

HEARING BEFORE THE
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY:
“COURTING BIG BUSINESS: THE SUPREME COURT’S RECENT DECISIONS ON
CORPORATE MISCONDUCT AND LAWS REGULATING CORPORATIONS”
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My name is Elizabeth Bartholet, and I am a professor of law at Harvard Law School. I appreciate the opportunity to testify on important issues about the problematic impact recent decisions by the U.S. Supreme Court have had on employees and consumers.

I will focus my comments on the Court’s decisions related to mandatory pre-dispute arbitration, an issue that I am familiar with both through my professional work in the employment discrimination area, and through my experience serving as an Arbitrator for the National Arbitration Forum as well as other arbitration providers.

I have taught Employment Discrimination at Harvard Law School for the past three decades, and have worked as a civil rights and public interest lawyer in the employment discrimination area for a number of years prior to joining the HLS Faculty. I have worked as an Arbitrator on a part-time basis for almost three decades, doing mostly labor arbitration, and working through such arbitration providers as the American Arbitration Association (Labor and Commercial panels), the Federal Mediation and Conciliation Service, JAMS (formerly JAMS-Endispute), the Mediation Research & Education Project, and the National Arbitration Forum.

Arbitration is often thought of as a means of dispute resolution that might work better for regular people without significant means than the court system, because arbitration is designed to be simpler, more expeditious, and less costly. However the Supreme Court transformed the meaning of arbitration in our society when it upheld the legality of mandatory pre-dispute arbitration in the two key cases of *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). These cases constituted a stunning development for those familiar with the law in the area, contrary to the general understanding of the rights of civil rights plaintiffs and of other plaintiffs to access federal courts for the vindication of their legal rights, and contrary to the general understanding of the meaning of the Federal Arbitration Act. These cases meant that in the employment context employers could condition job offers on prospective employees’ “agreements” that all disputes, including disputes involving alleged violations of federal civil rights law, be resolved by arbitration. They meant that in the consumer context, banks could condition credit card arrangements on consumers’ similar agreements.

These decisions transformed the meaning of arbitration because they put the big corporate players – the employers and the banks – in the position of forcing arbitration on the people who simply want to get jobs and credit cards, and will not turn down the opportunity to get these things simply because of what seems at the time the abstract and unlikely possibility that they

might later have an important dispute with the employer or bank. The big corporate players were then also free to select arbitration providers who would provide them a sympathetic forum, and to design an arbitration process that would serve their interests, since the employees and consumers would again not be in any position to bargain or even to think about these things at the point they were applying for jobs or credit cards. All this is very different from the situation in post-dispute arbitration. At this stage, employees or debtors with legal claims they could take to court are likely to agree to arbitration only if they have reason to believe that it will serve their interests as well or better than going to court, and they are in a position to take a careful look at the specific system of arbitration and the specific arbitration provider that the corporate player is suggesting before deciding whether to agree to arbitration.

There are two main problems with mandatory pre-dispute arbitration that I will address. One is the problem of bias in favor of the big corporate player and against the employee and consumer that is inherent in this form of arbitration. I will describe my experience as an arbitrator dealing with consumer credit card cases for the National Arbitration Forum to illustrate the bias problem. The second problem I will address is the way in which pre-dispute arbitration has undermined civil rights law in the employment area, changing what Congress designed and the courts used to enforce as an important public law protecting large classes of victims against systemic discriminatory practices and deterring employers from continuing such practices, to a private law that can do little more than occasionally correct obvious individual wrongs. This second problem exists independent of the first – even if the problem of bias is solved, arbitration is unlikely ever to serve as an appropriate forum for vindicating the important public law concepts central to our civil rights laws.

The Biased Forum Characteristic of Pre-Dispute Arbitration's Private Justice System

Arbitration is by definition a private justice system in the sense that the parties select and pay for the arbitrators who resolve their disputes. Arbitrators are of course supposed to be unbiased in their decision-making, but there is a risk in this system that one side will be in a position to purchase the justice that they want, because arbitrators and the organizations that serve as arbitration providers are under financial pressure to satisfy the corporate repeat player by systematically ruling in its favor. Arbitrators only get paid if they are selected to hear cases. Arbitration providers only make money and survive in the business if they succeed in attracting companies to hire them to provide arbitration services.

My own experience over the past two decades as an arbitrator has led me to conclude that in many instances corporate players are in fact benefitting from a system of purchased justice in both the employment and the consumer credit areas. My experience as an arbitrator for the National Arbitration Forum (NAF) is but one example, although it may be the most telling.

NAF has locked up a huge part of the nation's credit card business. Others have documented how NAF sells its services as a corporate-friendly arbitration provider to banks and credit card companies, assuring them that their interests will be well-served by choosing arbitration over the court system as a way to resolve disputes with consumers, and by choosing NAF rather than another arbitration provider.

I was solicited to join NAF's roster of arbitrators, although I had no prior consumer law experience, and I signed an "Assignment Agreement" with them late in 2001. I was then assigned starting in early 2003 to a succession of cases involving credit card company attempts to collect alleged debts, all of which I was to decide simply on the papers without any hearing unless one side asked for a hearing. In the period between early 2003 and February 2004 I decided 19 cases, and in 18 of these I decided for the one particular credit card company involved in each case. These cases seemed to involve no real dispute as to whether the alleged debtors owed the money claimed. (The 19th case I dismissed.) However I developed growing concern with the fairness of the underlying credit card agreements mandating arbitration with the NAF, which as I remember generally had provisions precluding class actions and providing attorney fees only for the credit card companies, and I was also concerned that there were no lawyers representing the consumers in a position to raise any such fairness issues, or otherwise protect the consumers against wrongful claims.

I then was assigned a case in which for the first time the consumer, who happened himself to be a lawyer, asked for a hearing, and filed a counterclaim against the credit card company alleging that it had wrongly charged him with penalty charges and interest and also had harmed his credit rating and accordingly caused him significant financial damage. After that hearing I issued an opinion for the first time in any of my NAF cases ruling for the consumer and against the credit card company on the merits on both the original credit card company claim and his counter claim, and I ordered the credit card company to pay the consumer \$48,000 in damages.

After that March 2004 decision, I was allowed to decide only four more NAF cases, the four cases I had been assigned in the same timeframe as the case in which I ruled against the credit card company. In the two of these that involved that same credit card company, the 10-day time period for a party to move to request removal of the arbitrator without having to demonstrate any cause had passed; in the other two this credit card company was not involved, and I am unsure as to the timing and also do not believe that any credit card company was involved. After these four cases, I was prevented from deciding the next 11 cases to which I was assigned, all of which involved the same credit card company. In seven of these 11 cases I was notified by NAF that I had been removed as Arbitrator based on the credit card company's objection and request for removal pursuant to the NAF Rule providing for removal without cause, and in four the credit card company moved to dismiss in a way that would leave it free to file the claim again, with another arbitrator presumably to be assigned. At that point I terminated my Assignment Agreement with NAF and resigned from the NAF roster of arbitrators.

In the first three of the cases in which I was removed by virtue of the credit card company's request, I received copies of letters sent to the parties which stated that the reason I would not be hearing the case was that "due to a scheduling conflict, the Arbitrator previously appointed is not available to arbitrate the above case." This was of course not true. I called the NAF case administrator immediately after receiving these notices to discuss what I described as a problem in the fairness of the NAF process, saying that it seemed clear that I was being removed simply because I had once ruled on the merits against a credit card company, after having ruled for the company numerous times, and saying additionally that in sending out a misleading statement about my being unavailable because of a schedule conflict when actually I had been removed by the company, NAF was depriving any party that might want to investigate or challenge the

system for bias of vital information. The NAF case administrator agreed that I was likely being removed simply because of my one ruling against the credit card company. She said that the misleading letter about my being unavailable was a form letter that was regularly sent out in all cases. I asked her to have a higher NAF authority call me back to discuss their process. Later I received a call from someone at NAF who described herself as legal counsel and in a supervisory capacity over the case administrators. I raised the same issues with her, and she did not deny that the likely reason for my removal as Arbitrator was because of the one case in which I ruled against the credit card company on the merits, but argued that the NAF process was fair since each side had what in court would be called a peremptory challenge. When I countered that in the NAF process it was only the credit card companies which as repeat players were in a position to exercise their peremptory challenges, and thus to stack the deck by ensuring that arbitrators would be favorable to their interests, and that the NAF knew that this was going on and was facilitating this process, this person had no satisfactory explanation as to how the process could nonetheless be understood as fair.

I concluded from this experience that the NAF process was systematically biased in favor of credit card companies and against debtors, since the process gave the companies a peremptory challenge right which they could use to systematically remove any arbitrator who ruled against a credit card company in a single case, since the companies were apparently using it in this way, since the alleged debtors were not in a position to know what was going on, and since NAF was fully aware of the practice and was either facilitating it or at a minimum tolerating it rather than doing anything to address it. Accordingly I wrote the NAF a letter dated February 8, 2005, terminating our Assignment Agreement, stating that “I have come to the decision to do this based on my concern about the ethics of the NAF system of providing ADR services, and its apparent systematic bias in favor of the financial services industry.”

Some time later I was subpoenaed to testify in a case involving an individual who had a dispute with a corporation over the sale of a computer, and was concerned that he would not get a fair hearing in the NAF forum which the sales agreement mandated for any dispute resolution. This party’s lawyer had heard of my experience with NAF, and wanted me to testify about it in a discovery deposition in order to help him prove that the NAF forum was biased. NAF went to great lengths to try to prevent me from testifying. NAF’s Chief Operating Officer and General Counsel sent me a letter just before the scheduled deposition stating that NAF believed it would be “improper for the requested deposition to proceed,” due to the confidentiality obligations allegedly imposed on me by the Assignment Agreement I signed when I first agreed to be an NAF arbitrator,¹ even though I made it clear that I would not testify about anything specific to parties or to case facts that could in any way identify parties. NAF subsequently moved to quash the deposition subpoena. I felt forced to retain a lawyer to protect me against NAF and to represent me in the court proceeding that the party who needed my testimony to prove NAF bias had to bring to get a court order clarifying that the confidentiality provisions in my Assignment Agreement did not prevent me from testifying in a general way about bias in the NAF system. NAF was represented by lawyers in that court proceeding who argued that I should be prevented from testifying in order to “protect the integrity” of the arbitral process, although they knew my

¹ Court Order issued 9/5/06, in *In re William Carr*, Mass. Superior Court, Civil 06-2032 (9/5/06), ordering me to testify.

testimony would in fact challenge the integrity of their process. They argued that the Assignment Agreement I signed with NAF should prevent me from testifying about any bias in their system, despite the fact that I had long since terminated that Agreement and resigned as an NAF arbitrator, and despite the fact that I would be testifying only to the kinds of general facts regarding bias stated in my testimony here, and not to any specific party or case facts. The court ultimately concluded that my Assignment Agreement did not preclude me from testifying and ordered that I should testify regarding the general facts related to bias in the NAF system. My lawyer billed \$25,808. for the time he felt was necessary to protect me given NAF's claims.

I was relatively free from the financial pressures to go along with the NAF system compared to most NAF arbitrators, since I have a full-time job serving on the Harvard Law School Faculty, and my income from NAF arbitration during those years I was working as an NAF arbitrator represented only a tiny fraction of my annual income (roughly 1% in the two years when I heard the largest number of NAF cases). Many and perhaps most arbitrators depend solely or very largely on their arbitration income which is based entirely on the cases that they actually hear. Accordingly there is a very real risk that the NAF pool of arbitrators is overwhelmingly stacked against the consumer, with arbitrators either being removed as I was because they have decided a case for the consumer, or arbitrators being pressured into always ruling for the repeat player companies out of fear of being removed from cases.

All this, together with my other experience as an arbitrator, and my reading of the literature, is what has led me to conclude that the Supreme Court's approval of pre-dispute arbitration has led to a private justice system in which banks and credit card companies are able to purchase the results they want, at the expense of the debtors forced into the system.

The Diminution of Civil Rights Characteristic of Pre-Dispute Arbitration's Private Law System

The Supreme Court's decisions upholding mandatory pre-dispute arbitration mean that employees can be coerced into surrendering their rights to go to court to vindicate any of their legal rights, including the rights guaranteed under both federal and state civil rights law. The Court justified its decisions by claiming that arbitration provided an equivalent forum in which to vindicate their legal rights. But this has proven patently untrue for two different kinds of reasons.

The first reason is the bias problem, which I discussed above in the context of NAF and consumer arbitration, and so will only briefly mention here since the essence of the problem is the same. Employers, like credit card companies, are in a position to shop for arbitration providers, to design the arbitration system they will use, and to force this system upon their employees by making agreement to it a condition of employment. Employers are in the same position as credit card companies to purchase the justice they want, by pressuring both arbitration providers and arbitrators to produce results that favor employers over employees. Arbitration providers and arbitrators are under the same financial pressure to produce the desired results if they want to continue getting paid.

The second problem, which I will focus on here, is the problem of what I will call privatization of the law. It would exist even if you were to solve the bias problem.

The federal law of employment discrimination, embodied in significant part in Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, was designed by Congress as public law. The federal courts of the 1960s, 1970s and early 1980s made it clear that they understood the 1964 Civil Rights Act as important public law, designed to undo the effects of prior discrimination and to bring into existence a new era characterized by equal opportunity. For example, the Supreme Court held early in the history of interpreting the 1964 Civil Rights Act that plaintiffs who prevailed in court on their civil rights claims should be awarded attorneys fees by the courts, paid for by defendants, because civil rights plaintiffs should be understood to be acting as “private attorneys general” in enforcing this very important public law, and attorneys fee awards would encourage such law enforcement. Congress later enacted a law generalizing this principle by guaranteeing prevailing plaintiffs attorney fee awards in all federal civil rights cases. The federal courts in this early era were generous in granting class actions, in which a small number of individual named plaintiffs were able to represent huge classes of hundreds or thousands of employees, ensuring a day in court for many who by virtue of poverty or ignorance of their rights or fear of retribution would never otherwise have been able to get their legal rights vindicated. The federal courts granted generous discovery rights which together with class actions gave plaintiffs the opportunity to use statistics and other broad patterns of proof to get at subtle, hidden, and other forms of hard-to-prove discrimination which otherwise would go unchallenged. The federal courts developed over the years theories of discrimination like disparate impact which allowed for findings of discrimination in the absence of intent, and forced employers to reform or abandon a wide range of selection systems that had functioned to exclude minority race employees. The federal courts published decisions on all these and other matters in a form which was public and accessible, and this served to get the word out to all employers about the nature of the civil rights law regime and the liability that they risked if they operated in violation of the law, thus encouraging widespread reform of employment practices regardless of whether employers were actually sued in court.

The Supreme Court together with the lower federal courts have of course done much in the later 1980s, the 1990s, and the first decade of this 21st Century to weaken discrimination law in all these respects, limiting class actions, limiting the use of statistical proof, and undermining disparate impact doctrine. They have also weakened discrimination law in a range of other ways, with the *Ledbetter* case recently under consideration by Congress serving as but one relatively minor example. They have essentially gutted the Americans with Disabilities Act.

And Congress has occasionally struck back, as for example when it revived disparate impact doctrine and overruled numerous Supreme Court decisions with the Civil Rights Act of 1991.

However nothing the Court has done in the employment area is as potentially significant in destroying our civil rights regime as the mandatory pre-dispute arbitration decisions. This is because this form of arbitration simply removes a huge and growing group of cases from the federal courts altogether, and puts them into a system that is not designed for any public law purpose. Nothing that Congress does to “fix” Court decisions in the civil rights area, nothing that future courts might do to undo some of the last few decades’ decisions, will succeed in re-creating civil rights law as important public law if civil rights cases are being decided in

arbitration and not in the courts. What Congress needs to do therefore if it wants to revive our civil rights regime in any real way is to fix the mandatory pre-dispute arbitration decisions.

This is because of the nature of the traditional arbitration system, a system that employers will want to perpetuate through the arbitration rules they design and force on their employees in pre-dispute arbitration “agreements.” Arbitration is not typically a system for vindicating important public law, but instead a system for quickly and quietly resolving small disputes so that they are finally settled with minimal expense. Arbitration has traditionally not involved class actions, and many pre-dispute arbitration agreements prohibit class actions. Arbitration has traditionally not involved any extensive discovery, and many pre-dispute arbitration agreements prohibit any such discovery. Arbitrators will thus not likely have the statistical and other proof before them that will allow for finding any form of subtle or hidden discrimination. Arbitrators are not likely to know anything about sophisticated theories of discrimination like disparate impact and systemic disparate treatment even if the proof could be made out. Arbitrators either rule without issuing any opinion or issue opinions which are not published in any generally accessible form. Decisions are designed to be final, with very limited appeal to court – simply being egregiously wrong on the facts and the law is not a basis for appeal.

For these many reasons, arbitration will not serve the public law function of defining and developing the law, vindicating and protecting large classes of employees, and educating employers about and deterring them from violating the law. It will at best, assuming that there are no biased forum problems, enable some limited numbers of employees who have identified and are able to prove obvious forms of relatively overt discrimination, because they have access to smoking-gun types of evidence, to win individual damages relief for the violation of their rights. Individual relief for people who recognize that their rights have been violated and are aggressive enough to push for vindication does nothing to help all those who are unaware that their rights have been violated, or unable because of poverty or fear to press forward to demand relief. And these kinds of smoking-gun cases are not representative of the nature of our modern discrimination problems, which consist instead of the kind of subtle, hidden, systemic forms of discrimination that can only be proved in the more complex process typical of the court system.

Conclusion

Congress needs to end mandatory pre-dispute arbitration. And it needs to act now. Creditors in these economic times are growing increasingly desperate, and they deserve at a minimum a fair forum for the resolution of their disputes with credit card companies and banks. Employers are racing forward in increasing numbers to embrace pre-dispute arbitration, recognizing the advantages it presents for them as compared to the court process, and they are accordingly removing an ever-increasing percentage of all employment discrimination cases from the judicial to the arbitral forum, changing in fundamental ways the nature of our civil rights regime.