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Sixth Time's the Charm: Rethinking the Arbitration Fairness Act to Achieve Practical Reform

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SIXTH TIME'S THE CHARM: RETHINKING THE ARBITRATION FAIRNESS ACT TO ACHIEVE PRACTICAL REFORM

By
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I. INTRODUCTION

Over the past several years, federal legislators have proposed arbitration reforms through the Arbitration Fairness Act, which would limit the use of arbitration agreements to those arising after the beginning of a consumer or employment dispute. While the Arbitration Fairness Act would prevent the use of arbitration agreements in contracts of adhesion, and greatly limit the use of arbitration in consumer and employment contexts, the Act fails to rectify the power disparity between individuals, and repeat-player businesses once arbitration begins. As there is little chance of Congress passing preclusive arbitration reform under the Trump Administration,[1] legislators should instead propose practical reform measures that mandate the use of consumer-friendly arbitration terms, and greater disclosure of arbitration results and arbitrator decisions. By doing so, legislators can garner bipartisan support for practical arbitration reform, rather than continue to promote the same tired, unsuccessful bill.

II. A LEGISLATIVE IMPASSE

Federal legislators have made several recent efforts to pass the Arbitration Fairness Act ("AFA"),[2] which would amend the Federal Arbitration Act ("FAA") to preclude the use of pre-dispute arbitration agreements ("PDAAs") in consumer and employment contracts.[3] Although introduced six times since 2007, the Act has failed to garner sufficient support to

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[1] George Friedman, *A New Congressional Attempt to Curb Arbitration Agreements: A More Focused Attack that's also Doomed to Fail*, SECURITIES ARBITRATION COMMENTATOR (Feb. 14, 2016), http://www.sacarbitration.com/blog/new-congressional-attempt-curb-arbitration-agreements-focused-attack-thats-also-doomed-fail/ (Noting that several attempts to amend the FAA to limit the use of mandatory arbitration have failed when Republicans have held Congress and the White House).

[2] *See* Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Garen E. Dodge, *Congress Considers Limiting Pre-dispute Arbitration Agreements in the Employment Context*, Nat'l Law Rev. (Mar. 17, 2017), https://www.natlawreview.com/article/congress-considers-limiting-pre-dispute-arbitration-agreements-employment-context.

[3] *See* H.R. 1374; H.R. 2087, 114th Cong. (2015); H.R. 1844, 113th Cong. (2013); H.R. 1873, 112th Cong. (2011); H.R. 1020, 111th Cong. (2009); H.R. 3010, 110th Cong. (2007). (The arbitration fairness act was initially introduced in the 110th Congress, and has been reintroduced before every Congress through 2017).

pass.[4] Meanwhile, Supreme Court jurisprudence has strengthened the validity and enforceability of PDAAs,[5] and many businesses include pre-dispute arbitration clauses in contracts to the extent of ubiquity.[6] Given the Supreme Court's favorable view of mandatory arbitration agreements, and the broad use of such clauses by businesses, arbitration reform will likely be achieved only by new legislation.[7]

Under the Trump Administration, passage of the 2017 version of the AFA[8] into law appears less likely than ever.[9] In addition, after the rejection of the Consumer Financial Protection Bureau's ("CFPB") arbitration rule in 2017,[10] broad, preclusive reform measures are unlikely to win Congress' approval.[11] Now, however, publicity surrounding the AFA has brought PDAAs into the public eye, and support for arbitration reform has grown.[12]

Unfortunately, the current draft of the AFA neither addresses the procedural shortcomings of consumer arbitration, nor attempts to manage the power disparity between repeat-player corporations and consumers, who have little choice but to agree to arbitration

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[4] *See* Javier J. Castro, *Employment Arbitration Reform: Preserving the Right to Class Proceedings in Workplace Disputes*, 48 U. MICH. J. L. REFORM 241, 265 (2014) ("This bill has drawn considerable support in the Senate, yet it has so far been unable to obtain the requisite number of votes to get past committee.").

[5] Thomas E. Carbonneau, *Arbitration Law in a Nutshell*, 4th ed., 378 ("In *AT&T Mobility v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011), the Court legitimated adhesive arbitration contracts. An obligation to arbitrate can be unilaterally imposed by the stronger party on its weaker counterpart . . . ").

[6] *See* CFPB, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act*, § 2, at 8 (2015) [hereinafter *Arbitration Study*] (listing that 99.9% of mobile wireless contracts, and 98.5% of storefront payday loan contracts include a mandatory arbitration clause).

[7] *See* Castro, *supra* note 4, at 264-65.

[8] Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

[9] George Friedman, *A New Congressional Attempt to Curb Arbitration Agreements: A More Focused Attack that's also Doomed to Fail*, SECURITIES ARBITRATION COMMENTATOR (Feb. 14, 2016), http://www.sacarbitration.com/blog/new-congressional-attempt-curb-arbitration-agreements-focused-attack-thats-also-doomed-fail/.

[10] *See* 12 C.F.R. § 1040 (2017) (Limiting the use of pre-dispute arbitration agreements in consumer financial products and services, and precluding the use of class-action waivers).

[11] Evan Weinberger, *Trump Officially Kills CFPB Arbitration Rule*, LAW 360 (Nov. 1, 2017, 4:35 PM), https://www.law360.com/articles/980811/trump-officially-kills-cfpb-arbitration-rule. ("The U.S. Senate passed its version of the [Congressional Review Act] resolution of disapproval of the CFPB's arbitration rule on a 51-50 vote with Vice President Mike Pence breaking a tie on Oct. 24. That followed a July vote in the U.S. House of Representatives to overturn the rule.")

[12] Sylvan Lane, *GOP Polling Firm: Bipartisan Support for Consumer Bureau Arbitration Rule*, THE HILL (Oct. 5, 2017, 5:29 PM EDT), http://thehill.com/policy/finance/354143-gop-polling-firm-finds-bipartisan-support-for-consumer-bureau-arbitration-rule; Stephen Rouzer, *New Poll: Overwhelming Support for CFPB Arbitration Rule in Arizona and Maine*, Fair Arbitration Now (Oct. 12, 2017), https://www.fairarbitrationnow.org/new-poll-overwhelming-support-cfpb-arbitration-rule-arizona-maine/ (The polling was conducted by Public Policy Polling, a polling firm associated with the Democratic Party).

clauses in consumer contracts.[13] Drafters of the AFA should instead propose practical reform measures to mitigate the inherent disparities between resource-rich companies and the ordinary consumer, which would establish a fairer arbitration process and garner more bipartisan support for the Act. Legislators concerned with arbitration reform should strike now, while the public is informed and academics continue to criticize the current state of consumer arbitration.[14]

III. THE EVOLUTION OF CONSUMER ARBITRATION

A. Arbitration: From Niche Practice to a Premier Alternative to Litigation

Prior to federalization in 1925, 17th century common law governed arbitration.[15] Courts viewed PDAAs as efforts to circumvent the courts' jurisdiction,[16] and parties were permitted to withdraw from arbitration at any point before the arbitrator issued an award.[17]

In 1925, Congress passed the Federal Arbitration Act,[18] which legitimized arbitration in maritime transactions and commerce,[19] and explicitly provided that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[20] The FAA also dictated procedures for arbitrator selection and granted arbitrators the authority to compel witness testimony.[21] Furthermore, the FAA ensured that arbitration proceedings would remain

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[13] Carbonneau, *supra* note 5, at 378.

[14] Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration*, PUBLIC CITIZEN (July 2008), https://www.citizen.org/sites/default/files/arbitrationdebatetrapfinal.pdf; Carbonneau, *supra* note 4, at 378.

[15] Steven A. Certilman, *This Is a Brief History of Arbitration in the United States*, 3 N.Y. DISP. RESOL. LAW 10, 12 (2010); *see also* Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925).

[16] Certilman *supra* note 15, at 12*; see also Kill v. Hollister*, 95 E.R. 532 (K.B. 1742) (stating that "the agreement of the parties [to arbitrate] cannot oust this court.").

[17] Certilman *supra* note 15, at 12; *see also* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2038 (2011) ("[C]ourts permitted either party to a pre-dispute arbitration agreement to revoke the agreement at any time before the entry of an award"); Vynior's Case 77 E.R. 597 (1609). ("So also it would seem that a revocation, made before a Judge's order is made a rule of Court, is also a revocation of the submission; and therefore the submission being gone, there remains nothing to make a rule of Court. . . .")

[18] Arbitration Act., Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 1 (2017)).

[19] 9 U.S.C. § 1 (1947).

[20] 9 U.S.C. § 2 (1947).

[21] 9 U.S.C. §§ 5, 7 (1947).

subject to judicial review when necessary, and provided a mechanism to vacate arbitration awards that resulted from corruption, fraud, or arbitrator misconduct. [22]

In the following years, the Supreme Court expanded and strengthened arbitration's position in the United States.[23] In 1967, the Court's decision in *Prima Paint Corp v. Flood & Conklin Mfg. Co* ("Prima Paint") established the separability doctrine, which directed that arbitration agreements are enforceable unless challenged on grounds of contract validity.[24] The same year, the Court overturned a California law that exempted franchise cases from arbitration, holding that by enacting a substantive rule applicable in both state and federal courts, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[25] Three years later, the Court recognized that Section 2 of the FAA, which presumes that arbitration clauses are valid and enforceable,[26] represents a "federal policy favoring arbitration agreements,"[27] and ruled that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."[28] Finally, the Supreme Court ruled that the courts must grant motions to compel arbitration, regardless of potential judicial inefficiency over related

[22] 9 U.S.C. § 10 (2002) (In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.).

[23] *See e.g* Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Southland Corp. v. Keating, 465 U.S. 1 (1980).

[24] Prima Paint Corp, 388 U.S. at 403 ("[T]he federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.").

[25] Southland Corp., 465 U.S. at 16.

[26] *See* 9 U.S.C. § 1 (1947) (". . . an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[27] Moses H. Cone Memorial Hosp. v. Mercury Construction Co., 460 U.S. 1, 24 (1983).

[28] *Id*. at 24-25.

claims.[29] The Supreme Court thus firmly established that the FAA governs disputes concerning arbitration.[30]

B. The Rise of Consumer Arbitration and Pre-dispute Arbitration Agreements

Recognizing the merits of arbitration over litigation,[31] businesses began to include pre-dispute arbitration clauses in their contracts.[32] Consumers and employees, however, could invalidate arbitration clauses under common law theories of contract validity, such as unconscionability, so long as the challenging parties' claims concerned the arbitration clause itself.[33] Courts often found PDAAs to be unconscionable, for example, when the agreement conferred an unfair advantage to the party compelling arbitration.[34] Provisions that conferred an unfair advantage included provisions that granted only one party power

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[29] Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) (holding that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute.").

[30] Carbonneau, *supra* note 5, at 2; Moses H. Cone Memorial Hosp., 465 U.S. at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability").

[31] *See* Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, FRANCHISE L.J. 141-142 (Spring 1997) ("Absent unusual circumstances . . . [a] franchisor with an arbitration clause should be able to require each franchisee in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, and because arbitrators typically do not issue runaway awards, strict enforcement of an arbitration clause should enable the franchisor to reduce dramatically its aggregate exposure").

[32] *See, e.g.*, Badie v. Bank of America, 79 Cal. Rptr. 2d. 273, 276 (1998) (ruling that an arbitration clause is unenforceable when the respondent bank unilaterally included the clause after the parties had entered a contract.);) DAI v. Hollingsworth, 949 F. Supp. 77 (D. Conn. 1996) (upholding DAI's arbitration agreements, precluding a state class action suit).

[33] *See* Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (stating that "if the claim is fraud in the inducement of the arbitration clause itself -- an issue which goes to the 'making' of the agreement to arbitrate -- the federal court may proceed to adjudicate it."); Carbonneau, *supra* note 5, at 110 ("[FAA §2] expressly provided that agreements to arbitrate could be challenged only on the basis of standard contract formation grounds (e.g., indefinite subject matter, lack of capacity in a contracting party, the failure to coordinate offer and acceptance, the absence of consideration, or unconscionability)").

[34] Nino v. Jewelry Exchange, Inc., 609 F.3d 191, 204 (3d Cir. 2010) (stating that "arbitration provisions that confer an 'unfair advantage' upon the party with greater bargaining power are substantively unconscionable.") (quoting Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 269 (3d Cir. 2003)).

to select an arbitrator,[35] restrict discovery,[36] or limit an arbitrator's authority when determining an award.[37] Courts examining such provisions often found that consumers were stripped of their legal rights, including access to a remedy.[38]

Corporations responded to contemporary jurisprudence by including delegation clauses in consumer agreements, which grant arbitrators authority to determine the validity of the arbitration clause itself,[39] a concept also known as *kompetenz-kompetenz*.[40] The Supreme Court upheld the validity of delegation clauses in 2010,[41] thus further expanding the separability doctrine established in *Prima Paint*, which had already limited challenges of arbitration to those premised upon issues concerning contract validity.[42] The Court reasoned that a delegation clause is a separate agreement to arbitrate the validity of the arbitration clause by itself.[43] By establishing that delegation clauses are severable, the Court provided a fast-track to arbitration for consumer disputes, which forces claimants to first submit to arbitration to determine whether the delegation clause is conscionable before being heard in court.[44]

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[35] Hooters of Am. v. Phillips, 39 F. Supp. 2d 582, 614 (S.C. 1998) (finding a provision limiting arbitration selection to a list of company approved arbitrators unconscionable).

[36] *Id.* at 614; Ferguson v. Countrywide Credit Indus., 298 F.3d 778 (9th Cir. 2002) (holding that an arbitration provision limiting depositions of corporate representatives to four topics provided the employer an unfair advantage).

[37] Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 154 (1997) (finding an arbitration agreement's damages restrictions unconscionable).

[38] Ting v. AT&T, 182 F. Supp. 2d 902, 939 (N.D. Cal. 2002).

[39] *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68-69 (2010) (Upholding the validity of Rent-A-Center's delegation provision, noting that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate . . .").

[40] Carbonneau, *supra* note 5, at 29 ("Kompetenz-kompetenz, or jurisdiction to rule on jurisdictional challenges, establishes that the arbitral tribunal can rule on matters relating to the validity and scope of the agreement to arbitrate.").

[41] *Id.*

[42] Prima Paint Corp., 388 U.S. at 403-04.

[43] *See* Rent-A-Center, W., Inc., 561 U.S. at 71 ("a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.").

[44] Friedman, *supra* note 17, at 2048.

C. Concepcion, Italian Colors and the Consumer Arbitration Debate

In recent decisions, the Supreme Court has made PDAAs nearly impervious to consumer and employer challenges of contract validity.[45] In *AT&T Mobility LLC v. Concepcion* ("Concepcion"),[46] the Supreme Court held that class action waivers in consumer contracts of adhesion are enforceable, even when applied to small claims.[47] The Court overruled California's decision to prohibit class action waivers in arbitration agreements,[48] reasoning that class-wide arbitration proceedings preclude individual claims, judicialize arbitration proceedings,[49] and increase defendants' risk of being held liable, especially due to the lack of multilayered review in arbitral proceedings.[50] Concluding that arbitration was ill-suited for class-wide proceedings,[51] the Court upheld AT&T's class action waiver.[52]

The Court further established the enforceability of PDAAs in *American Express v. Italian Colors* ("Italian Colors"), in which claimants sought class action arbitration proceedings to avoid the costs of individual proceedings, which would exceed each claimant's total amount in controversy.[53] Respondents argued that the class action waiver was unenforceable because the claims were based on federal antitrust statutes, and the class waiver precluded the claimant's right to seek a remedy.[54] The Court rejected American Express' argument, stating that, although the class action waiver may render claims too expensive to pursue, the waiver did not actually preclude each claimant from seeking relief.[55] The Court clarified that class arbitration remained unavailable for consumers seeking a remedy.[56]

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[45] Carbonneau, *supra* note 5, at 230.

[46] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, (2011).

[47] *Id.* at 352.

[48] Discover Bank v. Superior Court, 113 P.3d 1100, 1108-09 (Cal. 2005) (holding that a class action waiver provision was unconscionable when applied to consumer claims alleging that a credit card company had wrongfully charged customers a $29 late fee).

[49] *Concepcion*, 563 U.S. at 347-48.

[50] *Concepcion*, 563 U.S. at 350.

[51] *Id.* (noting that "[a]rbitration is poorly suited to the higher stakes of class litigation").

[52] *Id.* at 352.

[53] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013).

[54] *Italian Colors Rest.*, 133 S. Ct. at 2310.

[55] *Id.* at 2311. ("that '[the class-action waiver] no more eliminates [the] parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938 . . . ").

[56] *Id. at* 2312. (concluding that class procedures " . . . would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration, in particular, was meant to secure.").

The impact of *Concepcion* and *Italian Colors* is still debated. Conservative and pro-business groups argue that the decisions are pro-consumer,[57] and commend the value of arbitration as an accessible venue for consumers seeking redress.[58] Conservatives contend that the speed and informality of arbitration benefits consumers[59] and that consumers may simply refuse to enter contracts mandating arbitration.[60] These decisions have also been criticized by progressive and pro-consumer groups who reject the consumer-friendly characterization of arbitration.[61] Progressives argue that mandatory arbitration clauses relieve corporations of accountability for abusive practices,[62] and that consumers are less successful in arbitration than in judicial proceedings.[63]

Regardless of the benefit that arbitration confers to consumers, the Supreme Court's jurisprudence has insulated PDAAs from common law theories of contract unenforceability, and courts almost always enforce arbitration agreements under Section 2

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[57] Ted Frank, *Class Actions, Arbitration, and Consumer Rights: Why Concepcion is a Pro-Consumer Decision*, MANHATTAN INST., Legal Policy Report No.16 (Feb. 19, 2013), https://www.manhattan-institute.org/html/class-actions-arbitration-and-consumer-rights-why-concepcion-pro-consumer-decision-5896.html.

[58] *See, e.g.*, Brief of the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae in Support of Petitioners at 30, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) ("bilateral arbitration overwhelmingly *increases* access to justice for millions of individuals throughout the Nation.").

[59] Hans von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, THE HERITAGE FOUND. (July 17, 2013), http://www.heritage.org/report/the-unfair-attack-arbitration-harming-consumers-eliminating-proven-dispute-resolution-system.

[60] *Id.*

[61] *See* Brief of Amicus Curiae Public Citizen, Inc., Supporting Respondents at 18, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) ("the arbitration process poses significant barriers to the assertion of consumer claims . . . ").

[62] Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, CTR. FOR AM. PROGRESS (Aug. 2, 2016, 9:01 AM), https://www.americanprogress.org/issues/economy/reports/2016/08/02/142095/the-case-against-mandatory-consumer-arbitration-clauses/.

[63] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE Briefing Paper #414 (2015), http://www.epi.org/publication/the-arbitration-epidemic/#epi-toc-2.

of the FAA.[64] Arbitration reform must therefore be realized through other non-judicial avenues. The AFA remains a potential vehicle to empower consumers subject to PDAAs.[65]

III. THE ARBITRATION FAIRNESS ACT

A detailed assessment of the Arbitration Fairness Act reveals that the Act intends to make arbitration more equitable by broadly precluding its use, rather than by addressing the procedural issues inherent to the practice. The AFA addresses fairness concerns over the mandatory use of arbitration provisions, including when consumers lack sufficient knowledge and resources to successfully challenge corporations in arbitration,[66] and when the consumer has little choice but to agree to a PDAA.[67] To reach this goal, the AFA attempts to reform resolution of consumer and labor disputes by eliminating use of mandatory PDAAs. [68]

The AFA would alter clauses in Section 2 of the FAA that establish the validity of particular classes of arbitration agreements.[69] The crux of the bill provides that, "[n]otwithstanding any other provision of this title, no [PDAA] shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute."[70] The AFA, therefore, would preclude all forms of PDAA, ultimately relegating consumer arbitration to voluntary, post-dispute arbitration proceedings.

The AFA would also establish that, under Section 2 of the FAA, the validity and enforceability of an arbitration agreement "shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such

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[64] *See* Carolyn Shapiro, *Arbitration Uber Alles in the Supreme Court*, CHICAGO-KENT COLL. OF L. FAC. BLOG, (June 21, 2013), http://blogs.kentlaw.iit.edu/faculty/2013/06/21/arbitration-uber-alles-in-the-supreme-court/. ("American Express gives monopolists a road map to insulate themselves from liability under the antitrust laws. And it makes clear to all kinds of powerful interests that they can construct arbitration agreements so restrictive that no one in their right mind would take advantage of them, even if, as in American Express, this effectively nullifies a whole host of other important federal rights").

[65] Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. § 2 (2017).

[66] *Arbitration: Is it Fair When Forced?: Hearing Before the Comm. on the Judiciary*, 112th Cong. 2(2011) (Statement of Sen. Al Franken) ("These bills, like the ones that have come before it, seek to limit the use of forced arbitration clauses in contexts where one party suffers from a substantially weaker bargaining position. These particular bills focus on consumers and workers who sign form contracts with corporations.").

[67] Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. § 2 (2017).

[68] *Id.* at § 3.

[69] *Id.* at § 3(a).

[70] *Id.*

agreement."[71] In other words, the AFA would remove arbitrator authority to rule on its own jurisdiction and relegate determinations of validity and enforceability to the court system.[72]

The broad provisions of the AFA are predicated on a number of findings stated within the bill, which rightfully paint the current overall state of consumer arbitration as an unjust, secretive process forced upon consumers.[73] The bill first asserts that when the Supreme Court extended the FAA to consumer disputes the Court infringed on Congress' purpose behind the FAA, stating that the FAA "was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power."[74] Furthermore, consumers have "little or no meaningful choice whether to submit their claims to arbitration," and "[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions."[75] The findings do, however, make clear that the bill does not intend to eliminate consumer arbitration as a whole, stating that arbitration is acceptable "when consent to the arbitration is truly voluntary and occurs *after* the dispute arises."[76]

In light of the congressional concerns over the inherent unfairness of the consumer arbitration procedure and the lack of consumer choice but to submit to arbitration, the AFA seeks to eliminate binding PDAAs to equalize the bargaining power between individual consumer claimants and corporate defendants.[77] The AFA's prohibition against PDAAs in consumer and labor contracts is particularly broad and would subject all such arbitration procedures to the same standards that govern post-dispute arbitration agreements.[78] Such an approach, however, fails to fully address the asserted fairness issues of consumer arbitration. Consumer arbitration reform through practical legislative measures would greatly assist consumers and would be far more likely to garner the bipartisan support necessary to pass an arbitration reform measure of any kind.

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[71] Arbitration Fairness Act of 2017, at § 3(a).

[72] *Id.*

[73] *Id.* at § 2 (2017) (Finding that mandatory arbitration undermines the development of public law due to the lack of procedural transparency and judicial review, and that most consumers and employees have little to no choice in submitting their claims to arbitration, and often lack awareness that they have agreed to arbitrate future claims).

[74] *Id.*

[75] *Id.*

[76] Arbitration Fairness Act of 2017, at § 2.

[77] *Id.* at §§ 2(1), (3).

[78] *Id.* at § 2(5) ("Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.").

IV. SHORTCOMINGS OF THE CURRENT ARBITRATION FAIRNESS ACT

Although the Arbitration Fairness Act's moratorium on PDAAs may afford consumers broader latitude when choosing a dispute resolution method, the Act fails to address procedural fairness concerns in consumer arbitration. Furthermore, the AFA's attempt to empower consumers has missed the mark, because the Act's PDAA would largely foreclose arbitration, in which consumers tend to succeed more often than in litigation.[79]

A. The Arbitration Fairness Act Would Limit the Consumer's Choice of Dispute Resolution, Disadvantaging Consumer Claimants

While the AFA's legislative scheme seeks to prohibit PDAA clauses, the Act would allow consumers to agree to arbitration after a dispute has arisen. However, post-dispute agreements to arbitrate will likely transpire less often than PDAAs because of the consumers' lack of knowledge regarding arbitration proceedings and the lack of readily available information on prior awards.[80] Additionally, academics recognize that parties have conflicting priorities after disputes arise, which makes an agreement to post-dispute arbitration less likely.[81] Corporations are not likely to agree to low-cost arbitration proceedings, which appeal to consumers.[82] Conversely, consumer counsels are not likely to advise arbitration when the alleged damages are high because a corporation faced with an uncertain jury trial is more likely to seek settlement.[83]

Because voluntary post-dispute arbitration is often unfavorable to at least one party, the current AFA's prohibition against PDAAs will functionally preclude consumer arbitration in most disputes. Consumers will be more likely to litigate claims and forego the benefits that arbitration can provide. A CFPB study found that claims submitted to arbitration are generally resolved faster than either individual or class action claims submitted to litigation, especially claims submitted in state or multi-district courts.[84] The CFPB study also showed that consumers are more likely to receive favorable judgments in arbitral

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[79] *Arbitration Study*, *supra* note 6, § 5 at 13; §6 at 48.

[80] *Arbitration Study*, *supra* note 6, § 3 at 3-4; Carbonneau, *supra* note 5, at 23-24.

[81] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567 (2001).

[82] *Id.*

[83] *Id.*

[84] *See Arbitration Study*, *supra* note 6, § 5, at 12 (arbitrator decisions were generally issued "within five to eight months after the case was filed" and "the median time to settlement was 155 days of initiation."); *id.*, § 6, at 9 ("federal class cases closed in a median of approximately 218 days for cases filed in 2010, and 211 days for cases filed in 2011. Class cases in multi-district litigation . . . [closed] in a median of approximately 758 days for cases filed in 2010 and 538 days for cases filed in 2011 . . . individual federal cases closed in a median of approximately 127 days.").

proceedings rather than in class or individual litigation.[85] Consumers additionally benefit from the majority of arbitration agreements, which require that in-person hearings occur in a location reasonably convenient to the consumer, a valuable alternative to choice-of-law provisions, which may lead to adjudication in distant jurisdictions.[86] Moreover, arbitrators often award attorney's fees to prevailing consumers, and many arbitration agreements provide that companies will pay or advance initial arbitration fees.[87] Ultimately, the AFA's moratorium on PDAAs will likely disadvantage consumers seeking relief and may deny indigent consumers their day in court.

B. The Arbitration Fairness Act Does Not Rectify Procedural Fairness Issues in Consumer Arbitration

The AFA's broad prohibition against PDAAs fails to address a number of consumer arbitration fairness concerns, including the threats of repeat-player and repeat-arbitrator biases in arbitral proceedings.[88] Rather, the reduced number of arbitrations may exacerbate the risk of repeat player bias as competition amongst arbitrators increases. The repeat-player bias theory asserts that arbitrators are more likely to rule in favor of a party that frequently engages in arbitration, hoping to be hired again.[89] This theory similarly recognizes that arbitral bodies compete for business and asserts that these organizations are incentivized to adopt business-friendly procedures to govern consumer arbitration.[90] Arbitrators are also compelled to make pro-business decisions to avoid blacklisting

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[85] *Arbitration Study*, *supra* note 6, § 5, at 13 ("Of . . . 158 cases, arbitrators provided some kind of relief in favor of consumers' affirmative claims in 32 disputes (20.3%)."); *id.* at 293 ("Relative to class cases where a consumer judgment (class-wide or non-class) occurred in 1.8% of all cases, judgment for consumer(s) occurred more frequently in individual cases, in 6.8% of cases.").

[86] *Id*,. § 5, at 71 ("we were able to generate a distance estimate in 86 of the 116 disputes filed in 2010 and 2011 that featured an in-person hearing. For these 86 in-person hearings, the average and median travel distances for consumers were 30 miles and 15 miles, respectively.").

[87] *Arbitration: Is it Fair When Forced?: Hearing Before the Committee on the Judiciary*, 112th Cong. 101 (2011) (statement of Christopher R. Drahozal, John M. Rounds Professor of Law, Associate Dean for Research & Faculty Development, University of Kansas School of Law), Attachment 1, ("Consumer claimants sought to recover attorneys' fees in over 50% of the cases in which they were awarded damages and were awarded attorneys' fees in 63.1% of those cases."); *Arbitration Study*, *supra* note 6, at 81-83.

[88] Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration*, PUB. CITIZEN 24-25 (2008), https://www.citizen.org/sites/default/files/arbitrationdebatetrapfinal.pdf.

[89] *Id.* at 24 (quoting Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 194 (2004)).

[90] Lincoln & Arkush, *supra* note 88 at 25 (arbitral bodies include the American Arbitration Association and the National Arbitration Forum) (quoting Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650 (2005)).

themselves from future employment.[91] By contrast, arbitral bodies have little incentive to seek repeat business from consumer claimants who do not often engage in arbitration.[92] As the preclusion of PDAAs would decrease the total number of arbitration proceedings, arbitrators will face greater pressure to be selected in the future, incentivizing them to rule in favor of businesses more often than before.

Repeat-player bias also threatens consumers when considered alongside the scope of judicial review that courts apply to arbitral decisions, as consumers may struggle to demonstrate that an arbitrator's decision was the result of misconduct. Under FAA Section 10, courts may only vacate arbitral awards where a party demonstrates that the award was procured by "undue means," such as arbitrator impartiality, corruption, or procedural misconduct.[93] Courts, therefore, may only review arbitral decisions where an arbitrator has engaged in misconduct, and courts grant broad deference to an arbitrator's decision on the merits of the claim.[94] While arbitrator partiality is sufficient to vacate an award, the test to prove "evident partiality" varies between federal circuits, and several circuits require evidence from the arbitration itself to substantiate such claims.[95] Because transcripts are not mandatory in arbitration,[96] consumers may have difficulty proving claims by evident partiality in federal circuits that require evidence to challenge an arbitral award if they lack a transcript to substantiate their challenge to the arbitrator's impartiality. Without a transcript or other evidence to demonstrate arbitrator misconduct or partiality, an arbitrator's decision will be upheld.

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[91] Lincoln & Arkush, *supra* note 88 at 24-25 ("This previous view of Rutledge's finds support in anecdotal evidence, such as the notorious case of Harvard law professor Elizabeth Bartholet, who evidently was blacklisted by a NAF after she ruled for a consumer and against the credit card company in one case. NAF removed Bartholet from subsequent cases, saying she had a 'scheduling conflict,' a claim she asserts is false.").

[92] Stephan Landsman, *ADR and the Cost of* Compulsion, 57 STAN. L. REV. 1593, 1615 (2005) ("[T]here is a strong temptation, especially for commercial ADR concerns, to do whatever is necessary in order to gain a competitive advantage and increase business. These pressures have led some ADR organizations to seek cooperative agreements with adhesion contract drafters in the hope of securing a steady flow of business.").

[93] 9 U.S.C. § 10(a)(1)-(3) (2002).

[94] Carbonneau, *supra* note 5, at 122 ("A nearly irrefutable presumption exists in federal law that arbitral awards, once rendered, are legally enforceable.").

[95] Laura M. Fontaine, *Establishing an Arbitrator's "Evident Partiality"*, A.B.A. SEC. OF LITIG., TRIAL EVIDENCE COMM. (2011), http://apps.americanbar.org/litigation/committees/trialevidence/ articles/fall2011-establishing-arbitrator-evident-partiality.html ("several federal circuits allow or require introduction of evidence from the arbitration itself to show actual bias for or against a party to the arbitration . . . In addition, courts differ on the sufficiency and strength of contacts or relationships needed to prove 'evident partiality' where such contacts are not disclosed.").

[96] *See, e.g.*, *Consumer Arbitration Rules*, AM. ARB. ASS'N, 22 (2016) ("R-27. Written Record of Hearing: (a) If a party wants a written record of the hearing . . . The party or parties who request the written record shall pay the cost of the service.").

The AFA's broad preclusion of PDAAs additionally fails to address discovery issues in arbitration proceedings. Unlike the expansive discovery allowed in litigation, arbitration sacrifices scope of discovery for speed of proceedings.[97] PDAAs may limit the scope or duration discovery, or forego discovery altogether, so long as the arbitrator has ultimate discretion in dictating discovery procedures.[98] Although limited discovery ensures that disputes resolve themselves quickly, consumer claimants are likely to be disadvantaged by abridged discovery procedures, as consumers often lack the resources to access documents or depose corporate representatives to substantiate their claims.[99] The limited scope of discovery, although expeditious, may seriously impair meritorious consumer claims.

Finally, the AFA fails to address policy concerns that consumer arbitration lacks transparency and interferes with the development of public law.[100] The proposed Act does not require transparency of arbitral decisions, which would restrict consumer attempts to research the resolution of prior arbitration proceedings.[101] Consumers may choose to litigate their claims, even though arbitration may be more advantageous, because the consumer is unequipped to evaluate the potential success of their claim.

C. The Arbitration Fairness Act Does Nothing to Earn Support from Business Interests to Garner Bipartisan Support

In its current form, the legislative scheme of the AFA gives business interest little incentive to work with consumer interests towards pragmatic arbitration reform, instead tempering business interests against the premise of reform overall. The AFA's current scheme to broadly preempt the use of PDAAs threatens business interest's widespread reliance on such provisions, which serves as a rallying-cry for business interests to oppose the act.[102] Specifically, a moratorium on PDAAs would harm business interests by

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[97] Carbonneau, *supra* note 5, at 40 ("Arbitration usually does not include a right to pretrial discovery . . . ").

[98] *See* Dotson v. Amgen, Inc., 181 Cal. App. 4th 975, 984 (2010) (reasoning that a contractual limitation on depositions in arbitration was not unconscionable, as the agreement gave the arbitrator discretion to order discovery as needed to sufficiently litigate the parties' claims); *see also Consumer Arbitration Rules*, *supra* note 96, at 20 ("R-22 . . . the arbitrator may direct 1) specific documents and other information to be shared between the consumer and business, and 2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.").

[99] Lincoln & Arkush, *supra* note 14, at 31 (quoting Linda J. Demaine & Deborah R. Hensler, '*Volunteering' to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 L. & CONTEMP. PROBS. 55, 72 (2004)).

[100] Arbitration Fairness Act of 2017 at § 2.

[101] *See generally,* Arbitration Fairness Act of 2017.

[102] *See e.g., Comments to the U.S. House of Representatives on the Arbitration Fairness Act, H.R.3010*, Coalition to Preserve Arbitration (January 2007) (In which several businesses and business associations oppose passage of the AFA because the act would eliminate the use of pre-dispute arbitration agreements).

diverting disputes from arbitration to litigation, increasing the length and costs of proceedings while negating the benefits that repeat-player businesses gain in arbitration.[103] Moreover, businesses would be exposed to significantly greater risks of liability through class-action proceedings than they would experience in individual consumer arbitration.[104] Business interests are inclined to oppose the AFA because the act's broad preclusion on the use of PDAA's would increase the costs of settling or resolving consumer claims, while simultaneously providing little benefit to businesses.[105] As discussed above, arbitral proceedings are desirable to both consumer and corporate parties because they are less complex, and more informal than traditional court proceedings.[106] While simplicity and informality may disadvantage a consumer seeking to vindicate their rights, these features conversely benefit businesses who often find themselves defending against such consumer claims. Businesses benefit from abridged discovery proceedings, given that they have greater resources than consumers in discovery stages and often have little need to engage in discovery to the extent of consumer claimants.[107] Moreover, any risk of arbitrator bias, pursuant to the repeat-player theory, would favor a business compelling arbitration through PDAA's, as repeat-player bias inherently favors drafters of adhesion contracts over first-time consumer claimants.[108] Repeat-player status, in conjunction with the lack of transparency in arbitral proceedings, allows businesses to leverage their experience in arbitration.[109] While a repeat-player business can maintain records of past decisions and

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[103] Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 109 CALIF. L. REV. 1, 59-61 (Forthcoming 2019) (Finding that the probability of plaintiff wins in arbitration declines in consumer cases against high level repeat player businesses); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–57 (2006) (Noting a consensus viewpoint that businesses use adhesive arbitration agreements because businesses find arbitration lowers their dispute resolution costs).

[104] Sternlight, Jean R. and Jensen, Elizabeth J., *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 Law & Contemp. Probs. 75, 85-90 (2004) (Noting that class action waiver provisions impede consumer claims and insulate businesses from liability because individual claims may be too costly to assert, may suffer from a lack of information, and fail to achieve full enforcement of the law on a class basis).

[105] By preempting the use of pre-dispute arbitration agreements, businesses will be forced to adjudicate a greater volume of claims in court, which increases dispute resolution costs and nullifies any tangible repeat-player benefits that businesses may tacitly recognize. *See* Ware, supra note 102; Horton, *supra* note 103; Sternlight, *supra* note 104.

[106] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (" . . . it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.")

[107] Lincoln & Arkush, *supra* note 99.

[108] Landsman, *supra* note 92 at 1615.

[109] Arbitration Fairness Act of 2017, at § 2.

settlements, consumers lack similar information, ultimately granting businesses an advantage in deciding when to settle, and when to proceed to arbitration.

Similarly, businesses prefer arbitration over litigation because of the limitations on liability inherent to arbitral proceedings. Most notably, pursuant to *Italian Colors,* business interests benefit from the enforceability of pre-dispute class-waivers.[110] Under *Italian Colors*, businesses can include class-action waivers in PDAA's, limiting consumer claims to those made on an individual basis and mitigate the expanded monetary risk of being held liable under class-action suits.[111] Business interests have a clear motive to oppose the AFA following *Italian Colors,* as prohibition on the use of PDAA's would undercut efforts to compel customers to sign class waivers, ultimately eliminating the protection from class action that PDAA's can provide. More broadly, the AFA would also increase businesses exposure to liability by directing more consumer disputes to litigation, which imposes the uncertainty of a jury trial.[112] Where businesses can be more certain of results in arbitration, jury verdicts may be less predictable, may impose greater liabilities, and may compel businesses to settle more often than they would in arbitration.[113]

V. PRACTICAL REGULATION MAY EVEN THE POWER DISPARITY BETWEEN BUSINESSES AND CONSUMERS, AND ACHIEVE GREATER SUPPORT IN CONGRESS

The Arbitration Fairness Act's ban against PDAAs will not benefit consumers in arbitration, and will leave some consumers without a venue to seek remedy likely due to high litigation costs.[114] Because the ban would harm both business and consumer interests, the AFA, which was first introduced in 2007, has garnered little support in Congress.[115] Arbitration reform, however, is not doomed. More sensible provisions may ensure greater Congressional support and businesses may capitulate to practical reform to ensure that

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[110] *Italian Colors Rest.,* 133 S. Ct. at 2311-12 (upholding the enforceability of class-action waivers, and declaring that class-arbitration is antagonistic to the intent of the FAA).

[111] *Id.; See Concepcion*, 563 U.S. at 350 (Noting that class arbitration could expose defendants to expansive liability without the ability to seek multilayered review).

[112] Estreicher, *supra* note 81, at 567-68 (citing the *in terrorem* effect of a potential jury trial on settlement offers).

[113] *Id.*

[114] Carbonneau, *supra* note 5, at 3 ("In the American and other national legal systems, judicial processes are often overburdened and become inaccessible to aggrieved parties. Moreover, judicial litigation exacts a substantial financial and human cost on parties. In fact, in England, Canada, and the United States . . . large corporations and wealthy individuals are basically the only beneficiaries of, or viable participants in, the judicial trial machinery.").

[115] *Castro*, *supra* note 4, at 265.

PDAAs remain enforceable.[116] In addition, consumer-friendly arbitration terms can remedy many of the fairness issues by placing the consumer on equal footing with businesses.

A. Legislatively-Mandated Consumer-Friendly Arbitration Terms Can Place Consumers on Equal Footing with Businesses in Arbitral Proceedings

The PDAA at issue in *Concepcion* serves as a model provision for consumer-friendly arbitration agreements, which federal legislators should use in part to draft practical legislation mandating the use of consumer-friendly arbitration terms. In *Concepcion*, the Court evaluated the viability of consumer-friendly arbitration provisions.[117] The PDAA contained a number of provisions meant to benefit consumer claimants. First, AT&T offered to pay all costs for non-frivolous claims, and stipulated that "in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees."[118] The agreement offered beneficial venue provisions as well, dictating that the arbitration would take place in the county where the customer was billed, and permitting the customer to choose to conduct the arbitration over the phone or through document submissions where claims allege damages under $10,000.[119] Furthermore, the agreement did not limit damages, it barred AT&T from seeking reimbursement for attorneys' fees, and included a small claims carve-out allowing either party to remove the dispute to small claims court.[120]

Enacting legislation that requires consumer-friendly arbitration provisions may mitigate concerns regarding consumer choice and the disparity of resources between corporations and consumers.[121] Statutory provisions that require small-claims opt-out provisions in consumer contracts would allow potential consumer claimants to choose between litigation and arbitration, and a statute that requires flexibility in appearance may offer more consumers the opportunity to seek relief when an in-person appearance may be

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[116] Lawrence Hsieh, *COMMENTARY: A Kinder, Gentler Arbitration Process for U.S. Financial Consumers*, REUTERS (June 6, 2017, 1:58 PM), https://www.reuters.com/article/bc-finreg-arbitration-alternatives/commentary-a-kinder-gentler-arbitration-process-for-u-s-financial-consumers-idUSKBN18X2EL ("In Nov. 2016, several banks proposed a compromise with the CFPB that would allow arbitration requirements to remain in place . . . [i]n their proposal, the banks have shown willingness to compromise, even if only to preempt unilateral CFPB action.").

[117] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Arbitration Fairness Act of 2017, at § 2.

prohibitive.[122] Additionally, legislation that requires pro-consumer cost-splitting provisions may mitigate the resource disparity between consumers and businesses, thus allowing more consumers to seek remedies in arbitration.[123] Finally, legislation prohibiting limits on an arbitrator's discretion to provide individual relief would greatly mollify concerns that arbitration is a means for corporations to insulate themselves from accountability, because the arbitrators would have complete discretion when issuing damages.[124]

Although such legislation might threaten the overall freedom of contract afforded to corporations when drafting arbitration agreements, requiring consumer-friendly terms may never-the-less find support as a reform measure. AT&T's provisions in the *Concepcion* agreement[125] suggest that companies do not completely oppose legislation mandating consumer-friendly terms. Furthermore, the CFPB study indicates that consumer arbitration provisions widely incorporate consumer-friendly terms similar to those used in the *Concepcion* agreement.[126] For instance, the CFPB found that 93% of arbitration clauses contain small claims "carve outs,"[127] a multiplicity of agreements that require the company forcing arbitration to pay or advance at least a portion of fees.[128] In addition, a majority of arbitration agreements bar shifting company fees to the consumer, and shifting consumer fees to the company.[129] Moreover, reform measures that require consumer-friendly terms do not infringe on the parties' freedom of contract to a great extent, because PDAAs would represent a *quid pro quo* contract between the parties, in which the consumer may waive their ability to litigate future disputes in exchange for favorable terms of arbitration.

B. Legislatively-Mandated Disclosure Can Minimize Arbitrator Bias and Mitigate Concerns over Discovery Procedure and Judicial Review

Statutory disclosure and transparency requirements would make the arbitration process fairer for consumers as increased availability of information regarding arbitrators and their

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[122] *See Arbitration Study*, *infra* note 127; *id.* at § 2, at 54-55 (Most PDAAs account for hearings within the federal judicial district of the consumer, the consumer's state or county, or in a reasonably convenient location for the consumer. Businesses appear keen to make arbitral hearings convenient for consumers, signaling that businesses would not oppose statutes mandating convenient venues and alternative hearing methods, such as arbitration by filing or by phone in certain disputes).

[123] *See Arbitration Study*, *infra* note 128.

[124] Valenti, *supra* note 62.

[125] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

[126] *Arbitration Study*, *supra* note 6, § 2, at 30.

[127] *Id.* at 33.

[128] *Id.* at 58-61.

[129] *Id.* at 61-65.

decisions may help consumers select an impartial arbitrator. The CFPB found that a vast majority of arbitration agreements do not contain confidentiality and/or non-disclosure provisions regarding the results of the proceedings.[130] These results show that parties who impose arbitration may not oppose disclosing arbitral decisions. Proceedings can become more transparent by following California's approach, which requires that arbitration companies publish quarterly reports on their website. [131] These reports must disclose if the arbitration arose from a PDAA, the non-consumer party's name, how often they are a party in arbitration, the subject matter of the dispute, which party prevailed, the relevant dates of the proceeding, the disposition, the claim amount and any awards, and the name of the arbitrator.[132] Further, California statute establishes that that a failure to disclose relevant information or conflicts pertinent to arbitration is grounds to vacate an award, even when no arbitrator misconduct affected the outcome.[133] Mandated disclosure of proceeding details and arbitrator conflicts might expose pro-business biases, which would allow consumers to weed-out potential arbitrators with a history of decisions favoring repeat-players. As such, a statutory requirement to publish arbitration reports on provider's websites can substantially improve consumer claimant's access to arbitration data, ultimately improving knowledge of the practice, and their chances before a tribunal.

A more passive approach to resolving transparency issues is to legislatively preclude pre-dispute confidentiality provisions altogether, and by permitting the potential claimants to collect and disseminate information on arbitrators and proceedings. Professor Lisa Blomgren Amsler has recognized a multitude of websites designed to crowdsource information on employers, and individuals need only create their own arbitration review website.[134] With an outlet to compile data on arbitrations, consumers can mitigate the repeat-player effect through the crowdsourcing of information about arbitrators and arbitration service providers, as arbitrators will then be encouraged to consider their reputation on the consumer-side as well.[135] Additionally, this method would not altogether disregard a business' interest in nondisclosure. Parties would retain the option to sign a non-disclosure agreement after a dispute arises, and businesses would have an incentive to propose a fair settlement to consumers where businesses desire non-disclosure.[136] While

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[130] *Arbitration Study*, *supra* note 6, § 2, at 51-53.

[131] Lisa B. Amsler, *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. ARB. & MEDIATION 32, 52 (2014).

[132] Cal. Civ. Proc. Code § 1281.96

[133] Cal. Civ. Proc. Code § 1286.2(a)(6)

[134] Amsler, *supra* note 131.

[135] Amsler, *supra* note 131.

[136] *See generally, id; see also* FINRA Rule 12405, Disclosures Required of Arbitrators (Similar to California disclosure laws, FINRA requires that arbitrators disclose any circumstances that might preclude an arbitrator from rendering an impartial and objective decision in a proceeding).

possible, the creation of an arbitration-data crowdsourcing website would require individuals to take initiative and build such a website, and upload data of their own volition. As such, there is no way to foresee how effective such a website may turn out to be, or if it would improve the general transparency of arbitral proceedings at all, but it is a start.

Between the methods noted above, legislatively- mandated disclosure of arbitration reports on their respective websites, akin to California's requirements,[137] would be more likely to benefit consumers than simply precluding the use of pre-dispute nondisclosure agreements ("NDAs"). Requiring disclosure by arbitration providers places the onus of disclosure on the a more sophisticated party than the average consumer claimant. Arbitration providers have better access to their own records, and publication on a provider's website means that arbitration data is both centralized and complete. Conversely, a consumer-input option may result in incomplete data sets, given that a consumer-driven approach would require individuals to take the initiative to self-report arbitration results in a comprehensive manner. Further, a revised AFA should establish grounds for award vacatur where arbitrators fail to disclose conflicts of interest, which would naturally compel disclosure.[138] Vacatur for failure to disclose may also mitigate the repeat-player problem, as disclosure will reveal conflicts, whereas nondisclosure may lead to vacatur of pro-business decisions, ultimately rendering repeat-player advantages null. Businesses would likely push back against the California-inspired provisions more so than a preclusion of pre-dispute NDAs, however, given that the latter provision would still grant businesses the option of maintain some form of confidentiality. Moreover, California's Consumer Data Publication Laws have failed to successfully generate significant arbitration data, as arbitration providers have not published arbitration data in a consistent format, ultimately making data allocation difficult, and obfuscating its overall usefulness in comparing providers.[139] In turn, a statute requiring providers to issue reports would be more effective in informing consumers if standardized disclosures could be enforced, but a statute preempting pre-dispute NDAs would be more likely to garner bipartisan support, and in practice may overall be just as proficient in allocating data as a statutory requirement.

Disclosure and publication requirements will also alleviate concerns over discovery limitations and the judicial review of arbitral decisions. Under Section 10 of the FAA, courts may vacate arbitral awards only where a party demonstrates that significant procedural deficiencies tainted the proceeding,[140] and courts grant broad deference to an

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[137] Cal. Civ. Proc. Code, *supra* notes 132, 133.

[138] See e.g. Cal. Civ. Proc. Code § 1286.2(a)(6).

[139] David J. Jung, Jamie Horowitz, Jose Herrera & Lee Rosenberg, *Reporting Consumer Arbitration Data in California*, PUB. L. RES. INST. 1, 39 (March 2013) http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update.

[140] Carbonneau, *supra* note 5, at 121 ("Only significant procedural deficiencies in the arbitral proceeding can thwart the enforcement of an award.").

arbitrator's judgement on the merits of the claim.[141] The presumptive enforceability of arbitral awards ensures that claims will not become tied up in a series of appeals. Undercutting the enforceability of arbitral awards would only undermine a fundamental goal of arbitration.[142]

Because extensive judicial review may jeopardize the finality of arbitral awards, business groups would likely oppose any measure that expands judicial review. Therefore, information on arbitrator decisions is crucial to aid consumers in appealing procedurally-deficient awards. Disclosing awards will assist parties seeking *vacatur*, as allegations of partiality may be easier to substantiate with a record of an arbitrator's former cases and decisions. Furthermore, the enactment of statutory transcription requirements may provide evidence for consumers on appeal. Currently, however, no standard requirement that mandates the transcription of arbitration proceedings exists,[143] and procedural rules that do offer transcription often require the parties to pay for the service.[144] Rules requiring transcription or recording of arbitral proceedings may improve consumer claimant's chances of obtaining *vacatur* of awards, as an available record would aid parties that allege procedural missteps, and although a written transcript may prohibitively increase arbitration costs, a mandated audio or video recording of proceedings may serve as a cost-effective alternative. Similarly, transcripts and records of an arbitrator's decision on motions for discovery can assist in the appeal of restrictive discovery limitations, which may incentivize arbitrators to provide sufficiently broad discovery based on the merits of a case.

VI. CONCLUSION

The Arbitration Fairness Act seeks to implement much needed reform in the field of consumer arbitration, but does so in a manner that would ultimately end the practice of consumer arbitration.[145] Research evidence proves the merits of settling consumer disputes through arbitration for consumers in terms of cost and efficiency, and warrant taking a second look at the AFA's legislative scheme.[146] Through practical legislative solutions,

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[141] Carbonneau, *supra* note 5, at 122 ("A nearly irrefutable presumption exists in federal law that arbitral awards, once rendered, are legally enforceable.").

[142] Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, DISP. RESOL. J., 1, 9 (Nov. 2006) http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1124.pdf?sfvrsn=2.

[143] Samuel Estreicher & Steven C. Bennett, *The Confidentiality of Arbitration Proceedings*, 240 N.Y. LAW J. 31, ¶ 3 (Aug. 13, 2008), https://advance.lexis.com/api/permalink/e5b4ed99-99e8-4645-9d0c-ad9a29cd03e0/?context=1000516.

[144] *Consumer Arbitration Rules*, *supra* note 96, at 22.

[145] *See supra* Part III.

[146] *See supra* Part IV.

such as requiring consumer-friendly clauses and broader transparency measures, the AFA can better address fairness concerns in the field without precluding the use of the cost-effective dispute resolution practice that is arbitration.[147] Implementing such reforms would better tailor arbitration to the consumer's needs, would help legislators facilitate passage of the AFA, and would serve to benefit both consumers and corporations alike.[148]

[147] *See supra* Part V.

[148] *Id.*