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# Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements

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**OUT OF THE FRYING PAN, INTO THE FIRE:  
THE FEASIBILITY OF POST-DISPUTE EMPLOYMENT  
ARBITRATION AGREEMENTS**

Lewis L. Maltby<sup>†</sup>

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I. EXECUTIVE SUMMARY

Millions of Americans are now required to give up their right to take their employers to court in order to get a job. Thousands of employers require new employees to “agree” to take any legal dispute that may arise to private arbitration. The Supreme Court

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has not only approved such agreements, but has done so without requiring that arbitration be fair.

Civil rights advocates strongly oppose mandatory arbitration and argue that agreements to arbitrate should only be enforceable when made after a dispute has arisen. Congress is considering legislation that would outlaw pre-dispute employment arbitration agreements.

This report examines the likely impact of this proposed law and finds that it would harm the employees it is intended to help.

Analysis of data from the American Arbitration Association (“AAA”) reveals that post-dispute agreements to arbitrate employment disputes are rare, despite the widespread availability of this option. Only about 6% of all employment arbitration comes from post-dispute agreements.

This would not change if the law were reformed to eliminate an employer’s ability to force employees into arbitration. Examination of business-to-business arbitration, where both parties generally have comparable bargaining power, shows that only 9% of AAA arbitration of such disputes arises from post-dispute agreements.

Interviews with management attorneys reveal the reasons for this scarcity. Many employers are willing to agree to arbitrate all cases on a pre-dispute basis in order to avoid a jury trial on the handful of cases that could result in multimillion dollar judgments. Once the dispute arises, however, employers generally have no incentive to arbitrate the run-of-the-mill dispute. For example, 95% of the management attorneys we interviewed said they would not agree to arbitrate a dispute in which they could obtain summary judgment from a court. Since courts resolve 60% of all employment cases through summary judgment for the employer, this factor alone eliminates the possibility of a post-dispute agreement to arbitrate in slightly over half of all cases. Other management attorneys are reluctant to arbitrate when the employee does not have the financial means to pursue litigation, or for a variety of other reasons.

This evidence indicates that most employees will not be able to secure their employer’s agreement to arbitrate once the dispute arises. The vast majority of employment disputes, however, do not involve enough damages to support contingent fee litigation. Therefore, outlawing pre-dispute agreements to arbitrate will leave many employees with no access to justice.

This does not mean that we must accept arbitration as a condition of employment. Rather, we should allow pre-dispute agreements to arbitrate, but require that such agreements be voluntary. Unofficial coercion could be avoided in such situations by giving employees the choice of dispute resolution systems after they have started work and keeping the decision in a confidential file, unavailable to line managers. Employers could also adopt a default policy of arbitrating disputes but allow the employee to opt out before the dispute arises.

## II. INTRODUCTION

Employment arbitration today is a unilateral decision made by management. The vast majority of employers who use arbitration require employees to “agree” to waive their right to a jury trial or lose their jobs.

This does not automatically mean that employees do not receive justice. At least since the development of consensus due process standards,<sup>2</sup> empirical research has found that arbitration decisions from the American Arbitration Association compare favorably to those of federal courts.<sup>3</sup> Employment arbitration providers, however, are not legally required to comply with these standards. The lack of required standards leaves many employees in the position of being contractually required to submit to arbitration under conditions that even employers agree are unfair. Additionally, even if all providers met the due process standards, compulsory arbitration would not be right. No one should be forced to waive a constitutional right as a condition of employment, even if no tangible harm is done.

Employment rights advocates have fought this trend, largely unsuccessfully. Their arguments have been made forcefully and articulately by many, including the author.<sup>4</sup> Having twice failed to

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1. Interview with Robert Meade, Vice President, American Arbitration Association (Jan. 31, 2003).

2. BNA, PROTOTYPE AGREEMENT ON JOB BIAS DISPUTE RESOLUTION, 1995 DAILY LAB. REP. NO. 91 D-34 (1995).

3. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. (forthcoming 2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998).

4. See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); Lewis L. Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity*

persuade the Supreme Court that condition of employment arbitration is improper,<sup>5</sup> opponents of mandatory arbitration have turned to Congress. Employee rights advocates have persuaded members of Congress to introduce legislation that would abolish arbitration as a condition of employment.<sup>6</sup>

But what are the alternatives? If we are not to have arbitration as a condition of employment, what will take its place?

The majority of the plaintiffs' employment bar and civil rights attorneys argue that agreements to arbitrate should only be enforceable under two conditions:

A. *The Agreement Is Voluntary*<sup>7</sup>

Voluntary, in this context, means both parties truly prefer to arbitrate the dispute, rather than take it to court. Voluntary does not mean an employee who would prefer to litigate accepts arbitration because it is a condition of employment.

B. *The Agreement to Arbitrate Is Made After the Dispute Arises*<sup>8</sup>

The argument in support of this requirement comes from fundamental law regarding waiver of constitutional rights. A waiver, to be valid, must be both knowing and voluntary.<sup>9</sup> "How can an agreement to waive one's right to resolve a dispute by jury trial be knowing," the plaintiffs' bar argues, "when the employee knows nothing about the dispute because it hasn't even arisen?"

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for *Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1 (1994); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

5. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

6. Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997), available at <http://thomas.loc.gov/bss/d105/d105laws.html> (last visited Aug. 17, 2003).

7. Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1216 (2002).

8. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, POLICY STATEMENT ON MANDATORY ARBITRATION, EEOC Notice No. 915.002 (July 10, 1997), available at <http://www.eeoc.gov/docs/mandarb.html> (last visited Aug. 17, 2003); see also Patricia Ireland, President of National Organization of Women, Testimony before a committee of the National Association of Securities Dealers (June 1997), available at <http://www.now.org/issues/wfw/nasd-testimony.html> (last visited Aug. 17, 2003).

9. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972).

The only way an employee can know the facts and circumstances of the dispute, in order to make a knowing waiver, is after the dispute has arisen.

Enforcing only voluntary, post-dispute arbitration sounds wonderful, at least to the ears of a civil rights lawyer like myself. But would such a rule work in practice? Proponents of the rule assume, often unconsciously, that employers who currently insist on arbitration agreements before the dispute arises will be equally eager to sign such agreements after the dispute arises.

This may not be true. An employer's incentives regarding arbitrating an undifferentiated group of future disputes are quite different than an employer's incentives regarding a specific dispute whose contours are known. When a company considers all its future employment disputes, it sees a black hole that may contain a wide variety of financial risks. On the one extreme are disputes where the potential liability is too small for the employee to afford to litigate the case. A great many cases fall into this category. A 1995 survey of plaintiff employment lawyers found that an employee needed to have a minimum of \$60,000 in provable damages, not including pain and suffering or punitive damages, before an attorney would take the case.<sup>10</sup> With inflation, that figure has probably increased to at least \$80,000. At the other extreme, the future may contain a dispute that could anger a jury to the point of rendering a multibillion dollar punitive damage award that could bankrupt even a large company. Faced with this situation, many employers are willing to agree in advance to arbitrate everything. They are willing to create a risk of liability in many cases they could have otherwise ignored in order to decrease the risk of a ruinous punitive damages award.<sup>11</sup>

The situation after the dispute arises is far different. The employer now knows whether the magnitude of the employee's damages, and their likelihood of prevailing at trial, enable the employee to obtain counsel and litigate the dispute. Where the

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10. William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44.

11. The accuracy of employers' perception that arbitrators are less willing than jurors to award punitive damages is subject to debate. Unpublished empirical research has found little difference between the behavior of jurors and arbitrators when it comes to punitive damages. It is not all punitive damage awards, however, that employers are trying to avoid, only those that are large enough to cause the company catastrophic financial harm. Many management lawyers believe that these awards come primarily from juries.

employer knows that the employee has no credible threat of suing, the employer has no incentive to arbitrate. More precisely, it is in the employer's best interest to refuse to arbitrate. Thus, it is possible that if the law were changed to allow only post-dispute agreements to arbitrate, the result would be that employees with smaller claims would be denied access to justice completely.<sup>12</sup>

This issue has been raised by other legal scholars. Professor Samuel Estreicher argues that employee-plaintiffs (and their counsel) will only be willing to arbitrate cases in which arbitration gives them a competitive advantage.<sup>13</sup> Employers will only arbitrate when the opposite is true.<sup>14</sup> Thus, mutual post-dispute agreement to arbitrate will be inherently rare.<sup>15</sup> This conclusion is supported by Kritzer's work, showing that plaintiffs' lawyers are rational actors who only accept cases in which they believe the likely fee will profitably compensate them for the hours of work required.<sup>16</sup> David Sherwyn of Cornell reaches the same conclusion by surveying plaintiff and defense attorneys regarding their inclination to arbitrate in three different employment dispute scenarios.<sup>17</sup> In no scenario did plaintiff and defense lawyers agree that arbitration was the best way to resolve the dispute.<sup>18</sup> Plaintiffs' lawyers argue that employers' willingness to arbitrate would not be affected by the adoption of a "post-dispute only" rule.

Most of these discussions, however, have been theoretical. In order to reach conclusions, these theories must be confirmed by empirical data. This article will provide an empirical test.

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12. I first raised this issue in a 1998 article; see Maltby, *supra* note 3, at 56-58.

13. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

14. *Id.* at 567.

15. *Id.* at 567-68.

16. HERBERT KRITZER, INST. FOR LEGAL STUDIES, RHETORIC AND REALITY . . . USES AND ABUSES . . . CONTINGENCIES AND CERTAINTIES: THE AMERICAN CONTINGENT FEE IN OPERATION 9 (1996).

17. David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 57 (2003). The first scenario "involves the classic 'he said, she said' factual situation." *Id.* at 51. The second scenario involves facts that are "intended to evoke pro-employee sympathy" but "legal analysis . . . favors the employer." *Id.* at 53. Finally, the third scenario facts intended "to lead the parties to believe . . . the court would grant the [employer's] dispositive motion." *Id.* at 56.

18. *Id.* at 57.

### III. CURRENT FREQUENCY OF POST-DISPUTE AGREEMENTS TO ARBITRATE EMPLOYMENT DISPUTES

The most direct way to evaluate employers' willingness to arbitrate post-dispute is to examine the frequency with which they do it now. We conducted this examination by analyzing the records of the American Arbitration Association ("AAA"). We reviewed the files of 312 AAA employment arbitrations for the year 2001 to determine when the parties made the agreement to arbitrate.<sup>19</sup> In the majority of cases, this information was not present. However, for seventy-three cases the timing of the agreement to arbitrate was indicated in the case file. In fifty-eight of these cases (79%), the agreement to arbitrate was made prior to the dispute, almost always at the time of employment. In only fifteen cases (21%) the agreement to arbitrate was made after the dispute arose.

Timing of Agreement to Arbitrate	
Pre-Dispute	Post-Dispute
79%	21%

After we completed our manual review of individual files, the AAA increased the data retrieval capabilities of their computer system. At our request, AAA staff conducted a computerized analysis of their entire 2001 and 2002 caseload to determine the frequency of post-dispute arbitration agreements.

This analysis indicated that post-dispute agreements are even more rare. AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).<sup>20</sup>

Frequency of Post-dispute Agreements	
2001	2002
6%	2.6%

It is impossible to say with certainty which of these results

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19. This represents the total number of paper files of 2001 employment disputes located in the New York office of AAA.

20. Letter from Ryan Boyle, staff, AAA, to author (Mar. 31, 2003) (on file with author).



presents a more accurate picture of post-dispute agreements in employment arbitration. The fact that AAA's investigation involved their entire caseload suggests that the 2001 figure is closer to 6% than the 21% of the paper files.

There is also confusion in classifying individual cases as pre- or post-dispute agreements. For example, an arbitration is frequently initiated by a letter from a lawyer for one of the parties. Such a letter often states that the decision to arbitrate was by agreement of the parties. This appears to be a post-dispute agreement. In some cases, however, the parties have "agreed" to arbitrate because a judge has rejected a challenge by the employee to the enforceability of a pre-dispute agreement. Unless the court order is included with the letter, it is impossible for the person classifying the case to know when the agreement was made.

In most cases, the employee's attorney will not want this information disclosed to AAA and the arbitrator, and the employer's attorney will go along with this omission. Even if the court order is included in the submission to AAA, it is likely that the case administrator (or our researcher) may not make the correct conclusion. There are many additional ways in which a dispute submitted to AAA may disguise its true origin.<sup>21</sup> In most, if not all, of these situations, the result is that a pre-dispute agreement is mistakenly classified as a post-dispute agreement.

Even if one could resolve the correct percentage of post-dispute agreements for 2001, there remains the significant difference between AAA's numbers for 2001 and 2002. After consultation with AAA staff, I estimate the frequency of post-dispute arbitration at approximately 6% for 2002.

The infrequency of post-dispute agreements indicates employers are generally unwilling to arbitrate once a claim has arisen and its specifics are known. This does not bode well for the ability of employees to obtain access to justice if only post-dispute voluntary agreements to arbitrate are enforceable.

One might challenge this implication by arguing that post-dispute agreements are rare because there is little opportunity for them today. Employers who use arbitration almost always make it a condition of employment. If employers were not allowed to force employees into arbitration as a condition of employment, the

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21. Another reason a dispute may be characterized incorrectly is if the parties submit the dispute for arbitration by mutual agreement and the basis for their agreement is a pre-dispute agreement to arbitrate.

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argument goes, many more disputes would result in post-dispute agreements.

This argument might be persuasive if employment arbitration clauses were universal. This, however, is not the case. While the frequency of arbitration clauses in standard employment agreements has increased dramatically in recent years, the vast majority of employers still do not use them.<sup>22</sup> There is ample opportunity for the employers who do not use such arrangements to agree to arbitration after disputes arrive. Employers simply do not take advantage of this opportunity.

It is also possible that these lopsided numbers may be symptomatic of the peculiar nature of employment arbitration today. The classic model of arbitration involves two parties mutually and voluntarily agreeing to resolve their dispute(s) (current or future) through arbitration rather than litigation. The parties also mutually agree upon who the arbitrator will be and the rules under which he or she will operate. This model has little similarity with current arbitration, in which the employer makes virtually all the decisions. While it is difficult to explain why these changes have resulted in a dearth of post-dispute agreements to arbitrate, nothing should be ruled out in such a distorted situation.

#### IV. FREQUENCY OF POST-DISPUTE AGREEMENTS TO ARBITRATE DISPUTES BETWEEN BUSINESSES

Rather than argue about the arcane ways in which the power imbalances in today's employment arbitration might lead to the lack of voluntary post-dispute agreements, I chose to eliminate this variable from the analysis by examining another arbitration context where it does not exist. In business-to-business arbitration, there is generally rough equality of bargaining power. One seldom, if ever, hears complaints of arbitration clauses being forced upon small corporations by a more powerful business associate. If inequality of bargaining power is responsible for the absence of voluntary post-dispute agreements to arbitrate in the employment arena, that effect should disappear in business-to-business agreements.

We examined the relative frequency of pre- and post-dispute

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22. According to the United States General Accounting Office, only 19% of employers used mandatory arbitration agreements in 1997. UNITED STATES GENERAL ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 2 (1997). Even these employers do not use arbitration for all disputes.

agreements to arbitrate business disputes. Again, we used the data from the American Arbitration Association. Since AAA's entire business caseload would have overwhelmed our limited staff, we selected a limited, but representative, sample of business-to-business cases consisting of all 2001 cases resolved by AAA's Somerville, New Jersey office.

In seventy-eight cases the timing of the agreement to arbitrate could be determined. Post-dispute agreements to arbitrate were slightly more common in this sample. In seventy-one cases (91%) the agreement to arbitrate was entered into before the dispute arose. In only seven cases (9%) was the agreement to arbitrate made post dispute.

Timing of Agreement	
Pre-dispute	Post-dispute
91%	9%

As with the employment data, we also conducted an automated analysis of all AAA business-to-business arbitrations for the year 2002. This showed that only 1.8% of such disputes were the result of post-dispute agreements. The remainder, over 98%, were the result of pre-dispute agreements.

Timing of Agreement	
Pre-Dispute	Post-Dispute
98.2%	1.8%

Again, it is impossible to completely reconcile the 9% and the 1.8% rates of post-dispute agreements from these two analyses. In light of the fact that the second analysis included the entire set of AAA business-to-business arbitrations, the correct answer is probably closer to 1.8% than 9%.

No matter how one interprets this data, however, one point is indisputable. Eliminating the element of power imbalances does not significantly increase the rate of post-dispute arbitrations. Post-dispute agreements to arbitrate employment disputes are rare, and would continue to be rare even in the absence of power imbalances.

While the data does not support the argument that post-dispute arbitration will provide access to justice for those who need it, this alone does not prove that my hypothesis is correct. An

unwilling defense counsel is only one of many possible reasons why post-dispute arbitrations seldom occur. Even if one assumes that unwilling defense counsel is the explanation, economic hardball is not the only reason why they might decline to arbitrate. To completely understand the situation, one has to go behind the numbers and ask management employment lawyers about the reasons for their behavior.

We therefore interviewed twenty management employment lawyers.<sup>23</sup> Each of these individuals is a member of the American Bar Association's Committee on Employee Rights and Responsibilities or the Montgomery County (Pennsylvania) Bar Association's Committee on Dispute Resolution. These attorneys come from both large and small firms in all parts of the country. The selection process, however, was not sufficiently sophisticated to consider this group a random sample that is representative of all management employment lawyers for statistical purposes. Therefore, only dramatic trends in the responses are meaningful.

#### V. RARITY OF POST-DISPUTE ARBITRATION

The first insight revealed by these interviews was a confirmation of the rarity of voluntary post-dispute employment arbitration. Not one of these twenty attorneys had ever been involved in such arbitration. Plaintiffs' counsel had not offered them this option.

The selected attorneys were very forthcoming on how they would respond if given the opportunity to arbitrate an employment claim in the absence of a previous agreement to arbitrate. Their responses were not monolithic. While the list of factors they considered was relatively short, attorneys found different factors to be most influential in their decision-making. In some cases, a few attorneys found that the presence of a certain factor led them toward arbitration while other attorneys found the same factor a reason to litigate. Some strong patterns did emerge from these

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23. Our initial plan was to collect data using a questionnaire, an appropriate tool for collecting information from a large sample of people. We drafted a questionnaire and reviewed it with both academics and members of the target audience. Both found it confusing. Several attempts to clarify the questions were unsuccessful, and later consultation with a professional polling firm revealed that the information we sought was too conceptual and nuanced to be captured in a paper instrument. At this point, we decided to use personal interviews, which would allow us to probe more deeply and clarify when the interviewee did not understand the question.

interviews, however.

A. *Pre-trial Motions*

The strongest pattern was the unwillingness of management counsel to arbitrate when there is an opportunity to prevail on a pre-trial motion. All but one of the twenty attorneys interviewed (95%) were not interested in arbitration if they believed the case could be won on a pre-trial motion. While most believed arbitration was less expensive than litigation, they also believed the reduced cost of litigating only through pre-trial motions would be lower than the cost of arbitrating the dispute. They did not believe, however, that they could resolve disputes through pre-trial motions for summary judgment. This belief is correct; recent research confirms that summary judgment is virtually non-existent in arbitration.<sup>24</sup>

Nor were these management attorneys concerned about their ability to identify the specific cases in which a motion would be successful. The relative clarity of the legal rules for granting motions played some part in this confidence. A larger factor was the known track records of individual judges. One response referred to a judge who had never denied a single employer's motion for summary judgment in over two decades on the bench.

In most cases, those we interviewed preferred to litigate via motion even if they had to complete discovery and proceed by summary judgment. One attorney, however, would decline to arbitrate only if the case could be won on a motion to dismiss.

This factor alone would lead to the rejection of the majority of employee offers to arbitrate existing disputes. Currently, 60% of employee suits against their employers are lost on summary judgment.<sup>25</sup> Employers' counsels' unwillingness to arbitrate any case that they can win on summary judgment leaves slightly less than half of employees seeking to arbitrate with any chance of proceeding with arbitration.

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24. Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in HOW ADR WORKS 915, 921 (Norman Brand ed. 2002). In this study, the author examined all AAA employment cases for the year 2000 for which there is a published opinion. There are 163 such cases. Not one of these was decided by summary judgment.

25. Maltby, *supra* note 3, at 47.

### *B. Economic Hardball*

My initial concern was that employees with garden-variety claims, those not cost-effective for the private bar to litigate, might find their employers unwilling to arbitrate. Why should employers agree to arbitrate, and perhaps lose, when they could make the dispute disappear by saying “no” to arbitration?

This factor turned out to have less impact than anticipated. A majority of those we interviewed said they would be influenced by a would-be plaintiff’s apparent financial inability to maintain litigation. It was not, however, a large majority. Of the twenty management lawyers, eleven (55%) would consider financial resources if the employee was represented by counsel. Slightly more, thirteen (65%), did so if the employee was pro se.

The other lawyers felt quite differently. Many expressed the view that, no matter what the apparent economics, a determined employee would ultimately find a lawyer who would take the case. Similarly, many were reluctant to ignore even the least established attorney with the fewest financial resources. To these management attorneys, Erin Brockovich<sup>26</sup> is alive and well and they do not want to take a chance on meeting her. Even if the pro se employee never obtained an attorney, the management attorneys believed there could still be a cause for concern. These attorneys believed that many employees are sufficiently angry, or need the money badly enough, to litigate without counsel. They also believe the judge in such a case would help the employee through the system so that the case would be heard on the merits.

One attorney refused to engage in economic hardball out of principle. This person believed it was a misuse of the legal process to use such economic leverage and something that he was not willing to engage in.

### *C. Incendiary Facts*

The attorneys we spoke to frequently mentioned one situation in which they would prefer to arbitrate. This was the existence of facts (or reasonable allegations), probably admissible, which could cause the trier of fact to be prejudiced against the employer.

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26. Erin Brockovich’s investigation of exposure to toxic chemicals resulted in the largest toxic tort injury settlement in U.S. history: \$330 million in damages paid to 600 California residents. Erin Brockovich-Ellis biography at [http://www.maasryvitoe.com/erin\\_brockovich.shtml](http://www.maasryvitoe.com/erin_brockovich.shtml) (last visited Aug. 24, 2003).

Eighty percent (80%) of the lawyers we interviewed preferred to arbitrate under these circumstances. They believed arbitrators are more likely to keep negative facts in perspective and to avoid emotional decisions than juries.

Four attorneys, however, were largely unaffected by the presence of such facts. One attorney preferred to litigate when there are bad facts. He believed if the facts' probative value is outweighed by the prejudice they would cause, a judge will grant a motion in limine. Even the risk of having the motion denied did not change his opinion. Unlike the others, he believed that arbitrators would be prejudiced almost as much as a jury. The other three did not prefer to litigate in these circumstances, but also did not believe that difficult facts require them to arbitrate. They chose to litigate or arbitrate based on other factors.

#### *D. Clients*

The attorney, of course, does not make the final decision on whether to accept an offer to arbitrate. The employer must also agree.<sup>27</sup> In some situations, gaining the employer's agreement might be little more than a formality when the decision is a matter of professional expertise, and the employer trusts the attorney's professional judgment.

Arbitration is different. Many employers view this as a matter of corporate policy. They consider their attorney's opinion, but make the decision themselves. The lawyers we spoke with confirmed that many of their clients have strong views on arbitration that trump the recommendation of counsel when they differ. Of these lawyers, 30% considered their employer-clients opposed to arbitration and unlikely to agree to arbitrate even if this counsel so advised. The other 70% varied as to their client's response to arbitration. Some clients are strongly pro-arbitration, some are strongly opposed, and some decide based on the circumstances of the individual case.

One factor that frequently came up in our discussions is the reluctance of many clients to evaluate their cases pragmatically in the beginning of a dispute. The same dynamic that makes clients

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27. There are some situations in which a corporate client authorizes the attorney to make specific decisions. This is generally rare, however, and there is no reason to believe that the decision on whether to arbitrate is an exception. None of the attorneys we interviewed believed that their clients would delegate this decision.

refuse to consider settlement at the beginning of a case often leads them to refuse to arbitrate.

Beyond these general attitudes about arbitration, employers also may view the economic leverage issue discussed earlier differently than their attorneys. None of the attorneys we spoke with had conducted even the most rudimentary cost-benefit analysis. None knew how frequently a crusading lawyer takes on a case that is not financially viable. Nor did they know how often a pro se employee manages to litigate a case. At best, their perception of every dispute as a significant risk is an unquantified belief based upon experience. At worst, it is a manifestation of the risk averse nature of management counsel.

Corporate attorneys have a long history of great concern over minor risks. For example, they are extremely concerned about the risk of liability for defamation by reference check. Yet, the actual risk of liability in such situations is almost too small to measure.<sup>28</sup> If the attorney's willingness to arbitrate rather than play hardball comes from an exaggerated sense of caution rather than a realistic calculation of the risks, the client may not agree. The one attorney who refused to use economic leverage out of a sense of fair play may also find himself overruled by his client.

It is important to note that attorneys are required to tell their clients about their belief that the would-be plaintiff (with or without counsel) is financially unable to pursue litigation. Rule 1.4 of the ABA Rules of Professional Conduct requires an attorney to review all important aspects of a matter with the client in order for the client to make informed decisions regarding the representation.<sup>29</sup> In another paragraph, the Rule requires the attorney to "provide the client with facts relevant to the matter."<sup>30</sup> The other party's ability to pursue a lawsuit is clearly an important point that is relevant to the client's decision. This clear-cut reading of Rule 1.4 is supported by no less an authority than Professor Stephen Gillers, the dean of American legal ethics.<sup>31</sup>

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28. Terry Ann Halbert & Lewis L. Maltby, *Reference Check Gridlock: A Proposal for Escape*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 395, 403 (1998).

29. MODEL RULES OF PROF'L CONDUCT R. 1.4 (1983).

30. *Id.* at cmt. [1].

31. E-mail from Prof. Stephen Gillers, Vice Dean, New York University School of Law, to Lewis L. Maltby (Feb. 28, 2003) (on file with author).



## VI. ANALYSIS

However ideal it may sound in theory, the data strongly suggests that enforcing only post-dispute agreements to arbitrate employee disputes will not work well in practice. To be sure, employees with a strong case and several hundred thousand dollars in potential damages may be better off without such an agreement because they will preserve their right to a jury trial.

In the vast majority of cases, however, litigation is not cost-justified. These employees need arbitration to receive justice. The data on post-dispute arbitrations, however, strongly suggests that employees with run-of-the-mill employment disputes will find their employers unwilling to arbitrate. Despite ample opportunity, employers seldom agree to post-dispute arbitration today. Less than one in ten employment arbitrations today is the result of a post-dispute agreement.<sup>32</sup> This is not a reflection of power imbalances that might be eliminated by a “post-dispute voluntary rule.” In business-to-business arbitration, where parties generally have comparable bargaining power, the rate of post-dispute agreements is no higher.<sup>33</sup>

Interviews with management employment attorneys demonstrated that the reluctance of employers and their attorneys to arbitrate is the source of these low numbers. Some attorneys were simply adverse to arbitration generally. Virtually all management attorneys we spoke to would not arbitrate where the case could be resolved in court on pre-trial motions. Others refused to arbitrate if they believed the employee could not afford to pursue litigation. And even when the attorney would choose to arbitrate, the client often says no. The end result of changing the law so that only post-dispute agreements to arbitrate are enforceable might well be that most employees with legitimate claims would receive no justice at all.

This does not mean that we must accept the current regime of arbitration as a condition of employment. There are other alternatives that deserve serious consideration. The first is pre-dispute voluntary agreements. After a new employee is hired, she generally fills out a number of forms. Many of these involve choices on the employee’s part, such as which of several medical plan options the employee prefers. An employer could provide a

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32. *See supra* Part II.

33. *See supra* Part III.

form at this time allowing the employee to choose between the employer's arbitration system and maintaining their existing right to litigate for future disputes.

Such a system would work well in practice. The employee would already have been hired, but would not have had time to begin performing the job. The lack of job performance data would make it almost impossible for an employer to escape liability if it terminated the employee for making the "wrong" choice. Concerns about more subtle retaliation could be addressed by maintaining these forms in a secure location where they would not be accessible to line management.<sup>34</sup>

The newest alternative, first discussed at the 2003 meeting of the American Bar Association's Section on Dispute Resolution, is for employers to maintain an arbitration system, but to allow employees to opt out at the time of employment.<sup>35</sup> While such a system is not as respectful of employee choice as the former alternative, it does have much to recommend it. Traditional discussion of employment arbitration assumes that employees have a preference for maintaining their traditional legal remedies and that employers use their financial muscle to force them to accept arbitration.

This model is highly suspect. Most employees start a new employment relationship with enthusiasm and optimism, somewhat like a honeymoon. Future difficulties are the farthest thing from the employee's mind. Even if an employee were asked whether she prefers to arbitrate or litigate potential future disputes, it is unlikely she would have a preference, especially in light of the fact that most people know very little about either employment arbitration or

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34. It is possible senior management could still obtain access to these dispute resolution choice forms. However, it does not appear that this would often occur. Human resources professionals have a professional ethos that requires proper management of private employee data. If HR professionals were forced to choose between doing the right thing and keeping their jobs, most would capitulate (as would any other professional). Such a threat, however, could only be made by someone who outranked the head of HR. In most companies, only a handful of very senior executives could meet this criterion. Anecdotal evidence (primarily from the field of medical information) suggests that while HR executives are occasionally strong-armed, this happens only on the rare occasion where a very senior manager believes that they have a compelling financial need for the employee information. In the absence of a pending dispute, this situation would not exist.

35. Audiotape: American Bar Association Section on Dispute Resolution 2003 Meeting, San Antonio, Texas (Mar. 21, 2003) (on file with author).

litigation.

In a situation where most people have not thought about what they want, the perspective of default position analysis is very useful. Instead of pretending that employees know what they want, admit that most of them do not and select a default position that represents what most people would choose if they were to make an informed decision.

The literature on relative outcomes of employment arbitration and litigation consistently shows that employees as a whole receive more in arbitration than litigation.<sup>36</sup> Under these circumstances, the correct default position may well be arbitration. Employees who have a preference for litigation could freely choose that option.

These are only two possible models for voluntary pre-dispute agreements to arbitrate. Others are waiting to be discovered.

## VII. CONCLUSION

Changing the law to enforce only post-dispute agreements to arbitrate will not solve the problems of arbitration as a condition of employment. This change would leave the majority of employees who need arbitration in order to obtain justice empty handed, which is a situation far worse than the one employees face today. Rather than change from one unacceptable option to another, models for voluntary pre-dispute arbitration agreements need to be further developed.

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36. Hill, *supra* note 3; Maltby, *supra* note 3, at 48; Maltby, *supra* note 24, at 922.