

# ARTICLE: Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication

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## Reporter

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## Text

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I.

### Introduction

For more than a decade, the employment law community, including the plaintiffs' bar, the defense bar, and a cavalcade of academicians, has fiercely debated the use (or misuse, as some argue) of arbitration for the adjudication of federal and state employment law cases. The majority of the cases at issue in the debate are wrongful termination cases. In most wrongful termination cases, ex-employees allege that their ex-employers, or their employer's alleged agents, harassed or otherwise discriminated against them, which resulted in their termination (or other adverse action). Resolution of such cases, whether via litigation, arbitration, or any other [\*4] alternative means of dispute resolution, invariably entails interpretation of federal statutes such as Title VII of the Civil Rights Act of 1964 ("Title VII"),<sup>1</sup> the Americans with Disabilities Act ("ADA"),<sup>2</sup> the Age Discrimination in Employment Act ("ADEA"),<sup>3</sup> and the equivalent state and local statutes that mirror and often bolster the federal law.

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<sup>1</sup> 42 U.S.C. 2000e-2000e-17 (1994).

<sup>2</sup> 42 U.S.C. 12101-12213 (1994).

<sup>3</sup> 29 U.S.C. 621-634 (1994 & Supp. I 1995).

Since many employers believe that arbitration is superior to the present adjudicative system as a forum for resolving such disputes, numerous companies are implementing pre-dispute mandatory agreements to arbitrate ("mandatory agreements").<sup>4</sup> Where such agreements are lawful, the employers require newly hired employees to sign an agreement to arbitrate any and all disputes that arise out of the course and scope of their employment. In contrast to these employers, the majority of academics to weigh in on the subject, as well as numerous other "employee-rights advocates," contend that only post-dispute voluntary agreements to arbitrate ("voluntary agreements") should be enforceable. That is, these individuals believe that employees should not have to sign a mandatory agreement to forego their right to sue their employers in federal or state court should they desire to do so in the future. Instead, they believe that only after an employee initiates a claim against her employer should she be able to elect to waive her right to a trial by jury.

In *Circuit City Stores, Inc. v. Adams*<sup>5</sup>, the Supreme Court interpreted a section of the 1925 Federal Arbitration Act<sup>6</sup> ("FAA"), to deem mandatory agreements generally enforceable for all employees except for those who work in the transportation industry.<sup>7</sup> As a result of the *Circuit City* [\*5] decision, these agreements are enforceable in the majority of federal jurisdictions.<sup>8</sup>

Lawmakers have introduced legislation to overrule the *Circuit City* holding and several previous decisions with similar holdings.<sup>9</sup> In many of its sections, the proposed legislation closely resembles the July 10, 1997 policy

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<sup>4</sup> See David S. Sherwyn, J. Bruce Tracey & Zev J. Eigen, In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process, 2 U. Pa. J. Lab. & Emp. L. 73, 98-99 (1999) [hereinafter Sherwyn et al., Mandatory Arbitration] (indicating that some of the reasons why employers prefer arbitration to litigation include reduced costs, increased speed, privacy, and the elimination of juries). Pre-dispute mandatory arbitration is a term of art meaning that employers require employees to sign an agreement under which all disputes must be arbitrated. Similarly, post-dispute voluntary arbitration means that both parties can choose to arbitrate after the case is ripe.

<sup>5</sup> 532 U.S. 105 (2001).

<sup>6</sup> See 9 U.S.C. 1-16 (1994). Originally called the United States Arbitration Act, the FAA was modeled after New York State's Arbitration Act of 1920. See Ian R. Macneil, *American Arbitration Law* 181 n.2 (1992). President Coolidge signed the federal Act into law on February 12, 1925. See *id.* at 101. For an account of the history of federal arbitration law, see Barbara Ann Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. Fla. L. Rev. 61, 73-79 (1985); Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 388-89 (1992).

<sup>7</sup> 532 U.S. at 119. On remand the 9th Circuit again refused to compel arbitration. This time the court held that the agreement violated California law because: (1) the employer offered the arbitration agreement on a take it or leave it basis; (2) the agreement did not require the employer to arbitrate all claims; and (3) the agreement reduced the damages available to the plaintiff. See *Circuit City Stores v. Adams* 279 F.3d 889 (9th Cir. 2002). In a subsequent opinion, the 9th Circuit, in a one page opinion, compelled arbitration because the employee had the choice whether or not to sign the agreement and there were no "indicia of procedural unconscionability." See *Circuit City v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002).

<sup>8</sup> See, e.g., *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001); *Cunningham v. Fleetwood Homes of Ga., Inc.*, 253 F.3d 611 (11th Cir. 2001); *Tuskey v. Volt Info. Sciences, Inc.*, No. 00 Civ. 7410, 2001 U.S. Dist. LEXIS 10980 (S.D.N.Y. Aug. 3, 2001); *Prescott v. N. Lake Christian Sch.*, No. 01-475 Section: "J"(2), 2001 U.S. Dist. LEXIS 9793 (E.D. La. June 28, 2001); *Olivares v. Hispanic Broad. Corp.*, No. CV00-00354-ER, 2001 U.S. Dist. LEXIS 5760 (C.D. Cal. Apr. 26, 2001); *Dumais v. Am. Golf Corp.*, 150 F. Supp. 2d 1182 (D.N.M. 2001); *Roberson v. Clear Channel Broad., Inc.*, 144 F. Supp. 2d 1371 (S.D. Fla. 2001); *Nur v. K.F.C., USA, Inc.*, 142 F. Supp. 2d 48 (D.D.C. 2001).

<sup>9</sup> See, e.g., Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997) (proposing to outlaw mandatory arbitration of all civil rights claims); H.R. 983, 105th Cong. (1997) (proposing to ban mandatory arbitration of civil rights claims). The Civil Rights Procedures Protection Act proposed to amend all key federal civil rights statutes enacted to bar mandatory arbitration of claims arising under those acts. See S. 63; H.R. 983. For example, 2 of the Act proposed amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (1994) as follows:

Notwithstanding any Federal statute of general applicability that would modify any of the powers and procedures expressly applicable to a claim arising under this title, such powers and procedures shall be the exclusive powers and procedures

statement set forth by the Equal Employment Opportunity Commission ("EEOC").<sup>10</sup> The EEOC's policy statement declared that pre-dispute mandatory arbitration polices are contrary to the fundamental principles of discrimination law and that the EEOC would vigorously contest their enforceability.<sup>11</sup> The EEOC policy also stated, however, that it not only accepts, but also wholeheartedly endorses post-dispute voluntary arbitration.<sup>12</sup> Like the EEOC, numerous other agencies and organizations including the National Labor Relations Board,<sup>13</sup> the National Association of [\*6] Securities Dealers ("NASD"),<sup>14</sup> the National Academy of Arbitrators,<sup>15</sup> the Dunlop Commission,<sup>16</sup> and even the National Organization for Women ("NOW")<sup>17</sup> have resoundingly echoed the EEOC's rejection of pre-dispute mandatory arbitration. In the words of Patricia Ireland, President of NOW, "If proponents of arbitration are correct in their belief that it is faster, cheaper and better than the judicial system, then surely employees and their attorneys will opt for arbitration in a voluntary system." Predictably, all of these organizations and others have espoused post-dispute voluntary arbitration over mandatory agreements.<sup>18</sup>

Endorsement of post-dispute arbitration, as well as endorsement of any alternative form of dispute resolution, demonstrates that the legislators who support the bill and the organizations listed above recognize what may well be common knowledge among veteran practitioners of employment law: the litigation system currently in place is badly flawed. Because the EEOC is under-staffed and overburdened by a burgeoning caseload, the EEOC cannot adequately investigate or resolve the volume of cases filed.<sup>19</sup> This situation, in turn, has rendered the EEOC's

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applicable to such claim unless after such claim arises the claimant voluntarily enters into an agreement to resolve such claim through arbitration or another procedure.

S. 63 2; H.R. 983 2.

<sup>10</sup> See Equal Employment Opportunity Comm'n, Policy Statement on Mandatory Arbitration, EEOC Notice No. 915.002 (1997).

<sup>11</sup> *Id.* at IV.

<sup>12</sup> *Id.*

<sup>13</sup> See Bentley's Luggage Corp., 195 NLRB GCM Lexis 92 (1995). In that case, the NLRB authorized the issuance of a complaint against the nationwide chain of 100 stores after the company fired an employee who refused to sign its mandatory arbitration agreement. See *id.* at 4. The Board took the position that the agreement violated the National Labor Relations Act because it required an employee to forfeit the statutory right to file an unfair labor practice charge with the Board as a condition of employment. See *id.* at 5. The employer ultimately agreed to settle the case by, among other things, distributing a memorandum to employees stating that it would no longer require employees to proceed to arbitration before filing a complaint with the NLRB. See *id.* at 4. See also William B. Gould IV, *Alternative Dispute Resolution and the National Labor Relations Board: Some Ruminations About Emerging Legal Issues*, Jose Canseco and Gertrude Stein Address at the Inaugural Luncheon of the Greater Bay Chapter of the Industrial Relations Research Association (Apr. 8, 1997), in 1997 Daily Lab. Rep. (BNA) 69, at E-3 to - 4 & nn. 15-17 (Apr. 10, 1997) (discussing four cases in which the General Counsel issued complaints because of the use of mandatory arbitration agreements), NLRB General Counsel Report, 36 Daily Lab. Rep. (BNA) at E-6 (Feb. 23, 1996). In 1995, the Regional Director of the NLRB in Tampa, Florida said that "the requirement that an employee or job applicant sign a mandatory arbitration policy is an unfair labor practice, as is their discharge for not signing." See Margaret A. Jacobs, *Firms with Policies Requiring Arbitration are Facing Obstacles*, Wall St. J., Oct. 16, 1995, at B5 (quoting Rochelle Kentov).

<sup>14</sup> The NASD amended its Code of Arbitration Procedures, Rule 10201, effective January 1, 1999, to eliminate the previous requirement that employees submit all claims of employment discrimination to pre-dispute final and binding arbitration. This is now left to the discretion of each employer. See NASD, at [http://www.nasdadr.com/arb<\\_>discrim<\\_>faqs.asp](http://www.nasdadr.com/arb<_>discrim<_>faqs.asp). (last visited Jan. 13, 2002).

<sup>15</sup> See Brief of Amici Curiae National Academy of Arbitrators, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379) (supporting Respondents); National Academy of Arbitrators' Statement and Guidelines Adopted May 21, 1997, Daily Lab. Rep. (BNA) 103, at E-1 (May 29, 1997).

<sup>16</sup> See Commission on the Future of Worker-Management Relations, Report and Recommendations (Dunlop Report) (1994).

<sup>17</sup> Ms. Ireland spoke before a committee of the National Association of Securities Dealers in June 1997. See National Organization of Women, at <http://www.now.org/issues/wfw/nasd-testimony.html> (last visited Jan. 13, 2002).

<sup>18</sup> See *supra* notes 9-16.

case-filing procedures an administrative hoop through which plaintiffs with legitimate claims must [\*7] unfortunately jump, while those with frivolous claims gleefully hop on their way to court, or more likely, to settlement discussions. When faced with litigation, employees with legitimate suits often settle well below the true value of their claims because they cannot afford the time or costs associated with going to court. On the other hand, employees are often able to settle for sums greater than the true value of their frivolous claims. Plaintiff's attorneys calculate the defense-side's oft exorbitant costs of defense and know that the employer, sometimes with deep pockets or an employment practices liability insurance policy, is willing to settle for any amount less than the costs of winning a motion to dismiss the plaintiff's claim or going to trial.

As discussed in articles focusing on the topic of alternative dispute resolution of employment disputes, arbitration addresses these problems because it has proven faster <sup>20</sup> and less expensive <sup>21</sup> than the traditional litigation track. Based on these facts, there is no real debate over whether parties should be permitted to arbitrate employment disputes at all. There is, however, great concern over whether employers may require their applicants and employees to agree to arbitrate all claims that arise out of their employment or whether employers should merely give employees (and their attorneys) the option of voluntarily selecting arbitration as a means of resolving those disputes after they have taken form.

Those in favor of voluntary arbitration attack mandatory arbitration by arguing that voluntary arbitration offers the same benefits and drawbacks as its mandatory cousin without its intrinsic alleged drawbacks. Advocates of voluntary arbitration are correct in one respect, that arbitration as a mechanism for resolving disputes offers litigants the same benefits regardless of whether it is a voluntary or a mandatory term and condition of employment. That is, whether arbitration is selected or compelled, the arbitration hearing itself is exactly the same. However, the one overriding problem with post-dispute voluntary arbitration is that, according to the evidence carefully examined herein and a logical analysis of the economic, political, and legal incentives of the parties and their lawyers, it is extremely rare for both the plaintiff's and defense's attorneys in a case to select arbitration after the dispute has arisen. Accordingly, because parties do not choose to arbitrate when a case is ripe, voluntary arbitration fails to address any of the problems inherent in the current system.

[\*8] The purpose of this Article is to explain why parties have not, and likely will not, choose to arbitrate an employment dispute after it has arisen. To support our assertion, we first explain how plaintiff's and defense lawyers select which cases to pursue. Understanding the complex motivation of attorneys surrounding the decision of how best to serve a client while simultaneously meeting their own economic needs is critical to an understanding of why it is rare for the attorneys on both sides to agree to arbitrate a claim after it has been filed. After identifying the lawyers' motivations, this Article poses the question whether these decision-makers regard arbitration as positively or negatively affecting their chances of achieving their goals. The Article then answers this question by: (1) providing the results of a comprehensive survey of labor and employment lawyers in Chicago, Illinois; and (2) analyzing a post-dispute voluntary arbitration system in effect in Chicago from 1994 through 1998. Before reporting these results and explaining my conclusions, however, I outline the current state of the law that pertains to the arbitration of employment disputes in Part II; and set forth the arguments for and against arbitration in Part III.

II.

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<sup>19</sup> See Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 *Ind. L. J.* 83, 92 (2001) (noting that the overburdened and under-funded EEOC tossed out many charges after the briefest investigations and that the Agency's backlog had soared past 100,000 charges while receiving almost 100,000 new charges a year); Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 *Baylor L. Rev.* 591, 593 n.9 (1995) (citing a U.S. GAO Report which states that as of February 1994 the EEOC had 88,000 claims on file, 99.5% of which it would never pursue); Sherwyn et al., *Mandatory Arbitration*, *supra* note 4, at 86-89.

<sup>20</sup> See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 *Ohio St. J. on Disp. Resol.* 559, 564 [hereinafter *Saturns for Rickshaws*] (2001); Ted Eisenberg and Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (Sept. 2002) (working paper on file with the author).

<sup>21</sup> See Estreicher, *Saturns for Rickshaws*, *supra* note 20, at 564. Hill and Eisenberg, *supra* note 20.

## Enforceability of Mandatory Arbitration Agreements

The lawfulness of arbitrating disputes arising out of Title VII of the Civil Rights Act of 1964 (as amended),<sup>22</sup> the Age Discrimination in Employment Act ("ADEA"),<sup>23</sup> and the Americans with Disabilities Act ("ADA")<sup>24</sup> has been the main subject of at least four Supreme Court cases<sup>25</sup> as well as countless circuit court opinions, district court opinions, and law review articles.<sup>26</sup> Specifically, courts and scholars have argued primarily about three areas: (1) whether the FAA applies to employment contracts<sup>27</sup>, [9] (2) the effect of 118 of the Civil Rights Act of 1991<sup>28</sup>, and (3) what constitutes a "fair" arbitration agreement. Now, over ten years after it became a subject of debate,<sup>29</sup> the first issue has been definitively resolved (one hopes)<sup>30</sup> Moreover, while the other two issues remain unsettled, there is a substantial amount of judicial authority from which one can ascertain the current state of the law and predict its likely future. Below, this article explains the development of the law concerning each of these issues.

Prior to 1991, lawyers, judges, and scholars generally accepted that mandatory arbitration agreements were unenforceable in cases filed under federal anti-discrimination statutes.<sup>31</sup> This position was based on *Alexander v. Gardner-Denver Corp.*<sup>32</sup> In *Gardner-Denver*, the Supreme Court held that an employee has a right to proceed with a Title VII claim regardless of an arbitrator's adverse decision pursuant to a collective bargaining agreement.<sup>33</sup>

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<sup>22</sup> 42 U.S.C. 2000e-2000e17 (1994).

<sup>23</sup> 29 U.S.C. 621-634 (1994).

<sup>24</sup> 42 U.S.C. 12101-12134 (1994).

<sup>25</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

<sup>26</sup> See, e.g., Estreicher, *Saturns for Rickshaws*, supra note 20; Paulette Delphine Hardin, *Sacrificing Statutory Rights on the Alter of Pre-Dispute Employment Agreements Mandating Arbitration*, 28 *Cap. U. L. Rev.* 455 (2000); Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 *Pepp. L. Rev.* 1 (1999); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 *N.Y.U. L. Rev.* 1344 (1997).

<sup>27</sup> See Stephan L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 *Berkeley J. Emp. & Lab. L.* 521, 542, 568-74 (2000); Samuel Estreicher, *Predispute Agreement to Arbitrate Statutory Employment Claims*, 72 *NYU L. Rev.* 1344, 1366-67 (1997). See also *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (DC Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996); *Asplundh Tree Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971); *Tenney Engineering Inc. v. United Elec. & Machine Workers of Am.*, 207 F.2d 450 (3rd Cir. 1953).

<sup>28</sup> 118 of the Civil Rights Act of 1991 was passed as P.L. 102-166, Title I, 118 amended 42 USC 1981 to encourage alternative dispute resolution of claims arising under the Civil Rights Act.

<sup>29</sup> See Sherwyn et al., *Mandatory Arbitration*, supra note 4, at 76 n.16.

<sup>30</sup> After *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the law is clear - the FAA applies to all employment situations, except those in the transportation industry. See infra notes 43-52.

<sup>31</sup> See *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36, 47 (1974) ("There is no suggestion in [Title VII] that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."); see, e.g., *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989) (holding that Title VII claims are nonarbitrable in nonunion employment settings); *Swenson v. Management Recruiters Int'l, Inc.*, 872 F.2d 264 (8th Cir. 1989) (distinguishing commercial from civil rights disputes in terms of mandatory arbitration).

<sup>32</sup> 415 U.S. 36 (1974).

<sup>33</sup> *Id.* at 59-60 (noting that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.").

The lower courts extended this holding to the non-union setting and thus, for some years, it seemed clear that mandatory arbitration agreements for civil rights claims were unenforceable.<sup>34</sup>

In 1991, however, the Supreme Court distinguished *Gardner-Denver* in its watershed opinion in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>35</sup> *Gilmer* involved an ex-employee, Robert Gilmer, a sixty-two year-old registered securities representative, who alleged that the company discriminated against him based on age in his termination.<sup>36</sup> The company filed a motion to compel arbitration because he had signed an agreement with the National Association of Securities Dealers to arbitrate all disputes [\*10] that arose out of his employment. Signing such an agreement was a condition of working on the New York Stock Exchange.<sup>37</sup> Mr. Gilmer contended that the agreement was unenforceable under *Gardner-Denver*.<sup>38</sup> The Court distinguished *Gardner-Denver* on its facts because in that case the arbitration occurred pursuant to a collective bargaining agreement as opposed to an individual contract.<sup>39</sup> Following the *Gilmer* decision, lower courts extended the holding to apply to other discrimination statutes in addition to the ADEA.<sup>40</sup>

The *Gilmer* Court based its holding (and distinguished *Gardner-Denver*) on four grounds: (1) "labor" arbitrators are limited to enforcing only the collective bargaining agreement that the parties asked them to interpret and have no authority to determine if the employer violated federal or state statutes; (2) labor arbitrators must enforce the collective bargaining agreement even if it conflicts with federal law; (3) in labor arbitrations, the union, not the employee, owns the grievance and decides whether to pursue it; and (4) the FAA covered the individual arbitration agreement in *Gilmer*, but not in *Gardner-Denver* where collective rights in a collective bargaining agreement prevailed.<sup>41</sup> The first three issues provide a clear distinction between *Gardner-Denver* and *Gilmer*. This was not the case with the FAA. In fact, the interpretation of the scope and applicability of the FAA was one of the core issues in the debate over the legality of mandatory arbitration until the recent Supreme Court decision in *Circuit City Stores, Inc. v. Adams*.<sup>42</sup>

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<sup>34</sup> See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

<sup>35</sup> 500 U.S. 20 (1991).

<sup>36</sup> *Id.* at 23-24.

<sup>37</sup> *Id.* at 23. The employment application signed by Mr. Gilmer provided that the employee agreed to "arbitrate any dispute, claim or controversy" that arose between the applicant and the employer "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations" with which the applicant registers. *Id.* Mr. Gilmer had registered with the New York Stock Exchange, which has a rule providing for arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.*

<sup>38</sup> *Id.* at 24.

<sup>39</sup> *Id.* at 35. A very unusual aspect of *Gilmer's* argument is that the mandatory arbitration agreement he signed as a condition of his employment was unenforceable because the agreement contained an arbitrator selection clause that allegedly stacked the tripartite panel with older Caucasian men involved in the securities business. Mr. Gilmer, a 62 year old Caucasian man, might have been hard pressed to convince the court that such a panel would be biased against him in his age-discrimination suit.

<sup>40</sup> See, e.g., *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (New Jersey Law Against Discrimination); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (Title VII and state law discrimination claims); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k) (1998)); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (Title VII); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (Title VII based claim); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (Title VII); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (Kentucky state law).

<sup>41</sup> *Gilmer*, 500 U.S. at 35 (1991).

<sup>42</sup> 532 U.S. 105 (2001).

## A. The Federal Arbitration Act

When the FAA was enacted in 1925 courts generally mistrusted arbitration as an adjudicative process and often refused to enforce agreements to arbitrate in a variety of settings.<sup>43</sup> Congress enacted the FAA to remedy that mistrust. In the broadest and most simple terms, the FAA reflects a "liberal federal policy favoring arbitration agreements."<sup>44</sup> Section 1 of the FAA, however, excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>45</sup> In *Gilmer*, the Court held that the arbitration agreement at issue was not an "employment contract" because the parties to the agreement were the New York Stock Exchange and *Gilmer*, not the "employer" and the "employee."<sup>46</sup> Because the agreement that *Gilmer* signed was not an "employment contract," the Court elected not to address the question of whether the term "engaged in foreign or interstate commerce" of Section 1 of the FAA referred to all employees or only those in the transportation industry.<sup>47</sup> This was the specific issue [\*12] decided by the Court in *Circuit City Stores, Inc. v. Adams*.<sup>48</sup>

At the time the Supreme Court heard the *Circuit City* case, nine circuits had held that the Section 1 exclusion narrowly applied to only transportation industry employees, two circuits had not ruled on the issue, and one circuit, the Ninth, had held that the exclusion applied broadly to cover nearly all employment contracts.<sup>49</sup> The *Circuit City*

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<sup>43</sup> See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-85 (2d Cir. 1942) (offering an account of historical and judicial attitudes towards enforcement of arbitration agreements).

<sup>44</sup> *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)); see *supra* note 5.

<sup>45</sup> 9 U.S.C. 1 (1994). The statute in its entirety provides:

"Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

*Id.*

<sup>46</sup> *Gilmer*, 500 U.S. at 25 n.2. This minor detail spawned hundreds of lawsuits in the past decade and cost litigants millions of dollars.

<sup>47</sup> See *id.* at 25 n.2. The court noted:

Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. Several amici curiae in support of *Gilmer* argue that that section excludes from the coverage of the FAA all "contracts of employment." *Gilmer*, however, did not raise the issue in the courts below; it was not addressed there; and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. See 9 U.S.C. 2, 3. The record before us does not show, and the parties do not contend, that *Gilmer's* employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in *Gilmer's* securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications [citations omitted]. Unlike the dissent, [citation omitted], we choose to follow the plain language of the FAA and the weight of authority, and we therefore hold that 1's exclusionary clause does not apply to *Gilmer's* arbitration agreement. Consequently, we leave for another day the issue raised by amici curiae.

*Id.*

<sup>48</sup> *Circuit City*, 532 U.S. at 109 (2001) (noting a circuit court split where the majority of circuits held that the FAA did not apply to employment contracts of transportation workers, and the Ninth Circuit construed it as not applying to any employment contracts).

Court adopted the opinion of the majority of the circuits, holding that the FAA applied to the vast majority of agreements to arbitrate in the employment context.<sup>50</sup>

The Circuit City decision received a fair amount of publicity and rekindled the debate on arbitration. The decision's effect was quite limited because, as stated above, it simply confirmed the standing law in nine circuits. Moreover, it may not have changed the law even in the Ninth Circuit because of that Circuit's interpretation of Section 118 of the Civil Rights Act of 1991<sup>51</sup> and because of the Circuit's holding on what constitutes a "fair" agreement.

#### B. Section 118 of the Civil Rights Act of 1964

In order to refuse to enforce an arbitration agreement, a court must find that Congress had "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>52</sup> Section 118 of the Civil Rights Act of 1991 states: "where appropriate and to the extent authorized by law, the use of alternative dispute resolution including...arbitration, is encouraged to resolve disputes arising under [the acts and provisions of federal law amended by this title]."<sup>53</sup> In *Duffield v. Robertson Stephens & [\*13] Co.*, another case rejecting mandatory arbitration, the Ninth Circuit held that this language evidences (in part) such congressional intent and, therefore, it actually prohibits mandatory arbitration.<sup>54</sup> Once again, the Ninth Circuit represented the minority opinion. The First,<sup>55</sup> Second,<sup>56</sup> Third,<sup>57</sup> Fourth,<sup>58</sup> Fifth,<sup>59</sup> Seventh,<sup>60</sup> and District of Columbia<sup>61</sup> Circuits rejected *Duffield* and held, or in the case of the D.C. Circuit, strongly implied, that Section 118 does not prohibit parties' ability to resort to mandatory arbitration of employment disputes, and may in fact expressly permit<sup>62</sup> it. The other circuits have not yet ruled on this issue.

Despite the circuit split over this issue, and to the dismay of many academicians and practitioners, especially those in the Ninth Circuit, the Supreme Court's and the Ninth Circuit's *Circuit City* decisions neglected to even mention

<sup>49</sup> The following cases hold that Section 1 of the FAA applies narrowly only to the transportation industry: *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-76 (10th Cir. 1998); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997); *Rojas v. TK Comm., Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-601 (6th Cir. 1995); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Eng'g, Inc. v. United Elec. & Machine Workers of Am.*, 207 F.2d 450 (3d Cir. 1953). The Ninth Circuit case holding that the FAA does not apply to contracts of employment is *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (1998). As of the writing of this article, the Eighth, Eleventh and Twelfth Circuits have not ruled on the issue.

<sup>50</sup> See *Circuit City*, 532 U.S. at 109 (2001) (confining the exemption of the FAA to employees in the transportation industry).

<sup>51</sup> See *infra* Part II.B.

<sup>52</sup> *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir. 1998).

<sup>53</sup> Pub. L. No. 102-166, 118, 105 Stat. 1071, 1081 (1991) (codified in scattered sections of 2 U.S.C., 29 U.S.C. and 42 U.S.C.).

<sup>54</sup> *Duffield*, 144 F.3d at 1185. The court draws the distinction between encouraging and mandating arbitration.

<sup>55</sup> *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999).

<sup>56</sup> *Desiderio v. NASD*, 191 F.3d 198, 204-05 (2d Cir. 1999).

<sup>57</sup> *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183 (3d Cir. 1998).

<sup>58</sup> *Hooters of Am., Inc. v. Philips*, 173 F.3d 933, 937 (4th Cir. 1999).

<sup>59</sup> *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453, 456 (5th Cir. 1998).

<sup>60</sup> *Koveleski v. SBC Capital Markets, Inc.*, 167 F.3d 361, 365 (7th Cir. 1999).

<sup>61</sup> *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 835 (D.C. Cir. 2001).

<sup>62</sup> Whether Section 118 permits or encourages arbitration is irrelevant; the only requirement is that the statute must not prohibit arbitration. See *Sherwyn, et. al., Mandatory Arbitration*, *supra* note 4, at 102-04.



Duffield or Section 118. Still, at least one California district court has held that the Circuit City decision overturned the Duffield holding.<sup>63</sup> Alternatively, two Ninth Circuit district courts in Oregon have held that Duffield is still good law.<sup>64</sup>

Thus, at this time, mandatory arbitration is lawful for ADEA claims throughout the country and lawful for Title VII and ADA claims in seven circuits. In the other five circuits, however, it currently remains an open question whether employers can require employees to submit Title VII and ADA claims to arbitration. There is, of course, one caveat to this conclusion: mandatory arbitration polices are enforceable only if they are considered "fair."

### C. What Constitutes a Fair Agreement

Despite the fact that neither Congress nor the Supreme Court has [\*14] defined what constitutes a "fair" arbitration agreement, and despite the fact that there are those who believe that there is no such thing as a "fair" arbitration agreement,<sup>65</sup> enough authority exists on the issue to extrapolate fairly reliable and comprehensive guidelines. In examining fairness, Gilmer and its progeny focus on five issues: (1) the method of delivering opinions; (2) the procedures for selecting the arbitrator; (3) discovery; (4) available damages; and (5) whether the employee entered into the agreement knowingly and voluntarily.<sup>66</sup> The first three issues are relatively easy to define: Arbitration agreements should provide for written opinions, both parties must have a substantial role in selecting the arbitrator, and agreements must allow for at least some discovery, even if it is limited.

However, there is conflicting authority on how arbitration agreements may limit damages available to prevailing parties. Case law and a mass of scholarly work support the argument that arbitration agreements must permit an arbitrator to award the same damages that would have been available to parties had they prevailed in court.<sup>67</sup> Alternatively, there are cases that hold, and others imply, that arbitration agreements are enforceable even if they limit damages to less than what the prevailing parties might have been entitled had their case been heard in court.<sup>68</sup>

Finally, with respect to employees' waiver of their opportunity to file their claims in federal court, arbitration agreements are enforceable so long as they clearly describe the terms of the agreement (for example, the agreements must state that they cover discrimination claims and that the document is a binding legal contract) and

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<sup>63</sup> See *Olivares v. Hispanic Broad. Corp.*, No. CV00-00354-ER, 2001 U.S. Dist. LEXIS 5760, at 2 (C.D. Cal. Apr. 26, 2001) ("Therefore, in light of the Supreme Court's pronouncement in *Circuit City*, the Ninth Circuit's decision in *Duffield* should not preclude arbitration...").

<sup>64</sup> See *LeLouis v. W. Dictionary Co.*, Civil No. 00-1719-JE, 2001 U.S. Dist. LEXIS 12517, at 13-14 (D. Or. Aug. 10, 2001); *Melton v. Philip Morris, Inc.*, Civil No. 01-93-KI, 2001 U.S. Dist. LEXIS 12601, at 11 (D. Or. Aug. 9, 2001).

<sup>65</sup> See *supra* note 10.

<sup>66</sup> The Supreme Court in *Gilmer* reiterated the so-called savings clause of Section 2 of the FAA (arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"). *Gilmer*, 500 U.S. at 33 (quoting 9 U.S.C. 2 (1994)). The Court also stated that "there is no indication in this case, however, that *Gilmer*, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application." *Id.*

<sup>67</sup> See, e.g., *Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994). Additionally, in accordance with the National Rules for the Resolution of Employment Disputes, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would be available to the parties had the matter been heard in court. This authority includes the right to award compensatory and exemplary (or punitive) damages and other remedies to the extent those remedies would be available under applicable law in court. See also JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, at [http://www.jamsadr.com/employmentArb<\\_>min<\\_>stds.asp](http://www.jamsadr.com/employmentArb<_>min<_>stds.asp) (last visited Nov. 11, 2001); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 103 (Cal. 2000).

<sup>68</sup> See *Degaetano v. Smith Barney, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 401 (S.D.N.Y. Feb. 5, 1996) (upholding an arbitration agreement that prevented the arbitrators from awarding punitive damages or injunctive relief of any kind); see, e.g., *Kinnebrew v. Gulf Ins. Co.*, 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. Nov. 28, 1994).

are not hidden in an employee-handbook or another long and intimidating document. <sup>69</sup> This is the case [\*15] even if the arbitration is "offered" on a "take it or leave it" basis; as the Gilmer Court stated: "Mere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." <sup>70</sup>

Even though practitioners and academicians continue to debate over the minutia of what constitutes a "fair" arbitration agreement, much progress has been made over the past decade towards giving parties guidance on how to draft lawful agreements. Now, employers in most jurisdictions can confidently draft an arbitration agreement that will be upheld. <sup>71</sup>

#### D. The Policy Debate

Sometimes overshadowing the ever-evolving technical legal issues of arbitration of employment disputes is the often intense policy debate focusing on the broader issues at stake. Indeed, while scholars, judges, and practicing lawyers have spent countless hours debating, litigating, and writing about the technical legal applicability of different forms of alternative dispute resolution on different causes of action, mandatory arbitration of employment disputes has received even more attention from those who focus on fairness and other policy concerns.

Interestingly, both critics and advocates of mandatory arbitration bolster their contentions with policy arguments. As one would expect, the advocates and critics of mandatory arbitration also differ with respect to voluntary arbitration. Many critics of mandatory arbitration support voluntary arbitration. <sup>72</sup> Mandatory arbitration advocates believe, for the most part, that voluntary arbitration will not work and that its supporters are, at best, naive, and, at worst, hypocritical or disingenuous. <sup>73</sup>

While this article discusses a number of the issues below in greater detail, the critics' and advocates' respective arguments are briefly encapsulated as follows:

Critics believe that mandatory arbitration is an unfair process that employers force onto employees which impedes the goal of eliminating discrimination in the workplace. <sup>74</sup>

[\*16] Advocates believe that mandatory arbitration is the most efficient way to adjudicate employment discrimination and harassment cases given the limited resources of state and federal judicial systems and that the agreements, if drafted properly, offer litigants a fair and effective means of resolving disputes. <sup>75</sup>

An interesting and perhaps revealing contrast between the respective positions of the critics and the advocates is the amount of attention they pay to litigation and to the EEOC's resolution process, which are the current

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<sup>69</sup> See, e.g., *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683, 687 (N.D. Ohio 1988) (denying enforcement where the arbitration of claims policy was located on less than two pages in the middle of a sixty page employee handbook).

<sup>70</sup> *Gilmer*, 500 U.S. at 32-33. The 9th Circuit, relying on California contract law, rejects this position. See *supra* note 7.

<sup>71</sup> See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 103 (Cal. 2000).

<sup>72</sup> See, e.g., National Employee Rights Institute & Chicago-Kent College of Law, NERI's Position on Mandatory Arbitration of Employment Disputes, 1 *Empl. Rts. & Employ. Pol'y J.* 263 (1997); Stephen Ware, *Employment Arbitration and Voluntary Consent*, 25 *Hofstra L. Rev.* 83 (1996).

<sup>73</sup> See Sherwyn et al., *Mandatory Arbitration*, *supra* note 4, at notes 89-117.

<sup>74</sup> See Kathryn Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 *Denv. U. L. Rev.* 1017 (1996); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 *Hofstra L. Rev.* 83 (1996).

<sup>75</sup> See *supra* note 26; Michael Green, *Debunking The Myth Of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 *Rutgers L.J.* 399 (2000).

components of the system in place for handling employment disputes in this country. The advocates spend considerable time focusing on the ills of the EEOC and litigation.<sup>76</sup> The critics tend not to discuss these adjudication systems and instead focus on the ills of arbitration.<sup>77</sup>

In a previous article, my co-authors and I separated the critics' arguments on arbitration into two categories: (1) complaints that advocates contend are overstated or are correctable and (2) complaints that are inherent to arbitration as a mechanism for resolving disputes and therefore cannot be corrected, but rather are trade-offs worth accepting in light of litigants' alternatives.<sup>78</sup> We also explained why arbitration is preferable to the current system for resolving discrimination claims. We do not contend to have identified the entire universe of arguments on the subject. Nor do we claim to possess the unequivocally correct solutions, in fact, far from it. We do believe, however, that our previous work provides a good springboard for discussion because it provides an acceptable, and for the purposes of this article, necessary, overview of the arguments for and against arbitration.

Accordingly, below is a summary of our prior treatment of the arguments against arbitration and our responses to these contentions. First, however, is a brief synopsis of the reasons for supporting arbitration as a means to resolve employment disputes. A thorough understanding of the case for mandatory arbitration is critical to an understanding of why voluntary arbitration is not an adequate substitute or compromise.

[\*17]

III.

#### The Case for Arbitration

The case for arbitration necessitates a comparison of this form of adjudication with the current system for resolving discrimination charges. This Article contends that the current system for resolving discrimination claims provides perverse incentives for employees and employers to exploit the economic realities of the system by using the delays and costs of litigation to their benefit.

In addition, the current system causes numerous meritorious employee claims to slip through the cracks of a costly and overburdened system, while law-abiding employers may be motivated to settle meritless discrimination claims. Employers have greater incentive to settle any claim if the settlement figure is less than what it would cost to successfully defend a case before the EEOC or in court. The result is a system of litigation extortion that we euphemistically refer to as "de facto severance."<sup>79</sup> All the while, employees with legitimate claims may be forced to accept settlement offers that represent only a small fraction of the real value of their cases because they cannot afford the time and/or money it takes to litigate. Below we elaborate on the economic factors that create the undesirable status quo.

#### A. Agency Action Creates an Incentive for Employees To Settle Frivolous Claims and Frustrates Efforts by Employees with Meritorious Claims

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<sup>76</sup> See Green, *supra* note 26, at 76-99; Estriecher, *Saturns for Rickshaws*, *supra* note 20.

<sup>77</sup> See, e.g., 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); Stone, *The Yellow Dog Contract of the 1990s*, *supra* note 74.

<sup>78</sup> See Sherwyn et al., *Mandatory Arbitration*, *supra* note 4, at 129-39.

<sup>79</sup> See *id.* at 82 (defining "de facto severance" as a process whereby employees file baseless discrimination charges because they know that their former employers are willing to pay a nominal amount of money in order to avoid the aggravation, cost, and losses of time, resources, and productivity that inevitably arise in defending such allegations).

In order to file a discrimination lawsuit, employees must first file a charge of discrimination with the EEOC or an affiliated state agency.<sup>80</sup> If the agency cannot induce the parties to settle, the plaintiff may request from the EEOC a "right to sue" letter, which will allow the plaintiff to file a complaint in court.<sup>81</sup> Alternatively, the EEOC may investigate the claims and render its opinion as to whether there is "reasonable cause" to believe that the employer discriminated against the plaintiff.<sup>82</sup> In an extraordinarily small percentage of the cases filed, the EEOC decides that the issue is so [\*18] important that the agency should litigate on the plaintiff's behalf.<sup>83</sup> In all other cases, the EEOC issues a "right to sue" letter regardless of the agency's decision with respect to "cause."<sup>84</sup> Unfortunately, each step of this process costs money and only amplifies the extortive capabilities of plaintiffs who file frivolous claims that they only intend to settle.

In 1989, employees filed 59,411 discrimination claims with the EEOC and 48,995 claims with affiliated state and local agencies.<sup>85</sup> In 2001, employees filed 79,896 EEOC charges, which represents a 35% increase from 1989.<sup>86</sup> With workloads that continue to increase while budgets remain relatively fixed, the agencies need to employ systems that resolve claims in an efficient manner. Agencies have responded to this problem by attempting to induce parties to settle.<sup>87</sup> The problem is that when settlement is the desired result, the merits of the case tend to lose their significance. If the merits are irrelevant, then employees have an incentive to file frivolous claims. Employers have an incentive to settle claims, even if they are false, because of the high costs of the agency's investigation and the even more exorbitant costs of the litigation that loom ominously on the horizon.

Responding to an agency's investigation may cost an employer, depending on the complexity and location of the case, between \$ 2,500 and \$ 10,000.<sup>88</sup> Litigating a case through trial will cost the employer between \$ 50,000 and \$ 500,000.<sup>89</sup> In most cases, the available damages are a fraction of the costs of defense and there is always the possibility of losing at trial. Defense lawyers believe that juries are unpredictable and fear that they are inclined to award large sums of money in damages and attorneys' fees to plaintiffs that might not deserve it.<sup>90</sup> Thus, strong economic incentives [\*19] influence employers to settle most employment related cases.

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<sup>80</sup> See 29 U.S.C. 626(d) (1994); 42 U.S.C. 2000e-5 (1994). Employees may elect to file their claims with federal, state or local agencies. In most circumstances, the agencies exercise concurrent jurisdiction so that claims are cross-filed among agencies. In other circumstances, the local agency is independent so that employees' claims may be investigated more than once.

<sup>81</sup> See U.S. Equal Employment Opportunity Comm'n, at <http://eeoc.gov/facts/qanda.html> (last visited November 30, 2002).

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> One commentator, Michael Selmi, notes that the EEOC often informs the plaintiff of its intention to issue a no-cause finding before doing so to afford the plaintiff an opportunity to request a right-to-sue notice. Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 Ohio St. L.J. 1, 9 n.35 (1996).

<sup>85</sup> See U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1986-1996* at <http://www.eeoc.gov/stats/charges.html> (last visited May 1997). In 1994, there were 158,582 cases filed, and 154,609 in 1995. See *id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Sherwyn et al., *Mandatory Arbitration*, *supra* note 4, at 80-82.

<sup>88</sup> Telephone Interviews with David Ritter, Chair of the Labor and Employment Department at the law firm of Altheimer & Grey in Chicago, Ill. (Mar. 12, 1998), and Peter Albrecht, partner at the law firm of Godfrey & Kahn in Madison, Wis. (Mar. 12, 1998).

<sup>89</sup> *Id.*; David Ritter, *Guest Lecture at Cornell University*, Sept. 1, 2002.

<sup>90</sup> By means of an anecdotal illustration, a team of defense lawyers conducted a mock-jury trial before the actual trial of a case brought by a plaintiff who was diagnosed as a pathological liar by the defense-side's psychologist. Plaintiff also had absolutely no supporting facts or witnesses to bolster her flimsy allegations of sexual harassment levied against the most unlikely of supervisors - a church-going mild-mannered, older family man. Enough of the mock-jurors awarded the plaintiff some damages not because they believed that she was sexually harassed, but rather because they felt sorry for her. Unbeknownst to the mock-jury, awarding her even a modest sum may trigger a potentially exorbitant award of attorneys' fees. Suffice to say that the frightening and somewhat surreal mock-jury experience convinced the employer to settle the case.

Employers do not, however, settle all cases filed against them. In the years 1992-2000, the EEOC resolved between 68,366 and 106,312 cases each year.<sup>91</sup> The EEOC classifies each resolved case as either: (1) a merit resolution (examples include a settlement, a withdrawal with benefits, or finding of "cause") or (2) non-merit resolution (a "no cause" finding or an administrative closing). With regard to merit resolutions in those years, the parties settled or "withdrew the case with benefits" in 7% to 13.2% of the cases<sup>92</sup> while EEOC found cause in only 2.3% to 8.8% of the cases<sup>93</sup> Of the remaining non-merit resolutions, the EEOC found no reasonable cause in 48.1% to 61% of the cases and administratively closed 20.5% to 36.3% of the cases.<sup>94</sup> Overall, non-merit resolutions comprised 78.7% to 90.9% percent of the resolutions.<sup>95</sup> One could argue that the relatively low number of settled cases is evidence that de facto severance does not exist. In fact, we contend that the high percentage of non-merit resolutions proves that just the opposite is the case.

There are three explanations for the large number of no-cause findings: (1) employees do not understand the law; (2) the EEOC is failing to find cause in cases with merit; or (3) employees are filing frivolous claims hoping for nuisance settlements.<sup>96</sup> Even if each explanation accounts for a third of those cases closed administratively or because of a no cause finding, it would still mean that 26% to 30% of the cases filed in each of the last ten years were frivolous. In addition, many discrimination investigators and defense lawyers contend that frivolous cases comprise a significant percentage of the merit resolutions settled for "nuisance" values.<sup>97</sup> The fact that employees continue to file frivolous claims supports the contention that de facto severance exists and that it is a problem that the law needs to address.

Frivolous claims do not just injure law-abiding employers. An abundance of frivolous claims taxes the system and means that plaintiffs' [\*20] lawyers and EEOC investigators may be unable to devote the proper attention to meritorious cases. Without sufficient resources to devote to the EEOC's ever-burgeoning caseload, it is likely that some legitimate claims, especially ones filed by injured employees who are not represented by attorneys, may slip through the cracks. Thus, if legitimate cases are falling through the cracks, it is likely the fault of a system overburdened by frivolous claims. The unfortunate result is that both employees and employers become frustrated and jaded by the system. Frustration is a logical result when employers do not adequately redress employees with legitimate claims and employees extort employers who diligently comply with the federal and state discrimination laws.

#### B. Mediation Does Not Adequately Address the System's Flaws

Parties often turn to mediation as a low-cost alternative dispute mechanism in the face of burgeoning court queues and rising litigation costs. While mediation may lead to relatively painless resolution, it may actually exacerbate the system's endemic flaws. Mediation is not an adjudicative process; it is a negotiation process designed to seek a settlement based in part on the simple economic reality of what price the defendant is willing to pay and what dollar amount the plaintiff is willing to accept to make the case "go away". For many participants, it is ultimately a game of compromises, but often little real emphasis is placed on the merits of the parties' respective claims.

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<sup>91</sup> See U.S. Equal Employment Opportunity Comm'n, All Statutes, at <http://www.eeoc.gov/stats/all.html> (last visited Jan. 13, 2002).

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> See id.

<sup>96</sup> See Michael Selmi, The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law, 57 Ohio St. L.J. 1, 9 n. 35 (1996).

<sup>97</sup> Conversations with Clifford Penn, Partner at Laner, Muchin, Dombrow, Levin & Taminberg, Chicago, IL (Nov. 1994); James Convery, and Joseph Yastrow, Partners at Laner, Muchin, Dombrow, Levin & Taminberg, Chicago, IL (Dec. 2001); David Ritten, Partner at Altheimer & Gray, Chicago, IL (Dec. 2001); Paul Wagner, Partner at Stokes & Murphy, Ithaca, NY (Dec. 2001).

In a vacuum, one could quickly predict the effects on both employers and employees to be grim. Plaintiffs' attorneys who know that they can mediate claims privately and confidentially may be more inclined to lodge a harassment or discrimination complaint with dubious factual and/or legal support with the hope that the employer will agree to pay the employee a hefty sum of money as long as the amount is less than the cost of having a judge dismiss the claim on a pre-trial motion.<sup>98</sup> Conversely, employers whose attorneys know that they can mediate claims without fear of bad publicity and without the costs of a lengthy trial may have incrementally less of an incentive to prevent harassment and discrimination in their workplaces. Mediation as a process for resolving employment disputes appears, therefore, as an attractive alternative to parties facing protracted and costly litigation. However, this view is myopic. In the long run, mediation of employment disputes offers little to benefit employers or employees if the goal of all is to curb discrimination and harassment from the workplace.

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### C. Mandatory Arbitration Is a Viable Alternative

If mediation as a process is like candy to a sweet-tooth in offering a quick fix but causing long term damage not easily discernable in the short-run, then arbitration is like a granola bar; not quite as sweet as the candy, tasty nonetheless, healthy in the long run and certainly better than the alternative, costly and drawn-out litigation - like a plate of liver and onions with a side of over-cooked brussel sprouts.<sup>99</sup>

Arbitrators adjudicate cases for a fraction of what it costs litigants to litigate.<sup>100</sup> The hope is that the diligently law-abiding employers and the employees whose rights are actually violated win cases more often than the reverse. In a vacuum, such a result yields proper incentives because well-meaning employees will no longer extort employers with the high costs of litigation and truly wronged employees will have reduced barriers to the damages to which they are entitled. Conversely, mal-intentioned employees will be unable to leverage de facto severance payments and will receive little or nothing at all. And, mal-intentioned employers will be unable to force a plaintiff-employee to accept an otherwise less than deserved settlement. Instead, such employers will likely pay full or close to full damages. Therefore, in comparison to the alternative forms of dispute resolution like mediation and in comparison to traditional litigation, arbitration offers litigants savings in cost and time as well as incentives that may actually hinder discrimination and harassment in the workplace.

Employers are therefore wise to implement lawful mandatory arbitration programs. Such programs are an effective means for employers to pool the risk of liability for being sued for unfounded claims and to resolve substantiated claims without fear of breaking the bank or incurring bad publicity that may drive them out of business. Certainly, many employers in the United States who have already implemented such programs believe that the benefits of such risk-pooling far outweigh the obvious disadvantages of mandatory arbitration, namely, the near impossibility of appealing arbitration decisions and the lack of a guarantee that the arbitrator selected will fully understand the applicable laws.

Mandatory arbitration also simplifies the adjudication process. The parties know they must arbitrate, they know positives and negatives of such a forum vis-a-vis alternative and they, hopefully, will attempt to resolve the issue. Alternatively, voluntary arbitration raises a preliminary issue: which forum should a party choose? Thus, the attorneys must engage in the often [\*22] complex and sometimes misinformed decision-making process inherently necessary in any voluntary arbitration system. Reducing or eliminating the need for such decision making increases

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<sup>98</sup> The employer's decision to settle is obviously also guided by the chances of success on the merits of the motion to dismiss. In addition to the merits of the case, the chances of success are also affected by other factors over which litigants have no control such as the jurisdiction and assigned judge.

<sup>99</sup> Our humblest apologies to the staunch liver and brussel sprouts lobby.

<sup>100</sup> Compare Stone, *The Yellow Dog Contract of the 1990s*, supra note 74, at 1037 (noting that the arbitrator's fees could easily exceed \$ 1,000) with Sherwyn et al., *Mandatory Arbitration*, supra note 4, at 132-33 (arguing that \$ 1,000 may be a paltry sum in comparison with the legal fees accrued during litigation).

the chances of the parties actually adjudicating their disputes, which thereby reduces the incidence of the undesirable incentives described above.

There are some, however, who argue that arbitration is not a suitable forum for resolving employment disputes. What follows is an analysis of the most common arguments that the critics of arbitration set forth and responses to these arguments.

#### IV.

##### The Critics' Arguments Against Arbitration and Responses

The critics of arbitration as a process for resolving employment disputes seem ever vigilant. Shared themes often unite the arguments launched by a diverse collection of academicians, all branches of the government, political groups, and other interested parties. In reviewing a great deal of the literature on the subject, we have identified several of these common themes. In the broadest sense, the arguments may be subdivided into two categories; (1) correctable complaints and, (2) arguments that attack the fundamental nature of arbitration as a process.<sup>101</sup> Below, we explain the commonly voiced complaints that fit into both of these broad categories and address them in turn.

##### A. Correctable Complaints

Critics commonly make five arguments against arbitration that are easy to either refute and/or correct: (1) arbitration does not allow for the development of the law; (2) arbitration will adversely effect the EEOC's ability to enforce the law; (3) arbitration is too expensive for employees; (4) arbitration may reduce the available damages unfairly; and (5) procedural deficiencies of arbitration prevent government agencies from enforcing their laws, reduce the statute of limitations, alter the burden of proof, and allow for untrained and unqualified arbitrators.<sup>102</sup>

The fact that arbitration does not allow for the development of the law is easy to refute and correct. It is easy to refute because that contention rests on the premise that in place of arbitration, federal court juries will decide cases. In fact, only a fraction of the discrimination charges filed with the EEOC and state agencies end up in court. For example, in the year 2000 the EEOC resolved 93,672 cases.<sup>103</sup> Since the EEOC does not report [\*23] the basis for its decisions in individual cases, the law is publicly developed only if the case is adjudicated in court. Employees, however, filed only 21,032 employment discrimination lawsuits in federal court in 2000.<sup>104</sup> Thus, it appears that only 23% of the discrimination charges filed ended up in federal court. This does not mean, however, that 23% of the discrimination charges resulted in reported decisions.

First, the numbers are not exact for several reasons. Employees who received a right to sue letter in 1999 could have sued in 2000, which would decrease the percentage above. Similarly, employees could have received a right to sue letter in 2000 and then filed in 2001. This would of course increase the percentage above. It is likely that these discrepancies, however, do not have major effect on the percentage of discrimination charges filed that are resolved publicly.

Two factors, however, could significantly reduce the percentage of cases publicly resolved. First, there are a number of claims that plaintiffs file with state or local agencies that are not represented in the EEOC data, but are included in the federal court litigation reports. It is likely that the addition of such state and local agency data would significantly increase the number of resolved cases and thus, decrease the percentage that are litigated. Moreover, of the cases filed in court, a significant percentage are resolved privately before there is a trial or even a dispositive

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<sup>101</sup> See Sherwyn et al., Mandatory Arbitration, *supra* note 4, at note 310-411.

<sup>102</sup> See generally Stone, The Yellow Dog Contract of the 1990's, *supra* note 74.

<sup>103</sup> Equal Employment Opportunity Comm'n, Enforcement Statistics and Litigation, at <http://www.eeoc.gov/stats/enforcement.html> (last visited Jan. 30, 2002).

<sup>104</sup> See Administrative Office, Judicial Business of the United States Courts 2000, tbl. C - 2A (Sept. 30, 2000).

motion.<sup>105</sup> Finally a number of cases that litigants resolve by adjudication or motion are not reported. What this means is that we can conservatively state that more than 75% of the discrimination charges filed are resolved with no public report.

The EEOC's new mediation system provides additional support for the contention that the current system does not permit the development of the law at all. Unlike arbitration, the mediators do not even attempt to make a determination or a ruling of law.<sup>106</sup> Instead, they simply attempt to get the two sides to reach an accord. Arbitration is not worse than mediation (a system that often eludes criticism) in the way that either system provides for development of the law. In fact, arbitration is much better because it offers an adjudicative process instead of one that merely focuses on reaching a monetary middle ground. Arbitrators, pursuant to Gilmer, issue written decisions that lawyers, judges, legislators, and EEOC officials can [\*24] scrutinize.<sup>107</sup> This can affect the EEOC's decision to take cases, influence judicial opinions, and lead to guiding legislation. None of that could occur after a settlement, an EEOC dismissal, or mediation.

Alternatively, the problem may be easy to correct. The law is clear: (1) arbitration agreements cannot prevent employees from filing a charge with the EEOC (or a state agency); (2) the EEOC can litigate on behalf of the employees; and (3) the employees can be awarded full damages.<sup>108</sup> We propose that all arbitration agreements should inform employees of that fact and encourage employees to allow the EEOC to review each case. The EEOC may then litigate those cases that it believes are critical to development of the law. The EEOC should be given a time frame (e.g., thirty days) in which it can decide whether it intends to pursue any given claim in court. As a desirable byproduct, this simple proposal also solves the issue regarding arbitration's effect on the EEOC's ability to enforce the law. If the EEOC has the opportunity and authority to litigate any claim, it can continue to enforce the law.

Moreover, arbitration, if popular enough, could actually enhance the EEOC's ability to regulate the employment discrimination landscape more rigorously. The EEOC spends too much time and money investigating non-meritorious claims. In fact, in the year 2000, the EEOC classified 78.8% of the cases it resolved as non-meritorious resolutions.<sup>109</sup> The EEOC could better enforce the law if it could defer to arbitration to handle cases that lacked merit, did not involve a class of people, or did not involve a novel legal issue.<sup>110</sup>

Critics of arbitration also contend that arbitration is too expensive for employees. This contention may be bifurcated into two complaints; (1) some arbitration agreements require employees to pay half the cost of the arbitration, and (2) some mandatory arbitration agreements reduce the amount of damages available to plaintiffs.<sup>111</sup> These arguments may no longer be valid in some states because of legal authority that holds that employers must pay for the entire cost of the proceedings and that they [\*25] cannot limit damages.<sup>112</sup> Indeed, for the court to consider

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<sup>105</sup> See Michael Heise, Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time, 50 Case W. Res. L. Rev. 813, 815-16 (2000).

<sup>106</sup> Because the EEOC's mediation system encourages so many cases to settle, these cases have no precedential value anyway. See Sherwyn et al., Mandatory Arbitration, *supra* note 4, at 131.

<sup>107</sup> See Gilmer, 500 U.S. at 22. Arbitrators opinions should be made public, perhaps with the names redacted to protect privacy.

<sup>108</sup> See Gilmer, 500 U.S. at 28; see also EEOC v. Waffle House, Inc. 534 U.S. 279, 306 (2002).

<sup>109</sup> See Equal Employment Opportunity Comm'n All Statutes, at <http://www.eeoc.gov/stats/all.html> (last visited Jan. 13, 2002).

<sup>110</sup> In EEOC v. Waffle House, 534 U.S. 279 (2002), the Supreme Court held that the EEOC can file discrimination lawsuits on behalf of individual plaintiffs and can seek money damages even if the employer and employee entered into an arbitration agreement. Several lower courts had held in such situations that the EEOC could only ask for equitable relief on behalf of a class of employees. This Waffle House holding confirms that the EEOC can effectively enforce the law. The agency could increase its effectiveness by embracing arbitration agreements. If the agency deferred "garden-variety" cases to arbitration it would have more resources to spend on litigating "A" cases.

<sup>111</sup> See Stone, The Yellow Dog Contract of the 1900s, *supra* note 74, at 1039.



an arbitration agreement fair in California, employers, at most, may require employee-plaintiffs to pay for the arbitration costs up to the actual cost that employees would incur if they filed their lawsuits in state court.<sup>113</sup> Moreover, even if employees had to pay half of the cost, which we do not believe they should, arbitration advocates contend that the costs associated with arbitration are still significantly less expensive than litigation.<sup>114</sup>

The other procedural deficiencies of arbitration cannot be dismissed. They can, however, be corrected. Critics contend that arbitration agreements: (1) reduce the statute of limitations; (2) alter the burden of proof; and (3) allow for untrained arbitrators. Each of these points may be valid depending on the jurisdiction and the particular arbitration agreement at issue, but are easily remedied by legislation or by case law.

## B. Arguments Against the Fundamental Nature of Arbitration

Three arguments against arbitration center on the fundamental elements of arbitration: (1) arbitration is private and allows for little public accountability; (2) arbitration limits discovery; and (3) arbitration is unfairly biased in favor of employers. The author agrees that arbitration is a private process and that arbitration agreements should be permitted to limit discovery; otherwise, the incentive to seek alternatives to litigation would be reduced. However, privacy and reduced discovery are trade-offs generally worth accepting in light of the alternative of litigation. As discussed in more detail below, we strongly disagree with the third issue.

Arbitration is private. It seems clear that the public nature of litigation deters employers from engaging in unlawful behavior. Thus, a private adjudication system theoretically acts as less of a deterrent than a public one. On the other hand, the public nature of litigation may encourage plaintiffs and their lawyers to pursue frivolous or doubtful claims against deep-pocketed, publicity-sensitive employers. Because of the constant fear of the often-devastating effects of negative publicity, innocent companies may be vulnerable to being leveraged into settling wholly meritless claims. We contend that this "public-versus-private" issue is a question of trade-offs, not of right or wrong.

Similarly, arbitration agreements, almost by definition, need to limit [\*26] discovery or else they risk saving participants little, if any, money or time when compared to traditional civil litigation. Discovery, as conducted pursuant to state and federal pre-trial rules, is an incredibly expensive process. If alternative dispute resolution mechanisms are to offer any economic relief to the parties, they must limit the costs of discovery.<sup>115</sup> The question is whether this is a positive or negative component of arbitration.

Limited discovery does, of course, reduce the amount of information that a plaintiff can access, and therefore, can potentially impede counsel's efforts to prove pretext or find the proverbial "smoking gun" in discrimination and harassment cases. And the employment-law plaintiffs' bar is quick to point out that the employee, as the litigant, is most harmed by limiting discovery because the employer is invariably the keeper of all of the records and usually, the possessor of the most critical evidence in employment law cases.

On the other hand, as mentioned above, limiting discovery significantly reduces costs to all parties. Reducing the costs of discovery should theoretically increase access to adjudication. Thus, employees need not settle legitimate claims for inadequate amounts because they cannot afford the time and costs of the drawn-out litigation process.<sup>116</sup> In addition, limited discovery should reduce the number of frivolous claims filed as the value of nuisance

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<sup>112</sup> See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 104 (Cal. 2000) (concluding that damages limitations are contrary to public policy and therefore unlawful).

<sup>113</sup> See *id.* at 113 (holding that a mandatory employment arbitration agreement implicitly obliges the employer to pay all types of costs that are unique to arbitration).

<sup>114</sup> See Ted Eisenberg and Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (Sept. 2002) (working paper on file with the author). Of course there will be no costs to the plaintiff employee if she prevails; fee-shifting provisions will place the cost on the employer.

<sup>115</sup> See *Gilmer*, 500 U.S. at 22.

settlements would be reduced. Without the high costs of defense litigation, employers do not have an incentive to settle frivolous claims. Furthermore, to address the employment-plaintiffs' bar's concern that limiting discovery unfairly injures the employee-plaintiff's ability to obtain critical records and evidence, courts have set parameters on the extent of the limitations that agreements may place on the discovery process.<sup>117</sup>

According to critics, arbitration also favors employers because of the "systematic pro-employer effect on the outcomes of disputes."<sup>118</sup> In other words, critics claim that arbitration is procedurally unfair, or to use a dirtier word, "fixed." To support this rudimentary contention, critics often focus on four premises: (1) employees fare better in litigation than they do in [\*27] arbitration; (2) litigation awards are higher than arbitration awards; (3) the "repeat-player" effect favors employers; and (4) arbitration agreements are unconscionable contracts of adhesion.<sup>119</sup>

Advocates of arbitration contest and explain each of these premises or observations, especially by questioning the reliability of the studies used to support them. For example, advocates often attack studies presented and conducted by mandatory arbitration detractors that compare plaintiffs' success rates before arbitrators to their success rates before juries.<sup>120</sup> Even assuming *arguendo* the reliability of the data extrapolated from such studies, arbitration advocates offer several explanations for any disparity between the plaintiffs' success rates. These explanations are briefly set forth below.

#### 1. Critics Observe that Plaintiffs Fare Better Before Juries than They Do Before Arbitrators

To begin with, many studies cited in support of this observation compare the plaintiffs' success rate at arbitration to the plaintiffs' success rate in cases that went to trial.<sup>121</sup> This is not, however, a comparison from which any valid conclusions may be drawn. In the arbitral setting, it is extremely rare for an arbitrator to dismiss a case based on a motion to dismiss offered by defense counsel and therefore, it is very unusual for defense counsel to waste both time and the client's money developing such a motion.<sup>122</sup> Arguments for dismissal are typically reserved for the arbitration hearing itself or for pre-or post-hearing briefs. However, in stark contrast, in the traditional litigation setting, pre-trial motions to dismiss are often the primary weapon that defense attorneys use to sink plaintiffs' claims before they ever enter a courtroom. Thus, to ensure a balanced and fair comparison, all the cases that courts dismissed as a result of any dispositive pre-trial motions need to be included in any data set that is compared with arbitration win/loss rates. This is often not the case.<sup>123</sup> The studies done to support this contention are therefore of dubious reliability.

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<sup>116</sup> Clients retain most plaintiffs lawyers on a contingent basis - that is, they only get paid when they extract money from the defendant - either via a verdict, or much more likely, through a settlement. It stands to reason therefore, that plaintiffs lawyers who act reasonably, that is, to maximize their profit, would want to settle cases and spend the least amount of time and effort conducting discovery. As explained in more detail above, if discovery costs less for plaintiffs, it would be less likely that a plaintiff's lawyer would have incentive to settle early.

<sup>117</sup> See, e.g., *Williams v. Katten, Muchin, & Zavis*, No. 92 C 5654, 1996 U.S. Dist. LEXIS 18301 (N.D. Ill. 1996), 13 (upholding the American Arbitration Association's discovery rules which allow the arbitrator to "subpoena witnesses and documents either independently or upon the request of the parties").

<sup>118</sup> See Stone, *Yellow Dog Contracts of the 1990s*, *supra* note 74, at 1040.

<sup>119</sup> See Stone, *The Yellow Dog Contract of the 1990s*, *supra* note 74.

<sup>120</sup> See Sherwyn et al., *Mandatory Arbitration*, *supra* note 4, at 141-42.

<sup>121</sup> See, e.g., Stone, *The Yellow Dog Contract of the 1990s*, *supra* note 74; Bingham, *supra* note 77.

<sup>122</sup> However, some practitioners advise lodging motions to dismiss with arbitrators. The theory is that doing so gives the party lodging the motion an opportunity to educate the arbitrator about her theory of the case and puts the arbitrator in the proper frame of mind to rule in her favor at the hearing. Some arbitrators notoriously wait until the day of the hearing to familiarize themselves with the facts of the case, and by presenting the evidence in the form of a motion, the motion-lodger can anchor the arbitrator's view on her side.

<sup>123</sup> See Stone, *Yellow Dog Contracts of the 1990s*, *supra* note 74, at 1040.

[\*28] Second, as discussed at some length in other works on the topic, there is strong evidence that juries favor employees over employers regardless of the merits of the case.<sup>124</sup> If this is true, arbitration may offer a "fairer" forum than litigation.

Lastly, because the cost of defense is lower in arbitration than in litigation, employers may refuse low cost nuisance settlements in cases where they are confident that they will win. Adjudicating such cases creates the illusion of greater employer win rates at arbitration than at trial.

Therefore, even assuming that the critics' studies offer reliable results, it is spurious to conclude that litigants fare better before juries than they do before arbitrators. Rather, it is only safe to conclude that comparing plaintiff win rates before arbitrators to their win rates before juries is like comparing apples and oranges.

## 2. Critics Contend that Plaintiffs Receive Higher Awards from Juries than from Arbitrators

If this observation is true, there are two plausible explanations. First, in most cases, the key component in assessing damages is back pay. Because it takes less time to arbitrate than to litigate, less back pay accrues in arbitration than in litigation. Second, and perhaps most importantly, juries may be biased against employers who they perceive as having deep pockets.<sup>125</sup>

## 3. Critics Assert that Arbitrators are Biased by the So-Called "Repeat-Player Effect"

Critics contend that "repeat-players" (entities that tend to have numerous claims against them over time) fare better in arbitration than non-"repeat-players."<sup>126</sup> From this premise, critics infer that arbitrators unfairly favor "repeat-players," who, by the critics' definition, happen to be employers most of the time. In some instances, critics cite studies purporting to lend empirical support for the claim that such an effect, or more aptly named, arbitrator bias, exists.<sup>127</sup>

[\*29] Advocates of mandatory arbitration vigorously contest the results of such studies. First, it is far from clear that any repeat-player effect exists. In fact, it simply may not.<sup>128</sup> Second, to accuse the arbitrators as a group of individuals, comprised mainly of retired judges or retired longstanding practitioners with a deep understanding of employment law, of bias ignores the individual qualifications of the arbitrator pool.<sup>129</sup> Lastly, mandatory arbitration

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<sup>124</sup> See Jeffrey T. Frederick, *The Psychology of the American Jury* 7-108 (1987); Michael Fried et al, *Juror Selection: An Analysis of Voir Dire in the Jury System in America: A Critical Overview* 47, 52-53 (1975); Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, *Law & Contemp. Probs*, Autumn 1989, at 177, 197.

<sup>125</sup> See Sherwyn et al., *Mandatory Arbitration*, *supra* note 4, at 140.

<sup>126</sup> *Id.* at n.371-72.

<sup>127</sup> Critics cite Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 *Employee Rts. & Emp. Pol'y J.* 189 (1997) despite the fact that Professor Bingham does not conclude that such bias exists. See, e.g., Equal Employment Opportunity Comm'n, *Policy Statement on Mandatory Arbitration*, EEOC Notice No. 915.002; National Employment Rights Institute (NERI), *NERI's Position on Mandatory Arbitration of Employment Disputes*, 1. *Empl. Rts. & Employ. Pol'y J.* 263, 264 n.4 (1997); Elizabeth G. Thornburg, *Fast, Cheap and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 *J. Small & Emerging Bus. L.* 191, 220 n.116 (2002).

<sup>128</sup> See Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 *Brook. L. Rev.* 1095, 1108 (1993) (reporting that a GAO report found no indication of pro-industry bias in arbitrator decisions in "industry-sponsored arbitration forums"). See also, Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, *supra* note 26, at 1355.

<sup>129</sup> See American Arbitration Association, at <http://www.adr.org> (last visited Jan. 15, 2002). The site enumerates stringent criteria for membership on the AAA National Roster of Arbitrators and Mediators including, but not limited to, a minimum of ten years of senior-level business or professional experience or legal practice, honors, awards, and citations indicating leadership in one's field, membership in a professional association(s) and a reputation of being "held in the highest regard by peers for integrity, fairness and good judgment." See also *Judicial, Arbitration and Mediation Services (JAMS/ENDISPUTE)*, at

advocates contend that neither employers nor employees are the "players." Instead, the advocates contend that lawyers are the only true repeat-players because they both repeatedly appear before and choose arbitrators. Because a plaintiff's lawyer can have as many cases as a management lawyer before any given arbitrator, the advocates contend that a repeat-player effect, if it existed, would not favor employers over employees.

#### 4. Critics Contend that Mandatory Arbitration Agreements are Unlawful Contracts of Adhesion

The last argument concerning mandatory arbitration is that the agreements are contracts of adhesion because employers offer them on a take-it-or-leave-it basis.<sup>130</sup> The fact that the Supreme Court has held that such agreements are not unlawful contracts of adhesion does not, nor [\*30] should it, satisfy the critics' complaints.<sup>131</sup> Advocates of arbitration respond to this complaint by pointing to the numerous other acceptable take-it-or-leave-it employment policies that employees commonly face. For example, employees are often faced with take-it-or-leave-it choices regarding terms and conditions of employment including benefits, such as health insurance, vacation, and retirement, non-competition agreements, and unionization. With regards to unionization, not only must newly hired employees agree that the union already in place will negotiate the terms and conditions of their employment, but also the new hires, in the majority of cases, must pay dues or "agency fees" even if they do not want the incumbent union to represent them. Take-it-or-leave-it offers are simply part and parcel of the employment relationship. Employees in demand can refuse offers of employment while others cannot. In the case of arbitration, the parties can negotiate, but they cannot in a union situation.

#### C. The Compromise Offered by the Critics: Post-Dispute Voluntary Arbitration

Most critics of mandatory arbitration advocate voluntary arbitration as a means of correcting the problems explained above.<sup>132</sup> Obviously, post-dispute voluntary arbitration eliminates the concerns about the nature of the take-it-or-leave-it arbitration being offered, rendering the contract of [\*30] complaint outlined above moot. In addition, the critics trumpet a voluntary system because it allows the employee the opportunity to weigh the procedural defects of arbitration against its benefits to his own situation. One can infer from their support of such a system that the critics believe that post-dispute voluntary arbitration allows for an intelligent, informed choice and eliminates the fear that the employer will cheat the employee out of the potentially more lucrative federal and state courts.

There are two main flaws with these arguments. First, most of the critics' arguments against mandatory arbitration remain unaddressed if the system is voluntary. Specifically, the following arguments would not be remedied: (1) arbitration does not allow for the development of the law; (2) arbitration will adversely affect the EEOC's ability to enforce the law; and (3) arbitration is private and allows for little public accountability. Accordingly, it is simply inconsistent for critics to make these arguments and simultaneously support voluntary arbitration as a means for resolving employment disputes.

The second argument against voluntary arbitration is perhaps more [\*31] persuasive: Lawyers have not and will not use the system enough for it to help solve the problems associated with the current system.

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[http://www.jamsadr.com/employment<\\_>practice.asp](http://www.jamsadr.com/employment<_>practice.asp) (last visited Jan. 15, 2002). JAMS maintains a roster of arbitrators who specialize in employment law. Their web site boasts of having "neutrals [who] understand the statutes and developing case law that apply to employment matters. They appreciate the difficult issues that surround the employment litigation process and the risks and opportunities of taking employment disputes to court." *Id.* JAMS also contends that it is "deeply committed to continuing professional development for its neutrals. Briefings on current legal developments and how they may affect settlements are a part of everyday practice. In addition, JAMS conducts high-level education sessions for its neutrals that focus on the many specialties within employment law such as sexual harassment, disability claims and the different aspects of discrimination law." *Id.*

<sup>130</sup> See Stone, *Yellow Dog Contracts of the 1990s*, *supra* note 74.

<sup>131</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that mandatory arbitration agreements are enforceable under the FAA except for employees in the transportation industry).

<sup>132</sup> See *supra* notes 9-16.

What follows is an examination of the viability of post-dispute voluntary arbitration systems. To analyze such systems we first scrutinize the factors that motivate discrimination lawyers to select which clients to represent and which cases to pursue. As already mentioned, such an analysis is critical to evaluate voluntary arbitration as a substitute for mandatory arbitration. Parties' amenability to agree voluntarily to arbitrate a pre-existing claim entirely depends on whether doing so conforms with their case-management strategies and ultimate case-resolution goals.

With the basic explanation of the attorneys' incentives and case-management strategies in mind, the Article then reports the results of a survey conducted regarding the preferences of arbitration among lawyers who specialize in employment law. Next, the Article reports the results of two different tests concerning lawyers' propensities to select arbitration as a forum for resolving disputes. The first test is an analysis of lawyers' responses to hypothetical situations. The second is an examination of what actually occurred when a post-dispute arbitration system was in place. A careful analysis of all of the above clearly supports the proposition that when given the option to select arbitration as a means to resolve disputes after a claim has arisen, in the vast majority of cases parties have not selected it, will not select it, and probably should not select it.

This conclusion begs two questions: (1) how can the author and a handful of other advocates of mandatory arbitration of employment disputes contend that such a form of dispute resolution is fair to all parties if, in fact, most of the time parties do not and should not select arbitration voluntarily after a dispute has arisen and the parties have more information about their cases; and (2) how can critics of mandatory arbitration advocate implementation of a system that no one uses? The Article concludes by answering the first question and setting forth a hypothesis regarding the second.

V.

## The Case Against Post-Dispute Voluntary arbitration

### A. When Attorneys Should Select Arbitration

Professor Samuel Estreicher contends that post-dispute voluntary arbitration will have no real effect on the employment discrimination docket.<sup>133</sup> His hypothesis pivots on two premises. First, private practice lawyers, not their clients, ultimately decide which forum to select after an [\*32] employment dispute has arisen. Second, these lawyers act strategically and will only choose an alternate forum if they believe that such a decision will increase their chances of a successful resolution.<sup>134</sup> Professor Estreicher argues that in nearly all cases either one or both parties will believe that arbitration will lessen their side's chances of obtaining the desired resolution in terms of the amount of the damage award or an unfavorable ruling.<sup>135</sup> Accordingly, there will be few, if any, cases where both sides will choose arbitration.

Professor Estreicher predicates his theories on a straightforward and fairly narrow set of circumstances. He posits that in a termination case, management will not voluntarily offer arbitration if the employee has not obtained counsel. In these cases, it is not in the employer's best interest to offer an adjudication process featuring relaxed procedural rules and lower costs. Instead, an employer is better off letting the case languish pending an agency's review or dismissed by a court that may get frustrated with the pro se plaintiff not versed in the minutia of the procedures that judges often require. If, however, an employee-plaintiff obtains counsel, Professor Estreicher contends that the plaintiff's lawyer will almost never voluntarily select arbitration because reducing the potential costs of defense reduces the case's settlement value.<sup>136</sup>

Professor Estreicher's theories and conclusion are both logical and realistic. In this section, the authors bolsters his conclusion that parties will only rarely agree to arbitrate employment disputes after a claim has been filed by

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<sup>133</sup> See Estreicher, *Saturns for Rickshaws*, supra note 20, at 566-67 n.20.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

examining how lawyers manage their cases, comparing and contrasting the relevant features of arbitration and litigation, and reporting the results of the authors' survey, which explains how lawyers perceive the differences between the two forums and how these differences affect lawyers' decisions.

#### B. How Plaintiffs' Lawyers Choose Cases

I am aware of no academic studies that analyze how plaintiffs' lawyers manage their employment law-related caseloads. Professor Herbert Kritzer, however, has done extensive work on how plaintiffs' lawyers, working on a contingency fee arrangement, choose and manage their personal injury practices.<sup>137</sup> While there are some important differences between the two [\*33] types of practices, Kritzer's basic findings should apply to discrimination cases.

According to Kritzer, excluding a handful of outliers, plaintiffs' lawyers are rational actors in that they only take cases they believe to be profitable. Of course, profitability is relative because a determination of what is profitable is based in large part on an attorney's opportunity costs. To effectively manage their practices, Kritzer contends that plaintiffs' lawyers treat their case loads as if they were financial portfolios with the rather monochromatic ultimate goal of achieving a high return.<sup>138</sup> Kritzer defines the return as the "effective hourly rate."<sup>139</sup> The effective hourly rate is simply the attorney's fee divided by the hours that the lawyer works on a case. Some cases, of course, yield no return. To ensure a marginally acceptable effective hourly rate, the profitable cases must subsidize those that result in little or no compensation. To do this, plaintiffs' lawyers, acting to maximize their hourly effective rate, must make critical economic decisions at no less than three junctions in the life of every case they consider accepting: (1) the outset (determining whether the case initially appears profitable), (2) the settlement negotiations (determining what the attorney's bottom-line is) and (3) the decision to litigate (determining if the case is worth pursuing after considering the costs of expert witnesses, preparation and opportunity costs after discovery is completed).<sup>140</sup>

The best way for a plaintiffs' law firm to maximize its collective effective hourly rate is to settle as many cases as possible while minimizing the amount of time spent on any matter. This is true even if the settlement figure is but a fraction of the full damages the plaintiff could, or even would have received if a case had been fully litigated. This concept is best illustrated by the following hypothetical situation:

An employer terminates a \$ 100,000 per year employee from his job in violation of Title VII. In spite of the employee's wholehearted attempts to find another job similar to the one he lost, he cannot find one for a whole year. The employee is therefore rightly entitled to back pay in the amount of \$ 100,000. The employee easily finds a lawyer who agrees to take his case on contingency, thirty-three percent of the employee's settlement before trial, and thirty-five percent of whatever a judge or jury awards him. The employee's lawyer writes the employer a letter sternly requesting reimbursement of the lost wages for the year. The employer responds with an offer to pay off the ex-employee for what might be considered a "nuisance" settlement offer of only \$ 30,000. The employee's lawyer, who [\*34] at most, spent five hours working on the case, sees this offer as a windfall because the fee, a mere \$ 10,000, would mean the lawyer earned \$ 2,000 per hour. Under Kritzer's theory, \$ 2,000 per hour is a more than acceptable effective hourly rate and thus, it likely makes sense to settle the case.<sup>141</sup>

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<sup>137</sup> Herbert M. Kritzer, *Rhetoric and Reality...Uses and Abuses...Contingencies and Certainties: The American Contingent Fee in Operation ?* (Inst. for Legal Studies, Working Paper No. DPRP 12-2, 1996) [hereinafter, Kritzer, *Rhetoric and Reality*]; Herbert M. Kritzer, *Investing in Cases: Can You Profit from Contingency Fee Work?*, *Wis. Law.*, Aug. 1997, at 89; Herbert M. Kritzer, *Contingent Fee Lawyers and Contingent Fee Cases*, at <http://www.polisci.wisc.edu/users/kritzer/research/research.htm#contfee> (last visited Jan. 13, 2002).

<sup>138</sup> See Kritzer, *Rhetoric and Reality*, *supra* note 137, at 89.

<sup>139</sup> See *id.*

<sup>140</sup> Telephone conversation with Zev J. Eigen, Associate at Littler Mendelson (Feb. 13, 2002).

<sup>141</sup> Of course the attorney may want to take a chance on winning the big payoff that could arise out of litigation. This would make sense only if the lawyer is extremely confident in the case and the lawyer does not have other work that could yield a better hourly rate.

The economic incentives of a plaintiffs' lawyer often, however, conflict with the client's best interests. In the above hypothetical situation for instance, the plaintiff might not be satisfied with a \$ 20,000 award (after the lawyer's fee) that taxes and withholdings will further reduce. The plaintiff may not wish to settle for anything less than \$ 100,000 after he reads his attorney's letter to his ex-employer waxing poetic on how much the employer might have to pay on top of the \$ 100,000 in the form of punitive damages and costs of defense including discovery, expert witnesses, and their own attorneys' fees. This does not even include plaintiff's attorney's fees if the employer loses. Moreover, the employee may seek vindication and wish to litigate regardless of the risks and lost time.

Obviously, plaintiffs are not concerned with their lawyers' returns on their cases and instead, want the highest settlement or judgment. Sometimes plaintiffs are not the rational actors that their attorneys are because plaintiffs sometimes want to go to trial regardless. Whereas plaintiffs' attorneys strive to minimize the time spent on resolving their clients' cases, their clients want their lawyers to devote as much attention to their cases as possible. This conflict presents a problem for plaintiffs' attorneys. Assuming that the hypothetical case outlined above was litigated before a jury, the firm representing the employee would likely expend at least 500 attorney-hours to prepare for and litigate the case. <sup>142</sup> The best case scenario for the plaintiff's lawyer in this case would be that the plaintiff would prevail, the jury would award full back pay and the statutory maximum of \$ 300,000 (a combination of punitive and compensatory damages), the court would accept all of the firm's 500 hours, award the lawyer \$ 200 per hour in fees, and the lawyer would receive 35% of the plaintiff's award. If all of these "positives" for the plaintiff's law firm occurred, the firm's collective effective hourly rate would be a mere \$ 480. This represents a best-case scenario for the plaintiff's law firm. It could take more hours to prepare and litigate, the court could reduce the number of hours, the court could assign a lower hourly rate, the jury could refuse to award punitive damages, the jury could award a figure less than full back pay, or the plaintiff could lose, which is certainly the worst case scenario. [\*35] If any of these events occurred, the plaintiffs' lawyer would receive a lower effective hourly rate, or nothing at all. Clearly then, the attorney's economic incentives fall in stark contrast to the plaintiff's whose main concern may be merely to win.

### C. How Defense Lawyers Select Their Clients

Employment law defense practices typically differ fundamentally from plaintiffs'. Defense lawyers do not consider their queue of ongoing cases as a portfolio of stock picks with varying degrees of risk and potential to generate revenue. All of defense-side law firm's active cases generate revenue because these firms bill by the hour and are paid regardless of whether they win or lose. Defense firms therefore do not need to screen out cases that may not be successful on the merits. They take and pursue all cases because their clients pay them an hourly rate to defend them, win or lose.

Management firms' priorities are also different than those of plaintiffs' firms. Instead of attempting to maximize the dollar return on each individual case, management law firms strive to ensure their clients' satisfaction with their work. This result is attributable to pure economic incentives, not to any moral or ethical superiority intrinsic to defense-side representation. The reality is that while most plaintiffs will not need the services of a plaintiff-side lawyer more than once, management-side clients will need employment law services in the future and their lawyers are always motivated by the prospect of future business. As a result, management lawyers primarily concern themselves with two things: (1) ensuring that their clients do not seek other counsel in the future, and (2) convincing current clients to give them more work. <sup>143</sup> Thus, not only do management-side law firms not need to maximize their return on any given case, but also they will view cases that will not generate substantial fees as positive if those cases will likely lead to more work in the future.

This does not mean that firms that represent management invariably share the economic incentives of their clients. In fact, often they do not. Employers typically encourage their lawyers to minimize their fees. While lawyers seeking to retain clients are very concerned about costs, they obviously need to generate fees in order to prosper.

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<sup>142</sup> 500 hours is a conservative estimate according to David Ritter, Chair of the Labor and Employment Department at the Chicago law firm of Altheimer and Gray. See *supra* note 88.

<sup>143</sup> Conversation with Zev Eigen, *supra* note 140.

Resolving a case before the firm has put any real time into the matter will always generate less fees than litigating it to verdict or even summary judgment. Thus, putting securing prospects for future work aside, what is best for the client is not necessarily always best for the law firm.

The relationship between the management law firm and its clients [\*36] becomes more complex when one considers the question of winning and losing. At first, many clients are against settling a case, as a matter of principle, when they believe that their company has not violated the law. Such noble sentiments may create a dilemma for the defense lawyer. On the one hand, the defense attorney does not want to appear weak and is encouraged by the prospect of earning substantial fees; conversely, the client may shed its honorable principles when the legal bills begin to accumulate and the risk of loss, especially in a jurisdiction believed to be extremely pro-employee, looms heavily. The defense lawyer is well aware that one of the easiest ways to lose a client is to lose a case that could have been settled for the cost of defense or less.

#### D. The Decision to Arbitrate Is Complex

Because of the incentives explained above, it is clear that lawyers on both sides of the discrimination bar often face complex decisions regarding how to proceed with their cases. Whether to agree to arbitrate instead of litigate is yet another decision that lawyers sometimes consider. Of course, at least marginally, lawyers will make choices that they believe increase the odds of achieving their goals, namely, maximizing the "effective hourly rate" for plaintiffs' lawyers, and ensuring future work by pleasing clients for defense attorneys.

Both plaintiffs' and defense lawyers approach the decision whether to arbitrate a claim on a case-by-case basis and on several levels. In particular, the parties must decide whether they foresee their optimal chance of achieving their desired result arising out of settlement, adjudication by motion, or adjudication after a full evidentiary hearing. After making that decision, the lawyers must then decide which forum will likely offer the best chance for success given the type of resolution they seek. The "decision tree" is complex because of the different features that each forum offers and the conflicting incentives discussed above.

For example, assume a management lawyer believes her best chance of success is through a motion for summary judgment and her worst chance at success would be at the mercy (or lack thereof) of a jury. Should she risk the chance of a jury trial by refusing to arbitrate or give up the chance to prevail at summary judgment in exchange for having an arbitrator instead of a jury decide the case? Of course, each of these decisions will be made on a case-by-case basis, and it would therefore be an exercise in futility to equivocally prognosticate what lawyers will do in any situation.

More appropriately, I assess what lawyers are likely to consider in deciding which forum to select. In fact, this is desirable because it may allow us to understand whether lawyers, in the aggregate, are likely to agree to arbitrate claims after they are filed. Specifically, one would expect that lawyers would focus on the fact that federal or state court litigation (1) [\*37] provides for summary judgment motions, (2) allows for access to juries, (3) is public rather than private, (4) has an accessible appeals system, and (5) is often cumbersome and expensive. In contrast, arbitration generally (1) does not provide for summary judgment motions, (2) does not provide access to juries, (3) is private, (4) offers only extremely limited appeals, and (5) is significantly faster and less expensive than litigating a case to verdict.<sup>144</sup> In order for a post-dispute voluntary arbitration system to work, both the plaintiff's and the defense lawyer need to conclude that arbitration's benefits outweigh its costs and that arbitration represents the best chance for success for each lawyer.

As this article ultimately concludes, however, this rarely occurs. Invariably, what is advantageous to one side is disadvantageous to the other. Attorneys are hesitant to take any action that could signal weakness to the other side or hinder his or her chances of obtaining a desirable outcome. Parties are wise to consider not only the technical advantages and disadvantages of arbitration, but also the psychological effects of suggesting (or agreeing voluntarily to) an alternative forum. It may be the case that parties are reluctant to offer to arbitrate when either the

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<sup>144</sup> See Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 *Ind. L.J.* 83, 92 (2001) (noting that a defense before a jury may cost an employer \$ 100,000 to \$ 200,000 even if successful).



underlying facts of their case appear weak or the opposition aggressively postures its willingness and readiness to proceed to trial.

To illustrate how one side's tactical advantage is the other side's strategic nightmare, consider the determination attorneys must render of the amenability of the facts of a case to being dismissed on a motion. Particularly, attorneys evaluate whether there are favorable issues of law supported by undisputed facts that could constitute grounds for a successful motion. If such factors exist, a defendant will theoretically be less inclined to agree to arbitrate. It stands to reason that the stronger the basis for a defendant's pre-trial motion, the less likely it is that a defendant will agree to arbitrate and the more likely plaintiff will agree to arbitrate. The converse of these two statements logically follows: the weaker the basis for a defendant's dispositive pre-trial motion, the more likely it is that the defendant will agree to arbitrate and the less likely it is that a plaintiff will agree to arbitrate. Assuming that both defendants and plaintiffs are relatively competent assessors of the relative strengths and weaknesses of their respective cases and that both sides have sufficient access to information to render relatively informed decisions, theoretically, there would be only rarely, if ever, an instance in which both sides would simultaneously agree to arbitrate their claims after a lawsuit is filed.

To further illustrate how attorneys' decision-making processes yield [\*38] few, if any, instances of agreement to submit pre-existing claims to arbitration, this article reports, below, the preliminary results of a survey that explores lawyers' perceptions of arbitration and how those perceptions affect lawyers' decisions.

## VI.

### Empirical Evidence

To better understand the likelihood of both parties independently agreeing to arbitrate, I closely scrutinize each party's views about arbitration and its alternatives. To test the empirical accuracy of the arguments regarding voluntary arbitration outlined above, I draw on survey data from practicing Chicago employment lawyers as well as caseload data from the Illinois Human Rights Commission. My survey data provides a glimpse into practicing employment attorneys' opinions on arbitration as well as how their opinions influence their decisions regarding voluntary arbitration. In the first part of this section, I report findings from the collected survey data. Next, I report the results of complementary data, drawn from approximately 1,300 cases filed with the Illinois Human Rights Commission's (IHRC). The IHRC operated a voluntary arbitration program from 1994 through 1998, which provides valuable information on parties' actual arbitration practices.

#### A. Survey Data

##### 1. Background and Methodology

One critical step towards understanding how lawyers perceive and use voluntary arbitration procedures involves gaining a clearer understanding of the lawyers who have the occasion to use such dispute resolution mechanisms. Among the obvious sub-groups of attorneys inclined to use the IHRC procedure was Chicago's Employment Bar. Although I have no reason to believe that Chicago's employment attorneys are any more or less representative of employment attorneys practicing in other large metropolitan areas, they have the distinct attribute of practicing in a jurisdiction that had a voluntary arbitration alternative systematically available to them.

It is not easy to demarcate the sub-group of attorneys who specialize in employment law, or the side they represent. Although no firm "list" defines the entire universe of employment attorneys, one helpful proxy is attorney self-reports of practice areas. Specifically, a common practice for attorneys engaged in employment matters (as well as other sub-specialties) is to [\*39] identify their practice areas in the Martindale-Hubbell directory.<sup>145</sup> Indeed, Martindale-Hubbell now posts its attorney lists on-line<sup>146</sup> and, consequently, facilitates the development of survey mailing lists. I developed my initial universe of Chicago employment attorneys from the Martindale-Hubbell directory (N=

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<sup>145</sup> See Martindale-Hubbell, at <http://www.martindale.com> (last visited Feb. 6, 2002).

<sup>146</sup> *Id.*

1187). I surveyed each attorney listed and subsequently reduced the sample by the number of attorneys listed whose survey was undelivered or returned due to a wrong address and who could not be contacted with subsequent phone calls. Finally, I also removed from the sample those attorneys who responded to the survey but clearly indicated that they were no longer (or never had been) active in the Employment Bar. Such filtering further reduced the sample size to N=938. Of the 938 eligible respondents, 288 returned the surveys for a response rate of 31%.<sup>147</sup>

To glean insight into how defense and plaintiff employment lawyers might approach issues germane to voluntary arbitration differently, I divided the sample into two sub-groups: defense (N=247) and plaintiff (N=41) employment lawyers. Those in the defense lawyers group are those who reported that at least 51 percent of their employment law practice involves representing defendants. Conversely, those attorneys in the plaintiff group are those who report that less than 51 percent of their employment law practice involves representing defendants. Tables 1A and 1B present summary and descriptive information on the sample.

What is clear from Tables 1A and 1B is that the two groups of lawyers share many traits. For example, both groups are roughly equivalent in terms of experience (years in practice). Moreover, the two groups of employment lawyers possess remarkably similar background characteristics. Lawyers from both groups are, on average, in their mid-40s. Perhaps reflecting the Bar overall, most are both white and male. However, a much larger percentage of plaintiff lawyers are female (thirty-five percent versus twenty-one percent).

Despite sharing many traits, defense and plaintiff lawyers differ in important ways. Perhaps most important is how these differences bear on the likelihood of specialization. In terms of an overall percentage of their practice, more than one-half (51.3%) of defense lawyers' practice involves employment discrimination matters. For plaintiff lawyers, that figure is 43.5%. This disparity may be greater than it seems because many of the defense lawyers fill the remainder of their practice with other labor and employment issues such as union management relations, fair labor standards act issues, training, and other related matters. For many of the [\*40] plaintiffs' lawyers, the remainder of their practices involve non-employment issues like personal injury law. Further, defense lawyers have argued more than fifty percent more cases than plaintiff lawyers before the IHRC.

Finally, law firm size<sup>148</sup> might serve as yet another proxy, however crude, for law practice specialization. The single largest distinction between defense and plaintiff employment lawyers involves their respective law firm sizes. For defense lawyers the typical law firm size (211.9) is thirteen times larger than the typical plaintiff law firm (16.3). As I make clear in my discussion about the economic incentives that these two distinct groups of lawyers confront,<sup>149</sup> law firm size might also play some role in economic risk assessment. To be more specific, lawyers from larger law firms are likely to be better equipped to take on risky cases.

[\*41] Table 1A: Summary Statistics (Defense Lawyers)

[see org] N = 247

Table 1b: Summary Statistics (Plaintiff Lawyers)

[see org] N = 41

## 2. Opinions on Arbitration and Litigation

Results from the opinion survey illustrate why voluntary arbitration programs will likely stumble, at least in the employment context. As delineated in Table 2, the survey asked both plaintiffs' and defense lawyers their opinions as to whether arbitrators, judges, and juries are: (1) more likely to give employees or employers their desired

<sup>147</sup> In the analysis, I was unable to enter the full data contained in twenty surveys. I therefore used missing data techniques. For an overview of these techniques, see generally Roderick J. A. Little, *Statistical Analysis with Missing Data* (1987).

<sup>148</sup> I construe law firm size in terms of total number of attorneys.

<sup>149</sup> See supra note 137.

results; (2) better able to understand complex legal issues; and (3) better able to understand complex factual issues. As described in Table 3 below, the survey also asked how the lawyers' responses reported in Table 2 would affect their decisions whether to arbitrate. Taken together, the means of the lawyers' responses reveal that it is unlikely that there would be a significant number of cases in which the lawyers on both sides of a case would simultaneously agree to submit to voluntary arbitration.

[\*42] It is important to note that the results compiled herein reflect only the mean response to each question, not, of course, the exact response of each participant. Therefore, the interpretation of these results is what would occur on average. Indeed, because many respondents' actual recorded answers varied from the mean, it is possible that in any individual case the exact opposite of what my survey predicts could occur. Such cases would, however, represent an unlikely departure from the norm when the results are statistically significant.

The survey also sought to examine the parties' perceptions of favoritism on the part of arbitrators, judges, and juries. The attorneys' responses further confirm that it would be unlikely for both sides to choose arbitration in a given case. For example, neither defense lawyers nor plaintiffs' lawyers believe that arbitrators favor their clients. In fact, defense lawyers significantly disagree with the statement "arbitrators tend to favor employers" and plaintiffs' lawyers significantly disagree with the statement "arbitrators tend to favor employees." Moreover, both groups agree that arbitrators favor the other side. For the defense lawyers, this agreement is statistically significant. The fact that both sides believe that arbitrators do not favor their clients but favor the opposition offers convincing evidence of parties' general reluctance to select arbitration.<sup>150</sup>

Unlike their opinions about arbitrators, lawyers for both sides seem to agree on whom juries and federal judges favor. Both sides believe that juries favor employees and that judges favor employers. Both of these beliefs achieve statistical significance for plaintiff and defense side attorneys, but none differ significantly from those of the other side. Thus, lawyers from both sides tend to agree that a plaintiff-employee is better off in front of a jury and that a defendant-employer is better off in front of judge. Accordingly, because plaintiffs' lawyers believe that arbitrators favor employers, one would expect that a plaintiff would rarely select arbitration voluntarily. One could argue that employers, working hard to avoid a jury may choose to arbitrate even though they believe that the arbitrators favor plaintiffs because these lawyers believe that juries are more biased than arbitrators. But, of course, it takes two to arbitrate voluntarily.

Our complex litigation system, however, eludes simplified analyses. Because defendant-employers will rarely, if ever, be fortuitous enough to encounter a plaintiff who agrees to a bench trial,<sup>151</sup> the only opportunity that [\*43] may exist for a defendant-employer to have its case resolved by a judge is on a motion. According to my survey, lawyers believe that dispositive motions tend to favor employers.<sup>152</sup> In fact, both defense and plaintiffs' lawyers agree significantly that the general unavailability of dispositive motions in arbitration is detrimental to employers but not for employees.

It is clear that if both sides had their respective ways, defendant-employers would have all lawsuits filed against them dismissed on pre-trial motions and plaintiff-employees would have every lawsuit they filed decided by juries. Litigation, however, gives neither party what they want. It is equally clear that juries do not hear the vast majority of employment law cases filed and that parties settle more employment lawsuits than are dismissed on motions.<sup>153</sup>

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<sup>150</sup> Examining the distribution of the respondents, only 19 of the 229 defense attorneys believed that arbitrators favored employers (i.e. answered with a 5, 6, or 7 to the question). Similarly, only 5 of the plaintiffs' lawyers believed that arbitrators favored employees. If these distributions are representative of all discrimination lawyers, we would expect only 1% of the cases to have lawyers on both sides who believe that arbitrators favor their clients.

<sup>151</sup> In some jurisdictions, however, plaintiffs lose their right to a jury trial if they fail to request one within a given time period. See, e.g., N.Y. C.P.L.R. 4102(a) (requiring parties to demand jury trial within fifteen days of receiving a note of issue waiving trial by jury).

<sup>152</sup> This is based on the survey's finding that both sides agree significantly that judges tend to favor employers. Because more defendants file motions to dismiss than plaintiffs file motions for directed verdicts, it stands to reason that motion practice more often favors defendants, or at least lawyers perceive it as such.

Therefore, traveling down the path towards court is rife with risks for both sides. If a judge rejects a defendant's motion, an employer risks facing a jury trial or being forced to settle the case for an inflated sum. Similarly, a plaintiff risks having his case dismissed on a motion instead of being heard by a jury.

The risks inherent to litigation raise an important question: would an employer, afraid of an employee-friendly jury, and an employee, afraid of a judge eager to prune his overrun docket by granting dispositive motions, both voluntarily elect to arbitrate their claims despite the fact that each side believes that the arbitrator favors the opposition? We could support such a statement by citing the fact that my results reveal that while defense and plaintiffs' lawyers are both averse to letting arbitrators decide their cases, they are even more averse to having juries and judges, respectively, decide their cases. The counter to that argument is that the parties have indicated such a strong desire to let the adjudicator of their choice decide the fate of their claims that plaintiffs would risk losing a motion and employers would [\*44] risk facing a jury (or the prospect of settling the case with the jury looming). More likely is the conclusion that the parties will seek to mitigate their respective risk by examining additional factors that could help or harm their cases.

A second set of survey questions sought to shed light on such additional factors by eliciting lawyers' confidence levels regarding judges, juries, and arbitrators' relative abilities as adjudicators of employment-law related disputes. The results reveal a high degree of agreement between plaintiff and defense lawyers in this area. It seems, however, that such agreement will likely lead to few if any post-dispute agreements to arbitrate. In fact, it is likely that such agreement would in fact result in fewer incidents of defendants and plaintiffs concurrently consenting to arbitrating claims if the plaintiff files the case in federal court.

Both defense and plaintiff lawyers agree that arbitrators are better versed in the germane law than jurors. Indeed, both groups agree in a manner that significantly departs from the mid-point. However, the degree of defense and plaintiff lawyers' agreement varies with defense lawyers agreeing more strongly that arbitrators are better versed in the germane law than jurors. Defense and plaintiff lawyers' agreement that arbitrators understand complex legal issues better than jurors comports with related opinions on jurors' comparative abilities. Finally, in a manner that is not distinguishable, both groups of lawyers disagree with the assertion that arbitrators understand complex legal issues better than judges.<sup>154</sup>

These responses indicate more factors lawyers employ when they decide whether to arbitrate employment matters. It seems logical that parties who believe that their cases ride on the true understanding of complex legal issues would seek a judge and try to avoid a jury or an arbitrator. The other side would, likely, seek the exact opposite. Of course both sides would choose to adjudicate their claims before a judge if the parties each believed that an accurate passionless legal analysis would benefit them. I suggest, however, that, in most cases, veteran employment law practitioners understand whether the law, no matter how complex, supports their clients' claims. Thus one side invariably favors judges over juries and arbitration while the other side seeks to avoid judges.

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<sup>153</sup> See William J. Howard, *Arbitrating Claims of Employment Discrimination*, 50 *J. Disp. Resol.* 40, 43-44 (1995). The researcher surveyed 321 members of the National Employment Lawyers Association and 330 members of the Section of Labor and Employment Law of the American Bar Association. Employment law comprised at least 80% of the respondents' practices. Defense attorneys estimated that 79% of their cases settled before adjudication and plaintiffs' attorneys estimated that 84% of their cases settled prior to final adjudication. But, high success rates for motions to dismiss filed by defendants do not necessarily mean that judges are employer-friendly. In fact, just the opposite may be true. Defense attorneys typically charge their clients by the hour. Many clients do not accept unnecessarily incurred costs and would certainly not endorse filing dispositive motions without reassurance of a minimum probability of success. Therefore, defense attorneys are reluctant to file motions and incur costs unnecessarily unless there is a strong chance of success. In jurisdictions in which the judges are notoriously pro-employee, the defense would only contemplate filing a motion if it had a great likelihood of success. It stands to reason then, that in such jurisdictions, a greater success rate of dispositive motions could result despite the judges' reputation for their staunch pro-employee views.

<sup>154</sup> This result seems to conflict with note 129 that discusses the qualifications that JAMS and AAA lawyers must satisfy. One explanation is that many of the surveyed lawyers have experience with labor arbitration. There is wide variability in labor arbitrations.

The findings presented in Table 2 support the argument that it will be very rare for both sides to concurrently choose arbitration because the parties see significant discrepancies in the relative biases and the different adjudicators' skill sets and skill levels. These differences, I contend, should have a greater effect on the parties' decisions about whether to submit to [\*45] arbitration than the fact that arbitration is faster and less expensive than litigation. In fact, if arbitration's speed and reduced costs have any effect on the parties' decision making process, the effect would more likely reduce the likelihood of consensus between the parties to arbitrate after a dispute arises because either party may find itself in a position in which it would be advantageous to exploit the high costs and systemic delays intrinsic to litigation. Still, in order to meaningfully evaluate the effects of the differences (perceived or real) between judges, juries, and arbitrators on parties' decisions of which forum to select, I questioned employment attorneys regarding the influences of each of the items described above on their decisions. The following section discusses the results in greater detail.

[\*46] Table 2

### Opinions on Arbitration and Litigation

[see org] Notes: Respondents asked to rate the extent to which the following opinions might influence their decision to arbitrate (1=strongly disagree; 7=strongly agree). Standard deviations are reported in parentheses.

1. Defense lawyers' responses significantly different from that of the plaintiff lawyers at  $p < .05$
2. Defense lawyers' responses significantly different from the midpoint, 4.0, at  $p < .05$ .
3. Plaintiff Lawyers' responses significantly different from the midpoint, 4.0, at  $p < .05$ .

### 3. Influence of Employment Attorneys' Opinions on the Decision to Arbitrate

It is one thing to learn about attorneys' opinions on arbitrators; it is quite another to gauge whether their opinions influence their decisions to agree to post-dispute voluntary arbitration. Table 3 presents the survey results on whether attorneys' opinions compiled in Table 2 influence [\*47] parties' decisions to arbitrate.<sup>155</sup> The results demonstrate, not surprisingly, that the factors which generated significant departures from the mid-point in Table 2 (that is, the responses that generated strong agreement or strong disagreement) carried the most influence on lawyers' decisions.

To measure the influence of the items reported in Table 2 on lawyers' decisions to arbitrate, the author polled the practitioners on how these factors influenced their decisions.<sup>156</sup> The survey reveals that the greatest influences on parties' decisions whether to arbitrate are the lack of dispositive motions and the perceptions of adjudicator bias.

As reported in Table 2, both plaintiffs' and defense lawyers agree that the lack of dispositive motions compromises employer but not employee claims. Not surprisingly, when asked about the influence of the lack of motions on their decisions, the response of defense lawyers (the group whose cases would be compromised) depart significantly from the mid-point and also from that of plaintiffs. Based on the results reported in Table 2, the general unavailability of dispositive motions before arbitrators significantly influences employers not to accept offers to arbitrate but has no real influence on plaintiffs' decisions to accept offers to arbitrate. Thus, if dispositive motions were the only influence on lawyers, it is unlikely that there would ever be any post-dispute voluntary arbitrations

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<sup>155</sup> For this question, the survey asked respondents to score questions on a seven-point scale where 1 indicated very little influence and 7 indicated a strong influence.

<sup>156</sup> The survey used a seven-point scale with 1 meaning very little influence and 7 meaning a strong influence. It is possible to contend that any score over 1 represents some influence and that a score of five would be great influence. However, based on the fact that the previous scale was also a seven point scale with 4 as a mid-point, I am taking a much more conservative approach and reporting the results as if 4 represented a score of no real influence. Again this is a conservative interpretation that, at worst underestimates the influences of the items and, at best, represents the intent of the participants.

because defense lawyers would never choose this form of adjudication. Of course, there is at least one other major influence on the parties' decision.

Both defense and plaintiffs' lawyers' decisions to arbitrate were significantly influenced by the question of who would adjudicate their claims. The fact that a jury would otherwise decide a pending case significantly influences defense lawyers to agree to arbitrate and plaintiffs' lawyers not to agree to arbitrate. Conversely, the fact that a judge would not decide the case significantly influences defense lawyers to agree to arbitrate and plaintiffs not to agree to arbitrate.

The results uncover an interesting set of conditions. The lawyers' beliefs about the biases of judges tend to lead defense lawyers to refuse to arbitrate, but plaintiffs' lawyers to agree to arbitrate. On the other hand their beliefs regarding the biases of juries lead defense lawyers to select arbitration and plaintiffs' lawyers to refuse arbitration. Finally, the defense lawyers' reliance on dispositive motions influences employers not to [\*48] arbitrate, but has no real effect on employees. Unfortunately for those who offer post-dispute voluntary arbitration as a compromise to the mandatory pre-dispute variety, there are no factors that harmoniously influence both parties to elect arbitration. However, there is at least one factor that influences both sides not to agree to arbitrate: their shared beliefs about arbitrator bias. Table 2 indicates that both plaintiffs' and defense lawyers believe that arbitrators favor the other side. Table 3 shows that this belief significantly influences both sides not to arbitrate.

[\*49] Table 3

#### Influence of Opinions on Decision to Arbitrate

[see org] Notes: Respondents asked to rate the extent to which the following opinions might influence their decision to arbitrate (1=very little influence; 7=strong influence). Standard deviations are reported in parentheses.

1. Defense lawyers' responses significantly different from that of the plaintiff lawyers at  $p < .05$ .
2. Defense lawyers' responses significantly different from the midpoint, 4.0, at  $p < .05$ .
3. Plaintiff Lawyers' responses significantly different from the midpoint, 4.0, at  $p < .05$ .
4. Scenarios

The final part of the three-part survey involves gauging employment attorneys' responses to three composite scenarios. In these scenarios, the author stylized fact patterns to portray three common employment law situations. Scenario One involves the classic "he said, she said" situation without the benefit of third-party witnesses. In a "he said, she said" case, it is extremely unlikely that the court will grant a dispositive motion. The facts in Scenario Two endeavor to lead respondents to emotionally favor the [\*50] employee even though a strict and passionless legal analysis clearly favors the employer. In this scenario, a dispositive motion is unlikely, but possible. In the Third Scenario, the facts and the law support the employer so heavily that a judge would very likely grant a dispositive motion.

The survey asks the responding lawyers to rate the likelihood of: (1) the case being settled; (2) the case being successfully adjudicated; and (3) the case being successfully resolved (either through adjudication or settlement) if an arbitrator, a federal court judge, a jury, or an IHRC Administrative Law Judge ("ALJ") decided the case. The survey also asks the lawyers to evaluate which of the adjudication processes would most likely lead to their desired outcome and if they would voluntarily choose arbitration to resolve the dispute. I compiled results from questions relating to each scenario in Table 4.

Before examining the responses specific to each scenario, recall again the basic principle of voluntary arbitration: both parties must agree to participate - it takes two to arbitrate. Put slightly differently, the decision of either party not to participate will preclude even the most zealous proponent of voluntary arbitration from arbitrating a dispute. Three findings bear directly on this simple but crucial point.

First, for disputes filed in federal court, defense lawyers in all instances reported that it is less than likely that they would agree to arbitrate. In Scenarios Two and Three these responses were significant. Conversely, plaintiffs' lawyers, who reported they were less than likely to arbitrate in Scenario One, stated they were more than likely to agree to arbitrate in Scenarios Two and Three. None of these responses, however, were significant. Accordingly, there was not one scenario in which both the defense and plaintiff lawyers agree, on average, that voluntary arbitration is more likely than not to occur for a federal court case.

Second, defense lawyers report a better chance of a successful resolution in each scenario if the parties litigate the case in federal court as opposed to arbitration. Each of these findings is significant. Plaintiffs, on the other hand, believe they will have a better chance for success in arbitration than in federal court for each scenario. None of these findings, however, are significant.

Third, the results demonstrate what could be a particular aversion to litigating before the IHRC. Both groups of lawyers in all three scenarios predict that the likelihood for arbitration is more likely than not when the alternative is resolution by the IHRC. Interestingly, this result remains constant even in instances in which the parties perceive that they have better than even prospects for success before the IHRC.

[\*51]

#### a. Scenario One

Scenario One involves the classic "he said, she said" factual situation in which proof pivots on the perceived persuasiveness of the claimant versus that of the employer (or employer's agent) because little or no other corroborating evidence exists. Because this is clearly a question of fact, summary judgment should not be available.

##### 1. Chances of Settlement

Defense lawyers reported that settlement was the outcome more likely than not to result in all three contexts, federal court, the IHRC, and arbitration. Not surprisingly, defense attorneys' responses indicated that they are most certain that cases litigated in federal court will result in settlement, perhaps due to the reoccurring acute aversion to juries and the difficult issues of proof inherent to "he said, she said" cases. Each of these responses was significant. Likewise, plaintiff lawyers' responses indicated that they believed, with significance, that settlement is the outcome more likely than not to result for cases litigated in federal court. For cases pending before the IHRC or in arbitration, however, plaintiffs reported they were less than likely to settle. Neither of these results was significant. Both sides reported that the chances of settlement were lowest if they were to arbitrate the case. In fact, the difference in the likelihood of settlement between arbitration and both federal court and the IHRC were significant for defense lawyers. For plaintiffs, the difference between the likelihood of settlement was significant between arbitration and federal court. Based on this result, one may logically conclude that once the parties agree to arbitrate a case, settlement prospects become less likely.

##### 2. Perceived Chances of Successful Adjudication

Under the facts of Scenario One, the survey questions regarding attorneys' estimations of their prospects for receiving a favorable ruling or result by an ALJ, a federal judge, a jury, and an arbitrator yielded some surprising results. As expected, defense lawyers reported that their slimmest chances for receiving a favorable decision in the "he said, she said" case was if a jury decided it. As expected, though, plaintiffs' lawyers projected that their best chance of success was if a jury decided the case. It is worthwhile to note, though, that both groups regard the adjudicator as the key to success or lack thereof. Management lawyers believe they will prevail in front of a judge, but lose if a jury, an ALJ, or an arbitrator decides their case. Each of these beliefs is significant except in the case of arbitration. Plaintiffs' lawyers believe they will prevail in front of a jury [\*52] and an arbitrator, but lose if a federal court judge or an ALJ decides the case. Only the belief about success in front of a jury is, however, significant.

##### 3. Likelihood of Successful Resolution (Either via Adjudication or Settlement) and Probability of Agreement to Arbitrate

The last two questions that I asked are the most pointed and provide the most interesting results. The survey asked the lawyers to rate: (1) their likelihood of successfully resolving the case (either by obtaining an award in their favor or by negotiating a favorable settlement) if it was litigated in federal court, before the IHRC, or if the parties arbitrated it; and (2) the probability of them choosing to arbitrate this "he said, she said" case if the parties were to litigate the case in federal court or before the IHRC. The defense lawyers' reported scores for "likelihood of a successful resolution (adjudicated or settlement) if the case were to be arbitrated" <sup>157</sup> was significantly below the mid-point, while plaintiff's scores were slightly, but not significantly, above the mid-point. The scores, 3.77 for defense lawyers and 4.05 for plaintiffs' lawyers, do not significantly depart from each other. Based on this report, one would logically expect that the parties would choose to arbitrate only if they believed their chances for success were significantly lower than the mid-point in one or both of the other two forums.

Management attorneys rated their chances of success before a federal court significantly above the mid-point at 4.24 and their chances for success before the IHRC significantly below the mid-point at 3.30. As expected, defense lawyers reported that they were significantly more likely to voluntarily agree to arbitrate a "he said, she said" case in front of the IHRC with a score of 4.65. They were unlikely to voluntarily agree to arbitrate if the plaintiff filed the same case in federal court. However, the defense lawyers' aggregate response to the survey's inquiry about parties' likelihood of agreeing to arbitrate if the parties were to otherwise litigate the case in federal court, 3.96, was just slightly below the mid-point and not a significant divergence.

The plaintiffs' lawyers reported that their chances in federal court and before the IHRC were both above the mid-point at 4.03 and 4.08 respectively. In neither case, however, were the results significant. As expected, the plaintiffs' lawyers stated that they were unlikely to arbitrate if the parties were to adjudicate the fact pattern set forth in Scenario One in federal court with a seemingly strong, but surprisingly insignificant, score of 3.63. This is the case because plaintiffs' lawyers realize that a motion [\*53] will not resolve this case and thus, they can either have a jury trial or use the prospects of a jury to force a settlement. Plaintiffs' lawyers were, however, likely to arbitrate if the plaintiff filed the case with the IHRC with a score of 4.40, which is insignificant from the mid-point.

These findings suggest that it is highly unlikely that both plaintiffs' lawyers and defense lawyers will choose to arbitrate a "he said, she said" case if the plaintiff files the action in federal court. This conclusion is derived from the following: (1) both parties' scores on the ultimate question of "are you willing to agree to arbitrate" were below the mid-point; (2) defense lawyers rated their chances for success (either by adjudication or settlement) higher in federal court than in arbitration; and (3) both parties rated their chances of a settlement (which parties usually desire) as higher in federal court.

This conclusion is not as clear-cut if the IHRC were to hear the case because the results of the survey are not as consistent. On the ultimate question of whether the parties will agree to arbitrate, both sides' aggregate responses were above the mid-point. Only the employers' score, however, was significantly divergent. Defense lawyers rated their chances of success (via settlement or adjudication) as better in arbitration than before the IHRC. Plaintiffs' lawyers, on the other hand, reported a lower score. It appears, therefore, that if the parties were to adjudicate Scenario One, both sides agree that they have a better chance of prevailing if the case were before an arbitrator as opposed to the IHRC. Both sides also agree, however, that a settlement is more likely if this case is before the IHRC than before an arbitrator. Given this level of inconsistency, one could conclude that post-dispute voluntary arbitration could potentially impact the IHRC's docket in "he said, she said cases." Alternatively, because both sides must simultaneously agree to arbitrate, it is equally likely that there will be little or no effect.

## b. Scenario Two

The second scenario's hypothetical facts are intended to evoke pro-employee sympathy even though strict legal analysis decidedly favors the employer. While a dispositive motion is possible, it is not likely. The results reveal that defense lawyers are far more comfortable with this scenario than plaintiff lawyers.

### 1. Chances of Settlement

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<sup>157</sup> I defined success to include adjudication or settlement.



Under the facts of Scenario Two, defense lawyers estimated their chances for a successful resolution more favorably than plaintiff lawyers. Defense lawyers also reported a greater degree of confidence in the [\*54] prospect for settlement, regardless of the adjudication forum. Plaintiffs' lawyers reported that their chances for settlement are somewhat less than likely in all three forums. The differences between the defense and plaintiff lawyers' responses achieve statistical significance.

## 2. Perceived Chances of Successful Adjudication

Defense lawyers' responses reflect optimism regarding their chances for successful adjudicative results under this scenario if an arbitrator, a federal court judge, or an ALJ were to decide the case. Each of the scores is a significant departure from the mid-point. Alternatively, defense lawyers report that success before a jury is less than likely with a score of 3.82. While this score is not a significant departure from the mid-point, it is a significant departure from the scores for the other three adjudicators. The defense lawyers' fear of juries may explain their confidence in settling the case. One could conclude that defense lawyers will accept a settlement offer in this scenario to avoid any possibility of a jury.

Plaintiff lawyers' responses echoed defense lawyers' assessment of the case. Plaintiffs' lawyers feel that the prospects for their clients' success are unlikely in any context under Scenario Two. All of these scores are a significant departure from the mid-point with the sole exception of a jury trial, in which case defense and plaintiff lawyers share an almost identically bleak outlook for success under this scenario.<sup>158</sup>

## 3. Likelihood of Successful Resolution (Either via Adjudication or Settlement) and Probability of Agreement to Arbitrate

Once again, the last two questions provide the most direct information regarding attorneys' attitudes and beliefs on arbitration. In Scenario Two, with a score of 5.61, defense lawyers rated their greatest prospects for achieving a successful resolution if the parties litigated the case in federal court. They rate their chances for achieving a successful resolution as 4.30 and 4.58 if the IHRC or an arbitrator respectively hear the case. Plaintiffs' lawyers report their best prospects for achieving a favorable resolution if an arbitrator heard the case (3.38), which is a significant improvement over their reported likelihood of obtaining a favorable result in federal court (3.05), or before the IHRC (3.10). All of the recorded scores for this inquiry were significantly distinct from the mid-point and significantly different from the other sides' responses.

As for the ultimate question of whether the parties would likely [\*55] voluntarily agree to arbitrate, the responses are divided. If the plaintiff files the case in federal court, the defense lawyers reported, with a score of 3.07 that they would unlikely consent to arbitration. Plaintiffs' lawyers would arbitrate with a score of 4.33. Unlike the defense score, however, the plaintiffs' score of 4.33 is not significant. If the IHRC were to hear the facts of Scenario Two, both sides reported that they were likely to voluntarily agree to arbitrate. The aggregate defense attorney response was 4.51 as compared to 4.49 for plaintiffs' attorneys. The defense score is significantly different from the mid-point while the plaintiffs' score is not.

Once again, the results seem clear. Post-dispute voluntary arbitration will have little, if any, effect on federal court litigation. Plaintiffs' and defense lawyers will rarely, if ever, simultaneously select to arbitrate the same case. In fact, defendants will not choose arbitration even in cases where it is unlikely that they will prevail in summary judgment or in a motion to dismiss. As borne out by the results of the survey described above and tabulated below, defense lawyers will not choose to arbitrate Scenario Two because they rate their chances of success (either by adjudication or settlement) as higher in federal court than in arbitration, and rate their chances of settlement higher in federal court than in arbitration.

Furthermore, while defense lawyers appear decidedly more unwilling to agree to arbitrate in Scenario Two, plaintiffs' lawyers are, at best, ambivalent towards the prospect of arbitration. While plaintiffs' lawyers reported that they were likely to agree to arbitrate if the parties were to litigate the case in federal court, the aggregate score

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<sup>158</sup> Defense lawyers scored an aggregate 3.63 and plaintiffs' lawyers scored an aggregate 3.61 on this question.

representing plaintiffs' lawyers' responses was not significant. Plaintiffs' lawyers also reported that their estimated chances of success and the chances of settlement are slightly higher in federal court than in arbitration. Because plaintiffs' lawyers are at best ambivalent and management lawyers are evidently unwilling to agree to arbitrate a Scenario Two type case, one may conservatively conclude that parties will only arbitrate a minimal number, if any, of Scenario Two type cases filed in federal court. Again, this may not be the case with IHRC cases.

In contrast to their opinions about arbitration when the plaintiff files the facts of Scenario Two in federal court, both sides reported a shared willingness to agree to arbitration as an alternative to proceeding before the IHRC. Both sides reported that they were likely to agree to arbitration and believed that they had a significantly better chance of obtaining a successful resolution (via adjudication or settlement) before an arbitrator than before the IHRC. However, defense lawyers believed that they had a significantly better chance of settling the case if it were before the IHRC (4.18), than if they arbitrated it (3.95). The plaintiffs' lawyers' score on this question was just the opposite, 3.10 if filed before the IHRC and 3.45 if arbitrated.

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### c. Scenario Three

The third scenario's hypothetical facts were crafted to lead the parties to believe that there was a very strong likelihood that a court would grant a defendant's dispositive motion. The question is will either side want to arbitrate or will they want to take their chances either in federal court or before the IHRC?

#### 1. Chances of Settlement

In a scenario that strongly favors the employer, defense lawyers expressed a belief that settlement was possible in any of the three forums. Ostensibly, this may be because the third scenario represents a situation in which defense lawyers have greater control over settlement due to leverage gained from the strong likelihood of success on a dispositive motion. Only one of these scores, however, was significant. Tellingly, management-side attorneys believed, with statistical significance, that they would settle the case if it were before the IHRC but not if the parties were to arbitrate or litigate the case in federal court. Plaintiffs, on the other hand, significantly doubted their chances to settle this case in any of the three forums.

#### 2. Perceived Chances of Successful Adjudication

Defense lawyers' responses reflect optimism regarding their chances for successful adjudicative results under this scenario if an arbitrator, federal court judge, an ALJ, and even a jury were to decide the case. While the score for the jury is not statistically significant, the other three scores are statistically significant. Plaintiff lawyers' were more pessimistic about their chances of obtaining a successful adjudication than defense lawyers were confident. Plaintiffs' lawyers reported that their prospects for success were unlikely in any context under Scenario Three. All of these scores are significant from the mid-point including when a jury would hear the case. In fact, each score is below 3.

#### 3. Likelihood of Successful Resolution (either via Adjudication or Settlement) and Probability of Agreement to Arbitrate

The final two questions confirm the lawyers' opinions about their chances of success and are also consistent with the first two scenarios' results. As in the first and second scenarios, management-side attorneys perceive that their best chance for success is if the case is in federal court and that their smallest chance of success is before the IHRC. In fact, the defense lawyers' federal court score of 5.61 and the IHRC score of 4.42 are both significantly different from the arbitration score of 4.64. Plaintiffs' [\*57] scores are the opposite of the defendants. Plaintiffs report that their best chance of success is before the IHRC (2.72), the worst chance in federal court (2.53) and arbitration somewhere in the middle (2.66). While the Plaintiff's scores are not significant from each other, they are all significant from the mid-point.

The defense lawyers' beliefs about the likelihood of arbitration logically follow from their reports on likelihood for successful resolution in other forums. Defense lawyers report that they would not agree to arbitrate if this case were in federal court. They would, however, arbitrate if the IHRC were to hear the case. Both of these scores, 3.27 (for federal court) and 4.26 (for the IHRC) deviate significantly from the mid-point. As expected, plaintiffs' lawyers would arbitrate if this case were in either forum. With seemingly strong, but not significant scores of 4.46 for federal court and 4.32 for the IHRC, plaintiffs' lawyers seem to want to avoid summary judgment and agree to arbitrate.

#### d. Overall Conclusions Derived from the Survey Response Data

The results of the three scenarios seem clear: post-dispute voluntary arbitration will have little if any effect on federal court litigation because plaintiffs' and defense lawyers will rarely, if ever, simultaneously select to arbitrate the same case. In fact, while defendants will clearly not choose arbitration in cases where it is likely that they will prevail on a motion for summary judgment or in a motion to dismiss, the survey shows that they will refuse arbitration even if their success on a dispositive motion seems unlikely.

Upon first blush, this result appears anomalous. Given defense lawyers' professed fear of juries, why would they refuse to arbitrate in Scenario One, where summary judgment is not possible and in Scenario Two where a successful dispositive motion is unlikely? Perhaps defense lawyers refuse arbitration because they believe that they can exploit the exorbitant costs and delays of federal court litigation to yield a favorable settlement. Indeed, in the first two scenarios where summary judgment is unlikely, defense lawyers report, with significance, the likelihood of obtaining a settlement. Only in Scenario Three, a situation where the facts almost assure a summary judgment motion, do employers report their chances of settlement as not being significant.

Plaintiffs' lawyers are likely to arbitrate in Scenarios Two and Three to avoid summary judgment. These scores are not, however, significant, which could be based on some plaintiffs' lawyers' hope to get their case heard by a jury. Accordingly, in Scenario One, the only situation in which a successful dispositive motion is near impossible for employers, plaintiffs' lawyers report that they are unlikely to arbitrate.

[\*58] With respect to cases filed before the IHRC, lawyers on both sides seem much more amenable to arbitration. In fact, based on the results of the survey reported herein, it seems that a post-dispute voluntary arbitration system could be an effective alternative mechanism for efficiently adjudicating discrimination cases pending before the IHRC. Thus, though the survey response data shows that such a system will have little or no effect on the federal court employment-law related docket, post dispute voluntary arbitration could have an effect on IHRC litigation. Of course, the survey results are a single piece of evidence in the long-running debate on the subject. As no data is currently available on lawyers' preferences on resolving federal court claims when a program with post-dispute voluntary arbitration was available, it is nearly impossible to definitively prove or disprove the preliminary conclusions derived in this article. Data from such a program, in effect for cases pending before the IHRC cases in the 1990's, is, however, available and reported in the following section.

[\*59] Table 4: Scenarios

[see org] Continued [\*60] [see org] Notes: For Defense Lawyers, N = 238; for Plaintiff Lawyers, N = 41.

Tables report means, with standard deviations in parentheses.

1. Defense lawyers' responses significantly different from the midpoint, 4.0, at  $p < .05$ .
2. Plaintiff Lawyers' responses significantly different from the midpoint, 4.0, at  $p < .05$
3. Defense lawyers' responses significantly different from that of the plaintiff lawyers at  $p < .05$

Questions regarding choice to settle or arbitrate were not compared to a midpoint.

#### B. The IHRC Voluntary Arbitrary Program

One could logically conclude from the analysis above that the parties would not use a post-dispute voluntary arbitration program as an alternative to federal court. Such a system, however, could function to reduce the number of cases filed before the IHRC. Indeed, results from the three scenarios suggest that both sides might be positively inclined toward arbitration over IHRC litigation 27% of the time. In this section, I compare the results of my survey with that of the IHRC's voluntary arbitration program in effect between 1994 and 1998. Before discussing the results of the program, the Article explains how the IHRC operates and provide necessary background information on the post-dispute voluntary arbitration program.

## 1. Background Information

In Illinois, like many states, employees can file discrimination charges with either the federal agency, the Equal Employment Opportunity Commission ("EEOC") or the state agency, the Illinois Department of Human Rights ("IDHR").<sup>159</sup> Even though agencies cross-file the claims, the agency where the employee initially files it investigates the case. Moreover, while the investigation processes of the EEOC and the IDHR are [\*61] similar, their adjudication processes are quite different. As explained above, if the EEOC does not settle or litigate the case itself, it provides the employee with a "right to sue" letter, regardless of whether it finds probable cause as to the merit of the allegations. The right to sue letter allows the employee to file a lawsuit in federal court.<sup>160</sup>

Neither the IDHR nor the IHRC litigates cases on behalf of employees. Instead, upon completion of its investigation, the IDHR either finds probable cause and assigns the case to the IHRC for trial or dismisses the case.<sup>161</sup> Employees can request that the IHRC review a dismissal.<sup>162</sup> On review, the IHRC can either adopt the dismissal or reverse it and set the case for trial. If the IHRC adopts the dismissal, the employee may request a right to sue letter from the EEOC (because agencies cross-file the case).<sup>163</sup>

The IHRC adjudication process, in place between 1994 and 1998, was much more similar to that of a federal or state court as opposed to arbitration. As in court, the IHRC's administrative law judges ("ALJs") follow rules of evidence, engage in motion practice, and maintain extremely formal proceedings. In addition, discovery rules parallel those of Illinois' civil procedure code except for the fact that depositions may only be ordered upon leave of the court. There are no jury trials available, however, and appeals are made to the "Commission" first and then to the Illinois Circuit Court of Appeals.<sup>164</sup> Traditional labor lawyers may recognize this process as being somewhat similar to that of the National Labor Relations Board ("NLRB"). In fact, one Chicago defense lawyer, quoting a remark often made about the NLRB's administrative law judges, stated that the judges at the IHRC "were neutral on the side of employees."<sup>165</sup> Another employment lawyer, formerly based in Chicago, stated that, "[Practicing before the IHRC] was as expensive, time-consuming, and annoying as being in federal court."<sup>166</sup>

## 2. Statistics on Parties' Use of the IHRC/CEDR Voluntary Arbitration Program

Between 1994 and 1998, the IHRC and the Center of Employment Dispute Resolution ("CEDR") established an alternative dispute resolution [\*62] program under which the CEDR offered parties with cases pending before the IHRC the opportunity to mediate or arbitrate their claims with the CEDR.<sup>167</sup> Under the IHRC/CEDR program,

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<sup>159</sup> See Illinois Human Rights Act, 775 Ill. Comp. Stat. Ann. 5/1-102 (West Supp. 1982).

<sup>160</sup> Supra notes 80-84 and accompanying text.

<sup>161</sup> Interview with Jim Convery, Partner, Laner, Muchin, Dobrow, Becker, Levin & Tominberg, in Chicago, Ill. (Jan. 4, 2002).

<sup>162</sup> Id. See Illinois Human Rights Act, 775 Ill. Comp. Stat. Ann. 8/1-111 (West Supp. 1982).

<sup>163</sup> Interview with Jim Convery, supra note 161.

<sup>164</sup> Id.

<sup>165</sup> Interview with Cliff Perry, Partner, Laner, Muchin, Dombrow, Becker, Levin, & Tominberg, in Chicago, Ill. (Jan. 4, 2002).

<sup>166</sup> Interview with Peter Albrecht, Partner, Godfrey & Kahn, in Madison, Wisc. (Dec. 20, 2001).

CEDR contacted the parties or their attorneys in every case on the IHRC docket, informed them of the program, and offered them the opportunity to resolve their cases using either mediation or arbitration. Unfortunately, neither the IHRC nor the CEDR maintained precise records of their correspondence or the overall results of the program. CEDR did, however, provide the authors with records of approximately 1300 IHRC cases in which CEDR contacted each of the parties and offered mediation or arbitration. Of those 1300, there was not one case in which both parties agreed to arbitrate or mediate their claims. <sup>168</sup>

These 1300 cases did not, however, encompass the entire universe of the cases in the IHRC/CEDR program. Indeed, this number represents about half the cases that were on the docket when the program began. Given the number of IHRC cases filed per year and CEDR's own data, I estimate that there were more than 6,000 cases in which CEDR contacted the parties. Regretfully, I was unable to locate the full data set. I did, however, contact Professor Lamont Stallworth, director of CEDR.

Professor Stallworth had no definitive recollection of any specific arbitrations occurring under the program. He did say, however, that there may have been several. He also reported that there were a number of mediations. <sup>169</sup>

### 3. An Analysis of the IHRC Program's Ineffectiveness

For the purposes of this article, it is immaterial if there were zero, three, or even sixty (which Professor Stallworth states there were not) <sup>170</sup> arbitrations. The conclusion of this article is predicated upon the contention that post-dispute voluntary arbitration is not effective if it only affects 1% of the docket. Here, the program clearly affected substantially less than 1%. Thus, the question becomes why was the program so ineffective?

A second important and closely related question is how to harmonize the lack of participation in the IHRC/CEDR voluntary arbitration program with the survey responses that indicate that both defense and plaintiffs' attorneys were more inclined to arbitrate in each scenario if the IHRC were to hear the case. There are at least four explanations for the apparent failure [\*63] of the program and the inconsistency of the survey and the actual practice.

The first explanation is straightforward - it takes two to arbitrate. Indeed, this somewhat obvious principle, inherently problematic to voluntary arbitration's effectiveness, is generally borne out by statistics gathered by Professor Stallworth. In order to evaluate the CEDR program, Professor Stallworth included surveys with the letters he sent offering ADR to the attorneys who represented the parties in the first 3,000 "or so" cases included in the program. The CEDR directly contacted parties who did not have legal counsel. Of the approximately 6,000 disputants surveyed, 211 (109 employers or their representatives and 102 employees or their representatives) responded, a total of 3.4%. <sup>171</sup> Professor Stallworth reports that in "some 200 cases" <sup>172</sup> one side expressed a willingness to agree to resort to some form of alternative dispute resolution, but the other side would not agree. <sup>173</sup> In fact, because there were only 209 responses, it is conservative to say that almost every one who responded to the survey chose to use ADR. In every such case, however, the other side refused the offer. This may be an obvious

<sup>167</sup> The CEDR program is headed by Professor Lamont Stallworth, Ph.D., of Industrial and Labor Relations, Loyola University, Chicago, Illinois.

<sup>168</sup> From the documents I received, it is impossible to know if one party agreed to ADR.

<sup>169</sup> Interview with Professor Lamont Stallworth, Loyola University, Chicago, Ill. (July 2001).

<sup>170</sup> *Id.*

<sup>171</sup> See Lamont E. Stallworth & Linda K. Stroh, *Who Is Seeking To Use ADR / Why Do They Choose To Do So*, 51 *Disp. Resol. J.* 30, 30-38 (1996).

<sup>172</sup> The total number of responses does not exactly predict the total number of cases represented. There could have been, at the low end, 109 (the 102 claimants matched the 102 defendants and there were seven defendants left over) or, at the high end, 211 cases (if there were no cases where both sides responded). *Id.* at 34.

<sup>173</sup> *Id.*

by-product of the fact that only 3.4% of those surveyed agreed to ADR. If only 3.4% will agree, the odds of a match are only .12%. In other words, these results suggest that we could expect roughly three or four agreements to use ADR from the 3,000 cases. The plight of voluntary arbitration in the CEDR scheme is further compromised by the fact that CEDR's offer included mediation. Thus, it is possible that one or even all four of those "three or four" cases could be agreements to mediate, not to arbitrate.

The argument that it takes two to arbitrate may explain the inconsistency between the survey responses and the program. While the survey revealed that both sides were willing to arbitrate in each scenario if the plaintiff filed the case with the IHRC, none of the plaintiffs' lawyers' responses were significant. To further complicate this result, the plaintiffs' responses may have been artificially biased against the IHRC and thus, in favor of arbitration.

The second explanation is that many of the plaintiffs' lawyers who reported an unwillingness to litigate before the IHRC, and therefore a willingness to arbitrate, do not file cases with the agency. We base this argument on two facts. First, plaintiffs originally select the forum for their claims. Specifically, plaintiffs' lawyers choose whether to file their clients' [\*64] claims in federal court or before the IHRC. Second, fairly or unfairly, the IHRC has a reputation for having judges that are not as demanding as federal court judges, and who side with employees more often than federal court judges and even juries. The ALJ's however, also grant very low damage awards. Plaintiff's attorneys looking for their "fees" see the IHRC as an alternative forum. Plaintiff's lawyers wishing to achieve a high fee from a settlement and who are not "afraid" of federal court will not file before the IHRC. Several Chicago defense lawyers report that many of the city's best plaintiff's lawyers rarely, if ever, file claims with the IHRC.<sup>174</sup> Plaintiff's lawyers who never file in the IHRC were part of the survey. These lawyers, one can assume, respond by stating they would arbitrate if a case were before the IHRC. The fact that these lawyers are never before the IHRC could explain why the survey results conflict with the statistics that show the failure of the IHRC/CEDR program.

This argument leads to another question. If plaintiffs' lawyers are reluctant to file case before the IHRC, why are there so many cases on the docket? Again, there are two explanations. First, in the vast majority of the 1300 cases we surveyed, the plaintiff filed pro se. There is no reason to believe that the rest of the docket is any different. Second, many times plaintiffs file with the IDHR and find counsel after the agency investigates the case. In these cases, the plaintiffs' lawyers may request a right to sue letter from the EEOC in order to avoid the IHRC.

A third explanation may relate to timing. One of the recognized advantages of arbitration is its speed.<sup>175</sup> Arbitration as a process is simply faster than the IDHR-IHRC. The CEDR program, however, contacted the parties after they had been through the IDHR investigation. At this point, defense lawyers had likely already billed their clients for responding to the investigators' requests and plaintiffs' lawyers had become familiar with the facts of the case for at least a year. Even though arbitration would offer a faster resolution, by the time CEDR contacted the parties, an "expeditious resolution" was no longer possible.

A fourth and final explanation for the discrepancy between the results of the survey and the IHRC/CEDR program could be that the lawyers were uncomfortable about the program itself. Preliminary data, however, shows that this is not the case. Our survey asked the lawyers who were practicing in Chicago during the CEDR/IHRC program if they arbitrated any cases, and if not, why. 209 attorneys responded to the question. Of the 209 lawyers, twenty-one reported that the question was not applicable, the other 188 lawyers provided 254 reasons for refusing to arbitrate. Of those 254 reasons, there was not one negative comment pointed directly at the CEDR. [\*65] In fact, only 12 comments were critical of the program at all. These comments stated that the program limited the choice of arbitrators and that the arbitrators were unqualified or biased. With respect to the comments concerning the arbitrators' abilities, it is not clear if the respondents were focusing on those arbitrators on the CEDR panel or arbitrators in general.

#### 4. Why the CEDR Program Failed

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<sup>174</sup> See interviews with Convery and Perry, supra notes 161 and 165.

<sup>175</sup> See supra note 20.

The 254 responses provided to the survey question of "why did you refuse to arbitrate" may provide the most definitive support for the proposition that post-dispute voluntary arbitration will not work. The two most common reasons cited by the 188 lawyers who responded to the question were (1) an overall dislike for arbitration and (2) client preference. In fact, these two responses were cited by 47% of the respondents. The remaining responses included: (1) the strength of the case (in 17.5% of the answers); (2) negative effect on settlement (9%); (3) time and cost not considered helpful (9%); (4) preference for litigation's procedures (8.5%); and (5) not necessary to receive a favorable resolution (5%). These responses are revealing because almost all of them focus on the perceived ills of arbitration. In fact, answers that reveal a bias against arbitration<sup>176</sup> constitute 68% of the total responses. The remaining 20% of the responses consisted of lawyers who reported that they were not offered arbitration. Only three respondents, 1.2%, stated that they would have arbitrated their case.

VII.

### Mandatory Versus Voluntary Arbitration

#### A. Why Critics of Mandatory Arbitration Advocate For Implementation of a Voluntary Arbitration System That No One Uses

As discussed in greater detail above, critics of mandatory arbitration argue that "if proponents of arbitration are correct in their belief that it is faster, cheaper, and better than the judicial system, then surely employees and their attorneys will opt for arbitration in a voluntary system."<sup>177</sup> Some critics truly believe that this is the case. After all, in a vacuum, without [\*66] careful dissection of the parties' motivations and goals and an understanding of the factors influencing parties' decisions to select the most advantageous forum to maximize their chances of obtaining their desired outcome, the observation quoted above from National Organization of Women President Patricia Ireland appears logical.<sup>178</sup> Indeed, some critics may contest the results of the survey reported in this article. Some may even deny the total lack of participation in the IHRC/CEDR voluntary arbitration program. Some critics may even cite limited instances in which parties did voluntarily agree to arbitrate a claim after a dispute has arisen or even the limited success of voluntary arbitration programs. I do not assert that parties will never agree to arbitrate once a dispute has arisen. I, do, however, vigorously contest Ms. Ireland's above-quoted observation as a spurious and misleading notion.

Other critics of mandatory arbitration may not care whether the above-quoted statement is true or not because they take a myopic view of the entire issue. These critics laud litigation because, one can infer, the critics believe that such a system provides the best chance for remuneration. These critics do not, however, even acknowledge that under the current system may be unjust. They do not discuss the fact that merit is not the driving force in determining the resolution of a case. They do not mention that high cost of defense associated with litigation results in incidences of "de facto severance" and other forms of systemic leveraging to extort settlement for claims with no merit.<sup>179</sup> These individuals may not care about employers' costs of defense or the fact that arbitration reduces

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<sup>176</sup> Included in this category are the following responses: a client's negative feelings about arbitration; a perceived negative effect on settlement; time and cost not helpful; and preference for litigation.

<sup>177</sup> National Organization of Women, at <http://www.now.org/issues/wfw/nasd-testimony.html> (last visited Jan. 13, 2002) (testimony of Patricia Ireland, President of the National Organization for Women).

<sup>178</sup> See *id.*

<sup>179</sup> See Stone, *Yellow Dog Contracts of the 1990s* supra note 74; see also Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 Hofstra Lab. & Emp. L.J. 479, (2001). Even arbitration critics who acknowledge defacto severance do not see it as a problem. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol'y J. 189, 200 (1997). Professor Bingham states that plaintiffs' lawyers often take cases which they believe are "losers on the merits" because they know employers will often settle these cases for as much as \$ 10,000. Arbitration, according to Bingham, will prevent lawyers from taking these frivolous cases because the lawyers know that employers will not agree to nuisance settlements when the costs of defense are greatly reduced. Bingham does not, however, conclude that this conclusion supports arbitration nor does she state that the practice she described is problematic because it

incidence of "de facto severance" and other forms of systemic leveraging to extort settlement for claims with no merit.

Basically, these individuals espouse voluntary arbitration as a substitute for mandatory arbitration in the hopes of convincing legislators who are cognizant of the benefits of arbitration yet uncomfortable with the fact that employers may offer it to employees on a "take it or leave it" basis, to ban mandatory arbitration. For these individuals, if the law banned [\*67] mandatory arbitration and encouraged voluntary arbitration, critics would shed no tears if participation rates for voluntary arbitration were abysmal. In fact, these individuals would likely (incorrectly) conclude from theoretical statistics on the abysmal participation rates of voluntary arbitration that employers were previously coercing employees into agreeing to mandatory arbitration.

#### B. The Mandatory - Voluntary Paradox Explained

Even if it is true that voluntary arbitration would not accomplish the goals noted in this article's preamble, the question remains: How can the author, along with a handful of other advocates of mandatory arbitration of employment disputes, argue that more often than not, parties do not and should not select arbitration voluntarily after a dispute has arisen in the same breath as he contends that arbitration is fair to all parties including employees?

Explaining why employers do, and employees should, regard pre-dispute arbitration as an improvement over the current system for resolving disputes answers this question. Employers who implement mandatory arbitration programs are engaging in a risk management system. The employers realize that by having all of their disputes arbitrated they can avoid the de facto severance system that encourages the settlement of frivolous claims because arbitration is more cost-effective than defending the case in court or even responding to an investigation. The benefit of avoiding these claims outweighs the risk of: (1) increased claims because of easier access to an adjudication process; (2) the fact that employer will be less able to use the costs and delays of litigation to wear out the plaintiffs and their lawyers when a case has bad facts and high damages; and (3) an off-the-wall arbitration opinion that has limited review.<sup>180</sup>

Employees should welcome pre-dispute arbitration systems because employers who have such policies must comply with the law. These employers simply cannot risk having legitimate discrimination cases being arbitrated on a regular basis. Of course, like those employers who seek to use litigation's costs to derail legitimate claims, employees seeking de facto severance are worse off in a pre-dispute arbitration system.

The benefits of pre-dispute mandatory arbitration are simply not present in the post-dispute context. Employers with arbitration policies are attempting to pool their risk. They will accept the fact that a case with "bad facts" will be adjudicated quickly so they will be forced to settle and they will accept having a very limited right of appeal in exchange for not having to extend the costs of a court defense or unpredictable jury damage awards. [\*68] In the post-dispute context, employers are susceptible to all the problems of litigation, as well as the negatives of arbitration. In fact, both parties are hurt by a post dispute system. Arbitration is an alternative adversarial system designed to result in one winner and one loser, a zero-sum game. After the plaintiff has filed a claim, either side may find itself perched on the high end of the litigation seesaw, with a considerable tactical, economic or political advantage over its opposition. That is simply the reality of our legal system. Accepting arbitration from that vantage point would be unwise because all of the advantages gained by playing on the litigation seesaw would vanish on the level playing field offered by arbitration.

This is borne out by this Article's analysis of the results of the survey and the data on the use (or lack thereof) of the IHRC's voluntary arbitration program. Post-dispute, voluntary arbitration is conceptually as fair, just, and recommendable as its pre-dispute mandatory cousin. We are, however, realistic in our expectations of parties. No party should be expected to voluntarily forfeit an advantage it earned or otherwise lawfully acquired. Expecting this

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perpetuates institutional extortion. Instead, she uses this conclusion as basis to criticize the fairness of arbitration because, she explains lawyers will no longer take such cases and thus, will not be repeat players.

<sup>180</sup> Employers can further hedge their bets with employment practices liability insurance.



from parties would be like asking someone who is risk-averse and already seated at a \$ 10,000 ante blackjack table (possibly by mistake) that was just dealt an ace and a king if he would like to move to the \$ 2 ante table before the dealer reveals his cards. Even if he is risk-averse, the likelihood of his accepting the offer is slim to none. In contrast, mandatory arbitration is like giving that same risk-averse individual the option of moving to a lower-stakes table before he sees any of the cards being dealt. That is the intrinsic fairness of mandatory arbitration and the reason why it works where post-dispute voluntary arbitration fails.

VIII.

#### Conclusion

The decision to arbitrate is only one factor that complicates the already intricate calculus employment lawyers must consider in representing their clients' interests. Litigation invariably involves an immense degree of strategic action and planning by both parties. Specifically, the litigants must avoid any and all actions that may signal weakness to the opposition. This includes desperate offers to settle, mediate, or arbitrate a dispute. For cases filed in federal court, the parties invariably play a game of "trial chicken" with each other where neither side flinches at the prospect of actually convincing a jury of his clients' position or footing the Herculean legal fees associated with going to trial. Obviously, in such an important game of brinkmanship, varying degrees of actions that signal weakness exist. A party may not perceive an offer to arbitrate to be as desperate as an offer to settle coupled with a strong signal to accept a weak settlement offer. However, the party that initially extends the offer to arbitrate runs the risk [\*69] of appearing weak, especially if the other party rejects the offer. The potential for identifying a weakness continues even after a party accepts the offer to arbitrate when the parties begin negotiating the terms of the actual arbitration. For instance, if one side learned of new information or even a witness it wished to conceal, a party who demands more draconian limitations on discovery might strongly signal the opposition to back out of its initial agreement to arbitrate. This is merely one example of the numerous factors that may drastically influence attorneys' decisions on how to ensure victory for their clients and secure adequate fees for themselves.

Cataloguing the factors that influence an attorney's decision regarding alternative forms of resolving disputes is beyond the scope of this article. Every lawyer relies on a different pre-trial strategy heavily affected by his own personality, life experiences, and of course, the information given to him by his client. This article offers initial empirical support for what the author regards as a logical and expected result: parties fail to simultaneously agree to arbitrate claims after they have arisen. Obviously, there may be explanations other than the ones presented herein for the variant aggregate scores from which the author derives his conclusions. But after carefully scrutinizing both the results of the survey and the data on the voluntary arbitration program in place at the IHRC in the 1990s, the explanations offered are the most plausible.

The critical point of both this Article and the debate on the arbitration of employment disputes is that lawyers must make realistic comparisons by carefully scrutinizing not only the offered alternative, but also the forum from which that alternative is proposed. Thus, this Article first addresses the legality of mandatory arbitration and then discusses criticisms of mandatory arbitration before it explains why post-dispute voluntary arbitration is not a viable compromise in the debate. Indeed, that is why a lawyer considering whether mandatory arbitration is an advantageous alternative to traditional litigation, must carefully evaluate a litigant's other options for pursuing and defending his claims. Arbitration must be weighed against filing charges with the EEOC or an equivalent state agency and against settling claims without adjudication. Clearly after lawyers analyze their firms' incentives, and their clients' as well, it is clear that post-dispute voluntary arbitration will not decongest the discrimination law docket because it takes two to arbitrate.

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