

White Paper On Arbitration

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EXECUTIVE SUMMARY: WHITE PAPER ON ARBITRATION

Arbitration Generally

- The FAA preempts state law to the extent that state law conflicts with the FAA. (5)*
- In a survey of over 31,000 arbitration participants, respondents reported: arbitration was faster (74%), simpler (63%), and cheaper (51%) than litigation; arbitration resulted in a fair outcome (72%); and they were satisfied with the length of arbitration (84%). Even 61% of losers believed the process was fair and were moderately to highly satisfied with the outcome. (9)
- In 2006, 1.3% of all U.S. District Court cases went to trial—refuting the complaint that arbitration frustrates the right to a jury trial. (15, n.32)
- In a 2008 survey of senior corporate counsel: 47% report that Texas is their most active litigation jurisdiction; about 33% expect disputes to increase in 2009; 63% are least satisfied with litigation costs—20% of the largest companies spend over \$10 million in litigation costs per year. (7-8)
- Of 7000 members of ABA Section of Litigation surveyed: 78% of respondents believe arbitration takes less time than litigation, and 56% believe arbitration is more cost effective than litigation. (11)

Employment Arbitration

- Contract and Labor/Employment cases are the most actively litigated cases across most industries; the greatest increases in multi-plaintiff cases are in wage & hour and discrimination. (8)
- Most employees litigating discrimination claims are professional/managerial, with higher incomes. (12)
- Only 1 out of every 20 employees who have an employment discrimination claim against an employer is able to obtain the representation of an attorney to pursue that claim in court. (13)
- Research indicates more employees are able to gain access to justice through arbitration than litigation. (16)
- In a study comparing employment litigation with employment arbitration: claimants were more likely to win in arbitration (46%) versus litigation (34%); arbitrations were 33% faster; median monetary awards were higher in arbitration; and where claimants prevailed, median attorney fees were considerably lower in arbitration (\$69,388) versus litigation (\$149,756). (14)
- Across multiple studies, employees prevail in arbitration at an overall rate of 62%. (15)

Consumer Arbitration

- In a study of likely 2008 voters, voters favored arbitration and mediation over litigation; strongly preferred arbitration to resolve a serious dispute with a company (82%); and believed that arbitration agreements should not be removed from contracts (71%). The majority of respondents believed that if the legislature removed consumer disputes from arbitration: consumers who couldn't afford litigation would not be represented; companies would raise prices for goods/services; companies would not agree to arbitration after a dispute arose; and lawyers would benefit financially from increased litigation. (19-20)
- In consumer cases involving modest amounts of money, consumers find it virtually impossible to go to court because of litigation costs. (17)
- Courts have recognized and research indicates that consumers benefit from arbitration by way of cost savings that are passed on to consumers. (18-19)
- In a study of 34,000 consumer arbitration cases, where an arbitration fee was paid, consumers paid no fee in 99.3% of the cases, and paid a median fee of \$75 in .7% of the cases. (21)
- A report by the American Arbitration Association (AAA) shows that between January and August of 2007, consumers prevailed in 48% of cases in which they were the claimant. (23)

Class Actions

- In 2006, of all consumer claims filed in federal court under the federal Truth in Lending Act, only 17 out of 688 cases were class actions. (26)

* Refers to White Paper page number.

WHITE PAPER ON ARBITRATION

The purpose of this white paper on arbitration is to provide data with cited sources about arbitration as a recognized alternative dispute resolution method. There is no attempt in this white paper to advocate positions or interests. The white paper's sole purpose is to provide additional information about arbitration.

BACKGROUND

1. "Arbitration has been an alternative to litigation for hundreds of years. It was used as early as the thirteenth century by English merchants who preferred to have their disputes resolved according to their own customs (the law merchant) rather than by public law. Commercial arbitration in the United States antedated the American Revolution in New York and several other colonies and is widely used today. Labor arbitration became widespread during the 1940s, and now more than 95 percent of all collective bargaining contracts contain a provision for final and binding arbitration. Additionally, arbitration is used to resolve disputes in the construction industry, disputes between consumers and manufacturers, family disputes, medical malpractice claims, securities disputes, attorneys' fee disputes, disputes between non-unionized employees and their employers, community disputes, and civil rights disputes. It is even used to resolve disputes about salaries to be paid to major league baseball players."¹
2. "Arbitration originated in Roman and Canon law and was revived in the Middle Ages in European civil law systems. In the common law, arbitration has been a feature of dispute-resolution since the 14th century, if not before. Early forms of arbitration were dispute resolution procedures created and administered by trade groups - merchant or producer communities."²
3. "In England from the 17th century onward, many mercantile disputes were resolved by arbitration conducted by the merchant and craft guilds."³
4. The Texas Constitution of 1845 recognized arbitration as a dispute resolution method.⁴

¹ S. B. GOLDBERG, F. E. A. SANDER, & N. H. ROGERS, *ARBITRATION, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 233 (3rd ed. 1991).

² Katherine V. W. Stone, *Arbitration - National*, U. of California, Los Angeles School of Law, Public Law & Legal Theory Research Paper Series 2 (Research Paper No. 05-18); *see also* KATHERINE V. W. STONE, *PRIVATE JUSTICE: ALTERNATIVE DISPUTE RESOLUTION AND THE LAW* (Foundation Press, N.Y. 2000).

³ Stone, *Arbitration-National*, at 2.

⁴ TEX. CONST. OF 1845, art. VII, § 15 ("It shall be the duty of the Legislature, to pass such laws as may be necessary and proper, to decide differences by arbitration, when the parties shall elect that method of trial.").

5. “In 19th century Germany, courts of arbitration were established by the stock exchanges of the city-states, the chambers of commerce, and the local Associations of Dealers in Coffee, Colonial Products and other items.”⁵
6. “The New York Chamber of Commerce set up an arbitration system in 1768 in order to ‘sett[le] business disputes according to trade practice rather than legal principles.’”⁶
7. “In 1927, the American Arbitration Association’s Yearbook of Commercial Arbitration listed over 1,000 trade associations that had systems of arbitration.”⁷
8. In an attempt to overcome the U.S. common law courts’ hostility to arbitration by allowing a party to a pre-dispute arbitration agreement to revoke it at any time, twelve states by 1933 had adopted state arbitration acts that enforced pre-dispute arbitration agreements. Only Illinois in its state arbitration act continued to permit parties to revoke arbitration agreements so that the practical effect was the enforcement only of post-dispute arbitration agreements.⁸
9. The American Bar Association selected the enforceability of pre-dispute arbitration agreements approach adopted by the New York legislature and other states, except Illinois, and drafted a proposed federal statute and submitted it to Congress for consideration. This draft federal statute, permitting enforcement of pre-dispute arbitration agreements became what we know today as the Federal Arbitration Act.⁹

THE LAW OF ARBITRATION

10. Under the Federal Arbitration Act (“FAA”).
 - a. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269-70 (Tex. 1992) (The FAA applies to all suits in state or federal court when the dispute concerns a contract evidencing a transaction involving interstate commerce).
 - b. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983) (FAA at 9 U.S.C. § 2 reflects intent of Congress to establish a liberal policy that (1) favors arbitration, despite contrary substantive or procedural policies, and (2) establishes a federal substantive law of

⁵ Stone, *Arbitration-National*, at 3.

⁶ *Id.*

⁷ *Id.*

⁸ See Stone, *Arbitration-National*, at 3-4.

⁹ 9 U.S.C. §§ 1 *et seq.*

arbitrability that applies to any arbitration agreement within the FAA).

- c. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymoth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 3353-354, 87 L. Ed. 2d 444 (1985) (Courts must resolve any doubts about scope of arbitration agreement in favor of arbitration because of FAA).
- d. *Mitsubishi Motors Corp.*, 473 U.S. at 627 (Congressional policy manifested in the Federal Arbitration Act requires courts liberally to construe the scope of arbitration agreements covered by the FAA.).
- e. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737-38 (Tex. 2005) (orig. proceeding) (Presumption favoring arbitration arises only after party seeking to compel arbitration establishes valid agreement to arbitrate because purpose of FAA is to make arbitration agreements as enforceable as other contracts, not more so).
- f. *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008) (“As this Court recognized in *Southland Corp. v. Keating*, [omitting citation] the Federal Arbitration Act ...establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.”).
- g. *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008) (FAA §§ 9-11 substantiate “a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”).
- h. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (holding that the court decides whether arbitration clause actually agreed by the parties applying state contract law principles).
- i. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (holding that arbitrator decides if statute of limitations applies to dispute).
- j. *Gilmer v. Johnson/Interstate Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-15, 121 S. Ct. 1302, 1308-09, 149 L. Ed. 2d 234 (2001) (holding that federal statutory employment claims are subject to arbitration if parties have agreed to arbitrate and the FAA applies if the subject matter of the dispute affects interstate commerce).
- k. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996) (holding that FAA preempted Montana statute requiring that arbitration clause be “typed in underlined capital letters on the first page of the contract”).

- l. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (“The legislative history of the Act established that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims.”).
 - m. *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (With the enactment of the Federal Arbitration Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration).
 - n. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006) (Texas state courts have mandamus jurisdiction over trial court denying motion to compel arbitration pursuant to FAA).
11. Under the Texas General Arbitration Act (the “TGAA”).¹⁰
- a. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (“Agreements to arbitrate disputes between employers and employees are generally enforceable under Texas law; there is nothing *per se* unconscionable about an agreement to arbitrate employment disputes and, in fact, Texas law has historically favored agreements to resolve such disputes by arbitration.”) (quoting *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005)).
 - b. *Jack B. Anglin Co.*, 842 S.W.2d at 268 (“Arbitration has been sanctioned in Texas since at least the time of our first state constitution in 1845. [omitting cites] The public policy of both our state and federal governments favors agreements to resolve legal disputes through such voluntary settlement procedures. [omitting cites] Efficiency and lower costs are frequently cited as the main benefits of arbitration.”).
 - c. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) (“Subjecting arbitration awards to judicial review adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes.”).
 - d. *In re Dillard Dep’t Stores, Inc.*, 186 S.W.3d 514, 516 (Tex. 2006) (Whether the parties’ agreement imposes a duty to arbitrate is a contract interpretation question which is a question of law for the court).
 - e. *In re Dillard Dep’t Stores, Inc.*, 186 S.W.3d at 515 (Texas courts construe arbitration agreements according to well-settled, state-law contract principles)

¹⁰ TEX. CIV. PRAC. & REM. CODE ch. 171.

(citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995)).

- f. *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 352 (Tex. 1977) (“In addition to alleviating some measure of the burden on the courts, arbitration in a commercial context is a valuable tool which provides business people, and all citizens, with greater flexibility, efficiency, and privacy.”).
- g. *Belmont Constructors v. Lyondell Petrochemical Co.*, 896 S.W.2d 352 (Tex. App.–Houston [1st Dist.] 1995, no writ) (Courts may not order parties to arbitrate unless they have agreed to arbitrate; agreement to arbitrate is a settled, threshold requirement to compelling arbitration under the TGAA or the FAA).

FEDERAL ARBITRATION ACT PREEMPTION

- 12. “The FAA preempts only *contrary* state law, not *consonant*, state law.” *In re Bison Bldg. Materials, Ltd.*, 2008 Tex. App. LEXIS 4844, *27 (Tex. App.–Houston [1st Dist.] June 26, 2008, orig. proceeding) (citing *In re D. Wilson Constructors, Inc.*, 196 S.W.3d at 779).
 - a. *In re Bison Bldg. Materials, Ltd.* held that the FAA preempted the TGAA at TEX. CIV. PRAC. & REM. CODE §§ 171.002(a)(3) and (c). 2008 Tex. App. LEXIS 4844, *30.
 - b. *In re Bison Bldg. Materials, Ltd.* also held that the FAA preempted the TEX. LABOR CODE §§ 406.33(a) and (e).
- 13. State law conflicts with the FAA “to the extent that [State law] ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of Congressional intent in enacting the FAA.” *In re Bison Bldg. Materials, Ltd.*, 2008 Tex. App. LEXIS 4844, at *28.¹¹
- 14. The Supremacy Clause of the U.S. Constitution, article IV, clause 2, compels that FAA control over state legislative or judicial attempts to undercut enforceability of arbitration agreements governed by the FAA. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-78, 109 S. Ct. 1248, 1255, 103 L. Ed.2d 488 (1989); *Perry v. Thomas*, 482 U.S. 483, 489, 492, 107 S. Ct. 2520, 96 L. Ed.2d 426 (1987).
 - a. “In recognition of Congress’s principal purpose of ensuring that private

¹¹ See also *In re Border Steel, Inc.*, 229 S.W.3d 825, 832 (Tex. App.–El Paso 2007, orig. proceeding); *In re R&R Pers. Specialists of Tyler, Inc.*, 146 S.W.3d 699, 704 (Tex. App.–Tyler 2004, orig. proceeding) (Texas Labor Code §§ 406.033(a)(1)-(3) and (e) regarding non-subscriber claims are preempted in arbitrations governed by the FAA).

arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which ‘require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.’” *Volt Info. Scis., Inc.*, 489 U.S. at 478 (citing *Southland Corp. v. Keating*, 465 U.S. at 10 and *Perry v. Thomas*, 482 U.S. at 490).

- b. *See also Southland Corp. v. Keating*, 465 U.S. at 10-16 (finding preempted a state statute which rendered agreements to arbitrate certain franchise claims unenforceable).¹²
 - c. *See also Perry v. Thomas*, 482 U.S. at 490 (finding preempted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims).
 - i. The FAA “embodies Congress’s intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause.” *Perry*, 482 U.S. at 490.
 - ii. A court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.” *Id.* at 492, n.2.
15. “The dispositive inquiry [regarding FAA preemption] is whether application of state law ‘would undermine the goals and policies of the FAA.’” *In re D. Wilson Constr.*, 196 S.W.3d at 779; *see also Jack B. Anglin Co.*, 842 S.W.2d at 271 (“[The FAA] preempts state statutes to the extent they are inconsistent with [the FAA]”).¹³
16. State law undermines FAA goals and policies and will, therefore, be preempted by the FAA when four tests are met:
- a. The arbitration agreement is in writing;
 - b. The arbitration agreement involves interstate commerce;
 - c. The arbitration agreement can withstand scrutiny under traditional contract

¹² “[With regard to 9 U.S.C. § 2,] [w]e discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract ‘evidencing a transaction involving commerce’ and such clauses may be revoked upon ‘grounds as exist at law or in equity for the revocation of any contract.’ We see nothing in the [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under state law.” *Keating*, 465 U.S. at 10-11.

¹³ *See In re Poly-America, L.P.*, 262 S.W.3d 337, 347 (Tex. 2008) (“In determining the validity of an agreement to arbitrate under the FAA, courts must first apply state law governing contract formation.”). *But see also In re Poly-America, L.P.*, 262 S.W.3d at 347-48 (“*Perry* makes clear that state courts may not fashion special rules regarding the enforceability of arbitration contracts *per se.*”) (citing *Perry*, 482 U.S. at 492, n.9).

defenses under state law; and

- d. State law affects enforceability of the arbitration agreement.¹⁴
- 17. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-405 (1967) (Congress enacted the substantive provisions of the FAA pursuant, in part, to its constitutional power to regulate interstate commerce, a distinction which gives the FAA pre-emptive force under the *Supremacy Clause*).
- 18. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59, 131 L. Ed.2d 76, 115 S. Ct. 1212 (1995) (stating that the FAA, absent clear and unambiguous contractual language to the contrary, preempts a general choice-of-law provision that might otherwise make a state general arbitration act applicable to the arbitration required by the contract).

GENERAL ARBITRATION RESEARCH

- 19. The 2008 Fulbright & Jaworski *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics*,¹⁵ a survey of “senior corporate counsel on their experiences and opinions regarding various aspects of litigation and related matters,” found the following:
 - a. Respondents in all three size-of-company categories report that Texas is their most active litigation jurisdiction (47%), followed by California (36%). Fulbright & Jaworski (19).
 - b. “The United States remains the predominant jurisdiction for significant cases pending with 80% of the total sample listing it among their top three. Fulbright & Jaworski (20).
 - c. Respondents expect an increase in the number of disputes that their companies will face in the coming year.
 - i. Almost “one-third of the total sample... expect disputes to increase in the coming year.” Fulbright & Jaworski (3).
 - ii. “43% of respondents from the largest companies surveyed expect disputes

¹⁴ See *In re Bison Bldg. Materials, Ltd.*, 2008 Tex. App. LEXIS 4844, at *28-29 (citing *In re D. Wilson Constr.*, 196 S.W.3d at 780 (citing *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005)). “For the FAA to preempt state law, state law must *refuse to enforce* an arbitration agreement that the FAA *would enforce*.” *In re Bison Bldg. Materials, Ltd.*, 2008 Tex. App. LEXIS 4844, at *30 (citing *In re D. Wilson Constr.*, 196 S.W.3d at 780).

¹⁵ *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics*, Fulbright & Jaworski LLP (2008), available at www.fulbright.com/litigationtrends. Cited hereinafter as “Fulbright & Jaworski” followed by page number.

to increase in the coming year"-- higher than 2007 (34%) and 2006 (35%). Fulbright & Jaworski (9).

- iii. Smaller companies' expectations of an increase in disputes rose to 22% from just 5% in 2007 and 13% in 2006. Fulbright & Jaworski (9).
 - d. "Labor/Employment, Contracts and Personal Injury have remained the most active areas [in litigation] over the past 12 months." In fact, "Contracts and Labor/Employment cases dominate across most industries, except manufacturing where Product Liability is the most common type of litigation." "Half of the 2008 U.S. [respondents] put Labor/Employment on [their] list [of litigation areas of greatest concern], followed by Contracts (47%) and Personal Injury (29%)." Fulbright & Jaworski (10).
 - e. Currently, "[t]he greatest increases in multi-plaintiff cases in the U.S. are in wage & hour [32%], discrimination [23%] and privacy issues [15%]." Fulbright & Jaworski (3).
 - f. When asked their level of satisfaction with outside counsel in various litigation areas, respondents reported that they were least satisfied (a 63% level of satisfaction) with cost management. Moreover, 47% of all respondents reported that cost management is their area of greatest concern. Fulbright & Jaworski (13).
 - g. "One in five of the largest companies spend more than \$10 million [in litigation expenditures], compared with just 6% of privately held companies." Fulbright & Jaworski (22).
 - h. "The effects of the subprime credit crisis are starting to ripple through the legal system and are being felt in some sectors. When asked if they have engaged outside counsel for subprime-related matters, those answering 'Yes' represent: 12% of the insurance sector; 11% of financial services companies; 4% of the companies under \$100 million in revenues; 4% of the companies with \$1 billion or more in revenues; [and] 4% of the public companies."
20. Harris Interactive Survey, the Harris Poll people, did market research for the U.S. Chamber [of Commerce] Institute for Legal Reform which was released in April 2005.¹⁶
- a. The Harris Interactive survey, called "The Binding Arbitration Survey," conducted online interviews between February 28 and March 14, 2005, with 609 adult arbitration participants, a sub-sample of a national cross-section of 31,045

¹⁶ See *Arbitration: Simpler, Cheaper, and Faster Than Litigation*, Harris Interactive Survey, Conducted for U.S. Chamber Institute for Legal Reform (Apr. 2005), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf>. Cited hereinafter as "Harris" followed by page number of published report.

adults, regarding arbitration procedures and outcomes and tested participants' assessments of arbitration. Harris (3-4, 35-38).

- b. These participants must have been a participant in a binding arbitration case that reached a decision, and must have been in the binding arbitration either voluntarily due to contract language or because of strong urging by a court, but not because of court order. Harris (4).
- c. The disputes arbitrated for these participants included:
 - i. Contract disputes - 34%;
 - ii. Personal injury - 27%;
 - iii. Divorce issues - 4%;
 - iv. Unpaid bills/loans - 4%;
 - v. Child custody issues - 3%;
 - vi. Auto accident/damage - 3%; and
 - vii. Other - 25%. Harris (12).
- d. These participants said that arbitration is faster (74%), simpler (63%), and cheaper (51%) than going to court, and 66% said they would likely use arbitration again. Harris (5, 19-21, 30).
- e. Losers in arbitration believed the process was fair and were satisfied with the outcome (40% of losers were highly satisfied and 21% of losers were moderately to highly satisfied). Harris (6, 26).
- f. Participants were satisfied with the arbitrator's attentiveness (81%), impartiality (75%), and competence (78%). Harris (23).
- g. Participants believed that arbitration was a fair process (75%) and that it resulted in a fair outcome (72%). Harris (24).
- h. Eighty-four percent (84%) were satisfied with the length of their arbitration. Harris (28).
- i. Most of the participants interviewed had participated in binding arbitration as individuals (83%) as opposed to employees of a business or organization (17%). Harris (32).

21. A survey, published in 2006, of the entire membership of the General Practice Solo and Small Firm Division of the American Bar Association (“ABA”),¹⁷ which was administered by the independent survey company Surveys and Ballots, Inc. and reviewed and finalized by the GPSolo Division of the ABA and the National Arbitration Forum (“NAF”), made the following observations:
- a. Approximately 40% of the GPSolo respondents have more than 25 cases “open” and at some stage of litigation or alternative dispute resolution. GPSolo (5).
 - b. Approximately 86.2% of the GPSolo respondents believe that their clients’ interests are best served by offering ADR solutions. GPSolo (7).
 - c. Approximately 34.6% of the GPSolo respondents resolved more than 5 cases through ADR the previous year and 3.6% of the respondents resolved more than 25 cases through ADR. GPSolo (2).
 - d. Approximately 6.3% of the GPSolo respondents resolved more than 5 cases by arbitration in the previous year. GPSolo (3).
 - e. Approximately 68.6% of the GPSolo respondents would use arbitration more often if arbitrators were required to follow the law and 55.4% would use arbitration more often if arbitrators were lawyers or judges. GPSolo (3, 20).
 - f. Approximately 72.9% of the GPSolo respondents value arbitrators who are lawyers and former judges as opposed to lay arbitrators, but that number goes up to 85.7% for respondents who practice Consumer Law and 90.9% for respondents who practice Insurance Defense. GPSolo (17).
 - g. Nearly 40% of the GPSolo respondents initiate settlement immediately after becoming aware of a dispute. GPSolo (23).
22. The ABA Section of Litigation, while Scott J. Atlas was its chair in 2002-2003, formed a Task Force on ADR Effectiveness to analyze the arbitration process and to determine what litigants and counsel thought about arbitration. The Task Force worked with “a recognized authority in the field of public opinion survey work” and designed a survey that was distributed to “an excess of 7,000 Section [of Litigation] members” involved in areas including “Construction Litigation, Securities, Business Tort, Insurance Practice, Employment & Labor, International Law, and Trial Practice....”¹⁸
- a. Approximately 78% of the respondents believe that arbitration takes less time

¹⁷ Cited hereinafter as “GPSolo” followed by page number of the NAF copyrighted report published in 2006. See GPSolo (29) for description of sample and instrument employed in the survey.

¹⁸ *Survey on Arbitration*, ABA Section of Litigation Task Force on ADR Effectiveness, 2-3 (Aug. 2003). Cited hereinafter as “ABA Survey” with page number following.

than litigation. ABA Survey (4).

- b. Approximately 56% of the respondents believe that arbitration is more cost effective than litigation. ABA Survey (4).
- c. Approximately 28% of the respondents believe that outcome quality (with regard to fairness, validity, and client satisfaction with final awards) in arbitration “is better than litigation verdicts or judgments”; 25% of the respondents believe that outcome quality in arbitration “is not as good as litigation verdicts or judgments”; and 46% of the respondents believe that outcome quality in arbitration “is about the same as litigation verdicts or judgments.” ABA Survey (24).
- d. The respondents to this survey described steps that they have most frequently taken or have attempted to take to improve voluntary arbitrations:
 - i. Thirty-eight percent (38%) have incorporated or have attempted to incorporate discovery into arbitration;
 - ii. Thirty-five percent (35%) have required or have attempted to require arbitrators to apply governing substantive law; and
 - iii. Twenty-nine percent (29%) have required or have attempted to require arbitrators to provide opinions explaining awards. ABA Survey (28).

EMPLOYMENT ARBITRATION

- 23. The 2008 Fulbright & Jaworski study¹⁹ found the following with regard to arbitration in employment disputes:
 - a. In non-union settings, 75% of all respondents report that their companies require arbitration in employment disputes. Fulbright & Jaworski (44).
 - b. With regard to the average cost of arbitrating employment disputes:
 - i. “[A]most one-third [of smaller companies] spend \$50,000 to \$100,000 per dispute, and a quarter of them spend more than \$100,000”;
 - ii. “A quarter of the mid-sized companies spend \$50,000 to \$100,000 [per dispute], and 12% average \$100,000 or more per dispute”;
 - iii. “[A]mong the largest companies, 23% [spend] \$50,000 to \$100,000 [per

¹⁹ *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics*, Fulbright & Jaworski LLP (2008), available at www.fulbright.com/litigationtrends.

dispute], and 19% spend \$100,000 or more per dispute.” Fulbright & Jaworski (45).

24. The percentage of employers in the private sector using employment arbitration increased from 3.6% in 1991 to 19% in 1997.²⁰
 - a. Studies indicate that by 1998, 62% of large corporations in the U.S. had used employment arbitration on at least one occasion.²¹
 - b. Between 1997 and 2001, the number of employees covered by employment arbitration plans administered by AAA grew from 3 to 6 million.²²
25. Studies indicate that the majority of employees litigating employment discrimination claims in the courts are professional or managerial employees from the higher income scale²³ and that lower-income employees are excluded from the courts because of the small amounts of “provable damages”²⁴ and lawyers’ reluctance to take these smaller claim cases.²⁵
26. A 1991 study conducted by William M. Howard who, at the time the study was published was an adjunct faculty member at Arizona State University and Ottawa University, an AAA arbitrator, a member of the AAA regional advisory board, and a member of the Society of Professionals in Dispute Resolution, surveyed 321 member-lawyers of the National Employment Lawyers Association (NELA) that regularly represented employees (plaintiffs) in employment discrimination disputes.²⁶

²⁰ See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RES. J. 8, 10 (2008) (citing Peter Feuille & Denise Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27 (1995) and U.S. General Accounting Office, *Alternative Dispute Resolution: Employers’ Experiences with ADR in the Workplace*, Report to the Chairman, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, GAO/GGD-97-157 (Aug. 1997)).

²¹ *Id.* (citing David Lipsky & Ronald Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133-59 (1998)).

²² *Id.* (citing the U.S. Dept. of Labor Report, *Report and Recommendations: Commission on the Future of Worker-Management Relations* (Dec. 1994)).

²³ *See id.*

²⁴ Elizabeth Hill defines “provable damages” as “damages that are tangible and will definitely be collected if liability is established. For example, lost wages are provable damages, but damages for emotional distress are not.” *Id.*

²⁵ *See id.* at 10-11 (“Thus, these studies substantiate the belief that lower-income employees generally do not have access to the courts. During my research, I discovered, however, that more than three-quarters of the employees arbitrating claims pursuant to mandatory arbitration agreements earned less than \$60,000 per year, *i.e.*, were of lower- income by the standard applied above.”).

²⁶ William M. Howard, *Arbitrating Claims of Employment Discrimination; What Really Does Happen? What Really Should Happen?* 50 DISP. RES. J. 40, *4 (1995).

- a. The plaintiffs' attorneys reported that their average normal requirements for accepting employment discrimination claims included:
 - i. Minimum provable damages of \$60,000 to \$65,000;
 - ii. A required retainer of \$3,000 to \$3,600; and
 - iii. A 35% contingent fee.²⁷
 - b. “[W]hen asked about the number of employment discrimination cases that they accepted contrasted to those on which representation was requested, their responses ranged from 1% to 30% with both the mean and median acceptance rate being only 5%.”²⁸
 - c. “In other words, *19 out of every 20 employees who feel that they have an employment discrimination claim against an employer are unable to obtain the representation of an attorney to pursue that claim in court.*”²⁹
27. One of the most highly developed employment dispute resolution programs is the one developed and used by Halliburton and Brown & Root.³⁰
- a. Beginning in 1990, Halliburton had “a binding arbitration program” for some of its employment disputes. Bedman (55).
 - b. In 1992 Halliburton conducted an extensive study involving all levels of its employees and task forces, which resulted in final approval of a comprehensive employment dispute resolution program in February 1993, with formal implementation in June 1993 for both Halliburton and Brown & Root. Bedman (55).
 - c. Halliburton found that “litigation, as a system of employment dispute resolution, is highly inefficient, both economically and morally. It wastes time, money and careers. This is true even if, as assumed here, the end result is always correct. To the extent that the results through litigation are wrong, the social loss can only be greater.” Bedman (57).

²⁷ *Id.* at *5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See William L. Bedman, *Alternative Dispute Resolution: The Halliburton Experience*, 25 THE ADVOCATE (2003), published by the Texas State Bar Litigation Section. Cited hereinafter as “Bedman” followed by page number from THE ADVOCATE.

- d. Halliburton's initial experience revealed that "the annual expense for this type of program is substantially less than what a large, litigated employment case can cost both the company and the employee in legal expenses, while doing a much better job of delivering justice in the workplace to the average employee." Bedman (59).
28. A study published in 2003 by Michael Delikat and Morris Kleiner, Professor at the University of Minnesota, compared two sets of employment cases: (1) 125 employment discrimination cases filed between April 1, 1997 and July 31, 2001, in the Southern District of New York federal court, that concluded in trial, and (2) 186 employment arbitration cases in the securities industries, administered by the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE), in which awards were issued between April 1, 1997 and July 31, 2001.³¹
- a. The study reflects trial results, not actual final case results. Delikat and Kleiner (1).
- b. The study concluded that there was no statistical support for bias against individual claimants in arbitration outcomes compared to federal court outcomes: "[The] findings show that there is a statistically greater probability of a plaintiff winning a discrimination case before an arbitrator than in federal court. These results are sufficiently robust that adding statistical covariates are not likely to turn the estimates around in the other direction for this sample of cases." Delikat and Kleiner (2).
- c. Claimants prevailed in 46% of cases in arbitration versus 34% of the cases in court. Delikat and Kleiner (2).
- d. Claimants received median monetary awards of \$100,000 in arbitration versus \$95,554 in federal court. Delikat and Kleiner (1-2).
- e. In the cases in which the plaintiffs prevailed, the median attorney's fees awarded was \$69,388 and the average attorney's fees awarded was \$149,756. Delikat and Kleiner (1-2).
- f. Arbitrations were 33% faster than federal court claims. In arbitration, the median time from filing to judgment was 16 months, whereas in federal court cases the median time was 25 months. Delikat and Kleiner (2).
- g. While the study focused on 125 federal court claims that were filed between April 1, 1997 and July 31, 2001 and that concluded in trial, approximately 3000

³¹ See Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?* 58 DISP. RES. J. 56 (2003), available at http://findarticles.com/p/articles/mi_qa3923/is_200311/ai_n9463700. Cited herein as "Delikat and Kleiner" with page number following.

discrimination cases were actually filed during this period. Thus, only 3.8% of the discrimination cases that were filed concluded with a jury trial—refuting the complaint that arbitration prevents an employee’s right to a jury trial.³² Delikat and Kleiner (1).

29. The National Workrights Institute (“NWI”) published a paper entitled, *What Does the Data Show?*, in an attempt “to summarize the currently available data to provide a more informed basis for policy making,” as opposed to relying on the opinions of the National Employment Lawyers’ Association (an employee group) and the Equal Employment Advisory Council (an employer group).³³
 - a. In several empirical studies, the rate at which employees prevailed in arbitration was:
 - i. Bingham I - 73%;
 - ii. Maltby - 66%;
 - iii. Eisenberg & Hill - 43%;
 - iv. Bingham II - 63%; and
 - v. Overall - 62%. NWI (1).
 - b. While one study³⁴ found that employees prevailed in court in 57% of employment discrimination cases, NWI reports that when employment discrimination cases dismissed by summary judgment are included, the employee-win rate in court falls to 43%. NWI (2).
 - c. The NWI study also comments on the minimum jurisdictional amount required to file an employment discrimination claim in federal court (\$75,000) versus no threshold for filing an employment discrimination claim in arbitration. NWI (5).
 - d. “Research to date indicates that more employees are able to gain access to justice through arbitration than through litigation, and that they are more likely to win

³² U.S. District Courts statistics reveal the following percentages of total cases filed that went to trial (1990 - 4.3%); (1995 - 3.2%); (2000 - 2.2%); (2002 - 1.8%); (2003 - 1.7%); (2004 - 1.6%); (2005 - 1.4%); (2006 - 1.3%). Each year represents a twelve month period ending June 30 and is known as “Table 4.10 U.S. District Courts. Civil Cases Terminated by Action Taken” (Land Condemnation cases omitted) *available at* <http://www.uscourts.gov/judicialfactsfigures/2006/Table410.pdf>.

³³ See www.workrights.org/current/ed_arbitration.html for copy of report with citations to its sources. The report is cited hereinafter as “NWI” followed by page number of report.

³⁴ See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DIS. RES. J. 44, at *5 (2003).

their cases in arbitration (if they use a qualified arbitration provider).” NWI (5).

30. Professor Alexander J. S. Colvin, Department of Labor Studies and Employment Relations, Pennsylvania State University, prepared a report which analyzed a sample of 2,763 employment arbitration cases administered by the AAA from January 1, 2003 to September 30, 2006, that produced 836 employment arbitration awards (referred to by Professor Colvin as the “AAA C-filings data”).³⁵
 - a. Among the 836 employment arbitration awards in the AAA C-filings data, the employee win rate was 19.7%. Colvin (418).
 - b. The AAA C-filings included only cases based on employer-promulgated agreements, not individually-negotiated employment agreements. Colvin (419).
 - c. The large majority of these AAA C-filings (approximately 83%) involved employees who earned \$100,000 or less per year. Colvin (419).
 - d. Of the employees who won awards, the median damage awarded in the AAA C-filings was \$40,624 and the mean damage award was \$117,715. Colvin (423-24).
 - e. Of the employees who won awards, 77.4% earned less than \$100,000 per year. Colvin (423-24).
 - f. In the AAA C-filings, the employer paid 100% of the arbitrator fees in 96.6% of the cases in the sample. Colvin (424).
 - g. The mean time to a decision in the AAA C-filings that resulted in an award for the employee was 332.2 days, a much shorter time than comparable studies of employee claim litigation.³⁶ Colvin (426).

CONSUMER ARBITRATION

31. A study regarding consumer arbitration funded by the Hewlett Foundation found that “Private arbitration, enabled by predispute agreements whereby parties waive their rights to resolve future disputes in a public courtroom, has a long history in the United

³⁵ See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPLOYEE RTS. & EMP. POL’Y J. 405 (2007). Cited hereinafter as “Colvin” followed by page number of the published report.

³⁶ “[The AAA C-filings]...confirm the relative speed of employment arbitration for obtaining a hearing compared to the litigation system.” Colvin (426).

States.”³⁷

- a. Demaine and Hensler built “a statistical profile of the average U.S. consumer” from the 1999 Annual Demographic Survey published by the Bureau of Labor Statistics and the Bureau of the Census. Based on data of the average consumer in Los Angeles, California, consumers’ most likely purchases were studied for the use of arbitration in relation to those purchases. Demaine and Hensler (58).
 - b. The study shows that the average person in Los Angeles would be covered by mandatory arbitration clauses with respect to over a third of the major consumer transactions in his/her life. Demaine and Hensler (62).³⁸
 - c. Fifty-seven (57) of the one hundred sixty-one (161) sampled businesses with whom the average consumer was projected to do business used arbitration clauses in their consumer contracts. Demaine and Hensler (62, Table 2, n.2).
 - d. Demaine and Hensler’s study revealed that “the prevalence of arbitration clauses is highest (69.2%) in the financial category (credit cards, banking, investment, and accounting/tax consulting) and lowest (0%) in the food and entertainment category (grocery stores, restaurants, theme parks, and cultural/sports events).” Demaine and Hensler (62).
 - e. Demaine and Hensler cite a Brookings Institution study to support their observation that “many plaintiffs who are not formally barred from the courthouse find it virtually impossible to get through its doors” and so “for claims involving modest amounts of money, arbitration may have no greater tendency than court litigation to preclude access to justice.” Demaine and Hensler (69 n.37).
 - f. Demaine and Hensler’s study concludes that “it is likely that most consumers only become aware of what rights they retain and what rights they have waived after disputes arise.” Demaine and Hensler (73-74 n.43).
32. *In Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, Stephen Ware, Professor of Law at Samford University, Cumberland School of Law, suggests that any assessment of consumer arbitration law should consider the influence that consumer arbitration has on the prices that consumers pay because consumers inevitably pay for cost increases incurred by businesses. Ware lists seven reasons that arbitration might enable businesses to save on dispute resolution costs:

³⁷ Linda J. Demaine & Deborah R. Hensler, *Mandatory Arbitration: “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience*, 67 LAW & CONTEM. PROBS. 55, 55 (2004). Cited hereinafter as “Demaine and Hensler” with page number following.

³⁸ See also Jean R. Sternlight, *The Ultimate Arbitration Update: Examining Recent Trends in Labor and Employment Arbitration in the Context of Broader Trends With Respect to Arbitration*, 2003 ABA Annual Meeting (Aug. 10, 2003) (discussing the Demaine and Hensler study).

- a. “[A]rbitration does away with juries and, for that reason, is commonly thought to reduce the likelihood of high damages awards against businesses.”
 - b. “[A]rbitration’s confidentiality ‘lessens the risk of adverse publicity’ about a business and its disputes.”
 - c. “[A]rbitration can resolve disputes ‘according to a nationally uniform set of procedures,’ thus saving interstate businesses the costs of adapting to different procedural rules in different states.”
 - d. “[A]rbitration’s finality (near absence of appellate review) saves businesses the costs of appeals.”
 - e. “[A]rbitration can eliminate the possibility of class actions against businesses.”
 - f. “[A]rbitration can deter claims against businesses by requiring consumer-plaintiffs to pay arbitrator fees, as well as filing fees that exceed the filing fees in litigation.”
 - g. “[A]rbitration can reduce the amount of discovery available to consumer-plaintiffs, thus reducing the amount of time and money businesses must spend on the discovery process and also making it harder for consumers to prove their claims.”
33. Multiple courts have also recognized that consumers benefit from arbitration by way of cost savings that are passed on to consumers.
- a. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991) (“[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”).
 - b. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 94 (2000) (Ginsburg, J., concurring) (“Under the AAA’s Consumer Arbitration Rules, consumers in small-claims arbitration incur no filing fee and pay only \$125 of the total fees charged by the arbitrator. All other fees and costs are to be paid by the business party.... Other national arbitration organizations have developed similar models for fair cost and fee allocation.”) (citing in n.2 “National Arbitration Forum provisions that limit small-claims consumer costs to between \$49 and \$175 and a National Consumer Disputes Advisory Committee protocol recommending that consumer costs be limited to a reasonable amount.”).
 - c. *See Metro E. Ctr. For Conditioning & Health v. Quest Commc’ns Int’l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002) (“If arbitration offers benefits to [businesses] and

detriments to consumers ...these benefits are passed along to consumers....
[Telecommunication c]ustomers therefore are compensated through lower rates
for any net loss they may experience in arbitration.”), *cert. denied*, 537 U.S. 1090
(2002).

- d. *See Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1203 n.9 (C.D. Cal. 2006)
 (“National arbitration organizations like NAF not only provide a fair and
inexpensive model for consumers, they also potentially benefit consumers by
controlling companies’ costs.... [I]t is likely that consumers actually benefit in the
form of less expensive computers reflecting Dell’s savings from inclusion of the
arbitration provision in its contracts.”) (citing *Carnival Cruise Lines, Inc. v. Shute*,
499 U.S. 585, 594 (1991)).
34. The Institute for Legal Reform, Public Opinion Strategies, and the Benenson Strategy
Group conducted a national telephone survey, regarding consumer disputes, of 800
registered voters who indicated they were likely to vote in the 2008 national election.³⁹
- a. The survey was conducted between December 17 and 20, 2007 and had a margin
of error of + 3.5%.
- b. “Four-in-ten voters believe it would be very difficult to resolve a serious dispute
with a company, and a majority are not confident that a dispute would be settled
fairly.”⁴⁰
- c. “To resolve disputes between companies and customers, voters have a more
favorable opinion of arbitration and mediation than they do of filing a lawsuit or
class action lawsuits.”⁴¹
- d. “Given the choice, voters strongly prefer [82%] arbitration over litigation to
resolve any serous [sic] dispute with a company.”⁴²
- e. “Voters clearly believe [71%] arbitration agreements should not be removed from
the contracts consumers sign with companies providing goods and services.”⁴³
- f. Voters identified the following possible outcomes from the legislative removal of

³⁹ See Bill McInturff, Alex Bellone, & Joel Benenson, *Key Findings From a National Survey of Likely Voters*,
Institute for Legal Reform (Apr. 2008), available at
<http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1092>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

consumer disputes from mandatory arbitration.

- i. “Consumers who may not be able to afford the cost of a trial would never be represented in a dispute.”
 - (1) 64% surveyed said this was the worst thing that could happen.
 - (2) 60% surveyed said this was almost certain or a very likely outcome.

- ii. “Companies will raise their prices and we will all end up paying higher prices for everyday goods and services.”
 - (1) 56% surveyed said this was the worst thing that could happen.
 - (2) 50% surveyed said this was almost certain or a very likely outcome.

- iii. “Consumers will end up either having to file a lawsuit, or just dropping their complaint because companies will not agree to arbitration after a dispute arises.”
 - (1) 51% surveyed said this was the worst thing that could happen.
 - (2) 57% surveyed said this was almost certain or a very likely outcome.

- iv. “Lawyers will benefit financially because they will file more lawsuits.”
 - (1) 49% surveyed said this was the worst thing that could happen.
 - (2) 74% surveyed said this was almost certain or a very likely outcome.

- v. “Fewer consumers will have their dispute heard through an arbitration proceeding so there will be more lawsuits filed through our courts.”
 - (1) 45% surveyed said this was the worst thing that could happen.
 - (2) 59% surveyed said this was almost certain or a very likely outcome.

35. In July 2008, the U.S. Chamber Institute for Legal Reform released a comprehensive and

independent new study performed by Navigant Consulting⁴⁴ on behalf of the U.S. Chamber Institute for Legal Reform. This study of 34,000 consumer arbitration cases from 2003 to 2007,⁴⁵ involving California consumers,⁴⁶ resulted in the following findings:

- a. Consumers were successful in 32.1% of these arbitration cases, the same or higher rate than consumers prevailed in debt collection lawsuits.
 - b. Claim amounts against consumers in the arbitrations studied were reduced in an additional 16.4% of cases; claim amounts against consumers that went to arbitration hearing where the consumer did not prevail were reduced in 37.4% of cases with a median reduction for consumers of \$824.
 - c. In 33,935 cases where an arbitration fee was paid, the consumer did not pay any fee in 99.3% of the cases; in the 0.7% of cases where consumers paid a fee, the median fee was \$75.
 - d. In cases in which the consumer did not appear, actual damages awarded to the claimant were 22.6% less than the damages sought by the claimant.
 - e. *See* the full report by U.S. Chamber Institute for Legal Reform at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212>.
36. An earlier analysis by Public Citizen in September 2007 of the same data used in the July 2008 U.S. Chamber Institute for Legal Reform study⁴⁷ only utilized a subset of the same arbitration data.⁴⁸
- a. Of the original data set of 33,948 cases, all but 15 of the cases were designated as

⁴⁴ *See* Memorandum from Jeff Nielsen, Garrett Rush, & Jonathan Hartley, Navigant Consulting (July 11, 2008), regarding “National Arbitration Forum: California Consumer Arbitration Data,” *available at* <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212>. Cited hereinafter as “Navigant” followed by page number. The memorandum summarizes results of certain analyses performed with respect to National Arbitration Forum data disclosed pursuant to California Code of Civil Procedure 1281.96 which requires private arbitration companies to collect and publish data pertaining to consumer arbitrations heard in California. Consumer arbitration, according to California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, involves “a consumer or employee who was required to accept an arbitration provision in a contract drafted by a non- consumer or its representative.”

⁴⁵ NAF data from 2003 through the first quarter of 2007 obtained in spreadsheet from the Public Citizen website (<http://www.citizen.org/congress/civjus/arbitration/>).

⁴⁶ *Id.*

⁴⁷ *See* Paragraph 35.

⁴⁸ *See* <http://www.citizen.org/documents/ArbitrationTrap.pdf> for copy of *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007).

“collection” cases.

- i. In collection cases, unlike most other consumer cases, there is no question but that the consumer owes the debt at issue.⁴⁹
 - ii. Debtors typically lose in arbitration cases because they owe the debt at issue.⁵⁰
- b. Consumers’ lack of success in arbitration collection cases mirrors consumers’ lack of success in court collection cases.⁵¹
 - c. The Public Citizen report did not analyze more than 8,000 cases that were dismissed in which consumers were identified as the prevailing parties.
 - d. The Public Citizen report did not consider the reductions in claims amounts experienced by approximately 38% of the cases in which the median reduction was \$824.
 - e. The Public Citizen report did not consider that in 99.3% of the cases studied the consumer paid no fees.
37. Many studies and articles indicate that consumers achieve better results in arbitration as opposed to litigation.
- a. See Peter B. Rutledge, *Arbitration - A Good Deal for Consumers*, U.S. Chamber Institute for Legal Reform (April 2008), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091> (“Whatever the measure, most research suggests that individuals as a whole achieve superior results in arbitration than litigation.”).
 - b. See *Boston Globe* articles in 2006 on “Debtors’ Hell,” available at <http://www.boston.com/news/specials/debt/> (depicting the litigation burdens and costs on debtors sued in courts).
 - c. See *Banks v. Consumers (Guess Who Wins?)*, BUSINESSWEEK, June 6, 2008.
 - d. See NAF report, *The Benefits of Arbitration Report*, available at

⁴⁹ Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 DISP. RES. MAG. 31, 31 (2008).

⁵⁰ *Id.*

⁵¹ *Id.* (citing Hillard M Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357 (1990) and Matthew C. McDonald & Kirkland E. Reid, *Arbitration Opponents Barking Up Wrong Branch*, 62 ALA. LAW 56, 60 (2001)).

<http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3>.

38. Numerous court decisions recognize the cost-effectiveness of consumer arbitration.
 - a. *Provencher v. Dell, Inc.*, 409 F. Supp.2d at 1198.
 - b. *Green Tree Fin. v. Randolph*, 531 U.S. at 95 n.2.
 - c. *Marsh v. First USA Bank*, 103 F.Supp.2d 909, 925 (N.D. Tex. 2000).
39. The American Arbitration Association (“AAA”) administers consumer arbitrations that meet its *Consumer Due Process Protocol* and *Supplementary Procedures for Consumer-Related Disputes* requirements.
 - a. AAA reports that, for the period between January 2007 and August 2007, of the 310 AAA consumer cases that resulted in an award, consumers prevailed in 48% of cases in which they were the claimant and businesses prevailed in 74% of the cases in which they were the claimant.⁵²
 - b. According to this same report, AAA administers approximately 1,500 consumer cases each year, of which approximately 60% are settled by mutual agreement of the parties or are withdrawn from administration.
 - c. Approximately 41% of AAA consumer arbitrations are conducted by documents only and are completed in approximately 4 months; in-person AAA consumer arbitrations are completed within approximately 6 months.

HEALTH CARE ARBITRATION

40. The Commission on Health Care Dispute Resolution, composed of four representatives from the American Medical Association, the American Bar Association, and the American Arbitration Association, was formed in September 1997 “to evaluate and make recommendations as to how alternative dispute resolution should be used to provide a just, prompt, and economical means of resolving disputes over access to health care treatment, and coverage, in the private health plan/managed care environment.”⁵³ The Commission’s *Final Report*, issued on July 27, 1998, makes the following recommendations and observations, among others, about alternative dispute resolution:

⁵² See *Analysis of the American Arbitration Association’s Consumer Arbitration Caseload* (Based on consumer cases awarded between January and August 2007), American Arbitration Association (no date), available at <http://www.adr.org/si.asp?id=5027>.

⁵³ See *Final Report*, Commission on Health Care Dispute Resolution (July 27, 1998), available at <http://www.ama-assn.org/amal/pub/upload/mm/395/healthcare.pdf>. Cited hereinafter as “CHC” followed by page number of *Final Report*.

- a. ADR can and should be used to resolve disputes over health care coverage and access arising out of the relationship between patients and private health plans/managed care organizations and between health care providers and private health plans/managed care organizations. CHC (2).
- b. “Alternative dispute resolution has emerged as an accepted means of resolving disputes outside of the court system.” CHC (5).
- c. No study was made of the application of ADR “to medical malpractice, Medicare, specific provisions of health care insurance contracts, or general access to health care outside of the private health care relationship.” CHC (7).
- d. The Commission focused on “consumer v. plan,” “consumer + provider v. plan,” and “purchaser/plan/provider” disputes. CHC (11-12).
- e. “The members of the Commission believe that mediation and arbitration of health care disputes - conducted with proper due process safeguards - should be encouraged in order to provide expeditious, accessible, inexpensive, and fair resolution of disputes.” CHC (14).
- f. The Commission adopted ten principles of “A Due Process Protocol for Resolution of Health Care Disputes.” CHC (15-17).
- g. Citing a Deloitte & Touche Litigation Services report, *1993 Survey of General and Outside Counsels: Alternative Dispute Resolution* (1993), the Commission cited the following “major benefits of arbitration”:
 - i. Expert Neutrals;
 - ii. Speed;
 - iii. Cost Savings;
 - iv. Confidentiality; and
 - v. Limited Discovery. CHC (30).
- h. The Commission also appended to its *Final Report* “A Due Process for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship” previously issued by the Task Force on Alternative Dispute Resolution in Employment (CHC (37-41))⁵⁴ which recognized the right of

⁵⁴ Which represented the individual views of its signers and not the institutions with which these signatories were affiliated. CHC (37).

employers “to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment.” CHC (37).

- i. The Commission also appended to its *Final Report* “A Due Process Protocol for the Mediation and Arbitration of Consumer Disputes” issued on April 17, 1998.⁵⁵ CHC (42-46).
41. The Joint Commission on Accreditation of Healthcare Organizations has adopted new standards within “Chapter Leadership” for conflict management, effective January 1, 2009.⁵⁶
- a. “The governing body provides a system for resolving conflicts among individuals working in the hospital.” *Elements of Performance 7 for LD.01.03.01*.⁵⁷
 - b. “The [organization] manages conflicts between leadership groups to protect the quality and safety of care.” *Standard LD.02.04.01*.⁵⁸

JURY TRIAL AND CLASS ACTION WAIVERS

42. Texas civil litigation in Texas district courts for the period from September 1, 2006 to August 31, 2007, as reported by the Texas Office of Court Administration, reveals that the civil jury trial is not popular with litigants and their lawyers.⁵⁹
- a. Of the 15,306 dispositions of “Injury or Damage Involving Motor Vehicle,” only 431 were by jury verdict - 2.82%.
 - b. Of the 14,172 dispositions of “Injury or Damage Other than Motor,” only 284 were by jury verdict - 2.00%.
 - c. Of the 42,024 dispositions of “Accounts, Contracts and Notes,” only 143 were by jury verdict - 0.34% (1/3 of 1%).

⁵⁵ *Id.*

⁵⁶ Joint Commission Resources: The Joint Commission of Accreditation Standards for Hospitals, Oakbrook Terrace, IL: Joint Commission on Accreditation of Healthcare Organizations, 2009.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *District Courts—Activity Summary by Case Type from September 1, 2006 to August 31, 2007*, Texas Office of Court Administration, available at <http://www.courts.state.tx.us/pubs/ar2007/dc/4-dc-summary-of-activity-by-case-type-fy07.pdf>.

- d. Of the 63,452 dispositions of “Other Civil Cases,”⁶⁰ only 241 were by jury verdict - 0.38% (little more than 1/3 of 1%).
43. One study shows that of all consumer claims filed in federal court under the federal Truth in Lending Act (the “TILA”),⁶¹ only a small number of these claims were class actions indicating that class action waiver would affect only a small fraction of TILA consumer claims based on claims filed in federal court.⁶²
- a. In 2006 of 688 TILA cases filed, only 17 were class actions (2.47%).
- b. In 2005 of 492 TILA cases filed, only 19 were class actions (3.86%).
- c. In 2004 of 574 TILA cases filed, only 20 were class actions (3.48%).
- d. In 2003 of 513 TILA cases filed, only 39 were class actions (7.6%).
- e. In 2002 of 576 TILA cases filed, only 37 were class actions (6.42%).

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⁶⁰ Not including Workers’ Compensation, Tax, Condemnation, UIFSA Reciprocal, Divorce, All Other Family Law Matters, and the categories above listed.

⁶¹ 15 U.S.C. §§ 1601-67f (2000).

⁶² See Alan S. Kaplinsky and Mark J. Levin, *Consumer Arbitration: If the FAA ‘Ain’t Broke,’ Don’t Fix It*, 63 BUS. LAW. 907-19 (2008) (citing, at page 917 n.50, data compiled from LexisNexis CourtLink® database by David Webster, Librarian at Ballard Spahr Andrews & Ingersoll, LLP).