



# **Arbitration – A Good Deal for Consumers**

## **A Response to Public Citizen**

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## INTRODUCTION AND EXECUTIVE SUMMARY

In 1925, Congress enacted the Federal Arbitration Act (FAA) to counteract the “longstanding judicial hostility to arbitration agreements.”<sup>1</sup> Since that time, the Act has served as the keystone for a system of alternative dispute resolution in the United States. As court dockets have exploded and the costs of litigation have risen, alternative dispute resolution techniques, including arbitration, have served as an essential release valve for the country’s overburdened civil justice system. It has provided a cheaper, faster, more effective forum for a variety of disputes, a reality that the Supreme Court routinely has recognized. Consequently, companies in many industries have to come rely on arbitration as an important method of resolving disputes with their business partners, their employees, and their customers.

Despite this success, Congress is contemplating the most radical overhaul of the FAA since its enactment 83 years ago. Among the proposals, the Arbitration Fairness Act (S. 1782/H.R. 3010) would retroactively invalidate arbitration clauses in all employment, consumer, and franchise contracts, among others. Not only would this bill effectively rewrite millions of contracts, it would eviscerate the substantial gains achieved through the emergence of a robust system of arbitration in this country.

The bill has spawned a firestorm of activity from advocacy groups. This activity includes the release of reports purporting to demonstrate conclusively the evils of arbitration. As one example, the group Public Citizen recently released a report entitled “The Arbitration Trap: How Credit Card Companies Ensnare Consumers (September 2007)” (hereinafter referred to as “Report” or “Public Citizen Report”). At bottom, the Report claims to show how arbitration is “stacked against consumers” and is “rife with problems for consumers.”

The Public Citizen Report is not a dull read. In addition to a number of sensational anecdotes, the report claims to analyze data comprising tens of thousands of arbitrations involving credit card disputes in California and to demonstrate that consumers fared poorly in these cases. To right the wrongs detailed in the Report, Public Citizen urges Congress to adopt the Arbitration Fairness Act.

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<sup>1</sup> *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 21 (1991).

There is only one little problem with the Public Citizen Report – it is wrong, both on the facts and in its ultimate conclusions. Once one separates the Report’s rhetoric from its substance, four main problems emerge:

- The Public Citizen Report largely ignores existing research on arbitration which shows that arbitration generally provides results that are superior, or at least comparable, to the results that individuals could expect from the civil justice system;
- The Public Citizen Report relies on such an unusual data set—consumer debt collection actions—that it does not permit any meaningful lessons to be drawn about arbitration generally;
- The Public Citizen Report simply ignores the fact that, if arbitration of these debt collection claims were unavailable, the individual debtors would be far worse off in the civil justice system;
- Existing research does not support or in some cases flatly contradicts the more generalized attacks on arbitration contained in the Public Citizen Report.

This white paper provides lawmakers and their staffs with a counterpoint to the Public Citizen Report and sets forth the case, grounded in empirical research, for why arbitration is a good deal for consumers. The table on the following pages summarizes the differences between the myths about arbitration spun in the Public Citizen Report and the realities.

## Myths in the Public Citizen Report vs. Realities of Arbitration

Myths in the Public Citizen Report	Realities of Arbitration
<p><b>Myth:</b> “Arbitration proceedings are secret.” (Report at 7, 28)</p>	<p><b>Reality:</b> The complaints about secrecy are overblown. The parties control the confidentiality of the proceedings, and can choose to agree to confidentiality if they wish. Various mechanisms allow for public oversight of the arbitral process. Finally, confidential proceedings avoid the “scorched earth” psychology of civil litigation and spare individuals the public disclosure of embarrassing details (pp 15-17, <i>infra</i>).</p>
<p><b>Myth:</b> “Arbitrators have financial incentives to favor firms that hire them.” (Report at 7-8, 29)</p>	<p><b>Reality:</b> The empirical record on the “repeat player” phenomenon is mixed. Most researchers conclude that it is most likely due to companies’ settlement decisions rather than arbitrator bias. (pp 19-21, <i>infra</i>).</p>
<p><b>Myth:</b> “Arbitration often costs consumers more than court.” (Report at 8, 34)</p>	<p><b>Reality:</b> Taking attorneys’ fees into account, the overall costs of arbitration can be lower than those in litigation. Moreover, arbitral rules ensure that individual consumers bear only a limited share of the dispute resolution costs. Where an arbitration system truly forces the consumer to bear an unwieldy share of the costs, courts can refuse to enforce the agreement. (pp 22-24, <i>infra</i>)</p>
<p><b>Myth:</b> Through arbitration “the constitutional right to a jury trial ... suffer[s].” (Report at 7, 38)</p>	<p><b>Reality:</b> Most civil litigants never see a jury. The vast majority of cases are dismissed, resolved at summary judgment, or settled. (p 24, <i>infra</i>)</p>

**Myths in the Public Citizen Report vs. Realities of Arbitration (cont'd)**

<p><b>Myth:</b> “Parties have reduced discovery rights [in arbitration].” (Report at 9, 38)</p>	<p><b>Reality:</b> Existing research suggests that arbitration clauses virtually never preclude discovery, and all the major arbitral associations entitle the parties to some degree of discovery. Discovery tailored to the exigencies of the case helps to keep costs down. For individual plaintiffs, this improves access to justice; for individual defendants, this reduces their out-of-pocket expenses. (pp 26-27, <i>infra</i>).</p>
<p><b>Myth:</b> “[T]he arbitration appeals process is limited, confusing and extremely difficult.” (Report at 8, 39)</p>	<p><b>Reality:</b> Limited appeals benefit individuals. Individuals as a whole generally achieve comparable or superior results in arbitration compared to litigation. The finality of the award, coupled with the superior speed of arbitration, enables individuals to realize those results more quickly. (pp 29-30, <i>infra</i>)</p>
<p><b>Myth:</b> “Only the rare appeal succeeds with high costs for consumers.” (Report at 40).</p>	<p><b>Reality:</b> Limited appeals keep consumer costs down. As already noted, individuals achieve better results in arbitration than litigation, so the limited opportunity to appeal means that the individual must expend fewer resources defending a favorable result. By contrast, if cases were heard in small claims court, the losing party could request a trial <i>de novo</i>, driving up the individual’s legal expenses. (pp 29-30, <i>infra</i>)</p>

## Myths in the Public Citizen Report vs. Realities of Arbitration (cont'd)

<p><b>Myth:</b> “While arbitration firms make the rules, they do not always follow them.” (Report at 41)</p>	<p><b>Reality:</b> Most participants in arbitration, individuals and lawyers alike, have expressed satisfaction with the arbitral process. According to a 2003 survey of trial lawyers conducted by the American Bar Association, 75% found that the outcomes in arbitration were comparable with or superior to the outcomes in litigation. A 2005 study of participants in consumer lending cases by Ernst &amp; Young found that 69% of consumers were either “satisfied” or “very satisfied” with the arbitration process. Similarly, a 1999 study of individuals participating in securities arbitration found that 93.49% felt that it was fair and handled without bias. (p 29, <i>infra</i>)</p>
<p><b>Myth:</b> “Arbitration agreements typically prohibit class action lawsuits.” (Report at 49, 3)</p>	<p><b>Reality:</b> Many claims referred to arbitration—and the most common types of disputes that consumers and employees are likely to have—would not qualify for class treatment anyway. Even where they would, it is far from clear that class actions substantially benefit the individual consumer. (pp 25-26, <i>infra</i>)</p>

## I. EXISTING RESEARCH ON CONSUMER ARBITRATION

The Public Citizen Report opens with the bold assertion that “data show [predispute arbitration] is stacked against the consumer.”<sup>2</sup> Curiously, the report ignores almost all of the existing literature bearing on this question. This section of the white paper briefly summarizes that literature before turning to the “data” actually analyzed in the Public Citizen Report.

Empirical research on arbitration is growing. The most extensive research currently available concerns employment arbitration and, to a lesser extent, securities arbitration. In general, that research shows several things:

- Arbitration improves access to justice. Civil litigation is costly, burdensome, time-consuming and slow.<sup>3</sup> Consequently, plaintiffs’ attorneys turn away most cases unless a case offers a high rate of success and sufficiently high potential damages.<sup>4</sup> 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.<sup>5</sup>
- Individuals generally achieve superior results in arbitration than litigation.<sup>6</sup> Outcomes can be measured in various ways – such as individual win rates vs. business win rates; win rates in arbitration vs. litigation; and recovery in arbitration vs. litigation. Whatever the measure, most research suggests that individuals as a whole achieve superior results in arbitration than litigation.<sup>7</sup>
- Arbitration delivers results at a far faster pace than litigation.<sup>8</sup> On this point, the empirical research is unequivocal. By any measure, arbitration resolves cases far faster than the civil litigation system. This is unsurprising: whereas the civil litigation system requires

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<sup>2</sup> Report at 13.

<sup>3</sup> Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *Stan. L. Rev.* 1557, 1569 (2005).

<sup>4</sup> See William M. Howard, *Arbitrating Claims of Employment Discrimination*, *Dis. Resol. J.* Oct.-Dec. 1995, at 40.

<sup>5</sup> Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 *Colum. Hum. Rts. L. Rev.* 29, 47 (1998).

<sup>6</sup> See, e.g., Delikat & Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate their Rights in Arbitration than in Litigation?*, ABA Litigation Section of Conflict Management, Vol. 6, Issue 3 (Winter 2003).

<sup>7</sup> For a summary of the literature, see Rutledge, *Whither Arbitration?*, 6 *Georgetown J. L. & Pub. Pol’y.* \_\_ (forthcoming 2008).

<sup>8</sup> See, e.g., Maltby, 30 *Colum. Human Rts. L. Rev.* 29.

litigants to “take a number” on already crowded court dockets, arbitration puts disputants at the front of the line. It provides them a decisionmaker or panel of decisionmakers dedicated to their case

- The costs of arbitration (including attorneys’ fees) are often lower than the equivalent costs of litigation.<sup>9</sup> Critics of arbitration often bemoan the forum fees and arbitrator fees associated with arbitration. However, as discussed in greater detail later in this report, this criticism overlooks two important facts. First, most arbitral schemes (unlike civil litigation systems) limit the individual’s share of those fees, and arbitrators often reallocate the individual’s share to the company.<sup>10</sup> Second, attorneys’ fees are often lower in arbitration than litigation; when those fees are included in the calculus, the aggregate costs of arbitration can in fact be lower than the analogous costs in litigation.

Admittedly, much of the foregoing empirical research concerns employment arbitration and securities arbitration rather than consumer disputes. Yet these well researched forms of arbitration share the same essential characteristics with consumer arbitration: they involve disputes between an individual, who rarely litigates, and a company, which regularly litigates, and the company has requested assent to an arbitration clause as a condition of some underlying transaction (whether employment, opening a brokerage account or something else). The success of arbitration in the employment and securities contexts undercuts an essential premise of the Public Citizen Report’s complaint about arbitration – that arbitration systematically favors repeat-player companies over single-player individuals.

While the literature governing consumer arbitration is less extensive, the available research generally confirms the findings summarized above:

- In 2004, the California Dispute Resolution Institute, part of the University of San Francisco’s Leo T. McCarthy Center for Public Service and the Common Good, reviewed data from six arbitration providers regarding consumer arbitration in California (the same data source for Public Citizen’s California data).<sup>11</sup> While the Institute noted that data limitations prevented broad conclusions, it did find

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<sup>9</sup> See Sherwyn, 57 Stan. L. Rev. 1557; Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the AAA*, 18 Ohio St. J. on Disp. Res. 777 (2003).

<sup>10</sup> See Section II.3, *infra*.

<sup>11</sup> See 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). It should be noted that, while the two reports tapped the same data source, they analyzed different slices of the data. The Public Citizen Report analyzed data for a single institution (the NAF) for a period of slightly more than four years. The California Dispute Resolution Institute analyzed data for six institutions (including the NAF) for a period of slightly more than a year (n = 2175 cases).

that arbitration produced positive results for consumers. Of the cases surveyed by the Institute, consumers prevailed slightly over 70% of the time. Moreover, in contrast to the often sluggish pace of civil litigation, these results came quickly: the average time from filing to disposition was approximately 100 days.

- Also in 2004, Linda Demaine of the Rand Institute and Deborah Hensler of Stanford Law School published a review of arbitration clauses in consumer contracts.<sup>12</sup> The authors surveyed 161 companies in over 30 different industry groups. Approximately one-third of the companies surveyed utilized arbitration clauses, with the frequency varying across industry.<sup>13</sup> The authors were particularly interested in testing various claims that arbitration clauses routinely contained terms favoring the business and harming the consumer (such as inconvenient venues, remedies limitations, discovery limitations, etc.). 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 ....”<sup>14</sup>
- In 2006, the National Arbitration Forum published the results of a study comparing outcomes in arbitration and litigation, specifically focused on consumer disputes.<sup>15</sup> The study found that, when consumers initiated the case, they prevailed more often in arbitration than litigation; when business initiated the case, their win rate in arbitration was almost identical to that in litigation. For consumers who prevailed, arbitration delivered those results far more rapidly than litigation. According to the NAF data, cases reached final disposition in approximately 4-5 months; by comparison, the median duration of litigation was 3-4 times longer.

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<sup>12</sup> Linda J. Demaine and Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 L & Contemp. Probs. 55 (Winter/Spring 2004).

<sup>13</sup> Arbitration clauses appeared most frequently in contracts used by the financial services industry (69.2%) and least frequently in contracts used by the food and entertainment industry (0%). *Id.* at 63-64.

<sup>14</sup> *Id.* at 72.

<sup>15</sup> Fellows, *The Same Results as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, Metro. Corp. Counsel 32 (July 2006).

- In 2007, the American Arbitration Association published a summary of consumer arbitration cases that it administers.<sup>16</sup> According to the AAA, approximately 60% of its consumer arbitration cases are settled by mutual agreement.<sup>17</sup> Based on an analysis of 310 awards in consumer arbitration cases rendered between January and August 2007, consumers prevailed approximately half the time when they were proceeding as claimants. A case reached final disposition in approximately 4-6 months (depending on whether the case required an in-person hearing).

In sum, the existing research on arbitration between companies and individuals – in several settings, including consumer arbitration – suggests that arbitration generally provides a fair system producing positive results for individuals. The Public Citizen Report ignores this entire corpus of literature almost entirely and thereby creates the misimpression that its own “data” provide unimpeachable evidence about arbitration’s “flaws.” The next section of this white paper considers the “data” used in the Public Citizen Report.

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<sup>16</sup> See American Arbitration Association, *Analysis of the American Arbitration Association’s Consumer Arbitration Caseload*, available at [www.adr.org/si.asp?id-5027](http://www.adr.org/si.asp?id-5027) (last visited Dec. 30, 2007).

<sup>17</sup> This win-rate is comparable to win rates in court for plaintiffs alleging a variety of torts. See Cohen *et al.*, *Civil Trial Cases and Verdicts in Large Counties, 2001*, Bureau of Justice Statistics Bulletin 4 (Apr. 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctevlc01.pdf> (last visited Jan. 20, 2008) (noting that plaintiffs won 51.6% of tort cases that reached trial in 2001). See also *id.* at 9 (noting that this win-rate was stable over time).

## II. THE “DATA” IN THE PUBLIC CITIZEN REPORT

The data sets analyzed in the Public Citizen Report ultimately boil down to two sources. One source concerns statistics about approximately 20,000 NAF arbitrations involving First USA Bank, disclosed in the course of litigation in Alabama (“the Alabama data”). The second source concerns statistics about approximately 34,000 NAF arbitrations in California, nearly half of which involved MBNA Bank (“the California data”).

At the most elementary level, these two data sets supply a poor basis upon which to draw any lessons about arbitration generally. Both the Alabama data and the California data involve just one arbitration institution, the National Arbitration Forum. Of course, a much wider array of associations, such as the American Arbitration Association and JAMS, also administer arbitrations, and nothing in the Alabama data or California data calls their work into doubt.<sup>18</sup> Furthermore, both data sets only concern a single sector of the economy (consumer credit) and, largely, only two companies within that sector. Here too, it must be noted that a wider array of companies and industries employ arbitration agreements, and nothing in the two data sets calls arbitration under those agreements into doubt.<sup>19</sup>

Even if Public Citizen could somehow overcome the unrepresentative nature of its “data,” a deeper analysis reveals further flaws. Specifically, the cases analyzed in the two data sets are almost entirely debt-collection actions, that is cases in which the credit card holder fails to pay his or her bill. The nature of these actions helps to explain at least two of the findings that Public Citizen stresses: (1) the bank’s win-rates and (2) the speed of resolution. The first two subsections explore these issues. Moreover, the Report ignores the deleterious consequences if arbitration of these cases were unavailable, as the Arbitration Fairness Act proposes. The third subsection explores this issue. Finally, subsection 4 addresses the various “anecdotes” that supplement Public Citizen’s “data.”

1. The win rates described in the Public Citizen Report simply reflect the realities of debt collection actions and do not differ from statistics regarding comparable actions in civil litigation.

The Public Citizen Report makes much about the frequency with which banks prevail in these types of cases. Yet most debt collection actions do not

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<sup>18</sup> For example, according to the American Arbitration Association, it administers approximately 1500 consumer cases annually. See [www.adr.org/si.asp?id=5027](http://www.adr.org/si.asp?id=5027) (last visited Dec. 30, 2007).

<sup>19</sup> See Linda J. Demaine and Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 L & Contemp. Probs. 55, 63-64 (Winter/Spring 2004).

present a great deal of controversy. Instead, they usually boil down to three facts - (1) did the debtor open the account, (2) did the debtor incur the charge, and (3) did the debtor make the payment? That is ordinarily the end of the story: If those three facts are uncontested, there is very little to dispute. Therefore, it is unsurprising that banks enjoy high win rates in these sorts of actions analyzed in the Public Citizen Report.<sup>20</sup>

Comparable data on debt collection actions in small claims court buttress this point. Studies of debt collection actions in major cities reveals that the lender typically wins between 96% and 99% of the time, right in line with the lender win-rate data cited in the Public Citizen Report.<sup>21</sup> Thus, the high win-rates for banks in the two data sets analyzed in the Public Citizen Report fail to demonstrate that arbitration systematically favors companies over individuals. Rather, it simply confirms the commonsense idea that most debt collection actions are uncontroverted.

## 2. Public Citizen's complaints about arbitrators dispensing mass-produced awards rest on a fundamental misreading of the California data.

The Public Citizen Report also makes much of the fact that the debt-collection arbitrations were resolved so quickly. The report notes that on some days one NAF arbitrator entered between forty and sixty awards.<sup>22</sup>

This argument mischaracterizes the California data. Those data include a field for the date of the award. The Public Citizen Report treats this listed date as the day when the arbitrator actually rendered an award. This is incorrect. Rather,

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<sup>20</sup> These facts also help put into context Public Citizen's charge that "a small, busy cadre of 28 arbitrators handled nearly 9 out of every 10 NAF cases ... [and] ruled for businesses 95 percent of the time" (Report at 2). Moreover, NAF assigns arbitrators to cases based upon subject-matter specific subpanels. Since most of the cases analyzed by Public Citizen concerned a single industry (consumer debt collection), it is unsurprising that arbitrators with an expertise in that area are more likely to hear those cases.

<sup>21</sup> See Sterling & Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 Denver U. L. Rev. 357 (1990). For a more dated study showing comparable results, see Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* (1974). More recently, a 1994 study of the National Center for the Study of State Courts reported similarly high win-rates for business in small claims court than the win-rates for arbitration described by Public Citizen. See John A. Goerd, *Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions*, A Report of the National Center for State Courts 53 (1992), available at [http://www.ncsconline.org/WC/Publications/KIS\\_SmaClaUrban.pdf](http://www.ncsconline.org/WC/Publications/KIS_SmaClaUrban.pdf) (last visited Jan. 20, 2008). While the NCSC study considered a wider array of claims (not simply debt collection actions), the high win rates for businesses in these cases cast further doubt on Public Citizen's argument that arbitration systematically favors companies.

<sup>22</sup> Report at 17.

the California data reflect the date that the award was entered into NAF's system. An arbitrator may render a series of awards over several days, yet NAF enters those awards into its system in a single day.<sup>23</sup> Thus, Public Citizen is simply incorrect when it suggests that arbitrators are unreflectively reading the pleadings, deliberating upon and deciding cases.

Moreover, given the relatively uncontroversial nature of these disputes, it is perhaps unsurprising that an arbitrator could resolve them rapidly. Indeed, comparable data on debt collection actions in small claims court reveals that, generally, more than 90% result in default judgments – that is, the debtor does not appear in court to contest the debt, and the case is resolved in minutes.<sup>24</sup> Thus, as with its complaint about win rates, the Public Citizen Report distorts the data by failing to interpret that data in light of comparable evidence from the court system.

3. The Public Citizen Report simply ignores what would happen to the individuals described in the California and Alabama data if arbitration of debt collection actions were unavailable.

Apart from defects in the data, the Public Citizen Report begs the question whether the defendant-debtors in these collection actions would be any better off in a world without arbitration. In several respects, they would not.

First, some of the procedural protections that, according to the Public Citizen Report, are lacking in arbitration would also be unavailable in civil litigation. For example, the Public Citizen Report criticizes arbitration agreements on the ground that they “typically prohibit class action lawsuits.”<sup>25</sup> Assuming that were true (a topic discussed later on), that procedural device would not benefit the individuals in the cases analyzed in the Alabama data or the California data. In those instances the individuals are almost always defendants who would not be entitled to proceed as a class.

Second, civil litigation would increase the financial burden on the individual. Recall that in debt collection actions the individual will be the defendant. Thus, he or she cannot benefit from the contingency fee arrangements available to plaintiffs whereby the attorney covers the costs of legal representation against the prospect of

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<sup>23</sup> The NAF website provides information on their data collection methods. See <http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3> (“Some summary reports suggest that FORUM arbitrators decide numerous cases on the same day, but this is an artifact of how the awards are administratively processed. The date of an arbitration award indicates the date it was entered into the FORUM database. Therefore, an arbitrator may issue a series of awards over several days, but those awards are often bundled for delivery to the FORUM and thus “entered” on a single day.”) (last visited Jan. 25, 2008).

<sup>24</sup> See *supra* note 21.

<sup>25</sup> Report at 43.

some future recovery. Rather, in these cases, the individual is going to have to pay for his or her own defense. Litigation will likely be more time-consuming and process-laden than arbitration, thereby increasing the individual's out-of-pocket costs. (By contrast, arbitration often caps the individual's share of the fees.)<sup>26</sup>

Finally, not only would individual debtors be worse off resolving these cases without arbitration, society would be too. Imagine the reactions of California's trial judges when they are told that their docket is going to increase in size by nearly 34,000 cases. Assuming that most of those cases would fall within the jurisdiction of the small claims court, that deluge of new cases would increase that court's docket by over 14%.<sup>27</sup> Consequently, everyone else with a claim in the California court system would wait longer for resolution of their claims, as their cases would compete with 34,000 new debt collection cases for a judge's time and attention.

#### 4. The anecdotes in the Report are, at best, of dubious value.

Public Citizen periodically supplements its "data" with anecdotes that purport to illustrate the evils of arbitration. To respond to each individually would be counterproductive: a central thesis of this white paper is that policymakers should focus on the aggregate empirical picture, which consistently demonstrates the benefits of arbitration both for individuals and society. Nonetheless, it is appropriate to offer a few observations which call into doubt the value of Public Citizen's anecdotes.

First, in some cases, the anecdotes are more properly described as unsupported allegations. The Public Citizen Report is rife with instances of anecdotes that it does not support through citation to evidence. For example, Public Citizen accuses companies of strategically timing their motions to confirm an arbitration award so as to minimize an individual's ability to challenge the award.<sup>28</sup> Curiously, Public Citizen cites nothing to support this allegation about the companies' intentions – no record, no evidence, nothing.

Second, in other cases where Public Citizen offers a footnote or two in support of an anecdote, the footnotes reveal that Public Citizen is only telling one side of the story. For example, Public Citizen relates a story of a California attorney in a credit card arbitration whose request for attorneys' fees was rejected.<sup>29</sup> A close examination of the footnotes reveals that Public Citizen is relying entirely on a letter written by the lawyer to NAF and an email from the lawyer to a Public

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<sup>26</sup> See Section III.3, *infra*.

<sup>27</sup> See Judicial Council of California, *2007 Court Statistics Report: Statewide Caseload Trends* at 47 (2007) (showing 236,511 filings in small claims court during 2005-06).

<sup>28</sup> Report at 8, 39.

<sup>29</sup> *Id.* at 42.

Citizen researcher. Similarly, the Public Citizen report contains outlandish allegations about anti-competitive collusion among credit card companies but barely mentions the fact that a federal judge dismissed a complaint making these same allegations.<sup>30</sup> Such one-sided accounts should offer little confidence to policymakers that they are hearing both sides of the story.

Third, Public Citizen's anecdotes sometimes say very little about arbitration but, instead, concern some other broader social phenomenon. For example, a number of the anecdotes in the Public Citizen report concern cases of identity theft or mistaken identity.<sup>31</sup> Identity theft is indeed a serious problem. According to a very recent study by the nonprofit Identity Theft Resource Center, there were 446 breaches of secure data last year, exposing over 127 million records.<sup>32</sup> But nothing in the Public Citizen Report suggests that the backlogged civil justice system and overburdened judges are in a better position to handle such claims.

Finally, Public Citizen's anecdotes often demonstrate that the arbitration system has mechanisms in place to correct the occasional erroneous outcome. For example, Public Citizen relates the unfortunate story of a California art student whose name was confused with another similar sounding name, resulting in an adverse award against her.<sup>33</sup> During confirmation proceedings, the bank made clear that she did not owe the debt.<sup>34</sup> No system of dispute resolution is flawless, and our own civil justice system has been the subject of routine criticism. Far from justifying the wholesale abandonment of arbitration (as Public Citizen and the Arbitration Fairness Act would have), these stories confirm that the present system works well – the FAA generally promotes the benefits of arbitration while providing sufficient judicial oversight at the agreement and enforcement stage as a check on the arbitral process.

In sum, the Public Citizen Report tells a misleading story using a curious data set. It analyzes a specialized cluster of cases involving a few companies in a single industry using a single arbitration association. Even if that data could somehow provide a basis for generalizable lessons about arbitration, it is far from clear that the individual consumers would be better off in court. Rather, abolishing arbitration would further clog the judicial dockets and slow the already sluggish pace of justice for the citizenry as a whole.

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<sup>30</sup> *Id.* at 47-48.

<sup>31</sup> *Id.* at 11-12, 26-27, 40, 49.

<sup>32</sup> Identity Theft Resource Center, 2007 Breach List (Dec. 31, 2007) (available at [idtheftmostwanted.org/ITRC%20Breach%20Report%202007.pdf](http://idtheftmostwanted.org/ITRC%20Breach%20Report%202007.pdf) (last visited Jan. 20, 2008)).

<sup>33</sup> Report at 26-27.

<sup>34</sup> *Id.* at 26.

### III. THE BROADER ARGUMENTS OVER ARBITRATION

Chapter II of the Public Citizen Report launches a more generic attack on arbitration, supported largely by anecdote rather than data. In so doing, the report ignores the available data in some cases and badly distorts the record in others. This section of the white paper fills the gaps and corrects the distortions.

Public Citizen organizes its generalized criticism of arbitration around four main complaints – (1) arbitration proceedings are secret; (2) arbitrators have financial incentives to favor financial firms that hire them; (3) arbitration often costs consumers more than court; and (4) arbitration lacks civil courts’ safeguards to ensure fairness. The following subsections respond to each of those complaints and follow the same order employed in the Public Citizen Report.

#### 1. Arbitration offers sufficient opportunities for public scrutiny while maintaining the benefits of confidentiality.

The Public Citizen Report first criticizes arbitration for its “secret” proceedings.<sup>35</sup> According to the report, arbitration associations often do not hold hearings and, when they do, disallow the preparation of transcripts. Arbitrators often do not provide written awards with reasons. Finally, parties lack sufficient information about the histories and potential biases of arbitrators. This broad-based criticism about the confidential nature of arbitration is misplaced for several reasons.

For one thing, Public Citizen badly mischaracterizes the nature of confidentiality in arbitration. Parties to arbitration are not bound to any confidentiality obligation. Indeed, a recent arbitration involving allegations of doping in the Tour de France received extensive coverage and publicity.<sup>36</sup> Rather, under most arbitral rules, the confidentiality obligation extends to the administering institution and the arbitrators. It precludes them from divulging details about the arbitration, absent approval by the parties.<sup>37</sup>

Even where the parties have agreed to keep an arbitral proceeding confidential, the Report simply overlooks the opportunities for public scrutiny. Any arbitration is potentially subject to public scrutiny during at least two junctures in the process. First, a party resisting arbitration can refuse to commence proceedings, thereby forcing the other party to seek an order compelling

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<sup>35</sup> *Id.* at 7, 28-29.

<sup>36</sup> During the hearing, viewers could obtain on-demand access to the proceedings at [www.floydlandis.com](http://www.floydlandis.com) (last visited Dec. 31, 2007).

<sup>37</sup> *See, e.g.*, National Arbitration Forum Code of Procedure Rule 4; JAMS Comprehensive Arbitration Rules & Procedures Rule 26(a); American Arbitration Association Consumer Due Process Protocol Principle 12(b).

arbitration.<sup>38</sup> Second, 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.<sup>39</sup> Both of these actions are entirely public, not unlike any other judicial action, and undercut Public Citizen's claim that the arbitration takes place in this shroud of secrecy.

For another thing, existing mechanisms address some of the particular criticisms that Public Citizen levels at the confidential nature of arbitration proceedings. For example, to the extent a litigant is concerned about the availability of a transcript, arbitration rules generally permit a party to obtain one if they so desire (just like in a courtroom proceeding).<sup>40</sup> 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).<sup>41</sup> To the extent parties desire a written award with detailed reasoning, arbitral rules entitle them to it.<sup>42</sup> To the extent individuals are concerned about arbitrator bias, arbitral institutions manage this matter by requiring arbitrators to be independent and impartial.<sup>43</sup> To the extent those screens 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.<sup>44</sup>

Finally, Public Citizen ignores the fact that many of the indicia of secrecy about which it complains 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

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<sup>38</sup> 9 U.S.C. § 4.

<sup>39</sup> 9 U.S.C. §10.

<sup>40</sup> See, e.g., American Arbitration Association, Commercial Arbitration Rules, Rule 26; National Arbitration Forum, Code of Procedure, Rule 35(f).

<sup>41</sup> See Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 Kan. J.L. & Pub. Pol'y 578 (2000).

<sup>42</sup> See AAA Consumer Due Process Protocol Principle 15(c); NAF Code of Procedure, Rule 37(E), (I); JAMS Comprehensive Arbitration Rules, Rule 24(h). At one point in the Report (at 2, 34), Public Citizen highlights an instance in which a three-page decision cost \$1500, apparently to suggest that arbitration renders justice for individuals unaffordable. The Report does not make clear who paid the fee for the written award, but apparently the bank did so. See Report at 34. In all events, Public Citizen simply ignores the fact, explored below, that both arbitration associations and courts have adequate mechanisms in place to ensure that individuals do not bear an unwieldy share of the expenses associated with arbitration.

<sup>43</sup> See American Arbitration Association, Consumer Due Process Protocol, Principle 3.a ("All parties are entitled to a Neutral who is independent and impartial."); NAF Code of Procedure Rule 23.A ("An arbitrator shall be disqualified if circumstances exist that create a conflict of interest or cause the Arbitrator to be unfair or biased ...").

<sup>44</sup> 9 U.S.C. §10(a)(2). See, e.g., *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968) (vacating arbitral award where arbitrator previously had performed consulting services for one party despite lack of evidence of actual partiality and despite unanimous award); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi A.S.*, 492 F.3d 132 (2d Cir. 2007); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995).

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.

Not only are the criticisms about the secrecy of arbitration overblown, the Public Citizen Report also overlooks the benefits to consumers from less public disputes. Confidential proceedings can prevent parties from becoming "dug in" to their positions because they have not staked them out in public. Moreover, confidentiality preserves the privacy of both parties to the dispute. It spares them from embarrassing revelations, the disclosure of which benefits neither party. For example, the debtor-defendants described in the Alabama and California data may well prefer not to have details about their personal spending habits or financial behavior made available in a public proceeding. Individuals who make claims about identity theft, for example, similarly would not want their personal information to become part of the public record. Whereas litigation leaves decisions about confidentiality ultimately in the judges' hands, arbitration provides parties the assurance that the decision maker does not control the publicity surrounding their dispute.

2. Research does not support Public Citizen's claim that arbitrators systematically favor companies in their disputes with individuals.

The Public Citizen Report also criticizes arbitration on the ground that arbitrators "have a strong incentive to favor the arbitration company's clients."<sup>45</sup> This argument starts from the premise that arbitration associations "hawk" their services to companies who then insert arbitration clauses naming the association in their contracts. The argument continues with the notion that these same arbitration associations (and the arbitrators nominated by them) feel financially pressured to rule in favor of these companies in order to ensure their continued business.

Public Citizen supports this complaint in two main ways. First, it cites two anecdotes from NAF arbitrations. Second, it claims that academic research supports the notion of a "repeat player" effect, under which the arbitration associations and the arbitrators display biases favoring the company who, in contrast to the individual, is more likely to need arbitration services in the future. Here too, the Public Citizen Report is mistaken.

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<sup>45</sup> Report at 7-8, 29-34.

*The Anecdotes:* One concerns the experience of Elizabeth Bartholet, a law professor who previously served as a NAF arbitrator.<sup>46</sup> According to Public Citizen, Bartholet was blackballed by NAF after she decided a case in favor of a consumer, and NAF subsequently sent out notices indicating that she had been removed due to scheduling conflicts. The only sources cited in support of these allegations are a deposition of Professor Bartholet, a telephone conversation between her and a Public Citizen representative, and a copy of her resignation letter.

Unfortunately, Public Citizen apparently failed to read the entire transcript of Professor Bartholet's deposition (or at least quote the document in context). That record reveals that Professor Bartholet, who also ruled for the business in debt-collection cases about 95 percent of the time, decided her cases fairly:

Q: And in your duties as an arbitrator with the NAF organization, is it fair to say that you did in fact conduct yourself and your arbitral duties fairly and impartially?

A: Yes.

Q: And in compliance with the rules or regulations or laws that were applicable?

A: Yes

...

Q: And just because you found 18 out of 19 cases in favor of one party does not suggest to you that you were biased in favor of that party, does it?

A: No.<sup>47</sup>

It also reveals that Professor Bartholet felt no pressure to decide cases in favor of business interests:

A: I feel sure they would be given instructions to decide cases fairly and impartially, but I worried that the disqualification process that I saw in operation would mean that NAF arbitrators might well feel some pressure that if they wanted to continue to get business, they ought to come out on a certain side.

Q: You didn't feel that pressure, did you?

A: No.<sup>48</sup>

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<sup>46</sup> *Id.* at 30-31.

<sup>47</sup> Deposition of Elizabeth Bartholet at 87-88.

Finally, the Public Citizen Report fails to mention that, even after she awarded damages to the consumer in March 2004, Professor Bartholet continued to receive referrals from NAF for almost an entire year until she voluntarily resigned.<sup>49</sup>

The other anecdote concerns two cases handled by a lawyer in Michigan who appears to specialize in consumer bankruptcies.<sup>50</sup> In one case, the lawyer complained about the hearing location and later requested dismissal of the case against her client; in the other case, the lawyer complained about inadequate notice of the opposing party's submissions.<sup>51</sup>

As an initial matter, a reader can be rightfully skeptical of the accuracy of these anecdotes. As support for them, the Public Citizen Report supplies only a single footnote which simply reads "Account based on e-mail messages and telephone calls between [lawyer] and [a Public Citizen researcher]." In other words, there is no evidence of independent verification of any of the allegations through, for example, review of the documentary record or interviews with the other relevant parties. For example, the Report quotes the lawyer as stating "I have not yet found anything unbiased about the NAF," suggesting that the lawyer is passing judgment based on decades of experience. Yet it fails to note that the lawyer only has been practicing since 2001.<sup>52</sup>

But even accepting the accuracy of the one-sided accounts, the two cases ultimately vindicate the arbitral process. In the one case, the arbitrator dismissed the claim. In the other, the arbitrator rescheduled the hearing to provide the lawyer additional time to review the documents. In other words, the arbitral process provided the relief that the lawyer sought.

In short, these anecdotes – when viewed in context – hardly supply the indictment of arbitration that Public Citizen hopes to deliver.

*The repeat player claim:* According to this argument, arbitrators have a built-in financial incentive to favor companies. Companies, unlike individuals, are more likely to participate in multiple arbitrations and, thus, have more occasions to

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<sup>48</sup> *Id.* at 91.

<sup>49</sup> *Id.* at 74. In a similar vein, the Table in the Public Citizen Report showing the decision patterns of several arbitrators (at 16) indicates that even those arbitrators who found more frequently in favor of the consumer still received a substantial number of arbitral appointments. *See also* Report at 18. This fact casts further doubt on Public Citizen's claim that NAF blackballed arbitrators who decided cases in consumers' favor.

<sup>50</sup> *See* [www.guznacklaw.com](http://www.guznacklaw.com) (last visited Dec. 31, 2007).

<sup>51</sup> Report at 31-32.

<sup>52</sup> *See* [www.guznacklaw.com/About-US.htm](http://www.guznacklaw.com/About-US.htm) (last visited Dec. 31, 2007).

appoint arbitrators. By ruling in favor of the companies, the arbitrators enhance their chances of receiving these future appointments.

Apart from dicta in two California court decisions, the Public Citizen Report ultimately relies on two studies to support this claim – a 2001 study of Internet Domain name disputes by Michael Geist and a 1997 study of employment arbitration by Lisa Bingham. This entire line of argument overlooks three additional findings that are at odds with Public Citizen’s claims.

First, the Public Citizen Report ignores the studies that have failed to identify evidence of a repeat player phenomenon. For example, an earlier study of employment arbitration by Bingham found that employees achieved superior results where the arbitrator was compensated.<sup>53</sup> If the repeat player hypothesis were true, an employee would be worse off when the arbitrator was compensated (as compensated arbitrators would have a greater incentive to favor the company). Similarly, a 2003 paper by Elizabeth Hill found no statistically significant support for a “repeat player” phenomenon: arbitrators did not systematically favor employers so as to be re-nominated.<sup>54</sup>

Second, the Public Citizen Report ignores later research interpreting the Geist and Bingham studies. As to the Geist study, a subsequent article observed that the high win-rates found in Geist data were probably attributable to the high rate of default cases where the respondent did not contest the claimant’s allegations about the domain name.<sup>55</sup> As to the Bingham study, a paper published by Bingham herself the following year (which Public Citizen does not address) found no statistically significant evidence suggesting that individual arbitrators were systematically favoring employers in the hope of obtaining repeat business.<sup>56</sup> As Bingham noted, the arbitrator’s chances at nomination were only slightly better than 1%, so the opportunities for rewarding repeat players (even if the arbitrator wanted to do so) were slim.<sup>57</sup>

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<sup>53</sup> Lisa Bingham, *Is there a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 Int’l J. on Conflict Mgmt. 369, 380 (1995).

<sup>54</sup> Hill, *Due Process At Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the AAA*, 18 Ohio St. J. on Disp. Res. 777 (2003).

<sup>55</sup> See Donahey, *The UDRP: Fundamentally Fair, but Far from Perfect*, 6 Elec. Com. & Law Reps. 937 (2001).

<sup>56</sup> Bingham surveyed over two-hundred AAA employment arbitrations from a three-year period. See Bingham, *On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L. Rev. 223 (1998).

<sup>57</sup> Studies of securities arbitration (in which the rules allow arbitrators to have ties to the industry) tell a similar story. Research into securities arbitrations has found no measurable evidence of a pro-industry bias by arbitrators. See *Industry Arbitrator Award Survey: Does the Securities Industry Arbitrator’s Presence Create a Discernible Shift in Award Outcomes?*, 2005(4) Sec. Arb. Commentator 1, available at <http://www.sec.gov/rules/sro/nasd/nasd2005094/rpruder091905.pdf>; Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations*, Paper presented

Finally, the 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. The very same Bingham article cited by Public Citizen discusses settlement behavior. Bingham observes that at least three possible hypotheses might explain the repeat player phenomenon – (1) the individual litigants lack sufficient information during the arbitrator selection process; (2) only certain arbitrations actually reach the award stage, and those arbitrations tend to favor the company; or (3) the company is better able to screen meritorious cases and, thus, will settle them rather than proceed to the award stage. None of these hypotheses suggests any bias in the arbitration proceedings or the results. Rather the first hypothesis merely suggests informational asymmetries (which the individual's lawyer can counteract)<sup>58</sup>, and the other two merely suggest that companies develop a good sense of when to settle cases (something as true in litigation as in arbitration). Research since the publication of Bingham's initial study largely has concluded that any repeat player effects in arbitration primarily are the result of case selection and settlement rather than systematic bias.<sup>59</sup> Thus, even assuming that a repeat player phenomenon does exist, the Public Citizen Report leaves unanswered the question of cause, and the available research suggests that the likely cause of the effect has nothing to do with systematic bias in arbitration.<sup>60</sup>

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at the Aug. 5, 1999 meeting of the Academy of Legal Studies in Business (Aug. 5, 1999); GAO, *Securities Arbitration: How Investors Fare* (May 1992).

<sup>58</sup> See Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 Kan. J. L. & Pub. Pol'y 578 (2000).

<sup>59</sup> Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005); Hill, *Due Process At Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the AAA*, 18 Ohio St. J. on Disp. Res. 777 (2003); Estreicher, *Saturns for Rickshaws*, 16 Ohio St. J. on Disp. Res. 559 (2001). In recent research, Bingham also has noted that employer win rates declined following the AAA's adoption of the Due Process Protocol, suggesting that the AAA successfully screened out disputes that did not comport with the protocol. See Bingham & Sarraf, *Employment Arbitration Before and After the Due Process Protocols*, Proceedings of the NYU 53<sup>rd</sup> Annual Conference on Labor, 303, 325 (Estreicher & Sherwyn eds) (2004).

<sup>60</sup> Early in the Report (at 2), Public Citizen also charges that arbitrators can earn exorbitant fees (\$400/hour; \$10,000/day; \$1 million/year) thereby creating the conditions for biased results. What Public Citizen fails to note, however, is that these rates are not the sorts of rates that arbitrators charge to handle the sort of small-claim debt collection case analyzed in its data. See <http://www.adr.org/sp.asp?id=22039> (AAA arbitrator fees for consumer cases) (last visited Jan. 25, 2008); <http://www.adrforum.com/users/naf/resources/20070801FeeSchedule.pdf> (NAF arbitration fees for common claims) (last visited Jan. 25, 2008).

3. A fair comparison of the costs of litigation and arbitration reveal that arbitration is often less expensive. Even when arbitration is costly, existing mechanisms adequately regulate the burden borne by the individual.

The Public Citizen Report complains that arbitration forces the consumer to pay fees that outstrip those in litigation. It also argues that a “loser pays” rule (under which the losing party must pay the prevailing party’s fees) further discourages individuals from commencing arbitration.<sup>61</sup> It cites a few instances of potentially high fees borne by consumers, highlights the NAF’s fee schedule and accuses the NAF of concealing fees in its awards. Here too, Public Citizen is wrong on the facts and wrong on the law, for three main reasons.

First, the Public Citizen Report employs a deceptive baseline to compare costs. Rather than comparing the fees in arbitration with the fees in litigation, a better measure would be to compare the overall costs – both filing fees *and* attorneys’ fees – in arbitration and litigation.<sup>62</sup> Individuals generally do not draw the nuanced distinctions that underpin the Public Citizen Report. Rather, they simply want to know how much, at the end of the day, they will pay out of pocket to prosecute (or defend against) a suit. By this more appropriate measure, several studies suggest that arbitration is less costly for the individual than litigation.<sup>63</sup>

Second, many arbitration systems have built-in safeguards to limit the consumer’s financial exposure. In some cases, the arbitration clause itself may cap the individual’s share of fees.<sup>64</sup> In other cases, the arbitral institution’s rules set caps on the fees (which in some cases may be lower than filing fees at court). Organizations may limit the individual’s share of fees in consumer disputes (which may in some cases be lower than judicial filing fees). For example, under its Consumer Due Process Protocol, the American Arbitration Association limits a consumer’s share of total arbitration costs to \$125;<sup>65</sup> similarly, the NAF only charges a \$25 filing fee for a consumer to commence a \$2,000 claim against a

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<sup>61</sup> Report at 8, 34-37.

<sup>62</sup> See Michael H. LeRoy & Peter Feuille, *When is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 U.C.L.A. L. Rev. 143 (2002)

<sup>63</sup> See Sherwyn, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005); Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the AAA*, 18 Ohio St. J. on Disp. Res. 777 (2003); Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998).

<sup>64</sup> See Linda J. Demaine and Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 L & Contemp. Probs. 55, 70-71 (Winter/Spring 2004) (citing examples of arbitration clauses that “make some provision for aiding consumers who request assistance in paying filing, administrative and hearing fees”).

<sup>65</sup> See American Arbitration Association, *Consumer-Related Disputes Supplementary Procedures* (for claims under \$10,000).

company and caps a consumer's fee at \$250 for claims under \$75,000.<sup>66</sup> Organizations also may waive the individual's fees entirely upon a showing of indigence.<sup>67</sup> Thus, unsurprisingly, a number of judges, including several Justices of the United States Supreme Court, have praised these systems as "models for fair cost and fee allocation."<sup>68</sup>

Moreover, in contrast to civil litigation, arbitration also affords arbitrators greater discretion to shift fees and costs to the business litigant.<sup>69</sup> While the Public Citizen Report makes much of various NAF advertisements touting this fee-shifting power to suggest that arbitrators will shift fees to benefit businesses, the actual research suggests that, generally, when arbitrators shift fees, they generally do so for the benefit of the individual.<sup>70</sup> According to one study of employment arbitration, arbitrators reallocated the employees' share of a particular fee to the employer from 70% to 85% of the time, depending on the fee.<sup>71</sup>

Third, even where the costs of arbitration may be prohibitive for individuals, existing law provides adequate protection against those costs. Section 2 of the FAA subjects arbitration agreements to generally applicable contract defenses.<sup>72</sup> The Supreme Court has made clear that these defenses include situations where the costs of arbitration would be too burdensome for the individual.<sup>73</sup> Such existing safeguards thus weaken Public Citizen's claim that the excessive costs of arbitration require its wholesale elimination.

These safeguards in arbitration stand in stark contrast to the lack of any such controls in litigation. Where an individual is a plaintiff in a civil suit, the judicial system does not ensure that his legal costs (such as his attorneys' fees) do not exceed his ability to pay.<sup>74</sup> Likewise, where the individual is a defendant (as would be the case in the vast majority of the cases contained in Public Citizen's Alabama and California data sets), courts make no accommodation for the legal bills to defend against such a suit.<sup>75</sup> Thus, when the true costs of dispute resolution

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<sup>66</sup> NAF Fee Schedule, available at [www.adrforum.com](http://www.adrforum.com) (last visited Dec. 30, 2007).

<sup>67</sup> See, e.g., NAF Code of Procedure Rule 45.

<sup>68</sup> *Green Tree Financial v. Randolph*, 531 U.S. 79, 95 n.2 (2000) (Ginsburg, J., concurring in part, dissenting in part and concurring in the judgment, joined by Stevens, Souter and Breyer, JJ.). See also *Lux v. Good Guys, Inc.*, 2006 WL 357820 (C.D. Cal. Feb. 8, 2006).

<sup>69</sup> Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 47(1998)

<sup>70</sup> See Hill, *Due Process At Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the AAA*, 18 Ohio St. J. on Disp. Res. 777 (2003).

<sup>71</sup> *Id.*

<sup>72</sup> 9 U.S.C. §2.

<sup>73</sup> *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000).

<sup>74</sup> See, e.g., *Zarnes v. Rhodes*, 64 F.3d 285, 288 (7<sup>th</sup> Cir. 1995) ("Civil litigants do not have a right, either constitutional or statutory, to counsel.").

<sup>75</sup> See *Lassiter v. Dep't of Social Services of Durham County*, 452 U.S. 18 (1981) (no constitutional right to defense counsel in civil proceeding).

(forum fees and attorneys' fees) are considered, the safeguards built into the arbitration system are, if anything, far superior.

In sum, Public Citizens' complaints about the costs of arbitration are unfounded. Arbitration is not inherently more expensive than civil litigation, particularly when attorneys' fees are included in the calculation. Moreover, arbitration associations have proven quite responsive at ensuring that consumers do not bear an excessive share of the administrative fees. Finally, 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.

4. The Public Citizen Report takes an unrealistic view of the availability of a jury trial and makes unfounded criticisms of the arbitral process.

Finally, the Public Citizen Report argues that arbitration, in contrast to litigation, fails to accord adequate procedural protections to individuals.<sup>76</sup> First, the report claims that citizens surrender their right to a jury trial. Second, the report alleges that individuals in arbitration do not enjoy procedural devices such as class actions, discovery or hearings. Third, the report claims that individuals surrender various remedies in arbitration. Finally, it complains about the inadequate judicial review of arbitration awards. This subsection of the white paper responds to each of those criticisms.

*Jury Trial*

As to the availability of jury trials, the Public Citizen Report ignores the realities of the civil litigation system. Numerous studies have indicated that cases in the civil litigation system almost never reach a jury or are decided by a jury verdict. For example, a study of employment discrimination cases found that only 8% reach a verdict or judgment; of the cases resolved by pretrial motion, the employer won 98% of the time.<sup>77</sup> More broadly, in 2006, only 1.3 percent of federal civil cases ended in a trial, before a jury or otherwise.<sup>78</sup> Thus, the reality of our civil justice system is that, even without arbitration, in most instances, a jury never hears the case.

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<sup>76</sup> Report at 7, 37-49.

<sup>77</sup> *Id.*

<sup>78</sup> See <http://www.uscourts.gov/judicialfactsfigures/2006/Table410.pdf> (last visited Dec. 31, 2007).

### Class Actions

Public Citizen next complains that arbitration precludes class actions. This complaint is flawed in several respects. First, as already noted, this device would not help the individual debtors at issue in the Alabama and California data – as defendants in any litigation, they would not be entitled to class treatment anyway.<sup>79</sup>

Second, the Public Citizen Report also presumes, mistakenly, that class actions necessarily are a better deal for the consumer. In fact, research on class actions calls this premise into question. Most class actions result in some form of settlement, where the individual claimant receives only a coupon from the company or a small remunerative payment.<sup>80</sup> If the take rate for the class settlement is low (that is, only a few individuals file a claim against the class settlement), then most individuals will not receive any compensation whatsoever.<sup>81</sup> The only people who benefit with certainty from class actions are the trial lawyers (the same people who benefit with certainty from the elimination of predispute arbitration agreements).<sup>82</sup>

Third, even if class actions are a good deal for consumers, the Public Citizen Report inaccurately presumes that most cases in arbitration naturally would qualify for class certification. In fact, the requirements to qualify for class certification in federal litigation are demanding,<sup>83</sup> so many disputes between individuals and companies (such as an employment discrimination suit) likely would not qualify for class treatment anyway.

Finally, to the extent that an arbitration clause affirmatively precludes class arbitration in combination with other problematic limitations on procedural rights, existing mechanisms already filter out these sorts of clauses. Just as courts have relied on their power under Section 2 to refuse enforcement of arbitration clauses imposing undue costs on individuals, so too have they relied on that same power to

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<sup>79</sup> See Section II.3, *supra*.

<sup>80</sup> Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. Rev. 991 (2002). The value of such coupon settlements is the subject of much debate. To the extent the purpose of a class-action settlement is compensatory, coupons may offer little. To the extent the purpose is deterrence, coupons may be superior to cash settlements. See A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Damage-Revelation Rationale for Coupon Remedies*, Stanford Institute for Economic Policy Research, Discussion Paper No. 04-09 (2005).

<sup>81</sup> See 4 Newberg on Class Actions § 14:7 (4th ed. 2007).

<sup>82</sup> For examples of the increasing judicial skepticism about whether plaintiffs' attorneys can fairly represent the interests of the class members whom they purport to represent, see, e.g., *Smith v. Sprint Commc'ns Co. L.P.*, 387 F.3d 612 (7<sup>th</sup> Cir. 2004).

<sup>83</sup> As the Supreme Court has explained, a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982).

regulate the enforceability of class action waivers in certain situations.<sup>84</sup> The Public Citizen Report itself contains instances where courts have employed that power.<sup>85</sup> Yet rather than discard all arbitration clauses wholesale (as the Public Citizen Report would urge) courts have been more measured, upholding certain clauses while finding others unenforceable. Thus, Public Citizen's criticisms about arbitration's effect on class actions are simply misguided.

### Discovery

The Public Citizen Report complains that arbitration, in contrast to litigation, often limits the individual's right to discovery. This complaint is flawed in several respects.

For one thing, it bears emphasis that the individuals covered by the Alabama and California data may well prefer limited discovery. Recall that they would be defendants in any debt collection action. It is doubtful whether these debtors even would retain an attorney. Even if they did, they probably would be paying their attorneys by the hour (or by the task), and the prospect of discovery would simply drive up their out-of-pocket expenses.

For another thing, to the extent the individual is the claimant in the arbitration, the Public Citizen Report is simply wrong in its assertion that arbitration cuts off the individual's right to discovery altogether. Demaine and Hensler's study of consumer arbitration clauses found that only about five percent affirmatively barred discovery.<sup>86</sup> In a similar vein, most arbitration rules permit at least some degree of limited discovery. The American Arbitration Association's Consumer Due Process Protocol, for example, provides that "[n]o party should ever be denied the right to a fundamentally fair process due to an inability to obtain information material to a dispute."<sup>87</sup> NAF rules explicitly authorize discovery methods similar to those available in litigation but accord the arbitrator the discretion to tailor the discovery based on matters such as the relevance of the information, the burden of producing it and the amount in controversy.<sup>88</sup>

Indeed, in some respects, the procedural flexibility afforded by arbitration may offer the individuals greater opportunities for discovery than civil litigation. Some civil litigation may be dismissed at the pleading stage before the parties have had any opportunity to pursue discovery. Moreover, some civil litigation forums

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<sup>84</sup> Report at 46-47. See generally Anderson & Knutson, "Class" Arbitration? What about the Rights of Absent "Class" Members?, 7 Engage 148, 149 (Oct. 2006).

<sup>85</sup> Report at 46-47.

<sup>86</sup> 67 L. & Contemp. Probs. at 68.

<sup>87</sup> AAA, Consumer Due Process Protocol, Principle 13.

<sup>88</sup> NAF Code of Procedure, Rule 29.

such as small claims court do not entitle the parties to any discovery at all.<sup>89</sup> By contrast, arbitration does not categorically exclude certain claims and proceedings from the opportunity to propound discovery.

Third, the Public Citizen Report ignores the main benefits for the individual of a more limited system of discovery – speed and price. A system of targeted discovery, in contrast to the fishing expeditions that typify civil litigation, helps to ensure that a case is resolved more quickly. As noted above, studies bear this out: they consistently conclude that arbitration delivers results more quickly than litigation.<sup>90</sup> Moreover, a system of targeted discovery obviously lowers the costs of resolving the dispute. In cases of individuals who pay attorneys on an hourly rate, it reduces their out-of-pocket costs. In cases of individuals who pay attorneys on a contingency fee, it reduces the amount that the attorney must “float” his or her client and, consequently, can increase the individual’s ability to obtain affordable counsel.

### Hearings

Throughout the Report, Public Citizen complains about the lack of hearings in arbitration.<sup>91</sup> According to this complaint, arbitrators decide cases on the basis of a documentary record without any opportunity for the individual to be heard. This criticism both misreads arbitral rules and ignores the benefits to individuals of more streamlined proceedings.

Contrary to the suggestions in the Public Citizen Report, arbitral associations do not deny parties the opportunity for a hearing. Rather, most specifically enshrine a right to a hearing in their rules. For example, the AAA’s Consumer Due Process Protocol specifically provides that individuals “are entitled to a fundamentally fair arbitration hearing ... [and] an opportunity to be heard and to present relevant evidence to impartial decision-makers.”<sup>92</sup> Empirical research confirms that hearings do in fact occur. A 2003 study of employment arbitration found that 89% of the cases involved at least one hearing.<sup>93</sup> These entitlements in arbitration stand in contrast to the civil litigation system, which disposes of most cases at the pleading or summary judgment stage – before an individual ever has an opportunity to testify in court.<sup>94</sup>

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<sup>89</sup> See *Muhammad v. County Bank of Rehoboth Beach*, 379 N.J. Super. 222, 243 (N.J. Super. 2005).

<sup>90</sup> See *supra* text accompanying note 8.

<sup>91</sup> Report at 4.

<sup>92</sup> AAA Consumer Due Process Protocol, Principle 12(a).

<sup>93</sup> Hill, *Due Process At Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the AAA*, 18 Ohio St. J. on Disp. Res. 777 (2003).

<sup>94</sup> See text accompanying notes 77-78, *supra*.

Furthermore, while arbitration rules generally entitle individuals to a hearing, they also recognize that proceedings without hearings can, in some cases, benefit individuals. Specifically, proceedings without hearings lower an individual's out-of-pocket costs. Some disputes may simply turn on a decision about the documentary record. In those cases (which may otherwise end up in small claims court), a hearing may require individuals to miss a day of work (thereby foregoing wages) and to pay the added costs of requiring an attorney's attendance. Moreover, the costs do not stop there. If those cases had been brought instead in small claims court, the losing party often would be entitled to a trial *de novo* in a state court of general jurisdiction, further driving up the expenses borne by the individual. Arbitration, by contrast, tailors the procedures to the demands of the case and the parties' interests.

### Remedies

The Public Citizen Report complains that arbitration clauses often limit the remedies that a party may recover. This complaint misses the mark in several respects. First, it again is worth emphasizing that the individual debtors at issue in the California and Alabama data would not be affected by any such limits, as they would be defendants in any action.

Second, the data simply do not support the claim that arbitration clauses routinely limit an arbitrator's remedial powers. A recent study of arbitration clauses in consumer contracts found that only 7.7% of them contained damages limits.<sup>95</sup> A study of arbitration rules confirms these findings. A variety of rules entitle claimants to the same panoply of remedies available to them in civil litigation.<sup>96</sup> For example, the AAA Consumer Due Process Protocol provides that "[t]he arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."

Third, to the extent the damages limitation truly deprives the individual of otherwise available relief, existing mechanisms serve to filter those claims. As already noted, courts can refuse to enforce arbitration agreements on the basis of unconscionability. Just as courts have relied on this doctrine to decline to enforce certain types of class action waivers or cost-shifting provisions, so too have they relied on this doctrine to refuse to enforce certain damages limitations.<sup>97</sup> Here too,

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<sup>95</sup> Linda J. Demaine and Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 L & Contemp. Probs. 55, 71 (Winter/Spring 2004).

<sup>96</sup> AAA Consumer Due Process Protocol Principle 14 ("The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."). See also National Arbitration Forum Rule 5.M ("All types of legal and equitable remedies and relief available in court are available in arbitration.").

<sup>97</sup> See *Kristian v. Comcast Corp.*, 446 F.3d 25 (1<sup>st</sup> Cir. 2006).

however, courts have not employed the meat-cleaver approach urged by Public Citizen that would render all such clauses unenforceable (thereby depriving individuals of the benefits of arbitration). Instead, they have relied on a more nuanced consideration of a particular statute's remedial scheme and the effect of an arbitration clause on that scheme.<sup>98</sup>

### Right of appeal

The Public Citizen Report complains that arbitration limits the individual's right of appeal. This complaint is flawed in three respects.

First, the complaint is simply inaccurate. 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.<sup>99</sup>

Second, the complaint rests on the misplaced assumption that arbitrators somehow do not follow the governing law. Yet most arbitral rules require them to do precisely this, and the Public Citizen Report points to no data suggesting that arbitrators ignore their charge.<sup>100</sup> Most studies suggest that individuals are pleased with the process and outcomes in arbitration, suggesting there is no reason to believe arbitrators are wholly ignoring governing legal principles.<sup>101</sup>

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<sup>98</sup> Compare *Kristian*, 446 F.3d 25 (refusing to enforce damages limitation provision), with *Anderson v. Comcast Corp.*, 500 F.3d 66 (1<sup>st</sup> Cir. 2007) (upholding damages limitation).

<sup>99</sup> See 9 U.S.C. §10. For cases articulating and applying the manifest disregard of the law doctrine, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Wilko v. Swann*, 346 U.S. 427 (1953); *Patte v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4<sup>th</sup> Cir. 2006); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2<sup>d</sup> Cir. 1998).

<sup>100</sup> See, e.g., National Arbitration Forum, Code of Procedure Rule 20.D ("An Arbitrator shall follow the applicable substantive law ..."); American Arbitration Association, Consumer Due Process Protocol, Principle 14(b) ("In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes and legal precedents.").

<sup>101</sup> For studies showing satisfaction with consumer arbitration, see Harris Interactive survey conducted for US Chamber's Institute of Legal Reform, *Arbitration: Simpler, Faster, Cheaper than Litigation* (April 2005), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf>; Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, available at <http://www.arb-forum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf>

For studies showing satisfaction with arbitration in the securities industry, see Michael Perino, *Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* 34-36 (November 4, 2002); Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations*, Paper presented at Aug. 5, 1999 meeting of Academy of Legal Studies in Business p. 3 (Aug. 5, 1999), available at [http://www.finra.org/web/groups/med\\_arb/documents/mediation\\_arbitration/p009528.pdf](http://www.finra.org/web/groups/med_arb/documents/mediation_arbitration/p009528.pdf).

For other studies showing favorable impressions of arbitrations by both individuals and lawyers, see ABA Section on Litigation Task Force on ADR Effectiveness (Aug. 2003); Roper ASW, 2003 Study for Institute for Advanced Dispute Resolution (Apr. 2003).

Third, the complaint also presumes, erroneously, that a trial *de novo* following the arbitration would somehow make individuals better off. Precisely the opposite is true. Recall that, on average, individuals prevail more frequently in arbitration and generally obtain comparable, if not superior, outcomes. In this respect, it is in the individual's interest for there to be limits on appeal rights, for those limits apply to the company as much as they do to the individual. Apart from protecting favorable outcomes, limitations of appeals reduce the individual's litigation costs and reduce the waiting time before the individual receives satisfaction on his or her judgment.

In sum, Public Citizen's generalized complaints about the arbitral process are badly misguided. They rest on misunderstandings (or misrepresentations) about how arbitration works. They ignore the substantial benefits inuring to individuals through arbitration. Finally, they disregard how, without arbitration, individuals would be worse off in the civil litigation system.

#### **IV. CONCLUSION: WHAT CONSUMERS CAN DO**

The final chapter of the Public Citizen Report suggests a series of steps that consumers can take in their transactions. These include, among other things, urging consumers to “use credit cards with care” and “examine all consumer contracts for arbitration clauses.” These are perhaps the most laudable aspects of the Public Citizen Report. Using credit cards carefully and reading the terms of an agreement are consumer practices that should be encouraged. Such practices are a far wiser prescription to the problems asserted by Public Citizen than the wholesale rejection of a system of enforceable, predispute arbitration agreements.

The Public Citizen Report fails to make its case against those agreements. Arbitration improves access to justice. It enhances the likelihood of recovery. It delivers speedier results. It keeps costs down. For many, it is a superior option to the expensive, slow, cumbersome ways that have come to typify our civil justice system. On balance, it is a good deal for individual consumers.

Consumers should not be misled to believe that the abolition of this system somehow will make them better off. They should not be misled to believe that the abolition of arbitration will make it easier for them to find a lawyer; in fact, it will complicate the search. They should not be misled to believe that the abolition of arbitration will magically cause juries to appear to resolve their cases; in all likelihood, a jury will never hear, much less decide, their case. Consumers should not accept Public Citizen’s invitation to support the Arbitration Fairness Act – it is a bad deal for consumers.

## A BRIEF COUNTER-HISTORY OF ARBITRATION

Others have thoroughly narrated the history of arbitration in the United States. While there is no need to repeat that history here, the Public Citizen Report presents a distorted account of that history. Those distortions necessitate a brief counterstatement in order to give policymakers an accurate and complete picture.

Prior to 1925, courts generally did not enforce predispute arbitration agreements.<sup>102</sup> While recognizing that arbitration agreements essentially operated as a type of contract, they nonetheless refused to enforce them on public policy grounds. At bottom, they treated such agreements as illegal efforts to oust them of subject matter jurisdiction. Courts treated forum selection clauses in a similar vein.<sup>103</sup>

This judicial hostility left the commercial community deeply dissatisfied. Over time, they had developed a viable system for alternative dispute resolution, one that already had gained traction in New York. In 1925, inspired by New York's example, Congress passed the Federal Arbitration Act ("FAA"). By declaring that arbitration agreements were enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," the FAA put arbitration agreements on an equal footing with other contractual commitments.<sup>104</sup> In so doing, Congress overcame the historical judicial hostility to arbitration agreements.

In the decades that followed, courts displayed a greater solicitude toward arbitration agreements but allowed arbitration to develop cautiously. In a line of cases beginning with *Wilko v. Swan*, the Supreme Court articulated what came to be known as the nonarbitrability doctrine, which reflected whether, as a matter of statutory interpretation, arbitration was consistent with the creation of a cause of action and grant of federal subject matter jurisdiction in various federal statutes such as the securities laws.<sup>105</sup> The Court also developed a doctrine of separability, whereunder courts retained a gatekeeper role, testing the enforceability of the arbitration agreement while leaving the merits of the underlying dispute for the arbitrator.<sup>106</sup>

Two major developments in the 1970's marked a greater judicial acceptance of arbitration and, more generally, parties' ability to control the forum in which they resolved their disputes. First, the Court held that federal statutory claims were arbitrable, at least in the international context.<sup>107</sup> Second, the Court upheld the

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<sup>102</sup> See generally Born & Rutledge, *International Civil Litigation in the United States* 1090-93 (4<sup>th</sup> ed 2006).

<sup>103</sup> *Id.* at 438-39.

<sup>104</sup> 9 U.S.C. §2.

<sup>105</sup> 346 U.S. 427 (1953).

<sup>106</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395, 402 (1967).

<sup>107</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

enforceability of forum selection clauses, again in an international context.<sup>108</sup> This second development became important to arbitration, as courts began to see a relationship between arbitration clauses and forum selection clauses.

In the 1980's and early 1990's, these developments influenced domestic dispute resolution as well. In a series of decisions, the Court largely interred the nonarbitrability doctrine and held that federal statutory claims were arbitrable.<sup>109</sup> It showed an even greater tolerance of forum selection clauses, including in contracts between companies and consumers.<sup>110</sup> And it explicitly linked the two phenomena, noting that arbitration clauses functioned as a type of specialized forum selection clause.<sup>111</sup>

In this context, the Supreme Court decided *Southland Corp. v. Keating*, the prime target of Public Citizen's "history" of arbitration.<sup>112</sup> While the Public Citizen Report stresses the opinions of the dissenting minority, it simply ignores the essential insight of the majority's decision: application of FAA Section 2 in state court was necessary to ensure that parties did not effect an end-run around federal arbitration law. If the FAA did not apply, then crafty litigants could thwart the statute's purposes through the legal trick of filing in state court rather than federal court. That essential lesson has not been lost on the Supreme Court, which repeatedly has rejected attempts to overrule *Southland*.<sup>113</sup>

Just like the FAA's enactment, this greater judicial solicitude during the late 1980's and early 1990's was responding to larger social forces. During this period, the dockets of the federal judiciary were exploding.<sup>114</sup> As court dockets were rising, so too was the cost of litigation, something that affected both businesses and individuals. As for businesses, increased legal expenses cut into their bottom line. A report of the Dunlop Commission, created by President Clinton, recognized the impact: "as the firm's employment law expenses grow, less resources are available to provide wage [sic] and benefits to workers."<sup>115</sup> As for individuals, exploding dockets and the higher cost of litigation made it more difficult for them to find a

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<sup>108</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>109</sup> See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>110</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>111</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>112</sup> 465 U.S. 1 (1984).

<sup>113</sup> *Doctor's Assocs, Inc. v. Casaratto*, 517 U.S. 681 (1996); *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1206 (2006).

<sup>114</sup> See Posner, *The Federal Courts: Crisis and Reform* 63-65 (1985) ("From 1960 to 1983 "the number of cases filed [annually] in the [federal] district courts more than tripled, roughly from 80,000 to 280,000 – a 250 percent increase, compared with less than 30 percent in the preceding quarter century.").

<sup>115</sup> U.S. Commission on the Future of Worker-Management Relations, Final Report at 50 (1994).

lawyer. Arbitration held forth the promise of lowering the costs of disputes, making justice more affordable to the individual and less expensive for business.

The greater solicitude for arbitration was a natural response to this phenomenon. Courts generally enforced arbitration agreements (and forum selection agreements) in recognition of the substantial benefits that they offer, both for the individual litigants and for society as a whole. At the same time, they retained a residual oversight function – checking the enforceability of the arbitration agreement (or forum selection agreement) at the front end of the process and being available to review the award (in the case of arbitration) at the conclusion of the proceedings.

The Supreme Court's recent near-unanimous decision in *Buckeye Check Cashing, Inc. v. Cardegna*, also the subject of criticism in the Public Citizen Report, is simply a natural outgrowth of this trend.<sup>116</sup> *Buckeye* preserved for the judiciary the role of deciding challenges to the arbitration agreement but held that arbitrators should decide, as an initial matter, whether the underlying transaction was void on public policy grounds. *Buckeye* also reaffirmed once again the basic principle of *Southland* – that to ensure a uniform federal law and avoid forum selection games, Section 2 of the FAA should apply equally in both federal and state court.

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<sup>116</sup> 126 S. Ct. 1204, 1206 (2006).