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Setting the Record Straight About the Benefits of Pre-Dispute Arbitration

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The top priority of the organized plaintiffs' bar in the 116th Congress is to restrict or eliminate the use of binding pre-dispute arbitration agreements. Numerous bills have been introduced in Congress that would broadly prohibit the use of these agreements in consumer and employment disputes, as well as narrower proposals that would invalidate these agreements with respect to specific disputes involving students, military service members, or persons alleging sexual misconduct, among others. The plaintiffs' bar's incentive for limiting pre-dispute arbitration agreements is clear: it would mean more litigation in the courts and more attorneys' fees. But, is dismantling the arbitration system in the public's best interest?

Congress has held hearings examining the merits of pre-dispute arbitration compared to the alternative of civil litigation. Pre-dispute arbitration is also a subject in which both the public and the judiciary have an interest. As with many legal subjects, though, facts and myths collide. The purpose of this paper is to explain the benefits of pre-dispute arbitration and dispel some of the myths that have clouded the public policy debate.

Key Benefits of Pre-Dispute Arbitration

A principal benefit of pre-dispute arbitration agreements, and arbitration generally, is that it provides consumers, employees, and other claimants with an efficient means to obtain redress for a large number of claims in which civil litigation is impractical. Pursuing a lawsuit can be a costly and time-consuming endeavor for anyone, and may simply be an unrealistic option where an alleged injury is of an individualized nature and too modest in potential value to attract the assistance of a lawyer.

Some studies indicate that even around 20 years ago lawyers often would not take a case unless the expected value of the claim was at least $60,000.[1] More recent reports suggest that some plaintiff lawyers will not take a case valued at less than $200,000.[2] Plaintiff lawyers are also risk averse and will typically not take a case without a high likelihood of success.

Arbitration allows claimants to bypass the barriers and costs of the litigation system. Claimants, in general, can have their disputes (including those involving less-certain claims) adjudicated more quickly and more cheaply than in the courts. For example, under the American Arbitration Association's (AAA) employment procedures, employees cannot be asked to pay more than $300 in total arbitration costs; employers must shoulder the

[1] *See, e.g.,* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. May-Jul. 2003, at 8, 10-11.
[2] *See, e.g.,* Minn. State Bar Ass'n, *Final Report: Recommendations of the Minnesota Supreme Court Civil Justice Task Force* 11 (Dec. 23, 2011), http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf.

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remaining fees.[3] In many instances, claimants pay nothing at all in arbitration.[4] In the litigation system, the court fees alone to initiate a case may be $400 or more, and that is before the payment of any fees to a lawyer.

The more costly litigation path is also plagued with problems that can significantly delay any adjudication and potential redress of a claim. Many state courthouses—where most civil claims are filed—are overburdened. Many federal district courts likewise have experienced high caseloads and lengthy delays. Arbitration, on the other hand, can shave months or even years off the resolution time of a claim.

Claimants using arbitration can also benefit from a simpler, more convenient method of dispute resolution. As the U.S. Supreme Court explained: "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."[5]

Such flexibility at lower cost can make real differences in claimants' lives. The eminent jurist Learned Hand wisely observed that a person "should dread a lawsuit beyond almost anything short of sickness and death."[6] By way of contrast, a claimant in arbitration may never need to take time away from family or work to meet with a lawyer, sit for a deposition, or even make a personal appearance in a matter to obtain a recovery. Arbitration proceedings often require far less information than would be exchanged in traditional civil discovery and may be adjudicated on the basis of something as simple as a telephone call. The arbitral process also provides claimants with a fair, reliable, and effective means of dispute resolution. Numerous studies demonstrate that claimants receive even-handed justice in arbitration proceedings.[7]

Dispelling Myths about Pre-Dispute Arbitration

Myth #1: Pre-dispute arbitration agreements are categorically unfair because they are entered into by consumers, employees, or other individuals with unequal bargaining power.

Despite opponents' rhetoric that pre-dispute arbitration agreements are "forced arbitration," it is important to appreciate that these contracts are voluntarily entered into by consumers, employees, and others. If one feels strongly enough that he or she would not want to participate in arbitration should a disagreement arise, one can choose to not purchase the product or service at issue or pursue different job opportunities. In many instances, there will be a marketplace alternative, and if retaining the option to pursue litigation is indeed valuable, actors in a competitive marketplace will typically adjust and offer that option.

The notion that a voluntary contract is unfair just because it includes a provision on a "take it or leave it" basis ignores the fact that an individual can just "leave it." Countless agreements include terms that are offered on such a basis; pre-dispute arbitration provisions are hardly unique in this regard.[8] Prohibiting or otherwise

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[3] Am. Arbitration Ass'n, *Employment/Workplace Fee Schedule: Costs of Arbitration* (Oct. 1, 2017), https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

[4] *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).

[5] *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

[6] Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address Before the N.Y. City Bar Ass'n (Nov. 17, 1921), in 3 LECTURES ON LEGAL TOPICS 89, 93 (1926).

[7] *See, e.g.,* 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); David Sherwyn *et al*., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567 (2005).

[8] *Cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011). ("the times in which consumer contracts were anything other

limiting the use of pre-dispute arbitration provisions based on unequal bargaining power alone would do more harm to individuals in the aggregate by "forcing" them to face greater burdens, costs, and delay in seeking access to justice and experience worse outcomes—in essence, "forced litigation."

Myth #2: Pre-dispute arbitration provisions are unsound because they are often written in "legalese" and "buried" in legal agreements.

As noted previously, individuals should be accountable for the contracts they enter voluntarily. Personal accountability extends to reading a contract and making an effort to understand its contents. Individuals should not be able to benefit from their choice of rushing through and execute an agreement without reading it first and then use that decision as a basis for invalidating all or part of the agreement.

If a contract's terms are overly burdensome or deceptive, individuals can legally challenge such provisions. Contract terms are subject to an unconscionability analysis, and courts have invalidated various pre-dispute arbitration provisions on this basis. The mere inclusion of a pre-dispute arbitration provision, however, should not be rejected out-of-hand as unfair where a consumer has a reasonable opportunity to review the contract.

Myth #3: Pre-dispute arbitration agreements are unjust because they require confidential adjudication that denies claimants a public forum.

An arbitration proceeding does not necessarily foreclose public awareness of a dispute. Claimants are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.[9] If an arbitration agreement purported to impose a "gag order," that restriction would likely be invalidated in court. To the extent arbitration proceedings are private, they are not unique in limiting public awareness of a dispute. Many claims filed in civil court settle, and a settlement can result in less public disclosure than arbitration.

In addition, claimants may prefer arbitration precisely because the adjudication takes place in a less public setting than civil litigation. Many claimants choose not to pursue litigation because of the potential toll it might take on them within their community, or on their loved ones or valued co-workers, if the dispute plays out in the "court of public opinion."

Myth #4: If there are benefits to binding pre-dispute arbitration agreements, consumers should be allowed to choose to resolve a dispute through post-dispute arbitration or civil litigation.

The notion of supplanting pre-dispute arbitration agreements with post-dispute arbitration ignores the fact that parties' incentives change dramatically in the post-dispute setting. Unlike in pre-dispute arbitration, where both parties—regardless of position and strength of case relative to each other—agree to arbitrate any dispute, each party in the post-dispute context will insist on either arbitration or litigation where it provides the greatest expected benefit to them and them alone. Consequently, the adversarial parties are unlikely as a practical matter to agree on the same dispute-resolution method. This is why post-dispute arbitration agreements are virtually non-existent in the "real world."

For example, if a company believes the value of an individual's claim is so minimal that that person will struggle finding a lawyer, the company would be less likely to agree to post-dispute arbitration because holding out would prevent his or her pursuit of the claim. Conversely, if the company believed the individual's claim might result in a substantial judgment, the company would probably prefer arbitration whereas the individual might be more inclined to pursue civil litigation. Pre-dispute arbitration agreements ensure that both parties are on the "same page" regardless of the particulars of any subsequent dispute.

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than adhesive are long past").

[9] *See* 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).

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Myth #5: Businesses prevail at greater rates in arbitration proceedings, which suggests these proceedings are biased and "stack the deck" against claimants.

Empirical studies find "no evidence that plaintiffs fare significantly better in litigation."[10] "In fact, the opposite may be true" that claimants fare better in arbitration because a "critical question is not what happens at the final stage, but instead what happens to the claims that never make it that far."[11]

For instance, there can be significant differences in the types of claims brought in arbitration versus civil litigation. As discussed, the use of pre-dispute arbitration agreements may provide an individual a forum to bring a modest claim of questionable value that, as a practical matter, would never see the light of day if pursued through the civil litigation system. Here, the availability of arbitration is a testament to greater access to justice for the individual even if defendants prevail in such cases more frequently.

Myth #6: Pre-dispute arbitration provisions unfairly preclude individuals from bringing class actions that allow for small damages claims to be aggregated for adjudication.

Class actions are available only in discrete situations where people sustain injury in the same way at the same time (and can satisfy other requirements of Federal Rule of Civil Procedure 23 or an analogous state rule). Class actions are not permitted where claims are highly individualized. Accordingly, a class action is generally not available for most employment or consumer disputes, such as those involving a physical injury or particularized alleged economic harm (*e.g.* overcharging or improper payment) that pertains to a specific person.

Class actions are also not as beneficial to consumers as pre-dispute arbitration agreement proponents may suggest. Class actions are often enormously complex and expensive. They also typically take many years to resolve. Arbitration largely avoids these problems. In addition, members of a class action frequently end up receiving little or no benefit at the end of the litigation. The history of class action litigation in America is replete with examples of consumer class actions in which the vast majority of the class members remain absent and recover nothing at all.[12] For example, an analysis prepared by the Consumer Financial Protection Bureau (CFPB) reported a "weighted average claims rate" in class actions of just 4%.[13] Other studies report even lower rates of class member involvement.[14]

These studies indicate that the true beneficiaries of class action litigation are not consumers or other claimants, but rather the plaintiffs' lawyers who bring these cases and collect substantial attorneys' fees. The evidence shows that individuals fare better through arbitration; it is the plaintiffs' lawyers who do not, which is why they are leading efforts to bar or limit the use of binding pre-dispute arbitration agreements.

Conclusion

Everyone knows the universal truth: nothing is perfect. Pre-dispute arbitration is not perfect, but neither is the civil litigation system. On balance, though, the benefits of pre-dispute arbitration agreements far outweigh any perceived concerns when one sees the full picture. Barring the use of these agreements is not sound public policy. Individuals would face greater burdens and costs in seeking access to justice, experience worse outcomes, and have disputes resolved at a far slower rate.

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[10] Sherwyn, 57 STAN. L. REV. at 1578.

[11] *Id.*

[12] *See* U.S. Chamber Inst. for Legal Reform, *Unstable Foundation: Our Broken Class Action System and How to Fix It* 3-5 (Oct. 2017), https://www.instituteforlegalreform.com/uploads/sites/1/UnstableFoundation_Web_1024207.pdf (analyzing studies of recoveries under class actions and discussing specific case examples).

[13] *See* Consumer Fin. Pro. Bureau, *Arbitration Study: Report to Congress 2015* 30 (Mar. 2015).

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

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