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November 29, 2017

VIA E-MAIL

Chairman Chuck Grassley
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6050

RE: Answers to Questions for the Record

Dear Chairman Grassley:

Please find my answers to questions for the record posed by you, Senator Sasse, Senator Franken and Senator Durbin following the hearing on "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators."

Chairman Grassley

1. During the hearing, I referenced a 2006 law review article by Professor Gilles where she argues "there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all. Nor is there any economic reason to fret that entrepreneurial plaintiffs' lawyers are being overcompensated."[1] She further argues: "All that matters is whether [class action procedure or practice] causes the defendant-wrongdoer to internalize the social costs of its actions."[2] Do you agree with these arguments? Why or why not?

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[1] Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 105 (2006).

[2] *Id.*

I respectfully disagree with Professor Gilles. Federal Rule of Civil Procedure 23 is a ***procedural*** device that was designed to make litigation more efficient when certain requirements are satisfied. As one court explained, Rule 23 is meant to "provide a vehicle to compensate class members and to resolve disputes"[3] – it does not create a "free-standing device to do justice."[4] Using the class action device to achieve Professor Gilles's policy goals would effectively transform Rule 23 into a private attorney general statute. This is contrary to law. After all, under the Rules Enabling Act, a rule of procedure or evidence may not "abridge, enlarge or modify any substantive right."[5] This is so because using a procedural rule to alter the substantive law would interfere with the powers of Congress and state legislatures to decide governing laws.[6] "Thus, treating the tail of the procedure to be wagging the dog of the substantive law is invariably viewed by the Supreme Court as a mistake – whether that mistake benefits plaintiffs or defendants."[7]

2. I've heard argument, including during the hearing, that Congress has no business amending the rules or procedures governing litigation in our federal court system. Some seem to think that just because Congress passed the Rules Enabling Act, Congress shouldn't step in and consider ways to further improve the procedures governing the civil justice system. Are those arguments well grounded? Why or why not?

The Rules Enabling Act is not a bar to Congressional reform in these areas. That law merely establishes and defines the ***judiciary's*** rulemaking authority. It does not purport to limit ***Congress's*** legislative authority. Indeed, the United States Code is replete with chapters and subsections addressing the procedures of our civil justice system. The federal removal statute,[8] the law governing multidistrict litigation,[9] the Class Action Fairness Act ("CAFA"),[10] the law

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[3] *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1105 (D.N.M. 2012) ("[T]he Court does not believe that it is appropriate to distribute the balance of any remaining settlement funds to the Center for Civic Values, which is not a party to this case and which does not represent the parties' interests.").

[4] *Id.* at 1105.

[5] *Id.*

[6] *See Schwab v. Philip Morris USA, Inc.*, No. CV 04-1945 (JBW), 2005 U.S. Dist. LEXIS 27469, at *13 (E.D.N.Y. Nov. 14, 2005) (noting that "courts must stay within the bounds of due process and avoid altering substantive law in violation of the Rules Enabling Act when shaping the remedies in Rule 23(b)(3) actions"); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1014 (2d Cir. 1973), *vacated for other reasons*, 417 U.S. 156 (1974) ("Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation."); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (noting that Rules Enabling Act "limits judicial inventiveness" with respect to Rule 23).

[7] Ted Frank, *Class Actions, Arbitration, and Consumer Rights: Why Concepcion Is a Pro-Consumer Decision*, Manhattan Institute, Legal Policy Report No. 16, at 4 (2013) (citing, *inter alia*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)) (federal plaintiffs have right to bring class action, notwithstanding state law precluding use of class action to seek punitive damages).

[8] 28 U.S.C. § 1446.

[9] 28 U.S.C. § 1407.

[10] 28 U.S.C. § 1332(d).

governing proper venue in our federal courts,[11] the Private Securities Litigation Reform Act ("PSLRA")[12] and the law governing the transfer of cases to a more convenient court[13] are just a handful of examples. It has been more than a decade since Congress enacted CAFA, which was a milestone in the crusade for a more just and more effective civil justice system. CAFA's expansion of federal diversity jurisdiction has moved countless class actions of national importance from state to federal court. In the process, CAFA has eliminated magnet state-court jurisdictions that were once a haven for meritless and abusive class action lawsuits. While CAFA has been integral to improving the civil justice landscape in the United States, problems remain, many of which were addressed at the recent hearing. The Advisory Committee on Civil Rules has given attention to some of the problems outlined in my prepared statement and is currently addressing some of them again, but it remains unclear whether that body will take any concrete steps toward reforming federal class action and multidistrict litigation practice. I have enormous respect for the federal judiciary's thoughtful, meticulous rulemaking process. But it is not clear to me that the courts have authority to effect all of the changes that are necessary, particularly with respect to jurisdictional issues. Further, deferring to the relatively protracted judicial rulemaking process would not be prudent in light of the exorbitant costs exacted on American businesses – particularly small businesses – as a result of lawsuit abuse.

3. During the hearing, Professor Gilles claimed that federal judges are not concerned about the frequency with which attorneys are filing frivolous lawsuits. Is she correct that frivolous litigation is not a significant problem in our federal court system?

Once again, I respectfully disagree with Professor Gilles. Frivolous litigation is a major problem in our federal court system. The possibility of meritless, implausible claims opening the doors to burdensome discovery is precisely why the Supreme Court clarified federal pleading standards in *Ashcroft v. Iqbal*, and *Bell Atlantic Corp. v. Twombly*.[14] Notably, as recently as 2015, Chief Justice Roberts declared that "[w]e must engineer a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice."[15] "In essence, he called for a leaner, meaner federal bench and bar."[16]

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[11] 28 U.S.C. § 1391.

[12] 15 U.S.C. 77z-1.

[13] 28 U.S.C. § 1404.

[14] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

[15] 2015 Year-End Report, on the Federal Judiciary, at 11, https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[16] Richard Wolf, *Supreme Court's chief justice seeks faster, fairer, more efficient system*, USA Today, Dec. 31, 2005, https://www.usatoday.com/story/news/politics/2015/12/31/supreme-court-chief-justice-roberts-rules/78144142/.

Meritless litigation is particularly prevalent in mass tort proceedings, which now account for more than one-third of all federal civil cases pending in U.S. courts.[17] Multidistrict litigation ("MDL") proceedings are becoming black holes for substantial numbers of meritless cases – and some MDL courts, facing daunting numbers of cases, are engaging in questionable practices to spur global settlements to clear the dockets. To be sure, some MDL courts are coming to realize that they need to put a stop to the filing of frivolous claims. For example, Chief Judge Clay Land of the U.S. District Court for the Middle District of Georgia, who has been presiding over an MDL proceeding involving allegedly defective surgical-mesh devices, finally had "enough" with the number of meritless claims in that proceeding and warned plaintiffs' counsel that they would be subject to sanctions in the future for frivolous filings.[18] "At a minimum," Judge Land declared, "[MDL] judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly."[19] Unfortunately, many MDL judges have taken a hands-off approach to the problem of meritless litigation, declaring that they "do[] not intend to engage in the process of sorting through thousands of individual claims . . . to determine which claims have or have not been properly presented."[20] As a result, plaintiffs' counsel are "expand[ing] the number of plaintiffs beyond those with viable causes of action," thereby "distort[ing] the true scope of MDL litigation."[21]

Frivolous litigation is also a significant problem in the class action arena. My written testimony contains ample examples of abusive and frivolous class actions that fall far short of the vision espoused by Chief Justice Roberts – class actions where nobody was aggrieved, class actions where less than one percent of the class even bothered participating in a payout and the lawyers got millions. This is not a system of justice. It is a scheme to siphon money from litigants to lawyers. The class actions involving Subway's foot-long subs really help tell this story. Plaintiffs' attorneys filed suit claiming that consumers were defrauded because some "foot-long" subs were less than twelve inches. For years, Subway spent money fighting those claims before the parties reached a settlement. As part of that settlement, Subway agreed to have bread-

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17 According to a report conducted by the Duke Law School Center for Judicial Studies, "these MDL cases ma[d]e up 36% of the civil caseload" in 2014, up from 16% in 2002. *Standards & Best Practices for Large and Mass-Tort MDLs*, Duke Law Center for Judicial Studies, at *x* (2014); *see also* H.R. Rep. 115-25, at 33 (2017) ("Astoundingly, there are around 120,000 lawsuits pending in th[e]se MDL proceedings. That's 35% of all civil lawsuits currently pending in all Federal courts nationwide (which number about 342,000).").

18 Order at 1, *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-md-02004-CDL, (M.D. Ga. Sept. 7, 2016),ECF No. 1039.

19 *Id.* at 5.

20 *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010*, 808 F. Supp. 2d 943, 965 (E.D. La. 2011), *aff'd on other grounds*, 745 F.3d 157 (5th Cir. 2014); *see also In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, MDL No. 2272, 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012) ("With more than 549 individual actions . . . [t]he proper court to hear dispositive motions concerning the sufficiency of plaintiff-specific allegations is the transferor court.").

21 James Beck, *Multidistrict Litigation Reform: The Case for Earlier Application of Federal Pleading Standards* at 2, Washington Legal Foundation, No. 204, Sept. 2017.

measuring rulers – but the real meat of the settlement was the more than $500,000 Subway had to pay to the plaintiffs' lawyers and their class representatives. The so-called class did not get one cent of that. And in the end, after all the time and money everyone spent on that case, the Seventh Circuit ended up rejecting the settlement, calling it a "racket" by plaintiffs' attorneys who sought "worthless benefits for the class" and yielded only fees for class counsel.[22]

A recent lawsuit filed against Jelly Belly Candy Co. is another prime example of the problem of frivolous litigation. In that putative class action, a mother claims that she was tricked into buying a variety of the defendant's jelly beans while trying to find a healthy snack for her family.[23] The gravamen of the lawsuit is that Jelly Belly used "evaporated cane juice" on the ingredients list instead of "sugar" because evaporated cane juice would make the product, Sport Beans, more attractive to athletes. But as the company highlighted in its first motion to dismiss (the plaintiff amended her complaint after the initial motion), the plaintiff could have simply looked up the sugar content on the nutrition label. The court recently granted the motion to dismiss in substantial part, dismissing all of the claims for equitable relief on the ground that the plaintiff had adequate remedies at law.[24] However, the plaintiff's claim for damages under California's Consumer Legal Remedies Act has not been dismissed, meaning that this case will continue to force Jelly Belly Candy Company to defend this patently frivolous lawsuit.

Unfortunately, there is very little recourse for victims of frivolous lawsuits. It costs thousands of dollars to defend against a frivolous claim even if a court eventually dismisses it. A letter from national medical associations to former Treasury Secretary Timothy Geithner estimated that the cost of obtaining dismissal of a meritless medical malpractice claim is $22,000.[25] The Lawsuit Abuse Reduction Act ("LARA"), passed by the House earlier last year, would help curb frivolous litigation and further the Chief Justice's vision. Under Rule 11 of the Federal Rules of Civil Procedure, claims filed in federal court must be based on both law and fact.[26] However, as Rule 11 currently stands, the filing of a frivolous claim does not automatically result in sanctions. In the words of late Supreme Court Justice Scalia, the rule is completely "toothless," allowing parties "to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose."[27] Indeed, under the current 21-day "safe harbor" provision, "a plaintiff may be able to, with impunity, file a complaint for an improper purpose and then

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[22] *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 557 (7th Cir. 2017).

[23] John O'Brien, *Mom Who Sued Over Sugar In Jelly Beans Sought Healthier Snack; Jelly Belly Called Suit 'Nonsense'*, Legal Newsline, Aug. 2, 2017, https://www.forbes.com/sites/legalnewsline/2017/08/02/mom-who-sued-over-sugar-in-jelly-beans-sought-healthier-snack-jelly-belly-called-suit-nonsense/#13a589041330.

[24] *Gomez v. Jelly Belly Candy Co.*, No. EDCV 17-00575-CJC(FFM), 2017 U.S. Dist. LEXIS 134188, at *4 (C.D. Cal. Aug. 18, 2017).

[25] *See* Hearing Before the House Comm. on the Judiciary regarding H.R. 758, 114th Cong. (2015) (statement of Carly Silverman) (citation omitted).

[26] Fed. R. Civ. P. 11.

[27] Amendments to the Federal Rules of Civil Procedure, Dissenting Statement of Justice Scalia, 146 F.R.D. 507-08 (1993).

voluntarily dismiss it shortly thereafter."[28] LARA would eliminate the "safe harbor" provision that allows lawyers to file frivolous claims without the threat of sanction. And it would also add teeth to this important rule by making sanctions mandatory rather than discretionary.

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[28] *Kovacs v. Ford Motor Credit Co.*, No. 01-72324, 2001 U.S. Dist. LEXIS 27330, at *2 (E.D. Mich. Oct. 12, 2001).

Senator Ben Sasse

1. Though difficult to quantify due to the lack of information on the indirect and direct costs as well as the diversity of firms in different sectors of the economy, can you describe the types and magnitude of costs that excessive litigation places on American small businesses?

Excessive litigation creates two significant categories of costs for American small businesses. First, any litigation requires the business that is sued to hire defense lawyers, which is generally expensive. According to the National Federation of Independent Business, even a frivolous case can impose $2,000 to $5,000 in defense costs on a small business, a "significant hit" to businesses that typically generate only $50,000 a year for their owners.[29] Cases that last into discovery, or go to trial, are even more costly to defend.

Second, there are the costs of settlements in these cases, which are often paid even when the plaintiff's claim lacks merit because high defense costs pressure businesses into settling rather than litigating on the merits.

The resulting cost burden on small businesses is substantial. For example, one study found that the total burden of tort liability on American small businesses (including settlements, defense costs, judgments, and administrative expenses) was $105.4 billion in 2008.[30] That figure amounted to 81% of the tort liability costs for *all* American businesses that year, even though small businesses account for only 22% of American business revenue.[31]

2. To what extent are businesses' litigation costs passed on to consumers? Does the extent tend to vary by firm size?

There is little data on the exact extent to which litigation costs are passed on to consumers. But it is indisputable that these costs *are* passed on to consumers, at least in part. Indeed, simple logic suggests that this is the case. In order to stay in business, any company (large or small) must generate at least enough revenue to pay its employees and cover its other operating expenses – one of which is the cost of defending and resolving litigation. The company must set prices that will give it the amount of revenue it needs to continue operating, which means that the higher the costs of litigation, the higher (all else equal) prices will be. There is widespread consensus that this "pass-through" of litigation costs to consumers occurs.[32]

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[29] Stephen Parezo, *Frivolous Lawsuits: A Serious Threat to Nation's Small Businesses*, Smartpros, April 2005, http://accounting.smartpros.com/x47861.xml.

[30] U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010), http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf.

[31] *Id.*

[32] *See* H.R. Rep. 115-25, at 4 (2017) ("[U]ltimately these costs are paid by consumers, workers, and investors, throughout the economy–because the diversion of hundreds of millions of dollars away from productive purposes, as well as the time and attention of entrepreneurs, means prices are higher, new products are not brought to market, and

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3. To what extent does the enforcement of arbitration agreements not only reduce costs for the firm, but also prevents increases in costs for the end consumer?

As explained above, businesses must build litigation costs into their overall cost of doing business and therefore invariably pass most or all of those litigation costs on to their consumers. It follows that, when businesses are able to use arbitration to reduce the cost of dispute resolution, they are able to pass the resulting savings on to consumers as well.[33] Indeed, as one study explained, "Basic economic theory predicts that competition *forces* firms to pass on to consumers at least a portion of any cost decrease."[34]

One scholar explains the economic logic this way:

- "The consensus view is that businesses using adhesive arbitration agreements do so because those businesses generally find that those agreements lower their dispute resolution costs."

- "In the case of consumer arbitration agreements, this benefit to businesses is also a benefit to consumers. That is because whatever lowers costs to businesses tends over time to lower prices to consumers."

- "The extent to which cost-savings are passed on to consumers is determined by the elasticity of supply and demand in the relevant markets. Therefore, the size of the price reduction caused by enforcement of consumer arbitration agreements will vary, as will the time it takes to occur."

- "But it is inconsistent with basic economics to question the existence of the price reduction."[35]

(cont'd from previous page)
new jobs are not created."); Arbitration Agreements, 82 Fed. Reg. 33,210, 33,302 (July 19, 2017) (CFPB acknowledges "risk that some or potentially even all [class action litigation] costs will be passed through to consumers); Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique* 33, Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA (Aug. 2015) ("As an empirical matter, evidence shows that financial products firms do pass on changes in their costs."); *cf. Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004) (Posner, J.) (noting that, assuming a business's costs increased because of fraud by its suppliers, "some part of the increase would undoubtedly have been passed on to consumers in the form of higher prices").

[33] *See, e.g.*, Amy J. Schmitz, *Building Bridges to Remedies for Consumers in International eConflicts*, 34 U. Ark. L. Rev. 779, 779 (2012) (''[C]ompanies often include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices.'').

[34] Johnston & Zywicki, *supra* note 32, at 33 (emphasis added).

[35] Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration Of Class Actions and Arbitration Fees*, 5 J. Am. Arbitration 251, 254-57 (2006) (emphasis added) (footnotes omitted) (citing, *inter alia*, Richard Posner, *Economic Analysis of Law* (6th ed. 2003)).

In short, arbitration is not only good for the businesses that employ arbitration agreements to resolve disputes efficiently; it is also good for their customers, who enjoy lower prices for goods and services as a result.

4. Class action waivers in arbitration clauses were the target of a recent CFPB rule that banned class action waivers in arbitration clauses, though the rule was recently repealed via the Congressional Review Act.

4.a. What is the average consumer payout for class action lawsuits?

Virtually no class actions are resolved on their merits; any class action that is not dismissed at the pleading stage will be settled by the defendant. And the evidence shows that, in these settlements, consumers usually do poorly. The March 2015 study of arbitration by the CFPB, which purported to be the "most comprehensive empirical study of consumer financial arbitration carried out to date,"[36] found that 251 class action settlements provided a total of $1.1 billion to some 34 million class members, which works out to a settlement payment of a mere $32.35 per class member.[37]

4.b. What is the average consumer payout for arbitration?

In arbitrations resolved by arbitrators involving affirmative claims by consumers where data on the amount of the award was available, the CFPB found that consumers received relief on 32 claims on the merits; the average payment to consumers was $5,389, and the median amount was $2,682.[38] Those awards are significantly greater than the relief to claimants in class action settlements.

4.c. How long does it typically take for arbitrations to be completed?

The CFPB itself found that arbitrations take between four and eight months to resolve on the merits. When arbitrations were settled, the process took a mere two to five months.[39] A prior study by the California Dispute Resolution Institute likewise found that consumer and employment disputes were resolved in an average of 104 days in arbitration.[40]

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[36] *See* Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* at section 1, page 2 (Mar. 1, 2015) ("*CFPB Study*").

[37] *Id.* at section 8, pp. 27-28.

[38] *Id.* at section 5, p. 41.

[39] *Id.* at section 5, p. 72.

[40] California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* 19 (Aug. 2004), http://www.mediate.com/cdri/cdri_print_Aug_6.pdf.

4.d. How long does it take for class action lawsuits to be completed?

According to the CFPB's study, class actions that actually produced a class-wide settlement took an average of nearly two years to resolve.[41] The two-year average duration calculated by the Bureau, moreover, may not even have included the time needed for consumers to submit claims and receive payment *after* a settlement is reached. Meanwhile, another study conducted by the U.S. Chamber of Commerce found that some class actions take even longer; 14% of the class actions that the Chamber examined were still pending *four years* after they were filed, with no end in sight.[42]

4(e). Is there a risk that encouraging class action lawsuits actually encourages "frivolous" lawsuits that companies settle instead of challenge, given the costs associated with going to court in a class action lawsuit?

As Justice Ginsburg has recognized, "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."[43] As a result, "even a small chance of a devastating loss" inherent in most decisions to certify a class produces an "in terrorem" effect that often forces settlement independent of the merits of a case.[44] The upshot is that plaintiffs' lawyers have an incentive to threaten or file frivolous class action complaints, knowing that prudent defendants and small businesses likely have no choice but to pay off the lawyers so the litigation will go away, even if their defense against the claims would likely be successful. In short, class actions are powerful cudgels that plaintiffs' counsel can use to force defendants to hand over cash. More and more businesses are being forced to accept these demands, choosing not to roll the dice on an uncertain and costly multi-year litigation defense in which they would be mired in burdensome discovery and other pre-trial litigation wrangling. According to one study of putative consumer and employee class actions filed in or removed to federal court in 2009, more than one-third of the class actions that were resolved were dismissed voluntarily by the plaintiff.[45] "Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit – even though the class members receive nothing."[46]

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[41] *CFPB Study* at section 8, p. 37.

[42] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1 (Dec. 11, 2013), http://www.mayerbrown.com/files/uploads/-Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

[43] *Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) (citation omitted).

[44] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted).

[45] Mayer Brown, *supra* note 42, at 1-2.

[46] *See* Andrew Pincus, *Unstable Foundation, Our Broken Class Action System and How to Fix it*, U.S. Chamber Institute for Legal Reform, at 16 (October 2017).

This is not a surprising trend. Whether it be fending off vexatious document production requests or spending hours preparing a corporate witness whose testimony can bind the company, defense against a putative class action is an extremely expensive proposition. Small businesses, in particular, are ill-equipped to mount the necessary defense and therefore find themselves increasingly settling frivolous class actions at the outset.

4(f). How does this possibility influence the degree to which class action lawsuits encourage firms to comply with the rule of law, instead of merely imposing unnecessary costs on companies whose actions should not have been punished?

It makes no sense to argue that class actions deter wrongful conduct because the reality is that plaintiffs' attorneys routinely file class actions notwithstanding the fact that the challenged conduct is in full compliance with the applicable law.

Take litigation against General Mills involving its Nature Valley snack bars. Plaintiffs have brought individual and purported class actions against General Mills, challenging the statement "100 Natural Whole Grain Oats" on the labels of certain varieties of General Mills' Nature Valley snack bars because the snacks contain trace amounts of glyphosate, a common biocide. Plaintiffs do not dispute that the products, in fact, contain, whole grain oats and that the oats themselves are natural. ***And the FDA considers products with this level of biocide to be organic***. A federal judge in Minnesota recently tossed the class action, finding that "it is not plausible to allege that the statement 'Made with 100% Natural Whole Grain Oats' means that there" are no trace amounts of synthetic molecules.[47] But another judge in Washington, DC, has allowed a similar consumer action to proceed.[48]

Another example is litigation over eye drop medications, in which plaintiffs have argued that eye drop dispensers waste medicine because they emit drops that are too large. But these dispensers and the medicine they contain are approved by the FDA. Moreover, changes to the dispensers would constitute major changes under FDA regulations. One federal court in Massachusetts shut down a lawsuit like this on preemption grounds.[49] But another federal court in Illinois certified an eye drops class action. It was reversed on appeal, but only after substantial litigation in the district court.[50] And a third action of this sort was recently reinstated by the U.S. Court of Appeals for the Third Circuit.[51]

These are just a couple of examples of lawsuits, which – far from encouraging American businesses to "comply with the rule of law" – are punishing companies for conduct that is perfectly legal. The reality is that in our current legal climate, "class action payments are simply an unavoidable cost of doing business, no matter what steps a company takes to comply with the law."[52]

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[47] *In re Gen. Mills Glyphosate Litig.*, No. 16-2869 (MJD/BRT), 2017 U.S. Dist. LEXIS 108469, at *16-17 (D. Minn. July 12, 2017).

[48] *See Organic Consumers Ass'n v. General Mills, Inc.*, No. 2016 CA 6309 B, 2017 D.C. Super. LEXIS 4 (D.C. Super. Ct. July 6, 2017).

[49] *Gustavesen v. Alcon Labs., Inc.*, No. CV 1:14-11961-MLW, --- F. Supp. 3d ----, 2017 WL 4374384 (D. Mass. Sept. 29, 2017), *appeal docketed*, No. 17-2066 (1st Cir. Oct. 27, 2017).

[50] *Eike v. Allergan, Inc.*, 850 F.3d 315 (7th Cir. 2017).

[51] *Cottrell v. Alcon Labs.*, 874 F.3d 154 (3d Cir. 2017).

[52] Pincus, *supra* note 46, at 1.

5. Numerous small business owners have expressed concern over being the target of frivolous or unfair lawsuits, a fear which has influenced their business decisions. Can you explain how this fear is addressed or alleviated by the use of arbitration?

Arbitration reduces businesses' exposure to frivolous or unfair lawsuits because arbitration is usually conducted on a bilateral – i.e., "one on one" – basis, rather than on a class or collective basis.

Class actions present a heightened potential for frivolous or abusive litigation because plaintiffs' lawyers know that the tremendous defense costs and massive potential damages liability in class actions put tremendous pressure on the defendant to settle, irrespective of whether the claims in the case are meritorious or not. The Supreme Court,[53] lower courts,[54] and commentators[55] have all acknowledged this incentive and the power it gives plaintiffs' lawyers to extort money from defendants, in what Judge Henry Friendly aptly termed "blackmail settlements."[56]

Defendants also face intense pressure to settle because they bear a much greater share of the expenses of litigation and discovery. In a consumer class action, the defendant is frequently the party who possesses the bulk of the relevant, discoverable information and bears the cost of producing it to the plaintiffs. The Supreme Court has recognized that the threat of this asymmetrical discovery expense, which can be considerable, contributes to unjustified settlements.[57]

The pressure on defendants to settle class actions is magnified even further in cases brought under one of the many statutes that allow plaintiffs to recover a fixed dollar amount of "statutory

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[53] *Shady Grove*, 559 U.S. at 445 n.3 ((Ginsburg, J., dissenting); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

[54] *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that a defendant facing $25 billion in potential liability "may not wish to roll the dice. That is putting it mildly. They will be under intense pressure to settle").

[55] *See, e.g.*, Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 416 (2014) (noting that class action defendants "may capitulate to meritless or unsubstantiated claims rather than incur substantial ongoing litigation expenses with the risk of an adverse jury decision"); Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 13 (Aug. 2007) ("[S]ome defendants can feel financially pressured to settle even if they have done nothing wrong, believing it not to be worth betting their companies on a subsequent mistaken jury verdict that can be difficult to overturn on an appeal.").

[56] *See* Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

[57] *See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."); *Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases.").

damages" per alleged violation of the law, even if the plaintiffs suffered no actual harm from the alleged violations. Most statutory damages provisions are civil penalty provisions designed to make *individual cases* more attractive to prosecute. But as one scholar has noted, "when combined with the procedural device of the class action, aggregated statutory damages can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent."[58] Thus, as Justice Ginsburg has observed, "[w]hen representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury."[59]

In contrast to class actions, bilateral arbitration: (1) involves lower defense costs, because it is procedurally simpler and takes less time; (2) entails lower discovery costs; and (3) does not entail the threat of a massive judgment, such as a judgment consisting of massive aggregated statutory damages. These factors reduce the pressure on a defendant to settle, allowing it to defend itself on the merits. Thus, a defendant that finds itself the target of a frivolous claim will likely be able to vindicate itself in bilateral arbitration, while it might have been forced to settle the same claim in a class action lawsuit.

6. Are arbitrations clauses ironclad, or are there situations where exceptions allow for a waiver of the arbitration agreement?

Arbitration clauses are not "ironclad"; under generally-applicable state law contract principles, courts can and will refuse to enforce arbitration agreements that are unfair to consumers. For example, courts routinely invalidate arbitration provisions that purport to limit consumers' substantive rights to recover certain types of damages permitted them by state and federal law;[60] require excessive fees to access the arbitral forum;[61] unreasonably shorten statutes of limitations;[62] or mandate that arbitration take place in inconvenient locations.[63]

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58 Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009).

59 *Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting).

60 *See, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003) (provision barring punitive damages); *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (same).

61 The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. *See, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-25 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (reaffirming that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable" for a plaintiff). Courts also have reached the same conclusion under state unconscionability law. *See, e.g.*, *Brunke v. Ohio State Home Servs., Inc.*, No. 08CA009320, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008); *Liebrand v. Brinker Rest. Corp.*, No. G039017, 2008 WL 2445544 (Cal. Ct. App. June 18, 2008); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003).

62 *See, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. Apr. 3, 2013), *aff'd*, 601

(cont'd)

In addition, arbitration providers such as the American Arbitration Association ("AAA") have established due process standards and will refuse to administer arbitration if a business's arbitration agreement does not comply with these standards.[64] These protections ensure that consumers are not forced to arbitrate in biased or procedurally unfair arbitration systems.

7. **What consumer protections are in the typical arbitration clause?**

As companies have gained more experience with arbitration over time, they have sought to include features in their arbitration provisions that make arbitration more favorable and accessible for consumers. These include:

- Provisions specifying that the business will voluntarily shoulder the entire costs of arbitration, including the $200 or $250 filing fee and any arbitrator fees[65];
- Provisions in which the business agrees to pay a consumer a bonus (e.g., $5,000-10,000) and/or to cover the consumer's expert witness fees, attorneys' fees, or discovery costs if the plaintiff obtains an award in arbitration that is greater than

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F. App'x 461 (9th Cir. 2014); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2005) (180 days); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen v. SuperCuts, Inc.*, 60 Cal. Rptr. 2d 138, 138 (Cal. Ct. App. 1997) (rejecting provision that imposed shortened one-year statute of limitations).

[63] *See, e.g.*, *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (travel from Oregon to California); *Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (travel from Virginia to Los Angeles); *see also, e.g.*, *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688 (W.D. Tex. 2006) (travel from Texas to Indiana); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (travel from Missouri to Arkansas); *Pinedo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435 (Cal. Ct. App. 2000) (travel from Los Angeles to Oakland).

[64] *See, e.g.*, Am. Arbitration Ass'n, *Consumer Arbitration Fact Sheet*, perma.cc/FN55-BJ4D ("The AAA will accept a case for administration only after the AAA reviews the parties' arbitration agreement and if the AAA determines that the agreement substantially and materially complies with the due process standards of the Rules and the Consumer Due Process Protocol."). JAMS, another arbitration provider, similarly will administer a pre-dispute arbitration clause between a business and a consumer only if the contract clause complies with "minimum standards of fairness." JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, http://www.jamsadr.com/consumer-arbitration.

[65] *See, e.g.*, AT&T, *Dispute Resolution by Binding Arbitration*, http://www.att.com/disputeresolution ("AT&T will pay all AAA filing, administration and arbitrator fees for any arbitration" under $75,000); Amazon.com, *Terms of Use*, http://www.amazon.com/gp/help-/customer/display.html/?nodeId=508088 ("We will reimburse [arbitration] fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous.").

the company's last settlement offer[66]; and

- Provisions allowing plaintiffs the exclusive choice whether to conduct the arbitration in person, via telephone, or solely on the documentary record.[67]

For these reasons, the former Solicitor General of the United States recognized that "many companies have modified their agreements to include streamlined procedures and premiums designed to encourage customers to bring claims."[68] Thus, as the Solicitor General explained, instances where individuals are unable to bring their claims in arbitration are "rare."[69]

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[66] *See, e.g.*, AT&T, *supra* note 65 ("If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T's last written settlement offer made before an arbitrator was selected, then AT&T will . . . reimburse any expenses (including expert witness fees and costs), that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration."); Santander Bank, *Personal Deposit Account Agreement* § 7(o), https://dmob.santanderbank.com/csdlv/BlobServer?blobcol=-urldata&blob-header=application%2Fpdf&blobheadername1=Content-Disposition&blob-headervalue1=in-line%3Bfilename%3DB000215-_Jul2015_new-PDAA_r17_Final_Print+Dwn.pdf&blob-key=id-&blobtable=MungoBlobs&blob-where=1354963014673&ssbinary=true (providing for $7,500 "Special Payment" to customers who win as much or more in arbitration as they demanded from the company).

[67] *See, e.g.*, Netflix, *Terms of Use*, https://www.netflix.com/TermsOfUse ("If your claim is for US$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing."); Ticketmaster, *Terms of Use*, http://www.ticketmaster.com/h/terms.html (same).

[68] Brief for the United States as Amicus Curiae Supporting Respondents at 28-29, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 367051 (emphasis added).

[69] *Id.*

Senator Franken

At the hearing, during your exchange with Senator Cornyn, you agreed with his statement that the notion that forced arbitration is dissimilar to the civil justice system is a "fallacy." You then offered the following: "[a]s is the notion that there is all this confidentiality – confidentiality surrounding [the arbitration process]." In other words, you were stating that the idea that the arbitration process is surrounded in confidentiality is a "fallacy." Is that correct?

I was merely pointing out that the degree of confidentiality in arbitration is overstated. Notably, this observation is consistent with the Consumer Financial Protection Bureau's ("CFPB's") own recent study of arbitration, which found that only ***3%*** of credit card agreements, ***2%*** of prepaid card agreements, and ***11.5%*** of checking account contracts had any confidentiality provisions.[70]

While most arbitration-sponsoring organizations maintain rules that call for some degree of confidentiality, they are limited in scope. For example, the AAA provides that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary."[71] Notably, the rule of privacy only applies to the hearings themselves; nothing in the rules requires that other events – e.g., pleadings, allegations or outcome – be kept confidential. Additionally, the rule of privacy only binds the ***arbitrator*** and the ***AAA***. There is no rule precluding those in attendance during the arbitration from disclosing what occurred during the proceedings in a public forum. JAMS, the other major arbitration-sponsoring organization, takes a similar approach to confidentiality, providing that "[t]he Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information."[72]

It bears noting that some states impose more expansive confidentiality requirements. For example, in Missouri, "[a]rbitration . . . proceedings shall be regarded as settlement negotiations. Any communications relating to the subject matter of such disputes made during the resolution process by any participant, mediator, or conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication."[73] However, state confidentiality rules

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[70] *See* Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress 2015*, at section 2, p. 52; *see also* Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Yearbook on Arbitration and Mediation, http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1028&context=arbitrationlawreview; *see also id.* (noting that "[t]he available empirical data . . . reveal only ***limited*** use of confidentiality provisions in arbitration clauses, at least in consumer financial services contracts") (emphasis added).

[71] AAA Commercial Arbitration Rules and Mediation Procedures R-25.

[72] JAMS Comprehensive Arbitration Rule and Procedures R. 26.

[73] Mo. Ann. Stat. § 435.014; *see also* Del. Rapid Arbitration Rule 5 ("Arbitration under the Act are confidential proceedings. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any communication made in or in connection with the Arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at a Preliminary Conference, Preliminary Hearing or Arbitration Hearing, is confidential.").

governing arbitration vary in scope. Moreover, other statutes fail to enumerate any confidentiality requirements.[74]

Finally, some states (like California and Maryland) require arbitral forums that do business in their states to file quarterly public reports on all of the ***consumer*** claims, including the outcome of those claims.[75] These reports must cover all such arbitrations nationwide and must be made available on the forum's website. According to a recent report available on the JAMS website, the reports specify the name of the non-consumer party, the result of the consumer arbitration and the number of past arbitrations and mediations JAMS has had with the non-consumer party for the previous five years.[76]

In sum, and as one law professor (who consulted with the CFPB on its arbitration study) explained, "under U.S. law, the privacy of arbitration typically does ***not*** extend to precluding a party's disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and the arbitrator and arbitration provider cannot disclose information about the proceeding."[77]

You then went on to say that "the fact of arbitration, and the outcomes, there's no, no protection that those can't be made public." In other words, you were stating that there is no protection for a company that ensures that the occurrence of an arbitration and the results of such an arbitration be kept secret. Is that correct? And if not, what did you mean?

As discussed above, the fact of arbitration and the outcomes are often not exempt from public disclosure. In fact, the state laws mentioned above expressly require these things to be disclosed in consumer cases. However, it is important to recognize that confidentiality provisions, to the extent they apply, can protect ***both parties***.[78] In addition, "[r]ightly or wrongly, many applicants and employees are extremely concerned about the prospect of being characterized as litigious or anti-employer and are much more likely to bring workplace issues forward in a private setting."[79]

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[74] *See, e.g.*, 9 U.S. Code ch. 1 (Federal Arbitration Act).

[75] *See* Cal. Code of Civ. P. § 1281.96; Md. Com. Law 14-3901 *et seq.*

[76] https://www.jamsadr.com/consumercases/.

[77] Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 Berkeley J. Emp. & Lab. L. 153, 167 (2014).

[78] Ashley Winters, Note, *Regardless of Potential Scrutiny, the Arbitration Clause of the Fair Play and Safe Workplaces Executive Order (2014) Should not Have a Resounding Impact*, 31 Ohio St. J. on Disp. Resol. 179, 196 (2016).

[79] Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, Dispute Resolution Journal, Volume 52, Issue 4, at 23 (1997); *see also id.* ("the private nature of arbitration is often just as attractive to applicants and employees as it is to employers).

Please refer to the below confidentiality clause included in the arbitration agreement found in Gretchen Carlson's employment contract:

> **"Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's [Ms. Carlson's] employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association ("AAA") then in effect. … Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence."**

Mr. Beisner, does the above clause prevent a "Performer" from speaking out about a potential arbitration and its outcome? In other words, does the above clause ensure that a potential arbitration and its outcome be kept secret? If this is not a protection for the company, how would you characterize it?

This particular confidentiality provision does appear to preclude the performer from speaking out about a potential arbitration and its outcome. However, the suggestion that it served solely as a protection for the employer is unfounded. As previously explained, a confidentiality provision protects both parties; it is not a one-way street. In fact, the Equal Employment Opportunity Commission itself maintains the ***employee's*** confidentiality wherever possible for the very purpose of encouraging other potential victims to come forward.[80] "While there are laws in place to prevent employers from retaliating against employees that speak out about sexual harassment in the workplace, that does not make it any easier for the employee personally."[81]

Further, Ms. Carlson was presumably represented by counsel during her employment negotiations. To the extent Ms. Carlson was "prevented" from speaking out about an employment action, that is a result of a choice she made in agreeing to the terms of her employment contract.

Moreover, an employee or consumer is free to challenge a confidentiality clause in an arbitration agreement if it is procedurally or substantively unconscionable. Such a challenge was recently and successfully mounted in *Larsen v. Citibank FSB* – a putative class action alleging that KeyBank improperly manipulated the order of debit card transactions in customer accounts in order to maximize collection of overdraft fees.[82] While the Eleventh Circuit concluded that the arbitration agreement itself was not unconscionable, it held that the confidentiality clause requiring both parties to keep the outcome of the arbitration confidential was substantively unconscionable and therefore severed that provision from the agreement. In so doing, the Court of Appeals recognized that the agreement did not purport to keep confidential "non-decisional

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80 *See* Ida L. Castro, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), http://www.eeoc.gov/policy/docs/harassment.html.

81 Winters, *supra* note 78, at 196.

82 *Larsen v. Citibank FSB*, 871 F.3d 1295, 1300 (11th Cir. 2017).

information concerning the arbitral process . . . such as discovery and briefing[.]"[83] Nonetheless, the Eleventh Circuit reasoned, "where the outcomes of prior arbitration proceedings themselves remain concealed, as the arbitration agreement requires, prospective claimants have little context in which to assess the value of discovered documents or work product from prior disputes."[84] According to the Court of Appeals, "[t]he obvious informational advantage KeyBank holds at the outset of a dispute may therefore have the effect of discouraging consumers from pursuing valid claims."[85] The Eleventh Circuit therefore deemed the confidentiality clause in the arbitration agreement to be substantively unconscionable and refused to enforce it.

Similarly, in *Colvin v. NASDAQ OMX Group, Inc.*, a federal court in California severed as unconscionable a confidentiality provision in an employment arbitration agreement because it "impose[d] a significant burden on discovery, preventing Plaintiff from even contacting other employees for information."[86] In particular, the agreement expressly barred the employee from disclosing to any third party "the existence of a claim, the nature of a claim, any documents, exhibits, or information exchanged or presented in connection with such a claim.[87] The court held that such a confidentiality provision was overbroad and one-sided and therefore unenforceable.

Without an arbitration agreement like the one above, would parties to a contract ordinarily be required to keep confidential all filings, evidence, and testimony connected to a dispute arising out of a contract? In other words, when a consumer or employee pursues a claim in a public court of law, does the civil justice system require that they keep confidential all filings, evidence, and testimony?

The general rule is that the record of a judicial proceeding is public. Thus, absent a confidentiality provision like the one outlined above, the parties to a contract would ordinarily not be required to keep confidential all filings, evidence, and testimony connected to a dispute arising out of a contract. But once again, confidentiality is a mutually beneficial concept, especially in the employee-employer context. And, as discussed above, to the extent a confidentiality provision is unfairly one-sided, an employee or consumer can challenge its enforceability in court.

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[83] *Id.* at 1319.

[84] *Id.*

[85] *Id.*

[86] *Colvin v. NASDAQ OMX Group, Inc.*, No. 15-cv-02078-EMC, 2015 U.S. Dist. LEXIS 149932, at *20 (N.D. Cal. Nov. 4, 2015); *see also, e.g.*, *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014) ("Here, the confidentiality provision requires that anything and everything pertaining to the arbitration remain confidential and it is unfairly one-sided. Thus, the court finds that the confidentiality provision is substantively unconscionable."); *Zhu v. Hakkasan N.Y.C. LLC*, No. 16 Civ. 5589 (KPF), 2017 U.S. Dist. LEXIS 195158, at *26 (S.D.N.Y. Nov. 28, 2017) ("if the arbitrator were to decide that the confidentiality clause is unenforceable under *Cheeks*, that would not necessarily void the entire agreement.").

[87] *Id.* (internal quotation marks and citation omitted).

<u>Mr. Beisner, Dictionary.com defines fallacy as "a deceptive, misleading, or false notion, belief, etc." Please answer each of the following questions with a yes or no:</u>

- **In general, are arbitration awards made public?** I am unaware of any empirical data addressing the frequency with which arbitration awards are made public. However, as already explained, the claim that arbitration clauses universally require confidentiality in the consumer setting is false. In fact, and as previously noted, California and Maryland require forums like the AAA to file quarterly public reports on all of the ***consumer*** claims that they administer.

- **In general, are materials developed in the course of the arbitration proceeding, including filings, made public?** As previously discussed, the arbitration-sponsoring organizations like the AAA and JAMS do not have specific rules subjecting pleadings or other materials to a veil of confidentiality. JAMS rules do allow an arbitrator to issue orders protecting the confidentiality of documents exchanged by the parties, but this rule is permissive and is not a requirement.[88]

- **In general, are filings in the civil justice system made public?** Yes, filings in the civil justice system are generally made public.

- **In general, unless it is settled out of court, is the outcome of a civil dispute filed in a public court of law made public?** Yes, ***unless it is settled out of court***, the outcome of a civil dispute filed in a public court of law is publicly disclosed. But, of course, the overwhelming majority of lawsuits filed in court are in fact settled ***out of court***.[89] For example, according to a University of Pennsylvania Law Review article, approximately ***70%*** of all employment discrimination lawsuits end in settlement.[90] And "parties who settle out of court are largely free to contract for confidentiality as they see fit. Only when the parties file their settlement agreements in court does the court become involved."[91] "In many cases, both parties have a strong interest in keeping settlements and records confidential."[92] An aggrieved employee's interest in keeping embarrassing

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[88] *See* JAMS R. 26(b).

[89] *See* Eisenberg, Theodore and Lanvers, Charlotte, "What is the Settlement Rate and Why Should We Care?" (2009). *Cornell Law Faculty Publications*, Paper 203, at 146 ("If a single settlement rate is to be invoked, it should be that about two-thirds of civil cases settle[.]").

[90] *See* Robert D. Friedman, *Confusing the Means for the Ends: How a Pro-Settlement Policy Risks Undermining the Aims of Title VII*, 161 U. Pa. L. Rev. 1361, 1363 (2013).

[91] R. Kyle Alagood, *Settlement Confidentiality: A "Fracking" Disaster for Public Health and Safety*, 45 ELR 10459, 10469 (2015); *see also* Andrea Barach et al., *Healthcare Law and Intellectual Property Law: When Worlds Collide*, 25 Health Lawyer 26, 29 n.29 (2013) ("Most settlements are confidential, and so it is not possible to verify the terms of circumstances[.]").

[92] Dawn Shawger McCord, *People, Practice, Pitfalls, the Secret to Keeping Settlements Secret*, 33 Litigation

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or sensitive information outside the public domain was discussed above. But "[e]ven product liability plaintiffs who have successfully negotiated a sizable settlement may not want to publish their newfound wealth to all of their long-lost cousins, nosy neighbors, and telemarketers selling life insurance."[93] Moreover, in contrast to the paltry percentage of civil cases that ever reach a jury, "'50 percent of consumer claims in [AAA] arbitrations ma[k]e it to a hearing before an arbitrator.'"[94] In other words, consumers are far more likely than a plaintiff in court to have his or her story heard by a neutral fact-finder.

- **Is it "deceptive or misleading" to state that Gretchen Carlson's arbitration agreement imposed an obligation of confidentiality on her that would not otherwise be <u>required</u> if she pursued her claim in a public court of law?** Well, it would absolutely be incorrect to suggest that any agreement was "imposed" on Ms. Carlson, who was free to accept or reject the employment contract if she objected to an arbitration provision. But it would not be "deceptive or misleading" to state that Ms. Carlson's arbitration agreement, by mutual assent, imposed a confidentiality requirement on ***both her and her former employer*** that would not have applied in a public court of law. As discussed above, the suggestion that Ms. Carlson had no choice but to enter into her arbitration agreement is not tenable. In any event, in light of the statistics described above, if Ms. Carlson had chosen to pursue her claims in court, those claims would likely have been resolved ***out of court*** pursuant to a confidential settlement agreement. In short, the question is premised on a false dichotomy that is unfounded.

- **Do you maintain that it is "deceptive or misleading" to suggest that the arbitration process is surrounded in confidentiality?** It is not "***deceptive*** or ***misleading***" to suggest that the arbitration process has some aspects of confidentiality, and I did not make such a characterization at the hearing. Rather, I merely pointed out that critics of arbitration have overstated the degree of confidentiality in arbitration.

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45, 45 (2007).

[93] *Id.*

[94] Hans A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, The Heritage Foundation (July 17, 2013), at 10 (quoting Statement of Christopher R. Drahozal at 2, *Arbitration: Is it Fair when Forced?* Hearing Before the S. Comm. On the Judiciary, 112th Cong. (2011)).

Senator Durbin

1. **Mr. Beisner, several years ago you represented One West Bank in litigation before Judge Matthew Kennelly in the Northern District of Illinois. This was a case in which a couple, Charles and Cynthia Thul, sued One West for breaching a promise to modify their mortgage. You and your co-counsel filed a motion to dismiss, and in your opening brief you failed to bring to the court's attention an adverse 7th Circuit precedent that squarely rejected your argument.**

   Judge Kennelly said that your failure to do so ran afoul of your obligation of candor under the ABA Model Rules of Professional Conduct and corresponding Illinois rules, and "it likely amounted to conduct sanctionable under Federal Rule of Civil Procedure 11(b)(2) and 28 U.S.C. section 1927." Judge Kennelly ordered you to show cause why you should not be sanctioned, including by payment of plaintiffs' reasonable attorney's fees, revocation of your *pro hac vice* status, a written or oral reprimand, or other sanctions.

   You responded by apologizing to the judge and settling the case with the Thul family.

   Mr. Beisner, in your view, did your conduct in the One West case constitute lawsuit abuse? Please explain your answer.

The conduct in the One West case was a regrettable mistake, not lawsuit abuse. In that case, the judge admonished my firm for failing to cite *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), in an opening brief in support of a motion to dismiss a lawsuit alleging that One West had breached a promise to permanently modify the plaintiffs' mortgage under the Home Affordable Modification Program ("HAMP"). In *Wigod*, the Seventh Circuit had reversed the dismissal of breach-of-contract, promissory estoppel and consumer-fraud claims in another case involving a mortgage modification under HAMP. Our firm extended what the court "found to be a sincere apology to plaintiffs' counsel and to the court."[95] But neither I nor anyone else working on the case ever sought to deceive the court or to conceal the existence of the Seventh Circuit authority. Rather, there was a communication error within our team and a belief by some that the case was not directly adverse or controlling under the particular facts of the plaintiffs' case – namely, that the plaintiff in *Wigod* satisfied each of the conditions required for a modification under HAMP, while the plaintiffs in the case against One West did not. I fully recognize that the court rejected our position, and we learned a lot from that experience.

As I explained to the court, I take my ethical obligations, professional responsibilities and duties to the court very seriously, and at bottom, I regret not having cited *Wigod* in our opening brief.

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[95] Mem. Op. & Order at 3, *Thul v. OneWest Bank, FSB*, No. 12 CV 6380 (N.D. Ill. Jan. 18, 2013), ECF No. 49; *see also id.* at 5 (noting counsel's serious "demeanor when they spoke in the courtroom and when they listened to the oral admonition that the Court rendered").

However, that mistake is a far cry from the repeated and pervasive examples of class action and MDL abuse chronicled in my written testimony.

Sincerely,

John H. Beisner