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ARBITRATION'S SUMMER SOLDIERS: AN EMPIRICAL STUDY OF ARBITRATION CLAUSES IN CONSUMER AND NONCONSUMER CONTRACTS

Theodore Eisenberg*
Geoffrey P. Miller**
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We provide the first study of varying use of arbitration clauses across contracts within the same firms. Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms' consumer and nonconsumer contracts. Over three-quarters of the consumer agreements provided for mandatory arbitration but less than 10% of the firms' material nonconsumer, nonemployment contracts included arbitration clauses. The absence of arbitration provisions in the vast majority of material contracts suggests that, ex ante, many firms value, even prefer, litigation over arbitration to resolve disputes with peers. Our data suggest that the frequent use of arbitration clauses in the same firms' consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution.

INTRODUCTION

Arbitration clauses are common features of American consumer agreements. Popular products such as cellular phone service, credit cards, and discount brokerage typically come with fine-print contracts in which customers waive their right to litigate disputes in court. Knowingly or not, the customer who signs these contracts agrees to submit disputes to arbitration and, in many cases, agrees not to participate in aggregate proceedings, either in court or before an arbitrator.

Mandatory arbitration clauses in consumer contracts have been controversial. Supporters of such clauses argue that arbitration is cheaper, faster, and more effective as a means for dispute

* Henry Allen Mark Professor of Law, Cornell Law School. For helpful comments we thank Jennifer Arlen, Oren Bar-Gill, Yun-chien Chang, Geerte Heslen, Christopher Leslie, Herbert Kritzer, Michael Levine, Florencia Marotta-Wurgler, Larry Ribstein and participants at the NYU Law and Economics Workshop and the contracts panel at the 2008 Annual Meeting of the Association of American Law Schools. Benjamin Freshman and Michael Ernemann provided excellent research assistance. Professor Eisenberg serves as a consultant for plaintiffs in a case raising a class action-arbitration issue.

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resolution than litigation.¹ Professional arbitrators are neutral, outcomes are at least as favorable to consumers as the outcomes of litigation, and a majority of participants express satisfaction with the process.² Litigation, meanwhile, is seen as antithetical to arbitration because it undermines the speed, simplicity, and financial benefits of the arbitration process.³ More broadly, supporters argue that mandatory arbitration, coupled with class action waivers, benefits all consumers by reducing the price of consumer products. Companies save money, and in a competitive market, pass their savings on to customers.⁴ Pre-dispute arbitration clauses, in short, serve the best interests of both companies and consumers.

Opponents of mandatory arbitration in consumer contracts characterize these clauses as a limited and often unsatisfactory mode of dispute resolution imposed by economically powerful corporations on unsophisticated consumers without genuine con-

1. See, e.g., Discover Bank's Answer to Amicus Curie [*sic*] Brief of Consumer Attorneys of California in Support of Real Party in Interest at 13–14, *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (No. S113725) (arguing that arbitration provides consumers with an advantageous forum); Brief of Respondent Cingular Wireless, *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (No. 77406-4) (citing legislative history of the FAA); Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736–42 (2006) (discussing the costs of arbitration); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–66 (2001) (discussing savings in time and costs through arbitration); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 54–55, 57 (1998) (discussing the comparative speed and cost-effectiveness of arbitration in employment settings); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 763–69 (2003) (enumerating benefits of arbitration over litigation).

2. See, e.g., 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 MGMT. 369, 378 (1995) (reporting favorable employee win-rates in employment-related arbitration); Maltby, *supra* note 1, at 45–51 (citing studies of win-rates, awards, and participant satisfaction in arbitration and litigation); Mogilnicki & Jensen, *supra* note 1, at 763–65 (citing studies of outcomes in arbitration and litigation).

3. See, e.g., Brief of CTIA—The Wireless Ass'n as Amicus Curiae in Support of Affirmance, *Scott*, 161 P.3d 1000 (No. 77406-4); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 94; Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1710 (2005).

4. See Ware, *supra* note 3. Ware lists a variety of ways in which arbitration reduces the costs of dispute resolution for companies: high damages are less likely, defendant companies avoid adverse publicity, procedures are nationally uniform, discovery and appeals are limited, class actions may be avoided, and, more generally, claims may be deterred altogether. *Id.* at 90. Of course, deterring claims means that victims of corporate wrongdoing obtain no relief for violations of their legal rights; overall, however, consumers might be willing to forego legal remedies for minor wrongs in exchange for lower-priced goods and services. See *id.* at 94 (acknowledging that class action waivers save costs, and lower prices, in part by deterring valid claims).

sent.⁵ Consumers are deprived of jury trials; instead their claims are judged by private arbitrators who may seek to ingratiate themselves with companies that frequently use their services.⁶ Damage awards may be lower in arbitration than in litigation,⁷ though evidence supporting this claim is inconclusive.⁸ Critics also maintain that mandatory arbitration of consumer disputes is detrimental to the public interest in open resolution of legal controversies. Arbitration proceedings are typically private and do not result in published opinions; therefore, decisions rendered by arbitrators contribute nothing to the body of law, have little deterrent effect on future wrongdoing, and fail to stimulate interest in legal reform.⁹

Opponents of mandatory consumer arbitration are particularly critical of arbitration agreements in which consumers waive their right to initiate or join in aggregate disputes, in or out of

5. See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call For Reform*, 38 HOUS. L. REV. 1237, 1246–49 (2001) (emphasizing adhesion); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 328 (1995) (emphasizing adhesion); Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer Experience, 67 LAW & CONTEMP. PROBS. 55, 73–74 (2004) (concluding that consumer arbitration clauses are not fully voluntary and restrict consumers' substantive rights); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 787–89 (2002) (emphasizing differences in bargaining power); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36, 58–60, 132 (1997) (emphasizing adhesion); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN L. REV. 1631, 1648–53, 1671–72 (2005) (cataloguing criticisms).

6. Studies finding that consumers often win contested arbitrations, according to these critics, are unrepresentative because they involve relatively sophisticated consumers. See Budnitz, *supra* note 5, at 320–21; Sternlight, *Creeping Arbitration*, *supra* note 5, at 1659 (same).

7. Estreicher, *supra* note 1, 565 tbl.4 (2001) (showing lower median awards in arbitration of employment cases); Schwartz, *supra* note 5, at 64–65 (reviewing imprecise evidence and noting that limited empirical evidence raises a serious concern).

8. See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (Nov. 2003–Jan. 2004) (finding no significant difference between litigation and arbitration awards); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 890–93 (1993) (statistical tests on arbitrator-mock juror samples yielded no statistically significant difference in the median or mean awards); Donald Wittman, *Lay Juries, Professional Arbitrators, and the Arbitrator Selection Hypothesis*, 5 AM. L. & ECON. REV. 61 (2003) (finding little evidence of difference between juror and arbitrator outcomes in California automobile accident cases).

9. See Alderman, *supra* note 5, at 1262–64 (arguing that arbitration detracts from development of law); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 298–303 (2004) (finding mandatory arbitration to be incompatible with democratic values); Sternlight, *supra* note 5, at 1661–65 (discussing transparency, public education, and the rule of law).

arbitration.¹⁰ Class actions and other forms of aggregate dispute resolution, they argue, are necessary to apprise consumers of corporate malfeasance, to make litigating small claims economically viable, and to hold companies accountable for wrongdoing that results in small losses to many customers. Thus, waivers of aggregate dispute resolution defeat both the rights of individual consumers and the public's interest in enlisting private litigants to enforce the law.¹¹ Avoiding aggregate actions may save money for companies, these critics say, but there is no guarantee that the savings will be passed on to consumers, and in any event public interests in law enforcement trump private interests in lower prices for consumer products.

Mirroring this public policy debate is a vibrant pattern of litigation pitting consumers and consumer advocates against big corporations. Arbitration clauses are raised by corporate defendants in such cases as a defense against class action treatment.¹² Plaintiffs typically contend that standard-form contract provisions combining mandatory arbitration with class action waivers are unconscionable under state contract law.¹³ In the ensuing litigation, the parties have vigorously debated the justifiability of arbitration clauses, with major trade and consumer organizations participating as amici curiae on the expected sides.¹⁴ Decisions on

10. See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 103 (2004) (referring to the combination of mandatory arbitration and class action waiver as "do-it-yourself tort reform" by companies).

11. See Budnitz, *supra* note 5, at 322–23 (noting an adverse effect on "public" disputes); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 430 (2005) (discussing the public benefits of class actions); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 170–77 (2006) (arguing that low value claims are not viable on an individual basis, leaving companies unaccountable for violations of law); Schwartz, *supra* note 5, at 53 (referring to "Corporate Self-Deregulation"); Sternlight, *supra* note 5, at 1251–52 (arguing that companies use arbitration to shield themselves from legal liability); Sternlight & Jensen, *supra* note 10, at 85–92 (arguing that financial and informational obstacles to arbitration allow companies to escape liability).

12. See, e.g., *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007).

13. See, e.g., *id.*

14. For example, in a recent case before the Supreme Court of Washington, *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), Cingular's position was defended by the United States Chamber of Commerce, CTIA—The Wireless Association, Amazon.com, Intel, Microsoft and others, and the plaintiff's position was supported by the Washington State Trial Lawyers Association, AARP, and the National Association of Consumer Advocates. See Brief Amicus Curiae of the Chamber of Commerce of the U.S. in Support of Respondent Cingular Wireless, *Scott*, 161 P.3d 1000 (No. 77406-4); Brief of CTIA—The Wireless Ass'n as Amicus Curiae in Support of Affirmance, *Scott*, 161 P.3d 1000 (No. 77406-4); Brief of Amazon.com, Intel Corp., Microsoft Corp. and Real networks as Amicus Curiae in Support of Affirmance, *Scott*, 161 P.3d 1000 (No. 77406-4); Brief of Amicus Curiae Wash. State Trial Lawyers Ass'n Found., *Scott*, 161 P.3d 1000 (No. 77406-4); Brief Amici Curiae of AARP &

the question of unconscionability, in both federal¹⁵ and state¹⁶ courts, have been mixed.

Nat'l Ass'n of Consumer Advocates, *Scott*, 161 P.3d 1000 (No. 77406-4). Similarly, in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), Discover was supported by The U.S. Chamber of Commerce, the American Bankers' Association, the American Financial Services Association, the Consumer Bankers' Association, the Consumer Attorneys of California, and others. Application of Amicus Curiae the Chamber of Commerce of the U.S. for Permission to File Supplemental Brief and Supplemental Brief of Amicus Curiae the Chamber of Commerce of the U.S. in Support of Defendant-Petitioner, *Discover*, 113 P.3d 1100 (No. S113725); Brief of Amici Curiae Am. Bankers Ass'n, Am. Fin. Servs. Ass'n & Consumer Bankers Ass'n in Support of Petitioner Discover Bank at 7, *Discover*, 113 P.3d 1100 (No. S113725). Plaintiffs were supported by AARP, the National Association of Consumer Advocates, and others. See Brief Amicus Curiae of AARP in Support of Christopher Boehr, Real Party in Interest, *Discover*, 113 P.3d 1100 (No. S113725); Amicus Curiae Brief of the Nat'l Ass'n of Consumer Advocates in Support of Real Party in Interest, *Discover*, 113 P.3d 1100 (No. S113725); Amicus Curiae Brief of Consumer Attorneys of Cal. In Support of Real Part in Interest Christopher Boehr, *Discover*, 113 P.3d 1100 (No. S113725).

15. *Compare, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006) (invalidating arbitration agreements barring antitrust treble damages, class actions, and attorney fees), *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1308-09 (E.D. Okla. 2005) (upholding membership agreement's prohibition on class action participation), *Luna v. Household Fin. Corp.*, III, 236 F. Supp. 2d 1166, 1178-79 (W.D. Wash. 2002) (finding waiver of class action rights unfair and emphasizing the class action's importance in vindicating consumer rights), *and Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (invalidating waiver of class remedies and declaratory and injunctive relief as substantively unconscionable), *with, e.g.*, *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (enforcing arbitration clause effectively precluding class action remedy), *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting the "argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she [the plaintiff] will be unable to maintain her legal representation given the small amount of her individual damages."), *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001) (same) *and Johnson v. W. Suburban Bank*, 225 F.3d 366, 379 (3d Cir. 2000) ("claims arising under the EFTA [Electronic Fund Transfer Act] may also be subject to arbitration notwithstanding the desire of a plaintiff who previously consented to arbitration to bring his or her claims as part of a class.").

16. *Compare, e.g.*, *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59-60 (1st Cir. 2007) (finding an employment contract's class action waiver in an arbitration clause unconscionable under Massachusetts law), *Ting v. AT&T*, 319 F.3d 1126, 1147-52 (9th Cir. 2003) (finding ban on class claims procedurally and substantively unconscionable under California law), *Discover*, 113 P.3d 1100, 1108 (finding that some waivers of class arbitration in consumer class action are unconscionable under California law), *S.D.S. Autos, Inc. v. Chrzanowski*, Nos. 1D06-5664, 1D06-5662, 2007 WL 4145222 at *2 (Fla. Dist. Ct. App. Nov. 26, 2007) (refusing to enforce arbitration clause precluding class relief), *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (same), *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100-01 (N.J. 2006) (holding deprivation of class-wide action unconscionable), *Scott*, 161 P.3d, at 1005-06 (holding that a class action waiver in an arbitration clause violates public policy), *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W. Va. 2002) (holding retailer's contract prohibiting class relief unenforceable), *with, e.g.*, *Leonard v. Terminix Int'l Co.*, 854 So.2d 529, 538 (Ala. 2002), *Kinkel v. Cingular Wireless*, 857 N.E.2d 250, 277 (Ill. 2006), *Schwartz v. Alltel Corp.*, No. 86810, 2006-Ohio-3353, ¶ 36, 2006 WL 2243649 (Ohio Ct. App. June 29, 2006), *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 951 (Or. Ct. App. 2007) (holding unconscionable ban on class actions), *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005) (holding arbitration clause stripping class action right substantively unconscionable), *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. 2006), *and Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 175 (Wis.

A growing body of literature attempts to measure the incidence of mandatory arbitration in different types of contracts. The literature to date, however, has been limited because it examines only particular types of contracts and does not control for the contracting parties. This study adds to the literature by investigating whether particular firms vary use of arbitration clauses depending on the type of contract. Do firms uniformly include arbitration clauses, or do they vary their practice based on the nature of the contract? Our aim is to explore whether firms are consistent in their contractual practices across consumer and nonconsumer contracts.

The results are striking. Over three-quarters of the studied companies' consumer agreements provided for mandatory arbitration of disputes.¹⁷ Yet less than 10% of their negotiated nonconsumer, non-employment contracts included arbitration clauses.¹⁸ The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers. The systematic eschewing of arbitration clauses in business-to-business contracts also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses.

Given that large corporations reveal a clear preference for litigation over arbitration in their business-to-business contracts, the frequent inclusion of mandatory arbitration clauses in consumer contracts requires explanation. One plausible hypothesis is that these provisions are intended to preclude aggregate dispute resolution by remitting the consumer to an individual action before an arbitrator. The strategy of precluding aggregate treatment of consumer grievances is potentially beneficial to corporations because few individual consumers will find it worthwhile to pursue their claims on an individual basis, either in litigation or in arbitration. To the extent these clauses are effective at preventing aggregate dispute resolution, therefore, they may eliminate any effective consumer remedy for defective products or services.

2006) (questioning whether class action waiver in arbitration clause would be enforceable) with, e.g., *Delta Funding Corp. v. Harris*, 912 A.2d 104, 115 (N.J. 2006) (class arbitration waiver "is not unconscionable per se"); *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865, 875 (N.C. Ct. App. 2006), *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 714–15 (Tenn. Ct. App. 2006) (enforcing class arbitration waiver under Utah law), and *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App. 2003) (holding that waiver of class action rights in arbitration clause is not unfair because it does not eliminate a substantive right); see also Tyler M. Paetkau, *Drafting Employment-Related Agreements*, PLI Order No. 11091, at 277–78 (Oct. 2007) (listing additional cases).

17. See *infra* text accompanying note 49.

18. See *infra* text accompanying note 50.

Part I of this Article discusses prior empirical research on arbitration clauses and outlines our research hypotheses. Part II describes the data, Part III reports the results, Part IV discusses the results, and Part V provides additional evidence for our thesis.

I. PRIOR RESEARCH AND HYPOTHESES

Prior Research. Empirical studies show a reasonably consistent pattern of arbitration clause use. The data show that arbitration clauses appear more frequently in consumer agreements than in other contracts, but also that substantial variation exists across types of contracts. In the securities industry, arbitration clauses are routinely used for resolving disputes between brokers and customers.¹⁹ Linda Demaine and Deborah Hensler report arbitration clauses in about 35% of consumer contracts with rates varying by the type of contract; for example, 69% of twenty-six consumer financial contracts, including credit card contracts, contained arbitration clauses compared to 0% of twenty consumer food and entertainment contracts.²⁰ Florencia Marotta-Wurgler found that about 6% of 597 online end-user software license agreements contained arbitration clauses,²¹ although some of these would not necessarily be consumer contracts. Elizabeth Rolph, Erik Moller, and John Rolph found that 9% of a sample of California physicians and hospitals used arbitration agreements,²² but it was reported at about the same time that the health care and health insurance industries had begun to require customers to agree to binding arbitration.²³ In a study of nonconsumer contracts, Eisenberg and Miller reported arbitration clauses in about 11% of material contracts of large corporate firms.²⁴ As in the case of consumer agreements, the rate of arbitration clauses in material contracts

19. See Stephen J. Choi, Jill E. Fisch, & Adam C. Pritchard, *Attorneys as Arbitrators* (Working Paper, Jan. 2008), available at SSRN: <http://ssrn.com/abstract=1086372> (offering an empirical study of arbitrations involving securities brokers and investors); *Wilko v. Swan*, 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

20. Demaine & Hensler, *supra* note 5, at 63–64 & tbl.2.

21. Florencia Marotta-Wurgler, “Unfair” *Dispute Resolution Clauses: Much Ado About Nothing?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45, 47–48 (Omri Ben-Shahar ed., 2007).

22. Elizabeth Rolph, Erik Moller & John E. Rolph, *Arbitration Agreements in Health Care: Myths and Reality*, 60 *LAW & CONTEMP. PROBS.* 153, 171 (1997).

23. Schwartz, *supra* note 5, at 53–54.

24. Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 *DEPAUL L. REV.* 335, 350 (2007). For other reports of rates of arbitration clauses, see *id.* at 346–48.

varied substantially depending on contract type. For example, one-third of licensing agreements contained arbitration clauses, whereas none of the trust agreements studied contained such clauses.²⁵ Employment contracts of senior executives have relatively high rates of arbitration clauses, with reports of clauses in 41.6% and 37% of executive contracts,²⁶ rates that exceed the approximately one-third rate Demaine and Hensler reported for consumer contracts.

Contract-level studies, however, cannot fully reveal individual firms' preferences with respect to arbitration and related clauses. Studying a firm's pattern of arbitration clause use provides information about the firm's true preferences about arbitration clauses. To detect firm-level patterns, one should observe multiple contracts per firm across a range of contractual situations. This is the research strategy employed in this Article.

Hypotheses. Our core hypotheses are simple. First, the companies we studied, or organizations to which they belong, have publicly endorsed the virtues of arbitration, particularly in the context of challenges to pre-dispute arbitration clauses and related class action waivers in consumer agreements. Arbitration, they maintain, "takes less time and costs less than litigation,"²⁷ it is "fair and effective,"²⁸ and it offers "a quick, cheap, and easy dispute resolution mechanism"²⁹ that is "more efficient"³⁰ than resolving disputes through litigation. Based on these assertions, we would expect that companies would consistently contract for dispute resolution through arbitration in all types of contracts and disputes.

Second, the stated justifications for mandatory arbitration typically apply to all types of disputes; they do not distinguish between consumer and other cases, for example. Thus our second hypothesis is that contracts will consistently require arbitration regardless of the nature of the contract or the identity of the counterparty.

Third, arbitration clauses are one of a suite of possible dispute resolution clauses present in many contracts. Most closely related to arbitration clauses are contract terms relating to jury trials. Arbitration clauses preclude litigation and, therefore, constitute a way

25. Eisenberg & Miller, *id.* at 351 tbl.2.

26. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 234 (2006) (41.6%); Eisenberg & Miller, *supra* note 24, at 351 tbl.2 (37%).

27. Brief of CTIA, *supra* note 3, at 2. Similar citations of the benefits of arbitration appear in Cingular's brief. Brief of Respondent Cingular Wireless at 39, *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (No. 55028-4).

28. Brief of CTIA, *supra* note 3, at 2.

29. Discover Bank's Answer, *supra* note 1, at 13-14.

30. Brief of Amici Curiae Am. Bankers Ass'n, et al., *supra* note 14, at 7.

of effectively avoiding jury trials. But mandatory arbitration clauses are not the only way to avoid a jury. In the federal courts and in most states, contract terms expressly waiving jury trials preserve access to court but avoid jury trials.³¹ Some tort reform proponents regard jury trials as a distinct source of problems with the U.S. legal system.³² Some researchers claim that juries are poorly suited to address matters of punitive damages.³³ And large jury awards have been made in litigation between business firms.³⁴ By agreeing ex

31. Knowing and voluntary pre-dispute contractual waivers of the civil right to a jury trial are enforced in federal courts. *See, e.g.*, *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985); *Rodenbur v. Kaufmann*, 320 F.2d 679, 683–84 (D.C. Cir. 1963); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp 2d 811, 813–14 (N.D. Tex. 2002). The majority of state courts agree. *See, e.g.*, *L & R Realty v. Conn. Nat'l Bank*, 715 A.2d 748, 756 (Conn. 1998); *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 626–627 (Mo. 1997) (en banc) (per curiam); *Lowe Enter. Residential Partners, L.P. v. Eighth Judicial Dist. Court of Nev.*, 40 P.3d 405, 410 (Nev. 2002); *R.I. Depositors Econ. Prot. Corp. v. Coffey and Martinelli, Ltd.*, 821 A.2d 222, 226 (R.I. 2003); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132–33 (Tex. 2004); *see also* Jay M. Zitter, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5TH 53, 71 (1996). California and Georgia reject at least some pre-dispute waivers. *See, e.g.*, *Grafton Partners v. Superior Court*, 116 P.3d 479, 492 (Cal. 2005) (rejecting waiver of jury right); *Bank South, N.A. v. Howard*, 444 S.E.2d 799, 800 (Ga. 1994) (limiting waiver of jury solely to when parties make no demand for a jury trial, or agree by stipulation filed in court); *see also* Miss. R. Civ. P. 38(b) (“The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.”).

32. This widely held corporate view regards juries as increasing the risks and costs of trials because they decide the questions put to them on the basis of legally irrelevant factors rather than according to the evidence and applicable law. *E.g.*, John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 51–52 (1998). For a broader description of this view and the evidence for and against it, see Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539, 587 (2007) (describing and weighing evidence of various hypotheses influencing jury trial waiver rates and finding corporations often “assign a positive value” to juries).

33. *E.g.*, Cass Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002).

34. *See, e.g.*, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (upholding a \$10 million jury award in business dispute); *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003) (reducing jury award of about \$505 million by over 80% by striking some compensatory and all punitive damages); *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 256–59 (5th Cir. 1999) (striking only punitive damages from jury award in excess of \$150 million); *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 20 Cal Rptr. 3d 234, 238 (Cal. Ct. App. 2004), review granted and depublished by 105 P.3d 543 (Cal. 2005) (awarding \$300,164,130 compensatory damages, \$200 million punitive damages); *Time Warner Entm't Co. v. Six Flags Over Ga.*, 563 S.E.2d 178 (Ga. App. 2002) (\$257 million punitive award), *cert. denied*, 538 U.S. 977 (2003); *Pioneer Commercial Funding Corp. v. Am. Fin. Mortgage Corp.*, 855 A.2d 818 (Pa. 2004) (striking large jury award); *COC Serv., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654 (Tex. App. 2004) (upholding trial court's JNOV striking large punitive damages award), *review denied*, June 9, 2006; *Micro/Vest v. Computerland* (awarding an estimated \$400 million in compensatory damages in a jury trial), *reported in* Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Juries Decide*, 33 J. LEGAL STUD. 1, 6 tbl.1 (2006); *Rubicon Petrol. Inc. v. Amoco Prod. Co.*, *reported in Amoco Loses Oilfield Suit*, N.Y. TIMES, Nov. 24, 1993, at D16 (awarding \$417 million in a jury trial); *Amoco Chem. Co. v. Certain Underwriter's at Lloyd's of London*, No. B083904, 1996 WL

ante to avoid jury trials, businesses can avoid the perceived risk of a runaway jury granting possibly bankrupting. Based on the business community's expressed attitudes towards juries, one expects businesses to seek to avoid that risk. Our third hypothesis, therefore, is that even when an arbitration clause is absent, contracts will waive jury trials for all types of contracts and counterparties.

II. DATA DESCRIPTION

We identified a number of companies with significant market shares or name recognition in the telecommunications, credit, and financial services industries. Most are in the top 100 of American companies listed in *Fortune* magazine's annual ranking;³⁵ others are close to the top 100 or are well-known within the relevant consumer sector. Next, we collected consumer agreements drafted by the companies. Some of these were available to anyone visiting the web site on which the company marketed its products. Others were available through a link or window that appeared during the process of placing an order. Others were available only by mail after ordering the company's product.³⁶ We searched for versions of these agreements current in July and August, 2007. In the industry sectors we studied, consumer agreements typically regulated an ongoing relationship between the company and the consumer, such as phone service, brokerage, or credit.

We then searched for negotiated agreements entered into by the same companies. Our sources for these contracts were the companies' Form 8-K and Form 10-K filings during the period from January 1, 2006 to August 13, 2007. The SEC requires registered companies to file current and annual reports listing, among other

407855 (Cal. App. June 4, 1996) (reversing large jury award). In *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F.Supp. 535 (S.D. Tex. 1997), a jury awarded \$220,720,000 in compensatory and punitive damages. After a retrial was ordered, see Felicity Barringer, *Judge Says Record Libel Case Should Be Retried*, N.Y. TIMES, Apr. 9, 1999, at C1, it is reported that MMAR did not pursue the case. See David McHam, *Law & the Media in Texas: Handbook for Journalists*, available at <http://www.texaspress.com/Lawpress/LawMedia/Libel/TexasLibelCases.htm>. See also THOMAS PETZINGER, JR., *OIL AND HONOR: THE TEXACO-PENNZOIL WARS* (1987) (describing in detail a multi-billion dollar jury award in a corporate control battle).

35. *Fortune* 500, FORTUNE, Apr. 30, 2007, available at http://money.cnn.com/magazines/fortune/fortune500/2007/full_list/.

36. For example, Walmart (*Fortune's* #1) provides credit card applicants with a disclosure statement at the time of application, then mails the full consumer agreement to the customer when the application is accepted. Telephone requests for an advance copy of the agreement, prior to submission of an application containing personal financial information, were declined on the ground that the company did not furnish its contracts to "just anyone." Telephone Interview with Walmart Customer Service (June 15, 2007). The consumer contract that Walmart sends is in fact a contract with GE Money Bank.

things, contracts that materially affect the financial condition of the company.³⁷ Contracts filed by the companies we studied included stock purchase agreements; credit and security agreements; loan pooling and service agreements; employment agreements; and various agreements relating to benefits and incentives for key employees. Given the economic significance of these contracts—implied by their inclusion in Forms 8-K and 10-K—we assume that they were negotiated with care.

Our data include 26 consumer agreements drafted by 21 companies and 164 negotiated, material contracts entered into by the same companies. Fourteen of the negotiated contracts were employment agreements. Sorting by industry, seven of our companies (accounting for seven consumer contracts and sixty-three negotiated contracts) provide telecommunications services; five companies (accounting for seven consumer contracts and thirty-eight negotiated contracts) provide “triple play” cable services (CATV, Internet, and phone); four companies provide securities services (accounting for four consumer agreements and thirty-three negotiated agreements); three companies are commercial banks (accounting for five consumer agreements and fourteen negotiated contracts); two companies issue retail credit cards (accounting for two consumer contracts and eight negotiated contracts); and one company is a financial credit company (accounting for one consumer contract and eight negotiated contracts). Table 1 reports the companies studied and the number of each kind of contract for each company.

TABLE 1
COMPANIES AND CONTRACT TYPES

Company	Contract Type			Total
	Consumer	Employment	Material Contracts	
AT&T	1	0	17	18
Alltel	1	0	12	13
American Express	1	0	8	9
Ameriprise	1	0	7	8
Ameritrade	1	6	8	15
Bank of America	1	0	6	7
Cablevision	3	0	7	10
CellularOne	1	3	9	13
Charles Schwab	2	0	11	13
Charter Commun.	1	1	9	11

37. See 15 U.S.C. §§ 78l, 78m, 78o(d) (2000); 17 C.F.R. §§ 240.13a-1, 240.13a-11, 249.308, 249.310 (2007).

Company	Contract Type			Total
	Consumer	Employment	Material Contracts	
Chase	2	0	6	8
Citigroup	2	0	2	4
Comcast	1	0	10	11
Cox	1	0	1	2
E-Trade	1	0	1	2
GE/GE Money Bank ³⁸	1	0	8	9
Qwest	1	1	7	9
Sprint	1	3	3	7
Time Warner	1	0	10	11
U.S. Cellular	1	0	5	6
Verizon	1	0	3	4
Total	26	14	150	190

³⁸GE Money Bank describes itself as "the consumer and small business financial services unit of General Electric."³⁸ Sources. Authors' collection of consumer contracts: EDGAR database Form 8-K and Form 10-K filings, Jan. 1, 2006 to Aug. 13, 2007.

We coded both consumer agreements and negotiated contracts for the presence of mandatory arbitration clauses,³⁹ class action waivers, jury trial waivers, choice of law provisions, forum selection clauses, and provisions for payment of costs, including attorneys' fees. If the contract required arbitration, we coded for waivers of class arbitration, waivers of class action treatment, rules governing arbitration, arbitration venue selection, and provisions on fees. We also noted and coded for a fairly common non-severability provision stating that, in the event that a waiver of class treatment is found to be unenforceable, the entire agreement to arbitrate is nullified.

III. EMPIRICAL RESULTS

We report results for (1) arbitration clauses, (2) waivers of class treatment and related terms, and (3) waivers of jury trial.

A. Arbitration Clauses, Class Action Waivers

Table 2 reports the rate of arbitration clauses by major contract type. Over 75% of the consumer agreements we examined in-

38. GE Money, *About Us*, http://www.gemoney.com/about_us/index.html (last visited Apr. 5, 2008).

39. Some clauses provided for arbitration at the election of either party. Because the company can elect arbitration, we count these as mandatory.

cluded mandatory arbitration clauses. This rate can usefully be compared with the arbitration clause rates in the material contracts in the EDGAR data base. The EDGAR material contracts can subdivided into employment contracts and other contracts. Over 90% of the EDGAR employment agreements included arbitration clauses.⁴⁰ The consumer contracts and employment contracts arbitration clause rates are strikingly different from the rates in nonconsumer material contracts (contracts in the EDGAR database other than employment contracts). These material contracts included arbitration clauses only at about a 6% rate. The difference between the nonconsumer contract rate and the rate for consumer and employment contracts is highly statistically significant ($p < 0.001$). Even including employment contracts, less than 10% of the negotiated contracts we examined contained arbitration clauses.⁴¹ At the individual firm level, only eight of twenty-one firms had any nonconsumer, nonemployment contract that provided for arbitration. None of these eight firms provided for arbitration in more than one material contract. In sum, the data establish that the large companies in our data overwhelmingly selected arbitration as the method for resolving consumer disputes and permitted litigation as the method for resolving business disputes.

TABLE 2
RATE OF ARBITRATION CLAUSES BY CONTRACT TYPE

Contract type	Arbitration Clause		Total
	No	Yes	
Consumer (N)	6	20	26
Percent	23.1	76.9	100.0
Employment (N)	1	13	14
Percent	7.1	92.9	100.0
Material contract (N)	138	9	147
Percent	93.9	6.1	100.0
Total (N)	145	42	187
Percent	76.3	23.7	100.0

Sources. Authors' collection of consumer contracts: EDGAR database Form 8-K and Form 10-K, Jan. 1, 2006 to Aug. 13, 2007.

40. Three executive agreements relating to executive departures in the case of corporate takeovers provided for arbitration at the executive's option. We do not count those as contracts containing mandatory arbitration clauses.

41. This is consistent with findings reported by Eisenberg and Miller. See Eisenberg & Miller, *supra* note 24, at 350-51 & tbl.2 (finding an average of 89% of contracts do not mandate arbitration).

B. Waivers of Class Treatment and Related Terms

The pattern of class-related provisions in these contracts is also instructive. Table 3 shows that every consumer contract with an arbitration clause also included a waiver of classwide arbitration. Table 4 shows that, in 60% of the consumer contracts that contained mandatory arbitration clauses, companies' contracts deemed those clauses void if the arbitration process allows for classwide activity.⁴² Table 5 shows that, independent of arbitration clauses, 80% of consumer contracts waived class action litigation rights. Moreover, in a result not shown in the tables, the presence of a clause waiving class action litigation rights only appeared in contracts with arbitration clauses. No litigation class action waivers were found in consumer or other contracts in the absence of an arbitration clause.

These three clauses—waivers of classwide arbitration, non-severability clauses voiding the arbitration agreement in the event classwide arbitration is granted, and waivers of class action litigation—are each significantly more prevalent for consumer than for business-to-business and employment contracts. The differences in all three tables between consumer and nonconsumer contracts are statistically significant at $p < 0.001$.

TABLE 3
PATTERN OF CLASS ARBITRATION WAIVER IN
CONTRACTS WITH ARBITRATION CLAUSES

Contract type	Class Arbitration Waiver		
	No	Yes	Total
Consumer (N)	0	20	20
Percent	0.0	100.0	100.0
Employment (N)	13	0	13
Percent	100.0	0.0	100.0
Material contract (N)	5	2	7
Percent	71.4	28.6	100.0
Total (N)	18	22	40
Percent	45.0	55.0	100.0

42. See *infra* note 52.

TABLE 4
PATTERN OF VOID ARBITRATION CLAUSES IN THE
EVENT OF CLASS ACTION ARBITRATION

Contract type	Arbitration Clause Void if Class Action Waiver Clause Void		
	No	Yes	Total
Consumer (N)	8	12	20
Percent	40.0	60.0	100.0
Employment (N)	13	0	13
Percent	100.0	0.0	100.0
Material contract (N)	7	0	7
Percent	100.0	0.0	100.0
Total (N)	28	12	40
Percent	70.0	30.0	100.0

TABLE 5
PATTERN OF CLASS ACTION WAIVER IN
CONTRACTS WITH ARBITRATION CLAUSES

Contract type	Class Action Waiver		
	No	Yes	Total
Consumer (N)	4	16	20
Percent	20.0	80.0	100.0
Employment (N)	13	0	13
Percent	100.0	0.0	100.0
Material contract (N)	5	2	7
Percent	71.4	28.6	100.0
Total (N)	22	18	40
Percent	55.0	45.0	100.0

Sources for Tables 3, 4, and 5. Authors' collection of consumer contracts: EDGAR database Form 8-K and Form 10-K filings, Jan. 1, 2006 to Aug. 13, 2007.

C. Jury Trial Waiver

Table 6 reports on the pattern of jury trial waivers. The table's leftmost two columns limit the sample to contracts not containing mandatory arbitration clauses to isolate jury trial clauses in contracts in which jury trial clauses are unaffected by arbitration clauses. Column (1)'s and (2)'s "Material contract" rows show that only about 25% of 138 material contracts contained express jury trial waivers. This is consistent with prior work on jury trials, which shows low rates of jury trial waiver, about 20%, for large

corporations' business-to-business contracts.⁴³ Interestingly, none of the consumer contracts that lacked mandatory arbitration provisions contained waivers of jury trial.

Columns (3) and (4) account for the fact that arbitration clauses implicitly waive jury trials. Treating arbitration clauses as jury trial waivers results in only about 30% of material contracts precluding jury trials—a result consistent with Eisenberg and Miller's prior study.⁴⁴ The situation is otherwise with respect to consumer and employment contracts. Because these contracts had high rates of mandatory arbitration, most of these contracts effectively avoided juries even when they lacked an explicit jury trial waiver.

TABLE 6
SUMMARY OF JURY TRIAL WAIVER CLAUSES BY CONTRACT TYPE

	Sample limited to contracts without arbitration clauses		Arbitration clauses treated as jury trial waivers	
	(1)	(2)	(3)	(4)
Contract type	No jury trial waiver	Jury trial waiver	No jury trial waiver	Jury trial waiver
Consumer (N)	6	0	6	20
Percent	100.0	0	23.1	76.9
Employment (N)	1	0	1	13
Percent	100.0	0	7.1	92.9
Material contract (N)	103	35	103	44
Percent	74.6	25.4	70.1	29.9
Total (N)	110	35	110	77
Percent	75.9	24.1	58.8	41.2

Sources. Authors' collection of consumer contracts: EDGAR database Form 8-K and Form 10-K filings, Jan. 1, 2006 to Aug. 13, 2007. Columns (3) and (4) treat arbitration clauses as jury trial waivers.

IV. DISCUSSION

None of our hypotheses was confirmed. The companies in our data set do not uniformly include arbitration clauses in their contracts; less than one quarter (23.7%) of the contracts studied contained such clauses. Nor is the pattern of mandatory arbitration uniform across contract type. Arbitration clauses appear routinely in employment contracts (92.9%), frequently in consumer contracts (76.9%), and rarely in material nonemployment nonconsumer contracts (6.1%). And the companies in our data set

43. Eisenberg & Miller, *supra* note 32, at 553 tbl.2.

44. Because arbitration clauses opt out of all litigation, arbitration clauses may reflect a dislike of judges as well as juries as decision-makers. *Id.* at 552–53.

do not routinely flee jury trials. Only 24.1% of the contracts contained explicit waivers of jury trials. Even when arbitration clauses are treated as jury trial waivers the overall rate of jury trial waiver was only 41.2%. As in the case of arbitration clauses, the pattern differs depending on the type of contract: because so many employment and consumer contracts contained arbitration clauses, the effective jury trial waiver rates for these contracts were also high when arbitration clauses are considered jury waivers.

What explains these results? The low rate of mandatory arbitration clauses in material nonlabor contracts suggests that the companies in our data set did not, in fact, view the purported advantages of arbitration as compelling when it came to resolving important business-to-business disputes. This result suggests reasons for doubting the arguments of some arbitration advocates, which would imply that rational actors would always prefer arbitration over litigation.

Other explanations, more favorable towards arbitration, can be proposed. As noted in Eisenberg and Miller's prior work, for example, bargaining dynamics may deter parties from demanding mandatory arbitration even when arbitration would be in the joint interest of the parties (the reason is that demanding arbitration could signal that the party may be inclined to breach the contract).⁴⁵ Alternatively, perhaps the parties anticipate that they might agree ex post to arbitrate disputes, and thus their failure to agree to ex ante mandatory arbitration is not, strictly speaking, an outright rejection of arbitration (although, in this case, their revealed preference for keeping the litigation option open does indicate that they believe litigation might be preferable in some or even many cases).⁴⁶ It appears, however, that the simplest explanation is the most plausible: the parties' revealed preference indicates that arbitration, for them, is often seen as less desirable than litigation as a means for resolving disputes.⁴⁷

Also requiring explanation is the remarkable contrast between employment and consumer contracts, with high rates of mandatory arbitration, and material nonemployment contracts, with low rates of arbitration. In the case of employment contracts, we conjecture that both parties perceive a need for confidentiality in the resolution of the dispute. The senior employees covered by these contracts are often in the public eye. Neither the employer nor the

45. See Eisenberg & Miller, *supra* note 24, at 369.

46. We thank Dan Crane for this suggestion.

47. Our evidence only includes material contracts in the EDGAR data so we offer no conclusions about these companies' less sizable contracts, or about contracts of smaller companies.

employee stands to gain in terms of reputation of the dirty linen of their dispute is aired in public.

What about the disparity between rates of arbitration clauses in consumer and material nonlabor contracts? Concerns for confidentiality cannot explain these data. The most plausible explanation here is that companies wish to avoid aggregate dispute resolution.⁴⁸

The theory is as follows. Companies prefer individual over aggregate dispute resolution because aggregate treatment creates overwhelming settlement pressure⁴⁹ and because few consumers will seek redress on an individual basis due to lack of information or the small amounts in dispute.⁵⁰ Companies could attempt to address this problem by imposing waivers of class action litigation in their consumer contracts. But such waivers would be politically controversial and also would face a risk of being declared unconscionable by courts. The mandatory arbitration clause is a preferable alternative. Such clauses, if effective, may have the same result as class action waivers: they prevent class actions and remit consumers to individual actions which, in light of the stakes, are usually not worthwhile to pursue. But mandatory arbitration clauses are easier to sell and enforce than class action waivers. Because arbitration is often seen as cheaper and simpler than litigation, the company can claim that it is helping rather than hurting its customers. This reduces political costs and also increases the prospects that the clause will be upheld in court. In short, mandatory arbitration offers companies an opportunity to claim that they are concerned for consumer welfare while simultaneously denying their customers any practical avenue for redress.

A possible objection to the theory that companies are using arbitration clauses to avoid group dispute resolution is that such a tactic would be useless if the result was to substitute classwide arbi-

48. Our study thus provides support for commentators who claim that corporations are including arbitration clauses in consumer contracts as a device to avoid class action litigation. See Gilles, *supra* note 11, at 391–412; Sternlight & Jensen, *supra* note 10. At least one court has taken account of the much higher rates of arbitration clauses in companies' consumer contracts than in the business contracts. *Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 971 So. 2d 1257, 1267–68 (La. Ct. App. 2007) (finding that an arbitration clause contained in defendants' standard form consumer contract was not subject to negotiation with individual consumers but that defendant was willing "to dispense with arbitration provisions in its dealings with non-consumers").

49. See Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1879–95 (2006) (discussing legitimate and illegitimate settlement pressures).

50. See Issacharoff & Delaney, *supra* note 11, at 170–77 (noting that consumers cannot afford to arbitrate small claims on an individual basis); Sternlight & Jensen, *supra* note 10, at 86–87 (same).

tration for class action litigation. If an arbitration could be brought on a class basis, the advantages described above could be lost.⁵¹ But the contracts in our sample also take account of this possibility. Every one of the consumer contracts that provided for mandatory arbitration also contained clauses waiving classwide arbitration. Again, the evidence suggests that the companies wished to avoid all forms of aggregate dispute resolution.

What about the fact that 60% of the consumer contracts that contained arbitration clauses also included non-severability provisions stipulating that if classwide arbitration was ordered, the entire arbitration agreement would be invalid? The presence of these clauses suggests that companies prefer litigation class actions to classwide arbitration. The revealed preference for litigation in this context might reflect the perception that arbitrators are more willing to grant class treatment. Companies may desire to retain the rights to appeal both class certification and any eventual judgment—rights that are more available in litigation than in arbitration. Defendants or defense lawyers have substantial experience in litigating class actions and lack experience with arbitration. They might also believe that they are more likely to win the case before a court or jury than before an arbitrator whose instincts could be to split the difference between the parties' positions.⁵²

The desire to avoid aggregate dispute resolution procedures also helps explain the interesting pattern of class action waivers in our data. 80% of the consumer contracts that had arbitration clauses also had class action waivers. It is evident, therefore, that the parties who drafted these contracts desired to avoid class actions. Further, all of the class action waivers in our sample were

51. Classwide arbitrations have been uncommon to date, but some states have accepted the idea. *See, e.g.,* *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002); *Mandel v. Household Bank (Nev.)*, Nat'l. Ass'n., 129 Cal. Rptr. 2d 380 (Ct. App. 2003), review granted and opinion superseded, 132 Cal. Rptr. 2d 525, 65 P.3d 1284 (Cal. 2003); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991); *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002), *vacated*, 539 U.S. 444 (2003). The Supreme Court left the availability of classwide arbitration undecided in *Green Tree, Id.* at 449. It is fair to say, however, that classwide arbitration remains a somewhat controversial and poorly developed means for group dispute resolution.

52. *See* *Long John Silver's Restaurants, Inc. v. Cole*, 409 F. Supp. 2d 682, 687–88 (D.S.C. 2006) (applying a deferential standard of review to an arbitrator's lenient class certification having found certification procedures a matter of contract interpretation rather than state civil procedure); Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, at 12 (2007) (unpublished outline on file with the authors) (advising company lawyers to avoid class arbitration); Mark J. Levin, *Drafting a "Bulletproof" Arbitration Agreement and Related Practice Issues*, at 6 (unpublished outline on file with the authors) (suggesting that consumer agreement should include a non-severability provision).

embedded in mandatory arbitration clauses. There were no stand-alone waivers of class action litigation treatment. Companies appear to recognize that standalone class action waivers are legally vulnerable and also politically controversial, and thus include such waivers only when they can be disguised within the framework of a purportedly pro-consumer arbitration clause.

Other explanations could be advanced for the differences in arbitration rates between consumer and material nonlabor contracts. For example, the bargaining explanation for the paucity of arbitration clauses in business-to-business contracts—the idea that demanding an arbitration clause sends an undesirable signal about propensity to breach—is not persuasive in consumer contracts, where bargaining over contract terms is absent. Because no negative signal is conveyed, there is no reason, in this theory, to omit an arbitration clause. While logically possible, we find this explanation to be implausible. Moreover, while signaling may not be a problem in consumer contracts, adverse selection could be: if arbitrators tend to award some recovery even when the complainant's grievance is baseless, the presence of arbitration clauses in consumer contracts might select for customers with a propensity to breach.

Another possible explanation for the pattern we observe is that companies favor the presumably more costly and more reliable litigation system for the material contracts that may generate major litigation. For small consumer contracts with less at risk, companies are willing to trade access to litigation for the presumably faster, less costly arbitration system. While we cannot discount the possibility that the schedule of costs and benefits varies according to the scale or nature of the controversy, it is not obvious why the tradeoff should favor arbitration for small-scale disputes and litigation for large-scale ones (small claims court may be just as inexpensive as arbitration, for example). More importantly, the hypothesis has a somewhat fictional quality because few consumers will in fact exercise their rights under arbitration clauses.

Our explanation for the observed variance between arbitration clause rates in consumer and nonconsumer contracts is consistent with the most significant prior empirical study on the topic, that of Demaine and Hensler,⁵³ and also explains differences in reported arbitration rates in our study and theirs. The 76.9% rate of arbitration clauses in our sample of consumer contracts contrasts with the 35.4 rate reported by Demaine and Hensler, a difference that is

53. Demaine & Hensler, *supra* note 5.

highly statistically significant ($p < 0.001$).⁵⁴ The explanation for the difference appears to lie in the industries studied. Our study is limited to a fairly narrow range of industries. As described above, only six major industry groups appear in our sample. Demaine and Hensler reported on a wider range of consumer contracts. But isolating some of their contract categories yields an interesting pattern of results.

Demaine and Hensler report on five categories of insurance contracts (homeowners', renters', auto, health, and life insurance). Seventeen of twenty-one insurance contracts (80.9%) in their sample provided for arbitration, with none of the three life insurance contracts in their sample containing arbitration clauses. Outside the insurance industry, real estate contracts (two of two contracts), online retail contracts (three of five contracts), gas credit card contracts (four of five contracts), tour operator contracts (three of five contracts), contracts with attorneys (two of three contracts), and financial contracts (eighteen of twenty-six contracts) included arbitration clauses in more than half the contracts studied. A small minority of contracts in twenty-one other consumer contract categories had arbitration clauses. In those twenty-one categories, only eight of ninety-seven contracts (8.2%) had arbitration clauses. There thus appear to be two classes of consumer contract categories: those with a substantial portion containing arbitration clauses and those with a small minority containing such clauses.

Some of the pattern may be explained by industrial concentration. Our high rate of arbitration clauses appears in financial services and telecommunications contracts. Demaine and Hensler similarly report a 69.2% rate of arbitration clauses in financial contracts.⁵⁵ Five credit card issuers dominate their industry,⁵⁶ three of whom, JP Morgan Chase, Citigroup, and Bank of America, appear in our consumer contracts data. Similarly, the telecommunications industry has a high level of industrial concentration.⁵⁷ For the typical consumer today, a mobile phone contract is realistically available from only a handful of companies, including AT&T,

54. The rate of arbitration clauses in Demaine & Hensler is 35.4% (57 of 161 contracts). *Id.* at 64.

55. *Id.* Only the "Accountant/Tax Consultant" subcategory showing less than half the contracts with arbitration clauses. *Id.*

56. Douglas Akers at al., *Overview of Recent Developments in the Credit Card Industry*, 17 FDIC BANKING REV. 23, 25 tbl.2, available at <http://www.fdic.gov/bank/analytical/banking/2005nov/article2.pdf>.

57. *E.g.*, William D. Rahm, *Watching Over the Web: A Substantive Equality Regime for Broadband Applications*, 24 YALE J. ON REG. 1, 13 (2007) (noting high level of concentration of telecommunications and cable companies).

Alltel, Qwest, Sprint Nextel, and Verizon, all of which appear in our consumer contracts data.

The variance Demaine and Hensler establish in the cross-industry use of consumer arbitration clauses can be combined with industrial concentration data to suggest at least part of the explanation for the pattern of consumer contract arbitration clauses. Marotta-Wurgler reports an association between industrial concentration in the software industry, as measured by market share, and pro-seller contract conflict resolution terms, including arbitration clauses.⁵⁸ Industries for which Demaine and Hensler find low arbitration clause rates, including apartment rentals, grocery stores, cultural/sports events, and restaurants, lack the levels of industrial concentration present in the credit card and telecommunications industries.

The low-arbitration-clause rate industries also lack firms with millions of similarly situated customers affected by central company policy. In contrast, cell phone and credit card companies face a substantial economic threat due to their millions of customers. Intentional or intentional acts that deprive millions of customers of small amounts threaten financial and telecommunications firms only if customers can aggregate their claims. Industrial concentration and the varied risks of aggregate litigation thus suggest an explanation for the pattern of consumer contract mandatory arbitration clauses.

Finally, what explains the results on jury trial waivers? As noted, our hypothesis that companies would routinely flee juries was not confirmed. Consistent with Eisenberg & Miller's earlier study,⁵⁹ our results suggest that the companies we studied do not, in fact, view juries as undesirable factfinders for many disputes. The six consumer contracts in our sample that did not have arbitration clauses contained no waivers of jury trials, a fact which in itself might suggest that the companies involved preferred jury resolution of consumer contracts. However, when mandatory arbitration clauses are considered as forms of jury waiver, these companies are seen to flee juries at a high rate (76.9%). Our data are thus consistent with the view that another advantage of mandatory arbitration clauses, from the standpoint of companies, is that they allow companies to

58. Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. (forthcoming September 2008).

59. Eisenberg & Miller, *supra* note 32.

avoid juries while disguising the fact they are doing so in the form of an ostensibly consumer-oriented arbitration clause.⁶⁰

V. ADDITIONAL EVIDENCE

Our view that consumer arbitration clauses are used as means for avoiding aggregate dispute resolution finds support in other, qualitative data. Federal and state courts typically have enforced arbitration clauses in standard-form consumer agreements unless they contain specific provisions found to violate state contract law. Recently, however, some state courts, including California's, have found class action waivers in consumer arbitration agreements to be unconscionable and therefore contrary to generally applicable state law, at least when the consumers' claims were too small to support individual actions.⁶¹ Company lawyers responded to these adverse decisions by softening other terms pertaining to arbitration, while retaining the class action waiver. For example, companies may subsidize the costs of arbitration, use larger print for arbitration clauses, or may permit customers to opt out of arbitration (within a short time after purchasing the product).⁶² The apparent purpose of these "kinder and gentler" arbitration clauses is to avoid the appearance of one-sidedness, and thus to protect both the basic choice of arbitration over litigation and the connected waiver of class proceedings from challenges based on unconscionability.⁶³ This sequence of judicial decisions and

60. See Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003).

61. E.g., *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88 (N.J. 2006); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007). Several courts have reached the opposite conclusion. See the more comprehensive summary of authority cited *supra* note 16.

62. E.g., *Scott*, 161 P.3d at 1007 ("Cingular contends that it has cured any concerns about access to a remedy by promising to pay all AAA filing, administrative, and arbitrator fees unless the arbitrator finds the claim frivolous, and by promising to pay the attorneys fees under certain circumstances.").

63. See Levin, *supra* note 52, at 3, 7-8 ("Ironically, the best way to ensure that [an] arbitration clause will be enforced is to give the consumer or employee the right to reject it").

One recent case, *Berensen v. National Financial Services*, 485 F.3d 35 (1st Cir. 2007), might be taken as evidence that companies prefer to arbitrate, rather than litigate, consumer claims, even when class action is not an issue. In *Berenson*, brokerage customers sued Fidelity for failure to pay interest on funds debited from their account for electronic bill payments but held for several days before bills were paid. *Id.* at 37. After the district court refused to certify the plaintiffs as a class but also refused to grant summary judgment on some of the plaintiffs' individual claims, Fidelity went on to argue strenuously (but unsuccessfully) for arbitration of the remaining individual claims. *Id.* at 38-40. However, Fidelity knew at this point that the district court viewed the interest claims as potentially viable; therefore its

contractual responses further suggests that company lawyers have turned to arbitration as a source of protective cover for class action waivers.

Moreover, apart from the role of arbitration clauses in shoring up the validity of class action waivers, it is not clear why consumer arbitration would appeal to companies. Particularly when the company has agreed to subsidize a portion of the consumers' costs, fair arbitration provides little clear advantage for companies. Arbitration may be cheaper, but a cheaper forum invites more claims. Compensatory claims arising under the types of consumer agreements we studied are inherently limited by the modest stakes of consumer contracts; therefore, civil juries are unlikely to assess large damage awards. Companies may worry about punitive damages in court, but arbitrators are usually capable of awarding punitive damages, and contractual provisions barring punitive damages in arbitration increase the chance that the arbitration clause will be stricken as unconscionable.⁶⁴ Companies might also worry about the *res judicata* effects of judicial decisions in favor of consumers. Yet the Restatement of Judgments accords the same effect to adverse outcomes in arbitration as it does to adverse outcomes in court.⁶⁵ In any case, collateral estoppel may not be available if courts (or arbitrators) have reached varied conclusions in prior cases.⁶⁶ Finally, it is possible that companies, as repeat players in arbitration and the source of much business for arbitrators and the organizations to which they belong, anticipate favoritism from arbitrators. Yet studies do not show that biased outcomes have emerged.⁶⁷ Thus, from the perspective of corporate self-interest, concern over class actions remains the most likely explanation for the prevalence of arbitration clauses in consumer agreements.

On balance, we believe our data support the inference that the companies in our sample do not view consumer arbitration as offering a superior combination of cost savings, expeditious decision-making, consistency, and justice. Rather, they view consumer arbitration as a way to save money by avoiding aggregate

continued stance in favor of arbitration does necessarily support a general preference for arbitration as a method of dispute resolution.

64. Levin, *supra* note 52, at 8 ("A company might be tempted to put in the clause that the arbitrator cannot award punitive or exemplary damages. But that is asking for trouble . . .").

65. *E.g.*, *E.W. Audet & Sons, Inc. v. Fireman's Fund Ins. Co.*, 635 A.2d 1181, 1186–87 (R.I. 1994) (holding that the parties to an arbitration proceeding are bound by *res judicata*) (citing 1 RESTATEMENT (SECOND) OF JUDGMENTS § 34(1)).

66. *See, e.g.*, *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346–47 (5th Cir. 1982) (refusing to recognize collateral estoppel).

67. *See supra* note 8 and accompanying text.

dispute resolution. Our data do not allow us to draw firm conclusions as to the social utility of this strategy. If aggregate group dispute resolution, on balance, harms the interests of society (because, for example, it imposes high transactions costs while achieving little in the way of deterrence or compensation for harm), then devices that avoid aggregate treatment, including mandatory arbitration clauses, can be seen as socially beneficial. Consumers and others could benefit from these clauses because companies could pass cost savings on to their customers. On the other hand if aggregate dispute resolution does have net social benefits, then devices such as mandatory consumer arbitration clauses can reduce overall social welfare. These social welfare calculations depend on market conditions beyond the scope of our study.

CONCLUSION

Corporations regularly defend their use of mandatory consumer arbitration clauses by asserting arbitration's superior fairness and efficiency over traditional litigation. However, corporations' selective use of arbitration clauses against consumers, but not against each other, suggests that their use of mandatory arbitration clauses may be based more on strategic advantage than on a belief that corporations are better serving their customers.

The growth of mandatory consumer arbitration clauses appears to be part of a broader initiative by corporations to preclude or limit aggregate litigation. Other industry-supported statutory initiatives—the Private Securities Litigation Reform Act (“PSLRA”)⁶⁸ and the Class Action Fairness Act of 2005 (“CAFA”)⁶⁹—have limited or modified class action practice. But these initiatives merely raised the bar for successfully aggregating small claims. Notwithstanding the enactment of the PSLRA and CAFA, many class actions continue to proceed in both state and federal court.⁷⁰ In comparison

68. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

69. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.). See generally 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1756.2 (3d ed. 2005); GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005 (2005).

70. See, e.g., THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS (2007) (assessing evidence of the effects of CAFA on filing claims), available at http://www.uscourts.gov/rules/CAFA_Third_Interim.pdf; Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598 (2007) (assessing evidence of the effect of PSLRA on the filing of claims); Kevin M. Clermont &

to these statutes, mandatory consumer arbitration clauses are more draconian attacks on aggregate consumer dispute resolution. The clauses do not merely elevate pleading standards, reform attorney fees, or promote use of a federal over a state forum, as do the PSLRA and CAFA. Arbitration clauses seek to completely preclude aggregation of small plaintiff claims into economically viable actions. Policy debate about, and judicial assessment of, consumer arbitration and associated clauses should proceed with this context in mind.

Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, U. PA. L. REV. (forthcoming 2008) (reporting on CAFA cases in federal court); Marilyn F. Johnson et al., *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, 23 J.L. ECON. & ORG. 627, 628 (2007) (stating that securities fraud class actions have returned to and exceeded pre-PSLRA levels).