Where Have All the Claims Gone?

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Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 **N.C.L. Rev.** 679 (2018).

Much has been written about employers' mandates that their employees arbitrate claims on an individual basis. Empirical studies have examined employee success rates in arbitration, comparing them to employee success rates in litigation, and the effects of the employer being the only repeat player in the process. Scholars have also examined the evolving abdication by courts of their role in policing arbitration mandates. Cynthia Estlund's article examines a more basic question: when employers impose arbitration mandates on their employees, do employee claims even get brought? Her answer is a resounding "rarely," and much more rarely than when the claims can be brought in court.

Estlund acknowledges the challenges in collecting data about employment arbitration. She works with data assembled by Alexander Colvin and his colleagues. Colvin's studies focus on the American Arbitration Association (AAA), which he estimates is designated in about half of employment arbitration agreements. Colvin also estimates that 56% of private sector non-agricultural employees are covered by arbitration mandates.

The starting point for Estlund's analysis of claim filing is AAA's report that in 2016, 2879 individuals filed employment claims. Given that AAA has about half of the employment arbitration business, she doubles this to produce an estimate of 5126 total cases. She then turns to the number of employment cases filed in federal court in 2016, 31,000. If 56% of employees nationwide were subject to employer-imposed arbitration mandates, Estlund reasons, and employees filed arbitration demands with the same frequency as they filed suit, we would expect 39,000 claims in arbitration. She reduces this figure to account for the 15.2% of employees who work in the public sector and to account for the possibility that some, even many, of the federal court filings were by employees subject to arbitration mandates. This yields an estimate of between 9600 and 28,400 expected arbitration claims if employees are as likely to pursue their claims in arbitration as in court. She adjusts the figure upward to take into account state court filings, relying on an estimate of 195,000 per year developed by Mark Gough, and for collective actions in Fair Labor Standards Act (FLSA) cases, which she estimates included 350,000 individuals. She concludes that if employees are as likely to file arbitration demands as law suits, there would be between 320,000 and 727,000 claims in arbitration, or that under 2 percent of the claims one would expect to find actually enter the arbitration process.

Estlund addresses two limitations of her analysis. First, she observes, larger employers are more likely than smaller ones to impose arbitration mandates, and they are also more likely to comply with the employment laws. Second, she relates that many large employers incorporate arbitration in a comprehensive dispute resolution system that includes mediation and many claims may get resolved in earlier stages of the system. But she urges, correctly in my view, that the disparity between the number of arbitration claims we would expect to be filed and the number that are actually filed is so great that these two limitations cannot come close to explaining it.

I have a few quibbles with Estlund's work. First, I don't agree with including the individual employees covered by FLSA collective actions in her total figures for law suits filed. Those who join collective actions have not taken the initiative on their own to file suit. They have responded to notices inviting them to join lawsuits already filed. A more apples-to-apples comparison would be between those employees who took the initiative to file suit and those who took the initiative to file arbitration demands. Second, Estlund relied on Colvin's data, which focused exclusively on AAA cases. J. Ryan Lamar and David Lipsky have conducted extensive empirical analysis of FINRA employment arbitration. It would be nice to see if their data is consistent with Colvin's with respect to likelihood that an employee will file an arbitration demand. Third, Estlund relied on data from 2016. She had to, as that was the most recent data available to

her. But in 2016, the plaintiffs employment bar was just beginning to deal with the Supreme Court's gutting of the key tools of judicial policing of the fairness of employer-mandated arbitration procedures in *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors Restaurant*.

In 2018, plaintiffs' lawyers are increasingly responding to employer mandates of individual arbitration by filing hundreds, and in some cases thousands, of individual arbitration demands. Such actions give plaintiffs significant settlement leverage because under AAA rules, employers are responsible for all AAA fees and all arbitrator fees. In light of this development, it would not surprise me if the number of arbitration cases has increased significantly since 2016 and will continue to increase in the coming years. It also will not surprise me if employers drop their arbitration mandates once they realize that they could be facing hundreds of thousands of dollars, and in the cases with the largest number of filings millions of dollars, in arbitration fees.

These quibbles aside, Estlund makes a compelling case that under current conditions, employment claims mostly disappear into a black hole when employers mandate individual arbitration. The notion that by agreeing to arbitrate, an employee does not waive statutory rights but merely agrees to seek redress for violations of those rights in an arbitral rather than a judicial forum has become nothing more than a legal myth, or as Estlund puts it, judicial "complicit[y] in employers' effective nullification of employee rights and protections."

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