR also produced evidence that Jones had "a history of being dishonest on resumes and job applications, including not disclosing" various medical ailments that included mental problems.[35]

A reporter for *Mother Jones* who had supported Jones before the trial conceded afterwards that there was substantial evidence "that could cause jurors to question her credibility."[36] Ultimately, the claim was deemed to be so specious that KBR was awarded $145,000 in court costs against Jones.[37] No criminal prosecution was ever pursued against Jones's alleged attackers.[38]

Neither the fact that Jones was not required to arbitrate her claims nor the flimsiness of those claims in the first place prevented opponents of arbitration from using her story to try to discredit arbitration agreements generally and eliminate arbitration clauses specifically in employment contracts. In fact, even after her story unraveled, bills were introduced in Congress to achieve these objectives.

Other False Claims About Arbitration. Opponents of arbitration argue that its use should be curtailed or eliminated because it is unfair to consumers who are "forced" to accept arbitration in their contracts, is too expensive, favors businesses, and interferes with the class action rights of consumers. Many of these claims found support in a 2007 report by Public Citizen that claimed that arbitration is "rigged" and that the system "stacks the deck to favor corporate interests over consumers."[39] Each of these claims is incorrect.

No one is forced into arbitration. To begin with, arbitration is not "forced" on consumers. An obvious point is that "no one forces an individual to sign a contract."[40] Consumers have many choices, and if an individual seeks to purchase a particular product or service, he or she can decide "whether the benefits outweigh having to arbitrate" the claim if a dispute arises with the company selling the

32. Stephanie Mencimer, *Why Jamie Leigh Jones Lost Her KBR Rape Case,* Mother Jones, July 7, 2011, *available at* http://www.motherjones.com/politics/2011/07/kbr-could-win-jamie-leigh-jones-rape-trial.

33. Jones v. Halliburton Co., 583 F.3d 228, 242 (5th Cir. 2009).

34. Jessica Priest, *KBR Rape Suit Loss Devastates Accuser; Company Relieved,* Houston Chronicle, July 8, 2011.

35. *Woman Loses Iraq Rape Case Against Contractor,* Associated Press, July 8, 2011, *available at* http://www.nbcnews.com/id/43681446/ns/world_news-mideast_n_africa/t/woman-loses-iraq-rape-case-against-contractor/.

36. Mencimer *supra* note 32.

37. Susanna Kim, *Jamie Leigh Jones Ordered to Pay $145,000 in Court Costs After Failed Rape Claim,* ABC News, Sept. 30, 2011, *available at* http://abcnews.go.com/Business/jamie-leigh-jones-ordered-pay-145000-contractor-kbr/story?id=14635936.

38. The Justice Department made that determination in 2008, and the State Department also found no credibility in her claims in 2005, long before Jones became a *cause célèbre* over arbitration. *Id.*

39. *The Arbitration Trap: How Credit Card Companies Ensnare Consumers,* Public Citizen 4 (Sept. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf. A reviewer of the report noticed that it "ignores almost all of the existing literature bearing on this question." Prof. Peter B. Rutledge, *Arbitration—A Good Deal for Consumers: A Response to Public Citizen,* U.S. Chamber of Commerce Institute for Legal Reform 6 (April 2008).

40. Schwartz Testimony at 3.

product or service. Given the competitive business environment, "if contractual arbitration were an anathema to millions of consumers, and there was consumer outrage about them, an enterprising business seeking a competitive advantage would simply offer a product or service without such a provision"—although that business would probably have to increase the price of that product or service to cover the increased risk of expensive litigation.[41]

Most important, the claim that arbitration clauses are universally used in consumer contracts and that consumers therefore have no choice is also false. In fact, "[m]ost consumer contracts do not include arbitration clauses, and even most credit card issuers do not, and never have, included arbitration clauses in their cardholder agreements."[42] Data from the Federal Reserve, with which credit card issuers are required to file their credit card agreements, show that as of 2009, only 17 percent of credit card issuers used arbitration clauses in their agreements.[43]

One study of 161 companies in more than 30 different industries found that only 33 percent of surveyed companies had arbitration clauses. It found that usage varied significantly by industry. For example, the financial services sector "used them 69.2% of the time while other industries such as food and entertainment never use them."[44] Contrary to claims that arbitration agreements are one-sided, the same survey also found that arbitration clauses "appear in many respects to put the consumer on equal terms with the businesses that drafted them."[45]

Arbitration's speed and efficiency benefit consumers. Arbitration is faster and less expensive than its alternative: litigation. According to statistics from the American Arbitration Association, the average length of time from the filing of an arbitration request to the final award is just 6.9 months; the average for business claimants is 6.6 months, and the average for consumer claimants is seven months.[46] Another study of California arbitration data in 2006 found that consumer claims against businesses in arbitration took 4.35 months on average, while business claims against consumers took 5.6 months.[47]

By comparison, "claims filed by individuals against businesses in court have a median length of 19.4 months. Lawsuits filed by businesses against individuals have a median length of 15 months."[48] The median length of time from the filing of a complaint in federal court to trial is 23.6 months, but in the busiest federal courts, such as in Connecticut, it can take as long as 38.6 months to get to trial.[49] If an appeal is filed, the time to final resolution of a dispute is much longer. Only 1.1 percent of civil cases filed in federal court ever make it to trial; the overwhelming majority are settled or dismissed at earlier stages, in large part due to the cost of litigation.[50]

Claims that arbitration somehow removes a consumer's right to a jury trial are therefore exaggerated given how few civil cases ever reach a jury. By contrast, "50 percent of consumer claims in [American Arbitration Association] arbitrations made it to a hearing before an arbitrator," so a consumer in arbitration is much more likely than a plaintiff in court

41. *Id.* at 3–4.
42. *Arbitration: Is it Fair When Forced? Hearing Before the S. Comm. on the Judiciary, 112th Cong.* (2011) (statement of Christopher R. Drahozal at 2) [hereinafter Drahozal Testimony].
43. *Id. at 3.*
44. *S. 1782: the Arbitration Fairness Act of 2007: Hearing of the Subcomm. on the Constitution, S. Comm. on the Judiciary*, 110th Cong. (Dec. 12, 2007) (statement of Peter Rutledge) (internal citation omitted) [hereinafter Rutledge Testimony].
45. Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clause: The Average Consumer's Experience,* 67 L.&Contemp Probs 55, 72 (2004).
46. Christopher R. Drahozal and Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations* (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1365435.
47. Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes,* Metropolitan Corporate Counsel, July 2006, available at http://www.metrocorpcounsel.com/pdf/2006/July/32.pdf.
48. *Id.*
49. Administrative Office of the U.S. Courts, Statistical Tables for the Federal Judiciary, table C-5 (Dec. 2011), *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/C05Dec11.pdf.
50. Administrative Office of the U.S. Courts, 2010 Annual Report of the Director: Judicial Business of the U.S. Courts, table 4.10 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table410.pdf. One third of that 1.1 percent are nonjury trials.

to have his story heard in person by a neutral fact-finder.[51] What is clear is that "virtually every study considering the issue has concluded that results in arbitration are far swifter than those in litigation."[52]

Arbitration is also less expensive and gives consumers with smaller claims the ability to pursue remedies that would be impossible to pursue in litigation because of the enormous expense, including attorneys' fees. The study of California arbitration cases found that in claims brought by businesses against consumers, businesses paid an average of $149.50 in arbitration fees and that in claims brought against businesses, consumers paid an average of $46.63 in fees.[53] That is one reason why the Supreme Court has recognized the rules of national arbitration organizations as "models for fair cost and fee allocation."[54] The quick resolution of claims in arbitration makes pursuing claims more affordable because attorneys' fees are "by far the most significant cost of litigation, and they increase in direct proportion to the time to resolution of the case."[55]

In employment cases, one study found that an employee pursuing a claim against his employer would need a claim worth at least $60,000 for an employment lawyer to be willing to litigate the case. A founder of the National Employment Lawyers' Association testified that "employment attorneys turned away at least 95% of employees who sought representation."[56] Another study concluded that "only about 5% of employees who contend they were discriminated against can access the litigation system given its economic realities; for them, 'it looks like arbitration—or nothing.'"[57] Even in the small number of cases in which a claimant can convince a plaintiff's lawyer to take the case on a contingency-fee basis, a claimant's ultimate recovery can be reduced by upwards of 50 percent or more when expenses are included.

Limiting arbitration would also hurt employees and consumers "in the form of lower wages, higher prices or reduced share value."[58] A 1997 U.S. General Accounting Office study of employers that had established alternative dispute resolution (ADR) programs, including arbitration, reported huge drops in litigation costs. One company established its program after spending $400,000 to defend itself successfully against an employment claim; another company spent $1 million in attorneys' fees to defend against an employment claim that it won. Their legal costs dropped sharply after they implemented an ADR program: The first company's legal fees dropped by 90 percent, and the total cost of the ADR program was "less than half of what the company used to spend on legal fees for employment-related litigations." Employees were not short-changed, because the amount the company spent on settlements "remained about the same since the program's inception, although there have been more settlements under the new program."[59]

Arbitration protects consumers. While consumers have the option of being represented by an attorney in an arbitration hearing, they are not required to do so. The simpler rules of procedure allow consumers to present their claims themselves without the formalities of legal proceedings and often without the huge amount of time away from work and personal activities that litigation requires, since "consumers in arbitration can appear in person, or if they prefer by telephone, or by simply submitting documents."[60]

51. *Arbitration: Is it Fair When Forced? Hearing Before the S. Comm. on the Judiciary,* 112th Cong. (2011) (statement of Christopher R. Drahozal at 2) [hereinafter Drahozal Testimony].
52. Rutledge Testimony.
53. Fellows, *supra* note 47, at 32.
54. Green Tree Financial Corp.–Alabama v. Randolph, 531 U.S. 79, 95 (2000).
55. Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes,* A.B.A. Dispute Resolution Magazine (March 2012), *available at* http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.
56. Rutledge Testimony.
57. Schwartz Testimony at 8 (citing Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U.Mich. J.L. Reform 783, 792 (2008)).
58. Rutledge Testimony.
59. U.S. General Accounting Office, GAO/GGD-97-157, Employers' Experiences With ADR in the Workplace 40 (August 1997).
60. Schwartz Testimony at 8.

Consumers are protected, however, by the due process rules of organizations like the American Arbitration Association and JAMS (formerly Judicial Arbitration and Mediation Services) that are designed to protect both parties to an arbitration and achieve a fair, objective result.[61] The rules are administered by arbitrators who are ethical professionals, often retired state and federal judges. The JAMS rules, for example, require that the same remedies "that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration." The arbitration "must allow for the discovery or exchange of non-privileged information relevant to the dispute," and the consumer has a "right to an in-person hearing in his or her hometown area" and cannot be discouraged from "the use of counsel."[62]

Consumers fare well in arbitration. Little surprise, then, that consumers' win rate in arbitration is the same as or better than their win rate in litigation. The evidence shows "that arbitration actually leaves individuals better off than in litigation."[63] For example, a comparison of 125 employment discrimination lawsuits filed in the Southern District of New York with 186 employment arbitration cases in the securities industry found that employees won 46 percent of the arbitration cases but only 34 percent of the court cases and that the average amount recovered by the employees was also slightly higher in arbitration.[64] Another study of employment arbitration cases filed with the AAA found that in 1994, employees won 63 percent of their cases, compared to only 14.9 percent of employment cases in federal court.[65]

In 2007, the AAA found that 60 percent of its consumer arbitrations were settled and that consumers won about half of the time when they were bringing a claim against a business, which was roughly the same as the win rate of 51.6 percent of tort cases brought by plaintiffs in cases that went to trial in 2001, a win rate that was stable over time.[66] A study by the Searle Civil Justice Institute found that "consumer claimants won some relief in 53.3 percent" of arbitrations and "were awarded 52.1 percent of the amount they sought."[67]

The Public Citizen report made much of the fact that consumers overwhelmingly lost in the narrow set of arbitration cases that it studied, but the organization looked at data largely from just two companies engaged in debt-collection actions in the consumer credit industry. The vast majority of such actions have no facts in controversy other than whether the consumer incurred charges and failed to make payment. The high win rate in debt arbitrations that Public Citizen decries as proof that arbitration favors businesses is "right in line with the lender win-rate" in court, where lenders typically win 96 percent to 99 percent of the time.[68] Litigation would do nothing more than increase the cost to individual debtors, adding to the amounts they already owe—particularly with the addition of attorneys' fees and court costs.

These consumers had another advantage not found in litigation: In 3,632 of the cases examined by Public Citizen that were brought by businesses where there was no hearing because the consumer defaulted, "the arbitrator refused to award the entire amount the business requested." This is because the applicable arbitration rules require an arbitrator to consider all of the available evidence even when there is no response. This is an "added

61. *See, e.g., JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, JAMS* (July 15, 2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf.

62. *Id.*

63. Rutledge Testimony.

64. Fellows, *supra* note 47, at 32.

65. *Id.*

66. Peter B. Rutledge, *Arbitration—A Good Deal for Consumers: A Response to Public Citizen,* U.S. Chamber of Commerce Institute for Legal Reform 9 (April 2008)(citations omitted).

67. Drahozal Testimony at 5.

68. Prof. Peter B. Rutledge, *Arbitration—A Good Deal for Consumers: A Response to Public Citizen,* at 11 (citations omitted). In fact, Public Citizen "slanted its numbers by omitting from its analysis more than 8,000 cases that were dismissed without an award before an arbitrator was selected because the creditor decided not to pursue charges for lack of evidence or otherwise." Consumer prevailed "in nearly every case that Public citizen omitted from its percentages." Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 Dispute Res. Mag. 31 (Fall 2008).

layer of protection" that is not available to consumers in court, where failure to appear typically results in judgment in full.[69]

Some opponents argue that arbitrators have a strong incentive to favor business clients because they are repeat players in arbitration. Again, however, the empirical research does not support that claim. A study of over 200 AAA employment arbitrations over a three-year period found no evidence that employers were being systematically favored.[70] To the extent that there is any "repeat-player" effect in arbitration, research shows that it is likely the result of "case selection and settlement rather than systematic bias" because businesses are "better able to screen meritorious cases and, thus, will settle them rather than proceed to the award stage."[71]

While the Searle study found that businesses bringing arbitration claims were more likely to win than consumers bringing claims, it also concluded that the disparity was due to differences in the types of claims brought by consumers, as compared to those brought by businesses:

> Business claimants usually bring claims for specific monetary amounts representing debts for goods provided or services rendered. Many of the cases are resolved ex parte, with the consumer failing to appear. By comparison, cases with consumer claimants are much less likely to involve liquidated amounts and more likely to be contested by businesses.[72]

The Searle study also noted that businesses' win rate in what are essentially debt collection arbitrations are not as high as the win rate of businesses in debt collection cases brought in court: an 86.2 percent win rate in arbitrations, compared with 98.4 percent to 100 percent in court. The Searle data "provide no support for the view that consumers fare worse in arbitration than they do in comparable cases in court."[73]

The erroneous claim has also been made that consumers have no ability to appeal an arbitration decision. The Federal Arbitration Act, however, specifically provides that a federal court may vacate an arbitration award for certain specified reasons such as refusing to hear evidence material to the controversy or other misbehavior prejudicing the rights of a party.[74]

Arbitration is better for consumers than class actions. Individual arbitrations usually provide greater benefit to consumers than is provided by class actions in the courts. For example, opponents of arbitration have complained about the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, which reversed a Ninth Circuit decision holding unconscionable a contractual provision barring class arbitration. Such criticism erroneously assumes that class actions will provide a better remedy for a consumer with a claim against a business, but for all of the reasons previously discussed that illustrate the advantages of arbitration over litigation, this is simply not the case. Most consumer claims depend on very different individualized circumstances that are not amenable to class actions.

The disadvantage of litigation over arbitration is particularly true in regard to class litigation. Many settlements of such cases result in large attorneys' fees for the lawyers representing the class but small or minimal remedies, such as coupons, for the members of the class:

> [A class action] is expensive, raising costs to consumers in the long run; it is slow-moving,

69. Cole & Frank Frank, *The Current State of Consumer Arbitration* at 32.

70. Lisa Bingham, *On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L. Rev. 223 (1998).

71. Prof. Peter B. Rutledge, *Arbitration-A Good Deal for Consumers: A Response to Public Citizen,* U.S. Chamber of Commerce Institute for Legal Reform (April 2008), page 21.

72. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St.J. on Disp. Resol. 843, 901 (2010).

73. Drahozal and Rounds Testimony at 6.

74. 9 U.S.C. §10 (2002). Section 10 allows a federal court to vacate an arbitration award if it was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators; where the arbitrators were guilty of misconduct in refusing to postpone a hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior prejudicing the rights of the party, or where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made.

> bringing relief, if at all, long after class members have been harmed; even when class plaintiffs do succeed, class members face significant barriers to obtaining recovery; and class settlements often are a boon for class action attorneys but a bust for class members who recover little or nothing of value.[75]

Typical of the type of profiteering engaged in by class action lawyers who provide little or no benefit to consumers was a recent case in the Ninth Circuit claiming that the manufacturers of cell phone headsets that utilize Bluetooth technology had committed fraud because they failed to warn consumers of the risk of hearing loss caused by prolonged exposure to high-volume sounds. The class action lawyers settled the case for $850,000 in attorneys' fees and a $100,000 payment to a charity. The members of the class recovered nothing.[76]

Arbitration is usually "superior in many cases to class actions in vindicating consumer rights" because it provides "swift resolution of disputes; allows for easy and complete recovery; and does not pit the interests of consumers against an attorney tasked with representing their interests." This does not mean that class actions are never worth pursuing, "[b]ut the notion that they are a panacea, or even that they are more often beneficial than not, is belied by the evidence."[77]

Conclusion

The attacks on arbitration and the attempts in Congress to restrict or entirely eliminate arbitration requirements are unjustified and risk hurting both consumers and businesses. Arbitration is generally faster, cheaper, and more effective than its alternative: the litigation system. It is not affected by cutbacks in judicial budgets or the increases in court dockets that significantly delay justice.

There is no empirical evidence that arbitration favors businesses over consumers or that the rules of procedure for arbitration impinge on the rights of individuals or prevent them from receiving just compensation for their injuries. In fact, arbitration improves access to justice, and eliminating arbitration would make it very difficult for individuals to recover for many claims, particularly those that are relatively small, if they are forced to go to court. Legislation to curtail access to arbitration "would make worse off the very people whom Congress" is seeking to protect.[78]

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75. Ted Frank, *Class Actions, Arbitration, and Consumer Rights: Why Concepcion Is a Pro-Consumer Decision,* Manhattan Institute Legal Policy Report No. 16, 4 (Feb. 2013).
76. In re Bluetooth Headset Products Liability Litigation, 654 F.3d 935 (9th Cir. 2011) (remanding a more searching inquiry into the fairness of the negotiated distribution of funds and the reasonableness of the attorneys' fees).
77. Schwartz Testimony at 6.
78. Rutledge Testimony.