

ANSWERS TO POST-HEARING WRITTEN QUESTIONS FROM SENATOR BROWNBACK

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1. *Given that so little of the money recovered in class action settlements actually goes to class members, can you conceive of any way that this bill would not simply result in transferring money directly into the bank accounts of the trial lawyers both bringing and defending those class actions? Wouldn't consumers and employees be likely to receive more money directly through arbitration than waiting for the scraps that they would receive from a class action settlement?*

It is reasonable to expect that the trial lawyers likely will benefit from the Arbitration Fairness Act, both for the reasons you mention and because litigation is more expensive than arbitration. With one exception, the available empirical evidence, summarized in my written testimony, suggests that by most measures the average individual will be worse off in litigation compared to arbitration. As to the exception, one study of employment arbitration suggests that individuals below a certain income threshold actually recover less money in arbitration than litigation. But, as the authors of this study acknowledge, this aberration likely is due to the fact that most individuals in this income bracket could not find a lawyer willing to litigate their case (unless they had a sufficiently high-stakes claim) whereas arbitration, due to its lower costs, actually improves the chances of obtaining an affordable resolution of a dispute.

2. *The vast majority of members of a settlement class who are eligible to file claims never do so - most people receive claims forms in the mail, and never return them because the forms are too complicated, or they don't have the right information to prove they have a claim, or they are turned off by the idea that the lawyers running the class action are going to get millions while each individual gets a few dollars. Do you know of any class actions involving consumers where even 10 percent of the eligible class members actually applied for and shared in the class settlement?*

I am generally aware of the research on class actions, which suggests that the “take rate” (i.e., the rate at which eligible class members seek compensation from a settlement fund) can be quite low.

3. *A number of the witnesses cited studies that show that consumers and employees will have difficulty finding an attorney if they do not have a claim for at least \$65,000. Most consumer and employment disputes are individualized - and therefore, not susceptible to being part of a class action under Federal Rule of Civil Procedure 23 and the analogous state rules. If this law is passed, will those consumers with individualized claims, who cannot join a class action, be better off in court than in arbitration?*

No, the individuals described by your question will not be better off in litigation than arbitration. The stakes of their claim coupled with the access-to-justice problems in our civil litigation system mean that these individuals likely will never have a day in court (much less the jury trial touted by defenders of the Arbitration Fairness Act).

4. *Proponents of this bill assure us that the bill will not eliminate arbitration because consumers and employees will still be free to choose arbitration after a dispute arises. But studies have shown that only a miniscule number of arbitrations are the result of post-dispute agreements to arbitrate. Isn't it likely that this bill will eliminate 99 percent (or more) of consumer and employment arbitrations in this country?*

Yes, there is virtually no empirical evidence demonstrating the viability of post dispute arbitration. The available empirical evidence, cited in my written testimony, suggests precisely the opposite – that postdispute arbitration does not occur. This may be for psychological reasons – that the parties become dug in once their positions are public. Or it may be for strategic reasons – because parties know more information about their adversaries' position after a dispute arises than in the predispute veil of ignorance. Whatever the cause, and more research can be done in this area, the record suggests that postdispute arbitration is not a meaningful alternative. Consequently, the likely effects of the Arbitration Fairness Act should be unmistakable – it will kill arbitration for these types of disputes.

5. *A number of the witnesses who testified in support of the bill claim that arbitrators and arbitration organizations are fundamentally biased against consumers and employees. They also say that the lists from which the parties choose an arbitrator are routinely composed of only biased individuals. How can we make sure that arbitrators will be neutral and treat all parties to a dispute fairly?*

This question contains both an empirical component and a prescriptive component. As to the empirical component, the claim of arbitrator bias simply does not withstand scrutiny. Research into the so-called “repeat player” effect, detailed in my written testimony, offers at best a mixed conclusion on whether that effect exists. Moreover, even those scholars who have documented the repeat player effect have concluded that the effect is not due to any systemic bias in arbitration but rather factors unrelated to the arbitrator. As to the prescriptive component, existing mechanisms can ensure the neutrality of arbitrators – many arbitral institutions such as the American Arbitration Association employ strict requirements of independence and impartiality in their arbitrators. Even where the arbitral association does not screen out nonneutral arbitrators, evidence of bias provides a ground for vacatur of an arbitral award under Section 10 of the Federal Arbitration Act.

6. *Professor Alderman says that the main reason why arbitration should be eliminated is that courts perform the important function of interpreting the law and laying down precedents for future courts to follow. But it seems to be an exaggeration to say that every case filed in court results in a ground-breaking decision. Over 90 percent of all cases get dismissed, or are settled, well before judgment. Then, of the remaining cases that actually get decided by a court, a full 80 percent of them result in unpublished opinions that don't result in precedent. Can you explain whether, at the end of the day, concerns about the death of precedent are theoretical rather than practical?*

In some respects, concerns about the death of precedent are unfairly attributed to arbitration; in other respects, these concerns are overblown. As a general matter, a vast array of legal conventions such as mediations, settlements, unappealed judgments, and unpublished opinions (all fully endorsed by our legal system) reduces the opportunity to create precedent. Seen in this light, arbitration is simply another form of extrajudicial dispute resolution. Moreover, even as to arbitration, the complaint is overblown. Most centrally, administrative agencies (the EEOC, SEC, FTC, *et al.*) or other parties who are not signatories to arbitration agreements can still commence litigation and, thereby, have the opportunity to create precedent.

7. *What would be the likely impact on the backlogs that courts currently experience if S. 1782 was enacted?*

Adoption of the Arbitration Fairness Act likely will increase already congested court dockets, at both the federal and the state level. To take just one example, a recent report by the group Public Citizen criticized arbitration of consumer debt collection actions, citing recent data gathered by the State of California. If those actions were not arbitrable under the Arbitration Fairness Act, it would inject thousands new cases into the California court system. Not only would these parties have to “take a number” in the California courts, but they would naturally push other litigants to the back of the line, slowing down the machinery of justice for everyone.

8. *Mr. Bland told us that we should not credit the fact that the Equal Employment Opportunity Commission is not bound by arbitration agreements between the employee and employer, because the EEOC almost always obtains only injunctive relief, and not monetary relief for employees. Can you explain why it is significant that the EEOC can still go to court on behalf of employees, and whether the EEOC can in fact recover monetary relief for those employees?*

As I’ve already mentioned, the ability of the EEOC (and other agencies) to litigate a case enables those agencies to influence the development of caselaw. I do not profess to be an expert on remedies in employment discrimination law, but my research in preparation of answers to these questions does indicate that, contrary to Mr. Bland’s testimony, federal courts

have upheld the authority of the EEOC to obtain monetary relief for employees subject to arbitration agreements.