

The Arbitration^{Debate} Trap

How Opponents of Corporate Accountability
Distort the Debate on Arbitration



Acknowledgments

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About Public Citizen

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INTRODUCTION

Public Citizen has long opposed the use of pre-dispute binding mandatory arbitration, a method by which businesses force individuals to submit all disputes to private arbitration companies instead of litigating in court.¹ These arrangements, which are increasingly common, set up a severe conflict of interest by enabling businesses to choose the arbitration firms that resolve their disputes with customers or employees.

In September 2007, Public Citizen published a study showing that individual consumers had lost approximately 94 percent of arbitrations administered by the National Arbitration Forum.² The study also highlights several injustices wrought by binding mandatory arbitration.³

Six months later, the U.S. Chamber Institute for Legal Reform (“Chamber Institute”) issued a response authored by Catholic University law professor Peter B. Rutledge entitled *Arbitration – A Good Deal for Consumers: A Response to Public Citizen*.⁴ “There is only one little problem with the Public Citizen Report,” the *Response* argues. “[I]t is wrong, both on the facts and in its ultimate conclusions.”⁵

With financial support from the Chamber Institute,⁶ Rutledge also drafted a law review article entitled *Whither Arbitration?* that purports to review the academic literature on arbitration. “It is imperative to take an honest assessment of this empirical picture,” Rutledge states in *Whither*. “This paper takes up that charge.”⁷ We refer to these two papers collectively as the *Chamber Papers*.

Rutledge explains in *Whither* that he reaches “some surprising conclusions,” chiefly that “most of the methodologically sound empirical research does not validate the criticisms of arbitration.”⁸ The *Chamber Response* charges that Public Citizen’s 2007 report “ignores almost all of the existing literature” on how individuals fare in arbitration.⁹

This paper answers the Chamber’s challenge. We review the research cited in the *Chamber Papers* as well as studies that the *Chamber Papers* fail to address. We reach significant conclusions of our own. Most important, the literature overwhelmingly shows that individuals fare far worse in arbitration than court. The vast majority of available data show individuals winning at lower rates, receiving lower average awards, and

¹ For ease of discussion, we use the term “arbitration” to refer to pre-dispute binding mandatory arbitration unless otherwise noted.

² John O’Donnell, Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 15 (2007) [hereinafter *Arbitration Trap*].

³ *Id.* at 6-10.

⁴ Peter B. Rutledge, Chamber of Commerce Institute for Legal Reform, *Arbitration – A Good Deal for Consumers: A Response to Public Citizen* (2008) [hereinafter *Chamber Response* or *Response*].

⁵ *Chamber Response* at 2.

⁶ Peter B. Rutledge, *Whither Arbitration?* 6 GEO. J. L. PUB. POL’Y 549, 549 (2008) [hereinafter *Whither*].

⁷ *Id.* at 551.

⁸ *Id.*

⁹ *Chamber Response* at 6.

receiving lower median awards in arbitration than court. Perhaps most surprising, this conclusion holds firm even if one looks only at the studies *Whither* cites to contrast arbitration with court. In short, the Chamber Institute is promoting a deeply erroneous picture of the “empirical evidence.”

Rutledge concludes *Whither* with the warning that congressional scrutiny of arbitration “can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.”¹⁰ We agree. This paper aims to assist Congress in heeding the Chamber’s call.

¹⁰ *Id.* at 589.

SUMMARY OF KEY FINDINGS

Empirical evidence shows individuals do better in court than arbitration.

- Despite the *Chamber Papers*' claims that the "empirical research" shows that individuals achieve "superior" results in arbitration, every comparative study they cite in fact shows individuals receiving lower average payments in arbitration than court. Further, most of the studies show individuals winning at a higher rate in court than in arbitration and receiving larger median payments. The studies allow for a total of 27 discrete comparisons of win rates, average awards and median awards. Twenty-two of these comparisons favor court over arbitration.

The Chamber's literature review fails to mention unfavorable studies and findings.

- *Whither* fails to address several studies that distinguish between the arbitration success rates of employees who negotiated their own contracts and those who were subject to nonnegotiable arbitration terms detailed in employee handbooks. These studies report a success rate of 57 percent to 69 percent for employees who negotiated their own contracts compared to a success rate of only 20 percent to 40 percent for employees who were subject to employee-handbook terms.

The *Chamber Papers* characterize a study that found serious concerns with arbitration clauses as concluding that arbitration clauses put consumers on equal footing with businesses.

- The *Chamber Response* states that one study "concluded that 'few of the fifty-two [arbitration clauses studied] reflect the type of egregious self-dealing that has been identified in publicized cases. Most of the clauses appear in many respects to put the consumer on equal terms with the businesses that drafted them'"¹¹

In fact, the study's authors were discussing only the superficial appearance of fairness in arbitration clauses. "These terms suggest *prima facie* that businesses are placing consumers on equal footing with themselves in resolving any future disputes," the authors wrote. "A closer look at the clauses sampled, however, suggests that there are grounds for concern," the authors continued, launching into a three-paragraph litany of criticisms of binding mandatory arbitration, all of which Rutledge ignores.¹² "In

¹¹ *Chamber Response* at 8 (citing Linda J. Demaine & Deborah R. Hensler, 'Volunteering' to Arbitrate Through Predispute Arbitration Clauses: the Average Consumer's Experience, 67 L. & CONTEMP. PROBS. 55, 72 (2004)).

¹² Demaine & Hensler, 67 L. & CONTEMP. PROBS. at 72-73.

sum, the appearance of a level playing field may be deceptive,” the paper concludes.¹³

The *Chamber Papers* selectively cite favorable portions of studies that in fact flatly contradict the Chamber’s arguments.

- The *Chamber Papers* argue that “arbitration makes it easier for individuals to find an attorney willing to take their case [sic],”¹⁴ citing a study’s finding that lawyers will take a case only if they expect sufficiently high damages.¹⁵ The *Papers* neglect to mention that the same study reported that lawyers on average required *higher* provable damages to take a case to arbitration (\$65,000) than court (\$61,000).¹⁶
- *Whither* asserts that “the only reported data showing a win-rate of less than 50%” for claimants in arbitration was a study of securities arbitrations in the early 1990s.¹⁷ But at least five studies have shown win rates of less than 50 percent – and portions of four of these studies are cited in the *Chamber Papers*.¹⁸

¹³ *Id.* at 73.

¹⁴ *Chamber Response* at 6.

¹⁵ *Id.* (“[P]laintiffs’ attorneys turn away most cases unless a case offers a high rate of success and sufficiently high potential damages.”) (citing William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50 DISP. RESOL. J. 40 (1995) [hereinafter *Employment Discrimination*]); Rutledge, *Whither*, 6 GEO. J. L. PUB. POL’Y at 570 (“According to one oft-cited estimate, plaintiffs’ counsel will require a meritorious case with damages of at least \$60,000 to \$75,000.”) (citing Howard, *Employment Discrimination* at 40; William M. Howard, *Mandatory Arbitration of Employment Discrimination Disputes: Can Justice be Served?* (May 1995) (unpublished Ph.D. dissertation, Arizona State University) (on file with Public Citizen) [hereinafter *Can Justice Be Served*]).

¹⁶ Howard, *Can Justice be Served* at 150. Moreover, the median response was \$50,000 for both arbitrations and court cases. *Id.*

¹⁷ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL’Y at 557 n.36.

¹⁸ American Arbitration Association, *Analysis of the American Arbitration Association’s Consumer Arbitration Caseload* (undated), at <http://www.adr.org/si.asp?id=5027> [hereinafter *AAA One-Pager*]; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 405, 418 (2007); Michael Delikat & Morris Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Claimants Better Vindicate Their Rights in Litigation?* 6 A.B.A. LITIG. SEC. CONFLICT MGMT. 1, 10 (2003); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 48 (Nov. 2003-Jan. 2004); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777, 806 (2003).

The *Chamber Papers* Cite Surveys on Voluntary Arbitration as Evidence of Satisfaction with Pre-Dispute Binding Mandatory Arbitration.

- The *Chamber Papers* cite five surveys that discuss consumers' or lawyers' views on arbitration,¹⁹ but fail to mention that three of the five concern the use of *voluntary* arbitration.²⁰ The surveys are hardly unclear on this point. One repeated the phrase "voluntary arbitration" in twelve of sixteen inquiries,²¹ asking questions such as, "how would you rate the quality of the outcome . . . resulting from voluntary arbitration proceedings?"²² Of course, one expects a vast difference regarding views of "voluntary arbitration" and arbitration that is forced on individuals.

The *Chamber Papers* Wrongly State That a Key Survey Did Not Originate from the Arbitration Industry.

- *Whither* states that a survey by the "Roper Organization" showing favorable attitudes about arbitration was *not* "underwritten by industry associations."²³ But the survey was commissioned by a pro-arbitration advocacy organization called the Institute for Advanced Dispute Resolution, which described its mission as "promot[ing] the use of arbitration, mediation, and other dispute resolution methods throughout America and the world."²⁴ The Institute's president was Roger Haydock, a founder of the National Arbitration Forum (NAF)²⁵ and a director of NAF dating back to at least 1996.²⁶ (He is now NAF's managing director.²⁷) The Institute's most recent address placed it in NAF's offices,²⁸ and its

¹⁹ See ROPER ASW, 2003 LEGAL DISPUTE STUDY: INSTITUTE FOR ADVANCED DISPUTE RESOLUTION (2003) [hereinafter ROPER]; A.B.A., SECTION OF LITIGATION TASK FORCE ON ADR EFFECTIVENESS, SURVEY ON ARBITRATION (2003) [hereinafter A.B.A. SURVEY ON ARBITRATION]; HARRIS INTERACTIVE SURVEY CONDUCTED FOR U.S. CHAMBER'S INSTITUTE OF LEGAL REFORM, ARBITRATION: SIMPLER, FASTER, CHEAPER THAN LITIGATION (2005) [hereinafter HARRIS INTERACTIVE SURVEY]; Gary Tidwell, Kevin Foster & Michael Hummel, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulatory Arbitrations* (1999); ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES (2004).

²⁰ See, e.g., ROPER at 27; A.B.A. SURVEY ON ARBITRATION at 24; HARRIS INTERACTIVE SURVEY at 9.

²¹ See A.B.A. SURVEY ON ARBITRATION at 9-29.

²² *Id.* at 24.

²³ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL'Y at 561 (citing ROPER at 6).

²⁴ Institute for Advanced Dispute Resolution, Form 990, Statement 4 (2003).

²⁵ Website of William Mitchell College of Law,

<http://www.wmitchell.edu/faculty/Roger-Haydock+ADR+leave.html>.

²⁶ See, e.g., Ed Anderson & Roger Haydock, *History of Arbitration as an Alternative to U.S. Litigation*, WEST'S LEGAL NEWS, Aug. 12, 1996.

²⁷ See, e.g., Roger Haydock, *Arbitration Is a Solution That's Fair to Everyone*, MINNEAPOLIS STAR-TRIBUNE, May 15, 2008.

²⁸ Institute for Advanced Dispute Resolution, Form 990 (2005); Website of National Arbitration Forum, <http://domains.adrforum.com/main.aspx?itemID=766>.

website listed NAF as “our sponsor.”²⁹ When we dialed its most recently listed phone number, we got Haydock’s voice mail.

The *Chamber Papers* contradict several of the positions Rutledge took in previous writings.

In previous work, Rutledge voiced many of the criticisms of arbitration that he now disputes in the *Chamber Papers*. Perhaps most surprising, Rutledge devoted two full academic papers to arguing that parties in arbitration should have the ability to sue arbitrators – in court – because binding mandatory arbitration affords participants so little opportunity to appeal or otherwise protect themselves from arbitrators who are biased or ignore the law. Below are examples of statements in the *Chamber Papers* that contradict Rutledge’s past writings:

- The *Chamber Response* says that “judicial review of the award fills the gap” of policing unfair arbitration rulings and assures readers that “courts can vacate awards (and have done so) when, among other things, there is evidence that the arbitrators were not impartial.”³⁰ But Rutledge previously wrote that “the argument that aggrieved parties can always seek vacatur of the award is an inadequate response. Vacatur does not provide the parties the return of the costs that they bore as a result of the flawed institutional arbitration, nor does it compensate the parties for the lost time prior to the entry of an enforceable award.”³¹
- The *Chamber Response* labels a “myth” the argument that “arbitrators have financial incentives to favor firms that hire them.”³² But Rutledge previously wrote that arbitrators “who may seek to develop reputations for being friendly to particular parties or particular industries may actually have incentives that cut against independence.”³³
- The *Chamber Response* states that “parties to arbitration are not bound to any confidentiality obligation.”³⁴ But Rutledge previously wrote that “many arbitration rules and some arbitration laws specifically provide for the confidentiality of proceedings and, in addition, the confidentiality of any award.”³⁵

²⁹ Archived website of Institute for Advanced Dispute Resolution,

<http://web.archive.org/web/20070322202435/www.adrinstitute.org/nationalarbitrationforum.htm>.

³⁰ *Chamber Response* at 16.

³¹ Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 180 (2004) [hereinafter *Arbitral Immunity*].

³² *Chamber Response* at 3 (quoting *Arbitration Trap* at 7-8, 29).

³³ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 194.

³⁴ *Chamber Response* at 15.

³⁵ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 163.

- The *Chamber Response* says that “to the extent individuals may not know the details of the particular candidates for nomination as arbitrator, they or their lawyers can investigate (just as they do with a judge).”³⁶ But Rutledge previously wrote that “arbitrations often take place under the guise of confidentiality, so even assuming that a party were willing to undertake the investment, the party may be stymied in its efforts to learn much about an arbitrator’s or an institution’s reputation.”³⁷
- The *Chamber Response* argues that Public Citizen’s *Arbitration Trap* makes “the misplaced assumption that arbitrators somehow do not follow the governing law.”³⁸ But Rutledge previously promoted stripping arbitrators of immunity from lawsuits as a remedy for their failures to follow the law.³⁹ In doing so, he argued, “Arbitrators do not have to follow precedent. Arbitrators also are not bound by the same rules of evidence and procedure as courts. Often there is no transcript, and arbitrators are not obligated to provide detailed findings of fact and conclusion of law in their awards.”⁴⁰
- The *Chamber Response* provides many assurances that “arbitral rules” protect individuals from unfairness.⁴¹ But Rutledge previously argued that individuals should be given freedom to sue arbitrators partly because “the current regime of legal immunity protects arbitrators and arbitral institutions even when they have violated their own rules (*and a surprising number of reported opinions raise this problem*).”⁴²

³⁶ *Chamber Response* at 16.

³⁷ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 195.

³⁸ *Chamber Response* at 29.

³⁹ See generally Rutledge, *Arbitral Immunity*, 39 GA. L. REV. 151.

⁴⁰ *Id.* at 167.

⁴¹ See *Chamber Response* at 3, 4, 7, 15-16, 22, 27.

⁴² Peter B. Rutledge, *Market Solutions to Market Problems: Re-examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration*, 26 PACE L. REV. 113, 125 (2005) (emphasis added) [hereinafter *Market Solutions*].

I. THE EVIDENCE DEMONSTRATES THAT INDIVIDUALS FARE WORSE IN ARBITRATION THAN COURT.

The *Chamber Response* purports to rebut allegations of injustice in arbitration by bringing the broad sweep of empirical research to bear on the issue. The *Chamber Response* claims that the empirical evidence shows that “individuals generally achieve superior results in arbitration than litigation.”⁴³

In fact, the available empirical research almost universally demonstrates that individuals fare worse in arbitration than in court.

A. Studies Cited in the *Chamber Response* Do Not Support the Conclusion That Individuals Fare Better in Arbitration.

1. *The Comparative Studies Cited in the Chamber Response Do Not Support the Chamber’s Conclusion That Individuals Fare Better in Arbitration than Court.*

The *Chamber Response* cites just two comparative studies to support its sweeping claim that individuals fare better in binding mandatory arbitration than court. One study is of limited value because it compares arbitration recoveries of highly paid securities industry employees with court recoveries of employees from a cross-section of society. The other was written by an arbitration firm executive and suffers from a severe methodological error. We discuss each below:

Michael Delikat and Morris M. Kleiner (2003). This study compared results of jury trials in federal court with those of arbitrations involving NASD securities employees. It found that victorious individuals received an average court award of \$377,030 compared to \$236,292 in arbitration, and a median award of \$95,554 in court compared to \$100,000 in arbitration. Claimants prevailed at a higher rate in arbitration than court (46.2 percent to 33.6 percent). The average award for all claimants – including those who did not receive an award – was \$127,704 in court compared to \$110,500 in arbitration.⁴⁴

In addition to Delikat and Kleiner’s finding that individuals received significantly smaller average awards in arbitration than court, there are several other reasons why their study fails to show that individuals “generally achieve superior results in arbitration”:

Employees in the arbitration side of the study were almost certainly better paid than those on the litigation side. Critics of this study have pointed out that securities industry employment arbitration cases almost universally concern highly paid members of that industry. These individuals would be expected to receive higher average awards than those of the broader socio-economic cross-section of employees who litigated in court.⁴⁵

⁴³ *Chamber Response* at 6.

⁴⁴ Delikat & Kleiner, 6 A.B.A. LITIG. SEC. CONFLICT MGMT. at 10-11.

⁴⁵ See, e.g., Hill, 18 OHIO ST. J. DISP. RESOL. at 792 (securities industry arbitration “is largely limited to the highly compensated members of that industry”); Colvin, 11 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. at

Because the study was limited to cases that reached a verdict, employees' success rate in court was probably understated. The only court cases the researchers included in their results were those in which a judge or jury verdict was reached. Only 3.8 percent of the cases in the study reached this stage.⁴⁶ Therefore, the study omitted more than 96 percent of cases brought. Moreover, the average outcomes of the omitted cases might have been more positive for employees than those of the cases included. A 1995 study that proponents of arbitration often cite for other purposes found that 71 percent of all individuals filing employment cases in federal court received a favorable outcome (mostly through settlements) compared with only 28 percent of individuals whose cases reached a judge or jury verdict.⁴⁷

Securities arbitrations appear to provide more procedural protections for individuals than typical arbitration proceedings. The rules of securities arbitration are regulated by the Securities and Exchange Commission.⁴⁸ No other form of binding mandatory arbitration is subject to such regulatory oversight.⁴⁹ Also, securities industry arbitration rules require disclosure of information about arbitrators and provide individual claimants an equal say in choosing them.⁵⁰

Mark Fellows (July 2006). This article by an in-house attorney at the National Arbitration Forum argues that businesses' success rate in NAF-administered arbitrations is roughly the same as in business-initiated cases that go to a bench trial in federal court.⁵¹ But the article counts as a loss any arbitration claim that a business withdrew before the arbitrator was appointed. These claims are not comparable to judicial decisions after bench trials. As Figure 1 shows, when one includes only cases actually decided by an arbitrator – a closer approximation of cases in which a bench trial was held – businesses' success rate in arbitration soars.

416-17 (“It is likely that there are differences in the types of cases brought in these forums, with many securities arbitration cases involving contractual claims and relatively highly paid employees.”).

⁴⁶ Delikat & Kleiner 6 A.B.A. LITIG. SEC. CONFLICT MGMT. at 8.

⁴⁷ Howard, *Can Justice be Served*, at 107.

⁴⁸ See, e.g., Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities' Arbitration*, 76 U. CINC. L. REV. 101, 119 (2008) (“SEC regulation makes securities arbitration different in a meaningful way from other forms of consumer arbitration, which are not regulated by a federal administrative agency.”).

⁴⁹ *Id.*

⁵⁰ See, e.g., Barbara Black & Jill I. Gross, *Making It up as They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1003 (2002); MICHAEL A. PERINO, REPORT TO THE SECURITIES AND EXCHANGE COMMISSION REGARDING ARBITRATOR CONFLICT DISCLOSURE REQUIREMENTS IN NASD AND NYSE SECURITIES ARBITRATIONS 11-12, 24-25 (2002).

⁵¹ Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, 07/06 METRO. CORP. COUNS. 32 (2006).

Figure 1: Businesses Success in Business-Initiated Arbitrations Versus Court Cases
(arbitration statistics include only cases in which an arbitrator was actually appointed)

Type of Case	Percentage of Time Business Prevailed
<i>Arbitration:</i> Business-initiated contract cases handled by the National Arbitration Forum in which an arbitrator was appointed	96.8% ⁵²
<i>Courts:</i> Business-initiated contract cases in federal courts reaching a bench trial	78.9% ⁵³

The Fellows article also discussed consumer-initiated arbitrations, claiming that consumers prevailed in 65.5 percent of cases that reached a decision. This rate, the article claims, compares favorably with a 60.9 percent success rate for “buyer plaintiffs” litigating contract cases that culminated in a bench trial.⁵⁴ We were unable to duplicate these results. We analyzed NAF data disclosed under California law and found that consumers prevailed in only 37.2 percent of consumer-initiated cases that reached a decision.⁵⁵ Regardless of the discrepancy between NAF’s and Public Citizen’s analyses, consumer-initiated cases account for a minuscule percentage of NAF arbitrations and therefore are not representative of NAF arbitrations. Public Citizen’s review of NAF’s California caseload from 2003 to 2007 shows that consumers initiated only 118 out of 33,948 cases filed, or 0.35 percent.⁵⁶

2. *The Chamber Institute’s Memorandum Dated July 11, 2008, Is Meaningless Because of Its Selective Use of Data.*

The Chamber Institute for Legal Reform recently commissioned an analysis of data on NAF that uses a methodology similar to that employed by NAF’s counsel. The analysis claims that consumers prevailed in 32.1 percent of cases that did not end in settlements – either by “winning their arbitration hearing outright or having the claims against them dismissed.”⁵⁷ But 99.6 percent of these cases in which consumers purportedly “prevailed” (8,534 out of 8,558) were dismissals, not victories after a hearing. Of those dismissals, 91.2 percent (7,783) occurred before an arbitrator was even appointed.⁵⁸ These cases can hardly be used as evidence of the fairness of NAF arbitration. They scarcely involved arbitration at all.

⁵² Public Citizen analysis of National Arbitration Forum reports posted pursuant to § 1281.96 of the California Code of Civil Procedure [hereinafter Public Citizen Analysis of NAF Reports].

⁵³ Fellows, 07/06 METRO. CORP. COUNS. 32.

⁵⁴ *Id.*

⁵⁵ Public Citizen Analysis of NAF Reports.

⁵⁶ *Arbitration Trap* at 15.

⁵⁷ U.S. Chamber Institute for Legal Reform press release, *Arbitration Better than Court for Consumer Debtors, Study Shows Consumers Four Times More Likely to Lose When Credit Cases Go to Court* (July 15, 2008), at <http://www.instituteforlegalreform.com/media/pressreleases/20080715.cfm>; Jeff Nielsen, Garrett Rush & Jordan Hartley, Navigant Consulting, Memorandum dated July 11, 2008 [hereinafter *Chamber Memorandum*], at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212>. The Chamber Institute’s analysis used a dataset posted to the Internet by Public Citizen.

⁵⁸ Public Citizen Analysis of NAF Reports.

There is also reason to doubt NAF's characterization of the roughly 700 other dismissals it coded as consumer wins (instances in which an arbitrator was appointed before the dismissal). The business party might have dismissed for any number of manipulative reasons – practices that NAF actually encourages, according to recent press accounts:

A current NAF arbitrator speaking on condition of anonymity explains that the [marketing] presentation reflects the firm's effort to attract companies, or "claimants," by pointing out that they can use delays and dismissals to manipulate arbitration cases. "It allows the [creditor] to file an action even if they are not prepared," the arbitrator says. "There doesn't have to be much due diligence put into the complaint. If there is no response [from the debtor], you're golden. If you get a problematic [debtor], then you can request a stay or dismissal." When some creditors fear an arbitrator isn't sympathetic, they drop the case and refile it, hoping to get one they like better, the arbitrator says.⁵⁹

Given these practices, it is possible that the consumers who "won" the cases discussed above lost the very same cases later. NAF's secrecy prevents us from knowing.

In the end, the Chamber Institute's memorandum only confirms that consumers fare abysmally in NAF arbitrations. Of the 2,019 cases that had a hearing in which the consumer participated in some manner,⁶⁰ the Chamber Institute recognizes that consumers won only 28 cases, or 1.4 percent.⁶¹ Of the 18,075 total cases that went to a hearing, consumers won just 30, or 0.17 percent.

3. *The Non-Comparative Studies Cited by the Chamber Response Do Not Show Success for Individuals in Arbitration.*

The *Chamber Response* cites two other analyses as showing reasonable success for individuals in arbitration, although these studies do not compare results in arbitration to those in court. Like the comparative studies discussed above in section I.A.1, these studies also fail to support the Chamber's argument:

The California Dispute Resolution Institute (2004). This study attempted to analyze results of consumer arbitrations between January 2003 and February 2004 using data disclosed under California law. Researchers were unable to draw meaningful conclusions because the available data were grossly incomplete.

The *Chamber Response* states that "[w]hile the Institute noted that data limitations prevented broad conclusions, it did find that arbitration produced positive results for consumers."⁶² But the Institute made no such finding. Although the *Chamber Response*

⁵⁹ See Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins?)*, BUSINESS WEEK, June 5, 2008.

⁶⁰ Consumers could have participated in person or by submitting documents. The NAF data do not specify the means of participation for a given case.

⁶¹ *Chamber Memorandum* at 2.

⁶² *Chamber Response* at 7-8 (citing CALIFORNIA DISPUTE RESOLUTION INSTITUTE, CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CCP (2004)).

notes that the Institute's researchers reviewed 2,175 cases,⁶³ it fails to mention that the Institute could not determine the prevailing party in 1,873 of them (86.1 percent).⁶⁴ Indeed, the Institute's principal finding was that the public disclosures from arbitration firms were of limited value:

This report concludes that – owing to a number of factors, including problems with the statute's requirements – there are inconsistencies, ambiguities, and gaps in the data and that these limit the utility of the information in presenting a clear picture of consumer arbitration in California.⁶⁵

In 2007, Public Citizen wrote software to help analyze the results of NAF cases from 2003 to 2007. In contrast to many providers, NAF identifies the prevailing parties in its disclosures⁶⁶ although, as discussed above, there is reason to doubt some of its characterizations.

American Arbitration Association (2007). The *Chamber Response* also cites a one-page American Arbitration Association (AAA) fact sheet stating that individuals prevailed in 48 percent of consumer-initiated arbitrations in which AAA issued an award in the first eight months of 2007.⁶⁷ This finding is unreliable because any arbitrator award was counted as a win, regardless of its relation to the amount sought. This means for example that AAA would deem victorious a claimant who sought \$50,000 and received only \$5. Additionally, the *Chamber Response* fails to mention the fact sheet's finding that businesses prevailed in 74 percent of the cases in which they were the claimants.⁶⁸

We attempted to duplicate AAA's findings by analyzing reports it published as required under California law, but we could discern the victorious party only in approximately 7 percent of the cases. AAA left the "prevailing party" field – a required disclosure⁶⁹ – blank in more than 90 percent of the cases it has reported. We contacted AAA to inquire about the discrepancy, and AAA Senior Vice President Richard Naimark explained that AAA created its fact sheet by combing case files and counting any award as a victory for the claimant. Naimark acknowledged that because AAA's public disclosures do not reveal which party brought the case, the public cannot verify AAA's conclusions.⁷⁰

That AAA's disclosures are insufficient to permit even basic research on case outcomes only underscores the excessive secrecy and lack of accountability in arbitration generally.

⁶³ *Id.* at n.11.

⁶⁴ CALIFORNIA DISPUTE RESOLUTION INSTITUTE at 25.

⁶⁵ *Id.* at 5; *see also id.* at 18 ("Because arbitration as it is currently practiced in California is more complicated than the variables of this study can analyze, this data might not yield adequate information upon which definitive conclusions about the efficacy of private arbitration in California can be reached.").

⁶⁶ *Arbitration Trap* at 15.

⁶⁷ *Chamber Response* at 9 (citing AAA *One-Pager*, at <http://www.adr.org/si.asp?id=5027>).

⁶⁸ AAA *One-Pager*, at <http://www.adr.org/si.asp?id=5027>.

⁶⁹ C.C.P. § 1281.96(a)(3).

⁷⁰ Taylor Lincoln, research director of the Congress Watch division of Public Citizen, interview with AAA Senior Vice President Richard Naimark, July 11, 2008.

The *Response* also refers to *Whither*, Rutledge's literature review, which cites several other comparative studies. But the studies cited in *Whither* almost universally support the conclusion that individuals fare *worse* in arbitration than court.

B. The Studies That *Whither* Cites Contradict Its Claim That Individuals Enjoy Superior Results in Arbitration Versus Court.

1. The Studies That Whither Cites to Compare Arbitration with Court Support the Conclusion That Individuals Fare Far Better in Court.

The introduction of *Whither* promises that the paper "takes up [the] charge" of providing "an honest assessment of [the] empirical picture" on arbitration, and it touts "some surprising conclusions," including a finding that "arbitration generally results in higher win rates and higher awards for employees than litigation."⁷¹

But the evidence presented in *Whither* fails to support these conclusions. To the contrary, the studies cited in *Whither* that compare arbitration and court results overwhelmingly demonstrate that employees fare worse in arbitration than court.

Whither isolates three categories of comparison between arbitration and court.⁷² In two of the three (comparative awards and award amounts relative to demands), the preponderance of the studies *Whither* cites show that individuals fare worse in arbitration. *Whither* scores the other category, "comparative win rates," a tie. (This review will demonstrate that the studies *Whither* cites actually show that judicial outcomes are better for individuals in the comparative win rates category as well.) Thus, in the categories Rutledge selects, the record for individuals on arbitration versus court is 0-3 if one uses Public Citizen's analysis or 0-2-1 if one accepts Rutledge's. Neither result justifies the conclusion that "individuals as a whole achieve superior results in arbitration than litigation."⁷³ Here is a breakdown:

Comparative win rates. Two of the three studies *Whither* cites on comparative win rates show individuals faring better in court than arbitration. These studies offer a total of nine indices of comparison between court and arbitration,⁷⁴ and individuals fare better in court

⁷¹ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL'Y at 551.

⁷² *Id.* at 557-60. *Whither*'s discussion comparing success rates in arbitration versus courts also discusses "raw win rates" in arbitration, *i.e.*, studies that determined the percentage of times individuals won arbitration cases but did not attempt to compare such results to court results. We discuss *Whither*'s portrayal of individuals' raw win rates below in section I.B.2.

⁷³ *Chamber Response* at 6 (citing *Whither*).

⁷⁴ Eisenberg & Hill, 58 DISP. RESOL. J. at 48; Delikat & Kleiner, 6 A.B.A. LITIG. SEC. CONFLICT MGMT. at 10; Howard, *Can Justice be Served*, at 107, 122, 124. In discussing comparative win rates, *Whither* mentions in passing other articles that *Whither* states confirm the conclusion that "choice of forum" has "relatively little effect on a claimant's win rate." *Whither*, 6 GEO. J. L. PUB. POL'Y at 557 & n.39 (citing David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1574 (2005); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RESOL. 559 (2001); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 114 (2003) [hereinafter *Workplace Justice*]). We omit these articles here because they are

in six of the nine. Of the three in which individuals fare better in arbitration, two concern employees who negotiated their own contracts. By definition, these individuals have a greater opportunity to influence the terms of arbitration clauses than do employees who are subject to nonnegotiable, employee-handbook terms. The third study concerns individuals in securities arbitration, which, as discussed above, provides greater safeguards for individuals than other forms of arbitration.

Comparative awards. All three of the studies *Whither* cites on comparative awards show individuals receiving higher average (mean) awards in court, and two of the three show individuals receiving higher median awards.⁷⁵ These studies offer a total of nine indices of comparison. Individuals fare better in court in all nine mean-award comparisons and seven of nine median-award comparisons. The two median-award comparisons in which individuals fare worse in court concern securities industry arbitrations or cases involving employees who negotiated their own contracts.

Of twenty-seven total comparisons of win rates and awards, twenty-two favor court and five favor arbitration. Figure 2 provides individuals' win rates, average awards, and median awards in the comparative studies *Whither* cites.⁷⁶

literature reviews discussing prior research, much of which is addressed in this section and some of which is irrelevant. One of the articles contains a section of original analysis, but it primarily compares outcomes between EEOC proceedings and a single employer's in-house alternative dispute resolution program, not win rates between court and arbitration. See *Sherwyn, Estreicher & Heise*, 57 STAN. L. REV. at 1581-91.

⁷⁵ Eisenberg & Hill, 58 DISP. RESOL. J. 44 at 49; Delikat & Kleiner, 6 A.B.A. LITIG. SEC. CONFLICT MGMT. at 10; Howard, *Can Justice be Served*, at 109, 125-26.

⁷⁶ These are the sources consulted in Figure 2: Howard, *Can Justice be Served*, at 107, 109, 122, 124-26; Eisenberg & Hill 58 DISP. RESOL. J. 44 at 48-49; Delikat & Kleiner, 6 A.B.A. LITIG. SEC. CONFLICT MGMT. at 10. Figure 2 does not include results from Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 48 (1998), which *Whither* cites for insight into comparative recoveries in relation to amount sought. Its results are not included here because it did not use original data. It finds individuals achieving dramatically higher win rates in arbitration (63 percent to 14.9 percent) and dramatically higher awards in court (\$530,611 to \$49,030).

Figure 2: Studies Comparing Individuals' Success in Arbitration Versus Court
(favorable results in bold)

Study	Court Win Rate	Arbitration Win Rate	Court Mean Award	Arbitration Mean Award	Court Median Award	Arbitration Median Award
Howard (1995) (Arbitration versus federal court for employment disputes)	71% (all cases)	68%	\$330,277 (verdicts only)	\$114,905	\$75,000 (verdicts only)	\$32,950
Howard (1995) (Arbitration versus federal court for securities industry employees)	71% (all cases)	48%	\$330,277 (verdicts only)	\$83,518	\$75,000 (verdicts only)	\$41,700
Eisenberg and Hill (2004) (Arbitration versus state court for civil rights disputes brought by employees who had individually negotiated contracts)	43.8%	40% (n=5)	\$206,976	\$32,500 (n=2)	\$206,976	\$32,500 (n=2)
Eisenberg and Hill (2004) (Arbitration versus federal court for civil rights disputes brought by employees who had individually negotiated contracts)	36.4%	40% (n=5)	\$336,291	\$32,500 (n=2)	\$150,500	\$32,500 (n=2)
Eisenberg and Hill (2004) (Arbitration versus state court for civil rights disputes brought by employees who had employee-handbook arbitration clauses)	43.8%	24.3%	\$206,976	\$56,096	\$206,976	56,096
Eisenberg and Hill (2004) (Arbitration versus federal court for civil rights disputes brought by employees who had employee-handbook arbitration clauses)	36.4%	24.3%	\$336,291	259,795	\$150,500	56,096
Eisenberg and Hill (2004) (Arbitration versus state court for non-civil-rights disputes brought by employees who had individually negotiated contracts)	56.6%	64.9%	\$462,307	\$211,720	68,737	94,984
Eisenberg and Hill (2004) (Arbitration versus state court for non-civil-rights disputes brought by employees who had employee-handbook arbitration clauses)	56.6%	39.6%	\$462,307	\$30,732	\$68,737	13,450
Delikat and Kleiner (2003) (Arbitration versus federal court for securities industry employees)	33.6%	46.2%	\$377,030	\$236,292	\$95,554	\$100,000
Total favorable results	6	3	9	0	7	2

Comparative awards relative to demands. The lone study *Whither* cites for insight into award amounts relative to demands states that individuals fare significantly better in court. It reports that mean awards in court were 70 percent of the amount demanded

while mean awards in arbitration were only 25 percent of the amount demanded.⁷⁷ *Whither* criticizes the study's methodology on several grounds, most significantly because it compares "arbitration disputes *not* dominated by discrimination claims with litigated disputes that were dominated by discrimination claims."⁷⁸ Irrespective of the merit of that criticism, one can safely conclude that this study's finding on award amounts relative to demands does nothing to bolster *Whither's* argument that individuals do better in arbitration than court.

2. *Studies Cited in Whither Also Contradict the Chamber's Conclusions on "Raw Win Rates" in Arbitration.*

In addition to comparing courts and arbitration on the three measures mentioned above (win rates, awards, and awards relative to demands), *Whither* also discusses studies that report winning percentages in arbitration without comparing them to outcomes in similar court cases – a measure that Rutledge calls "raw win rates." Here, *Whither* makes a stunningly erroneous claim, asserting that "the only reported data showing a win-rate of less than 50 percent [for claimants in arbitration] is William Howard's study of securities arbitration."⁷⁹

In fact, at least five other studies have found win rates of less than 50 percent for individual claimants – and four of these are cited in the *Chamber Papers*. Among them is the study on which the *Chamber Response* relies most heavily to support its claim that "[i]ndividuals generally achieve superior results in arbitration than litigation."⁸⁰ These are the studies:

- Delikat and Kleiner (2003) found an employee win rate of 46.2 percent in arbitration.⁸¹ (Cited in both the *Chamber Response* and *Whither*.⁸²)
- An AAA fact sheet reviewing AAA-administered consumer arbitrations for the first eight months of 2007 reports that individuals prevailed in 48 percent of cases they initiated and 26 percent of cases initiated by businesses.⁸³ (Cited in *Chamber Response*.⁸⁴)
- Eisenberg and Hill (2004) found a 46 percent win rate for employees in arbitrations generally and a 26.2 percent win rate for employees in arbitrations of civil rights claims.⁸⁵ (Cited in *Whither*.⁸⁶)

⁷⁷ Maltby, 30 COLUM. HUM. RTS. L. REV. at 48.

⁷⁸ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL'Y at 559-60.

⁷⁹ *Id.* at 557 n.36.

⁸⁰ *Chamber Response* at 6.

⁸¹ Delikat & Kleiner, 6 A.B.A. LITIG. SEC. CONFLICT MGMT. at 10.

⁸² See *Chamber Response* at 6 n.6; Rutledge, *Whither*, 6 GEO. J. L. PUB. POL'Y, 570-71 & n.106.

⁸³ AAA *One-Pager* at <http://www.adr.org/si.asp?id=5027>.

⁸⁴ See *Chamber Response* at 9 n.17.

⁸⁵ Eisenberg & Hill, 58 DISP. RESOL. J. at 48. Public Citizen used Eisenberg and Hill's data to calculate the percentages provided in the text of this paper. Eisenberg and Hill report wins and losses separately for

- Hill (2003) found an employee win rate of 43 percent in arbitration.⁸⁷ (Cited in both the *Chamber Response* and *Whither*.⁸⁸)
- Colvin (2007) found a 19.7 percent win rate for individuals whose employment disputes were arbitrated by AAA.⁸⁹ (Not cited in the *Chamber Papers*.)

C. Evidence Not Cited by the Chamber Papers Shows That Employees Who Do Not Negotiate Their Contracts Individually Fare Dismally in Arbitration.

In addition to the deep flaws in the *Chamber Papers*' interpretations of the evidence they cite, they also fail to discuss important empirical evidence – for example other studies on comparative success rates in arbitration for employees who negotiated their own contracts versus those who were forced into arbitration under employee-handbook terms. The distinction is important because employees who negotiate their own contracts are able to influence the terms under which future arbitration proceedings will be administered – meaning that the arbitrations are at least in part voluntary. Employees subject to handbook terms enjoy no power to shape the rules.

A 2007 study by Penn State University professor Alexander J.S. Colvin found that employees subject to employee-handbook cases won fewer than 20 percent of their cases before AAA from 2003 to 2006.⁹⁰ Colvin notes that his findings conflict with some earlier studies on employment arbitration, but that this was probably because those studies involved employees who had individually negotiated contracts.⁹¹ His finding was more consistent with studies that examined arbitrations for employees subject to nonnegotiable handbook arbitration terms:⁹²

- In a 1998 study of employment cases administered by AAA between 1993 and 1995, Indiana University professor Lisa B. Bingham found that 68.8 percent of employees who had individually negotiated contracts received an award, compared to 21.3 percent of employees subject to employee-handbook terms.⁹³

higher-paid and lower-paid employees and for civil-rights and non-civil-rights claims. We added their numbers to determine total win rates.

⁸⁶ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL'Y at 558 n.25, 558 n.45, 559 n.46, 560 n.50.

⁸⁷ Hill, 18 OHIO ST. J. DISP. RESOL. at 806. This study appears to use data that overlaps with the data analyzed in Eisenberg and Hill's 2004 paper,

⁸⁸ See *Chamber Response* at 7 n.9, 20 n.54, 21 n.59, 22 n.63, 23 n.70, 27 n.93; *Whither*, 6 GEO. J. L. PUB. POL'Y at 555 n.25.

⁸⁹ Colvin, 11 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. at 418.

⁹⁰ *Id.*

⁹¹ *Id.* at 413, 418.

⁹² *Id.*

⁹³ Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 N.Z. J. INDUS. REL. 5, 16 (1998).

- Bingham and Shimon Sarraf in 2000 published a similar study reviewing AAA results in 1996 and 1997. Employees who negotiated their own contracts won 61.3 percent of the time; those subject to personnel manual agreements won 27.6 percent of the time.⁹⁴
- Eisenberg and Hill in 2003 distinguished between employees who negotiated their own contracts and those subject to employee-handbook terms, and also broke out discrimination and non-discrimination cases. The study reviewed a random selection of AAA employment arbitrations in 1999 and 2000 and found that employees subject to employee-handbook terms fared significantly worse than those who negotiated their own contracts in both civil rights and non-civil rights cases. They also fared worse than employees who litigated in court for both types of cases.⁹⁵

“It is not clear that the types of cases represented in these AAA awards of the early 1990s are representative of the employment arbitration system that has arisen in more recent years,” Colvin writes. “In particular, a majority of these awards [in the early 1990s] appear to have involved claims by employees, typically managers and executives, under individually negotiated contracts, rather than claims brought under arbitration provisions from employment manuals or handbooks.”⁹⁶ Colvin’s study and others like it “raise[] the concern that overall employee win rates may be much lower under the employer promulgated mandatory arbitration procedures that have expanded in recent years than suggested by some of the early studies in this area,” he explains.⁹⁷

Figure 3 compares the success rate in arbitration of employees who negotiated their own contracts to those who were subject to arbitration terms dictated by employment manuals.

⁹⁴ Colvin 11 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. at 414 (Lisa B. Bingham & Shimon Sarraf, *Employment Arbitrations Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 320-28 (Samuel Estreicher & David Sherwyn eds., 2004)).

⁹⁵ Eisenberg & Hill 58 DISP. RESOL. J. 44 at 48.

⁹⁶ Colvin, 11 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. at 413.

⁹⁷ *Id.*

Figure 3: Studies Assessing Arbitration Win Rates of Employees Subject to Employee-Handbook Terms

Study (Year published)	Success rate in arbitrated disputes for employees who individually negotiated their contracts	Success rate in arbitrated disputes for employees subject to employment manual terms
Bingham (1998)	68.8%	21.3 %
Bingham and Sarraf (2000)	61.3%	27.6 %
Eisenberg and Hill (2004) (Non-civil rights cases)	64.9%	39.6 %
Eisenberg and Hill (2004) (Civil rights cases)	40.0% (n=5)	24.3 %
Eisenberg and Hill (2004) (Total)	63.4%	35.3%
Hill (2003)	57%	34%
Colvin (2007)	n/a	19.7%

D. Surveys Show Satisfaction with Voluntary Arbitration, But Provide Little Insight into Pre-Dispute Binding Mandatory Arbitration.

The *Chamber Papers* refer to various surveys that “suggest that individuals are pleased with the process and outcomes in arbitration.”⁹⁸ Significantly, four of the five surveys that the *Papers* cite were produced on behalf of arbitration industry organizations or the Chamber Institute for Legal Reform itself. (The *Chamber Papers* purport to cite six surveys, but one merely quotes the findings of an already-cited survey.⁹⁹)

More important, the Chamber’s papers leave out a vital detail: Most of the surveys they cite concern satisfaction with arbitration entered into *voluntarily after a dispute arises*. This distinction is vital for two reasons. First, inquiries into consumer satisfaction with voluntary arbitration are irrelevant to the Chamber’s attempt to demonstrate the fairness of arbitration regimes that are forced on consumers or employees. Second, these studies actually serve to rebut the Chamber’s core argument: that it is necessary to retain the legality of pre-dispute binding mandatory arbitration because no one will choose arbitration willingly after a dispute arises. These are the surveys:

1. Harris Interactive

A Harris Interactive study financed by the Chamber Institute concluded that 66 percent of respondents who had used arbitration would choose it again. *Whither* neglects to inform

⁹⁸ *Chamber Response* at 29.

⁹⁹ See Rutledge, *Whither*, 6 GEO. J. L. PUB. POL’Y at 561 n.61 (quoting PERINO at 34-36); PERINO at 36 n.124 (citing Gary Tidwell, Kevin Foster & Michael Hummel, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulatory Arbitrations* 38 (1999)).

readers that 81 percent of the survey's subjects had voluntarily chosen to enter into arbitration after a dispute arose.¹⁰⁰

2. *Ernst & Young / National Arbitration Forum*

The *Chamber Papers* report that a 2005 Ernst & Young / National Arbitration Forum survey of participants in consumer lending cases found that 69 percent of consumers were at least "satisfied" with the resolution of disputes handled by NAF.¹⁰¹ While these survey subjects were subject to pre-dispute mandatory arbitration, they were selected from the minuscule fraction of NAF cases brought by consumers – just 226 cases between January 2000 and January 2003, according to the survey.¹⁰² (The survey does not provide a total number of cases for the period. But Public Citizen found that, of 33,948 California cases NAF handled from 2003 to 2007, only 118 (0.35 percent) were initiated by consumers.¹⁰³) Neither paper informs readers that such a selective pool was used, nor that the results were based on responses from just 29 of the 175 individuals chosen for the survey.¹⁰⁴ The *Chamber Papers* also neglect to mention that NAF assisted Ernst & Young by contacting the subjects.¹⁰⁵

3. *Roper Organization / Institute for Advanced Dispute Resolution / Roger Haydock*

Setting up a contrast to the Harris Interactive and Ernst & Young projects, *Whither* singles out a 2003 survey by the "Roper Organization" as one that was not "underwritten by arbitration industry associations."¹⁰⁶ This claim turns out to be wildly inaccurate. The organization that commissioned and published the survey was in fact a self-proclaimed arbitration advocacy organization led by the managing director of the National Arbitration Forum and operated out of NAF's offices.

The survey was published by the Institute for Advanced Dispute Resolution, a 501(c)(3) nonprofit.¹⁰⁷ The Institute's filings with the Internal Revenue Service (IRS) list Roger Haydock as its president.¹⁰⁸ Haydock was a founder of the National Arbitration Forum¹⁰⁹

¹⁰⁰ HARRIS INTERACTIVE SURVEY at 9; Rutledge, *Whither*, 6 GEO. J. L. PUB. POL'Y at 561.

¹⁰¹ *Id.*; *Chamber Response* at 5.

¹⁰² ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES 7 (2004).

¹⁰³ *See Arbitration Trap* at 15.

¹⁰⁴ ERNST & YOUNG at 7, 11. Ernst and Young attempted to contact a random sample of 175 individuals and obtained 29 responses. *Id.* at 11. The survey does not explain why researchers did not attempt to contact all 226 individuals.

¹⁰⁵ *Id.* at 19.

¹⁰⁶ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL'Y at 561 ("While the Harris and the Ernst & Young study generated similar results, both studies might be criticized on the ground that the studies were underwritten by industry associations. However, other reports have largely validated these studies' conclusions. For example, a 2003 study by the Roper Organization surveyed a random cross section of 1036 adults . . .").

¹⁰⁷ ROPER at 1; Institute for Advanced Dispute Resolution, Form 990 (2003); Public Citizen Researcher Peter Gosselar phone interview with principal from GfK Custom Research, the successor company of Roper ASW (July 11, 2008).

¹⁰⁸ Institute for Advanced Dispute Resolution, Form 990, Statement 7 (2003).

¹⁰⁹ Website of William Mitchell College of Law,

and by 2003 a longtime director of NAF.¹¹⁰ He is now NAF's managing director.¹¹¹ In its most recent filing with the IRS, the Institute listed its address as 6465 Wayzata Blvd., Suite 500, in St. Louis Park, MN,¹¹² which is NAF's address.¹¹³ The now-defunct Institute's phone number was 952-516-6410,¹¹⁴ one digit different from NAF's main line.¹¹⁵ When we dialed the "6410" extension, we reached Haydock's voice mail.

The Institute reported to the IRS that its primary purpose was "[t]o promote the use of arbitration, mediation, and other dispute resolution methods throughout America and the world."¹¹⁶ A now-defunct Web page of the Institute (retained by an Internet archiving service) contains a page titled "About Our Sponsor." The sponsor listed is the National Arbitration Forum.¹¹⁷

Moreover, a separate report published by the Institute (which listed the National Arbitration Forum as its sponsor) indicates that the Institute resided "at William Mitchell College of Law,"¹¹⁸ where Haydock is a professor.¹¹⁹ Public Citizen contacted a vice dean at the college who explained that Haydock had proposed creating the Institute at William Mitchell but that the idea was tabled because Haydock took a leave of absence. "We haven't done anything with it," he said.¹²⁰

Whither's claim that the Institute survey was not "underwritten by industry associations" is only the first of several problems with its use of the study.

Whither also uses this survey (like most others it cites) as evidence on binding mandatory arbitration, but the survey examined attitudes about *voluntary* arbitration. Survey respondents were asked, "If you had a legal dispute over [money] which one of the following statements best describes the likelihood of your taking it to arbitration versus filing a lawsuit?"¹²¹ The question makes clear that respondents were asked to consider arbitration chosen voluntarily after a dispute arose. Sixty-four percent said they either

<http://www.wmitchell.edu/faculty/Roger-Haydock+ADR+leave.html>.

¹¹⁰ See, e.g., Ed Anderson & Roger Haydock, *History of Arbitration as an Alternative to U.S. Litigation*, WEST'S LEGAL NEWS, Aug. 12, 1996 ("Roger Haydock is director of the National Arbitration Forum and Advanced Dispute Resolution.").

¹¹¹ See, e.g., Roger Haydock, *Arbitration Is a Solution That's Fair to Everyone*, MINNEAPOLIS STAR-TRIBUNE, May 15, 2008.

¹¹² Institute for Advanced Dispute Resolution, Form 990 (2005).

¹¹³ Website of National Arbitration Forum, <http://domains.adrforum.com/main.aspx?itemID=766>.

¹¹⁴ Institute for Advanced Dispute Resolution, Form 990 (2005).

¹¹⁵ Website of National Arbitration Forum, <http://www.adrforum.com/main.aspx?itemID=218>.

¹¹⁶ Institute for Advanced Dispute Resolution, Form 990, Statement 4 (2003).

¹¹⁷ Archived website of Institute for Advanced Dispute Resolution,

<http://web.archive.org/web/20070322202435/www.adrinstitute.org/nationalarbitrationforum.htm>.

¹¹⁸ INSTITUTE FOR ADVANCED DISPUTE RESOLUTION, JUDICIAL BENCHBOOK: ARBITRATION AND MEDIATION PRACTICE AND PROCEDURE (2003).

¹¹⁹ Website of William Mitchell College of Law,

<http://www.wmitchell.edu/academics/faculty/Haydock.asp>.

¹²⁰ Taylor Lincoln, research director of the Congress Watch division of Public Citizen, interview with William Mitchell College of Law Vice Dean for Faculty Niels B. Schaumann (July 17, 2008).

¹²¹ ROPER at 27.

“definitely” or “probably” would choose arbitration.¹²² *Whither* characterized the survey as finding that “64% said they would prefer arbitration over litigation,”¹²³ failing to note that this “preference” might not hold if arbitration were required rather than chosen.¹²⁴

Whither also indicates these respondents “had not necessarily participated in arbitration.”¹²⁵ This is a profound understatement. In fact, just 6 percent of the survey’s respondents had ever been involved in an arbitration proceeding,¹²⁶ and only 9 percent even mentioned arbitration when asked to name alternatives to court.¹²⁷

4. American Bar Association

The *Chamber Papers* note that 75 percent of respondents to a 2003 survey of lawyers conducted by the American Bar Association said that outcomes in arbitration were comparable to or better than the outcomes in litigation.¹²⁸ Both papers fail to inform readers that respondents’ answers addressed their experience with voluntary arbitration. Specifically, survey subjects were asked questions such as, “In general, how would you rate the quality of the outcome (the fairness, validity, client satisfaction etc. associated with final awards) resulting from voluntary arbitration proceedings?”¹²⁹ It would be difficult to misapprehend the survey as focusing on binding mandatory arbitration; it uses the phrase “voluntary arbitration” in twelve of sixteen questions.¹³⁰

5. NASD

Whither cites two surveys as evidence of satisfaction among participants in securities arbitrations. The first was a 1999 study led by Gary Tidwell, director of neutral training and development of the NASD Regulation Office of Dispute Resolution. “Of those surveyed, 93.49% felt that the arbitration was handled fairly and without bias,” *Whither* reports, accurately paraphrasing Tidwell’s finding.¹³¹ This result may indicate that securities industry arbitration systems include enough protections to give participants a sense of fairness. But *Whither* still overstates the support for its position by suggesting that different, newer evidence corroborated Tidwell’s findings. It continues, “In a more recent paper, Michael Perino reported similar results. He also reported that 91% of surveyed investors who had participated in NASD arbitrations found that the arbitrators demonstrated either an excellent or a good level of fairness.”¹³² In fact, this “more recent paper” merely restated the results of different questions from Tidwell’s 1999 study.¹³³

¹²² *Id.*

¹²³ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL’Y at 561.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ ROPER at 25.

¹²⁷ *Id.* at 20. Another page of the same survey indicates that 12 percent mentioned arbitration. *Id.* at 18. The survey does not explain this discrepancy.

¹²⁸ *Chamber Response* at 5; Rutledge, *Whither*, 6 GEO. J. L. PUB. POL’Y at 561.

¹²⁹ A.B.A. SURVEY ON ARBITRATION at 24.

¹³⁰ *See id.* at 9-29.

¹³¹ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL’Y at 561.

¹³² *Id.*

¹³³ PERINO at 36 n.124.

E. Conclusions About Empirical Data on Arbitration Results

The empirical data on binding mandatory arbitration support the following conclusions:

- Data on arbitration are scarce and skewed toward favorable results. Virtually the only credible data obtained and analyzed by independent researchers concerns securities industry arbitrations regulated by the federal government or employment arbitration cases administered by the American Arbitration Association, which is often suggested to be fairer than other arbitration companies.¹³⁴ Colvin aptly voiced this concern regarding potential biases in the available data: “I have always been enormously grateful to organizations that have allowed me access to them to conduct research in this area, but have often worried that this leads one to follow the trail from one best case scenario to another while missing the darker cases that are hidden from public scrutiny.”¹³⁵
- Notwithstanding the bias in the data sets, most studies show that individuals fare worse in arbitration than court.
- Employees who are required by terms of nonnegotiable personnel manuals to settle disputes in arbitration have experienced particularly low success rates. Most studies have placed their success rates in AAA-administered arbitrations at under 30 percent, and one recent study found a success rate of only 19.7 percent.
- Most surveys showing satisfaction with arbitration among individuals or lawyers are irrelevant to the debate on binding mandatory arbitration because they concern only voluntary arbitration or the hypothetical use of arbitration as described by interviewers – or both.

¹³⁴ See, e.g., Maltby, *Employment Arbitration*, 38 U.S.F. L. REV. at 114 (“[I]t is almost inconceivable that all of the hundreds of providers in this unregulated field meet AAA’s high standards.”); Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceañera*, 81 TUL. L. REV. 331, 349 (“The AAA is a reputable arbitral provider that frequently has refused to arbitrate cases under rules it considers unfair. Other arbitral service providers have demonstrated considerably fewer scruples.”).

¹³⁵ Colvin, 11 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. at 446-47.

II. THE *CHAMBER PAPERS* FAIL TO REFUTE CRITICISMS OF BINDING MANDATORY ARBITRATION, AND RUTLEDGE HIMSELF HAS VOICED MANY OF THESE CRITICISMS.

The *Chamber Papers* purport to dispel numerous criticisms of arbitration's processes that we outlined in our 2007 report. Several of these criticisms – for example, that arbitration is largely conducted in secret, lacks meaningful appeal mechanisms, and strips individuals of their right to a jury trial – usually receive only passing reference in the academic literature because they are generally accepted. Part II of this paper demonstrates that Rutledge himself has acknowledged many of these criticisms in his previous scholarship. Allegations that arbitrators have incentives to favor businesses, that arbitration rules are often stacked against individuals, and that arbitrators freely stray from the law are more controversial and have been the subject of somewhat more academic research. Part II discusses this research as well.

A. Arbitrators and Arbitration Providers Have Incentives to Favor Businesses Over Individuals.

1. Individual Arbitrators Have Incentives to Favor Business.

The *Chamber Response* says that it is a “myth” that “arbitrators have financial incentives to favor firms that hire them.”¹³⁶

But Rutledge has acknowledged in previous writings that these incentives exist. In 2004, he wrote that “[t]hose [arbitrators] who may seek to develop reputations for being friendly to particular parties or particular industries may actually have incentives that cut against independence.”¹³⁷ He also stated:

[Arbitrators] may also develop reputations with particular types of parties. For example, an arbitrator may be perceived as ‘industry friendly’ in securities law disputes or being ‘contractor friendly’ in construction disputes. Through these activities designed to enhance their reputations, arbitrators generate business in the form of fees and, hopefully, future appointments.¹³⁸

This previous view of Rutledge's finds support in anecdotal evidence, such as the notorious case of Harvard law professor Elizabeth Bartholet, who evidently was blacklisted by a NAF after she ruled for a consumer and against the credit card company in one case.¹³⁹ NAF removed Bartholet from subsequent cases, saying she had a “scheduling conflict,” a claim she asserts is false.¹⁴⁰ Other arbitrators also have expressed concern that their rulings could affect future appointments. In the words of California

¹³⁶ *Chamber Response* at 3 (quoting *Arbitration Trap* at 7-8, 29).

¹³⁷ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 194.

¹³⁸ *Id.* at 165.

¹³⁹ Testimony of Elizabeth Bartholet before the Senate Judiciary Committee, July 23, 2008.

¹⁴⁰ *Id.*

arbitrator Richard Hodge, “You would have to be unconscious not to be aware that if you rule a certain way, you can compromise your future business.”¹⁴¹

The view that individual arbitrators favor business parties also finds support in empirical studies. Several researchers have sought to answer whether “repeat players” – businesses trying multiple cases before the same arbitration firm, or before the same arbitrator – enjoy better success than first-timers. The *Chamber Response* states that such studies have yielded “mixed” results.¹⁴² Researchers generally have found that businesses enjoy atypically favorable results in repeat-player scenarios, disagreeing for the most part only on how to explain this phenomenon.¹⁴³ For its part, *Whither* acknowledges the existence of a repeat-player “effect,” arguing only that there is insufficient evidence that this advantage for business is caused by arbitrator bias.¹⁴⁴

2. *Arbitration Firms Have Incentives to Favor Business.*

The incentives of *arbitration companies* are far more important than those of individual arbitrators. These companies have the strongest of incentives to favor business: Their very existence depends on whether businesses choose them.

The use of pre-dispute binding mandatory arbitration clauses enables a business to choose its arbitration firm (or to create the appearance of consumer choice by permitting consumers to select one of two firms chosen by the business). Professor Jean Sternlight aptly summarized the problem this creates:

Arbitration organizations, such as the American Arbitration Association (AAA) and the National Arbitration Forum (NAF), are now competing to provide arbitration services for particular companies that require their consumers to arbitrate future disputes. Companies and providers often sign agreements to the effect that a particular company will be named as the provider in arbitration clauses involving certain kinds of disputes. Obviously, once an entity is named as the provider, financial benefits accrue to that provider.¹⁴⁵

In short, binding mandatory arbitration creates market competition to favor business – which of course means disastrous results for other parties. This is nothing short of a market for injustice.

¹⁴¹ Eric Berkowitz, *Is Justice Served?* L.A. TIMES, Oct. 22, 2006.

¹⁴² *Chamber Response* at 3.

¹⁴³ 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); Hill, 18 OHIO ST. J. DISP. RESOL. at 777.

¹⁴⁴ Rutledge, *Whither*, 6 GEO. J. L. PUB. POL’Y at 573 (“Empirical research has documented a repeat player effect but does not necessarily link that effect to any nonneutrality on the arbitrator’s part.”) (emphasis added).

¹⁴⁵ Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just*, 57 STAN. L. REV. 1631, 1650 (2005).

3. *Rutledge Agrees That the Way to Fix Unfairness in Arbitration Is to Align Market Incentives Properly, Not to Create New Arbitration Rules.*

In another irony, Rutledge agrees that “if we accept the oft-heard premise that the arbitral system favors the industry,” then “regulatory reforms” – meaning procedural fixes – “are unlikely to be an effective long-term solution” to unfairness in arbitration:¹⁴⁶

Basic economics suggests that, over time, both the industry and the agencies will adapt their behavior to the new legal regime, which is perhaps precisely why each new wave of reforms is met with academic criticism claiming that the reforms did not go far enough. Rather than simply imposing a rule on arbitrators and institutions in an effort to reach a desirable result, wouldn’t it be better if we designed the market in a way to give the players an incentive to reach those results on their own?¹⁴⁷

We could hardly agree more. We just think Rutledge’s solution is complicated and unrealistic. He proposes stripping arbitrators and arbitration institutions of immunity from lawsuits,¹⁴⁸ and he apparently would hold them liable not just for intentional or reckless misconduct, but also for mistakes of law, under a negligence standard.¹⁴⁹ At first blush, negligence liability for legal errors seems harsh and unworkable. And this change in the legal regime would likely be extremely disruptive. It would require arbitration providers and users alike to determine their options and prices for contracting around the new liability and would send insurers scrambling to offer coverage for it.

There is a much simpler and more sensible solution: Rather than force arbitration on consumers and employees when they have a dispute with a company, give them a choice in the matter. This will require arbitration providers to compete to satisfy these individuals too – and not just businesses.

B. Arbitration Lacks Adequate Appeal Rights.

The *Chamber Response* calls it a “myth” that “only the rare appeal succeeds with high costs for consumers” in arbitration.¹⁵⁰ It argues that “[a] court may vacate (or refuse to confirm the award) on various grounds specified in Section 10 of the FAA along with various nonstatutory grounds, including manifest disregard of the law”¹⁵¹ and that “[c]ourts can vacate awards (and have done so) when, among other things, there is

¹⁴⁶ Rutledge, *Market Solutions*, 26 PACE L. REV. at 120.

¹⁴⁷ *Id.* See also *id.* at 116 (“Calls for reform rest on a basic premise – that securities arbitration is unfair because the system is “captured” by the industry. If we accept that premise, then regulatory reforms are unlikely to be an effective long-term solution. Such reforms may yield ephemeral results as arbitrators and broker-dealers need time to react to shifting norms. Over the long run, however, economic analysis suggests that they will simply adapt their behavior to the new legal regime and, eventually, new norms will develop that continue to give favored treatment to the repeat players, namely the industry.”).

¹⁴⁸ See generally Rutledge, *Arbitral Immunity*, 39 GA. L. REV. 151; Rutledge, *Market Solutions*, 26 PACE L. REV. 113.

¹⁴⁹ Rutledge, *Market Solutions*, 26 PACE L. REV. at 130-31.

¹⁵⁰ *Chamber Response* at 4 (quoting *Arbitration Trap* at 9, 39).

¹⁵¹ *Id.* at 29.

evidence that the arbitrators were not impartial.”¹⁵² But Rutledge’s own past writings offer a starkly contrasting view.

1. *Rutledge Has Argued That Judicial Review of Arbitrations Is “Inadequate.”*

Rutledge himself has argued that it is virtually impossible to obtain meaningful judicial review of an arbitration ruling. In 2005, for example, he wrote that “the grounds for vacatur are themselves extremely narrow, and the opportunity for judicial review of the award’s substance virtually non-existent (apart from the toothless ‘manifest disregard of the law’ doctrine.)”¹⁵³

Even in the rare cases in which a party manages to convince a judge to vacate an arbitration award, Rutledge has argued, this redress is “inadequate.”¹⁵⁴ This is because, in Rutledge’s words from 2004, “Vacatur does not provide the parties the return of costs that they bore as a result of the flawed institutional arbitration, nor does it compensate the parties for the lost time prior to the entry of an enforceable award.”¹⁵⁵

Finally, Rutledge wrote, “Even if the party convinces a court to vacate the award, the party must then return to arbitration to relitigate the matter at substantial expense, on top of the already substantial expense of bringing the vacatur action in court.”¹⁵⁶

We hardly could have said it better.

2. *The Chamber Response Touts a Standard of Review for Arbitrations That Rutledge Has Deemed “Toothless” and Illegitimate.*

In the *Chamber Response*, Rutledge writes that parties can seek dismissal of bad decisions based on “manifest disregard of the law.”¹⁵⁷ But Rutledge has called this doctrine “toothless” or “practically toothless” multiple times, in articles published before and after the *Chamber Response*,¹⁵⁸ and he has advocated abolishing the doctrine:

Court-based expansions of judicial review of arbitration awards suffer from a legitimacy problem. Apologists for the “manifest disregard of the law” standard

¹⁵² *Id.* at 16.

¹⁵³ Rutledge, *Market Solutions*, 26 PACE L. REV. at 131-32.

¹⁵⁴ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 180 (“The argument that aggrieved parties can always seek vacatur of the award is an inadequate response.”). *See also* Rutledge, *Market Solutions*, 26 PACE L. REV. at 123.

¹⁵⁵ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 180.

¹⁵⁶ *Id.* at 194.

¹⁵⁷ *Chamber Response* at 29.

¹⁵⁸ Rutledge, *Market Solutions*, 26 PACE L. REV. at 131 (“[T]he ‘manifest disregard of the law’ standard is toothless and, as a consequence, ‘there is no meaningful review of arbitrator awards to assure arbitrators are applying the law.’”); *id.* at 131-32 (“[T]he grounds for vacatur are themselves extremely narrow, and the opportunity for judicial review of the award’s substance virtually non-existent (apart from the toothless ‘manifest disregard of the law’ doctrine.”); Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1200 (2008) (“Whatever review of the merits exists is practically toothless.”); *id.* at 1210 (“[A]t most, federal courts only review arbitral awards for manifest disregard of the law – a highly deferential, perhaps toothless, standard on which few awards have been set aside.”).

have sought to anchor it either in the text of the [Federal Arbitration Act] itself or in Supreme Court precedent. Contrary to their arguments, neither statute nor precedent supports a judicially created “manifest disregard of the law” standard.¹⁵⁹

In addition, Rutledge’s previous scholarship argued that the lack of a paper trail in arbitration is an obstacle to winning an appeal even when a legal basis exists:

Unless required by the parties’ agreement or the applicable institutional rules, arbitrators in the United States are not required to give reasons for their decision. This norm complicates application of the ‘manifest disregard of the law’ standard. As described above, the standard generally requires proof that the arbitrators consciously disregarded the applicable legal principle. Evidence of this conscious disregard, however, will be hard to come by in situations where arbitrators have not given reasons for their decisions.¹⁶⁰

We must add a caveat to this narrative of unsuccessful arbitration appeals: In state courts, the narrative apparently applies more to employees than employers. University of Illinois professor Michael LeRoy, who reviewed court rulings on appeals of arbitration rulings from 1975 to 2005, found that state appeals courts upheld 87 percent of employers’ arbitration victories but only 56 percent of employees’ wins. The discrepancy was smaller in lower state courts, but the trend still held. They upheld 87 percent of employer wins compared to 78 percent of employee wins. There was no meaningful discrepancy in federal courts, which backed arbitration rulings 85 to 93 percent of the time, and showed no significant discrepancy between success rates of employees or employers.¹⁶¹

Thus, at least in the employment context, individuals who are forced into arbitration cannot even count on the one purported benefit of a system that provides few opportunities for successful appeal: the ability to rely on the finality of a favorable decision.

C. Arbitration Proceedings Are Shrouded in Excessive Secrecy.

The *Chamber Response* states that “parties to arbitration are not bound to any confidentiality obligation.”¹⁶²

This, too, is contradicted by Rutledge himself. He wrote in 2004, “Many arbitration rules and some arbitration laws specifically provide for the confidentiality of proceedings and, in addition, the confidentiality of any award.”¹⁶³ The *Chamber Response*’s claims also flatly contradict direct evidence from arbitration firms and the businesses that use them. For example, the National Arbitration Forum’s rules state: “Arbitration proceedings are

¹⁵⁹ Peter B. Rutledge, *On the Importance of Institutions: Review of Arbitral Awards for Legal Errors*, 19 J. INT’L ARB. 81, 89 (2002). See also *id.* at 82 (“[C]ourts should not review arbitral awards for manifest disregard of the law.”).

¹⁶⁰ *Id.* at 99-100.

¹⁶¹ Joseph A. Slobodzian, *Arbitration Awards Studied*, HUMAN RESOURCES EXECUTIVE, May 28, 2008.

¹⁶² *Chamber Response* at 15.

¹⁶³ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. 163.

confidential unless all Parties agree or the law requires arbitration information to be made public.”¹⁶⁴ And researchers have found arbitration clauses that bar individuals from disclosing even the *existence* of a dispute without the consent of all parties.¹⁶⁵

Rutledge also discussed the confidentiality of arbitration when describing the challenge of researching the backgrounds of arbitrators and arbitration firms:

Acquiring information about arbitrators is costly, and parties may not have substantial resources to invest in learning about the reputations of arbitrators or arbitral institutions. Moreover, arbitrations often take place under the guise of confidentiality, so even assuming that a party were willing to undertake the investment, the party may be stymied in its efforts to learn much about an arbitrator’s or an institution’s reputation.¹⁶⁶

The *Chamber Response* proposes that two factors mitigate the secrecy of arbitration: First, arbitration is “potentially subject to public scrutiny”¹⁶⁷ at its start and finish. This is because “a party resisting arbitration can refuse to commence proceedings, thereby forcing the other party to seek an order compelling arbitration” and because “the losing party in the arbitration can resist enforcement of the award, either by bringing an action to vacate the award or forcing the prevailing party to file a petition to confirm the award.”¹⁶⁸

This argument inadvertently highlights that arbitration can encourage more, not fewer, court proceedings. The Chamber contemplates that parties will litigate, then arbitrate, then litigate again – hardly a model of efficiency or cost-saving.

But the Chamber’s argument is also wrong. Litigation over the enforceability of an arbitration provision in a contract or the enforceability of an arbitration rarely focuses on the merits of a dispute. Instead, it focuses on separate issues such as the validity of the contract or whether arbitrators abused their authority. Therefore, it need not address, much less reveal, many of the facts or legal issues in the underlying dispute.

Second, the *Response* argues that the “indicia of secrecy” cited by critics of arbitration “can likewise occur in our civil justice system. For example, information may be subject to a protective order, prohibiting its public dissemination.”¹⁶⁹ Thus, “the confidentiality about which Public Citizen complains is not unique to arbitration.”¹⁷⁰

This argument fails because, as Rutledge himself has recognized, court proceedings are usually public, while arbitration proceedings are usually private. In noting that many arbitration rules call for proceedings and awards to remain confidential, Rutledge wrote,

¹⁶⁴ National Arbitration Forum Code of Proc. Rule 4.

¹⁶⁵ Demaine & Hensler, 67 L. & CONTEMP. PROBS. 69.

¹⁶⁶ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 195.

¹⁶⁷ *Chamber Response* at 15.

¹⁶⁸ *Id.* at 15-16.

¹⁶⁹ *Id.* at 16.

¹⁷⁰ *Id.* at 17.

“By contrast, parties cannot guarantee that judicial proceedings will remain confidential, and the court’s opinion almost certainly will become public.”¹⁷¹

Finally, although the Chamber Institute funded and published Rutledge’s report calling it a “myth” that “arbitration proceedings are secret”¹⁷² and claiming that “parties to arbitration are not bound to any confidentiality obligation,”¹⁷³ the Institute’s own website contradicts these statements. It states: “The outcome [of arbitration] is made public only if the parties want it to be.”¹⁷⁴

D. The Rules of Arbitrations Protect Businesses More than Individuals.

The *Chamber Response* repeatedly attempts to deflect criticism of unfair practices in arbitration by arguing that consumers are protected by “arbitral rules.”¹⁷⁵ According to the *Chamber Response*, these rules entitle individuals to written opinions, restrict the share of costs that can be imposed on individuals, and guarantee that arbitration does not restrict available remedies.

But aside from SEC oversight of securities arbitrations, nothing requires any arbitration provider to establish rules to protect individuals. And many arbitration clauses include rules stacked against individuals.

Kansas University law professor Christopher R. Drahozal studied 34 arbitration clauses governing franchise contracts and found a trend of franchisors permitting themselves to pursue cases in court while foreclosing that option for franchisees. For example, some claims or remedies were excluded from arbitration in 32 of 34 cases (94 percent), “either categorically or at the option (almost always) of the franchisor.”¹⁷⁶ One clause granted the franchisor the right to choose arbitration or litigation for any claim,¹⁷⁷ and two permitted the franchisee to opt for court but only if the franchisee expressly waived “the right to a trial by jury and any and all claim(s) for punitive, multiple, exemplary and/or consequential damages.”¹⁷⁸

Demaine and Hensler’s study of 52 arbitration clauses is illuminating and worth quoting at length. Although the researchers found arbitration terms that “suggest *prima facie* that businesses are placing consumers on equal footing with themselves,” a “closer look at the clauses sampled” gave them several “grounds for concern”:¹⁷⁹

¹⁷¹ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 163.

¹⁷² *Chamber Response* at 3 (quoting *Arbitration Trap* at 7, 28).

¹⁷³ *Id.* at 15.

¹⁷⁴ Website of the Institute for Legal Reform, <http://www.instituteforlegalreform.com/issues/issuedetail.cfm?issue=ADR>.

¹⁷⁵ See *Chamber Response* at 3-4, 7, 15, 16, 22, 27.

¹⁷⁶ Christopher R. Drahozal, ‘Unfair’ Arbitration Clauses, 2001 U. ILL. L. REV. 695, 739 (2001).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 740.

¹⁷⁹ Demaine & Hensler 67 L. & CONTEMP. PROBS. at 72.

For example, if consumers challenge business practices, limitations on discovery will disadvantage them more than the business, as the businesses will hold most of the relevant information. If filing, administrative, and hearing fees add significantly to transactions costs, this burden will fall disproportionately on the (ordinarily less financially able) consumer, even when such fees are split equally. Class actions, which are almost always exclusively used by consumers against businesses, are often precluded. The nature of interim relief provided for is more suited to the business than the consumer. And the types of claims exempted from arbitration tend to be those brought by businesses against consumers. *In sum, the appearance of a level playing field between the parties may be deceptive.*¹⁸⁰

Moreover, this study provides little basis for believing that consumers are making informed decisions when they “agree” to arbitrate in predispute arbitration clauses. More than a third of the clauses obtained fail to inform consumers that they are waiving their right to litigate disputes in court. A fifth of the clauses do not explicitly state that the outcome of arbitration is final and binding. More than a third do not provide consumers with any information regarding the expenses they should expect to incur in an arbitration proceeding. Many clauses are silent on key aspects of arbitration, such as arbitrator qualifications and selection or the rules of discovery and evidence. And almost a third of clauses fail to state what organization will provide the arbitration. Moreover, to be fully informed of the features of the arbitration to which they are “agreeing,” consumers would need to review the applicable provider rules, a daunting task (made impossible when the arbitration provider is not named in the clause).¹⁸¹

Rutledge’s characterization of this discussion in the *Chamber Response* is perhaps just as illuminating as the discussion itself – not about arbitration, but about the business lobby’s selective use of the “empirical evidence.” Rutledge characterizes Demaine and Hensler’s article as follows:

While recognizing that further research was necessary, *they concluded that* “[f]ew of the fifty-two clauses reflect the type of egregious self dealing that has been identified in publicized cases. Most of the clauses appear in many respects to put the consumer on equal terms with the businesses that drafted them”¹⁸²

The *Response* neglects to discuss any portion of the next two paragraphs of Demaine and Hensler’s article, quoted above, which detail serious concerns about the fairness of arbitration clauses. And the *Response* ignores Demaine and Hensler’s last words – the conclusion of their conclusion, as it were:

The prevalence of arbitration rules that subtly or more strongly tilt the playing field in the business’s favor provides grounds for concern about how consumers

¹⁸⁰ *Id.* at 72-73 (emphasis added).

¹⁸¹ *Id.* at 73.

¹⁸² *Chamber Response* at 8 (emphasis added; ellipses in original). *See also* Testimony of Peter B. Rutledge before the Senate Judiciary Committee, Subcommittee on the Constitution, Dec. 12, 2007 (“This led the authors to conclude that ‘few of the 52 clauses reflect the type of egregious self-dealing that has been identified in publicized cases. Most of the clauses appear in many respects to put consumers on equal terms with the businesses that drafted them’”).

actually fare in arbitration. In summary, the evidence to date suggests that there is little reason to believe consumer arbitration is – in the conjecture of the [Supreme] Court – only another forum.¹⁸³

E. Arbitrators Are Not Required to Follow the Law, or Even Their Own Rules.

The *Chamber Response* asserts that Public Citizen’s complaint about limitations on individuals’ rights to appeal in arbitration “rests on the misplaced assumption that arbitrators somehow do not follow the governing law,”¹⁸⁴ and it labels a “myth” the statement that “while arbitration firms make the rules, they do not always follow them.”¹⁸⁵

1. Rutledge Voiced Public Citizen’s View in Prior Writings.

In a 2004 paper, Rutledge himself agreed with our view that arbitrators are *not* required to follow the law, stating, “Arbitrators do not have to follow precedent. Arbitrators also are not bound by the same rules of evidence and procedure as courts. Often there is no transcript, and arbitrators are not obligated to provide detailed findings of fact and conclusion of law in their awards.”¹⁸⁶

Rutledge proposes that the law should permit individuals to sue arbitrators – in real courts, no less – to provide “a greater incentive for arbitrators and arbitral institutions to ensure that they observe the governing law and rules.”¹⁸⁷ He explains that “the current regime of legal immunity protects arbitrators and arbitral institutions even when they have violated their own rules (and a surprising number of reported opinions raise this problem).”¹⁸⁸

2. Other Research Supports Public Citizen’s View as Well.

Other research also supports the view that arbitrators are not required to follow the law. For example, Pace University law professors Barbara Black and Jill Gross in 2001 studied arbitrators’ adherence to the law in securities cases. Although they speculated that arbitrators’ deviations from the law might at times help individuals, they left no doubt that that the practice is common:

Little attention has been paid to the issue of whether, as a result of *McMahon*, arbitrators, in fact, do apply the law to decide disputes. While the Supreme Court assumed that arbitrators could and did apply the law, there is now considerable evidence that they do not.

* * *

¹⁸³ Demaine & Hensler, 67 L. & CONTEMP. PROBS. at 74.

¹⁸⁴ *Chamber Response* at 29.

¹⁸⁵ *Id.* at 5 (quoting *Arbitration Trap* at 41).

¹⁸⁶ Rutledge, *Arbitral Immunity*, 39 GA. L. REV. at 167.

¹⁸⁷ Rutledge, *Market Solutions*, 26 PACE L. REV. at 125.

¹⁸⁸ *Id.* at 125.

Indeed, in recent years it has become evident that there are areas where the “law is clear,” but arbitrators are regularly arriving at results that appear contrary to the law.¹⁸⁹

F. Arbitration Limits the Remedies Available to Claimants.

The *Chamber Response* contends that “[a] variety of rules entitle claimants [in arbitration] to the same panoply of remedies available to them in civil litigation.”¹⁹⁰

But no rules, much less a “variety of rules,” require arbitration firms to provide particular types of remedies. The firms set their own rules. Moreover, even if an arbitration institution’s guidelines make available all remedies that an individual could receive in court, businesses often limit these remedies in the customized arbitration clauses they insert in contracts.

For example, the *Chamber Response* touts a rule in AAA’s protocol that says “[t]he arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.”¹⁹¹ But Drahozal’s study of 34 franchise arbitration clauses found that, although “virtually all” the clauses required arbitrations to be administered by AAA, 74 percent “sought to preclude recovery of punitive damages.”¹⁹²

Aside from prohibiting awards of punitive damages, some arbitration clauses limit compensatory awards. Demaine and Hensler found four clauses that “explicitly limit consumers’ substantive rights by placing limits on damages.”¹⁹³ One tour operator’s contract limited damages to just \$500.¹⁹⁴ Drahozal found that the franchise agreement of the Doctor’s Associates Inc., which licenses Subway sandwich shops, placed an \$80,000 cap on “total liability for Disputes.”¹⁹⁵

G. Many Arbitration Clauses Prohibit Class Actions, Which Harms Consumers by Blocking the Only Realistic Avenue for Bringing Many Small Claims.

The *Chamber Response* calls it a myth that “arbitration agreements typically prohibit class action lawsuits.”¹⁹⁶ Aside from this statement, however, the *Response* fails to include any argument actually contesting the allegation.

Instead the *Chamber Response* advances several irrelevant and unsupported arguments. It argues that most consumer and employment disputes “would not qualify for class

¹⁸⁹ Black & Gross, 23 CARDOZO L. REV. at 991.

¹⁹⁰ *Chamber Response* at 28.

¹⁹¹ *Id.*

¹⁹² Drahozal, 2001 U. ILL. L. REV. at 737.

¹⁹³ Demaine & Hensler 67 L. & CONTEMP. PROBS. at 71.

¹⁹⁴ *Id.* at 71.

¹⁹⁵ Drahozal, 2001 U. ILL. L. REV. at 738-39.

¹⁹⁶ *Chamber Response* at 5 (quoting *Arbitration Trap* at 3, 49).

treatment anyway.”¹⁹⁷ Setting aside the validity of this sweeping and unsupported assertion, it offers no help to individuals whose claims would in fact “qualify for class treatment.” The *Chamber Response* also advances a weak argument against the value of class actions, stating that “it is far from clear that class actions substantially benefit the individual consumer.”¹⁹⁸ And it offers that courts sometimes “regulate the enforceability of class action waivers,”¹⁹⁹ which we take as an oblique acknowledgement that some courts have invalidated class action bans as violating fundamental state public policy.²⁰⁰ None of these arguments has anything to do with the frequency of class action bans in arbitration provisions.

Moreover, Rutledge has indicated at least implicitly that there is a significant relationship between class action bans and arbitration provisions. He recently wrote that if the Arbitration Fairness Act became law, plaintiffs’ lawyers “would unquestionably find it far easier to bring certain class action lawsuits in court.”²⁰¹ Similarly, he told the *Legal Times* that eliminating pre-dispute binding mandatory arbitration would burden court dockets by smoothing the path for class actions.²⁰²

And in both *Whither* and the *Chamber Response*, Rutledge rightly hedges against the argument that class actions do not benefit individuals, which he advances only tepidly in the first place.²⁰³ He admits that the argument “presupposes that class actions serve as [sic] compensatory purpose” and that, “[t]o the extent class actions serve a deterrent purpose, this argument loses some force.”²⁰⁴

Finally, the *Chamber Response* argues that arbitrations involving consumer defendants are irrelevant to the dispute over class action bans because, “as defendants in any litigation, [these consumers] would not be entitled to class treatment anyway.”²⁰⁵ This argument is mistaken because many consumer defendants might have class-worthy claims against their creditors under, for example, state consumer-protection or federal lending and debt-collection laws. And it is possible that the consumers’ inability to bring those claims is precisely what leaves them with no option but to play defense, alone, in a forum firm picked by the creditor, with little chance of defeating meritless claims against them.

Moreover, given reports that NAF awards typically add legal fees of 15 percent to 20 percent of debts owed and that NAF processes many arbitrations with extreme haste,

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* See also *id.* at 25. The Chamber does not explain what it means by the phrase “substantially benefit.”

¹⁹⁹ *Chamber Response* at 25-26.

²⁰⁰ See, e.g., *Scott v. Cingular Wireless*, 160 Wash. 2d 843, 161 P.3d 1000 (2007).

²⁰¹ Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against The Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 268 (2008).

²⁰² *Arbitration Goes to the Mat*, BLOG OF THE LEGAL TIMES (April 2, 2008).

²⁰³ See, e.g., *Chamber Response* at 25 (arguing merely that “research on class actions calls . . . into question” whether class actions “necessarily are a better deal for the consumer”).

²⁰⁴ *Whither*, 6 GEO. J. L. PUB. POL’Y at 572 n.116. See also *Chamber Response* at 25 n.80.

²⁰⁵ *Chamber Response* at 25.

requiring little effort on the part of corporate claimants,²⁰⁶ consumers might have class claims against creditors or NAF for charging unjust or falsely inflated legal fees.

H. Arbitrations Harms Consumers by Limiting Access to Jury Trials.

The *Chamber Response* argues it is a “myth” that “the constitutional right to a jury trial . . . suffer[s]” under binding mandatory arbitration.²⁰⁷ This claim appears to hinge on the definition of “suffer,” for Rutledge has acknowledged that participants in arbitration lose the right to a jury trial. He wrote in Senate testimony that “as to the waiver of the right to a jury trial, it is certainly true that arbitration does not involve a jury.”²⁰⁸

Similar to its argument on class action bans, the *Chamber Response* answers not by disputing whether binding mandatory arbitration strips people of the right to jury trial, but instead by arguing that this right has little value. The *Response* cites the “reality of our civil justice system . . . that, even without arbitration, in most instances a jury never hears the case.”²⁰⁹

But the right to a jury trial can play a significant role even in cases that never go before a jury. This is of course because the threat of a jury trial can give individuals leverage against corporations in settlement discussions.

Moreover, actual arbitration provisions belie the *Chamber Response*’s disparagement of the significance of jury trials. Several arbitration agreements reviewed by Public Citizen deprive customers of the right to jury trial even if a future dispute should find its way into court. For example, a Verizon Wireless contract states, “Further, if for any reason a claim proceeds in court rather than through arbitration, we each waive any trial by jury.”²¹⁰ There would be little reason for companies to strip consumers of the right to jury trial if that right did not benefit consumers in litigation against the companies.

Finally, the Chamber Institute itself recently published a survey in which corporate lawyers were asked to list their top complaints about the judicial system, and five of the top 15 issues concerned juries.²¹¹

²⁰⁶ Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins?)*, BUSINESS WEEK, (June 5, 2008).

²⁰⁷ *Chamber Response* at 3 (quoting *Arbitration Trap* at 7, 38).

²⁰⁸ Testimony of Professor Peter B. Rutledge before the Senate Judiciary Committee, Subcommittee on the Constitution, Dec. 12, 2007.

²⁰⁹ *Chamber Response* at 24.

²¹⁰ Customer Agreement Terms & Conditions Your Verizon Wireless Customer Agreement (on file with Public Citizen).

²¹¹ U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LAWSUIT CLIMATE 2007: RATING THE STATES 10.

I. Arbitration Makes It Harder, Not Easier for Individuals to Find Counsel, and Some Evidence Suggests That Consumers Do Not Represent Themselves Adequately in Arbitration.

The *Chamber Response* argues that arbitration benefits individuals because, “By streamlining the dispute resolution process and reducing the costs associated with it, arbitration makes it easier for individuals to find an attorney willing to take their case or, alternatively, to represent themselves.”²¹² The data contradict these claims.

1. Consumers Subject to Binding Mandatory Arbitration Have More Difficulty Finding Counsel, Not Less.

The argument that arbitration makes it easier for individuals to obtain a lawyer flows largely from an unscientific survey of employment lawyers in an unpublished, 1995 Ph.D. dissertation by William M. Howard.²¹³ And that survey supports the opposite conclusion.

Howard’s dissertation reported that lawyers responding to his survey required average provable damages of \$61,000 to pursue an employment case in court. Myriad arbitration studies have cited Howard’s findings to argue that high court costs lock out people of modest means.²¹⁴ But these proponents – including Rutledge and the Chamber – invariably neglect to mention a key detail: Survey respondents reported requiring *higher* provable damages on average – \$65,000 – to take an arbitration case.²¹⁵ Additionally, the survey found that attorneys

- were more likely to require at least some minimum damages for arbitration cases (90 percent) than court cases (78 percent);

²¹² *Chamber Response* at 6.

²¹³ Howard, *Can Justice be Served*, at 150. Howard’s dissertation was later summarized in Howard, *Employment Discrimination*, 50 DISP. RESOL. J. 40.

²¹⁴ See Eisenberg & Hill, 58 DISP. RESOL. J. at 45 (“lower-paid employees seem to lack ready access to court, as other researchers have reported.”); *id.* n.15 (citing Howard, *Employment Discrimination*, 50 DISP. RESOL. J. at 45); Hill, 18 OHIO ST. J. DISP. RESOL. at 782-83 (“A recent survey by William Howard of plaintiff’s lawyers’ standards for accepting employment discrimination cases shows that it is probable that only highly-compensated employees pursue employment discrimination claims in court.”); *id.* n.21 (citing Howard 50 DISP. RESOL. J. at 43-44); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1574 (2005) (“Similarly, Maltby reports a 1995 study of plaintiffs’ lawyers that found that lawyers would not take a case unless the employee had at least \$60,000 in back pay damages.”); *id.* n.91 (citing Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 (2003) (citing Howard, *Employment Discrimination*, 50 DISP. RESOL. J. at 40, 44)); Maltby, *Employment Arbitration*, 38 U.S.F. L. REV. at 106-07 (“In order for a member of the private bar to accept a civil case against an employer, there must be provable economic damages (not including punitive damages) of at least \$75,000.”); *id.* n.1 (citing Howard, *Employment Discrimination*, 50 DISP. RESOL. J. at 40, 44); *id.* (“Howard’s data from 1995 showed a minimum level of provable damages of \$60,000. Lewis Maltby estimated this figure to have increased to at least \$75,000.”).

²¹⁵ Howard, *Can Justice be Served*, at 150. The median minimum-damages requirement was \$50,000 in each forum. *Id.*

- were more likely to require retainers for arbitration cases (90 percent) than court cases (77 percent), although the average retainer was higher for court;²¹⁶ and
- required slightly higher contingent fees for arbitration cases (36 percent) than for court cases (35 percent).²¹⁷

Howard's survey respondents also reported that they passed up 95 percent of potential cases,²¹⁸ a figure arbitration proponents have used to argue that court is too expensive for all but the highest dollar cases. But proponents fail to inform their audience that the most frequently cited reason for rejecting a claim, listed by 84 percent of respondents, was that there was "no provable case."²¹⁹ This problem of course prevents lawyers from taking cases regardless of whether they are headed to arbitration or court. Another factor equally relevant to arbitration and court, "Unable to pay retainer," was cited by 24 percent of respondents. "Inadequate damages" was cited by only 18 percent.²²⁰

Colvin offered the opposite view from those who argue arbitration makes it easier to obtain a lawyer for an arbitration case. He speculated that the lower average awards in arbitration could make the challenge more difficult than for court cases: "The differences in mean outcomes between arbitration and litigation discussed above are likely to have a major impact on the ability of employees to obtain representation by counsel."²²¹

2. *Although Little Empirical Data Exists, Some Evidence Suggests That Individuals Are Harmed by the Lack of Counsel in Arbitration.*

In his recent review of 836 AAA-administered employment arbitrations, Colvin found that employees with counsel enjoyed a success rate 65 percent higher than that of self-represented employees (22.6 percent to 13.7 percent). Average awards for employees with counsel were more than double those for self-represented employees (\$28,009 to \$13,222).²²² However, as Colvin suggests, it could be that the unrepresented plaintiffs could not secure counsel because they had weak cases, in which case their lower win rate is appropriate.²²³

But another of Colvin's comparisons gives stronger reason to believe that having counsel is critical. Colvin reports that represented employees won 23.4 percent of cases in which

²¹⁶ The average retainer was \$3,600 for court and \$3,000 for arbitration, while the medians were \$3,000 and \$2,000, respectively. *See id.*

²¹⁷ *Id.* at 150.

²¹⁸ *Id.* at 151.

²¹⁹ *Id.* at 152.

²²⁰ *Id.* at 150.

²²¹ Colvin, 11 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. at 432-3.

²²² *Id.* at 433.

²²³ Somewhat similarly, Elizabeth Hill found that pro se and represented employees had comparable win rates, but that the unrepresented claimants were less likely to receive monetary relief. *See Hill*, 18 OHIO ST. J. DISP. RESOL. at 820. Of course, it could be that the unrepresented claimants had no counsel precisely because they were likely only to win equitable rather than monetary relief and could have paid attorneys only through contingency fees.

the employer appeared for the first time before a particular arbitrator (*i.e.*, not a “repeat” arbitrator), while winning 17.3 percent in cases before repeat arbitrators. This difference was not statistically significant. Self-represented employees, however, won 16.3 percent of cases before non-repeat arbitrators and only 2.0 percent (1 win in 49 cases) before repeat arbitrators. Colvin found the latter win rate “strikingly low,” noting that it “raises particular concerns about the danger of repeat player bias for the more vulnerable employee who does not have representation by counsel.”²²⁴

J. Arbitration Reduces Individuals’ Ability to Obtain Relevant Evidence.

The *Chamber Response* labels as a “myth” the assertion that “parties have reduced discovery rights” in arbitration.²²⁵ But arbitration firms themselves *advertise* that they limit discovery – and the Chamber itself has touted this feature of arbitration.

The National Arbitration Forum has promised clients: “Little discovery. Very little, if any, discovery and pre-hearing maneuvering.”²²⁶ The Chamber Institute for Legal Reform’s website states: “Time consuming and expensive pre-trial discovery is avoided.”²²⁷

Indeed, the *Chamber Response* scarcely defends its assertion that arbitration does not limit discovery. The strongest claim it makes is that “arbitration clauses virtually never *preclude* discovery, and all the major arbitral associations entitle the parties to *some degree* of discovery.”²²⁸ Elsewhere, the *Chamber Response* cites a finding “that only about five percent [of arbitration clauses] affirmatively barred discovery.”²²⁹ The *Response* neglects to inform readers that those same researchers concluded that 54 percent of arbitration clauses discussed discovery or evidentiary standards, in most instances to “alert consumers that discovery may be limited and evidentiary standards may be relaxed by comparison to litigation.”²³⁰

K. Arbitration Is Often More Expensive than Court for Individuals.

There is little doubt that the costs of pursuing a case in arbitration (excluding attorney’s fees) are typically higher for individuals than those to pursue a case in court unless lenient arbitrators shift costs to the business party.

²²⁴ Colvin, 11 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. at 434.

²²⁵ *Chamber Response* at 4.

²²⁶ National Arbitration Forum document soliciting business, submitted under subpoena in *Toppings v. Meritech Mortgage Inc.*, 569 S.E.2d 149 (W. Va. 2002) (on file with Public Citizen). In addition, NAF director Roger Haydock has written that “discovery is limited” in arbitration. Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 765 (2000). See also Roger S. Haydock, *The Supreme Court Creates Real Civil Justice Reform*, 11/01 METRO. CORP. COUNS. 45 (2001) (“In arbitration . . . the discovery process is limited . . .”).

²²⁷ Website of the Institute for Legal Reform,

<http://www.instituteforlegalreform.com/issues/issuedetail.cfm?issue=ADR>.

²²⁸ *Chamber Response* at 4 (emphasis added).

²²⁹ *Id.* at 26.

²³⁰ Demaine & Hensler, 67 L. & CONTEMP. PROBS. 68.

At times, arbitration fees are dramatically higher than court costs and undoubtedly hinder individuals' ability to pursue cases. Indeed, arbitration firms sometimes use "loser pays" rules, which effectively threaten individuals with thousands of dollars of liability if their case is unsuccessful.²³¹

Public Citizen's 2007 report on NAF arbitrations showed that an individual seeking damages of \$50,000 to \$74,999 would face \$1,730 in initial costs to pursue a case. This compared with average costs of less than \$200 for three state courts (Maryland, Michigan and California) and \$350 in federal court. But initial filing fees were just the beginning. The cost of a participatory hearing session would be \$950, and requesting written findings on an award would run another \$1,500.²³²

These fees appear to serve two functions: discouraging individuals from pursuing cases and enriching arbitration firms. A National Arbitration Forum financial statement showed that it had income in 2006 of \$10.7 million on revenue of \$39.4 million – a 27 percent profit margin on top of the fees received by arbitrators.²³³

The *Chamber Response* attempts to minimize the cost issue by arguing that overall costs of arbitration – including attorney's fees – are lower "at the end of the day" compared to costs of proceeding in court.²³⁴ But advocates for arbitration argue that it enables individuals to cut legal fees by representing themselves – a perilous endeavor.²³⁵ Also, other costs of arbitration can be prohibitively high on their own. For example, Public Citizen examined two cases homeowners brought against a termite company. One case was adjudicated in court, the other in arbitration. Both homeowners received substantial awards (\$435,000 in court; \$431,000 in arbitration). But while court fees totaled only \$600, arbitration costs were \$42,000 – and half of that fee was assessed to the victorious homeowner.²³⁶

Second, the *Chamber Response* argues that arbitrators have the discretion to assess costs to the business party and that costs assessed to individuals are usually modest: "In contrast to civil litigation, arbitration also affords arbitrators greater discretion to shift fees and costs to the business litigant."²³⁷ Of course, the greatest difference in arbitrators' discretion is their freedom to shift fees to the individual consumer or employee in any case – something a court would do only as a sanction for severe misconduct.

²³¹ National Arbitration Forum document soliciting business, submitted under subpoena in *Toppings v. Meritech Mortgage Inc.*, 569 S.E.2d 149 (W. Va. 2002) ("Loser pays. Prevailing party may be awarded costs.") (on file with Public Citizen).

²³² *Arbitration Trap* at 36.

²³³ National Arbitration Forum, *Statements of Cash Flows Years ended Dec. 31, 2006 and 2005* (on file with Public Citizen).

²³⁴ *Chamber Response* at 22.

²³⁵ See, e.g., Colvin, 11 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. at 434. ("Among self-represented employees, the employees won only one out of forty-nine cases (a 2.0 percent win rate) where there was a repeat employer-arbitrator pairing.")

²³⁶ Laura MacCleery, Testimony before the House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Oct. 25, 2007.

²³⁷ *Chamber Response* at 23.

The *Response* takes issue with Public Citizen’s report of the National Arbitration Forum shifting costs to individuals by arguing “the actual research suggests that, generally, when arbitrators shift fees, they generally do so for the benefit of the individual.”²³⁸ But the “actual research” cited in the *Response* consists of one study that reviewed employment cases administered by the American Arbitration Association.²³⁹ The findings of that study would provide little reassurance to someone forced to arbitrate under a different firm. A system in which the rules require individuals to pay steep fees but grant arbitrators discretion to shift or relax the fees – and also grant arbitrators discretion to saddle individuals with even higher costs – can hardly be viewed as better than court, which does not require steep fees in the first place and does not threaten ordinary individuals with the possibility of paying for their opponents’ corporate lawyers.

Third, the *Chamber Response* cites the possibility of protection from courts. “Section 2 of the Federal Arbitration Act, as construed by the Supreme Court, helps to ensure that a particular arbitration clause cannot impose costs that place arbitration beyond an individual’s ability to pay.”²⁴⁰ But the Supreme Court has held that individuals bear the burden of proving this inability to pay in court – a result that even *Whither* deems “debatable”²⁴¹ and deems a potential issue for reform.²⁴² It is unclear how individuals who cannot afford arbitration will find the money to prove in court that they cannot afford arbitration.

Whither also provides a telling acknowledgement of the significance in administrative fees in arbitration cases. It states: “Additionally, depending on the arbitral forum, fees may depend on the amount in controversy (unlike American litigation, which does not vary fees with amount demanded), giving lawyers an incentive to claim lower damages in arbitration relative to litigation.”²⁴³ If fees were truly insubstantial in relation to the overall costs of a case, they would not influence the amount a claimant requests – particularly in a system such as NAF’s, which specifies that arbitrators may not award more than the request.²⁴⁴

L. Banning Pre-Dispute Binding Mandatory Arbitration Would Not End All Arbitrations.

Finally, *Whither* argues that banning pre-dispute binding mandatory arbitration would effectively end the use of arbitration as a method for resolving disputes because one party will invariably choose to litigate in court after a dispute arises. In the employment

²³⁸ *Id.*

²³⁹ *Id.* (citing Hill, 18 OHIO ST. J. DISP. RESOL. at 777).

²⁴⁰ *Id.* at 24.

²⁴¹ *Whither*, 6 GEO. J. L. PUB. POL’Y at 569; *see also id.* (“*Green Tree*’s holding on that point has been the subject of some academic criticism.”).

²⁴² *Id.* at 590.

²⁴³ *Id.* at 560.

²⁴⁴ National Arbitration Forum Code of Proc. Rule 37B (“An Award shall not exceed the money or relief requested in a Claim or amended Claim and any amount awarded under Rule 37C.”); Rule 37C (providing for the award of fees and costs).

context, for example, employees with higher-stakes claims would choose court, where there are “higher mean recoveries.”²⁴⁵ And in lower stakes cases, if one accepts the argument that pursuing a case in court is more expensive, then the “employer may be *less* likely to agree to arbitration precisely because it knows that its holdout will effectively prevent the employee from pursuing her claim.”²⁴⁶

The claim that post-dispute arbitration is not viable is severely undercut by surveys touted in the *Chamber Papers* themselves. The *Papers* cite three surveys of lawyers or consumers that report favorable attitudes toward voluntary, post-dispute arbitration, belying the Chamber’s claim that no one would choose arbitration if offered voluntarily.

To the contrary, making arbitration voluntary is the only way to ensure that arbitration providers offer something that individuals *would* choose.

²⁴⁵ *Id.* at 586.

²⁴⁶ *Id.* (emphasis in original).

APPENDIX

**A STUDY IN CONTRADICTION: A REVIEW OF
PROFESSOR RUTLEDGE’S STATEMENTS ON ARBITRATION**

On Whether Arbitrators Have Financial Incentives to Favor Businesses (Part I)

Rutledge	Rutledge
<p>It is a “myth” that “[a]rbitrators have financial incentives to favor firms that hire them.”</p> <p style="text-align: right;">– Peter B. Rutledge, <i>Chamber Response</i> at 3.</p>	<p>“[Arbitrators] may also develop reputations with particular types of parties. For example, an arbitrator may be perceived as ‘industry friendly’ in securities law disputes or being ‘contractor friendly’ in construction disputes. Through these activities designed to enhance their reputations, arbitrators generate business in the form of fees and, hopefully, future appointments.”</p> <p style="text-align: right;">– Peter B. Rutledge, <i>Toward a Contractual Approach for Arbitral Immunity</i>, 39 GA. L. REV. 151, 165 (2004).</p>

On Whether Arbitrators Have Financial Incentives to Favor Businesses (Part II)

Rutledge	Rutledge
<p>“Public Citizen study ignores the academic research finding that, to the extent that a repeat player phenomenon exists, it has nothing to do with the arbitrator’s incentives at all and instead is most likely attributable to a business’s settlement behavior.”</p> <p style="text-align: right;">– Peter B. Rutledge, <i>Chamber Response</i> at 21.</p>	<p>Arbitrators “who may seek to develop reputations for being friendly to particular parties or particular industries may actually have incentives that cut against independence.”</p> <p style="text-align: right;">– Peter B. Rutledge, <i>Toward a Contractual Approach for Arbitral Immunity</i>, 39 GA. L. REV. 151, 194 (2004).</p>

On Whether Arbitration Provides Sufficient Appeal Provisions (Part I)

Rutledge	Rutledge
<p>“Parties to arbitration do have the right to appeal an award. A court may vacate (or refuse to confirm the award) on various grounds specified in Section 10 of the FAA along with various nonstatutory grounds, including manifest disregard of the law.”</p> <p>– Peter B. Rutledge, <i>Chamber Response</i> at 29.</p>	<p>“[T]he grounds for vacatur are themselves extremely narrow, and the opportunity for judicial review of the award’s substance virtually non-existent (apart from the toothless ‘manifest disregard of the law’ doctrine).”</p> <p>– Peter B. Rutledge, <i>Market Solutions to Market Problems: Re-examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration</i>, 26 PACE L. REV. 113, 131-32 (2005).</p>

On Whether Arbitration Provides Sufficient Appeal Provisions (Part II)

Rutledge	Rutledge
<p>“To the extent those [protections] are inadequate, judicial review of the award fills the gap. Courts can vacate awards (and have done so) when, among other things, there is evidence that the arbitrators were not impartial.”</p> <p>– Peter B. Rutledge, <i>Chamber Response</i> at 16.</p>	<p>“The argument that aggrieved parties can always seek vacatur of the award is an inadequate response. Vacatur does not provide the parties the return of costs that they bore as a result of the flawed institutional arbitration, nor does it compensate the parties for the lost time prior to the entry of an enforceable award.”</p> <p>– Peter B. Rutledge, <i>Toward a Contractual Approach for Arbitral Immunity</i>, 39 GA. L. REV. 151, 180 (2004).</p>

On Whether Arbitration Is Confidential

Rutledge	Rutledge
<p>“Parties to arbitration are not bound to any confidentiality obligation.”</p> <p>– Peter B. Rutledge, <i>Chamber Response</i> at 15.</p>	<p>“Many arbitration rules and some arbitration laws specifically provide for the confidentiality of proceedings and, in addition, the confidentiality of any award.”</p> <p>– Peter B. Rutledge, <i>Toward a Contractual Approach for Arbitral Immunity</i>, 39 GA. L. REV. 151, 163 (2004).</p>

On Whether Court Is Less Confidential than Arbitration

Rutledge	Rutledge
<p>“Public Citizen ignores the fact that many of the indicia of secrecy about which it complains [in arbitration] can likewise occur in our civil justice system. For example, information may be subject to a protective order, prohibiting its public dissemination. Certain judicial proceedings may be nonpublic, either by nature of the court’s jurisdiction or based on the judge’s decision in a given case. Judges may not always give reasons for their rulings, instead entering a minute order or ruling from the bench. Juries likewise may render verdicts without giving reasons for their decision, particularly when they are using a general verdict form. Thus, the confidentiality about which Public Citizen complains is not unique to arbitration.”</p> <p>– Peter B. Rutledge, <i>Chamber Response</i> at 15.</p>	<p>“By contrast [to arbitration], parties cannot guarantee that judicial proceedings will remain confidential, and the court’s opinion almost certainly will become public.”</p> <p>– Peter B. Rutledge, <i>Toward a Contractual Approach for Arbitral Immunity</i>, 39 GA. L. REV. 151, 163 (2004).</p>

On Whether Individuals Can Reasonably Research the Background of Arbitrators and Arbitration Firms

Rutledge	Rutledge
<p>“To the extent individuals may not know the details of the particular candidates for nomination as arbitrator, they or their lawyers can investigate (just as they do with a judge).”</p> <p>– Peter B. Rutledge, <i>Chamber Response</i> at 16</p>	<p>“Acquiring information about arbitrators is costly, and parties may not have substantial resources to invest in learning about the reputations of arbitrators or arbitral institutions. Moreover, arbitrations often take place under the guise of confidentiality, so even assuming that a party were willing to undertake the investment, the party may be stymied in its efforts to learn much about an arbitrator’s or an institution’s reputation.”</p> <p>– Peter B. Rutledge, <i>Toward a Contractual Approach for Arbitral Immunity</i>, 39 GA. L. REV. 151, 195 (2004).</p>

On Whether Arbitrators Adhere to the Law and Governing Principles

Rutledge	Rutledge
<p>“[Public Citizen’s] complaint rests on the misplaced assumption that arbitrators somehow do not follow the governing law.”</p> <p>– Peter B. Rutledge, <i>Chamber Response</i> at 29</p>	<p>“Arbitrators do not have to follow precedent. Arbitrators are not bound by the same rules of evidence and procedure as courts. Often there is no transcript, and arbitrators are not obligated to provide detailed findings of fact and conclusion of law in their awards.”</p> <p>– Peter B. Rutledge, <i>Toward a Contractual Approach for Arbitral Immunity</i>, 39 GA. L. REV. 151, 167 (2004).</p> <p>“The current regime of legal immunity protects arbitrators and arbitral institutions even when they have violated their own rules (and a surprising number of reported opinions raise this problem).”</p> <p>– Peter B. Rutledge, <i>Market Solutions to Market Problems: Re-examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration</i>, 26 PACE L. REV. 113,125 (2005)</p>

On the Importance of Class Action Bans in Pre-Dispute Arbitration Clauses

Rutledge	Rutledge
<p>“Requirements to qualify for class certification in federal litigation are demanding, so many disputes between individuals and companies (such as an employment discrimination suit) likely would not qualify for class treatment anyway.”</p> <p>– Peter B. Rutledge, <i>Chamber Response</i> at 5.</p>	<p>“Lastly, [Rutledge] noted, the prohibition of pre-dispute arbitration agreements would lead to a greater burden on judges’ dockets by smoothing the path for class actions.”</p> <p>– Jeff Horwitz, <i>Arbitration Goes to the Mat</i>, BLOG OF THE LEGAL TIMES (April 2, 2008).</p>