The Same Result As In Court, More Efficiently: Comparing Arbitration And Court Litigation Outcomes

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NATIONAL ARBITRATION FORUM

Parties choosing to arbitrate disputes look for a quicker, more efficient, and less expensive resolution than traditional litigation provides. At the same time, parties want an expert decision maker to review the evidence and provide them with the same substantive outcome, in the form of an arbitration award, that they would have received had they sought a judicial decision. In short, arbitration involves the election of a different – and more efficient – forum, but should not alter the substantive rights of the parties or the availability of remedies.

The degree to which arbitration actually succeeds in providing the same result as court litigation has been the subject of some speculation. While anecdotal accounts of parties' experiences with arbitration and surveys of arbitrating parties and attorneys have indicated that arbitrations are resolved more quickly than lawsuits and that parties consider arbitration outcomes to be fair,[1] relatively few empirical studies have compared actual arbitration and litigation outcomes. The outcomes comparison studies that have been published show that arbitrating parties receive outcomes similar to parties who choose to litigate and that arbitrations are resolved much more quickly than lawsuits.

This article presents new comparison analyses based upon consumer arbitrations conducted in California. These new results are entirely consistent with those presented in previous reports. The "win" rates of consumer and business arbitration claimants are within a few percentage points of the win rates of consumer and business litigation plaintiffs. And arbitration cases are resolved much faster than cases in court litigation. In fact, for some types of claims, arbitrations conclude more than a year sooner than litigated cases.

Arbitration Procedures

Arbitration administrators strive to deliver the "same result, more efficiently" by providing rules and procedures designed to promote fair and efficient dispute resolution. The National Arbitration Forum (FORUM) approach is particularly strong in this regard. FORUM arbitration rules promote efficiency by setting realistic procedural deadlines and enforcing reasonable limits on party conduct. By exclusively using arbitrators who are legal experts and requiring arbitrators to follow the law in their decisions, the FORUM ensures that arbitration awards closely track results that would have been obtained in court.

FORUM arbitrations achieve efficiency by structuring arbitrator selection, claim and response submission, discovery, and the conduct of the hearing. Clear rules and realistic deadlines allow parties to focus their arguments on the merits of the dispute instead of on the procedural details.

Mark Fellows

Because discovery is so often lengthy, contentious, and expensive in court, it may be the best example of the efficiencies available with arbitration. Parties to FORUM arbitrations have access to similar discovery methods as those available in court, such as document requests, requests for admissions, interrogatories, depositions, and requests for physical or mental examinations. However, FORUM rules allow arbitrators to place reasonable limits on the scope and duration of discovery, while still allowing parties to prove their claims or defenses. By rule, a party is granted discovery in a FORUM arbitration when 1) the information sought is relevant, reliable, and informative to the arbitrator, 2) the cost is "commensurate with the amount of the claim," and 3) production is reasonable and not unduly burdensome and expensive.[2]

FORUM rules encourage consistency with court outcomes by requiring that arbitrators "follow the applicable substantive law" when resolving disputes and permitting arbitrators to "grant any legal, equitable or other remedy or relief provided by law" in deciding claims.[3] By providing decision makers who are experienced legal experts, directing them to apply the same law that would be applied in court, and allowing them to award the same types of relief that would be available in court, the FORUM discourages compromise outcomes and creates ideal conditions for achieving the same substantive outcome as the parties would have received had they litigated the dispute.

Previous Studies Comparing Arbitration To Court

Although producing the "same result, more efficiently" is an important goal for arbitration, there is relatively little empirical research on the issue. A major obstacle to this type of outcomes study is the difficulty in gathering comparable litigated and arbitrated cases. Where arbitration and court outcomes data is available, there may be systematic differences between the arbitration cases and the court cases that render the comparison something less than apples-to-apples. The best available approach is to compare outcomes of similar types of cases that have been decided in court and in arbitration.

For example, a study published in the *Dispute Resolution Journal* compared 125 employment discrimination lawsuits filed in the Southern District of New York, with 186 arbitration claims involving employment disputes in the securities industry.[4] The data showed that employee claimants prevailed 46% of the time in arbitration compared to 34% in federal court. The median monetary award amount was slightly higher in arbitration, and the median time from filing to judgment was 16.5 months in arbitration compared to 25 months in litigation.

Also, a 1998 comparison of arbitration and litigation published in the *Columbia Human Rights Law Review* noted that employees prevailed over employers in 63% of employment arbitration cases filed with the American Arbitration Association between 1993 and 1995.[5] To compare, only 14.9% of employees who brought cases to federal district court in 1994 prevailed in their litigation. The average duration of an arbitrated claim was 8.6 months, compared to 2.5 years in litigation.

New Analyses Using California Consumer Arbitration Data

California Code of Civil Procedure Section 1281.96 requires arbitration administrators to publicly disclose certain information about California consumer arbitrations. Mandatory disclosures include whether the consumer or nonconsumer party prevailed in the arbitration, the type of disposition (i.e., award after hearing, settlement, default, etc.), and the start and end dates of the arbitration.

This analysis compares "win" rates and case durations from disclosed 2003-2004 National Arbitration Forum consumer arbitration awards from California[6] with publicly-available outcomes information from the Bureau of Justice Statistics on litigated contract cases involving individuals in the 75 largest counties in the United States.[7] Similar types of cases from arbitration and civil litigation are compared (contract cases involving individual consumer and business parties), rather than carefully matched samples. However, the similarity in win rates for consumers and business claimants, along with the much shorter duration from initial filing to final disposition for arbitrations, illustrate that FORUM arbitrations meet the challenge of delivering the same result as do courts, but in a more efficient manner.

"Win" Rates in Arbitration are Similar to Court

The California data shows that when consumers bring arbitration claims against businesses, the consumers prevail in 65.5% of cases that reach a decision. To compare, buyer plaintiffs litigating contract claims in the 75 largest American counties prevailed 61.5% of the time overall, and 60.9% of the time in cases decided by bench trials.

When businesses bring arbitration claims against California consumers, the businesses prevail in 77.7% of cases that reach a decision. To compare, seller plaintiffs litigating contract cases in the largest 75 counties prevail 76.8% of the time overall and 78.9% of the time in cases decided by bench trial.

These results show that the win rates for consumers and businesses bringing claims in arbitration are within just a few percentage points – and, sometimes, just fractions of a percentage point – of the win rates of individuals and businesses bringing contract claims in court. These percentages confirm previous survey and outcomes research results indicating that parties obtain the same substantive result in arbitration as they do in court.

Case Duration in Arbitration is Shorter than Litigation

While the prevailing party analysis shows a marked similarity between arbitration and court litigation, the difference in case durations is striking. In arbitration, the median duration from initial filing to final disposition is 4.35 months for claims brought by consumers against businesses and 5.60 months for claims brought by businesses against individuals.

In contrast, 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.

This data strongly reinforces the general understanding that arbitration is a quicker and more efficient process than court litigation.

Arbitration Costs are Very Reasonable

The California consumer arbitration data also reveals the arbitration fees paid by businesses and consumers. In arbitration claims brought by businesses against consumers, businesses paid an average of $149.50 in arbitration fees. In arbitration claims brought by consumers against businesses, consumers paid an average of only $46.63 in arbitration fees.

Conclusions

The analyses presented in this article confirm earlier results. Consumers prevail at similar rates in arbitration and in court. In this data, businesses prevail at a rate only one percentage point higher in litigated, compared to arbitrated, cases; consumer win rates were only slightly higher in arbitration proceedings versus consumer win rates in court litigation.

Arbitrations are also demonstrably quicker and more efficient than court litigation, concluding in roughly one-third of the time as litigated cases. Arbitration costs are remarkably low.

The similarities in win rates illustrated by this data make sense. FORUM arbitrations, like bench trials in court, are decided by a legal expert tasked with weighing the evidence and applying the substantive law. With this in mind, the similarity in win rates is no surprise. The shorter duration of arbitrated cases is a result of the efficient procedures prescribed by the FORUM arbitration rules.

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[1] See, e.g., *U.S. Chamber of Commerce, Institute for Legal Reform*, Arbitration: Simpler, Cheaper, and Faster Than Litigation, April 2005, *available at www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf (arbitration seen as faster (74%), simpler (63%), and cheaper (51%) than going to court); Ernst and Young,* Outcomes of Arbitration*:* An Empirical Study of Consumer Lending Cases, *available at www.arb-forum.com/media/EY_2005.pdf (69% of arbitrating parties satisfied or very satisfied with arbitration process).*

[2] *National Arbitration Forum* Code of Procedure, *Rule 29.*

[3] Id. *Rule 20(D).*

[4] *Michael Delikat & Morris M. Kleiner*, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, *58 DISPUTE* RESOLUTION JOURNAL 56, 57-58 (2004).

[5] *Lewis L. Maltby*, Private Justice: Employment Arbitration and Civil Rights, *30 COLUM. HUM. RTS. L. REV. 29, 45-48 (1998).*

[6] Available at *www.adrforum.com/focus/consumers/ca_consumer.asp. This analysis uses data from 2003 and 2004, the most recent years for which complete data is available.*

[7] See *Thomas H. Cohen, Bureau of Justice Statistics, U.S. Department of Justice*, Contract Trials and Verdicts in Large Counties, *2001, 4 (2005); Lea S. Gifford, et al., Bureau of Justice Statistics, U.S. Department of Justice*, Contract Trials and Verdicts in Large Counties*, 1996, 5 (2000).*

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State Court Enforcement of Arbitration Agreements

By John M. Townsend

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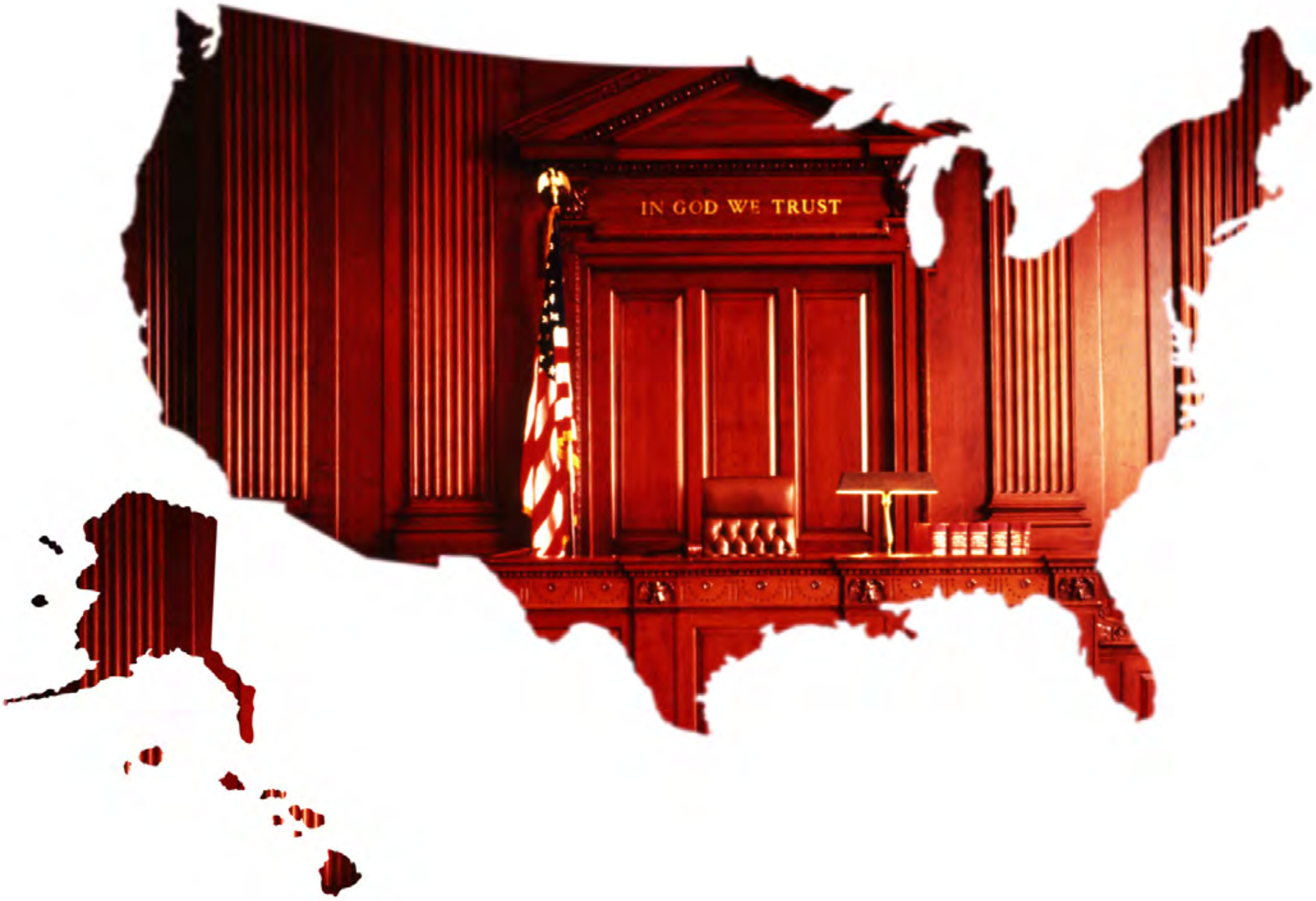

Table of Contents

Page

STATE COURT ENFORCEMENT OF ARBITRATION AGREEMENTS: A REPORT TO THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

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INTRODUCTION

Congress passed the Federal Arbitration Act (FAA) in 1925 to overcome judicial hostility to arbitration agreements.[1] Broadly speaking, if a contract dealing with interstate commerce contains an agreement to arbitrate, the FAA requires that the arbitration agreement be enforced, unless generally applicable contract principles render the agreement unenforceable.[2] The FAA thus forbids courts called upon to enforce agreements to arbitrate from imposing special burdens on arbitration agreements, but permits courts to hold those agreements to the same standards that all contracts must meet.

In 1984, the Supreme Court held that the FAA's mandates apply not only to federal courts, but also to state courts.[3] The reaction of state courts varied, but many clung to their traditional hostility towards arbitration. The stiff resistance to application of the FAA in state courts came to a head in 1994, when the attorneys general of twenty states filed amicus briefs asking the Supreme Court to overturn its 1984 decision and to permit the states to enforce state anti-arbitration statutes.[4] The Supreme Court declined to do so, and took the opportunity to spell out the obligations of the states with regard to arbitration clauses:

> "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit) but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent."[5]

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[1] The Federal Arbitration Act was intended to "reverse centuries of judicial hostility to arbitration agreements." *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). It is codified at 9 U.S.C. § 1 et seq.

[2] 9 U.S.C. §2.

[3] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[4] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

[5] *Id.* at 281 (citations omitted).

As the Supreme Court put it the following year, state rules that "undermine the goals and policies of the FAA" are preempted by that statute.[6]

PURPOSE AND FINDINGS OF THIS STUDY

The U.S. Chamber's Institute for Legal Reform commissioned this study to inquire whether the mandate of the FAA and the Supreme Court decisions implementing it have now been fully accepted by the state courts. The good news is that, for the most part and in most states, courts have understood the message, and overt judicial hostility to arbitration has generally been overcome. We identified only two states—Alabama and California—in which the sheer number of decisions refusing enforcement might reasonably be thought to have been influenced by a lingering hostility to arbitration, and even in those states, resistance is far more circumspect than it was twenty years ago. Thus, while courts in those states appear somewhat readier to find reasons not to enforce arbitration agreements than courts in other states, they express themselves in terms of disapproval of particular features of arbitration agreements rather than in terms of hostility to arbitration itself. Indeed, the types of clauses that tend to arouse judicial hostility in Alabama and California are often met with suspicion by the courts of other states.

Broadly stated, the types of arbitration agreements most likely to encounter resistance from state courts are those that arise in the context of a perceived imbalance of bargaining power and that contain terms that appear to take advantage of that imbalance to achieve a procedural or substantive advantage. Arbitration clauses have become common in consumer and employee agreements in recent years, and these are contexts in which courts most readily perceive disparities in bargaining power. In such contexts, where the distinction between the stronger and the weaker party is clearest, the drafters of some arbitration clauses have included provisions that require the weaker parties not simply to arbitrate, but to arbitrate on unfavorable terms. It is this type of arbitration agreement that has, understandably, met with the greatest resistance from state courts.

Many of the arbitration clauses deemed unenforceable by state courts can only be described as overreaching. The benefits of arbitration may thus be lost or jeopardized if a party in a position to dictate the terms of a contract succumbs to the temptation to use the arbitration clause as an opportunity to tilt the scales in that party's favor. That temptation can manifest itself in terms that favor the stronger party procedurally—such as allowing the stronger party to select the arbitrator or the rules unilaterally, imposing high costs on a party wishing to initiate arbitration, or forcing one party to arbitrate while giving the other party the option of a judicial forum. Or the contract may seek to favor the stronger party substantively—for example, by

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[6] *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.").

limiting the remedies available to the weaker party.[7] While some courts have attempted to correct one-sided clauses by simply removing the offending provision, others have refused to enforce arbitration clauses containing such provisions in their entirety. In either case, such decisions often appear to be motivated more by resistance to the perceived unfairness of the terms than by an underlying hostility to arbitration.

The balance of this report focuses on some of the contexts in which state courts—sometimes even in states otherwise friendly to arbitration—have been most inclined to scrutinize arbitration agreements closely.[8] These pockets of resistance are the areas of: consumer disputes, homeowner disputes, employment disputes, health care disputes, and class actions. The lesson throughout is that those wishing to enjoy the benefits of arbitration in any of these contexts should be careful to craft arbitration agreements that avoid the types of terms that state courts have perceived as overreaching and unenforceable. Precisely what terms may be perceived as problematic will vary with context and by state, as discussed below.

THE POCKETS OF RESISTANCE TO ARBITRATION

The Supreme Court has made it clear that the FAA requires state courts to hold arbitration agreements to no more restrictive a standard than that to which they hold other contract provisions. On the one hand, the clarity of this rule has largely eliminated overt hostility to arbitration as a basis upon which state courts invalidate arbitration agreements. On the other hand, state courts inclined to resist presumptive enforcement of arbitration agreements may still employ a familiar arsenal of state contract law doctrines to mount such resistance.[9] The weapon upon which state courts draw most often in invalidating arbitration agreements is the contract-law doctrine of unconscionability.

Different states have developed differing standards for determining when a contract or term will be deemed unconscionable and, therefore, unenforceable. In articulating the majority approach, the Restatement sets forth a flexible, context-sensitive standard that treats each of two factors—inequality of bargaining power and terms unreasonably favoring one party—as probative, but not dispositive, of unconscionability.[10] Many states characterize these two factors as, respectively, procedural unconscionability and substantive unconscionability, and weigh their

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[7] An egregious example of a party's exploiting an imbalance to gain procedural and substantive advantages is described in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999).

[8] The information on which this paper is based was obtained by searching legal databases for state court decisions published between 2000 and mid-2006 discussing the enforcement of arbitration agreements. Generally, only decisions of the highest court in the state and some intermediate appellate decisions are published, so trial court decisions that were not appealed would often not have been examined.

[9] *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements").

[10] Restatement (Second) of Contracts § 208, cmt. d; *see also* U.C.C. § 2-302.

significance on a sliding scale—the more procedurally oppressive a contract, the less substantive oppression must be shown to support a finding of unconscionability, and vice versa.[11]

When state courts measure arbitration agreements against this sliding scale of procedural and substantive unconscionability, certain classes or contexts of arbitration agreements face heightened scrutiny. In particular, because arbitration agreements in the consumer, homeowner, employment, and health care areas may be more likely to arise out of a context of unequal bargaining power (so-called procedural unconscionability), some state courts have shown a propensity to look closely at those agreements for terms that appear unreasonably favorable to one side (so-called substantive unconscionability). In these contexts, arbitration clauses containing elements such as limitations on statutory remedies, provisions for shifting costs to the weaker party, or requirements applicable to only one of the parties run the risk of being deemed unenforceable. In addition, courts that place particularly high value on the class action mechanism tend to resist enforcement of arbitration clauses that waive resort to that procedure.

Ultimately, the pattern of recent state court refusals to enforce arbitration agreements suggests a straightforward approach for businesses seeking to craft enforceable agreements to arbitrate. When drafting an agreement governing a relationship that courts may view as giving rise to a disparity in bargaining power, businesses should avoid any temptation to use the arbitration clause as a vehicle for creating substantive or procedural imbalances that could be perceived as unfair. The American Arbitration Association (AAA) has issued "due process protocols" that provide guidelines for fairness in the areas in which courts are most likely to scrutinize agreements to arbitrate.[12] Drafting arbitration clauses to conform to the AAA's due process protocols is probably the most effective precaution that can be taken to shield arbitration agreements from state court hostility and thereby to preserve the benefits of resolving disputes in an arbitral forum.

<u>Consumer Disputes</u>

Consumer agreements often typify adhesion contracts, as they are usually offered on a "take it or leave it" basis, with little or no room for negotiation between the parties. Although such contracts are not per se unconscionable, the fact that they almost necessarily entail some degree of what is characterized as "procedural unconscionability" means that consumer agreements containing one-sided terms may be vulnerable. Arbitration clauses in consumer agreements will often face scrutiny for substantive bias. Courts may refuse to enforce arbitration clauses that reflect a purpose and effect beyond simply mandating that consumer disputes be resolved through arbitration, and that instead appear to stack the deck against the consumer.

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[11] *See, e.g.*, *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 2006 WL 2273448, at *6 (N.J. Aug. 9, 2006); *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000); *Cheshire Mortg. Serv., Inc. v. Montes*, 612 A.2d 1130, 1135 (Conn. 1992).

[12] *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, *Consumer Due Process Protocol*, and *Health Care Due Process Protocol*, available at http://www.adr.org/Protocols.

Recent decisions reflect the reluctance of state courts to enforce arbitration agreements that shift or increase the burden of pursuing arbitration to the consumer, attempt to limit available remedies under the contract, or make arbitration mandatory for only the consumer.

a. Cost Shifting Provisions

Several recent decisions reflect reluctance by courts to enforce consumer arbitration agreements that have the effect of deterring aggrieved consumers from pursuing claims. Courts have found such deterrent effects in a number of arbitration clauses that provide for shifting the costs of arbitration or increasing the financial burden of pursuing a claim in arbitration to the consumer-plaintiff. Finding support in the Supreme Court's consideration (albeit inconclusive) of a "prohibitive costs" defense, several state courts have declared unconscionable or otherwise unenforceable arbitration clauses that create cost barriers to consumer claims.[13] Decisions from Pennsylvania and Washington illustrate the context-sensitive analysis applied by courts refusing enforcement of cost-shifting arbitration agreements.

In *McNulty v. H&R Block*,[14] a Pennsylvania Superior Court affirmed a lower court's refusal to enforce arbitration agreements against customers of H&R Block who sought to recover fees paid ($34 or $37) for electronic filing of their tax returns. In addition to affirming the lower court's determination that the agreements did not govern the dispute, the Superior Court noted that the unconscionability of the arbitration agreements provided alternative grounds for affirming. The arbitration agreements required a party wishing to make a claim to pay a filing fee of $50 as well as any costs exceeding $1,500. The court acknowledged that these terms did not, on their face, unreasonably favor either party. However, considered in the context of the relief sought by the claims at issue (less than $40), the court concluded that cost-shifting provisions effectively precluded the individual presentation of claims.[15] Accordingly, the court concluded that the arbitration agreements could not be enforced.[16]

The decision by a Washington appellate court in *Medez v. Palm Harbor Homes, Inc.*[17] demonstrates that provisions that have the effect of shifting costs may be subject to scrutiny even when the shifting of costs is neither explicit nor for a fixed amount. In *Medez*, the retail installment contract signed in connection with a consumer's purchase of a mobile home provided for arbitration by a three-member panel appointed by the American Arbitration Association (AAA).[18] Although the agreement did not specify how costs would be allocated, the consumer-

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[13] *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 (2000).

[14] 843 A.2d 1267 (Pa. Super. Ct. 2004).

[15] *Id.* at 1273.

[16] *Id*.

[17] 45 P.3d 594 (Wash. Ct. App. 2002).

[18] *Id.* at 598.

plaintiff submitted an affidavit to the court that the AAA would require him to pay a $2,000 filing fee to initiate arbitration by a three-arbitrator panel. Taking into account other costs associated with commencing arbitration, the court found that the consumer-plaintiff "would have been required to spend up front well over $2,000 to try to vindicate his rights under a contract to buy a $12,000 item in order to resolve a potential $1,500 dispute."[19] While recognizing the laudable goals served by arbitration, the court refused to enforce the arbitration agreement based on the reasoning that "avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable."[20]

Together, *McNulty* and *Medez* demonstrate the willingness of some state courts to scrutinize and decline enforcement of consumer arbitration agreements that shift costs of access to arbitration to the consumer. Such scrutiny may arise even when the costs allocated to the consumer are facially negligible or when the costs are not explicitly defined by the agreement.

b. Provisions Limiting Remedies

Just as financial barriers to consumer commencement of arbitration are greeted with suspicion by some state courts, barriers to consumers' full recovery in arbitration are also likely to elicit scrutiny. Generally the provisions that run afoul of state unconscionability law impose limitations on the relief an arbitrator may award or seek to waive particular remedies available in litigation or under a statute. Recent decisions in Alabama and Ohio exemplify the sometimes aggressive analysis applied by state courts that start from the premise that it is unconscionable to require a weaker party to forgo substantive remedies and conclude that any limits on remedies render an arbitration clause unenforceable.

In *American General Finance*, the Alabama Supreme Court reviewed an arbitration clause in a loan agreement that expressly limited the arbitrator's ability to award punitive or other damages to five times "the economic loss suffered by the party."[21] The court determined that the provision not only limited the availability of punitive damages, but also limited the availability of all non-economic losses (*i.e.*, mental anguish) that would otherwise be recoverable in litigation.[22] Finding the provision unconscionable because it "so grossly favored the lender," the court stated, "[u]nder these contracts, the arbitrator cannot award the full panoply of relief available in state courts under Alabama law."[23] The Alabama Supreme Court refused to enforce

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[19] *Id.* at 605.

[20] *Id.*

[21] *Am. Gen. Finance v. Branch*, 793 So. 2d 738, 741 (Ala. 2000).

[22] *Id.* at 749.

[23] *Id.* at 749 (internal quotation omitted).

the arbitration agreement and suggested that any agreement restricting the range of relief available to a consumer claimant would meet the same fate.[24]

The decision of an Ohio appellate court to invalidate an arbitration provision in *O'Donoghue v. Smythe, Cramer Co.* suggests the confluence of the two issues of cost shifting and limitations on available relief.[25] The Ohio court assessed the validity of a provision in a home inspection contract limiting the inspector's liability to the cost of the inspection ($256). Considering the costs of arbitration (filing fees and arbitrator fees), in addition to the requirement to pursue arbitration of all claims under the contract, the court determined that the contract was unconscionable.[26] Specifically, the court concluded that the limitation on remedies effectively denied the plaintiff any meaningful redress or incentive to pursue her claim, especially since the cost of filing for arbitration exceeded the amount recoverable.[27]

These decisions illustrate the hostility that arbitration agreements that attempt to limit the substantive relief available to consumer claimants are likely to encounter. Agreements that simply specify an arbitral forum, without attempting to influence what can be recovered in an arbitration, should avoid such hostility.

c. Provisions Reserving Unilateral Control Over The Dispute-Resolution Process

State courts frequently exhibit hostility to arbitration agreements in the consumer context that assign unilateral control over the process to the corporate party, or which allow only that party access to the courts. The strong form of that hostility is exemplified by the pronouncement of a Pennsylvania court that reservation in a consumer arbitration agreement of one party's access to the courts creates a presumption of unconscionability.[28] Decisions from courts in California, Alabama, Wisconsin, and Tennessee illustrate varying degrees of hostility to arbitration agreements that provide for one-sided control of the dispute-resolution process.

A recent decision from the Wisconsin Supreme Court exemplifies the type of analysis that courts may apply to arbitration agreements that compel the consumer to arbitrate, but reserve to the other party the right of access to the courts. In *Wisconsin Auto Title Loans, Inc. v. Jones*, the court refused to compel arbitration under a loan agreement containing language reserving

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[24] *Id.*

[25] *O'Donoghue v. Smythe, Cramer Co.*, No. 80453, 2002 Ohio App. LEXIS 3571, at *1 (Ohio Ct. App. July 3, 2002).

[26] *Id*. at *6-7.

[27] *Id*. at *6-7, *14-15.

[28] *See Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 665 (Pa. Super. 2002). The *Lytle* court noted that some courts in other jurisdictions disagreed with this approach. *Id.* at 665 n.13.

access to a judicial forum for the defending loan company only.[29] Pursuant to the terms of the loan agreement, any claims or disputes arising between the borrower and lender were to be resolved by binding arbitration.[30] However, the agreement reserved to the lender the right to enforce the borrower's obligations under the contract through the judicial system.[31] Evaluating the validity of the provision, the court stated, "[t]he doctrine of substantive unconscionability limits the extent to which a stronger party to a contract may impose arbitration on the weaker party without accepting the arbitration forum for itself."[32] The court found that the clause excused the lender (the stronger party) from arbitrating claims against the borrower, reserving to itself "full access to the courts, free of arbitration," while requiring the borrower (the weaker party) to arbitrate any and all claims against the lender.[33] The court found this to render the clause unconscionable, because of the perceived benefit to the lender and disadvantage to the borrower.[34] Courts in California, Alabama, and Tennessee have similarly found such one-sided clauses unconscionable.[35]

Another situation in which state courts have struck down provisions reserving one party's access to the courts is when the stronger party attempts to delineate specific causes of action subject to arbitration and those that are exempt. In *Armendariz v. Foundation Health Psychcare Services, Inc*, a frequently cited decision by the Supreme Court of California, the court concluded, in the context of an employment agreement, that "[a]n agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are most likely to be brought by the stronger party."[36] In *Flores v. Transamerica Homefirst, Inc*., a California appellate court applied the principle stated in *Armendariz*.[37] The parties to a mortgage contract disputed the enforceability of the arbitration provision. The provision provided that all disputes arising from

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[29] 714 N.W.2d 155 (Wis. 2006).

[30] *Id*. at 160-161.

[31] *Id*. at 161.

[32] *Id*. at 173.

[33] *Id*. at 172.

[34] *Id*. at 176.

[35] *See Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004) (invalidating arbitration clause as unconscionable when the seller retained the choice to pursue a claim against the buyer through litigation, while the buyer was required to adhere to arbitration); *Rocha v. Central Valley RV Outlet, Inc*., No. F046584, 2005 Cal. App. Unpub. LEXIS 11152 (Cal. Ct. App. Dec. 1, 2005) (similar grounds for finding clause unconscionable); *Am. Gen. Finance, Inc. v. Branch*, 793 So. 2d 738 (Ala. 2000) (finding unconscionable a provision exempting a lender from arbitration of claims against a borrower, but requiring the borrower to arbitrate all claims against the lender).

[36] 6 P.3d 669 (Cal. 2000).

[37] 93 Cal. App. 4th 846 (Cal. Ct. App. 2001).

the agreement were subject to arbitration *except* an action to foreclose on the property, and went on to reserve additional remedies to the lender.[38] The court stated that it was unconscionable for a party to "impose the arbitration forum on the weaker party without accepting that forum for itself."[39] Further, the "unilateral obligation to arbitrate is so one-sided as to be substantively unconscionable."[40]

In addition to rejecting one-sided requirements to arbitrate, some state courts have expressed hostility to contract terms granting one side disproportionate control over the process once it begins. Unilateral arbitrator selection is one example of such a term. In *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, the Alabama Supreme Court refused to enforce a clause in a mobile home sales agreement that gave the seller the sole right to select an arbitrator to decide potential disputes under the agreement, as long as the arbitrator had not provided legal services for the seller at any previous time.[41] Despite the seller's attempt to provide for an unbiased arbitrator, the Alabama Supreme Court found the clause unconscionable and severed it from the contract.[42] The Court sent the dispute to arbitration, but before a court-appointed arbitrator.[43] Chief Justice Moore dissented in part, believing that the court should have refused to enforce the entire arbitration clause.[44]

These decisions seem to arise primarily from judicial concern about perceived overreaching in dealings with consumers. Starting from the presumption that all consumer adhesion contracts are procedurally unconscionable, courts will hold terms of arbitration agreements to an exacting standard if they appear to be unduly restrictive of a consumer's ability to bring or recover on claims. When dealing with form contracts as to which consumers have little or no bargaining power, businesses wishing to secure the benefits of an arbitral forum for disputes should avoid the temptation to craft arbitration clauses that appear to tilt the process against the consumer.

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[38] *Id*. at 849.

[39] *Id*. at 854 (quoting *Armendariz* at 118).

[40] *Id*. at 855.

[41] 825 So. 2d 779 (Ala. 2002).
[42] *Id*. at 785.

[43] *Id*. at 785.

[44] *Id*. at 786.

Homeowner Disputes

Homeowner contracts are perceived by the courts as closely akin to consumer contracts.[45] Courts recognize that contracts concerning home ownership—including home-building, home-purchase, and home-inspection contracts—often arise in situations of unequal bargaining power. Homeowner contracts are not, however, necessarily subject to the same presumptions of procedural unconscionability as are consumer product and service contracts; evaluation of arbitration clauses in homeowner agreements tends to involve more use of the sliding scale of bargaining power and fairness of terms. A number of state courts have nevertheless demonstrated a bias towards construing arbitration agreements in homeowner contracts narrowly, to avoid extending them to disputes not expressly contemplated by the terms of the agreements, and two states—California and New York—have enacted statutes that disfavor arbitration agreements in the homeowner context.

a. Unconscionability

The unconscionability analysis applied by state courts to arbitration agreements in the homeowner context largely mirrors their approach in the consumer context. In recent decisions, courts in several states have found provisions unenforceable because they unilaterally reserved access to the judicial system while requiring another party to arbitrate all claims under the contract,[46] or limited liability and recovery,[47] or permitted unilateral selection of the arbitrator,[48] or unreasonably shifted the costs of arbitration.[49] In addition, in applying the sliding-scale unconscionability analysis, courts may find inadequate notice of the terms of an arbitration agreement suggestive of procedural unconscionability, thereby reducing the showing of substantive unconscionability required to hold the agreement unenforceable.[50]

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[45] The AAA's *Consumer Due Process Protocol* extends to homeowner disputes. *See* http://www.adr.org/sp.asp?id=22019.

[46] *See Harlamert v. Fischer Attached Homes, Ltd*., No. C-020462, 2003 Ohio App. LEXIS 641 (Ohio Ct. App. Feb. 14, 2004) (refusing to enforce an arbitration clause in a homebuilding contract when the builder reserved the right to file suit, but required the purchasers to arbitrate).

[47] *See O'Donoghue*, 2002 Ohio App. LEXIS 3571 (refusing to enforce arbitration clause limiting home inspector's liability to the cost of the contract); *Davidson v. Robinson Orchards, Inc.*, No. H-99-020, 2000 Ohio App. LEXIS 1624 (Ohio Ct. App. April 14, 2000) (refusing to enforce arbitration clause limiting arbitration award in home warranty agreement).

[48] *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006) (severing provisions in home building contract permitting the president of the Home Builder's Association to select the arbitrator and shifting the fees to the weaker party due to unconscionability); *Burch v. Kosach*, 49 P.3d 647 (Nev. 2002) (finding home buyer's warranty unconscionable because it permitted the builder's insurer to select the arbitrator).

[49] *See Vincent*, 194 S.W.3d at 860.

[50] *See Burch*, 49 P.3d 647 (finding buyers did not have a meaningful opportunity to accept the terms of the home builder's warranty, including the arbitration provision).

In *Vincent*, the Missouri Supreme Court reviewed a contract between a homebuilder and purchasers that included an arbitration agreement permitting the president of the Home Builder's Association to select the arbitrator and requiring all costs of arbitration to be born by the purchasers.[51] The court held the cost-shifting provision unenforceable because, "[i]t is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer. This is particularly true when the cost-shifting terms could work to grant one party immunity from legitimate claims on the contract."[52] Additionally, the court found the arbitrator selection clause to be unconscionable, because of the potential for bias in the selection.[53] However, instead of invalidating the agreement to arbitrate altogether, the court chose to sever the objectionable provisions and compelled arbitration, pursuant to the remaining contract terms.[54]

The interplay between procedural and substantive unconscionability in the homeowner context is demonstrated by the Nevada Supreme Court's reasoning in *Burch*.[55] The court found that the contract in question, a home buyer's warranty signed in connection with the purchase of a newly constructed home, was a contract of adhesion, because it was offered on a "take it or leave it" basis.[56] In concluding that the warranty presented a strong case of procedural unconscionability, the court was heavily influenced by the inconspicuous placement of the arbitration clause on the sixth page of the agreement and by the complexity of the language.[57] Accordingly, the court held that "[b]ecause the procedural unconscionability of this case is so great, less evidence of substantive unconscionability is required to establish unconscionability."[58] Finding the arbitration clause's reservation to the homebuilder's insurer of the exclusive right to select both the rules and the arbitrator, the court held the agreement unenforceable.

An example of a refusal to enforce a one-sided term in an arbitration clause contained in a home buyer's warranty is the Ohio appellate court decision in *Davidson*.[59] The arbitration clause in that warranty limited available recovery to the lesser of the home's value, $1 million, or such lesser amount as the warranty company might, with *or without* the homebuyer's knowledge,

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[51] *Vincent*, 194 S.W.3d at 859

[52] *Id*. at 860.

[53] *Id.* at 859.

[54] *Id*. at 860.

[55] 49 P.3d at 650.

[56] *Id.* at 649.

[57] *Id*. at 650.

[58] *Id.*

[59] 2000 Ohio App. LEXIS 1624, at *1.

have communicated to the builder.[60] The effect of the provision was to potentially limit recovery to an amount below what the homebuyer could expect and which the arbitrator could otherwise award.[61] Accordingly, the court held the agreement unenforceable. A similar approach was taken in *Carll v. Terminix International Company, L.P.*, in which a Pennsylvania court found a provision in an extermination contract requiring arbitration of all claims, but prohibiting special, incidental, consequential, exemplary or punitive damages, to be against public policy in a personal injury case.[62]

The cases applying unconscionability analysis in the homeowner context support conclusions similar to those reached in the consumer context. The types of arbitration provisions most likely to encounter judicial resistance are those that have the purpose or effect of placing the homeowner at a disadvantage.

b. Narrow Construction

State courts may also avoid enforcing arbitration agreements in the homeowner context by construing the agreements narrowly to confine them to a limited set of disputes. This approach essentially stops enforcement at the threshold, because a court may determine whether or not a valid agreement to arbitrate the dispute exists without first determining whether such an agreement would be enforceable.[63]

Strictly interpreting the language of the arbitration clause, a Washington appellate court refused to enforce an arbitration agreement between a homebuilder and a buyer when the buyer sued, among other things, for personal injuries allegedly caused by defective construction.[64] The court concluded that the personal injury claim was outside the scope of the arbitration agreement, which stated that someone with "working knowledge of residential construction" would decide the issues presented in arbitration.[65] Furthermore, the court determined that the language of the clause was inconsistent and ambiguous because it limited arbitration to construction disputes in one sentence and in a second sentence broadened the application of the arbitration clause to all disputes under the contract.[66] In light of the ambiguity and the specific language of the

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[60] *Id*. at *3.

[61] *Id*.

[62] 793 A.2d 921 (Pa. Super. Ct. 2002).

[63] *See, e.g., Woodhaven Homes, Inc. v. Alford*, 143 S.W.3d 202 (Tex. App. 2004); *Burgess v. Jim Walter Homes, Inc*., 588 S.E.2d 575 (N.C. Ct. App. 2003).

[64] *Pearson v. Adair Homes. Inc*., 128 Wash. App. 1045 (Wash. Ct. App. 2005).

[65] *Id*.

[66] *Id*.

agreement, the court determined that the parties had not agreed to arbitrate personal injury claims.[67]

Another variation on the narrow construction approach can be found in two similar recent decisions from Texas and North Carolina, where the courts carefully parsed contracts potentially governing the dispute to determine if the parties were bound to arbitrate.[68] Both courts found that while one agreement between the homebuilder and the buyers contained an arbitration clause, a second agreement failed to mention binding arbitration.[69] The courts construed the agreement containing the arbitration clause narrowly and the second contract broadly and thereby concluded that the claims arose under the second contract and were thus not subject to arbitration.

c. California and New York Statutory Resistance to Homeowner Arbitration Agreements

In the context of homeowner disputes, courts in California and New York have recently relied on statutes that effectively create hurdles to enforcing agreements providing for mandatory arbitration of such disputes.[70] Whereas California has imposed heightened requirements for enforcement of mandatory arbitration provisions in the homeowner context, New York has taken a more aggressive approach, effectively creating a presumption that such provisions will not be enforced. Courts in both states characterized the types of homebuilding contracts covered by their statutes as not involving interstate commerce, in order to counter the argument that the statutes were preempted by the FAA.[71]

Section 7191 of California's Business and Professions Code imposes mandatory disclosure and formatting requirements for arbitration provisions in contracts involving work on residential property of one to four units. Invoking this statute, a California appellate court recently refused to enforce an arbitration award, because the applicable agreement failed to provide adequate notice to the consumer that she was waiving her right to resolve her dispute in court according to the requirements of the statute.[72]

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[67] *Id.*

[68] *Woodhaven Homes, Inc.*, 143 S.W.3d at 204; *Burgess*, 588 S.E.2d at 492.

[69] 143 S.W.3d at 204; 588 S.E.2d at 493.

[70] *See Ragucci v. Professional Construction Servs.*, 25 A.D.3d 43 (N.Y. App. Div. 2005); *Baronoff v. Kean Development Co., Inc.*, 818 N.Y.S.2d 421 (N.Y. Sup. Ct. 2006); *Woolls v. Superior Court of Los Angeles County*, 127 Cal. App. 4th 197, 205 (Cal. Ct. App. 2005).

[71] *See Baronoff v. Kean Development Co., Inc.*, 818 N.Y.S.2d 421 (N.Y. Sup. Ct. 2006); *Woolls*, 127 Cal. App. 4th at 213.

[72] *Woolls*, 127 Cal. App. 4th at 200.

Section 399-c of New York's General Business Law forbids contracts for the sale or purchase of consumer goods from incorporating mandatory arbitration clauses. Although this statute has not often been invoked, New York courts have recently determined that contracts for services related to home construction are consumer contracts subject to the terms of the statute.[73]

In *Ragucci*, a 2005 case of first impression, a New York appellate court refused to compel the arbitration of a home construction dispute between a homeowner and an architectural firm.[74] The court determined that the services provided by the defendant firm in connection with the plaintiff's home fell within the meaning of consumer goods as defined by General Business Law §399-c. Specifically, the court determined that statute's broad definition of consumer goods, which included "services purchased or paid for by a customer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer," covered the services provided by the architectural firm to the homeowner.[75] The arbitration clause was therefore held invalid and void under the statute.[76] The *Ragucci* court explained that the law "was 'designed to prevent sales contracts from including clauses pre-committing consumers to arbitrate disputes rather than resort[ing] to … other remedies.'"[77] The court also interpreted the statute to provide that "no contract 'should deprive a consumer of the right to take the dispute further and seek judicial redress'… as well as 'the ability to choose between arbitration or judicial resolution of their disputes after the time when a dispute arises.'"[78]

Employment Disputes

The U.S. Supreme Court has made it clear that the FAA applies to employment contracts in businesses in interstate commerce, and that the statute generally requires courts to enforce arbitration clauses in such contracts.[79] As arbitration clauses in employment contracts and employee policy handbooks become increasingly common, state courts must contend with an increasing number of challenges to their enforceability.[80] Arbitration clauses in employment

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[73] *See Ragucci*, 25 A.D.3d at 48; *Baronoff*, 818 N.Y.S.2d at 425.

[74] 25 A.D.3d 43 (2005).

[75] *Id.* at 48.

[76] *Id* at 50.

[77] *Id*. at 46.

[78] *Id.* at 46-47.

[79] *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991). *See also Adler v. Fred Lind Manor*, 103 P.3d 773, 779 (Wash. 2004).

[80] Arbitration agreements in the collective bargaining context are primarily governed by the Labor Management Relations Act, 29 U.S.C. §185(a), rather than by the FAA, *see* 9 U.S.C. §1, and will not be discussed here.

agreements are generally enforced, but certain elements can place enforcement of the agreement or a resulting award in doubt.

Arbitration clauses in employment agreements tend to be subject to scrutiny under an unconscionability analysis. The likelihood that a court will find inequality of bargaining power to support the procedural unconscionability of an employment arbitration agreement means that most of the analysis focuses on substantive unconscionability.[81] In addition, agreements to arbitrate employment disputes are also subjected to scrutiny based on public policy concerns.

a. Unconscionability

Much as with consumer disputes, the courts scrutinize arbitration agreements for provisions that favor the employer to the disadvantage of the employee. Employment arbitration agreements that limit an employee's remedies, require shifting or sharing the cost of arbitration, unilaterally restrict judicial access, or otherwise appear to limit the scope of arbitration unfairly have been deemed by state courts to be unconscionable or otherwise unenforceable.

In addition to these indicia of substantive unconscionability, employment arbitration agreements may also be called into question if they unreasonably impair an employee's ability to vindicate a statutory right. This emphasis on statutory rights finds its most widely cited expression in the decision of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*[82] In *Armendariz*, employees sued their employer for wrongful termination under the California Fair Employment and Housing Act. The employer claimed that the dispute was subject to arbitration pursuant to the terms of a pre-employment application and employment contract signed by the parties. The arbitration agreement in each contract contained clauses that (a) limited recoverable damages to back pay, (b) allowed only the employer to go to court, (c) required sharing the costs of arbitration, and (d) restricted the scope of discovery.[83] The employees argued that the terms of the agreement were unconscionable.

Analyzing the terms of the agreement, the court emphasized the importance of protecting an employee's ability to vindicate his or her statutory claims in an arbitral forum.[84] The court "held that California courts must perform a separate analysis in addition to the unconscionability analysis to determine if the arbitration agreement satisfies specific minimum requirements."[85]

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[81] *See, e.g.*, *Wilson v. Bally Total Fitness Corporation, Inc.*, D039355, 2003 Cal. App. Unpub. LEXIS 5892, at *1, *10 (Cal. Ct. App. June 18, 2003) ("The fact the Agreement is an adhesion contract is sufficient to establish that the Agreement is procedurally unconscionable….").

[82] 6 P.3d 669 (Cal. 2000).

[83] *Id.* at 675.

[84] *Id.* at 681.

[85] *Id.*; *see Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 652 (Cal. Ct. App. 2004).

Pursuant to this separate analysis, now known as an *Armendariz* analysis, California courts will not compel employees to arbitrate their claims if the arbitration agreement does not (1) provide for adequate discovery, (2) require a written decision subject to limited judicial review, (3) permit the types of relief available in court, (4) limit the employee's forum costs and (5) provide for a neutral arbitrator.[86]

Applying this analysis, the *Armendariz* court found the terms of the agreement before it to be unconscionable and unenforceable, because the provisions (a) compelled the employees to arbitrate statutory claims "without affording the full range of statutory remedies, including punitive damages and attorneys fees…available under the [California Act],"[87] (b) required the employees to bear expenses not applicable in courts,[88] and (c) required the employees, but not employer, to arbitrate.[89]

In the wake of the *Armendariz* decision, California and Washington courts have struck down similar terms in other employment contracts. In *Abramson*, an employee claiming wrongful termination challenged terms in his employment agreement requiring him to pay half of the arbitration fees and excluding claims by the employer from arbitration (unilaterally reserving access to the courts), while requiring all claims by the employee to be submitted to arbitration.[90] Finding the terms unconscionable and unenforceable, the appellate court relied on the principle that an arbitration agreement may not present obstacles to the vindication of claims involving statutory or non-statutory public rights.[91]

Similarly, in *Gonlugur v. Circuit City Stores, Inc*., an employee disputing statutory overtime payments claimed that his employment contract was unenforceable because it imposed a unilateral obligation to arbitrate, reserved to the employer access to the courts, shortened the statute of limitations, required fee shifting, and barred class actions.[92] The appellate court agreed, concluding that the employment agreement lacked mutuality and fairness, and effectively deprived the employee of the full range of benefits provided by the state statute.[93]

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[86] *See Armendariz*, 6 P.3d at 682.

[87] *Id*. at 683.

[88] *Id.* at 678.

[89] *Id*. at 694.

[90] *Abramson*, 115 Cal. App. 4th at 665.

[91] *See id.* at 653.

[92] *Gonlugur v. Circuit City Stores, Inc*., No. G033351, 2004 Cal. App. Unpub. LEXIS 8140, at *1 (Cal. Ct. App. Sept. 2, 2004).

[93] *Id*. at *8-14. *See also Wilson v. Bally Total Fitness Corp.*, D039355, 2003 Cal. App. Unpub. LEXIS 5892, at *10 (Cal. Ct. App. June 18, 2003) (California courts must ensure "fairness in arbitration so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum").

The decision in *O'Hare v. Municipal Resource Consultants* illustrates the effect of the *Armendariz* standard on features of arbitration clauses that might not, in other contexts, support a finding of unconscionability. [94] There, a California appellate court invalidated an arbitration agreement in an employment contract that required an employee to pay an equal share of the expenses of arbitration. The court ruled that arbitration agreements "imposing mandatory arbitration as a condition of employment…cannot generally require the employee to bear any type of expense" they would not incur in a court action.[95] Additionally, despite the employer's offer to pay the costs of arbitration in an effort to cure the problem, the court refused to sever the offending clause, stating that the term's "unconscionability permeate[d] the arbitration provision."[96] The California courts now generally find provisions requiring employees to share the costs of arbitration unenforceable.[97]

Finally, in *Fitz v. NCR Corporation*, a California appellate court considered an employee dispute resolution policy that listed several types of disputes between employers and employees that were subject to arbitration, and others that were not.[98] The court found that the disputes subject to arbitration were solely of the type that employees would bring against employers, but not the reverse. Finding the provision unlawful for lack of mutuality, the court refused to enforce the arbitration clause, stating "[the provisions] indicate a systematic effort to impose arbitration on an employee not … as an alternative to litigation, but as an inferior forum that works to the employer's advantage."[99]

Washington state courts have adopted much of the reasoning of the *Armendariz* decision. In *Zuver v. Airtouch Communications, Inc.*, the Supreme Court of Washington decided the enforceability of a provision in an employment agreement requiring the waiver and release "of all rights to recover punitive or exemplary damages in connection with common law claims, including claims arising in tort or contract…."[100] The court held the provision unconscionable because it "blatantly and excessively favor[ed] the employer" and did not allow the employee any significant recourse while permitting the employer full access to the remedies.[101]

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[94] 107 Cal. App. 4th 267 (Cal. Ct. App. 2003).

[95] *Id.* at 279.

[96] *Id*. at 282.

[97] *See, e.g., Abramson*, 115 Cal. App. 4th 638; *Wilson*, 2003 Cal. App. Unpub. LEXIS 5892.

[98] 118 Cal. App. 4th 702, 725 (Cal. Ct. App. 2004).

[99] *Id*. at 727. *See also Wilson*, 2003 Cal. App. Unpub. LEXIS 5892 (exempting certain employer claims from arbitration found unconscionable).

[100] 103 P.3d 753, 767 (Wash. 2004). The provision did not preclude the employer from seeking these remedies in an action against the employee.

[101] *Id*.

In *Adler v. Fred Lind Manor*, another Supreme Court of Washington decision, the court severed provisions of an arbitration agreement requiring parties to pay their own attorneys fees and prescribing a shorter statute of limitations when arbitrating state statutory employment discrimination claims, finding the provisions unconscionable.[102] The court determined that the provisions undermined the protections provided in the statute to the disadvantage of the employee and were thus not enforceable.

The *Armendariz* line of cases illustrates the determination of some state courts to apply heightened scrutiny to arbitration agreements in the employment context. Courts following this type of analysis are more likely to conclude that even modest indicia of substantive unconscionability are enough to defeat enforcement of an arbitration agreement. At the same time, these cases do not create a *per se* rule against employment arbitration. As in other contexts, those wishing to avoid invalidation of an agreement to arbitrate in the employment context will do well to avoid including terms that could be viewed by a court as one-sided. Once again, the AAA has provided guidelines in the form of due process protocols to help employers avoid the pitfalls of enforcing agreements to arbitrate employment disputes.[103]

b. Public Policy

Public policy is sometimes treated by courts as an independent standard against which to evaluate agreements to arbitrate employment disputes and has also been employed in considering enforcement of arbitral awards. While courts are generally not permitted to disturb arbitral awards except on narrow statutory grounds, the U.S. Supreme Court has authorized some judicial review, at least of labor arbitration awards, on public policy grounds.[104] Of the states that have relied on public policy considerations to decline enforcement of arbitral awards, Connecticut has taken the most aggressive approach and has done so primarily in the area of arbitral awards reinstating public employees.

In *Board of Police Commissioners of the City of Ansonia v. Stanley*, a city police officer appealed the lower court's decision to vacate an arbitration award reinstating him with the city's police force.[105] The officer had been terminated for making false statements during an internal investigation into complaints about the harassment and sexual intimidation of four women.[106] At the conclusion of arbitration, despite finding the claims substantiated, the arbitrator ruled that the

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[102] 103 P.3d 773 (Wash. 2004).

[103] *See* http://www.adr.org/sp.asp?id=28535.

[104] *W.R. Grace & Co. v. Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983). The statutory grounds are set forth in 9 U.S.C. §10.

[105] 887 A.2d 394 (Conn. App. Ct. 2005).

[106] *Id*. at 398-400.

City lacked just cause to terminate the officer and called for his reinstatement.[107] The City moved to vacate the award.

In order to vacate an arbitration award on the grounds of a public policy violation, the court had to identify "well defined and dominant [public policy], as is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests," and determine whether or not the award violates the expressed policy.[108] The court stated, "[a]rbitrators exceed their authority if their award orders a party to engage in conduct that is … in clear violation of public policy."[109] Finding that expressed state and federal law prohibited the behavior of the officer,[110] the court vacated the award reinstating the officer as against public policy, because it appeared to signify endorsement of his behavior by the City.[111]

Similar cases in which state courts have refused to enforce an arbitration award on public policy grounds include *City of Torrington v. AFSCME Council 4 Local 1579*, where a Connecticut court vacated an arbitration award reinstating a state building inspector suspected of taking bribes while on duty and falsifying his employment application.[112] The court stated, "[t]he public has a right to expect honesty, good faith and fair dealing from its government employees…a truism that is obvious and grounded in common sense…[and] may, in and of itself, constitute a public policy."[113] Based on this interpretation of public policy, the court vacated the award.

In *State v. AFSCME. Council 4, Local 2663, AFL-CIO*, the court vacated an arbitration award reinstating a driver for the Department of Children and Families who was terminated after a conviction of possession of drugs with the intent to sell.[114] Relying on state policy concerning the state's duty to protect and nurture children, the court found that the arbitrators' award conflicted with the public policy.[115] Specifically, the court stated, "[c]ommon sense commands that it is utterly inappropriate to place potentially troubled children in daily contact with a convicted drug offender. An arbitrator's award that undermines the department's responsibility

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[107] *Id*. at 400-401.

[108] *Id*. at 404; *see also United Paperworks Int'l Union, AFL-CIO v. Misco, Inc*., 484 U.S. 29 (1987).

[109] 887 A.2d at 406.

[110] *Id*. at 405.

[111] *Id*. at 406-07.

[112] No. CV000083909S, 2002 Conn. Super. LEXIS 2290, at *1 (Conn. Super. Ct. July 11, 2002).

[113] *Id.* at *34.

[114] 758 A.2d 387 (Conn. Ct. App. 2000).

[115] *Id*. at 390.

to protect children in such a dramatic way violates a compelling public policy, and we will not allow it to stand."[116]

These cases do not suggest a broad trend or often-used basis for invalidating arbitral awards, nor do they suggest that courts will wield public policy as a weapon to invalidate pro-employer awards (indeed, the opposite appears to be the case in Connecticut). However, weighing arbitral awards against public policy may not always yield predictable results, especially if the trend moves from the collective bargaining context into other employment disputes.

Health Care Disputes

In the area of health care disputes, as in the employment context, state courts appear inclined to scrutinize agreements that appear to impair statutory rights. Public policy favoring protection of those placed at a disadvantage by illness tends to play a significant role in the analysis of agreements to arbitrate health care disputes. Various terms in arbitration agreements have been determined to violate state public policy in this field.

First, courts have found provisions limiting remedies under health care agreements to be unenforceable as violations of state public policy, especially if they attempt to alter statutorily guaranteed protections. The courts tend to reject these alterations based on the principle, articulated by the U.S. Supreme Court, that an agreement to arbitrate statutory claims incorporates all provisions of the statute, substantive and remedial.[117] Accordingly, provisions that seek to limit the protections of a statute are considered contrary to public policy and unenforceable.

In *Blankfield v. Richmond Health Care, Inc*., the parties disputed whether or not the nursing home had violated the deceased's rights under a state statute and had negligently cared for her while she was alive. The parties had signed a nursing home admission agreement containing an arbitration clause that required arbitration under the rules of the National Health Lawyers Association, which precluded awarding damages absent proof to a clear and convincing standard.[118] The Florida court determined that the clear and convincing standard effectively eliminated recovery for negligence, and was contrary to the state's Nursing Home Residents Act,

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[116] *Id.* at 395. *See Chicago Firefighters Union Local No 2 v. City of Chicago*, 751 N.E.2d 1169, 1174 (Ill. App. Ct. 2001) (vacating an award reinstating a firefighter found drinking alcohol while on duty and responding to a call, because it was contrary to public policy).

[117] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985); *see also, e.g.*, *Armendariz,* 6 P.3d at 682.

[118] 902 So. 2d 296 (Fla. Dist. Ct. App. 2005). Pursuant to the NHLA arbitration rules, an arbitrator is prevented from awarding consequential, exemplary, incidental, punitive or special damages absent "clear and convincing evidence that …[a party]…is guilty of conduct evincing an intentional or reckless disregard for the rights of another party." *Id.* at 298.

which provided for a preponderance of the evidence standard.[119] The damages clause in the agreement "defeated the remedial provisions of the statute" and was therefore found to be a violation of public policy.[120]

Other circumstances that tend to lead courts to refuse to enforce an arbitration agreement include failing to provide notice of the arbitration clause in a health care contract. A recent decision from a Tennessee appellate court considered not only whether the parties were alerted to the existence of an arbitration clause in a contract, but also whether the circumstances under which the clause was bargained for were reasonable. In *Howell v. NHC Healthcare-Fort Sanders, Inc.*, the court refused to enforce a clause, in spite of the nursing home having explained it to the patient.[121] The court found that the nursing home representative failed to explain the meaning and implications of the arbitration clause, because she failed to explain that the signatory waived his right to a jury trial, and it was clear that the signatory had a limited education.[122] Furthermore considering the urgency of the admission to the nursing home, and the "take it or leave it" basis under which the patient was admitted, the court determined that the parties did not mutually agree to arbitrate.[123]

Some states have codified an arbitration notice requirement. As a general matter, states are prohibited from adopting legislation or other policies that restrict the enforcement of arbitration agreements based on criteria not applicable to other contracts—including notice and formatting requirements. In *Doctor's Associates, Inc. v. Casarotto*, the U.S Supreme Court struck down a Montana statute requiring special formatting requirements for arbitration agreements.[124] The Montana statute required contracts to give notice that they contained arbitration clauses in "underlined capital letters on the first page of the contract."[125] The Supreme Court found that the statute undermined the goals of the FAA—to put arbitration agreements on equal footing with other contracts—and held that the Montana statute was pre-empted by the federal Act.[126] The Court stated, "[c]ourts may not…invalidate arbitration agreements under state laws applicable only to arbitration agreements," nor may they condition

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[119] *Id*. at 298.

[120] *Id*. at 299. *See also Flyer Printing Co. v. Hill*, 805 So. 2d 829 (Fl. Dist. Ct. App. 2001) (arbitration clause limiting remedies available under Title VII unenforceable).

[121] 109 S.W.3d 731 (Tenn. Ct. App. 2003).

[122] *Id.* at 733.

[123] *Id.* at 735.

[124] 517 U.S. 681 (1996).

[125] *Id.* at 684.

[126] *Id.* at 687.

"the enforceability of arbitration agreements on compliance with a special notice requirements not applicable to contracts generally."[127]

Overall, states seem to be complying with the *Casarotto* rule. However, California and Colorado courts have struck down arbitration clauses under state statutes dictating formatting and disclosure requirements in insurance agreements.[128] The viability of such statutes is premised on the theory that the McCarran-Ferguson Act "reverse preempts" the FAA by reserving to the states the power to regulate terms in insurance contracts.[129] Pursuant to this exemption, these states created legislation requiring health care contracts containing arbitration clauses to meet specific formatting and disclosure requirements.

Class Actions

In its 2003 decision in the *Bazzle* case, the Supreme Court held that it is for an arbitrator to decide whether a claimant may pursue a claim on a class basis if the claim is governed by an arbitration clause that is silent on the subject.[130] Since then, arbitration clauses in consumer and employment contracts have become less silent, and many now contain explicit waivers of the right to proceed on a class basis. State courts have differed as to the enforceability of such class action waivers, and the Supreme Court recently declined an opportunity to clarify the law in this area when it denied *certiorari* in a case in which the California courts had held such waivers to be unconscionable in consumer agreements. [131]

The typical argument against class action waivers is that such clauses prevent potential plaintiffs with financially insignificant individual claims from joining together to pursue their claims on a class basis. Courts adopting this argument reason that, without the benefit of class actions, cases that do not offer the potential financial gains needed to attract a lawyer could not be pursued, with the result that conduct that harms society in the aggregate could go unchecked.[132] Courts following this line of reasoning perceive class action waivers as impermissibly one-sided, because it is defendants who benefit from the reduced threat of

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[127] *Id.*

[128] *E.g.*, *Robertson v. Health Net of California, Inc.*, 132 Cal. App. 4th 1419 (Cal. Ct. App. 2005); *Imbler v. Pacificare of California, Inc.*, 103 Cal. App. 4th 567 (Cal. Ct. App. 2002); *Smith v. Pacificare Behavioral Health of California, Inc.*, 93 Cal. App. 4th 139 (Cal. Ct. App. 2001); *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003).

[129] The McCarran-Ferguson Act is codified at 15 U.S.C. §1012(b). *See Allen*, 71 P.3d at 382.

[130] *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

[131] *Cingular Wireless v. Mendoza*, 126 U.S. 2353 (2006), denying a writ of certiorari to review *Parrish v. Cingular Wireless*, No. A105518, 2005 Cal. App. LEXIS 978 (Cal. Ct. App. June 17, 2005).

[132] *See, e.g.*, *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 665 (Pa. Super. Ct. 2002).

aggregate action. Accordingly, many courts view these waivers as unconscionably restrictive both of a claimant's ability to redress wrongdoing and of her or his right to vindicate a claim.[133]

In the last five years, courts in Alabama, California, Illinois, Missouri, New Jersey, North Carolina and West Virginia have struck down arbitration clauses incorporating class action waivers. In Alabama, the Supreme Court voided the entire arbitration agreement in a home inspection contract on grounds of unconscionability for precluding class actions.[134] The court concluded that the agreement was unconscionable because it "restrict[ed] [the plaintiffs] to a forum where the expense of pursuing their claim far exceed[ed] the amount in controversy…by foreclosing…an attempt to seek practical redress through a class action and restricting them to…individual arbitration."[135]

New Jersey state courts have also refused to give effect to arbitration agreements containing class action waivers. In *Discover Bank v. Shea*, a New Jersey trial court refused to compel arbitration upon finding the class action waiver clause in a credit card agreement to be unconscionable.[136] The court explained its disapproval of the clause: "Discover can use the provision to preclude class actions and therefore, effectively immunize itself completely from small claims, [while] individual cardholders gain nothing, and in fact, are effectively deprived of their small individual claims."[137] The New Jersey Supreme Court recently adopted this reasoning in *Muhammad v. County Bank of Rehoboth Beach, Delaware*, declaring that a class-arbitration waiver found in a consumer contract involving a "predictably small amount of damages" was unconscionable.[138]

In 2005, in another action challenging the validity of an arbitration agreement forbidding class wide arbitration involving Discover Bank, California's Supreme Court found prohibitions on class actions unconscionable.[139] The court held that, in the face of the one-sidedness and effective insulation from "liability otherwise imposed under California law," class action waivers "are generally unconscionable."[140] As did the New Jersey court, the California court narrowly tailored its holding to apply only to consumer contracts of adhesion involving potentially small

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[133] *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005).

[134] *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002).

[135] *Id.* at 539.

[136] 827 A.2d 358 (N.J. Super. Ct. 2001).

[137] *Id.* at 366.

[138] 2006 WL 2273448, at *9-10 (N.J. Aug. 9, 2006).

[139] *Discover Bank v. Sup. Court of Los Angeles,* 113 P.3d 1100 (Cal. 2005).

[140] *Id.* at 1109.

amounts of damages.[141] In the months following that decision, a California court of appeals followed the state supreme court's lead and invalidated an arbitration clause in a credit card contract containing a class action waiver. In *Klussman v. Cross Country Bank*, the court stressed that *Discover Bank* did not hold that all class action waivers are unconscionable, but rather that the facts in *Klussman* fit the narrowly defined circumstances presented by the California Supreme Court.[142]

On remand from the California Supreme Court's *Discover Bank* decision, however, the court of appeals conceded that California law was more demanding on this subject than the law of other states.[143] Concluding that the agreement in question was governed by Delaware law, the court found that class action waivers in credit card agreements were enforceable under that state's law, while noting that class action waivers had been found unconscionable in eight other states. The court enforced the arbitration clause containing the waiver, because the class that the plaintiff sought to certify was not limited to California consumers.

Courts in Missouri and West Virginia have also nullified arbitration agreements with class action waivers, but each court relied on additional provisions to support its determination of unconscionability. In *Dunlap v. Berger*, the West Virginia Supreme Court of Appeals, reviewing a consumer contract, held that the FAA did not prohibit the state from considering whether or not clauses that limit a party's ability to enforce their rights or obtain relief under state law can be held unconscionable.[144] The court went on to refuse to enforce an arbitration clause containing provisions waiving class actions and limiting remedies, finding that the clauses significantly limited a party's remedial rights.[145] The Missouri Court of Appeals applied similar reasoning in refusing to enforce an agreement with a similar class action waiver and fee shifting provision.[146]

Most recently, the Illinois Supreme Court declared unconscionable a class action waiver in a cellular telephone service agreement's arbitration clause.[147] Starting from the premise that class action waivers in arbitration clauses are not *per se* unconscionable, the court surveyed decisions from other jurisdictions to distill a pattern to the circumstances in which such waivers

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[141] "When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money…the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud, or willful injury to the person or property of another." *Discover Bank*, 113 P.3d at 1110.

[142] 134 Cal. App. 4th 1283, 1297 (Cal. Ct. App. 2005).

[143] 134 Cal. App. 4th 886 (Cal. Ct. App. 2005).

[144] 211 W. Va. 549, 564 (W. Va. 2002).

[145] *Id.* at 564.

[146] *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005).

[147] *Kinkel v. Cingular Wireless LLC*, No. 100925, 2006 WL 2828664 (Ill. Oct. 5, 2006).

will be enforced.[148] The court found that "a class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner."[149] Because the class action waiver was contained in an adhesion contract that did not explicitly set forth the costs associated with arbitration, the court concluded that the plaintiff lacked a meaningful opportunity to reject the term.[150] Similarly, because the plaintiff's claim—that a $150 early termination fee operated as an illegal penalty—could not result in individual recovery exceeding the costs of arbitration, the court found that the class action waiver limited the plaintiff's ability to vindicate her claim.[151] The court refused to enforce the class action waiver, but held that the remainder of the agreement to arbitrate could be severed and enforced.[152]

Another recent state court decision discussing class waivers offers a slightly different analysis. A North Carolina court of appeals held, in *Tillman v. Commercial Credit Loans, Inc.*, that contracts that require parties to waive their rights to bring class actions may be enforceable if the agreement provides for the recovery of attorney's fees.[153] According to the court, the general apprehension that class action waivers would make it impossible to obtain legal representation becomes inapplicable when the arbitration agreement contains language stating that the parties continue to be entitled to the remedies provided by law, because the consumer protection statute under which the claim was made expressly provided for the recovery of a plaintiff's costs.[154] Therefore, the plaintiffs' argument "that without the ability to join claims, they [were] deterred from bringing lawsuits against defendants due to the amount of money at stake being too small to justify an attorney's involvement" was rejected.[155]

The enforceability of class action waivers in arbitration agreements remains a live issue, as the law continues to be defined and interpreted in the courts. Most of the decisions do not find that a class action waiver renders an arbitration agreement *per se* unconscionable, and a number of courts have upheld such waivers.[156] Nonetheless, such waivers carry a risk that they will not

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[148] *Id.* at *18-19.

[149] *Id.* at *20.

[150] *Id.*

[151] *Id.*

[152] *Id.* at *23.

[153] 629 S.E. 2d 865 (N.C. Ct. App. 2006).

[154] *Id*. at 872-73.

[155] *Id.* at 872.

[156] *E.g.*, *Hutcherson v. Sears Roebuck & Co*., 793 N.E.2d 886 (Ill. App. Ct. 2003) (Arizona law) ("Because the arbitration provision in this case provides financial protections to card holders with the burden of costs falling

(Footnote continued on next page)

only be rejected, but also that they will take the entire arbitration agreement out with them. As with other terms that may jeopardize the enforceability of an arbitration agreement, the benefits of including a class action waiver must be weighed against the risk that such a provision will lead to a finding that the agreement is unenforceable.

The AAA has again provided a possible middle position, by adopting *Supplementary Rules for Class Arbitrations*.[157] Those rules are not designed to tilt the playing field for or against class actions or class action waivers, but rather to provide an alternative for those who may wish to provide for resolution of disputes on a class basis within the framework of arbitration, rather than in competition with it.

CONCLUSION

Twenty-two years after the Supreme Court held that the FAA applies in and must be enforced by state courts, parties who have agreed to resolve disputes between them by arbitration can generally depend on those agreements being enforced in state court. Overt judicial hostility to arbitration now represents the exception rather than the rule, and it is rare for an agreement that simply provides for arbitration to be refused enforcement.

Difficulties arise, however, when parties add provisions to arbitration agreements that go beyond providing for arbitration. Courts in many states feel that they have an obligation to scrutinize closely contracts between parties of unequal bargaining power, especially take-it-or-leave-it contracts between large corporate entities and consumers, employees, homeowners, and users of health care services. Federal law may require that arbitration clauses in such contracts be enforced, but it also allows a state judge to refuse enforcement on grounds applicable to contracts in general, such as unconscionability. Terms in arbitration clauses that appear to a state judge to be unfair to a party perceived to be weaker may well be refused enforcement, particularly if the terms appear designed to tilt the outcome or to limit access to remedies provided by statute. As long as the party drafting the arbitration clause takes care to keep the process fair, it should be able to enforce the agreement to arbitrate.

A special problem is presented when an arbitration clause contains a waiver of the right to proceed on a class basis. Such waivers affect the economics of the dispute resolution process, and are treated by some state courts as unconscionable if they appear to make it impossible for

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primarily on SNB, we do not find the no-class-action provision to be so one-sided or oppressive as to render the agreement unconscionable."); *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865 (N.C. Ct. App. 2006) (N.C. law); *Spann v. American Express Travel Related Services Co., Inc.*, No. M2004-02786-COA-R3-CV, 2006 Tenn. App. LEXIS 582 (Tenn. Ct. App. Aug. 30, 2006) (Utah law); *Delta Funding Corp. v. Harris*, No. A-44, 2006 N.J. LEXIS 1155 (N.J. Aug. 9, 2006) (N.J. law) (class arbitration waiver enforceable under facts of the case, in which plaintiff was seeking more than $100,000 in damages and was not seeking class certification).

[157] *See* http://www.adr.org/Classarbitrationpolicy.

an individual to pursue a claim. If care is taken to address that concern, by providing other mechanisms to make pursuit of small claims possible (such as fee shifting, or payment of the costs of arbitration by the stronger party, or class arbitration), this is an obstacle that can be dealt with in many states by careful drafting. In some states, however, the class waiver issue represents the last bastion of determined resistance to arbitration, and the enforceability of such waivers will probably remain a state-by-state question until the Supreme Court decides to resolve it.

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Arbitration Tech Toolbox: Looking Beyond the Black Box of AI in Disputes over AI’s Use (https://arbitrationblog.kluwerarbitration.com/2023/05/25/arbitration-tech-toolbox-looking-beyond-the-black-box-of-ai-in-disputes-over-ais-use/)

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A black box artificial intelligence (“AI”) model is one “created directly from data by an algorithm, meaning that humans, even those who design them, cannot understand how variables are being combined to make predictions” (see a more detailed discussion **here (https://hdsr.mitpress.mit.edu/pub/f9kuryi8/release/8)**). That we do not understand the way an AI reaches its conclusions is creating discomfort over the implementation and use of AI. We first summarise the views shared in two recent seminars by Young ICCA and Maxwell Chambers. We then turn to share our thoughts on the same.

Young ICCA

On 29 March 2023, within the framework of the **Young ICCA mentoring program (https://www.youngicca.org/mentoring-programme)** me and sponsored by **ArbTech (https://www.arbtech.io/)**, the webinar ***Will I Lose My Job to a Robot?* (https://www.linkedin.com/posts/young-icca_young-icca-webinar-will-i-lose-my-job-to-activity-7044001724499394560-gKgR?utm_source=share&utm_medium=member_desktop)** took place. The event sparked a robust discussion concerning the hype around new cutting-edge tools based on AI and their applications in international arbitration.

Sofía Klot (https://www.freshfields.com/en-gb/contacts/find-a-lawyer/k/klot-sofia/) (Senior Associate, Freshfields Bruckhaus Deringer) discussed which predictive and generative AI tools are increasingly being used in arbitration and litigation (*e.g.*, **ArbiLex (https://www.arbilex.co/)**; **Casetext – CoCounsel (https://casetext.com/)**; **Harvey (https://www.harvey.ai/)** and productivity tools such as **Microsoft’s Co-Pilot (https://blogs.microsoft.com/blog/2023/03/16/introducing-microsoft-365-copilot-your-copilot-for-work/)**). She also raised two key issues: (1) the use cases for AI in arbitration and (2) ethical and legal risks.

1. Large Language Models (“LLMs”) consist of neural networks trained on large amounts of text that are very good at anticipating, generating and predicting language. They can be used to create tailor-made outputs for a range of applications, including for arbitration. Klot pointed to several ways in which lawyers can use LLMs, along with new career paths (*e.g.*, in data annotation and labelling), and explained how arbitrators and arbitral institutions can also leverage LLMs (*e.g.*, to summarize parties’ positions, automate transcriptions of hearings, and prepare the procedural history of a case for publication in an award); and
2. Ethical and legal risks posed by AI (for instance, preserving client data confidentiality and preventing the use of fake evidence). (Such issues are explored in further detail on the Blog **here (https://arbitrationblog.kluwerarbitration.com/2023/04/08/arbitration-tech-toolbox-lets-chat-some-more-about-chatgpt-and-dispute-resolution/)**.)

The second discussion was led by **Emily Hay (https://arbitrationblog.kluwerarbitration.com/author/emily-hay/)** (Counsel, Hanotiau & van den Berg) and **Federico Ast (https://en.federicoast.com/)** (Founder & CEO, Kleros). After a thorough overview of blockchain and Kleros, the discussion turned to how domestic courts will react to blockchain-based awards in AI-related disputes.

Considering the New York Convention, Hay outlined challenges in: (i) identifying an arbitral seat; (ii) lack of reasoning in self-enforceable awards; (iii) complying with the writing requirement of the arbitration agreement; (iv) having an original and duly authenticated award; and (v) non-compliance with due process (discussed further on the Blog **here (https://arbitrationblog.kluwerarbitration.com/2022/03/11/autonomous-arbitration-in-the-era-of-the-metaverse/)**). Ast, in turn, brought to the table a Kleros case that overcame those barriers: in 2021, a Mexican court enforced a blockchain-based award by incorporating it by reference into a traditional arbitration award (discussed on the Blog **here (https://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/)**).

Finally, **Mauricio Sánchez Lemus (https://www.linkedin.com/in/mauricio-sanchez-lemus)** (Contract International Advisor, White & Case LLP) addressed the AI scheme from a regulatory perspective. He analyzed the reaction of states to AI-based technologies and the problems they entail. For Sánchez Lemus, states are running this race far behind the speed at which AI tools are growing.

Maxwell Chambers

On 27 April 2023, as part of its inaugural **#BeyondtheBlackBox (https://www.maxwellchambers.com/beyond-the-black-box/)** series, **Maxwell Chambers (https://www.maxwellchambers.com/)** hosted a closed-door roundtable discussion under Chatham House Rule on the implementation and use of AI. Participants were treated to a live demonstration of **Rocketeer (https://www.simmons-simmons.com/en/products/trademark-rocketeer)** – an AI tool that can predict the outcome of a conflict between trademarks.

A topic discussed at length was how the use and implementation of AI could potentially stifle legal innovation and accelerate tunnel vision. AI largely relies on the use of robust datasets, patterns, and predictive learning. However, this very nature of AI seems antithetical to the conditions required for legal innovation. Seminal cases like ***Donoghue v Stevenson* (https://www.bailii.org/uk/cases/UKHL/1932/100.html)** suggest that critical analysis and courage to depart from established principles are necessary for legal developments.

Another point raised in the discussion is that AI does not need to reach perfection before it is preferred over human input in a wide variety of contexts. For example, if AI can predict with just 80% accuracy the likely outcome of a dispute based on inputs of fact and evidence, businesses may consider that preferable to costly legal advice—the traditional antecedent to the commencement of legal proceedings.

Nevertheless, the majority agreed that AI holds great potential and possibilities for the legal sector. Possible uses of AI tools in international arbitration and dispute resolution, such as ChatGPT, are being explored (as discussed **here (https://arbitrationblog.kluwerarbitration.com/2023/04/08/arbitration-tech-toolbox-lets-chat-some-more-about-chatgpt-and-dispute-resolution/)**, **here (https://arbitrationblog.kluwerarbitration.com/2023/02/26/arbitration-tech-toolbox-will-chatgpt-change-international-arbitration-as-we-know-it/)** and **here (https://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligence-time-tango/)**).

Our thoughts

Inherent nature of AI and "AI Singularity": will this mean more arbitrations over misplaced regulations?

With the rapid speed at which AI is developing, **governments are scrambling (https://www.bloomberg.com/news/articles/2023-03-17/chatgpt-leaves-governments-scrambling-for-ai-regulations#xj4y7vzkg)** to put in place regulations to curb and control the use of AI. Chinese regulators **recently released (https://www.reuters.com/technology/china-releases-draft-measures-managing-generative-artificial-intelligence-2023-04-11/)** draft rules designed to manage how companies develop generative AI products like ChatGPT, with the aim of circumscribing AI development. For example, under these rules, the content generated by AI needs to reflect the core values of socialism and should not subvert state power. Similarly, the UK government recently **published a white paper (https://www.lexology.com/library/detail.aspx?g=0f135adc-ae0a-474a-966c-b51344ce9a6d)** on the future of governance and regulation of AI.

The rush to impose regulations stems from an assumption that the concerns brought about by AI can be resolved with a better understanding of how AI works and effective control of undesirable outcomes.

However, the inherent nature of AI makes this difficult. Current AI systems use artificial neural networks that mimic the complex organisational structure of deep neural networks in the human brain. The human brain is already difficult to understand. It is unsurprising then, that even the people behind the development of AI are **facing problems explaining how it works (https://builtin.com/artificial-intelligence/ai-right-explanation)** and why certain outputs are generated. We may have to accept that we cannot control or manage something we do not understand.

The greatest discomfort with AI is its potential to eventually evolve into something we can no longer control or restrain, simply because we cannot grasp how it works. Indeed, the concept of "**AI Singularity (https://www.aiforanyone.org/glossary/technological-singularity)**" was raised in the roundtable discussion. AI Singularity refers to the tipping point at which AI systems become so advanced that they transcend human intelligence. At this point, humanity becomes unable to understand or control the very technology it creates, potentially resulting in a future where humans and human innovation become obsolete. Experts do not know when this can happen, but the possibility is certainly concerning.

Regulators thus must take this into account when implementing legislation. No doubt arbitration practitioners will watch this space carefully for disputes arising out of misplaced regulations. One possible (but extreme and potentially controversial) way to tackle this is for regulators to move fast and strictly curtail the ability for private parties to develop AI. This may arguably be what Chinese regulators are now doing. However, we need to decide how far we should let our fear of the unknown limit the potentially revolutionary developments we could make as a human race.

Can predictive AI tools enhance the decision-making process?

AI poses several challenges that should keep us on our toes. LLMs lack awareness and creative capabilities are limited to the data sets they are fed ("garbage in, garbage out"). The absence of biases is crucial when deciding to incorporate them. Therefore, parties and arbitrators can be concerned about simply "outsourcing" the decision-making function to predictive algorithms. When using predictive AI, it is vital to detail its usage in the arbitration agreement, and ask questions such as: how is the training data selected and labelled? Are there auditing procedures built into the system? How is the data updated? Are there controls for algorithmic biases?

Furthermore, AI systems with invisible inputs and inner workings might generate conclusions without providing explanations as to how they were reached (the black box phenomenon). The solution may lie in incorporating explainable AI into the algorithm. However, machine learning algorithms sometimes do not base their "decisions" and predictions on the applicable law or facts of the case, but on information that humans would not find relevant.

Moreover, AI poses practical challenges in arbitration:

- confidentiality and data management: client data could need to be stored in a private server, cloud or data room; it should be anonymized and should not be fed back into the training algorithm;
- manipulation of evidence; and
- infringements of the equality of arms principle.

While AI will not replace certain human cognitive functions, it will increasingly permeate our practice. We must be prepared to be at the forefront and respond to clients' needs.

Conclusion

The implementation and use of AI carries both risks and rewards, and not just in the legal sector. One way in which governments are attempting to manage the risks is through regulation and careful supervision. But with growing interest and rapid developments in AI, coupled with the inherent limits to human understanding of complex neural AI systems, it remains to be seen whether we can continue being the masters of the very thing we created.

Further posts in our Arbitration Tech Toolbox series can be found ***here* (https://arbitrationblog.kluwerarbitration.com/category/arbitration-tech-toolbox)**.

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Highlight

Parties to an arbitration contract may agree to a secrecy clause that will govern their arbitration process to protect the confidentiality of their proprietary or personal information. Of great concern, however, is that they also may use such an arbitration secrecy clause to hide their improper or discriminatory practices or defects in their products, and to silence the victims of their wrongdoing. This silence, in turn, may enable perpetrators to continue to engage in harmful behavior, that is like the conduct that the secrecy clause has covered up. This Article explores the relationship between the Federal Arbitration Act (FAA), which generally requires that courts enforce arbitration agreements as written, and various state and federal limitations on the enforcement of nondisclosure agreements (NDAs), which might be used to safeguard against the harmful effects of arbitration secrecy clauses.

Courts have divided sharply in considering the extent to which the FAA preempts or displaces, respectively, various state and federal limitations on the enforcement of NDAs as

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they relate to arbitration secrecy. The established broad framework is clear enough: Pursuant to the U.S. Supreme Court's FAA jurisprudence, the FAA will preempt or displace a regulation that undermines a fundamental attribute of arbitration. A neutral regulation will not conflict with the FAA, however, when it impacts only an incidental aspect of arbitration. Lower courts have not reached a consensus as to whether arbitration secrecy is a fundamental attribute or merely an incidental aspect of arbitration. The U.S. Supreme Court has never explicitly addressed the issue.

The Article's analysis begins by considering the nature of arbitration and the place of secrecy in the hierarchy of arbitral values. After reviewing the FAA's structure and legislative history, the folklore of arbitration, and the case law addressing encroachments upon arbitration secrecy, the Article concludes that secrecy is neither a fundamental attribute of arbitration nor a mere incidental aspect of arbitration. Rather, secrecy should be regarded as a secondary or intermediate attribute of arbitration. This Article's novel conclusion that arbitration has intermediate attributes, suggests the need for an expanded framework for resolution of challenges to neutral arbitration regulation that allows for a more nuanced intermediate scrutiny. This Article proposes and defends such a framework. In the context of government infringements of arbitration secrecy, the framework would require the government to demonstrate that its infringement upon arbitration secrecy is reasonable in its inception and reasonable in its scope when measured against the parties' interest in arbitration secrecy. This balancing approach would allow for consideration of context that the Supreme Court's current all-or- nothing approach ignores and, thus, is better suited to harmonizing the competing concerns grounding the FAA and any potentially conflicting state or federal effort that does not target arbitration specifically but nonetheless impacts a secondary attribute of arbitration.

Text

[*1730]

Introduction: Infringements on Arbitration Secrecy

Constance Ramos was a much sought-after and highly experienced litigator and patent attorney when she joined the Silicon Valley office of Winston & Strawn, LLP as an "income [*1731] partner" in May 2014.[1] Three years later, Ramos resigned from the firm "under protest" and simultaneously filed a complaint with the California Department of Fair Employment and Housing, alleging that Winston had illegally discriminated against her because of her sex.[2] When Ramos subsequently filed a sex discrimination lawsuit against Winston in California superior court, the firm moved to compel arbitration of the dispute, citing the arbitration clause in the Winston partnership agreement that Ramos had signed shortly after she joined the firm.[3]

After the trial court granted Winston's motion to compel arbitration, the court of appeals reversed.[4] The appellate court grounded its refusal to compel Ramos to arbitrate her case, in part, on its conclusion that the arbitration clause's confidentiality provision was substantively unconscionable.[5] That confidentiality provision required that, "[e]xcept to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence."[6] The court reasoned that this clause would prevent Ramos from gathering evidence to present her case. The court explained, "[i]t is hard to

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[1] Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 685 (Cal. Ct. App. 2018).

[2] Id. at 687.

[3] Id.

[4] Id. at 685. An order denying a motion to compel arbitration is immediately appealable but an order granting a motion to compel arbitration generally is not. In Ramos's case, however, the court of appeals took the unusual step of granting a writ of mandate to hear her immediate appeal of the trial court's order granting Winston & Strawn's motion to compel arbitration. Id. at 687-88.

[5] Id. at 700-02. The appeals court also held that several provisions of the arbitration clause at issue violated public policy as set forth in California's Armendariz doctrine. Id. at 696-98 see also Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682-89 (Cal. 2000). The Armendariz doctrine is grounded in the state effective-vindication exception to FAA preemption, which itself is of dubious validity. E. Gary Spitko, Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight, 20 Harv. Negot. L. Rev. 1, 14-25 (2015) (discussing the state effective-vindication exception and the Armendariz doctrine and arguing that the FAA largely preempts the doctrine).

[6] Ramos, 239 Cal. Rptr. 3d at 700.

see how she could engage in informal discovery or contact witnesses without violating the prohibition against revealing an `aspect of the arbitration.'"[7]

The case of *Constance Ramos v. Winston & Strawn* is emblematic of the tension between the strong desire of many parties to an arbitration contract to maintain the confidentiality of [*1732] their arbitration proceedings and the application of federal and state doctrines hostile to confidentiality provisions in arbitration agreements or to a party's claims of arbitration confidentiality.[8] Parties to a dispute may value arbitration secrecy as a means to protect the confidentiality of their valuable proprietary information or their sensitive personal information.[9] For example, an employee asserting any claim against her current or previous employer may prefer secrecy to safeguard her reputation with potential future employers.[10] More generally, a claimant alleging harassment, defamation, or other abuse may prefer that the details of her alleged victimization not become public knowledge.[11] Arbitration also may protect against public disclosure of sensitive information relating to non-disputants, such as salary data and performance evaluations relating to an employment discrimination claimant's coworkers.[12]

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[7] Id. at 701.

[8] With respect to the widespread desire among parties to arbitration for arbitral secrecy, see, e.g., Llewellyn Joseph Gibbons, Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce, 15 Ohio St. J. on Disp. Resol. 769, 771 (2000) ("Frequently, institutions and individuals choose arbitration solely in the hope of keeping some facts private.") Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846, 849-50 (1961) (listing a desire for privacy among several reasons that chiefly motivate parties to choose arbitration) Randall Thomas, Erin O'Hara & Kenneth Martin, Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis, 63 Vand. L. Rev. 959, 965, 970-71, 983, 985 (2010) (explaining how the structure of arbitration promotes secrecy and discussing various reasons why disputants might value arbitral secrecy).

[9] Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 170 F.3d 1, 7 n.4 (1st Cir. 1999) Alexandria Real Est. Equities, Inc. v. Fair, No. 11 Civ. 3694 (LTS), 2011 WL 6015646, at *3 (S.D.N.Y. Nov.30, 2011) Amy J. Schmitz, Untangling the Privacy Paradox in Arbitration, 54 Kan. L. Rev. 1211, 1212, 1248-49 (2006).

[10] Alexandria Real Est. Equities, 2011 WL 6015646 at *3 (describing arbitral party seeking to seal an arbitration award and supporting documents arguing that "they may be read by future [potential] employers who may be less likely to hire him as a result of knowing the details of his employment history") Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age, 7 Va. J.L. & Tech. 1, 51 (2002).

[11] Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 Geo. L.J. 2663, 2684 (1995) ("In fact, plaintiffs in sexual harassment, defamation, and employment cases, as well as some tort cases, have strong interests in not publicizing the underlying facts of their cases, even if they win, and most certainly if their alleged facts are not `sustained.'") id. at 2695 Schmitz, supra note 9, at 1239 (arguing that "some sexual harassment claimants, and others with sensitive claims, would not assert those claims without ensured arbitral secrecy") Meagan Glynn, Note, #TimesUp for Confidential Employment Arbitration of Sexual Harassment Claims, 88 Geo. Wash. L. Rev. 1042, 1063 (2020) ("[C]onfidentiality can be a valuable feature of arbitration, especially for certain victims.").

Arbitration secrecy may [*1733] also promote a conflict resolution atmosphere relatively more conducive to reconciliation among the parties.[13]

On the other hand, arbitration secrecy may aid parties in hiding from the public their improper or discriminatory practices or defects in their products that otherwise would have been exposed in public litigation.[14] Thus, commentators have argued that arbitration secrecy may negatively impact public welfare in several ways.[15] For example, arbitration secrecy may lessen the likelihood that potential victims of a particular harasser who previously had created a hostile environment in the workplace will learn of the harasser's prior behavior and, in this way, may enable the offender's harassment of new and unsuspecting victims.[16] Arbitration secrecy similarly may impede victims from gathering evidence of a pattern of illegal or tortious conduct that may be useful in prosecuting litigation.[17] More generally, arbitration secrecy may make it more difficult for potential claimants to cooperate with one another.[18] Finally, because arbitration secrecy makes it less likely that the public will learn of an arbitration award that rebukes a party, such secrecy also detracts from the ability of arbitration to have a punitive and

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[12] E. Gary Spitko, Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements, 43 U.C. Davis L. Rev. 591, 608 (2009).

[13] See Cal. Com. Club, Inc., 369 N.L.R.B. No. 106, at 6 (June19, 2020) ("[P]rotecting parties' agreement to arbitrate disputes on a confidential basis saves resources, protects all parties from reputational injury, and facilitates the cooperative exchange of discovery.") Mentschikoff, supra note 8, at 864 ("The physical format of the hearing room is designed to create an atmosphere of relative coziness.") Schmitz, supra note 9, at 1215 ("Many have defended arbitration's private process as necessary to foster open communications, relax tensions that often exist in the courtroom, and allow for flexible and efficient dispute resolution.") id. at 1245 (stating arbitration privacy "may promote candor and non-adversarial relational mending").

[14] Laurie Kratky Dore, Public Courts versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution, 81 Chi.-Kent L. Rev. 463, 487 (2006) Schmitz, supra note 9, at 1212, 1222, 1240.

[15] See, e.g., Schmitz, supra note 9, at 1229-31 (discussing ways in which the lack of a published opinion in arbitration impedes public access to information and, thus, may negatively impact public health or safety) id. at 1232-34 (discussing how arbitration secrecy may augment some repeat player advantages of arbitration).

[16] Glynn, supra note 11, at 1046-47, 1056.

[17] Schmitz, supra note 9, at 1232 Glynn, supra note 11, at 1054, 1056.

[18] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 246 (2013) (Kagan, J., dissenting) (discussing how arbitration contract's "confidentiality provision prevents [one merchant] from informally arranging with other merchants to produce a common expert report.") Christopher R. Drahozal, Confidentiality in Consumer and Employment Arbitration, 7 Y.B. on Arb. & Mediation 28, 30 n. 9 (2015).

specific [*1734] deterrent effect on the wrongdoer and to serve general deterrence and norm development functions.[19]

The policy debate focused on arbitration secrecy has played out against a backdrop of various state and federal doctrines that limit arbitration secrecy. In fact, while arbitration in the United States almost always is private, arbitration confidentiality is often infringed.[20] Arbitration privacy refers to the closed nature of the arbitration proceedings themselves.[21] The public has no right to attend arbitration proceedings including the arbitration evidentiary hearing.[22] Rather, through their arbitration contract, the parties control access to the arbitration proceedings in their case.[23] Where the parties have not come to an agreement on third-party access, the arbitrator generally has the power to determine who, aside from the parties, their counsel, and the presently testifying witness, may attend the arbitration proceedings.[24]

Arbitration confidentiality refers to the right of the parties to an arbitration, by means of an arbitration confidentiality agreement, to prevent nonparties to the arbitration from learning of or obtaining access to materials produced in arbitration discovery, testimony presented in the arbitration hearing, and [*1735] the arbitration award itself.[25] Several states have statutes that

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[19] Spitko, supra note 12, at 614-16 see also Geraldine Szott Moohr, Arbitration and the Goals of Employment Discrimination Law, 56 Wash. & Lee L. Rev. 395, 400 (1999) (arguing that, in part because of arbitration secrecy, arbitration does not serve general deterrence and norm development functions) Stephen Plass, Private Dispute Resolution and the Future of Institutional Workplace Discrimination, 54 How. L.J. 45, 79 (2010) ("Privatization of employment disputes will greatly reduce these public condemnation and monitoring efforts that instigate company-wide reforms.").

[20] Drahozal, supra note 18, at 30 (discussing how "under U.S. law, arbitration is a private process, not a confidential one") Richard C. Reuben, Confidentiality in Arbitration: Beyond the Myth, 54 Kan. L. Rev. 1255, 1260 (2006) (discussing the distinction between arbitration privacy and arbitration confidentiality) Schmitz, supra note 9, at 1211 ("Arbitration is private but not confidential.").

[21] Drahozal, supra note 18, at 40 Reuben, supra note 20, at 1259-60 Schmitz, supra note 9, at 1211.

[22] Drahozal, supra note 18, at 30-31 Schmitz, supra note 9, at 1214 Maureen A. Weston, Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era, 2021 U. Ill. L. Rev. 101, 110.

[23] Weston, supra note 22, at 111.

[24] See, e.g., Am. Arb. Ass'n, Commercial Arbitration Rules and Mediation Procedures, Rule 26 (2022), https://www.adr.org/sites/default/files/Commercial_Rules_Web.pdf [https://perma.cc/5TX6-XBV7] Am. Arb. Ass'n, Employment Arbitration Rules and Mediation Procedures, Rule 22 (2009), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [https://perma.cc/8BPP-HCEE] JAMS, Comprehensive Arbitration Rules & Procedures, Rule 26(c) (2021), https://www.jamsadr.com/rules-comprehensive-arbitration/ [https://perma.cc/LB48-YVBJ].

[25] Schmitz, supra note 9, at 1214, 1218.

protect arbitral communications from discovery by third parties and render such communications inadmissible in subsequent judicial or administrative proceedings.[26] Absent statutory protection, however, nonparties to the arbitration may gain access to arbitral materials, testimony, and awards in a variety of ways. For example, absent a confidentiality agreement or protective order, an arbitration party may voluntarily disclose information or documents obtained in the course of the arbitration to third parties.[27] Similarly, a nonparty participant in the arbitration is under no obligation to maintain the confidentiality of the arbitration proceedings absent her consent to a confidentiality agreement.[28] A party to separate litigation may use a subpoena or discovery requests to obtain documents produced in an arbitration or transcripts of arbitration testimony.[29]

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[26] Ark. Code. Ann. §16-7-206 (2023) Cal. Evid. Code §703.5 (West 2023) Mo. Ann. Stat. §435.014 (West 2023) Tex. Civ. Prac. & Rem. Code Ann. §154.073 (West 2021).

[27] A.T. v. State Farm Mut. Auto. Ins. Co., 989 P.2d 219, 220-21 (Colo. App. 1999) Stephen J. Ware, Principles of Alternative Dispute Resolution §2.1 (4th ed. 2023) Drahozal, supra note 18, at 31, 38 see also Am. Cent. E. Tex. Gas Co. v. United Pac. Res. Grp., Inc., No. 2:98CV0239-TJW, 2000 WL 33176064, at *1-2 (E.D. Tex. Jul.27, 2000) (declining an arbitral party's request to order that an arbitration award be sealed and noting that the parties had not entered into a confidentiality agreement).

[28] Schmitz, supra note 9, at 1211, 1221, 1235.

[29] See, e.g., Gotham Holdings, LP v. Health Grades, Inc., 580 F.3d 664, 665-66 (7th Cir. 2009) (holding that a nonparty to an arbitration may obtain documents related to the arbitration by serving a subpoena on a party to the arbitration) Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc, No. 04-N-1228, 2004 WL 1821968, at *4 (D. Colo. Aug.13, 2004) United States v. Panhandle E. Corp., 118 F.R.D. 346, 351 (D. Del. 1988) (denying a motion for a protective order from discovery requests seeking documents related to an earlier arbitration) Industrotech Constructors, Inc. v. Duke Univ., 314 S.E.2d 272, 274 (N.C. Ct. App. 1984) (holding that a nonparty to an arbitration suing a party to the arbitration is entitled to production in discovery of a transcript of the arbitration) see also Reuben, supra note 20, at 1261-73 (discussing federal and state regulation and case law addressing the discoverability of arbitral communications and concluding that "at both the state and the federal level, present law provides little reliable support for arbitration confidentiality when arbitration communications are sought for purposes of discovery or admission at trial") Matthew Gierse, Note, You Promised You Wouldn't Tell: Modifying Arbitration Confidentiality Agreements to Allow Third-Party Access to Prior Arbitration Documents, 2010 J. Disp. Resol. 463, 468-72 (discussing case law concerning the right of a nonparty to an arbitration to subpoena documents relating to the arbitration).Professor Richard Reuben has considered at length the normative question of whether a communication made in an arbitration or a document introduced in an arbitration should be discoverable and admissible in another formal legal proceeding. See generally Reuben, supra note 20. He argues for a heightened standard for discoverability and admissibility of evidence sought from arbitration proceedings whereby the party seeking to discover or introduce such information must demonstrate that the information is otherwise not obtainable and is necessary for resolution of the movant's case. Id. at 1294-99. Reuben's justification for such an exclusionary rule is grounded in his understanding of congressional intent and the nature of arbitration as an alternative to the public court system:In enacting the FAA, Congress intended to authorize a private adjudicatory alternative to public trial. A general rule freely permitting the discovery and admissibility of arbitration communications, would frustrate this unambiguous congressional intent, upset party expectations of arbitration, create pragmatic problems, undermine public confidence in the arbitration process, and inhibit the democratic legitimacy of arbitration as an alternative dispute resolution process.*Id.* at 1281.

And [*1736] the public may gain access to the arbitration award itself when a party to the arbitration seeks to confirm or vacate the award in state or federal court.[30]

These deviations from arbitration confidentiality make clear that without an enforceable confidentiality agreement the value of arbitration privacy is greatly diminished.[31] For example, the right to exclude a third party from the arbitration hearing is less valuable when limitations on arbitration confidentiality allow that third party to subpoena a transcript of the hearing.[32] Indeed, arbitration confidentiality would seem to be the whole point of arbitration privacy: the principal reason that arbitral parties highly value arbitration privacy is that it prevents nonparties to the arbitration from accessing documents and testimony presented in the arbitration. Thus, this Article considers arbitration privacy and arbitration confidentiality together and subsumes the two into the concept of arbitration secrecy.

This Article explores the relationship between the FAA and various infringements on arbitration secrecy. The FAA does not contain an express preemption clause.[33] With respect to [*1737] implied preemption, the Supreme Court has held that Congress did not intend to occupy the entire field of arbitration law.[34] Thus, the FAA will preempt a state law only where the state law actually conflicts with the FAA by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA.[35]

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[30] Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., No. 07 CIV. 8196 (PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Apr.21, 2008) Chartis Specialty Ins. Co. v. LaSalle Bank, Nat'l Ass'n, No. CIV.A. 6103-VCN, 2011 WL 3276369, at *3 (Del. Ch. July29, 2011) Drahozal, supra note 18, at 38-39.

[31] See Judith Resnik, Stephen Garlock & Annie J. Wang, Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge, 24 Lewis & Clark L. Rev. 365, 375 (2020) (asserting that, with respect to dispute resolution, "[c]onfidentiality is often a method of protecting privacy").

[32] Hassneh Ins. Co. of Israel v. Mew [1993] 2 Lloyd's Rep. 243 (Q.B.) 247 (concluding that "the requirement [under English law] of privacy [in arbitration] must in principle extend to documents which are created for the purpose of that hearing" and reasoning that, "[t]he disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party").

[33] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

[34] Id.

[35] Id. (quotation omitted).

The FAA's primary purpose and objective is set forth in Section 2 of the Act. Section 2 of the FAA provides in part that "[a] written provision in…a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[36] The Supreme Court, applying an obstacle preemption analysis, has held repeatedly that this provision requires that "courts must place arbitration agreements on an equal footing with other contracts…and enforce them according to their terms."[37] Thus, a state may not invalidate an arbitration contract on grounds that do not apply to contracts generally.[38]

Moreover, even a state rule that is neutral on its face with respect to arbitration agreements may not stand as an obstacle [*1738] to the accomplishment of the FAA's objectives.[39] Thus, "the saving clause [of Section 2] does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration."[40] The

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[36] 9 U.S.C. §2.

[37] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 248 (2017) ("The Federal Arbitration Act…requires courts to place arbitration agreements `on equal footing with all other contracts.'" (quoting DIRECTTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015))) Volt, 489 U.S. at 476 ("[T]he federal policy [of the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.") Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974).

[38] Kindred Nursing Ctrs., 581 U.S. at 248 (holding that the FAA preempts a rule that the Kentucky Supreme Court derived from the Kentucky Constitution, "[b]ecause that rule singles out arbitration agreements for disfavored treatment") Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).For a discussion of whether a state law that applies to arbitration clauses as well as some but not all other contracts is sufficiently "general" to avoid FAA preemption, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 408-10 (2004) see also Hiro N. Aragaki, AT&T Mobility v. Concepcion *and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. on Arb. & Mediation 39, 56 (2013) (arguing that no state law can apply "in any meaningful sense" to every contract and, therefore, a requirement that state law must put arbitration contracts on an equal footing with all other contracts is "hopelessly incoherent") David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217, 1252 (2013) (concluding that "if a rule must govern `all types of contracts' to satisfy the savings clause, then section 2 preempts contract law in its entirety" because in "the sprawling universe of private agreement, *no* rule reaches so far").

[39] Concepcion, 563 U.S. at 343 Volt, 489 U.S. at 477-78.

[40] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (internal quotation omitted) see also Kindred Nursing Ctrs., 581 U.S. at 251 (explaining that the FAA "preempts any state rule discriminating on its face against arbitration" and "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements") Concepcion, 563 U.S. at 344 (holding that the FAA preempts a state rule requiring the availability of class arbitration because that rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

same limitations necessarily hold when a state seeks to regulate arbitration by statute as opposed to through a general contract law defense.[41]

In sum, the Supreme Court's FAA jurisprudence has developed an all-or-nothing preemption analysis for any state rule that does not target arbitration for special treatment but nonetheless impacts an aspect of arbitration.[42] If the state statute, regulation, or doctrine interferes with a fundamental attribute of arbitration, the FAA will preempt the state effort.[43] For example, as the Supreme Court has instructed, a state may not "find[] unconscionable or unenforceable as against public policy consumer arbitration agreements" that "disallow an ultimate disposition by a jury (perhaps termed `a panel of twelve lay arbitrators' to help avoid preemption)" because such a rule would undermine expert decision-making, which unquestionably is a fundamental attribute of arbitration.[44] On the other [*1739] hand, a state statute, regulation, or doctrine that impacts only an incidental aspect of arbitration should survive FAA preemption analysis. For example, a state court finding that an arbitration agreement was unconscionable on the grounds that it specified a hearing location that would unreasonably burden an employee or consumer party should avoid FAA preemption because hearing locale is merely an incidental aspect of arbitration, particularly when holding the arbitration hearing at the specified location would not

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[41] See Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (stating in a pre-Concepcion case that "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") Christopher R. Drahozal, FAA Preemption After Concepcion, 35 Berkeley J. Emp. & Lab. L. 153, 169 (2014) ("It would seem to follow that if application of a general contract law defense is preempted despite the savings clause, a state statute invalidating an arbitration clause for the same reason would also be preempted.").

[42] See Sarah Rudolph Cole, Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?, 48 U.C. Davis L. Rev. 921, 968 (2015) (concluding that the FAA preemption analysis as to whether states may preclude a non-lawyer from representing a party in an arbitration "depends on whether non-lawyer representation is a fundamental attribute of arbitration").

[43] Concepcion, 563 U.S. at 352 (holding that the FAA preempted a California rule that conditioned the enforceability of a consumer arbitration agreement on the availability of class arbitration because such a rule interfered with fundamental attributes of arbitration).

[44] Id. at 341-42 see also infra notes 48-55, 58, 65-66 and accompanying text (arguing that expert decision-making is a fundamental attribute of arbitration).

result in savings of time or money.[45] The Supreme Court has applied a similar displacement analysis when a federal statute impacts an aspect of arbitration.[46]

Thus, the contours of any FAA preemption or displacement analysis of regulation impacting arbitration secrecy will differ depending upon whether secrecy is a "fundamental attribute of arbitration."[47] Therefore, this Article turns next in Part I to an exploration of the place that secrecy holds in the hierarchy of arbitration values. This Part concludes that arbitration secrecy is neither a fundamental attribute of arbitration nor a mere incidental attribute of arbitration. Rather, secrecy is a secondary attribute of arbitration. As such, arbitration secrecy does not fit neatly into the current all-or-nothing FAA preemption and displacement framework of the Supreme Court's jurisprudence. Part I argues, therefore, for a novel framework that would apply an intermediate review to intrusions into arbitration secrecy, [*1740] as well as to infringements of other secondary attributes of arbitration. The framework for this intermediate review is informed by the balancing approach that courts have long used to evaluate a public employee's claim that the government has impermissibly infringed upon her right to privacy. As applied in the context of government infringements of arbitration secrecy, the framework would require the government to demonstrate that the infringement upon arbitration secrecy is reasonable in its inception and reasonable in its scope.

Applying this intermediate review framework and established arbitration doctrine, Part II then more fully considers the relationship between the FAA and several doctrines that otherwise

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[45] Drahozal, supra note 41, at 166 (concluding that application of unconscionability doctrine to the arbitral hearing location should survive FAA preemption analysis because hearing locale is not a fundamental attribute of arbitration) but see Arpan A. Sura & Robert A. DeRise, Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations, 62 Kan. L. Rev. 403, 471-75 (2013) (discussing the split in the cases considering whether the FAA preempts state efforts to limit arbitral forum selection clauses and arguing that cases invalidating an arbitral forum selection clause "are likely not on firm footing after Concepcion because they do not acknowledge that forum selection clauses serve many pro-arbitration ends").

[46] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (assuming for the sake of argument that the FAA's saving clause applies to defenses arising from federal statutes and reiterating that "the saving clause does not save defenses that target arbitration by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration" (internal quotation omitted)).

[47] See Concepcion, 563 U.S. at 344 (holding that a state may not regulate arbitration under the FAA's saving clause where that regulation "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA") Drahozal, supra note 41, at 167 (reasoning that although privacy is a fundamental attribute of arbitration, confidentiality is not, and, therefore, "there is a good argument that [intrusions into arbitration confidentiality] are not preempted under Concepcion").

would limit the extent to which the parties to an arbitration contract may agree to maintain arbitration secrecy: (1)the unconscionability and public policy doctrines, (2)state statutes rendering non-disclosure agreements (NDAs) unenforceable against employees, (3)the common law and statutory right of access to documents filed in litigation, and (4)the right to concerted activity arising under Section 7 of the National Labor Relations Act. Using this set of state and federal intrusions into arbitration secrecy allows for application and evaluation of the new intermediate review framework in diverse contexts in which the primary focus is on, respectively, the relationship between the parties to an arbitration contract, state public policy, and displacement of one federal statute by another.

I Secrecy and the Hierarchy of Arbitration Values

Julius Henry Cohen, the FAA's principal architect, has written of the three evils that arbitration and the FAA are intended to overcome[48]: (1)congestion and complexity in the courts and the attendant delays of litigation (2)the high costs of litigation and (3)"[t]he failure, through litigation, to reach a decision regarded as just when measured by the standard [*1741] of the business world" resulting from the application of legal standards that are inappropriate for the dispute at hand or "because, in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy."[49] Thus, the FAA seeks primarily to enable speedy, economical, and expert resolution of disputes through arbitration.[50]

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[48] For the proposition that Julius Henry Cohen was the principal drafter of the FAA, see Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 10 (1924) [hereinafter 1924 Joint Hearings] (statement of W.H.H. Piatt, Chairman, ABA Comm. on Commerce, Trade, and Commercial Law) (stating that Cohen "has had charge of the actual drafting of the work") id. at 15 (testimony of Julius Henry Cohen) (stating that "it is true I made the first draft") id. at 19 (statement of Francis B. James, Westory Building) (stating that "the burden fell of drafting the bill" upon Cohen).

[49] Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 269 (1926) see also 1924 Joint Hearings, supra note 48, at 34-35 (brief of Julius Henry Cohen) (same).

[50] See, e.g., S. Rep. No. 68-536, at 3 (1924) ("It has been said that `arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society.'") Weston, supra note 22, at 109-10 ("Arbitration historically has been, and continues to be, a preferred and private forum for many commercial [disputes] because the process is considered faster, less expensive, [and] allows the parties to select decision-maker(s)….").

Indeed, the drafter's concerns with these three fundamental attributes of arbitration are evident in the FAA's structure.[51] Sections 3, 4 and 6 of the FAA provide a procedure for the enforcement of contracts to arbitrate on a motion, rather than through initiation of a separate cause of action for breach of contract, that was designed specifically to minimize delay and expense.[52] Similarly, FAA Sections 9 through 12 were designed to ensure a prompt hearing on a motion to confirm, vacate, modify, or correct an arbitration award.[53] Also, FAA Section 16 allows for an interlocutory appeal of an order denying a motion to compel arbitration while generally disallowing interlocutory appeal of an order compelling arbitration.[54] Finally, Section 5 of the FAA makes enforceable the parties' chosen means for selecting an arbitrator, allowing the parties to choose a [*1742] decisionmaker with relevant expertise.[55] In contrast, the FAA's structure itself does not suggest a concern with arbitration secrecy. In fact, its structure expressly compromises arbitration secrecy in requiring an arbitration party that seeks to confirm, modify, or correct an arbitration award to attach the award to the relevant motion.[56]

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[51] 1924 Joint Hearings, supra note 48, at 35-36 (brief of Julius Henry Cohen) (discussing how the FAA's structure minimizes delay and expense).

[52] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983) (discussing how the structure of Sections 3 and 4 of the FAA reflect "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible") H.R. Rep. No. 68-96, at 2 (1924) (describing the FAA's procedure for enforcement of an arbitration contract as "following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties") S. Rep. No. 68-536, at 3 ("Section 6 provides for expedition in the matter of the hearing of arbitration matters by the court.") see also 9 U.S.C. §§3, 4, 6.

[53] 1924 Joint Hearings, supra note 48, at 34 (brief of Julius Henry Cohen) ("The proceedings for vacating, modifying, correcting or enforcing an award follow the ordinary motion practice of the court, so that a prompt hearing is assured.") see also 9 U.S.C. §§9, 10, 11, 12.

[54] 9 U.S.C. §16.

[55] 9 U.S.C. §5 ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed….").

[56] 9 U.S.C. §13(b) see also Dish Network, LLC, 370 N.L.R.B. No. 97, at 15 (Mar.18, 2021) (McFerran, concurring in part and dissenting in part) (asserting that "several sections of the FAA expressly provide for public filings that would violate the plain language of many broad confidentiality agreements") Resnik, Garlock & Wang, supra note 31, at 429 (arguing that considering the FAA's provisions regarding motions to confirm, vacate, or modify an arbitration award, "the FAA should not be interpreted to preclude disclosure of information about the pendency or outcomes of arbitration").

The FAA's legislative history strongly suggests that Congress passed the FAA principally to empower parties to arbitration to avoid the costs and delays of litigation.[57] The legislative [*1743] history also contains several references to the desire of disputants to obtain expert decision-making through arbitration.[58] The legislative history is silent, however, with respect to arbitration secrecy.[59]

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[57] See 1924 Joint Hearings, supra note 48, at 34 (brief of Julius Henry Cohen) (listing the long delay and expense of litigation among the evils "at which arbitration agreements in general are directed") id. at 7 (testimony of Charles L. Bernheimer) (asserting that "arbitration saves time, saves trouble, saves money") id. at 21 (letter dated January31, 1923, from Herbert Hoover, Sec'y of Commerce, to Sen. Thomas Sterling) (arguing that the FAA is needed because "[t]he clogging of our courts is such that the delays amount to a virtual denial of justice") id. at 22 (letter dated January8, 1924, from M.L. Toulme, Sec'y of the Nat'l Wholesale Grocers' Ass'n, to Sen. Thomas Sterling) (supporting the FAA in the interest of "economical adjustment of trade disputes and elimination of expensive litigation") id. at 24 (letter dated January7, 1924, from Samuel M. Forbes, Sec'y of the Converters' Ass'n, to Sen. Thomas Sterling) ("Our members have found arbitration to be expeditious, economical, and equitable, conserving business friendships and energy.") id. (letter dated January8, 1924, from Arthur S. Somers, Brooklyn Chamber of Commerce, to Rep. William E. Cleary) ("The Brooklyn Chamber of Commerce…believes that it is often possible by arbitration to save time, trouble, and money.") id. at 27 (statement of Alexander Rose, Arb. Soc'y of America) (discussing delay in the courts as a reason to support the FAA and asserting that "the people…want speedy justice") id. at 31 (resolution of the American Bankers' Association, adopted January26, 1923) ("[A]rbitration offers the best means yet devised for an efficient, expeditious, and inexpensive adjustment of such disputes.") A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce and A Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 2 (1923) [hereinafter 1923 Hearing] (statement of Charles L. Bernheimer) (asserting that the FAA "will enable business men to settle their disputes expeditiously and economically") id. at 11 (testimony of W.H.H. Piatt) (suggesting that expeditious arbitration "would offer…opportunities for saving perishable products") id. at 14 (excerpt from the Report of the ABA Comm. on Commerce, Trade, and Commercial Law) (stating the FAA "will reduce litigation [and] will enable business men to settle their disputes expeditiously and economically and will reduce the congestion in the Federal and State courts") S. Rep. No. 68-536, at 3 (1924) (noting the appeal of arbitration "to big business and little business alike, to corporate interests as well as to individuals" in light of the persistent and growing "desire to avoid the delay and expense of litigation") H.R. Rep. No. 68-96, at 2 (1924) ("It is practically appropriate that the action [of enacting the FAA] should be taken at this time when there is so much agitation against the costliness and delays of litigation.") id. (suggesting that the costliness and delays of litigation "can be largely eliminated by agreements for arbitration") 66 Cong. Rec. S984 (daily ed. Dec.30,1924) (statement of Sen. Walsh) ("The business interests of the country find so much delay attending the trial of lawsuits in courts that there is a very general demand for a revision of the law in this regard.") 65 Cong. Rec. H11081 (daily ed. June6,1924) (statement of Rep. Dyer) (commenting that "[t]he result of such a bill [the proposed FAA] will be to do away with a lot of expensive litigation").

[58] 1924 Joint Hearings, supra note 48, at 14 (statement of Julius Henry Cohen) (discussing the value of having a dispute resolved by one in whom the disputants "have confidence in his ability to understand complex commercial situations and in his sense of right and justice") id. at 27 (statement of Alexander Rose, Arb. Soc'y of America) (noting that arbitration allows for selection of a decisionmaker "who is familiar with the subject of the controversy…so that no time will be lost in educating a man in the jury who is unfamiliar with the subject" and later discussing the "tremendous advantage" of arbitration in that "we may select judges satisfactory to the parties") id. at 35, 40-41 (brief of Julius Henry Cohen) (asserting that arbitration contracts seek to address the fact that "in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy" and twice later mentioning the desire of disputants for "expert" decision-making) 1923 Hearing, supra note 57, at 3 (statement of Charles L. Bernheimer) (discussing the will of President George Washington "which stipulated that the disputants [with respect to any dispute concerning the will] were each to select a man `known for probity and good understanding' and these two to select a third" to serve as arbitrators).

[59] The FAA's text also is silent with respect to arbitration secrecy. 9 U.S.C. §§1-16 see also Drahozal, supra note 18, at 32 ("Neither the Federal Arbitration Act (FAA) nor the Uniform Arbitration Act (UAA) imposes any obligation of confidentiality on the

The Congress that passed the FAA may well have assumed, however, that arbitrations within the purview of the Act would be private. At the time of the FAA's enactment in 1925, privacy was part of the folklore of arbitration.[60] Thus, the custom [*1744] of privacy in arbitration may well have been part of the law merchant that Congress intended the FAA to codify. For example, when the New York Chamber of Commerce set out in 1911 to reestablish commercial arbitration facilities at the organization, the first significant decision made by the committee tasked with adopting rules to govern the new arbitration system was that the arbitration proceedings would be private.[61] The twelve simple rules later approved by the committee to govern arbitrations included the principle that arbitrations would be private unless the parties agreed otherwise.[62] Soon thereafter, the Chamber promoted its new arbitration system as being "conducted on plain, common sense, business-like methods, with guaranteed privacy."[63] Privacy and, to a lesser extent, confidentiality, maintain a central place in the custom of arbitration to the present day.[64]

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parties to an arbitration agreement, the arbitrator or the arbitration administrator. Nor do they address the privacy of the arbitration process.") Weston, supra note 22, at 111 ("While federal and state laws provide for the enforcement of arbitration agreements and awards, these laws do not address arbitration's procedural aspects or confer specific confidentiality privileges to arbitral proceedings or awards.").

[60] Michael Collins, Privacy and Confidentiality in Arbitration Proceedings, 30 Tex. Int'l L.J. 121, 122 (1995) (noting that, under English law, "it has for centuries been recognized that arbitrations take place in private" and "[o]ther common law jurisdictions appear to share that view") Resnik, Garlock & Wang, supra note 31, at 376 ("[B]y the time of the enactment of the FAA in 1925, the model of business-to-business and labor-management arbitrations shaped assumptions that arbitrations were to be closed to third parties.").

[61] Imre Stephen Szalai, Outsourcing Justice: The Rise of Modern Arbitration Laws in America 43 (2013).

[62] Id. at 45.

[63] Id. at 57 (quoting Chamber of Commerce of the State of New York, Monthly Bulletin (Feb. 1914)).

[64] See, e.g., Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting) ("Arbitration agreements often include provisions requiring that outcomes be kept confidential.") Am. Arb. Ass'n, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethicsfor_Arbitrators_2010_10_14.pdf [https://perma.cc/4WNQ-ALGA] ("The Arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.") Am. Arb. Ass'n., Commercial Arbitration Rules and Mediation Procedures, supra note 24, at Rule 45 (requiring the American Arbitration Association (AAA) and the arbitrator to "keep confidential all matters relating to the arbitration or the award" and empowering the arbitrator to protect "the confidentiality of the arbitration proceeding or of any other matters in connection with the arbitration and [to] take measures for protecting trade secrets and confidential information") JAMS, Comprehensive Arbitration Rules & Procedures, supra note 24, at Rule 26 (providing that "JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award" and empowering the arbitrator to "issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information" and to "exclude any non-Party from any part of a Hearing") Resnik, Garlock & Wang, supra note 31, at 376 ("Since the American Arbitration Association's (AAA) founding in 1926, the AAA has described privacy as a central feature of arbitrations.") Sura & DeRise, supra note 45, at 466 ("It is well recognized that confidentiality is a principal advantage of arbitration.") Laura A. Kaster, Confidentiality in U.S. Arbitration, 5 N.Y. Disp. Resol. Law., Spring 2012, at 23, 23 (commenting that "[p]rivacy is the dominant feature of arbitration"

[*1745] The Supreme Court has several times discussed speed, economic efficiency, and expert decision-making together as three fundamental attributes of "the nature of arbitration."[65] For example, the Court has remarked, "[i]n bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[66] More frequently, the Court has focused on speed and economy alone when speaking of the essence of arbitration.[67]

The Court has only twice suggested that arbitration secrecy also may be among arbitration's fundamental attributes.[68] In *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, the Court held that an arbitrator may not imply an agreement to authorize class-action arbitration solely from the fact that the parties agreed to arbitrate their dispute.[69] "This is so," the court explained, "because class-arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[70] The Court then listed the loss of "the presumption of privacy and confidentiality" among "the fundamental changes" arising from the shift away from bilateral arbitration to class arbitration under the American Arbitration [*1746] Association's rules for class-action

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and noting that "[i]t is almost universally the case that the arbitral organization's administrative personnel and arbitrators have an obligation to protect information about the proceeding").

[65] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344-45 (2011) Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) Alexander v. Gardner-Denver Co., 415 U.S. 36, 56-58 (1974) (commenting with respect to labor arbitration, which is outside the FAA's purview, that "[p]arties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations" and "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution").

[66] Stolt-Nielsen, 559 U.S. at 685.

[67] See, e.g., Epic Sys. Corp., 138 S. Ct. at 1621 (The FAA reflects that in "Congress's judgment arbitration had more to offer than courts recognized - not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved") Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277-78 (1995) (rejecting an interpretation of the words "evidencing a transaction involving commerce" in Section 2 of the FAA that would "risk[] the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid") id. at 280 (listing among the advantages of arbitration that "it is usually cheaper and faster than litigation") Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (speaking of the "expedition of arbitration").

[68] See Concepcion, 563 U.S. at 347-48 Stolt-Nielsen, 559 U.S. at 685-87.

[69] Stolt-Nielsen, 559 U.S. at 685.

[70] Id.

arbitration.[71] The Court set forth a similar analysis in *AT&T Mobility LLC v. Concepcion*.[72] After quoting its earlier opinion in *Stolt-Nielsen* for the proposition that "the `changes brought about by the shift from bilateral arbitration to class-action arbitration' are `fundamental,'" the Court included among several examples the assertion that "[c]onfidentiality becomes more difficult" in class arbitration.[73]

Two U.S. courts of appeals have found confidentiality to be, if not a "fundamental attribute" of arbitration, part of the "character of arbitration."[74] In *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, the U.S. Court of Appeals for the Fifth Circuit rejected the argument by cellular-telephone service customers that a clause in their arbitration agreement requiring the parties to keep the existence and result of any arbitration under the contract confidential was unconscionable because it would give an informational advantage to "repeat-player" arbitration parties who would have first-hand knowledge of how arbitrations to which they were a party were decided.[75] The court characterized the argument against the confidentiality provision as "an attack on the character of arbitration itself."[76] In its reasoning, the court focused on the role that confidentiality plays in promoting "the simplicity, informality, and expedition of arbitration"[77]:

> If every arbitration were required to produce a publicly available, "precedential" decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted [in court], adherence to formal rules of evidence,

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[71] Id. at 686.

[72] Concepcion, 563 U.S. at 347-48.

[73] Id. (quoting Stolt-Nielsen, 559 U.S. at 686) but see Dish Network, LLC, 370 N.L.R.B. No. 97, at 19 (Mar.18, 2021) (arguing that "the Supreme Court has never so much as suggested that strict party confidentiality is a fundamental attribute of arbitration" and suggesting that the Court in Concepcion was concerned with arbitration confidentiality only as a means to protect trade secrets).

[74] Guyden v. Aetna, Inc., 544 F.3d 376, 385 (2d Cir. 2008) Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004) but see Seibert v. Precision Contracting Sols., LP, No. CV 18-818 (RMC), 2019 WL 935637, at *8 (D.D.C. Feb.26, 2019) (finding that "the broad confidentiality condition in the contract under review is [not] `fundamental' to arbitration").

[75] Iberia Credit Bureau, 379 F.3d at 175.

[76] Id.

[77] Id. at 176.

> more extensive appellate review, and so forth - in short, all of the procedural accoutrements that accompany a judicial proceeding.[78]

[*1747] In *Guyden v. Aetna, Inc.*, the U.S. Court of Appeals for the Second Circuit reasoned similarly in rejecting a former employee's argument that a confidentiality clause in her arbitration agreement would prevent her from vindicating her federal statutory rights arising under the whistleblower protection provisions of the Sarbanes-Oxley Act.[79] The confidentiality clause at issue provided that "[a]ll proceedings, including the arbitration hearing and decision, are private and confidential, unless otherwise required by law."[80] The *Guyden* court expressed sympathy with the former employee's argument that arbitration secrecy "conflicts with one of the purposes of the SOX whistleblower provision - to communicate to other employees that their rights will be protected if they report wrongdoing."[81] Further, the court assumed for the sake of argument that "the public litigation of SOX whistleblower claims would create a positive incentive for potential whistleblowers to come forward."[82] Nonetheless, the court rejected the federal effective vindication claim. The court found that "confidentiality clauses are so common in the arbitration context," and that "confidentiality is a paradigmatic aspect of arbitration."[83] Thus, quoting the Fifth Circuit, the court concluded that the challenge to the confidentiality provision was "an attack on the character of arbitration itself" and, consequently, was inconsistent with a body of Supreme Court case law endorsing arbitration.[84]

Despite this caselaw suggesting that secrecy is part of the character of arbitration, the better conclusion is that secrecy is not a fundamental attribute of arbitration. As detailed above, the FAA's structure does not evidence a concern with arbitration secrecy and even, in parts, impairs

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[78] Id. at 175-76.

[79] Guyden, 544 F.3d at 385.

[80] Id. at 384.

[81] Id. at 384-85.

[82] Id. at 385 n.2.

[83] Id. at 385.

[84] Id. (quoting Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004)).

arbitration secrecy.[85] Moreover, the legislative history of the FAA does not contain a single reference to arbitration secrecy.[86] Finally, the Supreme Court's FAA jurisprudence strongly suggests that arbitration secrecy is of lesser importance in contrast to the three attributes [*1748] of arbitration that the Court has repeatedly recognized as fundamental: speed, economy, and expert decision-making.[87]

This is not to say, however, that arbitration secrecy is a mere incidental aspect of arbitration. Arbitration secrecy has for centuries been a widely accepted custom of arbitration.[88] And privacy is ubiquitous in arbitration in the United States today.[89]

Of critical importance also, as the U.S. Court of Appeals for the Fifth Circuit explained in *Iberia Credit Bureau*, arbitration secrecy promotes arbitration's fundamental attributes of speed and economy by lessening the incentives that parties to arbitration would otherwise have to adopt a litigate-to-the-hilt strategy.[90] For example, an enforceable arbitration secrecy provision should lessen a party's fear that the discovery material it produces in arbitration will become public and, consequently, also should reduce the party's incentive to contest discovery requests.[91] Indeed,

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[85] See supra notes 51-56 and accompanying text.

[86] See supra notes 57-59 and accompanying text.

[87] See supra notes 65-73 and accompanying text.

[88] See supra notes 61-64 and accompanying text.

[89] See supra notes 20-24 and accompanying text.The limited empirical data on point suggests that relatively few parties to an arbitration contract provide for confidentiality in the arbitration process. *See, e.g.*, Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a), at §2.5.8 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/8UEL-WUWB] (reporting that 7.3 percent of arbitration-subject credit card loans outstanding, 28 percent of checking account arbitration-subject insured deposits, 33 percent of private student loan arbitration clauses, 5.9 percent of payday loan storefronts with arbitration clauses, and no mobile wireless arbitration clauses included an arbitral secrecy provision) John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 Vand. J. Transnat'l L. 323, 367-68 (2019) (reporting that 29.1 percent of arbitration clauses in international supply contracts studied required at least some degree of confidentiality in the arbitral process) Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law & Contemp. Probs. 55, 69 (2004) (reporting that 13.5 percent of the consumer arbitration contracts studied provided for some degree of arbitral confidentiality). In the context of employment arbitration, a study of pre-dispute arbitration contracts alone almost certainly would significantly underreport the extent to which the parties had contracted for confidentiality. In the more than 50 employment arbitrations for which I served as the arbitrator between 2011 and 2022, the parties in a significant number of cases stipulated to a confidentiality agreement or asked the arbitrator to enter a protective order only after the demand for arbitration had been filed.

[90] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175-76 (5th Cir. 2004) (explaining the role that arbitration secrecy plays in promoting "the simplicity, informality, and expedition of arbitration").

arbitration secrecy may also facilitate a faster [*1749] and less expensive conflict resolution by removing an incentive for the arbitrator to "judicialize" the arbitration process and her arbitration award so as to protect her public reputation.[92] Thus, while arbitration secrecy is neither a fundamental attribute of arbitration nor an incidental attribute of arbitration, arbitration secrecy is a significant secondary attribute of arbitration.

An important implication of the conclusion that arbitration secrecy is a secondary attribute of arbitration, rather than a fundamental or incidental attribute of arbitration, is that the Supreme Court's framework for considering challenges to arbitration regulation is ill-suited to resolving challenges to state and federal limitations on arbitration secrecy. As explained above, that framework is rigidly dichotomous.[93] The FAA will preempt any state arbitration regulation that undermines a fundamental attribute of arbitration.[94] In contrast, arbitration regulation that infringes only an incidental attribute of arbitration will survive FAA preemption analysis provided that the regulation applies to contracts generally.[95] The conclusion that there are intermediate attributes of arbitration suggests that the current framework is rigid to the point of dysfunction and reveals the need for an expanded framework for resolution of challenges to arbitration regulation that allows for a more nuanced intermediate scrutiny.

The intermediate scrutiny analysis should not merely add an additional all-or-nothing prong to the existing fundamental attribute/incidental attribute framework. Rather, the revised framework should allow for a case-by-case balancing of the state's interests in restricting arbitration secrecy on the one hand against the interests of the parties to the arbitration contract in the enforcement

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[91] See Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1312 n.10 (11th Cir. 2001) ("The prospect of all discovery material being presumptively subject to the right of access would likely lead to an increased resistance to discovery requests.") Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 483 (1991) ("If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent disclosure.") id. at 446, 500.

[92] See Amy J. Schmitz, Assuming Silence in Arbitration, N.J.L. Mag., Apr. 2011, at 13, 14 (arguing that "privacy may help minimize `judicialization' of arbitration proceedings").

[93] See supra notes 42-45 and accompanying text.

[94] See supra notes 39-41, 43-44 and accompanying text.

[95] See supra note 45 and accompanying text.

of their arbitration secrecy provisions as written on the other. Such a balancing approach would allow for consideration of context that the Supreme Court's [*1750] all-or-nothing approach ignores. For example, the state may have a significantly greater interest in infringing an arbitration secrecy provision in the context of an employment arbitration that concerns a nonwaivable statutory right than the state would have in infringing the same arbitration secrecy provision in the context of an arbitration of a breach-of-contract claim.[96]

Admittedly, it would be unusual to employ a balancing test in a federal preemption analysis. The Supremacy Clause of the U.S. Constitution provides that federal law "shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[97] Thus, state law must bow to federal law whenever Congress so intends.[98]

The FAA's saving clause, however, as the Supreme Court has interpreted it, can be seen as a Congressional mandate to balance state interests against the federal interests that ground the FAA when a neutral state law interferes with an element of arbitration.[99] On its face, the saving clause suggests that a state's interests in its arbitration regulation law shall outweigh federal interests whenever the state regulates arbitration "upon such grounds as exist at law or in equity for the revocation of any contract."[100] As the Supreme Court has interpreted the saving clause, however, whether state interests outweigh federal interests depends upon the nature of the element of arbitration that the neutral state regulation impacts. A state's interests in its neutral arbitration regulation outweigh federal interests if the regulation impacts only an incidental

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[96] See Gibbons, supra note 8, at 771-72 (arguing that the public has no interest in the arbitration of a contract dispute, but when an arbitration involves statutory rights, "then privacy interests in the arbitration must be weighed against the public's interests in the arbitration").

[97] U.S. Const. art. VI, cl. 2.

[98] Kansas v. Garcia, 140 S. Ct. 791, 801 (2020).

[99] Cf. Southland Corp. v. Keating, 465 U.S. 1, 17-21 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that the federal courts should develop a federal common law setting forth the scope of the FAA's saving clause and expressing the belief that the saving clause "leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses").

[100] 9 U.S.C. §2.

aspect of arbitration. On the other hand, federal interests outweigh a state's interests in any neutral arbitration regulation that impacts a fundamental attribute of arbitration.[101]

[*1751] Thus, the Supreme Court's current all-or-nothing approach to FAA preemption under the saving clause can be seen as a balancing approach where the Court has pre-balanced the respective state and federal interests. My proposed reform is in accord, but it eschews pre-balancing. Where a neutral state regulation impacts a secondary attribute of arbitration, one cannot say that the state's interests will always outweigh the interests that ground the FAA, or vice versa. Rather, one must consider a broader context in balancing the respective state and federal interests to determine whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[102]

In addition to focusing on the state's interest in infringing arbitration secrecy in a specific context, my proposed framework would focus on the state's specific means of infringing arbitration secrecy. Essentially, pursuant to my proposed framework, the state must enforce the parties' agreement with respect to arbitration secrecy unless the state can demonstrate that its interest in disregarding that agreement is reasonable in its inception and reasonable in its scope when measured against the parties' interest in arbitration secrecy. This proposed balancing test borrows from the Supreme Court's case-by-case approach to evaluating a government worker's claim for privacy protection when the government seeks to invade that privacy as employer rather than as sovereign.[103]

In *O'Connor v. Ortega*, a four-justice plurality of the Supreme Court announced a framework for evaluating a government employer's intrusion into a public employee's privacy.[104] The first part of the *O'Connor* framework evaluates whether the public employee had a reasonable

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[101] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

[102] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[103] See generally O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion).

[104] Id. at 714-26. The plurality limited its inquiry to only two types of government employer intrusions: non-investigatory work-related searches and investigatory searches for evidence of suspected work-related employee misconduct. Id. at 723.

expectation of privacy in the area or thing into which the government employer intruded.[105] The plurality reasoned with respect to this first inquiry that, in light of great variations in public sector work environments, the inquiry must be made on a case-by-case basis and must focus on whether the public employee's expectation of privacy is one [*1752] that society is prepared to consider reasonable in light of the operational realities of her particular work environment.[106]

If the public employee did have such a reasonable expectation of privacy, the second part of the *O'Connor* framework considers whether the government employer's intrusion into the public employee's privacy was reasonable both in its inception and in its scope.[107] Subsequent to *O'Connor*, a majority of the Court endorsed this second part of the *O'Connor* framework in a case in which the Court assumed for the purposes of its analysis that the public employee had a reasonable expectation of privacy and, thus, found it unnecessary to decide whether the *O'Connor* plurality's approach to determining whether a public employee had a reasonable expectation of privacy controlled.[108] This second inquiry seeks to "balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and efficient operation of the workplace."[109]

The inception inquiry focuses on the government's objectives in intruding.[110] The *O'Connor* plurality suggested that a government employer's intrusion into a worker's privacy will be reasonable in its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose."[111] Necessity, however, is not the standard. Rather, the Court has clarified that an intrusion will be reasonable in its inception

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[105] Id. at 715.

[106] Id. at 717-18.

[107] Id. at 725-26.

[108] City of Ontario v. Quon, 560 U.S. 746, 757, 760-61 (2010).

[109] O'Connor, 480 U.S. at 719-20 (plurality opinion).

[110] Id. at 726.

[111] Id.

where the government has a "legitimate interest," "legitimate purpose," or "legitimate reason" it seeks to further by intruding.[112]

The scope inquiry focuses on the government's means of intruding in relation to its reasonable purposes for intruding. The intrusion "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the [harm to be addressed]."[113] Importantly, the Court has held [*1753] that a government search is not "excessively intrusive" under the *O'Connor* framework merely because the means chosen is not the least intrusive means practicable.[114]

In a concurring opinion in *O'Connor*, Justice Scalia disapproved of the plurality's framework.[115] In particular, he criticized the plurality's call for a case-by-case inquiry into whether the public employee had a reasonable expectation of privacy as "a standard so devoid of content that it produces rather than eliminates uncertainty in this field."[116] Justice Scalia argued instead for a fixed approach under which a public employee would, "as a general matter," have a reasonable expectation of privacy in her office and the drawers and files within that office - the physical spaces at issue in *O'Connor*.[117]

Justice Scalia's concern about the uncertainty arising from a case-by-case inquiry into the reasonableness of a claimant's expectation of privacy should be taken seriously in formulating a standard for evaluating intrusions into arbitration secrecy. Parties often desire arbitration

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[112] See Quon, 560 U.S. at 761, 764.

[113] O'Connor, 480 U.S. at 726 (plurality opinion) (quotation omitted).

[114] Quon, 560 U.S. at 763-64.

[115] O'Connor, 480 U.S. at 729-32 (Scalia, J., concurring).

[116] Id. at 730.

[117] Id. at 731 see also Quon, 560 U.S. at 767 (Scalia, J., concurring) ("In this case, the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on public employees' employer-issued pages, but whether it applies in general to such messages on employer-issued pagers.").

precisely because it can be a speedy and economical means of dispute resolution.[118] Thus, the extent to which an arbitration-related standard is likely to breed litigation is highly relevant.[119]

In the context of an arbitration secrecy clause within the FAA's purview, the FAA itself weighs against a case-by-case approach to consideration of whether a party had a reasonable expectation of secrecy. Where a party to an arbitration agreement has contracted for arbitration secrecy, the FAA protects that party's interest in enforcement of the contract as written.[120] [*1754] Thus, my proposed framework for evaluating intrusions into arbitration secrecy would assume, as a general matter, that the contracting party has a reasonable expectation of secrecy. My proposed framework, therefore, would focus primarily on whether the state's intrusion into arbitration secrecy was reasonable in its inception and reasonable in its scope in relation to the party's generally given reasonable interest in arbitration secrecy.

Although my proposed standard borrows from the law governing privacy claims against the government as employer, its justification as a preemption standard for infringements on arbitration secrecy does not rely upon a connection to privacy law. Rather, justification for the proposed inception and scope test can be found in both of the principal existing strands of FAA preemption theory - the antidiscrimination strand and the essence of arbitration strand.[121] Thus, application of the inception and scope test should not be limited to government infringements of arbitration secrecy. Indeed, the inception and scope test should be applied widely to any government infringement of a secondary attribute of arbitration.[122]

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[118] See Preston v. Ferrer, 552 U.S. 346, 357 (2008) ("A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results.") (internal quotation omitted) supra note 57.

[119] See Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 266, 275 (1995) (rejecting an interpretation of the FAA that would conflict with the purpose of the Act by "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it").

[120] 9 U.S.C. §2 ("A written provision in…a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract….") Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) ("The federal policy [grounding the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").

[121] See infra notes 123-132 and accompanying text.

[122] A thorough analysis of which attributes should be classified as secondary attributes of arbitration is beyond the scope of this Article. Because of their likely impact on fundamental attributes of arbitration, candidates for classification as secondary

The antidiscrimination strand of FAA preemption theory reflects Congressional intent that that FAA target government efforts that suggest a hostility to arbitration.[123] Most obviously, Section 2 of the FAA, in combination with Section 4 of the FAA, [*1755] was meant to end the refusal of courts to specifically enforce predispute arbitration agreements.[124] Thus, the FAA will preempt any state effort that fails to put arbitration contracts on an equal footing with all other contracts.[125]

My proposed inception and scope test is designed to apply to cases in which a neutral, non-discriminatory statute or doctrine impacts a secondary attribute of arbitration. Thus, at one level, the antidiscrimination principle would seem inapposite. Still, my proposal finds support in the antidiscrimination strand of FAA preemption theory in that when the state infringes upon a secondary attribute of arbitration without a legitimate reason or in a way that is only loosely connected with a legitimate reason, one should suspect that hostility to arbitration motivated the infringement, at least in part.[126] Thus, one justification of my proposed inception and scope test is similar to the "pretext" justification of adverse impact law in the employment context: requiring

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attributes might include the ability to contract for limited judicial review in state court of an arbitration award, foregoing a reasoned opinion in support of the arbitrator's award, allowance of motions to dispose of the case without a full evidentiary hearing, and acceptance of remote or documentary testimony.

[123] See, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act.") Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.") Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) ("The [Federal Arbitration] Act was intended to reverse centuries of judicial hostility to arbitration agreements….") (internal quotation omitted) Hiro N. Aragaki, Equal Opportunity for Arbitration, 58 UCLA L. Rev. 1189, 1194, 1197, 1220, 1224 (2011) (distilling from the FAA preemption jurisprudence an antidiscrimination principle aimed at "ensur[ing] that arbitration agreements were not denied enforcement because of unjustified considerations such as the historic `mistrust' or `suspicion' of the arbitral process" and arguing that the purpose of the FAA was to "put[] the arbitration process on par with its main public sector competitor: litigation").

[124] 9 U.S.C. §2 (making certain arbitration contracts "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract") 9 U.S.C. §4 (providing for specific performance for a breach of an arbitration contract).

[125] See, e.g., Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) Allied-Bruce Terminix Cos., Inc., v. Dobson, 513 U.S. 265, 281 (1995) Volt, 489 U.S. at 478 H.R. Rep. No. 68-96, at 1 (1924) (discussing the effect of the proposed FAA and asserting that "[a]n arbitration agreement is placed upon the same footing as other contracts, where it belongs").

[126] See Hiro N. Aragaki, Arbitration's Suspect Status, 159 U. Pa. L. Rev. 1233, 1285-88 (2011) (discussing "the problem of pretext: the possibility that courts may be concealing lingering anti-arbitration bias behind the mask of `general' contract defenses" and arguing that "[p]reemption concerns are just as salient here as they were in the case of statutes that single out arbitration").

an employer to demonstrate that its neutral practice that has an adverse impact upon women or minorities is job related and consistent with business necessity is a means to limit intentional discrimination that workers cannot prove is intentional discrimination.[127]

The essence of arbitration strand of FAA preemption theory reflects Congressional intent that parties who seek to avoid litigation in the public courts be allowed to contract for a binding [*1756] adjudication that will differ significantly from litigation.[128] Specifically, the FAA seeks to protect the rights of disputants to enjoy a resolution of their dispute that, by design, is faster, less expensive, and more informed than public litigation.[129] In short, this strand of FAA preemption theory requires that states allow arbitration to be arbitration.[130]

My proposed inception and scope test can be seen as grounded in the essence of arbitration strand of FAA preemption theory in two ways. First, infringement of a secondary attribute of arbitration carries a significant risk of impairing the fundamental attributes of arbitration. For example, as argued above, infringement of arbitration secrecy may incentivize the parties and the arbitrator to judicialize arbitration, ultimately resulting in a slower and more expensive dispute resolution process.[131]

Second, infringement of a secondary attribute of arbitration itself may interfere with the right of the parties to an arbitration contract to design a process that differs significantly from litigation in the public courts. For example, as argued below, infringement of a secondary attribute of

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[127] See George Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 Va. L. Rev. 1297, 1299, 1309-10 (1987) ("Because of the difficulty of proving the defendant's intent directly and because Congress attempted to prevent pretextual discrimination in several central provisions of title VII, the theory of disparate impact constitutes a justifiable extension of the statute's prohibitions against discrimination.").

[128] See Stephen J. Ware, The Centrist Case Against Current (Conservative) Arbitration Law, 68 Fla. L. Rev. 1227, 1276-78 (2016) (arguing that the Supreme Court has interpreted the word "arbitration" in the FAA to mean "a streamlined form of binding adjudication" and concluding that the FAA requires states to allow "[a] form of binding adjudication that significantly differs from litigation by having (1)less discovery, (2)fewer evidentiary rules, and (3)no jury," as well as no class actions).

[129] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) ("The point of [the FAA] affording parties discretion in designing arbitration processes is to allow efficient, streamlined procedures tailored to the type of dispute.").

[130] Id. at 351 (asserting that arbitration "pursuant to a discovery process rivaling that in litigation" is "not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law").

[131] See supra notes 90-92 and accompanying text.

arbitration so that arbitration may better promote the public policy purposes of public litigation will cause arbitration to be less useful to and less utilized by potential arbitration parties.[132]

For these reasons, a more stringent FAA preemption standard should apply in the case of a neutral government infringement of a secondary attribute of arbitration than in a case of a neutral government infringement of a merely incidental attribute of arbitration. In sum, the FAA should preempt or displace a neutral government infringement upon a secondary attribute of arbitration unless the state can demonstrate that the infringement is reasonable in its inception and reasonable [*1757] in its scope. This standard finds support in both the antidiscrimination strand of FAA preemption theory and the essence of arbitration strand of FAA preemption theory. The next Part illustrates how this standard should be applied.

II The Federal Arbitration Act's Relationship to Anti-Secrecy Efforts

This Part explores how the proposed reasonableness inquiries would impact FAA preemption and displacement analysis across a sample of state and federal limitations on arbitration secrecy. First, Part II reviews case law applying the unconscionability and public policy doctrines to arbitration secrecy contracts and, in turn, applies the inception and scope tests to the reasoning of those cases. Second, this Part focuses on state statutes that preclude enforcement of nondisclosure agreements against employees and considers whether such statutes can survive FAA preemption analysis under the reasonableness inquiries. Third, this Part examines the relationship between the common law and statutory right of access to documents filed in litigation and FAA preemption or displacement under the inception and scope tests. Finally, Part II considers the extent to which the FAA would displace Section 7 of the National Labor Relations Act under the inception and scope tests when Section 7 would otherwise apply to preclude a workplace arbitration secrecy contract.

A. Unconscionability and Public Policy

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[132] See infra notes 170-182 and accompanying text.

As noted above, Section 2 of the FAA allows a state to invalidate an arbitration contract, in whole or in part, on grounds that would apply to any contract, so long as application of the neutral contract doctrine does not undermine a fundamental attribute of arbitration.[133] Such generally applicable contract doctrines that may be used to invalidate an arbitration provision include fraud, duress, and unconscionability.[134] Of these, unconscionability has most frequently been used to deny enforcement of arbitration secrecy provisions.[135]

[*1758] A contract may be procedurally unconscionable, substantively unconscionable, or both.[136] Procedural unconscionability relates to unfairness in contract formation and focuses on inequality of the parties with respect to bargaining power and surprise to a party arising from hidden or complex terms.[137] Substantive unconscionability refers to unfairness with respect to the terms of the contract and focuses on whether the contract terms are one-sided or overly harsh to one party.[138]

In some states, a court may hold a contract to be unenforceable if the court finds either that the contract is procedurally unconscionable or that the contract is substantively unconscionable.[139] In most states, however, a court must find a contract to be both procedurally unconscionable and substantively unconscionable before the court will hold the contract to be invalid on grounds of unconscionability.[140] In some of those states, as the degree of procedural unconscionability present increases, the amount of substantive unconscionability needed to find a contract

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[133] See supra notes 36-41 and accompanying text.

[134] Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[135] See, e.g., Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556 (Haw. 2017) Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 579 (Ky. 2012) Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004).

[136] See, e.g., Schnuerle, 376 S.W.3d at 575-76.

[137] Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).

[138] Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir. 2003) Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975).

[139] See, e.g., Schnuerle, 376 S.W.3d at 576 n.12 Gandee v. LDL Freedom Enters., Inc., 293 P.3d 1197, 1199 (Wash. 2013).

[140] See, e.g., Armendariz, 6 P.3d at 690 Narayan, 400 P.3d at 551 Hayes v. Oakridge Home, 908 N.E.2d 408, 412 (Ohio 2009) see also Susan Landrum, Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements, 97 Marq. L. Rev. 751, 767 (2014) ("Most states' unconscionability doctrines require both procedural unconscionability and substantive unconscionability before a court will refuse to enforce a contract.").

unenforceable decreases.[141] Conversely, in these states, as the degree of substantive unconscionability present increases, the amount of procedural unconscionability needed to invalidate the contract on grounds of unconscionability decreases.[142]

Despite these variations across the states in the law of unconscionability and even though unconscionability analysis, by its very nature, is case specific, patterns and themes have emerged in the caselaw adjudicating unconscionability challenges to arbitration secrecy provisions. First, a significant number of courts have focused on the effect of the arbitration secrecy provisions at issue on nonparties to the contract, in [*1759] particular on potential future litigants.[143] Second, courts have routinely failed to distinguish between arbitration secrecy provisions and broader nondisclosure agreements separable from the arbitration contract.[144] The former pattern raises principally an inception issue. The latter pattern implicates principally a scope issue.

1. Concern for Nonparties to the Arbitration Agreement

In a significant number of cases, courts have found an arbitration secrecy clause to be substantively unconscionable because the clause would impede nonparties to the agreement in building a case against a party to the clause.[145] The reasoning of the U.S. Court of Appeals for the Eleventh Circuit in *Larsen v. Citibank FSB* is illustrative: "[W]ithout the guidance of prior arbitral decisions, future claimants are less able to assess the viability of their claims. In turn,

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[141] See, e.g., Armendariz, 6 P.3d 669 at 690.

[142] Id.

[143] See infra notes 145-158 and accompanying text.

[144] See infra notes 184-205 and accompanying text.

[145] See, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007) Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) Narayan, 400 P.3d at 556 Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 579 (Ky. 2012) but see Sanchez v. Carmax Auto Superstores Cal., LLC, 168 Cal. Rptr. 3d 473, 481-82 (Cal. Ct. App. 2014) (rejecting the trial court's conclusion that an arbitration secrecy provision which required that the arbitration be confidential was unconscionable because it "inhibit[ed] employees from discovering evidence from each other") (internal quotations omitted).After the California Court of Appeal decided *Sanchez*, the U.S. Court of Appeals for the Ninth Circuit held that the holding in *Sanchez* bound the Ninth Circuit in cases arising under California law. *See* Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1266 (9th Cir. 2017). This holding calls into question the outcomes in *Ting* and *Davis*, which had purported to apply California's law of unconscionability in holding arbitration secrecy clauses to be substantively unconscionable. *Id.* at 1267.

they cannot accurately measure the costs of dispute resolution against its benefits."[146] The court reasoned further that when arbitral outcomes remain concealed, "prospective claimants have little context in which to assess the value of discovered documents or work product from prior disputes.…[Moreover,] they cannot avoid repeating past claimants' mistakes - nor can they leverage prior successes - if they have no insight into dispute outcomes."[147] The *Larsen* court found that the informational advantage that a party would gain from routinely using arbitration secrecy clauses in its contract might discourage potential claimants [*1760] from pursuing even valid claims.[148] Thus, the court held that the arbitration secrecy clause at issue was substantively unconscionable under the relevant state law.[149] Numerous other courts have reasoned more specifically that the unavailability of information relating to an arbitration arising from the contract at issue will prevent nonparties to the contract from gathering evidence of intentional misconduct or a pattern of discrimination by a party to the contract.[150]

A common concern expressed by courts in this line of cases is that an arbitration secrecy provision will compound the advantages that a repeat player in arbitration enjoys in arbitrating a case against a one-shot player.[151] As the label suggests, a repeat player is an entity that uses arbitration for multiple cases.[152] A prototypical example is an employer that requires its

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[146] Larsen v. Citibank FSB, 871 F.3d 1295, 1319 (11th Cir. 2017).

[147] Id.

[148] Id.

[149] Id.

[150] See, e.g., Ting, 319 F.3d at 1152 ("[T]he unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T.") Plaskett v. Bechtel Int'l, Inc., 243 F. Supp. 2d 334, 343 (D.V.I. 2003) ("[T]he ability of a party to unilaterally prevent the inclusion of its name in the award favors the repeat participant and makes it difficult for a potential plaintiff to build a case of intentional misconduct or to establish a pattern or practice of discrimination by a particular company.") Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1180-81 (W.D. Wash. 2002) (same) Narayan, 400 P.3d at 556 (finding that an arbitration secrecy clause "insulates the Defendants from potential liability" by precluding potential disputants from accessing arbitral precedent and, in turn, hampering the ability of those parties to build a case of intentional misconduct or unlawful discrimination) Schnuerle, 376 S.W.3d at 579 (adopting the reasoning of the U.S. Court of Appeals for the Ninth Circuit along this line) Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004) ("As written, the provision hampers an employee's ability to prove a pattern of discrimination or take advantage of findings in past arbitrations.").

[151] See, e.g., Plaskett, 243 F. Supp. 2d at 343 ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) Luna, 236 F. Supp. 2d at 1180-81 Schnuerle, 376 S.W.3d at 578-79.

[152] See, e.g., Lisa B. Bingam, Employment Arbitration: The Repeat Player Effect, 1 Emp. Rts. & Emp Pol'y J. 189, 190 (1997).

employees to arbitrate any employment law claims brought against the employer and, therefore, finds itself arbitrating numerous cases.[153] Any single employee, on the other hand, is unlikely to arbitrate more than once in her lifetime.[154] Thus, an employee is a prototypical one-shot player.[155]

[*1761] The specific "repeat player effect" concern with arbitration secrecy clauses in this line of cases is that the repeat player has access to information from prior arbitrations involving claims under similar contracts or concerning similar alleged misbehavior while, because of the widespread use of arbitration secrecy provisions, the one-shot player will not have access to this same information.[156] Thus, the repeat player will be able to accumulate a body of knowledge over time about how best to defend itself from these types of claims.[157] At the same time, the repeat player will be able to hide relevant arbitration "precedent" from potential one-shot players.[158]

Concern that an arbitration secrecy clause will enhance the repeat player effect is principally, if not entirely, a concern for nonparties to the arbitration contract that is being challenged as unconscionable. The contract at issue requires the parties to maintain the secrecy of the instant arbitration but does not preclude those parties from accessing information relating to earlier arbitrations - what some courts have called arbitration "precedent."[159] Rather, other arbitration secrecy clauses in other arbitration contracts aside from the arbitration contract that is being challenged prevent the parties to the challenged arbitration contract from accessing that

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[153] Id.

[154] Id.

[155] See, e.g., Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 97 (1974) (discussing "one-shotters" in the context of litigation).

[156] See, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007) Fox v. Vision Serv. Plan, No. 2:16-CV-2456-JAM-DB, 2017 WL 735735, at *8 (E.D. Cal. Feb.24, 2017) Sprague v. Household Int'l, 473 F. Supp. 2d 966, 974-75 (W.D. Mo. 2005) Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556 (Haw. 2017).

[157] See, e.g., Ting v. AT&T, 319 F.3d 1126, 1151-52 (9th Cir. 2003) Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 579 (Ky. 2012).

[158] See, e.g., Ting, 319 F.3d at 1151-52 Fox, 2017 WL 735735, at *8 Schnuerle, 376 S.W.3d at 579.

[159] See, e.g., Ting, 319 F.3d at 1152.

arbitration precedent. The arbitration secrecy provision that is the focus of the instant unconscionability challenge will preclude only nonparties to the agreement from accessing arbitration precedent relating to the arbitration arising from the contract that is being challenged.

Thus, courts across this line of cases have confused unconscionability with public policy. Unconscionability doctrine is concerned with unfairness between the parties to a contract.[160] Where the concern with a contract is its impact on nonparties to the contract, unconscionability is not the issue.[161] Rather, [*1762] the issue is one of public policy.[162] The U.S. Court of Appeals for the Third Circuit has noted the distinction in a case involving an arbitration secrecy clause:

> The District Court's concern was not about any potential unfairness between two contracting parties vis-à-vis each other. Rather, that concern related to whether allowing an employer the right to prevent its name from appearing in an award in one proceeding would make it more difficult for claimants in subsequent proceedings to prove their cases. This concern has to do, not with unfairness between contracting parties, but with public policy and, more specifically, with whether confidentiality in arbitration proceedings of this kind is consistent with the public policy reflected in [antidiscrimination law].[163]

This Article's proposed inception and scope test should apply to a public policy challenge in the same way that the test would apply to an unconscionability challenge.[164] Indeed, the Supreme Court has made clear that its all-or-nothing approach to neutral state regulation of arbitration applies with equal effect to rules grounded in state public policy.[165] In *Lamps Plus, Inc. v. Varela*,

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[160] Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 279 (3rd Cir. 2004).

[161] Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1180 (Ohio Ct. App. 2004) (distinguishing between unconscionability analysis and public policy analysis).

[162] Parilla, 368 F.3d at 280 Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 n.20 (5th Cir. 2004) (noting that the plaintiffs' unconscionability arguments "relate more to broader considerations of public policy" given that "[t]he vice (if any) of the [arbitration] confidentiality clause lies mostly in its systematic effect, not in its oppressiveness as regards the particular plaintiffs before us") Eagle, 809 N.E.2d at 1180 ("Rather than focus on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole.") David A. Hoffman & Erik Lampmann, Hushing Contracts, 97 Wash U. L. Rev. 165, 199 (2019).

[163] Parilla, 368 F.3d at 280.

[164] See generally Horton, supra note 38, at 1245 (arguing "that a purposivist account of FAA preemption allows courts to nullify arbitration clauses under some strands of the contract defense of violation of public policy").

the Supreme Court considered California's application of the generally applicable contract rule known as *contra proferentum* to an arbitration contract.[166] The *contra proferentum* doctrine, which provides that an ambiguity in a contract should be resolved against the contract's drafter, is grounded in public policy considerations, including equitable concerns relating to the likelihood that the contract's drafter enjoyed [*1763] greater bargaining power.[167] In *Lamps Plus*, the Court held that even though the rule of *contra proferentum* applied to arbitration contracts and other contracts equally, the doctrine could not be applied to impose class arbitration upon the parties to an arbitration contract because such an application would interfere with fundamental attributes of arbitration.[168]

Thus, the questions one should ask with respect to a public policy challenge to an arbitration secrecy provision are the same questions one should ask with respect to an unconscionability challenge to such a provision: Is the state's limitation on arbitration secrecy reasonable in its inception? If so, is the state's limitation reasonable in its scope?

A regulation that would invalidate an arbitration secrecy provision because of that provision's effect on nonparties to the arbitration contract fails the reasonable inception test. This is so principally because, unlike public litigation, arbitration is neither intended to serve the public interest nor well-situated to do so.[169] Rather, arbitration at its essence is a private alternative to public litigation.[170] In fact, arbitration is the principal means for disputants to reject and withdraw

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[165] See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019) (applying "the same reasoning" that Supreme Court case law has developed in the context of unconscionability to a state rule grounded in public policy).

[166] See id. at 1417-19.

[167] Id. at 1411, 1417 (citing several treatises discussing these points).

[168] Id. at 1418.

[169] See Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("People who want secrecy should opt for arbitration. When [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.").For a discussion of how arbitration and mediation processes differ from public court litigation with respect to party autonomy and how this difference presents challenges when courts adopt mediation and arbitration techniques given that courts are designed to serve a public function, see Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 Hastings L.J. 1199 (2000).

[170] Ware, supra note 128, at 1277 ("`Arbitration' is widely understood to mean a form of binding adjudication that is not litigation.").

from the public court system.[171] The greatest utility of arbitration is that it allows the contracting parties to tailor their own dispute resolution [*1764] process to best serve *their* own needs unrestrained by the rules of the public court system.[172]

Indeed, the parties to arbitration pay for the privilege of avoiding the public civil justice system.[173] Public tax dollars almost entirely fund the civil justice system's facilities, administrators, and judges.[174] In contrast, the parties to an arbitration typically pay for their hearing room, an arbitral organization's administrative fees, and their arbitrator's fees and expenses.[175]

At a practical level, arbitration is poorly situated to promote the public interest. The contrast with the public civil justice system is informative.[176] The public has input into the composition of the judiciary, either directly by means of a judicial election or indirectly through their elected representatives.[177] Those judges create judicial precedent that guides and binds the public.[178]

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[171] See generally E. Gary Spitko, Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family, 57 Wash. & Lee L. Rev. 1139, 1142-1154 (2000) (discussing "the potential utility of arbitration for those who wish to avoid or dismantle subordinating law that they feel does not well serve them") E. Gary Spitko, Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 Case W. Rsrv. L. Rev. 275, 275, 294-97 (1999) (arguing that minority-culture litigants "have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel" and that arbitration provides a means for cultural majorities to escape from majoritarian bias).

[172] See Kristen M. Blankley, Impact Preemption: A New Theory of Federal Arbitration Act Preemption, 67 Fla. L. Rev. 711, 764 (2015) ("Parties choose arbitration, in part,…to custom design a process to best meet the needs of all of the participants.") E. Gary Spitko, Judge Not: In Defense of Minority-Culture Arbitration, 77 Wash. U. L.Q. 1065, 1066 (1999) (arguing that arbitration "can serve as…a laboratory for developing procedural and substantive reforms") Stephen J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 Minn. L. Rev. 703, 746-47 (1999) (arguing that the parties to an arbitration contract might create "sophisticated, comprehensive, legal system[s]" tailored to their specific industry).

[173] Stephen J. Ware, Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration, 14 Cardozo J. Conflict Resol. 899, 907-08 (2013) ("[T]he public-sector court system provides legally binding adjudication virtually free of charge to the disputing parties, while the private sector arbitration system generally charges them market rates for it.").

[174] Erin S. Knutsen, Keeping Settlements Secret, 37 Fla. St. U. L. Rev. 945, 946, 963 (2010) Ware, supra note 173, at 905-06.

[175] Sura & DeRise, supra note 45, at 468 ("[T]he funding required to resolve disputes with a private third-party neutral, instead of a judge, will almost invariably come from the parties themselves.") Ware, supra note 173, at 906.

[176] See Dore, supra note 14, at 465 ("A judge represents a broader public interest, even when adjudicating a seemingly private dispute, and must carefully balance any legitimate need for secrecy against any countervailing public interest in disclosure.").

[177] See Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 78 (Cal. 1999) (noting that superior court judges in California are elected and may be recalled).

[178] Cole, supra note 169, at 1202, 1215 Knutsen, supra note 174, at 946.

Unlike with the appointment of a judge, the public has no say in the arbitrator's appointment they have no reason to place confidence in her.[179] Moreover, the arbitrator is [*1765] not accountable to the public, nor is she obligated to value or even consider their interests.[180] The arbitrator's decision in any case will not create precedent that will develop the law or bind the public.[181]

Requiring that arbitration serve as a public resource or public good is antithetical to this nature of arbitration. The more that regulation requires that arbitration serve the public policy purposes of public litigation, the less of a private alternative to public litigation arbitration will become. The result will almost certainly be a more expensive, slower, less informed, and less flexible dispute resolution method that remains arbitration in name only. This public-interest-serving arbitration will be less useful to potential arbitration parties and, ultimately, less utilized by them.[182] Thus, regulation that demands that arbitration serve the interests of entities that are not parties to the arbitration contract is not reasonable in its inception.

Assuming for the sake of argument that a certain set of disputes should be adjudicated in a process that is required to serve the public interest, society has one obvious option other than coopting and mutating private arbitration: Congress might amend the FAA to place that set of disputes outside the statute's scope.[183] Amending the FAA to keep such disputes in the public

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[179] Broughton, 988 P.2d at 77-78 (stating that "it hardly requires elaboration that superior court judges are accountable to the public in ways arbitrators are not" and elaborating on those differences, including that superior court judges "are locally elected" and "[v]irtually all of their proceedings take place in public view").

[180] Id. at 78 (noting that "arbitrators are not public officers and are in no way publicly accountable").

[181] But see Menkel-Meadow, supra note 11, at 2681 (suggesting that arbitrators who sit in a series of similar cases "write opinions requiring both legal conclusions and fact-findings that must be elaborated and over time necessarily become affected and `constrained' by the equity of decisions in other, similar cases") W. Mark C. Weidemaier, Toward a Theory of Precedent in Arbitration, 51 Wm. & Mary L. Rev. 1895, 1899-1906 (2010) (reviewing arguments that support the conclusion that arbitration does not produce precedent, conceding that past arbitral awards do not determine the outcome of future disputes, yet arguing that "each system of arbitration represents a unique institutional context, the particulars of which undoubtedly will influence how (and whether) arbitral precedent evolves").

[182] Cf. Joseph B. Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 Vt. L. Rev. 85, 117 (1981) (rejecting a call for a non-neutral mediator in environmental disputes and arguing that "[t]he way to insure [sic] the continued integrity and usefulness of mediation as a dispute settlement procedure, however, is to be certain that we do not demand that it perform functions beyond the scope of its institutional and conceptual capacity").

[183] See 9 U.S.C. §402 (amending the FAA to provide that a predispute arbitration agreement is not enforceable with respect to claims of sexual harassment or sexual assault).

court system would better protect the relevant public interest while allowing arbitration to remain arbitration.

[*1766] 2. Conflation of a Broad Nondisclosure Agreement with an Arbitration Secrecy Clause

A second pattern emerging from the caselaw adjudicating unconscionability challenges to arbitration contracts containing secrecy clauses is the failure of courts to distinguish between arbitration secrecy provisions and broader nondisclosure agreements separable from the arbitration contract.[184] To fully appreciate the implications of this failure for the purposes of FAA preemption analysis, one must first understand two related preliminary points: First, the FAA's purview is quite limited. Second, the separability doctrine requires that the arbitration secrecy provision at issue be considered apart from any non-arbitration contract that contains it or relates to it.[185]

As to the first point, the FAA governs the enforcement only of arbitration contracts.[186] It has nothing to say about the enforcement of broader nondisclosure agreements as they relate to matters arising outside of arbitration.[187] This remains true even if the NDA is contained in a contract that also contains an arbitration clause or, indeed, even if the NDA is wrapped in an arbitration clause.[188] The latter would include any arbitration secrecy provision that purports to

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[184] See, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066, 1071 (9th Cir. 2007) (failing to distinguish between secrecy provisions of an arbitration contract and secrecy provisions of an NDA that are separable from the arbitration contract where the relevant clause provided that "all claims, defenses and proceedings (including…the existence of a controversy and the fact that there is a mediation or arbitration proceeding) shall be treated in a confidential manner" and that "no one shall divulge…the content of the pleadings, papers, orders, hearings, trials, or awards in the arbitration") Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 701 (Cal. Ct. App. 2018) Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 555 (Haw. 2017).

[185] For a broad discussion of the separability doctrine, see E. Gary Spitko, The Will as an Implied Unilateral Arbitration Contract, 68 Fla. L. Rev. 49, 92-97 (2016) (discussing the separability doctrine and applying the doctrine to various challenges to the validity of a will or trust).

[186] See 9 U.S.C. §2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

[187] See 65 Cong. Rec. 1931 (1924) (statement of Rep. Graham commenting that the proposed FAA "does not affect any contract that has not the agreement in it to arbitrate") Drahozal, supra note 41, at 172 ("If the parties agree to a process that is not `arbitration,' the FAA does not apply and state law rather than federal law will determine the enforceability of the agreement.").

[188] Dish Network, LLC, 370 N.L.R.B. No. 97, at 5 (Mar.18, 2021) (stating that "the FAA does not speak to settlements," given that "settlements are effectively an alternative to arbitration" and holding that an arbitration confidentiality provision that read "all

require confidentiality with [*1767] respect to matters beyond the scope of the arbitration proceedings.[189] State law or federal law aside from the FAA governs the enforceability of such extra-arbitral secrecy provisions.[190]

Consider once again, for example, the confidentiality provision in *Ramos v. Superior Court*.[191] The court interpreted the provision requiring the parties to maintain the confidentiality of "all aspects of the arbitration" such that Ramos "would be in violation if she attempted to informally contact or interview any witnesses outside the formal discovery process."[192] Accepting for the sake of argument that the confidentiality clause means what the court says it means, the clause must be understood to contain two separable contracts - a provision respecting secrecy in arbitration (its pleadings, discovery, testimony, and award) and an NDA governing Ramos's conversations with persons who may have information relevant to Ramos's sex discrimination claims against her former employer. The FAA governs the former contract, while the latter contract is outside of the FAA's scope.

A contract not to speak to persons outside of an arbitration concerning matters that arose independent of the arbitration is not an arbitration contract.[193] Thus, such an NDA does not fall within the purview of the FAA even if a court implies the NDA's existence from the arbitration confidentiality provision. Given the FAA's limited scope, the concern that *arbitration* secrecy will broadly prevent the parties to an arbitration contract from discussing the events giving rise to their dispute is misplaced.

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arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential" was outside the purview of the FAA with respect to settlements) Cal. Com. Club, Inc., 369 N.L.R.B. No. 106, at 1 (June19, 2020).

[189] Cal. Com. Club, 369 N.L.R.B. at 1 ("Provisions [in an arbitration contract] that impose confidentiality requirements beyond the scope of the arbitration proceeding and `the rules under which the arbitration will be conducted' receive no protection from the FAA.").

[190] Id. at 1 (commenting that secrecy provisions in an arbitration contract that purport to govern in a context outside of the arbitration proceeding "must be assessed under the same standards that apply to confidentiality rules generally").

[191] Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 701 (Cal. Ct. App. 2018).

[192] Id.

[193] See Cal. Com. Club, 369 N.L.R.B. at 1 ("Provisions [in an arbitration contract] that impose confidentiality requirements beyond the scope of the arbitration proceeding and `the rules under which the arbitration will be conducted' receive no protection from the FAA.").

It may seem odd that the FAA would govern a clause at it relates to arbitration but not govern the very same clause as it relates to matters outside of arbitration. Nonetheless, the arbitral doctrine of separability dictates this result. Even when [*1768] an arbitral secrecy provision and a broader NDA arise from the same contract or the same clause of a contract, the arbitral doctrine of separability requires that a court treat the arbitration secrecy provision and the broader NDA as two separate contracts.[194]

In short, the separability doctrine provides that a court must treat a contract's arbitration provisions as a separate contract apart from the contract that contains the arbitration provisions.[195] Thus, where a party to a contract challenges the validity of the container contract, a court will not view that challenge as a challenge to the container contract's arbitration provisions.[196] For example, where a party to a contract containing an arbitration provision alleges that the contract as a whole was procured by fraud and, therefore, is voidable, the court will not treat that allegation as a challenge to the validity of the arbitration provision contained in the allegedly voidable contract.[197] The Supreme Court has held that the FAA provides for separability in cases to which the FAA applies.[198] Moreover, the Revised Uniform Arbitration Act expressly adopts a separability scheme.[199]

A court that conflates a contract's arbitral secrecy clause with a broader NDA in the same container contract violates both the letter and the spirit of this separability principle.[200] The

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[194] See ITT Educ. Servs., Inc. v. Arce, 533 F.3d 342, 344 (5th Cir. 2008) (holding that even if the arbitrator found fraud in the inducement with respect to a container contract, "the district court nonetheless properly found that the confidentiality provision [which stated that `all aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator, will be strictly confidential'] is part of the arbitration clause and, thereby, severable and enforceable under Prima Paint and its progeny").

[195] See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006) (explaining that "as a matter of substantive federal law [under the FAA], an arbitration provision is severable from the remainder of the contract").

[196] Id. at 445-46.

[197] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967) (holding that "a claim of fraud in the inducement of the entire contract" is one that the arbitrator, not the court, must decide).

[198] Id.

[199] Revised Uniform Arbitration Act §6(c) (2000) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.").

[200] See, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007) (holding an arbitration secrecy clause that was intertwined with a broader NDA to be substantively unconscionable and reasoning that "[a]n inability to mention even the

court's reasoning in *Narayan v. Ritz-Carlton Development* [*1769] *Company, Inc.* illustrates the point.[201] The clause at issue in *Narayan* included an arbitral secrecy provision intertwined with a broader NDA: "Neither a party, witness, or the arbitrator may disclose the facts of the underlying dispute or the contents or results of any negotiations, mediation, or arbitration hereunder without prior written consent of all parties."[202] The court held that what it labeled the "confidentiality provision of the arbitration clause" was substantively unconscionable because it would impede the plaintiffs' ability to investigate and prosecute their claims against the defendant.[203]

More specifically, the *Narayan* court found that if the contract's secrecy provisions and discovery limitations were enforced, "the [plaintiffs] would only be able to obtain discovery by consent and would be prevented from discussing their claims with other potential plaintiffs because the confidentiality provision would make them unable to disclose the facts of the underlying dispute."[204] The court may well be correct that the contract's confidentiality provisions as a whole would have this effect. That, however, would be the effect of the broader NDA rather than of the arbitral secrecy provision. The arbitration secrecy clause would preclude the plaintiffs only from disclosing "the contents or results of any…arbitration."[205]

To avoid FAA preemption under the inception and scope test, a court may have to eschew the type of conflated unconscionability analysis seen in *Narayan*. One may assume for the sake of argument that an unconscionability analysis that seeks to ensure that a claimant would have a reasonable opportunity to investigate and prosecute her claims against a respondent would be found reasonable in its inception. Still, the conflated unconscionability analysis is not reasonable in its scope where it invalidates an arbitration secrecy provision if that purpose can be achieved by invalidating only the NDA or other non-arbitral confidentiality provisions. In such a case, the

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existence of a claim to current or former O'Melveny employees would handicap if not stifle an employee's ability to investigate and engage in discovery").

[201] See Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 548-49 (Haw. 2017).

[202] Id. at 548-49.

[203] Id. at 556.

[204] Id. (internal quotations omitted).

[205] See id. at 548-49.

regulation of arbitration through unconscionability doctrine is excessively intrusive when weighed against the contract party's interest in arbitration secrecy and the lack of the state's need for such intrusion.

[*1770] An unconscionability analysis is not reasonable in its scope when it misattributes to an arbitration secrecy provision the effects of a broader NDA, as was the case in *Narayan*. Nor is such an analysis reasonable in its scope when it invalidates an arbitration secrecy clause because of the combined effect of the arbitration secrecy provision and the broader NDA. Rather, to be reasonable in scope, the court's analysis may invalidate an arbitration secrecy provision only if that provision alone would have an impermissible effect. Thus, in considering an unconscionability challenge to an arbitration secrecy provision, a court should assume that any non-arbitral confidentiality restrictions, which the FAA does not protect, have been found unconscionable and unenforceable. In sum, in accordance with the separability principle, the court must ensure that its unconscionability analysis relates specifically to the arbitration clause and not a broader NDA.[206]

B. State Statutory Limitations on Nondisclosure Agreements

A nondisclosure agreement obligates a party to the agreement to maintain the confidentiality of information specified by the agreement.[207] As with arbitration secrecy agreements, parties enter into NDAs that are not specific to arbitration to protect their proprietary information and reputational interests.[208] For example, an employee may value an NDA agreed to as part of the

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[206] Indeed, where the arbitration clause assigns to the arbitrator the power to rule on the enforceability of the container contract that contains the NDA, the separability principle dictates that the arbitrator and not the court must decide whether the broader NDA is enforceable. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006) (explaining that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance") Revised Uniform Arbitration Act §6(c) (2000) ("An arbitrator shall decide whether…a contract containing a valid agreement to arbitrate is enforceable.").

[207] See, e.g., Weston, supra note 22, at 108.

[208] See, e.g., id. at 108-09.

settlement of her claims against her employer as a means to minimize publicity and the likelihood of retaliation from her co-workers and potential future employers.[209]

[*1771] There is widespread concern, however, that NDAs may be used by wrongdoers to hide their malfeasance and silence their victims.[210] A broader concern is that this silence, in turn, enables perpetrators to continue to engage in harmful behavior that is like the behavior that the NDA has covered up.[211] Thus, an NDA may put nonparties to the agreement at risk of harm.[212]

In response to such concerns, in the past few years, the federal government and a significant number of states have enacted meaningful restrictions on the enforcement of NDAs as they relate to workplace behavior.[213] For example, in December 2022, President Biden signed into law the Speak Out Act, which limits enforcement of predispute NDAs as they relate to sexual assault and sexual harassment claims.[214] More specifically, the Speak Out Act provides, "[w]ith respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law."[215] While this legislation will ensure that victims of workplace sexual assault and sexual harassment remain free to discuss their claims publicly, the Speak Out Act is unlikely to have a significant effect on

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[209] See, e.g., Weston, supra note 22, at 130 Gloria Allred, Opinion: Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private, L.A. Times (Sept.24, 2019), https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits [https://perma.cc/4MZ6-NW4U] ("Many victims want the opportunity to enter a confidential settlement because they are unwilling to have what happened to them made known to their family members, their co-workers, their future employers or the general public.").

[210] See, e.g., Weston, supra note 22, at 109 ("NDAs have also been invoked to silence reports of misconduct, negligence, sexual harassment, and even sexual assault.").

[211] See, e.g., id. at 121.

[212] See, e.g., id. at 131 ("NDAs can deprive the public of knowledge about misconduct and impede individuals at risk of similar harm from obtaining proof necessary to their cases as well as impair regulatory agencies from investigating and enforcing statutory rights.").

[213] See Cal. Civ. Proc. Code §1001 (West 2023) 820 Ill. Comp. Stat. 96/1-30 (2019) Md. Code Ann., Lab. & Empl. §3-715 (West 2018) Nev. Rev. Stat. Ann. §10.195 (West 2019) N.J. Rev. Stat. §10:5-12.8 (2019) N.M. Stat. Ann. §50-4-36 (West 2020) N.Y. Gen. Oblig. Law §5-336 (McKinney 2019) Or. Rev. Stat. §659A.370 (2023) Tenn. Code Ann. §50-1-108 (West 2018) Vt. Stat. Ann. tit. 21, §495h(g), (h) (West 2018) Va. Code Ann. §40.1-28.01(A) (West 2023) Wash. Rev. Code Ann. §49.44.211 (West 2022).

[214] Speak Out Act, Pub. L. No. 117-224, 136 Stat. 2290 (2022).

[215] Id. §(4)(a).

arbitration secrecy. This is because only nine months before enactment of the Speak Out Act, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which gives claimants the option of invalidating any predispute agreement within the purview of the FAA to arbitrate sexual assault and [*1772] sexual harassment claims.[216] Thus, such claims are unlikely to end up in arbitration and, therefore, a statute limiting NDAs with respect to such claims is likely to have minimal impact on arbitration secrecy.

Importantly, the Speak Out Act expressly does not preempt state limitations on the enforcement of NDAs that are "at least as protective of the right of an individual to speak freely, as provided by" the Speak Out Act.[217] In fact, several states have enacted bans on NDAs that are similar to but broader in scope than the Speak Out Act. Most of these statutes are concerned principally with NDAs that would have the effect of silencing complaints of invidious discrimination, discriminatory harassment with respect to any protected trait, or noncompliance with worker protections.[218] Thus, several of the statutes and their limitations expressly do not apply to the protection of proprietary information.[219]

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[216] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26, 27 (2022) ("[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute…no predispute arbitration agreement…shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.").

[217] Speak Out Act §4(b).

[218] See, e.g., Cal. Civ. Proc. Code §1001(a) (declaring void certain NDAs focusing on workplace harassment and discrimination) 820 Ill. Comp. Stat. 96/1-30(a) (a settlement or termination agreement that contains a confidentiality provision "related to alleged unlawful employment practices" must meet certain specified conditions to be enforceable) N.J. Rev. Stat. §10:5-12.8(a) (an NDA is unenforceable against an employee to the extent that the agreement "has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment") N.M. Stat. Ann. §50-4-36 (regulating nondisclosure provisions relating to an employee's "claim of sexual harassment, discrimination or retaliation") N.Y. Gen. Oblig. Law §5-336 (regulating NDAs "which involve[] discrimination, in violation of laws prohibiting discrimination") Or. Rev. Stat. §659A.370(a) (limiting certain NDAs by referring to various Oregon statutes that prohibit specified types of invidious employment discrimination) Wash. Rev. Code Ann. §49.44.211(1) (prohibiting an NDA limiting an employee's right to discuss "conduct…that the employee reasonably believed…to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy, is void and unenforceable.").

[219] See, e.g., Cal. Gov't Code §12964.5(f) (West 2022) ("This section does not prohibit an employer from protecting the employer's trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.") N.J. Rev. Stat. §10:5-12.8(c)(2) ("[T]his section shall not be construed to prohibit an employer from requiring an employee to sign an agreement…in which the employee agrees not to disclose proprietary information.") Wash. Rev. Code Ann. §49.44.211(6) ("This section does not prohibit an employer and an employee from protecting trade secrets, proprietary information, or confidential information that does not involve illegal acts.").

[*1773] Washington state is unusual in that it has enacted legislation that specifically targets employment arbitration secrecy.[220] Although the relevant statute does not mention the word "arbitration," it is evident that arbitration that is subject to a confidentiality agreement is a target[221]: "A provision of an employment contract or agreement is against public policy and is void and unenforceable if it requires…an employee to resolve claims of discrimination in a dispute resolution process that is confidential."[222]

To the contrary, most of the recent statutes that limit the enforceability of NDAs as they relate to workplace behavior do not expressly target arbitration.[223] Nonetheless, some of these non-arbitration-specific statutes are broad enough to apply to arbitration secrecy agreements. This is so because although the separability doctrine, discussed above,[224] dictates that a challenge to a container contract is not a challenge to the arbitration clause within the container contract, the principle does not apply in the context of a regulation of a container contract: a statute that regulates the container contract may very well regulate an arbitration clause within the container contract. Thus, a statute that applies to "an agreement" between an employer and an employee, or even more specifically "a nondisclosure or confidentiality agreement" between an employer and an employee, should be seen as regulating an arbitration secrecy provision entered into between an employer and an employee whether that arbitration contract stands alone or is contained within a more general contract.[225]

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[220] Wash. Rev. Code Ann. §49.44.085 (West 2018). Washington state also has a separate statute that targets NDAs as they relate to workplace behavior. Id. at §49.44.211.

[221] See Chamber of Com. v. Bonta, 62 F.4th 473, 486 (9th Cir. 2023) ("[A] state rule discriminates against arbitration even if it does not expressly refer to arbitration, but instead targets its defining characteristics.") Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 725 (4th Cir. 1990) ("[T]he mere fact that a statute or regulation does not expressly refer to arbitration is not determinative on the question of whether it impermissibly singles out arbitration provisions.").

[222] Wash. Rev. Code Ann. §49.44.085.

[223] See, e.g., N.Y. Gen. Oblig. Law §5-336 N.J. Stat. Ann. §10:5-12.8 820 Ill. Comp. Stat. 96/1-30.

[224] See supra notes 195-199 and accompanying text.

[225] See Or. Rev. Stat. §659A.370 (2023) (making it an unlawful employment practice for an employer and an employee "to enter into an agreement" under certain circumstances that contains certain nondisclosure provisions) Va. Code Ann. §40.1-28.01(A) (West 2023) ("No employer shall require an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement, including any provision relating to nondisparagement, that has the purpose or effect of concealing the details relating to a claim of sexual assault…or a claim of sexual harassment…as a condition of employment.").

[*1774] Given a state statute limiting the enforceability of an NDA that is broad enough to apply to an arbitration secrecy clause, the question becomes whether the FAA preempts this statute as it relates to arbitration secrecy. A statute that invalidates an NDA to the extent that the agreement prevents a person having knowledge of discrimination, harassment, or noncompliance with worker protections from sharing that knowledge should be found to be reasonable in its inception. The government unquestionably has a legitimate interest in preventing workplace discrimination and harassment and in promoting compliance with worker protections. Thus, the government also has a legitimate interest in limiting the tools that perpetrators of invidious discrimination and those who fail to comply with worker protections use to silence those who would raise awareness of their wrongdoing.

Anti-NDA statutes that carve out exceptions for trade secrets and other proprietary information or that limit their application to agreements that obligate parties to keep their knowledge of illegal acts secret avoid an overbreadth problem. The state does not further its legitimate interests in preventing workplace discrimination and promoting compliance with worker protections by abrogating contractual protections for trade secret or proprietary information. Thus, such carveouts and limitations ensure that the anti-NDA statute is not excessively intrusive.

An anti-NDA statute may still be unreasonable in scope, however, where its focus is too narrow. Specifically, a prohibition that applies to arbitration secrecy agreements but does not apply to documents or disclosures relating to or arising from settlement negotiations or mediations may unreasonably discriminate against arbitration.[226] Information precluded from disclosure by negotiation secrecy or mediation secrecy is no less likely to enable further wrongdoing or impede potential claimants in building their case than is information precluded from disclosure by arbitration secrecy.[227] Thus, arbitration [*1775] secrecy is but one piece of the broader problem of secrecy in conflict resolution.[228]

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[226] See Md. Code Ann., Lab. & Empl. §3-715 (West 2018) Or. Rev. Stat. §659A.370 Tenn. Code Ann. §50-1-108 (West 2018) Va. Code Ann. §40.1-28.01(A).

[227] See Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC, 379 F.3d 159, 176 (5th Cir. 2004) (rejecting an unconscionability challenge to an arbitration secrecy clause and pointing out that "a corporate repeat-player can use confidential settlements to

Moreover, even under existing FAA jurisprudence, states are not free to address this problem piecemeal - targeting only the arbitration secrecy piece. In *Doctor's Associates, Inc. v. Casarotto*, the Supreme Court held that "[c]ourts may not…invalidate arbitration agreements under state laws applicable only to arbitration provisions."[229] The Court found that when Congress enacted the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts."[230]

One might meaningfully distinguish between the need to protect and promote secrecy in the context of a settlement negotiation or mediation on the one hand versus arbitration on the other.[231] Most importantly, abrogating confidentiality in settlement negotiations and mediations would likely discourage the candor that is essential to the negotiation and mediation processes given that a party might then reasonably fear that information it discloses during a negotiation or mediation session could later be used against it if the case proceeds to [*1776] trial.[232] As arbitration is itself a replacement for trial, no similar concern would arise from a statute

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prevent a court from making adverse findings.…") Lisa A. Kloppenberg, The Best Beloved Thing is Justice: The Life of Dorothy Wright Nelson 153 (2022) ("[M]ediation is entirely confidential and if people cannot air grievances publicly and officially in other ways, the confidentiality agreements in mediation can be used to hide information and prevent redress of grievances (e.g., with a sexual predator).") Dore, supra note 14, at 506 ("Confidential settlements can deprive existing and potential claimants of information necessary to build their case or prevent disclosure of information relevant to public welfare, health, and safety.") Knutsen, supra note 174, at 962, 966 (noting the view that "secret settlements also deny future litigants information about the dispute" that settled and "allow information pertaining to safety to remain undisclosed") Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buff. L. Rev. 185, 220 (2004) ("Institutions which enter confidential settlements, like institutions which resolve disputes through confidential arbitration, are able to minimize information available to potential claimants.").

[228] Hoffman & Lampmann, supra note 162, at 174-82 (detailing harms that arise from confidential settlements of sexual harassment claims) Sarah Rudolph Cole, The End of `Forced' Arbitration Isn't the Beginning of Corporate Transparency, The Hill (Feb.17, 2022), https://thehill.com/opinion/judiciary/594533-the-end-of-forced-arbitration-isnt-the-beginning-of-corporate-transparency/ [https://perma.cc/Z9AE-JSHZ] (noting that "NDAs are typically part of settlement agreements between employers and employees in litigated matters, as well [as arbitrated matters]" and arguing that "[a]rbitration is not the problem - settlement with nondisclosure is").

[229] Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (emphasis omitted).

[230] Id. (internal quotations omitted).

[231] See Randall, supra note 227, at 220 (discussing differences between arbitration and settlement negotiation that "may provide additional justifications for confidentiality in settlements, not applicable to arbitration.").

[232] See id. (listing among the reasons to differentiate between arbitration and negotiation that "[a]dmissibility of information from failed negotiations would create a significant disincentive to settlement efforts.").

abrogating confidentiality in the arbitration process. Nonetheless, the FAA may not allow for such well-reasoned and well-meaning differentiation. In sum, a statute that abrogates arbitration secrecy while respecting secrecy in the context of a settlement negotiation or mediation may be found unreasonable in scope in that it fails to put arbitration contracts "upon the same footing as other contracts."[233]

C. The Presumption of Public Access to Judicial Records

Federal and state courts recognize a common law presumption of public access to criminal and civil judicial proceedings and records.[234] Moreover, a significant number of state legislatures have codified this common law right.[235] This right of access protects not only the right to attend open court proceedings but also the right to inspect and copy judicial records.[236] Pursuant to the broadest of several approaches, a document will qualify as a "judicial record" and, thus, fall within the purview of the presumption of public access if the document has been filed with the court or otherwise integrated into the court's proceedings.[237] "While filing clearly establishes such [*1777] status, a document may still be construed as a judicial record, absent filing, if a

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[233] See id. (arguing that "[t]he fact that judges find confidentiality requirements to be harsh, oppressive, and ultimately unenforceable in the context of arbitration agreements but perfectly acceptable in the context of settlement agreements once again suggests a bias against arbitration").

[234] See, e.g., Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (citing federal and state cases) In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019) Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003) In re Atlanta J.-Const., 519 S.E.2d 909, 910-11 (Ga. 1999).

[235] See, e.g., Colo. Rev. Stat. §24-72-203(1)(a) (2016) ("All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law.") S.D. Codified Laws §15-15A-5 (2005) ("Information in the court record is accessible to the public except and as prohibited by statute or rule and [this statute].") Tex. R. Civ. P. 76(a)1) (providing that "court records….re presumed to be open to the general public and may be sealed only upon a showing of all of [certain factors]").

[236] See, e.g., In re Avandia Mktg., 924 F.3d at 672 Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001) Rosado v. Bridgeport Roman Cath. Diocesan Corp., 970 A.2d 656, 676 (Conn. 2009).

[237] See, e.g., In re Avandia Mktg., 924 F.3d at 672 Rosado, 970 A.2d at 678-79 (discussing several approaches that courts have taken to determining what constitutes a judicial record). Pursuant to the narrowest approach, a document becomes a judicial record only if the court relies upon the document to determine a litigant's substantive rights. Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986). A middle approach requires that a filed document "be relevant to the performance of the judicial function and useful in the judicial process" to be classified as a judicial record. Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006) (quoting United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995)).

court interprets or enforces the terms of that document, or requires that it be submitted to the court under seal."[238]

Several related rationales ground the presumption of public access. The public subsidizes the judicial system and, for that reason, has a right to know how that judicial system is functioning.[239] Giving the public access to the documents that bear on the merits of litigation allows the public to assess the judge's disposition of the case.[240] Thus, the right of access helps to ensure that judges perform their judicial duties honestly and competently.[241] Relatedly, the presumption of public access promotes public confidence in the judicial system and, thus, the legitimacy of the judicial process by exposing the bases for the court's reasoning and decisions.[242]

The right of access may compromise arbitration secrecy when private arbitration intersects with the public courts.[243] [*1778] Private arbitration involves the public court system in several common scenarios. When a party to an arbitration contract refuses to arbitrate and seeks instead to litigate in court, for example, the other party or parties to the arbitration contract may file a motion in federal or state court to stay the pending litigation and to compel arbitration.[244] In

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[238] In re Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001).

[239] Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("When [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.").

[240] Romero v. Drummond Co., Inc., 480 F.3d 1234, 1245 (11th Cir. 2007) (stating that the presumption of public access "is instrumental in securing the integrity of the [judicial] process") Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544, 546 (7th Cir. 2002) see also Dore, supra note 14, at 476 ("Public monitoring and understanding of the judicial process require disclosure of documents relevant and useful to a court's determination of the litigants' substantive rights.").

[241] In re Cendant Corp., 260 F.3d at 192 A.A. v. Glicken, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020) ("[P]ublic access to civil trials enhances the quality of justice….").

[242] Leavell, 220 F.3d at 568 (noting that judges claim legitimacy by virtue of their reasoning and arguing that "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification") United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995) Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3rd Cir. 1988) Doe v. Bellmore-Merrick Cent. High Sch. Dist., 770 N.Y.S.2d 847, 848 (N.Y. Sup. Ct. 2003) ("There is an overwhelming presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system.") Glicken, 237 A.3d at 1170 (public access "promotes confidence in and respect for our judicial system").

[243] Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., No. 07 CIV. 8169 (PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Apr.21, 2008) (explaining that while parties to an arbitration contract are entitled to privacy, "[t]he circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, i.e. the arbitration award") Dore, supra note 14, at 507 ("Once arbitration documents are filed with the court with a request for judicial action, they become judicial records subject to the right of public access.").

such cases, the arbitration contract necessarily will be filed with the court in connection with either type of motion.[245]

Private arbitration also intersects with the public court system when a party to an arbitration asks a federal or state court to confirm, vacate, modify, or correct an arbitration award.[246] The party that prevailed in arbitration may wish to have a court confirm the arbitrator's award so that the award becomes a ruling of the court. Upon confirmation, the prevailing party may enforce the arbitration award just as a party to public litigation would enforce any judgment of the court.[247] A confirmed award also may give rise to claim preclusion and issue preclusion, respectively, under the judicial doctrines of res judicata and collateral estoppel.[248] For these very reasons, the party that lost in arbitration may decide to move a court to [*1779] vacate the arbitrator's award. Finally, either a prevailing party or a losing party in arbitration may seek to have a court direct the arbitrator to complete, correct, or clarify her arbitration award in cases where the arbitrator failed to rule on an issue properly before her in the arbitration, made a computation error in her award, or issued an award that is unclear.[249]

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[244] See 9 U.S.C. §§3-4 (governing in federal court, respectively, a motion to stay litigation and a motion to compel arbitration) Revised Uniform Arbitration Act §7(a), (g) (2000) (governing in state court, respectively, a motion to compel arbitration and a motion to stay litigation).

[245] Dish Network, LLC, 370 N.L.R.B. No. 97, at 17 (Mar. 18, 2021) (McFerran, concurring in part and dissenting in part) (noting that "a party seeking to stay judicial action or to compel arbitration under Section 3 or 4 of the FAA must necessarily disclose the existence and content of such a demand").

[246] See 9 U.S.C. §§9-11 (governing in federal court, respectively, a motion to confirm an arbitration award, a motion to vacate an arbitration award, and a motion to modify or correct an arbitration award) Revised Uniform Arbitration Act §§22, 24 (governing in state court, respectively, a motion to confirm, vacate, and modify or correct an arbitration award). See, e.g., Global Reinsurance Corp., 2008 WL 18005459 at *1 (unsealing submissions relating to petitions to confirm several arbitration awards in light of the common law right of access) Zurich Am. Ins. Co. v. Rite Aid Corp, 345 F. Supp. 2d 497, 506 (E.D. Pa. 2004) (ordering that the record be unsealed with respect to a petition to vacate, modify, or correct an arbitration award where the party seeking continuation of the sealing order failed to demonstrate that disclosure would lead to sufficient harm).

[247] See 9 U.S.C. §13(c) Revised Uniform Arbitration Act §25(a) Ware, supra note 172, at 708 ("Through confirmation, the court adopts the arbitrator's decision as its own, and that decision is enforced like any other ruling of the court.").

[248] See Postlewaite v. McGraw-Hill, Inc., 333 F.3d 42, 48 (2d Cir. 2003) ("[C]ollateral estoppel may also be applied…to an issue resolved in arbitration.").

[249] 9 U.S.C. §11 (providing grounds for a court to order modification or correction of an arbitration award "so as to effect the intent [of the award] and promote justice between the parties") see also Revised Uniform Arbitration Act §24.

When a party to an arbitration seeks to confirm, modify, or correct the award arising from the arbitration, the FAA itself requires that the movant file the award with the court.[250] A party seeking to vacate such an award must necessarily attach the award to the motion to vacate.[251] Upon a party's filing an arbitration award with the court in connection with a motion to confirm, vacate, modify, or correct the arbitration award, the award is deemed a judicial record to which the presumption of public access attaches.[252] Thus, the presumption of public access routinely threatens to infringe upon arbitration secrecy.[253]

The right of access "begins with a presumption in favor of public access."[254] The right of access, however, is not absolute.[255] Thus, a party seeking to maintain or prolong arbitral secrecy despite the need to involve the public courts in a motion relating to an arbitration proceeding or award may seek leave with the court at issue to file the arbitration contract, award or other documents relating to an arbitration under [*1780] seal.[256] Such a motion is, in essence, a request that the court maintain the confidentiality of the arbitral contract, award, or other documents.

A significant number of states have enacted legislation or adopted court rules specifying the findings that a court must make before sealing a judicial record.[257] In general, to overcome the

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[250] 9 U.S.C. §13.

[251] Dish Network, LLC, 370 N.L.R.B. No. 97, at 17 (Mar.18, 2021) (McFerran, concurring in part and dissenting in part).

[252] Pa. Nat'l Mut. Cas. Ins. Grp. v. New England Reinsurance Corp., 840 Fed. App'x 688, 691 (3d Cir. 2020) Dish Network, LLC, 370 N.L.R.B. at 17 (McFerran, concurring in part and dissenting in part) McAfee, Inc. v. Weiss, 336 S.W.3d 840, 843-44 (Tex. App. 2011) (concluding that an arbitration award filed with a motion to confirm "plainly comes within the definition of `court records' found in [the Texas Rules of Civil Procedure]").

[253] See, e.g., Century Indem. Co. v. AXA Belgium, No. 11 CIV. 7263(JMF), 2012 WL 4354816, at *13-14 (S.D.N.Y. Sept.24, 2012) (rejecting an arbitral party's motion to seal an arbitration award and other documents filed in connection with a motion to confirm the arbitration award) Alexandria Real Est. Equities, Inc. v. Fair, No. 11 Civ. 3694(LTS), 2011 WL 6015646, at *3 (S.D.N.Y. Nov.30, 2011) (same).

[254] In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 677 (3d Cir. 2019).

[255] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) In re Avandia Mktg., 924 F.3d at 672 Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003).

[256] See, e.g., Decapolis Group, LLC v. Mangesh Energy, Ltd., No. 3:13-CV-1547-M, 2014 WL 702000, at *2 (N.D. Tex. Feb.24, 2014) (ruling on a motion to seal the court's record in connection with a petition to confirm an arbitration award) Fair, 2011 WL 6015646 at *3 (same).

[257] See, e.g., Ind. Code Ann. §5-14-3-5.5 (West 2023) (specifying required findings) Cal. R. Ct. 2.550(d) (setting out the factual findings that a court must make before it may order that a record be filed under seal) Ga. Unif. Super. Ct. R. 21.2 ("An order

presumption in favor of public access, the movant must demonstrate that disclosure of the judicial record will result in a clearly defined and serious injury to the movant.[258] Further, the movant must demonstrate that the movant's interest in avoiding the harm from disclosure outweighs the public's interest in access to the judicial record.[259]

In ruling on a motion to seal an arbitration award, courts generally do not find themselves to be bound by a confidentiality agreement that the arbitration parties have entered into or by a protective order that an arbitrator has issued.[260] Rather, courts have applied to a motion to seal an arbitration award the same standards that they would apply to any other motion [*1781] to seal.[261] Pursuant to those standards, courts commonly decline to seal an arbitration award.[262]

Even when a court grants a motion to seal, the protection of arbitral secrecy may well be only temporary. Under a balancing of the interests test, a court will maintain the secrecy only for as long as the circumstances that supported its granting of the motion to seal persist.[263] Pursuant

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limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest.").

[258] In re Avandia Mktg., 924 F.3d at 672 A.A. v. Glicken, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020).

[259] In re Avandia Mktg., 924 F.3d at 672 Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988) Anderson v. Home Ins. Co., 924 P.2d 1123, 1126-27 (Colo. App. 1996) In re Atlanta J.-Const., 519 S.E.2d 909, 911 (Ga. 1999).

[260] See, e.g., Bristol-Meyers Squibb Co. v. Novartis Pharma AG, No. 22 Misc. 124, 2022 WL 1443319, at *1 (S.D.N.Y. May6, 2022) (denying a motion to file a petition to confirm an arbitration award under seal despite the parties' agreement to file any documents connected with the arbitration under seal) Chartis Specialty Ins. Co. v. LaSalle Bank Nat'l Ass'n, No. CIV.A. 6103-VCN, 2011 WL 3276369, at *1 (Del. Ch. July29, 2011) ("The Court concludes that the existence of a confidentiality order does not necessarily require…the sealing of the award.") McAfee, Inc. v. Weiss, 336 S.W.3d 840, 845 (Tex. App. 2011) ("We have found no cases recognizing a party's general interest in a confidentiality agreement - even an agreement reinforced by an arbitrator's rules and orders - as a specific, serious, and substantial interest within the meaning of [the Texas Rule of Civil Procedure governing the sealing of judicial records].") Steven C. Bennett, Confidentiality Issues in Arbitration, 68 Disp. Resol. J. 1, 3 (2013) ("Where a party seeks to confirm or vacate an award,…an arbitration confidentiality agreement may not compel the court to seal the award as part of the review proceedings.").

[261] See, e.g., Scott D. Boras, Inc. v. Sheffield, No. 09 CIV. 8369 (SAS), 2009 WL 3444937, at *1 (S.D.N.Y. Oct.26, 2009) Chartis Specialty Ins. Co., 2011 WL 3276369 at *1 McAfee, Inc., 336 S.W.3d at 844-45.

[262] See, e.g., Mission Wellness Pharmacy LLC v. Caremark LLC, No. CV-22-00967-PHX-GMS, 2022 WL 2488817, at *1 (D. Ariz. Mar.4, 2022) Am. Cent. E. Texas Gas Co. v. United Pac. Res. Grp., Inc., No. 2:98CV0239-TJW, 2000 WL 33176064, at *1-2 (E.D. Tex. Jul.27, 2000) Chartis Specialty Ins. Co., 2011 WL 3276369 at *4 (concluding that "sealing the award [at issue] in toto is not necessary and would improperly encroach upon the public's right of access") McAfee, Inc., 336 S.W.3d at 845 (concluding that the trial court did not abuse its discretion in declining to seal an arbitration award filed along with a motion to confirm the award).

[263] Rosado v. Bridgeport Roman Cath. Diocesan Corp., 970 A.2d 656, 692-93 (Conn. 2009). Some jurisdictions apply a stricter "extraordinary circumstances" test, pursuant to which a court will modify or vacate an order to seal upon which a party has reasonably relied only where the party seeking modification or vacatur demonstrates that the order to seal was improvidently

to this approach, when, because of changed circumstances, the interest of the parties in arbitral secrecy no longer outweighs the public's interest in its right of access, the court will unseal the judicial records at issue and arbitral secrecy will be lost.[264]

This approach to granting the public access to judicial records arising from or relating to an arbitration is reasonable in its inception. The parties to an arbitration contract or arbitral proceeding who file a motion with a court to stay litigation, compel arbitration, or confirm, vacate, modify, or correct an arbitration award, in their motion process, utilize facilities, administrative personnel, and judges that the public funds.[265] Moreover, the court's ruling on any such motion will guide and perhaps bind members of the public that consider entering into an arbitration contract or who do become subject to an arbitration agreement. Thus, the public has a significant interest in gaining access to judicial records that the court utilizes in ruling on any such motion. Such access assists the public in [*1782] monitoring judicial behavior that may have a significant impact on members of the public.

As applied, however, the presumption of public access often is not reasonable in its scope. Specifically, the right of access is not reasonable in its scope when the right grants the public access to documents or portions of documents that are not relevant to what the court is deciding.[266] For example, a motion to compel arbitration may center on an arbitration clause contained in an employment contract that also contains provisions relating to an employee/party's stock options. Where the contract provisions governing incentive compensation are irrelevant to the question of whether a valid contract to arbitrate exists between the parties, the incentive compensation provisions are not a focus of what the court is deciding, and the right of access should not extend to the incentive compensation provisions.

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granted or an extraordinary circumstance or compelling need supports modification or vacatur. See, e.g., Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979).

[264] Pansy v. Stroudsburg, 23 F.3d 772, 790 (3d Cir. 1994) Rosado, 970 A.2d at 693.

[265] See Knutsen, supra note 174, at 946, 963 ("The public purse provides the administrative framework for the dispute resolution process: the judge, the rules of civil procedure, and the courthouse forum.").

[266] See Miller, supra note 91, at 440 (arguing that "[d]iscovery material is not considered by a court, and no court decision is based upon it[, therefore,] allowing access [to discovery material] neither promotes fair and open decisionmaking by the court nor educates the public about the justice system").

Counterintuitively, often the reasoning of an arbitration award will be largely or totally irrelevant to what a court adjudicating a motion to confirm or vacate the arbitration award is considering. This is so because the grounds for vacating an arbitration award, which are few and narrow, mostly relate to the arbitration process but not to the reasoning of the arbitration award. The FAA provides four grounds for challenging an arbitration award: the award "was procured by corruption, fraud, or undue means" there was "evident partiality or corruption in the arbitrators" the arbitrators inappropriately refused to postpone the hearing or refused to hear material evidence and "the arbitrators exceeded their powers."[267] Of the four grounds for judicial review of an arbitration award, only the "exceeded their powers" ground necessarily would require the court to consider the reasoning of the arbitration award. The Uniform Arbitration Act and the Revised Uniform Arbitration Act, one or the other of which has been adopted in nearly every state, have judicial review standards that are substantially identical to those of the FAA.[268] Importantly, that an arbitrator misapplied the facts or misunderstood the law is not a proper basis for [*1783] challenging an arbitration award under the FAA, the Uniform Arbitration Act, or the Revised Uniform Arbitration Act.[269]

When a court adjudicating a motion to confirm or vacate an arbitration award is not concerned with the reasoning of the arbitration award, the presumption of public access is not reasonable in scope where it enables the public to review the entirety of the arbitration award. Rather, to be reasonable in scope, the presumption of public access should apply only to those portions of the arbitration award that the court has evaluated in vacating an award or evaluated or turned into a judgment in confirming the award. Indeed, the presumption should be in favor of sealing all parts of the award except those that the court has evaluated or turned into a judgment.

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[267] 9 U.S.C. §10.

[268] See Revised Uniform Arbitration Act §23(a) (2000) Uniform Arbitration Act §12(a) (1956).

[269] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350-51 (2011) ("[R]eview under [FAA] §10 focuses on misconduct rather than mistake.") cf. Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., No. 07 CIV. 8169 (PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Apr.21, 2008) ("In the ordinary course, a petition to confirm or vacate an arbitration award ought not to require a court to review all testimony and documentary evidence before the arbitration panel.").

Even absent application of an intermediate scrutiny to infringements of arbitration secrecy, the parties to an arbitration contract themselves can mitigate the threat that the presumption of public access poses to their interest in arbitration secrecy.[270] First, the parties can draft their arbitration contract as a stand-alone document free of any contractual terms unrelated to arbitration. Doing so will minimize the likelihood that information unrelated to the arbitration provisions at issue in a motion to compel arbitration will be disclosed to the public pursuant to the right of access. Second, the parties can specify in their arbitration contract that any arbitration award arising from the contract will state only which party prevails and the amount of damages, if any, that are due.[271] If the parties wish for an explanation of the arbitrator's reasoning, the contract can call for the arbitrator to set forth that reasoning in [*1784] a separate confidential memorandum that is not a part of the award.[272] Such provisions will minimize the likelihood that an eventual motion to confirm or vacate the arbitration award will result in disclosure of the facts surrounding the parties' dispute pursuant to the right of access.

D. The National Labor Relations Act Right to Concerted Activity

Section 7 of the NLRA guarantees to certain employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[273] A concern with employment arbitration contracts that provide for arbitration secrecy is that the secrecy provision may infringe upon an employee's Section7

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[270] Baxter Int'l, Inc. v. Abbott Labs, 297 F.3d 544, 548 (7th Cir. 2002) (opining that arbitral parties might preserve arbitration secrecy by "par[ing] down the appellate record" given that "[t]he strong presumption of public disclosure applies only to the materials that formed the basis of the parties' dispute and the district court's resolution").

[271] Precluding the arbitrator from issuing a reasoned award may also have the effect of limiting the application of collateral estoppel arising from the arbitration award. See Postlewaite v. McGraw-Hill, Inc., 333 F.3d 42, 48-49 (2d Cir. 2003) (commenting that "[a]pplication of the estoppel following arbitration…may be problematic because arbitrators are not required to provide an explanation for their decision" and declining to apply collateral estoppel in the case at hand given that the arbitration award at issue did not state the grounds for the arbitrator's decision).

[272] Kaster, supra note 64, at 24 (arguing that "the greater the information disclosed in an [arbitration] award, the more confidentiality may be threatened, so that the desire for a reasoned award may have to be tempered or satisfied in a form that is separate from the award itself if there is a great desire or need for privacy").

[273] 29 U.S.C. §157.

right to engage in concerted activities. Specifically, the arbitration secrecy clause may preclude the employee from speaking with coworkers about an arbitration award finding the employer liable for violating the employee's workplace rights as well as information or materials disclosed in the arbitration that speak to the employer's workplace practices. That concern itself raises the related issue of how Section 7 of the NLRA and Section 2 of the FAA relate to each other with respect to arbitration secrecy.

In 2018, in *Epic Systems Corporation v. Lewis*, the Supreme Court considered the extent to which Section 7 of the NLRA displaces the FAA's general command that courts must enforce arbitration agreements as written.[274] The precise issue in *Epic Systems* was whether Section 7 nullifies an arbitration contract that contains a class and collective action waiver and purports to require an employee to bring any claims against her employer arising from her employment in an individual arbitration.[275] The Court began its analysis by reiterating its holding in *Concepcion*: the FAA commands that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without [*1785] the parties' consent."[276] The Court then turned to the novel argument at hand - that Section 7 of the NLRA "overrides" the FAA with respect to an employment arbitration agreement containing a class and collective action waiver.[277]

In its displacement analysis, the Court first recognized its "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another."[278] Moreover, the Court emphasized that the party arguing in favor of displacement bore the "heavy burden of showing a clearly

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[274] See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[275] Id. at 1622.

[276] Id. at 1623.

[277] Id. at 1623-24.

[278] Id. at 1619, 1624 ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both.") (internal quotations omitted).

expressed congressional intention that such a result should follow."[279] Finally, the Court cited the strong presumption against repeal by implication.[280]

Applying these principles, the Court held that Section 7 of the NLRA does not displace the FAA, at least with respect to the FAA's mandate that a court may not condition the enforceability of an arbitration agreement on the availability of class or collective arbitration procedures.[281] The Court noted that Section 7 does not expressly disapprove of arbitration, says nothing of class or collective actions, and "does not even hint at a wish to displace the Arbitration Act - let alone accomplish that much clearly and manifestly, as our precedents demand."[282] Importantly, the Court rejected the employees' argument that the phrase "other concerted activities for the purpose of…other mutual aid or protection" should be interpreted to encompass class and collective legal actions.[283] Citing the *ejusdem generis* canon of statutory interpretation, the Court reasoned that "the term "other concerted activities" should, like the terms that precede it [all relating to unionization and collective bargaining], serve to protect things employees just do for themselves in the course of exercising their right to free association in the [*1786] workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation."[284]

With respect to arbitration secrecy, it is highly plausible that "other concerted activities" should be read to encompass workplace communications about information or materials disclosed in an employment arbitration or the arbitration award itself. These types of communications seem much more closely connected with free association in the workplace as contrasted with class and joint litigation.[285] Thus, arbitration secrecy arguably presents a more challenging context in

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[279] Id. at 1624 (internal quotations omitted).

[280] Id.

[281] Id. at 1632.

[282] Id. at 1624.

[283] Id. at 1625.

[284] Id. (internal quotations omitted). The ejusdem generis canon of statutory interpretation counsels that when "a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Id. (internal quotations omitted).

[285] See St. Margaret Mercy Healthcare Ctrs., 350 N.L.R.B. 203, 205 (2007) ("It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.").

which to attempt to harmonize Section 7 of the NLRA and Section2 of the FAA. Subsequent to *Epic Systems*, the National Labor Relations Board ("NLRB" or "Board") has considered this issue at length.[286]

In 2020, in *California Commerce Club, Inc.*, the NLRB considered whether an arbitration clause that provided that "[t]he arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding" violated an employee's Section 7 right to engage in concerted activities.[287] The Board interpreted this arbitration secrecy provision as allowing a party to discuss information that the party came to possess independent of the arbitration proceeding including "the existence of the arbitration, their claims against the employer, the legal issues involved, or the events, facts, and circumstances that gave rise to the arbitration proceeding."[288] Nevertheless, the Board found that the secrecy provision did restrict an employee's freedom to discuss some terms and conditions of employment with coworkers and, thus, did curtail the employee's Section 7 rights.[289] Moreover, the Board assumed for the sake of argument that the [*1787] negative impact of these restrictions outweighed any interest that the employer had in enforcement of the secrecy provision and "that this provision would therefore violate the [NLRA] if maintained as an employer-promulgated work rule" outside of an arbitration contract within the purview of the FAA.[290] The Board, held, however, that the FAA shielded the arbitration secrecy provision from invalidation by the NLRA.[291] The Board noted that "the FAA gives parties the discretion to design their own dispute-resolution procedures, tailored to the type of dispute, including that

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[286] See Dish Network, LLC, 370 N.L.R.B. No. 97 (Mar.18, 2021) Covenant Care Cal., LLC, 369 N.L.R.B. No. 112 (June29, 2020) Cal. Com. Club, Inc., 369 N.L.R.B. No. 106 (June19, 2020).

[287] Cal. Com. Club, 369 N.L.R.B. at 2.

[288] Id. at 6.

[289] Id.

[290] Id.

[291] Id. at 7-9.

arbitral proceedings be kept confidential" and concluded that the NLRA did not express a contrary congressional command that would displace the FAA.[292]

The Board also specifically rejected the argument that the NLRA invalidated the arbitral confidentiality provision by means of the FAA's saving clause.[293] Whether the saving clause applies to defenses arising from federal law is an open question.[294] Putting aside that question, the Board noted the Supreme Court's holding that the saving clause does not save defenses that "interfere with fundamental attributes of arbitration."[295] In rejecting the saving clause argument, the Board found, without elaboration, that "a prohibition on arbitral confidentiality provisions would interfere with a fundamental attribute of arbitration" and, thus, "[t]he FAA's saving clause provides no basis for refusing to enforce such provisions."[296]

Less than a year after deciding *California Commerce Club*, a divided NLRB reaffirmed its basic holding that the NLRA does not displace the FAA with respect to an arbitration secrecy clause requiring that arbitration proceedings remain confidential.[297] In *Dish Network, LLC*, the Board also split on whether arbitration secrecy was a fundamental attribute of arbitration.[298] The majority concluded that "confidentiality" is indeed a [*1788] fundamental attribute, reasoning that an infringement on arbitration confidentiality would simultaneously interfere with other attributes of arbitration that the Supreme Court has clearly identified as fundamental - namely, arbitration's informal nature and streamlined proceedings.[299] Quoting the U.S. Court of Appeals for the Fifth Circuit in *Iberia Credit Bureau*, the majority found that "[p]rohibiting arbitration confidentiality

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[292] Id. at 7-8.

[293] Id. at 8 n.6.

[294] See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (declining to decide whether "the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes").

[295] Cal. Com. Club, 369 N.L.R.B. at 8 n.6 (quoting Epic Sys. Corp., 138 S. Ct. at 1622).

[296] Id.

[297] Dish Network, LLC, 370 N.L.R.B. No. 97 (Mar.18, 2021).

[298] Compare id. at 8-9 (concluding that confidentiality is a fundamental attribute of arbitration), with id. at 16-17 (McFerran, concurring in part and dissenting in part) (concluding that confidentiality is not a fundamental attribute of arbitration).

[299] Id. at 8-9 (majority opinion).

provisions would interfere with these fundamental attributes of arbitration because, absent confidentiality, discovery disputes are more likely, and parties will demand "all of the procedural accoutrements that accompany a judicial proceeding.""[300]

In her opinion concurring in part and dissenting in part, newly-confirmed NLRB Chairperson Lauren McFerran argued that the Board had wrongly decided *California Commerce Club*.[301] More specifically, she argued that a confidentiality provision in an employment arbitration contract undeniably interferes with the employee-disputant's core Section 7 right to discuss the terms and conditions of her employment with her co-workers and that invalidation of such a confidentiality provision would not interfere with a fundamental attribute of arbitration.[302] In concluding that arbitration confidentiality is not a fundamental attribute of arbitration, the dissent reasoned that although arbitration historically has been private in that the proceedings have been closed to the public, arbitration historically has not been confidential in that the parties have been free to disclose information concerning the arbitration proceedings as well as the arbitration award.[303] Indeed, the dissent noted that a party seeking to stay litigation pursuant to FAA Section 3, compel arbitration pursuant to Section 4, or confirm, vacate, or modify an arbitration award pursuant respectively to Sections 9, 10, or 11 necessarily will have to disclose information relating to the arbitral proceedings and that, absent a court protective order, this information will become part of the public record.[304]

[*1789] Having concluded that arbitration confidentiality is not a fundamental attribute of arbitration, the dissent further reasoned that the FAA's saving clause supplied a means for the NLRA to displace the FAA with respect to an arbitration confidentiality provision.[305] Recall that

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[300] Id. at 9 (quoting Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC, 379 F.3d 159, 175-76 (5th Cir. 2004)).

[301] Id. at 13-18 (McFerran, concurring in part and dissenting in part). Chairperson McFerran's first term as a member on the National Labor Relations Board expired prior to the Board deciding California Commerce Club. President Biden reappointed her to the Board after the Board decided California Commerce Club. See id. at 10 n.10.

[302] Id. at 15-17.

[303] Id. at 17.

[304] Id. ("Given that accessing enforcement mechanisms expressly provided by the FAA itself would require violating the plain terms of many broad confidentiality agreements, it makes no sense to claim that the FAA actually mandates enforcing such terms as written.").

the saving clause, as the Supreme Court has interpreted it, allows for the invalidation of an arbitration contract "upon such grounds as exist at law or in equity for the revocation of any contract," provided that application of the neutral principle does not interfere with a fundamental attribute of arbitration.[306] Applying this all-or-nothing framework, the dissent began with the proposition that the NLRA generally invalidates an employer's restriction on an employee's right to discuss the terms and conditions of her employment.[307] Thus, the dissent argued, the NLRA's invalidation of an arbitration confidentiality clause would be, in the words of the saving clause, "upon such grounds as exist at law or in equity for the revocation of any contract."[308] The dissent concluded, therefore, that "invalidating arbitration-confidentiality provisions, because of their demonstrable impact on Section7 rights, is the proper accommodation between the NLRA and the FAA."[309]

The majority and dissenting opinions in *Dish Network*, taken together, demonstrate the inadequacy of the Supreme Court's all-or-nothing framework when one seeks to harmonize the FAA and a conflicting federal statute. The *Dish Network* [*1790] majority, having concluded that arbitration secrecy is a fundamental attribute of arbitration, saw no need to consider the negative effects of an arbitration secrecy provision on the public policy goals that ground the NLRA's concerted activities provision or on the right of specific employees to discuss the workplace practices and conditions that their employer maintains. Conversely, the dissent, after finding that arbitration secrecy is not a fundamental attribute of arbitration, failed to give special weight to

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[305] Id.

[306] 9 U.S.C. §2 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018).

[307] Dish Network, LLC, 370 N.L.R.B. at 17 (McFerran, concurring in part and dissenting in part).

[308] Id. at 17-18 (quoting 9 U.S.C. §2.).

[309] Id. at 16 see also id. at 18 ("[H]olding [confidentiality restrictions] unlawful where they conflict with the core protections of the NLRA - in mandatory arbitration agreements, just as in any other contract - properly accommodates the FAA and the NLRA with no harm to either statute.").Less than a year after the NLRB decided *Dish Network*, the Board, with a newly appointed Democratic majority, invited briefing to address (1)whether it had erred in *California Commerce Club* in holding that confidentiality is a fundamental attribute of arbitration and, consequently, the FAA precludes the NLRB from invalidating an arbitral nondisclosure provision even if that provision infringes an employee's right to engage in concerted activity under the National Labor Relations Act, and (2)if so, what standard the NLRB should use to determine whether arbitration confidentiality provisions are lawful. Ralphs Grocery Company, Notice and Invitation to File Briefs, Case 21-CA-073942, 370 N.L.R.B. No. 50 (Jan.18, 2022). As of September 2023, the Board had taken no further action with respect to the matter.

the FAA's concern with overcoming hostility to arbitration contracts as well as the interest of a specific employer in the enforcement of the arbitration secrecy provision agreed to by the employer and its employee.[310]

In contrast, my proposed inception and scope analysis is better suited to harmonizing the competing concerns of the FAA and a potentially conflicting federal statute. Where a secondary attribute of arbitration is implicated, this analysis requires a court to consider the legitimate purposes that the competing statute seeks to achieve in infringing upon a secondary attribute of arbitration as well as how the statute's means for intruding relate to those purposes. Moreover, this analysis compels a court to balance the statute's need to intrude upon a secondary attribute of arbitration in the manner selected against the interests of the FAA and the contracting parties in the enforcement of the arbitration contract at issue as written.[311]

Whether Section 7 of the NLRA may infringe upon a particular arbitration secrecy provision should depend upon the scope of the provision and the purpose of the employee's intended disclosure. An arbitration secrecy provision that precludes an employee from discussing information that the employee learned in arbitration that relates directly to the employee's workplace conditions strikes at the heart of the NLRA's Section 7 [*1791] protections. The central premise grounding Section 7's right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is that the typical employee will not be able to match her employer's bargaining power unless she acts in concert with her fellow employees.[312] Thus, abrogation of an arbitration secrecy provision pursuant to Section 7

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[310] Under the standard in effect at the time the Board decided Dish Network, if the NLRB determined that an employer's policy potentially interferes with an employee's Section 7 right to concerted activity, the Board then determined whether the policy violates the NLRA by weighing the policy's impact on the employee's section 7 rights against the employer's legitimate justifications for the policy. The Boeing Co., 365 N.L.R.B. No. 154, at 3-4 (Dec.14, 2017). Having concluded that confidentiality is not a fundamental attribute of arbitration, Chairperson McFerran reasoned that an arbitration secrecy clause that interferes with the right to concerted activity "is just as unlawful as the same provision in any other type of contract would be." Dish Network LLC, 370 N.L.R.B. at 17 (McFerran, concurring in part and dissenting in part).

[311] See City of Ontario v. Quon, 560 U.S. 746, 762 (2010) ("[T]he extent of an expectation [of privacy] is relevant to assessing whether the search was too intrusive.").

[312] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1634 (2018) (Ginsburg, J. dissenting) (asserting that the "NLRA operate[s] on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting the terms and conditions of employment.") id. at 1640.

should be found reasonable in both its inception and its scope to the extent that the abrogation is necessary to prevent the arbitration secrecy provision from frustrating the employee's ability to effectively vindicate her statutory right to act in concert with her fellow employees.[313]

Conclusion

The U.S. Supreme Court has interpreted the FAA so that it preempts any otherwise neutral state regulation that interferes with a fundamental attribute of arbitration. In contrast, a neutral regulation that interferes with only an incidental attribute of arbitration will avoid FAA preemption. This all-or-nothing framework is ill-suited to resolving a challenge to any state infringement of arbitration secrecy, however, because secrecy is neither a fundamental attribute of arbitration nor a mere incidental attribute of arbitration. An examination of the FAA's structure, its legislative history, and the Supreme Court's arbitration jurisprudence reveals that arbitration secrecy ranks lower on the hierarchy of values than the three attributes of arbitration that the Court has repeatedly recognized as fundamental, namely speed, economy, and expert decisionmaking. Still, secrecy is more than an incidental attribute of arbitration. Privacy has long been and is today ubiquitous in arbitration. Moreover, parties to an arbitration contract commonly include provisions to maintain the confidentiality of documents and testimony relating to their arbitration. Finally, arbitration secrecy promotes arbitration's fundamental attributes of speed and economy by removing an incentive for parties to an arbitration contract as well as the arbitrator to judicialize the [*1792] arbitration process. Thus, secrecy is best characterized as a secondary attribute of arbitration.

This Article's conclusion that arbitration has intermediate attributes suggests the need for an expanded framework for resolution of challenges to neutral arbitration regulation that allows for a more nuanced intermediate scrutiny. This Article proposes such a framework. In the context of government infringements of arbitration secrecy, the framework would require the government to

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[313] Cf. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (commenting that the federal effective vindication exception to FAA enforcement "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights").

demonstrate that its infringement upon arbitration secrecy is reasonable in its inception and reasonable in its scope when measured against the parties' interest in arbitration secrecy. This balancing approach would allow for consideration of context that the Supreme Court's currentall-or-nothing approach ignores.

The Article has demonstrated the utility of the inception and scope analysis by applying the proposed framework to several state and federal intrusions upon arbitration secrecy. The analysis would compel a court to focus on the legitimate purposes that the government seeks to achieve in infringing upon arbitration secrecy as well as how the government's means for intruding relate to those purposes. In addition, the analysis would require a court to balance the government's need to intrude upon arbitration secrecy in the manner selected against the interests of the FAA and the contracting parties in the enforcement of the arbitration contract at issue as written. Thus, in the context of a neutral government limitation on arbitration that affects a secondary attribute of arbitration, the proposed framework is better suited to harmonizing the competing concerns grounding the FAA and any potentially conflicting state or federal limitation on arbitration than is the Supreme Court's current all-or-nothing approach to resolving challenges to a government effort that does not target arbitration specifically but nonetheless impacts an attribute of arbitration.

Cornell Law Review

JAMS® Local Solutions. Global Reach.®

JAMS Artificial Intelligence Disputes Clause and Rules

Effective June 14, 2024

In a continuing effort to provide our clients with the highest quality dispute resolution services, JAMS offers clauses, rules and procedures designed to meet the parties' needs in a variety of situations, including artificial intelligence. A summary of the June 14, 2024 revisions may be found **here**.

Notice: These Rules are the copyrighted property of JAMS. They cannot be copied, reprinted or used in any way without permission of JAMS, unless they are being used by the parties to an arbitration as the rules for that arbitration. If they are being used as the rules for an arbitration, proper attribution must be given to JAMS. If you wish to obtain permission to use our copyrighted materials, please contact JAMS at 949-224-1810.

Model Dispute Resolution Clause

The Parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration.

Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, will be referred to and finally determined by arbitration in accordance with the JAMS Artificial Intelligence Dispute Rules. The seat of the arbitration will be [location]. The language to be used in the arbitral proceeding will be English. Judgment upon the award rendered by the Arbitrator(s) may be entered by any court having jurisdiction thereof.

Artificial Intelligence Disputes Clause, Rules and Protective Order PDF Download

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JAMS Rules Governing Disputes Involving Artificial Intelligence Systems

Table of Contents

- **Rule 23. Waiver of Hearing**
- **Rule 24. wards**
- **Rule 25. Enforcement of the Award**
- **Rule 26. Confidentiality and Privacy**
- **Rule 27. Waiver**
- **Rule 28. Settlement and Consent Award**
- **Rule 29. Sanctions**
- **Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability**
- **Rule 31. Fees**
- **Rule 32. Bracketed (or High-Low) Arbitration Option**
- **Rule 33. Final Offer (or Baseball) Arbitration Option**
- **Rule 34. Optional Arbitration Appeal Procedure**

Rule 1. Scope of Rules

(a) The JAMS Artificial Intelligence Dispute Rules ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, the disputes or claims are AI-related, unless other Rules are prescribed.

(b) JAMS may, in its discretion, assign the administration of the dispute resolution process to any of its Resolution Centers.

(c) The term “Party,” as used in these Rules, includes Parties to the Arbitration process and their counsel or representatives.

(d) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel or their designees.

(e) The term "Artificial Intelligence" refers to a machine-based system capable of completing tasks that would otherwise require cognition.

(f) “Electronic filing" (e-filing) means the electronic transmission of documents to JAMS for the purpose of filing via the internet. "Electronic service" (e-service) means the electronic transmission of documents to a Party, attorney or representative under these Rules.

Rule 2. Party Self-Determination and Emergency Relief Procedures

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the Arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS Rules, the Parties may agree to modify that Agreement to provide that the Arbitration will be administered by JAMS and/or conducted in accordance with JAMS Rules.

(c) Emergency Relief Procedures. These Emergency Relief Procedures are available in Arbitrations filed and served after July 1, 2014, and where not otherwise prohibited by law. Parties may agree to opt out of these Procedures in their Arbitration Agreement or by subsequent written agreement.

(i) A Party in need of emergency relief prior to the appointment of an Arbitrator may notify JAMS and all other Parties in writing of the relief sought and the basis for an Award of such relief. This Notice shall include an explanation of why such relief is needed on an expedited basis. Such Notice shall be given by email or personal delivery. The Notice must include a statement certifying that all other Parties have been notified. If all other Parties have not been notified, the Notice shall include an explanation of the efforts made to notify such Parties.

(ii) JAMS shall promptly appoint an Emergency Arbitrator to rule on the emergency request. In most cases the appointment of an Emergency Arbitrator will be done within 24 hours of receipt of the request. The Emergency Arbitrator shall promptly disclose any circumstance likely, based on information disclosed in the application, to affect the Arbitrator's ability to be impartial or independent. Any challenge to the appointment of the Emergency Arbitrator shall be made within 24 hours of the disclosures by the Emergency Arbitrator. JAMS will promptly review and decide any such challenge. JAMS' decision shall be final.

(iii) Within two business days, or as soon as practicable thereafter, the Emergency Arbitrator shall establish a schedule for the consideration of the request for emergency relief. The schedule shall provide a reasonable opportunity for all Parties to be heard taking into account the nature of the relief sought. The Emergency Arbitrator has the authority to rule on his or her own jurisdiction and shall resolve any disputes with respect to the request for emergency relief.

(iv) The Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate loss or damage will result in the absence of emergency relief and whether the requesting Party is entitled to such relief. The Emergency Arbitrator shall enter an order or Award granting or denying the relief, as the case may be, and stating the reasons therefor.

(v) Any request to modify the Emergency Arbitrator's order or Award must be based on changed circumstances and may be made to the Emergency Arbitrator until such time as an Arbitrator or Arbitrators are appointed in accordance with the Parties' Agreement and JAMS' usual procedures. Thereafter, any request related to the relief granted or denied by the Emergency Arbitrator shall be determined by the Arbitrator(s) appointed in accordance with the Parties' Agreement and JAMS' usual procedures.

(vi) In the Emergency Arbitrator's discretion, any interim Award of emergency relief may be conditioned on the provision of adequate security by the Party seeking such relief.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration under the JAMS Artificial Intelligence Dispute Rules is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration and use of the JAMS Artificial Intelligence Dispute Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and specifying JAMS administration or use of JAMS Artificial Intelligence Dispute Rules; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS and conducted pursuant to the JAMS Artificial Intelligence Dispute Rules.

(iv) A copy of a court order compelling Arbitration at JAMS and conducted pursuant to the JAMS Artificial Intelligence Dispute Rules.

(b) The issuance of the Commencement Letter confirms that requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties together with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 22(j), the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirement, such as the statute of limitations; any contractual limitations period; or any claims notice requirement. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rules 3, 13(a), 17(a) and 31(a)).

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses, and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate two or more of the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming Parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed. When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.
Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

Rule 7. Number and Neutrality of Arbitrators; Appointment and Authority of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator, the Parties shall agree on, or, in the absence of agreement, JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed, in advance of the Arbitration Hearing, to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service

(a) JAMS or the Arbitrator may at any time require electronic filing and service of documents in an Arbitration, including through the JAMS Electronic Filing System. If JAMS or the Arbitrator requires electronic filing and service, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of documents and notifications. Any document filed via the JAMS Electronic Filing System shall be considered as filed when the transmission to the JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date.

(b) Every document filed with the JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to the JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney.

(c) Delivery of e-service documents through the JAMS Electronic Filing System shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through the JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service or JAMS completes the transmission of the electronic document(s) to the JAMS Electronic Filing System for e-filing and/or e-service.

(d) If an electronic filing and/or service via JAMS Electronic Filing System does not occur due to technical error in the transmission of the document, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed and/or served nunc pro tunc to the date it was first attempted to be transmitted electronically. In such cases a Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period. If the last day for the performance of any act that is required by these Rules to be performed within a specific time falls on a Saturday, Sunday or other legal holiday, the period is extended to and includes the next day that is not a holiday.

Rule 9. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have. JAMS may grant reasonable extensions of time to file a response or counterclaim prior to the appointment of the Arbitrator.

(d) Within fourteen (14) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

Rule 10. Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted, except with the Arbitrator's approval. A Party may request a hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(c) or (d).

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or sua sponte, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may be altered only in accordance with Rules 22(i) or 24.

Rule 12. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone number and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone number and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative has been obtained and shall state the effective date of the new representation.

(c) The Arbitrator may withhold approval of any intended change or addition to a Party's legal representative(s) where such change or addition could compromise the ability of the Arbitrator to continue to serve, the composition of the Panel in the case of a tripartite Arbitration or the finality of any Award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitrator shall have regard to the circumstances, including the general principle that a Party may be represented by a legal representative chosen by that Party, the stage that the Arbitration has reached, the potential prejudice resulting from the possible disqualification of the Arbitrator, the efficiency resulting from maintaining the composition of the Panel (as constituted throughout the Arbitration), the views of the other Party or Parties to the Arbitration and any likely wasted costs or loss of time resulting from such change or addition.

Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

Rule 14. Ex Parte Communications

(a) No Party may have any ex parte communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have ex parte communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive ex parte communication between a Party and a non-neutral Arbitrator. More extensive communication with a non-neutral Arbitrator may also be permitted by applicable law and rules of this

Rule Arbitrator Selection, Disclosures and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and at least ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall propose, subject to availability, only panelists approved by JAMS for evaluating disputes involving technical subject matter with appropriate background and experience. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may add names to or replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities or individuals are adverse for purposes of Arbitrator selection, considering such factors as whether they are represented by the same attorney and whether they are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule, unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the Party that did not appoint that Arbitrator.

Rule 16. Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:
(a) The exchange of information in accordance with Rule 17 or as permitted or ordered by the Arbitrator;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 16.1. Procedures

(a) The Arbitrator shall require compliance with Rule 17(a) prior to conducting the first Preliminary Conference. Each Party shall confirm in writing to the Arbitrator that it has so complied or shall indicate any limitations on full compliance and the reasons therefor.
The **AI Disputes Protective Order** (Appendix A) shall apply to protect confidential information, unless another form of protective order is agreed to by the Parties.
(b) The production and inspection of any AI systems or related materials, including, but not limited to, hardware, software, models and training data, shall be limited to the Disclosing Party making such systems and materials

available to one or more expert(s) in a secured environment established by the Disclosing Party. The expert(s) shall not transmit or remove any produced materials or information from such environment.
If jointly requested by the Parties, the Arbitrator shall designate expert(s) to inspect AI systems or related materials. In which case, the Arbitrator shall first attempt to designate such expert(s) from a list of third-party experts maintained by JAMS, subject to availability and appropriate qualifications. All costs related to the use of Arbitrator appointed expert(s) shall be borne equally by the Parties, although the Arbitrator may shift fees at the Arbitrator's sole discretion, including in the Final Award. Expert testimony from an Arbitrator appointed expert shall be limited to a written report requested by the Arbitrator addressing questions posed by the Arbitrator, and testimony at the Hearing of such expert(s).

(c) Document requests shall (1) be limited to documents that are directly relevant to the matters in dispute or to its outcome; (2) be reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (3) not include broad phraseology such as "all documents directly or indirectly related to." The requests shall not be encumbered with extensive "definitions" or "instructions." The Arbitrator may edit or limit the number of requests.

(d) E-discovery shall be limited as follows:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the requesting Party and convenient and economical for the producing Party. Absent a showing of compelling need, the Parties need not produce metadata, with the exception of header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected should be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the Final Award.

(v) The Arbitrator may vary these Rules after discussion with the Parties at the Preliminary Conference.

(e) Depositions of percipient witnesses shall be limited as follows:

(i) The limitation of one discovery deposition per side (Rule 17(b)) shall be applied by the Arbitrator, unless it is determined, based on all relevant circumstances, that more depositions are warranted. The Arbitrator shall consider the amount in controversy, the complexity of the factual issues, the number of Parties and the diversity of their interests, and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

(ii) The Arbitrator shall also consider the additional factors listed in the JAMS Recommended Arbitration Discovery

Protocols for Domestic Commercial Cases.

(f) Expert depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing, expert depositions may be conducted only by agreement of the Parties or by order of the Arbitrator for good cause shown.

(g) Discovery disputes shall be resolved on an expedited basis.

(i) Where there is a panel of three Arbitrators, the Parties are encouraged to agree, by rule or otherwise, that the Chair or another member of the panel be authorized to resolve discovery issues, acting alone.

(ii) Lengthy briefs on discovery matters should be avoided. In most cases, the submission of brief letters will sufficiently inform the Arbitrator with regard to the issues to be decided.

(iii) The Parties should meet and confer in good faith prior to presenting any issues for the Arbitrator's decision.

(iv) If disputes exist with respect to some issues, that should not delay the Parties' discovery on remaining issues.

(h) The Arbitrator shall set a discovery cutoff not to exceed seventy-five (75) calendar days after the Preliminary Conference for percipient discovery and not to exceed one hundred five (105) calendar days for expert discovery (if any). These dates may be extended by the Arbitrator for good cause shown.

(i) The Hearing shall commence within sixty (60) calendar days after the cutoff for percipient discovery. Consecutive Hearing days shall be established unless otherwise agreed by the Parties or ordered by the Arbitrator. These dates may be extended by the Arbitrator for good cause shown.

(i) The Arbitrator may alter any of these Procedures for good cause.

Rule 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

Rule 18. Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case.

Rule 19. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, and the Arbitrator reasonably believes that the Party will not participate in the Hearing, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena duces tecum to a third-party witness.

Rule 20. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; (3) any written expert reports that may be introduced at the Arbitration Hearing; and (4) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should premark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 21. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena duces tecum shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 22. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Arbitrator has full authority to determine that the Hearing, or any portion thereof, be conducted in person or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places, or in a combined form. If some or all of the witnesses or other participants are located remotely, the Arbitrator may make such orders and set such procedures as the Arbitrator deems necessary or advisable.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments, whichever is later.

(i) At any time before the Award is rendered, the Arbitrator may, sua sponte or on application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. No other means of recording the proceedings shall be permitted absent agreement of the Parties or by direction of the Arbitrator.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to the Optional Arbitration Appeal Procedure (Rule 34), they shall, if possible, ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing, as defined in Rule 22(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and file with JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may sua sponte propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file and serve any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either the Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec. 1, et seq., or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) All Parties to the Arbitration and their counsel shall strictly maintain in confidence all details of the Arbitration and the Award, including the Hearing, except as necessary to participate in the Arbitration proceeding and the Hearing, in connection with a judicial challenge to or enforcement of a decision, or unless otherwise required by law or judicial decision.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 28. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree, pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed

Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys’ fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 31. Fees

(a) Each Party shall pay its pro rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its pro rata or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities or individuals are adverse for purpose of fees, considering such factors as whether the entities or individuals are represented by the same attorney and whether the entities or individuals are presenting joint or separate positions at the Arbitration.

Rule 32. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the Final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the Final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 33. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

Rule 34. Optional Arbitration Appeal Procedure

The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

User Name: mary@mckeansmithlaw.com

Date and Time: Monday, December 2, 2024 1:56:00 PM PST

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Document (1)

1. *Bagley v. Mt. Bachelor, Inc.*

   Client/Matter: -None-

   Search Terms: bagley v mount bachelor

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Content Type	**Narrowed by**
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Bagley v. Mt. Bachelor, Inc.

Supreme Court of Oregon

May 7, 2014, Argued and Submitted; December 18, 2014, Filed

SC S061821

Reporter

356 Ore. 543 *; 340 P.3d 27 **; 2014 Ore. LEXIS 994 ***

Myles A. BAGLEY, individually, Petitioner on Review, and Al BAGLEY, individually; and Lauren Bagley, individually, Plaintiffs, v. MT. BACHELOR, INC., dba Mt. Bachelor Ski and Summer Resort, Respondent on Review, and John DOES 1-10, Defendants.

Prior History: CC 08CV0118SF; CA A148231. On review from the Court of Appeals. [***1] [*]

Bagley v. Mt. Bachelor, Inc., 258 Ore. App. 390, 310 P.3d 692, 2013 Ore. App. LEXIS 1080 (2013)

Disposition: The decision of the Court of Appeals is reversed. The judgment of the trial court is reversed, and the case is remanded to that court for further proceedings.

Case Summary

Overview

HOLDINGS: [1]-A grant of summary judgment in favor of the operator in the snowboarder's negligence action was improper because enforcement of the anticipatory release would have been unconscionable. The snowboarder had no meaningful alternative to the operator's terms if he wanted to participate in snowboarding and he had no opportunity to negotiate for different terms or pay an additional fee for protection against negligence; [2]- Because, accepting as true the allegations in the complaint, he would not have been injured if defendant had exercised reasonable care in designing, constructing, maintaining, or inspecting the jump on which he was injured, and the operator, not its patrons, had the expertise and opportunity and duty to foresee and avoid unreasonable risks of its own creation on its business premises, the enforcement of the release would cause a harsh and inequitable result.

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[*] Appeal from Deschutes County Circuit Court, Stephen P. Forte, Judge. 258 Ore. App. 390, 310 P3d 692 (2013).

Outcome

Judgment reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[⬇] **Motions for Summary Judgment, Cross Motions**

Appellate courts review the trial court's rulings on summary judgment to determine whether there is no genuine issue as to any material fact and whether the moving party is entitled to prevail as a matter of law, Or. R. Civ. P. 47(C). The courts view the historical facts set out in the summary judgment record, along with all reasonable inferences that may be drawn from them, in the light most favorable to the nonmoving party, plaintiff on defendant's motion for summary judgment, and defendant on plaintiff's cross-motion. An adverse party on summary judgment has burden of producing evidence only on any issue raised in the motion as to which adverse party would have burden of persuasion at trial, Rule 47(C).

Torts > Negligence > General Overview

HN2[⬇] **Torts, Negligence**

Or. Rev. Stat. § 30.980(1) requires that a ski area operator shall be notified of any injury to a skier within 180 days after the injury.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

Contracts Law > Contract Formation > Consideration > Sufficient Consideration

Torts > General Overview

HN3[⬇] **Consideration, Sufficient Consideration**

It is a truism that a contract validly made between competent parties is not to be set aside lightly. When two or more persons competent for that purpose, upon a sufficient consideration, voluntarily agree to do or not to do a particular thing which may be lawfully done or omitted, they should be held to the consequences of their bargain. The right to contract privately is part of the liberty of citizenship, and an important office of the courts is to enforce contractual rights and obligations. However, contract rights are not absolute; equally fundamental with the private right is that of the public to regulate it in the common interest. It is sometimes said that compensation for losses is the primary function of tort law, but it is perhaps more accurate to describe the primary function as one of determining when compensation is to be required. Additionally, the prophylactic factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. A related function of the tort system is to distribute the risk of injury to or among responsible parties.

Torts > General Overview

HN4[⬇] **Torts**

The fundamental purposes of the tort system are compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct.

Contracts Law > Defenses > Illegal Bargains

Contracts Law > Defenses > Public Policy Violations

HN5[⬇] **Defenses, Illegal Bargains**

One way in which courts have placed limits on the freedom of contract is by refusing to enforce agreements that are illegal. An illegal agreement is void and unenforceable. An agreement is illegal if it is contrary to law, morality or public policy. Plain examples of illegality are found in agreements made in violation of some statute; and, stating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute. Public policy requires that contracts between competent parties, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice, and it is only when some other overpowering rule of public policy intervenes, rendering such agreement illegal, that it will not be enforced.

Contracts Law > Defenses > Illegal Bargains

Contracts Law > Defenses > Public Policy Violations

***HN6*[⬇] Defenses, Illegal Bargains**

In determining whether an agreement is illegal because it is contrary to public policy, the test is the evil tendency of the contract and not its actual injury to the public in a particular instance. The fact that the effect of a contract provision may be harsh as applied to one of the contracting parties does not mean that the agreement is, for that reason alone, contrary to public policy, particularly where the contract in question was freely entered into between parties in equal bargaining positions and did not involve a contract of adhesion, such as some retail installment contracts and insurance policies. Courts determine whether a contract is illegal by determining whether it violates public policy as expressed in relevant constitutional and statutory provisions and in case law.

Contracts Law > Defenses > Unconscionability > General Overview

***HN7*[⬇] Defenses, Unconscionability**

The concept of unconscionability was meant to counteract two generic forms of abuses: the first of which relates to procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analyzed in terms of whether the imposed upon party had meaningful choice about whether and how to enter the transaction; and the second of which relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the non-drafting party, or unreasonably and unexpectedly harsh terms having nothing to do with price or other central aspects of the transaction. The doctrine of unconscionability reflects concerns related specifically to the parties and their formation of the contract, but it also has a broader dimension that converges with an analysis of whether a contract or contract term is illegal because it violates public policy.

Contracts Law > Defenses > Unconscionability > General Overview

Contracts Law > Defenses > Public Policy Violations

HN8[⬇] **Defenses, Unconscionability**

Public policy analysis asks whether the contract provision at issue threatens harm to the public as a whole, including by contravening the constitution, statutes, or judicial decisions of Oregon. In contrast, an unconscionability analysis asks whether the agreement, by its formation or by its terms, is so unfair that the court cannot enforce it consistent with the interests of justice. As this suggests, the two doctrines are aimed at similar concerns: unfairness or oppression in contract formation or terms that are sufficiently serious as to justify the conclusion that the contract contravenes the interests of justice.

Contracts Law > Defenses > Unconscionability > General Overview

Contracts Law > Defenses > Public Policy Violations

HN9[⬇] **Defenses, Unconscionability**

The Supreme Court of Oregon has often relied on public policy considerations to determine whether a contract or contract term is sufficiently unfair or oppressive to be deemed unconscionable.

Contracts Law > Defenses > Unconscionability > Gen eral Overview

HN10[⬇] Defenses, Unconscionability

Oregon courts have recognized their authority to refuse to enforce unconscionable contracts since the nineteenth century. A court may refuse specific performance if a bargain is unconscionable. Unconscionability is assessed as of the time of contract formation, and the doctrine applies to contract terms rather than to contract performance. Unconscionability is a legal issue that must be assessed as of the time of contract formation. Unconscionability may be procedural or substantive. Procedural unconscionability refers to the conditions of contract formation and focuses on two factors: oppression and surprise. Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. Surprise involves whether terms were hidden or obscure from the vantage of the party seeking to avoid them. Generally speaking, factors such as ambiguous contract wording and fine print are the hallmarks of surprise. In contrast, the existence of gross inequality of bargaining power, a take-it-or-leave-it bargaining stance, and the fact that a contract involves a consumer transaction, rather than a commercial bargain, can be evidence of oppression.

Contracts Law > Defenses > Unconscionability > General Overview

HN11[⬇] Defenses, Unconscionability

Substantive unconscionability generally refers to the terms of the contract, rather than the circumstances of formation, and focuses on whether the substantive terms contravene the public interest or public policy. Both procedural and substantive deficiencies, frequently in combination, can preclude enforcement of a contract or contract term on unconscionability grounds. Adhesive and fine-print terms may be substantively unconscionable and the distinction between procedural and substantive abuses may become quite blurred.

Contracts Law > Defenses > Unconscionability > General Overview

HN12[⬇] Defenses, Unconscionability

Identifying whether a contract is procedurally unconscionable requires consideration of evidence related to the specific circumstances surrounding the formation of the contract at issue. By contrast, the inquiry into substantive unconscionability can be more complicated. To discern whether, in the context of a particular transaction, substantive concerns relating to unfairness or oppression are sufficiently important to warrant interference with the parties' freedom to contract as they see fit, courts frequently look to legislation for relevant indicia of public policy. When relevant public policy is expressed in a statute, the issue is one of legislative intent. In that situation, the court must examine the statutory text and context to determine whether the legislature intended to invalidate the contract term at issue.

Contracts Law > Defenses > Public Policy Violations

HN13[⬇] **Defenses, Public Policy Violations**

Frequently the argument that a contract term is sufficiently unfair or oppressive as to be unenforceable is grounded in one or more factors that are not expressly codified; in such circumstances, the common law has a significant role to play. Only infrequently does legislation, on grounds of public policy, provide that a term is unenforceable. When a court reaches that conclusion, it usually does so on the basis of a public policy derived either from its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to the policy although it says nothing explicitly about enforceability.

Torts > ... > Defenses > Exculpatory Clauses > General Overview

HN14[⬇] **Defenses, Exculpatory Clauses**

Agreements to exonerate a party from liability or to limit the extent of the party's liability for tortious conduct are not favorites of the courts but neither are they automatically voided. The treatment courts accord such agreements depends upon the subject and terms of the agreement and the relationship of the parties.

Business & Corporate Compliance > Contracts > Types of Contracts > Adhesion Contracts

Contracts Law > Types of Contracts > Adhesion Contracts

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Defenses > Public Policy Violations

HN15[⬇] Types of Contracts, Adhesion Contracts

The fact that one party may possess greater financial resources than the other is not proof that such a disparity of bargaining power exists that a limitation of liability provisions should be voided. When the parties are business concerns dealing in a commercial setting and entering into an unambiguous agreement with terms commonly used in commercial transactions, the contract will not be deemed a contract of adhesion in the absence of evidence of unusual circumstances. There is nothing inherently bad about a contract provision which exempts one of the parties from liability. The parties are free to contract as they please, unless to permit them to do so would contravene the public interest.

Contracts Law > Types of Contracts > Releases

Business & Corporate Compliance > Contracts > Types of Contracts > Releases

Contracts Law > Defenses > Public Policy Violations

HN16[⬇] Types of Contracts, Releases

A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy. An exculpatory agreement should be upheld if it is freely and fairly made, if it is between parties who are in an equal bargaining position, and if there is no societal interest with which it interferes. The Restatement refuses to give effect to express liability releases where there is a substantial disparity in bargaining power.

Contracts Law > Types of Contracts > Releases

Business & Corporate Compliance > Contracts > Types of

Contracts > Releases

Torts > ... > Defenses > Exculpatory Clauses > Interpretation

HN17[⬇] **Types of Contracts, Releases**

A factor for determining whether an anticipatory release may be unenforceable is the possibility of a harsh or inequitable result for the releasing party. A court's inquiry into intent of parties to immunize against negligence focuses not only on the language of the contract, but also on the possibility of a harsh or inequitable result that would fall on one party by immunizing the other party from the consequences of his or her own negligence.

Contracts Law > Types of Contracts > Releases

Business & Corporate Compliance > Contracts > Types of Contracts > Releases

Torts > ... > Defenses > Exculpatory Clauses > Interpretation

HN18[⬇] **Types of Contracts, Releases**

Relevant procedural factors in the determination of whether enforcement of an anticipatory release would violate public policy or be unconscionable include whether the release was conspicuous and unambiguous; whether there was a substantial disparity in the parties' bargaining power; whether the contract was offered on a take-it-or-leave-it basis; and whether the contract involved a consumer transaction. Relevant substantive considerations include whether enforcement of the release would cause a harsh or inequitable result to befall the releasing party; whether the releasee serves an important public interest or function; and whether the release purported to disclaim liability for more serious misconduct than ordinary negligence. Nothing in previous decisions suggest that any single factor takes precedence over the others or that the listed factors are exclusive. Rather, they indicate that a determination whether enforcement of an anticipatory release would violate public policy or be unconscionable must be based on the totality of the circumstances of a particular transaction. The analysis in that regard is guided, but not limited, by the factors that this court previously has identified; it is also informed by any other considerations that may be relevant, including societal expectations.

Contracts Law > Types of Contracts > Releases

Business & Corporate Compliance > Contracts > Types of Contracts > Releases

Torts > ... > Defenses > Exculpatory Clauses > Bargaining Power

HN19[⬇] **Types of Contracts, Releases**

A release may not be enforced where there is such a disparity in bargaining power between the parties that the agreement does not represent a free choice on the part of the plaintiff. The basis for such a result is the policy of the law which relieves the party who is at such a disadvantage from harsh, inequitable, and unfair contracts which he is forced to accept by the necessities of his situation. The disparity in bargaining power may arise from the defendant's monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause; or it may arise from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms.

Business & Corporate Compliance > Contracts > Types of Contracts > Adhesion Contracts

Contracts Law > Types of Contracts > Adhesion Contracts

Torts > ... > Defenses > Exculpatory Clauses > Bargaining Power

HN20[⬇] **Types of Contracts, Adhesion Contracts**

Where there is such a disparity in bargaining power between the parties that the agreement does not represent a free choice on the part of the plaintiff. The basis for such a result is the policy of the law which relieves the party who is at such a disadvantage from harsh, inequitable, and unfair contracts which he is forced to accept by the necessities of his situation. The disparity in bargaining power may arise from the defendant's monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause; or it may arise from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms.

Business & Corporate Compliance > Contracts > Types of Contracts > Adhesion Contracts

Contracts Law > Types of Contracts > Adhesion Contracts

Contracts Law > Defenses > Unconscionability > General Overview

Torts > ... > Defenses > Exculpatory Clauses > Bargaining Power

HN21[⬇] **Types of Contracts, Adhesion Contracts**

When one party is in such a superior bargaining position that it totally dictates all terms of the contract and the only option presented to the other party is to take it or leave it, some quantum of procedural unconscionability is established. The party who drafts such a contract of adhesion bears the responsibility of assuring that the provisions of the contract are not so one-sided as to be unconscionable.

Torts > ... > Duty On Premises > Invitees > General Overview

HN22[⬇] **Duty On Premises, Invitees**

Business owners and operators have a heightened duty of care toward patrons, invitees, with respect to the condition of their premises that exceeds the general duty of care to avoid unreasonable risks of harm to others. In general, it is the duty of the possessor of land to make the premises reasonably safe for the invitee's visit. The possessor must exercise the standard of care above stated to discover conditions of the premises that create an unreasonable risk of harm to the invitee. The possessor must exercise that standard of care either to eliminate the condition creating that risk or to warn any foreseeable invitee of the risk so as to enable the invitee to avoid the harm. Furthermore, a business operator's obligation to make its premises reasonably safe for its invitees includes taking into account the use to which the premises are put. An owner must take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the premises.

Torts > ... > Duty On Premises > Invitees > General Overview

HN23[⬇] **Duty On Premises, Invitees**

An "invitee" is a person who has an express or implied invitation to enter or use another's premises, such as a business visitor or a member of the public to whom the premises are held open.

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

Torts > ... > Defenses > Exculpatory Clauses > General Overview

Torts > ... > Defenses > Contributory Negligence > General Overview

Torts > ... > Assumption of Risk > Elements & Nature > General Overview

HN24[⬇] **Assumption of Risk, Athletic & Recreational Activities**

In accordance with Or. Rev. Stat. § 31.600 (pertaining to contributory negligence) and notwithstanding Or. Rev. Stat. § 31.620 (2) (abolishing the doctrine of implied assumption of risk), an individual who engages in the sport of skiing, alpine or nordic, accepts and assumes the inherent risks of skiing insofar as they are reasonably obvious, expected or necessary.

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

HN25[⬇] **Assumption of Risk, Athletic & Recreational Activities**

See Or. Rev. Stat. § 30.970(1).

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

Torts > ... > Defenses > Comparative Fault > General Overview

HN26[⬇] **Assumption of Risk, Athletic & Recreational Activities**

By providing that a skier assumes the "inherent risks of skiing," Or. Rev. Stat. § 30.975 reduced ski area operators' heightened common law duty to discover and guard against certain natural and inherent risks of harm. However, the Skier Responsibility Law did not abrogate the common-law principle that skiers do not assume responsibility for unreasonable conditions created by a ski area operator insofar as those conditions are not inherent to the activity. The Skier Responsibility Law provides that to the extent an injury is caused by an inherent risk of skiing, a skier will not recover against a ski area operator; to the extent an injury is a result of ski area operator negligence, comparative negligence applies.

Torts > ... > Duty On Premises > Invitees > Public Invitees

HN27[⬇] **Invitees, Public Invitees**

The policy rationale is to place responsibility for negligently created conditions of business premises on those who own or control them, with the ultimate goal of mitigating the risk of injury-producing accidents. In that setting, where a business operator extends a general invitation to enter and engage in activities on its premises that is accepted by large numbers of the public, and those invitees are subject to risks of harm from conditions of the operator's creation, their safety is a matter of broad societal concern. When a substantial number of such sales take place as a result of the operator's general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises. The public interest, therefore, is affected by the performance of the operator's private duties toward them.

Contracts Law > Types of Contracts > Releases

Business & Corporate Compliance > Contracts > Types of Contracts > Releases

Torts > ... > Defenses > Exculpatory Clauses > General Overview

HN28[⬇] **Types of Contracts, Releases**

An anticipatory release violates public policy where it purports to immunize the releasee from liability for gross negligence, reckless, or intentional conduct, but a release that disclaims liability only for ordinary negligence more often is enforced. That statement is correct as a general comment on the validity of anticipatory releases, but, of course, whether any particular release will be enforced depends on various factors.

Contracts Law > Contract Interpretation > General Overview

HN29[⬇] **Contracts Law, Contract Interpretation**

A decision as to enforceability is reached only after a careful balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms.

Contracts Law > Defenses > Public Policy Violations

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

Torts > ... > Duty On Premises > Invitees > Public Invitees

Torts > ... > Defenses > Exculpatory Clauses > General Overview

HN30[⬇] **Defenses, Public Policy Violations**

Public policy favors the deterrence of negligent conduct. Skiers and snowboarders have important legal inducements to exercise reasonable care for their own safety by virtue of their statutory assumption of the inherent risks of skiing. By contrast, without potential exposure to liability for their own negligence, ski area operators would lack a commensurate legal incentive to avoid creating unreasonable risks of harm to their business invitees. Where members of the public are invited to participate without restriction in risky activities on defendant's business premises (and many do), and where the risks of harm posed by operator negligence are appreciable, such an imbalance in legal incentives is not conducive to the public interest.

Counsel: Kathryn H. Clarke, Portland, argued the cause and filed the briefs for petitioner on review. With her on the briefs was Arthur C. Johnson.

Andrew C. Balyeat, Balyeat & Eager, LLP, Bend, argued the cause and filed the brief for respondent on review.

Michael J. Estok, Lindsay Hart, LLP, Portland, filed a brief on behalf of amicus curiae Oregon Association of Defense Counsel.

Kristian Roggendorf, Roggendorf Law LLC, Lake Oswego, filed a brief on behalf of amicus curiae Oregon Trial Lawyers Association.

Judges: BREWER, J.

Opinion by: BREWER

Opinion

[**30] [*545] En Banc

BREWER, J.

The issue on review in this case is whether an anticipatory release[1] of a ski area operator's liability for its own negligence in a ski pass agreement is enforceable in the face of an assertion that the release violates public policy and is unconscionable. Plaintiff suffered serious injuries while snowboarding over a jump in defendant ski area operator's "terrain [***2] park," and brought this action alleging that defendant was negligent in the design, construction, maintenance, and inspection of the jump. Defendant moved for summary judgment based on an affirmative defense of release; plaintiff filed a cross-motion for partial summary judgment on the ground that the release was unenforceable as a matter of law. The trial court granted defendant's summary judgment motion and denied plaintiff's cross-motion. Plaintiff appealed, asserting, among other arguments, that the trial court erred in concluding that the release did not violate public policy and that it was neither substantively nor procedurally unconscionable. The Court of Appeals affirmed. *Bagley v. Mt. Bachelor, Inc.*, 258 Ore App 390, 310 P3d 692 (2013). Because we conclude that enforcement of the release would be unconscionable, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

HN1[🡅] We review the trial court's rulings on summary judgment to determine whether "there is no genuine issue as to any material fact" and whether "the moving party is entitled to prevail as a matter of law." [***3] ORCP 47

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[1] By "anticipatory release," we refer to an exculpatory agreement that purports to immunize—before an injury occurs—the released party from liability for its own tortious conduct.

C. We view the historical facts set out in the summary judgment record, along with all reasonable inferences that may be drawn from them, in the light most favorable to the nonmoving party—plaintiff on defendant's motion for summary judgment, and defendant on plaintiff's cross-motion. *Id.; Vaughn v. First Transit, Inc*., 346 Ore 128, 132, 206 P3d 181 (2009). The historical facts in the record largely relate to the enforceability of the release at issue. Defendant's summary judgment motion did not address the issues of negligence, causation, or damages. Therefore, insofar as those issues are relevant to [*546] the enforceability of the release, we accept as true the allegations in plaintiff's complaint. ORCP 47 C (adverse party on summary judgment has burden of producing evidence only "on any issue raised in the motion as to which adverse party would have burden of persuasion at trial").

On September 29, 2005, plaintiff purchased a season pass from defendant for use at defendant's ski area. Plaintiff was a skilled and experienced snowboarder, having purchased season passes from defendant for each of the preceding three years and having classified his skill level as of early 2006, before being injured, as an "advanced expert." Upon purchasing the season pass, plaintiff [***4] executed a written "release and indemnity agreement" that defendant required of all its patrons. That document provided, in pertinent part:

> "In consideration of the use of a Mt. Bachelor pass and/or Mt. Bachelor's premises, I/we agree to release and indemnify Mt. Bachelor, Inc., its officers and directors, owners, agents, landowners, affiliated companies, and employees (hereinafter 'Mt. Bachelor, Inc.') from any and all claims for property damage, injury, or death which I/we may suffer or for which I/we may be liable to others, in any way connected with skiing, snowboarding, or [**31] snowriding. This release and indemnity agreement shall apply to any claim even if caused by negligence. The only claims not released are those based upon intentional misconduct.
>
> "* * * * *
>
> "The undersigned(s) have carefully read and understand this agreement and all of its terms on both sides of this document.

> This includes, but is not limited to, the duties of skiers, snowboarders, or snowriders. The undersigned(s) understand that this document is an agreement of release and indemnity which will prevent the undersigned(s) or the undersigneds' estate from recovering damages from Mt. Bachelor, Inc. in the event [***5] of death or injury to person or property. The undersigned(s), nevertheless, enter into this agreement freely and voluntarily and agree it is binding on the undersigned(s) and the undersigneds' heirs and legal representatives.
>
> "By my/our signature(s) below, I/we agree that this release and indemnity agreement will remain in full force [*547] and effect and I will be bound by its terms throughout this season and all subsequent seasons for which I/we renew this season pass.
>
> "See reverse side of this sheet * * * for duties of skiers, snowboarders, or snow riders which you must observe."

(Capitalization omitted.)[2] The reverse side of the document detailed the "Duties of Skiers" under ORS 30.985 and ORS 30.990 and also included a printed notification that "Skiers/Snowboarders/Snowriders Assume Certain Risks" under ORS 30.975—the "inherent risks of skiing."[3]

On November 18, 2005, plaintiff began using the pass, which stated, in part:

> "Read this release agreement
>
> "In consideration for each lift ride, the ticket user releases and agrees to hold harmless and indemnify Mt. Bachelor, [***7] Inc., and its employees and agents from all claims for property damage, injury or death even if caused by negligence. The only claims not released are those based upon

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[2] Although defendant relies on several documents that, it asserts, separately and collectively released it from liability for plaintiff's injuries, for convenience we refer to those documents in the singular throughout this opinion as "the release." In addition to the releases discussed in the text, plaintiff's father also executed a "minor release and indemnity agreement" on plaintiff's [***6] behalf, containing essentially the same terms as the other releases, because plaintiff was not yet eighteen years old when he bought the season pass. Plaintiff asserted before the trial court and the Court of Appeals that he was entitled to—and effectively did—disavow the release after he reached majority. For reasons explained in its opinion, the Court of Appeals affirmed the trial court's rejection of that argument. Plaintiff did not seek review of that holding in this court and we do not address it here.

[3] As elaborated below, Oregon has enacted statutes specifically pertaining to skiing and ski areas. *See* ORS 30.970 - 30.990. Those statutes, among other provisions, set out the "duties" of skiers, require that ski area operators inform skiers of those duties, establish notice requirements and a statute of limitations pertaining specifically to injury or death while skiing, and provide that those who engage in the sport of skiing accept and assume the risks inherent in that activity.

> intentional misconduct."

(Capitalization omitted.) Further, the following sign was posted at each of defendant's ski lift terminals:

> "YOUR TICKET IS A RELEASE
>
> "The back of your ticket contains a release of all claims against Mt. Bachelor, Inc. and its employees or agents. [*548] Read the back of your ticket before you ride any lifts or use any of the facilities of Mt. Bachelor, Inc. If you purchase a ticket from someone else, you must provide this ticket release information to that person or persons.
>
> "Skiers and lift passengers who use tickets at this resort release and agree to hold harmless and indemnify Mt. Bachelor, Inc., its employees and agents from all claims for property damage, injury or death which he/she may suffer or for which he/she may be liable to others, arising out of the use of Mt. Bachelor's premises, whether such claims are for negligence or any other theory of recovery, except for intentional misconduct.
>
> [**32] "If you do not agree to be bound by the terms and conditions of the sale of your ticket, please do not purchase [***8] the ticket or use the facilities at Mt. Bachelor.
>
> "Presentation of this ticket to gain access to the premises and facilities of this area is an acknowledgment of your agreement to the terms and conditions outlined above."

(Capitalization in original.)

Beginning on November 18, 2005, plaintiff used his season pass to ride defendant's lifts at least 119 times over the course of 26 days that he spent snowboarding at the ski area. On February 16, 2006, while snowboarding over a human-made jump in defendant's "air chamber" terrain park, plaintiff sustained serious injuries resulting in his permanent paralysis. Approximately four months later, plaintiff provided defendant with notice of his injuries under ***HN2***[🡅] ORS 30.980(1), which requires that "[a] ski area operator shall be notified of any injury to a skier * * * within 180 days after the injury[.]" Within two years after he was injured, plaintiff brought this action; his complaint alleged negligence on defendant's part in designing, constructing, maintaining, and inspecting the jump on which plaintiff was injured. Defendant answered, in part, by invoking the affirmative defense of release, pointing to the above-quoted documents.

In its summary judgment motion, [***9] defendant asserted that plaintiff "admittedly understood that he [had] entered into a release agreement and was snowboarding under its terms on the date of [the] accident." Defendant [*549] argued that the release conspicuously and unambiguously disclaimed its future liability for negligence, and that the release was neither unconscionable nor contrary to public policy under Oregon law, because "skiers and snowboarders voluntarily choose to ski and snowboard and ski resorts do not provide essential public services." Thus, defendant reasoned, there was no material issue of fact as to whether the release barred plaintiff's action, and defendant was entitled to judgment as a matter of law.

In his cross-motion for partial summary judgment, plaintiff asserted that the release was unenforceable because it was contrary to public policy and was "both substantively and procedurally unconscionable." The trial court rejected plaintiff's public policy and unconscionability arguments, reasoning that "[s]now riding is not such an essential service which requires someone such as [p]laintiff to be forced to sign a release in order to obtain the service." Accordingly, the trial court granted summary judgment in defendant's [***10] favor and denied plaintiff's cross-motion for partial summary judgment.

As noted, the Court of Appeals affirmed. The court initially observed that the line between the public policy and unconscionability doctrines on which plaintiff relied was not clearly delineated:

> "We assume without deciding that the 'void as contrary to public policy' doctrine pertaining to this type of case has not been superseded by later-evolved principles concerning substantive unconscionability. *See Restatement*[(*Second) of Contracts*], § 208 comment a [(1981)] (unconscionability analysis generally 'overlaps' with public-policy analysis)."

Bagley, 258 Ore App at 403 n 7. The court then proceeded separately to analyze plaintiff's arguments. It first concluded that the release did not violate public policy. In particular, the court understood plaintiff to rely on an uncodified Oregon public policy that gives primacy to the tort duties of landowners and business operators to provide safe premises for invitees. In rejecting plaintiff's argument, the Court of Appeals relied on several factors. First, the court observed that the release "clearly and unequivocally" expressed defendant's intent to disclaim liability for negligence. *Id*. at [*550] 405 ("[W]e are hard-pressed to envision [***11] a more unambiguous expression of 'the expectations under the contract'[.]"). Second, the court noted that anticipatory releases that disclaim liability only for ordinary negligence do not necessarily offend public policy where they pertain exclusively to recreational activities and, most importantly, where the party seeking to relieve itself from liability does not provide an essential public service. *Id*. The court noted that a ski resort primarily offers recreational activities that, with possible exceptions that do not apply in [**33] this case, such as training for search-and-rescue personnel, do not constitute essential public services. *Id*. at 406. Third, the court stated that plaintiff's claims were based on ordinary negligence and did not implicate a violation of any heightened duty of care. Id.

The court then rejected plaintiff's unconscionability argument for essentially the same reasons. First, the court concluded, the release was not procedurally unconscionable in that it did not surprise plaintiff (that is, it was conspicuous and unambiguous) and it was not impermissibly oppressive, because, even though offered on a "take it or leave it basis," plaintiff always could choose not to engage [***12] in the non-essential recreational activity that defendant offered. *Id*. at 407-08. The court also concluded that the release was not essentially unfair and, therefore, was not substantively unconscionable. *Id*. at 409. Although "favorable" to defendant, the release was not impermissibly so, the court stated, because a person does not *need* to ski or snowboard, but rather merely desires to do so. That is, the patron is free to walk away rather than accept unjust terms. *Id*. at 409-10. For those reasons, the court affirmed the trial court's summary judgment rulings and its dismissal of plaintiff's action.

ANALYSIS

The parties' dispute in this case involves a topic—the validity of exculpatory agreements—that this court has not comprehensively addressed in decades.

Although the specific issue on review—the validity of an anticipatory release of a ski area operator's liability for negligence—is finite and [*551] particular, it has broader implications insofar as it lies at the intersection of two traditional common law domains—contract and tort—where, at least in part, the legislature has established statutory rights and duties that affect the reach of otherwise governing common law principles.

HN3[🡅] It is a truism that a contract validly [***13] made between competent parties is not to be set aside lightly. *Bliss v. Southern Pacific Co. et al*, 212 Ore 634, 646, 321 P2d 324 (1958) ("When two or more persons competent for that purpose, upon a sufficient consideration, voluntarily agree to do or not to do a particular thing which may be lawfully done or omitted, they should be held to the consequences of their bargain."). The right to contract privately is part of the liberty of citizenship, and an important office of the courts is to enforce contractual rights and obligations. *W. J. Seufert Land Co. v. Greenfield*, 262 Ore 83, 90-91, 496 P2d 197 (1972) (so stating). As this court has stated, however, "contract rights are [not] absolute; * * * [e]qually fundamental with the private right is that of the public to regulate it in the common interest." *Christian v. La Forge*, 194 Ore 450, 469, 242 P2d 797 (1952) (internal quotation marks omitted).

That "common," or public, interest is embodied, in part, in the principles of tort law. As a leading treatise explains:

> "It is sometimes said that compensation for losses is the primary function of tort law * * * [but it] is perhaps more accurate to describe the primary function as one of determining when compensation is to be required.
>
> "* * * * *
>
> "[Additionally, t]he 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation [***14] of the victim, but with admonition of the wrongdoer."

W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 4, 20-25 (5th ed 1984). See also Dan B. Dobbs, *The Law of Torts*, § 8, 12 (2000) (most commonly mentioned aims of tort law are compensation of injured persons and deterrence of undesirable behavior). A related function of the tort system [*552] is to distribute the risk of injury to or among responsible parties. *Prosser and Keeton*, § 4, 24-25.[4]

[**34] ***HN5***[↑] One way in which courts have placed limits on the freedom of contract is by refusing to enforce agreements that are illegal. *Uhlmann v. Kin Daw*, 97 Ore 681, 688, 193 P 435 (1920) (an illegal agreement is void and unenforceable). According to *Uhlmann*:

> "An agreement is illegal if it is contrary to law, morality or public policy. Plain examples of illegality are found in agreements made in violation of some statute; and, stating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute."

Id. at 689 (internal citation omitted); *see also Eldridge et al. v. Johnston*, 195 Ore 379, 405, 245 P2d 239 (1952) ("It is elementary that [***15] public policy requires that * * * contracts [between competent parties], when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice, and it is only when some other overpowering rule of public policy * * * intervenes, rendering such agreement illegal, that it will not be enforced.").

HN6[↑] In determining whether an agreement is illegal because it is contrary to public policy, "[t]he test is the evil tendency of the contract and not its actual injury to the public in a particular instance." *Pyle v. Kernan*, 148 Ore 666, 673-74, 36 P2d 580 (1934). The fact that the effect of a contract provision may be harsh as applied to one of the contracting parties does not mean that the agreement is, for that reason alone, contrary to public policy, particularly where "the contract in question was freely entered into between parties in equal bargaining positions and did not involve a contract of adhesion, such as some retail installment contracts and insurance policies." *Seufert*, 262 Ore at 92.

As we discuss in more detail below, courts determine whether a contract is illegal by determining whether it violates public policy as expressed in relevant constitutional and

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[4] *See also Rizutto v. Davidson Ladders, Inc*., 280 Conn 225, 235, 905 A2d 1165 (2006) (***HN4***[↑] fundamental purposes of the tort system are "compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct.").

statutory provisions and in case law, *see, e.g., Delaney v. [*553] Taco Time Int'l, Inc*., 297 Ore 10, 681 P2d 114 (1984) (looking to those [***16] sources to determine whether discharge of at-will employee violated public policy), and by considering whether it is unconscionable. With respect to the doctrine of unconscionability, one commentator has explained:

> ***HN7***[🡅] "The concept of unconscionability was meant to counteract two generic forms of abuses: the first of which relates to procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analyzed in terms of whether the imposedupon party had meaningful choice about whether and how to enter the transaction; and the second of which relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having nothing to do with price [***17] or other central aspects of the transaction."

Richard A. Lord, 8 *Williston on Contracts* § 18.10, 91 (4th ed 2010). As that passage suggests, the doctrine of unconscionability reflects concerns related specifically to the parties and their formation of the contract, but it also has a broader dimension that converges with an analysis of whether a contract or contract term is illegal because it violates public policy.[5]

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[5] This court has not distinguished between contracts that are illegal because they violate public policy and contracts that are unenforceable because they are unconscionable. However, a difference in focus between the two concepts has been described in this way:

> ***HN8***[🡅] "[O]ur public policy analysis asks whether the contract provision at issue threatens harm to the public as a whole, including by contravening the constitution, statutes, or judicial decisions of [this state]. In contrast, an unconscionability analysis asks whether the agreement, by its formation or by its terms, is so unfair that the court cannot enforce it consistent with the interests of justice."

Phoenix Ins. Co. v. Rosen, 242 Ill 2d 48, 61, 949 NE2d 639, 350 Ill. Dec. 847 (2011). As that passage suggests, the two doctrines are aimed at similar concerns: unfairness or oppression in contract formation or terms that [***18] are sufficiently serious as to justify the conclusion that the contract

[*554] [**35] Recognizing that convergence, ***HN9***[⬆] this court often has relied on public policy considerations to determine whether a contract or contract term is sufficiently unfair or oppressive to be deemed unconscionable. *See, e.g., William C. Cornitius, Inc. v. Wheeler*, 276 Ore 747, 754-55, 556 P2d 666 (1976) (treating lessee's unconscionability defense as grounded in public policy); *Cone v. Gilmore*, 79 Ore 349, 352-54, 155 P 192 (1916) (analyzing unconscionability challenge to contract enforcement based on public policy considerations); *Balfour v. Davis* 14 Ore 47, 53, 12 P 89 (1886) (referring to unconscionability interchangeably with public policy considerations). Other authorities also have described the two doctrines in functionally the same terms, *see, e.g.*, E. Allen Farnsworth, 1 *Farnsworth on Contracts*, § 4.28, 577 (3d ed 2004) (comparing unconscionability to violation of public policy), or as involving substantially overlapping considerations, *see Restatement (Second) of Contracts* § 208 comment a (1981) (policy against unconscionable contracts or contract terms "overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy").

As discussed, the Court of Appeals concluded that the release at issue here did not violate public policy and was not [***19] unconscionable for essentially the same reasons: it was conspicuous and unambiguous, and it related to a recreational activity, not an essential public service. Likewise, neither party has suggested that different legal standards apply in determining whether the release at issue in this case violates public policy or is unconscionable. Thus, for the sake of convenience—if not doctrinal convergence—we address the parties' public policy arguments in the context of our analysis of whether, in the particular circumstances of this case, enforcement of the release would be unconscionable.[6]

HN10[⬆] Oregon courts have recognized their authority to refuse to enforce unconscionable contracts since the nineteenth century. *See Balfour*, 14 Ore 47, 12 P. 89 (refusing [***20]

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contravenes the interests of justice.

[6] We emphasize that it is not necessary to decide in this case whether the doctrines always are identical in practical effect or whether they may vary in their application depending on the particular circumstances of a given case. It suffices to say that we discern no difference in their practical application in this case and, therefore, for the sake of convenience, we consider plaintiff's violation of public policy theory in the context of his unconscionability arguments.

to award attorney fees because amount specified in contract was [*555] unconscionable); *see also Caples v. Steel*, 7 Ore 491 (1879) (court may refuse specific performance if bargain is unconscionable). Unconscionability is "assessed as of the time of contract formation," and the doctrine "applies to contract terms rather than to contract performance." *Best v. U.S. National Bank*, 303 Ore 557, 560, 739 P2d 554 (1987) ("Unconscionability is a legal issue that must be assessed as of the time of contract formation."); *Tolbert v. First National Bank*, 312 Ore 485, 492 n 4, 823 P2d 965 (1991) (same).

Unconscionability may be procedural or substantive. Procedural unconscionability refers to the conditions of contract formation and focuses on two factors: oppression and surprise. See, e.g., John Edward Murray, Jr., *Murray on Contracts* § 96(b), 555-56 (4th ed 2001) (describing components of procedural unconscionability). Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Ore App 553, 566-567, 152 P3d 940, 948 (2007); *Acorn v. Household Intern. Inc.*, 211 F Supp 2d 1160, 1168 (ND Cal. 2002). Surprise involves whether terms were hidden or obscure from the vantage of the party seeking to avoid them. *Id*. Generally speaking, factors such as ambiguous contract wording and fine print are the hallmarks of surprise. In contrast, the existence of gross inequality of [***21] bargaining power, a takeit- or-leave-it bargaining stance, and the fact that a contract involves a consumer transaction, rather than a commercial bargain, can be evidence of oppression.

HN11[🡅] Substantive unconscionability, on the other hand, generally refers to the terms of [**36] the contract, rather than the circumstances of formation, and focuses on whether the substantive terms contravene the public interest or public policy.[7] *See Restatement* § 208 comment a; *Williston on*

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[7] It sometimes can be difficult to categorize the factors on which a determination of unconscionability may be based as distinctly procedural or substantive, and even factors usually considered in assessing procedural unconscionability can help establish a violation of public policy. For example, the passage quoted above from *Williston on Contracts* § 18.10, 356 Or at __ suggests that adhesive and fine-print terms may be substantively unconscionable. Indeed, the author goes on to say that "[t]he distinction between procedural and substantive abuses * * * may become quite blurred." [***22] *Williston on Contracts* § 18.10 at 108-111.

*[*556]* *Contracts* § 18.10 at 91. Both procedural and substantive deficiencies—frequently in combination—can preclude enforcement of a contract or contract term on unconscionability grounds. *Restatement* § 208 comment a.[8]

HN12[⬆] Identifying whether a contract is procedurally unconscionable requires consideration of evidence related to the specific circumstances surrounding the formation of the contract at issue. By contrast, the inquiry into substantive unconscionability can be more complicated. To discern whether, in the context of a particular transaction, substantive concerns relating to unfairness or oppression are sufficiently [***23] important to warrant interference with the parties' freedom to contract as they see fit, courts frequently look to legislation for relevant indicia of public policy. When relevant public policy is expressed in a statute, the issue is one of legislative intent. *See Uhlmann*, 97 Ore at 689-90 (so stating). In that situation, the court must examine the statutory text and context to determine whether the legislature intended to invalidate the contract term at issue.[9] *Id*.

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[8] In some jurisdictions, courts require both procedural and substantive unconscionability before they will invalidate a contract. *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal 4th 83, 114, 99 Cal Rptr 2d 745, 6 P3d 669, 690 (2000) (procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability); *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So 2d 1077, 1087 (Ala 2005) ("To avoid an arbitration provision on the ground of unconscionability, the party objecting to arbitration must show both procedural and substantive unconscionability."). This court has not addressed that issue, and because, as explained below, we conclude that both procedural and substantive considerations support the conclusion that the release here is unconscionable, we do not decide that issue in this case.

[9] Many jurisdictions that limit or prohibit the use of anticipatory releases from negligence liability on public policy grounds do so as a matter of statutory enactment, rather than common law. For example, Great Britain and the States of Louisiana and Montana have statutory provisions that forbid contracts exculpating one party from liability for negligence that results in personal injury. Unfair Contract Terms Act of 1977, ch 50, § 2(1) (Eng) ("A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence."); La Civ Code Ann art 2004 ("Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury [***24] to the other party."); Mont Code Ann § 28-2-702 ("All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility * * * for violation of law, whether willful or negligent, are against the policy of the law."); *see also Miller v. Fallon County*, 222 Mont 214, 221, 721 P2d 342 (1986) (under statute, prospective release from liability for negligence is against the policy of the law and illegal, despite being a private contract between two persons without significant public implications).

Some states use statutes to make anticipatory releases from liability for negligence void as against public policy as to businesses providing recreational activities to the public. NY Gen Oblig Law § 5-326 (every contract between recreational business owner and user of facility, pursuant to which owner receives payment for use of facilities, that exempts owner from liability for damages resulting from owner's negligence "shall be deemed void as against public policy and wholly unenforceable"); Haw Rev Stat § 663-1.54(a) ("Any person who owns or operates a business providing recreational activities to the public * * * shall be liable for damages resulting from negligent acts or omissions of the person which cause injury.").

Other states have enacted more narrowly crafted statutes that deal with specific [***25] recreational activities, including

[*557] ***HN13***[↑] Frequently, however, the argument that a contract term is sufficiently unfair [**37] or oppressive as to be unenforceable is grounded in one or more factors that are not expressly codified; in such circumstances, the common law has a significant role to play. As the commentary to the *Restatement (Second) of Contracts* explains:

> "Only infrequently does legislation, on grounds of public policy, provide that a term is unenforceable. When a court [*558] reaches that conclusion, it usually does so on the basis of a public policy [***27] derived either from its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to the policy although it says nothing explicitly about enforceability."

Restatement § 178 comment b.

This court has considered whether enforcement of an anticipatory release would violate an uncodified public policy in only a few cases. Although, in those cases, this court has not expressly analyzed the issue through the lens of unconscionability, it has followed an approach that is generally consistent with the application of that doctrine. That is, the court has not declared such releases to be *per se* invalid, but neither has it concluded that they are always enforceable. Instead, the court has followed a multi-factor approach:

> ***HN14***[↑] "Agreements to exonerate a

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skiing. For example, an Alaska statute specifically prohibits ski area operators from requiring skiers to enter into agreements releasing them from liability in exchange for the use of the facilities. Alaska Stat Ann § 05.45.120. In North Carolina, a statute imposes a duty on ski area operators "[n]ot to engage willfully or negligently in any type of conduct that contributes to or causes injury to another person or his properties." NC Gen Stat § 99C-2(c)(7); NC Gen Statute § 99C-3 (violation of duties of ski area operator that causes injury or damage shall constitute negligence); *see also Strawbridge v. Sugar Mountain Resort, Inc*., 320 F Supp 2d 425, 433 (WD NC 2004) (in light of statutory duty imposed on ski area operators not to negligently engage in conduct that causes injury, exculpatory clause on back of lift ticket was unenforceable).

Still other states have statutes that pertain specifically to skiing and, although not addressing releases, prescribe ski area operator duties and provide that operators will be liable for a violation of those duties. Colo Rev Stat § 33-44-104(1) (violation of duties of ski area operator constitutes negligence to extent such violation causes injury to any person or damage to property); *see also Anderson v. Vail Corp*., 251 P3d 1125, 1129-30 (Colo App 2010) (if ski area operator violated statutory duties, exculpatory agreement would not release operator from [***26] liability); Idaho Code § 6-1107 ("Any ski area operator shall be liable for loss or damages caused by its failure to follow the duties set forth in [other sections of the Idaho Code pertaining to duties of ski area operators], where the violation of duty is causally related to the loss or damage suffered."); NM Stat Ann § 24-15-11 (to same effect); ND Cent Code § 53-09-07 (same); W Va Code § 20-3A-6 (same); Utah Code Ann § 78B-4-401(public policy of Utah Inherent Risks of Skiing Act is to make ski area operators better able to insure themselves against the risk of loss occasioned by their negligence); *see also Rothstein v. Snowbird Corp*., 2007 UT 96, 175 P3d 560, 564 (Utah 2007) (by extracting a pre-injury release from plaintiff for liability due to ski resort's negligent acts, resort breached public policy underlying Utah Inherent Risks of Skiing Act).

> party from liability or to limit the extent of the party's liability for tortious conduct are not favorites of the courts but neither are they automatically voided. The treatment courts accord such agreements depends upon the subject and terms of the agreement and the relationship of the parties."

K-Lines v. Roberts Motor Co., 273 Ore 242, 248, 541 P2d 1378 (1975).

In *K-Lines*, this court upheld a limitation of liability contained in a commercial sales agreement. The court held that ***HN15***[↑] the [***28] fact

> "[t]hat one party may possess greater financial resources than the other is not proof that such a disparity of bargaining power exists that a limitation of liability provisions should be voided.
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> "When the parties are business concerns dealing in a commercial setting and entering into an unambiguous agreement with terms commonly used in commercial transactions, the contract will not be deemed a contract of *adhesion* in *the* absence of evidence of unusual circumstances."

Id. at 252-53. The court also noted that, in an earlier decision, it had stated:

> [*559] "'There is nothing inherently bad about a contract provision which exempts one of the parties from liability. The parties are free to contract as they please, unless to permit them to do so would contravene the public interest.'"

Id. at 248 (quoting *Irish & Swartz Stores v. First Nat'l Bk*., 220 Ore 362, 375, 349 P2d 814 (1960), *overruled on other [**38] grounds by Real Good Food v First National Bank*, 276 Ore 1057, 557 P2d 654 (1976)).[10]

Soon after deciding *K-Lines*, this court, in *Real Good Food*, held that a bank-serving [***29] as a bailee for depositors-could not limit its liability for the negligence of its employees. Relying on the *Restatement (Second) of Torts*, the court held:

> "Where the defendant is a common carrier, an innkeeper, a public warehouseman, a

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[10] In *K-Lines*, which, as noted, involved a commercial transaction, the court distinguished between releases from liability for ordinary negligence and releases involving more serious misconduct, concluding that the latter violate public policy, but that the former are not necessarily unenforceable. *K-Lines*, 273 Ore at 249.

> public utility, or is otherwise charged with a duty of public service, and the agreement to assume the risk relates to the defendant's performance of any part of that duty, it is well settled that it will not be given effect. Having undertaken the duty to the public, which includes the obligation of reasonable care, such defendants are not free to rid themselves of their public obligation by contract, or by any other agreement."

Id. at 1061 (quoting *Restatement (Second) of Torts* § 496B comment g (1965)).[11] The court in *Real Good Food* concluded that "[b]anks, like common carriers and utility companies, [*560] perform an important public service," and the release therefore violated public policy and was unenforceable. 276 Ore at 1061.

Finally, this court has held that another ***HN17***[🡅] factor for determining whether an anticipatory release may be unenforceable is the possibility of a harsh or inequitable result for the releasing party. *Commerce & Industry Ins. v. Orth*, 254 Ore 226, 231-32, 458 P2d 926 (1969) (so stating); *Estey v. MacKenzie Engineering Inc*., 324 Ore 372, 376-77, 927 P2d 86 (1996) (court's inquiry into intent of parties to immunize against negligence "focuse[s] not only on the language of the contract, but also on the possibility of a harsh or inequitable result that would fall on one party by immunizing the other party from the consequences of his or her own negligence").

We glean from those [***31] decisions that ***HN18***[🡅] relevant procedural factors in the determination of whether enforcement of an anticipatory release would violate public policy or be unconscionable include whether the release was conspicuous and unambiguous; whether there was a substantial disparity in the parties' bargaining power; whether the contract was offered on a take-it-or-leave-it basis; and whether the contract involved a consumer

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[11] *Restatement (Second)of Torts* § 496B provides:

> ***HN16***[🡅] "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy."

According [***30] to the comments to that section, an exculpatory agreement should be upheld if it is freely and fairly made, if it is between parties who are in an equal bargaining position, and if there is no societal interest with which it interferes. *Restatement (Second) of Torts* § 496B comment b. Comments e-j set out a non-exclusive list of situations in which releases may interfere with societal interests, insofar as they are contrary to public policy. Among other things, in addition to situations like those described in the passage quoted above, the *Restatement* refuses to give effect to express liability releases where there is a substantial disparity in bargaining power. *Restatement (Second) of Torts* § 496B comment j.

transaction. Relevant substantive considerations include whether enforcement of the release would cause a harsh or inequitable result to befall the releasing party; whether the releasee serves an important public interest or function; and whether the release purported to disclaim liability for more serious misconduct than ordinary negligence. Nothing in our previous decisions suggests that any single factor takes precedence over the others or that the listed factors are exclusive. Rather, they indicate that a determination whether enforcement of an anticipatory release would violate public policy or be unconscionable must be based on the totality of the circumstances of a particular transaction. The analysis in that regard is guided, but not limited, by the factors that this court [***32] previously has identified; it is also informed by any other considerations that may be relevant, including societal expectations.[12]

[*561] [**39] With those principles in mind, we first consider the factors that usually are described as procedural, *viz*., those pertaining to the formation of the agreement. Plaintiff does not contend that the release was inconspicuous or ambiguous; that is, plaintiff does not contend that he was surprised by its terms. Thus, that factor weighs in favor of enforcement. Other procedural factors, however, point in a different direction. This was not an agreement between equals. Only

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[12] Justice Peterson eloquently described the role of societal expectations in informing the development of both the common law and legislation:

> "The beauty and strength of the common-law system is its infinite adaptability to societal change. Recent decisions of this court are illustrative. In *Heino v. Harper*, 306 Ore 347, 349-50, 759 P2d 253 (1988), the court abolished interspousal immunity, holding 'that the common-law rule of interspousal immunity is no longer available in this state to bar negligence actions between spouses.' In *Winn v. Gilroy*, 296 Ore 718, 734, 681 P2d 776 (1984), the court abolished parental tort immunity for negligent injury to minor children. Nineteen years earlier, in *Wights v. Staff Jennings*, 241 Ore 301, 310, 405 P2d 624 (1965), stating that 'it is the function of the judiciary to modify the law of torts to fit the changing needs of society,' the court held that a seller of a product may be held strictly liable for injuries to a plaintiff not in privity with the seller.
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> "The development of the common law occurs in an environment in which tensions abound. On occasion, the Legislative Assembly passes laws in response to decisions of this court. Products liability decisions of this court led to the enactment [***33] of a series of products liability statutes now found in ORS 30.900 to 30.927. A decision of this court involving an injury to a skier, *Blair v. Mt. Hood Meadows Development Corp*., 291 Ore 293, 630 P2d 827, *modified*, 291 Ore 703, 634 P2d 241 (1981), led to the enactment of statutes concerning skiing activities, ORS 30.970 to 30.990.
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> "On the other hand, this court, in deciding common-law issues presented to it, has ascertained public policy by looking to legislative enactments. The legislature is incapable of passing laws that govern every conceivable situation that might arise, however. The common-law court is the institution charged with the formulation and application of rules of governing law in situations not covered by constitution, legislation, or rules."

Buchler v. Oregon Corrections Div., 316 Ore 499, 518-19, 853 P2d 798 (1993) (Peterson, J., concurring).

one party to the contract-defendant-was a commercial enterprise, and that [***34] party exercised its superior bargaining strength by requiring its patrons, including plaintiff, to sign an anticipatory release on a take-it-or-leave-it basis as a condition of using its facilities. As the *Restatement (Second) of Torts*, section 496B, explains, ***HN19***[⬆] a release may not be enforced

> ***HN20***[⬆] "where there is such a disparity in bargaining power between the parties that the agreement does not represent a free choice on the part of the plaintiff. The basis for such a result is the policy of the law which relieves the party who is at such a disadvantage from harsh, inequitable, and [*562] unfair contracts which he is forced to accept by the necessities of his situation. The disparity in bargaining power may arise from the defendant's monopoly of a particular field of service, *from the generality of use of contract clauses insisting upon assumption of risk by those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause;* or it may arise from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms."

Id. comment j (emphasis added).

Also, plaintiff had no opportunity in this [***35] case to negotiate for different terms or pay an additional fee for protection against defendant's negligence. What makes the substantial disparity in the parties' bargaining positions even more significant in this circumstance is the limited number of ski areas that provide downhill skiing and snow-boarding opportunities in Oregon, and the generality of the use of similar releases among that limited commercial cohort.[13] Simply put, plaintiff had no meaningful alternative to defendant's take-it-or-leave-it terms if he wanted to participate in downhill snowboarding. Although that factor is not, by itself, dispositive,

> [**40] ***HN21***[⬆] "[w]hen one party is in such a superior bargaining position that it totally dictates all terms of the contract and the only option presented to the other party

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[13] In an excerpt from the transcript of plaintiff's deposition that was included in the summary judgment record, plaintiff testified that he had never been to a ski resort [***36] where a release such as the one at issue here was not required.

> is to take it or leave it, some quantum of procedural unconscionability is established. The party who drafts such a contract of adhesion bears the responsibility of assuring that the provisions of the contract are not so one-sided as to be unconscionable."

Strand v. U.S. Bank Nat. Ass'n, 2005 ND 68, 693 NW2d 918, 925 (ND 2005).

We next consider the substantive factors that are relevant to our inquiry. The parties have identified the following relevant factors: whether enforcement of the release would cause a harsh or inequitable result; whether defendant's recreational business operation serves an important public interest or function; and whether the release [*563] purported to disclaim liability for more serious misconduct than ordinary negligence.

We begin with the question whether enforcement of the release would cause a harsh and inequitable result to befall the releasing party, in this case, plaintiff. As discussed, this court has recognized the importance of that consideration in other cases. *See, e.g., Estey*, 324 Ore at 376. As pertinent here, we conclude that the result would be harsh because, accepting as true the allegations in plaintiff's complaint, plaintiff would not have been injured if defendant had exercised reasonable care in designing, constructing, maintaining, or inspecting the jump on which he was injured. And that harsh result also would be inequitable because defendant, not its patrons, has the expertise and opportunity to foresee and control hazards [***37] of its own creation on its premises, and to guard against the negligence of its employees. Moreover, defendant alone can effectively spread the cost of guarding and insuring against such risks among its many patrons.

Those public policy considerations are embodied in the common law of business premises liability. ***HN22***[🡅] Business owners and operators have a heightened duty of care toward patrons—invitees[14]—with respect to the condition of their premises that exceeds the general duty of care to avoid unreasonable risks of harm to others. *Hagler v. Coastal Farm*

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[14] ***HN23***[🡅] An "invitee" is "[a] person who has an express or implied invitation to enter or use another's premises, such as a business visitor or a member of the public to whom the premises are held open." Bryan A Garner, *Black's Law Dictionary* 846 (8th ed 1999).

Holdings, Inc., 354 Ore 132, 140-41, 309 P3d 1073 (2013); *Garrison v. Deschutes County*, 334 Ore 264, 272, 48 P3d 807 (2002) (business invitee rule is a "special duty"). As this court explained in *Woolston v. Wells*, 297 Ore 548, 557-58, 687 P2d 144 (1984):

> "In general, it is the duty of the possessor of land to make the premises reasonably safe for the invitee's visit. The possessor must exercise the standard of care above stated to discover conditions of the premises that create an unreasonable risk of harm to the invitee. The possessor must exercise that standard of care either to eliminate the condition [*564] creating that risk or to warn any foreseeable invitee of the risk so as to enable the invitee to avoid the harm."

Furthermore, a business operator's obligation to make its premises reasonably safe for its invitees includes taking into account [***38] the use to which the premises are put. *See, e.g., Ragnone v. Portland School Dist. No. 1J*, 291 Ore 617, 621 n 3, 633 P2d 1287 (1981) (so stating); *Mickel v. Haines Enterprises, Inc*., 240 Ore 369, 371-72, 400 P2d 518 (1965) (owner must "take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the premises.").

The legislature has statutorily modified those duties to some extent in the Skier Responsibility Law, ORS 30.970 to 30.990. Under ORS 30.975, skiers assume certain risks:

> ***HN24***[🡅] "In accordance with ORS 31.600 [pertaining to contributory negligence] and notwithstanding ORS 31.620 (2) [abolishing the doctrine of implied assumption of risk], an individual who engages in the sport of skiing, alpine or nordic, accepts and assumes the inherent risks of skiing insofar [**41] as they are reasonably obvious, expected or necessary."

ORS 30.970(1) describes "inherent risks of skiing":

> ***HN25***[🡅] "'Inherent risks of skiing' includes, but is not limited to, those dangers or conditions which are an integral part of the sport, such as changing weather conditions, variations or steepness in terrain, [***39] snow or ice

> conditions, surface or subsurface conditions, bare spots, creeks and gullies, forest growth, rocks, stumps, lift towers and other structures and their components, collisions with other skiers and a skier's failure to ski within the skier's own ability."

ORS 30.985 prescribes the duties of skiers, which generally deal with behaving safely while skiing.

HN26[⬆] By providing that a skier assumes the "inherent risks of skiing," ORS 30.975 reduced ski area operators' heightened common law duty to discover and guard against certain natural and inherent risks of harm. However, the Skier Responsibility Law did not abrogate the common-law principle that skiers do not assume responsibility for unreasonable conditions created by a ski area operator insofar as those conditions are not inherent to the activity. *See Nolan [*565] v. Mt. Bachelor, Inc*., 317 Ore 328, 336, 856 P2d 305 (1993) (Skier Responsibility Law provides that "[t]o the extent an injury is caused by an inherent risk of skiing, a skier will not recover against a ski area operator; to the extent an injury is a result of [ski area operator] negligence, comparative negligence applies"). It follows that the public policy underlying the common-law duty of a ski area operator to exercise reasonable care to avoid creating [***40] risks of harm to its business invitees remains applicable in this case.

In short, because (1) accepting as true the allegations in plaintiff's complaint, plaintiff would not have been injured if defendant had exercised reasonable care in designing, constructing, maintaining, or inspecting the jump on which he was injured; and (2) defendant, not its patrons, had the expertise and opportunity—indeed, the commonlaw duty—to foresee and avoid unreasonable risks of its own creation on its business premises, we conclude that the enforcement of the release would cause a harsh and inequitable result, a factor that militates against its enforcement.

To continue our analysis, we next consider whether defendant's business operation serves an important public interest or function. The parties sharply disagree about the importance of that factor to our resolution of this case. According to defendant, that factor is paramount here, because, as a matter of law, anticipatory releases of negligence liability are unenforceable only when a defendant provides an "essential" public service.

Although this court has not previously addressed that precise issue in the context of a release involving a recreational [***41] activity, other courts have done so. As defendant observes, courts in several jurisdictions that lack statutory prohibitions of anticipatory releases of liability for negligence have upheld such releases (at least in part) on the ground that the activity at issue did not involve an "essential" public service.[15] However, courts in other jurisdictions have [*566] taken the opposite approach, concluding that, regardless of whether the release involves an essential public service, anticipatory releases that immunize a party from the consequences of its own negligence can violate public policy or be unconscionable.

For example, in *Dalury v. S-K-I, Ltd.*, 164 Vt 329, 670 A2d 795 (1995), the Vermont Supreme Court rejected the argument that anticipatory releases of negligence liability necessarily are enforceable in the context of recreational activities because such activities are not essential. 670 A2d at 799. In that case, the plaintiff sustained serious injuries when he collided with a metal pole that formed part of the control maze for a ski-lift line. He brought a negligence action against [**42] the [***42] defendant ski area operator, alleging that it had negligently designed, built, and placed the maze pole. The trial court granted the defendant's motion for summary judgment based on an anticipatory release that the plaintiff had signed absolving the defendant of liability for negligence.

On appeal, the court noted that the release was conspicuous and unambiguous, but it nevertheless concluded that the release violated public policy. *Id*. at 797. The court began its analysis with the *Restatement (Second) of Torts* § 496B comment b, which states that an anticipatory release should be upheld if (1) it is freely and fairly made, (2) between parties who are in equal bargaining positions, and (3) there is no societal interest with which it interferes. *Dalury*, 670 A2d at

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[15] *See, e.g.*, *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 NW 2d 727 (Minn App 1986) (upholding an exculpatory agreement entered into between a skydiving operation and a patron); *Chepkevich v. Hidden Valley Resort*, 607 Pa 1, 2 A3d 1174 (2010) (skiing); *Pearce v. Utah Athletic Foundation*, 2008 UT 13, 179 P3d 760 (Utah 2008) (bobsledding); *Benedek v. PLC Santa Monica*, LLC, 104 Cal App 4th 1351, 129 Cal Rptr 2d 197 (2002) (health club); *Henderson v. Quest Expeditions, Inc.*, 174 SW3d 730, (Tenn Ct App 2005) (whitewater rafting).

797. The parties' dispute focused on the last issue. The defendant urged the court to conclude that, because skiing-like other recreational activities-is not a necessity of life, the sale of a lift ticket is a purely private transaction that implicates no public interest. The court concluded that "no single formula will reach the relevant public policy issues in every factual context." *Id*. at 798. Rather, the court stated that it would consider "the totality of the circumstances [***43] of any given case against the backdrop of current societal expectations." *Id*.

The court found a significant public policy consideration in the case in the law of premises liability; in particular, the court stated, business owners—including ski area operators—owe a duty of care to make their premises safe [*567] for patrons where their operations create a foreseeable risk of harm. *Id*. at 799. The court observed that

> "[d]efendants, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises, and train their employees in risk management. They alone can insure against risks and effectively spread the cost of insurance among their thousands of customers. Skiers, on the other hand, are not in a position to discover and correct risks of harm, and they cannot insure against the ski area's negligence.
>
> "If defendants were permitted to obtain broad waivers for their liability, an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries. * * * It is illogical, in these circumstances, to undermine the [***44] public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control."

Id.

Turning to the defendant's argument that the release was enforceable because ski resorts do not provide an essential public service, the court stated that, "[w]hile interference with an essential public service surely affects the public interest, those services do not represent the universe of activities that implicate public concerns." *Id*. The court held that, "when a facility becomes a place of public accommodation, it 'render[s] a service which has become of public interest in the manner of the innkeepers and common carriers of old.'" *Id*. at 799-800 (quoting *Lombard v. Louisiana*, 373 U.S. 267, 279, 83 S Ct 1122, 10 L Ed 2d 338 (1963)) (internal quotation marks omitted).

Finally, the court's analysis was informed by a statute that placed the "inherent risks" of any sport on the participant, insofar as the risks were obvious and necessary.[16] The court stated that "[a] ski area's own [*568] negligence * * * is neither an inherent risk nor an obvious and necessary one in the sport of skiing," and, therefore, "a skier's assumption of the inherent risks of skiing does not abrogate the ski area's duty to warn of or correct dangers which in the exercise of reasonable prudence in [***45] the circumstances could have been foreseen and corrected." [**43] *Dalury*, 670 A2d at 800 (internal quotation marks omitted).[17]

We, too, think that the fact that defendant does not provide an essential public service does not compel the conclusion that the release in this case must be enforced. As the court stated in *Dalury*, "[w]hile interference with an essential public service surely affects the public interest, those services do not represent the universe of activities that implicate public concerns." 670 A2d at 799. It is true that ski areas do not provide the kind of public service typically associated with government entities or heavily regulated private enterprises such as railroads, hospitals, or banks. *See Real Good Food*, 276 Ore at 1061 ("Banks, like common carriers and utility companies, perform an important public service, and, for that very reason, are subject to state and

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[16] Vermont Statutes Annotated title 12, section 1037, provides:

> "Notwithstanding the provisions of section 1036 of this title, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."

[17] For similar reasons, the Connecticut Supreme Court also has declined to enforce an anticipatory release of negligence liability in the face of the defendant's contention that recreational activities do not implicate the public interest. *Hanks v. Powder Ridge Restaurant Corp*., 276 Conn 314, 885 A2d 734 (2005). *Hanks* was a negligence action brought by a plaintiff who was injured when his foot was caught between his snowtube and the artificial bank of a snowtubing run at a ski resort operated by the defendant. The defendant relied on an anticipatory release that the plaintiff had signed that purported to absolve the defendant from liability for its negligence. The court acknowledged that the release was conspicuous and unambiguous, but ultimately agreed with the Vermont Supreme Court that determining what constitutes the public interest required consideration of all relevant circumstances, including that the plaintiff lacked sufficient knowledge and authority to discern [***46] whether, much less ensure that, the snowtubing runs were maintained in a reasonably safe condition. *Id*. at 331. Thus, the court held, "it is illogical to permit snowtubers, and the public generally, to bear the costs of risks that they have no ability or right to control." *Id*. at 332.

federal regulation."). However, like other places of public accommodation such as inns or public warehouses, defendant's business premises—including its terrain park—are open to the general public virtually without [***47] restriction, and large numbers of skiers and snowboarders regularly avail themselves of its facilities. To be sure, defendants' business facilities are privately owned, but that characteristic does [*569] not overcome a number of legitimate public interests concerning their operation.[18]

The major public interests at stake are those underlying the law of business premises liability. ***HN27***[🡅] The policy rationale is to place responsibility for negligently created conditions of business premises on those who own or control them, with the ultimate goal of mitigating the risk of injury-producing accidents. *Hagler*, 354 Ore at 140-41; *Garrison*, 334 Ore at 272. In that setting, where a business operator extends a general invitation [***48] to enter and engage in activities on its premises that is accepted by large numbers of the public, and those invitees are subject to risks of harm from conditions of the operator's creation, their safety is a matter of broad societal concern. *See Dalury*, 670 A2d at 799 ("[W]hen a substantial number of such sales take place as a result of the [operator's] general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises."). The public interest, therefore, is affected by the performance of the operator's private duties toward them. *See, e.g., Strawbridge v. Sugar Mountain Resort, Inc.*, 320 F Supp 2d 425, 433-34 (WD NC 2004) (holding, under North Carolina law, that "the ski industry is sufficiently regulated and tied to the public interest" to preclude enforcement of anticipatory release, based on the principle that "a party cannot protect himself by contract[ing] against liability for negligence * * * where * * * public interest is involved, or where public interest requires the performance of a private duty"). Accordingly, we reject defendant's argument that the fact that skiing and snowboarding are "non-essential"

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[18] Public accommodations laws that prohibit discrimination against potential users of the facility are just one example of limitations imposed by law that affect the use of defendant's premises. *See, e.g.*, ORS 447.220 (explaining purpose of ORS 447.210-280 to make places of public accommodation accessible to persons with disability); ORS 447.210 (defining public accommodation to include "places of recreation"); ORS 659A.403 (prohibiting discrimination in places of public accommodation); ORS 659A.400 (defining places of public accommodation for purposes of ORS 659A.403 to include places offering "amusements").

activities [**44] compels enforcement of the release in this case. Instead, we conclude that defendant's business operation is sufficiently tied [***49] to the public interest as to require the performance of its private duties to its patrons.

[*570] Finally, we consider the nature of the conduct to which the release would apply in this case. Defendant makes a fair point that, although the release purports to immunize it from liability for any misconduct short of intentional conduct, plaintiff's claim is based on ordinary negligence. Defendant notes that this court has held that ***HN28***[🡅] an anticipatory release violates public policy where it purports to immunize the releasee from liability for gross negligence, reckless, or intentional conduct, but a release that disclaims liability only for ordinary negligence more often is enforced. *K-Lines*, 273 Ore at 249. That statement is correct as a general comment on the validity of anticipatory releases, but, of course, whether any particular release will be enforced depends on the various factors that we discuss in this opinion. In the circumstances of this transaction, the fact that plaintiff's claim is based on negligence rather than on more egregious conduct carries less weight than the other substantive factors that we have considered or than it would, for example, in a commercial transaction between parties of relatively [***50] equal bargaining power.[19]

SUMMARY AND APPLICATION

To summarize, our analysis leads to the conclusion that permitting defendant to exculpate itself from its own negligence would be unconscionable. As discussed, important procedural factors supporting that conclusion include the substantial disparity in the parties' bargaining power in the particular circumstances of this consumer transaction, and the fact that the release was offered to plaintiff and defendant's other customers on a take-it-or-leave-it basis.

There also are indications that the release is substantively unfair and oppressive. First, a harsh and inequitable result would follow if defendant were immunized from negligence liability, in light of (1) defendant's superior ability to guard against the risk of harm to its

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[19] Defendant does not contend that the release would be enforceable against a claim based on alleged gross negligence or reckless conduct.

patrons arising from its own negligence in designing, creating, and maintaining its runs, slopes, jumps, and other facilities; and (2) defendant's superior ability to absorb and spread the costs associated with insuring against those risks. Second, because [*571] defendant's business premises [***51] are open to the general public virtually without restriction, large numbers of skiers and snowboarders regularly avail themselves of its facilities, and those patrons are subject to risks of harm from conditions on the premises of defendant's creation, the safety of those patrons is a matter of broad societal concern. The public interest, therefore, is affected by the performance of defendant's private duties toward them under business premises liability law.

In the ultimate step of our unconscionability analysis, we consider whether those procedural and substantive considerations outweigh defendant's interest in enforcing the release at issue here. *Restatement (Second) of Contracts* § 178 comment b (***HN29***[↑] "[A] decision as to enforceability is reached only after a careful balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms."). Defendant argues that, in light of the inherent risks of skiing, it is neither unfair nor oppressive for a ski area operator to insist on a release from liability for its own negligence. As defendant explains,

> "[W]hen the plaintiff undertook this activity, he exposed himself [***52] to a high risk of injury. Only he controlled his speed, course, angle, 'pop' and the difficulty of his aerial maneuver. Skiing and snowboarding requires [*sic*] the skier to exercise appropriate caution and good judgment. Sometimes, even despite the exercise of due care, accidents and injuries occur."

Further, defendant contends, denying enforcement of such a release

> [**45] "improperly elevates premises liability tort law above the freedom to contract, fails to take into account the countervailing policy interest of providing recreational opportunities to the public, fails to recognize that certain recreational activities are inherently dangerous and fails to consider the fact that the ski area operator has little, if any, control over the

skier/snowboarder."

Defendant's arguments have some force. After all, skiing and snow boarding are activities whose allure and risks derive from a unique blend of factors that include natural features, artificial constructs, and human engagement. [*572] It may be difficult in such circumstances to untangle the causal forces that lead to an injury-producing accident. Moreover, defendant is correct that several relevant factors weigh in favor of enforcing the release. [***53] As discussed, the release was conspicuous and unambiguous, defendant's alleged misconduct in this case was negligence, not more egregious conduct, and snowboarding is not a necessity of life.

That said, the release is very broad; it applies on its face to a multitude of conditions and risks, many of which (such as riding on a chairlift) leave defendant's patrons vulnerable to risks of harm of defendant's creation. Accepting as true the allegations in plaintiff's complaint, defendant designed, created, and maintained artificial constructs, including the jump on which plaintiff was injured.[20] Even in the context of expert snowboarding in defendant's terrain park, defendant was in a better position than its invitees to guard against risks of harm created by its own conduct.

A final point deserves mention. It is axiomatic that ***HN30***[⬆] public policy favors the deterrence of negligent conduct. [***54] 2 *Farnsworth on Contracts* § 5.2, 9-12 ("[i]n precedents accumulated over centuries," courts have relied on policy "against the commission or inducement of torts and similar wrongs"). Although that policy of deterrence has implications in any case involving the enforceability of an anticipatory release of negligence liability, here, that policy bolsters the other considerations that weigh against enforcement of the release. As the parties readily agree, the activities at issue in this case involve considerable risks to life and limb. Skiers and snowboarders have important legal inducements to exercise reasonable care for their own safety by virtue of their statutory assumption of the inherent risks of skiing. By contrast, without potential exposure to liability

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[20] We reiterate that the issues of whether defendant actually was negligent in one or more of the particulars alleged by plaintiff, whether and the extent to which plaintiff was comparatively negligent, and the extent to which either party's negligence actually caused plaintiff's injuries, are not before us on review.

for their own negligence, ski area operators would lack a commensurate legal incentive to avoid creating unreasonable risks of harm to their business invitees. *See Alabama Great Southern Railroad Co. v. Sumter Plywood Corp.*, 359 So 2d 1140, 1145 [*573] (Ala 1978) (human experience shows that exculpatory agreements induce a lack of care). Where, as here, members of the public are invited to participate without restriction in risky activities on defendant's business premises (and many do), and where the risks of harm posed by operator negligence [***55] are appreciable, such an imbalance in legal incentives is not conducive to the public interest.

Because the factors favoring enforcement of the release are outweighed by the countervailing considerations that we have identified, we conclude that enforcement of the release at issue in this case would be unconscionable.[21] And, because the release is unenforceable, genuine issues of fact exist that preclude summary judgment in defendant's [**46] favor. It follows that the trial court erred in granting defendant's motion for summary judgment and in denying plaintiff's cross-motion for partial summary judgment, and that the Court of Appeals erred in affirming the judgment dismissing plaintiff's action.

The decision of the Court of Appeals is reversed. The judgment of the trial court is reversed and the case is remanded to that court for further proceedings.

End of Document

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[21] By so concluding, we do not mean to suggest that a business owner or operator never may enforce an anticipatory release or limitation of negligence liability from its invitees. As explained, multiple factors may affect the analysis, including, among others, whether a legally significant disparity in the parties' bargaining power existed that made the release or limitation unfairly adhesive, whether the owner/operator permitted a patron to pay additional reasonable fees to obtain protection against negligence, [***56] the extent to which the business operation is tied to the public interest, including whether the business is open to and serves large numbers of the general public without restriction, and the degree to which the personal safety of the invitee is subjected to the risk of carelessness by the owner/ operator.

Dispute Resolution Enhanced: How Arbitrators and Mediators Can Harness Generative AI

David L. Evans, Stacy Guillon, Ralph Losey, Valdemar Washington, and Laurel G. Yancey[1]

Introduction[2]

The legal world has been buzzing with discussions about the potentials of artificial intelligence (AI), especially in its aid to advocates. However, a significant yet less discussed transformation is unfolding within the offices of arbitrators and mediators. This article, penned by the AI Working Group assembled by the American Arbitration Association (AAA), seeks to shine a light on this nuanced application of AI technology in the world of neutral decision-making and alternative dispute resolution (ADR). The authors are arbitrators serving on AAA's panels, and we have collectively put these tools to use in arbitrations and mediations, both as neutrals and as advocates.

While fears and speculations abound regarding AI's potential to replace human judgment, our current perspective is not about replacement, but rather enhancement. For the arbitrator and mediator, generative AI stands as a promising tool to enhance efficiency, offer deeper insights, and provide a level of precision previously unattainable.

This article begins with an examination of contemporary applications for generative AI within the domain of arbitration and mediation, identifying specific purposes for which neutrals can use this technology to benefit the parties before them. We also

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[1] Together with AAA staff members, the authors, who are all AAA panelists, comprise AAA's AI Working Group. The content of this article was finalized in early November 2023.

[2] In the spirit of our exploration, we used ChatGPT-4 to assist us in drafting this article's title, introduction, and conclusion, exemplifying the very blend of human expertise and machine capabilities we discuss in this article.

compare various AI tools' effectiveness at these tasks. While OpenAI's ChatGPT may be the most widely recognized generative AI platform, there are others, including some that have been tailored for the legal industry. Then, we transition to prospective applications, offering insights into potential future developments in this intersection of technology and dispute resolution.

Current Uses

Large language models (LLMs) represent a remarkable advancement in the realm of generative AI. These models are trained on vast and diverse data sets sourced from a wide array of materials, including books, images, and web content. LLMs, such as the generative pre-trained transformers (GPT), serve as the foundation for platforms like ChatGPT and Anthropic's Claude. Generative AI's Natural Language Processing capacity means it can "understand," interpret, and generate human language at an advanced level. Its level of "understanding" can be quite deep; it can identify patterns, relationships, and anomalies within document training sets. And, importantly, AI can perform those tasks at a herculean scale within a matter of minutes (or less).

1. Document Analysis and Comparison

a. Document Analysis Applications

Like most legal work, arbitrations and mediations can be document intensive, which creates enormous opportunities to use LLMs. Here, we offer a few ways in which arbitrators and mediators can use AI to improve the quality and efficiency of their work.[3]

Search and Index: At the most basic level—perhaps offering an ideal entry point for AI newbies—neutrals can use this feature to answer substantive questions about a large document set's contents. Because AI retrieves relevant content based on meaning, it is far more effective than a tool that simply finds exact word

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[3] We are not addressing the separate issues of disclosure or independence associated with the use of AI by neutrals. We are identifying use cases.

matches. For example, in preparing for a hearing, an arbitrator could upload the case documents and ask AI to comb them all for a particular fact. Some AI tools, as we discuss in more detail below, link directly to their sources within the document set, directing the neutral to the relevant page(s), so she can read the information firsthand. These tools will even compile the basis for their answers from various sources when the subject matter has been addressed in multiple exhibits and filings. AI's speed allows a neutral to use these tools in real time; for instance, by typing in a question raised about an expert's report during a hearing to navigate directly to the responsive section rather than flipping through pages or having to pause the hearing to ask for page numbers.

Compare Content: These tools can also analyze the similarities and differences between positions taken in various documents. An arbitrator could prompt the tool to identify evidentiary inconsistencies across multiple deposition transcripts, or a mediator could prepare for a session by asking the tool to identify the parties' overlapping interests.

Contract Review: Some AI platforms have been specially trained to analyze contracts. With these tools, neutrals can home in on contract provisions that govern the dispute resolution process, even if that text is scattered throughout the contract.

Summarize: AI tools can summarize documents with varying levels of detail. Neutrals can put this to use to create outlines that guide neutrals to key sections without requiring them to spend (and bill) time digging through extraneous text. For instance, a mediator could generate a detailed summary of a preliminary injunction hearing transcript to grasp efficiently the procedural history of the case. Or, where counsel have pointed to excerpts of a deposition, an arbitrator could generate a comprehensive summary of the full deposition transcript to direct him to additional sections he should read before deciding a substantive motion.

Timeline Generation: During an arbitration hearing or a mediation, many neutrals like to refer to timelines. When counsel did not provide them, we used to have to manually identify, compile, and order the various dates. But, after reviewing the entire document set, AI can digest that information for us and generate a timeline of the case's events.

b. Platform Comparison: Document Summary

This section compares query results from the Generative AI models Casetext's CoCounsel,[4] Anthropic's Claude Pro,[5] and OpenAI's ChatGPT-4.[6]

First, we compare CoCounsel's and Claude's summaries of the proposed "Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act" or "The RESTRICT Act."[7] Then, we compare CoCounsel's and ChatGPT-4's summaries of an Intellectual Property Cross-License Agreement.

i. CoCounsel vs. Claude: Summarizing

1) CoCounsel Summary—The RESTRICT Act

CoCounsel acts as an AI legal assistant and has been identified as a generative AI model currently used in arbitration.[8] From the CoCounsel Skills options, the Summarize Skill was chosen. As shown in the screenshot below, the skill generates three levels of detail: (1) Brief Summary (High level overview of document in 1-3 paragraphs), (2) Detailed Summary (Multi-page detailed summary that includes all important information from the documents), or (3) Comprehensive Summary (Page by page summary of the document, for comprehensive overview). The Comprehensive Summary was chosen.

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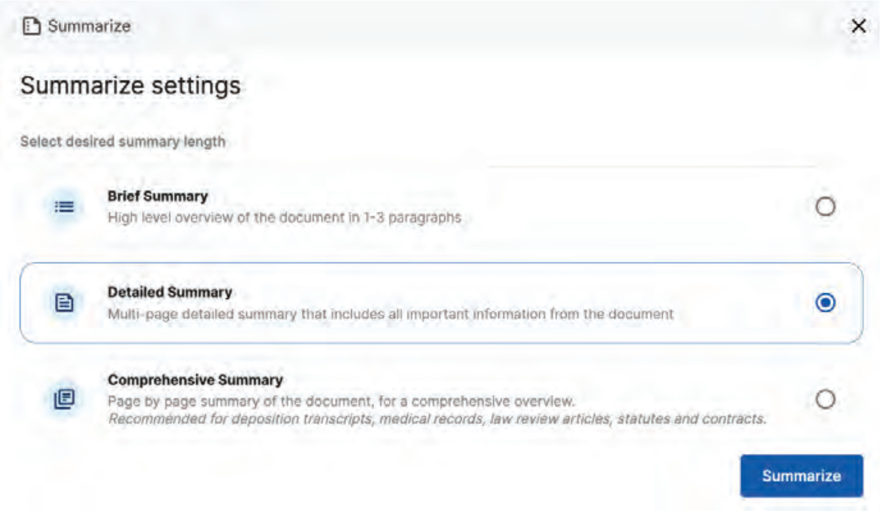
[4] Casetext's CoCounsel 2.0 Beta, October 2023 version, https://casetext.com/v2/cocounsel. Casetext provided AAA's AI Working Group, including the authors of this report, CoCounsel subscriptions in conjunction with our exploration of using AI in arbitrations and mediations.

[5] Anthropic's Claude Pro, October 2023 version, https://claude.ai.

[6] OpenAI's ChatGPT-4 Pro, October 2023 version, https://chat.openai.com.

[7] The RESTRICT Act, S.686, available at www.congress.gov/118/bills/s686/BILLS-118s686is.pdf.

[8] Andrea Seet et al., *Arbitration Tech Toolbox: Looking Beyond the Black Box of AI in Disputes Over AI's Use*, Kluwer Arbitration Blog, May 25, 2023, arbitrationblog.kluwerarbitration.com/2023/05/25/arbitration-tech-toolbox-looking-beyond-the-black-box-of-ai-in-disputes-over-ais-use/.



Summarize settings

Select desired summary length

○ **Brief Summary**
High level overview of the document in 1-3 paragraphs

● **Detailed Summary**
Multi-page detailed summary that includes all important information from the document

○ **Comprehensive Summary**
Page by page summary of the document, for a comprehensive overview.
Recommended for deposition transcripts, medical records, law review articles, statutes and contracts.

CoCounsel produced a 16-page Comprehensive Summary report of The RESTRICT Act, a 55-page document. The Comprehensive Summary listed pages 1 to 55 with each page providing defined key items in three to four bulleted paragraphs.

Key points excerpted from the summary:

- The bill, S. 686, would authorize the Secretary of Commerce to review and prohibit certain transactions between the U.S. and foreign adversaries.
- The bill further clarifies the definition of "covered transaction" to include current, past, or potential future transactions.
- The bill also defines "entity" broadly to include a variety of organizations, such as firms, governments, labor unions, and corporations.
- The bill defines "holding" as an equity interest, stock, security, share, partnership interest, interest in a limited liability company, membership interest, or any participation, right, or other equivalent.
- The bill defines "information and communications technology products or services" as any hardware, software, or other product or service that enables information or data processing, storage, retrieval, or communication.
- The bill defines "transaction" broadly, encompassing any acquisition, importation, transfer, installation, dealing in,

or use of any information and communications technology (ICT) product or service.

- The document also outlines civil forfeiture procedures, which allow for the seizure and forfeiture of any property used to commit or facilitate a violation, as well as any proceeds from the violation.
- The document outlines criminal forfeiture procedures, which include the forfeiture of any property used to commit or facilitate a violation, as well as any proceeds from the violation.

2) Claude Summary—The RESTRICT Act

When prompted to summarize the Act and report results, Claude produced a one-and-one-half-page summary.

Key points excerpted from the summary:

> The Restrict Act is a proposed bill that would authorize the Secretary of Commerce to review and prohibit certain transactions between persons in the United States and foreign adversaries that pose risks to US national security. Some key points:
>
> - It defines "covered transactions" broadly to include any transactions with foreign adversaries that could pose national security risks. This includes China, Russia, Iran, North Korea, Cuba, and Venezuela.
> - The Secretary of Commerce can prohibit or impose mitigation measures on covered transactions that pose undue risks. This includes risks of sabotage, effects on critical infrastructure, election interference, or other national security risks.
> - The Secretary can also identify "covered holdings"—controlling holdings in ICT companies by foreign adversaries—that pose risks and refer them to the President for potential divestment or other mitigation measures.
> - The bill establishes procedures for reviews, enforcement, and judicial oversight of the Secretary's prohibitions or mitigation measures. However, the scope of judicial review is limited.
> - It aims to address national security risks from foreign ownership and control of ICT and critical

> infrastructure companies. The goal is to authorize stricter prohibitions and divestment requirements for covered transactions and holdings.
>
> In summary, The Restrict Act would significantly expand the government's ability to block or mitigate foreign investment in US ICT companies that is deemed to pose national security risks. It reflects broader concerns about foreign influence in critical technology sectors.

3) Observations about CoCounsel's and Claude's Summary Functions

Both CoCounsel and Claude summarized the provisions of The RESTRICT Act, underscoring salient points applicable to proposed prohibitions on certain transactions. Each model reported results with efficiency. The speed of results from the Claude model was quicker than that of CoCounsel. The difference may be attributed to the selection of the CoCounsel Comprehensive Summary skill that reports an extensive page-by-page summary of the document for a comprehensive overview. Regardless of the speed of output, both generative AI models produced results that would inform neutrals and enhance their specialized expertise, where stakeholders identify that "specialized/expert decision-making" is a top benefit of arbitration.[9]

The CoCounsel report outlined in more specific detail the terms, requirements, and sanctions of The RESTRICT Act as those sections relate to information and communications technology products and services transactions. The proposed sanctions are relevant to the efficacy of arbitral processes. "Increasingly, US sanctions are giving rise to commercial disputes (many of which are subject to mandatory arbitration agreements) and even beginning to interfere with the smooth functioning of ongoing arbitration proceedings."[10]

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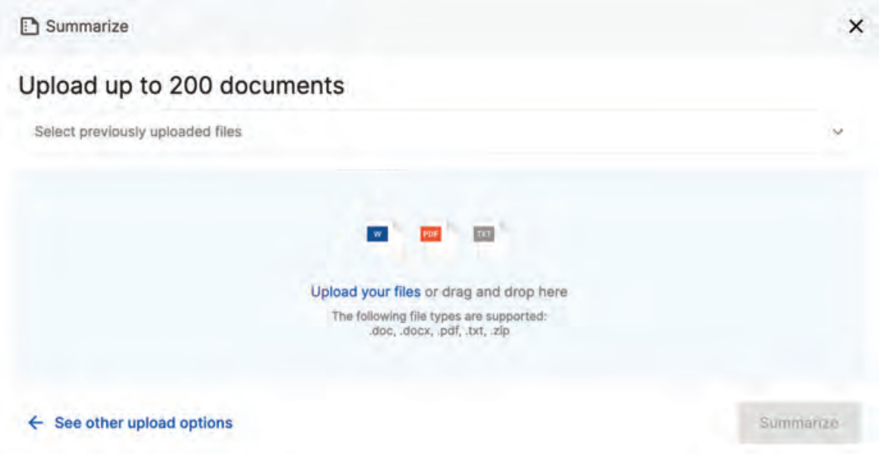
[9] Gary Benton et al., *Cost Is the Top Tech Litigation Problem, Survey Shows*, Silicon Valley Arbitration and Mediation Center, 2017, svamc.org/wp-content/uploads/SVAMC-2017-Survey-Report.pdf.

[10] Anton A. Ware and Soo Mi Rhee, *United States: Economic Sanctions And Arbitration: Are We Ready?*, Mondaq, May 3, 2022, www.mondaq.com/unitedstates/export-controls-trade-investment-sanctions/1189170/economic-sanctions-and-arbitration-are-we-ready.

ii. CoCounsel vs. ChatGPT-4: Summarizing and Analyzing

Here, we compare the abilities of CoCounsel and ChatGPT-4 when prompted to summarize and analyze a complex 15-page document, “Intellectual Property Cross-License Agreement,”[11] dated June 30, 2023, which was selected at random for the test from the Edgar Archives.

The upload process for CoCounsel was simple and straightforward, unlike the upload process for ChatGPT-4, which was difficult and complex. OpenAI is working on that, but as of October 2023, they still have a long way to go. Here is a screenshot of the CoCounsel upload page. As you can see, they make it very easy.



Upload up to 200 documents

Upload your files or drag and drop here

The following file types are supported:
.doc, .docx, .pdf, .txt, .zip

We started by asking both CoCounsel and ChatGPT-4 to prepare a detailed summary of the License Agreement. As described above, the CoCounsel software offers a choice between a brief, detailed, or comprehensive summary of a document. ChatGPT-4 does not have such guidance, or limitation, depending how you look at it. You can ask anything about a document, once you finally get it uploaded.

Both AIs provided a good, detailed summary, but, in actuality, that was not too helpful for this document. We could skim the standard terms and conditions of the document manually in the same time and learn as much. It was mostly familiar boilerplate that we had seen many times before.

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[11] https://www.sec.gov/Archives/edgar/data/908255/000110465923079180/tm2320751d1_ex10-4.htm.

A shorter summary of a document would be more helpful for a busy attorney or arbitrator. So next we asked CoCounsel for a Brief Summary. Here is the result:

> This document is an Intellectual Property Cross-License Agreement between four companies. It defines key terms such as “Intellectual Property,” “Licensed IP,” “Licensee,” “SpinCo Field,” and “SpinCo Licensed IP.” The agreement outlines the license grants to SpinCo Licensee and Parent Licensee, as well as the rights and restrictions related to sublicensing, reservation of rights, and assignment of licensed IP. It also addresses intellectual property ownership, the prohibition against challenging ownership, and the prosecution, maintenance, and enforcement of intellectual property rights. The agreement covers confidentiality, disclaimers of warranties, limitations of liability, and indemnification. It also outlines the term and termination of the agreement, and contains miscellaneous provisions such as the entire agreement clause, third-party beneficiaries, and notices.

We also prompted ChatGPT-4 for a brief summary. Here is the result:

> The document is an “Intellectual Property Cross-License Agreement” dated June 30, 2023, involving multiple parties: BORGWARNER INC., DELPHI TECHNOLOGIES IP LIMITED, PHINIA TECHNOLOGIES, INC., and BORGWARNER LUXEMBOURG OPERATIONS S.A.R.L.
>
> Key highlights:
>
> 1. **Definitions**: The agreement meticulously defines key terms such as “Affiliate,” “Confidential Information,” “Intellectual Property,” “Licensee,” and “Licensor,” among others.
> 2. **License Grants**: Both Parent Licensors and SpinCo Licensors grant nonexclusive, perpetual, nontransferable, sublicensable, worldwide, royalty-free licenses to operate in specific fields. The licenses are also bound by certain limitations.
> 3. **Sublicensing**: The agreement permits sublicensing under stringent conditions, including the protection of Confidential Information.

> 4. **Indemnification**: Both Parent and SpinCo parties are obligated to indemnify each other against losses arising from breaches of the agreement.
> 5. **Miscellaneous Provisions**: This section serves as a catch-all for various legal and procedural elements, including the entire agreement clause, third-party beneficiaries, and notices.
> 6. **Interlocking with Separation Agreement**: The document also refers to a separate "Separation Agreement," and in the event of any conflict, the terms of this IP License Agreement will control.
>
> The document is a comprehensive legal framework that outlines the scope, limitations, and responsibilities associated with intellectual property licensing between the involved parties. It also integrates terms from a separate "Separation Agreement," making it a complex, interlocking legal document.
>
> Would you like to delve into any other aspects?

The summary by ChatGPT-4 provided more information, but was still concise. We would give the edge this time to ChatGPT-4 over CoCounsel. Still, we do not think short summaries like this have much value for experienced practitioners, except perhaps for client consumption. Anyone with expertise in license agreements could dispense with this summary and jump right into the analysis—in the form of Q&A—about terms of the agreement of interest. Here, the AI summary and analysis abilities can be of real help.

To ask good questions, we needed to know more about the overall deal. We saw the license agreement was part of a larger corporate spin-off by BorgWarner.[12] A quick Google search led to a business article with practical insights into the deal,[13] which is the kind of information a lawyer and client would probably already

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[12] The license agreement was part of SEC Form 10-12B, Filing Date: 2023-05-18, found at http://pdf.secdatabase.com/536/0001628280-23-018828.pdf. This *Intellectual Property Cross-License Agreement* is Exhibit 10.4 to the 10-12B Registration disclosure, and is found at http://pdf.secdatabase.com/536/0001628280-23-018828.pdf#%5B%7B%22num%22%3A307%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C0%2C751%2C0%5D.

[13] *PHINIA Spin-Off Deep Dive* (Stock Spin-Off Investing, 6/30/23), https://stockspinoffinvesting.com/spin-offs/phinia-spin-off-deep-dive/.

have as a background to begin asking questions about a document. We wanted our Q&A to be as realistic as possible. The article on the Phinia deal stated:

> **BorgWarner (BWA)** will spin-off [sic] **PHINIA (PHIN),** its Fuel Systems and Aftermarket segments, by the end of the day on July 3, 2023. . . . To put it simply, the rationale for the spin-off is to shed exposure to internal combustion engines and increase exposure to electric vehicles. Borgwarner is on track to meet or exceed its will spin-off goal of 25% of revenue from EV by 2025 . . . . PHINIA end markets are perceived to be in secular decline.

With that background information, we could ask CoCounsel a useful test question, one that a practitioner might want to know in a transaction like this: "What information is specifically excluded from this assignment?" Here is the response.

> **Trademarks, power electronics, improvements**
>
> The document specifically excludes trademarks, service marks, trade dress, trade names, domain names, social media accounts or usernames, or other indicia of source or origin from the definition of "Intellectual Property" (pgs. 5,7), as well as power electronics applications for any electrified stationary applications or electrified mobility applications (pgs. 5,7). Additionally, improvements to the Licensed Parent IP or the Licensed SpinCo IP are not granted as part of this agreement (pg. 11), and any prior agreements or undertakings are superseded by this agreement (pg. 16).

We asked the same question of ChatGPT and received the following response.

> The document contains several provisions that specify what is explicitly excluded or limited within the scope of the agreement. Here are some key points:
>
> 1. Third-Party Rights: The terms and conditions of the IP License Agreement, including the licenses granted, are subject to any and all rights of and obligations owed to any third parties with respect to the Licensed IP under any contracts (Page 10-11).

> 2. No Other Rights or Obligations: Except as expressly set forth in the agreement, no right or license is granted, whether by implication, estoppel, or otherwise, under any intellectual property rights that any party or any of their affiliates may have (Page 11).
> 3. Limitation of Liability: Neither party nor any of its affiliates will be liable for any consequential, incidental, indirect, exemplary, special, punitive, or enhanced damages, or for any loss of actual or anticipated profits (Page 13-14).
> 4. Provision of Information: The agreement specifies that no licensor or its affiliates are required to provide any written, electronic, computerized, digital, or other tangible or intangible media that has already been provided to, or is in the possession of, the licensee or its affiliates (Page 10-11).
> 5. Assignment of Licensed IP: Any assignment of Licensed IP will include a transfer of any applicable license and similar contractual rights or permissions granted to the applicable licensee in this IP License Agreement (Page 10).
> 6. Relationship of the Parties: The agreement states that nothing contained creates any agency, partnership, joint venture, or other forms of joint enterprise, employment, or fiduciary relationship between the parties (Page 17-18).
>
> These exclusions and limitations are crucial for understanding the scope and boundaries of the agreement, as they delineate the responsibilities and liabilities of each party involved. Would you like to delve into any other aspects?

Again, although both responses were good, and both provided references to the agreement page numbers, we thought ChatGPT-4's response was more useful.

Finally, we asked what we thought was a key question for this deal, "Are hybrid vehicle parts covered by this agreement?"

CoCounsel's response:

> No.
>
> Hybrid vehicle parts are likely not covered by the agreement, as the agreement specifically excludes power electronics applications for any electrified mobility applications, which would include hybrid vehicles (pg. 7).

ChatGPT's response to the same question:

> The document explicitly states that power electronics applications for any electrified stationary applications or electrified mobility applications, including any hybrid vehicles, are excluded from the SpinCo Field (Page 7).
>
> In essence, hybrid vehicle parts are not covered by this Intellectual Property Cross-License Agreement. This exclusion is significant as it delineates the scope of the agreement and clarifies that the licensing does not extend to hybrid vehicle technologies.
>
> Would you like to explore further?

Again, we preferred ChatGPT-4's answer, as it was more complete. Moreover, it did not qualify its answer to this straightforward question with the phrase "*likely* not covered."

Overall, both CoCounsel and ChatGPT-4 perform admirably well in summarizing documents and providing analysis.

iii. A Note About Privacy

As using the document summary and analysis function of any of these tools involves uploading information, we want to address concerns about privacy. All three systems purport to protect the confidentiality of all documents submitted for analysis.

We are aware of many misconceptions that the paid version of ChatGPT offers no privacy protections, and we suspect those stem in part from conflating the free version of ChatGPT-3.5 and ChatGPT-4. Even in ChatGPT-4, however, the data control settings are off by default and must be turned on manually. Once enabled, the privacy settings purport to provide for the auto-destruction of all information after 30 days and allow OpenAI to use the information only "when needed to monitor for abuse."[14] When history is turned

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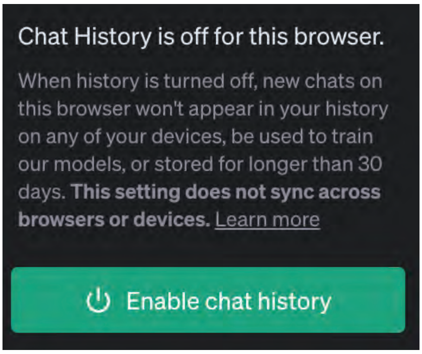
[14] Joshua J., *Data Controls FAQ*, OpenAI, help.openai.com/en/articles/7730893-data-controls-faq.

off, as it should be for any legal work, you will see this notice in the upper left corner of your browser screen.



Chat History is off for this browser.

When history is turned off, new chats on this browser won't appear in your history on any of your devices, be used to train our models, or stored for longer than 30 days. **This setting does not sync across browsers or devices.** Learn more

CoCounsel has privacy automatically engaged. According to Casetext, data input into CoCounsel is "never used to train the AI model. The model is accessed through dedicated, secure servers. Data is encrypted in transit and at rest, and never stored by our AI partner. Clients retain all rights to their data. Your data is only used by Casetext to serve the product to your users."[15]

Anthropic reports that Claude will only "use your prompts and conversations" if you give explicit permission, if they are "flagged for trust and safety review," or "to improve [Claude's] ability to detect and enforce Acceptable Use Policy violations, including to train Trust and Safety classifiers in order to make our services safer."[16] Anthropic also "retains your personal data for as long as reasonably necessary for the purposes and criteria outlined in our Privacy Policy."[17]

Before uploading confidential data, we urge users to look into the privacy protections of the platform. We would not use any of these programs to summarize and ask questions about classified documents. But, for more standard confidential case documents, there are generative AI tools available that can satisfy many

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[15] *CoCounsel, the First Legal Assistant: Security Overview*, provided directly to the authors on May 9, 2023.

[16] *I would like to input sensitive data into Claude Pro. Who can view my conversations?*, ANTHROPIC, support.anthropic.com/en/articles/8325621-i-would-like-to-input-sensitive-data-into-claude-pro-who-can-view-my-conversations.

[17] *How long do you store personal data?*, ANTHROPIC, support.anthropic.com/en/articles/7996866-how-long-do-you-store-personal-data.

arbitrators' and mediators' privacy needs, especially when appropriate disclosures are made in advance.

2. Research

a. Research Applications

LLMs excel in combing and analyzing large quantities of data quickly—which, in the internet age, is the very essence of legal and factual research. Often, independent research is not a significant part of a neutral's work, including because it is often not economical. When used prudently, AI helps solve that problem.

Although computerized legal research tools have assisted with legal research for years, generative AI is indeed a game changer. For example, AI's concept-based search produces more thorough and often more targeted results than platforms that do only a search for specified keywords. The user can ask an initial question and follow-up questions, allowing her to engage in a conversation with the bot in the same way she would a law firm associate, honing the query as the thinking progresses.

For example, neutrals can use AI's research function to explore the law on a particular topic in preparation for a mediation, as the parties' mediation memoranda often do not brief all legal issues in detail. Where appropriate,[18] arbitrators can review the legal contentions made in arbitration filings. And, though likely precluded in arbitrations,[19] mediators can also use generative AI to verify the accuracy of claims or facts presented when publicly available information can be used to do so.

b. Platform Comparison: Legal Research

LLMs started off with something of a bad name in the context of legal research. Not only has there been prolific news coverage of the *Roberto Mata v. Avianca Inc.* lawyer's reliance on fake cases,[20] judges and others have expressed skepticism about the careless

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[18] For purposes of this paper, the authors take no position on whether an arbitrator should or may conduct independent legal research.

[19] *See, e.g.*, American Arbitration Association Commercial Rule 36.

[20] Brandon Kimura, *ChatGPT Ethics Case Summary*, Blawg 401, August 11, 2023, blawg401.com/chatgpt-ethics-case-summary/#:~:text=One%20of%20the%20first%20cases,The%20plaintiff%2C%20Mr.

use of AI in litigation, while in general still encouraging its use.[21] However, different AI platforms offer different guardrails relevant to legal research, including to reduce hallucinations.[22] This section compares ChatGPT-4's, Claude's, and CoCounsel's legal research functions.

i. ChatGPT-4's Legal Research

As the *Avianca* filing exemplifies, ChatGPT-3's answers to legal research questions, in these authors' experience, often contained citations to and quotes from cases that the software had fabricated (hallucinated).

ChatGPT-4 has been updated to disclose its own limitations. For example, in response to the prompt "Which First Circuit cases address circulation of religious images in public schools?," ChatGPT-4 responded:

> As of my last training data in January 2022, I cannot provide an exhaustive or up-to-date list of all First Circuit cases specifically addressing the circulation of religious images in public schools. The First Circuit, like other federal appellate courts, has certainly addressed First Amendment issues in the public school context.
>
> If you are specifically interested in cases from the First Circuit on this topic, it would be best to consult a legal database like Westlaw or LexisNexis. These databases provide up-to-date and specific case law on such nuanced topics. Alternatively, reaching out to a legal professional or scholar familiar with First Amendment issues in the First Circuit might provide more detailed insights.
>
> Remember, case law evolves, and new decisions can impact interpretations and precedents. Always ensure that the information you're using is current and relevant to your specific context.

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[21] *See, e.g.*, retired Judge Ralph Artigliere, *Ethical Guideposts for Lawyers Using Generative AI*, EDRM, Oct. 31, 2023, edrm.net/2023/10/ethical-ai-guideposts-for-lawyers-using-generative-ai/ (describing the Florida Bar's proposal to regulate attorneys' use of generative Ai in a case).

[22] Cade Metz, *Chatbots May "Hallucinate" More Often Than Many Realize*, New York Times, November 6, 2023.

When we framed the question differently,[23] however, ChatGPT-4 did perform legal research. In response to the prompt "Can New Hampshire public schools circulate religious imagery?," GPT-4 offered a substantive response:

> Public schools in the United States, including those in New Hampshire, are subject to the Establishment Clause of the First Amendment, which has been interpreted to mean that schools may not promote or endorse any particular religion. The Supreme Court has ruled that public schools cannot sponsor religious activities or symbolism because they are government institutions.
>
> Circulating religious imagery, if it is part of a curriculum that is educational and not devotional in nature, such as in a world religions or art history class, might be permissible as long as it is presented in an objective, non-proselytizing manner. However, using religious imagery in a way that could be seen as promoting or endorsing a particular religion would likely be unconstitutional.
>
> The precise legal boundaries can sometimes be complex and subject to interpretation, and local school policies may also provide additional guidance on these matters. It's often best for school administrators to consult with legal counsel to ensure that they comply with the relevant constitutional and statutory requirements.

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[23] If AI tools are adopted, training on how to properly construct prompts/queries and how to evaluate any results is necessary. Akin to Boolean searches that require some knowledge of how to construct a "good" search, AI tools require "good" prompts. One advantage of generative AI prompts and responses is that the tool has "thread" conversations. A person can ask clarifying questions. Users can ask the AI tool to clarify previous responses or ask the AI tool to customize the tone or persona of the response. Training on compliance with confidentiality concerns, as well as considerations involving bias is recommended. *See* Hon. Xavier Rodriquez, *Artificial Intelligence (AI) and the Practice of Law*, 24 Sedona Conf. 783 at 817-18 (Sept. 2023), https://thesedonaconference.org/sites/default/files/announcements/Artificial-Intelligence-and-the-Practice-of-Law-Xavier-Rodriguez_1.pdf. Jus Mundi offers training to arbitrators to educate themselves on how the tool works and its features, including Jus-AI. Part of the training includes the limitations of the tool and its benefits. *See AI in Arbitration: Insights from Jus-AI's Creators*, Daily Jus, July 20, 2023, daily.jusconnect.com/in-conversation-with/2023/07/ai-in-arbitration-insights-from-jus-ais-creators.

When we asked for the cases that informed ChatGPT-4's answer, it identified and very cursorily described six of the United States Supreme Court's Establishment Clause cases[24] but then wrote, "If you need details or have a specific situation in mind, consulting legal experts or reviewing recent court decisions would be valuable."

ii. Claude's Legal Research

> *User Prompt*: "Can New Hampshire public schools circulate religious imagery?"
>
> *Response*:
>
> I do not have enough context to definitively answer whether public schools in New Hampshire can circulate religious imagery. However, I can provide some general information about the legality of religious imagery in U.S. public schools:
>
> - The First Amendment of the U.S. Constitution prohibits the government from establishing an official religion. This is generally interpreted to mean that public schools cannot promote or endorse any particular religion.
> - At the same time, the First Amendment protects private religious expression, including by students in public schools. So students are typically allowed to express their religious beliefs through things like clothing, jewelry, etc.
> - Whether or not a public school can display religious imagery like crosses or nativity scenes is a complex issue that depends on the specific context and how the display is handled. Courts have ruled both for and against certain types of religious displays.
> - In general, religious displays are more likely to be upheld if they have a clear secular purpose (like displaying art or celebrating a holiday), are initiated by students rather than school officials, and do not

---

[24] *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Stone v. Graham*, 449 U.S. 39 (1980); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

> dominate the school setting. Displays that seem to endorse a particular religion are more vulnerable to legal challenge.
>
> So in summary, while some religious expression is allowed in public schools, there are legal limits. Whether any particular religious image or display would be permissible in New Hampshire public schools would depend on the specific details of the situation. The school would need to be careful not to appear to be endorsing or promoting religion in a way that violates the First Amendment. Definitive judgments require looking at the totality of the circumstances around the display.

When asked to cite its sources, Claude, like GPT-4, identified and briefly summarized United States Supreme Court cases.[25]

iii. CoCounsel's Legal Research

CoCounsel's built-in database of case opinions includes all 50 states, the United States Supreme Court, Federal Circuit Courts, District Courts, Bankruptcy Courts, the Tax Court, administrative materials, and legal articles published by JD Supra.[26]

When you click on the Legal Research Memo button, CoCounsel will ask you to "Explain your legal research request-using normal sentences like you would when talking to a colleague. Include as much relevant information for the search such as jurisdiction, background facts, and anything else that you feel is relevant to the query." To ensure that it understands your query, CoCounsel will "interpret" your question and will in a few seconds give you its understanding of your legal research question. If CoCounsel has correctly understood your query, clicking the "Submit" button will cause CoCounsel to start processing your request. If there is an error or miscommunication between you and CoCounsel, you may return to your original question to add or subtract to it for

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[25] *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Stone v. Graham*, 449 U.S. 39 (1980); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny County v. ACLU*; 492 U.S. 573 (1989); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

[26] Valerie McConnell, *Which sources does CoCounsel search and review when generating a legal research memo?*, Casetext, help.casetext.com/en/articles/7207127-which-sources-does-cocounsel-search-and-review-when-generating-a-legal-research-memo.

clarity. CoCounsel will then re-interpret your request. There are filters by jurisdiction, date, and unpublished cases to narrow or expand the focus of your search.

Once your question has been submitted to CoCounsel, a progress window and completion appear. This function allows you to run another legal research request while the first one is processing or tend to other work, and when the first legal research memo is finished (usually) in two to three minutes or less, it will send you an email telling you that your legal research memo is complete. The output from CoCounsel will be a Microsoft Word document with hyperlinks to the actual case, statute, regulation, or court rule that is relevant to your query. Those hyperlinks allow the neutral to conduct all necessary diligence using primary authority rather than AI-generated text.

> *User Prompt*: "Can New Hampshire public schools circulate religious imagery?"
>
> *Response*:
>
> **Answer**
>
> There is no clear answer to whether public schools in New Hampshire can distribute materials containing religious imagery. However, several authorities suggest that such distribution may be permissible if it does not advance or inhibit religion, does not foster excessive entanglement between the school and religion, and is not calculated to favor any particular religious sect.
>
> **Analysis**
>
> Several cases and statutes provide guidance on the question of whether public schools in New Hampshire can distribute materials containing religious imagery. The most relevant authorities are the New Hampshire Revised Statutes sections 189:26 and 194-B:7, and the cases Opinion of the Justices, 307 A.2d 558 (N.H. 1973) and State v. Mack, 173 N.H. 793 (N.H. 2020).
>
> Section 189:26 of the New Hampshire Revised Statutes prohibits public schools from introducing any book that favors a particular religious sect. This statute suggests that the distribution of religious imagery would be permissible as long as it does not favor one particular sect over another.

> Section 194-B:7 sets out the criteria for determining whether a chartered public school is secular or nonsecular, and prohibits schools from advancing or prohibiting religion, or fostering excessive entanglement between the school and religion. This statute also suggests that the distribution of religious imagery would be permissible as long as it does not violate these criteria.
>
> The case Opinion of the Justices, 307 A.2d 558 (N.H. 1973) discusses the constitutionality of religious activities in public schools in New Hampshire. The court held that a law does not offend the First Amendment's prohibition on enactments respecting an establishment of religion if it has a secular legislative purpose, does not principally advance or inhibit religion, and does not foster an excessive governmental entanglement with religion. This case suggests that the distribution of religious imagery in public schools would be permissible if it meets these criteria.
>
> Finally, the case State v. Mack, 173 N.H. 793 (N.H. 2020) discusses the free exercise of religion under the New Hampshire Constitution. The court held that when religious practices violate a generally applicable law, the state constitution requires a balancing of competing interests. This case suggests that if the distribution of religious imagery in public schools is challenged, the court will need to balance the interests of the school against the interests of those challenging the distribution.

CoCounsel then summarized and linked directly to seven New Hampshire cases, two New Hampshire statues, and an article,[27] and CoCounsel described how each of these sources are relevant to the research inquiry. In this instance, CoCounsel did not ask whether

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[27] In the order they appeared on CoCounsel: *Opinion of the Justices*, 108 N.H. 97 (N.H. 1967); *Opinion of the Justices*, 307 A.2d 558 (N.H. 1973); *Opinion of the Justices*, 233 A.2d 832 (N.H. 1967); *State v. Mack*, 173 N.H. 793 (N.H. 2020); *Opinion of the Justices*, 109 N.H. 578 (N.H. 1969); *Lincoln v. Page*, 109 N.H. 30 (N.H. 1968); *City of Concord v. New Testament Baptist Church*, 118 N.H. 56 (N.H. 1978); N.H. Rev. Stat. §§ 189:26, 194-B:7; Fox Rothschild LLP, *Clear as Mud: Navigating In-School Employee Expression in the Wake of Kennedy v. Bremerton School District*, July 15, 2022, www.foxrothschild.com/publications/clear-as-mud-navigating-in-school-employee-expression-in-the-wake-of-kennedy-v-bremerton-school-district.

we wanted to include federal as well as state law in our research. When we added "under federal law," to the beginning of the prompt, CoCounsel provided a different answer, citing 11 First Circuit and 3 District of New Hampshire cases.[28] It also identified with a red flag graphic that one of the cited cases had been reversed.

iv. Analysis of the Platform's Legal Research Skill

Like ChatGPT and Claude themselves, we recognize the shortcomings of conducting legal research using a general-purpose AI tool that does not include current source material in its training. Not only did those platforms deliver much more generalized answers to legal research questions, but they also acknowledged that their information is out of date. CoCounsel, which specializes in legal research specifically, surpasses the other platforms in terms of the breadth and currentness of its legal databases, as well as its ability to parse legal questions more like a lawyer would, acknowledging, for example, the differences in jurisdictions and the hierarchy of courts. CoCounsel also Shepardizes its citations and links directly to the source material, thereby guarding against inaccuracies and hallucinations. We caution readers, however, that, when we specified a jurisdiction in the prompt rather than using the filters, CoCounsel myopically focused on opinions from that jurisdiction's courts without acknowledging the relevance, for instance, of United States Supreme Court opinions.

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[28] In the order they appeared on CoCounsel: *Freedom v. Hanover Sch. Dist*, 626 F.3d 1 (1st Cir. 2010); *Freedom from Religion Found. v. Hanover School*, 665 F. Supp. 2d 58 (D.N.H. 2009); *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990); *Local 8027 v. Frank Edelblut, Comm'r*, 21-cv-1077-PB (D.N.H. Jan. 12, 2023); *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020); *Asociación v. García*, 490 F.3d 1 (1st Cir. 2007); *Knights of Columbus, # 94 v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001); *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997); *Governor Wentworth Reg. School v. Hendrickson*, 421 F. Supp. 2d 410 (D.N.H. 2006); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004); *Shurtleff v. City of Boston*, 928 F.3d 166 (1st Cir. 2019); *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020); *Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1 (1st Cir. 1983).

3. Document Generation

a. Document Generation Applications

In addition to analyzing complex texts for the purpose of summarization, analysis, or research, today's generative AI platforms can assist professionals, including arbitrators and mediators, in creating and editing documents. ChatGPT and Claude are two notable examples of LLMs designed to aid in drafting legal content.[29] They can generate human-like text in response to user queries, sometimes incorporating information provided by the user. Moreover, these tools can refine their outputs based on user feedback.

ChatGPT and Claude can generate text in response to a prompt or a question by a user, sometimes based on documents, images, or other information provided by the user. ChatGPT and Claude can also iterate on the content they have generated based on feedback from the user.

Using LLMs such as ChatGPT and Claude for drafting legal documents presents several advantages, including:

- Time and Resource Efficiency: LLMs can swiftly generate text that resembles human-written content. This can substantially reduce the time spent on research, writing, editing, and proofreading of legal documents.
- Enhanced Creativity and Innovation: LLMs can generate diverse, relevant, and novel text, which can foster fresh ideas, perspectives, and arguments that might otherwise remain unexplored.
- Improved Quality and Consistency: LLMs produce coherent, fluent, and grammatically correct text, mitigating errors, inconsistencies, and ambiguities in legal documents.

However, employing LLMs for legal drafting also comes with specific challenges, which include:

- Ensuring Accuracy and Reliability: LLMs, while powerful, are not infallible. They can generate inaccuracies, outdated information, invent facts or cases, or misinterpret user input. Therefore, users must cross-verify content generated by LLMs with credible sources and seek expert input.

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[29] As of the date of this article, CoCounsel did not offer a drafting function.

- Maintaining Ethical Standards and Professional Responsibility: LLMs are not bound by ethical codes or professional regulations, and they lack moral or legal obligations. Users must exercise their judgment and discretion when using LLMs, ensuring compliance with data protection, confidentiality, intellectual property rights, plagiarism, and disclosure laws and regulations.
- Managing Expectations and Limitations: LLMs are tools that augment human capabilities, not substitutes for human lawyers. Users should not solely rely on LLMs for drafting legal documents and should employ their own knowledge, skills, experience, and intuition. Users must also be aware of LLM limitations, including data sources, training methods, time constraints, and domain specificity.

As applied to arbitration and mediation, the potential use cases for generative AI as a drafting tool are practically unlimited. They include:

- Drafting arbitration agreements and mediation clauses in contracts. AI tools can help generate customized language based on industry standards and best practices.
- Preparing mediation statements and arbitration pleadings. AI tools can analyze case facts and legal issues, and produce draft documents outlining each party's positions and arguments serving as a starting point for lawyers to refine.
- Drafting procedural orders and case management plans. LLMs can generate standard formats for procedural orders based on prompts about the number of parties, issues in dispute, deadlines, etc.
- Drafting settlement agreements and arbitration awards. LLMs can facilitate the creation of initial drafts of straightforward settlements or uncontested arbitration awards based on terms provided.
- Automating parts of mediation briefs and letters. LLMs can generate standard sections in mediation briefs, such as recitals and reservations of rights.
- Producing first drafts of form documents. When standard contracts, agreements, or correspondence are needed, LLMs can produce a draft using templates and key case details.

b. Platform Comparison: Document Generation

Here are examples of drafting exercises we explored using ChatGPT-4 and Claude:

> *User Prompt*: You are an attorney asked to draft an arbitration clause to be included in a contract between a Massachusetts software company and a New York investment bank. The parties wish the clause to invoke the Commercial Rules of the American Arbitration Association, and to cover the issues of the venue for the arbitration, a pre-arbitration mediation requirement, a reasonable time limit for completion of the arbitration, and reasonable discovery limitations. Please draft the arbitration clause.
>
> *ChatGPT 4 Response*:
>
> Here is a possible arbitration clause that meets the requirements of the parties:
>
> **Arbitration Clause**
>
> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA Rules") in effect on the date of this contract, except as modified herein.
>
> The place of arbitration shall be Boston, Massachusetts, unless the parties agree otherwise in writing.
>
> Before initiating arbitration, the parties shall attempt to resolve their dispute amicably through mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. Either party may commence mediation by providing to the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with the American Arbitration Association and with one another in selecting a mediator from the American Arbitration Association's panel of neutrals and in scheduling the mediation proceedings. The parties agree that they will participate in the mediation in good faith and that they will share equally in its costs.
>
> If the dispute is not resolved within 60 days after the request for mediation, either party may initiate arbitration by

filing a notice of arbitration with the American Arbitration Association and serving a copy on the other party. The notice of arbitration shall include a statement of the claim, the relief sought, and the names and contact information of the parties.

The arbitration shall be conducted by one arbitrator, unless the amount in dispute exceeds $1,000,000, in which case three arbitrators shall be appointed. If one arbitrator is to be appointed, the parties shall endeavor to agree on the arbitrator within 15 days after receipt of the notice of arbitration. If three arbitrators are to be appointed, each party shall appoint one arbitrator within 15 days after receipt of the notice of arbitration, and the two party-appointed arbitrators shall appoint the third arbitrator within 15 days thereafter. If a party fails to appoint an arbitrator within the specified time limit, or if the two party-appointed arbitrators fail to appoint the third arbitrator within the specified time limit, the American Arbitration Association shall appoint the arbitrator.

The arbitrator(s) shall decide the dispute in accordance with the substantive law of New York, without regard to its conflict of laws rules.

The arbitration shall be completed within six months after the appointment of the arbitrator(s), unless otherwise agreed by the parties or extended by the arbitrator(s) for good cause.

The discovery in the arbitration shall be limited to document production and depositions of no more than three witnesses per party, unless otherwise agreed by the parties or ordered by the arbitrator(s) for good cause.

The award of the arbitrator(s) shall be final and binding on the parties, and may be entered and enforced in any court having jurisdiction. The award shall state the reasons for the decision and apportion the costs of arbitration between the parties. The prevailing party in any arbitration or judicial proceeding arising out of or relating to this contract shall be entitled to recover its reasonable attorneys' fees and expenses from the other party.

Claude Response:

Here is a draft arbitration clause for the Massachusetts software company and New York investment bank:

Arbitration. Any dispute arising out of or relating to this Agreement shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties agree to first attempt mediation prior to initiating arbitration. The mediation shall take place in Boston, Massachusetts and shall conclude within 30 days of initiation unless extended by mutual written agreement. If mediation does not resolve the dispute, the arbitration shall take place in New York, New York. Discovery shall be limited to the request and production of documents directly relevant to the dispute, along with no more than two depositions per party, each lasting no more than four hours. The arbitrator shall issue a final award within 120 days of the initiation of arbitration unless this time is extended by mutual written agreement. The arbitrator shall have authority to award compensatory damages only and shall not award punitive or exemplary damages. The arbitrator shall have no authority to award provisional remedies of any nature including, but not limited to, injunctive relief. Any award rendered shall be final and binding upon the parties. Judgment upon the award may be entered in any court having jurisdiction.

A second example:

User Prompt: You are a mediator who has been asked to provide the parties with an opinion on the merits of a dispute between a copywriter and her employer over ownership of an article written by the copywriter. The article was written at 10:00 p.m., after work hours, on her work computer. The article has some relevance to the business of the employer, but would never be published by the employer. Please advise the parties of your view on ownership of the article.

ChatGPT-4 Response:

Thank you for choosing me as your mediator. I have reviewed the facts of your dispute and searched the web for relevant information on the topic of work made for hire. Based on my research, I have formed an opinion on the merits of your case, which I will share with you below.

The main issue in your dispute is whether the article written by the copywriter is a work made for hire or not. If it is, then the employer owns the copyright in the article. If it is not, then the copywriter owns it.

According to the definition of work made for hire in the U.S. Copyright Act, a work is a work made for hire in two situations:

- When it is created by an employee as part of the employee's regular duties
- When a certain type of work is created as a result of an express written agreement between the creator and a party specially ordering or commissioning it

In your case, the second situation does not apply, as there is no evidence of any written agreement between the copywriter and the employer regarding the article. Therefore, the only question is whether the article was created by the employee as part of her regular duties.

This question is not easy to answer, as it depends on various factors, such as the nature of the employment relationship, the scope of the employee's duties, the level of control and direction exercised by the employer over the employee's work, and the intent of the parties. [Links omitted]

Based on the information you provided, I think that there are arguments for both sides. On one hand, the employer could argue that the article was created by the employee within the scope of her employment, because:

- The article was written on her work computer, which implies that she used the employer's resources and equipment to create it
- The article has some relevance to the business of the employer, which implies that she used her skills and knowledge acquired from her employment to create it
- The article was written during a time period that could be considered part of her regular work hours, depending on her schedule and expectations

On the other hand, the copywriter could argue that the article was not created by her within the scope of her employment, because:

- The article was written after her normal work hours, which implies that she did not create it as part of her assigned tasks or projects
- The article would never be published by the employer, which implies that she did not create it for the benefit or use of the employer

- The article was written for her own personal interest and expression, which implies that she did not create it under the control or direction of the employer

In my opinion, based on these arguments and facts, I think that **the copywriter has a stronger case** than the employer. I think that **the article is not a work made for hire**, because it does not meet the criteria of being created by an employee as part of her regular duties. Therefore, I think that **the copywriter owns** the copyright in the article.

However, this is only my opinion and not a legal advice. You should consult with a qualified attorney if you want to pursue this matter further. I hope that this opinion helps you resolve your dispute amicably and fairly. Thank you for your cooperation and trust.

Claude Response:

Dear Parties,

As the mediator in this dispute over ownership of the article written by the copywriter, here is my opinion on the merits based on the facts provided:

While the article was written after work hours, it was done so on the employer's computer with resources provided by the employer. However, the article has little relevance to the employer's business and would likely never be published by the employer.

The general rule is that works created by an employee within the scope of employment belong to the employer. But here, since the article was written after hours on a matter unrelated to the employer's business, there is a stronger argument that the copywriter herself owns the copyright to the article, not the employer.

My recommendation would be to consider a compromise—the copywriter maintains copyright ownership of the article, but grants the employer a limited license to use portions of the article for internal purposes only. This allows both parties to benefit from the work product to some degree.

I hope this assessment of the merits provides a reasonable middle ground to resolve this dispute. Please let me know if

> you have any other questions as we continue the mediation process.

In both examples, ChatGPT-4 excels in providing nuanced and in-depth responses, offering users a comprehensive understanding of the legal issues with links to sources. Claude, on the other hand, provides more concise responses, focusing on practical solutions. The choice between the two depends on the user's specific needs and preferences.

Future Uses

As new generative AI tools are developed and the existing ones learn and grow, we foresee additional uses in arbitration and mediation. While possibilities abound, we identify a few here.

1. Judicial and Arbitral Decision Making

The hot topic in the arbitration world is whether generative AI will replace arbitrators as decision-makers. For years, companies like eBay have used learning computer systems to resolve disputes online.[30] But, with the proliferation of LLMs, computers can digest large quantities of information rapidly and either suggest or predict the outcome of a dispute. Although we are not aware of a court or ADR institution that designates AI as the final decision maker,[31] the technology is evolving rapidly.

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[30] Colin Rule, *Resolving Dipsutes in the World's Largest Marketplace*, ACResolution (Fall 2008), https://colinrule.com/writing/acr2008.pdf.

[31] *Automated Justice: Use of AI in the Resolution of Disputes*, Tilleke & Gibbons, July 11, 2023, www.tilleke.com/insights/automated-justice-use-of-ai-in-the-resolution-of-disputes ("For now, there are few, if any, courts that use automated decision making. However, the use of AI to assist judges is not uncommon. In the US, many courts use the COMPAS system to help determine criminal sentences, a practice that has been upheld by the Wisconsin Supreme Court. Malaysian courts have experimented with similar AI systems. More recently, judges in Colombia and Pakistan have used ChatGPT to assist with preparing judgments. By far the most advanced case study is China, where AI is used in a number of 'smart courts' to automate transcription, analyze evidence, recommend decisions, and monitor the consistency of judgments with past case law.").

For example, certain AI tools predict what a particular judge would decide or propose a decision for the arbitrator. Pre/Dicta, which launched in 2022, is a predictive litigation analytics tool "that looks for patterns in a judge's past decisions and potential areas of bias, using around 120 data points."[32] According to Pre/Dicta's CEO, the tool can predict how a judge will rule with 86% accuracy.[33] Bridget McCormick, president and CEO of the American Arbitration Association, has commented that information tools like Pre/Dicta's are most useful to parties "trying to decide whether to litigate at all, as opposed to arbitrate or mediate."[34]

Other AI tools are tailored for arbitration but are currently targeted at advocates rather than neutrals. In June 2023, Jus Mundi launched a beta version of "Jus-AI," its AI-powered arbitration intelligence tool. The tool "is aimed at providing concise summaries from arbitral awards and court judgments,"[35] and "interpret[s] specific provisions of arbitration rules by verifying the legal reasoning of thousands of arbitrators, counsel, and experts."[36] "The International Centre for Dispute Resolution, the international division of the American Arbitration Association, and Jus Mundi united to make non-confidential ICDR international arbitration awards freely available to the global legal and business community,"[37] which could invite their use as training materials for Jus-AI and other arbitration-focused AI tools.

The available data is more limited for commercial arbitrations, which are generally confidential. Arbitration practitioners, nevertheless, still expect the use of AI tools to rise in the coming years, depending on more "initiatives to publish a greater number

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[32] Ryan Heath, *AI Tells Lawyers How Judges Are Likely to Rule*, Axios, Sept. 12, 2023.

[33] *Id.*

[34] *Id.*

[35] Lucia Bizikova et al., *IA Meets AI—Rise of the Machines*, Daily Jus, Oct. 2, 2023, dailyjus.com/legal-tech/2023/10/ia-meets-ai-rise-of-the-machines.

[36] *Legal Intelligence Powered by AI Technology*, Jus Mundi, jusmundi.com/en.

[37] *A Key Partnership for the Publication of AAA-ICDR Arbitral Awards*, Jus Mundi, jusmundi.com/en/partnership/icdr?utm_source=Website&utm_medium=why%20partner%20with%20us%20page&utm_campaign=aaa_icdr_why_partner_with_us&utm_id=AAA-ICDR%20Landing%20page%20&utm_content=aaa_icdr_why_partner_with_us.

of commercial arbitration awards and related materials (with or without redaction/anonymization)."[38]

While predictive analysis tools are generally directed at advocates, they may "enable arbitrators to predict the possible factual outcomes of their awards, based on historical cases and jurisprudential data. Simply put, ChatGPT can predict the chances of an award being annulled, denied enforcement or voluntarily complied with, which, in turn can allow arbitrators to draft their awards in such a way, so as to ensure their longevity."[39]

The same tools that currently review large quantities of past judicial and arbitral decisions to evaluate or predict decisions could eventually become the deciders. While that reality may seem far off, we anticipate that automated decision makers will be available shortly to provide first-cut, appealable resolutions in disputes with lower amounts in controversy.

2. Augmenting Information Provided to the Neutral

ChatGPT-4 suggests that, as generative AI technology evolves, it can assist arbitrators and mediators by providing the following types of information that might not be otherwise available:

- Emotion Analysis: By analyzing voice tones, word choices, or facial expressions during hearings or sessions, AI could provide insights into parties' emotional states, aiding neutrals in navigating discussions more effectively.
- Automated Fact-Checking: In real time, AI could verify claims or facts presented during proceedings against a vast database of information, ensuring the accuracy of presented data.
- Predictive Behavior Analysis: Based on historical data and behavioral patterns, AI could predict the likely responses

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[38] Bizikova, *supra* note 35.

[39] Leonardo F. Souza-McMurtrie, *Arbitration Tech Toolbox: Will ChatGPT Change International Arbitration as We Know It?*, Kluwer Arbitration Blog, February 26, 2023, arbitrationblog.kluwerarbitration.com/2023/02/26/arbitration-tech-toolbox-will-chatgpt-change-international-arbitration-as-we-know-it/.

> of parties to certain resolutions or decisions, allowing arbitrators and mediators to strategize their approaches.[40]

Conclusion

Machines are not ready to assume sole responsibility for legal analysis, decision-making, or dispute resolution functions. However, they can adroitly support arbitrators and mediators who are well informed about the technology's strengths and potential pitfalls. As we look to the future, we see the potential for even more transformative and disruptive applications. These advancements, while promising, should be approached with judicious balance, ensuring that the essence of human judgment, empathy, and ethics remain paramount in arbitration and mediation. As we stride into this AI-augmented future, the arbitrator or mediator is not diminished but rather enhanced, equipped with a richer toolkit to better serve the evolving needs of parties in dispute.

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[40] ChatGPT-4's excerpted response to the October 30, 2023, prompt: "As generative AI evolves, what are some of the future, cutting-edge ways arbitrators and mediators could use it?"

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TESTIMONY BEFORE THE
U.S. SENATE COMMITTEE ON THE JUDICIARY

Small Print, Big Impact: Examining the Effects of Forced Arbitration

Prof. Myriam Gilles
Submitted April 8, 2024

Chairman Durbin, Ranking Member Graham, and distinguished members of the Committee:

Thank you for inviting me to participate in this important hearing. My name is Myriam Gilles, and I am a law professor at the Benjamin N. Cardozo School of Law. Since 2005, I have written extensively about the harmful effects of pre-dispute mandatory arbitration clauses – forced arbitration clauses – on consumers, workers and small businesses. These traps hidden in standard-form contracts forfeit a person's Constitutional right to a judge and jury, forcing them into a "privatized, invisible, and often inferior forum in which they are less likely to prevail."[1] I have testified about the negative effects of forced arbitration before this Committee in 2013, 2017 and 2019, before the Senate Banking Committee in 2022, and the before the House Judiciary Committee in February and November 2021. Over this stretch of time, forced arbitration clauses have only grown more pervasive, as millions of Americans have been forced to sign away their right to choose for themselves whether to pursue claims for legal relief.

In my testimony, I hope to shed light on the ways that forced arbitration harms consumers and workers. Part I provides an overview of numerous studies revealing the prevalence of forced arbitration clauses, as well as their deleterious effects on consumers and workers. Part II steps back to examine the broader effects of forced arbitration on the rule of law, the development of legal precedents and Congressional intent in enacting legislation seeking to protect consumers, workers and military servicemembers. Part III describes the Ending Forced Arbitration in Sexual

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[1] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, Dec. 2015.

Assault and Sexual Harassment Act ("EFASASHA"), passed by Congress in 2022. While this amendment to the Federal Arbitration Act ("FAA") was undoubtedly a step in the right direction, its enactment reveals the need for a more comprehensive statutory exemption barring forced arbitration in all contracts of adhesion. The FAIR Act – legislation that would prohibit forced arbitration for all employment, consumer, antitrust, and civil rights disputes – would ensure that every American can access the civil justice system. Finally, in Part IV, I describe the recent phenomenon of "mass arbitration," in which plaintiffs simultaneously file thousands of individual arbitrations, forcing corporate defendants to make good on their contractual promises to pay the cost of arbitrating large numbers of nominally individual claims. Forced to live up to their own contractual terms, companies have balked and run to court seeking relief. Accordingly, mass arbitration reveals that companies imposing forced arbitration clauses on their employees and consumers never intended these provisions to be actually used; instead, forced arbitration was intended to suppress cases where corporate wrongdoing harms large numbers of people who each suffer relatively modest injuries.

PART I
FORCED ARBITRATION HARMS AMERICAN CONSUMERS & WORKERS

As the result of the Supreme Court's recent and extraordinarily broad interpretation of law passed in 1925 – the Federal Arbitration Act ("FAA") – companies now freely employ forced arbitration clauses in nearly every aspect of American life. Where arbitration was once limited what the 1925 Congress sought to foster, namely commercial contracts negotiated by equally sophisticated parties, today, these provisions are regularly included in "take-it-or-leave-it" contracts of adhesion – including contracts governing credit cards, bank accounts, cell phones, payday loans, insurance, loans, leases and myriad other consumer transactions.[2] Forced arbitration is imposed by most nursing homes, gyms, student loan providers, internet service providers and music streaming services – as well as in job applications, employment contracts and benefits packages.[3] Forced arbitration clauses are literally everywhere, and when these provisions are given legal effect, they are used to silence individuals and deprive them of their choice of whether and how to pursue a remedy.

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[2] Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 631 (2012) ("[A]bsent broad legal invalidation, it is inevitable that the waiver will find its way from the agreements of 'early adopter' credit card, telecom, and e-commerce companies into virtually all contracts that could even remotely form the predicate of a class action someday.).

[3] *Id.*

i. *The Effect of Forced Arbitration on Consumers*

The data reveals how prevalent forced arbitration has become in the marketplace. Back in 2015, the Consumer Financial Protection Bureau ("CFPB") reported to Congress that nearly all mobile wireless providers imposed arbitration on their subscribers – meaning that nearly 290 million cell phone users were barred from going to court.[4] The same was true for the vast majority of credit card users, checking account holders, payday borrowers, student loan recipients, and users of countless other consumer financial products.[5]

Today, the situation is significantly worse. One study found that 81 of the 100 largest U.S. companies use forced arbitration in connection with consumer transactions.[6] And in 2020, the publication *Consumer Reports* estimated that over 60% of U.S. retail e-commerce sales are subject to forced arbitration.[7]

Meanwhile, most consumers have no idea they have signed away their right to hold companies accountable for wrongdoing. The 2015 CFPB Study found that only 13% of consumers who were directed to read a forced arbitration clause understood it prohibited them from participating in a class action lawsuit.[8] More recently, a 2020 survey of over 1,000 American consumers further confirmed that a staggering 99% of individuals surveyed had no understanding or awareness of forced arbitration clauses when shown a checking account contract.[9] This utter lack of awareness is no surprise, given that these rights-stripping clauses are often hidden in the boilerplate language that consumers either skim or ignore when making purchases.[10] Indeed, companies intentionally impose these clauses in click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.[11] Further, forced arbitration clauses are imposed as a *precondition* to obtaining the product or service in question – i.e., they are imposed long before any dispute or problem arises. And since most people simply don't contemplate dispute-resolution procedures at the point of sale, we simply lack the

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[4] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 7 (2015) [hereinafter CFPB STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[5] *Id.* at § 2, pp. 7-24.

[6] Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).

[7] Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020.

[8] CFPB STUDY, § 3, pp. 19-24 (reporting that half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court).

[9] Roseanna Sommers, *What Do Consumers Understand About Pre-dispute Arbitration Agreements? An Empirical Investigation*, PLOS ONE (2024).

[10] *See, e.g.,* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020 (describing an arbitration clause located "about two-thirds of the way through 4,600 words of legalese" in the defendant Wayfair's online terms of use).

[11] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 2015.

information necessary to place sufficient value on the rights we're giving up until it's too late.[12] But even if consumers did read and comprehend the fine print, none of us really has a choice of whether to accept or reject an arbitration clause.[13] If 99% of mobile service providers impose arbitration, then there are no real market alternatives available to consumers wishing to avoid these provisions.

Once consumers realize they have unknowingly forfeited their right to a judge and jury, they are left with only two unattractive options: passively accept whatever harm they have suffered or enter the private forced arbitration forum chosen by the company, governed by a set of rules written by the company for its benefit. Faced with this unjust regime, it is little wonder most choose the former, refusing to take part in a process they did not choose and cannot win.[14]

Again, the data backs this up, revealing that only a tiny percentage of consumers file arbitrations annually.[15] In 2017, the nonprofit group Level Playing Field examined the use of forced arbitration in the Wells Fargo identity-theft debacle.[16] Compiling data from the AAA and JAMs, the country's largest forced arbitration providers, the report found that just 250 consumers arbitrated claims with Wells Fargo between 2009 and the first half of 2017.[17] Given that the bank boasts over 70 million customers, the report observed that 250 was "a shockingly low number of

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[12] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005) (arguing imposing arbitration long before a dispute arises is unfair because most consumers don't place sufficient value on the rights they are relinquishing until after a dispute has arisen).

[13] Colvin & Stone, *supra* note 1 ("[T]he corporation that chooses to make arbitration mandatory for its workers or consumers will write the rules of the procedure, and the worker or consumer will have no choice but to assent if they want to enter into an employment or consumer transaction").

[14] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 2015 ("Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely."). *See also* Colvin & Stone, *supra* note 1 ("The ability of corporations to set the rules of mandatory arbitration allows them, and not the workers or consumers, to choose whether to adopt the procedures of a reputable organization with due process protections or rules that violate basic principles of fairness.").

[15] *See, e.g.,* CFPB STUDY (finding that from 2010 to 2011, only a handful of consumers who filed individual arbitrations were awarded affirmative relief – while nearly 10 million consumers were represented in comparable class actions during the same period).

[16] In 2016, media outlets reported that Wells Fargo employees had been opening fake accounts as far back as 2013. When injured customers tried holding the bank accountable for the identity theft, their claims were quickly forced into the black box of arbitration. *See, e.g.,* Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES, Dec. 6, 2016. The profound secrecy afforded by arbitration allowed Wells Fargo to avoid both liability and bad press, and allowed wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. *See* Hearing of the Senate Banking Committee, Wells Fargo: One Year Later, available at https://www.banking.senate.gov/hearings/wells-fargo-one-year-later (Oct. 2017).

[17] Wells Fargo and Forced Consumer Arbitration, Level Playing Field (2017).

arbitration claims" – all the more surprising given the "continued revelations of widespread unfair business practices" by Wells Fargo.[18]

Scholars and journalists have also sought to document the paucity of consumer arbitrations. For instance, in 2018, Professor Imre Szalai determined there were an estimated 826,537,000 consumer arbitration provisions in force.[19] Yet, the AAA and JAMS recorded an average of only 6,000 consumer arbitrations per year.[20] Similarly, Professor Judith Resnik reported that only 134 individual arbitrations were filed against AT&T between 2009 and 2014 – despite the company having over 120 million wireless customers and being the subject of numerous investigations and public enforcement actions alleging widespread violations of consumer laws.[21] And in 2019, journalist Alison Frankel examined data provided by the AAA, which revealed that in the first quarter, it had resolved only 895 consumer arbitrations – despite being the designated arbitral provider for the thousands of consumer companies.[22]

Worse yet, those who individually brave these arbitral waters are unlikely to prevail due to the well-documented repeat-player bias that corporate clients enjoy in arbitration.[23] One study found that of the 30,000 AAA/JAMS consumer arbitrations conducted between 2014 and 2018, consumers prevailed in only 6.3%.[24] The CFPB Study revealed a similar tilt: the agency found that companies won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits, and were awarded 98¢ for every dollar claimed; by contrast, arbitrators sided with consumers in just 27% of cases and awarded them an average of 13¢ for every dollar

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[18] *Id.*

[19] Szalai, *supra* note 6.

[20] *Id.*

[21] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2680, 2812 (2015). Professor Resnik notes: "[t]he result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so – rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights."

[22] Alison Frankel, *Consumer Arbitration is on the Rise -- But the Numbers are Still Puny*, REUTERS, May 9, 2019.

[23] *See, e.g.,* Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2356-57 (2012) (discussing how "selection bias" of the stronger party in a mandatory arbitration setting may prejudice the weaker party by selecting favorable arbitrators or arbitration groups); Katherine V.W. Stone and Alexander J.S. Colvin, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights, (Economic Policy Institute 2015) (finding that, when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% of winning but if the employer had appeared before the arbitrator four times, the employee in the fifth case only had a 15.3% chance of winning, and if the employer had appeared before the same arbitrator 25 times, the 26th employee only had a 4.5% chance of winning).

[24] American Association for Justice, *The Truth About Forced Arbitration* (2019).

claimed.[25] These findings substantiate decades of research on the "repeat-player" bias in forced arbitration – which posits that arbitrators may decide cases in favor of the party most likely to be in a position to appoint them to serve in a future case.[26] This structural imbalance allows companies to "stack the deck" with arbitrators who will be favorable to their interests, while the secrecy surrounding these proceedings makes it impossible for individual consumers to discern or challenge potential arbitrator bias.[27]

ii. *The Effect of Forced Arbitration on Workers*

Similarly disturbing trends are evident in America's workplaces, as employers increasingly bury forced arbitration clauses in the paperwork that employees must acquiesce to if they want a job. These provisions silence aggrieved workers and eliminate corporate accountability for systemic workplace violations.[28] In 2018, the study by the Economic Policy Institute estimated that 56.2% of private-sector, non-union workers – nearly 60.1 million workers in all – were bound to forced

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[25] CFPB STUDY at § 5, pp. 11-12. The agency found that, by contrast, 422 consumer class actions settled between 2008 and 2012 returned over $440 million (after deducting attorneys' fees and court costs) to an average of 6.8 million consumers each year. *Id.* at § 1, pp. 16.

[26] These studies have generally focused on repeat-player bias employment arbitration, but there is no reason to believe that consumers would suffer in similar fashion. *See, e.g.,* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189, 198-99 (1997) (reporting on a study of 270 AAA employment arbitration awards from 1993-1994, finding that employees won only 16% of cases against repeat-player employers); Stone & Colvin, *supra* note 1 (reporting on a study finding that when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% of winning -- but if the employer had previously appeared before the arbitrator four times, the employee in the fifth case only had a 15.3% chance of winning, and if the employer had previously appeared before the same arbitrator 25 times, the 26th employee had only a 4.5% chance of winning).

[27] Testimony of Professor Elizabeth Bartholet Before the U.S. Senate Committee on the Judiciary, *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations* (July 23, 2008) ("The big corporate players were [] free to select arbitration providers who would provide them a sympathetic forum, and to design an arbitration process that would serve their interests, since the employees and consumers would again not be in any position to bargain or even to think about these things at the point they were applying for jobs or credit cards.")

[28] *See* Lauren Weber, *More Companies Block Employees From Filing Suits*, WALL ST. J., Mar. 31, 2015 (reporting that CVS, Kmart, Nordstrom, and Halliburton are "among the largest employers that require or ask employees to waive their rights to sue as a class"); Kriston Capps, *Sorry: You Still Can't Sue Your Employer*, CITYLAB, July 11, 2017 (reporting that Wells Fargo, Citibank, Comcast, AT&T, Time-Warner Cable, Olive Garden, T.G.I. Friday's, Applebee's, Macy's, Target, Amazon, Uber, and Lyft all impose arbitration and class action bans in employment contracts).

arbitration clauses.[29] Labor economists now project that by year's end, more than 80% of private-sector non-union workers will be subject to forced arbitration.[30]

Yet, despite the large chunk of the U.S. workforce bound to individually arbitrate their disputes, study after study shows that few workers initiate arbitrations.[31] An EPI study estimated that only 1 in 10,400 workers subject to these provisions has filed a claim in arbitration.[32] The remaining workers with potentially valid cases – somewhere between 315,000 to 722,000 each year – are left to suffer in silence, unwilling to shoulder the expense of individual arbitration and unable to be heard by a judge and jury.[33] One legal scholar estimates that, as a result of the unprecedented implementation of class-banning arbitration clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned.[34] And when individual employees do bring arbitrations, they are far less likely to succeed against their employers: of the 11,114 AAA/JAMS employment arbitrations conducted between 2014-18, only 2.5% of cases resulted in an employee monetary award (that was not outweighed by an even larger employer award).[35] Here again, the repeat player advantage is strong. Not only do employers choose the arbitral provider and write the rules, they also "gain familiarity with the system and how to operate effectively in it, [and] may also be able to lobby for changes to the system that benefit them."[36] As Professors Colvin and Stone observe, "[e]ven absent any sort of arbitral bias, more sophisticated repeat-player employers may gain an advantage by getting to know particular arbitrators well and developing an understanding of their decision-making patterns and what types of arguments appeal to them."[37] Taken together, these elements bode poorly for workers should they wish to enter the arbitral regime, and may go a great distance in explaining why so few do so.

iii. *Forced Arbitration Exacerbates Economic Inequality*

The data reveals another troubling development: forced arbitration provisions are disproportionately imposed on low-wage workers and low-income consumers, exacerbating the yawning economic chasm in this country. One study estimates that low-wage workers (those paid $13 or less per hour) suffered approximately $12.6 billion in wage-related losses in 2019 due to

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[29] Alexander Colvin, Economic Policy Institute, The Growing Use of Mandatory Arbitration (2018). *See also* CARLTON FIELDS 2015 CLASS ACTION SURVEY, available at (finding that the percentage of companies using arbitration clauses to preclude employment class actions jumped from 16.1% in 2012 to 42.7% and that the number of employment class action suits filed decreased precipitously between 2011 and 2014).

[30] *Id.* (projecting that by the end of 2024, more than 80% of private-sector non-union workers will be subject to forced arbitration).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

[35] AAJ, *The Truth About Forced Arbitration*, *supra* note 24.

[36] Colvin & Stone, *supra* note 1.

[37] *Id.*

minimum wage and overtime violations, employee misclassification and payroll fraud — but because the vast majority of these estimated 6.13 million workers are subject to forced arbitration, they can't access the courts to resolve these disputes or to deter future violations.[38] Other research has shown that minorities and women are more likely to work in fields that subject them to forced arbitration.[39] For instance, the construction industry -- with its predominantly male workforce – has the lowest rate of forced arbitration, whereas education and health, industries with a more predominantly minority and female workforce, have the highest rate.[40] The disparate deployment of forced arbitration provisions contributes to economic inequality by denying low-wage workers access to justice enjoyed by other employees.[41]

Low-income consumers are also more vulnerable to the effects of forced arbitration. For one, low-income individuals face structural barriers to accessing traditional credit markets, which renders them more reliant on high-cost and abusive alternatives – such as payday loans, money orders, pawnshops, rent-to-own stores and high-interest-rate credit cards.[42] These products are rife with forced arbitration provisions, preventing consumers from challenging illegal and exploitative practices.[43] Furthermore, studies show that low-income groups suffer the disproportionate burden of fraud, predatory lending, reverse redlining, abusive mortgages, exorbitant student loans, subprime car loans, and other unfair and deceptive practices.[44] These sorts of consumer harms are precisely the type best addressed through class and collective litigation – procedural devices which allow claimants to aggregate damages where individual suits

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[38] Hugh Baran, Forced Arbitration Enabled Employers to Steal $12.6 Billion From Workers In Low-Paid Jobs in 2019 (Nat'l Employment Law Project 2020).

[39] Colvin, *supra* note 29 (estimating that 57.6% of working women, 59.1% of African Americans, and 54.3% of Hispanic workers are subject to forced arbitration).

[40] *Id.*.

[41] *See* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket, Symposium: The War on the Civil Justice System,* 65 EMORY L. REV. 1531 (2016); *see also* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) (asserting that "mandatory arbitration exacerbates" existing inequalities in the workplace); Jean Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. CIV. RTS-CIV. LIB. L. REV. 155 (2019) (observing that people of color "stand to lose the most when arbitration is substituted for litigation").

[42] Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41 (2012) (arguing for more regulations to protect lower class credit products); Brian Grow & Keith Epstein, *The Poverty Business*, BLOOMBERG, May 20, 2007 (explaining that the payday-lending industry is concentrated in the poorest counties of the poorest states – luring "unsophisticated shoppers by the hundreds of thousands into a thicket of debt from which many never emerge"); CFPB STUDY at § 2, p. 7 (describing sampling data from California and Texas revealing that 83.7% of payday lenders covering 98.5% of the industry imposed arbitration clauses in their borrower agreements).

[43] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, Symposium: The War on the Civil Justice System, 65 EMORY L. REV. 1531 (2016).

[44] Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1509 n. 43 (2008) (listing studies showing that lower-income groups are specifically targeted by a host of shady businesses for various other types of economic exploitation).

would be inefficient or disproportionately expensive.[45] But the rise of class-banning forced arbitration clauses has left low-income consumers without remedy for widespread wrongdoing.[46] The distributive implications of forced arbitration provisions are clear: companies that exploit the economic vulnerability of low-income groups pay no real price for bilking consumers, given that few will pursue claims in arbitration and those who do will be less successful.[47]

PART II
THE BROADER EFFECTS OF FORCED ARBITRATION

Contemporary forced arbitration clauses typically contain language which strips a person of their right to join together with others who've been harmed in a similar way to try and seek accountability through a class mechanism. The harm caused by class-banning forced arbitration clauses extends well beyond individual consumers and workers: we are *all* harmed when companies escape accountability and individuals are forced to forfeit their rights. In this Part, I offer a brief overview of just some of the harmful effects of these provisions on our system of laws.

i. *Concealing Misconduct Only Leads to More Misconduct*

Forced arbitration keeps consumer rip-offs and worker exploitation secret and largely out of public view. Confidentiality, of course, is core to the institution of forced arbitration and guaranteed by both the providers and the standard terms of contemporary forced arbitration agreements.[48] Accordingly, forced arbitration proceedings and decisions are confidential – i.e., arbitrators hear cases behind closed doors and render decisions without being bound to follow

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[45] Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1347 (2007); *see also* Gilles, *supra* note 43 (asserting that class and collective litigation often result in broad-based injunctive relief to reform problematic practices, which is particular benefit to low-income groups).

[46] *See, e.g.,* Eric W. Macaux, *Limiting Representation in the Age of Private Law: Exploring the Ethics of Limited-Forum Retainer Agreements*, 19 GEO. J. LEGAL ETHICS 795, 806-07 (2006) ("the plaintiffs most likely to be disadvantaged" by forced arbitration clauses "are those least able to protect their interests: low-income individuals").

[47] Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 515 (2017) ("The distributive implications of forced consumer arbitration are especially pronounced given that the primary users of payday loans and prepaid cards -- which include arbitration clauses at particularly high rates -- are low-income consumers, [which] suggests that those most vulnerable to exploitation by financial institutions are those most likely to lack effective redress."); *see also* Abi Velasco and Remington A. Gregg, *Forced Arbitration Stacks the Deck Against Everyday People, Especially Against Workers and Consumers of Color*, Public Citizen, Feb. 23, 2022.

[48] *See* AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must "maintain the privacy of the hearing to the extent permitted by applicable law"); AAA Commercial Rule 25 (directing arbitrators to "maintain the privacy of the hearings unless the law provides to the contrary").

legal precedents and often without publishing a written decision that explains their reasoning.[49] This culture of secrecy prevents consumers and employees from learning whether others have experienced a similar problem before and how that problem was resolved. It also leads to arbitrary and inconsistent results in the arbitral forum because arbitrators, unlike judges, are not required to follow precedents created by earlier-decided cases with similar facts. This directly undermines the principles that are central to the rule of law, such as stare decisis and the development of legal precedents.[50] By forcing disputes into hermetically-sealed, secret proceedings, companies deny all citizens the transparency, openness and accountability necessary for the operation of a fair and democratic civil justice system.[51] And, of critical importance to this lawmaking body, forced arbitration undermines law enforcement and deterrence because, once blocked from going to court as a group, most people drop their cases entirely. If Congress passes laws that can't be enforced in the real world, what good are those laws?

The Wells Fargo scandal illustrates this point: some Wells Fargo customers learned that their identities had been stolen by bank employees and fake accounts had been opened using their private information as early as 2013, but the company used its forced arbitration clause to keep the fraud quiet for as long as it could.[52] Regrettably, the main lesson that Wells Fargo took from the identity-theft scandal was that forced arbitration is an effective way of concealing illegal conduct: in a completely different scandal involving its manipulation of debit card purchases to maximize overdraft fees,[53] the bank again tried to force customers into arbitration to avoid bad publicity and legal liability.[54] By compelling cases into secret proceedings, companies like Wells

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[49] *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979) ("[Arbitrators] may have little incentive to produce precedents…why should they make any effort to explain the result in a way that would provide guidance for future parties?"); Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 473 (2008) ("Written arbitration awards currently are the exception in arbitration, which normally operates behind a veil of privacy.").

[50] *See id.*; *see also* Lillian Howan, *The Prospective Effect of Arbitration*, 7 BERKELEY J. EMP. & LAB. L. 60, 62 (1985) ("In contrast to the judicial doctrine of stare decisis, an arbitrator's interpretation of the contractual relation is not technically binding on a future arbitrator. Instead, the arbitrator must exercise independent and impartial judgment in each case.").

[51] *See* AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must "maintain the privacy of the hearing to the extent permitted by applicable law"); AAA Commercial Rule 25 (directing arbitrators to "maintain the privacy of the hearings unless the law provides to the contrary"). *See also* Michelle Andrews, *Signing a Mandatory Arbitration Agreement With a Nursing Home Can Be Troublesome*, WASH. POST., Sept. 17, 2012 (reporting that nursing home arbitration hearings "are conducted in private and [these] proceedings and materials are often protected by confidentiality rules").

[52] Robert Weissman & Lisa Donner, *Why Wells Fargo Got Away With It For So Long*, THE HILL, Sept. 20, 2016 (observing that if "early cases been allowed to proceed, others almost certainly would have followed, and Wells Fargo may have ended these pervasive abuses years ago").

[53] *See* Gutierrez v. Wells Fargo, 2010 WL 1233885 (N.D. Cal. 2010) (ordering Wells Fargo to return approximately $203 million to California customers who had incurred overdraft fees on debit card transactions as a result of its illegal practices).

[54] Kate Berry, *Wells is Last Bank Standing in Overdraft Litigation*, AMERICAN BANKER, June 26, 2017 (reporting that Wells Fargo had repeatedly tried to use forced arbitration to block relief in the other 49 states and avoid

Fargo deny their customers the right to a fair and just system – but they also deny every citizen the right to learn about potential fraud, illegal fees, and other unfair business practices. Lacking this critical information, consumers cannot make educated choices about the myriad options available in the marketplace.

ii. *Stymying Public Participation and Common Law Development*

Our legal system relies for its legitimacy on publicity and transparency. Through the fair operation of law, "[t]he public participates in a transparent conversation about legal rights. To that end, citizens have some ownership, at least in spirit, of what happens within that system [because] the whole reason for a public dispute resolution system is that it operates for the benefit of the public."[55] But when disputes are shunted into the hermetically-sealed vault of private arbitration, the public has no opportunity to "participate in a transparent conversation about legal rights" – quite the contrary, the public is barred from entry and arbitral outcomes are shrouded in secrecy.[56]

Over the longer term, forcing consumers and workers into the black box of arbitration precludes the very development of common law doctrine.[57] In consumer, employment, antitrust and other areas where forced arbitration clauses have become routine, the imposition of forced arbitration clauses will cease common law development. By enforcing these provisions, we have, in essence "frozen the law… denying the courts the ability to develop and adapt the law as society and business changes."[58]

iii. *Undermining Congressional Intent, Including Consumer Protection, Civil Rights and Statutes Intended to Protect Servicemembers*

With no accountability and no transparency, forced arbitration clauses have been weaponized by businesses and employers to serve as a form of legal immunity, undermining the very laws and protections enacted by Congress. Shielded by forced arbitration, companies brazenly violate consumer protection laws, civil rights statutes, and Congressional efforts to protect active duty servicemembers.

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repaying up to $1 billion); Associated Press, *Wells Fargo Wants Court to Toss Overdraft Lawsuits and Let it Use Arbitration*, LOS ANGELES TIMES, Aug. 24, 2017.

[55] Erik S. Knutsen, *Keeping Settlements Secret*, 47 FLA. ST. U. L. REV. 945, 959-60 (2010).

[56] Hon. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 324 (2012) ("Arbitrations with no public record do not develop the law in any way.").

[57] *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) ("by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law").

[58] S. 1782, Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. 10 (2007) (statement of Richard Alderman).

For example, in its periodic amendments to the Servicemembers Civil Relief Act ("SCRA") over the past century, Congress has evinced a clear intent to protect the rights of active servicemembers.[59] In 2003, Congress significantly modernized SCRA, expanding protections for service members and their families in areas such as rental agreements, mortgage foreclosure proceedings and more. And then in 2020, Congress passed Section 547 of the National Defense Authorization Act, amending the SCRA to provide that "[a]ny person aggrieved by a violation of [the SCRA] may in a civil action ... be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary."[60] Despite the unambiguous statutory text, robust legislative history and revered status of active-duty servicemembers, companies continue to financially prey on our military and then try to hide behind illegal arbitration clauses. Case in point: when servicemembers Jeremy Bell, Pablo Espin, Nicholas Padao and Keith Taylor sought to challenge a Citibank-imposed "veteran penalty,"[61] the bank – blatantly contravening the 2020 amendments to SCRA – moved to compel arbitration.[62] The district court denied the bank's motion, but it has vowed to appeal the decision – forcing these servicemembers to continue expending time and money fighting an illegal forced arbitration clause.

Forced arbitration undermines congressional intent across all sectors and protected classes, from the most vulnerable to the most impervious. Take former Miami Dolphins NFL Coach Brian Flores. In January 2022, Coach Flores was fired despite back-to-back winning seasons. Flores believed his dismissal was the result of racial discrimination, and along with ex-Arizona Cardinals head coach Steve Wilks and Tennessee Titans defensive coordinator Ray Horton, filed suit against the league.[63] But due to the forced arbitration clauses in their employment contracts, these and other claims of discrimination cases against the NFL have been forced into secret proceedings designating NFL Commissioner Roger Gooddell as the presiding arbitrator.[64] It

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[59] *See, e.g.,* Gordon v. Pete's Auto Serv. Of Denbigh, Inc., 637 F.3d 454, 457 (4th Cir. 2011) ("The Servicemembers Civil Relief Act is part of a long record of congressional concern for the domestic affairs of those in military service."); Brewster v. Sun Tr. Mortg., Inc. , 742 F.3d 876,879 (9th Cir. 2014) (observing that the "Supreme Court has unambiguously required courts to give a broad construction to the statutory language of the SCRA to effectuate the Congressional purpose of granting active-duty members of the armed forces repose from some of the trials and tribulations of civilian life ....").

[60] 50 U.S.C. § 4042(a). Congress further stated that this amendment "shall not be construed to imply that a person aggrieved by a violation of such Act did not have a right to bring a civil action as a representative party on behalf of members of a class or be a member of a class in a civil action before the date of the enactment of this Act." 116 P.L. 92, div. A, TITLE V § 547(b), 133 STAT. 1198 (2019).

[61] Espin et al. v. Citibank, 2023 WL 6447231 at *1 (E.D.N.C. Sept. 29, 2023) (this penalty "refers to interest and fee increases imposed on servicemembers returning to civilian life").

[62] Espin et al. v. Citibank, No. 5:22-CV-383-BO-RN, Order Denying Motion to Compel Arbitration, Sept. 29, 2023.

[63] Flores v. NFL, 2023 WL 4744191 (S.D.N.Y. July 25, 2023).

[64] Notably, cases against the New York Giants, the Denver Broncos, and the Houston Texans for violations of the Rooney Rule (which requires teams to interview minority candidates) have been allowed to proceed in court because plaintiffs in those cases were not bound by forced arbitration clauses. *See* Daniel Kaplan, *Judge*

doesn't seem a stretch to believe Goodell is likely to be biased in favor of the team owners, rendering him the single most unsuitable person to act as a sole arbitrator in cases brought against the league. Without meaningful legal accountability, the discriminatory hiring practices Congress intended to stop through the Civil Rights Act have gone unchecked.[65]

PART III
THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2022

In 2022, Congress enacted the bipartisan Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act (the "EFASASHA"), which amended the FAA by restoring the rights of sexual harassment and assault survivors to file a case in court, despite the presence of a forced arbitration clause. This was the first major legislative change to the FAA in nearly a century, revealing that the statute can withstand revision without damage to its core mission.

The EFASASHA provides in relevant part that "no pre-dispute arbitration agreement ... shall be valid or enforceable with respect to a case which is filed under Federal [or] State law and relates to the sexual harassment dispute."[66] In effect, this amendment renders arbitration agreements voidable at the election of a plaintiff alleging sexual harassment or assault.[67]

As of this writing, only a handful of federal district courts have had occasion to interpret the EFASASHA. Much of this early decisional law centers on the question of whether the statute permits a plaintiff with multiple claims for harassment to bring *all* her claims in court, or instead, demands that only claims for sexual harassment may escape arbitration. So far, the lower federal courts are divided on this issue. For instance, in *Johnson v. Everyrealm,* a case brought by a black male employee alleging both sexual and racial harassment in the workplace, the court denied defendant's motion to cleave the case in two and dispatch the race claim to arbitration.[68]

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rules Brian Flores can pursue some discrimination claims in court, others sent to arbitration, THE ATHLETIC, March 1, 2023, *available at* https://theathletic.com/4265892/2023/03/01/brian-flores-discrimination-case-nfl/.

[65] Fred Bowen, *The NFL has only 3 Black head coaches. That needs to change.*, WASH. POST, Sept. 29, 2022, available at https://www.washingtonpost.com/kidspost/2022/09/29/nfl-has-only-3-black-head-coaches-that-needs-change/; Tom Schad, *Often interviewed, never hired: How hot-shot NFL head coaching candidates go cold*, USA TODAY, Jan. 12, 2023, available at https://www.usatoday.com/story/sports/nfl/2023/01/12/do-nfl-teams-head-coach-vacancies-shortchange-coaches-color/10994631002/.

[66] PUB. L. NO. 117-90, 136 STAT. 26 (2022) (codified at 9 U.S.C. §402(a)). Note: the EFAA defines a "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State Law." *Id*

[67] H.R. 4445; 168 CONG. REC. 27 (February 10, 2022) (statement of Senator Dick Durbin (D-IL)) (The EFASASHA "ensure[s] that every survivor has the choice to go to court" and "give[s] survivors a choice of whether or not to bring a claim in court after the sexual [] harassment claim has arisen, notwithstanding the presence of a forced arbitration clause.").

[68] 2023 WL 2216173, at *7 (S.D.N.Y. Feb. 24, 2022). Alternatively, the defendants argued that – should the court find that plaintiff's allegations of discrimination based on sex were subject to the EFAA – "those claims should be stayed pending the outcome of the arbitration" of the remainder of plaintiff's claims. *See* Motion to

Reasoning that a "case," as that term is used in the EFASASHA, encompasses an *entire* legal proceeding, the court held that once a claim of sexual harassment is plausibly pled, all of plaintiff's claims remain in court.[69] In support of this conclusion, the court observed that Congress, in enacting the new law, "amended the FAA directly," which:

> reinforces Congress's intent to override – in the sexual harassment context – the FAA's background principle that, in cases involving both arbitrable and non-arbitrable claims, 'the former must be sent to arbitration even if this will lead to piecemeal litigation.'[70]

This outcome comports with the drafters' deliberate intent *not* to divide cases by sending some claims from the same case into arbitration. Several senators addressed this precise issue during debates of the EFASASHA, stating that keeping cases whole "is exactly what we intended the bill to do."[71] For instance, Senator Gillibrand explained:

> When a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims [but] it is essential that all the claims related to the sexual assault or harassment can be *adjudicated at one time* to ensure that a victim need not relive that experience in multiple jurisdictions.[72]

By contrast, a handful of courts have been unperturbed by the specter of claim-splitting created by selective application of the statute.[73] Relying on Supreme Court decisions dating back to the 1980's announcing that litigants may have to tolerate greater inefficiency, wasted resources

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Compel Arbitration at 14-15 ("Arbitrable claims accordingly predominate the dispute. In light of the foregoing, the Court should, respectfully, stay any potential non-arbitrable claims while arbitration is pending.").

[69] 2023 WL 2216173, at *7 (the court observed that the plain text of the EFAA clearly "keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute [and] does not limit the invalidation to the claim or claims in which that dispute plays a part"); *see also id.* at *17 ("Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms "case" and "claim."). A handful of courts have adopted *Everyrealm's* approach. *See, e.g.,* Turner v. Tesla, 2023 WL 6150805 (N.D. Cal. Aug. 11, 2023) ("while the two other claims are not strictly sexual harassment claims, their resolution is intertwined with the resolution of the sexual harassment claims. Accordingly, the EFAA renders the parties' arbitration agreement unenforceable in Turner's entire case…").

[70] *Id.*, citing KPMG LLP v. Cocchi, 565 U.S. 18, 19 (2011) (holding that "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation" because "[a] court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration").

[71] 168 CONG. REC. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand).

[72] *Id.*

[73] Silverman v. DiscGenics, Inc., 2023 WL 2480054 at *3 (D. Utah Marh 13, 2023) (enforcing the parties' arbitration agreement "even if doing so requires some claims to be resolved in arbitration while other closely related claims are litigated in court"); Mera v. SA Hospitality Group LLC, 2023 WL 3791712 (S.D.N.Y. June 3, 2023) (finding that plaintiff had to resolve his wage and overtime claims in arbitration, while his sexual orientation claims would remain in court pursuant to the EFAA).

and higher costs for the sake of arbitration, these courts have fragmented cases into separate judicial and arbitral parts – in seeming contradiction to congressional intent.[74]

While questions surrounding the proper interpretation of the EFASASHA may continue to wend their way through the courts, these early decisions make clear that the drafters' well-intentioned effort to single out claims of sexual harassment and sexual assault is both insufficient and unjustified. In many cases, such as *Johnson,* the precise nature of the harassment is simply not known to the victim, whose diverse identities may preclude a single, distinct basis for alleging discriminatory action. Furthermore, there is no clear justification for differentiating between claims of sexual harassment and other forms of harassment – whether based on age, race, disability, religious or political affiliation, or any other protected category. *All* victims should have the right to access courts to seek justice for these injuries, not just those alleging harm based on sex. Indeed, there are currently a number of bills circulating in Congress that would apply the EFASASHA's basic structure to other disadvantaged groups[75] -- an effort reminiscent of prior "piecemeal" legislation enacted to eliminate forced arbitration in certain instances or as against certain narrowly drawn claimants.[76] While the impetus behind these bills is understandable, I urge this body to enact the Forced Arbitration Injustice Repeal Act ("FAIR" Act), which would invalidate any pre-dispute arbitration clause imposed in an employment, consumer, antitrust or civil rights dispute.[77]

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[74] Silverman, 2023 WL 2480054 at *3, citing Dean Witter, 470 U.S. at 217 (holding that the FAA requires district courts to compel arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"); Moses H. Cone, 460 U.S. at 20 ("[R]elevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.").

[75] On May 2, 2023, Senators Cory Booker (D-NJ) and Representative Colin Allred (D-TX) introduced a bicameral bill that would end the practice of forcing individuals who have experienced racial discrimination into arbitration. Ending Forced Arbitration of Race Discrimination Act of 2023, S. 1408, HR 3038 (118th Cong. 2023-4). A month later, Senators Kristen Gillibrand (D-NY), Lindsay Graham (R-SC) and Richard Durbin (D-IL), along with Representative Nancy Mace (R-SC), introduced another bill, the "Protecting Older Americans Act of 2023," prohibiting arbitration of age discrimination claims. *See* S.1979, Protecting Older Americans Act of 2023, 118th Cong. (2023-4).

[76] *See, e.g.,* The Franken Amendment, § 8116 of 2010 Defense Appropriations Act (prohibiting federal contractors who receive funds under the Act for contracts in excess of one million dollars from requiring their employees or independent contractors to arbitrate "claims involving Title VII of the civil rights act or any tort arising out of alleged sexual assault or harassment"); Military Lending Act, 32 C.F.R. § 232.8 (prohibiting mandatory arbitration in certain forms of credit extended to military service members and dependents); Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639c(e) (prohibiting mandatory arbitration in mortgage loan and manufactured home loan agreements); Fair Contracts for Growers Act of 2007, S. 221, 110th Congress (2007); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. (2011).

[77] Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 1423, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1423/text.

PART IV
MASS ARBITRATION

Class action-banning forced arbitration clauses were not designed to achieve fair, expeditious or cost-effective resolutions – indeed, they were not designed to be used at all. Instead, companies and employers have imposed forced arbitration in order to deter victims from filing cases altogether. The proof of this is evident in the recent phenomenon of "mass arbitration," in which victims simultaneously file thousands of individual arbitrations, forcing corporate defendants to confront claims of wrongdoing and make good on their contractual promises to pay the costs of arbitrating large numbers of individual claims.[78] The offer of financial subsidies helped buttress corporate advocates' claims that arbitration is just as fair as the public legal system and less expensive to claimants.[79] But in reality, companies were simply betting that, even factoring in the subsidies, "consumers and employees would not think it worth the time and money to pursue their meritorious but likely monetarily-small claims."[80]

But now that some consumers and employees are filing thousands of nearly identical individual arbitration demands and companies are confronting their contractual obligation to incur millions of dollars in arbitral fees, a number of corporate defendants have balked at the prospect of individually arbitrating claims.[81]

Take, for example, the case of Twitter: after Elon Musk purchased the company and laid off a substantial portion of its workforce, a putative class of ex-employees filed suit alleging wrongful termination in violation of federal and state laws.[82] The court compelled individual arbitration of these claims pursuant to the Twitter employment agreement, which designates JAMS as the arbitral provider. In turn, JAMS Rules governing employment arbitrations provide that employees are required to pay but a nominal filing fee (roughly the same amount that would be required for

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[78] *See* Myriam Gilles, *Arbitration's Unraveling*, 172 U. PENN. L. REV. __ (forthcoming 2024).

[79] *See* Myriam Gilles, *Killing Them With Kindness: Examining Consumer-Friendly Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012) (explaining in the immediate wake of *Concepcion* that companies seeking to protect their arbitration provisions from judicial scrutiny adopted "consumer-friendly" provisions limiting the financial responsibility of the individual claimant and promising to pay the bulk of costs).

[80] Lynda J. Grant, *Turnabout Is Fair Play: The Power of Mass Arbitrations,* VERDICT, vol. 29, No. 3 (July 2023) at 4.

[81] *See* J. Maria Glover, *Mass Arbitrations,* 74 STAN. L. REV. 1283, 1314 n.8 (2022) ("claims that were rendered unmarketable by class-action waivers suddenly became capable of generating settlement pressure greater than that produced by class certification"). *See also* Sam Mellins, *How Corporate America's Favorite Legal Trick Is Backfiring*, THE LEVER, May 27, 2022 (reporting that one prominent mass arbitration firm, Keller Postman, "claims that it has secured more than $200 million for its mass arbitration clients," mainly through mass settlements).

[82] Cornet et al. v. Twitter, 2022 WL 18396334 (N.D. Cal., Dec. 14, 2022). Two other class actions were subsequently filed against Twitter by other groups of workers. *See* Borodaenko v. Twitter, Inc., 2023 WL 3294581 (N.D. Cal. May 5, 2023); Rodriguez v. Twitter, Inc., 2023 WL 3168321 (N.D. Cal. May 1, 2023).

filing a lawsuit in state court).[83] All other arbitration fees must be borne by the employer, including a $2000 filing fee that "must be paid in full" at the commencement of proceedings, as well as all arbitrators' hourly fees and JAMS administrative fees.[84]

Following the court's grant of Twitter's motion to compel arbitration, nearly 2,000 ex-employees inundated JAMS seeking to initiate individual arbitrations. But Twitter refused to pay JAMS' $4 million non-refundable filing fee – much less the arbitral fees that would come later – and, after multiple attempts to secure payment, JAMS finally closed the delinquent file.[85] The ex-employees have now returned to court – this time to compel Twitter to abide by its own arbitration provision.

Likewise, in a bid to avoid paying $91 million in filing fees for 31,500 individual consumer disputes, Uber sued the AAA in New York state court, claiming the "exorbitant" fees violated the provider's commitment to "a fair, cost-effective process."[86] The court was unimpressed, reminding Uber that it alone had "made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and [that the] AAA's fees are directly attributable to that decision."[87] Other courts have similarly rejected companies' attempts to avoid the implications of their own arbitration provisions.[88]

In the case of DoorDash, thousands of couriers filed individual arbitrations with the AAA, which informed the company that it owed about $12 million in nonrefundable fees to launch these worker arbitrations.[89] Like Uber, DoorDash ran to court for help, but Northern District of California Judge William Alsup was unsympathetic: "Faced with having to actually honor its side of the bargain, DoorDash now blanches at the cost of the filing fees it agreed to pay in the

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[83] JAMS Policy on Employment Arbitration, Minimum Standards of Fairness at p. 4, Stnd. 6 ("The only fee that an employee may be required to pay is the initial JAMS Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fees and all professional fees for the arbitrator's services…"). Further, JAMS Rules require that all employment-related arbitrations before JAMS "must comport with the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness." *Id.*

[84] *Id.; see also* Cornet, *supra* note __, 2023 WL 187498, at *3.

[85] Fabien Ho Ching Ma v. Twitter, 23-cv-03301 (N.D. Ca., July 3, 2023), Petition to Compel Arbitration at ¶ 35 ("On June 30, 2023, following Twitter's notice of its refusal to pay these fees, JAMS notified the parties that: "JAMS will close its file as JAMS will not proceed with cases that we have determined fall under our Employment Minimum Standards if Respondent will not abide by those standards."). *See also* Cyrus Farivar, *Ex-Employees Suing Twitter Say It's Not Cooperating On Arbitration, Asks To Keep Case In Court*, FORBES, Feb. 10, 2023.

[86] Uber Tech., Inc. v American Arbitration Assn., Inc., 2022 N.Y. Slip Op. 02503 (1st Dept., April 14, 2022).

[87] Uber v. AAA, 2022 N.Y. Slip Op. 02503 (unanimously affirming the trial court order rejecting Ubers motion for preliminary injunction, in which Uber sought to enjoin the AAA from issuing any additional invoices).

[88] *See, e.g.*, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020) ("The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them.").

[89] *See, e.g.,* Abernathy v. DoorDash, Inc., No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020).

arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration."[90]

The resistance of these companies to individually arbitrating these cases — after unilaterally forcing these provisions on their workers and consumers — makes clear that the corporate preference for forced arbitration was never about fairness and efficiency, but about suppressing worker and consumer cases and avoiding accountability at all costs. This stunning hypocrisy underscores the need for legislative action, as corporate actors and their savvy defense counsel are already finding ways to avoid legal exposure by rewriting contractual provisions to repel mass arbitrations in various ways.[91]

CONCLUSION

Forced arbitration does not accomplish what its proponents claim: it doesn't channel cases into an alternative system that's cheaper or faster. Instead, when subject to forced arbitration, consumer and worker claims simply vanish. And along with those disappearing cases, we sacrifice the rights of all Americans to make decisions for themselves about the path to accountability, as well as deterrence, adherence to legal principles, and the development of the law itself.

Thank you again for the opportunity to testify. I am happy to answer any of your questions.

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[90] *Id.* ("This hypocrisy will not be blessed.")

[91] Myriam Gilles, *Arbitration's Unraveling*, 172 PENN. L. REV. __ (forthcoming 2024).

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Document (1)

1. *Hatkoff v. Portland Adventist Med. Ctr.*

   Client/Matter: -None-

   Search Terms:

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
	-None-

Hatkoff v. Portland Adventist Med. Ctr.

Court of Appeals of Oregon

May 18, 2011, Argued and Submitted; September 12, 2012, Filed

A143162

Reporter

252 Ore. App. 210 *; 287 P.3d 1113 **; 2012 Ore. App. LEXIS 1127 ***; 2012 WL 3985547

STAN HATKOFF, Plaintiff-Appellant, v. PORTLAND ADVENTIST MEDICAL CENTER, a domestic non-profit entity, dba Adventist Medical Center, Defendant-Respondent.

Prior History: [***1] 090404600. Multnomah County Circuit Court. Judith H. Matarazzo, Judge.

Disposition: Affirmed.

Case Summary

Overview

The trial court properly dismissed the employee's age discrimination action against the employer based on his failure to follow the alternative dispute resolution procedure described in his employee handbook. The prescribed dispute resolution procedure was not substantively unconscionable, and the employee's agreement to that procedure was not the product of unconscionable means. While the grievance process was one-sided in application, the effect of the process was not impermissibly one-sided. The 90-day time limit for initiating the grievance process was not substantively unconscionable.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN1[⬇] **Alternative Dispute Resolution,**

Validity of ADR Methods

A party asserting unconscionability bears the burden of demonstrating that a grievance and arbitration procedure is unconscionable.

Contracts

Law > Defenses > Unconscionability > General Overview

HN2[⬇] **Defenses, Unconscionability**

The doctrine of unconscionability does not relieve parties from all unfavorable terms that result from the parties' respective bargaining positions; it relieves them from terms that are unreasonably favorable to the party with greater bargaining power. Oregon courts are reluctant to disturb agreements between parties on the basis of unconscionability, even when those parties do not come to the bargaining table with equal power. In those rare instances in which courts declare contractual provisions unconscionable, there exist serious procedural and substantive unfairness.

Contracts

Law > Defenses > Unconscionability > General Overview

HN3[⬇] **Defenses, Unconscionability**

In Oregon, the test for unconscionability has both procedural and substantive components. "Procedural unconscionability" refers to the conditions of contract formation and involves a focus on two factors: oppression and surprise. Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. Surprise involves the question whether the allegedly unconscionable terms were hidden from the party seeking to avoid them. "Substantive unconscionability" generally refers to the terms of the contract, rather than the circumstances of formation, and the inquiry focuses on whether the substantive terms unfairly favor the party with greater bargaining power. The substantive fairness of the challenged terms is always an essential issue.

Contracts

Law > Defenses > Unconscionability > General Overview

HN4[⬇] **Defenses, Unconscionability**

Both procedural and substantive unconscionability are relevant, although only substantive unconscionability is absolutely necessary. Each case is decided on its own unique facts.

Contracts Law > Defenses > Unconscionability > General Overview

HN5[⬇] **Defenses, Unconscionability**

It is clear that, if a challenged provision is substantively unconscionable, it is unenforceable, regardless of whether it is procedurally unconscionable. Conversely, a contractual provision that is neither substantively nor procedurally unconscionable is enforceable.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN6[⬇] **Alternative Dispute Resolution, Arbitration**

Or. Rev. Stat. § 36.665(1) provides that an arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.

Business & Corporate Compliance > Contracts > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN7[⬇] **Contract Conditions & Provisions, Arbitration Clauses**

In determining unconscionability, the proper focus is on the one-sided effect of an arbitration clause, rather than its one-sided application.

Business & Corporate Compliance > ... > Exculpatory Clauses > Express Conditions > Time is of the Essence

Contracts Law > Contract Conditions &

Provisions > Express Conditions > Time is of the Essence

_HN8_[] Express Conditions, Time is of the Essence

Parties are free to contractually limit the time frame in which to bring a claim, and that limit will be enforced unless unreasonable. A contractual deadline can be void as against public policy if it effectively deprives a party of the reasonable opportunity to vindicate his or her rights.

Contracts Law > Defenses > Unconscionability > General Overview

_HN9_[] Defenses, Unconscionability

The issue of procedural unconscionability, although not "essential," is nonetheless "relevant" in an unconscionability analysis. Procedural unconscionability refers to the conditions of contract formation and focuses on oppression and surprise.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Contracts > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

_HN10_[] Arbitration, Arbitrability

A party does not waive arbitration merely by engaging in action inconsistent with an arbitration provision. Rather, the party seeking to prove waiver must show: (1) the adverse party had knowledge of an existing right to compel arbitration; (2) the adverse party acted inconsistently with that right; and (3) the action resulted in prejudice to the party opposing arbitration.

Counsel: Eric J. Fjelstad argued the cause for appellant. With him on the briefs was Smith & Fjelstad.

Dennis Steinman argued the cause for respondent. With him on the brief was Kell, Alterman & Runstein, LLP.

Judges: Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

Opinion by: HASELTON

Opinion

[**1115] [*211] HASELTON, C. J.

In this employment age discrimination action, ORS 659A.030, plaintiff appeals from a general judgment of dismissal, ORCP 21 A, that was predicated on plaintiff's failure to follow the alternative dispute resolution procedure prescribed in his employee handbook. Plaintiff contends that the prescribed grievance and arbitration procedure is unenforceable for three reasons: (1) the procedure in the employee handbook was "not presented explicitly enough to constitute a knowing and voluntary waiver of statutory rights"; (2) defendant waived its right to assert plaintiff's failure to utilize the procedure as a defense; and (3) the procedure is unconscionable. For reasons explained below, we conclude that the prescribed grievance and arbitration procedure is not unconscionable either substantively or procedurally, and [***2] we reject plaintiff's waiver arguments. Accordingly, we affirm.

The facts material to our review are undisputed. Plaintiff worked for defendant from November 2000 until defendant terminated plaintiff's employment on July 7, 2008. At that time, plaintiff, who had worked in sales and marketing for most of his professional life, was 65 years old. Plaintiff questioned the sincerity of defendant's explanation that he had been laid off for financial reasons, because defendant had recently hired a younger woman to fulfill some of the job duties that plaintiff had performed. In response to plaintiff's inquiry, defendant's vice president sent him a letter reiterating, and further explaining, the reasons for his termination. The vice president denied any discriminatory motive and closed her letter as follows:

> "In the event that you disagree with my decision, I have enclosed a copy of the 'Grievance and Arbitration Procedure' from the Employee Handbook. Please contact [the human resources director] if you have remaining questions."

As we describe more precisely below, in general under the grievance and arbitration procedure set out in the employee handbook, an employee with an employment-related [***3] dispute must submit a written grievance to his or her [*212] immediate supervisor, which commences an informal grievance process with three levels of internal "appeal." If that grievance process fails to resolve the matter to the employee's satisfaction, he or she is entitled to initiate arbitration for certain types of disputes—including disputes regarding employment discrimination and termination. Here, plaintiff did not contact the human resources director; nor did he submit a written grievance in accordance with the procedure. Instead, in September 2008, he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and, on April 2, 2009, filed this age discrimination action under ORS 659A.030. [1]

Defendant moved to dismiss the action under ORCP 21 A, arguing that plaintiff was precluded from raising his employment-related claim in court because he had failed to follow [***4] the internal grievance and arbitration procedure. Defendant alternatively moved the court to abate the action and refer it to [**1116] arbitration. Plaintiff opposed the motion to dismiss and the alternative motion to abate, arguing that the grievance process is unenforceable because (a) the grievance process is unconscionable; (b) the mandatory internal dispute resolution procedure was not "explicitly presented" to plaintiff and, thus, he did not "knowingly and voluntarily" waive his right to pursue his claim in court; (c) his agreement lacked consideration; and (d) defendant had waived the application of the grievance and arbitration procedure "by not pressing the issue" after plaintiff had filed a charge with the EEOC. The court granted defendant's motion to dismiss and entered a general judgment dismissing the complaint with prejudice, thereby implicitly rejecting all of plaintiff's arguments regarding the enforceability of the procedure. [2] Plaintiff appeals from the general judgment of dismissal, raising essentially the same arguments regarding waiver and unconscionability.

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[1] The EEOC process terminated on February 20, 2009, when the EEOC issued plaintiff a notice of right to sue, which pertained only to plaintiff's right to file federal discrimination claims. There is no suggestion in this record that plaintiff ever subsequently pursued any claim under federal law.

[2] The trial court's order stated that it dismissed the claim "with prejudice for failure to exhaust contractual remedies [***5] and lack of subject matter jurisdiction[.]"

[*213] Because it is the predicate for the trial court's order of dismissal—and the object of plaintiff's challenge—we begin with a detailed description of the internal grievance and arbitration process, as well as the documents describing and prescribing that process and plaintiff's conduct in relation to those documents. When plaintiff started working for defendant in 2000, defendant provided him with an employee handbook, and plaintiff signed an acknowledgement recognizing his receipt of the handbook and his responsibility to read and understand its contents. Additionally, plaintiff agreed that,

> "[i]n the event that I am dissatisfied or disagree with any action taken by [defendant], I agree to submit the matter to the hospital's Grievance and Arbitration Procedures for final and binding resolution." [3]

Defendant updated its employee handbook in 2003 and again in 2006. As pertinent here, defendant most recently signed an acknowledgement in 2006, which provides, in part:

> "I acknowledge that I have received a copy of [defendant's] Employee Handbook. I further acknowledge and agree that my employment is governed by the Handbook and the policies contained [***6] therein. I understand that this Handbook supersedes and replaces any inconsistent Policies and all prior handbooks."

Thus, unlike the 2000 acknowledgement, the 2006 acknowledgement did not explicitly reference the grievance and arbitration procedure.

The 2006 employee handbook stated that employees

> "should initiate the Grievance and Arbitration Procedure ('Procedure') for any event, action, failure to act, condition, rule, or practice arising out of or relating to your employment which you believe to be improper or in conflict with your civil rights ('grievance'). This Procedure covers the full range of employment disputes, including those based on state and federal civil rights laws, other state and federal [*214] statutes, torts, public policies, and

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[3] The portions of the 2000 handbook describing the contemporaneous grievance and arbitration procedure are not in this record. We do not understand plaintiff to suggest or contend that those procedures varied materially from those extant in 2006, which we describe immediately below.

> those involving terminations."

The prescribed procedure for resolving employee complaints and claims consists of two *seriatim* components: (a) the grievance process and [***7] (b) with respect to certain specified matters that either party elects to pursue beyond the final level of the grievance process, the arbitration process. The handbook precisely delineates those types of matters that are subject to arbitration upon demand following timely and complete pursuit of the grievance process:

> "Arbitrable disputes are those disputes that * * * [a]rose out of or are related to a claim of (i) employment discrimination (including, but not limited to, discriminatory retaliation, discriminatory or sexual harassment), (ii) termination of employment, including claims of constructive discharge, or (iii) any other claim(s) (whether brought by or on behalf of one or more employees) for wages or other compensation [**1117] with an actual aggregate value of $75,000 or more."

Generally, to initiate that integrated procedure, an employee "must submit a written grievance and [employee's] requested solution * * * within 90 calendar days of the event giving rise to the grievance." However, the arbitration process provides for an alternative deadline for initiation of the grievance process for matters that are, ultimately, subject to arbitration:

> "[I]f the applicable statute of limitations [***8] provides a longer period of time in which to initiate a claim, the grievance will be considered timely if [the aggrieved party] initiate[s] the Procedure within the period of time allowed by the statute of limitations."

The grievance process provides for four successive stages of internal process before reaching arbitration, with the internal decision-makers at each stage being, respectively: (1) the aggrieved employee's immediate supervisor; (2) the department head; (3) an "administrative officer" in concurrence with the human resources department (HR); and finally (4) defendant's president or his or her designee. At each stage of the grievance process, the decision-maker is required to provide the aggrieved employee with a written [*215] response "[w]ithin 14 calendar days, or as soon thereafter as practicable." If the employee is dissatisfied with that result, the employee must renew the grievance and "advance" to the next level within 14 days. The handbook provides that, with respect to the fourth and final level of the grievance process, "[t]he decision of the President or designee is final, except to the extent that a grievance is arbitrable." Significantly, the failure of the employee [***9] to timely initiate or, as applicable, timely "advance" the grievance from one step to the next "shall result in the waiver of [employee's] right to pursue the underlying issue in court or arbitration."

If an employee is dissatisfied with the final result of the grievance process with respect to a matter that is arbitrable, the employee must initiate arbitration by giving defendant written notice of the intent to arbitrate "within the longer of the applicable statute of limitations or 60 calendar days of the mailing of the President's written decision." The handbook states that "arbitration shall be the exclusive remedy for resolving any such arbitrable disputes" and that the arbitrator's decision "shall be final and binding on all parties." The rights of the parties in arbitration "are the same as those available * * * in a court of competent jurisdiction." Failure to timely initiate arbitration "shall constitute a waiver of the dispute in any forum."

The processes just described pertain to employee-initiated grievances. With respect to defendant employer's claims against an employee, the processes, while similar, differ in some respects. Defendant "must, within the longer of 90 calendar [***10] days or the period of time allowed by the applicable statute of limitations, notify the employee in writing of the claim and the requested solution." The employee is then required to arrange, through HR, a meeting with defendant's representative. If that meeting does not lead to resolution, or if the employee fails to respond, defendant may initiate arbitration by giving the employee written notice of the intent to arbitrate within the longer of 60 calendar days or the applicable statute of limitation. Defendant's failure "to pursue a grievance in a timely fashion shall result in the waiver of its right to pursue the underlying issue in court or arbitration."

[*216] Against that factual backdrop, we address plaintiff's contention that the grievance and arbitration procedure is unenforceable

because it is unconscionable. Before describing and applying pertinent principles of unconscionability, it is essential to identify the object to which that analysis properly refers. In particular, although plaintiff directs his unconscionability challenge to certain aspects of the grievance process individually and collectively, defendant remonstrates that that approach is impermissibly selective and skewed. [***11] Rather, defendant asserts, the grievance process and the arbitration process are merely two components of an integrated procedure for addressing and resolving those employment-related claims that are, ultimately, subject to arbitration upon demand—and, thus, any unconscionability must be assessed with respect to that procedure *in toto*.

In the circumstances of this case, we agree with defendant for either of two interrelated reasons on which we will elaborate below. [**1118] First, as noted, the grievance process is the first of two components in a unified procedure, affording a variety of points at which a dispute can be resolved to the parties' satisfaction, and nothing in that process impermissibly impairs an employee's ability and entitlement to invoke arbitration, if necessary, to vindicate statutorily protected rights. Second, to the extent that, as plaintiff (correctly) asserts, various features of the grievance process are not commensurate with those afforded in a civil trial, the procedures and relief available in the arbitration process are much more complete and substantial. Because the latter is ultimately available upon demand to an employee who has pursued the grievance process [***12] but is unsatisfied with its final resolution, the focus of the unconscionability analysis is, properly, on the alternative dispute resolution process as an integrated whole.

As ***HN1***[⬆] the party asserting unconscionability, plaintiff bears the burden of demonstrating that the grievance and arbitration procedure is unconscionable. *W. L. May Co. v. Philco-Ford Corp.*, 273 Ore. 701, 707, 543 P2d 283 (1975). Plaintiff's burden of persuasion is hardly ameliorated by the substantive rigor that we have historically employed in reviewing claims of unconscionability:

> [*217] "[T]he doctrine of ***HN2***[⬆] unconscionability does not relieve parties from all unfavorable terms that result from

> the parties' respective bargaining positions; it relieves them from terms that are *unreasonably* favorable to the party with greater bargaining power. Oregon courts have been reluctant to disturb agreements between parties on the basis of unconscionability, even when those parties do not come to the bargaining table with equal power. In those rare instances in which our courts have declared contractual provisions unconscionable, there existed serious procedural and substantive unfairness."

Motsinger v. Lithia Rose-FT, Inc., 211 Ore. App. 610, 626-27, 156 P3d 156 (2007) [***13] (internal quotation marks, footnote, and citations omitted; emphasis in original); *see also The Hays Group, Inc. v. Biege*, 222 Ore. App. 347, 351-52, 193 P3d 1028 (2008) (same).

We most recently summarized the test for unconscionability as follows:

> ***HN3***[↑] "In Oregon, the test for unconscionability has both procedural and substantive components. Procedural unconscionability refers to the conditions of contract formation and involves a focus on two factors: oppression and surprise. Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. Surprise involves the question whether the allegedly unconscionable terms were hidden from the party seeking to avoid them.
>
> "'Substantive unconscionability' generally refers to the terms of the contract, rather than the circumstances of formation, and the inquiry focuses on whether the substantive terms unfairly favor the party with greater bargaining power."

Livingston v. Metropolitan Pediatrics, LLC, 234 Ore. App. 137, 151, 227 P3d 796 (2010) (citations omitted); *see also Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Ore. App. 553, 566-67, 152 P3d 940 (2007).

Our [***14] case law has not fully explained the interplay between the two identified unconscionability "components." In *Carey v. Lincoln Loan Co.*, 203 Ore. App. 399, 423, 125 P3d 814 (2005), *aff'd*, 342 Ore. 530, 157 P3d

775 (2007), we [*218] observed that "[t]he substantive fairness of the challenged terms *is always an **essential** issue*." (Emphasis and boldface added.) Later, in *Vasquez-Lopez*, we explained that ***HN4***[🡅] "both procedural and substantive unconscionability are relevant, although *only substantive unconscionability is absolutely necessary*. With that proviso, each case is decided on its own unique facts." 210 Ore. App. at 567 (emphasis added).

HN5[🡅] It is clear that, if a challenged provision is substantively unconscionable, it is unenforceable—regardless of whether it is procedurally unconscionable. Conversely, a contractual provision that is neither substantively nor procedurally unconscionable is enforceable. Our case law has not clarified the proper result when a court determines that the challenged provision is procedurally unconscionable but substantively fair. *See Vasquez-Lopez*, 210 Ore. App. at 567 (noting that, "[i]n some jurisdictions, unconscionability [**1119] requires both components" and that, in other [***15] jurisdictions, "courts may invalidate a contract or a contract term on either procedural or substantive grounds" but that Oregon "has not adopted a formal template"); *accord* *Sprague v. Quality Restaurants Northwest, Inc.*, 213 Ore. App. 521, 526-29, 162 P3d 331, *rev den*, 343 Ore. 223, 168 P.3d 1154 (2007) (upholding an arbitration agreement that was "not entirely free from procedural unfairness" but was substantively fair). However, we need not resolve that question in this case, because we ultimately conclude that the grievance and arbitration procedure is neither substantively nor procedurally unconscionable.

We begin our analysis with the "essential issue," *Carey*, 203 Ore. App. at 423: whether the grievance and arbitration procedure is substantively unconscionable. Plaintiff argues that the procedure is substantively unconscionable for three reasons: (1) the procedure does not allow plaintiff to effectively vindicate his statutory rights because the grievance process component "involves no discovery, no real hearing, no witnesses, no impartial decision maker * * *, no lawyers * * * and unclear remedies;" (2) the grievance process "is entirely one sided in favor of the defendant" because it "applies [***16] only to employees and does not bind defendant" (*i.e.*, [*219] lack of mutuality); and (3) the 90-day period in which to initiate a grievance "effectively severely shortens all employment claim statutes of limitation to 90 days." [4]

In response, defendant contends that the terms do not unfairly favor defendant. Defendant responds that the protections that plaintiff complains the grievance process lacks would have been available to him had he complied with the prescribed procedure by pursuing the grievance process to completion and, if then dissatisfied, invoking arbitration. Defendant also argues that parties are free to agree to limit rights and remedies and may contractually shorten the length of an otherwise applicable statute of limitations, so long as the contractual period is "reasonable." Defendant notes that the arbitration process allows for an extension of the contractual deadline to the time allowed by the applicable statute of limitation. [5]

We address each of plaintiff's contentions in turn. Plaintiff first emphasizes that the grievance process involves no discovery, no real hearing, no witnesses, no impartial decision-maker (because the only decision-makers are defendant's employees), no lawyers to help grievants with complex civil rights claims, no jury to hear his complaint, and "unclear" remedies. Plaintiff's challenge in that regard fails for two related reasons. First, as we explained, the proper referent for assessing unconscionability in this case is the entire alternative dispute resolution process, as prescribed by the handbook. Second, plaintiff does not contend that the arbitration process is similarly (or even materially) deficient with respect to procedural protections—nor could he credibly. As noted, under the terms of the handbook, the rights of the parties in arbitration "are the same as those available * * * in a court of competent jurisdiction." *See* __ Ore. App. at __ (slip op at 6); [***18] [*220] *accord* ***HN6***[🡅] ORS 36.665(1) ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding."). To be sure, as plaintiff points out, there is no right to a jury trial under the grievance and

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[4] Plaintiff specifically references the one-year limitation to file an employment discrimination complaint with the Bureau of Labor and Industries, ORS 659A.820, or in state court, ORS 659A.875.

[5] Defendant also contends, in the alternative, that, [***17] even if the prescribed procedure limited an employee to 90 days to initiate a grievance based on conduct purportedly violating ORS 659A.030, that limitation would still afford sufficient time so as not to be unreasonable.

arbitration procedure, but that feature is hardly unconscionable—or, more precisely, if it were, virtually every system of alternative dispute resolution would be substantively unconscionable. [6] *Accord* [**1120] *The Hays Group, Inc.*, 222 Ore. App. at 351 (observing that "[c]laims cannot be settled by 'final' and 'binding' arbitration except by a waiver of the right to a jury trial" and upholding an arbitration agreement despite the lack of explicit waiver of the right to a jury trial).

Plaintiff next contends that the grievance process is impermissibly onesided because only the employee, and not the defendant employer, is required to pursue the grievance process. *Motsinger* is instructive in that regard. There, we held that an arbitration clause that required an employee to submit claims to arbitration, while not similarly requiring the employer to submit claims against an employee to arbitration, lacked mutuality but was not substantively unconscionable. 211 Ore. App. at 619, 627. In so holding, we emphasized that ***HN7***[↑] the proper focus is on the "one-sided *effect* of an arbitration clause—rather than its one-sided *application*." *Id.* at 623 (emphasis in original). Applying that principle, we concluded that the challenged arbitration clause was not totally one-sided in its effect because, under the clause, "plaintiff [was] entitled to all of the same remedies—and most [***20] of the same procedural protections—as defendant." *Id*. at 626. For example, the agreement did not limit the amount or type of recovery available to the plaintiff, nor did it impose [*221] limits on discovery or "tight deadlines" on the filing of claims. *Id.*

Plaintiff is correct that, under the alternative dispute resolution procedures at issue here, defendant is not required to follow the same grievance process as its employees. Specifically, as noted, __ Ore. App. at __ (slip op at 6), defendant is only required to notify an employee of its claim and requested solution. The *employee* is then required to contact HR to set up a meeting with defendant's

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[6] As to substantive protections, plaintiff asserts, vaguely, that the "internal process [is] devoid of numerous procedural and substantive protections available to plaintiff outside of the internal grievance procedure." He later argues that an enforceable arbitration procedure "must provide adequate process and other protections to allow an employee to develop and argue his or her case fully and have adequate remedies available if the employee [***19] prevails." Plaintiff characterizes the available remedies in the grievance process as inadequate and "mysterious"; however, plaintiff never explains precisely how or why the grievance and arbitration procedure as a whole fails to provide adequate remedies in comparison to those that would be available in court.

representative. If the employee fails to respond, or if the parties fail to resolve the issue at that meeting, defendant may then initiate arbitration. Thus, defendant is subject to only two steps of internal process before reaching arbitration, as compared to the four stages of the internal grievance process that plaintiff must negotiate before reaching arbitration. Moreover, the process that applies to defendant almost immediately shifts the burden to act onto the employee. Thus, the grievance process is, in fact, one-sided in *application*. [***21] Nevertheless, the *effect* of the grievance process is not impermissibly one-sided. That is so because, again, an employee does have ultimate access to the arbitration process which is completely mutual. Thus, any interim imbalance is ultimately subject to correction upon demand within the overall design of the alternative dispute resolution process.

Additionally, in characterizing the grievance process as an impermissible impediment to his ability to vindicate his statutory rights, plaintiff fails to acknowledge that the grievance and arbitration procedure also benefits employees. That is so because the informal process allows for potentially faster, easier, and cheaper resolution of employment-related disputes in comparison to litigation. The internal dispute resolution process provides an opportunity for an employee to resolve the issue to his or her satisfaction at any one of the four internal steps or in arbitration.

Finally, with respect to substantive unconscionability, plaintiff argues that the 90-day period in which an employee must commence the grievance process is a burden that defendant does not share and that the contractual period "severely shortens all employment claim statutes [***22] of [*222] limitation to 90 days." In that regard, plaintiff refers particularly to the one-year statute of limitation for age discrimination claims pursuant to ORS 659A.875.

That argument fails for one of several reasons. First, the plain language of the 2006 alternative dispute resolution provisions belies plaintiff's "90-day limit" premise. As noted, __ Ore. App. at __ (slip op at 5), the pertinent provision states, "[I]f the applicable statute of limitations provides a longer period of time in which to initiate a claim, the grievance will be considered timely if [the aggrieved party] initiate[s] the Procedure within the period of time allowed by the statute [**1121] of limitations." Thus, for those claims (including plaintiff's claim for a purported violation of ORS 659A.030) for which there is a prescribed statute of limitation, the time for initiating a grievance is commensurate with the operative statute of limitation (here, one year).

Second, even if plaintiff were somehow contractually compelled to initiate a grievance regarding this matter within 90 days, ***HN8***[⬆] parties are free to contractually limit the timeframe in which to bring a claim, and that limit will be enforced unless unreasonable. *Biomass One, L.P. v. S-P Construction (A61560)*, 103 Ore. App. 521, 526 n 4, 799 P2d 152 (1990) [***23] ("'The parties to a contract may stipulate that an action for a breach of an agreement must be brought within a certain period, and, if such limitation is reasonable, it will be upheld[.]'" (quoting *Ausplund v. Aetna Indemnity Co.*, 47 Ore. 10, 22, 81 P 577 (1905))); *accord Thurman v. DaimlerChrysler, Inc.*, 397 F3d 352, 358, 116 Fed. Appx. 638 (6th Cir 2004) (holding that a six-month limitation in the plaintiff's employment application was "reasonable" and applicable to the employment discrimination action). To be sure, at some point a contractual deadline *could* be void as against public policy if it effectively deprives a party of the reasonable opportunity to vindicate his or her rights. *Cf. Motsinger*, 211 Ore. App. at 624 (explaining that unconscionability "overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy" (internal quotation marks omitted)). Here, however, plaintiff does not so contend. Finally, as we observed in *Sprague*, a contractually shortened period for initiating a claim can both burden and benefit a potential plaintiff. 213 Ore. App. at 527 ("[A]lthough the shorter period can [*223] impose hardship on those who would bring claims, it also provides [***24] them with an incentive to do so while the disputed events are fresh in the memories of witnesses and parties."). Thus, the contractual time limit for initiating the grievance process is not substantively unconscionable.

We thus conclude that the procedure is not substantively unconscionable.

Having determined that the terms of the agreement are not substantively unconscionable, we proceed to plaintiff's argument that the agreement is procedurally unconscionable. ***HN9***[🡅] That issue, although not "essential," is nonetheless "relevant." *Vasquez-Lopez*, 210 Ore. App. at 567. As noted, procedural unconscionability refers to the conditions of contract formation and focuses on oppression and surprise. *Livingston*, 234 Ore. App. at 151. Plaintiff does not contend that his agreement was the product of oppression; rather, he argues that "the contractual terms at issue were hidden from [him], justifying a finding of surprise."

Vasquez-Lopez is instructive on the issue of surprise. 210 Ore. App. 553, 152 P.3d 940. There, the plaintiffs did not read nor speak English and, thus, they could not read the arbitration rider in the loan contract at issue in that case. *Id.* at 556. The defendant had misled the plaintiffs by convincing [***25] them that the terms of the agreement were favorable to them and that the arbitrator's decision would not be binding or exclusive. *Id.* at 568. We concluded that the formation of the contract involved unconscionable surprise "because defendant affirmatively concealed the arbitration rider's terms." *Id.* at 567-69.

The facts here are markedly different from those in *Vasquez-Lopez*. Here, defendant updated its employee handbook in 2006 and notified plaintiff. Plaintiff, an experienced and educated professional, acknowledged and agreed that his employment was "governed by the handbook and the policies contained therein." *See Livingston*, 234 Ore. App. at 152 (noting that the plaintiff was "highly educated" in determining that the employment agreement was not unconscionable). The 2006 acknowledgement evidences plaintiff's awareness, at the very least, that the handbook existed and that it contained policies governing his employment. *See Wyss v. Inskeep*, 73 Ore. App. 661, 667, 699 P2d 1161, *rev den*, 300 Ore. 64, 707 P.2d 582 [*224] (1985) ("All that was necessary was that the terms of the plan were capable of ascertainment and that plaintiff knew that there was a plan."). Further, although by its own terms, the 2006 [***26] handbook "supersede[d] and replace[d] any inconsistent Policies and all [**1122] prior handbooks," plaintiff's 2000 acknowledgement explicitly informed plaintiff that his employment agreement included a binding grievance and arbitration procedure, and plaintiff, in executing that acknowledgement, expressly confirmed that, "[i]n the event that I am dissatisfied or disagree with any action taken by [defendant], I agree to submit the matter to the hospital's Grievance and Arbitration Procedures for final and binding resolution." [7]

We thus conclude that, unlike in *Vasquez-Lopez*, the procedure was not "hidden" from plaintiff here. There was no procedural unconscionability.

We turn finally to plaintiff's two "waiver" arguments. First, plaintiff contends that he did not explicitly waive his entitlement to pursue his claim under ORS 659A.030 in a judicial forum and, thus, any purported waiver in that regard is invalid. As support for [***27] that proposition, plaintiff invokes a federal appellate decision, *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F3d 756, 762 (9th Cir 1997), *cert den*, 523 U.S. 1072, 118 S. Ct. 1511, 140 L. Ed. 2d 665 (1998), which issued 20 years after the enactment of the anti-age discrimination provisions of the antecedent of the current ORS 659A.030, [8] in which the court stated:

> "Any bargain to waive the right to a judicial forum for civil rights claims * * * in exchange for employment or continued employment must at the least be express: the choice must be *explicitly presented* to the employee and the employee must *explicitly agree* to waive the specific right in question."

(Emphasis added.) Plaintiff emphasizes the "explicitness requirement" and proposes that we should "adopt the *Nelson* [*225] reasoning in this matter." We decline that invitation because *Nelson* is inapposite here.

In *Nelson*, the plaintiff, an electrical technician at the defendant's copper mine, complained that the employer defendant had violated the Americans with Disabilities Act and state law by terminating his employment after he experienced medical difficulties while working rotating 12-hour shifts. 42 USC §§ 12101 - 12213. The defendant had issued [***28] the plaintiff an employee handbook that contained a grievance and arbitration procedure, which stated that an employee is "precluded from filing any action with any court concerning any matter which could have been addressed through these procedures." *Nelson*, 119 F3d at

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[7] As noted, __ Ore. App. at __ n 3 (slip op at 4 n 3), there is no implication in this record that defendant engaged in some sort of "bait and switch" between 2000 and 2006, with the prescribed alternative dispute procedures in the latter varying from those in the former.

[8] Or Laws 1977, ch 770, § 1.

758. The district court granted summary judgment to the defendant because the court determined that the arbitration clause was enforceable and that the plaintiff had agreed to waive his right to a judicial forum. *Id.* at 759.

The Ninth Circuit reversed after first observing that "Congress can and sometimes does preclude waivers of a plaintiff's rights under a particular statute." *Id*. at 760. The court then determined that Congress had intended to restrict a plaintiff's waiver of the right to a judicial forum (in favor of arbitration) for ADA claims to situations where the plaintiff "knowingly and voluntarily" agreed to waive that right. *Id.* at 760-61. The court concluded that the plaintiff had not "knowingly and voluntarily" waived his right to a judicial forum because the choice was not "explicitly presented" to the plaintiff and the plaintiff did not "explicitly agree" to waive that specific right. *Id*. at 762. In so [***29] holding, the court applied the waiver analysis from a Title VII case, *Prudential Ins. Co. of America v. Lai*, 42 F3d 1299 (9th Cir 1994), *cert den*, 516 U.S. 812, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995). There, the court had held that it was "apparent from the text and legislative history of Title VII" that "Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes." *Id*. at 1304. The *Lai* court, in turn, had derived the "knowing and voluntary" requirement from a senator's statement contained in the Congressional record associated with Title VII. *Id.* at 1305.

[*226] Plaintiff does not direct us to any similar legislative history in relation to ORS 659A.030— [**1123] which is the sole basis for his age discrimination claim. We decline plaintiff's invitation to adopt the *Nelson* reasoning, because that reasoning is based on a statutory exegesis uniquely predicated on Title VII's particular legislative history. [9] Accordingly, we reject plaintiff's argument that the grievance and arbitration procedure is unenforceable based on his invalid waiver.

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[9] We further observe, as noted previously, *see* __ Ore. App. at __ (slip op at 18), *Nelson* issued 20 years after the enactment of the pertinent provisions of ORS 659A.030. Accordingly, the legislature, in enacting those provisions, could not be deemed to have somehow implicitly endorsed, and incorporated by reference, *Nelson*'s reasoning and result.

[***30] [10]

Plaintiff alternatively argues that defendant waived its right to assert as a defense plaintiff's failure to utilize the grievance and arbitration procedure because defendant did not "press the issue" when plaintiff filed his charge of discrimination with the EEOC. As plaintiff acknowledges, there are no reported Oregon decisions addressing "when or under what conditions an employer waives the right to assert failure to exhaust internal remedies or the existence of an arbitration agreement as a defense" in the specific context [***31] of employment discrimination litigation. However, in Wilbur-Ellis Co. v. Hawkins, 155 Ore. App. 554, 557-58, 964 P2d 291 (1998), we have more generally addressed that question with respect to a matter arbitrable under the Federal Arbitration Act (FAA). There, we noted that, given the FAA's strong policy of encouraging arbitration, ***HN10***[🡅] "a party does not waive arbitration merely by engaging in action inconsistent with an arbitration provision." *Id.* at 558 (internal quotation marks omitted). Rather,

> "the party seeking to prove waiver must show: (1) the adverse party had knowledge of an existing right to compel arbitration; (2) the adverse party acted inconsistently with that right; and (3) the action resulted in prejudice to the party opposing arbitration."

[*227] *Id.* We do not understand plaintiff to contest the applicability of that construct in this context. [11]

Plaintiff's waiver argument fails here because he cannot establish (at least) the second and third of the conjunctive components of that formulation. Specifically, [***32] as defendant emphasizes, its cooperation in the EEOC preliminary investigation process cannot, without more, be deemed to be inconsistent with its right to have the merits of the dispute and the appropriate relief, if any, ultimately, substantively determined pursuant to the prescribed alternative dispute resolution process. Further, even if defendant's conduct

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[10] In addition to his invocation of *Nelson*, plaintiff also raises intertwined contentions that his waiver was not "knowing." Those contentions essentially overlap with features of plaintiff's procedural unconscionability argument, and we reject them for the same reasons. *See* _ Ore. App. at _ (slip op at 16-18).

[11] Indeed, the *Wilbur-Ellis* formulation is essentially identical to that set out in *United Computer Systems, Inc. v. AT & T Corp.*, 298 F3d 756, 765 (9th Cir 2002), which plaintiff does cite.

were somehow "inconsistent," plaintiff has not established, and cannot establish, cognizable prejudice. As noted, immediately after the termination of plaintiff's employment and before he initiated the EEOC process, defendant explicitly reminded plaintiff of the prescribed internal grievance and arbitration procedure. *See* __ Ore. App. at __ (slip op at 1-2). Thereafter, nothing in the course of the EEOC investigation process precluded plaintiff from timely initiating a grievance pertaining to an asserted violation of ORS 659A.030—indeed, as noted, under the prescribed procedures, plaintiff had up to one year, the operative statute of limitations, to initiate such a grievance. *See* __ Ore. App. at __ (slip op at 14-15). Defendant did not waive the alternative dispute resolution procedure.

In sum, the prescribed alternative [***33] dispute resolution procedure is not substantively unconscionable, and plaintiff's agreement to that procedure is not the product of unconscionable means. Further, plaintiff's "waiver" arguments are unavailing. Accordingly, the trial court did not err in dismissing plaintiff's action.

Affirmed.

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The New York Times https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html

BEWARE THE FINE PRINT | PART II

In Arbitration, a 'Privatization of the Justice System'

Jessica Silver-Greenberg and Michael Corkery

Nov. 1, 2015

> *See how this article appeared when it was originally published on NYTimes.com.*

Deborah L. Pierce, an emergency room doctor in Philadelphia, was optimistic when she brought a sex discrimination claim against the medical group that had dismissed her. Respected by colleagues, she said she had a stack of glowing evaluations and evidence that the practice had a pattern of denying women partnerships.

She began to worry, though, once she was blocked from court and forced into private arbitration.

Presiding over the case was not a judge but a corporate lawyer, Vasilios J. Kalogredis, who also handled arbitrations. When Dr. Pierce showed up one day for a hearing, she said she noticed Mr. Kalogredis having a friendly coffee with the head of the medical group she was suing.

During the proceedings, the practice withheld crucial evidence, including audiotapes it destroyed, according to interviews and documents. Dr. Pierce thought things could not get any worse until a doctor reversed testimony she had given in Dr. Pierce's favor. The reason: Male colleagues had "clarified" her memory.

When Mr. Kalogredis ultimately ruled against Dr. Pierce, his decision contained passages pulled, verbatim, from legal briefs prepared by lawyers for the medical practice, according to documents.

“It took away my faith in a fair and honorable legal system,” said Dr. Pierce, who is still paying off $200,000 in legal costs seven years later.

If the case had been heard in civil court, Dr. Pierce would have been able to appeal, raising questions about testimony, destruction of evidence and potential conflicts of interest.

But arbitration, an investigation by The New York Times has found, often bears little resemblance to court.

Over the last 10 years, thousands of businesses across the country — from big corporations to storefront shops — have used arbitration to create an alternate system of justice. There, rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found.

The change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court.

“This amounts to the whole-scale privatization of the justice system,” said Myriam Gilles, a law professor at the Benjamin N. Cardozo School of Law. “Americans are actively being deprived of their rights.”

All it took was adding simple arbitration clauses to contracts that most employees and consumers do not even read. Yet at stake are claims of medical malpractice, sexual harassment, hate crimes, discrimination, theft, fraud, elder abuse and wrongful death, records and interviews show.

The family of a 94-year-old woman at a nursing home in Murrysville, Pa., who died from a head wound that had been left to fester, was ordered to go to arbitration. So was a woman in Jefferson, Ala., who sued Honda over injuries she said she sustained when the brakes on her car failed. When an infant was born in Tampa, Fla., with serious deformities, a lawsuit her parents brought against the obstetrician for negligence was dismissed from court because of an arbitration clause.

Even a cruise ship employee who said she had been drugged, raped and left unconscious in her cabin by two crew members could not take her employer to civil court over negligence and an unsafe workplace.

For companies, the allure of arbitration grew after a 2011 Supreme Court ruling cleared the way for them to use the clauses to quash class-action lawsuits. Prevented from joining together as a group in arbitration, most plaintiffs gave up entirely, records show.

Still, there are thousands of Americans who — either out of necessity or on principle — want their grievances heard and have taken their chances in arbitration.

Little is known about arbitration because the proceedings are confidential and the federal government does not require cases to be reported. The secretive nature of the process makes it difficult to ascertain how fairly the proceedings are conducted.

Some plaintiffs said in interviews that arbitration had helped to resolve their disputes quickly without the bureaucratic headaches of going to court. Some said the arbitrators had acted professionally and without bias.

But The Times, examining records from more than 25,000 arbitrations between 2010 and 2014 and interviewing hundreds of lawyers, arbitrators, plaintiffs and judges in 35 states, uncovered many troubling cases.

Behind closed doors, proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favor. A hearing that lasted six hours cost the plaintiff $150,000. Arbitrations have been conducted in the conference rooms of lawyers representing the companies accused of wrongdoing.

Winners and losers are decided by a single arbitrator who is largely at liberty to determine how much evidence a plaintiff can present and how much the defense can withhold. To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show.

“What rules of evidence apply?” one arbitration firm asks in the question and answer section of its website. “The short answer is none.”

Like the arbitrator in Dr. Pierce’s case, some have no experience as a judge but wield far more power. And unlike the outcomes in civil court, arbitrators’ rulings are nearly impossible to appeal.

When plaintiffs have asked the courts to intervene, court records show, they have almost always lost. Saying its hands were tied, one court in California said it could not overturn arbitrators’ decisions even if they caused “substantial injustice.”

Unfettered by strict judicial rules against conflicts of interest, companies can steer cases to friendly arbitrators. In turn, interviews and records show, some arbitrators cultivate close ties with companies to get business.

Some of the chumminess is subtler, as in the case of the arbitrator who went to a basketball game with the company’s lawyers the night before the proceedings began. (The company won.) Or that of the man overseeing an insurance case brought by Stephen R. Syson in Santa Barbara, Calif. During a break in proceedings, a dismayed Mr. Syson said he watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)

Stephen R. Syson, who lost an insurance case in arbitration. Jeff Clark for The New York Times

Other potential conflicts are more explicit. Arbitration records obtained by The Times showed that 41 arbitrators each handled 10 or more cases for one company between 2010 and 2014.

“Private judging is an oxymoron,” Anthony Kline, a California appeals court judge, said in an interview. “This is a business and arbitrators have an economic reason to decide in favor of the repeat players.”

With so much latitude, some organizations are requiring their employees and customers to take their disputes to Christian arbitration. There, the proceedings can incorporate prayer, and arbitrators from firms like the Colorado-based Peacemaker Ministries can consider biblical scripture in determining their rulings.

The firms that run the arbitration proceedings say the process allows plaintiffs to have a say in selecting an arbitrator who they think is most likely to render a fair ruling.

The American Arbitration Association and JAMS, the country's two largest arbitration firms, said in interviews that they both strived to ensure a professional process and required their arbitrators to disclose any conflicts of interest before taking a case.

The American Arbitration Association, a nonprofit, said it allowed plaintiffs to reject arbitrators on the ground of potential bias.

JAMS, a for-profit company, said it did the same and put extra protections in place for consumers and employees. "Their core value is neutrality — their business depends on it," Kimberly Taylor, chief operating officer of JAMS, said of its arbitrators.

But in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.

Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. "Why would an arbitrator cater to a person they will never see again?" she said.

Arbitration proved to be devastating to Debbie Brenner of Peoria, Ariz., who believes she did not get a fair shake in her fraud case against a for-profit school chain that nearly left her bankrupt. In a rambling decision against Ms. Brenner that ran to 313 pages, the arbitrator mused on singing lessons, Jell-O and Botox.

"It was a kangaroo court," Ms. Brenner said. "I can't believe this is America."

From Cradle to Grave

An ob-gyn's office in Tampa, Fla., now informs expectant mothers that if problems arise — a botched vaginal delivery, a flawed C-section — the patients cannot take their grievances to court. Neither can the families of loved ones who are buried at Evergreen Cemetery outside Chicago, which also requires disputes to be resolved privately.

From birth to death, the use of arbitration has crept into nearly every corner of Americans' lives, encompassing moments like having a baby, going to school, getting a job, buying a car, building a house and placing a parent in a nursing home.

The first contact point can arise prenatally, when obstetricians seek to limit liability by requiring patients to sign agreements containing arbitration clauses as a condition of treating them.

Leydiana Santiago of Tampa was devastated when her baby was born in November 2011 with vision and hearing loss and thumbs that needed to be amputated. Ms. Santiago blamed her doctor at Lifetime Obstetrics and Gynecology for the problems. She said her doctor mistakenly determined that she had miscarried, court records show. As a result, Ms. Santiago resumed taking medication for lupus — medication that can cause birth defects.

Women's Care Florida, which owns Lifetime, declined to comment on the case.

In April 2014, a Florida appeals court upheld a decision to force Ms. Santiago into arbitration. "I obey what appears to be the rule of law without any enthusiasm," wrote one of the judges, Chris Altenbernd, adding that he feared "I have disappointed Thomas Jefferson and John Adams."

Students from high school to graduate school can likewise find themselves caught in the gears. Lee Caplin discovered this when he enrolled his 15-year-old son at Harvard-Westlake, a private school in Los Angeles.

His son said he was bullied and harassed, and received graphic and profane death threats, including some that came from school computers. Among the threats, court records show, were, "I'm going to pound your head with an ice pick" and "I am looking forward to your death."

Harvard-Westlake declined to comment on the case, but said that it "takes allegations of bullying very seriously."

Afraid for his life, the teenager dropped out and the family relocated. When Mr. Caplin sued the school for failing to protect his son, he learned that even civil rights cases can be blocked from court.

The arbitrator ruled in favor of Harvard-Westlake, saying the plaintiff did not sufficiently prove that the school was “negligent.”

“It’s not a system of justice; it’s a rigged system of expediency,” Mr. Caplin said.

Many companies give people a window — typically 30 to 45 days — to opt out of arbitration. Few people actually do, either because they do not realize they have signed a clause, or do not understand its consequences, according to plaintiffs and lawyers.

Cliff Palefsky, a San Francisco lawyer who has worked to develop fairness standards for arbitration, said the system worked only if both sides wanted to participate. “Once it’s forced, it is corrupted,” he said.

Graduates entering the job market can confront even more challenging terrain. For many people, when the choice is between giving up the right to go to court or the chance to get a job, it is not a choice at all.

That is why a housekeeper in suburban Virginia said she had to sign an employment agreement with an arbitration clause that her employer had printed from the Internet. She said she regretted it later when he sexually harassed her and she had no legal recourse in court.

Circumstances are not any easier on the home front, where residents like Jordan and Bob Fogal of Houston can become stuck with a construction nightmare.

Not long after they moved into their townhouse, more than 100 gallons of water crashed through their dining room ceiling.

The couple won when they took their builder to arbitration, but they ended up with only $26,000, about a fifth of what they needed to make repairs. Unable to come up with the rest of the money and sickened from pervasive mold, the Fogals moved out.

The perils of using a secretive system can be even more acute in old age, as illustrated by numerous cases involving nursing homes.

Daniel Deneen said he was incredulous when he got a fax from a nursing home in McLean, Ill., about a client for whom he was a legal guardian.

The client, a 90-year-old woman with dementia, needed prompt care for bed sores. Unless Mr. Deneen agreed to arbitration, he said, doctors working at the nursing home would not treat her there.

“It was the most obnoxious, unfair document I have ever been presented with in over 30 years of practicing law,” Mr. Deneen said.

Once contracts with arbitration clauses are signed, nursing homes can also use them to force civil cases involving sexual assault and wrongful death out of the courts.

In May 2014, a woman with Alzheimer’s was sexually assaulted twice in two days by other residents at the Bella Vista Health Center, a nursing home in Lemon Grove, Calif., according to an investigation by the state’s department of public health. The investigation also found that the nursing home “failed to protect” the woman.

A lawyer for Bella Vista, William C. Wilson, said the company disputed the state’s findings and that the staff “makes the health and safety of its patients their top priority.”

After unsuccessfully fighting to have the arbitration clause in their agreement voided, the woman’s family settled with Bella Vista.

Between 2010 and 2014, more than 100 cases against nursing homes for wrongful death, medical malpractice and elder abuse were pushed into arbitration, according to The Times’s data.

Roschelle Powers said she found her mother, Roberta, who had diabetes and dementia, vomiting and disoriented one day in May 2013 at a Birmingham, Ala., nursing home. Ms. Powers said she alerted the home, Greenbriar at the Altamont, specifically mentioning pills she had found in her mother’s hand, according to a deposition.

A few days later, Roberta Powers’s son, Larry, said he called 911 after finding her alone and unresponsive.

A day after the ambulance took his mother to the hospital, she was dead. An autopsy showed that the 83-year-old Mrs. Powers had more than 20 times the recommended dose of metformin, a diabetes medication, in her blood.

During arbitration, the nursing home acknowledged the blood test results but said they had been the result of renal dysfunction. The arbitrator ruled in favor of Greenbriar. “There was no evidence to support the allegation that Ms. Powers somehow gained access to, and then took, more than her prescribed amount of metformin,” Joseph L. Reese Jr., a lawyer for the nursing home, said.

Perry Shuttlesworth, the family’s lawyer, said that "it was only because of forced arbitration that the nursing home got away with this." He added that “a jury would not have let this happen. “

Even when plaintiffs prevail in arbitration, patterns of wrongdoing at nursing homes are kept hidden from prospective residents and their families.

Recognizing the issue, 34 United States senators have asked the federal government to deny Medicare and Medicaid funding to nursing homes that employ arbitration clauses. “All too often, only after a resident has suffered an injury or death,” the senators wrote in a letter in September, “do families truly understand the impact of the arbitration agreement they have already signed.”

Sometimes, even death provides no escape.

Willie K. Hamb stands in the cemetery where she wanted her husband to be buried in a simple plot. David Kasnic for The New York Times

Willie K. Hamb was at the funeral for her husband at Evergreen Cemetery outside Chicago when she discovered that his coffin would not be buried in the shady plot she said she had requested.

Instead, the cemetery informed Mrs. Hamb that it would place the coffin in a wall crypt until the more than $56,000 marble mausoleum they said she had agreed to in a contract was complete.

Mrs. Hamb, 72 and retired, said all she could afford for her husband, known to his friends as Pudden, was the simple plot and service she had already paid $12,461 to arrange.

Mrs. Hamb's husband, known to his friends as Pudden.

David Kasnic for The New York Times

Service Corporation International, one of the nation's largest providers of funeral services and the owner of Evergreen Cemetery, declined to comment.

The dispute will be resolved in a coming arbitration. Mrs. Hamb's lawyer, Michelle Weinberg, said she was not optimistic that her client would prevail, especially since the arbitrator is a bank compliance officer.

A Crash Course

Debbie Brenner enrolled in the surgical technician program at Lamson College near Phoenix in her 40s with high hopes of reinventing herself. She spent hours learning about the tools used in surgical procedures as if mastering the movements of the waltz, each handoff in graceful succession: scalpel, retractor, clamp, sutures.

Whether the instruments featured in lessons were real, or just depictions in photographs, depended on what teachers could round up on any given day. Lamson students became accustomed to empty surgical trays and anatomical mannequins missing their plastic replicas of organs. One enterprising instructor fashioned hearts, livers and kidneys out of felt and string.

Students considered that instructor to be one of Lamson's better faculty members, more than a dozen of them said in interviews. Some teachers routinely disappeared from class, leaving tests conspicuously on the desks to be copied, they said.

Ms. Brenner, a devout Christian, said she prayed that the program's shortcomings would not diminish her job prospects. She said the enrollment officer who persuaded her to sign up for the $24,000-a-year program had promised her she would easily find a job after graduation.

Debbie Brenner, whose fraud case against a for-profit school chain was forced into arbitration and left her nearly bankrupt. Nick Cote for The New York Times

When Ms. Brenner completed the program with high marks in 2009, she said, Lamson failed to find her an internship. She was volunteering at Maricopa County Hospital when, she said, a surgical technician told her that most hospitals refused to hire Lamson students because they were so poorly trained. According to students, some did not even know how to properly sterilize their hands before surgery.

“It was a joke,” Ms. Brenner said. “The school’s brochure was all about making our dreams come true, but this was a nightmare.”

Soon after, Lamson shut down the program when it was unable to place enough of its students in internships. In March 2011, Ms. Brenner and other students filed a lawsuit against the school and its owner, Delta Career Education Corporation, accusing them of fraud. The case was promptly dismissed because of an arbitration clause in the students’ enrollment agreements.

Ms. Brenner, confident she could prevail in arbitration, persuaded her husband to withdraw $12,000 from his retirement account to put toward legal fees.

By the time her case was heard in March 2013, the attorney general of Arizona had sued another Delta school for defrauding students in a criminal justice program. And a federal class-action lawsuit in Michigan had accused a Delta school of defrauding students out of millions of dollars in student loans. The company did not admit wrongdoing, but settled both lawsuits for a total of more than $8 million.

Arbitration would prove to be more advantageous for the company, records and interviews show.

Ms. Brenner's case was conducted in the Phoenix office of Gordon & Rees, one of two big law firms defending Lamson and Delta. The arbitrator, Dennis Negron, was a corporate lawyer and real estate broker who had written papers on how to limit liability because "last on your list of desires is to be sued."

As in most arbitrations, lawyers for both sides chose Mr. Negron from a list provided by an arbitration firm, in this case the American Arbitration Association.

Lawyers for Ms. Brenner and four other students grouped into the same arbitration said they anticipated victory because they believed that the evidence was overwhelmingly in their favor.

Even the school's former head of admissions, Jeff Bing, testified that he had been instructed by his superiors at Delta to increase enrollment at all costs.

Mr. Bing said it was widely known that the admissions staff, whose compensation was tied to the number of students recruited, was "overpromising" on jobs. He testified that the job placement rate for graduates was around 20 percent.

To keep the enrollment numbers up, Mr. Bing said, virtually anyone who applied was accepted. He added in an interview that the only qualification was "a pulse."

Mr. Bing and other former employees recounted in interviews with The Times how profits drove most of the decision-making at Lamson.

As administrators were pressured to increase enrollment, instructors were drilled on the importance of student retention — which factored into federal aid disbursements.

Penny Philippi and Karen Saliski, two former teachers, said they were directed not to flunk anyone, including a student who skipped classes to “chase U.F.O.s.”

Delta declined to comment.

During the arbitration proceedings, even a witness for the defense expressed concerns about Lamson. Kelly Harris, who headed the school’s surgical technician program, defended the quality of education offered at Lamson but said the school enrolled too many students.

Ms. Harris, in an interview with The Times, said she warned school executives that the practice would dilute the quality of training, flood the job market and make the Lamson degree worthless. They scoffed, she said.

“It broke my heart to see these kids treated as dollar signs,” Ms. Harris said.

She was one of only two people who testified for the defense. Lawyers for Lamson and Delta denied that enrollment officers guaranteed jobs, adding that they were hard to come by during the recession.

In the end, Mr. Negron ruled in favor of Lamson and Delta.

Mr. Negron found that the defense had presented the “two most credible witnesses” and praised for-profit education, according to his decision, a copy of which was obtained by The Times. Mr. Negron did not return repeated calls and emails seeking comment.

“There is little doubt that for-profit technical or specialty schools, like the college, serve an invaluable service to the public,” he wrote in his decision.

Mr. Negron found that the college did not make job promises during the enrollment process but may have engaged in “puffery, which each of the adult students should have known and recognized as puffery.” Chiding Ms. Brenner for not being a savvier shopper, he said she had approached her decision to enroll in a “most cavalier manner” as if “buying a Snickers at the local market.”

His opinion was not shared by arbitrators who ruled in favor of students in two nearly identical cases against Lamson, documents obtained by The Times show.

If the cases had played out in court, legal experts said, Ms. Brenner could have referred to those decisions to appeal Mr. Negron’s.

As it stands, Ms. Brenner lost far more than the case.

Mr. Negron decided that she and the other students should pay the defense’s $354,210.77 legal bill because of the “hardship” the students had inflicted on Lamson and Delta.

“I felt like I had been sucker-punched,” Ms. Brenner said.

Repeat Business

Fearful of losing business, some arbitrators pass around the story of Stefan M. Mason as a cautionary tale. They say Mr. Mason ruled in favor of an employee in an age discrimination suit, awarding him $1.7 million, and was never hired to hear another employment case.

While Mr. Mason’s experience was rare, more than 30 arbitrators said in interviews that the pressure to rule for the companies that give them business was real.

Companies can even specify in contracts with their customers and employees that all cases will be handled exclusively by one arbitration firm. Big law firms also bring repeat business to individual arbitrators, according to documents and interviews with arbitrators. Jackson Lewis, for example, had 40 cases with the same arbitrator in San Francisco over a five-year period.

The JAMS arbitrator in an employment case brought by Leonard Acevedo of Pomona, Calif., against the short-term lender CashCall simultaneously had 28 other cases involving the company, according to documents disclosed by JAMS during the proceedings.

“This whole experience burst my bubble,” said Mr. Acevedo, a 57-year-old veteran, who lost his case in October 2014. His lawyer, James Cordes, offered a more critical take. “It clearly appears that the arbitrator was working for the company,” Mr. Cordes said. “And he disregarded evidence to hand a good result to his client.”

JAMS denied that its arbitrator had been influenced by CashCall.

Linda S. Klibanow, an employment arbitrator in Pasadena, Calif., acknowledged the potential for conflicts of interest but said she thought most arbitrators, many of whom are retired judges, could remain fair.

“I think that most arbitrators put themselves in the place of a jury as the fact finder and try to render a fair decision,” Ms. Klibanow said.

Elizabeth Bartholet, an arbitrator in Boston who has handled more than 100 cases, agreed that many arbitrators had good intentions, but she said that the system made it challenging to remain unbiased. Ms. Bartholet recalled that after a company complained that she had scheduled an extra hearing for a plaintiff, the arbitration firm she was working with canceled it behind her back.

A year later, she said, she was at an industry conference when she overheard two people talking about how an arbitrator in Boston had almost cost that firm a big client. “It was a conference on ethics, if you can believe it,” said Ms. Bartholet, a law professor at Harvard.

Deborah Pierce, the doctor in Philadelphia, said she did not expect to confront in arbitration the very problem she was suing her employer over: an uneven playing field.

Dr. Pierce decided to go to arbitration after learning that another female doctor had been denied a partnership by her employer, Abington Emergency Physician Associates, under similar circumstances. She also had the backing of the Equal Employment Opportunity Commission, which found that there was probable cause that Dr. Pierce had been discriminated against.

The practice is now under different management.

Dr. Pierce needed to prove the partners' states of mind when they dismissed her, or debunk whatever reason the company gave for letting her go. Both required access to the practice's records and witnesses.

Once in arbitration, she and her lawyers said, the arbitrator gave them a weekend to review hundreds of records the defense originally withheld.

Vasilios J. Kalogredis, the arbitrator, said he could not comment on details of the proceedings because they were confidential, though he emphasized that "everything was handled properly."

For Dr. Pierce, the most astounding moment came when her lawyers asked Mr. Kalogredis to impose sanctions on the defense for breaking the rules of discovery and destroying evidence. He fined the defense $1,000 after investigating the matter, then billed Dr. Pierce $2,000 for the time it took him to look into it.

"I kept thinking, 'I'm not a lawyer, but this can't be right,' " said Dr. Pierce, who had to take out a second mortgage to cover her legal expenses, which included a $58,000 bill from Mr. Kalogredis.

After the ruling, Dr. Pierce's lawyers wrote to Mr. Kalogredis's arbitration firm questioning his qualifications. The firm, American Health Lawyers Association, responded that it was not its responsibility to verify the "abilities or competence" of its arbitrators.

Robert Gebeloff contributed reporting.

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Congress Was Wrong: Arbitration Is More Plaintiff-Friendly Than Litigation, and We Can Make It Even More Just

Harry C. Katz,[*] David Sherwyn[**] &
Paul Wagner[***]

Introduction

In March of 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA)[1]—a law that made pre-dispute arbitration agreements unenforceable, regardless of whether the agreements were entered into voluntarily by the employee or were a mandatory condition of employment. In describing the new law, commentary by Professor Deborah Widiss in the newsletter of the ABA Section of Labor and Employment Law stated:

> A growing body of empirical research suggests that workers are disadvantaged by being forced into arbitration. As #MeToo has highlighted the ongoing pervasiveness of sexual harassment, advocates have argued that forced arbitration and nondisclosure policies may contribute to the problem by shuttling complaints into private arbitrations rather than public court filings.[2]

We disagree. The "empirical evidence" referenced in the ABA newsletter's assertion suggesting that employees are "disadvantaged" by mandatory or voluntary arbitration is fatally flawed. We, instead, demonstrate that employees in civil rights cases enjoy significantly

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1. Pub. L. No. 117-90, 136 Stat. 26 (2022).

2. Deborah A. Widiss, Commentary, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, Lab. & Emp. L. Newsletter (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/new-law-limits-mandatory-arbitration-in-cases-involving-sexual-assault-or-harassment/#:~:text=In%20March%202022%2C%20Congress%20enacted,)%2C%20went%20into%20effect%20immediately [https://perma.cc/3SGF-GZTR].

greater results in arbitration than in litigation. Put simply, the research relied upon by the authors of the bill, the ABA newsletter's description of the new law, and numerous academics, commentators, and pundits, inexplicably fail to include dispositive motions in their analysis. When these critical data are included, plaintiffs prevail in 19% of the resolved cases[3] in arbitration and only 1% in litigation. While there are several other reasons to scrutinize arbitration (*e.g.* mandatory vs. voluntary; the effect on the development of the law; class action waivers), we contend that: (1) most of these perceived flaws can be fixed; and (2) the main reason for the criticism—the lack of employee success—is actually illusory. If Congress's intent in passing the EFASASHA was to increase employee rate of success in sexual harassment claims, it should have sought to further regulate the arbitration process to render it even more accessible and fair to employees, not prohibit it altogether.

Having studied Alternative Dispute Resolution (ADR) for more than a quarter century, we believe that ADR is something that all employees and employers seeking a positive employment culture should favor, and that society should not only allow but should encourage. We also believe, however, that in order to create a system that is efficient, fair, and positive for employees, employers, and society, Congress must pass a statue incorporating the best of ADR polices and correcting a number of flaws currently allowed by law. Following, we give a quick overview of the current legal status of ADR and then set forth our arguments summarized as follows: (1) The current system of adjudicating employment claims is untenable and unfair to employees, demonstrating why ADR is necessary to achieve a fair and effective way to settle workplace disputes: (2) The academic research that has fueled much of the backlash against employment arbitration is simply wrong; and (3) our Dispute Resolution Proposal offers a model for future ADR legislation.[4]

I. Legal Background

Over the last forty years, alternative dispute resolution (ADR), as a method to resolve employment disputes, has undergone a remarkable transition from a pro-employee concept favored by progressives to "forced arbitration"—a perceived employer tool to take away employee rights. The transition has been fueled by academic scholarship, intense lobbying from the National Association of Trial Lawyers, and some

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[3] By resolved cases, we mean cases not settled and instead resolved by a judge, jury, or arbitrator.

[4] We must address the fact that this paper discusses non-union arbitration. In many ways, the systems are similar, but there are two major differences: in union arbitration, (1) unions and employers are relatively equal in their access to, and knowledge of, the arbitration system, and (2) the sides split the costs (as opposed to the employer paying the full cost). *See* Julius Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 919–20 (1979).

questionable practices by certain members of the business community. The slow and inconsistent development of federal and state case law regulating arbitration initially added chaos and uncertainly, creating a "Wild West" scenario where employers were left to develop policies that undermined the intended protections of federal and state legislation.[5] In the last twenty years, however, the law has been clarified, and the so-called due process protocols[6] have addressed some major concerns previously raised about employment arbitration.[7] Today the law is clear: employers, who are not in the transportation industry, may implement pre-dispute mandatory arbitration policies to cover all employment-related claims, except sexual harassment and sexual assault, as long as the polices meet the due process protocols developed by the courts over the past twenty-five years.[8] The due process concerns of the early 1990s are no longer relevant because the necessary protections have been largely imposed by the courts. This fact, however, has not stopped the criticism of pre-dispute mandatory arbitration as the final step in the dispute resolution process. This criticism, which has been motivated primarily by trial lawyers' self-interest and buoyed by inaccurate research, has gotten traction on both sides of the political aisle.

For over twenty years, the Democratic Party has proposed legislation to outlaw pre-dispute mandatory arbitration. In the fall of 2021, Congress held hearings and proposed legislation to limit, or even eliminate, pre-dispute mandatory arbitration through federal legislation, state legislation, or a presidential executive order, although the latter would only affect government contractors.[9] The anti-arbitration forces

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[5] *See generally* Katherine Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 932 (1999).

[6] *See* Am. Arb. Ass'n, Employment Due Process Protocol (1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [https://perma.cc/98D9-YE4A]; *The Fairness Issue: Due Process*, Nat'l Arb. & Mediation (NAM) (2023), https://www.namadr.com/practice-areas/employment-area/the-fairness-issue-due-process [https://perma.cc/Z2PT-NLW8].

[7] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)*; see also* Samuel Estreicher, Opinion, *Court Ruling Might Help Workers After All*, Virginian-Pilot (May 29, 2018 12:00 AM), https://www.pilotonline.com/opinion/columns/article_18a01a6f-eb64-5a9f-b22d-f62c38193880.html [https://perma.cc/86CU-VLRR].

[8] *See Epic Sys. Corp.*, 138 S. Ct. at 1621–22 (2018); *see also* Estreicher, *supra* note 7.

[9] *See* John Andrew Schaffer & Marla N. Presley, *In the Crosshairs: U.S. Congress Again Takes Aim at Arbitration Agreements in Employment Context*, Nat'l L. Rev. (Aug. 20, 2021), https://www.natlawreview.com/article/crosshairs-us-congress-again-takes-aim-arbitration-agreements-employment-context [https://perma.cc/4GJ7-3P2V]; Press Release, Jerrold Nadler, Chairman, H. Judiciary Comm., Chairman Nadler Statement for the Markup of H.R. 963, the Forced Arbitration Injustice Repeal Act (Nov. 3, 2021), https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=4775 [https://perma.cc/M9K7-8W4U]; Douglas Wigdor, *Senate Committee Takes Aim at Forced Arbitration of Sexual Harassment Disputes*, Forbes (Nov. 15, 2021, 3:07 PM EST), https://www.forbes.com/sites/douglaswigdor/2021/11/15/senate-committee-takes-aim-at-forced-arbitration-of-sexual-harassment-disputes [https://perma.cc/9YL6-46ZW].

in Congress were partially successful in their pursuit to ban arbitration when they passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA). The passing of the EFASASHA was bipartisan. The vote in the House was 335–97.[10] In the Senate, the bill passed by a bipartisan voice vote.[11] Following the passage of the bill, politicians on both sides of the aisle congratulated themselves for their efforts. For example, one of the bill's sponsors, Kirsten Gillibrand (D-N.Y.), stated:

> This bill represents one of the most significant workplace reforms in American history. It will help us fix a broken system that protects perpetrators and corporations and end the days of silencing survivors. . . . The arbitration process not only allows the corporations to hide sexual harassment and assault cases in this secretive and often biased process, but it shields those who committed serious misconduct from the public eye.[12]

Senate Majority Leader Charles E. Schumer (D-N.Y.) called the bill "painfully overdue" and said that, for decades, mandatory arbitration "perpetuated cultures of abuse and unaccountability" in workplaces. Co-sponsor, Senator Lindsey Graham (R-S.C.), stated: "It does not hurt business to make sure that people who are harassed in the workplace get treated fairly," Graham said. "It's better for business."[13]

The bipartisan support for the EFASASHA legislation, the comments by legislators on both sides of the aisle, and the surrounding news coverage of the law would lead a casual observer to two conclusions: (1) private arbitration is fundamentally flawed and, thus, unfair to employees; and (2) the default process for resolving employment disputes is a positive process for employees that yields them much better results than arbitration. In fact, both conclusions are demonstrably wrong. Below we critique the current system that the legislation perpetuates and that its sponsors and supporters implicitly endorse. We contend that this system is untenable for the majority of "good actor" employees, while benefiting "bad actor" employers and employees alike, as well as plaintiffs' lawyers. Arbitration of employment claims offers a more just way forward.

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[10] *Roll Call 33 | Bill Number: H.R. 4445*, U.S. H.R. Clerk (Feb. 7, 2022, 7:24 PM), https://clerk.house.gov/Votes/202233 [https://perma.cc/DYM6-NQMS].

[11] Amy B. Wang, *Senate Passes Bill to End Forced Arbitration in Sexual Assault, Harassment Cases*, Wash. Post (Feb. 10, 2022, 2:59 PM EST), https://www.washingtonpost.com/politics/2022/02/10/senate-sexual-assault-forced-arbitration [https://perma.cc/7Z7H-764M].

[12] *Id.*

[13] *Id.*

II. ADR Is Necessary Because the Current System Is Unfair and Unruly

The current system for resolving non-union workplace disputes is inefficient, inaccessible, and ineffective. Moreover, the current system is perceived as being unfair by both employers and employees, and that system tilts decidedly in favor of employers.[14] The current system for resolving employment claim emanates from a tort-based litigation system. The theory of tort-based litigation is that high damage awards for those who are injured will incentivize property owners, product manufacturers, and professionals to avoid injuring the public. This theory should not be the basis for employment disputes because it does not fit with many features of workplace disputes. Unlike torts, employment disputes are not only inevitable, but they are also, in some ways, healthy. Disputes can raise issues that need to be corrected at the workplace. Sometimes the conduct at issue is egregious, although it may not be. When the dispute is not egregious, academic research and practical experience suggest that disputes are best resolved at the lowest level with minimal involvement from outsiders (e.g., lawyers, government agencies, etc.).[15]

The grievance and arbitration system that exists in the union sector provides some clear lessons. While unions and management often conflict, almost all will agree that grievance and arbitration procedures facilitate conflict resolution in an efficient and effective manner.[16] Indeed, the National Labor Relations Board (NLRB) defers cases to

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[14] For an extensive study concluding that employers and employees, regardless of whether or not they prevail, find the current discrimination litigation system unfair, see Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 L. & Soc'y Rev. 1 (2012).

An obvious question is whether those who do not favor pre-dispute mandatory arbitration would also contend that the EEOC litigation system is inefficient, ineffective, and inaccessible. Simply put, we do not know. We have studied the literature and those who argue against arbitration do not compare the two systems against each other. Instead, as described *infra* Part III, those who do not favor arbitration compare litigation results to arbitration results in terms of win/loss, time, and expenses. While, as explained, *infra* Parts IV and V, there is no dispute that arbitration is faster and less expensive, the only scholars who actually examine the two systems include Sam Estreicher, Ted St. Antoine, and the authors herein, who favor arbitration. Those that do not favor arbitration (e.g., Alex Colvin, Mark Gough, Kathy Stone, David Schwartz, Lisa Bingham) do not use EEOC or dispositive motion data in their studies.

[15] *See generally* Harry C. Katz, Thomas A. Kochan & Alexander J.S. Colvin, An Introduction to U.S. Collective Bargaining and Labor Relations (5th ed. 2017).

[16] Every union contract that the authors have ever studied has a grievance arbitration procedure offered in exchange for a no-strike clause. Of course, the union grievance arbitration system has two parties of relatively equal power, while there is no organization representing the individual employee in employment arbitration. For a critical comparison, see Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

Collyer Insulated Wire Co., 192 N.L.R.B. 837, 839–40 (1971).

arbitration if (1) an arbitration agreement is part of the collective bargaining agreement (CBA); and (2) if alleged violations of the National Labor Relations Act (NLRA) are factually parallel to the grievance filed under the CBA.[17]

The tort-based litigation system that operates in the non-union sector, however, provides the opposite of effective dispute resolution. Instead of being based on cooperation and problem solving, the system is adversarial with an emphasis on remuneration. This adversarial system has created an industry of government workers and legal professionals (on both the employee and employer side) whose livelihoods depend on it. Indeed, thousands of people are employed by the Equal Employment Opportunity Commission (EEOC), state agencies, employment law firms, in-house lawyers, Human Resources (HR) consultants, in-house HR professionals, etc. While their work is interesting, lucrative, and vital to make the system work, we contend below that the current system is broken.

The two major types of workplace disputes are discrimination and wage and hour violations.[18] For wage and hour claims, a major consideration is the "class action waiver."[19] Class actions are fundamentally different than non-class action claims. The amount of litigation necessary to obtain class certification often exceeds the entire single-plaintiff case. In addition, class actions often feature very technical applications of the Fair Labor Standards Act (FLSA) and state laws. Finally, because many arbitration policies have class action waivers,[20] it is difficult, if not impossible, to analyze arbitration versus litigation in these types of cases. The authors intend to do a study in the future on the effect of class action waivers by exploring the costs of the litigation, the attorneys' fees, the basis for settlements, and the percentage of damages that the plaintiffs in the class receive. While these same factors may be relevant in discrimination cases, the nature of such class actions is different and the frequency of class actions is much lower.[21] Because the sort of analysis necessary to address class actions is beyond the scope of this paper, our litigation discussion will focus exclusively on

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[17] *Id*. at 841–42.

[18] The major court decisions on arbitration come from these kinds of cases. *E.g.*, Morgan v. Sundance, Inc., 596 U.S. 411 (2022); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[19] This was the issue in *Epic Systems Corp.*, 138 S. Ct. 1612, for example, which upheld enforcement of mandatory class action waivers.

[20] ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2, 11–12 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/XCJ4-59CC]

[21] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353–54 (2011) (explaining the narrow circumstances in which a discrimination class action can be brought and rejecting it in the absence of a facially discriminatory policy).

discrimination cases, where few cases are class actions, and we will not wrestle with appropriate public policy regarding class action waivers. As stated previously, we are gathering information on class actions and hope to add to that discussion at a later date.

A. Discrimination Claims

The problem with the current system for resolving discrimination claims is that it is slow, expensive, inaccessible, and unfair to most aggrieved parties. To file a charge of discrimination, an employee must first file a claim with the EEOC or a corresponding state agency.[22] In the last decade, the EEOC averaged 89,402 charges filed per year. [23] The range was 72,675–99,947.[24] In the last decade, the EEOC averaged 97,388 resolutions per year.[25] The range was 80,806–112,499. [26] The higher average and range reflect the fact that the EEOC has had a backlog of cases for decades. The number of charges is not the problem. The problem is the way the EEOC processes claims and the results.

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[22] We use discrimination cases because they are the most prevalent types of cases and because the EEOC data is readily available. The arbitration cases are limited to statutory claims, which are, for the most part, discrimination cases because wage and hour cases (the second most prevalent type of case) are almost always litigated as class actions. These are outside of the arbitration forum under almost all employer promulgated polices, a practice that was held lawful by *Epic Systems Corp.*, 138 S. Ct. 1612. We avoid arbitration contract cases because the burden of proof is on the employer instead of the employee, and proving cause is much more difficult than defending a discrimination claim. For a discussion of contract versus statutory claims in arbitration, see J. Ryan Lamare & David B. Lipsky, *Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry*, 72 ILR Rev. 158, 158–84 (2018).

[23] *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2022*, EEOC, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 [https://perma.cc/4SH8-ZJZF]. We noticed that charges seem to be a lot higher during Democratic administrations than Republican administrations. The reasons for that pattern are not clear. Unfortunately, similar data is not available from the state agencies. State agencies have different names (e.g., Illinois Department of Human Rights, Michigan Department of Human Rights, New York State Division of Human Rights, etc.), and they have different formats. For example, Illinois has its own adjudication forum, the Illinois Commission of Human Rights, while other states, like California, adjudicate their cases in state courts. It is beyond the scope of this paper to collect the relevant data from the forty-seven different states with different systems prohibiting employment discrimination in the private sector; thus, we use the federal system.

[24] *Id.*

[25] *Id.*

[26] *Id.*

Discrimination Claims Over the Last Ten Years

Charges filed per year	
Average	89,402
Range	72,675–99,947
Charges resolved per year	
Average	97,388
Range	80,806–112,499

Before examining the EEOC process, we must emphasize that our criticism is not directed at the EEOC's administrators or investigators. Through our work in the field, the authors have had the opportunity to work with several EEOC commissioners and the former EEOC General Counsel. We have found the commissioners, both Democrats and Republicans, and the General Counsel to be consummate professionals who are committed to enforcing the law and working to eliminate discrimination in the workplace. Nonetheless, as explained below, the system, as it has evolved over the last fifty-plus years, provides a poor way to resolve disputes in the workplace. Below, we explain how the system works and why we urge its replacement.

Discrimination charges begin with the filing of a charge with the EEOC or a corresponding state agency.[27] Cases can be initiated by employees, the EEOC, or, in some states, the state agency. The EEOC or state agency where the employee filed will enforce both state and federal law. It should be noted, however, that some states have expanded protected classes (e.g., family status) and/or expanded coverage (e.g., employers with fewer than fifteen employees). The EEOC will not, for example, investigate a charge of discrimination against an employer with fewer than fifteen employees or a claim of family status discrimination; they will instead refer that case to the appropriate state agency.[28] A small number of states (e.g., North Carolina and Georgia) do not have state discrimination laws enforceable in the private sector, and, consequently, they do not have state agencies.[29] We have already cited EEOC data and will continue to do so throughout the paper. We do not cite state agency data simply because that data are not readily

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[27] 42 U.S.C. § 2000e-5; *Filing a Charge of Discrimination*, EEOC, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/4WUP-38CK].

[28] *Filing a Charge of Discrimination*, *supra* note 27. The EEOC "dual files" charges with state agencies as a matter of course, so when the EEOC dismisses charges over which it lacks jurisdiction, the charge remains filed with the state agency. *See id.*

[29] North Carolina has a law, N.C. GEN. STAT. § 143-42.2 (2022), but no enforcement mechanism. Alabama, Georgia, and Mississippi generally only prohibit discrimination in the public sector, not the private sector, although Alabama does prohibit age discrimination in the private sector. ALA. CODE §§ 25-1-21, 25-1-30, 29-4-3 (2022); GA. CODE ANN. §§ 45-19-29, -19-22, -19-28, 34-1-2, 34-5-3 (2022); MISS. CODE ANN. §§ 25-9-149, 33-1-15 (2022).

available. Accordingly, we focus exclusively on the EEOC; the term "Agency" hereinafter refers to the EEOC.

B. The EEOC Process

To begin a charge of discrimination, an employee must first file a case with the EEOC. The EEOC, upon receiving the charge, labels the case an A, B, or C case.[30] "A cases" make up 10–20% of the charges, "B cases" represent 60–70%, and "C cases" are the remaining 10–20%.[31] The C cases are those that the EEOC determines to be untimely, jurisdictionally barred, or frivolous.[32] The EEOC will notify the employer that no action is required, essentially ending the charge. The B cases are the garden variety cases that do not fit into the EEOC's then-current national enforcement plan.[33] The vast majority of cases are labeled as B cases,[34] and they are routinely assigned to investigator. The A cases fit into the Agency's enforcement plan and, thus, consume most of its resources.[35] The EEOC, however, simply does not have sufficient resources to litigate the majority of these cases. From 2010 to 2019, the EEOC, on average, litigated 191 A cases per year.[36] That amounts to only 0.21% of the total cases filed, and between only 1.1 and 2.2% of the A cases. That means that the EEOC does not litigate more than 97% of the cases that fit into its national enforcement plan. This fact begs the more significant question, namely, what happens to 99.7% of the total cases, 97.8% of the A cases, and 100% of the B cases? The answer is that 10–20% of the cases, the C cases, are simply put on the shelf, and the remaining 79.8–89.8% of the cases go through the "regular" EEOC process.

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[30] EEOC Regional Attorneys' Manual, at 1.III.A (2005), https://www.eeoc.gov/regional-attorneys-manual/introduction-commission-policies [https://perma.cc/RA87-FVQN].

[31] *The ABCs of EEOC*, DLA Piper: Lab. Dish (Mar. 3, 2014), https://www.labordish.com/2014/03/the-a-b-cs-of-eeoc [https://perma.cc/82YU-N4BE].

[32] *See* EEOC Regional Attorneys' Manual, *supra* note 30, at 1.III.A.

[33] For 2017–2021, the national enforcement plan included segregation, harassment, trafficking, pay, retaliation, and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities. *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017–2021, EEOC (2016), https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021 [https://perma.cc/A6HR-EWSX].

[34] *Id.* at II.E.1.d.

[35] *See* EEOC Regional Attorneys' Manual, *supra* note 30, at 1.III.A.

[36] *See EEOC Litigation Statistics, FY 1997 Through FY 2022*, EEOC, https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2022 [https://perma.cc/K4U7-AVVQ].

Discrimination Cases Filed With the EEOC Process by Type (2010–2019)

Case Type	Percentage of total discrimination charges received	Percentage of total cases litigated
A	10–20%	1.1–2.2%
B	60–70%	0%
C	10–20%	0%

The regular EEOC process is focused on pragmatic resolutions and not necessarily on justice for all claimants. Upon receiving an EEOC charge, the Agency will contact the employer and ask it to reply to a relatively long questionnaire and to write a "statement of position" explaining what happened and allowing the employer to argue why it has not violated the law.[37] The EEOC will then assign an investigator to the case. Because of budget limitations, it often takes the EEOC as long as one year to simply assign an investigator.[38] From the time of their assignment, the investigator will seek to have the parties settle. In these initial discussions, the investigator rarely, if ever, discusses the merits of a case. Instead, the focus is on identifying what the employer will pay to settle the case and what the employee will accept. If the parties cannot agree on settlement terms, the EEOC will schedule a fact-finding conference where the EEOC investigator moderates a discussion between the parties.[39] The parties may ask each other questions through the investigator. Again, the investigator uses this time to try to get the parties to settle. If the parties do not settle, the EEOC will, in B cases, encourage a mediation.[40] Mediation is the culmination of the EEOC's ADR program. Before or after mediation, the EEOC will endeavor to resolve the case and end its involvement in the dispute.

According to data we collected from the EEOC, between 2010 and 2019, the EEOC resolved, on average, 97,388 charges per year.[41] The EEOC categorizes each case resolution into one of two broad categories: merit resolutions and non-merit resolutions. Merit resolutions

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[37] *See What You Can Expect After a Charge Is Filed*, EEOC, https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed [https://perma.cc/XTG8-WG7Y]; EEOC Respondent Portal User's Guide (2016), https://www.eeoc.gov/employers/eeoc-respondent-portal-users-guide [https://perma.cc/HG2M-XA62].

[38] *See What You Can Expect After a Charge Is Filed*, *supra* note 37 (noting that the average length of an investigation was ten months in 2015). The employee may request a right to sue after six months when the EEOC has not resolved the case. 42 U.S.C. § 2000e-5.

[39] *See* 29 C.F.R. § 1601.15; *What You Can Expect After a Charge Is Filed*, *supra* note 37.

[40] *What You Can Expect After a Charge Is Filed*, *supra* note 37.

[41] *See Charge Statistics (Charges Filed With EEOC) FY 1997 Through FY 2022*, *supra* note 23.

consist of (1) settlements;[42] (2) withdrawal with benefits (basically a settlement);[43] and (3) a finding of reasonable cause.[44] After a finding of reasonable cause, the parties engage in either (3a) a successful conciliation (another term for settlement)[45] or (3b) an unsuccessful conciliation.[46] In three of the above categories (1, 2, and 3a), the parties settle, and the case is over. In 3b, unsuccessful conciliations, the employee gets a "right to sue" letter allowing them to pursue litigation to settle the dispute.[47] Non-merit resolutions consist of "administrative closures"[48] and findings of "no reasonable cause,"[49] and, in these cases, the employee also receives a right to sue letter. Over the last decade, the breakdown of cases was as follows:

Merit Resolutions	**Average**	**Range**
Settlements	8.0%	6.1–9.3%
Withdrawal with Benefits	5.0%	4.9–6.1%
Reasonable Cause	3.1%	2.9–4.7%
Successful conciliations	1.3%	1.2–1.5%
Unsuccessful conciliations	2.2%	1.8–3.5%
Total Merit resolutions	17.0%	14.8–19.2%
Non-Merit Resolutions	**Average**	**Range**
Administrative Closures	14.2%	14.2–16.9%
No Reasonable Cause	67.3%	64.3–70.6%
Total Non-Merit Resolutions	83%	80.8–85.2%

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[42] **Negotiated Settlements:** Charge is settled during investigation with benefits to the charging party.

[43] **Withdrawal with Benefits:** Charge is withdrawn, at the request of charging party, who will receive benefits through a separate agreement with the employer.

[44] **Reasonable Cause:** EEOC's determination based upon the evidence obtained in the investigation that it believes discrimination did occur. Reasonable cause determinations are followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge.

[45] **Successful Conciliation:** Charge with reasonable cause determination closed after resolution of the charge through voluntary efforts, whereby EEOC is a party to the agreement.

[46] **Unsuccessful Conciliation:** Charge with reasonable cause determination closed after failure to resolve the charge through voluntary efforts. Because "reasonable cause" has been found, this resolution is considered a merit resolution.

[47] Right to sue letters are required to bring a case in federal court. 42 U.S.C. § 2000e-5. The EEOC will grant them when it concludes a case or, upon request, after six months and sometimes prior. *Id.*

[48] **Administrative Closure:** Charge closed for administrative reasons without a determination based on the merits, which include lack of jurisdiction due to untimeliness, insufficient number of employees, or lack of employment relationship; charging party requests withdrawal without receiving benefits or requests the notice of right to sue.

[49] **No Reasonable Cause:** EEOC's determination based upon the evidence obtained in the investigation that it believes discrimination did not occur; the determination does not certify that the respondent is in compliance with the statute. The charging party may exercise the right to bring private court action.

Based on EEOC data, 85.8% of the cases in the 2010s resulted in the employee being issued a right to sue letter and then having to obtain a lawyer to begin the (court) litigation process. On average, that means that 83,559 of those whose charges were resolved each year had to pursue court litigation to obtain any type of relief or compensation for their claim. From 2015 to 2020, employees, on average, filed 12,234 discrimination lawsuits per year.[50] To put this into perspective, the EEOC resolves on average 97,388 cases per year; 13,927 of those cases settle, and the aggrieved party receives some amount of compensation as part of the settlement, and 191 fortunate employees have the EEOC use its offices to take their case and pursue relief for their claim. Thus, 14.3% of those who made an EEOC claim got relief via EEOC procedures, and another 12.6% of aggrieved parties pursued relief by filing their cases in court. The remaining 73.1% (71,191 claimants) received no compensation and, essentially, walked away from their claims.

EEOC Claim Compensation Rates

Average Number of Discrimination Lawsuits Filed with EEOC Per Year	Relief Received with EEOC Procedures	Pursued Relief Filing Case with Court	No Compensation Received
97,388	14.3%	12.6%	73.1%

More concerning is the fact that it is unknown what percentage of the 27.1% of the charging parties that either settled or filed lawsuits (approximately 26,353 of the charges filed) received a significant remedy. First, a large percentage of settlements provide little relief to aggrieved employees. EEOC investigators use the uncertainty associated with litigation and the cost of litigation to cajole employers and employees into settling on often modest terms. For example, it is common practice for mediators and investigators to tell employers that, regardless of the merits, summary judgment will cost the employer more than $100,000 and a trial more than $500,000, so they should settle.[51] Similarly, the investigators tell employees that they should accept pennies on the dollar because so few employees ultimately prevail at trial after years of litigation. EEOC-induced settlements commonly range from $100 to more than $100,000 depending on the employees' salaries, the cost of attorneys' fees, and other idiosyncratic factors.[52]

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[50] ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS tbl. 4.4 (2019), https://www.uscourts.gov/sites/default/files/data_tables/jff_4.4_0930.2019.pdf [https://perma.cc/8DPQ-D73F].

[51] *Update: EEOC Enforcement/Litigation Statistics Belie Common Statements EEOC Mediators Make*, EEO LEGAL (Dec. 2, 2013), http://eeolegalsolutions.com/behind-closed-doors-what-eeoc-mediators-say-to-make-employers-pay [https://perma.cc/GYB2-LE2J].

[52] Anecdotally, one of the authors, Sherwyn, settled his last case prior to joining the Cornell faculty. An all-female newspaper (owner and all employees) laid off several employees based on seniority. One of the laid-off employees filed a sex discrimination

Unfortunately, there is no available data on settlements for us to analyze. This leaves us without answers to the following questions about the efficacy of the EEOC's process: (1) what percentage of settlements reflect a real violation of the law?; (2) what percentage of loss was recovered by the employee with a compensable loss?; (3) were the parties were satisfied with the result?; and (4) was the resolution just?

The next question is what happens to the 12,000-plus discrimination cases filed in court each year. Several years ago, Laura Beth Nielsen and her co-authors, conducted a study where they collected a random sample of employment civil rights cases filed in federal courts between 1988 and 2003 in seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco.[53] The final sample consisted of 1,672 cases.[54] We cite this study because, unlike most others studies, it examines the entire lifespan of each case from filing to disposition. The study grouped cases according to a chronology:

- Early dismissal (i.e., 12(b)(6) motions to dismiss): 19%;
- Early settlement: 50%;
- Summary judgment: 18% (for a total of 37% of the cases dismissed by motion);
- Settled post summary judgment: 8% (and 57% of the cases that survived summary judgment); and
- Tried to verdict: 6% of the total cases and 43% of the cases that survived summary judgment.
- Plaintiffs prevailed in 33% of the cases that went to verdict (or 2% of the total cases).[55]

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charge and demanded $50,000. By the time the case got to a fact-finding hearing, the newspaper was purchased by another group and then shut down. When the investigator offered a settlement of $250, Sherwyn, billing at $300 per hour, realized it was more cost effective to agree than to keep fighting for an hour—this case was classified as a merit resolution and settlement.

[53] *See* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (2010).

> These districts contain about twenty percent of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. Three hundred cases were drawn from the list of all civil employment discrimination cases (classified as nature of suit code "442") in these districts from 1988 to 2003. They were compiled by the Administrative Office of the U.S. Courts (AOUSC) in each city, yielding a sample of 2,100 total cases. We derived sampling weights by district based on the total number of employment discrimination case filings in each district. This article examines only closed cases (N = 1,805) with all required key variables for this analysis, producing a final sample for analysis of 1,672 cases.

Id. at 181.

[54] *Id.*

[55] *Id.* at 184–87.

Plaintiffs prevailed in 4.5% of the cases where either a judge (by motion or verdict) or jury decided the case. Including the settlements, the plaintiffs were compensated in 60% of the cases. We call the first number, 4.5% (plaintiff victories divided by total number of cases decided by a court, be it in motions or at trial), the "effective win rate." We call the second number, 60% (settlements plus pro-plaintiff trial verdicts), the "plaintiff compensation rate." Unfortunately, the voluminous existing academic research uses neither the plaintiff compensation rate nor the effective win rate to judge the effectiveness of litigation. As we explain below, although the plaintiff compensation rate would be very instructive of the role of litigation, because of a lack of data, it cannot be computed from prior research. Alternatively, the effective win rate could be easily calculated from the data available in prior studies and would be informative for comparisons of the fairness and consequences of employment arbitration versus litigation comparisons. However, the effective win rate is not reported in most prior research.

III. Prior Academic Research on Employment Arbitration Uses a Flawed Design and Thus Provides Misleading Results

Academics have been studying ADR and comparing the results from arbitration and litigation for more than two decades.[56] While much of the scholarship has been extremely informative, the research is almost all fundamentally flawed and, thus, should not be used to drive public policy.

It is important to note that none of the current or objectively designed studies can actually reveal which resolution method is more just. To determine justice, we need to know not only who "won" a case, but also who *should have* won. In a fair system, should plaintiffs win 50% of their cases, 90%, or 10%? We simply do not know the answer, and thus it is impossible to judge the systems for fairness. In the studies we rely on for this article, plaintiffs won about 25% of their cases in arbitration and 25% before judges, while they won approximately 35%

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[56] One of the authors, Sherwyn, has been part of this cadre of scholars. Most of those who study litigation results can limit their cases to "civil rights" cases. Employment arbitration may include wage and hour claims. Unfortunately, the arbitration data often does not break the studies down by topic. Another flaw in the studies is that, despite the fact that the majority of the cases in both arbitration and litigation settle, there is no clear data concerning where the settlements are the most just. There are multiple reasons for this, including, but not limited to the following: (1) most settlements are private; (2) since arbitration is faster than litigation, there may be less backpay; (3) the cases that make it to either forum may be different in terms of the employees' salary and job title, etc. Thus, despite numerous attempts to find relevant data, we have not found any study that provides a clear picture of where there are more just settlements.

of their cases before juries.[57] While those studies imply that juries are more employee-friendly than judges and arbitrators, they do not reveal which system is more likely to produce the just answer, and they suffer from the fact that juries may be seeing different, and possibly more worthy, cases as compared to the other forums.

How could we fully assess whether litigation or employment arbitration is fairer? First, identify a substantial sample of cases. Second, determine via objective investigation if discrimination occurred. Third, put all those cases through the EEOC/litigation process and the applicable ADR system and determine which system provides the most efficacious results. This method, however, is impossible because (1) the required investigation and determination is not possible, and (2) parties will not likely go through the time and expense of double adjudication for the purposes of providing interested stakeholders an answer to their assessment of the fairness of litigation versus that of employment arbitration.[58]

Given that this sort of study remains impossible to achieve, most commentators, scholars, judges, and academics default to general statistics regarding trial win/loss rates in federal court.[59] Of the studies relying on this data, nearly all ignore the plethora of federal court claims that are dismissed via dispositive motions, which, if considered, drastically reduces the effective win rate of plaintiff employees in federal court. Many of the same studies do not even attempt to ascertain the plaintiff's compensation rate.

Next, we examine two recent employment arbitration studies, one led by Professor Alex Colvin, and the other from our own data set. We then calculate an effective win rate and a plaintiff's compensation rate

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[57] *See* Samuel Estreicher, Michael Heise & David Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers Univ. L. Rev. 375 (2018); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005).

[58] Because, as seen below, settlements account for anywhere from 58% to 75% of resolutions in the studies that we examine, the value of the settlements and the time involved should be taken into account. Unfortunately, there is no reliable data on settlements.

[59] This is not to say there is no value in studying litigation versus arbitration statistics. Indeed, as we proved in David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. Lab. L. 1 (2000), counsel for both employers and employees use the choice of forum to their advantage, and that is why post-dispute voluntary arbitration is ineffective. Thus, if a party knew that their case would not settle, the litigation versus arbitration verdict would be very relevant. Moreover, if the parties were to settle, the expected value of the case would clearly be impacted by the litigation versus arbitration results. Our argument is as follows: since fewer than 1% of all EEOC cases go to verdict, and, in our study of an employer's policy, fewer than 5% of all cases even filed for arbitration, *see generally* Sherwyn, Estreicher & Heise, *supra* note 57, using litigation versus arbitration to judge the entire system is inappropriate.

to determine if the EEOC/litigation path is better for plaintiffs and thus should form the basis for public policy.

In their article, *Saturn and Rickshaws Revisited: What Kind of Employment Arbitration Has Developed*,[60] Alex Colvin and Kelly Pike used American Arbitration Association (AAA) data to study 449 arbitration cases and a larger data set of California arbitration cases.[61] The authors were also given access to the complete files from 217 of the 449 cases mentioned above. Colvin and Pike explained the breakdown of varying resolutions from these arbitration cases: (1) 26.9% resulted in an actual decision after hearing; (2) 59.5% resulted in a settlement prior to a decision; and (3) 13.3% were dismissed by the arbitrator prior to a hearing or withdrawn by the plaintiff.[62] The AAA data combined voluntary withdrawals (*i.e.*, the plaintiff decided to no longer pursue the case) with motions to dismiss and summary judgment motions (which are dispositive motions).[63] Since we do not know the percentage breakdown of withdrawals versus dismissals, we propose two calculations. First, we assume that 100% of the cases in this category were dismissed by dispositive motion. We then do a second calculation where we assume that 50% were dismissed by motion and 50% by voluntary withdrawal. Our first calculation results in arbitration being as unfriendly as possible when factoring in motions/withdrawals. Our second calculation results in arbitration being more plaintiff friendly.

The Colvin and Pike study provides more information using the data set of 217 cases compared to the larger data set. Unfortunately, even in this more extensive study, it is unclear from the article if this data set includes settlements or withdrawals. Still, Colvin and Pike conclude that 11.5% of the 217 cases, and 14.1% of the 149 cases that arose from employer policies as opposed to individual arbitration contracts, were dismissed on dispositive motions.[64] Since the dispositive

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[60] Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 Ohio State J. on Disp. Resol. 59 (2014). There are numerous other studies to use, and Sherwyn, Estreicher, and Heise have compared most of these studies in their Stanford and Rutgers articles. Estreicher, Heise & Sherwyn, *supra* note 57; Sherwyn, Estreicher & Heise, *supra* note 57. For a full discussion of the numerous studies, see for example Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, Disp. Resol. J., Nov. 2003/Jan. 2004, at 44. We focused on Colvin & Pike and Nielsen, Nelson & Lancaster herein because the purpose of this paper's empirical discussion is not to analyze every study, but instead to develop two new measures for analyzing the forums and to create a new system for ADR. The previous papers provide a full literature of the relevant studies.

[61] Colvin & Pike, *supra* note 60, at 61–62.

[62] *Id.* at 71.

[63] *See id.* at 72.

[64] *Id.* at 72–73.

motion data is ambiguous in the Colvin and Pike study, we once again have to perform multiple calculations to determine the possible effective win rates. It should be noted, in each of these calculations, arbitration turns out to be more employee friendly than litigation. We do the multiple calculations to try and be as fair and transparent as possible. Thus, for the Colvin and Pike data set, we calculate the effective employee win rate with four different assumptions about dispositive motions, which represent our best guesses of what their data showed to provide the range of possible assessments.

Colvin and Pike reported the percentages of types of resolutions in their data set of 449: 267 (59.5%) cases were settled, 121 (26.9%) cases went to award, 29 cases (24.7% of those cases that went to award) resulted in the plaintiff prevailing; and either 27 (6.2%), 54 (13.3%), 52 (11.5%), or 63 (14.1%) cases concluded with an arbitrator granting a dispositive motion.[65] The effective plaintiff win rate (*i.e.*, the number of cases the plaintiff won divided by the number of cases that the plaintiff lost plus the number of cases dismissed by a dispositive motion) results in the following effective employee win rates: 19.6%; 16.6%; 16.8%; and 15.8%. Our plaintiff compensation rate, the percentage of cases where the employee either settled or prevailed, when applied to Colvin and Pike's study, is 65.9%. This means that plaintiffs either prevailed or settled in 296 out of 449 cases.

Our own study of 7,316 AAA employment arbitration cases resolved from 2012–2017 produced the following results: 5,538 (75.7%) cases were settled; 847 (11.6%) cases went to award; in 189 (22.4%) of these cases, the plaintiff prevailed; and in 931 (12.7%) of the cases were either withdrawn or dismissed by a dispositive motion.[66] Again, because the AAA combines withdrawals and dismissals, we first calculate the effective win rate as 100% and then consider that 50% of these 931 cases were dismissed by motion. The effective plaintiff win rate in our study is 10.6% and 14.4%. The plaintiff compensation rate in our study is 78.3%, which means that plaintiffs either prevailed or settled in 5,727 cases out of 7,316. Thus, the range for the effective win rates for plaintiffs in the two arbitration studies was 10.6%–19.6%, and the range for the plaintiffs' compensation rate was 65.9%–78.3%. In Nielsen's litigation study described above, the plaintiffs' effective win rate was 4.5% and the plaintiffs' compensation rate was 60%. When applying our standards to all the cases filed with the EEOC, the effective employee win rate in those cases is 0.3% and the plaintiff compensation rate is 23.8%.

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[65] *Id.* at 71, 74; *see* 72–73,

[66] The data from the authors' own study is on file with the authors.

	Colvin & Pike Study	**Our Study**
Resolution types	**Percentage of arbitration cases**	**Percentage of arbitration cases**
Arbitration Award	26.9%	11.6%
Settlements	59.5%	75.7%
Withdrawn/Dismissed	13.3%	12.7%

A. New Data Confirms That Motions Are Not Only Relevant—They Are Determinative

While we do believe that using the Colvin & Pike study, the Nielsen study, and our own prior data set is comprehensive and does make the case, we were concerned about relying on arbitration and litigation data from sources other than ourselves.[67] Thus, the authors here joined a research group consisting of Lew Maltby,[68] Professor Emeritus Ted St. Antoine,[69] and Professor Tom Kochan.[70] Like the authors here, Maltby, a longtime employee advocate with decades of practical experience, could not understand why prior work excluded motions and felt the need to create a more comprehensive study of arbitration versus litigation results. Our data sources were all AAA employment arbitrations from 2019–2020 and all federal employment cases from the same years.

The settlement rates in the two forums were both significant. The arbitration settlement rate was 80%, while the litigation settlement rate was 72%. These numbers are very relevant because one of the arguments against using motions in such studies was that litigation plaintiffs who survived summary judgment motions leveraged their victory to extract settlements from employers who lost.[71] Because settlements are almost always confidential, we focused on cases that were concluded by a ruling from either a court or arbitrator. In arbitration, there were 811 such cases. Of these cases, 323 were dismissed by an arbitrator pursuant to a motion (40%) and 488 cases were resolved after a hearing (60%). In litigation there were 14,654 such cases. Of these cases, 7,862 were dismissed after a motion to dismiss and 6,378 were dismissed after a summary judgment motion, for a total of 14,240 cases (97%) decided by a judge on motion. There were 414 cases decided by

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[67] We have the utmost respect for the methods and integrity of Professors Colvin, Pike, Nielsen, Nelson, and Lancaster, but felt we needed to also produce our own study.

[68] Lew Maltby is the President of the National Workrights Institute and former head of the ACLU's Civil Rights Division.

[69] Ted St. Antoine is the James E. and Sarah A. Degan Professor Emeritus of Law at the University of Michigan School of Law.

[70] Tom Kochan is the George Maverick Bunker Professor of Management at the MIT Sloan School of Management where he is a professor of industrial relations, work and employment.

[71] *See* Mark Gough, *Employment Discrimination Outcomes in Arbitration and Civil Litigation: A Tale of Two Forums*, 74 Indus. Lab. Rels. Rev. 875, 880 (2020).

a jury or judge after a trial (3%). In post-trial litigation, the employees prevailed 40% of the time. In post-hearing arbitration, the employees prevailed 31% of the time. Previous articles interpreted these numbers to conclude that litigation is more advantageous to employees than arbitration by a 40% to 31% win rate. When dispositive motions are factored in, however, the arbitration employee net win rate adjusts to 19%, while the litigation employee net win rate drops to a staggering 1% (arbitration employees won 152 out of 811 cases; litigation, employees won 164 out of 14,654 cases.

Table I
Comparative Results of Employment Arbitration and Employment Litigation
All Cases
Arbitration (2019–2020)

Decided After Hearing	Employee Wins	Employer Wins
488	152 (31%)	336 (69%)
Decided on Pre-Hearing Motions	**Employee Wins**	**Employer Wins**
323	0 (0%)	323 (100%)[72]
Total	**Employee Wins**	**Employer Wins**
811	152 (19%)	659 (81%)

Court Litigation (2019–2020)

Decided After Trial	Employee Wins	Employer Wins
414	164 (40%)	250 (60%)
Decided on Motion to Dismiss[73]	**Employee Wins**	**Employer Wins**
7,862	0 (0%)	7,862 (100%)
Decided on Summary Judgment	**Employee Wins**	**Employer Wins**
6,378	0 (0%)	6,378 (100%)
Total	**Employee Wins**	**Employer Wins**
14,654	164 (1%)	14,490 (99%)

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[72] In theory, either party can request that a case be resolved on a pre-hearing motion. In practice, however, cases decided on motions are virtually always decided in favor of the employer.

[73] A motion to dismiss argues that, even if the other party can prove its allegations, the party filing the motion is entitled to a judgment in its favor as a matter of law. A motion for summary judgment is filed after discovery. Such a motion argues that the evidence produced in discovery is legally insufficient to submit the claim to a jury. With either type of motion granted, the case is dismissed. While in theory either party can file such a motion, in practice they are granted virtually exclusively to employers.

No rational justification exists for comparing arbitration and litigation results without including dispositive motions. After years of considering this issue, we have settled on an appropriate analogy. Let's suppose a professor has accepted at appointment at Cornell, and she is basing her decision on where to live—Lansing, a suburb north of Ithaca, or Ithaca—on the success of the softball program. The professor wants to compare the win/loss records of the two schools over twenty-five years where each team played 500 games. The professor hires a researcher to calculate both teams' winning percentages. Ithaca has 40% winning percentage, and Lansing has a 31% winning percentage, so the professor chooses Ithaca. What the professor did not know is that, in New York State, leagues employ the "slaughter rule," which halts a seven-inning game after five innings if one team is ahead by ten or more runs. The researcher decided to exclude slaughter rule games from the analysis. Using the same percentages as that of our study with the slaughter rule acting as dispositive motions, we point to the facts that our softball-obsessed professor should have considered. If 97% of all Ithaca games were decided by the slaughter rule, then Ithaca would have won only six out of 500 seven-inning games for a winning percentage of 1.2% Conversely Lansing, where only 40% of the cases were decided by the slaughter rule, boasted a seven-inning winning percentage of 18.6%.

Why do so many scholars exclude dispositive motions from their analysis? We contend that dispositive motions are like the slaughter rule—the game is so lopsided that it ends early and the players do not even get to finish. For employment plaintiffs in cases decided by motion, they do not get to testify or cross-examine the employer. When we compare employment arbitration to the entire EEOC litigation system, we conclude that employment arbitration is considerably more favorable to plaintiffs.[74]

B. Most of the Prior Work Fails to Even Mention Dispositive Motions

Most of the scholarship opposing arbitration simply ignores dispositive motions. At least one scholar, Mark Gough,[75] discusses dispositive motions and provides an argument to justify their exclusion. We commend Professor Gough for addressing the issue, but respectfully disagree with his contentions. Relying on the Nielsen et al. paper discussed above,[76] Gough argues that it is reasonable to exclude dispositive summary judgment motions in analyzing arbitration and litigation because

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[74] Using Colvin & Pike, Neilson, Nelson & Lancaster, and our own AAA data set leaves gaps. We do not have the data on whether the employees had counsel, what their salaries, education, and job titles were, what the quality of the evidence was, etc. It is possible that any of these factors could affect our effective win and compensation rates. In our defense, neither Colvin nor Neilsen had the data to control for these factors either.

[75] Gough, *supra* note 71.

[76] Nielson, Nelson & Lancaster, *supra* note 53.

(1) the parties use summary judgment motions to strategize whether to settle before a motion is filed or after the case survives the motion, and (2) summary judgment is on the rise in employment arbitration.[77] We are unpersuaded by Gough's argument for several reasons. First, Colvin and Pike's study found a settlement rate in employment arbitration of around 59.5%, our first arbitration study found a rate of 75%, and our recent study found a settlement rate of 80%. Nielsen's litigation study found a 58% litigation settlement rate while our study found a settlement rate of 72%. We fail to see why summary judgment should be ignored because it likely plays a role in facilitating settlements in litigation when the parties settle as much, or more often, in arbitration than litigation. Like any other factor (e.g., the facts of the case, the costs of litigation, the type of business, media attention, etc.), dispositive motions are part of the calculus involved in the decision whether to settle. Moreover, since costs are often a primary factor in the decision to settle and since the costs of litigation greatly outweigh the costs of arbitration, it is curious both to exclude a relevant data point because it may affect settlement, and to not even try to control for the disparity on costs. Consequently, it is simply not appropriate to ignore the elimination of 37% of the cases and 97% of cases terminated by a court—all plaintiff dismissals—from a study. Second, the argument that surviving summary judgment facilitates settlements ignores the fact that, in Nelson's study, 50%, and our study, 55% of the motions that end the case are motions with motions to dismiss—where the employer proves that, even if the facts alleged in the complaint are true, no legal violation exists. This is less settlement strategy and more elimination of frivolous cases. No justification exists for ignoring 19% of cases in one study, and 54% of the cases decided by a court in our study, all of which constitute plaintiff losses. The simple effect of doing so skews the data in favor of the litigation win rate compared to arbitration, and, secondly, it ignores a central benefit of employment arbitration: win or lose, plaintiffs are far more likely to get their case heard in arbitration.

The nature of litigation and arbitration may explain why motions are so much more prevalent in litigation than in arbitration. Cases end upon the granting of a motion. Arbitrators, who are paid by the day, have a financial incentive *not* to grant motions and can justify any such decision by saying that while it may be a close call, the employee deserves their day in hearing.[78] Alternatively, judges, who are not paid by the case, have an incentive to reduce their docket. This contrast is illustrated by two anecdotal occurrences and an analysis of AAA data.

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[77] Gough, *supra* note 71, at 880.

[78] This information is pulled from a conversation with Gregg Gilman, who stated that arbitrators routinely state that even if the case may not have merit, they will not dismiss the case by motion because they want to provide the employees with an opportunity to tell their stories.

One of the authors' former teaching assistants clerked for a district court judge, sitting in the Fourth Circuit, who ordered his clerks to find a way to grant dispositive motions against discrimination plaintiffs because the judge did not want these cases clogging his docket.[79] Similarly, while practicing, author Professor Dave Sherwyn found judges to be openly hostile to low-wage employee claims because they considered them to be "attorneys' fees" cases (i.e., cases where the attorneys' fees outweighed the potential employee loss or outweighed the judgment).[80]

As Professors Colvin and Grough correctly state, motions are on the rise in arbitration. Our research group was very surprised that 40% of the non-settled, non-withdrawn cases ended in a motion. In fact, we were so surprised that we sought to get a better understanding of the type of cases that were being dismissed by arbitrators on pre-hearing dispositive motions. We randomly selected thirty AAA cases where arbitrators dismissed the claims by dispositive motion. Of the thirty dismissals, twenty-four of the cases were untimely and, thus, did not comply with the statute of limitations. Of the remaining six, four alleged violations of classes not protected by law, and only two were judged by the merits. Based on this very small sample size, it appears that most arbitrations dismissed by motions would be dismissed in court by motions to dismiss. We contend that further research to examine motions and settlements is warranted.

We also would agree with Professors Colvin and Grough that cases decided by motion would not be relevant if the forums had the same or very similar percentages. They do not, though. Depending on the study, there are anywhere from 2.5 to 5 times the number of cases decided by dispositive motion in litigation over arbitration. This disparity is too great to ignore, even if arbitration's motion practice continues to rise.

The key point is that there are several plausible and debatable ways to address motions. Ignoring motions leads to results suggesting that litigation is fairer to employees as compared to employment arbitration. Therefore, our view is that public policy decisions should not depend on the findings of any existing study. Rather, policy decisions should recognize what is clearly apparent: namely, that under the right conditions, mediation and arbitration can help produce fair and effective dispute resolution.

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[79] This information was derived from a conversation with a former student, Steven Mutkowski, while he was clerking for a district court judge in the Fourth Circuit in December 1998. He reported to us that the judge ordered his clerks to "find a way to grant the motion."

[80] Sherwyn can still feel the sting of Northern District of Illinois Judge Marovich who literally screamed that he would not allow attorneys' fees cases to proceed in his court.

IV. Other Comparisons Between Employment Arbitration and Litigation

Along with plaintiffs' win/losses, scholars also compare the time, cost, and damage awards in various procedures. The evidence is clear with regard to time: arbitration is faster. When analyzing the average length of time between the filing of a claim and disposition, one study found 260 days for employment arbitration and 679 days for litigation.[81] Colvin, in a 2011 paper, determined that litigation took 2.5 years from filing to trial, while arbitration took just under one year (361.5 days).[82] We have found no study that concludes that arbitration is as costly as litigation. With limited discovery, less time, fewer motions, no juries to pick, and limited appeals, there is simply no way for a plaintiff's arbitration costs and fees to be close to that of litigation.

The last issue that scholars examine is awards. While a number of studies examine costs, there exists no good way to judge awards in the two forums against each other because (1) settlements take so many high- and low-damage award cases out of the mix; (2) damages are based on back pay—employment arbitration is faster, so less back pay has accrued; (3) the lower costs of arbitration in terms of time and money could result in lower value cases making it into the mix; (4) awards as a percentage of demands is based on lawyers' demands, which are often motivated by pushing settlement and are not grounded in the actual losses;[83] and (5) litigation almost always involves relatively high wage earners,[84] and they are more likely to have extended

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[81] Using this data raises a question as to why we contend that it is inappropriate to use verdict results for win and loss and then to use them for time. Sadly, there is no data set that we know of that tracks the time of EEOC filings to resolution. We do know the following: the EEOC allows employees to avoid EEOC investigation after six months and start the litigation process, and it generally takes approximately one year to even assign an investigator to examine a case. *See* David S. Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 Univ. PA. J. Lab. Emp. L. 73, 98–99 (1999). Conversely, in our prior study of one company, 81% of the cases were resolved in less than one week, fewer than 10% used outside resources (e.g., mediation), and fewer than 5% of the cases resulted in an arbitration being filed. *See generally* Sherwyn, Estreicher & Heise, *supra* note 57. Thus, in our one study of an employer, 81% of the cases are resolved in one week, while, at the EEOC, it takes one year to get an investigator assigned and, at best, employees seeking to avoid the EEOC need to wait six months. We therefore contend that any data set of the entire system would show exasperated differences between litigation and arbitration on timing.

[82] Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1, 8 (2011).

[83] Indeed, we recently examined a multi-million-dollar demand letter for the termination of a $120,000 per year employee.

[84] *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1007–08 (1991) (finding that the costs of litigation are so high that it simply makes no sense for an attorney to take a case for an employee who earned under $450 per week unless the liability was so clear and the conduct so egregious that it was a guaranteed win). In the third quarter of 2021, the median weekly earnings of the nation's 115.3 million full-time wage and salary workers

back pay because it takes longer to secure high wage employment versus low wage employment.

V. Research Findings Regarding Employment Arbitration Versus EEOC/Litigation

From the data and arguments described previously, several conclusions emerge: (1) we simply do not know which system is more just in the sense that it yields the correct result (i.e., a finding for the employee or the employer); (2) the EEOC litigation process is not clearly more employee friendly than employment arbitration; (3) under plausible assumptions, analyzing the effective win rate and the plaintiff compensation rate with available data, employment arbitration is more plaintiff friendly than litigation; (4) to truly measure the two systems, we need to study a universe of EEOC claims and employer claims;[85] (5) the EEOC/litigation model is not the best way to resolve disputes; (6) the current employment arbitration system is not the best way to resolve disputes; and (7) we can create a hybrid program that will be significantly better for employees and employers than the current EEOC/litigation and employment arbitration systems. Below, we describe that suggested system.

A. How Workplace Disputes Should Be Resolved

Numerous ways exist to settle workplace disputes. Indeed, other countries have tribunals, work councils, and various dispute resolution forums. In an attempt to be practical, we will not propose a system that completely alters the current method. With that in mind, we have several thoughts that drive our proposal:

1. Workplace disputes have been a major vehicle for social change, and thus the system must allow the law to evolve;
2. Some workplace disputes are so egregious that they need to be public with substantial penalties to prevent similar future behaviors;
3. Most employees, and all employers, wish that their disputes would remain private;
4. Many employees have been led to believe that they have more rights than they are afforded by law, which often results in unrealistic expectations with regard to lawsuits and other employment actions;

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were $1,001—a number higher than the median income for black men and women, Hispanic men and women, and barely higher than that for white women ($912). *See* News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Usual Weekly Earnings of Wage and Salary Workers Third Quarter 2021 (Oct. 18, 2023), https://www.bls.gov/news.release/pdf/wkyeng.pdf.

[85] Some may argue that different research design could yield accurate results. After studying this topic for almost thirty years, the authors believe that studying random samples is not as effective as taking all the cases from one jurisdiction in one year versus all the cases filed with an arbitrator provider in that year. This is because each case is different and because even large random samples will not account for these differences. Of course, this is open to debate.

5. Employees should be educated about the rights granted by the government or by contract with their employer;
6. Most workplace disputes are best resolved at the lowest possible level with little or no outside legal intervention;
7. The ideal solution to most disputes is satisfaction without employment termination;
8. The concept of "procedural justice," where employees have the opportunity to be fully heard, is vital;
9. The system should be accessible and efficient.

B. Our Proposal Includes a Role for Pre-Dispute Employment Arbitration

Before we begin describing our proposal, we need to address the argument that there should be no pre-dispute regulations and that both parties, or just employees, instead, should be able to choose their forum when the case is ripe. In an earlier article,[86] we showed that voluntary post-dispute arbitration is not useful. In our study, all parties who had cases before the Illinois Human Rights Commission over a period of several years were given the opportunity to choose to litigate or arbitrate their cases. In the more than 2,000 cases in the study, there were numerous instances where the employer or the employee chose arbitration, but there were no instances where both sides did so. Simply put, the forums are different, and the facts of the case, as well as other circumstances, will dictate attorney strategy. Since the fallback was litigation, the post-dispute option effectively provided no change or benefit. In other words, because both sides needed to choose arbitration in order for the case to be resolved outside of litigation and because there was not one instance when both sides chose arbitration, the entire exercise was pretty much useless, and the parties were left with the default option—litigation. If the employee could unilaterally dictate the choice of forum, a substantial increase in arbitrations would have resulted because employees elected arbitration in a large number of instances. To that end, there are some who contend that employer polices should allow the employee to have a choice of forum.[87] The question then arises: Why should (or would) an employer subject itself to a system where the choice of forum is based on what benefits the employee most? This makes little sense. Instead, the employer would prefer to use the EEOC/litigation path as the standard and only consider employment arbitration if requested by the employee. As indicated by the data reviewed above, however, if requested by the employee, arbitration is unlikely to be considered a viable option by the employer.

Our second threshold issue concerns the poignant relevance of our concept. Do we truly believe that upcoming legislation will either outlaw or modify ADR in the employment space? Prior to the passage of the

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[86] Sherwyn, *supra* note 59.

[87] This is the position taken by very well-regarded plaintiffs' lawyer Doug Wigdor.

EFASASHA, we believed that proposing legislation was, at best, unrealistic. Now, with the law predicated on what we contend to be faulty research, Congress should revisit the efficacy of arbitration. Even if this is not the case, employers can implement our proposals on their own.[88] While the EEOC does not defer to arbitration, under current law employer-promulgated policies prevent any litigation other than that initiated by the EEOC. As seen below, our proposal requires employers to notify employees that they have a right to file with the EEOC and let the Agency decide if the case is one of the fewer than 200 cases they will litigate. The rest of our policy can be implemented. Indeed, our proposal is greatly influenced by what we perceive to be the best practices of ADR. Thus, employers seeking to be employers of choice can implement our proposed policy and advertise it to applicants.

VI. We Propose the Following

The EEOC (and other federal and state agencies) should endorse an ADR policy and agree to "defer" cases to arbitration if the cases and the policy meet the following criteria:[89]

1. Employees must be informed that they have the right to file their charges with the EEOC.
    a. The EEOC will have thirty days to decide whether to defer or litigate the case. Because the deferrals will greatly reduce the number of cases to investigate, the EEOC will have increased resources to litigate cases.
    b. This will allow for development of the law and provide deterrence because the litigated cases will be public and the potential resources of the government to pursue these cases are vast. As one of our Cornell Center for Innovative Hospitality Labor and Employment Relations (CIHLER) board members once stated, "[I]f the EEOC is the plaintiff, God help you!"[90] Instead of fewer than 200 cases (under 1% of the A cases),[91] this should allow the EEOC to increase their litigation docket

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[88] Some may argue that once employers see the results of this study, they will be reluctant to implement arbitration polices. This could be the case! We contend, however, that employers seeking to use ADR for the "right reasons" see the polices as an employment relations tool where they can resolve the vast majority of disputes in a timely, non-adversarial manner. While lawyers may focus on win/loss, employers focus on morale, productivity, employee engagement, costs of disputes . . . and other factors that are not based on win/loss.

[89] Sherwyn, Tracey & Eigen, *supra* note 81; *see also* Joyce E. Taber, Comment, *An Unanswered Question About Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude the EEOC from Seeking Monetary Relief on an Employee's Behalf in a Title VII Case?*, 50 Am. U. L. Rev. 281 (2000); Lewis Maltby, *Paradise Lost—How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.U. L. Sch. J. Hum. Rts. 1 (1994).

[90] CIHLER is a Center housed in Cornell's Nolan School of Hospitality and ILR School. Statement by Joe Baumgarten, Partner and Chair of the Labor Department Proskauer, Roundtable Ithaca N.Y. (May 2010).

[91] *See supra* note 31 and accompanying text.

so that becoming an "Agency case" becomes a realistic concern of employers. Since all cases are published, the EEOC can see where the law is not being interpreted correctly and take the next case in which such an issue arises.

   c. Cases that do not fit into the EEOC enforcement priority protocol will be deferred if the employer's policy contains the elements listed in part 2 of our proposal below.

2. ADR in Exchange for Discharge and Discipline for Cause:

   a. Anecdotally, we believe most employees do not understand the concept of "employment at will."[92] Moreover, the United States is one of the few, if not the only, industrial nations that still employs this doctrine.

   b. With the number of different limits on at-will employment that already exist and the cost of turnover (e.g., morale, productivity, recruiting, training, etc.), it is not in employers' best interests to rely on the at-will doctrine as a defense in discrimination trials. Defense lawyers rarely take a case to trial without having a specific lawful reason for the employment decision. As CIHLER Board member Gregg Gilman stated: "*No* jury wants to hear I can fire anyone for no reason and they will infer an unlawful motivation. If I can't "prove" a good reason, I settle."[93] Of course, it is not in employees' best interests to be subjected to at-will employment. Thus, since at-will employment is not in society's best interests, it is time to let (and even encourage) employees and employers make the following trade: ADR in exchange for just cause instead of at-will employment.[94] We know of several employers who provide employees with a choice: (1) agree to a well-defined ADR system that includes an individual contract under which the employee can only be terminated for cause; or (2) remain an "at-will" employee, and if there is a dispute, the ADR system is not available and the employee would have to file with a state or federal agency. Consequently, two issues need to be addressed: (i) the distinction between voluntary versus mandatory arbitration; and (ii) the definition of just cause.

      i. One of us, Katz, believes that employees should be able to voluntarily choose between ADR with cause or EEOC/litigation with at-will employment and not be forced to do

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[92] Research from Pauline Kim supports this anecdotal evidence. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

[93] Mark Feffer, *"Employment at Will" Isn't a Blank Check to Terminate Employees You Don't Like*, SHRM (Nov. 7, 2017), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/employment-at-will-isnt-a-blank-check-to-terminate-employees-you-dont-like.aspx [https://perma.cc/DEN3-5LT6]; *see also* Zev J. Eigen, Nicholas F. Menillo & David S. Sherwyn, *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment and Implement a "Mandatory Arbitration Act,"* 87 IND. UNIV. L. J. 271 (2012).

[94] Indiana Less, *Why At-Will Employment Is Bad For* Workers, BOSS MAG. (2022), https://thebossmagazine.com/at-will-employment-bad-for-workers [https://perma.cc/VL6P-PG3T].

so as a condition of employment. He has a fundamental belief that employees should have choice and that fair systems will be chosen. Moreover, he believes that employees should have the ability to opt out of the ADR program after a certain amount of time (perhaps only two years after their initial choice to eliminate instability for organizations and the possibility of gaming). Sherwyn and Wagner, on the other hand, are fine with mandatory arbitration in exchange for a system where employees can only be terminated for "cause" (and we address what cause should be below) because they equate an ADR/for-cause system to the numerous employment rules that employees have no choice over (e.g., type of health insurance and cost, dress codes, vacation pay, reporting structures, remote work, union dues, etc.). That said, Sherwyn and Wagner do not think that the voluntary versus mandatory distinction is particularly relevant. They note that several employers who have offered employees the choice to choose just cause (and eliminated) at-will employment in exchange for ADR have found selection of the ADR-cause option at rates of over 95%.[95] Thus, Sherwyn and Wagner would support a voluntary arbitration system if necessary to get ADR legislatively available. Sherwyn and Wagner do not, however, support having an open-ended opt-out of the ADR system. Like Katz, they think this option would be unwieldly to manage and would be used strategically by lawyers, thereby undermining the process.

ii. What would just cause be in this system? Over the last seventy years, grievance arbitration included in collective bargaining agreements has resulted in a body of law that defines just cause. This standard for discharge and discipline is extremely high.[96] Since supervisors are not covered by the National Labor Relations Act (NLRA),[97] this jurisprudence has been applied exclusively to non-supervisors and almost all unionized hourly workers. Sherwyn worries that the common union version of just cause has also created a backlash against unionization, as it is seen as a guarantor of lifetime employment, save for egregious behavior. He believes there should be a viable middle ground between at-will and the existing unionized definition of just cause, especially since this system will apply to supervisors, managers, and high-level executives who are not covered by the NLRA and likely have more nuanced employment standards than the typical unionized hourly employee. He proposes that stakeholders on both sides of the aisle define this middle ground. Katz is not convinced

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[95] Four Seasons has had such a policy for over twenty-five years, and the acceptance rate has never been below 95%.

[96] *See* KATZ, KOCHAN & COLVIN, *supra* note 15.

[97] 29 U.S.C. § 152(3).

that the current union version of just cause is fundamentally flawed.

c. We do not see the development of a sensible and fair ADR policy as a choice between employment arbitration and litigation. We see it as a choice between ADR and EEOC/litigation. ADR is not litigation; to be effective, it should be part of a dispute resolution system. We propose that every approved ADR system have at least the following three steps:[98]

    i. Employees discuss the issue/concern with HR. If the organization does not have an HR professional, the discussion takes place between employees and their supervisors or the supervisors' supervisor. Numerous studies[99] show that this first informal and non-adversarial process resolves the most disputes. If not resolved, employees should move to step ii.

    ii. Employees can bring a complaint to a higher-level manager or to a peer review forum. Sometimes HR or the supervisor need either high-level people or peers to be involved in order to make the parties in the dispute see both sides and find a fair resolution. We have found that peer review is especially effective because peers understand the specifics of the work and the personalities of the players, and often can resolve problems effectively. Mediation can play an effective role in solving disputes at the workplace level, especially when included within a conflict management system.[100] This can advantage both employees and organizations by providing less expensive and quicker dispute resolution. Perhaps more importantly, mediated dispute resolution can address the organizational and systemic deficiencies that commonly underlie what at first might appear to be only an individual dispute. Our experience suggests that workplace disputes often escalate due to poor employee-supervisor communication, ineffective performance improvement efforts, or deficient organizational design.[101] Mediators can both help identify these systemic problems and stimulate the development of creative solutions.[102]

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[98] See Sherwyn, Estreicher & Heise, *supra* note 57, where the employer had a similar grievance system and fewer than 5% of the cases resulted in arbitration filing, proving that, at least in the non-union setting, step grievance systems result in resolutions and cases are not just pushed to arbitration.

[99] *See* KATZ, KOCHAN & COLVIN, *supra* note 15.

[100] *See generally* DAVID B. LIPSKY, RONALD L. SEEBER & RICHARD FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003).

[101] *See* WILLIAM URY, JEANNE BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED 201 (1988). During his nine years as dean of the IR School and ten months as interim provost of Cornell University, Katz observed the systemic problems that underpinned many employee complaints and the positive role that mediation could play in addressing those problems.

[102] These suggestions are influenced by the polices that are drafted and implemented by Paul Wagner, Stokes Wagner.

Note that if the parties cannot settle, arbitration is the last step:

iii. Arbitration is the last step. There has been a lot written about various procedures that can help make arbitration a fair process.

1. The parties mutually select the arbitrator through an established agency (e.g., AAA, JAMS, etc.);
    a. Law schools should establish clinics to assist employees in arbitrator selection and case preparation if the employee does not have counsel;
    b. Arbitrators' biographies and records of case dispositions should be made available;[103]
    c. The employer should pay all the costs of the arbitration except for the employee's attorneys' fees and adjudication costs;[104]
2. There must be adequate discovery with a select number of depositions, document requests, and interrogatories to be determined by the arbitrator or the policy;
3. The statute of limitations for statutory claims should be no less than 180 days;[105]
4. The damages available, including fee shifting, must mirror that of federal, state, local, and common law;

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[103] This requirement should satisfy those who are concerned about the so-called "repeat player doctrine." The Repeat Player Doctrine contends that employers who have more than one arbitration achieve higher winning percentages than those that do not. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997). Some readers inferred from these results that arbitrators made decisions in favor of employers because the arbitrators saw the potential for future cases. In previous articles, we contested these findings, but, regardless, it is easily fixed. Since employees will be able to see if the arbitrator has ever heard cases by this employer before, and presumably, would not choose such an arbitrator, the arbitrator would have little incentive to favor the employer to get future work because any concerned plaintiffs' lawyer or advocate would simply not choose that arbitrator.

[104] Some may contend that arbitrators will be biased in favor of the employer because the employer pays. This argument is an attack on the professional integrity of arbitrators and there is no real evidence to support it. Of course, our policy could require the employee to pay half the cost, which would solve one problem and create another. Of the two, we find the latter much more problematic than the former. Forcing employees to pay $5,000–$10,000 per day will create barriers similar to those inherent in the litigation system. Conversely, we contend that requiring arbitrator selection to go through the AAA, having law school clinics help employees in their selections, having all arbitration awards issued by all arbitrators on the list available, and having the plaintiffs' bar available more than covers the potential problem of arbitrators being unethical and basing decisions on who is paying them.

[105] Under Title VII, the statute of limitations is 180 days if there is no state law and agency (e.g., Georgia and North Carolina) and 300 days if both state and federal law apply. 42 U.S.C. § 2000e-5. We contend 180 days is enough time when there is an in-house ADR program.

5. If an employer makes a settlement offer and the judgment is for an equal or lesser amount, the plaintiff will pay the employer's costs and fees;
6. The arbitrator must issue a written opinion;
   a. The names of the parties will be redacted, and the opinion will be filed with an organization (e.g., government, university, private business such as West or Lexis) that will make the opinions available to the public.
   b. The opinion will also be filed with the EEOC so that it will allow the Agency to ensure that arbitrators are correctly applying the law. If not, the EEOC can pursue cases where litigation is necessary to "get the law right."
7. Appeals should be limited in accordance with generally accepted arbitration principles, as lack of appeals keep costs and time under control. Moreover, research shows that employment appeals weigh heavily in the employer's favor.[106]
8. Arbitration should be private. Privacy helps make it attractive to both employers and employees. If both parties agree, pre-arbitration, that they want the results to be public, they can make the publication happen; however, we would predict that, most often, both sides will favor privacy.[107]

As stated in the opening, we believe that strong arguments on several sides of many of these ADR issues exist and that they need to be debated and refined so as to be acceptable to reasonable employers and employees. For example, Katz can support a process without

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[106] *E.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 110–12 (2009) [hereinafter Clermont & Schwab, *From Bad to Worse*] (noting that the approximately 41% to 9% spread in reversal rates on appeal between defendants and plaintiffs in employment discrimination cases is more extreme than the difference between plaintiff and defendant reversal rates in non-job cases); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 442 (2004) [hereinafter Clermont & Schwab, *How Plaintiffs Fare*] (citing statistics illustrating that "employment discrimination plaintiffs have won only 19.29 percent of judge trials but 37.77 percent of jury trials"). The difference in reversal rates on appeal is stark. Reversal rates for defendants from plaintiff pretrial wins is 30% compared to a nearly 11% reversal rate for plaintiffs who appeal defendant pretrial wins. The reversal rate from trial wins is 41% for defendants when plaintiffs win at trial compared to nearly 9% for plaintiffs when the defendant wins at trial. Clermont & Schwab, *From Bad to Worse*, *supra* at 110.

[107] There is currently a movement to ensure that all sexual discrimination cases and harassment cases be public. This will likely result in fewer cases being brought. At a Davis & Gilbert Roundtable in Manhattan in November 2019, Marty Scheinman, one of the top mediators in the nation stated that he has never met a plaintiff who did not want the case to be private. Thus, preventing private adjudication will, according to Scheinman, result in fewer cases being filed and more women simply accepting the conduct. We believe that privacy is a net positive, as redacted cases will help with the development of the law and employees can complain and adjudicate without having to worry that every Google search will yield that they sued their former employer.

the opt-out, while Sherwyn and Wagner could support a system where employees have a choice upon hire.

Conclusion

We do not pretend that our proposed system is either perfect or that it should be set in stone.[108] Policy experimentation, informed by academic research, would promote a useful evolution of policy. Numerous tweaks might be made to create a better system. We do know, however, that EEOC/litigation is an inefficient, heart wrenching, and costly practice. Moreover, the number of EEOC charges that are filed each year has made it impossible for the Agency to enforce and develop the law because it spends too many resources investigating and dismissing tens of thousands of cases each year. Despite common perception, no convincing evidence indicates that EEOC/litigation is more employee friendly than employment arbitration. That said, the current state of employment arbitration, as allowed by the Supreme Court, does not address the EEOC resource issue and thus does not help develop the law, does not create a process to productively address disputes, and lacks controls to ensure fairness and due process. Our proposal seeks to address the problems with the current systems by creating an ADR process, allowing the EEOC to maximize its effectiveness, and imposing controls that fix the problems that plague employment arbitration.

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[108] As stated in the introduction, this paper examines discrimination cases. We are not concerned with the lack of contract claims, as very few employees have employment contracts. Alternatively, wage and hour cases are extremely prevalent in employment litigation, are often litigated in class actions, and the damages are often so high that people refer to these lawsuits as “bet the company lawsuits.” We believe that the class action system needs the type of examination we hoped to provide in this article and that others have discussed in numerous articles on ADR in general. We hope to address class action waivers, NDAs, and other aspects of non-discrimination employment disputes in our future work.

User Name: mary@mckeansmithlaw.com

Date and Time: Monday, December 2, 2024 1:55:00 PM PST

Job Number: 239885453

Document (1)

1. *Livingston v. Metro. Pediatrics, LLC*

   Client/Matter: -None-

   Search Terms:

   Search Type: Natural Language

   Narrowed by:

Content Type	**Narrowed by**
	-None-

Livingston v. Metro. Pediatrics, LLC

Court of Appeals of Oregon

February 11, 2009, Argued and Submitted; March 3, 2010, Filed

A134765

Reporter

234 Ore. App. 137 *; 227 P.3d 796 **; 2010 Ore. App. LEXIS 198 ***

JOSEPH S. LIVINGSTON, Plaintiff-Respondent, v. METROPOLITAN PEDIATRICS, LLC; HEATHER M. MOORE, M.D.; DEAN A. MOSHOFSKY, M.D.; KAREN H. LICKTEIG, M.D.; GWYNNETH G. NEACE, D.O.; RICHARD BARSOTTI, M.D.; GALE A. RYDELL, M.D.; CATHERINE THOMAS, PNP; KAREN HEICHELHEIM; MARY KAY BRADY; and NICOLE HUYCK, aka Nichole Powers, Defendants-Appellants.

Prior History: [***1] Multnomah County Circuit Court. 060100470. Richard C. Baldwin, Judge.

Disposition: Reversed and remanded with instructions to grant defendants' petition for arbitration.

Case Summary

Procedural Posture

In a wrongful discharge action, defendants, a medical group that was plaintiff's employer and several of its doctor-partners, appealed an order of the Multnomah County Circuit Court (Oregon) that denied their motion to compel arbitration.

Overview

Plaintiff employee, a pediatrician, filed suit against his former employer, a medical group, and several doctor-partners, for wrongful discharge, breach of contract, intentional infliction of emotional distress, intentional interference with economic relations, whistleblowing, and blacklisting. The employer and the doctor-partners moved to compel arbitration pursuant to the employment agreement, but the trial court ruled that the agreement's arbitration clause was unenforceable because it was unconscionable due to provisions that shifted the costs to the employee should he not prevail and that imposed a confidentiality requirement on the parties. On review, the court held that there was no record from which it could determine whether the fee-shifting provision would unreasonably deter the employee's ability to pursue his claims, as the trial court made its unconscionability ruling as a question of law based upon the contract language. Courts should not consider in a vacuum whether the imposition of costs would create an unreasonably unfair burden. Further, the confidentiality provision was even-handed and equally benefitted and burdened both sides to the employment agreement.

Outcome

The order denying arbitration was reversed, and the case was remanded to the circuit court with instructions to grant defendants' motion to compel arbitration.

LexisNexis® Headnotes

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN1[⬇] **Alternative Dispute Resolution, Arbitration**

See Or. Rev. Stat. § 36.625.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN2[⬇] **Alternative Dispute Resolution, Arbitration**

See Or. Rev. Stat. § 36.620.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

HN3[⬇] **Arbitration, Arbitrability**

Or. Rev. Stat. § 36.620(3) provides that an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled. While that provision has never been construed, the Revised Uniform Arbitration Act (RUAA) on which the Oregon statute is based states that, in the absence of an agreement to the contrary, issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide. While estoppel is more commonly regarded as a means of avoidance of contractual conditions or obligations rather than what contract law customarily describes as a condition precedent, the RUAA commentary nonetheless includes estoppel among the issues to be decided by the arbitrator in addressing conditions precedent to arbitrability. Because the commentary to a uniform act that is enacted by the Oregon legislature is a part of the act's legislative history, the RUAA commentary therefore provides guidance in the interpretation of Or. Rev. Stat. § 36.620(3).

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

HN4[⬇] **Arbitration, Arbitrability**

The Revised Uniform Arbitration Act (RUAA) does not stake out a distinct position as to whether waiver is a condition precedent to arbitrability to be decided by the arbitrator, but the RUAA commentary notes that waiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause. Federal circuits are split on that question under the Federal Arbitration Act. However, in Oregon, waiver likewise has been treated as a condition precedent to arbitrability.

Business & Corporate Compliance > Contracts > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Interpretation > General Overview

HN5[⬇] **Contract Conditions & Provisions, Arbitration Clauses**

In interpreting the provisions of an employment agreement and its arbitration clause, a court applies ordinary principles of contract interpretation. Thus, the court determines whether the parties intended their arbitration agreement to include the present controversy by examining the text and context of the provision. If the provision is unambiguous, then the analysis is complete, and the court gives the appropriate effect to the parties' intentions. In the absence of an ambiguity, the court construes the words of the contract as a matter of law. In addition to the ordinary rules of contract construction, special rules are applicable to the construction of arbitration agreements. Oregon, like the federal courts, recognizes a presumption in favor of arbitrability. Thus, the inquiry is whether the arbitration clause is susceptible to an interpretation that covers the parties' dispute, i.e., whether the clause can plausibly be interpreted to require arbitration. In making that determination, the court considers not only the arbitration clause itself but the entire contract, as well as the relationship of the parties, the subject matter of the contract, and the practical construction the parties themselves may have placed on the contract by their acts.

Contracts Law > Third Parties > General Overview

HN6[⬇] **Contracts Law, Third Parties**

Generally, a third party's right to enforce a contractual promise in its favor depends on the intentions of the parties to the contract.

Business & Corporate Compliance > Contracts > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN7[⬇] **Contract Conditions & Provisions, Arbitration Clauses**

The unconscionability of an arbitration agreement is an issue to be decided by the court and not by the arbitrator. The party asserting unconscionability bears the burden of demonstrating that the provision in question is unconscionable.

Contracts Law > Defenses > Unconscionability > General Overview

HN8[⬇] **Defenses, Unconscionability**

In Oregon, the test for unconscionability has both procedural and substantive components. Procedural unconscionability refers to the conditions of contract formation and involves a focus on two factors: oppression and surprise. Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. Surprise involves the question whether the allegedly unconscionable terms were hidden from the party seeking to avoid them. Substantive unconscionability generally refers to the terms of the contract, rather than the circumstances of formation, and the inquiry focuses on whether the substantive terms unfairly favor the party with greater bargaining power.

Contracts Law > Defenses > Unconscionability > General Overview

HN9[⬇] **Defenses, Unconscionability**

Substantial disparity in bargaining power, combined with terms that are unreasonably favorable to the party with the greater power, may result in a contract or contractual provision being unconscionable. Unconscionability may involve deception, compulsion, or lack of genuine consent, although usually not to the extent that would justify rescission under the principles applicable to that remedy. The substantive fairness of the challenged terms is always an essential issue.

Contracts Law > Defenses > Unconscionability > General Overview

HN10[⬇] **Defenses, Unconscionability**

The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Such a determination depends on the actual facts in existence at the time of the contract's execution, and each case is decided on its own facts. Oregon courts are reluctant to declare contractual provisions per se unconscionable, even among parties of unequal bargaining power.

Counsel: John Dudrey argued the cause for appellants. With him on the briefs were Michael D. Williams and Williams Frederickson, LLC.

Mark G. McDougal argued the cause for respondent. With him on the brief was Gregory Kafoury.

Judges: Before Landau, Presiding Judge, and Schuman, Judge, and Ortega, Judge.

Opinion by: ORTEGA

Opinion

[**799] [*139] ORTEGA, J.

Plaintiff brought common-law claims against defendants for wrongful discharge, breach of contract, intentional infliction of emotional distress, and intentional interference with economic relations, and brought statutory claims of employment discrimination, ORS 659A.230 (whistleblowing), [1] and blacklisting, ORS 659.805. [2] This is an interlocutory appeal of an order denying defendants' motion to abate plaintiff's claims and compel arbitration pursuant to an arbitration clause in plaintiff's employment agreement. ORS 36.730(1)(a). The trial court ruled that the arbitration clause [*140] is unenforceable because it is

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[1] ORS 659A.230 provides, in part:

> "(1) It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported criminal activity by any person, has in good faith caused a complainant's information or complaint to be filed against any person, has in good faith cooperated with any law enforcement agency conducting a criminal investigation, has in good faith brought a civil proceeding against an employer or has testified in good faith at a civil proceeding or criminal trial.
>
> "(2) For the purposes of this section, 'complainant's information' and 'complaint' have the meanings given those terms in ORS 131.005.
>
> "(3) The remedies provided by this chapter are in addition to any common law remedy or other remedy that may be available to an employee for the conduct constituting a violation of this section."

ORS 659A.885 [***3] provides that a person aggrieved by violation of ORS 659A.230 may file a civil action in circuit court.

[2] "Blacklisting" is a criminal offense. ORS 659.805 provides:

> "(1) No corporation, company or individual shall blacklist or publish, or cause to be blacklisted or published, any employee, mechanic or laborer discharged by such corporation, company or individual, with intent and for the purpose of preventing such employee, mechanic or laborer from engaging in or securing similar or other employment from any other corporation, company or individual.
>
> "(2) No officer or agent of any corporation or any other person shall, in any manner, conspire or contrive by correspondence or otherwise to prevent an employee discharged by such corporation or such person from securing employment."

A conviction under ORS 659.805 is punishable pursuant to ORS 659.990(2) by fine or imprisonment or both:

> "Violation of ORS 659.805 by any officer or agent of a corporation or any other person is punishable, upon conviction, by a fine of not less than $ 50 nor more than $ 250, or by imprisonment in the county jail not less than 30 nor more than 90 days, or both."

We note that no statute authorizes a civil action for [***4] a violation of ORS 659.805.

unconscionable. On appeal, defendants contend that the trial court's ruling was in error, and we agree. We also reject the other [***2] grounds for avoiding the arbitration clause that plaintiff asserts as alternative bases for affirming the trial court's ruling. Accordingly, we reverse and remand.

For purposes of the issues raised on appeal, we draw the underlying facts from plaintiff's complaint and take his allegations as true. Plaintiff is a pediatrician, with masters' degrees in computer science and public health. Defendant Metropolitan Pediatrics, LLC (MP), owns four pediatric clinics in the [**800] Portland metropolitan area. The individual named defendants are doctor members and employees of MP. After completing clinical training, plaintiff moved to Oregon to work for MP as a pediatrician on physician-partner track, at an annual salary of $ 105,000 plus benefits.

A few months after plaintiff arrived, as a result of a routine inspection of MP's facilities by the "Vaccines for Children" program, MP learned that there was a problem with its storage of vaccines, with the possible result that some of those that it had administered were ineffective. Vaccines for Children advised MP to investigate and to take appropriate corrective action, including determining the need for revaccination. Initially, MP decided not to inform patients of the problem. It later decided to offer free revaccination to patients who had been vaccinated within the last eight months. [***5] Plaintiff expressed strong and persistent disagreement with MP's investigation and with the individual defendants concerning the handling of the risks of having administered ineffective vaccines. When MP did not address plaintiff's concerns to his satisfaction, plaintiff expressed his intention to notify his own patients, but MP prohibited him from doing so. He also contacted government authorities and learned that defendants had submitted falsified documents concerning its revaccination program. MP later extended its revaccination program to patients who had received certain vaccines within two years of the discovery of the storage problem.

Despite positive feedback from his patients concerning his performance as a physician, MP admonished plaintiff [*141] for his conduct relating to the vaccines, and MP and the individual defendants began a pattern of abuse and discrimination. MP eventually terminated plaintiff's employment in retaliation for his conduct relating to revaccination. Defendants also made defamatory and untrue statements about him to several potential employers.

Plaintiff filed a complaint with the Oregon Bureau of Labor and Industries (BOLI). Defendant MP participated in the [***6] BOLI proceedings by responding to the complaint but did not seek to compel or enforce arbitration. Thereafter, BOLI investigated plaintiff's complaint, and plaintiff participated in discovery. The BOLI proceeding culminated in the issuance of a "right to sue" letter.

Plaintiff later filed the complaint in this proceeding, alleging that defendants' conduct constituted wrongful discharge, breach of contract, intentional infliction of emotional distress, and intentional interference with economic relations, and that it violated statutes prohibiting employment discrimination, and blacklisting. Plaintiff sought damages, injunctive relief, penalties, and attorney fees.

Plaintiff's employment agreement contained an arbitration clause that required arbitration of "[a]ny controversy, dispute or disagreement arising out of or relating to this Agreement, or the breach thereof[.]" Defendants filed a petition to compel arbitration of plaintiff's claims pursuant to ORS 36.625(1). [3] Plaintiff raised a number of challenges to the enforceability of the arbitration clause, contending that (1) by participating in proceedings before BOLI, defendants are estopped from asserting or waived the right to assert [***7] that the claims are subject to arbitration; (2) claims against the individual, nonsignatory defendants are not subject to arbitration; and (3) several provisions of the arbitration clause render it unconscionable.

[*142] The trial court rejected defendants' petition to arbitrate, accepting plaintiff's arguments about unconscionability. In a letter opinion, the court stated:

> "My conclusion is that several features of the subject arbitration provisions render

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[3] ORS 36.625 provides, in part:

> ***HN1***[🡅] "(1) On petition of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> "* * * *
>
> "(b) If the refusing party opposes the petition, the court shall proceed summarily to decide the issue * * * and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate."

> the agreement to arbitrate unenforceable as a matter of law. These features include 1) a fee shifting provision imposing attorney fees and costs on plaintiff should he [**801] not prevail on his blacklisting claim, 2) imposition of excessive arbitration fees on plaintiff, 3) ambiguity about what AAA Rules would apply (Commercial or Employment) to this controversy, [***8] and 4) a confidentiality requirement which also raises serious public policy concerns.
>
> "Under these circumstances, the Court need not determine whether each separate feature of the agreement renders the arbitration provisions unenforceable. Rather, the above features, in combination, render the arbitration provisions unenforceable. The Court concludes that the arbitration agreement is void as against public policy."

In this interlocutory appeal, defendants challenge the bases for the trial court's ruling. They also contend that plaintiff's other grounds asserted in the trial court in avoidance of the arbitration clause are without merit. We agree with defendants that the arbitration clause is enforceable and therefore reverse and remand.

The parties agree that the case is subject to the Uniform Arbitration Act (UAA), ORS 36.600 to 36.740. ORS 36.620 provides, in part:

> ***HN2***[🡅] "(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> "(2) Subject to ORS 36.625(8), the court shall decide [***9] whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> "(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled."

Because they are potentially dispositive, we first address each of plaintiff's alternative grounds for affirmance [*143] that were raised and argued below but not addressed by the trial court. *Outdoor Media Dimensions Inc. v. State of Oregon,* 331 Ore. 634, 660, 20 P.3d 180 (2001). Those grounds are (1) that defendants are estopped from or have waived enforcement of the arbitration clause; (2) that the right to compel arbitration, if any, did not survive the termination of plaintiff's employment; (3) that plaintiff's claims asserting intentional torts are not subject to arbitration; (4) that plaintiff's statutory employment discrimination claim is not subject to arbitration; and (5) that his claims against the individual defendants are not subject to arbitration. We conclude that the first issue is for an arbitrator to decide, and reject each of plaintiff's other arguments in turn.

First, plaintiff contends that the trial court's order should be affirmed because, by their participation in the BOLI [***10] proceeding, defendants either are estopped from or have waived enforcement of the arbitration clause. [4] Defendants contend that both estoppel and waiver present "conditions precedent" to arbitrability that must be addressed by the arbitrator rather than the court, pursuant to ORS 36.620(3).

HN3[🡅] That section provides that "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." The statute, enacted in 2003, Ore. Laws 2003, ch 598, § 6, has never been construed. However, the [**802] Revised Uniform Arbitration Act (RUAA) on which Oregon's UAA is [*144] based, contains an identical provision. RUAA § 6(c). Commentary to Section 6 of the RUAA states that, "in the absence of an agreement to the contrary, issues of * * * procedural arbitrability, *i.e.,* whether prerequisites such as time limits, notice, laches, estoppel, *and other conditions precedent to an obligation* to arbitrate have been met, are for the arbitrators to decide." *Id.* § 6 comment 2, 7 ULA 13 (Supp 2002) (emphasis added).

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[4] In *Bennett v. Farmers Ins. Co.,* 332 Ore. 138, 156-57, 26 P.3d 785 (2001), the Supreme Court briefly discussed the distinction between the doctrines of waiver and estoppel in the context of contract disputes. The court explained that waiver is the voluntary relinquishment of a known right. A party to a written contract may waive a provision of a contract by conduct or by oral representation. *Id.* The court explained that, in the absence of an intent to waive a provision, a party may nonetheless be estopped to rely on the provision, if the other party has relied on a perceived waiver:

> "This court has described the doctrine of estoppel by comparing it to the doctrine of waiver. The two doctrines are closely related, and sometimes it is difficult to distinguish between the two. *Smith v. Martin,* 94 Ore. 132, 141, 185 P 236 (1919). If there is no evidence of an intent to waive a contract provision, a party [***11] nevertheless may be estopped from relying on that provision if that party led the other party to believe that the provision had been waived, and the other party relied on that perceived waiver. *Id.; see also Waterway Terminals Co [v. P.S. Lord],* 242 Ore. [1, 26-27] 406 P.2d 556 (1965)] (waiver not presumed if not intended unless other party was misled, to that party's prejudice, into honest belief that waiver was intended)."

332 Ore. at 157-58.

Interestingly, estoppel is more [***12] commonly regarded as a means of avoidance of contractual conditions or obligations, rather than what contract law customarily describes as a "condition precedent." *See, e.g.,* *Day-Towne v. Progressive Halcyon Ins. Co.,* 214 Ore. App. 372, 381-82, 164 P.3d 1205 (2007) (addressing when estoppel may be invoked in the context of insurance); *Wright v. State Farm Mutual Automobile Ins. Co.,* 223 Ore. App. 357, 370 n 14, 196 P.3d 1000 (2008) ("A contractual condition 'is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.'" (quoting *Hill v. Oland,* 61 Ore. App. 85, 90, 655 P.2d 1088 (1982) (further citation and internal quotation marks omitted))); *see also* John Edward Murray Jr., *Murray on Contracts* 272 § 133 (2d Rev Ed 1974) ("In the law of contracts, the use of the word condition is usually confined to the designation of some fact or event, other than the mere lapse of time, which is not certain to occur but which must occur (unless excused) in order to activate a contractual duty."). Nonetheless, the RUAA commentary includes estoppel among the issues to be decided by the arbitrator in addressing "conditions [***13] precedent" to arbitrability. A commentary to a uniform act that is enacted by the Oregon legislature is a part of the act's legislative history. *State of Oregon DCS v. Anderson,* 189 Ore. App. 162, 169, 74 P.3d 1149, *rev den,* 336 Ore. 92, 79 P.3d 313 (2003). The RUAA commentary therefore provides guidance in our interpretation of ORS 36.620(3). Because the commentary unambiguously states that the issue of estoppel concerns a condition precedent to arbitrability, in the absence of a contractual provision providing otherwise, [5] we conclude that plaintiff's estoppel [*145] argument raises a question concerning a condition precedent to arbitrability that must be taken up with the arbitrator.

HN4[🠉] The RUAA does not stake out a distinct position as to whether waiver is also a "condition precedent" to be decided by the arbitrator, but the RUAA commentary notes that "[w]aiver is one area where courts, rather than arbitrators, often make the decision as to

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[5] *See* ORS 36.610(1) ("[A] party to an agreement to arbitrate * * * may waive, or the parties may vary the effect of, the requirements of ORS 36.600 to 36.740 to the extent permitted by law.").

enforceability of an arbitration clause." RUAA § 6 comment 5, 7 ULA 16 (Supp [***14] 2005) Federal circuits are split on that question under the Federal Arbitration Act (FAA). *See Marie v. Allied Home Mortgage Corp.,* 402 F3d 1, 12 (1st Cir 2005) (discussing cases).

However, in Oregon, waiver likewise has been treated as a condition precedent to arbitrability. In *Industra/Matrix Joint Venture v. Pope & Talbot,* 200 Ore. App. 248, 260-61, 113 P.3d 961 (2005), *aff'd,* 341 Ore. 321, 142 P.3d 1044 (2006), we held that the defendant's waiver defense to arbitrability was a precondition to arbitrability that the arbitrator should decide. Although that case was decided under the FAA and not the UAA, our reasoning there--that a waiver of arbitrability, like estoppel, presents a condition precedent to arbitrability that grows out of the dispute and bears on its final disposition, 200 Ore. App. at 261 (citing *Howsam v. Dean Witter Reynolds, Inc.,* 537 US 79, 83-85, 123 S Ct 588, 154 L Ed 2d 491 (2002))--is persuasive. Plaintiff's waiver argument, like estoppel, is a procedural rather than a substantive defense to arbitrability that grows out of the controversy itself, *see* RUAA § 6 comment 2, and we conclude for that reason that, under ORS 36.620(3), the issue of waiver of arbitrability [***15] involves a condition precedent to be decided by the [**803] arbitrator, rather than the court. Accordingly, we do not address it. [6]

[*146] It is undisputed that the remaining issues are for the court rather than the arbitrator. ORS 36.620(2) ("[T]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."). In logical sequence, then, the next alternative ground for affirmance that we take up is plaintiff's contention that the right to compel arbitration did not survive the termination of [***16] plaintiff's employment. We turn first to the text of the arbitration clause:

> "Any controversy, dispute or disagreement arising out of or relating to this Agreement,

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[6] We note that, when courts have addressed the question of waiver in the context of arbitration clauses, they have required the party opposing arbitration to show that he was prejudiced as a result of the alleged inconsistent conduct. *See, e.g., Fisher v. A.G. Becker Paribas Inc,* 791 F2d 691, 694 (9th Cir 1986) (deciding question of waiver under FAA). The RUAA commentary also provides:

> "[B]ecause of the public policy favoring arbitration, a court normally will only find a waiver of a right to arbitrate where a party claiming waiver meets the burden of proving that the waiver has caused prejudice."

RUAA § 6 comment 5. Plaintiff has made no such showing here.

> or the breach thereof, shall be resolved by arbitration which shall be conducted in Multnomah County, Oregon, in accordance with the rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

Plaintiff notes that the employment agreement contains an additional provision relating to the effects of termination, which provides, in part:

> "Upon termination of this Agreement, as provided herein, neither party shall have any further obligations hereunder except for (a) obligations accruing prior to the date of termination; and (b) obligations, promises, or covenants contained herein that are expressly made to extend beyond the term of this Agreement."

In plaintiff's view, the agreement does not expressly extend the obligation to arbitrate beyond the time frame of the agreement, and it therefore ended when plaintiff was terminated.

HN5[🡅] In interpreting the provisions of the employment agreement and the arbitration clause, we apply ordinary [***17] principles of contract interpretation. *See* *Industra/Matrix Joint Venture v. Pope & Talbot,* 341 Ore. 321, 332, 142 P.3d 1044 (2006). Thus, we determine whether the parties intended their arbitration agreement to include the present controversy by examining the text and context of the provision. *Yogman v. Parrott,* 325 Ore. 358, 361, 937 P.2d 1019 (1997). If the provision is unambiguous, then our analysis is complete, and we give the appropriate effect to the parties' intentions. *Id.* In the absence of an ambiguity, we construe [*147] the words of the contract as a matter of law. *Eagle Industries, Inc. v. Thompson,* 321 Ore. 398, 405, 900 P.2d 475 (1995).

In addition to the ordinary rules of contract construction, special rules are applicable to the construction of arbitration agreements. Oregon, like the federal courts, recognizes a presumption in favor of arbitrability. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 US 574, 582, 80 S Ct 1347, 4 L Ed 2d 1409 (1960) (courts should resolve any doubts in favor of arbitration and should not deny an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation [***18] that covers the asserted dispute"); *Snow Mountain Pine, Ltd. v. Tecton*

Laminates Corp., 126 Ore. App. 523, 869 P.2d 369, *rev den,* 319 Ore. 36, 876 P.2d 782 (1994) (same); *see also* Black v. Arizala, 182 Ore. App. 16, 48 P.3d 843 (2002), *aff'd,* 337 Ore. 250, 95 P.3d 1109 (2004). Thus, our inquiry here is whether the arbitration clause is susceptible to an interpretation that covers the parties' dispute, *Snow Mountain Pine, Ltd.,* 126 Ore. App. at 529, *i.e.,* whether the clause can *plausibly* be interpreted to require arbitration. In making that determination, we consider not only the arbitration clause itself, but the entire contract, as well as the relationship of the parties, the subject matter of the contract, [**804] and the practical construction the parties themselves may have placed on the contract by their acts. *Id.*

We reject for two reasons plaintiff's contention that the arbitration clause became inapplicable when plaintiff's employment terminated. First, the arbitration clause explicitly applies to "[a]ny controversy, dispute or disagreement arising out of or relating to this Agreement, or the breach thereof." That expansive language encompasses *any* controversy, dispute, or disagreement, as long as [***19] the subject matter of the dispute arises out of or relates to the employment agreement. In light of the strong policy favoring the enforceability of arbitration clauses, we conclude that the text of the clause plausibly encompasses controversies or disputes that are pursued after the termination of employment, including disputes over termination. Secondly, many of plaintiff's claims are based on allegations of misconduct occurring during the term of the contract and therefore plausibly fall within the termination provision's exception for "obligations [*148] accruing prior to the date of termination." We therefore reject plaintiff's contention that the right to seek arbitration terminated with plaintiff's employment.

Plaintiff next contends that the claims asserting intentional torts, including whistleblowing, blacklisting, intentional interference with economic relations, and intentional infliction of emotional distress, are not subject to arbitration, because the arbitration clause does not explicitly mention those torts, and the parties therefore cannot have "intended to waive their right to seek full legal redress for intentional harm to one by the other." Plaintiff's contention is again [***20] defeated by the broad language of the arbitration clause, which applies to "[a]ny controversy, dispute or disagreement arising out of or relating to this agreement." In light of the scope of the provision and Oregon's rule favoring arbitrability, *Snow Mountain Pine, Ltd.,* 126 Ore. App. at 529, we conclude that the claims are plausibly within the scope of the arbitration clause and are therefore subject to arbitration.

With regard to plaintiff's blacklisting claim under ORS 659.805, we likewise reject plaintiff's contention that, in providing statutory relief for blacklisting, the legislature necessarily intended that only the judicial remedy is adequate for vindication of statutory rights. In the absence of an express statutory limitation on arbitration, we know of no reason why parties should not be free to agree to arbitration of statutory claims. *See Gilmer v. Interstate/Johnson Lane Corp.,* 500 US 20, 28, 111 S Ct 1647, 114 L Ed 2d 26 (1991) ("So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 US 614, 637, 105 S Ct 3346, 87 L Ed 2d 444 (1985)).

In [***21] a slight variation on the above argument, plaintiff contends that his statutory employment discrimination claim, ORS 659A.230, is not subject to arbitration, because the claim is inherently outside the employment agreement, and requiring arbitration would defeat the strong public policy of encouraging employees to come forward and report [*149] employment abuses. However, as pleaded, the discrimination claim alleged facts that occurred during or arising out of plaintiff's employment. For that reason, we conclude that the discrimination claim also plausibly falls within the scope of the arbitration clause.

Plaintiff next contends that the claims against the individual defendants are not subject to arbitration, because those individuals were not parties to the employment agreement. In plaintiff's view, the arbitration clause, which applies to claims "arising out of or relating to" the employment agreement, cannot be enforced by individual defendants who are not parties to plaintiff's agreement with MP.

HN6[🡅] Generally, a third party's right to enforce a contractual promise in its favor depends on the intentions of the parties to the contract. *Sisters of St. Joseph v. Russell,* 318 Ore. 370, 374, 867 P.2d 1377 (1994). [***22] Courts have relied on a number of rationales for permitting nonsignatory defendants to [**805] invoke arbitration clauses in claims against them by signatories to a contract. [7] Once again, the terms of the arbitration clause are at the center of the inquiry, because it is the text of the arbitration clause that will determine whether the parties to the agreement intended that third parties could enforce its provisions. We conclude, as explained below, that the arbitration clause is broad enough to plausibly [*150] encompass plaintiff's claims against the individual defendants and to afford them the same right to request arbitration as MP.

The arbitration clause provides that it applies to controversies arising out of or relating to the employment agreement. That broad statement does not expressly limit its scope to claims between the parties to the employment agreement. Plaintiff nevertheless contends [***24] that, because the clause applies to disputes *arising out of or relating to the agreement,* its application is necessarily limited to claims *under the agreement*--that is, between the parties to the agreement--and does not extend to claims arising generally out of plaintiff's employment. The difficulty with plaintiff's position is that the plain text of the clause--in particular, the "arising out of or relating to" language--does not limit its scope to controversies *under* the agreement or between plaintiff and MP. Furthermore, the employment agreement provides the basis for and terms of plaintiff's employment. The text of the arbitration clause is reasonably susceptible

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[7] *See, e.g., Westmoreland v. Sadoux,* 299 F3d 462, 466-67 (5th Cir 2002) ("There are two circumstances under which a nonsignatory can compel arbitration. First, when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. Second, when the signatory to the contract containing a arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."); *Roby v. Corporation of Lloyd's,* 996 F2d 1353, 1360 (2d Cir 1993), [***23] *cert den,* 510 U.S. 945, 114 S. Ct. 385, 126 L. Ed. 2d 333 (1993) (nonsignatories to an arbitration agreement may benefit from the agreement where the legal basis and factual context for claims against nonsignatories are the same as claims against the signatories, where nonsignatories are employees, disclosed agents, or principal of signatory); *Arnold v. Arnold Corp.,* 920 F2d 1269, 1281 (6th Cir 1990) (if agents could not invoke their principals' arbitration provisions, a party easily could avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as defendants in his complaint or signatory parties in their individual capacities only, thereby effectively nullifying an arbitration agreement); *Letizia v. Prudential Bache Sec., Inc.,* 802 F2d 1185, 1187-88 (9th Cir 1986) (holding that nonsignatory employees of the signatory could invoke the arbitration clause because the employees' alleged wrongdoing related to their employment).

to the interpretation that the parties intended it to apply to *any* claim that plaintiff might have *arising out of or relating to his employment pursuant to the agreement.*

We conclude that the wording of the clause is also broad enough to encompass claims against nonsignatories and to support the interpretation that the parties intended that MP's employees and agents could avail themselves of its terms. Furthermore, the claims against the individual nonsignatory defendants (intentional interference with economic relations, [***25] intentional infliction of emotional distress, and blacklisting) depend on the same allegations made against MP and have as their source the identical circumstances of plaintiff's claims against MP--defendants' concerted response to plaintiff's conduct relating to the vaccine storage problem. [8] We conclude, especially in light of the public policy [*151] favoring arbitrability, *see Snow Mountain Pine, Ltd.,* 126 Ore. App. at 529, that the arbitration clause plausibly encompasses not only claims between the parties to the agreement, but claims against the individual defendants that arise out of or relate to plaintiff's employment with MP.

We now move on to the issue of ***HN7***[🡅] unconscionability, on which the trial court [**806] based its decision and that the parties do not appear to dispute is to be decided by the court and not the arbitrator. *See* *Sprague v. Quality Restaurants Northwest, Inc.,* 213 Ore. App. 521, 524, 162 P.3d 331, *rev den,* 343 Ore. 223, 168 P.3d 1154 (2007) (where the plaintiff's unconscionability challenge is to the arbitration clause alone and not to the entire employment contract, the issue is to be decided by the court and not the arbitrator); *Vasquez-Lopez v. Beneficial Oregon, Inc.,* 210 Ore. App. 553, 562-63, 152 P.3d 940 (2007) (same). Whether, under Oregon law, the facts support a determination of unconscionability is a question of law to be decided based on the facts in existence at the time the contract was made. *Best v. U. S. National Bank,* 303 Ore. 557, 560, 739 P.2d 554 (1987). The party

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[8] As plaintiff points out, the interference with economic relations claim is asserted only against the individual defendants. The complaint shows, however, that that claim, like the others, is based on the same misconduct alleged against MP. Although plaintiff disputes whether the intentional interference with economic relations claim arises out of or relates to the employment contract by alleging that defendants' actions "were outside the scope of their employment," the facts as alleged plausibly arise out of plaintiff's employment. Accordingly, in light of [***26] the presumption in favor of arbitrability, any factual dispute about whether defendants' actions actually arose out of employment is for the arbitrator.

asserting unconscionability bears the burden of demonstrating that the provision in question is unconscionable. *W. L. May Co. v. Philco-Ford Corp.,* 273 Ore. 701, 707, 543 P.2d 283 (1975).

HN8[↑] In [***27] Oregon, the test for unconscionability has both procedural and substantive components. *Vasquez-Lopez,* 210 Ore. App. at 566. Procedural unconscionability refers to the conditions of contract formation and involves a focus on two factors: oppression and surprise. Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. *Id.* Surprise involves the question whether the allegedly unconscionable terms were hidden from the party seeking to avoid them. *Id.* at 567.

"Substantive unconscionability" generally refers to the terms of the contract, rather than the circumstances of formation, and the inquiry focuses on whether the substantive terms unfairly favor the party with greater bargaining power. *Id.* In *Carey v. Lincoln Loan Co.,* 203 Ore. App. 399, 422-23, 125 P.3d 814 (2005), *aff'd,* 342 Ore. 530, 157 P.3d 775 (2007), [*152] we summarized Oregon's formulation of unconscionability and the interplay of the procedural and substantive components:

> "The primary focus * * * appears to be relatively clear: ***HN9***[↑] Substantial disparity in bargaining power, combined with terms that are [***28] unreasonably favorable to the party with the greater power may result in a contract or contractual provision being unconscionable. Unconscionability may involve deception, compulsion, or lack of genuine consent, although usually not to the extent that would justify rescission under the principles applicable to that remedy. The substantive fairness of the challenged terms is always an essential issue."

As we said in *Carey,* quoting *Restatement (Second) of Contracts* § 208 comment a (1979), ***HN10***[↑] "[t]he determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect." 203 Ore. App. at 422. Such a determination depends on the actual facts in existence at the time of the contract's execution, and each case is decided on its own facts. *Vasquez-Lopez,* 210 Ore. App. at 567. Oregon courts are "reluctant to declare contractual provisions *per se* unconscionable, even among parties of unequal bargaining power." *Motsinger v. Lithia Rose-FT, Inc.,* 211 Ore. App. 610, 623, 156 P.3d 156 (2007); *see also The Hays Group, Inc. v. Biege,* 222 Ore. App. 347, 351-52, 193 P.3d 1028 (2008).

Plaintiff here makes no claim of procedural unconscionability. Although [***29] defendants are willing to assume that, as a general proposition, a prospective employer has greater bargaining power than an applicant for employment, in this case it is undisputed that plaintiff, who is highly educated, had an opportunity to review the employment agreement for two weeks, and he signed and returned it without making any changes. Thus, there is no contract of adhesion. *See Reeves v. Chem Industrial Co.,* 262 Ore. 95, 101, 495 P.2d 729 (1972) (defining a contract of adhesion as a "take-it-or-leave-it" contract that is the product of unequal bargaining power). We conclude that, to the extent that the parties had disparate bargaining power, the inequality was minimal, and plaintiff voluntarily agreed to the arbitration clause. Our inquiry focuses on whether there are, in any event, one-sided or [*153] unreasonably unfair terms in the arbitration clause that render it substantively unconscionable. *Vasquez-Lopez,* [**807] 210 Ore. App. at 567.

As previously noted, the trial court explained that there were four aspects of the arbitration clause that collectively rendered it unconscionable: (1) a fee-shifting provision imposing attorney fees and costs on plaintiff should he not prevail on his [***30] blacklisting claim; (2) imposition of excessive arbitration fees on plaintiff; (3) ambiguity about which version of the American Arbitration Association rules would apply; and (4) a confidentiality requirement. Plaintiff asserts, additionally, as alternative grounds for affirming the trial court's ruling, that the clause unconscionably (1) shifts attorney fees and costs on the wrongful discharge and statutory employment discrimination claims; (2) adopts the American Arbitration Association rules; and (3) thereby requires the parties to waive all claims against the arbitrator.

Ordinarily, we would review the trial court's findings underlying a determination of unconscionability for any evidence. *See Vasquez-Lopez,* 210 Ore. App. at 566. Here, however, the trial court made no findings pertaining to unconscionability and decided the issue as a matter of law based only on the contractual provisions themselves. In reaching its decision, the court did not consider how or whether the provisions were unconscionable in light of plaintiff's individual circumstances. For example, the court did not consider whether the fee-shifting provision would be unfair to or cause a hardship to plaintiff. The [***31] court likewise did not consider whether the arbitration fees as applied to plaintiff would make it difficult for him to pursue his claims. The court determined, in essence, that the arbitration clause was unconscionable *per se.* There are no facts in the record--outside of the arbitration clause itself and the rules of the American Arbitration Association--concerning the effect of the allegedly unconscionable terms on plaintiff. We thus address plaintiff's arguments of *per se* unconscionability to determine whether any of the disputed provisions are inherently unreasonably unfair to plaintiff.

We begin with plaintiff's contentions regarding fee shifting. Although not part of the arbitration clause, [*154] Paragraph 5.6 of the agreement provides for an award of attorney fees to the prevailing party in any arbitration arising out of the agreement. The paragraph provides, in its entirety:

> "In the event of any breach of this Agreement, the nonbreaching party shall be entitled to recover its reasonable costs and attorney fees incurred in connection with enforcing the Agreement. *In any arbitration arising out of this Agreement, the prevailing party shall be entitled to recover its expenses, costs, [***32] and excerpt [sic] attorney fees, including expenses, costs, and fees on any appeal or petition for review."*

(Emphasis added.) Both parties treat the emphasized portion of that paragraph, described by plaintiff as a "fee-shifting" provision, as a part of the arbitration agreement. We agree that, in light of the fact that the contract requires that all disputes be resolved through arbitration, the attorney fee provision necessarily should be construed in *pari materia* with the arbitration provision. It allows the prevailing party in an arbitration to recover attorney fees, even if the claims at issue would not otherwise provide a basis for a fee award. In plaintiff's view, in light of the remedial and public policy purposes of ORS 659.805 [9] and ORS 659A.230, and the common-law tort of wrongful discharge, that consequence is unconscionable, because it creates a chilling effect that inhibits a plaintiff from pursuing legitimate claims. *See Vasquez-Lopez,* 210 Ore. App. at 573 (an arbitration agreement is unenforceable under the FAA if it denies a litigant the opportunity to vindicate his or her rights in the arbitral forum).

We assume, for the sake of discussion only, that the fee-shifting provision contained in the agreement would, in fact, allow defendants to recover fees on plaintiff's claims where fees would not otherwise be available [**808] to defendants. And it may well be, as plaintiff asserts, that the costs of arbitration to plaintiff could far exceed those of a jury trial in state court. However, as we have previously noted, whether the facts support a determination of unconscionability is a question of law to be decided based on the facts in existence at the time the contract was made. *Best,* 303 Ore. at 560. The [*155] party asserting unconscionability bears the burden of demonstrating that the provision in question is, in fact, unconscionable. *W. L. May Co.,* 273 Ore. at 707. As we held in *Motsinger,* we will not determine in a vacuum whether costs imposed on a plaintiff create an unreasonably unfair burden. 211 Ore. App. at 618; *see also Vasquez-Lopez,* 210 Ore. App. at 589 (uncontradicted evidence that the cost of arbitration would be six months' savings established that the clause was unconscionable); *cf. Torrance v. Aames Funding Corporation,* 242 F. Supp. 2d 862, 874 (D Ore. 2002) [***34] (an arbitration agreement that requires the plaintiff to pay *any* arbitrator's fee to vindicate statutory rights is unconscionable).

Here, there is no record from which we may determine whether the fee-shifting provision will deter or unreasonably burden plaintiff's ability to pursue his common-law and statutory claims. As in *Motsinger,* any conclusion that the fee-shifting provision would have a detrimental effect on plaintiff's ability to pursue

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[9] We do not consider in this opinion whether plaintiff is, in fact, [***33] entitled to pursue a civil remedy for his blacklisting claim.

his claims would be purely speculative. 211 Ore. App. at 618. Accordingly, in the absence of evidence that the fee-shifting provision, in fact, results in the arbitration forum not providing a reasonable alternative forum for this plaintiff, we conclude that the fee-shifting provision is not substantively unconscionable.[10]

We similarly reject plaintiff's contention [***35] that the filing fees associated with American Arbitration Association arbitrations render the arbitration clause unconscionable. The agreement requires that the arbitration be "conducted * * * in accordance with the rules of the American Arbitration Association." The agreement does not state that the arbitration must be *administered* by the American Arbitration Association, nor does it specify whether the American Arbitration Association's commercial or employment rules apply. The parties disagree about whether and to what extent, when an arbitration is not to be administered by the American Arbitration Association, its *fees* are applicable at all. In all events, however, as with the fee-shifting provision, [*156] in the absence of evidence that the fees would have a chilling effect on plaintiff's ability to pursue his claims, any conclusion that the fee is unconscionable would be speculative.

As noted, the employment agreement does not specify whether the American Arbitration Association's employment or commercial arbitration rules apply, and the trial court cited that as a factor in its determination that the arbitration provision is unconscionable. However, we do not find an ambiguity, at [***36] least not one sufficient to contribute to a determination that the agreement is unconscionable. The American Arbitration Association's rules provide that the employment rules apply when (1) the particular arbitration rules are not specified and (2) there is an employment dispute. Accordingly, the employment arbitration rules, rather than the commercial arbitration rules, would appear to be applicable, and plaintiff does not seriously contend otherwise. We conclude that the trial court erred in relying on that ambiguity as a factor in its determination that the arbitration

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[10] We note that plaintiff offered the affidavit of an employment law attorney, who stated that he has never encountered a client who would be willing to face the risk of paying defense counsel's attorney fees if the client were to proceed on a statutory claim and lose. The affidavit does not provide evidence as to the effect of fee-shifting on *plaintiff's* ability to pursue *his* claim.

clause is unconscionable.

Although the arbitration clause does not itself contain a confidentiality provision, the American Arbitration Association's employment arbitration rules provide that the arbitrator "shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." The trial court listed the confidentiality of the proceedings among factors supporting [**809] its determination that the arbitration clause is unconscionable. We do not find a basis for concern here.

In *Vasquez-Lopez,* [***37] we discussed, in general, problems with confidentiality provisions and their tendency to favor "repeat players," who gain information regarding preferences of arbitrators, the relative force of particular arguments, and the existence of rulings, and thereby acquire an advantage against those who are cut off from the same body of information. 210 Ore. App. at 575-76. Plaintiff does not raise those concerns here, but rather contends that his statutory claims seek to vindicate the public interest and that it is unconscionable for that reason to require that the claims remain confidential. Defendants respond that plaintiff's [*157] claims have been filed in circuit court and thus already are a matter of public record; additionally, the substance of any award would become a matter of public record on the filing of a petition for confirmation under ORS 36.700 or a petition to vacate the award under ORS 36.705. Assuming, without deciding, that a confidentiality requirement might be a basis for invalidating an arbitration clause in some other agreement, in this employment agreement, we conclude that it is not. There are reasons why either party to an employment agreement might desire to keep proceedings [***38] confidential. In this case, we conclude the confidentiality provision is even-handed and equally benefits and burdens both sides to the employment agreement. *See Vasquez-Lopez,* 210 Ore. App. at 575. Accordingly, we conclude that the American Arbitration Association's confidentiality rules do not support a determination of unconscionability here."

Finally, plaintiff failed to raise in the trial court, and we decline to address, his contention that the American Arbitration Association's authority to rely on a different rule version than the one in effect at the time of the agreement renders the arbitration clause unconscionable. We reject without further discussion plaintiff's remaining contentions that the arbitration clause's incorporation of the American Arbitration Association rules of arbitration, without setting them forth verbatim, renders the arbitration clause unconscionable *per se,* and that the American Arbitration Association rules themselves are unconscionable because they hold the arbitrator harmless from liability when acting in that capacity. *See* ORS 36.660 (describing immunity of arbitrators). In summary, we conclude that plaintiff has failed to establish that provisions [***39] of the arbitration clause, considered separately or in combination, are unreasonably favorable to defendants so as to render the clause substantively unconscionable.

Having rejected each of plaintiff's challenges to the enforceability of the arbitration clause, we conclude that the case must be remanded for arbitration of plaintiff's claims. [11]

[*158] Reversed and remanded with instructions to grant defendants' petition for arbitration.

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[11] In light of our disposition, we need not address defendants' contention that any unconscionable provisions of the employment contract are severable.

ANNUAL REVIEWS

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Mandatory Employment Arbitration

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Abstract

This article offers a comprehensive overview of the academic literature concerning mandatory employment arbitration and existing empirical evidence. Proponents of mandatory employment arbitration contend mandatory arbitration provides access to justice to those excluded from the traditional civil litigation system. Conversely, opponents of mandatory employment arbitration assert that it is a coercive system that disproportionately benefits employers and disadvantages employees. Although these entrenched perceptions of mandatory employment arbitration are not new, an expanding body of recent empirical research provides fresh insights. The empirical literature reveals lower employee success rates and financial awards, longer case resolution times, and evidence of a repeat player effect in arbitration relative to civil litigation and, as a whole, tends to support arguments made by opponents of the forum. This article reviews the literature on the major debates surrounding employment arbitration and corresponding empirical evidence.

INTRODUCTION

The rise of mandatory arbitration is arguably the single most important development in US employment law and dispute resolution in the past three decades. Under mandatory arbitration, employers require employees, as a term and condition of employment, to agree to resolve any legal claims they have against the employer through an arbitration procedure set out in the contract that the employer has drafted, effectively barring the employee from access to the courts. From an insignificant practice in 1990, mandatory employment arbitration has become the predominant dispute resolution mechanism for employment rights today in the United States, with more employees being subject to mandatory arbitration than have access to the courts. Outside of the United States, mandatory employment arbitration is much less prevalent and subject to additional administrative hurdles (Chesnokova 2019). Mandatory employment arbitration is highly controversial; advocates tout it as a solution to the pathologies they see in the litigation system, whereas critics increasingly point to empirical literature showing it as an employer-dominated system that denies due process and undermines employees' ability to effectively vindicate their rights.

What does the US system of mandatory employment arbitration look like, how does it function, and what is its impact on the ability of employees to vindicate the rights guaranteed to them by statutes? Empirical research is key to answer these questions. In the early years of its development, empirical research on mandatory employment arbitration was sparse. This reflected in part the newness of the phenomenon, driven by a shift in Supreme Court decisions rather than a process of informed legislative policy making. But it also reflected the difficulty of accessing data on mandatory arbitration due to it being a process set up by contracts imposed by private-sector employers, administered by private arbitration organizations, and decided in the traditionally private forum of arbitration. No government agencies oversee and regulate the system, so no systematic public information and data were being collected on it.

Indeed, unlike civil litigation, arbitration proceedings and documents are not generally open to the public and are inaccessible to researchers and policy makers. And although as a matter of principle arbitration is not a confidential process—in that an arbitration clause in and of itself is not a confidentiality clause—as a private process, the employment arbitration system remains stubbornly opaque. Any review of the literature on mandatory employment arbitration must address this fact: The private nature of the forum situates it in an empirical desert. However, through careful research design and artful use of the limited public data that do exist, academics have created empirical oases from which to observe the institutional characteristics of mandatory employment arbitration. We describe the picture of mandatory employment arbitration that has emerged from these efforts and discuss what it tells us about this new system for resolving employment rights.

ADOPTION AND USE RATES

What do we know about the prevalence of arbitration? Despite its immense importance to public policy, access to justice, human resource management, and stakeholders, federal agencies do not routinely track the adoption and use of mandatory employment arbitration among American firms. However, academic studies have charted its rise since inception to today. The House of Representatives commissioned the first, and to our knowledge only, systematic governmental analysis of the prevalence of mandatory employment arbitration shortly after the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.* (1991). The US General Accounting Office's 1995 report established that 7.6% of firms had adopted mandatory employment arbitration (Gen. Account. Off. 1995). Later studies, using data from the early 2000s, estimated that a quarter or more of all nonunion employees in the United States were subject to mandatory arbitration agreements (Colvin 2008). According to a 2011 survey of Fortune 1,000 corporations, 37.8% of firms reported using mandatory arbitration for employment disputes within the last three years (Stipanowich & Lamare 2014). In 2017, Colvin conducted a national-level survey of private-sector employers to measure the prevalence of mandatory employment arbitration and found that 56.2% of private-sector nonunion employees are subject to these arbitration procedures (Colvin 2019).

Surveys over the last three decades, though employing several different survey methodologies, have charted a clear "arbitration revolution" (Horton & Chandrasekher 2016). From less than 10% in the 1990s to more than 50% today, mandatory employment arbitration is now the predominate forum for the resolution of employment claims and likely covers more than 60 million workers. However, the increase in mandatory employment arbitration coverage has not coincided with proportional increases in workers arbitrating workplace disputes (Colvin 2019, Estlund 2018, Glover 2022, Gough 2016). As discussed in greater detail below, this suggests mandatory arbitration has tended to suppress access to justice.

In addition to the overall extent of mandatory employment arbitration, Colvin's (2019) survey further illuminates the contours of the employment arbitration landscape by presenting adoption rates by firm size, pay level, and employee demographics. While 53.9% of all firms, covering 56.2% of the workforce, mandated arbitration procedures for employment disputes, adoption rates varied by workforce size. Specifically, 49.8% of employers with fewer than 100 employees required arbitration, whereas 67.7% of employers with 5,000 or more employees required arbitration. This is consistent with the literature establishing that firm size is positively correlated with formalized human resource policies and access to more sophisticated legal strategies, like mandatory arbitration, to protect against legal liability.

On an individual level, Colvin (2018) establishes that low-wage workers are subject to mandatory arbitration at higher rates than their higher-paid counterparts. Whereas 64.5% of employees earning less than $13 an hour were subject to arbitration, 52.9% of employees making $13 to $16.99 an hour, 47.7% of employees making $17 to $22.49 an hour, and 54.1% of employees making $22.50 or more were covered by mandatory employment arbitration clauses. In addition, mandatory arbitration was more common in industries with higher proportions of women and of African American workers. These results suggest that the imposition of mandatory arbitration falls more heavily on groups that have suffered structural disadvantages in the labor force.

One noteworthy aspect of the above research is that it is largely atheoretical. While these foundational empirical studies are vital for literature development, there is opportunity for future researchers to adopt theoretical perspectives to understand the precise reasons mandatory employment arbitration has proliferated over time, to explore how state-level legal environments affect adoption, or to explain and situate the demographic inequalities described above (see, for example, Staszak 2015, 2020).

PROVIDER AND ARBITRATOR CHARACTERISTICS

The American Arbitration Association (AAA) is the largest provider of employment arbitration services in the United States. It is a not-for-profit founded in 1926 following the enactment of the Federal Arbitration Act (FAA) and serves the entire United States and internationally. JAMS, formerly Judicial Arbitration and Mediation Services, Inc., is the second largest arbitration provider. Unlike AAA, JAMS is a for-profit entity, and many of its rostered neutrals are also shareholders. A little more than one-quarter of JAMS neutrals have an ownership stake in the company. Together, AAA and JAMS are estimated to administer approximately 70% of mandatory employment arbitrations in the country (Gough & Colvin 2020).

A review of the JAMS and AAA neutral rosters—the two largest arbitration providers in the United States—exposes a stark lack of demographic diversity within the employment arbitration profession. Indeed, employment arbitrators are largely male and white (Gough 2020). Although women comprise a slight majority of the US population, women represent a disproportionate percentage of arbitrators: only 22% in the AAA and only 32% in JAMS. Even smaller providers, such as ADR Services, maintain rosters that are only 24% female. Likewise, 60% of the US population identifies as white, yet nearly 90% of employment arbitrators identify as white. Specifically, 87% of AAA arbitrators and 85% of JAMS arbitrators identify as white. Arbitration providers do not include arbitrator age in their disclosures; however, the distribution of arbitrator age skews older than the US workforce. A recent academic survey of AAA and JAMS employment neutrals revealed that only 10% of arbitrators were under the age of 60, 43% were between 60 and 69, 39% were between 70 and 79, and the remaining 9% were 80 or older (Gough 2021).

The law vests arbitrators with the awesome power of resolving private contractual disputes and those involving public, statutory rights such as Title VII, FMLA (Family and Medical Leave Act), FLSA (Fair Labor and Standards Act), ADA (Americans with Disabilities Act), and ADEA (Age Discrimination in Employment Act). And the reality is that arbitrators entrusted with this power are overwhelming white, male, and >60 years old. These demographic concerns are not unique to employment arbitration. LaRue & Symonette (2019, p. 3) reviewed current and historical members in the National Academy of Arbitrators, the nation's leading organization of labor arbitrators, and determined that "as of January 25, 2019 the Academy had accepted 1484 members over its 72 years; approximately 35 persons or 2.35% of that group were persons of color. Half of those persons of color have been admitted within the last 25 years." Lack of diversity can also be seen in the composition of federal judges, who are 71% white and nearly two-thirds male (Am. Const. Soc. 2022); however, juries provide a degree of representative diversity to the courts that is lacking in arbitration. The lack of racial and gender diversity among arbitrators relative to the characteristics of the workforce can plainly be framed as problematic and biased against women and members of racial minorities. Furthermore, roster diversity does not necessarily translate to a diversity of arbitrators actually presiding over cases, because parties have discretion to select from panels, and minority neutrals are selected at lower rates (Green 2020). Providers have recognized this issue and are taking limited positive steps, but researchers should continue to monitor diversity among arbitrators, understand factors contributing to the demographic composition of employment arbitration rosters and selection, and define and assess approaches to enhance diversity among arbitrators (see, generally, Chandrasekher 2021, Cole 2021).

CHARACTERIZING ARBITRATION OUTCOMES

What normative conclusions can be drawn from the widespread presence of mandatory employment arbitration? A logical starting point, and one of the most pressing questions in the employment arbitration arena, is whether and how arbitration affects employee outcomes and employee access to justice.

The last 20 years of literature on employment dispute resolution in arbitration and state and federal court has established clearly that when a dispute is taken to final adjudication in front of an arbitrator, judge, or jury, average plaintiff win rates and monetary damages are lower in arbitration relative to civil litigation. However, interpreting win rates and award amounts between arbitration and litigation is difficult. Does employment arbitration itself reduce the prospect of an employee plaintiff win and their monetary damages when they do? Or can these differences in employee outcomes be explained by variation in the types of cases, quality of representation, or other factors? This is difficult to untangle. Nevertheless, careful research and theorizing have isolated meaningful forum effects.

Until recently, the empirical scholarship comparing outcomes between litigation and arbitration relied on descriptive statistics within each forum to demonstrate that the population of cases adjudicated in arbitration receive smaller awards and lower win rates when compared to adjudicated cases in litigation. In a seminal 2011 study, Colvin analyzed 1,213 mandatory arbitration cases administered between 2001 and 2007 by the AAA and found that employees won 21% of their cases taken to verdict in arbitration and, where successful, were awarded median and mean monetary damages of $36,500 and $110,000, respectively. In a subsequent study of AAA data through 2014, Colvin & Gough (2015) found that employees won 19% of their cases adjudicated by an arbitrator, and the median and mean damages awarded to successful employee claimants were $49,000 and $135,000, respectively. In 2022 dollars, this would be more than $60,000 and $170,000, respectively. Chandrasekher & Horton (2019) analyzed employment win rates from AAA, JAMS, and ADR Services and found that employees prevailed in 22% of the 1,659 tried cases administered by the AAA, 31% of 310 tried cases administered by JAMS, and 59% of 174 tried cases administered by ADR services. An earlier study found an even lower win rate of 18% (Horton & Chandrasekher 2016).

Eisenberg & Hill (2003) investigated win rates and awards in federal and state court, finding that employee plaintiffs won in 36% of the 1,430 employment discrimination claims litigated in federal court and 44% of the 160 employment discrimination claims litigated in state court. They reported the mean damages awarded to successful plaintiffs in state court was over $200,000, which would be over $325,000 in 2022 dollars. Oppenheimer (2003) reported an employee win rate of 59% and mean damages of over $350,000 (or approximately $575,000 in 2022 dollars) in a sample of 117 common law discharge cases heard in California State Court. Using data from the 2005 Civil Justice Survey of State Courts, the average damages awarded in a random sample of employment verdicts in state courts across the United States were over $1,000,000 in 2022 dollars (Cohen 2008). Nielsen et al. (2010) analyzed a random sample of 1,672 employment discrimination cases disposed of in federal court between 1988 and 2003 and found an employee win rate of 33% and a median award at trial of $110,000, or over $150,000 in 2022 dollars after adjusting for inflation. In an analysis of jobs cases heard in federal court between 2009 and 2012, Gough (2016) found employment discrimination plaintiffs won in 32% of cases and received a median award amount of over $380,000, whereas wage and hour plaintiffs experienced a 56% success rate at trial and median awards of $81,000. A contemporary analysis of the universe of federal employment cases terminated between 2018 and 2022 reveals a plaintiff win rate of 37% for employment-related cases and a median award of approximately $338,000.[1]

A simple comparison of win rates and median and mean damages between arbitration and litigation across these various studies reveals a consistent pattern. Outcomes for employees are substantially better in litigation than in mandatory employment arbitration.

INTERPRETIVE DIFFICULTIES

That award amounts and employee win rates at trial are lower in arbitration than in litigation is widely accepted; however, the interpretation of these differences remains contentious. The first interpretive difficulty when comparing win rates between forums is agreeing on the definition of an employee "win rate" (Colvin 2011, Pham & Donovan 2022). Should a decision in an employee plaintiff's favor containing $0 or token $1 in damages be considered an employee win? And how should non-trial adjudications such as settlements and motions for summary judgment factor in? Most of the literature cited above defines employee win rates as nonzero monetary awards in

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[1] The Federal Judicial Center provides a key database covering all civil cases filed in federal court. These data can be accessed through the following link: **https://www.fjc.gov/research/idb**.

arbitration and compares outcomes that are adjudicated after a full trial in litigation (i.e., summary judgments and settlements are not considered directly). However, pro-arbitration scholars have adopted alternative definitional approaches (see, for example, H. Katz & D. Sherwyn, manuscript forthcoming; Pham & Donovan 2022; Sherwyn et al. 2005).

A second interpretive difficulty arises due to inevitable selection effects between forums. Scholars must contend with the likelihood of systematic differences between the population of cases filed and ultimately disposed of in arbitration and civil litigation. For example, we know that the decision to promulgate mandatory arbitration is not random. Indeed, firms that require mandatory arbitration are relatively larger and often do so in combination with other human resource management practices (Colvin 2003, 2019; Stipanowich & Lamare 2014). Under this rationale, lower awards and win rates in arbitration may be expected, not because arbitration is unfair but because larger firms with sophisticated human resource management practices may be more likely to adhere to the law and/or settle meritorious cases before they are filed. Further, proponents claim arbitration is cheaper, faster, and more accessible than litigation, which may lead plaintiffs to pursue lower-quality and lower-value cases in arbitration (Estreicher 2001, Pham & Donovan 2022). Here again, we may observe lower win rates and awards in arbitration, not because arbitration is itself an inequitable forum but because of systematic differences between the types of cases being disposed in each forum.

In sum, interpreting summary statistics found within forums is fraught with theoretical and empirical difficulties and requires "epistemological humility" (Ware 2017). However, several studies have controlled for potential selection effects and support the contention that arbitration is in fact an inequitable forum for employees. Klass et al. (2006) presented 32 hypothetical termination decisions to labor arbitrators, employment arbitrators, and jurors and found that employment arbitrators were the least likely among the three groups to rule in favor of the hypothetical employee. Gough (2018) adopted a similar design in a survey of more than 900 plaintiff attorneys where the presence of an arbitration clause was randomly manipulated in an experimental vignette and found that arbitration clauses have an independent, negative effect on the settlement values of plaintiffs' cases and attorneys' willingness to accept clients on a contingency fee basis. Further, Gough (2021) controlled for several potential selection effects in a survey of 1,256 plaintiff attorneys about their most recent cases taken to trial in arbitration and litigation. Even when controlling for differences in procedural motions; claim types; and defendant, claimant, and counsel characteristics between arbitration and civil litigation, Gough (2021) found the odds of an employee win at trial increase by 71% in a federal jury trial, 184% in a state bench trial, and 146% in a state jury trial relative to arbitration. He further reported that relative to arbitration, monetary awards are 203% and 166% higher in federal and state jury trials, respectively.

Although scholars are correct to identify potential confounding variables, careful empirical studies provide strong evidence that mandatory arbitration in the employment context unduly disadvantages employee plaintiffs by relegating their claims to a forum that reduces the likelihood of a verdict in their favor and the size of their monetary awards. Scholars should continue to pursue research in this area in hopes of establishing a broader consensus.

REPEAT PLAYER EFFECTS

Whether large employers gain undue advantages due to their status as frequent users has been a standing concern within arbitration research. Galanter (1974) argued in his seminal work that regular participants in dispute resolution processes have systematic advantages over parties who are not regular participators. One advantage of repeat players is their likely status as large, sophisticated organizations associated with enhanced resources to pursue resolution of a case, ability to hire better legal counsel, and experience and expertise within a given forum navigating the process of dispute resolution.

However, in employment arbitration, the presence of financial incentives creates heightened repeat player concerns. Although arbitrators are bound by the FAA, professional norms, and provider rules to remain neutral and impartial, there is a fear that arbitrators (even if just a small minority) will betray this neutrality in hopes of soliciting future business. Because employers are the party likely to be repeat players in employment arbitration, individual employee plaintiffs participating in their first (and likely only) case are potentially unduly disadvantaged (Chandrasekher & Horton 2019, Colvin 2011, Colvin & Gough 2015).

This is a unique feature of nonunion employment arbitration; in labor arbitration, for example, both management and the union are repeat players, each likely to act as equal and opposing institutional forces against repeat player biases. Perhaps plaintiff attorneys could also be considered repeat players in employment arbitration, but we are not aware of any literature empirically testing this. Colvin & Pike (2014) found that in a sample of employment arbitration cases, employers were represented by attorneys who specialize in employment law 76.6% of the time, whereas employees were represented by employment law specialist attorneys only 54.6% of the time. Among the 449 cases in their sample, just over half of the time (54.6%) the employer was represented by a law firm that was involved in multiple cases in the sample, whereas only 10.7% of the time employees were represented by law firms that were involved in more than one case in the same sample. Chandrasekher & Horton (2019) demonstrated that, at least in the consumer context, plaintiff-side lawyers experience empirically similar repeat player benefits to businesses. Taken together, these findings suggest that plaintiff-side lawyers can provide a countervailing force as a repeat player on the employee side, but employees are much less likely than employers to have representation by attorneys who have this capability (Chandrasekher & Horton 2019, Gough 2016, Gough & Taylor Poppe 2020).

The key empirical question is not only whether repeat employers do better in employment arbitration but also whether they gain an additional advantage from having selected the same arbitrator on multiple occasions (Colvin 2011). It should also be recognized that this type of repeat employer–arbitrator pairing advantage could arise even absent bias on the part of the individual arbitrator (Chandrasekher & Horton 2019, Colvin & Gough 2015). It could be that a repeat employer's greater experience with employment arbitration might allow it to be systematically better than a one-shot employee at selecting arbitrators more likely to rule in its favor. The repeat employer may observe tendencies in a particular arbitrator's handling of cases and decision-making processes that allow it to gain an advantage in how it presents future cases to that arbitrator. Although this would not suggest bias on the arbitrator's own part, it would nonetheless be problematic from a public policy perspective because it would suggest that the process of arbitrator selection in employment arbitration allows repeat employers to gain a systematic advantage over one-shot employees.

Though various repeat player effects have been identified in the literature, as discussed above, little empirical research explains the exact mechanisms at play. This led Ware (2017) to argue that scholars should take a comparative approach to the repeat player effect whereby the key questions should be not whether repeat player effects exist in arbitration but whether repeat player effects are more pronounced in arbitration relative to in litigation. Chandrasekher & Horton (2019) further investigated this issue and found evidence that repeat player effects are better explained by company-specific characteristics than by experience within arbitration. Scholars should continue this avenue of research to better understand the underlying reasons for repeat player effects and whether institutional characteristics of arbitration result in undue advantage accruing to repeat players.

IS ARBITRATION MORE ACCESSIBLE?

The strongest public policy argument in favor of mandatory arbitration holds that the traditional civil litigation system is inaccessible to most employees, particularly low-wage workers. Arbitration, it is argued, promises to provide an accessible, albeit imperfect, alternative for such claimants (Eigen & Sherwyn 2016, Estreicher 2001). For example, St. Antoine (2008, p. 794) argues,

> The vast majority of ordinary, lower- and middle-income employees. . .cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

The presumption that arbitration is more accessible than litigation, particularly for low-wage claimants, deserves serious consideration. But does the literature support the contention that arbitration provides access to justice to those who are barred from the civil litigation system? We investigate the accessibility of arbitration by evaluating the expediency of the process and the overall caseloads found in the respective forums.

SPEED

Arbitration has long been reputed as a faster alternative to civil litigation. For example, Chandrasekher & Horton (2019, p. 9) write, “The AAA epitomizes the rough-and-tumble model of alternative dispute resolution,” and “speed is one of private dispute resolution’s greatest virtues.” Gough (2014, p. 123) writes, “Arbitration is almost certainly faster than civil litigation.” And Sherwyn et al. (2005, p. 1572) note, “Unlike the win/loss comparisons, few dispute the assertion that arbitration is faster than litigation.” However, a closer look at contemporary data calls for a qualification regarding arbitration’s expediency: Arbitration is faster than litigation, on average, for the minority of cases taken to a trial verdict. This qualification is more than a mere technicality; it is a necessary correction to conventional wisdom because the data appear to show that, on the whole, cases are disposed of faster in litigation than in arbitration.

With access to publicly available data reported by arbitration providers and the Federal Judicial Center, docket times are relatively easy (and uncontroversial) to calculate. Specifically, we can access the universe of mandatory employment arbitration cases administered by the AAA and JAMS through their quarterly consumer arbitration disclosure reports. The Federal Judicial Center maintains a database of the universe of cases filed and disposed in federal court going back to the 1970s. As previous researchers have done, we can use these databases to calculate how much time elapses between filing and disposition in the two forums.

Figure 1*a*,*b* clearly demonstrates the limitations of describing arbitration as relatively speedy. Although it is true that cases taken to trial are resolved quicker in arbitration relative to litigation, tried cases represent a mere 1.8% of the approximately 175,0000 cases disposed in federal court, AAA, or JAMS between 2017 and 2022.[2] Settlements, in comparison, represent 69.5% of all dispositions in federal court, AAA, and JAMS during the same period. We argue the most meaningful comparison is found not in tried cases alone, or in settlements alone, but in the mean and median docket times for all dispositions. Specifically, 151,868 employment-related cases were disposed of

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[2] Less than 1% of cases are taken to verdict in federal court, whereas approximately 8% and 6% are awarded after a hearing in AAA and JAMS, respectively. The higher proportion of cases taken to trial is one obvious factor explaining why the mean and median docket times are higher in arbitration.

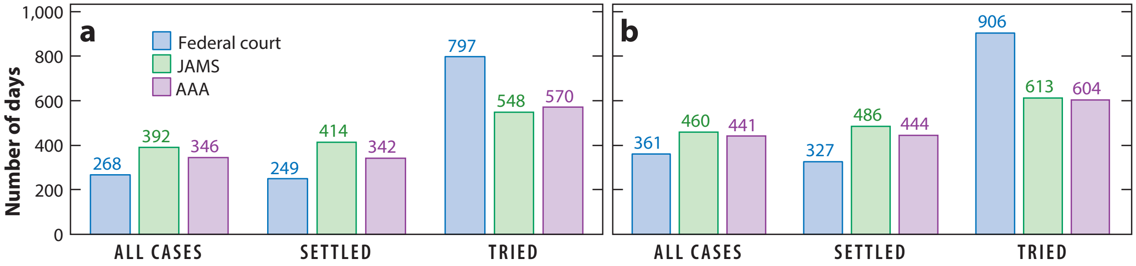

Figure 1

(*a*) Mean and (*b*) median docket time (days) by forum for cases disposed 2017–2022. Abbreviations: AAA, American Arbitration Association; JAMS, Judicial Arbitration and Mediation Services, Inc.

by any means (e.g., trial, summary motion, settlement, withdrawal) in federal court between 2017 and 2022,[3] whereas the AAA and JAMS disposed of 14,840 and 9,807 employment cases proceeding under mandatory arbitration clauses, respectively. **Figure 1*a*,*b*** reveals that the mean and median docket times for these 150,000+ cases in federal court were 361 and 268 days, respectively. The docket times for the 14,840 AAA cases were 441 days (mean) and 346 days (median), and for the 9,807 JAMS cases, 460 (mean) and 392 (median) days. A total of 1,297 cases were resolved after a full trial in federal court, 1,200 were resolved after a full hearing administered by AAA, and 567 were resolved after a full hearing by JAMS. The mean and median docket times for these cases were 906 and 797 days in federal court, 604 and 570 days for AAA, and 613 and 548 days for JAMS. These calculations are similar to those produced by Clermont & Schwab (2004), Eisenberg & Hill (2003), Colvin (2011), Colvin & Gough (2015), and Chandrasekher & Horton (2019) for each respective forum, though we believe these statistics need to be reframed and the emphasis shifted away from tried cases. Whereas a comparison of the small minority of cases resolved by a trial or hearing suggests that arbitration is much faster than litigation, a comparison of the full universe of cases, including all types of dispositions, indicates that cases are actually resolved faster in litigation than in arbitration.

These findings are supported by Gough (2016), who surveyed plaintiff lawyers and found that 40% viewed arbitration as having a "very negative" to "somewhat negative" effect on expediency of proceedings, 25% reported they were "undecided," and only 35% viewed arbitration as having a "somewhat positive" to "very positive" effect on expediency. Perhaps practitioners have understood what the literature has failed to bring in to focus: Although the small minority of tried cases in litigation have longer docket times, the average case filed in arbitration experiences docket times 20–30% longer than the average case filed in federal court.[4]

As in comparisons of win rates and award amounts, we should be careful to account for potential confounding variables in our interpretation of docket time as well. However, scholars should continue to research and reevaluate, where appropriate, the conventional wisdom that arbitration is a speedier alternative to litigation.

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[3] These 151,868 federal employment cases can be broken down into employment discrimination (79,165), Employment Retirement Income Security Act (ERISA) (33,186), and Fair Labor Standards Act (FLSA) cases (39,517).

[4] Many of the same selection effects bedeviling the interpretation of win rates and awards between the forums should be acknowledged here as well. That cases spend fewer days on the docket in federal court, on average, could result from differences in case complexity and changes in actors' behavior (for example, a higher proportion of cases are taken to trial in arbitration than litigation).

CASELOADS

A second measure of accessibility is to directly assess the caseloads and filing rates of arbitration relative to litigation. Despite the touted benefits of arbitration, some researchers have argued that arbitration represents a complete "erasure" of employment rights and dispute resolution (Resnik 2015). If arbitration is more accessible, we should expect employees to file at higher rates compared to litigation; yet this is not what the literature shows.

The number of claims being filed in arbitration has increased over time. The AAA is the largest employment arbitration provider in the country, with studies estimating it administers roughly half of all arbitrations emanating from mandatory employment arbitration clauses (Chandrasekher & Horton 2019, Gough & Colvin 2020, Stone & Colvin 2015). Colvin (2011) finds that the AAA disposed of an average of 789 mandatory arbitration cases per year between 2003 and 2007. Horton & Chandrasekher (2016) find this rate nearly doubled to an average of 1,307 cases per year between 2009 and 2013. And the analysis above shows AAA cases continuing to grow: In the five-year period between 2017 and 2022, the AAA disposed of an average of 2,968 mandatory arbitration cases per year. If the AAA maintains a 50% market share, we can estimate that employees file a mere 5,936 mandatory arbitration cases with any arbitration provider each year across the United States. This admittedly crude estimate suggests that only 1 in 10,000 employees covered by mandatory arbitration clauses makes a claim in arbitration. How does this compare to claims made in litigation? Estlund (2018) presents evidence that employees subject to mandatory arbitration agreements file claims at alarmingly low rates compared to the rates employees file in court. She estimates that if they were filing at the same rate as we observe employees filing claims in the courts, we should observe between 315,000 and 722,000 claims filed in arbitration each year, yet the reality is orders of magnitude less. Although a majority of private-sector nonunion employees are now covered by mandatory arbitration procedures, we continue to see much larger numbers of employment cases filed in the courts than in arbitration. This suggests that the premise and promise of greater accessibility of arbitration have yet to be realized and may be a mirage. Scholars should continue to refine these estimations and assess whether employment arbitration is truly accessible or, as the above rudimentary calculations suggest, extinguishes employee claims.

CLASS ACTION WAIVERS AND MASS ARBITRATION FILINGS

In the seminal case *AT&T Mobility LLC v. Concepcion* (2011), the Supreme Court ruled that companies could unilaterally ban the right to engage in class actions by inserting class action waivers in contracts, in this case, a cell phone contract, even if state law deems such clauses unenforceable. More than a simple federal preemption case, *AT&T v. Concepcion* is noteworthy for opening the door to wide-scale adoption of class action waivers in contracts. In *American Express Co. v. Italian Colors Restaurant* (2013), the court ruled 5–3 that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds potential recovery. In *Epic Systems Corp. v. Lewis* (2018), the Supreme Court continued its embrace of class action restrictions in holding that class action waivers in employment contracts do not violate workers' right to collective action under the National Labor Relations Act (NLRA). This case establishes the primacy of the FAA over worker rights to engage in concerted activity as enumerated in the NLRA but has broader implications for consumer arbitration. *Epic Systems* is particularly noteworthy, as legal commentators have argued it elevated the FAA into a kind of superstatute: Where the FAA conflicts with rights granted by other federal statutes, the FAA will seemingly prevail. Consumers' rights to class and collective actions in arbitration were dealt yet another blow in *Lamps Plus*, *Inc. v. Varela* (2019), in which the Supreme Court held that an ambiguous agreement cannot provide the necessary contractual basis for compelling class arbitration. The court ruled that they will "not infer consent to participate in a class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so. Silence is not enough." *Lamps Plus* effectively establishes that all arbitration agreements are, by default, agreements to arbitrate individually. An explicit class action waiver is not necessary. The opportunity to arbitrate on a class-wide basis is restricted to contracts that expressly and unambiguously allow class actions.

Colvin (2019) reported that 30.1% of companies that adopted mandatory employment arbitration included an explicit class action waiver. Given that larger firms included class action waivers at higher rates, Colvin estimated that 41.1% of employees covered by an arbitration agreement were also subject to class action waivers. These estimates translate to a minimum class action coverage rate of 23.1% for all private-sector nonunion employees, representing almost 25 million workers.

In response to class action waivers, enterprising plaintiff attorneys and consumers have adopted a strategy of mass arbitration filings (Glover 2022). By initiating individual arbitration proceedings en masse, employees and their attorneys attempt to force corporations to realize the cost of class action bans in mandatory arbitration agreements by making corporations pay for filing fees, which have approached tens of millions of dollars in several cases (Glover 2022). However, rather than participating in the arbitration process pursuant to clauses in contracts they unilaterally instituted, some firms have been refusing to pay these fees. And providers, therefore, have been refusing to administer the cases. Critics argue that employer resistance to mass arbitration filings demonstrates the "heads I win, tails you lose" aspect of employment arbitration. Employees cannot access the courts or engage in class actions but also face difficulty initiating arbitration proceedings due to corporate noncompliance and exploitation of provider rules.

Take, for example, Postmates, a company that provides on-demand grocery and take-out delivery services. Postmates included a mandatory arbitration provision with a class action waiver in its contract with delivery drivers. By 2020, more than 10,000 drivers filed individual arbitration demands claiming they had been improperly classified as independent contractors. However, Postmates refused to pay the required forum fees to proceed with arbitration. The Ninth Circuit ordered Postmates to pay their required forum fees, and the company ultimately reached a $32 million settlement.

Postmates is far from the only example of corporations receiving en masse demands for arbitration and subsequently refusing to pay. In April 2020, a federal judge ordered another food delivery company, DoorDash, to pay almost $10 million in arbitration forum fees it had been resisting to begin arbitrating 5,010 cases brought by delivery drivers. In response, DoorDash introduced new provisions into its arbitration agreement requiring disputes be arbitrated through the Institute for Conflict Prevention & Resolution (CPR), which adopted mass arbitration protocols favorable to DoorDash. It subsequently came to light that DoorDash was involved in reviewing and editing CPR's mass arbitration protocols. Businesses can shop for—and influence—provider rules that best suit their interests and unilaterally impose these rules on consumers.

Arbitration service provider rules can be exploited in individual proceedings as well. First, consumer contracts can list an arbitration service provider while promulgating rules and procedures contrary to the service provider's rules. For example, if a business's terms of use designate the AAA as the arbitration service provider but the terms of use do not comport with the AAA's rules, the AAA will simply administratively close the case. And although the AAA putatively requires companies to preregister their contracts, their website lists fewer than 800 preregistered clauses between 2014 and 2022. By comparison, more than 11,000 unique business names appear in the AAA's consumer arbitration disclosure report covering the years 2017–2022.

Businesses can further exploit service provider rules by refusing to pay required administration fees, as in the Postmates and DoorDash examples above. Neither AAA nor JAMS allows for default judgments for nonpayment of fees. Therefore, in the case of nonpayment, the consumer party can front the business's share of administrative fees, go to court to seek an order requiring the business to pay the fees, or withdraw from arbitration and attempt to pursue their claim in court. At a minimum, this presents additional procedural hurdles, wasted time, and expenses. At worse, it can be framed as clear abuse of the employer prerogative (Glover 2006, 2022; Racabi 2022).

CONCLUSION

This article represents a broad overview of the academic literature on mandatory employment arbitration. Employment arbitration has grown exponentially over the last three decades, from affecting less than 10% of the nonunion workforce in the 1990s to more than half today. Proponents of mandatory arbitration continue to describe it as an avenue to provide access to justice to those who are foreclosed from the civil litigation system. Opponents of mandatory arbitration contend it is a coercive forum that unduly advantages employers at the expense of employees. These conceptions of employment arbitration are not new, but the growing trove of empirical scholarship is (relatively speaking). And the empirical evidence demonstrating lower employee win rates and monetary awards, longer docket times, smaller caseloads, and repeat player effects in arbitration increasingly supports opponents' conception of the forum.

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1. *Motsinger v. Lithia Rose-Ft, Inc.*

   Client/Matter: -None-

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Motsinger v. Lithia Rose-Ft, Inc.

Court of Appeals of Oregon

September 6, 2006, Argued and Submitted ; April 4, 2007, Filed

A128192

Reporter

211 Ore. App. 610 *; 156 P.3d 156 **; 2007 Ore. App. LEXIS 483 ***

RECHELLE MOTSINGER, Plaintiff-Respondent, v. LITHIA ROSE-FT, INC., dba Lithia Ford Lincoln Mercury of Roseburg, Defendant-Appellant.

Prior History: [***1] 04CV2574CC. Douglas County Circuit Court. Ronald Poole, Judge.

Disposition: Reversed and remanded.

Case Summary

Procedural Posture

The Douglas County Circuit Court, Oregon, denied defendant employer's petition to abate the proceeding below pending arbitration. The trial court ruled that the arbitration clause contained in plaintiff employee's employment contract with the employer was unenforceable because it constituted an unconscionable contract of adhesion. The employer appealed.

Overview

The employee had brought a wrongful termination action against the employer, alleging claims of sexual harassment under Or. Rev. Stat. § 659A.030(1)(a), retaliation under Or. Rev. Stat. § 659A.030(1)(f), wrongful discharge, battery, and intentional infliction of emotional distress. The employer argued that the trial court erred in concluding that the arbitration clause was unenforceable due to unconscionability. The appellate court found that the employee did not show that the contract formation carried other indicia of procedural unconscionability apart from a showing of unequal bargaining power. The potential costs of arbitration did not render the arbitration clauses unconscionable. The appellate court had to determine on a case-by-case basis whether, given the unequal bargaining power, the effect of the arbitration clause made the parties' respective obligations so unbalanced as to be unconscionable. The employee was entitled to all of the same remedies, and most of the same procedural protections, as the employer; she simply had to bring her claims in a different forum. The effect of the arbitration clause was not so one-sided or unreasonable as to render it unconscionable.

Outcome

The judgment was reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1[⬇] **Reviewability of Lower Court Decisions, Preservation for Review**

Under Or. R. App. P. 5.45(1), an issue must be preserved in the trial court before the appellate court will review it on appeal, unless the appellate court exercises its discretion to review it as error apparent on the face of the record.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Civil Procedure > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN2[⬇] **Federal Arbitration Act, Arbitration Agreements**

9 U.S.C.S. § 2 of the Federal Arbitration Act (FAA), 9 U.S.C.S. §§ 1 to 16, provides that the enforceability of an arbitration clause may be challenged in state court upon such grounds as exist at state law or in equity for the revocation of any contract, including unconscionability. Accordingly, even though the arbitration clause is governed by the FAA, the appellate court must look to state law to determine whether it is unconscionable.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN3[⬇] **Unconscionability, Arbitration Agreements**

Whether, under Oregon law, the facts of a case support a finding of unconscionability is a question of law that must be determined based on the facts in existence at the time the contract was made. The party asserting unconscionability bears the burden of demonstrating that the arbitration clause in question is, in fact, unconscionable.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN4[⬇] **Unconscionability, Arbitration Agreements**

In Oregon, the test for unconscionability has two components--procedural and substantive. Procedural unconscionability refers to the conditions of contract formation, and substantive unconscionability refers to the terms of the contract. An analysis of procedural unconscionability focuses on two factors: oppression and surprise. Oppression arises when there is inequality in bargaining power between the parties to a contract, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. Surprise involves the extent to which the supposedly agreed terms were hidden from the party seeking to avoid enforcement of the agreement.

Contracts Law > Contract Formation > Execution & Delivery

Business & Corporate Compliance > Contracts > Contract Formation > Execution & Delivery

HN5[⬇] **Contract Formation, Execution & Delivery**

A party is presumed to be familiar with the contents of any document that bears the person's signature.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN6[⬇] **Unconscionability, Arbitration Agreements**

Unequal bargaining power is not enough to invalidate an arbitration clause on the basis of unconscionability. Accordingly, the appellate court must consider whether an arbitration clause is rendered unconscionable when the disparity in bargaining power is combined with the terms that are unreasonably favorable to the party with the greater power. Whether the arbitration clause is substantively unconscionable is an inquiry that focuses on the one-sided nature of the substantive terms.

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

***HN7*[⬇] Alternative Dispute Resolution, Validity of ADR Methods**

Former Or. Rev. Stat. § 36.345 provided that, unless otherwise agreed upon, the costs of witness fees and other fees in the case shall be taxed against the losing party.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

***HN8*[⬇] Unconscionability, Arbitration Agreements**

The appellate court will not invalidate an arbitration clause simply because of the possibility that a plaintiff, if she were to lose, would bear some undetermined costs of arbitration.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

***HN9*[⬇] Unconscionability, Arbitration Agreements**

An approach that focuses on the one-sided effect of an arbitration clause--rather than on its one-sided application--to evaluate substantive unconscionability is most consistent with the common law in Oregon regarding unconscionability of other kinds of contractual provisions and with state and federal policies regarding arbitration. The purpose of the Federal Arbitration Act, 9 U.S.C.S. §§ 1 to 16, was to reverse longstanding judicial hostility to arbitration and to place arbitration clauses on the same footing as other contracts. For that reason, arbitration clauses cannot be singled out for special treatment under an unconscionability analysis and should be governed by the same principles as other contracts.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN10[⬇] **Unconscionability, Arbitration Agreements**

Oregon cases generally focus on the procedural issues or involve provisions that the courts conclude are not unconscionable. Thus, a blanket rule that unilateral provisions to arbitrate are per se unconscionable would be inconsistent with the case-by-case analysis that Oregon courts have employed to determine unconscionability with respect to other types of contracts.

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN11[⬇] **Arbitration, Federal Arbitration Act**

Congress and the Oregon legislature have provided guidance as to some of the policy considerations at play in the context of arbitration agreements. Oregon law and the Federal Arbitration Act, 9 U.S.C.S. §§ 1 to 16, favor arbitration as a means for resolving disputes. In light of the federal policy favoring arbitration, the United States Supreme Court has rejected the argument that an arbitral forum is, by itself, inadequate to allow a prospective litigant to vindicate his or her statutory causes of action. Given the public policy favoring arbitration as a forum for dispute resolution, and Supreme Court case law recognizing the adequacy of that forum, the appellate court is reluctant to conclude that a unilateral agreement to arbitrate is inherently unconscionable in all cases.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN12[⬇] **Unconscionability, Arbitration Agreements**

Consistently with its approach regarding other contracts, the appellate court must determine on a case-by-case basis whether, given the unequal bargaining power, the effect of the arbitration clause makes the parties' respective obligations so unbalanced as to be unconscionable.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

HN13[⬇] **Unconscionability, Arbitration Agreements**

The doctrine of unconscionability does not relieve parties from all unfavorable terms that result from the parties' respective bargaining positions; it relieves them from terms that are unreasonably favorable to the party with greater bargaining power. Oregon courts have been reluctant to disturb agreements between parties on the basis of unconscionability, even when those parties do not come to the bargaining table with equal power. In those rare instances in which the courts have declared contractual provisions unconscionable, there existed serious procedural and substantive unfairness.

Counsel: William G. Wheatley and Jaqua & Wheatley, LLC, filed the briefs for appellant.

Shane Swilley argued the cause for respondent. On the brief were Martin C. Dolan and Dolan Griggs LLP.

Judges: Before Edmonds, Presiding Judge, and Brewer, Chief Judge, [*] and Wollheim, Judge. [**]

Opinion by: EDMONDS

Opinion

[**158] [*612] EDMONDS, P. J.

This case involves an interlocutory appeal from the trial court's denial of defendant's petition to abate the proceeding below pending arbitration. The trial court ruled that the arbitration clause contained in plaintiff's employment contract with defendant is unenforceable because it constitutes an unconscionable contract of adhesion. On appeal, defendant argues that the trial court erred in ruling that the arbitration clause was unconscionable. We agree and therefore reverse and remand.

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[*] Brewer, C. J., vice Ceniceros, S. J.

[**] Wollheim, J., vice Linder, J.

The relevant facts are brief and undisputed. Plaintiff was employed by defendant as a part-time receptionist. She alleges that, during the 14 months that plaintiff worked for defendant, she [***2] was subjected to repeated acts of sexual harassment by several male employees. Eventually, plaintiff was terminated and she alleges that her termination was due, in part, to retaliation for reporting the alleged sexual harassment to management. Consequently, plaintiff brought a wrongful termination action against defendant, alleging claims of sexual harassment under ORS 659A.030(1)(a), retaliation under ORS 659A.030(1)(f), wrongful discharge, battery, [**159] and intentional infliction of emotional distress.

Prior to trial, defendant petitioned the court to abate the proceedings pending arbitration based on the fact that plaintiff, at the time of hiring, signed an employment contract that included an arbitration clause requiring any claims against defendant to be submitted to arbitration. The trial court denied defendant's petition because it determined that the "arbitration agreement was unenforceable due to unconscionability." [1]

[***3] On appeal, defendant advances two assignments of error. Defendant's first assignment of error presents the issue of whether the court or the arbitrator should decide whether the employment contract is a contract of adhesion. [*613] Defendant did not raise that issue to the trial court, and we decline defendant's invitation to treat it as error apparent on the face of the record. [2] The issue is not clearly defined by the parties, and, given the nature of the trial court's ruling, it is not apparent to us that the court erred. Under the circumstances, further discussion of that assignment would not benefit the bench, the bar, or the public.

In its second assignment of error, defendant contends that the trial court erred in concluding that the arbitration clause is unenforceable due

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[1] The document at issue is a single page and is titled "Comprehensive Agreement Employment At-Will and Arbitration." The portion of that document that deals with arbitration takes up more than half of the page. For ease of understanding, we refer to the arbitration provision in the employment contract as the "arbitration clause" throughout this opinion rather than the "arbitration agreement."

[2] ***HN1***[] Under ORAP 5.45(1), an issue must be preserved in the trial court before we will review it on appeal, unless we exercise our discretion to review it as error apparent on the face of the record.

to unconscionability. [***4] [3] [***5] The arbitration clause at issue is governed by the Federal Arbitration Act (FAA), 9 USC sections 1 to 16, and the Oregon Arbitration Act (OAA), *former* ORS 36.300 to 36.365 (2001). [4] ***HN2***[⬆] Section 2 of the FAA provides that the enforceability of an arbitration clause may be challenged in state court "upon such grounds as exist at [state] law or in equity for the revocation of any contract," including unconscionability. Accordingly, even though the arbitration clause is governed by the [*614] FAA, we must look to state law to determine whether it is unconscionable. *See Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Ore. App. 553, 560, 152 P.3d 940 (2007); *DEX Media, Inc. v. Nat'l Mgmt. Servs.*, 210 Ore. App. 376, 150 P.3d 1093 (2007).

HN3[⬆] Whether, under Oregon law, the facts of this case support a finding of unconscionability is a question of law that must be determined based on the facts in existence at the time the contract was made. *Best v. United States Nat'l Bank*, 303 Ore. 557, 560, 739 P.2d 554 (1987). The party asserting unconscionability bears the burden of demonstrating that [**160] the arbitration clause in question is, in fact, unconscionable. *W.L. May Co., Inc. v. Philco-Ford Corp.*, 273 Ore. 701, 707, 543 P.2d 283 (1975).

HN4[⬆] In Oregon, the test for unconscionability has two components--procedural and substantive. *Vasquez-Lopez*, 210 Ore. App. at 566. Procedural [***6] unconscionability refers to the *conditions* of contract formation, and substantive unconscionability refers to the *terms* of the

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[3] Defendant's second assignment of error states that the trial court erred in ruling that the "Comprehensive Agreement Employment At-Will and Arbitration" was unconscionable. Although it is not entirely clear from the court's ruling whether it determined that the entire employment contract, or only the arbitration clause contained therein, was unconscionable, we presume that the court's ruling was directed solely at the arbitration clause. *See Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Ore. App. 553, 563, 152 P.3d 940 (2007) ("[I]f the claim is directed solely at the arbitration agreement, then the court can decide the validity of the arbitration clause, but if the claim is directed at 'the contract as a whole (including its arbitration provision),' then the arbitrator decides the validity of the arbitration clause."); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, _, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). Thus, the issue presented in defendant's second assignment of error, when properly framed, is whether the trial court erred in ruling that the *arbitration clause* in the employment contract was unenforceable due to unconscionability. Because the parties' arguments are directed at the unconscionability of the arbitration clause, defendant's characterization of the trial court's error does not affect our review.

[4] In 2002, when the parties entered into their contract, the Oregon Arbitration Act (OAA), *former* ORS 36.300 to 36.365 (2001), was in effect. The OAA was repealed in 2003, and was replaced by a version of the Uniform Arbitration Act (UAA). Ore. Laws 2003, ch 598, §§ 1-30, 57. The OAA continues to apply to this case because plaintiff's cause of action accrued before January 1, 2004. Ore. Laws 2003, ch 598, §§ 1-30.

contract. *Id*. at 566-67. An analysis of procedural unconscionability focuses on two factors: oppression and surprise. Oppression arises when there is inequality in bargaining power between the parties to a contract, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. *Id*. Surprise involves the extent to which the supposedly agreed terms were hidden from the party seeking to avoid enforcement of the agreement. *Id*. at 567.

Plaintiff contends that the arbitration clause is procedurally unconscionable because there was unequal bargaining power between the parties. Namely, plaintiff argues that (1) at the time of her hire she was only 19 years of age; (2) the arbitration clause was contained in a packet of approximately 70 new hire forms, 50 of which she had to read and sign; (3) she had less than two hours to review all the documents; and (4) she would not have been hired if she had refused to sign any of the documents.

Plaintiff argues that those conditions [***7] created unequal bargaining power, because the arbitration clause was imposed on her as a condition of employment and she had no meaningful opportunity to negotiate its terms. The [*615] trial court agreed that plaintiff had no opportunity to negotiate the terms of the arbitration clause, and the evidence in the record supports the trial court's finding. Plaintiff was given a standardized printed form as part of the hiring process, and plaintiff had to accept the arbitration clause on a "take-it-or-leave-it" basis if she wanted the job. [5] *See Reeves v. Chem Industrial Co.*, 262 Ore. 95, 101, 495 P.2d 729 (1972) (defining an adhesion contract as a "take-it-or-leave-it" contract that is the product of unequal bargaining power between the parties).

Apart from a showing of unequal bargaining power, plaintiff has not demonstrated that the circumstances of contract [***8] formation carried other indicia of procedural unconscionability. First, plaintiff has not demonstrated that the arbitration clause was the product of deception or compulsion. *See Carey v. Lincoln Loan Co.*, 203 Ore. App. 399, 422, 125 P.3d 814 (2005), *rev allowed*, 341 Ore. 449, 143 P.3d 772 (2006) (unconscionability may involve deception,

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[5] Defendant's regional personnel coordinator testified that, if a prospective hire does not sign the agreement, that person will not be hired.

compulsion, or genuine lack of consent). As defendant points out, it did not use high pressure tactics to compel plaintiff to consent to arbitration. To the contrary, defendant asserts that it gave plaintiff time to read through all of the forms and to ask questions, and the record supports that assertion. At the hearing on defendant's petition to abate, defendant's regional personnel coordinator testified:

> "A.When [employees] are hired, they come into the local personnel office. We go over our--what we call a registration packet. It's a book of forms. We go over each form with them and explain it in detail.
>
> "They then watch a video pertaining to those documents and -- just sort of giving them a general idea how to complete the forms.
>
> "They sign all the documents in that registration packet. * * * And then [***9] we give them an employee handbook and give them back their copy, any informational papers that they would receive back. And then they go to work.
>
> [*616] "Q. How long does that process take, this signing documents process?
>
> "A. On average I would say about two hours. Sometimes it's shorter; sometimes it's longer, just depending on how long it takes each individual person to read through the documents and sign them. But on average, it's about two hours.
>
> [**161] "Q. Are employees given the opportunity to completely read through the documents before they sign them?
>
> "A. Yeah. We not only encourage them to do so when we are going over the papers, but then also on our videotape it states don't -- you know, make sure you understand. We tell them, if you don't understand any document, come back to us and ask us questions."

That testimony is the only evidence in the record regarding the conditions under which plaintiff agreed to enter into binding arbitration with defendant. It does not show that plaintiff was in any way confused by the forms or misled into signing them. Nor is there any evidence in the record that plaintiff was surprised by the terms of the arbitration clause. [***10] The fact that the employment contract contained an arbitration clause was not hidden or disguised from plaintiff. The clause appeared in a one-page document that was labeled with the heading "COMPREHENSIVE AGREEMENT EMPLOYMENT AT-WILL AND ARBITRATION." (Uppercase in original.) The arbitration clause itself encompassed the majority of that one-page document and was, except for its last sentence, written in the same size and style of font as the other provisions of the document. The last sentence of the clause was typed in a font larger than the rest of the clause and provided: "**I UNDERSTAND THAT BY VOLUNTARILY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY.**" (Boldface and uppercase in original.) [6] Further, plaintiff signed the bottom of the document indicating that she had read and understood its terms. ***HN5***[🡅] A party is "presumed to be familiar with the [*617] contents of any document that bears the person's signature." *First Interstate Bank v. Wilkerson*, 128 Ore. App. 328, 337 n 11, 876 P.2d 326 (1994) (citing *Broad v. Kelly's Olympian Co.*, 156 Ore. 216, 229, 66 P.2d 485 (1937)).

[***11] Thus, the only indicia of procedural unconscionability here is unequal bargaining power.***HN6***[🡅] That, however, is not enough to invalidate an arbitration clause on the basis of unconscionability. *See Best*, 303 Ore. at 561 (account fees charged by bank not unconscionable where, "apart from the adhesive nature of the account agreement, the record reflect[ed] few indicia of one-sided bargaining[,]" the record contained no evidence that the depositors were not of ordinary experience and intelligence, and the agreement was not obtained through deception or other improper means); *Vasquez-Lopez*, 210 Ore. App. at 569 ("Under Oregon law, * * * procedural unconscionability is relevant, but the emphasis is clearly on substantive unconscionability * * *."); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) ("Mere inequality in bargaining power * * * is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."). Accordingly, we must consider whether the arbitration clause is rendered unconscionable when the disparity in

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[6] The parties do not argue about the potential implication of giving up their right to a jury trial in the context of whether their contract is unconscionable.

bargaining power [***12] is "combined with the terms that are unreasonably favorable to the party with the greater power * * *." *Carey*, 203 Ore. App. at 422. Whether the arbitration clause is *substantively* unconscionable is an inquiry that focuses on the one-sided nature of the substantive terms. *Vasquez-Lopez*, 210 Ore. App. at 567.

Plaintiff contends that the arbitration clause is substantively unconscionable for two reasons: (1) the clause does not guarantee that plaintiff will not have to pay any of the fees or costs associated with arbitration, and (2) it lacks mutuality because it requires plaintiff to submit all of her claims to arbitration while defendant is not mutually obligated to arbitrate any claims that it may have against plaintiff.

We turn first to plaintiff's arguments regarding the costs of arbitration. The arbitration clause is silent as to [*618] which party bears those costs. We observe that the clause, by its own terms, is governed by ***HN7***[🡅] *former* ORS 36.345, which provided that, unless [**162] otherwise agreed upon, "the costs of witness fees and other fees in the case shall be taxed against the losing party * * *."

In *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000), [***13] the Supreme Court considered an arbitration clause that was silent as to arbitration costs and held that silence as to which party will bear the costs of arbitration is insufficient to render an arbitration clause unenforceable. The court concluded that, because the plaintiff did not produce any evidence that she would be subject to the costs of arbitration, or what those costs might be, it would not invalidate the arbitration agreement. Specifically, the Court reasoned:

> "It may well be that the existence of large arbitration costs could preclude a litigant * * * from effectively vindicating her * * * rights in the arbitral forum. But the record does not show that [plaintiff] will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. * * * The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that [plaintiff] will be saddled with prohibitive costs is too speculative to justify

> invalidation of an arbitration agreement."

Id. at 90-91 (footnote omitted). Here, as in *Green Tree*, plaintiff has [***14] offered no evidence of the likely costs of arbitration or the potential impact of those costs on her. Thus, we are required to speculate as to (1) whether plaintiff will bear any costs at all in the arbitration, (2) if so, what those costs would be, and (3) what deterrent effect, if any, those potential costs would have on plaintiff's ability to bring an action to vindicate her rights. ***HN8***[⬆] We will not invalidate the arbitration clause simply because of the possibility that plaintiff, if she were to lose, would bear some undetermined costs of arbitration. *Cf. Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1260 (11th Cir 2003) (claim that cost of arbitration under "loser pays" fees provision would be prohibitive is too speculative to invalidate an otherwise enforceable [*619] agreement). For all of the above reasons, we reject plaintiff's argument that the potential costs of arbitration render the arbitration clause unconscionable on this record.[7]

[***15] Lastly, we turn to plaintiff's argument that the arbitration clause is unconscionable because it requires her to submit all of her potential claims against defendant to arbitration while not similarly requiring defendant to submit its claims against plaintiff to arbitration. Whether such an arbitration clause is unconscionable in a contract of adhesion appears to be a matter of first impression in Oregon.

Courts in other jurisdictions have taken varied approaches to challenges to "nonmutual" arbitration clauses between parties of unequal bargaining power. A number of courts--if not a majority--have rejected challenges of unconscionability, based on the theory that agreements to arbitrate do not require "mutuality of obligation" but only adequate consideration; that is, as long as the agreement is supported by adequate consideration, the arbitration clause need not apply equally to both parties. The Third Circuit's decision in *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 183 (3d Cir 1999), is illustrative. In *Harris*, the plaintiff

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[7] Recently, in *Vasquez-Lopez*, we distinguished *Green Tree* and concluded that a fee-sharing provision was "sufficiently onerous to act as a deterrent to plaintiffs' vindication of their claim." 210 Ore. App. at 575. In *Vasquez-Lopez*, the arbitration agreement specified the allocation of fees and the plaintiffs had offered evidence that, by the end of the second hour of the second day of arbitration, they would owe six months' savings. 210 Ore. App. at 572. Here, plaintiff has not made a similar showing.

homeowners argued that an arbitration clause in a mortgage contract lacked adequate consideration and was unconscionable [***16] because it allowed the lender to litigate disputes in court but required the homeowners to arbitrate. The court first addressed the "doctrine of mutuality." The court explained that "[m]odern contract law largely has dispensed with the requirement of reciprocal promises * * * provided that a contract is supported by sufficient consideration." *Id.* at 180. For that reason, the court concluded [**163] that "mutuality is not a requirement of a valid arbitration clause," a conclusion that the court noted "is consistent with that of most other federal courts that have considered this issue." *Id.* The court then [*620] turned to the issue of unconscionability and summarily concluded:

> "This argument overlaps substantially with the issue of mutuality, addressed above. As stated above, the mere fact that [the lender] retains the option to litigate some issue in court, while the [homeowners] must arbitrate all claims does not make the arbitration agreement unenforceable. We have repeatedly held that inequality in bargaining power, alone, is not a valid basis upon which to invalidate an arbitration agreement."

Id. at 183. Other courts have similarly [***17] relied solely on a "mutuality of obligation" analysis to reject unconscionability challenges to arbitration clauses. *See, e.g.*, *State ex rel Vincent v. Schneider*, 194 SW 3d 853, 859 (Mo 2006) (conflating unconscionability analysis and unenforceability due to lack of "mutuality of obligation"); *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So. 2d 1077, 1091 (Ala 2005) (same); *Rains v. Foundation Health Systems*, 23 P.3d 1249, 1255 (Colo App 2001) (rejecting unconscionability challenge to arbitration clause on the ground that Colorado law requires sufficient consideration, not mutuality of remedies); *see also In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757, 44 Tex. Sup. Ct. J. 900 (Tex 2001) ("Most federal courts * * * have rejected similar challenges [based on unconscionability] on the grounds that an arbitration clause does not require mutuality of obligation, so long as the underlying contract is supported by adequate consideration."). [8]

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[8] We had an opportunity to apply Colorado law on this issue in *Dex Media*, a case that, unlike this one, involved an arbitration agreement between parties of relatively equal bargaining

[***18] In our view, however, it is possible for a contractual term to be supported by adequate consideration and yet still be so unreasonable as to be unconscionable in the context of a [*621] contract of adhesion. [9] Indeed, some courts have concluded that, despite the existence of adequate consideration, a nonmutual arbitration clause is *presumptively* unconscionable when the parties lack equal bargaining power. The leading case in that regard is *Armendariz v. Foundation Health Psychcare*, 24 Cal 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000). In *Armendariz*, an employee challenged an arbitration clause in her employment contract, arguing, among other things, that the agreement was unconscionable because it applied unilaterally. The employer, in turn, argued that the agreement to arbitrate was supported by adequate consideration. The court agreed that the contract was not illusory, but explained that adequacy of consideration was not the basis of its decision: "We conclude, rather, that in the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable." *Id.* at 118, 6 P.3d at 692.

[***19] The *Armendariz* court reasoned that, to be enforceable, arbitration agreements must have a "modicum of bilaterality":

> "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'"

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power. We reasoned that, under Colorado law, "not every contractual obligation need be mutual as long as each party has provided some consideration for the contract." 210 Ore. App. at 388. We accepted the plaintiff's rationale for its business need for different remedies under the agreement and concluded that, even though "other provisions in the Agreement afford commercially reasonable remedies to [plaintiff], but not to [defendant], outside the arbitration process * * *," the arbitration provision was not unconscionable because "each party had provided consideration for the Agreement." *Id*. Because *Dex Media* applied Colorado law, and involved parties of equal bargaining power, our reasoning in that case is of little assistance here.

[9] *Cf. Batory v. Sears, Roebuck & Co.*, 2006 U.S. Dist. LEXIS 90161, 2006 WL 3627124 at *2, (D Ariz, December 12, 2006) (distinguishing between defenses regarding mutual promises and defense of unconscionability in the context of arbitration agreements).

[**164]

Id. at 117, 6 P.3d at 692. Thus, in the context of unequal bargaining power, the *Armendariz* court essentially shifted the burden to the party with superior bargaining power to prove a reasonable justification for the lack of mutuality in the arbitration clause. [10]

[***20] [*622] Some courts have attempted to steer a middle course between the more categorical approaches in *Armendariz* and *Green Tree*, examining the *effect* of the lack of mutuality on the rights of the employee. For example, in *Zuver v. Airtouch Communications Inc.*, 153 Wn. 2d 293, 103 P.3d 753 (2004), the court examined an arbitration clause in which the employee, but not the employer, waived the right to recover punitive and exemplary damages. The employee argued, based on the reasoning in *Armendariz*, that the clause was "substantively unconscionable because it applies only to her, *i.e.*, the provision is unilateral." *Id.* at 315, 103 P.3d at 766. The court agreed with the employee's argument that the effect of the remedies limitation "blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse." *Id.* at 318, 103 P.3d at 767. In response to a dissenting opinion that employed a "mutuality of obligations" analysis, the court explained:

> "[W]e are not concerned here with whether the parties have mirror obligations under the agreement, but rather whether [***21] the effect of the provision is so 'one-sided' as to render it patently 'overly harsh' in this case."

Id. at 317 n 16, 103 P.3d at 767 n 16. Thus, the court focused on whether, under the unilateral clause, the employee was left without significant legal recourse when compared to the recourse of the employer. *See also In re Palm Harbor Homes, Inc.,* 195 S.W.3d 672, 678, 49 Tex. Sup. Ct. J. 711 (Tex 2006) (lack of mutuality must be considered in context of the remaining provisions of the arbitration agreement); *Steed v. Sanderson Farms, Inc.*, 2006 U.S. Dist. LEXIS 71752, *26, 2006 WL 2844546 at 8 (SD Miss, Sept 6, 2006) (lack of mutuality does not automatically

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[10] The Supreme Court of Montana reached a similar conclusion in *Iwen v. U.S. West Direct*, 1999 MT 63, 293 Mont 512, 977 P.2d 989 (1999). *See also Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 868 (D Ore. 2002) (applying *Armendariz* principles to arbitration clause under Oregon law).

render an arbitration clause unenforceable; clause must be examined in context).[11]

Our recent opinion in *Vasquez-Lopez* [***22] , which involved a challenge to an arbitration rider to a loan agreement, took a similar tack. In that case, the plaintiffs, borrowers on a home loan, argued, among other things, that the rider contained an unconscionable ban on class action lawsuits. We noted that, although the ban forbade the defendant [*623] lender and its customers from bringing class actions, it was effectively unilateral. 210 Ore. App. at 570. However, we went on to examine the *effect* of that unilateral application, observing that the ban would deny borrowers a valuable mechanism for prosecuting actions for small recoveries. Ultimately, we concluded, "In short, the class action ban is unilateral in effect and, *more significantly, it gives defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud*." 210 Ore. App. at 572 (emphasis added).

We conclude that ***HN9***[🡅] an approach that focuses on the one-sided *effect* of an arbitration clause--rather than on its one-sided *application*--to evaluate substantive unconscionability is most consistent with the common law in Oregon regarding unconscionability of other kinds of contractual provisions and [***23] with state and federal policies regarding arbitration. The purpose of the FAA was to reverse longstanding judicial hostility to arbitration and to place arbitration clauses on the same footing as other contracts. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). For that reason, arbitration clauses cannot be singled out for special treatment under an unconscionability analysis and should be governed by the same principles as other contracts.

Generally, Oregon courts have been reluctant to declare contractual provisions "*per [**165] se*" unconscionable, even among parties of unequal bargaining power. For example, in *William C. Cornitius, Inc. v. Wheeler*, 276 Ore. 747, 755, 556 P.2d 666 (1976), the defendant, a gas station, argued that its lease from an oil company was unconscionable because it did not allow the gas station to renew the lease on reasonable

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[11] At least one commentator has argued that employees may be *worse off* as a result of mutual arbitration provisions. Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 Iowa J Corp L 537, 555 (2002).

terms. The gas station pointed to an emerging public policy that every such lease and dealer agreement contain an implied term requiring the lessor to offer a renewal on reasonable terms in the absence of good cause for terminating the lease. The court, however, [***24] refused to declare the lease term "*per se* unconscionable":

> "Similar problems face many other small businesses which are dependent on their location for most of their goodwill without respect to whether they lease from large corporations or whether the leases are coupled with franchise [*624] arrangements. *We do not believe that the failure of a lessor to include a renewal provision in a lease is per se unconscionable and, without legislative guidance, we have no basis for declaring that public policy requires such a provision in some leases and not in others*."

276 Ore. at 754-55. [12]

[***25] More recently, in *Carey*, 203 Ore. App. at 422, we noted the reluctance of Oregon courts to declare provisions substantively unconscionable: ***HN10***[🡅] "Oregon cases generally focus on the procedural issues * * * or involve provisions that the courts conclude are *not* unconscionable." (Emphasis added.) Thus, a blanket rule that unilateral provisions to arbitrate are *per se* unconscionable would be inconsistent with the case-by-case analysis that Oregon courts have employed to determine unconscionability with respect to other types of contracts. *See Vasquez-Lopez*, 210 Ore. App. at 567 ("[E]ach [unconscionability] case is decided on its own unique facts.").

Moreover, ***HN11***[🡅] Congress and the Oregon legislature have provided guidance as to some of the policy considerations at play in the context of arbitration agreements. *See Restatement (Second) of Contracts* § 208 comment a (1981) (explaining that unconscionability "overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.") (*quoted in Carey*, 203 Ore. App. at 422). Oregon law and the FAA favor [***26]

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[12] In *W.L. May Co.*, the court was "not persuaded that it is unreasonable per se for a manufacturer to reserve the right to refuse to repurchase at least portions of a distributor's inventory upon termination." 273 Ore. at 708. Although *W.L. May Co.* involved a contract between merchants that was governed by the Uniform Commercial Code, it demonstrates the reluctance of Oregon courts to declare contractual provisions unconscionable without regard to their practical effect on the parties.

arbitration as a means for resolving disputes. *Southland Corp. v. Keating*, 465 U.S. 1, 15-16, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (stating that the FAA evidences Congressional intent to strongly favor arbitration agreements); *Seller v. Salem Womens Clinic, Inc.*, 154 Ore. App. 522, 526, 963 P.2d 56, *rev den*, 328 Ore. 40, 977 P.2d 1170 (1998) (stating that Oregon courts construe arbitration agreements liberally in favor of arbitrability). In light of the federal policy favoring arbitration, the United States Supreme Court has rejected the argument that an arbitral forum is, by itself, inadequate [*625] to allow a prospective litigant to vindicate his or her statutory causes of action. *Gilmer*, 500 U.S. at 27-28. Given the public policy favoring arbitration as a forum for dispute resolution, and Supreme Court case law recognizing the adequacy of that forum, we are reluctant to conclude that a unilateral agreement to arbitrate is *inherently* unconscionable in all cases.

Rather, ***HN12***[⬆] consistently with our approach regarding other contracts, we must determine on a case-by-case basis whether, given the unequal bargaining power, the effect [***27] of the arbitration clause makes the parties' respective obligations so unbalanced as to be unconscionable. *See Best*, 303 Ore. at 561 (fee arrangement for processing nonsufficient fund (NSF) checks held not unconscionable where, despite adhesive nature of the agreement, fees were "relatively small and were similar to NSF fees charged by other banks"); *Vasquez-Lopez*, [**166] 210 Ore. App. at 575-77 (examining effect of procedurally unconscionable arbitration rider and concluding that the rider "conferred important benefits to [the lender] and imposed significant detriments" to the borrowers); *Carey*, 203 Ore. App. at 427 (focusing on whether the "effect" of a prohibition on the assignment of the contract was unconscionable and concluding that, because the law imposed a reasonableness condition that would limit the operation of the prohibition, the provision was not unconscionable); *see also W.L. May Co.*, 273 Ore. at 709 (concluding that a repurchase provision in a contract between merchants was not unconscionable where, "*in effect* any exercise of the repurchase election by [one merchant] would have been restricted by [***28] its obligation of good faith" (emphasis added)). In this case, that inquiry turns on whether plaintiff's opportunity to vindicate her rights in an arbitral forum, when compared to the remedies available to defendant, is substantively unconscionable.

We turn, then, to the terms of the arbitration clause. The clause provides that arbitration is to be governed by the FAA and former "Oregon Revised Statutes 36.300 et seq." The arbitrator is to be "a retired Oregon Circuit Court Judge whom the parties shall mutually agree to select." [13] The rules [*626] of pleading and evidence are to be governed by the standards in federal district court, and "[r]esolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of 'just cause') other than such controlling law." The clause further requires the arbitrator to provide a "written reasoned opinion." If either party is dissatisfied with the opinion, the award shall be reviewed by a second arbitrator who shall, "as far as practicable, proceed according to the law and procedures applicable to appellate [***29] review by the Oregon Court of Appeal[s] of a civil judgment following court trial."

Equally relevant, however, is what the arbitration clause does *not* do. Most importantly, the arbitration clause does not impose any limits on the type or amount of recovery that can be awarded by the arbitrator. It does not exclude punitive or statutory damages or preclude an award of attorney fees when otherwise provided by law. [14] [***30] The arbitration clause does not impose any limits on discovery or admissible evidence, apart from those limitations that apply in federal district court, [15] nor does it impose tight deadlines on the filing of claims. In effect, plaintiff is entitled to all of the same remedies--and most of the same procedural protections--as defendant; she simply must bring her claims in a different forum.

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[13] The arbitrator also shall be "subject to disqualification on the same grounds as would apply to a judge of such [circuit] court" and has the immunity of a judicial officer.

[14] In this respect, the arbitration clause at issue here differs materially from the clause held unconscionable in *Armendariz*. In addition to applying unilaterally, the agreement in *Armendariz* included significant damages limitations, including an exclusion of "damages for prospective future earnings, so-called 'front pay', a common and often substantial component of contractual damages in a wrongful termination case." 24 Cal 4th at 121, 6 P.3d at 694.

[15] Moreover, the clause includes a provision that, if marked by plaintiff, would have excluded arbitration of Title VII claims. Plaintiff did not mark that provision.

Thus, we cannot say that the *effect* of the arbitration clause is so one-sided or unreasonable as to render it unconscionable here. Certainly, plaintiff does not have contractual rights that are equivalent to those of defendant. But ***HN13***[🡅] the doctrine of unconscionability does not relieve parties from all unfavorable terms that result from the parties' respective bargaining positions; it relieves them from terms that are *unreasonably* favorable to the party with greater bargaining [*627] power. *See* UCC § 2-302, Official Commentary ("The principle is one of the prevention of oppression and unfair surprise * * * and *not of disturbance of allocation of risks because of superior bargaining power*.") (emphasis added); *see also Meyer v. Kesterson*, 151 Ore. App. 378, 394, 950 P.2d 896 (1997), *rev den*, 327 Ore. 123, 966 P.2d 216 (1998) ("It is not enough, as we have said, that defendant made [***31] what, in retrospect, turned out to be a [**167] bad bargain.").[16] Oregon courts have been reluctant to disturb agreements between parties on the basis of unconscionability, even when those parties do not come to the bargaining table with equal power. *See Best*, 303 Ore. at 561; *Cornitius*, 276 Ore. at 755; *Zemp v. Rowland*, 31 Ore. App. 1105, 1110, 572 P.2d 637 (1977), *rev den*, 282 Ore. 537 (1978) (concluding that early termination fee of $ 185 in a residential lease was not "shocking to the conscience"). In those rare instances in which our courts have declared contractual provisions unconscionable, there existed "serious procedural and substantive unfairness." *Vasquez-Lopez*, 210 Ore. App. at 576; *Carey*, 203 Ore. App. at 428 (declaring unconscionable a prepayment limitation that was "entirely disproportionate to its purpose" and "entirely fail[ed] to recognize [the homeowners'] interest in selling the house and recovering the equity that they had accrued * * *."). In light of that case law, and in the absence of some evidence that the arbitration clause was the product of deception, surprise, [***32] or other duress, we conclude that the arbitration clause in this case is not so substantively unconscionable as to render the

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[16] We have recognized that the UCC provisions regarding unconscionability, although applying only in sales cases, influenced the subsequent *Restatement (Second) of Contracts* and are influential in nonsales cases. *Carey*, 203 Ore. App. at 421 (citing *Best v. U.S. National Bank*, 78 Ore. App. 1, 10, 714 P.2d 1049 (1986), *aff'd on other grounds*, 303 Ore. 557, 739 P.2d 554 (1987)).

clause unenforceable.

For all of the above reasons, we hold that the arbitration clause in this case is not unconscionable and is enforceable against plaintiff. Thus, the trial court erred in denying defendant's petition to abate the proceedings pending arbitration.

Reversed and remanded.

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GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE IN ARBITRATION

1st Edition 2024

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& MEDIATION
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CONTENTS

Foreword

Since its founding, SVAMC has grown to be the voice of global technology dispute resolution through the collective efforts of SVAMC's Officers and Executive Committee, SVAMC's Tech List and the legion of its tech industry members. The publication of these general principles for the use of AI is a fitting tribute to SVAMC's tenth anniversary and its collective industriousness and dedication to promoting fairness, efficiency and transparency in arbitral proceedings.

I'd like to give special thanks to Sarah Reynolds, my predecessor as CEO, and Gary Benton, the SVAMC founder and former Chair, who initiated the SVAMC AI Guidelines project about a year ago. They recognized that the rising emergence of new AI technologies creates the critical need to harness the power of AI to positively shape the best practices for its use in domestic and international arbitration.

The seemingly daunting project was undertaken by the SVAMC Task Force and its Drafting Subcommittee, consisting of Benjamin Malek (Chair), Orlando Federico Cabrera Colorado, Elizabeth Chan, Dmitri Evseev, Marta Garcia Bel, Sofia Klot, Soham Panchamiya, and Duncan Pickard. The Drafting Subcommittee sought the broadest possible participation of experts throughout the international arbitration community, first by circulating a draft set of the AI Guidelines in August 2023 and then providing a lengthy comment period to December 2023, which was extended to February 2024. We are grateful that we received hundreds of thoughtful comments from arbitrators, corporate parties, advocates, universities, educational and arbitral institutions.

An AI Guidelines Review Committee of respected independent practitioners was established to scrutinize the draft, to review the large volume of revisions suggested during the comment period, and to submit a revised draft of the AI Guidelines for finalisation by the Drafting Subcommittee and the approval of SVAMC's Executive Committee. The AI Guidelines Review Committee worked cooperatively at a steady pace for two months. We thank the Review Committee and the Drafting Subcommittee and appreciate what they have accomplished, which is reflected in numerous substantive changes to the circulated draft.

The SVAMC AI Guidelines will be subject to continuing analysis and review to ensure that future editions adapt to the accelerating changes in the capabilities of artificial intelligence technologies.

Thanks again to all of the dedicated participants in this challenging exercise of thought leadership. We hope that the Model Clause for Inclusion in Procedural Orders will be routinely adopted within the global arbitration community.

Jonathan W. Fitch, *CEO*
Silicon Valley Arbitration & Mediation Center

Introduction

These Guidelines on the Use of Artificial Intelligence in Arbitration (the **Guidelines**) introduce a principle-based framework for the use of artificial intelligence (**AI**) tools in arbitration at a time when such technologies are becoming increasingly powerful and popular. They are intended to assist participants in arbitrations with navigating the potential applications of AI.

These Guidelines can be used in domestic or international arbitrations and are meant to serve as a point of reference for arbitral institutions, arbitrators, parties and their representatives (including counsel), experts, and, where relevant, other participants in the arbitral process. To that end, the Guidelines provide a Model Clause that can be incorporated into procedural orders to make the Guidelines applicable to all participants involved in a particular arbitration proceeding.

The Guidelines are prefaced by preliminary provisions that clarify the scope and application of the principles contained herein. The body of the Guidelines is organised into three chapters: one chapter containing Guidelines that generally apply to all participants in the arbitration process, regardless of their role; a second chapter containing Guidelines that address specific uses of AI by parties and party representatives (including counsel); and a third chapter with Guidelines addressing particular considerations that may arise when arbitrators use AI.

In order to ensure that the Guidelines remain up-to-date with the latest advancements in technology, we make it a priority to update them frequently.

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[1] This list represents the members of the SVAMC AI Task Force as of the publication date of the guidelines. For an up-to-date list of members, visit svamc.org.

Preliminary Provisions

Application of the Guidelines

These Guidelines shall apply when and to the extent that the parties have so agreed and/or following a decision by an arbitral tribunal or an arbitral institution to adopt these Guidelines.

Definition of AI

As used in these Guidelines, the term "AI" refers to computer systems that perform tasks commonly associated with human cognition, such as understanding natural language, recognising complex semantic patterns, and generating human-like outputs.

Non-derogation of any mandatory rules

These Guidelines shall not derogate from any legal obligations, ethical duties, or rules of professional conduct, or any other binding rules applicable to the arbitration proceedings or persons participating in them.

Part I: Guidelines for All Participants in Arbitrations

GUIDELINE 1

Understanding the uses, limitations, and risks of AI applications

All participants involved in arbitration proceedings who use AI tools in preparation for or during an arbitration are responsible for familiarising themselves with the AI tool's intended uses and should adapt their use accordingly.

All participants using AI tools in connection with an arbitration should make reasonable efforts to understand each AI tool's relevant limitations, biases, and risks and, to the extent possible, mitigate them.

GUIDELINE 2

Safeguarding confidentiality

All participants in international arbitration are responsible for ensuring their use of AI tools is consistent with their obligations to safeguard confidential information (including privileged, private, secret, or otherwise protected data). They should not submit confidential information to any AI tool without appropriate vetting and authorisation.

Special attention should be paid to policies on recording, storage, and use of prompt or output histories and of any other confidential data submitted to the AI tool. Only AI tools that adequately safeguard confidentiality should be used with confidential information. Participants should assess the data use and retention policies offered by available AI tools and opt for secure solutions.

Where appropriate, participants should redact or anonymise materials submitted to an AI tool.

GUIDELINE 3
Disclosure

Disclosure that AI tools were used in connection with an arbitration is not necessary as a general matter.

Decisions regarding disclosure of the use of AI tools shall be made on a case-by-case basis taking account of the relevant circumstances, including due process and any applicable privilege.

Where appropriate, the following details may help reproduce and evaluate the output of an AI tool:

1. the name, version, and relevant settings of the tool used;

2. a short description of how the tool was used; and

3. the complete prompt (including any template, additional context, and conversation thread) and associated output.

Part 2: Guidelines for Parties and Party Representatives

GUIDELINE 4

Duty of competence or diligence in the use of AI

Party representatives shall observe any applicable ethical rules or professional standards of competent or diligent representation when using AI tools in the context of an arbitration.

Parties shall review the output of any AI tool used to prepare submissions to verify it is accurate from a factual and legal standpoint. Parties and party representatives on record shall be deemed responsible for any uncorrected errors or inaccuracies in any output produced by an AI tool they use in an arbitration.

GUIDELINE 5

Respect for the integrity of the proceedings and the evidence

Parties, party representatives, and experts shall not use any forms of AI in ways that affect the integrity of the arbitration or otherwise disrupt the conduct of the proceedings.

Parties, party representatives and experts shall not use any form of AI to falsify evidence, compromise the authenticity of evidence, or otherwise mislead the arbitral tribunal and/or opposing party(ies).

Part 3: Guidelines for Arbitrators

GUIDELINE 6
Non-delegation of decision-making responsibilities

An arbitrator shall not delegate any part of their[2] personal mandate to any AI tool. This principle shall particularly apply to the arbitrator's decision-making process. The use of AI tools by arbitrators shall not replace their independent analysis of the facts, the law, and the evidence.

GUIDELINE 7
Respect for due process

An arbitrator shall not rely on AI-generated information outside the record[3] without making appropriate disclosures to the parties beforehand and, as far as practical, allowing the parties to comment on it.

Where an AI tool cannot cite sources that can be independently verified, an arbitrator shall not assume that such sources exist or are characterised accurately by the AI tool.

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[2] The terms "their", "they", and "them" as used in these Guidelines in relation to any of the individual participants in an arbitration, are used as singular, gender-inclusive pronouns.

[3] Some jurisdictions recognise the principle of *iura novit arbiter*, or the "arbitrator knows the law", pursuant to which arbitrators may have the authority to apply laws, case law and precedents not cited by the parties. This principle has also been applied in investment treaty cases and by the International Court of Justice. The extent of this authority may vary depending on the jurisdiction. However, this Guideline does not preclude in any way the application of the principle of *iura novit arbiter*, where appropriate.

Commentary

Preliminary Provisions

Application of the Guidelines

The Guidelines seek to establish a set of general principles for the use of AI in arbitration. Intended to guide rather than dictate, they are meant to accommodate case-specific circumstances and technological developments, promoting fairness, efficiency, and transparency in arbitral proceedings.

These Guidelines may be adopted, in whole or in part, in the arbitration agreement or by the parties and/or the tribunal at any other time subsequently, including during the course of arbitral proceedings (*see* Model Clause for Inclusion in Procedural Orders).

As applied to international arbitrations, the Guidelines acknowledge the multi-faceted and multi-jurisdictional nature of such proceedings. Given the potential for various national laws to apply—for instance, an arbitration seated in Paris, governed by Mexican law, with hearings in Hong Kong—it becomes necessary to harmonise the potentially disparate local and international standards relating to the use of AI.

Accordingly, these Guidelines do not intend to replace or override local AI laws or regulations (*see* non-derogation of any mandatory rules). Instead, they serve as a supplementary international standard that provides a common denominator for AI's ethical and effective use in international arbitrations.

Development of best practices around the use of AI in international arbitration is only beginning, and these Guidelines aim to contribute to that effort. As such, they are a tool that assists parties, arbitral tribunals, institutions and others in navigating the application of AI, with an understanding that technologies, local laws and international standards will continue to evolve.

Definition of AI

There is no single definition of AI, and even existing definitions may evolve over time. For this reason, it is essential to clarify how the term should be understood in the Guidelines.

The definition adopted is meant to be broad enough to encompass both existing and future foreseeable types of AI but not so broad as to encompass every type of computer-assisted automation tool. Rather, the definition focuses on modern technologies that tend to be more autonomous, complex, multifunctional, and probabilistic than traditional automation tools based on rule-based deterministic logic.

Modern AI systems are usually based on machine learning, a set of computer science techniques that allow machines to learn patterns and make intelligent predictions based on the data on which they have been trained. Machine learning algorithms have existed for decades and are employed behind the scenes in various technology products used by dispute resolution professionals, such as spelling and grammar checkers, email spam filters, search engines, optical character recognition (also known as "OCR"), or machine translation.

With the advent of technological advances such as deep neural networks, large language models, and generative AI, however, it has become possible for the general public to interact with multi-purpose AI systems directly. The potential uses for AI in the field of dispute resolution have exploded, even as the risks and limitations of these tools have become more difficult to comprehend. For example, deep neural networks can learn highly complex patterns and abstractions. Still, these patterns are recorded in a largely indecipherable form even to the computer scientists who created the models. Moreover, such models generate outputs based on statistical probabilities rather than a defined set of rules.

Large language models are a type of deep neural network trained on vast amounts of textual data and capable of generating natural-sounding and plausible (but not necessarily accurate) responses to a given prompt. AI tools that can generate meaningful text, images or other types of output that appear creative and extrapolate well beyond the data the model was trained on are often referred to as generative AI. Generative AI is used in tasks such as question-answering, summarising text, and producing drafts based on a given input or instruction.

It is important to note that, while generative AI systems tend to receive the most publicity and are the most accessible to the general public, there are other equally complex types of AI, such as those powering recommendation or classification tools, sometimes known as evaluative or discriminative AI. The focus of these Guidelines is not solely on generative AI but rather on all modern types of AI tools, whether intended to perform a specific evaluation or to generate outputs that resemble human-created content (including text, sound, or visual images).

Non-derogation of any mandatory rules

This provision recognises that the use of AI tools and AI applications in arbitrations may be subject to a range of rules and regulations, whether at the domestic or international level. These include, but are not limited to, laws, domestic statutes or international treaties on the use and development of AI, domestic rules of professional conduct, ethical and professional standards, and applicable arbitration rules, all of which can indirectly impact how certain professionals can use AI tools in an arbitration setting.

These Guidelines should not be construed as detracting or derogating from any of the above-mentioned rules and regulations. To the extent that these Guidelines are incompatible with any applicable mandatory rules and regulations, the latter should prevail.

GUIDELINE 1

Understanding the uses, limitations, and risks of AI applications

Participants should make reasonable efforts to understand, at least in general terms, the functionality, limitations, and risks of the AI tools they use in preparation for or during the course of an arbitration proceeding, as well as techniques for mitigating the limitations and risks inherent in AI tools. For example, for tools that use generative AI, participants should recognise the known limitations of such tools, such as their tendency to perpetuate biases contained in the training data, their propensity to mix up or invent information to fill gaps in knowledge, and their inability to identify the true logic or sources of information used to produce a given output, as further described below.

Participants should assess the AI tool's terms of use and data handling policies to understand if the tool's data treatment is consistent with any applicable confidentiality, privacy, or data security obligations, engaging technical experts as appropriate (*see Guideline 2* and commentary thereto).

Notably, participants should be aware of the following limitations, biases, and risks that (at present) are inherent in the use of certain AI tools.

"Black-box" problem

Generative AI tools produce natural-sounding and contextually relevant text based on speech patterns and semantic abstractions learned during their training. However, these outputs are a product of infinitely complex probabilistic calculations rather than intelligible "reasoning" (the so-called "black box" problem). Despite any appearance otherwise, currently available AI tools lack self-awareness or the ability to explain their own algorithms.

In response to this problem, participants may, as far as practical, use AI tools and applications that incorporate "explainable AI" features or otherwise allow them to understand how a particular output was generated based on specific inputs. "Explainable AI" is a set of processes and methods that allows human users to comprehend how an AI system arrives at a certain output based on specific inputs. "Explainable AI" can help promote transparency, increase trust in the AI tool's accuracy, and help ensure fairness when applied in an arbitration context. However, a complete understanding of complex AI systems may be beyond the reach of non-technical individuals, and this Guideline does not impose an expectation of thorough understanding. There are also technical and cost-related limitations to explaining fully how AI systems work, especially those systems employing complex algorithms and machine learning techniques.

Quality and representativeness of the training data

Large language models and other AI tools are trained using specific datasets and parameters, and their capabilities are a function of that particular training. Even the most advanced AI tools will exhibit biases and blind spots resulting from limitations in underlying datasets and training protocols. Moreover, general-purpose AI tools may not be well-suited for tasks requiring specialised knowledge or case-specific information, unless they are fine-tuned or provided with more relevant data.

Errors or "hallucinations"

Large language models may "hallucinate" or offer incorrect but plausible-sounding responses when they lack information to provide an accurate response to a particular query. Hallucinations occur because these models use mathematical probabilities (derived from linguistic and semantic patterns in their training data) to generate a fluent and coherent response to any question. However, they typically cannot assess the accuracy of the resulting output.

Hallucinations can be reduced through various techniques such as "prompt engineering" (*i.e.* crafting the query in a manner that is more likely to generate a better response) and "retrieval-augmented generation" (*i.e.* providing the model with relevant source material together with the query), but they are difficult to eliminate completely.

Augmentation of biases

An AI tool's training data may reflect biases that can be perpetuated through the use of the tool. Participants in arbitrations should minimise the risks associated with flawed or biased predictions by exercising their own independent judgement.

This is especially important when existing biases in the data may create, exacerbate, or perpetuate any form of discrimination or profiling in the search and appointment of individuals as arbitrators, experts, counsel, or any other roles in connection with arbitrations. Biases may occur when the underrepresentation of certain groups of individuals is carried over to the training data used by the AI tool to make selections or assessments. Participants should exercise extreme caution when using any AI tool for such purposes, especially if they are unaware of how the selection or assessment algorithm works.

Using AI tools to help identify a suitable candidate for a specific role in connection with an arbitration is a particularly sensitive matter, and participants should be mindful of the impact such use may have on diversity and the fair representation of diverse individuals.[4] In summary, participants are urged to: (i) use their personal judgement to evaluate the output of these AI tools, including from a diversity standpoint; (ii) to the best of their ability, become aware of the potential biases that may underlie the AI tool's output and, to the extent possible, mitigate them; and (iii) use AI tools that control for biases.

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[4] The term "diversity", as used in this Commentary, encompasses race, ethnicity, national origin, religion, gender, sexual orientation, gender identity, age, and ability, as well as intersections between these characteristics.

GUIDELINE 2

Safeguarding confidentiality

Different jurisdictions have their own rules on confidentiality, privilege, and secrecy of information.

Participants bound by these duties should limit themselves to using AI tools that adequately safeguard confidential information or otherwise refrain from inputting any such data into AI tools that do not guarantee confidentiality.

Some AI tools may retain information provided to them for a variety of purposes or even state that the service providers have rights to all the information that users enter. The use of these publicly available AI tools in the context of an arbitration could pose a risk of disclosing confidential information. By contrast, business-oriented or privacy-oriented AI tools and vendors may offer similar functionality but with additional safeguards for confidentiality.

Before using an AI tool, participants should assess the confidentiality policies, features, and limitations of the tool, engaging technical experts as appropriate (*see Guideline 1* and commentary thereto).

GUIDELINE 3

Disclosure

This Guideline does not impose any per se obligation to disclose the use of AI in arbitration. The use of AI is becoming increasingly common and is being incorporated into a variety of technological tools used in the context of an arbitration proceeding. In this evolving landscape, defining a set of generally applicable criteria for disclosure of AI does not seem feasible and could create more controversy than it resolves.

At the same time, the Guideline acknowledges the possibility that disclosure of the use of AI may be appropriate in some circumstances. Indeed, disclosure may be required by professional rules or more broadly to avoid misleading other participants in the arbitration process. In some circumstances, disclosure could be used as a means to mitigate concerning uses of AI that would otherwise fall under Guideline 5.

Disclosure concerning AI-related issues should, in principle, be resolved using the existing mechanisms for resolving disclosure disputes in the context of an arbitration, which, in most cases, is done by the tribunal under the procedural rules applicable to the arbitration.

Specific outputs from generative AI tools are necessarily a function of the inputs, as well as the characteristics of the AI tool itself. Accordingly, where the specific outputs of an AI tool are deemed to warrant disclosure, such disclosure should, in principle, cover the information necessary to reproduce and evaluate such output. In the case of generative AI tools, the input parameters typically include the full conversation history and additional text submitted to the AI model along with the query. The same considerations would apply, mutatis mutandis, to the use of AI tools that are not "generative" but rather evaluative, such as recommender or classification systems.

GUIDELINE 4

Duty of competence or diligence in the use of AI

Scope

This Guideline draws attention to some of the risks that may arise when party representatives delegate legal tasks (such as summarising cases, writing portions of briefs or oral submissions, or conducting legal research) to AI tools without reviewing the AI tool's output to make sure it is accurate, from a factual and legal standpoint.

As established in the Commentary to Guideline 1, certain generative AI tools may be prone to errors and hallucinations, and their output can include inaccurate legal citations or mistakes in the presentation or interpretation of facts, evidence, and legal authorities. Accordingly, this Guideline reminds party representatives (and particularly legal professionals) of their ethical and professional duty to review any work product created by, or with the help of, AI and remain responsible for inaccurate submissions made during an arbitration.

The tribunal and opposing counsel may legitimately question a party, witness, or expert as to the extent to which AI tool has been used in the preparation of a submission and the review process applied to ensure the accuracy of the output.

Guideline 4 does not impose an independent standard of review of party representatives' conduct. Rather, it contains *renvoi* to any applicable rules of professional conduct or responsibility to determine the level of diligence and reasonableness required when using AI tools. Party representatives on record will ultimately be deemed responsible for any non-compliance with this Guideline.

Consequences of non-compliance

Not all AI-induced errors are created equal. In some cases, an AI-induced error may be legitimately inadvertent, even after a reasonable review, or may be inconsequential or have no significant impact on the arbitration. In other cases, AI-induced errors and hallucinations can compromise the integrity of the proceedings, or result in a skewed presentation of the facts, the law or the evidence (*see Guideline 5*.).

The tribunal can take these factors into account when deciding how to address submissions containing AI-induced errors and inaccuracies. If a submission is found to be inaccurate as a result of the use of an AI tool, the tribunal's powers will include the ability to strike the submission, order its correction, disregard the submission, attach lower credibility to it, and draw inferences as appropriate.

GUIDELINE 5

Respect for the integrity of the proceedings and the evidence

This Guideline prohibits any use of AI that compromises the integrity of the arbitration or the authenticity of evidence. While deploying AI can enhance the efficiency of arbitration proceedings, its potential misuse may disrupt due process and corrupt an arbitral tribunal's findings.

The duty is to protect the integrity of the proceedings, not to mislead the arbitral tribunal, and not to submit false or adulterated evidence. Fraudulent behaviour and misconduct, such as submitting false documents or resorting to so-called "guerilla tactics", can occur with or without the use of AI.

Advancements in AI, however, particularly in generative AI and deep fakes, can heighten the risks of manipulated or false evidence, making it significantly easier to create fake evidence that can appear strikingly convincing to the naked eye or that can sometimes be virtually indistinguishable from authentic versions. It can also make it more costly or difficult to detect any such manipulation through forensic and other means.

This Guideline reminds parties to be aware and vigilant of these heightened risks while emphasising the importance of ensuring the fairness and integrity of the proceedings when using AI. Parties, party representatives and experts should simply not use AI tools to fabricate evidence, distort evidence, or compromise the integrity of the proceedings under any circumstances.

If the arbitral tribunal determines that a party has violated this Guideline, it may consider, in addition to any other measures available under the governing law and the applicable arbitration rules or the *lex arbitri* (such as, for example, striking the evidence from the record, or deeming it inadmissible), deriving adverse inferences, and taking the infringing party representatives' conduct into account in its allocation of the costs of the arbitration.

GUIDELINE 6

Non-delegation of decision-making responsibilities

Non-delegation of personal mandate

This Guideline underlines the critical principle that an arbitrator's mandate, especially their ultimate decision-making function, is personal and non-delegable. This Guideline does not prohibit or ban the use of AI tools by arbitrators to assist them in fulfilling their responsibility and duty to analyse the facts, arguments, evidence, and the law, and to issue a reasoned decision.

While AI tools are capable of managing information, analysing data, and predicting outcomes, they must not replace the human judgement, discretion, responsibility, and accountability inherent in an arbitrator's role. Therefore, arbitrators must be mindful that they are not inadvertently delegating part of this personal mandate to the AI tool.

This Guideline reinforces that arbitrators need to review the output produced by any AI tool to ensure it is accurate and shall take full responsibility for any errors or inaccuracies. If an arbitrator uses a generative AI tool to assist in the analysis of the arguments or the drafting of any part of a decision or award, the arbitrator cannot simply reproduce the AI's output without making sure it adequately reflects the arbitrator's personal and independent analysis of the issues and evidence at hand.

This Guideline reminds arbitrators that, even as technology evolves, their personal responsibility in rendering decisions remains paramount. AI tools can enhance efficiency and provide insights, but the arbitrator must make the ultimate decisions, preserving the human element essential to the fairness and integrity of arbitration proceedings. The arbitral tribunal will not be released from its duty to personally review the file and/or draft any arbitral tribunal's decision. At all times, the arbitrators remain responsible for their use of AI during the arbitration.

GUIDELINE 7

Respect for due process

This Guideline focuses on the principle of due process when using AI in arbitration. It emphasises the arbitrator's duty to disclose any reliance on AI-generated outputs outside the record that influence their understanding of the case, to the extent that any outputs are used, allowing parties the opportunity to comment. This approach ensures transparency and upholds the parties' right to be heard.

At the same time, it acknowledges that disclosure requirements may vary depending on the specific AI application used.

The Guideline also stresses the arbitrator's responsibility to avoid assuming the existence of authoritative sources from AI outputs. It prompts arbitrators to evaluate the reliability of AI-derived information independently and critically. Arbitrators, like parties and party representatives, must independently and critically evaluate AI-derived information to ensure reliability.

Model Clause For Inclusion in Procedural Orders

The Tribunal and the parties agree that the Silicon Valley Arbitration & Mediation Center Guidelines on the Use of Artificial Intelligence in Arbitration (**SVAMC AI Guidelines**) shall apply as guiding principles to all participants in this arbitration proceeding.

For any questions, concerns, or suggestions regarding the Guidelines, please contact AITaskForce@svamc.org

About Silicon Valley Arbitration & Mediation Center:

SVAMC is a non-profit serving the global technology sector through educational programming and related activities. SVAMC works with leading technology companies, law firms, ADR institutions, and universities in Silicon Valley and around the globe to promote effective and efficient resolution of technology-related business disputes. Visit www.svamc.org for additional information, or contact us at info@svamc.org.