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# OFTEN WRONG, NEVER IN DOUBT: HOW ANTI- ARBITRATION EXPECTANCY BIAS MAY LIMIT ACCESS TO JUSTICE

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## OFTEN WRONG, NEVER IN DOUBT: HOW ANTI-ARBITRATION EXPECTANCY BIAS MAY LIMIT ACCESS TO JUSTICE

Becky L. Jacobs\*

### I. INTRODUCTION

It is an honor to be a part of the *Maine Law Review's* "Accessing Justice in Hard Times: Lessons from the Field, Looking to the Future" symposium issue. Not only is the symposium's theme particularly relevant in our current economic environment, it also provides those of us in the "Alternative Dispute Resolution" (ADR)<sup>1</sup> field with an opportunity to reflect upon and return to the roots of our movement and to advance our cause and encourage others to join us.

While there long have been "alternatives" to the traditional trial for those seeking to resolve disputes,<sup>2</sup> the so-called "litigation explosion"<sup>3</sup> in the 1970s inspired a campaign for reform of the administration of justice that resulted in the modern ADR movement. The movement had many disparate goals, not the least of which was to improve public access to justice.<sup>4</sup> At the historic 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference), Harvard Law Professor Frank E.A. Sander first posited the concept of a "comprehensive justice center," more famously referred to as a "multi-door courthouse,"<sup>5</sup> in which a grievant's dispute would be evaluated then directed to the most appropriate process or sequence of processes.<sup>6</sup> "Room 3" in Professor Sander's Multi-Door Courthouse/Dispute Resolution Center was listed in the lobby's directory as Arbitration,<sup>7</sup> the alternative process on which this Article will focus.

The question that I pose herein is whether popular (mis)conceptions about

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1. "Alternative Dispute Resolution" is a phrase most commonly associated with the acronym "ADR." There are those, however, who have suggested that the more accurate phrase might be "Appropriate Dispute Resolution," a more inclusive phrase that describes the full panoply of dispute resolution options, including litigation. *See, e.g.,* LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 20-21 (4th ed. 2009); *DICTIONARY OF CONFLICT RESOLUTION* 17-20 (Douglas H. Yam ed., 1999).

2. For a survey of just a few of these methods, see STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 6-7 (5th ed. 2007).

3. *See* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 333 (2005).

4. *See generally id.* at 333 n.12 (citing, inter alia, Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *BUFF. L. REV.* 181 (1978); Russell G. Pearce et al., *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 *YALE L.J.* 122 (1980); BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977); *Dispute Resolution*, 88 *YALE L.J.* 905, 906 (1979).

5. *See A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo Exploring the Evolution of the Multi-Door Courthouse*, 5 *U. ST. THOMAS L.J.* 665, 665-67 (2008).

6. Frank E. A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 64, 83-84 (A. Leo Levin and Russell Wheeler eds., 1979).

7. Sander, *supra* note 6.

arbitration may actually be preventing some of those who are most in need from receiving the legal relief they seek. Before I reflect upon that query, however, a bit of background may be in order.

## II. ARBITRATION: THE PROCESS AND ITS PROGRESS

Arbitration is a "method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding."<sup>8</sup> The process has a storied historical pedigree, both in the United States and internationally. Most people associate arbitration with the Judgment of Solomon, a reference to the biblical account of King Solomon's decision to "split the baby" with a sword to settle a dispute between two women claiming to be the child's mother.<sup>9</sup> Ancient civilizations such as the Greek and Roman empires utilized arbitration to settle internal and external disagreements.<sup>10</sup> It also became popular in the late nineteenth and twentieth centuries for specialized industries to resolve intra-industry disputes with arbitration.<sup>11</sup>

However, while parties, industries, and nations have incorporated arbitration into their dispute resolution practices, courts were not always as receptive to the process.<sup>12</sup> The conventional wisdom<sup>13</sup> is that American courts, like their British common law counterparts, were hostile to arbitration agreements and were reluctant to enforce them.<sup>14</sup> An oft-quoted passage by Justice Story is representative of this period of judicial hostility:

One of the established principles of courts of equity is, not to entertain a bill for the specific performance of any agreement, where it is doubtful whether it may not thereby become the instrument of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected. . . . Now we all know, that arbitrators, at the common law, . . . are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases . . . . Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?<sup>15</sup>

New York was the first state to enact legislation to counter this perceived

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8. BLACK'S LAW DICTIONARY 112 (8th ed. 2004).

9. 1 Kings 3:16-28.

10. See ROBERT V. MASSEY, JR., W. VA. UNIV. EXTENSION SERV., INST. FOR LABOR STUDIES & RESEARCH, HISTORY OF ARBITRATION AND GRIEVANCE ARBITRATION IN THE UNITED STATES 2, available at [http://www.wvu.edu/~exten/depts/ilsr/arbitration\\_history.pdf](http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf) (last visited Mar. 25, 2010).

11. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 43 (1999).

12. See, e.g., Richard C. Rueben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599-601 (1997).

13. Some scholars have questioned the widely-espoused notion of judicial hostility to arbitration. See, e.g., Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 558-60 (2008).

14. Rueben, *supra* note 12, at 599-601.

15. *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (D. Mass. 1845).

judicial hostility,<sup>16</sup> and the United States Congress followed shortly with the Federal Arbitration Act of 1925 (FAA).<sup>17</sup> The FAA was the expression of "a national policy favoring arbitration,"<sup>18</sup> and it mandated enforcement of parties' pre-dispute agreements to arbitrate.<sup>19</sup> Pursuant to the FAA, Congress limited the role of the judiciary in the merits of contractually-agreed arbitration matters.<sup>20</sup> The FAA served as the model for the Uniform Arbitration Act, promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws (NCCUSL)<sup>21</sup> and enacted in some form or in its revised form in nearly every state in the nation.<sup>22</sup>

Following the enactment of these affirmatory legislative developments and following a series of United States Supreme Court cases that expanded the scope of the FAA,<sup>23</sup> arbitration clauses requiring that parties submit their disputes to binding arbitration became customary in contracts in a broad spectrum of settings. For example, standard consumer contracts for credit cards and other consumer loans, product purchases, real estate, construction, utilities, auto and home insurance, and health care contain mandatory arbitration clauses.<sup>24</sup> Sherman Act antitrust claims are arbitrable,<sup>25</sup> as are disputes between and among investors, securities firms, and

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16. 1920 N.Y. Laws 36. See John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL. 361, 371 (1986).

17. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (current version at 9 U.S.C.A. §§ 1-16 (1999 & Supp. 2008)).

18. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). See also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

19. See § 2, 43 Stat. at 883.

20. See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 165 (2002).

21. Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 388-89 (2007).

22. See Stanley A. Leasure & Kent P. Ragan, *Arbitration of Medical Malpractice Claims: Patient's Dilemma and Doctor's Delight?*, 28 MISS. C. L. REV. 51, 56 & n.38, 41 (2009). Twenty-eight states and the District of Columbia have adopted the UAA, or some version thereof. *Id.* at 56. "The following states have adopted the Uniform Arbitration Act of 1956: Alaska, Arizona, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wyoming." *Id.* at 56 n.38. Thirteen states have chosen the Revised Uniform Arbitration Act: Alaska, Colorado, the District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. Uniform Law Commissioners, *A Few Facts About the Uniform Arbitration Act (2000)*, available at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-aa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp) (last visited Jan. 23, 2010).

23. See, e.g., *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland*, 465 U.S. 1.

24. See generally Theodore Eisenberg, Geoffrey Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008); Mark Furletti, *FEDERAL RESERVE BANK OF PHILADELPHIA, MANDATORY ARBITRATION CLAUSES IN THE CREDIT CARD INDUSTRY (2003)*, available at [http://www.phil.frb.org/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses\\_012003.pdf](http://www.phil.frb.org/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses_012003.pdf) (last visited Mar. 28, 2010).

25. *Mitsubishi Motors Corp.*, 473 U.S. at 616, 640.

individual investment advisors.<sup>26</sup> Franchise contracts also frequently demand that disputes be resolved by arbitration.<sup>27</sup>

In the workplace, mandatory pre-dispute resolution clauses often require that employees submit all claims arising from or related to their employment to compulsory arbitration, including statutory discrimination claims.<sup>28</sup> In unionized workplace environments, arbitration has long been a fixture in dispute processing.<sup>29</sup> Collective bargaining agreements specify multi-step grievance procedures to resolve disputes, the vast majority of which culminate in binding arbitration.<sup>30</sup> Non-union employees also have been required by their employers to sign contracts containing pre-dispute arbitration clauses as a condition of their employment.<sup>31</sup>

In spite, or perhaps because, of its pervasiveness, however, arbitration has become the focus of renewed hostility in the public, in courts, and in legislatures.

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26. The Financial Industry Regulatory Authority (FINRA) is the largest independent regulator for U.S. securities firms. Its website states that it "operates the largest dispute resolution forum in the securities industry to assist in the resolution of monetary and business disputes between and among investors, securities firms and individual registered representatives." FINRA – Arbitration & Mediation, <http://www.finra.org/ArbitrationMediation/index.htm> (last visited Jan. 23, 2010). See also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (pre-dispute arbitration agreement for claims under the Securities Act of 1933 held to be enforceable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (arbitration agreement for claims brought under section 10(b) of the Securities Exchange Act of 1934 held to be enforceable); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (agreement to arbitrate disputes from international commercial transactions held to be enforceable).

27. See Christopher R. Drahozal, *Arbitration Clauses in Franchise Agreements: Common (and Uncommon) Terms*, 22 *FRANCHISE L.J.* 81, 81 (2002).

28. See Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 173, 173 (1998). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), the United States Supreme Court held that an employee's age discrimination claim under the Age Discrimination in Employment Act of 1967 (ADEA) was subject to mandatory arbitration pursuant to an arbitration clause set forth in the employee's New York Stock Exchange registration application. This holding has been expanded to require arbitration of employee federal discrimination claims pursuant to Title VII, section 1981, of the Americans with Disabilities Act, and various other anti-discrimination laws, including the Equal Pay Act, the Fair Labor Standards Act, and the Rehabilitation Act. Steven M. Warshawsky, *Gilmer, the Contractual Exhaustion Doctrine, and Federal Statutory Employment Discrimination Claims*, 19 *LAB. LAW.* 285, 294-95 & nn.79-85 (2004). "Indeed, it is now well-established that all federal laws prohibiting workplace discrimination may be the subject of compulsory arbitration agreements." *Id.* at 295.

29. Arbitration clauses contained in collective bargaining labor agreements were held enforceable pursuant to section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185 (1998)) (LMRA), rather than the FAA. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). See also *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The United States Supreme Court recently confirmed that statutory discrimination claims submitted to arbitration by parties to a collective bargaining agreement are arbitrable. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1461 (2009).

30. See generally Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 *DUKE L.J.* 2013, 2049-50 (2009).

31. See Thomas E. Carbonneau, *Building the Civilization of Arbitration: Introduction*, 113 *PENN ST. L. REV.* 983, 983-84 (2009).

This dissatisfaction with the process is not new; opponents of arbitration have lobbied for changes to the FAA or for "reform" legislation for many years. These efforts have been focused on so-called "mandatory"<sup>32</sup> pre-dispute arbitration agreements in contracts between parties with unequal bargaining power, for example, employment and franchising agreements and those for consumer goods and services.<sup>33</sup>

Reform legislation generally prohibiting enforcement of mandatory pre-dispute arbitration agreements in the context of all employment discrimination and other federal employment statutory claims has been proposed,<sup>34</sup> as have bills that would specifically amend a number of federal civil rights statutes to preclude the enforcement of pre-mandatory arbitration provisions in pre-dispute agreements relating to claims arising under these statutes.<sup>35</sup> Courts also have begun to more aggressively review arbitration agreements, using concepts such as unconscionability or public policy to refuse to enforce mandatory pre-dispute arbitration clauses.<sup>36</sup>

These efforts to limit or restrict the imposition of mandatory pre-dispute arbitration, however, have been "largely perfunctory."<sup>37</sup> It is only recently that they have gained traction, attributable, some have opined, to the composition of the new administration.<sup>38</sup> As one Commentator so poetically described, "What otherwise might have been a tempest in a teacup has grown into a full fledged tornado."<sup>39</sup> Fueled by the rising tide of public anger in the wake of the economic crisis, opponents of arbitration forcefully have made their case, arguing, among

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32. Some find the adjective "mandatory" to be inaccurate:

What [others] call[ ] mandatory arbitration is better called contractual arbitration because it, unlike some other arbitration, does not occur unless the parties to the arbitration have previously formed a contract stating their agreement to arbitrate the dispute. Arbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily. The rare cases in which consent to a contract is involuntary—as when "A grasps B's hand and compels B by physical force to write his name" to the signature line of a contract, or when A puts a gun to B's head and says "sign or I'll shoot"—result in contracts that are voidable on the ground of duress. In the absence of duress, it is inaccurate, as well as overly dramatic, to say that a contract containing an arbitration clause results in arbitration that is involuntary or mandatory.

Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 41 (2003) (footnotes omitted). *But see* Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 82 n.1 (2007).

33. *See, e.g.*, Sternlight, *supra* note 32, at 82-84.

34. Civil Rights Act of 2008, H.R. 5129, S. 2554, 110th Cong. § 423 (2008).

35. *See* Civil Rights Procedures Protection Act of 2001, H.R. 1489, S. 163, 107th Cong. (2001) (amending, *inter alia*, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Fair Labor Standards Act of 1938, and the Family and Medical Leave Act of 1993).

36. Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 760-62 (2004).

37. Carbonneau, *supra* note 31, at 984.

38. *Id.*

39. Sandra D. Grannum, *Securities Arbitration in the Market Meltdown Era: Achieving Fairness in Perception and Reality: The Faith and Face of Securities Arbitration After the 2008 Crash*, 1754 PRAC. L. INST./CORP 111, 116 (2009).



other negative consequences, that mandatory pre-dispute arbitration clauses in “adhesion” consumer product and services contracts and employment agreements are not the product of voluntary bargaining; that private arbitration is not a proper forum for the resolution of disputes implicating important civil rights; that arbitration requires individuals to surrender their right to a jury trial; and that arbitrators are captive to “repeat players” and produce unfair results.<sup>40</sup>

The first proposal in response to this highly publicized anti-arbitration campaign was the Arbitration Fairness Act of 2007,<sup>41</sup> a “radical” amendment to the Federal Arbitration Act that would virtually eliminate the binding effect of pre-dispute arbitration clauses in contracts involving consumers, employees, and, to some degree, franchisees.<sup>42</sup> More recently, two other proposals have surfaced. The first, the Arbitration Fairness Act of 2009 (AFA), would render pre-dispute arbitration agreements unenforceable for “an employment, consumer, or franchise dispute[.]” or “a dispute arising under any statute intended to protect civil rights.”<sup>43</sup> The second, the Consumer Fairness Act of 2009, would make pre-dispute arbitration agreements in consumer contracts unenforceable as “an unfair and deceptive trade act or practice.”<sup>44</sup>

Who could argue against such reforms, one might ask? “As the bill’s title suggests, this reform movement is ultimately about fairness, and who can be against fairness?”<sup>45</sup>

Most certainly, these concerns not only are valid, but also are, on the whole I believe, well-intentioned,<sup>46</sup> and it seemingly has been difficult for arbitration’s defenders to mount an effective rebuttal without appearing to be out to get the “little guy”<sup>47</sup> and to

40. See, e.g., Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 267 (2008); Recent Proposed Legislation, *Arbitration—Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees—Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007), 121 HARV. L. REV. 2262, 2264-65 (2008).

41. S. 1782, 110th Cong. (2007).

42. See Rutledge, *supra* note 40, at 267-68.

43. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009).

44. Consumer Fairness Act of 2009, H.R. 991, 111th Cong. § 2 (2009).

45. Rutledge, *supra* note 40, at 267.

46. *But see* Carbonneau, *supra* note 31, at 984-85. Professor Carbonneau asserts that some arguments posited by anti-arbitration advocates are disingenuous:

[T]he anti-arbitration sentiment in the U.S. Congress has been fueled and financed by the American Trial Lawyers' Association (ATLA) and encouraged by other lobbyist groups, like Public Citizen. While all the opponents of arbitration pay reverence to the Constitution and to the sanctity of legal rights, . . . [and] a proclaimed concern for disadvantaged parties and their plight in society[.] . . . [t]he virulence of the critics is motivated by the need to control the measure and implementation of the rule of law; it is not a concern about the rule of law itself. In the final analysis, the interests of the average citizen are irrelevant; what is truly important is who decides how society is governed and who controls the administration of justice.

*Id.* (footnotes omitted).

47. Professor Jean R. Sternlight has used the phrase “little guys” to describe “consumers, lower level employees, and perhaps certain franchisees and small businesses that could not be expected to knowingly and voluntarily negotiate arbitration clauses in advance.” Sternlight, *supra* note 32, at 82 n.3 (citing Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. QUARTERLY. 637, 637-39 (1996)).

be wholly biased in favor of "big business."<sup>48</sup> Yet, one must ask whether these very passionate anti-arbitration claims are as clear cut as those making them would have the public believe. Are they supported by overwhelmingly irrefutable data demonstrating the nefariously inflicted harm to the "little guys" that the legislation is designed to protect?

### III. ARBITRATION: THE PERCEPTION

To be clear, I am not advocating for or against the reforms embodied in the AFA. However, I would like to take a step back from the inflammatory rhetoric<sup>49</sup> with which we all are being bombarded and consider whether at least some of the arbitration reform advocacy may be based upon the expectancy bias of the advocates. In psychology and cognitive science, expectancy bias, a form of confirmation or confirmatory bias, is the tendency to search for or interpret data in such a way that supports one's preconceptions, beliefs, expectations, or hypotheses and to discount information that would disconfirm these existing opinions.<sup>50</sup>

Studies indicate that the public generally has a strongly negative opinion of arbitration and perceives it to be an unfair process.<sup>51</sup> Yet, this perception does not appear to be unequivocally supported by available empirical data on arbitral results<sup>52</sup> across a variety of subject matter disputes<sup>53</sup> and disputants, including those involving consumers,<sup>54</sup> individual investors,<sup>55</sup> and employees.<sup>56</sup>

48. Cf. Sternlight, *supra* note 32, at 83-84.

49. Consider, for example, the language of Public Citizen's advocacy: "Forced arbitration creates a systemic bias in favor of businesses while offering few, if any, meaningful deterrents against negligence or even foul play." ZACHARY GIMA ET AL., PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 4 (2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> [hereinafter PUBLIC CITIZEN, FORCED ARBITRATION].

50. See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). See also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 309-16.

51. See Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 DISP. RESOL. MAG. 30, 33 (2008). But see Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 560-62 (2008) (surveys of actual participants in arbitral proceedings across a variety of industries report positive attitudes about the process and its fairness).

52. This Author does not purport to engage in a thorough evaluation of these data, and an exhaustive analysis thereof is beyond the scope of this Article. As the prominent arbitration scholar Professor Peter B. Rutledge has opined, a meaningful analysis of whether arbitration produces "good" results really involves two distinct inquiries. First, how should arbitral outcomes be measured? Once this normative question is resolved, the second question is: What do the data reveal? Email from Peter B. Rutledge, Associate Professor, Univ. of Ga. Law School, to Becky L. Jacobs, Associate Professor, Univ. of Tennessee College of Law (Oct. 26, 2009) (on file with author). My brief discussion conflates these two inquiries, as do many of the available data analyses on arbitral results. This is not a merely academic issue. Not only may expectancy bias influence data interpretation, it also can creep into study design, and it hampers an intelligent and coherent public debate on arbitration's future.

53. See generally Rutledge, *supra* note 51.

54. See Cole & Frank, *supra* note 51, at 33.

55. See JILL I. GROSS & BARBARA BLACK, UNIV. OF CINCINNATI COLLEGE OF LAW, PERCEPTIONS OF FAIRNESS OF SECURITIES ARBITRATION: AN EMPIRICAL STUDY 59 (2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090969](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090969) (last visited Jan. 23, 2010).

56. See Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need To Know*, 10 CARDOZO J. CONFLICT RESOL. 579, 582-83 (2009).

Consider consumer debt arbitrations, the focus of much recent controversy and study. A widely-cited report by the advocacy group Public Citizen concluded that arbitrators in consumer debt arbitrations are “[b]iased decision-makers” who essentially “rubber-stamp[] corporate claims” and produce “[s]tunning results that disfavor consumers” in 94 percent of cases.<sup>57</sup> However, critical analysis of the data presented by Public Citizen to support these conclusions yielded a far different set of statistics, reporting that “consumers had at least partial success in 48.5 percent of the cases in Public Citizen’s data set, a far cry from the [one-sided] business success rate portrayed in Public Citizen’s report.”<sup>58</sup> Other data examination support the conclusion that Public Citizen’s report misleadingly overstates the situation,<sup>59</sup> including one analysis of 2006 consumer-filed cases administered by the American Arbitration Association (AAA) that calculated an 81 percent favorable outcome for the consumer through either an outright winning award or a voluntary settlement.<sup>60</sup>

These success rates compare favorably to results in consumer litigation. Comparative data demonstrate that consumers bringing arbitration claims against businesses prevail in 65.5 percent of cases that reach a decision, and the median duration from initial filing to final disposition is 4.35 months.<sup>61</sup> In court, buyer plaintiffs litigating contract claims prevailed 61.5 percent of the time, 60.9 percent in cases decided by bench trials, and with a median “filing to final” duration of 19.4 months.<sup>62</sup>

In securities arbitration, the disparity between perception and “reality” also appears to be prevalent. While investors held strongly negative perceptions of both the arbitration process and of the bias of arbitrators before they even filed a claim leading to arbitration,<sup>63</sup> analyses of securities arbitral awards provide that, in 2009, investors were awarded damages in 45 percent of cases.<sup>64</sup> According to these data, investors received a monetary or non-monetary recovery in approximately 70 percent of customer claimant cases, through settlements or awards.<sup>65</sup> Attempting to compare arbitral and judicial win/loss results in the securities context is difficult for a number of reasons. These reasons include (1) the differences between the

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57. JOHN O'DONNELL, PUBLIC CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 2, 12 (2007), <http://www.citizen.org/publications/release.cfm?ID=7545> (last visited Jan. 23, 2010).

58. Cole & Frank, *supra* note 51, at 32.

59. See SEARLE CIVIL JUSTICE INSTITUTE, *CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION* 109-13 (2009); Cole & Frank, *supra* note 51, at 31-34.

60. *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 110th Cong. 124 (2007) (statement of Richard Naimark, Senior Vice President, American Arbitration Association) [hereinafter Statement of Richard Naimark].

61. Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, Metro. Corp. Couns., July 1, 2006 <http://www.metrocorp.counsel.com/current.php?artType=view&artMonth=July&artYear=2006&EntryNo=5325> (last visited Jan. 23, 2010).

62. *Id.*

63. Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 389-91 (2008).

64. Dispute Resolution Statistics: Summary Arbitration Statistics December 2009, <http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/> (last visited Mar. 25, 2010).

65. *Id.*

arbitration and litigation processes, (2) the limited number of retail investor cases decided through litigation, and (3) the data that demonstrate that 25 percent of all investor claims are for less than \$10,000 and, therefore, not cost effective to litigate.<sup>66</sup> However, one older study reported that an average of 60 percent of investors received an award in securities arbitration; 39 percent of investors received favorable results in the very few cases that were decided in court.<sup>67</sup>

Employment cases follow this same expectancy bias pattern. While many believe that “[f]orced arbitration clauses effectively allow employers to shield themselves from the purview [of] employment laws,”<sup>68</sup> the data once again do not conclusively support this contention. Data analysis of all of the employment cases administered by the AAA in 2006 yielded a 77 percent success rate for employees.<sup>69</sup> While studies of other data sets yielded lower rates,<sup>70</sup> the aggregate arbitral data<sup>71</sup> compare favorably to the litigation alternative.<sup>72</sup> A study by the National Workrights Institute reported that, overall, employees prevailed 62 percent of the time in arbitration, while they had a 43 percent win rate in court.<sup>73</sup>

While you know what they say about statistics,<sup>74</sup> and about how reactive devaluation might impact what they say about these statistics,<sup>75</sup> these data do suggest that expectancy bias plays at least some role in the overwhelmingly negative perception that many have of the arbitration process.

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66. See Steven B. Caruso, *Sunshine May Be the Best Disinfectant for What Ails Securities Arbitration: A Discussion of the 2008 SICA Empirical Study of Fairness*, 1685 PRAC. L. INST./CORP. 233, 260 (2008); U.S. GEN. ACCT. OFF., *SECURITIES ARBITRATION: HOW INVESTORS FARE* 6 (1992) [hereinafter 1992 GAO Report].

67. 1992 GAO Report, *supra* note 66, at 35, 49.

68. Fair Arbitration Now, *Employment Arbitration*, <http://www.fairarbitrationnow.org/content/employment-arbitration> (last visited Jan. 23, 2010).

69. Statement of Richard Naimark, *supra* note 60, at 124.

70. Studies demonstrate that employee win rates in all fora, both judicial and arbitral, are highly dependent upon the legal theory of the claim and were much lower when the case involved a violation of a civil rights statute. Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 111 (2003).

71. Low-income employees appear to have much lower success rates in arbitration than higher earners. Rutledge, *supra* note 56, at 583.

72. *Id.* at 582-83.

73. THE NATIONAL WORKRIGHTS INSTITUTE, *EMPLOYMENT ARBITRATION: WHAT DOES THE DATA SHOW?*, [http://www.workrights.org/current/cd\\_arbitration.html](http://www.workrights.org/current/cd_arbitration.html) (last visited Jan. 23, 2010).

74. “Figures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often apply with justice and force: ‘There are three kinds of lies: lies, damned lies, and statistics.’” MARK TWAIN’S OWN AUTOBIOGRAPHY: THE CHAPTERS FROM *THE NORTH AMERICAN REVIEW* 185 (Michael J. Kiskis ed., 1990). For a critique of the value of “win rate” statistics in the context of securities arbitration, see Laurence S. Schultz, *Storm Clouds in Arbitration*, 1685 PRAC. L. INST./CORP. 351, 353-54 (2008) (cautioning that “annual win rates do not necessarily reflect true economic victories for the claimant,” and that “what is fair, and what is a reasonable win rate or a reasonable recovery rate, are subjective and may be argued at length”).

75. “Reactive evaluation,” also sometimes referred to as source devaluation or opposition bias, is a psychological process by which information is devalued, discounted or ignored, or perceived as inaccurate simply because it was proposed or produced by an “opponent.” See Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 28-29 (Kenneth J. Arrow et al. eds., 1995).

## IV. CONCLUSION

Regardless of the “objective” reality of the fairness or lack thereof of arbitration, negative perceptions of the process already are “transform[ing] the reality faced by policy-makers”<sup>76</sup> and influencing the development of the law regarding arbitration. For example, the AAA no longer will accept certain new consumer debt collection arbitration filings,<sup>77</sup> and, as part of a settlement with the Office of the Minnesota Attorney General, the National Arbitration Forum will stop accepting or participating in the processing or administration of any new consumer arbitrations.<sup>78</sup> Additionally, Bank of America and J.P. Morgan Chase have dropped mandatory arbitration for credit card customers, and, in Bank of America’s case, for bank account holders.<sup>79</sup> Other credit card companies, such as American Express, have indicated that they are monitoring their arbitration practices.<sup>80</sup>

While anti-arbitration advocates cheer these developments and continue their campaigns to further restrict the use of arbitration, others predict that limiting access to arbitration may in some instances be limiting access to justice for many claimants, in many settings.<sup>81</sup> Consumers and employees with modest financial claims may find it impossible to afford or locate counsel willing to represent them, and they may not have the time or funding for lengthy court proceedings.<sup>82</sup> Furthermore, even if arbitration remains a viable dispute resolution option, negative public expectancy bias may prevent consumers, employees, and other similar disputants from even considering its use.

As Voltaire warned, perfect is the enemy of good, and, in this situation, a favorable result in a “good” process for a consumer, employee, or franchisee may be infinitely better than little or no recourse at all.<sup>83</sup> If prohibitions or sweeping restrictions on pre-dispute arbitral requirements have even the potential to harm the very parties that anti-arbitration advocates claim to be seeking to protect, must reform be an all or nothing proposition? Even its most staunch and persistent

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76. Gross & Black, *supra* note 63, at 350.

77. Notice on Consumer Debt Collection Arbitrations, <http://www.adr.org/sp.asp?id=36427> (last visited Jan. 23, 2010) (“Matters included in this moratorium are: consumer debt collections programs or bulk filings and individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute and the case involves a credit card bill or, the case involves a telecom bill or the case involves a consumer finance matter.”).

78. Press Release, Office of the Minnesota Attorney General, National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson: *Swanson Also Wants Congress to Ban “Fine Print” Forced Arbitration Clauses* (July 20, 2009), <http://www.ag.state.mn.us/Consumer/PressRelease/090720NationalArbitrationAgremnt.asp> (last visited Jan. 23, 2010).

79. PUBLIC CITIZEN, FORCED ARBITRATION, *supra* note 49, at 2.

80. *Id.*

81. *See, e.g.*, Cole & Frank, *supra* note 51, at 34; Gross & Black, *When Perception Changes Reality*, *supra* note 63, at 354; Maltby, *supra* note 70, at 118; Rutledge, *Who Can Be Against Fairness?*, *supra* note 40, at 280-81.

82. “The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims. Consumers and employees bring claims in arbitration that would not be economical to bring in litigation.” Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840 (2008).

83. *See, e.g., id.*

critics do not recommend that arbitration be abandoned under all circumstances.<sup>84</sup> The process for reform should model the very values that arbitral reformists claim to seek and should provide an objective, unbiased, and deliberate evaluation of all available data, regardless of its source. Decision-makers should eschew, even denounce, the polemic rhetoric lest it reinforce any public negative expectancy bias and potentially deny access to justice to those most in need.

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84. See, e.g., Sternlight, *supra* note 32, at 105-06.