The Suspicious Existence of the “Repeat Player Effect” in Mandatory Arbitration of Employment Disputes

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I. Introduction

For as long as arbitration has existed in the realm of alternative employment dispute resolution there have been those who have taken issue with what they perceive to be its inherently flawed structure. Much of this criticism leveled at the process itself has been directed at the almost mythical “repeat player effect,” which has achieved that status by virtue of empirical studies that are as fraught with holes and opportunities for alternative explanation as they are with viable and supportable conclusions,[1] as well as by a perpetual misunderstanding of the breadth of the term.[2] Ultimately, it is undeniable that there are elements of the arbitration process that can be manipulated in such a way as to create an advantage for those who know how to play the game. Such a realization would appear to make the repeat
player effect undeniable. Nevertheless, the Supreme Court has demonstrated unwavering support for mandatory employment arbitration in its current form, implicitly refusing to recognize the potential for unfair advantages for more resourceful repeat players, like employers, who are able to force employees to arbitrate claims as a non-negotiable condition of employment. The Court’s stance has frustrated those who believe strongly that the process must be reformed if it is to be properly viewed on the same footing as the court system—i.e., as an impartial forum—and prompting blatant contravention of U.S. Supreme Court precedent using state-specific backdoor channels.

Unlike most areas of the law, the legal community’s understanding of the repeat player effect has remained relatively unchanged since the inception of the idea. This is not to say that modern scholars have not devoted time and energy to this area of the law or that it is not worth exploring, it is just that when Marc Galanter first gave us the framework for the “repeat player” and “one-shotter” dichotomy in his classic article on the limits of legal change—a dichotomy that was initially used to define the then-new “repeat player effect” in mandatory employment arbitration in some of the first articles on that subject—he basically got it right. Not to be glib, but the fact is we intuitively know that one with frequent recourse to any repetitive process has an advantage of some kind. While Galanter explored these purported advantages in the context of traditional litigation and repeat player plaintiffs, the observations he made, based on extensive empirical study and analysis, are just as applicable—if not more applicable—to repeat player defendants (e.g., employers) in mandatory employment arbitration settings because of their ability to structure the process to their advantage. And yet, despite all of this well-worn analysis, there are still those who deny that there is any advantage for repeat players in employment arbitration. This phenomenon, coupled with judicial attitudes driven by the “pre-emptive FAA and a mightily pro-arbitration U.S. Supreme Court,” make the topic one well worth exploring as it is apparent that even without the ability to prove the repeat player effect exists to the satisfaction of the entire legal community, if it does exist, it does not look like it is going anywhere anytime soon.

Part II of this article will explore the history of arbitration in the United States, with a focus on employment arbitration and its judicial treatment in cases from past to present. Part III of this note will examine the essential question—does the repeat player effect exist—using empirical data to attempt to answer that question from an objective standpoint, but ultimately arguing that the particular characteristics of mandatory employment arbitration, that employers are able to manipulate to their advantage, effectively create what has been described as the repeat player effect. Part IV will describe in more detail the problems alluded to in the previous section, and will explore how judicial disregard has prompted creative lawyering and even creative adjudicating—particularly in California state courts. Part V will address the current state of affairs concerning the repeat player effect and discuss what is being done, from a more general perspective, to address the inherent problems of mandatory employment arbitration. Part VI concludes.

II. History
Modern arbitration jurisprudence traces its history to 1925, when Congress passed the FAA.\[11]\ Prior to that time, common law courts in both England and American would not enforce agreements to arbitrate, believing that they “ousted” jurisdiction from the courts at a time when dockets still thirsted for cases.\[12]\ The FAA was passed in large part to overcome this prevailing sentiment; it gave arbitration agreements staying power by tying their existence to mechanisms used to invalidate other contracts.\[13]\ While arbitration was initially recognized by many as the “quicker, cheaper, and less adversary” means for people to resolve their disputes, as it was intended to be, its introduction to and use in employment disputes was met with immediate skepticism.\[14]\ Initially, the potential for abuse was not as troubling to critics because of the relative infrequency of employment arbitration. After Gilmer,\[15]\ however, “the milestone case establishing the validity of mandatory arbitration clauses in employment agreements,”\[16]\ the court showed its hand and employers paid attention; they had a green light. This is where the trouble really started. The court’s openly permissive attitude towards mandatory arbitration clauses in employment agreements coupled with the reality of employer control in structuring dispute resolution protocols created the almost unavoidable potential for abuse.\[17]\ The Court’s sanctioning of mandatory arbitration clauses in arbitration agreements was not the end of the fight, however—not by a long shot. While it is true that most circuits and state courts have “obediently toed the line drawn by Gilmer,”\[18]\ there have been some notable exceptions.\[19]\ In Cole v. Burns Intl. Security Servs.,\[20]\ the D.C. Circuit created a set of positive factors that must be present for an employment-related arbitration agreement to be enforceable against a Title VII claim. The court also held that agreements to arbitrate must not “require employees to pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the arbitration forum.”\[21]\ Effectively, what Cole did was react against the broad grant in Gilmer by indicating to employers that they cannot do whatever they want—Cole blazed the trail for those who saw the potential for inequity in employment arbitration and wanted to regulate the process in such a way as to avoid that potential. Notably, in Armendariz v. Foundation Health Psychcare Services, Inc.,\[22]\ the California Supreme court seized upon the Cole factors directly, finding that the agreement at issue in the case violated two of the five, and therefore declined to compel arbitration. Armendariz is significant because it signaled the retreat of mandatory employment arbitration opponents into the safe haven of state contract law,\[23]\ and “honored . . . unconscionability . . . into a weapon that could be used against [such agreements].”\[24]\ This is a strategy that would be duplicated by other jurisdictions similarly frustrated by the unwaveringly pro-arbitration Supreme Court.

III. The Essential Question

It is funny to think about lawyers and courts going to such great lengths—openly contravening Supreme Court precedent, for example—to curb a phenomenon that may
Like Holocaust denial, the barefaced audacity of some individuals’ steadfast conviction in what simply cannot be true perpetuates a stasis that precludes consensus. So why can we not just say conclusively, once and for all, that the repeat player effect exists? The answer lies in-part in the province of available empirical data and partially in the realm of definitional misunderstanding; there are those who believe that the repeat player effect simply does not exist, and that there is no inherent unfairness in employment arbitration and that this fact can be verified statistically, and there are those who believe that the “repeat player effect”—defined specifically as the collusive, financially motivated employer bias of a nominal neutral—does not exist.

It would seem that a statistical argument is simply untenable, but there are legal scholars who refuse to acknowledge the existence of the repeat player effect as long as there are unrebuttable arguments on the other side of the equation. As long as alternative explanations exist, the repeat player effect ostensibly will not—at least not in the minds of these individuals. As for those who deny the existence of an effect resulting from the personal bias of the arbitrator, their argument, while specious in its own right, is more credible because it cannot be affirmatively disproven—i.e., one cannot get into the heads of arbitrators finding in favor of employers to determine whether their decisions were improperly influenced. Ultimately, regardless of the basis for one’s denial, the fact of the matter is repeat players in employment arbitration—i.e., employers—do perform consistently and significantly better than one-shotter employees. This is a phenomenon that merits consideration in at attempt at explanation.

A. The Statistical Argument & Its Opponents

Lisa Bingham began to identify a repeat player effect using empirical data in a series of studies in the 1990s. Bingham found that “[e]mployees will win less frequently and/or will recover a lower proportion of their claims . . . in cases involving repeat player employers.” Bingham generally noted “statistically significant” differences in employee success depending on whether or not the employer was a repeat player. In regards to her findings, Bingham said, “[f]or lack of better terminology, let us call this the repeat player effect.”

Subsequent studies have confirmed Bingham’s findings. For example, a more recent study from an article published in 2011 showed that the employee win rate with repeat employers was roughly half what it was with “single shot” employers, and that the average damage award dropped from $27,039 to $7,451 in cases with repeat player employers. Outside the employment arbitration context, the non-profit organization Public Citizen released a report in 2007 that revealed nearly 95% win rates in mandatory credit-card company arbitrations. Granted, the Public Citizen study allows for even more alternative explanations, but it is noteworthy that all empirical studies effectively point in the same direction, seeming to evidence a clear advantage for repeat players in arbitration.

As compelling as this evidence is, however, it has not proven resistant enough to alternative explanations to allow for conclusive identification and acceptance of the
repeat player effect on this basis. For example, some argue that the empirical data is ultimately misleading (and therefore the repeat player effect does not actually exist) because it includes a large proportion of claims of lower-paid employees who may choose the process even for frivolous claims, because it is often free.[35] Dissenters further point out that it appears employers who have adopted employment arbitration have also institutionalized other dispute resolution procedures that screen out the strongest cases, leaving only the weakest to proceed to arbitration.[36]

Lawyers too play a role in the statistical counter-argument.[37] First, scholars note that the vast majority of employees to whom employment arbitration will eventually apply will be modestly compensated blue and pink collar works who can generally not afford to pay lawyer hourly rates.[38] Therefore, in order for them to obtain legal representation, they must have a case that a lawyer wants to take on a contingent fee basis.[39] Unfortunately for these employees, good lawyers, who correctly estimate the cases’ truth worth—systematically less than a jury award for wrongful dismissal—often may not take employment arbitration cases on this basis.[40] The point is, employees—if they are represented at all—may be represented poorly in the “vast majority of cases”[41] by lawyers who might be “one-shotters” themselves. In fact, Lisa Bingham has speculated that “only the most successful individual plaintiffs’ lawyers will emerge as repeat players in employment arbitration, and . . . will do so generally representing highly compensated white collar employees who are willing to pay hourly rates.”[42] Significantly in the minds of people who buy the statistical counter-argument, researchers have been unable to find the same significant disparity—the “repeat player effect,” if you will—when comparing higher-paid employees’ claims. This tends to suggest that employment arbitration empirical studies are awash in frivolous claims brought by bad lawyers who skew the statistics.[43]

In sum, those who counter on a statistical basis seem to believe that apples-to-apples, employment arbitration—whether mandatory or not—is impartial, and that employers receive no discernible advantage from having played the game before. Logic would seem to defeat this premise; after all, it makes sense to think that the more one does something, the better he or she becomes at it. This would seem to be especially true where one is able to prevent his adversary from practicing...or really from even learning the rules of the game.

B. The Definition Argument

Denying the existence of the repeat player effect by restricting the definition to an unverifiable phenomenon is a clever way to lend credibility to one’s argument, but ultimately that argument is unsustainable nonetheless. True, one might credibly determine that the repeat player effect, defined as improper arbitrator bias, does not exist. Yet, if employers enjoy advantages in spite of arbitrator impartiality as a result of their repeated engagement in the arbitration process then what is the point of making such an argument?

When the D.C. Circuit in Cole “discussed for the first time at some length the issue
posed by repeat player employers in non-union employment arbitration,“[44] it did not confine its discussion to the “possibility of arbitrators systematically favoring employers because employers are the source of future business”[45], in fact, the only time the court actually used the term “repeat player” was when describing the “troubling” implications of not having “the structural protections inherent in the collective bargaining context . . . in cases involving mandatory arbitration of individual statutory claims.”[46]. The court’s fear was that the employer, as the only repeat player in the case, might “gain[] some advantage in having superior knowledge.”[47] Arbitrator bias was unlikely, the court concluded[48]; what was actually troubling was the potential for “advantage in having superior knowledge.”

C. Verifiable vs. Nonverifiable Basis for Denial

Ultimately, the basis on which one denies the existence of the repeat player effect is either verifiable or nonverifiable.[49] Verifiable unfairness is unfairness a court can identify when it considers a challenge to an arbitration award.[50] Nonverifiable unfairness is unfairness a court cannot identify, like “repeat player bias” for example.[51] This distinction is at the heart of ongoing confusion in the legal community over whether the “repeat player effect” actually exists.[52] Repeat player bias can never be proven, but a more general and encompassing repeat player effect ostensibly has been.[53] Fixing the structure of mandatory employment arbitration in such a way as to mitigate the opportunities for verifiable unfairness might help to indirectly address nonverifiable unfairness. This is not to say that if the structure of mandatory employment arbitration is improved that, all of a sudden, the presumed incentive for arbitrators to favor employers will disappear, but improving the structural integrity of the process will serve to cure the advantages that we currently know exist and that we have the ability to address.

IV. The Structure of Mandatory Employment Arbitration:

A Breeding Ground for Inequity

When Lisa Bingham first began compiling statistics in an attempt to prove the existence of a repeat player effect she did so against the backdrop of regulations aimed at combating whatever issues—verifiable or nonverifiable—that existed in arbitration.[54] The fact that regulations were being concurrently administered was an implicit acknowledgement of the need for reform in the arbitration process. Looking in from the outside, it was clear that employees in mandatory employment arbitration were practically bereft of nearly all of the protections enjoyed by union employees whose dispute resolution policies were dictated by collective bargaining agreements that had actually involved bargaining. Nobody was looking out for the employees initially, and employers took notice—and then they took advantage.[55]

Mandatory employment arbitration clauses or agreements were—and for the most part are—unilaterally drafted contracts of adhesion that demand confidentiality and do not require written records or decisions, or any kind of “mutuality” between the parties. These are the fundamental elements of arbitration that, either by nature or
through manipulation, create advantages for employers. These concerns were at the forefront of Cole.[56] With little success at the Supreme Court level in invalidating mandatory employment agreements,[57] and with little success at any federal level in convincing courts of the existence of a more ethereal repeat player bias,[58] these concerns were left unaddressed. In order to rectify the problem, courts have shown a willingness to “retreat[] to the only province in which [they are] sovereign--state law”—i.e., a willingness to use the fundamentally unfair elements of mandatory arbitration agreements to attack them at their core...“upon such grounds as exist at law or in equity for the revocation of any contract.”[60]

A. Adhesion

The fact that arbitration agreements are contracts of adhesion has always drawn suspicion because of employees’ inability, and unwillingness,[61] to negotiate the terms. Significantly, in the face of the courts’ refusal to acknowledge the potential for repeat player bias, adhesion has morphed into the procedural half of an unconscionability defense that has found some success, particularly in California state courts.[62] As to the second half of the defense, substantive unconscionability, under Armendariz at least, “substantive unconscionability can be established by ‘overly harsh’ or ‘one-sided’ terms in an agreement.”[63] With the “large, callous corporation on one side, versus the relatively powerless, isolated employee on the other,”[64] and with the former effectively forcing terms on the latter by incorporating them in a take-or-leave it employment contract, substantive unconscionability is not difficult to find in this context.

B. Confidentiality & Lack of Written Opinion or Records

The fact that employment arbitration proceedings are confidential and no written records are typically created posed serious issues for those attempting to perform empirical studies, as they had a hard time finding statistics to use. This fact is also behind some of the most ardent criticism of mandatory employment arbitration.[65] The argument is that with arbitration proceedings effectively veiled in a cloak of secrecy, employers are able to maintain an “institutional memory of past arbitral rulings,”[66] while employees are basically left to take shots in the dark.[67] Some courts have taken these concerns to the next level, abrogating confidentiality clauses that “unconscionably favor” employers;[68] in this way, confidentiality, like adhesion, has morphed from part of a more ethereal “repeat player bias/effect” defense to part of a far more successful and specific state-contract-law-driven unconscionability defense.

C. Mutuality

As to mutuality, this complaint typically concerns the employer’s unilateral ability to select which claims are arbitrated and which are litigated. At least one court has described mutuality as “the paramount consideration in assessing unconscionability.”[69] Significantly, that court was a California state court; “substantive unconscionability, premised as it was on mutuality of remedy, is a
finding peculiar to California courts.”[70] The fact is that most commentators are slightly more forgiving as to mutuality—in fact, some consider asymmetry a good thing because it excludes from arbitration disputes that could be “better resolved” in court.[71] Generally, while this practice might not draw so much criticism when used in contracts between two sophisticated businesses, its use in contracts with “little guys”—e.g., consumers and employees—raises fairness concerns if not outright objection.[72]

V. Current State of Affairs

Recently, some state courts have begun to follow California’s lead and retreat into their own state law to invalidate pre-dispute adhesive agreements to arbitrate in apparent contravention of Supreme Court precedent.[73] These courts tend to cite California (and Ninth Circuit) cases often in support of their arguments.[74] Others courts have been more obedient.[75] Interestingly, the courts that have toed the line seem decidedly more skeptical about any potential for employer advantage, and wholly unconvinced about the existence of a “repeat player effect,” which one court defined as “an advantage . . . as a result of . . . repeated presence before the [arbitrators].”[76] At first glance, it would appear that this concern was focused merely on prior experience, but what the court in question was actually referring to was the plaintiffs’ “vague suggestions of potential bias,” which the court ultimately rejected as “speculative at best.”[77] What this suggests is that the term “repeat player effect” is still widely misunderstood in legal circles—although it is hard to say that conclusively because the repeat player effect does encompass “potential bias” but only as a small, nonverifiable part, of a much larger verifiable phenomenon. It is difficult to say how this misunderstanding of the term persists, but as long as the repeat player effect improperly understood to mean only repeat player bias, it will be difficult to get support for reform as there can never be conclusive evidence of faux neutral arbitrator bias.

The fact is there are very real problems with mandatory employment arbitration that have been recognized by the legal community.[78] And yet, because of the stance taken by the Supreme Court, these problems cannot be addressed in any meaningful way.[79] True, opponents have had success on the state and federal level, but essentially what they are doing is circumventing existing Supreme Court precedent.[80] Aside from undermining the authority of the judicial hierarchy, and the credibility of the California court, this approach also encourages forum-shopping among employers.[81] The real problem, however, “is that mandatory employment arbitration, as cases such as Mercuro demonstrate, is a problem which requires a more satisfactory solution than the U.S. Supreme Court or the legislature appear willing to provide.”[82] In other words it is not so much the way that courts have attempted to circumvent Supreme Court precedent that is the problem, but the fact that they feel the need to do so.

The Supreme Court has taken measures recently to preserve its own public image,[83] and yet it refuses to take the action required to preserve the public image of an institution that it lead the way in elevating to its present station.[84] The integrity
of the mandatory employment arbitration is in question. It has become institutionalized by repeat players at the same time that it has become a lucrative business, at least for some [85]. Even if you completely reject the argument of potential bias driven by financial incentives, the repeat player effect lives on as the monopolization of arbitration knowledge by employers, precipitated by the base elements that make arbitration what it is [86]. There is a serious problem if the very components of mandatory employment arbitration sanctioned and endorsed by the Supreme Court are sufficient to invalidate arbitration clauses or entire agreements in various state courts.

At the moment, those who wish to see mandatory employment arbitration procedures adjusted to account for inherent repeat player advantages have little choice but to wait. The Supreme Court does not appear to be poised for an about-face anytime soon [87]. Neither may it be prudent to hold out for a legislative fix [88]. The Arbitration Fairness Act has been introduced multiple times in the House and Senate, but to no avail. Even California’s attempts to enact a legislative cure have encountered resistance [89], although there has been more success there than elsewhere; today, California has a statutory requirement that arbitral organization make public disclosures of information that might indicate personal favoritism toward repeat players, as well as potential bias on the part of the provider organization with which the arbitrators are associated [90]. In response to criticism, some arbitration associations have even made attempts to regulate themselves [91]. All-in-all, however, the problem remains—driven largely by the stance of the country’s supreme legal body, the Supreme Court.

VI. Conclusion

The repeat player effect is real—there, I said it. The only reason why any confusion or uncertainty persists is because some individuals fail to consider the breadth of the problem—people say effect but what they mean is bias. The greater, empirically verifiable phenomenon of consistent employer advantage—the real repeat player effect—is swept up in a theory which, by definition, cannot be proven. Of course when the existence of a phenomenon is premised on proving the unproveable—or the nonverifiable—consensus cannot exist, because believing in the repeat player effect becomes something of an act of faith, or conviction. Does repeat player bias exist? No, maybe, sometimes... While that question does matter, the “effect” is bigger than that, and that is what ultimately demands a response—i.e., the fundamentally unfair components of the mandatory employment process itself.

Unfortunately, given the stance of the Supreme Court, it does not appear that anything is going to change anytime soon. To compensate, courts have retreated into their last bastion of sovereignty and plaintiffs have followed suit. These outcomes, these backdoor remedies, feel just [92], but the irony is that this justice flies in the face of the nation’s supreme authority [93]. Ultimately, in the face of the court’s stubborn support of mandatory employment arbitration in its current form, that might be the only way to provoke change. As is often the case in the law, only time will tell.
See Michael Schneidereit, A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements, 55 Hastings L.J. 987, 998 (2004) (“Unfortunately, as seems to be the case with many of the knottiest legal problems, such [empirical data] is spotty and inconclusive, tending to support both sides of the debate. Data can be apparently assembled either to show that arbitration is clearly unfair, or the exact opposite, depending on how it is spun.”).

There are those who confine the term to an employer advantage allegedly precipitated by improper arbitrator bias. I maintain that the repeat player effect should be understood to mean any advantage—whether a verifiable structural advantage resulting from familiarity with the legitimate and “manipulable” aspects of the arbitration process, or an nonverifiable, improper advantage resulting from financially-motivated arbitrator bias.

See Schneidereit, supra note 1, at 1000 (“[T]he Supreme Court is not the place to look for acknowledgment of the problem [of unequal bargaining power in employment arbitration]. Having built its castle in the sky, it is unlikely that the Supreme Court will reverse its position on employment arbitration in the near future.”).

See infra Part IV (discussing how California courts have used state contract law—specifically the doctrine of (substantive) unconscionability—to invalidate arbitration agreements that would formerly have been attacked directly with allegations of the repeat player effect).


See, e.g., Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 Employment Rts. & Emp. Pol’y J. 189,196 (1997) (noting that, in light of Galanter’s analysis, “[i]t is not surprising . . . that employers as repeat players might use [their] experience to structure their relationships and transactions with employees to better advantage.”

“Galanter observe[d] that most litigation [was] brought by repeat player plaintiffs against one-shotter defendants (landlord-tenant, creditor-debtor, prosecutor-accused criminal, and IRS-taxpayer being salient examples).” Bingham, supra note 6, at 195. Prior to the explosion of employment arbitration, repeat player defendants were comparatively infrequent.

“[Galanter] identified a collection of advantages repeat players will generally enjoy over one-shotters, including: (1) experience leading to changes in how the repeat player structures the next similar transaction; (2) expertise, economies of scale, and access to specialist advocates; (3) informal continuing relationships with institutional incumbents . . . .” Bingham, supra note 6, at 195. “One-shotters, on the other hand: (1) have more at stake in a given case; (2) are more risk averse; (3) are more interested in immediate over long-term gain . . . (5) are not able to form continuing relationships with . . . institutional representatives; (6) cannot use the experience to structure future similar transactions; and (7) have limited access to specialist advocates.” Id.

See infra note 17. Galanter’s repeat player plaintiffs, like creditors for example, brought their claims in
courts where they would have no ability to affect the process from a structural standpoint. Employers, on the other hand, can structure the entire employment arbitration process, picking and choosing only the most advantageous elements.


[12] Id. at 991–92.

[13] In the FAA, arbitration agreements were declared “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. § 2 (1994).

[14] See Erin O’Hara O’Connor et al., Customizing Employment Arbitration, 98 Iowa L. Rev. 133, 137–38 (1997) (‘Although employment arbitration promises a quicker, cheaper, and less adversary means for employees to resolve their disputes with employers, critics charge that the . . . the employment arbitration system is rigged in favor of employers, and that employers utilize arbitration to effectively deprive employees of their rights.’); see also id. at 220 (‘Employment arbitration is still in its infancy, but . . . . there are emerging patterns of . . . significantly different outcomes based on whether an employer is a repeat player . . . .”).


[16] Schneidereit, supra note 1, at 993.

[17] See O’Hara O’Conner et al., supra note 14, at 204:

Most [employment arbitration procedures] were developed by human resources staff and legal counsel without employee input. About 75% of the plans made arbitration a condition of employment. Ten percent of the plans prohibited employees from using outside counsel. Almost 15 percent of the plans provided for unilateral employer selection of the arbitration. All of this provides empirical evidence for [Marc] Galanter’s proposition that repeat players have strategic superiority in that they can structure a transaction to their advantage.

[18] Schneidereit, supra note 1, at 995.

[19] Id.


[21] Id. at 1482.

[22] 6 P.3d 669 (Cal. 2000). California has always been at the forefront of the reactionary movement implicated by Cole, and still is—to the extent the movement still exists. In fact, the West Coast, generally, has exhibited a less permissive attitude towards mandatory arbitration clauses in employment
agreements, as evidenced by the post-Cole trio of Ninth Circuit cases in which the court “attempted to salvage what it could from Gilmer’s [sic] assault upon an employee’s right to a jury trial.” Schneidereit, supra note 1, at 995. The cases are Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999); Circuit City Stores v. Adams, 194 F.3d 1070 (9th Cir. 1999); and Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998). Schneidereit, supra note 1, at 995–96. During its 2000 term, the Supreme Court granted certiorari in Circuit City to resolve the conflict between the Ninth Circuit and all circuits. Id.

[23] The Supreme Court cannot generally intrude on state law.

[24] Schneidereit, supra note 1, at 1002.


[Pro]cedural justice research and theory, along with data that have emerged . . . have raised concerns about the existence and consequences of structural bias among embedded neutrals. However, it has been relatively easy for courts to brush aside these objections as the overblown fantasies of people who like to complain or the frivolous objections of those who are attempting to avoid an inevitable loss on the merits.

[27] See generally Bingham, supra note 6.

[28] It is worth noting that even if there was no empirical or statistical basis supporting the idea of “unfairness” in mandatory employment arbitration, there would likely still be a widespread perception of unfairness. Some scholars contend that “[i]n dispute resolution, the perception of a fair process can be as important as the reality of impartiality.” Bingham, supra note 5, at 215 (emphasis added); see also Welsh, supra note 26, at 534 (“[I]f people perceive a dispute resolution or decision-making process as procedurally fair, they also are more likely to perceive the outcome as substantively fair.”).


[31] Id. at 213 (emphasis added). Notably, Bingham had found “no evidence of a systematic pro-employer bias” in an earlier one-year smaller sample of 1992 AAA Commercial Arbitration Awards. See Lisa B. Bingham, Is There a Bias in Arbitration of Nonunion Employment Disputes? An analysis of Actual Cases and


Public Citizen asserted that the favorable win rates were the result of cozy relationships between arbitral firms and credit-card companies. See Welsh, supra note 26, at 527. Academics and analysts defending the overall integrity of arbitration, however, pointed out that most of the cases included in Public Citizen’s analysis were collections cases, in which the consumer almost certainly owed the amount claimed, which would account for the high win rate. Id. at 527–28. Defenders also argued that the evidence further suggested that the discrepancy was due to effective case screening by repeat businesses rather than arbitrator bias. Id. at 529. The alternative theories of those seeking to discredit the Public Citizen study are indicative of the typical back-and-forth empirical data debates that take place in the context of the repeat player effect; although, admittedly, there appears to be more indisputable evidence supporting the counter arguments in the case of debtor arbitration, or at least a more feasible basis for disagreement.

[35] See Welsh, supra note 26, at 530.

[36] Id.

[37] See Bingham, supra note 6, at 197–202.

[38] Id. at 198–99.

[39] Id.

[40] Id. at 200.

[41] See text accompanying note 37. It follows that if “modestly compensated blue and pink collar employees” are the “vast majority of employees to whom arbitration will eventually apply,” that they will also be involved in the “vast majority” of actual arbitration cases.

[42] See Bingham, supra note 6, at 200.

[43] There is evidence to suggest that even less able lawyers may be unlikely to take arbitration cases. See Bingham, supra note 6, at 200. “Anecdotal evidence suggests that certain plaintiff’s lawyers will take cases on a contingent fee basis, cases which they know are losers on the merits . . . [just to settle] for the nuisance value of the lawsuit.” Id. However, to avoid a reputation for settling that might encourage claims, employers generally do not settle employment arbitration cases as readily, discouraging even less able lawyers who are known for using “nuisance” tactics to make a quick buck. Id.

[44] Bingham, supra note 6, at 191.

[46] Id. at 1476.

[47] Id.

[48] See Id. at 1485 (“Corrupt arbitrators would not survive long in the business . . . . there is little reason for concern.”).


[50] Id. at 562–63. “For example, the arbitration clause in Hooters of Am., Inc. v. Phillips [173 F.3d 933 (4th Cir. 1999)] required arbitrators to be selected from a list compiled by Hooters.” Id. “This method of arbitrator selection seem[ed] likely to result in different outcomes than would result in courts . . . and was apparent on the face of the arbitration agreement.” Id.

[51] Id.

[52] See supra note 2 and text accompanying.

[53] Although, of course, not to the satisfaction of everyone in the legal community. See supra Part III(A).

[54] See Bingham, supra note 6, at 204–05 (“Effective January 1, 1993, the AAA implemented its Employment Dispute Resolution Rules; these were a new set of rules for the arbitration of nonunion employment disputes.”).

[55] See note 17 and text accompanying.

[56] See Bingham, supra note 6, at 192–93 (“The [Cole] court observed that a lack of public disclosure of arbitration awards may systematically favor companies over individuals . . . . [as well as] the problem that employers may structure arbitration to their advantage unilaterally.”).


[58] See Cole, 105 F.3d at 1485 (noting that there are “several protections against the possibility of arbitrators systematically favoring employers because employers are the sources of future business,” and that ultimately “there is little reason for concern”).

[59] See Schneidereit, supra note 1, at 1005. Schneidereit goes on to say that “[t]he difficult question is whether [this strategy] is apposite.” Id. That question is taken up infra Part V.


[61] See Schneidereit, supra note 1, at 996 (“[Employees] are unlikely to challenge the inclusion of an arbitration clause, for they are at the honeymoon stage of their relationship with their employer and do not wish to chill any feet.”).
See, e.g., Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669 (2000); Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671 (Cal. Ct. App. 2002); see also Schneidereit, supra note 1, at 996 (“[T]he fact that a mandatory arbitration agreement is a contract of adhesion does not, by itself, render the agreement unenforceable. Nevertheless, a finding that a mandatory arbitration agreement is a contract of adhesion provides valuable ammunition for a defense of procedural unconscionability.”).

6 P.3d at 690.

Schneidereit, supra note 1, at 991.

See Bingham, supra note 6, at 193 (“The [Cole] court observed that a lack of public disclosure of arbitration awards also may systematically favor companies over individuals. The court noted problems with building a case for a pattern or practice of discrimination if all the complaints are arbitrated because the awards are confidential and not published.”).

This is an advantage that unions shared as well, but one that is obviously not shared by one-shotter plaintiffs.


[If the company succeeds in imposing a gag order on arbitration proceedings, it places itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, the company accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contracts.

See, e.g., Davis v. O’Melveny & Myers, 485 F.3d 1066, 1078 (2007). The clause in Davis precluded even mentioning to anyone “not directly involved in the mediation or arbitration . . . the content of the pleadings, papers, orders, hearings, trials, or awards in the arbitration.” Id. The court noted that “[s]uch restrictions would prevent an employee from contacting other employees to assist in [arbitrating] an employee’s case,” and that this inability “to mention even the existence of a claim to current or former [employees] . . . would handicap if not stifle an employee’s ability to investigate and engage in discovery.” Id. The confidentiality clause, the court determined, was “written too broadly.” Id. at 1079.

See Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671, 678-79 (Ct. App. 2002) (noting that employer’s choice of arbitral forum resulted in only eight available arbitrators in the relevant district and finding that the potential for repeat-player effect to influence the decision was one factor in its decision to strike the arbitration clause). O’hara O’connor et al., supra note 14, at n.129.

Schneidereit, supra note 1, at 991. That this finding is peculiar to state courts is only further evidence of California’s unique and distinct role at the forefront of the employees’ rights movement.

See Drahozal, supra note 25, at 565.

See id. at 540–41.
See, e.g., Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593; Schnuerle v. Insight Commc’ns, 376 S.W. 3d 561 (holding “[i]n light of the substantial potential adverse consequences of the confidentiality provisions and the absence of countervailing benefits . . . that such provisions and unconscionable and unenforceable.”).

See Bragg, 487 F. Supp 2d at 610 (citing Mercuro to support finding of unconscionability in confidentiality provision of arbitration agreement).


See id. at 126–27.

See id.

See Schnuerle, 376 S.W. 3d at 579 (“The advantages repeat participants possess over ‘one time’ participants in arbitration proceedings are widely recognized in legal literature and by federal courts.” (quoting Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 99 (2000)).

See text accompanying note 3.

See Schneidereit, supra note 1, at 1005–06 (“The most apparent problem with the California approach is that it likely contravenes the FAA as interpreted by the U.S. Supreme Court in Perry, Doctor’s Associates and Gilmer.”).

Id.

Id. at 1005.

Id. at 1005.

See Welsh, supra note 26, at 496–98. In Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009), the Supreme Court “took the extraordinary measure of announcing that West Virginia Supreme Court Justice Brent Benjamin had violated the Due Process Clause of the Fourteenth Amendment when he refused to recuse himself.” Welsh, supra note 26, at 496. “Writing on behalf of the majority of the Court, Justice Kennedy detailed the nearly $3 million in campaign contributes that had been directed to Justice Benamin’s campaign by defendant A.T. Massey’s board chairman and principal officer,” among a parade of other questionable associations that justified the action taken. Id. at 496–97.

See Welsh, supra note 26, at 506:

Many . . . have urged that . . . alternative process are inherently superior to – or at least no worse than – those offered by courts. The U.S. Supreme Court has clearly aligned itself with this side of the debate. Indeed, with its arbitral and administrative law jurisprudence, the Court has encouraged both the development of embedded neutrals and deference to the decisions and settlement agreements that these neutrals produce. The court has also regularly rejected one-time players’ general claims of structural bias . . .
See Welsh, supra note 26, at 501-02 ("There are . . . instances of judges leaving the bench or retiring to become private arbitrators . . . . Very recently, the [ABA] reported than an arbitrator charged $900 per hour . . .and assessed a total fee of $400,000 after casting his vote for a pay increase for [NYC] transit workers.").

See Schneidereit, supra note 1, at 1003 ("It is troubling that the [Armendariz] court relied on typical features of arbitration to support a finding of substantive unconscionability.") (emphasis added).

See supra note 3.

Schneidereit, supra note 1, at 1000.

See Schneidereit, supra note 1, at 1000:

In February of 2002, California Senate Bill 1538 was introduced proposing to “invalidate predispute arbitration agreements between employers and employees” that related to FEHA, and to prohibit employers from requiring employees to sign mandatory arbitration agreements as a condition of employment . . . . Governor Gray Davis vetoed the bill, explaining that “in these difficult economic times I am not prepared to place additional burdens on employers by preventing them from requiring alternative dispute resolution of employment claims.”

Welsh, supra note 26, at 505.

See O’Hara O’Connor, supra note 14, at 151-52. Examples include JAMS’s Employment Arbitration Standards and the AAA Employment Due Process Protocol. Id. Both address issues pertaining to discovery rights, reasonable fees, and costs and remedies available under applicable law in disputes involving statutory rights. Id. Clearly, much has been left unaddressed.

See Schneidereit, supra note 1, at 991.

See id. at 1003.

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