Ballard Spahr LLP

1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
TEL 215.665.8500
FAX 215.864.8999
www.ballardspahr.com

Alan S. Kaplinsky
Tel: [redacted]
Fax: [redacted]

April 23, 2019

Via E-mail

The Honorable Lindsey O. Graham
Chairman, Senate Judiciary Committee
Washington, D.C. 20510-6275
c/o [redacted]

Re: April 3, 2019 Senate Judiciary Committee Hearing on "Arbitration in America"

Dear Senator Graham and Members of the Committee:

I appreciate the opportunity to respond to the questions for the record submitted to me by Senators Grassley and Kennedy by letter dated April 9, 2019.[1] These answers reflect my own views on the subject of consumer arbitration, and my law firm and I are not being compensated in any fashion for my answers. My opinions do not necessarily reflect the opinions of any of my firm's clients.

Questions from Senator Chuck Grassley of Iowa for Mr. Kaplinsky and Mr. Schwartz

1. Both of you mentioned in your testimony the fact that courts can invalidate unlawful arbitration agreements. Can you explain in a bit more detail how courts are already capable of doing this?

Mr. Kaplinsky' s Answer

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, reserves to the federal and state courts the authority to invalidate or restrict arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." Therefore, generally applicable state law contract defenses such as lack of contractual assent and procedural and substantive unconscionability can be asserted by consumers who believe that a pre-dispute arbitration agreement should not be enforced because it was not agreed to or is unfair. *See Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

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[1] I gratefully acknowledge the help of my partners Mark J. Levin and Steven W. Suflas and my colleague Tiffany B. Gelott in preparing these responses.

Consumers typically assert those contractual defenses in court, not in arbitration. The default procedure under the FAA is that if a company files a motion in court to enforce an arbitration agreement and the consumer opposes the motion on generally applicable contractual grounds, the court (not an arbitrator) will decide those objections and determine whether the agreement is enforceable. Pursuant to Sections 3 and 4 of the FAA, 9 U.S.C. §§3, 4, the court determines the existence, enforceability and scope of the arbitration agreement. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 94 (2002) (court determines whether a particular dispute falls within the scope of an arbitration clause and whether the clause is enforceable); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (court determines "the validity of the arbitration clause [and] its applicability to the underlying dispute between the parties"). Under Section 4 of the FAA, if there is a factual dispute concerning the making of the arbitration agreement, the dispute is resolved by the court by means of a bench or jury trial. (*Id.* n. 1).

Pursuant to this existing statutory scheme, federal and state courts have proven to be extremely effective backstops for arbitration agreements that are found to impair the consumer's substantive rights, impose unreasonable costs on the consumer, are one-sided in favor of the company or are otherwise unfair to the consumer. *See, e.g., ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002) (arbitration agreement exempted collection proceedings brought by lender against consumer from arbitration and cost of arbitration would be ten times the cost of court action); *Luna v. Household Fin. Corp.*, 236 F. Supp. 2d 1166 (W.D. Wash. 2002) (company, but not consumer, reserved right to go to court rather than arbitrate); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (agreement limited damages in cases of fraud and other intentional torts and imposed thousands of dollars in arbitration fees); *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 857 N.E.2d (2006) (contract did not inform customer of the costs of arbitration and did not provide a cost-effective means for resolving the claim).

Thus, there is a time-tested and effective system already in place that enables the court to hear consumers' complaints about arbitration clauses and independently determine whether an arbitration should take place. There are literally thousands of federal and state court decisions dealing with the enforceability of arbitration agreements, ranging from U.S. Supreme Court opinions to county court determinations. These decisions span many decades and go both ways depending on the facts involved and the applicable law. I should emphasize that these days, most arbitration agreements are enforced because they are demonstrably fair to consumers. Indeed, the major consumer arbitration administrators (the American Arbitration Association and JAMS) require companies to adhere strictly to consumer due process protocols and rules and fee schedules and will not administer a

company's arbitration agreement if it does not comply.[2] But if an arbitration agreement is unfair to the consumer, the court is the guardian of the consumer's rights. If the court does decline to enforce an arbitration agreement, that shows that the existing system of checks and balances is working just as Congress intended when it enacted Sections 3 and 4 of the FAA.

2. Some of the witnesses at the hearing said that arbitration agreements harm consumers by preventing them from joining a class action. Used appropriately, class actions can create efficiencies and ensure justice. But they can also be abused. One of the goals of the bipartisan Class Action Fairness Act of 2005, which I authored, was to make sure that class members actually get compensation and aren't taken advantage of by their lawyers.

However, one of the witnesses, Professor Gilles, wrote in a law review article, "Class action plaintiffs' lawyers are indeed independent entrepreneurs driven by the desire to maximize their gain, even at the expense of class members' compensation. Where the conventional wisdom has gone wrong, however, is in condemning this as a bad thing...."[3] She goes on to say, "there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all. Nor is there any economic reason to fret that entrepreneurial plaintiffs' lawyers are being overcompensated."[4]

a. Do you agree with Professor Gilles that there's no reason to care whether members in a class action get compensated at all?

Mr. Kaplinsky's Answer

I strenuously disagree with Professor Gilles' position. As a matter of both law and public policy, I see no justification in allowing a damages class action to proceed if it benefits only the lawyers for the class and not the class members. Federal Rule of Civil Procedure 23 was promulgated to benefit the class members, not their lawyers. As observed in Senator Grassley's question, the Class Action Fairness Act of 2005 ("CAFA") was enacted to prevent the abuse of lawyers benefitting to the detriment of their clients. As this Committee emphasized in the CAFA Senate Report: "[T]he lawyers who bring the lawsuits

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[2] *See* http://www.adr. org/sp.asp?id=22019; http://www.jamsadr.com/rules-consumer-minimum-standards.

[3] Myriam Gilles & Gary B. Friedman, "Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers," 155 U. Pa. L. Rev. 103, 104 (2006).

[4] *Id.* at 105.

effectively control the litigation; their clients – the injured class members – typically are not consulted about what they wish to achieve in the litigation and how they wish to proceed. *In short, the clients are marginally relevant at best. This stands in stark contrast to the designed purpose of class actions.*" S. Rep. 109-14 ("S. Report"), 109th Cong., 1st Sess. p. 4, 2005 WL 627977, at *5 (Feb. 28, 2005) (italics added). Professor Gilles' position directly contradicts the legislative goal of CAFA.

Importantly, plaintiffs' lawyers are incentivized to bring class actions by the prospect of generous attorneys' fee awards, even if the case is marginal on its merits. In reality, the majority of consumer class actions end up settling before trial, not because they have merit, but because most companies cannot afford to lose them. *See, e.g., Coopers & Lybrand v. Liveasay*, 437 U.S. 463, 476 (1978) ("[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 164 (3d Cir. 2001) (class certification "places inordinate or hydraulic pressure on defendants to settle"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 293, 299 (7th Cir. 1995) (class certification may require defendants to "stake their companies on the outcome of a single jury trial"). *See also* Senate Report No. 14, *supra*, 2005 WL 627977, at *14, 20-21 ("Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits.").

Unfortunately, it appears that even CAFA has not succeeded in eliminating this perversion of Rule 23. The Consumer Financial Protection Bureau's ("CFPB") empirical study of consumer arbitration found that 87% of the 562 class actions it studied produced no benefits to the putative class members. Most of the class actions settled individually, leaving the putative class members to fend for themselves.[5] The 13% of class actions that settled on a class-wide basis produced only minuscule benefits to the settlement class members. The average settlement-class member received a paltry $32.35 after waiting for two or more years.[6] In the class settlements that required the putative class members to submit a claim form, the weighted average claims rate was only 4%, meaning that 96% of the potentially eligible putative class members failed to obtain any benefits because they did not submit claims.[7] Although the class members received nothing at all or a minuscule amount at best,

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[5] Study, § 1, pp. 13-14; § 6, p. 37.

[6] *See id.* at § 5, pp. 13, 41; 81 Fed. Reg. 32,849 n. 305.

[7] Study, § 1, p. 17, § 8, p. 30.

the lawyers for the class actions studied by the CFPB were awarded a total of $424,495,451 – *almost half a billion dollars* – in attorneys' fees.[8]

By contrast, as the CFPB acknowledged in its study, arbitrations "proceed relatively expeditiously [and] the cost to consumers of this mechanism is modest." Moreover, consumers who prevail in arbitration may obtain "substantial individual awards" as "the average recovery … [in the arbitrations it studied] was nearly $5,400."[9] Notably, at the time it was proposing to strip financial services companies of their arbitration rights, the CFPB was urging its own employees to arbitrate their workplace disputes because arbitration provides "faster and less contentious results" than litigation.[10] The CFPB's study showed that the average award to a prevailing consumer in arbitration was $5,389 –166 times what putative class members recover on average in class settlements.[11] They received that award in 2-5 months,[12] instead of more than two years.[13] And, the costs to the consumer were minimal.[14] Furthermore, none of the 562 class actions CFPB studied went to trial.[15] By contrast, the study found that of 341 cases resolved by an arbitrator, in-person hearings were held in 34% of the cases, and an arbitrator issued an award on the merits in about one-third of the cases.[16] It is not surprising that studies have shown that consumers prefer arbitration to court litigation.[17]

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[8] *Id.* at § 8, p. 33.

[9] 81 Fed. Reg. 32,855.

[10] *See* U.S. Government Accountability Office, Report to Congressional Requestors, *Consumer Financial Protection Bureau Additional Actions Needed to Support a Fair and Inclusive Workplace* ("GAO Report"), pp. 48-49 (May 2016).

[11] Study, § 5, pp. 13, 41.

[12] *Id.* at § 1, p. 13.

[13] *Id.* at § 6, pp. 9, 43.

[14] *Id.* at § 1, p. 13; § 4, pp. 10-11; *see also* note 18 *supra*.

[15] Study, § 6, pp. 7, 38.

[16] *Id.* at § 5, pp. 11-12.

[17] *See, e.g.*, Harris Interactive, *Survey of Arbitration Participants* (Apr. 2005). *See* https://www.instituteforlegalreform.com/uploads/sites/1/ArbitrationStudyFinal.pdf.

Had Congress not repealed the CFPB's rule that would have prohibited class action waivers in consumer arbitration agreements, the societal costs would have been dramatically worse. The CFPB itself estimated that its rule would have caused 53,000 businesses who currently utilize arbitration agreements to incur between *$2.62 billion and $5.23 billion* every five years to deal with 6,042 additional federal and state court class actions that would be filed due to the rule's elimination of class waivers. [18]

The U.S. Supreme Court very recently vacated a lower court judgment upholding a class action settlement in an internet privacy case in which the defendants paid $8.5 million, the lawyers for the class were paid $2.1 million in attorneys' fees, the remaining funds were distributed to *cy pres* institutions and more than 100 million class members received no compensation at all. *See Frank v. Gaos*, 139 S. Ct. 1041 (2019). Although the Court remanded the case to the lower court to determine a threshold issue – whether the plaintiffs suffered a constitutional "injury" that would give them Article III standing to sue – the case illustrates the abuses that continue to be rampant in consumer class action litigation, to the complete detriment of the class members who are the intended beneficiaries of Rule 23. If anything, I urge Congress to examine the need for additional class action reforms since, as I demonstrated at length in my hearing testimony and further amplified in my subsequent blog,[19] the existing system of arbitration is working very well. It is class actions that need reformation.

Questions from Senator John Kennedy of Louisiana for Kevin Ziober, Myriam Gilles, Alan Kaplinsky, F. Paul Bland Jr., Alan Carlson, and Victor Schwartz

1. **I will be introducing the Stop Blaming Victims Act to address the problem of nondisclosure agreements being used to protect government employees who sexually harass others. It would limit the ability of government employees to hide behind non-disclosure agreements. NDA's are dangerous because they are often mandatory elements of a settlement that prevent victims from speaking out later on when they see similar abuses repeated. How are mandatory NDA's used in forced arbitration? Are they also used to silence wronged parties who might seek to expose wrongdoing at a powerful company?**

Mr. Kaplinsky's Answer

Both arbitration and the use of nondisclosure agreements in arbitration serve valuable purposes not only for employers, but also employees. It is a misperception that employees

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[18] *Id.* at 32,907-09.

[19] *See* https://www.consumerfinancemonitor.com/2019/04/08/a-response-to-comments-made-at-senate-judiciary-committees-arbitration-hearing/. A copy of the blog is attached hereto as Exhibit 1.

who bring sexual harassment claims fare better when they pursue their claims publicly in court, as opposed to seeking recourse through private party arbitration.

Critics often overlook how privacy and confidentiality in arbitration may benefit employees with cases involving sensitive personal information.[20] In circumstances such as sexual harassment, there are several reasons why employees may prefer to keep their cases confidential. First, employees may be apprehensive, and rightfully so, to bring such claims publicly. Some alleged victims may still be working and want to remain employed in peace and privacy. Other alleged victims may be searching for new employment and hope to do so with a clean slate and without concern that a future employer may use employment related claims against her.[21] Without confidentiality, sexual harassment claimants may fear (rightly or wrongly) that they will be "retaliated against or ostracized by their employers, potential future employers and even entire industries."[22]

Second, employees often are motivated to resolve their claims in arbitration, in part, because of confidentiality.[23] They may not want their claims to become public, because of sincere concerns that they might be treated differently by their family and friends, or receive unwanted attention and unflattering publicity, especially if they undergo a public trial.[24] The cold reality is that when defendants are faced with their own public exposure issues in these cases, litigation often "come[s] after victims hard … by [publicly] casting them in whatever

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[20] *See Parilla v. IAP Worldwide Serv., V.I.*, 368 F.3d 269, 280 (3d Cir. 2004) (holding that AAA rules requiring confidentiality were not unreasonable: "[T]here is nothing inherent in confidentiality itself that favors or burdens one party vis-à-vis the other in the dispute resolution process. Importantly, the confidentiality of the proceedings will not impede or burden in any way [the plaintiff's] ability to obtain any relief to which she may be entitled."); *CarMax Auto Superstores, Inc. v. Sibley*, 215 F. Supp. 3d 430, 437 (D. Md. 2016) ("A confidentiality provision that imposes a confidentiality requirement on both parties—simultaneously benefiting both parties—is not "'unreasonably and unexpectedly harsh."); *see also* Amy J. Schmitz, *SYMPOSIUM: Secrecy and Transparency in Dispute Resolution: Untangling the Privacy Paradox in Arbitration*, 54 Kan. L. Rev. 1211, 1212-13 (2006).

[21] Robina Shea, *In Defense of Confidentiality (Yes, even in harassment cases)*, Jan. 12, 2018, *available at* https://www.constangy.com/employment-labor-insider/ban-confidentiality-in-sex-harassment-settlements-youll.

[22] Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, THE TIME, November 28, 2017, available at http://time.com/5039246/sexual-harassment-nda/.

[23] *Banning Nondisclosure Agreements May Hurt More Than Help*, NEW JERSEY LAW JOURNAL, July 30, 2018.

[24] *Id.*

negative light they can."[25] The potentially harsh consequences of increased transparency ultimately may dissuade sexual harassment claimants from asserting their claims in the first place. Confidential arbitrations, on the other hand, "protect victims from all the painful ugliness that comes with litigation in the public eye.[26]

Third, in the absence of a nondisclosure agreement, employers may refuse to settle, or they may make low-ball offers that will not reflect culpability when they become public. The lack of confidentiality, therefore, often results in not only less or no settlement money for the accuser, but also "costly, drawn-out, contentious, stressful, and often embarrassing litigation"[27] discussed above.

2. Courts consistently rule that claims under the Uniformed Services Employment and Reemployment Rights Act, which protects the employment rights of members of the armed forces, are subject to arbitration under the Federal Arbitration Act. We should be ensuring that our military men and women are adequately protected. How is it fair that an employer can fire an employee who leaves for combat and often times their only recourse is arbitration? What in your opinion needs to be done to correct this?

Mr. Kaplinsky's Answer

Our men and women in the military should receive the full protections afforded to them under the law when they bring employment rights claims. However, there is nothing inherently unfair in presenting claims under the Uniformed Services Employment and Reemployment Rights Act in arbitration. Members of the armed forces receive the same privileges and rights in arbitration as they would in our judicial system.

Arbitration proceedings are conducted under the applicable law and provide the same remedies that are available under USERRA as if the matter was heard in court. For example, the Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") (a leading administrator of arbitration proceedings) provide that "[t]he arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorneys' fees and costs, in accordance

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[25] *Id.*

[26] *Id.*

[27] Robina Shea, *supra* note 7.

with applicable law."[28] JAMS' Policy on Employment Arbitration Minimum Standards sets forth a similar requirement: "All remedies that would be available under the applicable law in a court proceeding, including attorneys' fees and exemplary damages, as well as statutes of limitations, must remain available in the arbitration."[29] JAMS also explicitly makes clear that "[p]ost-arbitration remedies, if any, must remain available to an employee."[30]

Courts likewise safeguard workers whose actions are to be sent to arbitration by refusing to enforce any employment arbitration agreement that does not model statutory entitlements or is against public policy. *See e.g. United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987) ("It is well-understood that courts will not enforce an arbitration award if the award itself violates established law or seeks to compel some unlawful action."); *Marlborough v. AFSCME, Council 4, Local 818-052*, 309 Conn. 790, 803, 75 A.3d 15 (2013) (holding the same); *see also Tim Huey Corp. v. Glob. Boiler & Mech.*, 272 Ill. App. 3d 100, 110, 208 Ill. Dec. 697, 704, 649 N.E.2d 1358, 1365 (1995) ("Illinois and Federal courts will not enforce an arbitration award that violates a well-defined and dominant public policy, as ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.") (internal quotations omitted).

Arbitration is also typically faster than court litigation and thus more efficient and less costly for the participants. *See* Samuel Estreicher, et al., Evaluating Employment Arbitration: A Call for Better Empirical Research, 70 Rutgers U. L. Rev. 375, 382 (2018) (discussing several studies finding that arbitration took less than half the time to resolve than litigation). In certain states, arbitration is dramatically faster than resolving a case in U.S. District Court. Roy Weinstein, et al., Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings, Micronomics Economic Research and Consulting, 10, Table 2.5 (2017) (discussing the additional time required to take a case through trial in federal court in comparison to arbitration). For example, in 2015, it took 6.3 additional months to take a case through trial in federal court compared to arbitration in Florida. By contrast, in Georgia, it took an

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[28] *Employment Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, *available at* https://www.adr.org/sites/default/files/EmploymentRules_Web2119.pdf.

[29] JAMS Policy on Employment Arbitration Minimum Standards, *available at* https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Stds-2009.pdf. The Institute for Conflict Prevention and Resolution ("CPR") also has a similar rule in place. *See* CPR's Employment Dispute Arbitration Procedure, *available at* https://www.cpradr.org/resource-center/rules/arbitration/employment-arbitration-procedure ("The arbitrator may award any remedy available under statute or otherwise in a court of competent jurisdiction.").

[30] *Id.*

additional 13.4 months; in Alabama, it took an additional 16.6 months; and in Maryland, it took an additional 21.1 months to litigate a case through trial in court. *Id.*

Numerous studies also show that employees fare better in arbitration than in court. One study dealing with AAA employment arbitration found that employees won 73% of the arbitrations they initiated and 64% of all employment arbitrations (including those initiated by employers). *See* Lisa B. Bingham, Is There a Bias in Arbitration of Nonunion Employment Disputes? An analysis of Active Cases and Outcomes, 6 Int'l J. Conflict Management 369, 378 (1995). A study which compared the results in employment arbitration with the results in federal court during the same period of time found that 63% of employees won in arbitration compared to 15% of employees who won in federal court. Awards to employees in arbitration were on average 18% of the amount demanded versus 10.4% of the amount demanded in court. The study also demonstrated that while arbitration awards to employees are on average lower than judgments to employees in court, the outcome for employees is still better in arbitration because of their higher win-rates of arbitration and the shorter duration of arbitration compared to court proceedings. *See* Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rights L. Rev. 29, 46-48 (1998).

In yet another study, it was reported that employees won 51% of arbitrations, while the EEOC won 24% of cases in federal court. *See* George W. Baxter, Arbitration in Litigation for Employment Civil Rights?, 2 Vol. of Individual Employee Rights 19 (1993-94). Another study reported that employees won 68% of the time before the AAA as contrasted with only 28% of the time in litigation. *See* William M. Howard, Arbitrating Claims of Employment Discrimination, Disp. Res. J. Oct-Dec 1995, at 40-43. *See also* Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure, California Dispute Resolution Institute (August 2004), http://www.mediate.com/cdri/cdri_print_Aug_6.pdf (concluding that consumers prevailed 71% of the time); Theodore Eisenberg and Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, Disp. Resol. J. Nov. 2003 – Jan. 2004, at 44 (finding that higher-compensated employees, i.e., those with annual incomes of $60,000 or more, obtained slightly higher awards in arbitration before the AAA than in court; Michael Delikat and Morris M. Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, Disp. Resol. J. Nov. 2003 – Jan. 2004, at 56 (comparing the results of employment discrimination cases filed and resolved between 1997 and 2001 in the S.D.N.Y. versus with the NASD and NYSE; employees prevailed 33.6% of the time in court versus 46% of the time in arbitration, the median damages award was $95,554 in court versus $100,000 in arbitration and the median duration was 25 months in court versus 16½ months in arbitration; Lisa B. Bingham, Is there a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes, 6 Int'l J. of Conflict Mgmt. 369 (1995) (in a study of 171 employment arbitration cases filed with the AAA in 1992, Bingham concluded that "employee claimants

are more likely than employer claimants to recover a larger proportion of the amount of damages claimed when the arbitrator is paid a fee, recovering almost fourfold what employers recover ...."; she concluded that her results "contradict the theory that employment arbitrators will be biased against individual employees ....").

3. In the past couple of years, more and more companies have eliminated forced arbitration. Over the last year, Uber, Lyft, Facebook, and Google and many others have scrapped their arbitration policy. Why do you think we are seeing this uptick in companies ending their forced arbitration policy?

Mr. Kaplinsky's Answer

The marketplace is often the best regulator for corporate behavior. While we cannot say with certainty what caused the listed companies to abandon their arbitration policies on sexual harassment claims, public statements and comments in the media indicate that they made these changes due to the competitive pressures of a free marketplace and their desire to retain employees and/or consumers.

For instance, Google announced it would make arbitration optional for all sexual harassment claims, and later expanded this policy to all employment disputes, after thousands of its staff worldwide participated in walkout in November 2018. In their protest, Google employees specifically demanded an end to forced arbitration in sexual harassment cases after they learned about claims against two Google senior executives.[31]

A day after Google announced its new policy of making arbitration optional, originally just for sexual harassment claims, Facebook followed suit and changed its policy as well. A Facebook spokesperson provided the following public comment on the day of its decision: "Today, we are publishing our updated Workplace Relationships policy and amending our arbitration agreements to make arbitration a choice rather than a requirement in sexual harassment claims."[32]

In May 2018, Uber appeared to change its customer arbitration policy due to negative public exposure it received after CNN reported that at least 103 Uber drivers in the United States have been accused of sexually assaulting or abusing their passengers over the last four

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[31] Rachel Lerman, *Google to End Forced Arbitration for All Worker Disputes*, FINANCIAL TIMES, Feb. 21, 2019; Richard Waters, *Google Ends Forced Arbitration for Sexual Harassment claims Stands First: Tech Giant Opens Itself Up to Possible Lawsuits After Internal Anger*, FINANCIAL TIMES, Nov. 8, 2018.

[32] Kurt Wagner, *Facebook Followed Uber and Google And Is Ending Forced Arbitration For Sexual Harassment Cases – Arbitration Is Now a "Choice Rather than a Requirement" at Facebook*, RECODE (USA), Nov. 9, 2018.

years.[33] Uber announced this policy change just days before its deadline to respond to a lawsuit filed against the company by 14 women who allege they were assaulted by their drivers.[34] Lyft, as Uber's biggest competitor, took action immediately and made a public statement just hours after Uber, vowing to make the same changes for sexual harassment claims: "Today, 48 hours prior to an impending lawsuit against their company, Uber made the good decision to adjust their policies .... We agree with the changes and have removed the confidentiality requirement for sexual assault victims, as well as ended mandatory arbitration for those individuals so that they can choose which venue is best for them. This policy extends to passengers, drivers and Lyft employees."[35]

However, this should not be interpreted as an indictment of employment arbitration agreements generally. As discussed above, arbitration agreements provide many benefits to employees. Notably, the Consumer Financial Protection Bureau has encouraged its own employees to arbitrate their workplace disputes because arbitration provides "faster and less contentious results" than litigation.[36]

Very truly yours,

Alan S. Kaplinsky

ASK/cvf

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[33] David Lazarus, *Uber and Lyft See the Light on Sexual Assault*, ERIE TIMES-NEWS, May 27, 2018.

[34] Johana Bhuiyan, *Following Uber's Lead, Lyft Is Also Allowing Alleged Victims of Sexual Assault to Pursue Cases in Open Court – The Company Is Also Waiving the Requirement to Keep Any Settlement Proceedings Confidential*, RECODE USA, May 15, 2018.

[35] Aaron Mak, *Uber ad Lyft Will No Longer Keep Sexual Harassment and Assault Victims Out of Court*, SLATE, May 15, 2018.

[36] *See* U.S. Government Accountability Office, Report to Congressional Requestors, *Consumer Financial Protection Bureau Additional Actions Needed to Support a Fair and Inclusive Workplace* ("GAO Report"), pp. 48-49 (May 2016).

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Consumer Finance Monitor
CFPB, Federal Agencies, State Agencies, and Attorneys General

A response to comments made at Senate Judiciary Committee's arbitration hearing

By **Alan S. Kaplinsky** on April 8, 2019

Last Tuesday, I had the great privilege of testifying before the Senate Judiciary Committee at its **"Arbitration in America" hearing**. As I told the Committee members in my opening remarks, arbitration is a topic that's very near and dear to my heart. The hearing lasted about two hours and only two Committee members were present for the entire hearing, Committee Chairman Lindsay Graham and Senator Richard Blumenthal who served as the Acting Ranking Member in place of Ranking Member Senator Dianne Feinstein. Many of the Committee members seemed to be present only when it was his or her turn to question the witnesses.

Although Republicans control the Committee by a 12-10 majority, Democratic members (who had an animus towards consumer or employee arbitration) played a dominant role, with many using their time to make statements against arbitration rather than to ask questions. When questions were asked, Democrats directed them only to "friendly' witnesses (which meant they avoided me.) I was asked only a few questions by Chairman Graham and Senator Grassley.

The hearing's format allocated five minutes to each witness to give oral testimony. The oral testimony was followed by questioning by Committee members. Witnesses could not respond to questions asked by Senators of other witnesses, nor could a witness comment on the response of another witness. For that reason, through this

blog post, I want to share the following comments that I would have made at the hearing if the format had permitted me to do so:

- Senator Whitehouse cited several historical texts to demonstrate that the right to a jury trial was viewed as fundamental by the nation's founders. While Senator Whitehouse's historical perspective is correct, his suggestion that Congress should not allow predispute arbitration agreements because they constitute a waiver of the right to a jury trial is inconsistent with the extensive body of case law upholding such waivers. Federal and state courts throughout the country, while characterizing the right to a jury trial as fundamental, have also held that the right to a jury trial can be waived. The United States Supreme Court recently held that "the primary characteristic of an arbitration agreement [is] ... a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). In this case, the Supreme Court enforced the arbitration clause.
- Senator Booker commented that arbitration is not "quick, efficient, or cheap" and Senator Klobuchar suggested that the cost of an individual arbitration is "so high" that "even if you win, you don't win." With regard to speed, several studies have demonstrated that consumer arbitration is faster than litigation. Indeed, the Consumer Financial Protection Bureau's (CFPB) exhaustive empirical study of consumer arbitration showed arbitration to be up to 12 times faster than consumer class action litigation. With regard to efficiency, surveys have shown that the vast majority of consumers view arbitration as simpler, less hostile, and more convenient than going to court. With regard to cost, arbitration is less expensive for consumers than going to federal court. The American Arbitration Association (AAA) and JAMS, the nation's leading national arbitration administrators, have capped the arbitration fees paid by a consumer at $200 and $250, respectively. The company pays the remainder of the fees. By contrast, it costs $400 to file a federal court complaint.

  Moreover, both the AAA and JAMS will waive even those modest fees if the consumer has a financial hardship. In addition, the arbitration agreements used

by many companies typically provide that the company will pay or advance the consumer's share of the administrative and arbitrator fees. In any event, the CFPB found that consumers who prevailed in arbitration recovered an average of almost $5,400. Given that the consumer at most has paid $200 or $250 to start the arbitration, consumers clearly win by going to arbitration instead of to court. And, as discussed in the next bullet point, consumers do in fact "win" in arbitration.

- Senator Booker commented that corporations win arbitrations "93% of the time." That statistic is derived from a so-called "fact sheet" published on August 1, 2017 by the Economic Policy Institute titled "Correcting the Record –Consumers fare better under class actions than arbitration." Unfortunately, these statistics create the misimpression that consumers fare very poorly in arbitration compared to class action litigation. That is not the case. In its 2015 study of consumer arbitration, the CFPB examined 1060 consumer financial services arbitrations administered by the AAA filed in 2010 and 2011. Of those 1060 arbitrations, 246 arbitrations (23.2%) settled, 362 arbitrations (34.2%) ended in a manner consistent with settlement, and 111 arbitrations (10.5%) ended in a manner inconsistent with settlement although it is possible that settlements occurred. Just because a case settles does not mean that the consumer did not come away with a monetary payment or some amount of debt forbearance.

  In fact, the opposite is likely true — a case settles because the parties found a way to compromise their positions and resolve their dispute. Moreover, the CFPB noted 32 arbitrations in which consumers recovered an average of about $5,400. Therefore, of the 1060 arbitrations filed in 2010-2011, consumers either did or may have come away with a monetary payment or some amount of debt forbearance in as many as 71% of the arbitrations. Notably, Professor Christopher Drahozal, who served as a Special Advisor to the CFPB in connection with its arbitration study, also conducted a study of more than 300 AAA arbitrations in 2009 for the Northwestern University Searle School of Law. He concluded that consumers won relief in 53.3% of the arbitrations. It turns out

that the 93% figure is referring to debt collection claims asserted by companies in which the consumer either defaulted or had no defenses or very weak ones. What the fact sheet fails to state is that the result would not have been any different in court. This precise point was made by the Maine Bureau of Consumer Protection in a 2009 report to the Maine Legislature on consumer arbitrations:

> [I]t is important to keep in mind that although credit card banks and assignees prevail in most arbitrations, this fact alone does not necessarily indicate unfairness to consumers. The fact is that the primary alternative to arbitration (a civil action in court) also most commonly results in judgment for the plaintiff. Although certainly there are cases in which a consumer has a valid defense to the action, it is also correct to say that most credit card cases result from a valid debt and a subsequent inability of the consumer to pay that debt.

- Senator Booker commented that the "deck is stacked" against consumers in arbitration because arbitrators have a pro-industry bias. Professor Gilles suggested that consumers have no role in selecting the arbitrator for their disputes and Mr. Bland also suggested that often the arbitration rosters are all industry people. However, it simply is not the case that arbitrators have a pro-industry bias or that consumers have no role in selecting the arbitrator and no recourse if they object to the arbitrator selected. Most consumer arbitration agreements require the AAA or JAMS to administer the arbitration. Both are well known and highly respected organizations that have earned the respect of the courts for many decades. Those administrators either appoint an arbitrator drawn from their national roster of arbitrators or allow the parties to select an arbitrator from a list of three or more provided. Thus, both the consumer and the business have exactly the same rights in selecting an arbitrator, and the deck is not stacked in favor of either party.

Both the AAA and JAMS require all of their arbitrators to be neutral, impartial, and independent. The arbitrators are required to disclose any conflicts, and there is a procedure whereby a party (consumer or company) can object to the appointed arbitrator or move to disqualify the arbitrator if there is even a hint or suspicion of bias or impartiality. *See* AAA Consumer Arbitration Rules 15-19; JAMS Streamlined Arbitration Rule 12. Moreover, under Section 10 of the Federal Arbitration Act, a court can vacate the arbitrator's award for "evident partiality," among other things.

- Professor Gilles, citing statistics about the number of individuals who filed individual arbitrations to resolve disputes during a specified period, suggested that the reason more individuals did not initiate arbitrations was because they are not "worth the cost." As indicated above, the typical cost of an arbitration to a consumer is quite modest and substantially less than initiating a court action. The fact is that most consumer disputes are resolved without the need for arbitration through the internal dispute resolution procedures that companies have in place.In its arbitration study the CFPB noted the "relatively low" number (1,847) of arbitration proceedings filed by consumers against financial services companies, compared to court cases. However, no inference should be drawn that consumers prefer litigation to arbitration or that arbitration is an ineffective remedy compared to class actions. In reality, the vast majority of consumer disputes are resolved by informal methods without the need for arbitration or litigation (even small claims litigation). Such procedures include error and dispute resolution procedures provided by federal and state law, customer complaint mechanisms maintained internally by businesses, such as toll-free customer complaint telephone numbers and website "contact us" links, as well as procedures such as complaint portals offered by regulatory agencies, state agencies, and private organizations such as the Better Business Bureau to help consumers resolve disputes with businesses.

  In particular, most financial services companies maintain internal complaint resolution programs which, unlike class actions, can address consumer disputes

quickly and efficiently. Financial services providers are driven to support robust complaint resolution systems by the desire and need to satisfy customers in order to survive in a competitive environment. And in today's world, where stories and complaints may be quickly and widely broadcast through the press and social media, companies have powerful incentives to resolve disputes fairly and quickly, especially small dollar disputes. Banks and other companies that are subject to federal or state supervision, in particular, have additional incentives to support strong complaint management systems and ensure complaints are resolved fairly because of the emphasis given to complaints in the examination process. There are also other reasons the number of consumer arbitrations is relatively small in comparison with court filings: (a) many plaintiffs' lawyers and consumer advocates have sent consistently negative messages about arbitration for almost two decades and have done their best to dissuade consumers from arbitrating, (b) consumer arbitration is still "the new kid on the block" compared to litigation, (c) vigorous governmental enforcement actions eliminate the need for consumers to bring private actions, (d) individuals are turning increasingly to on-line arbitration and mediation resources to resolve small-dollar customer complaints, and (e) government agencies have failed to educate consumers about the many benefits that arbitration can offer as opposed to litigation.

- Several Senators indicated that national standards are needed for arbitration agreements. However, the industry has already created standards protective of consumers that effectively function as national standards. Both the AAA and JAMS have adopted consumer due process protocols and consumer rules and fee schedules to ensure that the consumer will be treated fairly, that arbitration will be affordable to the consumer, and that the arbitrator will apply applicable substantive law and corresponding remedies. Moreover, companies have gone to great lengths to make their arbitration programs fair, even to the point of giving consumers the unconditional right to reject arbitration within 30 or 45 days after entering into the transaction. In addition, state and federal courts rigorously strike down arbitration agreements that they find to be overreaching,

unfair, or abusive to consumers, and enforce those that are reasonable and legally and equitably sound. This existing "checks and balances" system operates dynamically and very successfully to protect the rights of all parties to the consumer arbitration agreement, consumer and company alike.

- Senator Graham indicated that Congress needs to take a look at class actions. I wholeheartedly agree. The data analyzed in the CFPB's study clearly demonstrates that individual arbitration produces more tangible benefits to consumers than class action litigation. First, the study demonstrated that consumer arbitration is up to 12 times faster than consumer class action litigation and that arbitrations are concluded in months, while class actions take years. Second, the study showed that consumers pay far less to arbitrate than to sue in court. Third, the study showed that consumers recover more in arbitration than in class action litigation. According to the study, the consumer's average recovery in arbitration was $5,389 (an average of 57 cents for every dollar claimed).In sharp contrast, the average recovery for class members in consumer class action settlements was a mere $32.35. Thus, the consumer's average recovery in arbitration was 166 times greater than the average putative class member's recovery. The study further found that attorneys' fees awarded to class counsel in settlements during the period studied amounted to $424,495,451. In addition, the study concluded that in 87% of the 562 class actions the CFPB studied, the putative class members received no benefits whatsoever. The study also showed that consumers are more likely to obtain decisions on the merits in arbitration than in class action litigation.

  The CFPB's findings mirror the conclusions reached by the U.S. Chamber of Commerce, Institute for Legal Reform in a December 2013 empirical study of class actions titled "Do Class Actions Benefit Class Members?" After analyzing 148 putative consumer class action lawsuits filed in or removed to federal court in 2009, the Chamber's report found, inter alia, that:

  - None of the class actions ended in a final judgment on the merits for the plaintiffs or even went to trial, either before a judge or a jury.

- The vast majority of cases produced no benefits to most members of the putative class – although in a number of those cases the lawyers who sought to represent the class were paid substantial amounts.
- Over one-third (35%) of the class actions that were resolved were dismissed voluntarily by the plaintiff. Many of those cases settled on an individual basis, meaning a payout to the named plaintiff and the lawyers who brought the suit, even though the class members received nothing.
- Just under one-third (31%) of the class actions that were resolved were dismissed by a court on the merits, meaning that class members received nothing.
- For those cases that settled, there was often little or no benefit for class members.