Responses by Mark de Bernardo to Questions For the Record of the 10-7-09 Hearing before the U.S. Senate Committee on the Judiciary

Question # 1.a.

Binding, pre-dispute arbitration is common – even sacrosanct - in the unionized sector. Non-union companies have borrowed many of the procedures adopted in the unionized sector, but S. 931 would restrict those efforts by non-union companies.

When the labor movement has tried to export unionization to Mexico, Central America, and South America, they call for arbitration of employment disputes.

Thus, in an organized labor setting, arbitration of employment disputes is in fact as entrenched as it is in our jurisprudence in the non-union sector.

Procedures for selecting arbitrators, conducting pre-hearing discovery, conducting the final arbitration hearing, issuing a written opinion, and assuring the availability of judicialreview are the products of a bargain in both the union and non-union contexts. These procedures can vary marginally but are effectively the same in both the union and non-union contexts.

Question #1.b.

Because many of the procedures are similar in both union and non-union contexts, the two are both fair if properly drafted. Case law confirms that, established properly, employees are treated fairly. Indeed, many employees find that the pre-dispute arbitration system is more "fair" than litigation.

Question #1.c.

Eliminating pre-dispute bargains for binding arbitration in only private employment contracts and not collective bargaining agreements would be patently inequitable and unfair.

This inequitable result is indeed the intent of Senator Franken's Amendment #2588 in inserting Sec. 8104(b) which states, "The prohibition in subsection (a) does not apply with respect to employment contracts that may not be enforced in a court of the United States."

The effect of Senator Franken's legislative language is to create a loophole FOR UNIONS to avoid the elimination of pre-dispute arbitration agreements. The language accomplishes this effect because collective bargaining agreements are enforced by the United States National Labor Relations Board rather than a court of the United States.

Question #2.

"The notion that ordinary people want black-robed judges, well-dressed lawyers and fine courtrooms as settings to resolve their issues is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible..." [Emphasis added.]

Warren E. Burger, Former Chief Justice, United States Supreme Court

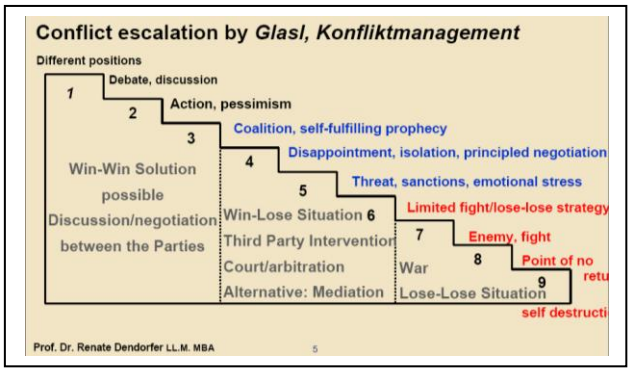
When problems fester, emotions escalate and feelings harden. The quicker an issue can be addressed, the more likely it is to be resolved and the less pain it will inflict. The duration of a problem also correlates with an increase in the costs involved, be the costs emotional, physical, financial, or otherwise. "Arbitration allows employees' claims to be heard in a timely fashion, and it allows employees to move on with their lives more quickly."[1]

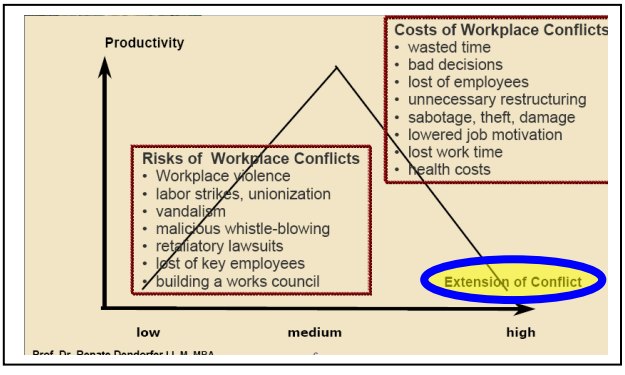
Without pre-dispute arbitration agreements, increased adversity and decreased productivity result.

The American Arbitration Association reports that:

> The mean length of all civil cases that reach a jury trial is just over two and one-half years, according to a study of state courts of general jurisdiction in 45 of the nation's 75 most populated counties. According to the Federal Judicial Center, it is almost 2 years from the time the average employment discrimination case is filed in federal district court until the time it is resolved. . . . [In comparison,] [t]he average arbitration case is resolved in 8.6 months. An external study of AAA employment cases terminated in 1999–2000 showed the average length of time to [arbitrate a case] was 8.2 months.[2]

The following two charts[3] cited by Dr. Renate Dendorfer shows an evaluation of the stages of conflict escalation and the assessment that the longer a conflict endures, the lower productivity goes.





"What little empirical data we have suggests that properly designed employment arbitration systems can out-perform court-based litigation systems. There seems little dispute that because arbitration proceedings tend to be informal (and ***quicker*****), *they require less lawyer time*** and resources.[14] Median time from filing to disposition is also lower for arbitration over court litigation…"[4] [Emphasis added.]

"[U]nlike litigation where resolutions often come too late and the process itself is so divisive that reinstatement is rarely practicable, arbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement."[5] [Emphasis added.]

"[A]t a Nov. 7 [, 2009,] session of the American Bar Association Section of Labor & Employment Law's annual meeting ... **[Neutral arbitrator Michael Lewis of JAMS] said that one advantage of employment arbitration is speed in decisionmaking. He said JAMS requires arbitrators write awards in 30 days, while some 'judges sit on decisions for ever and ever.' He also said speed in the arbitration process overall is of value to employees, some of whom wait many years for a resolution to their dispute.**"[6] [Emphasis added.]

The use of Alternative Dispute Resolution in employment is common and increasing as a means of avoiding litigation, addressing *more* employee issues, and resolving *more* amicably these concerns. Given the comparably bad costs[7], delays[8], and divisiveness of employment litigation, a more sensible and conciliatory option is preferable for employers *and their employees*. The net result of the use of ADR is:

(1) More employee complaints received *and* resolved;
(2) Employee complaints resolved sooner and with less tension;
(3) Less turnover/more likely and more favorable preservation of employment relationships;
(4) Improved morale;
(5) More effective communication, and enhanced constructive input by employees into their companies; and
(6) Better workplaces.

ADR helps "diffuse" employee issues and concerns – *before* they heat up and "come to a boil." With earlier intervention and correction, small problems do not build into big problems, and there is less psychological "wear and tear" all the way around.

One of the key advantages of ADR is the vastly increased chances for amicable resolution of an employment problem – the goal is to keep the employee in his or her job, and to do so in a way that the employee is happier and more productive. Litigation is very much a destroyer of the employment relationship; ADR is a preserver of the employment relationship.

Question #3.a.

Without pre-dispute arbitration, the courts would undoubtedly be more clogged, both at the federal and state levels.

Delays in having employment discrimination cases heard would result.

More judges and courtrooms and taxpayers' dollars would be needed.

Pointedly, more trial lawyers would be needed, and the increased demand would provide upward pressure on the prices these trial lawyers charge. This fact has not gone unnoticed—rather it is an incentive for the trial lawyers in the American Association for Justice (formerly the American Trial Lawyers Association) and in the National Employment Lawyers Association to push for the elimination of pre-dispute arbitration agreements.

Interestingly, it is not a zero sum game for employees—the loss of arbitration would not equal the increase in the courts' caseloads. Here's why.

Consider the hypothetical of 1000 employees with grievances. All 1,000 employees could have their grievances heard by an arbitrator. An employee who goes to binding arbitration will not be dismissed. Any arbitration fees are quite low and often paid by the employer.[9, 10, 11] Lawyers are not needed because arbitration is a simpler, more focused, more confidential, and more dignified process. The employee's case will be heard and will reach a final decision on the merits.

Were arbitration unavailable, these same 1,000 employees would be forced to seek access to the court system. Upon seeking a trial lawyer for representation, these 1,000 employees are in for a rude awakening.

Employees who do not have the type of very large claims that can attract a plaintiffs' lawyer are often effectively barred from the courtroom, and forced to abandon their cases. A survey of the plaintiffs' bar found that they agree to provide representation to only five percent of the individuals who seek their help.[12] Therefore, the door is slammed shut on 95 percent of potential plaintiffs in litigation at the outset.

In addition, plaintiffs' attorneys require a minimum of $60,000 provable damages, commonly request a retainer up front, and typically require a payment of a contingency fee of between 33 and 40 percent.[13]

"In addition, arbitration provides an affordable alternative to litigation. The cost of litigation shuts many people out of the court system, thus making the benefits inaccessible. In light of the controversy surrounding the issue of fee sharing and the AAA rules for employment cases, many employees can afford to arbitrate their discrimination claims. The employee's forum costs, i.e., administrative fees and compensation for the arbitrator, are currently capped at $125 under the AAA rules for employment cases arising from employer-promulgated dispute resolution plans. Even before the AAA fee cap went into effect, a study of randomly chosen awards from AAA employment arbitration decisions showed that "32% of employees arbitrating under employer-promulgated ADR plans paid nothing at all for their AAA arbitrations, and that 61% paid no forum fees," i.e., filing, hearing, or arbitrator's fees. In addition, the study found that arbitrators often reallocated the forum fees entirely to the employer. AAA employment arbitrators exercised their discretion to reallocate arbitrator's fees to the employer in 70.25% of the cases, hearing fees in 71.3% of the cases, and filing fees in 85.12% of the cases."[14] [Internal citations omitted.]

In arbitration, nobody is shut out – 100 percent of those who file grievances in ADR programs have their complaints addressed and resolved. In fact, the National Workrights Institute found that in those arbitration cases with a stated demand, the majority (54 percent)

were for a stated demand that was less than $75,000. More than a quarter involved demands for less than $25,000.[15] Those demands wouldn't meet the minimum of $60,000 provable damages.

As one legal analysis in the employment context recently concluded, without arbitration "[e]mployers will wait out most smaller claims, assuming employees will not be able to pursue them in court."[16]

Furthermore, nearly one-quarter (24.9 percent) of the employment cases arbitrated by the American Arbitration Association would not survive Motions for Summary Judgment, based on those arbitrations which do go to trial and are dismissed.[17]

The bottom line is that *many* more employees can access the arbitration system than can access the court system because of the dollar threshold of their claims alone.

After 950 of the 1000 employees are thwarted in their attempts to access the courts because no plaintiffs' attorney will take the case, there are 50 left to pursue their day in court.

Those 50 employees with claims large enough to attract an attorney will be unlikely to spare defendants the often exorbitant expense of litigation – and the attendant pressure for a large settlement – once their relationship becomes adversarial. Several other prominent academic commentators in the field fully support this assessment.[18]

Yet of those who do go to court, a number will fail on motions to dismiss and motions for summary judgment.

Only a small fraction of the original 1000 thus remain to see their case through to a jury.

In the final analysis, yes, the courts – state and federal – would see an increased caseload if pre-dispute arbitration agreements were eliminated, but it would not be as many as one might think at first blush.

The even greater travesty would be the loss of employees' ability to have their grievances addressed.

For the sake of bigger awards for trial lawyers and a bigger threat of expensive litigation with which to bludgeon employers, trial lawyers would sacrifice access to justice for "the little guy."

Question #3.b.

Empirically, employers that have implemented ADR programs have seen markedly decreased total costs to address employees' grievances even as markedly more grievances are addressed.

Without pre-dispute arbitration agreements, these legal costs would rise.

Additionally, the improved morale produced by having more grievances rapidly addressed would dissipate. Dissipated morale would mean disgruntled employees and higher employee turnover.

Thus, without pre-dispute arbitration agreements, human resources costs would also rise.

Increased legal and HR budgets would have to come out of the companies' bottom line. That financial hit could manifest itself in many ways, none of which are desirable in this fragile economy. Employers could raise prices which would deflate sales.
Employers could cut salaries.
Employers could cut benefits.
And yes, employers could downsize employees.

Question #4.a.

Beyond the low success rate of plaintiffs in court decisions, *most* plaintiffs' claims are dismissed on motions. "Many employment discrimination claims are lost at the summary judgment stage of litigation. Although an arbitrator may award summary judgment, such awards are rare. As a result, employees who are hesitant to bring a claim in the litigation forum because of the threat of summary judgment may feel confident to bring a claim in arbitration."[19] [Internal citations omitted.] Lewis Maltby's study[20] of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that 60 percent were dispensed of by pre-trial motions.

Question #4.b.

Lewis Maltby's study[21] of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that employers were the victors in 98 percent of those decisions.

Undoubtedly those plaintiffs are worse off than they would have been with only a smaller award in arbitration.

Question #4.c.

The evidence of differences between compensations from arbitration awards and jury awards is not uniform, as Theodore Eisenberg and Elizabeth Hill review[22],

> "A central question bearing on both arbitration policy and on the long-term struggle over adjudicatory authority between lay persons and professionals is whether arbitrated outcomes materially differ from litigated outcomes. Allegations that arbitration leads to unfair employee losses and to unfairly lower awards are of particular concern. Some simply use anecdotal horror stories about arbitration to support restrictions on arbitration[19] but supply no systematic evidence that arbitration is inferior to in-court adjudication. One study reports that jury trial awards in employment discrimination cases are at least three times higher than arbitration awards.[20] But the evidence is not uniform. Maltby reports that employees prevailed in 63% of arbitrations compared to 14.9% of court cases and finds mixed results on sizes of awards.[21] But he compares arbitrated disputes, which are not dominated by employment discrimination claims,[22] with litigated disputes that are limited to employment discrimination claims.[23] These sets of disputes are not readily comparable.[24]
>
> Arbitrator-juror comparisons in non-employment contexts provide no empirical evidence of systematic juror-arbitrator differences. Vidmar and Rice, in an experiment using professional arbitrators and jury-eligible citizens, asked the two groups to determine the level of noneconomic damages to be awarded for past pain and suffering and for disfigurement in a medical negligence case.[25] The median arbitrator award was $57,000 and

> the median was about $50,000. The median mock juror award was $49,000 and the mean was $52,000. Statistical tests on the arbitrator and juror samples yielded no statistically significant difference in the medians or means.[26] Wittman studied juror and arbitrator outcomes in actual California automobile accident cases and found little evidence of significant differences.[27]
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> [20] William M. Howard, Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?, 50 Disp. Resol. J. 40, 45 (Oct.-Dec. 1995).
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> [21] Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 31 (1998), at 49.
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> [22] Elizabeth Hill, Due Process at Low Cost, 18 Ohio St. J. Disp. Res. (2003), reprinted in NYU's 53rd Annual Conference on Labor (Samuel Estreicher ed. 2003) (7% of AAA arbitrations involve civil rights claims).
>
> [23] Maltby, supra note [21], at 46 (reporting use of federal court database as source of employee success rates).
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> [24] Hill, supra note [22].
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> [25] Neil Vidmar & Jeffrey J. Rice, Assessments of Non-economic Damage Awards in Medical Negligence: A Comparison of Juries with Legal Professionals, 78 Iowa L. Rev. 883 (1993).
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> [26] Id. at 892-93. The samples were of modest size, twenty-one arbitrators and fewer than 100 jurors, id. at 890-91, so one might expect only dramatic differences to be observed at statistically significant levels.
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> [27] Donald Wittman, Lay Juries Versus Professional Arbitrators and the Arbitrator Selection Hypothesis."

Eisenberg and Hill summarize their findings,

> For the class of higher paid employees, we find little evidence that arbitrated outcomes materially differ from trial outcomes. Employee win rates in both forums exceed 55% of disputes pressed to termination and median awards in both forums exceed $65,000.
>
> We find no statistically significant differences between arbitration and litigation in employee win rates or in median or mean award levels for higher pay employees.
>
> The litigation data do not allow a similar comparison of litigation and arbitration results for lower paid employees. Studies indicate that lower paid employees may lack ready access to court, and one simply may not observe substantial numbers of their cases in court.[30] Indeed, our results are consistent with a systematic absence of lower pay employees from realistic access to court in non-civil rights disputes. We also find evidence that arbitrated disputes conclude more quickly than litigated disputes.
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> [30] William M. Howard, Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?, 50 Disp. Resol. J. 40, 45 (Oct.-Dec. 1995)."

It is entirely true that recoveries in court are offset, in whole or in part, by the costs of litigation. In addition, plaintiffs' attorneys require a minimum of $60,000 provable damages,

commonly request a retainer up front, and typically require a payment of a contingency fee of between 33 and 40 percent.[23]

Question #5.

Eisenberg and Hill[24] examine this very hypothesis – that the majority of plaintiffs litigating employment discrimination cases in the federal courts were professional or managerial employees, probably because plaintiffs' attorneys only take cases with greater potential damages awards – and use empirical data to show it to be true:

> "In developing hypotheses, an important distinction between groups of employees in arbitration should be made. Low and medium income employees, who overwhelmingly are subject to arbitration imposed as a condition of employment, should be distinguished from more highly paid employees, for whom arbitration may be an individually negotiated contractual term.[49] We report results separately for highly paid employees ("higher pay employees") in contrast to low and medium paid employees ("lower pay employees").
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> Lower pay employees are those who are estimated to earn up to $60,000 per year.[50]
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> Our first hypothesis is that higher pay employees are probably the class of employees most represented in court.[51] The stakes of lower pay employee cases may simply be too low to attract counsel on a widespread basis.[52] William Howard, in his 1995 article, "*Arbitrating Claims of Employment Discrimination,"* reported the results of a survey of 321 members of the National Employment Lawyers Association. The survey showed that they would accept only 5% of the employment discrimination claims brought to them by prospective clients due to the attorneys' minimum requirements for provable damages.[53] In 1993, the Secretaries of Labor and Commerce established the Commission on the Future of Worker-Management Relations, better known as the Dunlop Commission.
>
> It reported in 1994 that most employment discrimination cases are brought by managers and professionals, rather than lower-level workers.[54] William Howard, in his 1995 article, "*Arbitrating Claims of Employment Discrimination*," reported the results of his survey of 321 members of the National Employment Lawyers Association.[55] He found that plaintiffs' counsel accepted only those employment discrimination cases in which employees could demonstrate, on average, provable damages of $60,000 or more.[56] Since provable damages are rooted in an employee's salary,[57] this survey indicates that highly compensated employees tend to be the ones who generate damages sufficient to attract an attorney to represent them in court. Accepting these two research results, it appears that highly compensated employees dominate among those who have access to the court system in employment discrimination cases.[58]
>
> If relatively few middle and lower income employees have access to the courts for employment discrimination claims, then

even fewer have access to the courts for other employment-related claims. Damages for other employment-related claims, like damages for employment discrimination claims, are correlated with salary, and middle and lower income employees will have difficulty meeting plaintiffs' counsels' minimum provable damages requirements. Furthermore, non-discrimination claims usually do not provide a statutory basis for attorney's fees.[59] Thus, a non-civil rights claim for the same amount of provable damages as a civil rights claim likely will be less attractive to plaintiffs' counsel than the civil rights claim.

These considerations suggest that litigated employment disputes should be more dominated by higher pay employee claims.

…

If the economics of obtaining counsel effectively exclude most lower pay employees from litigation,[69] then the court claimants are more analogous to the higher pay arbitration employees. If that is so, then it is noteworthy that we find no evidence of a significant difference (p = .252) between higher pay arbitration outcomes and litigated outcomes. The employee success rate in state-court litigation, 82 of 145 cases (56.6%), is similar to the 65% success rate in higher pay employee arbitrations. More importantly, the employee success rate in arbitration is in fact *higher* than the employee trial win rate. The direction of the difference in employee success is opposite to that of those concerned about the fairness of arbitration to employees.

In panel B, which focuses on civil rights claims, we again find no evidence of a significant difference (p = .999) between higher pay employee arbitrations and litigated outcomes. The employee success rate in litigation, 70 of 160 cases (43.8%), is similar to the 40% success rate in higher pay employee arbitrations but the number of arbitrations, five, is obviously too small to support firm conclusions.

Note also that the success rate in lower pay employee arbitrations, 24.3% is significantly lower (p = .040) than the trial success rate. This low success rate in civil rights arbitrations is consistent with reports based on another small sample.[70] The results are again consistent with the view that low-paid employees cannot readily gain access to court.

[53] Howard, supra note 20, at 45 ("as evidenced by the survey responses, plaintiffs' lawyers accept only one in 20 [employment discrimination] cases they are offered which typically consist of those where there are high provable damages and the client is financially capable of advancing a retainer").

[54] The Dunlop Commission on the Future of Worker-Management Relations:Final Report (1993-94), available at http://ilr.cornell.edu/library/e_archive/gov_reports/dunlop/DunlopFinalReport.pdf. For evidence of the prevalence of low-wage workers in sexual harassment cases that lead to reported opinions, see Ann Juliano & Stewart J. Schwab, The

Sweep of Sexual Harassment Cases, 86 Cornell L. Rev. 548, 561 (2001) ("Somewhat surprisingly, the bulk of the plaintiffs are clerical or blue collar, rather than workers in higher status occupations. One might hypothesize that high-status victims have more resources to bring a federal lawsuit, and thus professional women should comprise a higher fraction of all plaintiffs in comparison to their representation in the workforce.").

[55] Howard, supra note 20, at 45.

[56] Id. By "provable" damages, plaintiffs' counsel mean damages related to compensation and exclude damages for emotional distress and other intangible damages available under Title VII and the Americans with Disabilities Act. Id.

[57] Hill, supra note 10.

[58] Id.

[59] Id. Illustrative employment discrimination attorney fee statutes are 42 U.S.C. 2000e-5(k) (Title VII); 42 U.S.C. 12205 (Americans with Disabilities Act).

[60] Hill, supra note 10.

[61] Id.

[62] Id.

[63] Paul Burstein & Kathleen Monaghan, Equal Opportunity and the Mobilization of Law, 20 L. & Soc. Rev. 356, 358 (1986) (reporting low employee success rate, 16.8%, in published Fair Employment Practice Case published by the Bureau of National Affairs); Kevin M. Clermont & Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments, 2002 Illinois L. Rev. (forthcoming) (showing low success in appealed cases); Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1175 (1992) (hereinafter "Judge & Jury") (showing low trial success rate in employment discrimination cases).

…

[70] Maltby, supra note 10, at 49-50 (reporting employee success in one of thirteen 1996 discrimination disputes)."

Question #6.a. & 6.b.

The premise that bench trials would be a politically viable alternative is fallacious. For the trial lawyers of the National Employment Law Association and the American Association for Justice (formerly the American Trial Lawyers Association) as well as the House and Senate sponsors of the Arbitration Fairness Act, the Constitutional right to a jury trial is sacrosanct. A bench trial would not satisfy these prime movers.

Importantly too, to implement bench trials in lieu of arbitration is to throw out a long and firmly settled legislative and judicial history supporting arbitration. Beginning in 1925 with the Federal Arbitration Act, Congress has supported arbitration for nearly 85 years in a series of bills. Likewise, the federal courts have just as many years of case history, including numerous United States Supreme Court decisions. These Supreme Court decisions have shown progressive, increasing support for the use of arbitration.

If we as a nation suddenly switched away from binding arbitration to bench trials today, we would make it nowhere near 85 years before those insisting on jury trials cited horror stories of bench trials, decried the elimination of Contitutional rights, filed bills to ban bench trials, held press conferences about how unaccountable judges were undermining the Civil Rights Act, created political pressure from without and within the EEOC against contractual waivers of jury trial rights, and the like.

In theory, jury waivers leading to bench trials are available now, but they have not enjoyed widespread usage. ‘‘Pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial for their Title VII claims are uncommon in federal employment law, but do exist.’’[25]

Several reasons may account for their distant-second status.

First, the judiciary has supported arbitration. Warren E. Burger, Former Chief Justice, United States Supreme Court famously stated, "The notion that ordinary people want black-robed judges, well-dressed lawyers and fine courtrooms as settings to resolve their issues is not correct. <u>People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible</u>..." [Emphasis added.]

The Majority opinion in Circuit City Stores, Inc. v. Adams states “We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. … “[T]here are real benefits to the enforcement of arbitration provisions.”[26]

One reason for the judiciary’s support of arbitration is that it takes some of the overwhelming burden and backlog off of their backs. Bench trials would take up the time of judges in a way that arbitrations do not.

Another reason people prefer binding arbitration over bench trials is precisely because there are no appeals on the merits of the issues. Whereas Ms. LaRocca has considered this fact a drawback, many and indeed most see this prohibition of appeals as a benefit of binding arbitration over bench trials.

The finality of a binding arbitration decision ends the conflict, giving a catharsis so that the parties can move beyond the conflict and get on with their lives.

The finality of a binding arbitration decision saves the time and expense of an appeal, thus restoring productivity.

Caselaw regarding contractual waivers of a jury trial right are not as legislatively grounded as arbitration with its Federal Arbitration Act. Thus such waivers are more intensely scrutinized. A <u>presumption against</u> the waiver of a jury trial exists[27] whereas a

presumption in favor of arbitration exists.[28] The relative bargaining power of the parties is more scrutinized for jury trial waivers than for binding arbitration[29]. Additional criteria apply for waivers of jury trials, such as the business acumen of the party opposing waiver and whether counsel for the party opposing waiver had an opportunity to review the agreement, *et cetera*.[30]

All of that is to say that waivers of jury trials would be more litigated for procedural questions than arbitration is now. That's simply asking for more trouble than we have now.

Furthermore, waivers of jury trial rights, because they don't have a federal statute targeted to their particular implementation and enforcement, must comply with other federal and state statutes. "For example, agreements covering claims under the Age Discrimination in Employment Act ("ADEA") must comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA")."[31] "The OWBPA requires that in order for an individual to release an age claim under the ADEA, the waiver must specifically mention the ADEA, the individual must be given additional consideration, and the individual must be advised to consult an attorney prior to signing the release."[32] "In addition, the Act requires that the individual must be informed that he or she may take twenty-one days to consider the offer and has seven days after the signing of the agreement to change his or her mind and revoke the agreement."[33] Those provisions constitute substantial additional restriction.

Those points made, it would be excellent if the procedural unconscionability and substantive unconscionability objections to binding arbitrations were alleviated as they are for bench trials.

Ms. LaRocca treats the fact that bench trials are slower, less private, and more costly than arbitrations as an advantage to employers because "fewer employees may choose to bring discrimination claims,"[34] "employers will not be pressured to bear the full cost of the procedure,"[35] and "In addition, because judges have the power to grant summary judgment, hesitant employees may not bring complaints."[36] While some may like slow, costly, public, intimidating procedures, and indeed slow, costly, public, and intimidating are veritably hallmarks of—even definitional of—government, these are not desirable goals in and of themselves. Employees do not seek what Ms. LaRocca is offering, as stated by an employees' representative at the American Bar Association on November 7, 2009.[37]

Finally, Ms. LaRocca lauds that fact that bench trials place the costs on the taxpayer rather than keeping the costs between the parties to the conflict. Especially in this economy when people have enough financial hardship of their own, the last thing people want to spend money on is other people's problems.

If a bill regarding arbitral procedural fairness, not unlike Senator Sessions' Fair Arbitration Act of 2007 (S. 1135), were to move through Congress, guarantees of freedom from procedural and substantive unconscionability and from lack of contract claims should be included for parties who voluntarily comply with the standards set forth in the bill.

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[1] Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005), citing Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements, in* HOW ADR WORKS 99, 102 (Norman Brand ed., 2002); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 20, 22.

[2] AM. ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 16 (Jan. 2003);
[3] Dr. Renate Dendorfer, Aspects of Mediation in the Workplace and for Employment Law, Slides 5 and 6, Seminar at the LANDWELL conference, Barcelona, September 29&30, 2003, online at http://www.steinbeis-law.de/pdf/LandwellVortrag.pdf
[4] Samuel Estricher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. Disp. Resol. 559, 564 (2000-2001)
[5] Id.
[6] BNA Daily Labor Report, 216 DLR C-2 (11/12/2009), online at http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=15742396&vname=dlrnotallissues&fn=15742396&jd=a0c1j2a3p4&split=0
[7] AM. ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 16 (Jan. 2003); HOW ARBITRATION WORKS 2–3 (Edward P. Goggin & Alan Miles Rubin eds., 5th ed. Supp. 1999); Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 95, 98–99 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 20, 22; *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1673 (1996).
[8] HENRY S. KRAMER, ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE § 9.01, at 9-3 (2004); AM. ARBITRATION ASS'N, *supra* note 11, at 16; HOW ARBITRATION WORKS, *supra* note 11, at 2–3; Bingham & Chachere, *supra* note 11, at 98–99; Oppenheimer & Johnstone, *supra* note 11, at 20, 22; *Developments in the Law*, *supra* note 11, at 1673.
[9] "Rule 31. Fees
(c) If an arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an employee may be required to pay is the initial JAMS Case Management Fee." JAMS Employment Arbitration Rules & Procedures, Effective July 15, 2009, online at http://www.jamsadr.com/rules-employment-arbitration/#thirty-one.
[10] "For Disputes Arising Out of Employer-Promulgated Plans*: … The employer shall pay the arbitrator's compensation unless the employee, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation." American Arbitration Association, Employment Arbitration Rules, Amended and Effective June 1, 2009, online at http://www.adr.org/si.asp?id=5380
[11] In California, for disputes arising out of employer-promulgated plans, employees with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. California Code of Civil Procedure, Section 1284.3
[12] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003). *See also Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at http://www.workrights.org/current/cd-arbitration.html.
[13] *Id.*
[14] Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005), citing Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements*, *in* HOW ADR WORKS 99, 102 (Norman Brand ed., 2002); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 24, 35 n. 100.
[15] Lewis L. Maltby, *Arbitrating Employment Disputes: The Promise and the Peril in Arbitration and Employment Disputes*, 530. (Daniel P. O'Meara ed., 2005).
[16] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790 (2008).
[17] Theodore Eisenberg and Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, 2003 Pub. H. & Legal Theory Res. Paper Series 1, 14 available at http://papers.ssrn.com/co13/papers.crm?abstract_id=389780.

[18] *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567-68 (2001); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 57 (2003); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003).

[19] Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005), citing Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements, in* HOW ADR WORKS 99, 102 (Norman Brand ed., 2002); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 20, 22.

[20] *Employment Arbitration: Is It Really Second-Class Justice?*, Dispute Resolution Magazine, 23-24 (Fall 1999)

[21] *Id.*

[22] See Eisenberg and Hill, note 12, at page 3

[23] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003). *See also Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at http://www.workrights.org/current/cd-arbitration.html.

[24] See Eisenberg and Hill, note 12, at page 9, 13.

[25] "I was only able to find two cases that analyzed a jury trial waiver provision in the Title VII context: Brown v. Cushman & Wakefield, Inc., 235 F. Supp. 2d 291 (S.D.N.Y. 2002), discussed above, and Schappert v. Bedford, Freeman & Worth Publ'g Group, LLC, No. 03 Civ. 0058(RMB)(D.), 2004 U.S. Dist. LXIS 14153 (S.D.N.Y. 2004) (finding jury waiver provision enforceable)", Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005)

[26] 121 S. Ct. 1302, at 1312 (2001) [citing Southland Corp. v. Keating, 465 U.S. 1, 16 (1984)]

[27] Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

[28] "The presumption in the Federal Arbitration Act (FAA) is that arbitration agreements will be "valid, irrevocable, and enforceable" unless a generally applicable, state law contract defense would apply." Thomas W.H. Barlow, *The Enforceability of Class Action Waivers in Arbitration Clauses*, Dispute Resolution Journal, vol. 64, no. 3 (Aug.-Oct. 2009),

[29] Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

[30] Id.

[31] Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 626(f) (2000)); *see* Hammaker v. Brown & Brown, Inc., 214 F. Supp. 2d 575, 578–79 (E.D. Va. 2002)

[32] *See* 29 U.S.C. § 626(f)(1).

[33] Id.

[34] Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 at 954 (2005)

[35] Id.

[36] Id.

[37] "Pearl Zuchlewski, who represents employees in her firm of Kraus & Zuchlewski, pointed to some advantages of arbitration for her clients. Zuchlewski said some of her clients prefer the privacy of arbitration. She also noted that there is some control over who serves as the factfinder, since the two parties mutually select the arbitrator rather than have a judge selected by lottery. In addition, the employee can actually keep the award, she said, since arbitrations are rarely appealable." ABA Conference Report - Alternative Dispute Resolution: Panelists Agree Employment Arbitration Neither 'Panacea' Nor 'Horror Story', Daily Labor Report, 216 DLR C-2, 11/12/2009, online at http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=15742396&vname=dlrnotallissues&fn=15742396&jd=a0c1j2a3p4&split=0