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Jean R. Sternlight

University of Nevada, Las Vegas – William S. Boyd School of Law

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TESTIMONY TO THE UNITED STATES SENATE JUDICIARY COMMITTEE

**FORCED ARBITRATION UNDERMINES ENFORCEMENT OF FEDERAL LAWS BY
SUPPRESSING CONSUMERS' AND EMPLOYEES' ABILITY TO BRING CLAIMS**

December 17, 2013

By Jean R. Sternlight¹
Michael and Sonja Saltman Professor of Law &
Director Saltman Center for Conflict Resolution
University of Nevada, Las Vegas Boyd School of Law

Introduction

I thank the Committee for scheduling this hearing and for inviting me to present my testimony. I believe that the proposed Arbitration Fairness Act of 2013-14, S. 878, addresses a critically important topic and that it ought to be passed in order to protect United States consumers and employees as well as the sanctity of our laws. There is no point having substantive laws to protect us unless these laws can be enforced, and yet companies are currently using mandatory arbitration to prevent their consumers and employees from enforcing their substantive rights. In particular, companies are using mandatory arbitration clauses both to deter individuals from bringing claims and also to eliminate individuals' opportunity to participate in class actions.

¹ Jean R. Sternlight is the Michael & Sonja Saltman Professor of Law and also Director of the Saltman Center for Conflict Resolution, Boyd School of Law, University of Nevada, Las Vegas.

Personal Background

By way of background, I have studied the topic of what I have called “mandatory arbitration” for almost twenty years. Indeed, I wrote one of the first law review articles on the subject: *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996). I have since written approximately twenty articles on the subject that have appeared in publications such as the STANFORD LAW REVIEW, the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, and the WILLIAM AND MARY LAW REVIEW. I have also written four books on dispute resolution and been cited or quoted by numerous courts and newspapers. Currently I am employed by the University of Nevada-Las Vegas where I am the Director of the Saltman Center for Conflict Resolution and also the Michael and Sonja Saltman Professor of Law.²

As you might imagine, given my titles and interests, I am a big fan of alternative dispute resolution, including arbitration. I believe that disputants are often better served by resolving their disputes through negotiation, mediation or arbitration than through litigation. Nonetheless, I am staunchly opposed to the practice variously known as “mandatory,” “forced,” or “compelled” arbitration whereby businesses use form contracts to require their employees or consumers to resolve future disputes through arbitration rather than through litigation.³ Rather, I favor giving businesses and individuals the chance to *knowingly and voluntarily* choose to resolve disputes in the venues they both prefer.

Supreme Court Rulings on Arbitration

The legal landscape governing mandatory arbitration has changed substantially since I began writing on the topic almost twenty years ago. In particular, the U.S. Supreme Court has issued numerous decisions granting companies essentially free rein to require their consumers and employees to resolve disputes through arbitration, rather than through litigation. The Court has for example made clear that companies can use arbitration to eliminate plaintiffs’ opportunity to join together in class actions even where the elimination of class actions leaves plaintiffs without an economically realistic opportunity to present their claim.⁴ The Court has also largely eliminated states’ opportunity to protect

² Of course the opinions I express here are only my own.

³ While some may suggest that consumers and others can simply refuse to do business or take a job when arbitration is required the practical reality is that they often do not see the clause, understand it, or understand its importance. Moreover, in some fields even educated consumers would have virtually no choice but to agree to arbitration if they want the product or service in question, as the term may be so prevalent in some kinds of contracts.

⁴ In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), the Court held that the Federal Arbitration Act preempted lower courts’ use of California precedent to hold an arbitral class action prohibition unconscionable. Subsequently, in *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Court held that an arbitral class action prohibition was valid even though it would prevent plaintiffs from vindicating their rights under federal antitrust law.

their citizens from unfair arbitration by interpreting preemption doctrines broadly so as to void most state statutes governing arbitration.⁵ Additionally the Court has held that arbitrators rather than courts should interpret many aspects of arbitration clauses, including determining whether the arbitration clause is invalid due to unconscionability, so long as the clause gives that power to the arbitrators.⁶ In short, under current law companies are largely allowed to structure arbitration as they wish, subject only to limited regulation by the arbitrators themselves or by arbitration providers. Yet, arbitrators and arbitration providers have little incentive to rein in the practice that provides them with economic remuneration.

Policy Arguments Regarding Mandatory Arbitration

While the legal landscape has changed substantially over the past twenty years, the policy arguments regarding whether mandatory arbitration is good or bad for employees and consumers remain substantially the same. Advocates of the practice urge that arbitration is quicker and cheaper than litigation and that companies who compel arbitration are therefore providing employees and consumers with a better venue than court in which to present their legal claims. Such advocates typically assert that any unfair clauses will generally be weeded out by courts or by arbitration providers. By contrast, critics typically assert that mandatory arbitration is often unfair to the “little guys” -- consumers and employees -- and that forcing disputes into private arbitration also deprives the public of access to the dispute resolution process or resulting precedent.

Very Few Consumers and Employees Bring Claims in Arbitration

Those who focus on the fairness of arbitration *hearings* miss the main impact of mandatory arbitration clauses, which is that they typically deter or sometimes prevent consumers or employees from obtaining access to justice in *any* forum. That is, *almost no consumers or employees actually bring claims in arbitration*. Thus, rather than providing greater access to justice the main function of arbitration clauses is to protect companies from claims brought in any venue. Worrying about whether arbitration hearings are or are not fair largely misses the main point, which is that arbitration hearings are exceedingly rare.

⁵ For example, in *Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court held that the FAA preempted Wyoming law requiring arbitration clauses to appear in a particular location and font in contracts. More recently, in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court held that the parties' arbitration clause superseded a California statute requiring that certain kinds of contractual disputes in the entertainment industry be resolved by a particular state agency.

⁶ *Rent-a-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010) (holding that courts shall enforce arbitration clause written to provide that arbitrator, rather than court, decides whether arbitration clause is unenforceable due to unfairness).

While hard evidence regarding the practice of mandatory arbitration has been scant,⁷ the little publicly available data shows that miniscule numbers of consumers or employees end up filing claims in arbitration. The preliminary report of the Consumer Financial Protection Board, which has begun to study consumer arbitration pursuant to Congressional mandate, confirms the point that very few consumers are filing arbitration claims.⁸ These small numbers are particularly striking given that so many consumers and employees are required to file claims in arbitration rather than litigation. Professor Alexander Colvin has estimated that more than 20% of employees are covered by mandatory arbitration clauses.⁹ We all know that arbitration clauses are even more common in the consumer setting, as we see them in transactions involving banking, credit cards, insurance, schools, gym memberships, telephones, computers, and many many other goods and services.¹⁰

How few claims are actually filed in arbitration? On the consumer side in one informal report the American Arbitration Association, the largest and best-known arbitration provider in the country, stated that it handled roughly 1,000 claims by consumers per year.¹¹ The recent Consumer Financial Protection Bureau report is consistent, finding that from 2010 through 2012 consumers filed an average of just 300 arbitrations per year with AAA regarding credit cards, checking accounts, payday loans, or prepaid cards.¹² JAMS, the other major arbitration provider in the United States, states that it handles at most a few hundred consumer claims annually.¹³ Data revealed in several lawsuits similarly shows that when companies set up arbitration programs almost no customers bring claims.¹⁴ With respect to employees, the numbers are similar. Researcher Alexander Colvin, a professor at Cornell's International Labor Relations School, looked at the information the American Arbitration Association was required to produce by California law.

⁷ Arbitration providers such as the American Arbitration Association or JAMS or the National Arbitration Forum typically cite both the importance of confidentiality as well as business justifications in refusing to open their files to researchers much less the general public. When providers do make their files available to researchers one can never be sure whether either the researchers or the providers are slanting the data or results to favor a particular perspective.

⁸ CONSUMER FINANCIAL PROTECTION BOARD, ARBITRATION STUDY PRELIMINARY RESULTS 13 (December 12, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

⁹ Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury* 11 EMP. RTS. & EMP. POL'Y J., 405, 410 (2004).

¹⁰ A 2001 study showed that thirty-five percent of the consumer contracts in an average California consumer's life required arbitration Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004). Another more recent study of twenty-one companies with substantial name recognition or market share in the areas of telecommunications, credit, or financial services found that over seventy-five percent of the companies imposed mandatory arbitration on their consumers, and that every consumer arbitration contract included a waiver of class actions. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. LAW REFORM 871, 880-83 (2008).

¹¹ Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SOUTHWESTERN L. REV. 87, 99 (2012).

¹² CFPB ARBITRATION STUDY, *supra* n. 8.

¹³ Sternlight, *supra* n. 11.

¹⁴ *Id.* at 99-100.

Examining national data from 2003 through 2007 Colvin found that just 3,945 employees filed arbitration claims with AAA, or less than 1,000 employees per year.¹⁵ While I recognize that AAA and JAMS are not the only arbitration providers, these statistics certainly suggest that neither consumers nor employees are filing lots of arbitration claims. Although the advocates of mandatory arbitration claim that the process is good because it provides inexpensive and quick access to the justice system, no one has produced data substantiating this claim with respect to either consumers or employees.

One thing we can say for sure is that the absence of consumer and employee claims in arbitration does not reflect that consumers and employees have no claims. In 2011, 1.8 million consumers filed claims with the Federal Trade Commission.¹⁶ And, millions of consumers contest charges through their credit card companies.¹⁷ We also know that plenty of employees do have claims they wish to file against their employers. In 2012, for example, just under 100,000 employees filed discrimination claims against their employers with the Equal Employment Opportunity Commission.¹⁸ Of course many other employees filed discrimination claims with state agencies or might have liked to file tort or contract or other claims against their employers.

Courts Offer More Access to Justice than does Mandatory Arbitration

Some may suggest that even if arbitration is not perfectly accessible at least it is better than litigation, which is often slow and expensive. However, the evidence does not support this position. While it is certainly true that individual lawsuits are often difficult and expensive, court, despite all its drawbacks, offers consumers and employees far greater access to justice than does arbitration, particularly when one considers class actions. Federal court statistics show that 17,977 labor claims and 35,965 civil rights claims were filed in 2012.¹⁹ Presumably not all of these were claims brought by employees against employers, but these numbers, from federal court alone, do provide quite a contrast to the scant number of employment claims filed in arbitration. Another study similarly found that 265,356 employment discrimination cases were filed in federal court alone between 1979 and 2000.²⁰ If state court statistics were added these numbers would be far greater. With respect to lawsuits brought by consumers, the Consumer Financial Protection Board found that consumers had filed more than 3,000 cases in federal court from 2010-2012

¹⁵ Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL L. STUDIES 1, 4 (2011).

¹⁶ *Id.* at 102.

¹⁷ *Id.*

¹⁸ <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

¹⁹ Federal Court Management Statistics June 2013, available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-june-2013.pdf&page=1>.

²⁰ Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL STUDS. 429, 457 (2004).

regarding credit card issues alone.²¹ If one adds to this cases involving defective products, illegal fees, fraudulent charges and all the other matters consumers may complain of, and if one also adds consumer litigation in all the fifty state courts, of course the number would be far higher.

Class actions are also a tremendous resource for consumers and employees who would not be able to file individual claims, for example because they were not aware they were injured, because they did not realize the harm violated a law, because they could not afford to litigate their claim on an individual basis, or because they feared retaliation. The annual class action report compiled by law firm Seyfarth Shaw states that in 2011 employees filed 8,414 ERISA class actions, 6,779 Fair Labor Standards Act class actions, and 14,771 employment discrimination class actions.²² Similarly, the Consumer Financial Protection Board found that more than 400 consumer class actions were brought in federal court alone between 2010 and 2012, just with regard to credit card issues.²³ A single class action may provide hundreds or thousands or even millions of claimants access to relief, and may also deter companies from committing future violations. For example, two California lawsuits brought against Career Education Corporation for making fraudulent representations as to post-school employment prospects led to a \$40 million dollar settlement whereby the company agreed to reimburse 8,500 students up to \$20,000 apiece.²⁴ On the employment side, while the Supreme Court's decision in *Walmart v. Dukes*, 131 S. Ct. 2541 (2011), disallowed a proposed employment class action that would have covered more than a million employees,²⁵ even the far smaller and more targeted classes now being pursued post-*Walmart* could each often include thousands and thousands of members.²⁶ Yet, companies are increasingly turning to mandatory arbitration precisely as a means to eliminate consumers' and employees' access to class actions. Thus, it appears that mandatory arbitration is limiting rather than broadening access to justice.

²¹ Prepared Remarks of Director Richard Cordray at the Field Hearing on Arbitration (December 12, 2013), available at <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-director-richard-cordray-at-the-field-hearing-on-arbitration/>.

²² Seyfarth Shaw, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT (2012 edition) at 3, available at [http://www.seyfarth.com/dir_docs/publications/2012%20CAR%20short%20final%20\(secured\).pdf](http://www.seyfarth.com/dir_docs/publications/2012%20CAR%20short%20final%20(secured).pdf).

²³ Prepared Remarks of Director Richard Cordray, *supra* n. 21.

²⁴ Public Citizen & Nat'l Assoc. of Consumer Advocates, *Justice Denied – One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident* (2012) at 10, available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>. For reports on other similar class actions see Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SOUTHWESTERN L. REV. 87, 102-103 (2012).

²⁵ 131 S. Ct. at 2547.

²⁶ See, e.g., *Easterling v. Connecticut Dept. of Correction*, 278 F.R.D. 41 (D. Conn. 2011) (refusing to decertify class, even post-*Wal-Mart*, that challenged the use of a 1.5 mile run as an employment test in the hiring of corrections officers); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012) (certifying nationwide class of female Costco employees, post *Wal-Mart*, where class identified several companywide policies they claimed reduced their chances of promotion).

Why and How Mandatory Arbitration Suppresses Claims

Why do so few employees and consumers file claims in arbitration? It turns out that the mandatory form of arbitration is often not particularly appealing either to the attorneys who sometimes represent employees and consumers or to consumers and employees trying to proceed without representation. Here are just a few of the reasons why mandatory arbitration suppresses claims:

(1) Attorneys generally (but not always) prefer to file their claims in litigation than in arbitration. Weighing out the costs and benefits of each process attorneys may prefer litigation because they don't have to pay high filing or administrative fees or arbitral salaries, because they believe they will have a higher likelihood of prevailing, because they believe their client's recovery will be greater, because they will not be automatically foreclosed from proceeding in a class action, or because they seek a process in which the decision maker is required to follow the law and issue a written decision that will be publicly available.

(2) Because many plaintiffs' attorneys see mandatory arbitration as inferior to litigation they will be more reluctant to accept contingent fee cases when consumers and employees are arguably covered by arbitration clauses. In this way the imposition of arbitration "disarms" employees and consumers, making it more difficult for them to secure legal representation.

(3) Arbitration does not turn out to be a good vehicle for most unrepresented consumers and employees, as they may not be competent to file or present the claim effectively on their own behalf, and may not be able to afford filing fees and costs imposed in many arbitrations. Many consumer and employment claims are sufficiently complicated as a matter of law or fact that the typical consumer or employee cannot hope to prevail without assistance.

(4) Employees or consumers who are not aware they have been injured, or that the injury violates a law, will not file claims on their own behalf. Examples include consumers harmed by a toxic substance, a discriminatory practice, or a dangerous vehicle, or employees harmed by a discriminatory practice or the failure to pay overtime that is required by law.

While more research is needed to show which of these or perhaps other concerns discourage consumers and employees from filing individual claims in arbitration, we can be sure that arbitration is not providing the fast, cheap, fair access to justice that has been claimed.

Congress Must Act To Ensure Our Laws Are Enforceable

When companies use mandatory arbitration to deprive consumers and employees of access to justice they not only harm those consumers and employees but also prevent enforcement of the laws passed by Congress and state legislatures. In this country we largely rely on private lawsuits to secure enforcement of our laws. When companies can use arbitration to elude such lawsuits by suppressing claims they effectively render our laws toothless. I favor passage of the Arbitration Fairness Act of 2013-14, S. 878, because I believe it is the best means of protecting consumers and employees from unfair arbitration and ensuring that the laws legislatures have passed continue to be enforced.