Clauses and Consent

How Forced Arbitration Quietly Took Over Everything

Critical Corporate Theory Collection

Author

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Acknowledgements

Thank you to the following people, who all made this paper a lot of fun to write and a lot better than it would have been otherwise: Zekariah McNeal, Dani Solaru, Julia Keller, Professor Jon Hanson, and Matthew Shields. Extra special thanks to Zach Cohen, and *extra-extra* special thanks to Vail Kohnert-Yount and Kelsey Hudson.

About the Critical Corporate Theory Collection

The Critical Corporate Theory Collection is part of the *Systemic Justice Journal*, published by the Systemic Justice Project at Harvard Law School. The Collection is comprised of papers that analyze the role of corporate law in systemic injustices. The authors are Harvard Law students who were enrolled in Professor Jon Hanson's Corporations course in the spring of 2021.

The Collection addresses the premise that corporate law is a core underlying cause of most systemic injustices and social problems we face today. Each article explores how corporate law facilitates the creation and maintenance of institutions with tremendous wealth and power and provides those institutions a shared, single interest in capturing institutions, policies, lawmakers, and norms, which in turn further enhance that power and legitimates its unjust effects in producing systems of oppression and exploitation.

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ABSTRACT

Tucked into the fine print of millions of consumer and employment contracts, forced arbitration clauses are nearly ubiquitous in modern America. Most people who agree to them, however, have no idea that in doing so they've given away their right to sue in court, and have instead relegated any future claims to arbitration, an alternate legal universe where conflicts of interest abound and the system is designed, even more that it usually is, to ensure that corporations win.

This paper tells one story of how we got here, tracing forced arbitration from the modest origins of the Federal Arbitration Act to the secretive meetings that took these clauses from an afterthought to a juggernaut. The story offers a history through which to understand the current crisis, in part so that we might eventually get out of it.

Clauses and Consent

How Forced Arbitration Quietly Took Over Everything

PLAIN LANGUAGE

On July 26, 2004, the United States District Court for the Northern District of Mississippi handed down a thoroughly unremarkable decision.[1] Willie Griffin had sued the lender American General Financial Services, Inc. (AGFS) in a Mississippi state court, alleging various claims arising out of Mississippi laws regulating loans and insurance policies. (AGFS is now known as Springleaf Financial Services.)[2]

Griffin's state suit, though, faced a significant problem: the contract he'd signed with AGFS contained an arbitration agreement— a legally-binding pledge to resolve any future disputes between the parties in an arbitration hearing, rather than in court.[3] Now Griffin was the defendant in federal court, as AGFS was suing to enforce that provision of the contract and compel arbitration pursuant to the Federal Arbitration Act, a piece of legislation Congress passed in 1925.

Griffin's defense was straightforward: his arbitration agreement was invalid because no one at AGFS had explained it to him before he'd signed. This, Griffin explained, was significant in large part because he is legally blind. The court was unconvinced. While not questioning Griffin's inability to see, then-Chief Judge Glen H. Davidson wrote that "[h]ad the Defendant bothered to read the agreement and related documents or have them read to him he would have easily been able to understand its plain language."[4] The so-called "plain language" of the arbitration agreement included the following warnings: "by signing below" Griffin would "agree to the Arbitration Provisions," which meant that his "rights and [the] lenders [sic] rights will be determined by an arbitrator, not a judge or jury." And that, by singing, Griffin "[had] read, and agree[d] to all the terms of the arbitration provision, including the

waiver of a jury or judge trial."[5]

This was more than enough for Judge Davidson to resolve the case. He swatted away Griffin's claims of unconscionability, breach of fiduciary duty, and fraudulent inducement, and ruled in a short, workmanlike opinion that all of Griffin's state law claims against AGFS would be handled by an arbitrator.[6]

The case received no press coverage whatsoever. Had the decision not been published in the Federal Reporter, it is likely that no one outside of the parties who litigated the dispute would remember it at all. While the outcome of the case might strike some as peculiar, or even perverse, Judge Davidson's decision rested on firm legal ground. And that ground would only get firmer. 2004, when Griffin's case was decided, was not the golden age for champions of these arbitration clauses. In fact, it was barely the beginning.

FORCED ARBITRATION TODAY

Forced arbitration clauses, found in the fine print of an increasingly large number of contracts of all types, effectively shield corporations from the legal system. When workers and consumers sign contracts with these clauses they agree to waive their constitutionally-protected right to settle disputes in court. Instead, signees must seek justice via arbitration, an alternate legal universe in which conflicts of interest abound and the typical rules of evidence literally don't apply.

Due to his blindness, Willie Griffin was unable to read his arbitration agreement. But even if he could, he likely wouldn't have read it. And that's precisely the point: arbitration agreements, tucked into dense, jargon-filled paragraphs, are a kind of legal fiction. Not even the savviest legal thinkers among us have the time or the bandwidth to read— let alone consider the consequences of— each clause in each contract we sign with corporations like our healthcare providers, phone companies, or creditors. This not only feels intuitively true— did you read and consider every clause of the contract when you signed up for Netflix?— but also has been verified empirically. A 2015 study found a "profound lack of understanding about the existence and effect of arbitration agreements among consumers."[7] The authors report that "[l]ess than 9% realized that the contract had both an arbitration clause and that it would prevent consumers from proceeding in court."[8]

It is almost impossible to work and buy things in America and avoid forced arbitration entirely. Many of the country's most ubiquitous corporations— including Uber, Comcast, Microsoft, Chase, Lyft, Starbucks, AT&T, Walmart, American Express, Amazon, Wells Fargo, Sallie Mae, and Blue Cross Blue Shield— use them in their consumer or employee contracts.[9] An estimated fifty-five percent of the entire American workforce is bound by a forced arbitration agreement.[10] It is projected that by 2024, this number will rise to 80 percent.[11]

The result is that millions of Americans have no idea that they've signed away their access to the courts until it's far too late. Forced arbitration clauses thus often result in corporations getting away with behavior that even the most business-friendly judges would hesitate to sanction. Corporations of all types use these clauses to shield themselves from courts in disputes stemming from nearly every civil claim imaginable: wage theft, negligence in the wake of sexual assault, gender and racial discrimination, fraud, and much more.

Much has been written about forced arbitration. This paper attempts not a comprehensive survey, but instead compares three elements of the issue: its modest foundation in the Federal Arbitration Act, its modern origins in the powerful but largely unknown Arbitration Coalition, and the legal cover provided for it by the Supreme Court. Together, these three elements tell a story about corporate power, consent, and how small, seemingly innocuous contract clauses came to reshape nearly every area of American law.

A "PURELY VOLUNTARY THING"

The Congress that passed the Federal Arbitration Act (FAA) would be gobsmacked by the modern judicial construction of the legislation. In 1925, the FAA passed without a single "No" vote in either chamber of Congress,[12] and the legislature has never amended it.[13] By the twenty-first century, however, federal judges had re-read the Act in ways that amounted to, in the words of Professor Margaret Moses, one of the leading scholars of the FAA, "a complete rewriting of the statute." In 2006, even before the Roberts Court bolstered forced arbitration in unprecedented ways, Moses called the modern FAA "a statute that would not likely have commanded a single vote in the 1925 Congress."[14]

The FAA had humble origins. The legislation was dreamt up by two New

Yorkers: Julius Cohen, a lawyer, and Charles Bernheimer, a cotton merchant. Cohen and Bernheimer felt that arbitration agreements were good for business and good for the law. Prior to their intervention, either party to an arbitration agreement could simply refuse to arbitrate, and courts would accede to that refusal. Cohen and Bernheimer simply wanted a statute that said arbitration agreements had to be enforced by courts. They successfully lobbied the New York state legislature to pass just such a law, and then set their sights on the federal government.[15]

When they advocated for the Act before Congress, each man made the case for how more arbitration would improve conditions in their respective fields. Bernheimer testified that arbitration "saves time, saves trouble, [and] saves money," that it "maintains business honor," and "raised business standards."[16] Cohen, for his part, told Congress that more arbitration would help reduce litigation and clear courts' backlogs, and also that it would produce outcomes that more businessmen saw as just.[17]

Despite Cohen and Bernheimer's soaring language, the legislation they wanted was actually quite modest. The men explained that their bill wouldn't affect state law and would be limited to a select range of business transactions. Other proponents of the Act made it clear that the FAA would in no way touch employment relationships. Herbert Hoover, who was then the Secretary of Commerce wrote, in a letter of support whose language was eventually mirrored in the statute itself, that no part of the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."[18]

Nonetheless, members of Congress had concerns about the legislation's predatory potential. One senator from Montana asked during a hearing about the FAA whether the statute could apply to contracts which, in Professor Moses's words "were not really voluntary" because one party to the contract, "such as an insurance company or a railroad company, had much more bargaining power."[19] Cohen and others vehemently denied that the FAA would function in such a way.[20] Alexander Rose, who at that time headed the Arbitration Society of America, called arbitration a "purely voluntary thing."[21] After the Act's passage, Cohen wrote in the *Virginia Law Review* that the FAA was "merely a new method for enforcing a contract freely made by the parties thereto," and argued that arbitration was best suited "to the disposition of the ordinary disputes between merchants as to questions of fact" and was inappropriate for complex legal claims.[22]

"A-R-B-I-T-R-A-T-I-O-N"

The FAA's unanimous passage rested on its construction as narrow legislation meant to facilitate simple transactions between equally powerful, consenting merchants. Roughly 75 years later, however, lawyers for the very types of corporations that Congress feared would harness arbitration for a competitive advantage— including "insurance compan[ies]" with immense leverage over consumers[23]— quietly planned an arbitration revolution.

The group was led by Alan Kaplinsky, a corporate defense lawyer at the law firm Ballard Spahr.[24] Most of Kaplinsky's clients were banks and credit card companies, some of which were facing lawsuits from consumers who claimed they'd been tricked into unfair deals.[25] Facing daunting class action suits, they turned to Kaplinsky for help, and received an ingenious solution. Starting in 1999, Kaplinsky, in tandem with lawyers from WilmerHale, convened groups of corporate lawyers to strategize about blunting these consumer suits. Included in these sessions were lawyers for some of the country's most powerful financial institutions, including Bank of America, Chase, Citigroup, American Express, and Discover.[26]

Normally, of course, these corporations were rivals competing for market share. At Kaplinsky's sessions, however, they were united in the cause of limiting corporate liability for predatory lending. (During one meeting, the former general counsel for Citigroup warned attendees that "class actions [were] getting out of hand," but assured them that the group could "beat" the problem "by working together."[27]) When this group convened remotely, they dialed into to the teleconference using the password "a-r-b-i-t-r-a-t-i-o-n."[28] According to the *New York Times*, "records and interviews show that lawyers for the companies talked about arbitration as a means to an end. The goal was to kill class actions and send plaintiffs' lawyers to the 'employment lines.'"[29]

Correspondence and documents from these meetings— which have seldom been examined in detail— were unearthed as part of a 2014 antitrust lawsuit against these corporations.[30] They reveal a significant level of cohesion between the firms, and a striking frankness regarding their objectives. The group called itself the Arbitration Coalition. In a memo to other Coalition members, a lawyer from American Express noted that the group planned to share information through a secure web

site and "discuss and develop initial 'response points' to counter the various arguments being made to challenge arbitration clauses."[31] According an opinion by Judge William H. Pauley of the Southern District of New York, the memo also "alluded to the possibility that Arbitration Coalition members would fund amicus briefs to be submitted through trade associations 'without attribution.'" [32] Indeed, despite this series of seemingly concerted initiatives, the American Express lawyer assured everyone that there were "no plans whatsoever for the group to take any public posture or even consider itself as a formal or official group in any way."[33] The following year, at an Arbitration Coalition meeting at American Express's headquarters, a representative from a public relations firm gave a presentation on "some of the ways in which a public relations effort could alter perceptions about consumer arbitration."[34]

The result of these Arbitration Coalition meetings was nothing short of a clandestine revolution in contract law. When the first Coalition meeting was held, only two of the banks represented had arbitration clauses that banned class actions; when the last meeting was over, in 2003, every single one of these banks was using such a clause in their credit card member agreements.[35] By 2014 the members of the Arbitration Coalition were responsible for 87 percent of all credit card transactions in America,[36] and by roughly that same time, forced arbitration had spread to the employment contracts of 80 percent of the Fortune 100.[37]

Despite the size and coordination of their efforts, the Arbitration Coalition managed to escape liability completely. As he dismissed the plaintiffs' antitrust case against American Express and others, Judge Pauley noted that it "was only by a slender reed that Plaintiffs failed to demonstrate that the lawyers who organized these meetings had spawned a Sherman Act conspiracy among their clients."[38] (On appeal, the Second Circuit affirmed the ruling in a short summary opinion.)[39] But even in dismissing the suit against them, Judge Pauley seemed to taunt the banks. "In retrospect," he wrote, the banks' "short-term goal of lowering litigation costs eluded them," as "[u]ndoubtedly, retaining some of the most esteemed antitrust lawyers in the nation to counter the extraordinary talents of Plaintiffs' counsel imposed a significant [financial] burden."[40]

Curiously, however, Judge Pauley seemed to also view the Coalition's *lawyers* as acted upon by forces beyond their control, calling the case "a cautionary lesson to all lawyers who labor under inexorable pressure to generate new business."[41] This was, of course, not exactly the way the

Arbitration Coalition's lawyers seemed to frame the issue. But the court nevertheless suggested a kind of bifurcation of blame: the banks were greedy and loathsome, but their lawyers were simply responding to the pressure applied by their clients. Kaplisnky and his friends had not just survived a legal challenge— they'd managed to emerge with sterling reputations.

"BLACK HOLES" AND "HELLHOLES"

Forced arbitration was an ingenious way for Kaplinsky's corporate clients to derail class actions. But these clauses don't just prevent would-be plaintiffs from litigating as a class— they keep people out of court entirely. For corporations, then, the jurisdictional benefits of forced arbitration are just the beginning. Employees and consumers[i] who are forced to arbitrate their claims face a remarkably slanted playing field.

To start, arbitrators are often hired— and re-hired— by the very corporations who appear on one side of the arbitration dispute.[42] As the Center for Popular Democracy explains, "[b]ecause employers are 'repeat players' (who will be hiring arbitrators in the future, unlike their employees) arbitrators have a big incentive to find in their favor."[43] These arbitrators not only rule on substance, but also, quite often, set procedure as well. According to the Economic Policy Institute, "[u]nder established arbitration law, if the arbitration agreement does not specify procedures to be used, then the arbitrator has plenary authority to decide how the case is conducted, with very limited grounds for review."[44] These potential conflicts of interest are compounded by the extreme secrecy of forced arbitration.[45] Forced arbitration proceedings are confidential and produce no public record, making effective oversight of the process almost impossible.[46]

All of these factors were on display during the arbitration of Dr. Deborah

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[i] This paper does not meaningfully distinguish the challenges faced by employees and consumers who are forced to arbitrate their claims with powerful corporations. While there is certainly significant overlap between employee forced arbitration and consumer forced arbitration, there are undoubtedly also many important differences. While a number of scholars and commentators have examined these different forced arbitration contexts separately, this is an area ripe for further disaggregation.

Pierce. Pierce was fired by her medical group, and brought a sex discrimination claim, asserting that she had evidence that the group habitually denied partnership to female doctors.[47] Her contract, though, mandated that she bring her claim to arbitration. Pierce's arbitrator, Vasilios Kalogredis, was not a judge or even a doctor, but a corporate lawyer. When Pierce arrived for a hearing, she saw Kalogredis having coffee with the head of the group from which she had been dismissed. The *New York Times* reported that "[d]uring the proceedings, the practice withheld crucial evidence, including audiotapes it destroyed." A doctor who had testified in Pierce's favor later reversed course, claiming that her colleagues at the medical group had "clarified" her memory. "When Mr. Kalogredis ultimately ruled against Dr. Pierce," the *Times* reported, his decision contained passages pulled, verbatim, from legal briefs prepared by lawyers for the medical practice." Pierce is still working to pay off the over $200,000 bill she ran up bringing this case in arbitration.

Given the differences between judicial proceedings and arbitration hearings, it's likely unsurprising that, overall, arbitration clearly benefits corporations over consumers and employees. Workers win in only about 1 in 5 forced arbitration hearings, which is about 40 percent less than they win in federal court, and over 60 percent less than they win in state court.[48] Consumers, by some metrics, fare even worse: a 2007 report revealed that arbitrations overseen by the National Arbitration Forum, one of the largest arbitration administrators in America, ruled against consumers 94 percent of the time.[49] And even when employees do win in arbitration, their average damages are markedly less than those awarded to employees who win in state or federal court.[50]

These numbers, as striking as they may appear, dramatically under-capture the scope of the problem. The legal scholar Cynthia Estlund recently published a remarkable study, reporting that "well under *two percent* of the employment claims that one would expect to find in some forum, but that are covered by [forced arbitration] ever enter the arbitration process."[51] (Emphasis added.) Estlund explains that:

> Much is still unknown about the fate of cases in arbitration (and litigation). From whatever angle one looks at the numbers, however, it appears that a very large majority of aggrieved individuals who face the prospect of mandatory arbitration give up their claims before filing. For all the sound and fury about skewed outcomes, repeat player effects, biased arbitrators, limited discovery, and lack of

> adherence to or production of precedent in arbitration, it turns out that, except for a relative handful of cases, arbitration does not take place at all.[52]

"Metaphors beckon," Estlund writes, "but I have opted for that of the black hole into which matter collapses and no light escapes."[53] Another scholar, Professor Myrian Giles, claims that forced arbitration portends the "end of doctrine."[54]

One might think that, surveying the effects of their creation, Alan Kaplisnky and his fellow pioneers would perhaps respond with contrition. The opposite, however, is true. In 2019, the Senate Judiciary Committee convened a hearing on forced arbitration and invited Kaplinsky to testify.[55] Before introducing a number of guests who'd had their lives upended by forced arbitration clauses (including victims of sexual assault), Senator Richard Blumenthal of Connecticut called forced arbitration "one of the most important federal policy issues facing the nation— one of the more difficult to understand, but impactful in so many lives." Kaplinsky, though was adamant that he was on the side of justice. The inspiration for the clauses, he explained, was having to go to the "judicial hellholes" of America to defend corporate clients in "foolish" litigation. "In these judicial hellholes," he said, using the phrase a second time, "you didn't have a shot if you were a company." His clients, Kaplinsky explained, were "scared to death of appearing in front of a jury, in a remote county of the state, where they could not get any justice." All he and his allies wanted to do, he said, was "level the playing field."

Also testifying that day was Victor Schwartz, a corporate lawyer who happened to be the co-author of the most widely used torts textbook in America.[56] Schwartz had little patience for opponents of forced arbitration. "You enter it voluntarily," he said. "In most instances, there are alternatives." On the issue of informed consent, or lack thereof, Schwartz replied, blithely, that "I think people should be encouraged to read agreements." To illustrate his point, he told a story about having recently refused a great price on a case of wine after reading the fine print of the deal.

By the end of the hearing, even Republican Senator Lindsey Graham was disturbed. "This bothers me, that if you sign up for a product...no matter what you're giving away all your rights without really understanding what's going on," he said. "There's got to be some middle ground here."

THE SUPREME COURT AND THE FUTURE OF FORCED ARBITRATION

In 2002, the California Court of Appeal issued a ruling, against the credit card giant Discover, that undermined the Arbitration Coalition's goals.[57] Lawyers for the company petitioned the U.S. Supreme Court for certiorari.[58] "The California court's decision," the petition read, "strikes directly at the core purpose of the [Federal] Arbitration Act: to enforce arbitration agreements according to their terms." This issue, these lawyers argued, was "plainly of national importance."[59] The Court wasn't interested, and never heard the case, but it wasn't for a lack of legal talent on Discover's side. Alan Kaplinsky had worked with Discover's counsel of record on the petition. (Perhaps uncoincidentally, the petition cited to an article written by Kaplinsky.)[60] "He was a really nice guy," Kaplinsky later said.[61]

Only three years later, that really nice guy was the Chief Justice of the United States. John Roberts' rise, from, in the words of his biographer, "an advocate for corporate clients" to the most powerful lawyer in America happened with remarkable speed. So too did the Roberts Court's construction of legal protection for forced arbitration— both, in fact, happened in a three-year burst. In 2010, the Court held that arbitration clauses must be enforced even in illegal contracts.[62] The next year, the Court gave corporations an unqualified right to ban class actions via forced arbitration,[63] and two years after that the Court held that arbitration clauses must be enforced even when doing so completely precluded the exercise of a federal right.[64] All of these were 5-4 decisions with the same five conservative justices in the majority. More recently, in 2018, the Court further bolstered arbitration, holding, in *Epic Systems v. Lewis*, that the FAA trumped the National Labor Relations Act on the question of class action waivers.[65]

All of these decisions rest fundamentally on two ideas: that arbitration agreements are entered into freely, and that the FAA was intended to facilitate the kind of arbitration that dominates modern consumer and employment relationships. In *AT&T v. Concepcion*, the 2011 case, the Court asserted that the FAA dictated a "liberal federal policy favoring arbitration."[66] In *Epic Systems*, Justice Gorsuch wrote that "[t]he policy may be debatable but the law is clear: Congress has instructed that

arbitration agreements like those before us must be enforced as written."[67] A closer look at the actual agreements to which Gorsuch was referring, however, casts doubt on his assertion. One of the agreements at issue in *Epic Systems* came in the form of an email, sent to current employees of the accounting firm Ernst and Young. The email contained an attachment, which included the company's "revised" Arbitration Agreement. Tucked in that agreement was a clause stating that simply by "continuing employment with the firm," employees were agreeing to the new arbitration rules.[68] Nowhere in these opinions does the Court grapple with the history of the Arbitration Coalition, or meaningfully consider whether modern arbitration bears any resemblance to the kind of agreements Congress envisioned in 1925 when it passed its modest arbitration bill.

All of the recent decisions giving legal cover to forced arbitration rest on the Court's reading of the FAA. While its construction might be dubious, it leaves a significant opening— Congress can amend the FAA whenever it wants and constrain the use of arbitration clauses. A recently re-introduced bill,[69] the Forced Arbitration Injustice Repeal (FAIR) Act, seeks to do just that. If passed, it would amount to a legislative repeal of recent Supreme Court precedent, and outlaw forced arbitration in many kinds of disputes, including employment, consumer, and civil rights claims. The FAIR Act, though, faces the same hurdles— the slim Democratic Senate majority, corporate influence on both sides of the aisle, and the filibuster— that has dogged other progressive legislation.

The legislation's long odds, however, haven't stopped advocates and workers from getting creative. DoorDash, one of the food delivery services whose popularity has exploded during the pandemic, includes a forced arbitration clause in its employee contracts.[70] Last year, when DoorDash employees sued the company, claiming violations of the Fair Labor Standards Act and other laws, DoorDash pointed to its arbitration clause to keep the workers out of court.[71] The company likely thought it had successfully relegated these claims to Cynthia Estlund's "black hole," but these employees had other plans. Almost six thousand DoorDash workers moved forward, in unison, with their individual arbitration claims. As part of that process, DoorDash, through its agreement with the American Arbitration Association, was required to pay a filing fee of almost $2,000 for *each* of these worker's individual arbitrations.[72] Suddenly facing a nonrefundable bill of almost $12 million, DoorDash rushed to court, claiming, incredibly, that it did not have to honor the arbitration clauses and could instead deal with these workers via a class action lawsuit in state court.[73]

A federal district court judge in San Francisco, however, would have none of it, and ordered DoorDash to arbitrate. "For decades," Judge William Alsup explained, "the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights." Now, "[t]he employer here, DoorDash, faced with having to actually honor its side of the bargain…blanches at the cost of the filing fees it agreed to pay in the arbitration clause." Judge Alsup wrote that "[t]his hypocrisy will not be blessed, at least by this order."[74]

It's hard to see how anyone could disagree. A contract, after all, is a contract.

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[21] Id. at 108

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[26] Id.

[27] *Ross v. American Exp. Co.,* 35 F. Supp. 3d 407, 424

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[32] Id.

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[34] Id. at 422.

[35] Id. at 456.

[36] Id.

[37] Imre S. Szalai, The Employee Rights Advocacy Institute for Law & Policy, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies* (September 27, 2017) (Reporting that "80% of the companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with workplace-related disputes since 2010.") http://employeerightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf; See also Szalai, UC Davis Law Review

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[55] United States Senate, Committee on the Judiciary, Full Committee Hearing, "Arbitration in America" (April 2, 2019), https://www.judiciary.senate.gov/meetings/arbitration-in-america . Unless otherwise noted (as in FN45), all citations in this paragraph and the following two paragraphs are to the footage of this committee hearing.

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[58] *Discover Bank v. John Szetela*, "Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District" (cert. denied).

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[60] Id. at 24.

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[62] *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010)

[63] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)

[64] *American Express Co. et al. v. Italian Colors Restaurant*, 570 U.S. 228 (2013)

[65] *Epic Systems Corp. v. Lewis,* 584 U.S. __ (2018)

[66] 570 U.S. 333 at 339

[67] 138 S. Ct. 1612 at 1632

[68] *Morris v. Ernst & Young LLP*, No. CV C-12-04964 RMW, 2013 WL 3460052, at *1 (N.D. Cal. July 9, 2013)

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[71] Id.

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[73] Id.

[74] Id.