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# Is it the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration

*Suzette M. Malveaux\**

## I. INTRODUCTION

*“[C]hange of this magnitude is a journey.”<sup>1</sup>*

Today, employees are stuck between a rock and a hard place. On the one hand, they are increasingly forced to sign pre-dispute arbitration agreements—waiving the right to sue their employer in court—as a condition of their employment. Employees who challenge their employers’ conduct are subjected to binding arbitration—an alternative to civil litigation that often does not offer the full panoply of procedural protections.

On the other hand, employees seeking relief from the federal court system for employer misconduct are increasingly finding the system inhospitable to their claims. While the federal courts offer more robust procedural protections than arbitration, the courts pose obstacles of their own. Heightened pleading standards suggest that employees alleging intentional discrimination may have greater difficulty merely surviving dismissal. Furthermore, at the trial and appellate levels, the federal courts are overwhelmingly ruling in favor of employers against em-

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\* Suzette M. Malveaux is an Associate Professor of Law at the Columbus School of Law, at The Catholic University of America. I am indebted to many for their support of this project. I am especially grateful for the insights and invaluable feedback I received from: Cyrus Mehri, Esq., Joseph P. Moan, Esq., Edward N. Gadsden, Jr., Dr. Irwin Goldstein, Professor Stephen J. Ware, Professor Peter Riley and Professor Kevin M. Clermont. A special thanks for the excellent research assistance I received from Elizabeth A. Edinger, Stephen Young and my research assistants, Lori Kreloff, Shira Lazinger, Trish Gray and Lauren Nesbitt. I am very grateful for the administrative assistance of Janelle Salamon and editorial assistance of Christina Semmer, Brittany Barrientos, and Miranda Fleschert. Thank you to Dean Veryl Miles and the Columbus School of Law at The Catholic University of America for their generous funding, and to the Metropolitan Washington Employment Lawyers’ Association for enabling me to present on this topic at its annual conference held Mar. 13, 2009. Thanks also to the Washington & Lee University School of Law and the AALS Dispute Resolution Works-in-Progress Conference for inviting me to present my initial thoughts on this topic. And most importantly, I am grateful for the love and support of my family and dear friends, without whom I could not do this work.

1. Alexis M. Herman et al., Ingram et al. v. The Coca-Cola Co., Fifth Annual Report of the Task Force, No. 1-98-CV-3679 (RWS) (N.D. Ga. Dec. 1, 2006) [hereinafter *Coke Fifth Task Force Report*] at 3, available at [http://www.thecoca-colacompany.com/ourcompany/pdf/task\\_force\\_report\\_2003.pdf](http://www.thecoca-colacompany.com/ourcompany/pdf/task_force_report_2003.pdf) (realization by Coke and independent Task Force that major change in the company’s workplace culture and processes would be necessary for Coke’s historic employment discrimination class action settlement agreement to be “truly successful over time”).

employees who allege workplace discrimination.<sup>2</sup> Overwhelmed and underfunded, the EEOC—the administrative agency tasked with initial investigation and conciliation of employment discrimination claims—is often unable to resolve disputes prior to litigation. The federal court system, a place to which plaintiffs have historically flocked for relief from discrimination, turns out not to be a panacea either.<sup>3</sup>

This puts employees in a bind. Employees fighting to avoid mandatory arbitration in favor of federal court may end up going straight from the frying pan into the fire—into a forum stacked against them. This presents the question of where employees should go from here. Compulsory pre-dispute arbitration is an alternative to an inhospitable federal court system. But given the shortcomings of such arbitration, are there any alternatives to the alternative worthy of consideration? Yes: one-way binding arbitration.<sup>4</sup>

This promising and unique alternative—while requiring employees to use arbitration to resolve workplace disputes—gives the employee, but not the employer, the option of rejecting the arbitrator's decision.<sup>5</sup> In the event that the employee is not satisfied with the outcome of arbitration, she can pursue her claim in the court system. She is not bound by the arbitrator's determination. The employer, on the other hand, is bound by the arbitrator's decision, whether the outcome is favorable to the employer or not.<sup>6</sup>

This unilateral arrangement—voluntarily adopted by the Coca-Cola Company<sup>7</sup> following its historic employment discrimination class action settlement—is a groundbreaking and novel approach to promoting arbitration, while also protecting employee choice and access to the court system. One-way binding arbitration also offers employers an opportunity to forge new ground. Companies can enjoy all of the benefits of arbitration—such as efficiency, privacy, cost savings and litigation avoidance—while bolstering workplace relations that may enhance profitability. The legal system also profits from arbitration arrangements that relieve

2. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (forthcoming Winter 2009), available at [www.hlprronline.com/Vol3.1/Clermont-Schwab\\_HLPR.pdf](http://www.hlprronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf) [hereinafter *Empirical Study*].

3. See discussion *infra* at Part III and accompanying notes.

4. The term "one-way binding arbitration" is used by the author but not by the Coca-Cola Company or the literature describing the *Solutions* program. For a definition of the term, see RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 2.48, at 362 (Thompson/West 2008) (1996):

[T]he parties may choose binding arbitration, agreeing that the decision will be final and binding on both sides. Alternatively, the parties may agree that the result be binding on only one party, which is 'one-way binding arbitration' leaving the other side free to seek a trial *de novo* if sufficiently aggrieved by the result. Non-binding arbitration allows either party to seek further review.

5. The Coca-Cola Company's one-way binding arbitration is described as follows:

After hearing from both sides, the arbitrator makes a decision to resolve the Legal Dispute, much like a judge would do in court. The employee then has a choice to agree to the arbitrator's decision and end the Legal Dispute, or to reject the decision and pursue other external options, including legal action. . . . If the employee chooses to agree to the arbitrator's decision, the Company will be bound by that decision.

The Coca-Cola Co. *Solutions* Program Rules at 7 [hereinafter *Coke Rules*] (on file with author) (July 15, 2008).

6. *Id.*

7. Hereinafter *Coke*.

administrative and judicial backlog, promote settlement, and recognize and reconcile competing dispute resolution systems.

While the scholarly literature is replete with discussion of the pros and cons of mandatory arbitration and civil litigation, relative to one another,<sup>8</sup> there has been no examination of one-way binding arbitration as a potential bridge between these procedural poles.<sup>9</sup> The adoption of one-way arbitration by major corpora-

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8. Only a sampling of the articles in the literature follows. See, e.g., Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82 (2007) (summarizing arguments by critics and defenders of mandatory, pre-dispute arbitration, and proposing governmental mandatory arbitration imposed on companies, at the discretion of the "little guys"); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 871-77 (2007-2008) (summarizing arguments on both sides). Compare Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005), Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281 (2002); 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), Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001), Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000), Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employee Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017 (1996), and Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's - Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 290 (1996), with Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements - With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 261 (2006), David Sherwyn, *Mandatory Arbitration: Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims*, 6 CORNELL HOSPITALITY REPORT (July 2006), available at <http://www.hotelschool.cornell.edu/research/chr/pubs/reports/abstract-14081.html> (last visited Apr. 23, 2009), Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001), Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001), Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999), Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 63-64 (1998) (contending that arbitration may be better than civil litigation for employees), and Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

9. In many ways, arbitration and litigation are not at separate poles. If anything, arbitration—as a type of ADR—is much more similar to litigation than other types, such as negotiation and mediation. Professor Stephen J. Ware and others describe arbitration as a type of adjudication:

Arbitration, like litigation, is a form of adjudication. The difference between the two is that arbitration is private adjudication, while litigation is government adjudication. In both processes, a non-party decisionmaker resolves the dispute. In arbitration, the decisionmaker is one or more arbitrators; in litigation it is the court, i.e., a judge and, sometimes, a jury.

Adjudication typically produces winners and losers, and the losers may refuse to comply with the adjudicator's decision. When losers defy the ruling of a court, the process for enforcement is well-known. The sheriff or marshal enforces the court's ruling by seizing property, putting a person in jail, or forcibly enjoining a person from doing something. The same enforcement process occurs when the loser at arbitration defies the arbitrator's decision. The winner at arbitration petitions the court for an order confirming the arbitration award. Through confirmation, the court adopts the arbitrator's decision as its own, and that decision is enforced like any other ruling of the court.

Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, *supra* note 8, at 707-708; see also Stephen J. Ware, ALTERNATIVE DISPUTE RESOLUTION §2.1 at 19 (West Group 2001) ("Arbitration is private adjudication."); IAN R. MACNEIL, ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT, § 2.1.2, at 2:5 (Little Brown & Co. 1999 Supp.) ("Arbitration is generally understood to be a kind of adjudicatory process . . ."); David S. Schwartz, Symposium, *If You Love Arbitration, Set it Free: How "Mandato-*

tions, such as the Coca-Cola Company and Texaco, to resolve workplace disputes following some of the most high profile, historic employment discrimination cases, suggests that an examination of this alternative is long overdue. The goal of this article is to fill that void.

This article is comprised of six parts. Part I introduces the topic. Part II examines the growing prevalence of compulsory pre-dispute arbitration agreements in employment contracts and the problems with such agreements. Part III describes the challenges employees face in the federal court system: higher pleading thresholds for intentional discrimination claims, the federal judiciary's current antagonism toward employee claims of discrimination (as demonstrated by recent empirical studies), and a beleaguered EEOC. Part IV describes how Coke adopted one-way binding arbitration and explores the ways in which this alternative is preferable to both mandatory arbitration and civil litigation for employees, employers, and the greater legal community.<sup>10</sup> Part V discusses some limitations of one-way binding arbitration and the context in which it has the most potential. Finally, Part VI concludes by recommending that employers consider adopting one-way binding arbitration with sufficient procedural safeguards as a way of maximizing employee choice, empowering the company to resolve workplace issues internally, and bridging the divide between litigation and arbitration.

## II. COMPULSORY PRE-DISPUTE ARBITRATION AGREEMENTS

### A. The Prevalence and Evolution of Mandatory Arbitration Agreements

There has been a proliferation of mandatory pre-dispute arbitration agreements in employment contracts over the last fifteen years.<sup>11</sup> At least one-fifth of all employees are subject to mandatory arbitration.<sup>12</sup> The increase in such agree-

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ry" *Undermines "Arbitration,"* 8 NEV. L.J. 400, 402 (2007) (describing "judicialization of arbitration").

10. The article uses a case-study methodology to explore the utility of one-way binding arbitration. Through interviews with counsel and third-party experts, and company documents, the author was able to use Coke's dispute resolution process as an exemplar.

11. See, e.g., Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 412 (2008) [hereinafter *Megacases*] ("Employers are increasingly requiring employees unrepresented by unions—and even union-represented employees who are under a collective bargaining agreement that contains a clear waiver of statutory rights—to arbitrate their employment discrimination claims"); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RES. J. 44, 44 (Nov. 2003 - Jan. 2004); Mei L. Bickner et al., *Developments in Employment Arbitration*, 52 J. DISP. RESOL. 8, 78 (1997); 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, 348-50, T.2 (2007) (review of 2,858 corporate contracts revealed that employment contracts are more likely to have arbitration clauses than other types of contracts; arbitration clauses appeared in 37 percent of employment contracts (the highest percentage among the thirteen contract types studied), but appeared in only 11 percent of all the corporate contracts studied).

12. Press Release, National Employment Lawyers Association, *NELA Applauds Bill Banning Mandatory Arbitration* (July 12, 2007), available at [http://www.nela.org/temp/ts\\_78396BF6-BDB9-505B-D137F90CE69C8B2378396C06-BDB9-505B-DCB26F870980157F/NELASstatementArbitrationFairnessAct0707.pdf](http://www.nela.org/temp/ts_78396BF6-BDB9-505B-D137F90CE69C8B2378396C06-BDB9-505B-DCB26F870980157F/NELASstatementArbitrationFairnessAct0707.pdf) (last visited Apr. 5, 2009) (quoting NELA President, Kathleen L. Bogas); see also *Megacases*, *supra* note 11, at 412-13 ("Mandatory arbitration is pervasive: one survey of Fortune 1000 companies some years ago revealed that

ments has led to an unparalleled privatization of the justice system, which threatens to undermine civil rights enforcement. Because of the judiciary's propensity to enforce pre-dispute compulsory arbitration agreements, employees are increasingly precluded from having their claims heard in court, relegated instead to arbitration—a forum often lacking procedural features that promote vigorous civil rights enforcement.

Initially, arbitration agreements under the Federal Arbitration Act ("FAA")—enacted in 1925—served as a method of alternative dispute resolution ("ADR") between commercial entities of equal bargaining power, matched in business experience and sophistication. Within this context, the parties would agree to resolve future disputes in arbitration, a method which can be faster and less expensive than litigation.

The FAA's reach was initially limited. At first, the Supreme Court and lower courts resisted arbitration, doubting the arbitrator's capacity to adequately protect statutory rights and perceiving the forum as inferior to the judiciary. Prior to the 1980s, courts would ignore the FAA or openly resist forcing parties to arbitrate. The Supreme Court itself set a tone of distrust and disdain for the alternative forum. For example, in *Wilko v. Swan*,<sup>13</sup> the Court held that the right to select a judicial forum is non-waivable, thereby making a pre-dispute arbitration agreement between securities brokers and buyers an impermissible "stipulation" binding buyers to waive compliance with the Securities Act of 1933.<sup>14</sup> The Supreme Court believed that arbitrators, not instructed in the applicable law, might be relied upon to make subjective findings and interpretations of the law—an unacceptable risk in the absence of meaningful judicial review.<sup>15</sup> The Court expressed similar reservations about arbitration in the collective bargaining context.<sup>16</sup>

However, the Supreme Court's hesitancy to enforce pre-dispute arbitration agreements has drastically waned over the last forty years.<sup>17</sup> The Court's shift in direction is demonstrated by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, in which it held that claims brought under the Sherman Act for antitrust violations were subject to arbitration, pursuant to an arbitration agreement in an

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seventy-nine percent of them used arbitration"); see also *Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, DAILY LAB. REP. (BNA) No. 93, at A4 (May 14, 1997).

In light of the Supreme Court's recent ruling in *14 Penn Plaza L.L.C. v. Pyett*, even more employees may be required to arbitrate their statutory employment discrimination claims. See 129 S. Ct. 1456 (2009). In *Pyett*, the Supreme Court held enforceable a mandatory pre-dispute arbitration clause in a union-negotiated collective bargaining agreement, that waived an employee's right to file a discrimination claim under the ADEA. *Id.* at 1474. The *Pyett* Court determined that a collective bargaining agreement can waive an employee's right to bring federal claims of employment discrimination in court so long as the waiver is clear and unmistakable. *Id.* Thus, a union can bind an employee, through its collective bargaining agreement, to mandatory, pre-dispute arbitration.

13. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

14. *Wilko*, 346 U.S. at 434-37.

15. *Id.* at 435-37.

16. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974).

17. See Ware, *Employment Arbitration and Voluntary Consent*, *supra* note 8, at 137 (discussing the "Court's strongly pro-arbitration decisions of the last twenty years"); Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 593 (1995) ("employers and employees are increasingly entering into, and courts are increasingly enforcing, compulsory arbitration agreements").

international commercial agreement and governed by the FAA.<sup>18</sup> So long as the arbitral forum enabled a party to vindicate statutory rights, the statute would serve its remedial and deterrent functions, and the arbitration agreement could be enforced.<sup>19</sup> The Court radically departed from its initial reluctance, and instead embraced the “liberal federal policy favoring arbitration agreements.”<sup>20</sup>

Growing acceptance of arbitration became the norm. By 1989, the Court overturned *Wilko* in *Rodriguez De Quijas v. Shearson/American Express, Inc.*, putting an end to “the old judicial hostility to arbitration.”<sup>21</sup> In *Rodriguez De Quijas*, the Court concluded that once “the outmoded presumption of disfavoring arbitration” was cast aside, it became clear that the right to select the judicial forum was not paramount to Securities Act enforcement.<sup>22</sup> So long as no inherent conflict existed between the federal statute and the arbitral forum, the arbitration clause was enforceable.<sup>23</sup> The Court recognized that long-held skepticism over arbitration “has been steadily eroded over the years . . . .”<sup>24</sup> Moreover, the Court’s more recent decisions, upholding agreements to arbitrate claims under various federal statutes, indicate that this erosion has intensified.<sup>25</sup>

The Court’s fondness for arbitration has become commonplace over the last quarter-century.<sup>26</sup> This shift in attitude has taken place in the employment context, among others. In *Alexander v. Gardner-Denver Co.*,<sup>27</sup> the Court concluded that arbitration in the collective bargaining context was inferior to the federal court system for resolving Title VII claims. Almost two decades later, the Court, in *Gilmer v. Interstate/Johnson Lane Corp.*, held that statutory employment discrimination claims covered by a pre-dispute arbitration agreement could be re-

18. 473 U.S. 614, 628-36 (1985). This was “the first time the Court has considered the question of whether a standard arbitration clause referring to claims arising out of or relating to a contract should be construed to cover statutory claims that have only an indirect relationship to the contract.” *Id.* at 647 (Stevens, J., dissenting).

19. *Id.* at 625, 628, 637. The Court noted, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.” *Id.* at 626-27.

For a discussion of the constitutionality of mandatory arbitration see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1050-86, 991 (2000) (describing due process requirements for private arbitration); Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 534-40 (1989) (describing how statutorily mandated arbitration can comport with due process).

20. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate . . .”).

21. *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 480 (1989) (quoting *Kulundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

22. *Rodriguez de Quijas*, 490 U.S. at 481-82.

23. *Id.* at 481, 483.

24. *Id.* at 480.

25. See *id.* at 480-81 (discussing trend of upholding agreements to arbitrate claims under acts such as: the Securities Act of 1933 (*Rodriguez De Quijas*); the Securities Exchange Act of 1934 and RICO (*Shearson/Am. Express, Inc.*); and the Sherman Act (*Mitsubishi Motors Corp.*)).

26. See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (stating that FAA “requires that we rigorously enforce agreements to arbitrate”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”).

27. See *Gardner Denver*, 415 U.S. 36, 56-58 (concluding in collective bargaining context that arbitration was less appropriate than the federal court system for resolving Title VII claims).

solved in the arbitral rather than judicial forum.<sup>28</sup> In *Gilmer*, as a condition of his employment, the New York Stock Exchange required a securities broker to sign a contract, obligating the broker to arbitrate all employment-related disputes, including statutory discrimination claims.<sup>29</sup> In striking contrast to *Gardner-Denver*, the Court embraced the "liberal federal policy favoring arbitration agreements" and required the broker to arbitrate the claims he brought under the Age Discrimination in Employment Act of 1967 ("ADEA").<sup>30</sup> Most recently, in *14 Penn Plaza L.L.C. v. Pyett*,<sup>31</sup> the Court "corrected" *Gardner-Denver's* "misconceptions" about the drawbacks of the arbitral forum and held that a mandatory pre-dispute arbitration agreement in a collective bargaining agreement, whose coverage of ADEA claims was clear and unmistakable, was enforceable.<sup>32</sup>

The Court has endorsed the use of arbitration in just about every kind of civil dispute over which a court could have jurisdiction.<sup>33</sup> The Court has interpreted the FAA as expressing a strong preference for the private resolution of claims brought to enforce rights in areas as varied as securities,<sup>34</sup> antitrust,<sup>35</sup> consumer protection<sup>36</sup> and civil rights.<sup>37</sup>

As a result, employers have been increasingly conditioning employment on an individual's willingness to waive his right to sue his employer in court. The Court's endorsement of arbitration has contributed to a burgeoning practice by employers to insert mandatory arbitration clauses in their standardized, non-negotiable contracts—compelling employees to prospectively forgo the option of using the courts to vindicate rights which may be infringed upon in the future.

### *B. The Problems with Mandatory Pre-Dispute Arbitration*

The Supreme Court has repeatedly encouraged judicial deference to contract enforcement<sup>38</sup>—leaving only state law theories<sup>39</sup> and limited review of arbitral awards as means for challenging such contracts of adhesion.<sup>40</sup> The FAA makes clear that arbitration agreements are "valid, irrevocable, and enforceable, save

28. 500 U.S. 20, 24-36 (1991).

29. *Id.* at 20.

30. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

31. 129 S. Ct. 145 (2009).

32. *Id.* at 1471.

33. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (upholding mandatory arbitration provision by construing exception to the FAA to ensure that persons with employment claims in non-unionized workplaces would be covered by the Act).

34. *See, e.g.*, *Rodriguez de Quijas*, 490 U.S. at 480-81 (Securities Act of 1933); *Shearson/Am. Express Inc.*, 482 U.S. at 220 (the Securities Exchange Act of 1934 and RICO).

35. *See, e.g.*, *Mitsubishi Motors Corp.*, 473 U.S. at 614 (the Sherman Act).

36. *See* *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 92 (2000) (arbitration agreement covering statutory claims asserted under the Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA) was enforceable).

37. *See, e.g.*, *Gilmer*, 500 U.S. 20, 23 (1991) (ADEA); *see also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) ("contract evidencing a transaction involving interstate commerce" described in 9 U.S.C. § 2 of the FAA includes employment contracts).

38. *See, e.g.*, *Gilmer*, 500 U.S. at 26.

39. *See, e.g.*, *Mitsubishi Motor Corp.*, 473 U.S. at 627.

40. *See* *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute").



upon such grounds as exist at law or in equity for the revocation of any contract."<sup>41</sup> The arbitrator's decision is generally binding and subject only to appeal on limited contractual grounds such as fraud, duress, bias, or unconscionability.<sup>42</sup>

Moreover, the Supreme Court has rejected challenges to arbitration on a number of significant grounds. For example, in *Mitsubishi*, the Court approved the enforcement of arbitration, despite such arguments that: the arbitration agreement failed to expressly provide which statutory claims it covered;<sup>43</sup> the underlying issues were too complex for the arbitrator;<sup>44</sup> and the arbitrator might be incompetent, non-conscientious, or biased.<sup>45</sup> In *Gilmer*, the Court also endorsed arbitration despite arguments that: the underlying statute was designed to advance important broad public policies;<sup>46</sup> arbitration would undermine the enforcement agency's role;<sup>47</sup> arbitration only provided limited discovery, thereby compromising a party's ability to prove statutory violations;<sup>48</sup> the parties did not have equal bargaining power;<sup>49</sup> arbitration provided limited review;<sup>50</sup> the arbitrator lacked the power to provide broad equitable relief and certify class actions;<sup>51</sup> and the arbitrator's failure to issue written opinions would result in public ignorance about a defendant's conduct, the plaintiff's inability to secure adequate appellate review, and a stifled development of the law.<sup>52</sup>

While supporters of arbitration—largely employers and corporations—tout its speed, cost, and flexibility,<sup>53</sup> they fail to mention the risk that arbitration will dispense with many rights ordinarily available—and often taken for granted—in the courts. More specifically, mandatory binding arbitration can, and in some circumstances will, dispense with the right to a jury trial, a public and subsidized forum, a written record, discovery, binding legal precedents, opportunity for collective and class actions, an adjudicator with legal expertise, and meaningful appellate review.<sup>54</sup> Each of these features, standard in the judicial forum, can be compromised or eliminated altogether in the arbitral forum.

41. 9 U.S.C. § 2 (2006).

42. See *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); see also *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 63-67 (2000) (in collective bargaining context, Court demonstrated traditional deference to arbitrator's award by holding that it was not a violation of public policy for arbitrator to reinstate—in a safety-sensitive position—an employee who had twice tested positive for marijuana use); 9 U.S.C. § 10(a) (an arbitral award is granted full faith and credit and can only be overturned on the basis of very narrow grounds).

43. *Mitsubishi Motors Corp.*, 473 U.S. at 624-25.

44. *Id.* at 633-34.

45. *Id.* at 634; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (citing *Mitsubishi Motor Corp.*, 473 U.S. at 634).

46. *Gilmer*, 500 U.S. at 27-28.

47. *Id.* at 28-29.

48. *Id.* at 31.

49. *Id.* at 32-33.

50. *Id.* at 32 n.4.

51. *Id.* at 32.

52. *Id.* at 31-32.

53. For an interesting discussion of how litigation, like arbitration, can be customized, see Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007).

54. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435-37 (1953) (expressing concern that arbitrators must make findings without "judicial instruction on the law[, an arbitrator's] . . . award may be made without explanation of their reasons and without a complete record of their proceedings, . . . conception of the legal meaning of . . . statutory requirements . . . cannot be examined[.] . . . power to vacate an

Plaintiffs, unaware of the deleterious consequences of signing such an agreement, may be forced to accept unfavorable terms such as exorbitant costs,<sup>55</sup> class action prohibitions,<sup>56</sup> and proscribed statutory remedies.<sup>57</sup> Employees with little bargaining power are mandated to forego their day in court because they signed an arbitration clause that appeared in fine print, on the back of a form or application, in incomprehensible legalese.<sup>58</sup>

### *C. Legislative Attempts to Limit Mandatory Pre-Dispute Arbitration*

In response to a groundswell of dissatisfaction on the part of consumer and employee rights groups,<sup>59</sup> congressional leaders have sought to fix the problem of compulsory pre-dispute arbitration agreements that impact the enforcement of

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award is limited" and their interpretations of law are not subject to judicial review "for error in interpretation"), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477 (1989); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974) (expressing concern over factfinding process in arbitration of Title VII disputes in the labor context because "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable").

55. *But see*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (recognizing that an arbitration agreement that would impose large costs on a party opposed to arbitration may render the agreement unenforceable).

56. *See* *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001). However, advocacy groups challenging the enforceability of arbitration agreements that ban class actions have enjoyed recent success. The unenforceability of class action waivers in such agreements has gained traction in the Ninth, Second and Third Circuits. *See, e.g.*, *Homa v. Am. Express Co.*, 558 F.3d 225 (2009) (class action waiver unconscionable under application of state law and on public policy grounds); *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2009) (class action waiver unenforceable where it would effectively preclude vindication of statutory rights for small claims); *Ting v. AT&T*, 319 F.3d 1126, 1147-52 (9th Cir. 2003) (class action waiver held procedurally and substantively unconscionable under California state law); *see also* Linda S. Mullenix, *Class Action Waivers*, NAT'L L.J. 23 (Apr. 6, 2009) (discussing same).

57. *See* THOMAS H. OEHRKE, *COMMERCIAL ARBITRATION*, § 151:3, at 151-55 (West Publishing Group 2004) (1987) (discussing circuit split between Ninth Circuit and others over proper way to address remedial restrictions in arbitration agreements). *See, e.g.*, *Graham Oil Co. v. ARCO Prods. Co.*, a Div. of *Atl. Richfield Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (arbitration clause that shortened statute of limitations and limited punitive damages and attorney's fees, in contravention of the Petroleum Marketing Practices Act, held unenforceable); *Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006) (arbitration agreement provisions that barred treble damages, prohibited class actions, and limited attorneys' fees prevented plaintiffs from vindicating their statutory rights under federal antitrust law and were therefore severed).

58. *See* Statement of F. Paul Bland, Jr., Testimony to the Subcommittee on the Constitution of the United States Senate Judiciary Committee S. 1782, *The Arbitration Fairness Act of 2007*, (Dec. 12, 2007), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3055&wit\\_id=6829](http://judiciary.senate.gov/hearings/testimony.cfm?id=3055&wit_id=6829), (describing clauses "(a) cast in dense and cryptic legalese incomprehensible to lay persons (and even many lawyers); (b) set forth in miniscule print, often on the back side of a document; and (c) buried in the center of a mailing . . .").

59. *See, e.g.*, Public Citizen, Groups Launch Nationwide Effort to Stop Use of Binding Mandatory Arbitration Clauses: Campaign Includes Educational Web Sites, Call for State and Federal Legislation, Tools to Empower Consumers (Feb. 24, 2005), available at <http://www.citizen.org/pressroom/release.cfm?ID=1884> (ten-point platform for action released by numerous groups encouraging consumers to avoid doing business with companies that use binding mandatory arbitration clauses); National Employment Lawyers Association, *supra* note 12, at 4 (listing concerns and "urg[ing] Congress to ban the practice of mandatory arbitration by enacting the Arbitration Fairness Act without delay").

civil rights and consumer laws. In particular, the Arbitration Fairness Act of 2009 ("AFA")<sup>60</sup>—introduced on Feb. 12, 2009, to the 111th Congress—would amend the FAA to make unenforceable any pre-dispute arbitration agreement dealing with consumer disputes, employment and franchise disputes, or disputes arising under laws that protect civil rights.<sup>61</sup> The AFA's congressional findings state that "a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to *binding* arbitration."<sup>62</sup> While the AFA does not distinguish between binding and non-binding mandatory pre-dispute arbitration agreements, its findings indicate that legislators are concerned with agreements that force employees to "give up their rights" and require employees to use arbitration as a *substitute* for civil litigation<sup>63</sup>—something not required by Coke's one-way binding arbitration provision<sup>64</sup> in its internal dispute resolution program.<sup>65</sup> Under the AFA, mandatory pre-dispute arbitration of employment claims outside of collective bargaining agreements would be prohibited.<sup>66</sup>

While mandatory pre-dispute arbitration has been successfully curtailed by legislation for certain discrete groups—such as auto dealers,<sup>67</sup> livestock producers,<sup>68</sup> and covered members of the armed forces and their dependents subjected to payday loan agreements<sup>69</sup>—it has not gained the same traction for employees.<sup>70</sup>

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60. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (sponsored by Rep. Henry C. "Hank" Johnson, Jr.).

61. *Id.* Another pending bill, the Civil Rights Act of 2008 ("CRA"), also prohibits mandatory, pre-dispute arbitration agreements in employment contracts. See Civil Rights Act of 2008, H.R. 5129 § 423, 111th Cong. (2008) ("[A]ny clause of any agreement between an employer and employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable"). However, post-dispute agreements to arbitrate are permissible, and collective bargaining agreements are exempt. See *id.*

62. H.R. 1020 at 2 (emphasis added).

63. *Id.*

64. See Coke Rules, *supra* note 5, at 5, 20-21.

65. A substantially similar version of the AFA received bipartisan support from the 110th Congress. See Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007). The AFA of 2007 differs from the pending bill, in that the prior bill also prohibited mandatory pre-dispute arbitration agreements that "regulate contracts or transactions between parties of unequal bargaining power." H.R. 3010. For a history of the AFA, see Court Rules, 249 F.R.D. 402 (2008).

66. Arbitration Fairness Act of 2007, S. 1782, *supra* note 65; H.R. 3010, *supra* note 65.

67. The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002, Automobile Dealers' Day in Court Act, 15 U.S.C. § 1226 (2002):

(a) Election of arbitration . . . (2) Consent required: Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.

68. Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c(a) (2006) ("Any livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision").

69. John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109th Cong. (2006), 10 U.S.C. § 987 (f)(4) (2006):

Notwithstanding [9 U.S.C. § 2], or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable

Given the legislature's mixed success in quelling the surge of compulsory pre-dispute arbitration agreements among those of unequal bargaining power or those pursuing certain claims, the courts will continue to evaluate the legitimacy of such agreements on a case-by-case basis.

The federal judiciary's deference to contract enforcement suggests that many, if not most, of these agreements will pass muster. While the enforceability of an arbitration agreement is contingent upon its specific features, unless those features are particularly egregious,<sup>71</sup> courts will often determine that the contract suffices.

### III. CIVIL LITIGATION

Given the concerns over lack of meaningful employee consent and meaningful review, and the terms of the mandatory pre-dispute agreements themselves, employee advocates have properly focused on protecting employees from forced participation in binding arbitration and safeguarding their right to a judicial forum.<sup>72</sup> This focus is not surprising given the important role the federal judiciary has historically played in protecting civil rights plaintiffs and the forum's beneficial procedural features. For example, employees have benefited greatly from the right to jury trial, which provides a public subsidized forum, extensive access to evidence via discovery, binding legal precedents, broad collective and class relief, and significant appellate review.

While the federal judiciary has been a long-time friend of employees victimized by discrimination, the honeymoon may be over. In the event that an employee successfully persuades the court that a mandatory pre-dispute arbitration agreement is unenforceable, escaping binding arbitration may lead the employee into another trap—a judicial system inhospitable to employment discrimination

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against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.

70. Other groups, such as residents of nursing homes and car purchasers and leasers are attempting to enact prohibitions against mandatory, pre-dispute arbitration. *See* Fairness in Nursing Home Arbitration Act of 2008, S. 3828, 110th Cong. (2008) ("A pre-dispute arbitration agreement between a long-term care facility and a resident of facility long-term care facility (or anyone acting on behalf of such resident, including a person with financial responsibility for such resident) shall not be valid or specifically enforceable"); Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. (2008) (a controversy arising out of a motor vehicle consumer sales or lease contract "may not be settled by arbitration unless, after such controversy arises, all the parties to such controversy agree in writing to settle such controversy by arbitration").

71. *See, e.g.,* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-40 (4th Cir. 1999) (arbitration agreement unenforceable because so one-sided in favor of employer, where employer alone could control selection process of arbitrators (including family and friends), punish arbitrators that ruled against it, expand scope of arbitration, move to dismiss, record proceedings, move to vacate or modify award, and cancel arbitration agreement; and employee alone was required to file notice of claim and defenses, and provide list of fact witnesses and anticipated testimony); *Ramirez-De-Arellano v. Am. Airlines, Inc.* 133 F.3d 89, 91 (1st Cir. 1997) (where employee was denied a hearing, discovery, and any review and arbitrator was not a disinterested party, court concerned about "fundamental fairness" of process).

72. *See, e.g.,* Press Release, Public Citizen, Public Citizen Urges Support for the Arbitration Fairness Act of 2007, (July 12, 2007), available at <http://www.citizen.org/pressroom/release.cfm?ID=2472> (last visited Apr. 5, 2009) ("The insertion by business entities of arbitration clauses in everyday contracts forces individuals to forgo their right to a court or jury if . . . workplaces harm them").

claims. Recent empirical studies and case law suggest that employees may not be well-served by running from arbitration into the arms of the judiciary.<sup>73</sup>

Rather than offering a panacea replete with procedural protections, the federal court system has a number of its own deficiencies. First, under the new heightened pleading standard established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*,<sup>74</sup> an employee challenging intentional employment discrimination may risk having his case dismissed more so than plaintiffs bringing other types of cases because of the subjective nature of the claim. To the extent that *Twombly* is applied to civil rights cases, such cases may have a harder time surviving dismissal because of their dependence on circumstantial evidence. Second, if an employee's discrimination claim survives early dismissal, he is more likely to lose at trial than other plaintiffs.<sup>75</sup> Third, even if the employee wins at trial, he is more than four times more likely to have his victory reversed on appeal than the employer.<sup>76</sup> Finally, employees are not afforded a meaningful opportunity to avoid this fate with the help of the EEOC in investigating and conciliating workplace disputes prior to civil filing.

### A. Heightened Pleading Standard

As an initial matter, employees run the risk that their complaints will not overcome the judiciary's pleading standard. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>77</sup> Cases subject to a heightened pleading requirement fall under Rule 9(b)—which requires particularity for cases involving fraud, mistake,<sup>78</sup> or an applicable statute.<sup>79</sup> Consequently, the Supreme Court set forth a low notice pleading bar in *Conley v. Gibson*, which stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>80</sup> Despite the notice pleading standard set forth in Rule 8 and Supreme Court case law reiterating this standard,<sup>81</sup> lower

73. Empirical Study, *supra* note 2.

74. 550 U.S. 544 (2007); see *infra*, Part A: *Heightened Pleading Standard*, for a detailed discussion of this standard.

75. See *infra*, Part B: *Trial*, for a more detailed discussion.

76. See *infra*, Part C: *Appeals*, for a more detailed discussion.

77. FED. R. CIV. P. 8(a)(2).

78. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b).

79. For example, the Private Securities Litigation Reform Act of 1995 requires that a party pleading securities fraud state claims with sufficient particularity and provide allegations of "scienter" consistent with the terms of the statute. 15 U.S.C. § 78u-4(b)(1) (1998) (complaint must provide "each statement alleged to have been misleading, (2) the reason or reasons why the statement is misleading, and (3) if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed"); 15 U.S.C. § 78u-4(b)(2) ("the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind").

80. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

81. See *id.*

courts have subjected plaintiffs filing discrimination claims to greater scrutiny.<sup>82</sup> Because of the lower courts' persistence in applying a heightened pleading requirement to civil rights cases, the Supreme Court has had to refute this practice to bring the courts back in line.<sup>83</sup>

However, in *Bell Atlantic v. Twombly*, the Court recently rejected the *Conley v. Gibson*'s "no set of facts" standard, declaring that "after puzzling the profession for 50 years, this famous observation has earned its retirement."<sup>84</sup> The Court concluded that "[f]actual allegations must be enough to raise a right to relief above the speculative level"<sup>85</sup> and must show "plausibility of entitle[ment] to relief," not just a "possibility."<sup>86</sup> A complaint must give the defendant fair notice of the nature of plaintiff's claim and the grounds upon which it rests.<sup>87</sup> While detailed factual allegations are not necessary,<sup>88</sup> under *Twombly*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do."<sup>89</sup> Moreover, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."<sup>90</sup> The *Twombly* standard is a marked change from the liberal pleading standard that permitted a plaintiff to state a claim using conclusory statements and bare-bones facts to be fleshed out in discovery and examined through summary judgment.

Under *Twombly*, employees challenging intentional discrimination are more vulnerable to having their claims dismissed under Rule 12(b)(6), for failure to state a claim upon which relief can be granted, because of the more rigorous "plausibility" pleading standard. In the event that employees' claims are sub-

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82. See A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 111-18 (2008); see also Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990) (describing deleterious effect heightened pleading standard was having on civil rights cases in the 1980s).

83. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-15 (2002).

84. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). In the context of a putative antitrust class action, the Court concluded that plaintiffs failed to state a claim under Section 1 of the Sherman Act because the complaint did not allege enough factual matter that, taken as true, would suggest that an agreement was made—a necessary condition for a statutory violation. *Id.* at 554-58.

85. *Id.* at 555.

86. *Id.* at 557 (quoting 15 U.S.C. § 1 (2004)).

87. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

88. *Twombly*, 550 U.S. at 555; see also *Conley*, 355 U.S. at 47.

89. *Twombly*, 550 U.S. at 555.

90. *Id.* at 556 n.3.

jected to the *Twombly* standard, such claims are in potential jeopardy<sup>91</sup> for numerous reasons.<sup>92</sup>

First, the *Twombly* standard is harder for employees who bring employment discrimination claims than for plaintiffs who bring other types of claims because employers often have superior, if not exclusive, access to the evidence necessary to demonstrate plausibility. For example, in disparate treatment cases—the vast majority of employment discrimination cases<sup>93</sup>—plaintiffs must allege facts sufficient to show discriminatory intent—facts often solely in the defendant's possession.<sup>94</sup> Given that modern day discrimination is often subtle,<sup>95</sup> and consequently difficult to prove,<sup>96</sup> plaintiffs run the risk that they will not be able to put forth factual allegations sufficient to survive a post-*Twombly* 12(b)(6) dismissal.

Second, while plaintiffs may successfully allege facts consistent with discrimination, such facts may also be consistent with non-discrimination. *Twombly* requires plaintiffs to allege facts that show a claim is plausible, not just possible.<sup>97</sup> Therefore, if a court is so inclined, it may dismiss a civil rights complaint which alleges facts that lend themselves to explanations other than discrimination.

Third, the interpretation of what is “plausible” is highly subjective, thereby making it easier for judges suspicious of discrimination claims to dismiss them outright, prior to the claims being fleshed out in discovery or vetted through summary judgment. Given potential differences in perception based on background factors, such as race<sup>98</sup> and gender,<sup>99</sup> judges may have very different views—from

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91. It is unclear at this early juncture whether civil rights cases are being subjected to a heightened pleading standard post-*Twombly*, and consequently being disproportionately dismissed. See Spencer, *supra* note 82, at 155-59. See, e.g., Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (preliminary study shows a “significant departure from previous dismissal practice is [in] the civil rights field” post-*Twombly*); Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1273713> (preliminary study examining dismissal rates pre and post *Twombly* reveals a “substantial increase” in dismissal rate of employment discrimination cases) (last visited on Apr. 10, 2009). See also Nathan Koppel, *Job Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J., Feb. 19, 2009, at A16.

92. Civil rights cases are also vulnerable to dismissal because they are often brought pursuant to Section 1983, which provides for qualified immunity. *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (describing qualified immunity standard for Section 1983 claim). Cases in which qualified immunity is a potential defense are also more susceptible to a heightened pleading standard. See Spencer, *supra* note 82.

93. Empirical Study, *supra* note 2, at 103 (citing John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989, 998, n.57 (1991)).

94. Spencer, *supra* note 82, at 160-61.

95. See *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (“Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms”).

96. See Cyrus Mehri & Ellen Eardley, *21st Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration*, at 1-3 (discussing subtle or “second generation” discrimination and ways of combating it), available at <http://www.acslaw.org/node/7476> (last visited Apr. 9, 2009).

97. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

98. See, e.g., Jon Cohen & Jennifer Agiesta, *3 in 10 Americans Admit to Race Bias: Survey Shows Age, Too, May Affect Election Views*, WASH. POST, June 22, 2008, at A1 (“More than six in ten African Americans now rate race relations as ‘not so good’ or ‘poor,’ while 53 percent of whites hold more positive views”).

the plaintiff and each other—on whether the plaintiff has alleged facts sufficient to show that discrimination plausibly occurred.<sup>100</sup> Indeed, the empirical evidence discussed below lends support to the notion that some federal judges view employment discrimination claims unfavorably.

In sum, despite the transsubstantive<sup>101</sup> nature of the Federal Rules of Civil Procedure, the courts' application of such rules has historically not been even-handed. As gatekeepers, judges may prevent civil rights cases from entering the pipeline on the grounds that a plaintiffs'd factual allegations do not demonstrate plausible discrimination.

The judiciary's renewed opportunity for subjecting employment discrimination complaints to heightened pleading scrutiny creates a risk that efficiency will trump justice. The *Twombly* Court's rationale for the plausibility standard stemmed from its concern about the potentially exorbitant costs of discovery in the large, putative antitrust class action at issue,<sup>102</sup> and the Court's inability to weed out such a case early in discovery if it was groundless.<sup>103</sup> In addition to cost, the Supreme Court was also concerned about potential discovery abuse,<sup>104</sup> despite the fact that the record did not indicate potential ill will or manipulation by the plaintiffs. These concerns suggest that not only judicial economy, but judicial suspicion of plaintiffs and their counsel, influenced the *Twombly* Court.

At this juncture, *Twombly* seems to have created a "notice plus" pleading standard, requiring factual allegations to go beyond Rule 8's mere "notice" pleading, while allowing the allegations to fall short of Rule 9's "particularized notice" pleading requirement.<sup>105</sup> Consequently, federal judges—empowered as gatekeepers—may prevent employment discrimination cases from entering the pipeline on the questionable grounds that an employee's factual allegations do not demonstrate plausible discrimination. In comparison, arbitration is starting not to look so bad.

99. See, e.g., Gary L. Brase & Rebecca L. Miller, *Differences in the Perception of and Reasoning About Quid Pro Quo Sexual Harassment*, PSYCHOL., EVOLUTION & GENDER 3.3, at 241-64 (Dec. 2001), available at [http://www.k-state.edu/psych/research/documents/2001PEG\\_001.pdf](http://www.k-state.edu/psych/research/documents/2001PEG_001.pdf) (last visited Apr. 5, 2009) (demonstrating that women are more likely than men to perceive quid pro quo sexual harassment as a threat than a social exchange).

100. See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 141-42 (July 9, 2007). Moreover, judges may have different views based on the political party affiliation of the President who appointed him or her. See John Friedl & Andre Honoree, Essay, *Is Justice Blind? Examining the Relationship Between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases*, 38 CUMB. L. REV. 89 (2007) (noting statistically significant effect of political party of President who appointed judge on judicial opinions regarding Title VII summary judgment motions).

101. The Federal Rules of Civil Procedure are to be applied uniformly despite the underlying substantive claim.

102. See *Twombly*, 550 U.S. at 558-59. Courts, commentators and scholars are wrestling with *Twombly*'s scope and impact, trying to discern if its reach goes beyond large, discovery-intensive cases such as the antitrust class action at issue in *Twombly* itself. See e.g., Dodson, *supra* note 100, at 141-42; Spencer, *supra* note 82, at 457-60 (arguing that Federal Rules are transsubstantive and therefore, *Twombly* applies to all civil actions in the federal courts).

103. *Twombly*, 550 U.S. at 559.

104. *Id.*

105. See Dodson, *supra* note 100, at 140-41.



### B. Trial

Even if an employee's claim of discrimination survives dismissal on its face, the employee still has the formidable task of succeeding on the merits at trial. The rate of success for employment discrimination claims in the federal district courts, however, is slim. A recent study conducted by Professor Kevin M. Clermont and Dean Stewart J. Schwab, analyzing federal civil cases from 1970 to 2006,<sup>106</sup> paints a bleak picture of how employees challenging workplace discrimination fare in the federal courts today.<sup>107</sup> At the outset, "employment discrimination plaintiffs constitute one of the least successful plaintiff classes at the district court level, in that they win a very small percentage of their actions and fare worse than almost any other category of civil case."<sup>108</sup> From 1979-2006, the plaintiff success rate for employment discrimination cases in federal court was fifteen percent, while the plaintiff success rate for other types of federal cases was fifty-one percent.<sup>109</sup>

Moreover, plaintiffs challenging workplace discrimination have fewer opportunities to resolve their disputes short of trial.<sup>110</sup> While employment discrimination cases settle about seventy percent of the time, their trial rate is higher than that of other cases.<sup>111</sup> Employment discrimination cases also proceed through the litigation process longer; thirty-seven percent of them are resolved early in the process, in comparison to fifty-nine percent for other types of cases.<sup>112</sup> This means that employees who bring claims in federal court may be in it for the long haul. The cost, time, and burdens of civil litigation for employees are significant, and the outcomes are increasingly unsuccessful.

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106. See Empirical Study, *supra* note 2, at 4. The data was collected by the Administrative Office of the United States Courts and assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research. *Id.* "[T]he computerized database, compiled from this information, contains all of the millions of federal civil cases over many years from the whole country." *Id.* This recent study includes five additional years of data from a prior study conducted by the same authors, in which they also concluded employees did not do well in federal court. *Id.* at 1 ("Five years ago we surveyed how employment discrimination plaintiffs fared in federal court. We wrote in summary that they have a tough row to hoe"). See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUDS. 429 (2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=557851](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557851); Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003).

107. See also Stewart J. Schwab, *How Employment Discrimination Cases Fare in the Federal Courts: An Empirical Analysis*, Oct. 1, 2007, report for Mehri & Skalet, PLLC, available at [http://www.hlpronline.com/Vol3.1/Clermont-Schwab\\_HLPR.pdf](http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf) (last visited Apr. 12, 2009) (describing similar results).

108. Empirical Study, *supra* note 2, at 13.

109. *Id.* at 30, 32. Note, however, that plaintiffs in employment discrimination cases, unlike plaintiffs in other cases, do substantially worse in judge trials than jury trials. *Id.* at 34. There is little difference between the win rates in jury trials for employment discrimination and other types of cases. *Id.*

110. *Id.* at 22 ("The data . . . show that employment discrimination plaintiffs manage fewer resolutions early in litigation compared to other plaintiffs, and so they have to proceed toward trial more often"). The authors attribute this to defendants being more resistant to settling employment claims because they know their chances at prevailing in court are good. *Id.*

111. *Id.* at 22, 23.

112. *Id.* at 23.

### C. Appeals

Finally, if an employment discrimination case is appealed by either party, the plaintiff is far more likely to lose. Empirical data shows "that the defendants' reversal rate far exceeds the plaintiffs' reversal rate."<sup>113</sup> In other words, "the appellate courts reverse plaintiffs' wins below far more often than defendants' wins below."<sup>114</sup> Specifically, from 1988-2004, the percentage of appeals reversed after plaintiffs' wins at trial was forty-one percent, while those after defendants' wins at trial was less than nine percent.<sup>115</sup> During that same time period, the percentage of appeals reversed after plaintiffs' wins at a pretrial adjudication was thirty percent, while those after defendants' wins at a pretrial adjudication was eleven percent.<sup>116</sup> In sum, plaintiffs usually lose employment cases at the trial court level, a result likely not to change on appeal.<sup>117</sup> Clermont and Schwab have identified an "anti-plaintiff effect" that they attribute to negative judicial attitudes toward employment cases.<sup>118</sup>

For a plaintiff victorious at trial in an employment discrimination case, the appellate process offers a chance of retaining victory that cannot meaningfully be distinguished from a coin flip. Meanwhile, a defendant victorious at trial can be assured of retaining that victory after appeal. Defendants, in sharp contrast to plaintiffs, emerge from appellate court in a much better position than they were in when they left trial court. In this surprising plaintiff/defendant difference in the federal courts of appeals, we have unearthed an *anti-plaintiff effect* that is troublesome. ... The anti-plaintiff effect on appeal raises the specter that federal appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employers' victories.<sup>119</sup>

The skewed negative outcome for workplace discrimination cases begs the question of why they fare so poorly. An immediate explanation that comes to mind is that perhaps such cases are disproportionately weaker than others. Perhaps these are frivolous lawsuits being appropriately weeded out through the judicial system's checks and balances. This potential explanation is belied by several observations.

First, the vast majority of employment discrimination cases that come up on appeal involve claims of intentional discrimination—which require credibility determinations usually subject to greater deferential review.<sup>120</sup> Given this fact, one would expect the reversal rate for such cases to be lower rather than higher.<sup>121</sup>

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113. *Id.* at 10.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 6.

118. *Id.* at 8-16; *see also id.* at 13 ("We have argued elsewhere that an attitudinal explanation of the anti-plaintiff effect is most persuasive") (citing studies).

119. *Id.* at 13, 15-16.

120. *Id.* at 13.

121. *Id.* at 13, n.34.

Second, there is no reason to believe that plaintiffs' employment attorneys—who labor under the same economic pressures to succeed under contingency fee agreements—are more inclined to bring frivolous cases than other plaintiffs' attorneys.<sup>122</sup> Employment lawyers can no more afford to bring frivolous litigation or be less selective than anyone else. This suggests that employment cases coming into the pipeline are as rigorously selected as other types of cases. Third, those cases that survive the gauntlet of procedural hurdles—motion to dismiss, summary judgment, and trial—and do not settle are non-frivolous, close matters that one would expect could go either way: reversal or affirmance.<sup>123</sup> In light of this backdrop, an “anti-plaintiff” attitude<sup>124</sup> is a plausible explanation for the alarming reversal rate plaintiffs experience in workplace discrimination cases.<sup>125</sup>

### D. Exhaustion of Administrative Remedies

Finally, employees may not be afforded the opportunity to avoid such litigation hurdles by early investigation and conciliation of their employment discrimination claims. The EEOC—the administrative agency tasked with such early intervention—has been underfunded and overburdened for over a decade. As discussed more fully at Part IV.B.3.b *infra*, this “resource starved” institution’s ability to effectively address workplace disputes prior to civil filing has been severely compromised.<sup>126</sup>

122. *Id.* at n.34.

123. *Id.* at n. 34.

124. *Id.* at 13-14.

125. Empirical studies comparing the outcomes between arbitration and the court system for employees are rare and present mixed results. See Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, *supra* note 8, at 88 & n.30, n.31; Peter B. Rutledge, *Whither Arbitration?* 6 GEO. J. OF L. & PUB. POL’Y 549, 556-60 (2008) (citing various empirical studies); Richard Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceañera*, 81 TUL. L. REV. 331, 342 (2006) (“The early debate over employment occurred in a vacuum, with both proponents and critics making policy arguments without empirical support”); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105 (2003) (summarizing empirical studies); Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, *supra* note 8, at 1658-61; Samuel Estreicher, Michael Heise & David Sherwyn, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1564-66 (2005) (discussing difficulty in making empirical comparisons between arbitration and litigation). See, e.g., The National Workrights Institute, *Employment Arbitration; What Does the Data Show*, available at [http://www.workrights.org/current/cd\\_arbitration.html](http://www.workrights.org/current/cd_arbitration.html) (last visited Apr. 5, 2009); Christopher R. Drahozal, Symposium, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813 (2008); *Megacases*, *supra* note 11, at 43 (“employees win in arbitration slightly more than half the time”) (citing Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 ABA LITIGATION SECTION CONFLICT MANAGEMENT (Winter 2003), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf>, at 5 (last visited Apr. 5, 2009)); Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL’Y REV. 573, 589 (2005); William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 1995 J. DISP. RESOL. 40 (comparing employment litigation and arbitration outcomes). Cf. Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum’s Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1. Given the confidentiality of many arbitration agreements, obtaining such data is difficult.

126. Steve Vogel, *EEOC Struggles With Huge Workload, Diminished Staff*, WASH. POST, Feb. 2, 2009.

Given the troubling federal judicial landscape, the time may be ripe to consider an alternative. That alternative, however, should not be mandatory pre-dispute arbitration. Obviously, neither compulsory pre-dispute arbitration, nor the federal forum, is a perfect system. Therefore, it behooves employees and employers to consider another dispute resolution process. One-way binding arbitration, which was first adopted by Texaco,<sup>127</sup> and subsequently implemented by Coke, offers employees involved in workplace disputes the benefits of arbitration without some of the baggage.

#### IV. ONE-WAY BINDING ARBITRATION AS A BETTER ALTERNATIVE

##### A. Coke's Solutions Program

##### 1. Background of the Coke Employment Discrimination Settlement

On April 23, 1999, four named plaintiffs, representing a class of 2,200 current and former salaried, African-American employees of the Coca-Cola Company, filed a class action in the Northern District of Georgia against their employer.<sup>128</sup> The case was one of the largest employment race discrimination cases in United States history at the time.<sup>129</sup> The plaintiffs alleged race discrimination in salaries, promotions, and performance evaluations.<sup>130</sup> More specifically, the plaintiffs alleged significant pay disparities between African-American and white employees,<sup>131</sup> "glass ceilings"<sup>132</sup> that kept African-Americans from holding upper

127. The Coke settlement was modeled after the settlement with Texaco, which provided \$176 million and extensive programmatic relief. At the time, Texaco was the largest employment discrimination settlement in U.S. history. Texaco's settlement was surpassed in monetary and programmatic relief by the Coke settlement. See Sarah Schafer, *Coke to Pay \$193 Million in Bias Suit; Black Employees Sought Damages*, WASH. POST, Nov. 17, 2000, at A1 (Plaintiffs' attorney Pamela Coukos describing the Coke settlement as a "sister settlement" to Texaco, but one with more power); *Interview with Cyrus Mehri*, Corporate Crime Reporter, Nov. 27, 2000 (Plaintiffs' attorney Cyrus Mehri says, "What we got from Texaco on the programmatic side was considered unprecedented – and we were told it would never happen again. In Coca-Cola, we got Texaco plus").

Following Texaco's settlement, the company created a *Solutions* program which encompassed one-way binding arbitration. See *Texaco Solutions Brochure* (provided by Joseph P. Moan, Coca-Cola Senior Management Counsel, Employment Law) (on file with author) [hereinafter *Texaco Solutions Brochure*] at 3, 11. The *Solutions* program was created by Texaco, but fell under the review of an independent Equality and Tolerance Task Force. See *Roberts v. Texaco, Inc.*, Stipulation and Settlement Agreement, 94-Civ. 2015, 11, 13-14 (S.D.N.Y. Jan. 21, 1997) (on file with author). The settlement agreement did not require the company to create *Solutions*, or to provide one-way binding arbitration. In terms of problem resolution, the settlement only required Texaco to "[d]evelop and implement an ombudsperson program" and to "[d]evelop recommendations for the creation and implementation of a mechanism to minimize fear of retaliation in connection with complaints of employment discrimination." *Id.* at 11-12.

128. See *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 687, 697 (N.D. Ga. 2001).

129. Sakina Spruell, *A Company in Recovery: Coca-Cola from Discrimination Suit to Diversity Leader*, DIVERSITYINC Jan./Feb. 2007, 20, 21.

130. *Ingram*, 200 F.R.D. at 687.

131. Nikhil Deogun, *A race-bias suit tests Coke: Can the Real Thing do the right thing?*, WALL ST. J., May 18, 1999, at B1.

132. Laura Pearlman, *Motisola Malikha Abdallah, et al. v. The Coca Cola Company; Keeping Tabs on Coca-Cola*, AM. LAW., July 1999, at 38.

management-level positions, and “glass walls”<sup>133</sup> that kept African-Americans from certain fields within management. Moreover, plaintiffs contended that the company had been put on notice of these problems since 1995, but failed to act.<sup>134</sup>

A number of significant developments ensued which ultimately led the parties to settle.<sup>135</sup> On January 25, 2000, the court ordered the parties into non-binding mediation.<sup>136</sup> On June 14, 2000, the parties reached a tentative settlement,<sup>137</sup> and

133. Daniela Deane, ‘Bus Ride for Justice’ Targets Coke; Black Employees Say They Are Denied Raises, Promotions, WASH. POST, Apr. 18, 2000, at E1; Henry Unger, *Discrimination Lawsuit; Coca-Cola Accused of ‘Companywide Pattern,’* ATLANTA J.-CONST., Apr. 24, 1999, at H1.

134. *Ingram*, 200 F.R.D. at 701. Senior Vice-President, Carl Ware, the highest ranking African-American in the company at the time, wrote an internal report to Coke’s CEO, Douglas Ivester, recommending diversity initiatives and raising disparities between African-Americans and whites in the company. See Nikhil Deogun, *Coke was told in ‘95 of need for diversity*, WALL ST. J., May 20, 1999, at A3; Henry Unger, *Confidential Coke documents released*, ATLANTA J.-CONST., Feb. 10, 2000, at E1 (providing a description and excerpt of the Ware Report).

135. On June 4, 1999, the court ordered the company to turn over its workforce database and documents. See Bill Rankin, *Coke ordered to surrender database*, ATLANTA J.-CONST., June 9, 1999, at D3. In July, the plaintiffs survived a dismissal of the class action claims. See Henry Unger, *Class-action part of Coca-Cola suit is not dismissed*, ATLANTA J.-CONST., July 16, 1999, at F1. In October 1999, plaintiffs’ counsel accused the company of document destruction. See Henry Unger, *Coca-Cola denies it shredded documents*, ATLANTA J.-CONST., Oct. 1, 1999, at E1; Constance L. Hays, *Coca-Cola reaches a settlement with some workers in bias suit*, N.Y. TIMES, June 15, 2000, at C1 (discussing document destruction accusations).

Months later, CEO Ivester demoted Ware, the highest ranking African-American, prompting Ware’s resignation. Ivester announced his own retirement following a board meeting and Ware delayed his retirement. Douglas Daft became the new CEO. See Randall L. Waller & Nicola Graves, *The Corporate Web Site as an Image Restoration Tool: The Case of Coca-Cola*, published in PROCEEDINGS OF THE 2004 ASSOCIATION FOR BUSINESS COMMUNICATION ANNUAL CONVENTION 37, App. at 53 (Jeanette S. Martin ed., 2004); Ann Harrington, *Prevention is the Best Defense; Coke Dithered, Blundered, then Settled. Now, at Last, It’s Trying to Change Its Culture*, FORTUNE, July 10, 2000, at 188.

In 2000, African-American workers started mobilizing and organizing around the case – meeting, rallying, and preparing for a nationwide boycott of Coke products. See Henry Unger, *Coke employees begin to mobilize*, ATLANTA J.-CONST., Feb. 29, 2000, at C1; Henry Unger, *Coke changes waiver stance, laid-off workers can receive enhanced benefits and participate in race bias suit*, ATLANTA J.-CONST., Mar. 4, 2000, at F1; Shelia M. Pool, *Laid-off Coke workers rally for fair treatment*, ATLANTA J.-CONST., Mar. 5, 2000, at F2; Henry Unger, *Coke signals a desire to settle lawsuit*, ATLANTA J.-CONST., Mar. 8, 2000, at F1; Constance L. Hays, *Coke’s black employees step up pressure to resolve a racial discrimination lawsuit*, N.Y. TIMES, Mar. 23, 2000, at C1; Constance L. Hays, *Group of black employees calls for boycott of Coca-Cola products*, N.Y. TIMES, Apr. 20, 2000, at C1. These forces came to a head, leading the parties to settle:

In early 2000, public pressure for a settlement mounted. A former Coca-Cola manager, Larry [Jones], took thirty Coca-Cola employees with him on a bus ride from Atlanta, Georgia, to the shareholders’ meeting in Wilmington, Delaware, to threaten a boycott of Coca-Cola products unless Coca-Cola addressed its record on diversity and fair treatment. The Reverend Jesse Jackson also spoke to the audience at the shareholders’ meeting to pressure Coca-Cola to settle. Less than two months after this meeting, the plaintiffs and Coca-Cola reached an agreement to settle in principle and then spent four more months hammering out the details of the settlement, which was announced in November of 2000.

*Megacases*, *supra* note 11, at 400-401.

136. See Henry Unger, *Coke Suit Mediation Ordered*, ATLANTA J.-CONST., Feb. 9, 2000, at D1.

137. *Ingram*, 200 F.R.D. at 687. See Constance L. Hays, *Coca-Cola reaches a settlement with some workers in bias suit*, N.Y. TIMES, June 15, 2000, at C1; Henry Unger, *Coke talks were ‘intense,’ mediator says; Skilled Diplomacy: Veteran intermediary Hunter Hughes calls it the most difficult case he’s had*, ATLANTA J.-CONST., June 18, 2000, at G1 (describing dramatic moment where plaintiffs’ attorneys called their paralegals minutes before deadline to stop them from filing class certification brief with 30 boxes of documents because of settlement reached); *Interview with Cyrus Mehri*, *supra* note 127 (describing same).

on November 16, 2000, the parties announced the final settlement terms.<sup>138</sup> The U.S. District Court for the Northern District of Georgia approved the settlement agreement on June 7, 2001.<sup>139</sup> The settlement provided \$192.5 million—the largest monetary settlement in a race discrimination case in the country at that time—and extensive programmatic relief that linked diversity to business goals and bonuses.<sup>140</sup> The settlement covered various human resources practices and procedures, organized into nine systems.<sup>141</sup> The extensive programmatic relief and oversight led the judge, mediator, and parties to praise it as an historic and groundbreaking result.<sup>142</sup> The work of the independent Task Force that supervised the settlement, described *infra*, impacted all of the roughly 7,000<sup>143</sup> non-hourly

138. *Abdallah v. The Coca-Cola Co.*, No. 1-98-CV-3679 (RWS), The Class Representatives' Motion for Approval of Settlement and Brief in Support, 2001 WL 36041527 (N.D. Ga. May 22, 2001). Henry Unger, *Coke agrees to employment review*, ATLANTA J.-CONST., Nov. 16, 2000, at A1. The court preliminarily approved of the settlement agreement on Dec. 22, 2000. See *Abdallah v. The Coca-Cola Co.*, No. 1-98-CV-3679 (RWS), The Class Representatives' Motion for Approval of Settlement and Brief in Support, 2001 WL 36041527 (N.D. Ga. May 22, 2001); Russell Grantham, *Coca-Cola employees get lawsuit deadline*, ATLANTA J.-CONST., Dec. 23, 2000, at F1 (describing preliminary approval).

139. *Ingram*, 200 F.R.D. at 702. See *Judge to Approve Coke Settlement*, AP ONLINE, May 30, 2001; Henry Unger, *Judge OKs Coke bias settlement; \$192.5 million deal sets new diversity goals*, ATLANTA J.-CONST., May 30, 2001, at A1.

140. See Coke Fifth Task Force Report, *supra* note 1, at 5, 70 (Coke committed to a corporate "culture by designing and implementing a comprehensive strategy that links diversity to business goals and makes diversity a business imperative"); *Megacases*, *supra* note 11, at 403, n. 245 ("In 2007, the company stated that twenty percent of management bonuses are tied to diversity results") (citing DIVERSITYINC, *Top 50 for Diversity Profiles*, No. 4: *The Coca-Cola Company*, available at <http://www.diversityinc.com/public/1801.cfm>).

141. These include: performance management, staffing, compensation, diversity education, EEO, career development, succession planning, mentoring and problem resolution. Alexis M. Herman, et al., *Ingram v. The Coca-Cola Co.*, No. 1-98-CV-3679 (N.D. Ga.) [hereinafter *Coke First Task Force Report*], at 6.

142. In approving the settlement agreement, the court described Coke's commitment to the agreement and its Statement of Principle as "historic," and noted that "the possibilities for change and for improving the lot of all employees at Coca-Cola are tremendous." *Id.* at 1 (quoting Transcript of May 29, 2001 Fairness Hearing, at 214). The mediator for the settlement, Hunter Hughes, echoed the court's sentiment:

In my experience, the programmatic relief required by the Coke settlement is unique and groundbreaking. It calls for an analysis and potential revamping of virtually all aspects of Coke's personnel practices by independent professionals, with further direct oversight and input from a separate independent task force.

Henry Unger, *Coke agrees to employment review; details of settlement due today*, ATLANTA J.-CONST., Nov. 16, 2000, at A1. See James P. Miller, *Bias case costs Coke record \$192.5 Million; 'There's going to be fundamental change,' says former worker*, CHI. TRIB., Nov. 17, 2000, at N1 (Plaintiffs' attorney, Cyrus Mehri, described it as "perhaps the largest and most sweeping settlement in a race discrimination class-action in U.S. history"); Davan Maharaj, *Coca-Cola to settle racial bias lawsuit; Workplace: Soft drink giant agrees to pay \$192.5 million over allegations it treated blacks unfairly*, L.A. TIMES, Nov. 17, 2000, at A1 (Coke Chairman Douglas Daft described it as "meaningful, constructive and equitable to all parties. . . . It will be a process that continues forever.").

143. Harry R. Weber, *Judge encourages Coke to keep new diversity*, ASSOCIATED PRESS, Dec. 2, 2006. The Task Force's First Annual Report identified 6,864 employees covered by the consent decree (Coca-Cola Company's non-hourly U.S. workforce). *Coke First Task Force Report*, *supra* note 141, at 11; see also *Coke Fifth Task Force Report*, *supra* note 1, at 13. By the time the Task Force published its fifth and final report, that number had gone down 5 percent to a total of 6,557 employees as of Sept. 30, 2006. *Id.* at 13. The Task Force's final report, issued on Dec. 1, 2006, described the workforce demographics as follows:

employees of the Coca-Cola Company based in the United States from April 22, 1995, to June 14, 2000.<sup>144</sup>

## 2. The Task Force

In addition to the extensive programmatic relief, the agreement established an external seven-member Task Force that provided independent oversight of Coke's compliance with the agreement over a four-year period.<sup>145</sup> At the request of Coke in December 2004, the Task Force went on to serve an additional year.<sup>146</sup> The Task Force enjoyed extensive power to ensure compliance.<sup>147</sup> Specifically:

The Task Force [was] empowered to evaluate the Company's human resources policies and practices, recommend any necessary improvements to those policies and practices, monitor Coca-Cola's practices for the duration of the Agreement, investigate complaints, and provide periodic written reports on the Company's progress toward the terms of the Agreement.<sup>148</sup>

The Task Force was comprised of three members chosen by each party, and the chairperson, former Secretary of Labor, Alexis M. Herman, whom both parties selected.<sup>149</sup> The Task Force, approved of by the court, consisted of top leaders in diverse fields,<sup>150</sup> and was guided by court-appointed human resources experts, Dr.

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[S]ince our 2005 report, the workforce has remained roughly half female and a third minority, with approximately two-thirds of the minority workforce being African-American. However, over the entire course of the Settlement Agreement, the relative percentage of minorities in the workforce has increased by a fifth, from approximately 29% in December 2000 to 35% as of September 2006. Over half of the gain in minority representation was made by African Americans.

Coke Fifth Task Force Report, *supra* note 1, at 13, T.1. While all of the roughly 7,000 non-unionized employees were the beneficiaries of the broad programmatic relief, only class members were eligible for monetary relief. Out of a class of 2,201 members, the overwhelming majority, 2,191, received monetary relief. *See id.* at 59.

144. Employees covered by the Agreement work for one of the three major business units of the Coca-Cola Company: Corporate, Coca-Cola North America ("CCNA"), and The Minute Maid Company ("TMMC"). Coke First Task Force Report, *supra* note 141, at 1.

145. *See* Henry Unger, *Judge instructs Coke Task Force*, ATLANTA J.-CONST., Aug. 22, 2001, at D3 (Judge Richard Story explained to Task Force, "You do not represent the Coca-Cola Co. You do not represent any Coca-Cola employee. You represent the court." He further informed the Task Force that their recommendations "shall be implemented, unless I rule otherwise").

146. Coke Fifth Task Force Report, *supra* note 1, at 2; Alexis M. Herman, et al., *Ingram v. The Coca-Cola Co.*, No. 1-98-CV-3679 (N.D. Ga. Dec. 1, 2005) [hereinafter *Coke Fourth Task Force Report*], at 3.

147. The recommendations of the Task Force were binding on the company, unless Coke sought judicial relief. *See* *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 688 (N.D. Ga. 2001).

148. Coke First Task Force Report, *supra* note 141, at 1.

149. *See* Jonathan D. Glater & Greg Winter, *Coca-Cola selects former Labor Secretary to lead diversity task force*, N.Y. TIMES, Mar. 16, 2001, at C1; Henry Unger, *Ex-Labor Chief to head Coke diversity panel*, ATLANTA J.-CONST., Mar. 15, 2001, at A1.

150. At the time the Task Force was created, it was comprised of:

- M. Anthony Burns: Chairman of Ryder System, Inc., member of Board of Directors of Chase Manhattan
- Gilbert F. Casellas: President and CEO of Q-LINX Inc., former chair of the EEOC
- Edmund D. Cooke, Jr.: partner at Winston & Strawn law firm, labor and employment lawyer

Irwin Goldstein<sup>151</sup> and Dr. Kathleen Lundquist,<sup>152</sup> who identified "best practices"<sup>153</sup> and guided the company in its commitment to go beyond this to achieve the "Gold Standard" in human resources.<sup>154</sup>

The Task Force relied on various sources of qualitative and quantitative information in its analysis of Coke's compliance with the settlement agreement and the efficacy of its human resources systems. Specifically, Coke used an employee engagement survey to assess how employees felt about the systems put in place.<sup>155</sup> The company's May 2002 employee engagement survey was the baseline to which every subsequent year was compared.<sup>156</sup>

For the first year, the Task Force "focused principally on ensuring that the Company *designed* the best human resources systems possible for Coca-Cola employees."<sup>157</sup> The Task Force's first annual report, covering July 2001 through June 30, 2002, set forth the design of the nine human resources processes, and baseline data, from which subsequent comparisons could be made.<sup>158</sup> In the

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- Marjorie Fine Knowles: law professor, Georgia State University Law School
  - Bill Lann Lee: former Assistant Attorney General for Civil Rights at the Justice Department, former Western Regional Counsel for the NAACP Legal Defense Fund
  - René A. Redwood, former Special Assistant to Secretary of Labor Robert Reich, Executive Director of the Presidential Glass Ceiling Commission

See Henry Unger, *Coke completes diversity task force*, ATLANTA J.-CONST., July 3, 2001, at D3; *Megacases*, *supra* note 11, at 401.

151. At the time, Dr. Irwin Goldstein, an industrial psychologist, was the Dean of the College of Behavioral Sciences at the University of Maryland. Coke First Task Force Report, *supra* note 141, at 5. Prior to his becoming dean, he served as an assistant professor at Ohio State University and then professor at the University of Maryland, College Park. He received, among other awards, the University of Maryland President's Medal for "extraordinary contributions to the intellectual, cultural and social life of the University." See Universities at Shady Grove Board of Advisors Biography for Dr. Irwin Goldstein, Senior Vice Chancellor of Academic Affairs, University System of Maryland, <http://www.shadygrove.umd.edu/leadership-committees/boa/member-list/bios/dr-irwin-goldstein.cfm> (last visited Apr. 5, 2009).

152. At the time, Dr. Kathleen K. Lundquist, an industrial psychologist, was a national expert in human resources processes. Coke First Task Force Report, *supra* note 141, at 5. She is co-founder and president of Applied Psychological Techniques, Inc., and recipient of the National Association of Women Business Owners-CT 2002 Woman Business Owner of the Year Award. She has been consulting Fortune 100 employers on the design and implementation of their H.R. processes for over twenty-five years. See <http://www.aptmetrics.com/people/management/klundquist.asp> (last visited Apr. 5, 2009); [http://www.eoc.gov/abouteeoc/meetings/5-16-07/lundquist\\_bio.html](http://www.eoc.gov/abouteeoc/meetings/5-16-07/lundquist_bio.html) (last visited Apr. 5, 2009).

153. Coke Fifth Task Force Report, *supra* note 1, at 2. While the term "best practices" has been defined as "those technical, business, and management practices that have proven successful and are used by a large number of companies in an industry," Michael D. Scott, *Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?* 67 MD. L. REV. 425, 446 (2008), its precise meaning remains obscure. David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 307-308 (2006). More specifically:

Although agencies increasingly operate through best practices, the term has never been defined with precision. Congress has not weighed in on its exact meaning. The Supreme Court has not either, though it has heard cases that turned in part on the meaning of best practices. Nor does the term have a standard definition in the business management context where it originated; nor do agencies themselves, in most cases, define how to identify a best practice.

*Id.*

154. Coke Fifth Task Force Report, *supra* note 1, at 3, 7.

155. Coke First Task Force Report, *supra* note 141, at 7.

156. *Id.* at 7.

157. *Id.* at 8.

158. *Id.*



second report (covering July 1, 2002, through September 30, 2003), third report (covering October 1, 2003, through September 30, 2004), and fourth report (covering October 1, 2004, through September 30, 2005), the Task Force turned to “monitoring the implementation and effectiveness of these systems to ensure that they were working as designed and that progress was being made.”<sup>159</sup> In its fifth and final report (covering October 1, 2005, through September 30, 2006), the Task Force focused on the extent to which Coke institutionalized the principles of the settlement agreement generally throughout the company, particularly within middle management and all aspects of human resources.<sup>160</sup> In this final report, the Task Force’s assessments and recommendations emphasized how Coke’s restructured personnel practices could be sustainable in the long run and ultimately become embedded in the company’s culture.<sup>161</sup>

### 3. Coke’s Problem Resolution System

Following the settlement, Coke developed an internal mechanism—which could be initiated by the employee—for resolving workplace disputes. The settlement agreement memorialized Coke’s commitment not to retaliate against employees who challenged its employment practices,<sup>162</sup> and to establish an internal complaint mechanism comprised of a toll-free hotline,<sup>163</sup> an Ombudsperson,<sup>164</sup>

159. Alexis M. Herman, et al., *Ingram v. The Coca-Cola Co.*, No. 1-98-CV-3679 (N.D. Ga. Dec. 1, 2003) [hereinafter *Coke Second Task Force Report*], at 2-3; Alexis M. Herman et al., *Ingram v. The Coca-Cola Co.*, No. 1-98-CV-3679 (N.D. Ga. Dec. 1, 2004) [hereinafter *Coke Third Task Force Report*], at 3; *Coke Fourth Task Force Report*, *supra* note 146, at 3 (“the Task Force continues its emphasis on effective implementation of programs and evaluates the Company’s efforts toward sustainability of these programs”).

160. *Coke Fifth Task Force Report*, *supra* note 1, at 3.

161. *Id.* at 4.

162. *Abdallah v. The Coca-Cola Company*, Settlement Agreement, No. 1-98-CV-3679 (N.D. Ga. Nov. 20, 2000) [hereinafter *Coke Settlement Agreement*], at 6. Section II.C. “Non-Retaliation” states, “Coca-Cola reaffirms its commitment and acknowledges its legal obligation not to retaliate against persons participating in this lawsuit, asserting claims of unlawful discrimination against it or those who assist them in doing so.”

163. *Coke Settlement Agreement*, *supra* note 162, at 22, Section II.D.7.i. “Ombuds Function” states: Coca-Cola will establish a 1-800 phone number (operational 24 hours a day, 7 days a week) and retain an independent entity or individual to receive complaints of discrimination, harassment, and/or retaliation. This independent entity or individual will refer all reports or complaints to an internal Ombudsperson . . . .

164. *Coke Settlement Agreement*, *supra* note 162, at 22-23, Section II.D.7.i. “Ombuds Function” sets forth the terms of the Ombudsperson’s feature of the settlement:

[The] Ombudsperson [] will be responsible for: (1) ensuring that each report and complaint is appropriately investigated; (2) monitoring the investigations, and (3) reporting the results of each investigation to the appropriate management officials. Coca-Cola will promptly select a candidate for the Ombudsperson position and notify Settlement Class Counsel who may, within 5 business days, comment on the candidate’s qualifications. The final decision as to who fills the position will be made by Coca-Cola. The Ombudsperson will be (or become) a Coca-Cola employee at not less than Salary Grade 12. Such person may be removed from his or her position by the Company for: (1) failure to achieve a MR [meets requirements] performance rating or higher (or its future equivalent), (2) good cause, or (3) a Code of Business Conduct violation. Removal may also be recommended by the Task Force. The Ombudsperson will report directly to the CEO. The Ombudsperson will make periodic status reports to the Vice-President of Human Resources and the Task Force, as well as an annual status report to the CEO and the Public Issues and Diversity Review and Compensation Committees of the Board of Directors.

and an independent Task Force.<sup>165</sup> The Task Force called this programmatic relief Problem Resolution, one of the nine human resource systems<sup>166</sup> addressed in the consent decree. Problem Resolution—defined as “the methods for internally surfacing, investigating and resolving employee complaints”<sup>167</sup>—evolved over time, as Coke continued to develop various methodologies for addressing complaints. In each of its five yearly reports, the Task Force described the status of Problem Resolution’s design, implementation, and monitoring.

Coke called its first attempt at designing and implementing a Problem Resolution program the *Solutions* program. Class counsel played no role in the creation of *Solutions*.<sup>168</sup> Rather, *Solutions* was created entirely by the company, and fell under the independent review of the Task Force.<sup>169</sup> While some of the features of the initial *Solutions* program were required by the settlement agreement (such as the Ombudsperson and hotline described below), much of the program went far beyond what was required. The *Solutions* program provided employees with a “variety of approaches or vehicles by which to resolve problems”<sup>170</sup> and was comprised of five components: 1) the Open Door process, 2) the Employee Resolution Department; 3) an Ombuds Director, 4) the Employee Reporting Service (“ERS”) or hotline, and 5) the Employee Assistance Program (“EAP”).<sup>171</sup> Coke designed this initial *Solutions* program<sup>172</sup> to give employees an opportunity to resolve disputes with managers in a timelier manner, with greater options, without fear of retaliation, and with more management accountability.<sup>173</sup> The Open Door process gave each non-unionized employee an opportunity to resolve workplace issues directly with his or her manager, and if necessary, with managers one or two steps above.<sup>174</sup> If that effort proved unsuccessful, an employee could seek help from the Employee Resolution Department (in the Corporate Human Resources Department) with investigating and resolving the dispute.<sup>175</sup> The

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Coke Settlement Agreement, *supra* note 162, at 22-23.

165. Coke Settlement Agreement, *supra* note 162, at 23, Section II.D.7.j. “EEO Compliance and Response to Discrimination and Retaliation Complaints” states:

The Task Force, in conjunction with the Ombudsperson, shall ensure that all complaints of discrimination and retaliation are fully and fairly investigated, according to appropriate written guidelines, by adequately trained personnel, utilizing written record-keeping, and with written dispositions reflecting appropriate remedies. The Task Force, in conjunction with the Ombudsperson, shall ensure that Coca-Cola institutionalizes effective responses to discrimination complaints, through its procedures, reporting and monitoring, and any necessary training programs.

... The Task Force, in conjunction with the Ombudsperson, may evaluate whether implementing an ADR procedure would improve reporting and response.

Coke Settlement Agreement, *supra* note 162, at 23 (emphasis added).

166. See Coke First Task Force Report, *supra* note 141, at 6.

167. Coke Fifth Task Force Report, *supra* note 1, at 9.

168. E-mail from Cyrus Mehri, plaintiff’s counsel, Mehri & Skalet, PLLC, to Suzette M. Malveaux (Apr. 6, 2009) (on file with author).

169. *Id.*

170. Coke First Task Force Report, *supra* note 141, at 31.

171. *Id.* at 31.

172. “The company designed the process after the settlement. The process was designed – after extensive benchmarking and best practice research and in consultation with the Task Force and Joint Experts.” E-mail from Joseph P. Moan, Coca-Cola Company Senior Management Counsel, Employment Law to Suzette M. Malveaux (Mar. 5, 2009) (on file with author).

173. Coke First Task Force Report, *supra* note 141, at 31.

174. *Id.*

175. *Id.*

employee also had at his disposal the Ombuds Office (a confidential, neutral party available for consultation, who met monthly with the CEO)<sup>176</sup> and the ERS (an independent, anonymous toll-free number that received complaints and forwarded them to the Ombuds Office).<sup>177</sup> Lastly, the EAP served as a mechanism that provided professional counseling for employees.<sup>178</sup>

While the Task Force concluded in its first annual report that “[t]he design, planning and initial implementation” of the Problem Resolution System met the Task Force’s expectations under the settlement agreement, it conceded that communication, monitoring, and evaluation would be critical to the program’s success.<sup>179</sup> Even though the Task Force initially found that “[d]ata from the employee engagement survey indicate that employees generally view these systems positively”—with African-Americans and Hispanics viewing them more favorably than whites<sup>180</sup>—it also noted that many employees might not even be aware of the components in place.<sup>181</sup> At this juncture, the company had yet to implement the mediation and arbitration components, although the possibility of their inclusion was being explored.<sup>182</sup>

Coke’s Problem Resolution Program changed over the course of the settlement compliance period. In July 2003, the company announced the hiring of a Chief Ethics and Compliance Officer to head its Compliance Office, which began developing the mediation and arbitration piece of *Solutions*.<sup>183</sup> By spring of 2004, Coke unveiled a new *Solutions* program that included mediation and arbitration for the first time.<sup>184</sup> As of October 2005, Coke’s reorganized program consisted of three primary components: the revised *Solutions* Program, discussed below, an Ombuds Office, and an Employee Reporting Service (“ERS”)(or hotline).<sup>185</sup> Accompanying the new program was a “major communications effort” that emphasized both the various avenues by which an employee could raise workplace issues and the importance of the Ombuds Office—a requirement of the settlement agreement.<sup>186</sup>

#### 4. Coke’s Revised Solutions Program

Coke created the new *Solutions* program to be one of the primary means by which employees could register workplace concerns with the company and to “provide for the quick and fair resolution of issues” between the company and its

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 32.

180. The terminology used to describe the racial classifications are those used by the Task Force in its reports.

181. *Id.* (“[D]ata indicated that many employees might not be aware of the availability of these systems. That is somewhat understandable as many of these systems are new, but large numbers of employees were not aware even of the ‘Open Door Process’”).

182. *Id.*

183. Coke Third Task Force Report, *supra* note 159, at 46.

184. *Id.* at 46, 47; Coke Fourth Task Force, *supra* note 146, at 44.

185. Coke Fifth Task Force Report, *supra* note 1, at 45-46.

186. *Id.* at 46.

employees.<sup>187</sup> The program is based on the notion that internal, early, and open communication is the best way to "maintain a positive, productive working environment," and that only if the internal process fails should the parties seek help from a neutral outside source.<sup>188</sup> According to the company: "Participation in *Solutions* does not preclude an employee from pursuing any available legal remedy; *Solutions* is not intended either to restrict or expand the employee's or the Company's legal rights."<sup>189</sup>

The *Solutions* program is comprised of five steps that a non-unionized employee with a workplace dispute is required<sup>190</sup> to utilize in the following order:<sup>191</sup> 1) Open Door, 2) Facilitation, 3) Written Appeal, 4) Mediation, and 5) Arbitration.<sup>192</sup> The first three steps are designed to internally resolve workplace problems employees have with management, with the help of Human Resources, and a Program Manager in the company's Diversity & Workplace Fairness Office.<sup>193</sup> The company's expectation is that the "vast majority of issues will be resolved satisfactorily" here.<sup>194</sup> Because of the informal and cooperative nature of the first three steps, neither party is permitted to have an attorney during these steps, unless required by law.<sup>195</sup>

The Open Door policy is just that. Immediate managers have an open door policy that enables employees to speak directly to their immediate managers or their supervisors,<sup>196</sup> about workplace issues.<sup>197</sup> The employee's Human Resources

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187. Coke Rules, *supra* note 5, at 1.

188. *Id.*

189. *Id.* at 8. Moreover, the parties are not foreclosed from seeking emergency relief from the courts until the issue is resolved through *Solutions*. *Id.* For example, a party may seek a temporary restraining order or preliminary injunction prior to exhausting *Solutions*. *Id.*

190. *See id.* at 10, Section 12, "Consent," at 10 ("Employment or continued employment after the Effective Date of *Solutions* constitutes consent by the employee to participate in *Solutions*, both during the employment and after termination of employment").

191. *Id.* at 4-7. There are some exceptions to this. The seriousness of a workplace issue may justify the expediting or skipping the Open Door process altogether and going directly to Facilitation or Written Appeal for a formal investigation. *Id.* at 4. For example, harassment may require more immediate action, regardless of the status of Open Door discussions. *Id.* The Diversity & Workplace Fairness Office has the discretion to make these decisions. *Id.*

Concomitantly, the Diversity & Workplace Fairness Office Program Manager may delay the employee's moving from one step to the next if she deems it appropriate. *Id.* at 5.

The Program Manager may determine that further proceedings under the Open Door process would be helpful to resolution of the dispute and ask for such further steps as a prerequisite to Facilitation. . . . Facilitation will be deemed complete when either: 1) the issue is resolved, or 2) the Program Manager has determined that Facilitation would no longer be useful.

*Id.*

The employee also has the obligation to move his or her issue expeditiously through the *Solutions* process. *See id.* at 8 ("At the end of each step of *Solutions*, an employee who desires to move to the next step must make the request within 30 days, unless there are extenuating circumstances that, in the judgment of the Program Manager, justify an extension of this deadline").

Former employees raising legal disputes may proceed directly to the Mediation and Arbitration steps of *Solutions*. *Id.* at 7.

192. *Id.* at 1.

193. *Id.*

194. *Id.* at 7.

195. *Id.* at 9.

196. Where it is not feasible or appropriate to contact the immediate manager, the employee can, in consultation with the Human Resources representative, negotiate instead with managers up to two additional levels above. *Id.* at 4.

197. *Id.*

representative is there to aid the dialogue, which should occur within forty-eight hours of contact, and lead to a resolution after ten days.<sup>198</sup>

In the event that the problem is not resolved through Open Door, the employee may proceed to Facilitation, where the employee openly discusses the issue with the relevant manager(s), a Program Manager from the Diversity & Workplace Fairness Office, and Human Resources representatives.<sup>199</sup> An investigation may also take place.<sup>200</sup> The goal of the process is to be “informal and expeditious.”<sup>201</sup>

If the employee remains unsatisfied, he or she may proceed to step three and file a Written Appeal to the Senior Management Panel.<sup>202</sup> Upon receiving a Written Appeal, the Diversity & Workplace Fairness Office will hold a hearing within sixty days to resolve the dispute.<sup>203</sup> The employee has the right to appear at the hearing and make a statement or answer questions.<sup>204</sup> A manager also provides the employee with a written explanation for the underlying employment decision at issue.<sup>205</sup> After the hearing, the Senior Management Panel makes the final, internal determination based on documentation provided through the prior steps, the results of investigations, and any additional information.<sup>206</sup> The panel issues a written decision to the employee, with an explanation for the decision and for any relief provided.<sup>207</sup>

Once the first three internal steps are exhausted,<sup>208</sup> if the dispute is a “legal” one<sup>209</sup>—as defined by the company—then the employee must proceed to mediation and, perhaps, arbitration.<sup>210</sup> Both mediation and arbitration involve an outside neutral party.<sup>211</sup>

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198. *Id.*

199. *Id.* at 5.

200. *Id.*

201. *Id.*

202. *Id.* at 4-6. The Senior Management Panel is comprised of the General Counsel or designated representative, the Senior Vice President of Human Resources or designated representative, and the head of the Corporate or North America function of the employee or designated representative. *Id.* at 6.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 7.

209. The Program Manager of the Diversity & Workplace Fairness Office has the sole discretion to determine if a matter is a qualifying “Legal Dispute” and therefore eligible for Mediation and Arbitration. *Id.* at 11, 14. According to the Coke Rules:

Legal Disputes . . . are disputes involving legally protected rights, whether in contract, tort, under statute or regulation, or some other law. Legal Disputes can include, but are not limited to:

- claims of discrimination, including, for example, claims based on race, sex, religion, national origin, age, or disability
- claims of harassment, including sexual harassment
- claims for wages or other compensation
- claims of breach of contract
- claims of damage to person or property

*Id.* at 3.

210. Legal claims barred by the applicable statutes of limitations may be precluded by the Program Manager from proceeding to Mediation and Arbitration, and the company can use the statute of limitations as a defense. However, if an employee enters *Solutions* with a timely legal claim, the claim does not expire while the employee is going through *Solutions*. The statute of limitations is tolled while the

Mediation involves the parties working with a mediator to find common ground.<sup>212</sup> The parties first collectively select the mediator from a Roster of Neutrals.<sup>213</sup> Coke pays the fees and costs of the mediator, while each party covers the costs to prepare his or her own case.<sup>214</sup> Each party is permitted to bring counsel, at the party's expense, but Coke will not bring counsel in the event the employee does not.<sup>215</sup> The mediation is private, confidential, and not reduced to writing.<sup>216</sup> Either party or the mediator can terminate the mediation if desired.<sup>217</sup>

### 5. Coke's Arbitration Provision

The final step of *Solutions* is arbitration. Once mediation has been exhausted, an employee must proceed to arbitration to resolve the dispute.<sup>218</sup> To utilize this step, the employee submits a Request for Arbitration no more than thirty days after the completion of mediation, at which time the *Solutions* Program Manager determines, at his sole discretion, whether arbitration is appropriate.<sup>219</sup> Coke's arbitration process is covered by the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA"), subject to Coke's own rules described in the Coca-Cola Company *Solutions* Program Rules.<sup>220</sup> Coke pays the fees and costs of the arbitrator and the AAA.<sup>221</sup> Each party is permitted to bring counsel, at the party's expense, and Coke "may have an attorney present at all Arbitrations."<sup>222</sup>

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employee exhausts the *Solutions* internal process. *Id.* at 8; see also Telephone Interview with Joseph P. Moan (Feb. 16, 2009) (on file with author).

211. Coke Rules, *supra* note 5, at 8.

212. *Id.*

213. *Id.* at 11-12. *Solutions* provides a method for ensuring that each party has input into the selection of the mediator, although if the parties cannot come to agreement the Program Manager will select the mediator:

Within five days after determination to proceed with Mediation, each Party will be sent the list of geographically available mediators from the Roster of Neutrals. Each Party will then have ten days from the transmittal date to strike one mediator from the list and to number the remaining names in order of preference . . . and return the list to the Program Manager. The selected mediator shall be the individual with the lowest combined score. In the event of a tie, the Program Manager may select either of the tied mediators to serve. If a Party does not return the list within ten days, all persons therein will be deemed acceptable. The Program Manager will invite the selected mediator to accept and serve.

*Id.* at 11. The Coke Rules also describe the qualification of the mediator, excluding those presumptively or actually biased. *Id.* at 11-12.

214. *Id.* at 14.

215. *Id.* at 9, 12.

216. *Id.* at 13.

217. *Id.* at 14. Coke's mediation process is governed by the Mediation Rules and Standards of Conduct applicable to the state in which the mediation occurs, *id.* at 11, and by the Federal Mediation and Conciliation Service ("FMCS"). Feb. 16, 2009, telephone Interview with Moan, *supra* note 210.

218. *Id.* In the event that the Program Manager determines that arbitration would not be fruitful, the employee has exhausted *Solutions* and may pursue civil litigation.

219. *Id.* at 14.

220. *Id.*

221. *Id.* at 22.

222. *Id.* at 9.

The parties collectively select an arbitrator from a list of qualified arbitrators supplied by the AAA.<sup>223</sup> Coke has an opportunity to present defenses and bring counterclaims in response to the employee's Request for Arbitration, and the employee may defend against such counterclaims.<sup>224</sup> Both parties may amend their claims.<sup>225</sup> At the direction of the arbitrator, the parties are required to exchange witness lists.<sup>226</sup> Discovery includes reasonable document requests, depositions of the employee and of appropriate Coke employees, twenty-five interrogatories per side, and disclosure of expert testimony.<sup>227</sup> The arbitrator may permit additional depositions and discovery, *sua sponte*, or upon a showing of good cause, and he or she may issue subpoenas for non-party depositions.<sup>228</sup> Each party must bear its own discovery costs, including costs for duplication and expert services.<sup>229</sup>

At the request of the AAA, the parties, or the arbitrator, a conference may be held to discuss and decide any matters that will expedite arbitration, and this conference may be held by phone, written submission, or in person.<sup>230</sup> The arbitration is private and confidential.<sup>231</sup> The arbitrator may issue summary judgment.<sup>232</sup>

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223. *Id.* at 15. *Solutions* provides a method for ensuring that each party has input into the selection of the arbitrator, although if the parties cannot come to agreement the AAA will select the arbitrator:

Upon receipt of the Request for Arbitration, AAA immediately will send each Party an identical list of names of persons chosen from a panel of qualified arbitrators that AAA will select and maintain. Each Party will then have ten days from the transmittal date to strike any arbitrator objected to, number the remaining names in order of preference . . . and return the list to AAA and the Program Manager. If a Party does not return the list within ten days, all persons therein will be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the order of mutual preference, AAA will invite an arbitrator to accept and serve.

Any Party will have the right to strike one list of arbitrators in its entirety. When a Party exercises the right, AAA will issue a new list of arbitrators to all Parties consistent with the above procedures.

If the lists the Parties return to AAA do not contain at least one arbitrator approved by both Parties, AAA will have the authority to appoint an arbitrator from among other members of the panel without the submission of additional lists to the Parties.

Coke Rules, *supra* note 5, at 15. The Coke Rules also describe the qualification of the arbitrator, excluding those presumptively or actually biased. *Id.*; see also AAA National Rules for Resolution of Employment Disputes, effective July 1, 2006, *Employment Arbitration Rules and Mediation Procedures* §§ 12, 13, 15, 16, available at <http://www.adr.org/sp.asp?id=32904> (last visited Apr. 5, 2009).

A procedure that gives the employee input into selection of the arbitrator is critical to avoiding the risk that "repeat players" (employers who make repeated use of the process) will be favored by the process. For a discussion of this phenomenon and the impact of the AAA's Due Process Protocols on this risk, see Lisa Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in *ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NYU 53RD ANNUAL CONFERENCE ON LABOR* 303, 325 (Estreicher & Sherwyn eds. 2004).

224. Coke Rules, *supra* note 5, at 16.

225. *Id.*

226. *Id.* at 16.

227. *Id.* at 16-17.

228. *Id.* at 17.

229. *Id.* at 22.

230. *Id.* at 17, 18.

231. *Id.* at 21.

232. *Id.* at 18.

Coke's arbitration process provides all of the substantive rights and remedies that would be available in court.<sup>233</sup> The employee is permitted to take paid<sup>234</sup> time off from work to participate in arbitration.<sup>235</sup>

The arbitrator ultimately conducts a hearing, at which time the parties must have a "full and fair opportunity to present their evidence and arguments,"<sup>236</sup> whether by phone, written submission, or in person.<sup>237</sup> The arbitrator may conduct the hearing in any order and manner that is most expeditious, and he or she may administer oaths and subpoena witnesses and documents.<sup>238</sup> The arbitrator is the "sole judge of the relevancy, materiality, and admissibility of evidence offered."<sup>239</sup> Each party bears the costs of calling its witnesses.<sup>240</sup> A record of the hearing is not available unless required by the arbitrator or requested by a party, who must bear the cost of production and duplication.<sup>241</sup> *Ex parte* communications with the arbitrator are forbidden.<sup>242</sup>

After the hearing, the arbitrator has thirty days to issue a written decision that analyzes the applicable law and explains the decision.<sup>243</sup> In the event that the parties settle during arbitration, the arbitrator may issue a consent decision.<sup>244</sup> The arbitrator is bound to follow applicable laws, including burdens of proof and substantive law.<sup>245</sup> The arbitrator has the power to determine the applicable law and provide all relief that could be provided by a court, but no more.<sup>246</sup>

The employee has the power to decide if the arbitrator's decision is binding. Within thirty days of the arbitrator's decision, the employee must determine whether he or she wants to be bound by the decision.<sup>247</sup> In the event that the em-

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233. *Id.* at 7.

234. E-mail from Edward N. Gadsden, Jr., Coca-Cola former Vice President, Human Resources, to Suzette M. Malveaux (Mar. 27, 2009) (on file with author).

235. Coke Rules, *supra* note 5, at 7.

236. *Id.* at 19.

237. *Id.* at 18.

238. The arbitrator's subpoena power is enforceable by court order. *See* FAA, 9 U.S.C. §7 (2006) (an arbitrator can petition a federal district court to compel attendance of a non-party or punish the person for contempt).

239. Coke Rules, *supra* note 5, at 19.

240. *Id.* at 22.

241. *Id.* at 19.

242. *Id.* at 20.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 20, 22-23.

The Coke Rules state:

B. Other than provided herein, the substantive legal rights, remedies, and defenses of all Parties are preserved. In the case of Arbitration, the arbitrator shall have the authority to determine the applicable law and to order any and all relief, legal or equitable, including punitive damages and attorney's fees, that a Party could obtain from a court on the basis of the claims made in the Request for Arbitration.

C. Other than provided herein, *Solutions* shall not be construed to grant additional substantive, legal, or contractual rights, remedies, or defenses that would not be applied by a court in the absence of *Solutions*.

*Id.* at 22-23.

247. *Id.* at 20-21. The Coke Rules state:

Upon receipt of the arbitrator's decision, the employee or former employee initiating Arbitration will have thirty days to deliver to the Program Manager in writing a determination whether the employee or former employee wishes to be bound by the arbitrator's decision. If the employee or



ployee chooses to be bound, the parties are deemed to have consented to a court's jurisdiction to enforce the arbitral award.<sup>248</sup>

### *B. The Advantages of One-Way Binding Arbitration*

One-way binding arbitration offers a third approach to resolving workplace disputes. Where litigation is the more traditional default available for employees who want to challenge employer misconduct, mandatory pre-dispute arbitration is the alternative—an alternative quickly becoming the norm. One-way binding arbitration is an alternative to the alternative. Coke's one-way binding arbitration, within the context of its *Solutions* program, offers a fresh way of problem resolution for employees, employers, and the legal system in general.

#### *1. Benefits for Employees*

##### *a. Meaningful Consent*

One-way binding arbitration addresses one of the most contentious and troubling features of compulsory pre-dispute arbitration agreements—the lack of meaningful consent.<sup>249</sup> Such agreements are contracts of adhesion—take-it-or-leave-it propositions that an employee must accept as a condition of his or her employment.<sup>250</sup> An employee is not free to negotiate this term out of the employment

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former employee notifies the Program Manager timely that he or she wishes to be bound by the arbitrator's decision, or if the employee or former employee fails to deliver to the Program Manager any determination in a timely manner, the arbitrator's decision will be binding on all Parties, except to the extent that such decision may be vacated or amended pursuant to the Federal Arbitration Act, and judgment upon the decision of the arbitrator may be entered and enforced in any federal or state court having jurisdiction over the Parties pursuant to the Federal Arbitration Act. If the employee or former employee delivers to the Program Manager within thirty days of receipt of the arbitrator's decision a written determination that he or she does not wish to be bound by the arbitrator's decision, then that decision shall have no legal effect.

*Id.*

248. *Id.* at 22.

249. Compare Ware, *Employment Arbitration and Voluntary Consent*, *supra* note 8, at 103-59, with Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701-11 (1996); Heidi M. Hellekson, Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts*, 70 N.D. L. REV. 435 (1994). See also Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994):

Consent is the master concept that defines the law of contracts in the United States. . . . [It] expresses the primacy of individualistic values in our culture. To say that one cannot be bound by a promise that one did not voluntarily and knowingly make is to say that the individual should be the author of her own undertakings. . . .

See generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179-80 (1983).

For an interesting counterargument that informed consent in contracts in a mass-market context is not a good to be maximized, but an information cost to be minimized, see Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, Washington & Lee Public Legal Studies Research Paper Series, Working Paper No. 2008-31, June 8, 2008, available at <http://ssrn.com/abstract=1141843> (last visited Apr. 6, 2009).

250. See BLACK'S LAW DICTIONARY (8th ed. 2004).

contract; instead, he is merely free to forego the job altogether.<sup>251</sup> If such agreements continue to multiply, there will be few places where an employee can work without foregoing his right to bring future claims in court.

While mandatory arbitration forces an employee to use arbitration *instead of* the court system, one-way binding arbitration softens the blow. The *Solutions* program still compels an employee to utilize the arbitration process as the last step to resolve a workplace dispute and as a condition of employment.<sup>252</sup> Therefore, the employee, to some extent, is subject to another type of contract of adhesion—he must be willing to give arbitration a try.<sup>253</sup> Still, this requirement is in some ways no more onerous than court-mandated ADR as a prerequisite to court access.<sup>254</sup> One-way binding arbitration, however, empowers the employee to choose between the arbitrator's decision or going to court if she does not like the outcome. Should the employee choose to be bound by the arbitrator's decision, at that point, the employee consents to the legitimacy of the forum.<sup>255</sup> After proceeding through arbitration and receiving an outcome—favorable or unfavorable—the employee is in a unique and extraordinary position to evaluate the desirability of the arbitral forum as an alternative to litigation. The employee's consent to the forum is informed, meaningful, and real.

Moreover, the fact that the company is bound by the arbitral decision—no matter what the outcome—demonstrates the company's confidence in the forum.<sup>256</sup> The company's unilateral commitment to the arbitral forum shows, in a very concrete way, that it views the forum as a legitimate alternative to litigation, but does not require the employee to view it the same.

The employer's willingness to be bound by the arbitration outcome, while not requiring the same from the employee, sends a message of loyalty to the process. The employee benefits by knowing that the company believes in the system and is willing to "put its money where its mouth is."

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251. Where jobs are scarce because of difficult economic conditions – as they are now – employees will have even less capacity to negotiate terms of employment. Employees, grateful to have a job at all, may be more tempted to forego their rights.

252. Coke Rules, *supra* note 5, at 14.

253. In critiquing a similar one-way binding arbitration process conducted by the Better Business Bureau, called "conditionally binding" arbitration, Professor Jean R. Sternlight states, "[F]rom a fairness perspective, I am more comfortable requiring all disputants to elect a process pre-decision, rather than providing one, but not both disputants with a post-decision veto." Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, *supra* note 8, at 85 n.17. I am too. However, given that the alternative (mandatory, pre-dispute binding arbitration) is likely here to stay, one-way binding arbitration is an attractive alternative. The employee may ultimately extract herself from the arbitration process and go to court to vindicate her employment rights.

254. See The Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (1998). The ADR Act of 1998 went into effect on October 30, 1998, and requires each federal district court to "authorize, . . . devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in its district." *Id.* Pursuant to the act, each district court must adopt a local rule that requires civil litigants to consider using an ADR process. *Id.*

255. Coke Rules, *supra* note 5, at 20-22.

256. Telephone Interview with Edward N. Gadsden, Jr., Coca-Cola Vice President, Human Resources, (Dec. 24, 2008) (on file with author).

### *b. The Benefits of Both Worlds*

The one-way binding nature of the arbitration gives the employee the best of both worlds: arbitration and litigation. The employee not only gets “two bites at the apple,” or two opportunities to prevail, she also obtains advantages she would not otherwise receive under either arbitration or litigation alone. The employee obtains the benefits of arbitration without its usual drawbacks. To the extent that arbitration is cheaper, faster, and more flexible than litigation, the employee benefits from being compelled to try this system before bringing her case in court. To the extent that arbitration produces superior outcomes by superior means, the employee is required to do what is “good” for her by giving arbitration a shot—an admittedly paternalistic requirement.

*Solutions* offers its employees many of the benefits of arbitration. For example, an employee need not pay the fees and costs of the arbitrator or the AAA, and the employee is permitted to take time off from work to participate in arbitration.<sup>257</sup> The *Solutions* arbitration is, by design, a quick procedure: the employee must submit a Request for Arbitration no more than thirty days after the completion of mediation;<sup>258</sup> after arbitration, the arbitrator has thirty days to issue a decision in writing, analyzing the applicable law and explaining the decision;<sup>259</sup> and within thirty days of the arbitrator’s decision, the employee must determine whether he or she wants to be bound by the decision.<sup>260</sup> Moreover, the arbitral proceedings provide privacy not usually available in civil litigation.<sup>261</sup> An employee may also obtain a better outcome by using the internal dispute resolution procedure. Early and open communication with the relevant players prior to arbitration—the fifth and final step in *Solutions*—may result in superior outcomes.<sup>262</sup> This may be more true given employees’ dismal success rates in federal district court and troubling reversal rates in federal appellate courts, discussed *supra*.

The *Solutions* program, in particular, contains many of the procedural safeguards found in civil litigation. For example, discovery—critical to an employee’s ability to meet his burden of proof—is robust. *Solutions* tracks the Federal Rules of Civil Procedure in its discovery provisions regarding document requests, depositions, interrogatories, and disclosure of expert testimony.<sup>263</sup> The

257. Coke Rules, *supra* note 5, at 7.

258. *Id.* at 14.

259. *Id.* at 20.

260. *Id.* at 20-21.

261. *Id.* at 21.

262. See Interview with Gadsden, *supra* note 256 (one of the benefits of *Solutions* is that it gives employees another option which may be more effective than litigation); Telephone Interview with Edward N. Gadsden, Jr., Coca-Cola Vice President, Human Resources (Apr. 9, 2009) (on file with author) (describing flexibility and creative outcomes possible in the *Solutions* steps proceeding arbitration).

263. Coke Rules, *supra* note 5, at 16-17. Specifically, the Coke Rules:

[T]he arbitrator will direct that the Parties comply with:

- i. reasonable requests for production and for the exchange of documentary evidence as contemplated by Rule 34 of the Federal Rules of Civil Procedure;
- ii. requests for the deposition of the Employee and the depositions of appropriate employees of the Company;
- iii. requests for responses of up to 25 interrogatories, including sub-parts, as contemplated by Rule 33 of the Federal Rules of Civil Procedure; and

arbitrator may even permit additional depositions and discovery, *sua sponte*, or upon a showing of good cause,<sup>264</sup> and he or she may issue subpoenas for non-party depositions.<sup>265</sup> Moreover, the arbitrator is bound to follow applicable law, including the burdens of proof and the substantive law.<sup>266</sup> The arbitrator provides a written record of the proceedings, analyzing the applicable law and explaining the decision.<sup>267</sup> A record of the hearing can be made available, if required by the arbitrator or requested by a party, albeit at the requesting party's expense.<sup>268</sup> *Solutions* arbitration, thus, in many ways, provides the kind of transparency, accountability, and rigorous advocacy found in civil litigation.<sup>269</sup>

In addition to providing procedural protections, *Solutions* benefits all employees. Given their representation in Coke's workforce, white and male employees turn out to be major beneficiaries of the program. For example, for those cases where demographic information was provided, their representation in the program each year was as follows: July 2002 through September 2003, 59% white and 56% men;<sup>270</sup> October 2003 to August 2004, 46% white and 49% men;<sup>271</sup> October 2004 to August 2005, 28% white and 59% men;<sup>272</sup> and October 2005 to August 2006, 46% white and 57% men.<sup>273</sup> Of those minorities who use *Solutions*, however, the "vast majority" are African-Americans.<sup>274</sup> While *Solutions* has evolved as a by-product of the settlement agreement on behalf of African-Americans alleging race discrimination, it has clearly worked to the benefit of all Coke employees.

After an extensive arbitration process, replete with procedural features often found in civil litigation, in the event that the employee does not prevail, he does not suffer the same fate of those subjected to normal arbitration. If the Coke employee loses, he may reject the arbitrator's decision and proceed to court. Normally in mandatory arbitration, an employee has very little chance of overturning

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iv. the disclosure of expert testimony as contemplated by Rule 26(a)(2) of the Federal Rules of Civil Procedure.

*Id.*

264. *Id.* at 17.

265. *Id.*

266. *Id.* at 20.

267. *Id.*

268. *Id.* at 19. However, the requesting party must bear the cost of production and duplication. *Id.*

269. *Solutions* also incorporates the standards of the AAA. *See id.* at 14; *see also* E-mail from Joseph P. Moan, Coca-Cola Company Senior Management Counsel, Employment Law, to Suzette M. Malveaux (Mar. 5, 2009) (on file with author). To the extent that the AAA protections are sufficiently robust, the AAA standard insures a certain degree of quality and rigor in the *Solutions* arbitration. The AAA, while not perfect, provides a floor of due process protection through its Due Process Protocols. For a critique of the Due Process Protocols, *see generally* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004).

270. Coke Second Task Force Report, *supra* note 159, at 48. Coke's First Task Force Report, covering through June 2002, did not report the number of cases brought into *Solutions*. The *Solutions* program was just getting off the ground at this point.

271. Coke Third Task Force Report, *supra* note 159, at 47.

272. Coke Fourth Task Force Report, *supra* note 146, at 46.

273. Coke Fifth Task Force Report, *supra* note 1, at 46.

274. *Id.* at 46-47; *see also* Coke Fourth Task Force Report, *supra* note 146, at 46 (75%); Coke Third Task Force Report, *supra* note 159, at 47 (62%); Coke Second Task Force Report, *supra* note 159, at 48 (79%).

an arbitrator's decision because of the limited review of arbitral awards.<sup>275</sup> By rejecting the arbitral decision, the Coke employee, however, gets to start over, complete with the benefit of full appellate review, should the court also rule in the employer's favor.

*Solutions* not only gives the employee an opportunity to start over, but to start out ahead. For example, the employee has the opportunity to get "free discovery" prior to proceeding to court. While the discovery is not in fact "free" (quite the opposite),<sup>276</sup> and the employee is not permitted to use the actual discovery collected through the arbitration process (because of the confidentiality provision of *Solutions*),<sup>277</sup> the employee gets—for all intents and purposes—access to much of the information needed to bring her case in court. The employee learns the strengths and weaknesses of the case, defendant's counterclaims and defenses, and the documents and witnesses necessary to successfully pursue her case in court.<sup>278</sup>

### c. Due Process

Probably the most important benefit to the employee of one-way binding arbitration is the benefit that is the least visceral and concrete—the provision of due process. Fundamental to the United States legal system is the notion that a person has a right to his or her "day in court."<sup>279</sup> As the Supreme Court recognized in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>280</sup> The Supreme Court has long recognized the supremacy of one's right to be heard, established by the United States Constitution.<sup>281</sup> The *Solutions*

275. 9 U.S.C. §10(a) (2006) (an arbitral award is granted full faith and credit and can only be overturned on the basis of very narrow grounds); see, e.g., *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 66-67 (2000) (holding that it was not a violation of public policy for arbitrator to reinstate employee in a safety-sensitive position who had twice tested positive for marijuana use, even where employer argued reinstatement would compromise the health and safety of others).

276. Each party must bear its own discovery costs, including costs for duplication and expert services. *Coke Rules*, *supra* note 5, at 22.

277. *Id.* at 21.

278. While one-way binding arbitration may give the employee an advantage in later litigation, it seems unlikely that it would go far as to encourage an employee to pursue civil litigation. Replicating much of what occurred in arbitration countenances against the efficiency gained by engaging in the process.

279. See FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 6.7, at 311 (Little Brown & Co. Law & Business, 4th ed. 1992) ("Another characteristic American value is the right to have one's say, specifically, to have one's 'day in court'"); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996) ("deep-rooted historic tradition that everyone should have his own day in court") (quoting *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (internal citations omitted)).

280. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

281. *Traux v. Corrigan*, 257 U.S. 312, 332 (1921) ("The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns . . ."); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard"); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (Foundation Press, 2d ed. 1988) (1978) ("[There is] *intrinsic* value in the due process right to be heard" because "[w]hatever its outcome, such a hearing represents

program recognizes this right to one's "day in court" through its one-way binding arbitration provision. The employee is compelled to arbitrate his or her claim, but arbitration is not a substitute for the court system.

Of course, due process does not actually entitle a plaintiff to resolve grievances only through the court system,<sup>282</sup> but rather entitles the plaintiff notice and an opportunity to be heard—an entitlement often accomplished through arbitration with limited review by the courts. The Supreme Court has consistently upheld the enforceability of arbitration agreements under various federal civil rights statutes, concluding that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."<sup>283</sup>

However, even though an arbitral forum may provide an employee with a perfectly sufficient opportunity to be heard, so entrenched is the notion that everyone is entitled to their proverbial "day in court," that such deprivation is likely to meet resistance. Moreover, to the extent that an employee does not provide meaningful consent to the alternative forum and is consequently denied court access, due process is implicated. Such due process concerns are ameliorated by one-way binding arbitration.

#### *d. Enhanced Relationship with Employer*

Finally, an important by-product of Coke's *Solutions* program is the positive impact it has had on employees' perceptions of the company. Coke's efforts to diversify its workforce and ensure fair treatment have not gone unnoticed by its employees, as demonstrated in survey data collected from 2002 to 2006.

At the request of the company, for every year from 2003 to 2006, an independent firm conducted an anonymous electronic survey of Coke's Corporate and North America group employees.<sup>284</sup> The firm used questions first designed and asked by the Task Force and Joint Experts in 2002.<sup>285</sup> The survey yielded statistically significant data about the workforce's perceptions of the diversity climate,<sup>286</sup>

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a valued human interaction in which the affected person experience at least the satisfaction of participating in the decision that vitally concerns her").

282. See discussion *supra* at Part II.

283. 14 Penn Plaza L.L.C. v. Pyett, 129 S. Ct. 1456, 1471-72 (2009); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (same); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (same).

284. The sample size surveyed varied by year. In 2002, 2004 and 2006, the survey was given to Coke's entire U.S. workforce (Corporate and North America). In 2004, 3,824 (87% of the sample) responded, and in 2006, 4,700 (74% of the sample) responded. Coke Third Task Force Report, *supra* note 159, at 24; Coke Fifth Task Force Report, *supra* note 1, at 21. The 2003 survey was given to roughly 680 employees, who participated in focus groups and were randomly selected. Coke Second Task Force Report, *supra* note 159, at 23. The 2005 survey was given to 2,638 employees, which was 69% of a sample of randomly selected employees. Coke Fourth Task Force Report, *supra* note 146, at 22.

285. Coke Fifth Task Force Report, *supra* note 1, at 21.

286. The items included in the survey, first conducted in April 2002 are as follows:

- The Company consistently treats all employees fairly.
- Senior management visibly demonstrates that having a diverse workforce is important for the Company's business success.

company climate,<sup>287</sup> and fairness of the human resources processes.<sup>288</sup> Diversity climate was measured each year on the basis of employees' perceptions of the company's commitment to diversity and equal opportunity, senior management's demonstration of that commitment and of diversity as a business goal, and the company's fair and consistent treatment of its employees.<sup>289</sup> Company climate was measured each year on the basis of employees' pride in the company, willingness to say good things about the company to others, and commitment to working for the company.<sup>290</sup> Fairness of the Problem Resolution System was measured each year on the basis of employees' awareness of, and comfort with, the various programs (*i.e.*, *Solutions*, Ombuds Office, hotline, etc.), knowledge of how to use them, and employees' perceptions of the company's efficacy in responding to complaints, communication that discrimination is unacceptable, and fair treatment of employees who register workplace complaints.<sup>291</sup>

In 2006, the last year for which data was available, the company received the highest mean rating for diversity climate from each racial group—white, African-American, Hispanic, and Asian-American—since the survey was first administered in 2002.<sup>292</sup> On a scale of 1 to 6, from worst to best, the mean rating for diversity climate peaked in 2006 for each racial group: white at 4.6, African-American at 4.2, Hispanic at 4.7 and Asian-American at 4.5.<sup>293</sup> The Task Force observed a “dramatic improvement” between 2005 and 2006 for all of the minority groups, noting that African-Americans, Hispanics, and Asian-Americans all jumped at least one-half point on the diversity climate scale.<sup>294</sup> This increase resulted in almost no difference between the perceptions of Hispanics, Asian-

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- The Company is committed to creating a work environment that respects diversity and fosters equal opportunity.
  - The Company does not go far enough in fostering an atmosphere that respects diversity and equal opportunity.
  - The way employees are treated in the Company is not affected by prejudice based on bias and stereotypes.

Coke First Task Force Report, *supra* note 141, at 16. Employees' perceptions and attitudes were measured on a six-point scale for each of the items above. *Id.*

287. *Id.* at 17. Employees responded to the following general statements about work climate:

- I would highly recommend the Company to a friend seeking employment.
- It would take a lot to get me to leave the company.
- Given the opportunity, I tell others great things about working here.
- The Company's policies and procedures create a positive work environment for me.
- For me the Company is a terrific place to work.
- I am proud to say I work for the Coca-Cola Company.

*Id.* (crediting Hewitt Associates for developing questions used in employment engagement survey).

288. *Id.* at 16-17. Employees were asked about their perceptions of fairness for each of the nine human resource systems addressed by the settlement agreement, including Problem Resolution.

289. Coke Fifth Task Force Report, *supra* note 1, at 21.

290. *Id.* at 23.

291. *See id.* at 47, Coke Fourth Task Force Report, *supra* note 146, at 47, Coke Third Task Force Report, *supra* note 159, at 38; Coke Second Task Force Report, *supra* note 159, at 48, T.15. “These survey items asked: whether employees felt they would be treated fairly if they tried to resolve a dispute at work; whether this might result in a negative impact on their career; and, whether they thought the Company is committed to having their workplace issues addressed.” *Id.* at 49.

292. Coke Fifth Task Force Report, *supra* note 1, at 21, 22, Fig. 2.

293. *Id.* at 22, Fig. 2.

294. *Id.* at 22.

Americans and whites by 2006.<sup>295</sup> African-American perceptions of the diversity climate remained the lowest of all the racial groups, but the gap had "narrowed significantly from past years."<sup>296</sup> While employees increasingly gained confidence in Coke's commitment to diversity and equal opportunity, as demonstrated by the diversity climate composite, employees remained skeptical about the degree to which employment decisions were based on merit.<sup>297</sup> Even in 2006, employees perceived favoritism as a real problem.<sup>298</sup>

In 2006, the company also received the highest mean rating for company climate from each racial group: white at 4.9, African-American at 4.8, Hispanic at 5.1, and Asian-American at 4.8.<sup>299</sup> Between 2005 and 2006, each racial group also jumped at least one-half point on the company climate scale.<sup>300</sup> As noted, by 2006's data, there was barely any difference between the racial groups in company climate, with the exception of Hispanics, who scored company climate even higher.<sup>301</sup> The fact that the company climate score is higher for all groups than the diversity climate score indicates that employees view the company and its brand more favorably than its workforce practices.<sup>302</sup> However, part of employees' good feelings about the company's climate overall is attributable to their favorable impression of the company's policies and procedures.<sup>303</sup>

In 2006, the Task Force concluded in its final report that there had been "significant progress" based on the fairness indicators, but did not provide illustrative quantitative data.<sup>304</sup> In 2003—the first year the Task Force provided fairness analysis—it noted that African-Americans, Hispanics, and women "were signifi-

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295. *Id.*

296. *Id.* at 22, 23. The diversity climate rating for African-Americans was 3.3 in 2002, and 3.1 (its lowest) in 2003, in comparison to 4.2 in 2006 (the final year). *Id.* at 22, Fig. 2. The Task Force concluded that this drop may be attributable, in part, to a massive reduction in Coke's workforce, where restructuring of its North American business operations led to a 10% decrease or 800 job loss through March 2003. See Coke Second Task Force Report, *supra* note 159, at 4-5; see also Telephone Interview with Joint Expert and industrial psychologist Dr. Irwin Goldstein (Dec. 23, 2008) (on file with author) (noting potential negative impact of reduction in force).

According to the Task Force, however, by 2006 employees were "especially positive" on questions relating to senior management's commitment to diversity and equal opportunity. Coke Fifth Task Force Report, *supra* note 1, at 22. Additionally, in 2006 "perceptions of fairness in terms of its human resources programs and the treatment of individuals were at least a half scale point more positive" than in 2005. Interestingly, African-Americans hired more recently (within the prior three years) had a "much more favorable view of the diversity climate" than those who had been with the company longer. *Id.* The gender difference was "minimal," with men having a slightly higher diversity climate score. *Id.* at 22.

297. *Id.* ("Items related to advancement being based on who you know and career opportunities not going to the most qualified persons improved somewhat from last year [2005,] but the absolute scale values were among the very lowest of all items, the degree of improvement from the very first year is not very large").

298. *Id.* ("This perception of favoritism remains as an issue for the Company across all employee groups").

299. *Id.* at 23, & Fig. 3.

300. *Id.*

301. *Id.* at 23. Again, African-American recent hires were more likely to view the company climate more favorably than those with greater tenure. *Id.* at 24. There was no gender difference for company climate. *Id.* at 23.

302. *Id.*

303. *Id.* ("perceptions of improvements in company climate extend to the effect of policies on employees themselves").

304. *Id.* at 47.



cantly more negative in their assessments” for “nearly all” the fairness indicators, and that all of the groups’ opinions of all of the Problem Resolution Program fairness indicators had gone down since 2002.<sup>305</sup>

The Task Force’s final report demonstrates that as of 2006, this negative perception had turned around. Everyone surveyed was aware of the Problem Resolution System and employees “generally felt more positively about the Company’s implementation of [the system] . . . with minimal differences based on ethnicity.”<sup>306</sup> By 2006, all racial groups had exceeded the 2002 baseline in knowing how to address workplace problems, with African-Americans only slightly less knowledgeable than the other racial groups.<sup>307</sup> The Task Force describes employees’ perception of fairness positively, but as a work-in-progress:

Responses in 2004 and 2005 as to whether the Company makes it clear that discrimination is unacceptable in the workplace was extremely positive for whites, Hispanics, and Asian Americans, with African Americans being significantly less certain but still positive about this issue. In 2006, the responses for all groups improved significantly with responses being extremely high for all groups.

In 2004, when asked about whether the Company is effective in responding to employee complaints about being treated unfairly, the responses for all groups were not very positive, with African Americans responding more negatively than others. However, in 2005, the responses for all groups improved and in 2006 there was further significant improvement. These results are consistent with the responses to whether employees feel they would be treated fairly if they tried to resolve a dispute at work. The responses for this survey item in 2006 improved significantly for all groups and there was only a third of a scale point differences for African Americans as compared to Whites.<sup>308</sup>

The Task Force expressed its pleasure with the employees’ positive perception of the Problem Resolution System, while also emphasizing the importance of Coke’s ongoing supervision and monitoring.<sup>309</sup> In sum, *Solutions* is not only resolving concrete workplace conflicts, but healing relationships between management and employees.

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305. Coke Second Task Force Report, *supra* note 159, at 49. Additional information collected from focus groups confirmed that employees’ trust in the Problem Resolution System was initially low. *Id.* at 49-50. The Task Force concluded that addition of the mediation and arbitration components to the initial Problem Resolution System would be helpful. *Id.* at 50. The drop in fairness indicia for 2003 is consistent with the scores in diversity climate and company climate among all employees that year. See Coke Fifth Task Force Report, *supra* note 1, at 22, 23, Figs. 2 & 3. This drop may be attributable, in part, to a massive reduction-in-force (“RIF”), as discussed *supra* at note 296. See Coke Second Task Force Report, *supra* note 159, at 4-5; see also Dec. 23, 2008, telephone interview with Goldstein, *supra* note 296 (noting potential negative impact of reduction in force).

306. Coke Fifth Task Force Report, *supra* note 1, at 47.

307. *Id.*

308. *Id.* The author was not provided with the underlying data that would have enabled an independent and fuller understanding of Coke’s progress in this area.

309. *Id.* at 48.

## 2. *Benefits for Employer*

One-way binding arbitration is also beneficial for the employer because it preserves the benefits—but excludes the baggage—of mandatory pre-dispute arbitration.

### *a. One-Way Binding Arbitration Encompasses the Benefits of Mandatory Pre-Dispute Arbitration*

One-way binding arbitration shares many of the typical attributes of mandatory pre-dispute arbitration. For starters, one-way binding arbitration is still mandatory; it requires the employee to utilize the company's internal dispute resolution process, including arbitration. One-way binding arbitration is still a pre-dispute arrangement; it requires the employee to agree in advance to resolve any future employment problems through the company's internal dispute resolution process. One-way binding arbitration is still an employment prerequisite; it requires an employee to be willing to use *Solutions* as a condition of employment. It is non-negotiable.

Coke's one-way binding arbitration offers many of the procedural benefits of mandatory pre-dispute arbitration. For example, one-way binding arbitration gives the company the privacy it would enjoy under mandatory pre-dispute arbitration. The confidential process gives the parties the capacity to negotiate free from the spotlight and scrutiny of the media and other third parties. Additionally, the relative flexibility of the steps preceding arbitration gives both parties the potential capacity to structure relief in a way that is more individualized, creative, and satisfying.<sup>310</sup>

The *Solutions* program, in general, and one-way binding arbitration, in particular, empowers the company to fix the problem. As an alternative process to litigation, *Solutions* gives the employer an opportunity to bring its knowledge, resources, and expertise to bear on the workplace issue at hand. Not only does this give the employer the chance to provide a potentially superior process and outcome, it allows the employer to avoid litigation and the specter of being sued. Certainly, where a company has taken a beating in the media—as Coke did here—it has a keen interest in resurrecting its image<sup>311</sup> and avoiding future litigation, which may be more costly, unpredictable, and time consuming. Both of these goals are accomplished by *Solutions*.

During the 2002-2006 compliance period, the number of charges filed by employees with the EEOC decreased steadily each year. The number of new charges filed per year was as follows: July 2002 through September 2003, 47 cases;<sup>312</sup>

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310. Telephone Interview with Edward N. Gadsden, Jr., former Coca-Cola Vice President, Human Resources, (Apr. 9, 2009) (on file with author).

311. See Waller & Graves, *supra* note 135 (describing the communication methods used by Coke on its Web site to address the negative publicity generated by *Ingram v. The Coca-Cola Co.*).

312. Coke Second Task Force Report, *supra* note 159, at 45. Coke's First Task Force Report, covering through June 2002, did not report the number of charges filed. See Coke First Task Force Report, *supra* note 141. Instead, it stated, "EEO will continue to investigate external charges of discrimination, while the employee resolution department will handle internal charge investigations." *Id.* at 30.

October 2003 through September 2004, 19 cases;<sup>313</sup> October 2004 through September 2005, 14 cases;<sup>314</sup> and October 2005 through September 2006, 11 cases.<sup>315</sup> In comparison, for each year, employees brought more cases to *Solutions* for resolution than they filed with the EEOC. The number of cases brought to the company's attention per year was as follows: July 2002 through September 2003, 138<sup>316</sup>; October 2003 to August 2004, 39<sup>317</sup>; October 2004 to August 2005, 76<sup>318</sup>; and October 2005 to August 2006, 47.<sup>319</sup>

The steady decrease in the number of charges filed with the EEOC per year could suggest that there were fewer workplace problems over time, that employees were foregoing the use of outside institutions to solve workplace problems, or both.<sup>320</sup> Any of these three options would be advantageous to Coke. Assuming the worst case scenario—that the number of workplace disputes did not decrease—then the decrease in charges illustrates employees' willingness to resolve disputes internally. Such employee comfort with using the company's internal dispute resolution process is promising.

At the same time that employees are increasingly opting not to file charges, they are using *Solutions* in significant numbers. The amount of activity in *Solutions* (in terms of numbers of cases brought), while not showing a steady pattern, illustrates that employees are giving the company an opportunity to resolve problems before resorting to administrative action and litigation. The data suggests employee confidence in *Solutions*.

Since the implementation of *Solutions*, Coke's image among its employees has also improved. Indices, such as diversity climate and company climate, discussed *supra*, demonstrate how Coke's reputation has markedly improved among its employees. Given increasing employee satisfaction with the company, employees may feel that they need not go outside the company to resolve workplace disputes, resulting in fewer lawsuits against Coke.

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313. Coke Third Task Force Report, *supra* note 159, at 44.

314. Coke Fourth Task Force Report, *supra* note 146, at 43.

315. Coke Fifth Task Force Report, *supra* note 1, at 43.

316. Coke Second Task Force Report, *supra* note 159, at 48. This represents the number of cases brought to the attention of the Employee Resolution Department. *Id.* Coke's First Task Force Report, covering through June 2002, did not report the number of cases brought into *Solutions*. See Coke First Task Force Report, *supra* note 141. The *Solutions* program was just getting off the ground at this point.

317. Coke Third Task Force Report, *supra* note 159, at 47. This represents the number of cases brought to the attention of the Ethics and Compliance Office. The Task Force, while unclear about why there was such a significant drop in cases this year, surmised that the "very small" number could be attributable to the new *Solutions* program's having been recently announced. *Id.*

318. Coke Fourth Task Force Report, *supra* note 146, at 46. This represents the number of cases brought to the attention of the Ethics and Compliance Office. The Task Force surmised that the increase in cases from the prior year (almost double) was attributable to the timing of the new *Solutions* program announcement. *Id.*

319. Coke Fifth Task Force Report, *supra* note 1, at 46. This represents the numbers of cases brought to the attention of the Diversity and Workplace Fairness Office.

320. Telephone Interview with Edward N. Gadsden, Jr., former Coca-Cola Vice President, Human Resources (Mar. 3, 2009).

*b. The Binding Nature of Arbitration Helps the Company*

Certainly, being bound by an adverse arbitral decision without the option of rejecting it disfavors the company. Having to litigate solely at the employee's option does too. But ironically, what makes Coke's arbitration program appealing to employees—its unilateral binding provision—is what also favors the company in a number of significant ways.

*i. Improved Employee Perception*

First, the company's commitment to being the only party bound by the arbitration outcome likely builds trust and goodwill with its employees. While there is no data specifically on how employees rank the *Solutions* arbitration process—much less its unilateral binding feature—on the survey's one to six scale, the data reveals that employees are generally pleased with Coke's problem resolution process.<sup>321</sup> In the Task Force's final report, published in 2006, it concluded that "employees are more positive that they would be treated fairly if they tried to resolve a dispute at work."<sup>322</sup> Such optimism is important to the viability and success of *Solutions*. Without trust in the company's internal dispute resolution system, the employees are more likely to look to external institutions, such as the EEOC and the courts, for relief.<sup>323</sup>

Building such trust has taken time and remains an ongoing process. At the nascent period of the settlement agreement, minority employees expressed greater skepticism than their white counterparts over how fair Coke's human resources programs were and how successful its budding dispute resolution system would be.<sup>324</sup> Coke's first challenge was simply ensuring that employees were aware of its new dispute resolution system and its various components. By the end of the five-year compliance period, 100 percent of the employees surveyed in 2006 indicated that they were aware of the Ethics and Compliance Office, *i.e.*, the entry point for *Solutions*.<sup>325</sup> While employees have grown more aware of Coke's internal dispute resolution system, this does not mean that all employees would be comfortable actually using it. For example, at the program's inception in 2002, African-Americans and Hispanics were less comfortable than their white colleagues availing themselves of the Open Door process.<sup>326</sup>

Moreover, African-American, Hispanic, and female employees at that time were "significantly more negative" in their perceptions of whether the company would treat all employees fairly.<sup>327</sup> Not only did minority employees' fairness

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321. Coke Fifth Task Force Report, *supra* note 1, at 48 ("employees view the problem resolution process in a positive manner").

322. *Id.* at 48.

323. Dec. 24, 2008, interview with Gadsden, *supra* note 256.

324. Coke First Task Force Report, *supra* note 141, at 4.

325. Coke Fifth Task Force Report, *supra* note 1, at 47.

326. Coke Second Task Force Report, *supra* note 159, at 49. Employees were asked if they were comfortable, somewhat comfortable, or not comfortable in using the Problem Resolution programs. *Id.*

327. *Id.* Survey questions measuring fairness included: "whether employees felt they would be treated fairly if they tried to resolve a dispute at work; whether this might result in a negative impact on their career; and whether they thought the Company is committed to having their workplace issues addressed." *Id.*

assessments start out low in 2002,<sup>328</sup> they fell even lower in 2003.<sup>329</sup> Employees initially hesitated to use components such as the Employee Reporting Service (or hotline) and the Ombuds Office, out of fear that confidentiality would be breached.<sup>330</sup> Trust among the employees in 2003 was at an all-time low for the compliance period.<sup>331</sup>

Things began to turn around in 2004. Almost all (88%) employees were aware of the new Ethics and Compliance Office, and more employees (no matter what their racial makeup) knew what to do if they felt they had been treated unfairly<sup>332</sup>—an improvement since the survey was first administered in 2002.<sup>333</sup> By 2006, all racial groups were more knowledgeable about what to do in the event of a workplace problem.<sup>334</sup>

Over time, employees became more convinced that Coke disapproved of discrimination in the workplace. When asked “whether the company makes it clear that discrimination is unacceptable in the workplace,” in 2004 and 2005, all racial groups except African-Americans were “extremely positive.”<sup>335</sup> African-Americans, while “positive,” were “significantly less certain.”<sup>336</sup> By the last year of the compliance period, though, the assessments by all racial groups had “improved significantly” and their ratings were “extremely high.”<sup>337</sup>

Employees’ assessment of Coke’s efficacy in handling workplace fairness problems has slowly improved over time. Coke employees were asked “whether the Company is effective in responding to employee complaints about being treated unfairly,” to which all racial groups’ responses in 2004 were “not very positive.”<sup>338</sup> African-Americans were even more negative in their assessment of the company on this indicator.<sup>339</sup> However, according to the Task Force, in 2005, employees’ assessments had improved, and by 2006, the assessments had significantly improved, with African-Americans trailing behind their white counterparts by only one-third of a scale point on a six-point scale.<sup>340</sup> In sum, the company has been building employee trust over time through the *Solutions* program, an important component of the company’s success in resolving workplace disputes.

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328. Coke First Task Force Report, *supra* note 141, at 4 (“African-American employees were less positive concerning fairness within the Company than were white employees, particularly with regard to advancement and career development”).

329. Coke Second Task Force Report, *supra* note 159, at 49 (“As compared to last year [2002], all of the assessments for all groups, including those for whites, were more negative about Problem Resolution fairness issues”). See discussion *supra* at note 296 regarding RIF as possible explanation for general decline.

330. *Id.*

331. *Id.*; see also Coke Fifth Task Force Report, *supra* note 1, at 47.

332. Coke Third Task Force Report, *supra* note 159, at 48.

333. *Id.* at 47.

334. Coke Fifth Task Force Report, *supra* note 1, at 47 (all groups increased by about one-half scale point from 2005 to 2006, except for African-Americans who were “slightly less positive”). This does not mean that all employees were comfortable actually using the process.

335. *Id.*

336. *Id.*

337. *Id.* Unfortunately, the Task Force Reports do not give quantitative data for these indicators, making it necessary to rely on the Task Force’s characterization of the results.

338. *Id.*

339. *Id.*

340. *Id.* Employees were also asked if they felt they would be treated fairly if they tried to resolve a dispute at work. The results were similar. *Id.*

Moreover, the company's unilateral commitment to the arbitration process suggests that the company is not trying to control its employees, limit their rights, or hold them to a different and substandard dispute resolution system. As employees grow to trust the company's human resources department (the body tasked with *Solutions* implementation), they are more likely to trust the company's other systems and decisions.<sup>341</sup> This trust can translate into greater productivity and profits.<sup>342</sup> Woven throughout Coke's revised policies following the settlement is the connection between diversity and economic success. Its business model embraces diversity as a central component of success.<sup>343</sup> In sum, one-way binding arbitration promotes employee trust, which may advance the company's diversity goals and economic success.

## *ii. One-Way Binding Arbitration Helps the Company in Future Litigation*

Second, the company's unilateral commitment to the arbitral decision is good for the company because it may help the company prevail in court in a number of ways. In the event that the employee rejects the arbitral award and takes his case to court, the employer is all the better for it. Having experienced an arbitration process that so closely mirrors the court process in many ways, the parties are well prepared for litigation, and certainly more prepared than they would have been had they not utilized *Solutions*. The cost of litigation is lower because the case, in many ways, has already been "tee-ed up" through Coke's extensive arbitration process. The parties have narrowed the issues in contention and streamlined the case down to its central focus. In the event the company must go to court, the company goes after having tried numerous alternatives and having primed itself for litigation.

While the company may be well prepared, the employee, on the other hand, may be battle-fatigued.<sup>344</sup> Coke's arbitration process—replete with the potential for robust discovery, dispositive motions (*i.e.*, Rule 56 summary judgment), and a full-blown hearing—shares many of the features of civil litigation. Ironically, these very same features that protect an employee in arbitration may overwhelm him in the context of litigation. Coke's arbitration process is so extensive, it may put the employee at a disadvantage—pressuring him to spend money on substantial discovery and motion practice, in the event that Coke does the same.<sup>345</sup>

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341. Telephone Interview with Gadsden, *supra* note 256.

342. *Id.* See also *Megacases*, *supra* note 11, at 424-27 ("Corporations are beginning to understand that diversity in the workforce and in management correlates with financial success. Numerous studies . . . have demonstrated that 'diversity is good for business'"); Scott Miller & Kirk Miller and Associates, Inc., *Rewarding Employees When Your Budget Is Tight: 7 low-cost ways to make sure your employees are happy, healthy workers*, ENTREPRENEUR.COM (Feb. 18, 2005) ("Happy employees are more productive employees"), available at <http://www.entrepreneur.com/article/printthis/49278.html> (last visited Apr. 6, 2009). But see, Russell Cropanzano & Thomas A. Wright, *When a "Happy" Worker is Really a "Productive" Worker: A Review and Further Refinement of the Happy-Productive Worker Thesis*, 53 CONSULTING PSYCHOLOGY JOURNAL: PRACTICE AND RESEARCH 182 (Summer 2001); Rhian Silvestro, *Dispelling the Modern Myth: Employee satisfaction and loyalty drive service profitability*, 22-1 INT'L J. OF OPERATIONS & PROD. MGMT. 30 (2002).

343. See discussion *infra* at Section V.B., "Context Matters."

344. See telephone interview with Gadsden, *supra* note 256.

345. *Id.*

Even if the employee chooses to go to court, the company is in an advantageous position. Where the employer has prevailed in arbitration, and the employee opts not to be bound by the decision, the EEOC and the court may be tempted to rule consistently with the arbitrator's decision. Once the employee has gone through the extensive *Solutions* arbitration process, due process has likely been provided and there is little incentive for another decision maker to second-guess the outcome.<sup>346</sup>

Finally, the one-way binding aspect of arbitration may turn out to be more symbolic, given how rare it is that a dispute will get that far. The vast bulk of workplace disputes are resolved internally in the first three steps of *Solutions*.<sup>347</sup> As a practical matter, the company faces little risk that it will be bound unilaterally to a decision it does not like.<sup>348</sup>

### 3. Benefits to the Legal System

#### a. Promotes Efficiency and Judicial Economy, Supports Settlement, and Legitimizes Arbitration

One-way binding arbitration not only benefits the parties themselves, but the legal system in general. In particular, Coke's one-way binding arbitration promotes efficiency. The litigation is more streamlined and efficient because of the legwork already completed in arbitration. Both parties have narrowed the issues of contention and can move more quickly to trial. Given the extent to which Coke's arbitration process incorporates many features of civil litigation—such as adoption of some of the Federal Rules of Civil Procedure, summary judgment, the presentation of claims, counterclaims and amendments, and identical relief—arbitration saves the parties and the court precious resources and time.<sup>349</sup>

The judicial economy resulting from one-way binding arbitration encourages settlement. Empirical evidence indicates that the faster a court schedules trial, the more likely the case is to settle.<sup>350</sup> If an employee rejects the arbitral decision and instead litigates his case *de novo*, the parties enter litigation more prepared than

346. *Id.*

347. *Id.*; Telephone Interview with Joseph P. Moan, Coca-Cola Company Senior Managing Counsel, Employment Law (Feb. 16, 2009) (on file with author); See also Coke Fourth Task Force Report, *supra* note 146, at 47 (noting only one case going to mediation, where the issue was amicably resolved).

348. Feb. 16, 2009, interview with Moan, *supra* note 347; Dec. 24, 2008, interview with Gadsden, *supra* note 256.

349. In critiquing a similar one-way binding arbitration process conducted by the Better Business Bureau, called "conditionally binding" arbitration, Professor Jean R. Sternlight cautions that "it would be inefficient to require all disputes to be arbitrated in situations where a substantial number of consumers/employees may then opt for a trial *de novo*." Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, *supra* note 8, at 85 n.17. This critique is valid. Here, however, where the large majority of Coke employee disputes are resolved in the first three stages of *Solutions*, this inefficiency is minimized.

350. See, e.g., THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION, *Executive Summary* at xvii (Federal Judicial Center 1987) ("Cases settle individually or in groups of hundreds when firm, credible trial dates are scheduled"); *id.* at 54 ("the single most important aspect of judicial management of asbestos litigation is the setting of a firm, credible trial date"); *id.* at 59 ("In the opinion of the judges and lawyers interviewed, the use of firm trial dates controls the settlement process").

they otherwise would be. One-way binding arbitration sets the parties on the fast track to trial, thereby increasing the likelihood of settlement. Given the overcrowded federal dockets,<sup>351</sup> this by-product of Coke's dispute resolution system is significant.

The legitimacy of arbitration as a dispute resolution forum is enhanced when employees knowingly consent to use it and to be bound by it.<sup>352</sup> One-way binding arbitration removes the stigma attached to arbitration—that it is a forum forced upon unwitting employees who have little bargaining power, presented in a contract of adhesion. *Solutions* arbitration does not bar an employee from her “day in court”—a phrase often shorthand for due process. By stripping away the exploitative aspect of arbitration found in compulsory pre-dispute arbitration agreements, the true value of the forum can be recognized.

### *b. Solutions Aids the Administrative Exhaustion Process*

#### *i. Burden on Employee*

On the other hand, for the employee who wants to go to court, the five-step *Solutions* program—culminating in one-way binding arbitration—erects a series of requirements as a pre-requisite to court access. Employees who simply want to initiate the litigation process must first go through all five progressive steps of *Solutions*, which may impose additional costs, delay, and burdens.<sup>353</sup>

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351. *Solutions* provides much needed reprieve for an overwhelmed federal judiciary:

[T]he federal judiciary's resources are being stretched to the limit. This is particularly true in the district courts . . . [T]heir raw caseload, which itself has skyrocketed and given no indication of leveling off in the last fifteen years despite passage of the numerous provisions designed to reduce congestion within the federal courts. Without additional reforms, according to a U.S. Judicial Conference report, ‘the picture in 2020 can only be described as nightmarish.’ And . . . the consequences of judicial overload already are being felt in the form of delays, errors, and indeterminacy in the case law.

Christopher R. McFadden, *Removal, Remand, and Reimbursement under 28 U.S.C. § 1447(c)*, 87 MARQ. L. REV. 123, 128-29 (2003); see also Allan Kanner & M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 299-300 (2007) (“Federal judges in many districts are burdened with an impossible caseload . . . The pressure on judges to ‘clear their dockets’ has never been greater”); J. Jason Boyeskie, Comment, *A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions*, 60 ARK. L. REV. 955, 962 (2008) (“Since 1988, the number of cases heard at the appellate level has almost doubled”).

352. See Schwartz, *If You Love Arbitration*, *supra* note 9, at 401; Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 282 (2004) (“[A]s a dispute-resolution process, arbitration is generally undemocratic. . . it acquires democratic legitimacy when parties actually agree to arbitrate their disputes because it furthers the unifying democratic value of personal autonomy”).

353. Dec. 24, 2008, interview with Gadsden, *supra* note 256. The Coke *Solutions* program differs from its predecessor, the Texaco *Solutions* program, in this significant way. Unlike the Texaco *Solutions*, employees at Coke do not have the same freedom to skip steps in the *Solutions* process. See Texaco *Solutions* brochure at 7, 8, 10, 11 (provided by Joseph P. Moan) (on file with author) (describing how employees may skip steps in Texaco's four-step *Solutions* program if they are not satisfied or feel uncomfortable). The Texaco *Solutions* program is comprised of four steps, some of which an employee may opt out of prior to being permitted to file a charge with the EEOC. *Id.* at 2, 7, 8, 10, 11. The Coke *Solutions* program has even more (five) steps and does not give the employee the freedom to dispense with those he does not find useful. Coke Rules, *supra* note 5, at 4-7, 10.



An employee is already required to exhaust his administrative remedies through the EEOC or a local equivalent, prior to filing in court.<sup>354</sup> The EEOC process itself includes an investigation and mediation, in which the employee must participate.<sup>355</sup> Thus, employees are already obligated to negotiate with the employer and make a serious effort at resolving their claims short of litigation. Under *Solutions*, an employee must go through three steps within the company, and two steps (mediation and arbitration) outside of the company prior to bringing civil litigation. The *Solutions* progressive five-step program thus imposes an exhaustion requirement of its own, which could indeed leave an employee exhausted by the time he obtains access to court.<sup>356</sup>

Aside from the effort, delay, and potential costs an employee may have to incur by participating in *Solutions*, the larger issue that looms is the propriety of such pre-requisites for access to the court system. For those employees who simply wish to file a charge with the EEOC in hopes of filing a claim in court, the *Solutions* system may be perceived as redundant or, worse, obstructionist. The EEOC, as the agency tasked with enforcing employment discrimination laws and promulgating regulations, is uniquely positioned to broker settlements between employers and employees.<sup>357</sup> Its independent role as a government agency, its broad mission to serve the public interest,<sup>358</sup> and its expertise in employment matters all suggest that it should not be stymied by internal corporate resolution systems, much less supplanted by them.

### ii. Welcome Relief for Administrative Agencies and Employees

However, far from being the interloper described above, *Solutions* benefits the legal system by providing welcome relief to a beleaguered and battle-fatigued government agency. The EEOC's own cooperation with *Solutions* belies the notion that the agency's method of dispute resolution is superior to that of Coke, or other corporate employers.<sup>359</sup> Indeed, the EEOC has participated in, if not led, the

354. See 42 U.S.C. § 2000e-5 (2000) (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 626(d) (2000) (Age Discrimination in Employment Act of 1967); 42 U.S.C. § 12117(a) (2000) (Americans With Disabilities Act of 1990); see also *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (discussing employee's 42 U.S.C. § 2000e-5 option of filing with local fair employment practice (FEP) agency rather than the EEOC for Title VII claims).

355. 42 U.S.C. § 2000e-5(b) ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion").

356. Dec. 24, 2008, telephone interview Gadsden, *supra* note 256.

357. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 285-88 (2002) (describing EEOC's role); see also Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 6-24 (2001-2002) (historical overview of agency).

358. See *Waffle House, Inc.*, 534 U.S. at 287-88.

359. The EEOC has "added a significant number of employers to the ones already participating" in its Referral Back Pilot Program discussed *infra*. Letter from Nicholas M. Inzeo, director of Office of Field Programs, U.S. Equal Employment Opportunity Commission, Washington, D.C., to Mark Snyderman, director, Compliance Programs, Coca Cola Enterprises, Inc., 1 Coca Cola Plaza, Atlanta, Georgia (Mar. 29, 2005) (provided by Joseph P. Moan) (on file with author) [hereinafter *EEOC Referral Back Letter*]. The Department of Labor has a similar arrangement with Texaco, following the company's historic employment discrimination class action settlement. Dec. 24, 2008, telephone

effort to outsource its investigation and mediation functions to the company. Specifically, the EEOC accepted Coke's *Solutions* program as part of the agency's Referral Back Pilot Program.<sup>360</sup> As part of the agency's program, the EEOC would encourage any non-unionized employee who filed a charge with the EEOC—but who had not yet exhausted Coke's *Solutions* process—to resume participation in the company's internal process.<sup>361</sup> The *Solutions* brochure provided to employees states:

The goal of *Solutions* is to resolve workplace issues without legal action. Participation in *Solutions* does not preclude you, however, from pursuing any available legal remedy.

If you file a charge with an administrative agency or file a lawsuit related to an issue covered by *Solutions*, the Company may ask the agency or court to delay any action until you have attempted full resolution through *Solutions*. By continuing employment with the Company, you agree not to oppose the Company's request to delay such proceedings.<sup>362</sup>

As part of its Referral Back Pilot Program, the EEOC may, at Coke's request and with the employee's consent, refer the employee back to Coke's *Solutions*

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Interview with Gadsden, *supra* note 256. See also Texaco *Solutions* Brochure, *supra* note 127, at 13 (describing Texaco's *Solutions* program, upon which Coke was modeled, and stating that if a Texaco employee files a lawsuit prior to participating in *Solutions*' one-way binding arbitration, "it is Texaco's intent to ask the court to suspend the court proceedings until Step Four [arbitration] has been utilized"); The Coca-Cola Company, *Solutions: You Talk. We Listen. An Active Approach to Workplace Issue Resolution Brochure* (provided by Joseph P. Moan, Coca-Cola Senior Managing Counsel, Employment Law) (on file with author) [hereinafter *Coke Solutions Brochure*].

360. The EEOC Referral Back letter states:

Your *Solutions* program has been accepted as part of our Referral Back Pilot Program. Under this program, individuals who file charges of employment discrimination against Coca Cola Enterprises, Inc. (Coca Cola) will be offered the opportunity to have their charge referred back to Coca Cola for participation in your internal dispute resolution program.

EEOC Referral Back Letter, *supra* note 359.

361. *Id.*

362. *Coke Solutions Brochure*, *supra* note 359, at 10. The Coke Rules state the same:

Participation in *Solutions* does not preclude an employee from pursuing any available legal remedy; *Solutions* is not intended either to restrict or expand the employee's or the Company's legal rights. However, should an employee file a charge with an administrative agency or file a lawsuit in court concerning a dispute subject to *Solutions*, the Company may ask the administrative agency or the court to delay proceeding with the charge or lawsuit until the employee and the Company have attempted fully to resolve the dispute through *Solutions*. By continuing employment with the Company, each employee agrees not to oppose the Company's request to delay such proceedings. If the agency or court declines to delay proceedings, or if the Company determines not to seek delay of proceedings, the Program Manager may preclude further handling of the relevant workplace issue through *Solutions*.

Coke Rules, *supra* note 5, at 8, Section 5 "Effect on Legal Rights." See also *id.* at 10, Section 12 "Consent" ("Participation [in *Solutions*] includes an agreement by each employee not to oppose any motion or request by the Company before any administrative agency or court to defer proceedings on any Legal Dispute until the Parties have attempted fully to resolve the Legal Dispute through *Solutions*").

program to exhaust its internal resolution system.<sup>363</sup> This collaboration has been helpful in resolving workplace disputes in a timely and amicable manner.<sup>364</sup>

On the one hand, the collaboration between the EEOC and Coke is part of a larger phenomenon<sup>365</sup> worth examining. As the EEOC starts to share, if not out-source, its traditional dispute resolution function, it is important to ensure that the agency does not abdicate its role as public advocate for the employee. The EEOC, as the independent governmental body responsible for enforcing federal employment discrimination statutes,<sup>366</sup> is tasked with investigating employment discrimination charges, determining reasonable cause findings, and trying to eliminate discrimination through "informal methods of conference, conciliation, and persuasion."<sup>367</sup> The EEOC plays its own distinctive and important role in combating workplace discrimination, separate and apart from the aggrieved individual employee.<sup>368</sup> Certainly, the agency must keep its distance from the employer to preserve its impartiality. Just as the privatization of the civil justice system poses potential risks to due process, the privatization of the administrative agency system could do the same.

On the other hand, the fact that the EEOC has incorporated *Solutions* into its own conciliation process reflects a justified pragmatism. Overwhelmed<sup>369</sup> and

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363. *Id.* By working at Coke, the employee is deemed to have agreed not to oppose Coke's request to delay administrative proceedings until after *Solutions* has been exhausted. *Id.* However, should an employee oppose the delay, this does not mean the employee loses his or her job. Telephone Interview with Joseph P. Moan, Coca-Cola Senior Managing Counsel, Employment Law, with Suzette M. Malveaux (Dec. 22, 2008) (on file with author).

364. The EEOC has stated:

Employers have adopted internal programs for informally resolving employment disputes internally, including discrimination claims. Such programs have assisted in the resolution of claims promptly and amicably. Through a Pilot Program, the EEOC is exploring whether employer-provided dispute resolution programs that operate fairly and voluntarily can serve as an effective means of resolving employment discrimination charges filed with the EEOC. Under the Pilot, a charging party who has filed a charge against an employer *may elect* to have his or her charge referred to the employer's internal ADR program in an attempt to resolve the dispute. . . .

Under the Pilot, further processing of the charge by EEOC would be suspended for up to 60 days while you and The Coca-Cola Company (Coca-Cola) attempt a resolution. If a resolution is reached through Coca-Cola's *Solutions* Program, your charge will be closed pursuant to EEOC's procedures governing withdrawal and settlement of charges. If the dispute is not resolved, the EEOC will resume its processing of your charge.

U.S. Equal Employment Opportunity Commission, *Pilot Program Fact Sheet "Resolving Charges Through an Employer's Internal Dispute Resolution Program"* attached to EEOC Referral Back Letter, *supra* note 359.

365. See EEOC Referral Back Letter, *supra* note 359 ("Over the past eight months we have added a significant number of employers to the ones already participating in our pilot program").

366. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 6 (1996) (describing EEOC's primary enforcement responsibility for various federal employment discrimination statutes).

367. 42 U.S.C. § 2000e-5(b) (2000).

368. See 42 U.S.C. § 2000e-5(f)(1) (where the Commission has not reached an acceptable conciliation agreement with the employer, the agency may bring a civil action, in which the individual aggrieved employee may intervene); see also *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 290-92 (2002) (holding that employee's arbitration agreement with employer did not bar the EEOC from pursuing victim-specific judicial relief in enforcement action brought against employer under the ADA).

369. See Selmi, *supra* note 366, at 2 n.2, 4, 8 (describing ineffectiveness of EEOC and its backlog from the agency's inception and concluding that it "should either be eliminated or substantially reformed"). See also Moss et al., *supra* note 347, at 6 ("[T]he core problem for the Agency [EEOC] has

underfunded,<sup>370</sup> the agency is in no position to take an entrenched stand about the proper role government and the private sector should play vis-à-vis each other in employee dispute resolution.<sup>371</sup> The "resource starved" institution has subjected complainants to long delays and arguably greater risk of retaliation by their employers, as a result of such delays.<sup>372</sup> The careful investigation and conciliation process envisioned for the agency has been consistently undermined by a dearth of funding and staffing. Not surprisingly, the Director of the EEOC's Office of Field Programs, who accepted Coke into the agency's Referral Back Pilot Program,<sup>373</sup> recently conceded that the EEOC's backlog and limited resources negatively impacted the agency's effectiveness.<sup>374</sup> The Acting EEOC Chairman has concluded the same.<sup>375</sup> The National Council of EEOC Locals gave the EEOC an "F" for its 2008 performance, noting: "Rock bottom staffing and record high charges of dis-

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been the sheer enormity of its case load"); *Will Obama's pledge become reality for people with disabilities?*, 12 FED. EEO ADVISOR, (Mar. 1, 2009) ("EEOC is processing the most claims it has had since opening its doors in 1965"). See Steve Vogel, *EEOC Confronts Growing Backlog, Dwindling Staff*, WASH. POST, Feb. 3, 2009, at A13 (EEOC "facing its largest caseload in at least a quarter-century" resulting in an "overwhelmed workforce"). Cf. Michael A. Szkodzinski, Comment, *An Analysis of the EEOC's Issuance of Early Right-to-Sue Letters: Does it Promote Judicial Efficiency or Encourage Administrative Incompetence?*, 150 U. PA. L. REV. 689, 690 (2001) (describing practice in numerous jurisdictions where the EEOC issues early right-to-sue letters to employees because of its inability to act on charges within 180 days from the date the charge is filed).

370. Moss et al., *supra* note 347, at 5-6 ("The history of the EEOC, from its inception in the Civil Rights Act of 1964 to the present day [2002], can be seen as a series of attempts to deal with the inescapable fact that the Agency lacked the resources to do the job it had been assigned to do"); *Will Obama's pledge become reality for people with disabilities?*, *supra* note 369 (EEOC employee describing EEOC during the Bush Administration as "resource starved"). See Vogel, *supra* note 369 (describing "agency's higher workload and decreasing resources" and negative impact it is having on enforcement).

371. The EEOC has arguably also lacked the political will to aggressively pursue certain types of employment cases. For example, Joseph Rich, Director of Fair Housing and Community Development, Lawyer's Committee for Civil Rights Under the Law, testified on Nov. 16, 2006, before the U.S. Senate Judiciary Committee, that the EEOC under the Bush Administration brought relatively few race-based pattern or practice cases on behalf of African-Americans:

Since the beginning of the Bush Administration 34 Title VII cases have been filed, of which ten are pattern or practice cases, the most important employment discrimination cases brought by the Department both in their impact and complexity. Only two of the pattern or practice cases brought by the Division allege discrimination against African-Americans and these were not filed until February and July, 2006, more than five years into the Bush Administration and after considerable attention had been brought to the failure to bring such cases. In its first two years alone, the Clinton Administration filed thirteen pattern or practice cases, eight of which raised race discrimination claims. Moreover two of the ten employment pattern or practice filings—filed before the recent cases alleging discrimination against African-Americans—are "reverse" discrimination cases, alleging discrimination against whites.

Testimony of Mr. Joseph Rich, Director of Fair Housing and Community Development (Nov. 16, 2006), *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=2434&wit\\_id=5849](http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=2434&wit_id=5849) (last visited Apr. 10, 2009).

372. Vogel, *supra* note 369.

373. See EEOC Referral Back Letter, *supra* note 359.

374. See Vogel, *supra* note 368 (quoting Nicholas M. Inzeo, director of the EEOC Office of Field Programs, who stated, "If we had more investigators to investigate and more trial attorneys to litigate, we would do more . . . Would they tell you they're overworked? Oh yeah.").

375. Stuart Ishimaru, an EEOC Commissioner since 2003 and recently appointed acting chair of the EEOC, concluded, "If you have a staff cut of that magnitude, it does have a negative impact, there's no getting around it." Vogel, *supra* note 368.

crimination add up to another failing grade for the beleaguered civil rights agency."<sup>376</sup> Others have gone even further, concluding that the EEOC should be supplanted by the private sector altogether.<sup>377</sup>

Given this backdrop, *Solutions* plays a vital role in providing Coke employees with an avenue for prompt and effective problem solving in the workplace. So long as the EEOC and similar governmental agencies rigorously vet<sup>378</sup> corporate resolution systems like *Solutions*,<sup>379</sup> this alternative to the alternative can appropriately serve such agencies, rather than threaten them.

## V. LIMITATIONS AND DRAWBACKS OF ONE-WAY BINDING ARBITRATION

While one-way binding arbitration forges new and important ground in bridging the divide between compulsory pre-dispute binding arbitration and civil litigation, this groundbreaking approach may be further enhanced or best used in certain contexts.

### A. Unilateral Obligation to Initiate Claims Through Solutions

A potential inequity of the *Solutions* program is its failure to require the company to use it for initiating its own legal claims.<sup>380</sup> When the company has a dispute with the employee, it is free to proceed directly to court to litigate the matter.<sup>381</sup> *Solutions* permits the company to assert a counterclaim in response to an employee's request for arbitration,<sup>382</sup> but the employer's right to assert the counterclaim is not waived if it does not raise it at this time.<sup>383</sup> Thus, the employer has the option of raising its own claims in *Solutions* but is not required to do so. *Solutions* also explicitly carves out those types of claims the company would bring against an employee for alleged misconduct.<sup>384</sup>

376. *Id.*

377. See Selmi, *supra* note 366, at 64 (concluding in 1996 that "the agency is clearly a failure, serving in some instances as little more than an administrative obstacle to resolution of claims on the merits" and arguing that private attorneys are better at enforcing employment discrimination statutes).

378. See U.S. Equal Employment Opportunity Commission, *Pilot Program Fact Sheet "Resolving Charges Through an Employer's Internal Dispute Resolution Program"* attached to EEOC Referral Back Letter, *supra* note 359 (describing necessary characteristics of employer programs participating in pilot program).

379. General criteria for participation in the EEOC's Referral Back Pilot Program can be found at U.S. Equal Employment Opportunity Commission, *Questions and Answers; EEOC "Referral Back" Mediation Pilot Program*, available at <http://www.eeoc.gov/mediate/referralpilotqanda.html> (last visited on Apr. 10, 2009). While a company must meet certain criteria to qualify for the program, the EEOC's selection does not constitute an endorsement. *Id.*

380. Mar. 3, 2009, interview with Gadsden, *supra* note 320.

381. *Id.*

382. *Solutions* requires the company representative to deliver a position statement in response to the employee's Request for Arbitration. Coke Rules, *supra* note 5, at 16. The statement must include: "a. any defenses of the Company; and b. any claim that the Company would like to make against the employee or former employee initiating Arbitration ('counterclaim')." *Id.*

383. Feb. 16, 2009, interview with Moan, *supra* note 210; see also E-mail from Joseph P. Moan to Suzette M. Malveaux (Mar. 5, 2009) (on file with author). This issue, however, has not arisen to date. *Id.*

384. For example, the Coke Rules explicitly state that "*Solutions* cannot be used:

This unilateral obligation begs the question—if *Solutions* is so beneficial, then why isn't the company *required* to use the program when it wants to challenge an employee's conduct? Coke provides a number of explanations.

First, *Solutions* is designed primarily for employees because the company already has a legal department, tasked with representing the company's interests.<sup>385</sup> *Solutions* is designed to empower the employee when challenging the company, while giving the company an opportunity to solve the problem short of litigation.<sup>386</sup> *Solutions* is meant to equalize the playing field by the giving the employee a mechanism and platform for articulating his or her grievances. The company, on the other hand, has a legal department to address its own concerns.<sup>387</sup>

Second, the company need not bring claims through *Solutions* because it can already challenge an employee's potential violations of company policy or its Code of Business Conduct<sup>388</sup> through an entirely separate channel.<sup>389</sup> In the event that the company suspects such wrongdoing on the part of an employee—such as an alleged intellectual property infringement—the company conducts an internal investigation to determine whether its allegation is meritorious.<sup>390</sup> In the event that the company determines that an employee has violated company policy or the Code, it may exercise its normal managerial prerogative to discipline the employee<sup>391</sup> without having to use *Solutions*, mediation, arbitration, or any other internal resolution system.<sup>392</sup> The company may even choose to bring litigation against the employee in addition to taking disciplinary action.<sup>393</sup> To its credit, while the company is not required to use *Solutions* to raise work-related issues, it is likely to try.<sup>394</sup>

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- where prohibited by local laws
  - to challenge, establish, modify, or object to the Company's policies and procedures, except claims that allege discriminatory or inequitable application of the Company's policies or procedures
  - to resolve issues arising from workers' compensation or unemployment insurance claims
  - to resolve issues arising from benefits claims, including claims covered by . . . [ERISA]
  - to resolve issues related to an alleged breach of an Employee's non-competition, non-solicitation, fiduciary, or confidentiality obligations
  - to resolve issues related to a determination that an Employee has violated the Company's Code of Business Conduct
  - to resolve issues related to home appraisals under the Company's Relocation Program
  - to resolve issues involving patents, trademarks, or intellectual property

Coke Rules, *supra* note 5, Section 3B, at 3.

385. Mar. 3, 2009, interview with Gadsden, *supra* note 320.

386. *Id.*

387. *Id.*

388. *Id.* Telephone interview with Edward N. Gadsden, Jr., former Coca-Cola Vice President, Human Resources (Apr. 14, 2009) (on file with author).

389. See discussion *supra* at note 384 (listing exclusions).

390. Apr. 14, 2009, interview with Gadsden, *supra* note 388. This investigation involves the company's legal, security and human resources departments. *Id.*

391. This may include termination, demotion or a reduction in pay, for example. *Id.*

392. *Id.*; see also Feb. 16, 2009, interview with Moan, *supra* note 383.

393. Apr. 14, 2009, interview with Gadsden, *supra* note 388.

394. Suzette M. Malveaux:

How does the company go about resolving problems it has with an employee? May it bypass *Solutions* and go directly to court, or must it go through *Solutions* or another dispute resolution system first?

Joseph P. Moan:

Third, pragmatically speaking, the fact that the company is not required to affirmatively use *Solutions* may make little difference because it is rare for a company to want to bring litigation against an employee.<sup>395</sup> The *Solutions* program is designed to handle “most work related issues,” most of which are initiated by employees,<sup>396</sup> not the employer.<sup>397</sup>

Notwithstanding such explanations, the *Solutions* program could be designed more broadly to handle issues raised by the employer.<sup>398</sup> Certainly, an employer could benefit from the same positive attributes an internal alternative dispute resolution system offers an employee. Early and effective communication, flexibility, informality, reduced costs, expediency, and privacy are just some of the positive attributes any party could seemingly enjoy. While the company’s confidence in *Solutions* is demonstrated by its willingness to be bound by the arbitrator’s decision—favorable or unfavorable—such confidence is somewhat belied by the unilateral obligation on employees to use the program to initiate claims. The company would go even farther in building trust if it committed itself to using its own internal dispute resolution system—*Solutions*—prior to going to court.

### B. Context Matters

The success of Coke’s one-way binding arbitration has not taken place in a vacuum. Coke’s one-way binding arbitration has worked within the context of a larger system of employee choices for problem resolution and a corporate culture that values diversity.<sup>399</sup> The arbitration step of *Solutions* is the fifth and final step of a progressive series of interactions with the company. The *Solutions* program itself is one of a number of ways the employee may register a complaint about a workplace matter. The Ombuds Office<sup>400</sup> and the Employee Reporting Service (the confidential hotline) are additional approaches the employee may choose.

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The issue has never come up. However, the Company would most likely use the *Solutions* process to the extent it is feasible to resolve an issue with an associate.

Mar. 5, 2009 e-mail from Moan, *supra* note 383.

395. In-person interview with Cyrus Mehri, Esq., Counsel for plaintiffs in *Ingram v. The Coca-Cola Co.* (Jan. 14, 2009); Dec. 24, 2008, interview with Gadsden, *supra* note 256.

396. Mar. 3, 2009, telephone interview with Gadsden, *supra* note 320.

397. See, e.g., *Solutions* covers issues related to:

- application of a policy or work rule
- work assignments
- overtime assignments
- transfer or promotion decisions
- written warnings or other disciplinary actions
- compensation
- treatment perceived as unfair or discriminatory
- any form of perceived harassment (e.g., sexual, racial, ethnic, religious, sexual orientation)
- personal injury, unless covered by workers’ compensation.

Coke Rules, *supra* note 5, Section 3A, at 2-3. See also Mar. 5, 2009, e-mail from Moan, *supra* note 383 (“*Solutions* was designed to resolve legally cognizable claims. Therefore, claims about violations in Company policies and procedures are exempt”).

398. See some issues often raised by the employer listed *supra* at note 384.

399. Mar. 27, 2009, e-mail from Gadsden, *supra* note 234; Dec. 23, 2008, telephone interview with Goldstein, *supra* note 296.

400. See generally Andrea McGrath, *The Corporate Ombuds Office: An ADR Tool No Company Should be Without*, 18 HAMLINE J. PUB. L. & POL’Y 452 (1997).

For example, while there were 47 cases brought to the attention of the Diversity and Fairness Office as part of *Solutions* from October 2005 to August 2006,<sup>401</sup> there were 347 contacts made with the Ombuds Office and 69 contacts made with the Employee Reporting Service during that same time period.<sup>402</sup> These numbers demonstrate the importance of offering alternative modes of communication and dispute resolution channels. Coke's one-way binding arbitration has succeeded within an environment of multiple communication sources and entry points with the employer.<sup>403</sup>

Coke's one-way binding arbitration has worked in a corporate climate focused on diversity. The settlement agreement's Statement of Principle defines diversity as a primary objective: "The Company recognizes that diversity is a fundamental and indispensable value and that the Company, its shareholders and all of its employees will benefit by striving to be a premier 'gold standard' company on diversity."<sup>404</sup> Coke adopted the position "that diversity is critical to the success of business" and, through its Diversity Advisory Councils, committed "[s]ignificant time and resources . . . to executing 'diversity as business'"<sup>405</sup> in human resources, marketing, philanthropy, and selection of suppliers. By the end of the five-year settlement compliance period, the independent Task Force recognized Coke's significant progress in achieving diversity:

[T]he Company has made major strides in changing its culture by designing and implementing a comprehensive strategy that links diversity to business goals and makes diversity a business imperative . . . [T]his 'diversity as business' approach integrates diversity into the Company's overall plan for growth . . . emphasizing comprehensive linkages between business success and diversity. . . . Repeated, consistent internal communications to employees, coupled with training of senior and mid-level managers, formed a cornerstone to ensure culture change and sustainability. . . . As stewards of the diversity plan, the Diversity Advisory Councils are specifically empowered to develop annual diversity strategy and initiatives, to monitor progress on those initiatives, and to evaluate the Company's progress against diversity metrics and take action to ensure goals are met.<sup>406</sup>

On September 13, 2006, Coke's Chairman and Chief Operating Officer, E. Neville Isdell, wrote a letter to Task Force Chairwoman and Chief Operating Officer, Alexis Herman. Before the Task Force and the company met for the last time with Judge Story, Isdell reflected on the sustainability of diversity as business and made a long-term institutional commitment to this objective:

So let me end with one final thought around sustainability, and that's the common ingredient to all of this work and all that's come before it: in-

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401. Coke Fifth Task Force Report, *supra* note 1, at 46.

402. *Id.* at 47.

403. Dec. 23, 2008, telephone interview with Goldstein, *supra* note 296.

404. Coke Fifth Annual Task Force Report, *supra* note 1, at 2.

405. *Id.* at 5.

406. *Id.*



vestment. Over the five years you've been here, you've seen us invest significant time, energy, intellectual capital, resources and, most importantly, money, against our goal of being recognized the leader in diversity and fairness. By anyone's standards, this has been a significant investment, and no corporation makes this kind of investment without a view toward the long-term gain.

So what changes after December 1, [2006], after your report is complete and filed with the Court? In a word, nothing.

We won't stop any of the programs we've put in place. We won't change our practices, policies and business routines. We won't stop investing in this work, and we won't stop investing in a critical opportunity to create sustainable growth, as well as a great place to work where all of our employees are inspired to be the best they can be.

We'll keep enhancing our programs. We'll keep using our Insights Surveys to ask employees how we're doing with regards to diversity, fairness and our people programs. We'll keep holding ourselves accountable. We believe these are the things we must do if we're really serious about sustainability.

As you begin drafting your final report to the Court, let me personally assure you that this work is sustainable, that this work will go on long after this Task Force ceases to exist, and that you will know you played a critical role in helping this great Company shape a new future.<sup>407</sup>

Not only did Coke articulate a commitment to diversity, it put its money where its mouth is—tying incentive payments to diversity results. For example, in 2007, the company reported that twenty percent of management bonuses were linked to diversity outcomes.<sup>408</sup> In compliance with the consent decree,<sup>409</sup> starting in 2004, company bonuses at the higher levels of management were dependent upon progress made toward diversity objectives in female and minority representation.<sup>410</sup> Coke's efforts at promoting diversity yielded positive results in both raw

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407. Sept. 13, 2006, letter from E. Neville Isdell, Coke's Chairman and CEO, to Alexis Herman, Coke Task Force chairwoman, attached as Appendix B to Coke Fifth Task Force Report, *supra* note 1 (on file with author). At the Task Force's final meeting before Judge Story, Chairwoman Alexis Herman echoed this sentiment. See Transcript of Task Force Final Report Before the Honorable Richard W. Story, Dec. 1, 2006, at 16 ("[Y]ou cannot separate the whole question of inclusion and people practices and diversity from the growth and future of the company").

408. DIVERSITY INC., *The Top 50: The Nation's Most Credible Business Diversity List, No. 4: The Coca-Cola Company*, available at <http://www.diversityinc.com/public/1801.cfm> (last visited Apr. 10, 2009).

409. See *Abdallah et al. v. The Coca-Cola Company*, No. 1-98-CV-3769 (RWS) (N.D. Ga. Nov. 16, 2000) [hereinafter *Settlement Agreement*], at 21, IL.D.7.e ("The Task Force shall ensure that Coca-Cola bases some appropriate proportion of incentive compensation on the Company's progress against the Diversity Goals. This incentive shall encompass a more significant proportion of compensation for senior management, up to and including the CEO, than for line management").

410. See Coke Fifth Annual Task Force Report, *supra* note 1, at 40, 43-44.

numbers and employees' perceptions—both critical to the *Solutions* program's success.

First, the independent Task Force characterized Coke's improvements, realized over the Task Force's five-year reign, from a *quantitative* perspective, as "substantial":

For example, the Company made progress in diversifying its senior leadership—diversity among the Company's elected and appointed officers increased from 16% female and 8% minority in 2000 to 27% and 21%, respectively, in 2006. That is a 68% increase in women and a 161% increase in minority membership within the officer ranks in a five-year time span. The Company also has made progress in diversifying its pipeline of talent to fill middle management and senior management positions. From 2002 to 2005, minorities increased from approximately 21% to more than 27% of employees at salary grades 10-13, with all minority groups increasing in their percentage representation within these salary grades.<sup>411</sup>

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The Company designed and implemented a Diversity Goals Program, a requirement of the Settlement Agreement. Under the Diversity Goals Program, all senior managers based in North America will have a portion of their incentive tied to the achievement of The Company's diversity goals. This program tracks progress on an annual basis and was implemented in January 2004. For calendar year 2004, the program tied executive and senior manager compensation to a 2% net increase in representation of women and minorities at salary grades 10 and above, very ambitious goals for the first year of this program. The Task Force expressed concerns that these initial goals were possibly too aggressive. At the conclusion of the first year of the diversity goals program, two out of the four goals were met and two were partially met, resulting in a bonus payment of 2.5% less to senior managers. The Company continued the diversity goals program for 2005, but adjusted the goals to set more realistic goals. The Company set goals of 1% net increase in females and minorities at salary grades 10 through 13, and for salary grades 14 and above.

*Id.* at 40.

At the conclusion of the second year of the Diversity Goals Program, CCNA [Coca-Cola North America] met or exceeded three of its four goals (the representation goal for women in salary grades 14 and above was not met) for a bonus payout to senior managers which was 3.25% less than the 20% at risk. In Corporate, senior managers received a bonus payout of 3.5% less than the 20% at risk meeting both goals for minority representation but failing to meet goals for women at salary grades 10-13 and 14 and above.

*Id.* at 43-44.

In 2006, the Diversity Goals Program was modified to focus on the development and retention of women and minorities. The filling of all positions counted toward the attainment of goals, including hires, promotions and lateral moves.

*Id.* at 40.

Through July 2006, CCNA is exceeding all four of its goals often by substantial margins, while Corporate is exceeding the target for 3 of 4 goals, often substantially. Year to date [December 1, 2006], the diversity goals performance of both CCNA and Corporate would exceed the 20% payout target.

*Id.* at 44.

411. *Id.* at 6; see also *id.* at 16, T.4 ("The trend since 2000 shows a substantial net increase and a consistent improvement in minority and female representation among elected and appointed officers"); *id.* at 16, 17, T.5 (noting a "promising trend in minority and female representation in the pipeline jobs to senior leadership"); see also Sakina Spruell, *A Company in Recovery: Coca-Cola from Discrimination Suit to Diversity Leader*, DIVERSITY INC Jan./Feb. 2007, 20, 29 (describing percentage of people of color at Coke in 1999 and 2006).

The company made significant progress in hiring activity toward the latter period of the compliance period. More specifically, from October 1, 2005, through September 30, 2006, of the 824 new hires, approximately 54 percent were women and 47 percent were minorities, 31 percent of whom were African-Americans.<sup>412</sup> The company reported similar results the year prior.<sup>413</sup> Coke also made progress in its promotion rates.<sup>414</sup>

Second, in addition to measuring success quantitatively, the Task Force determined from a *qualitative* perspective that the company's commitment to diversity had improved via an annual employee survey conducted for five years, from 2002 to 2006. As discussed *supra*, in 2006, the company received the highest mean rating for diversity climate from each racial group since the survey was initially given in 2002.<sup>415</sup> In the final year of the compliance period, there was a "dramatic improvement" for all of the minority groups, resulting in almost no distinction between the perceptions of Hispanics, Asian-Americans and whites.<sup>416</sup> Moreover, the gap between African-American perceptions and those of whites had "narrowed significantly" during the compliance period.<sup>417</sup> Thus, the reality and perception of diversity as a corporate value at Coke have merged.

In sum, a serious change in corporate culture—focused on diversity—not only at the highest levels of the company, but also at middle management, is necessary for an internal problem resolution system like *Solutions* to work.<sup>418</sup> Without systemic change throughout a company's culture, the employee trust necessary for successful one-way binding arbitration will not develop.<sup>419</sup> Thus, a company must be committed to a culture of diversity in order to realize the benefits of an internal resolution system that provides one-way binding arbitration.

### C. Systemic Corporate Misconduct

Finally, while the *Solutions* program may be appropriate for addressing *individual* employee work-related matters, it is not appropriate for resolving class actions or other actions alleging systemic corporate misbehavior. Because of the

412. Coke Fifth Task Force Report, *supra* note 1, at 15, T.3.

413. *Id.* at 15.

414. *Id.* at 17, 18, T.6.

While Coke has made significant progress in diversifying its workforce since the consent decree, it clearly has more work to do to eradicate the disparities minorities and women experience:

While minorities account for nearly 35% of all employees, they represent approximately 52% of all support personnel in salary grades 1 through 8, 30% of professionals, and 22% of those at salary grades 13 and above. African Americans, who constitute 23% of the workforce, account for 42% of support personnel, 18% of professionals, and 11% of managers and executives. Women, who represent approximately 50% of the total workforce, account for two-thirds of support personnel, 47% of professional jobs, 32% of managerial jobs and 23% of executive jobs. Since the Settlement Agreement was signed, a larger percentage of minorities and women are now represented in higher-level jobs.

*Id.* at 14. Furthermore, "involuntary termination rates were higher for minorities than for whites across all job levels, most noticeably for executives and sales employees," during the last year of the consent decree. *See id.* at 19, 20, T.8.

415. *Id.* at 21, 22, Fig. 2.

416. *Id.* at 21.

417. *Id.* at 22.

418. Dec. 23, 2008, telephone interview Goldstein, *supra* note 296.

419. Dec. 24, 2008, telephone interview Gadsden, *supra* note 256.

important role the courts<sup>420</sup> play in resolving cases with larger societal implications, employees must be permitted to challenge an employer's pattern or practice of conduct without having to go through an internal company resolution process. The judiciary's unique public function and procedural attributes make it especially well-suited for addressing large-scale employment issues.

Scholars have long recognized that the judiciary's role is broader than resolving private disputes between parties.<sup>421</sup> Courts—imbued with the authority of the state—are tasked with the larger role of defining and defending democracy.<sup>422</sup> This broader role was articulated over a quarter-century ago by Professor Owen Fiss, in his seminal article, *Against Settlement*, and later by others, who provide a theoretical framework for the judiciary's role—referred to as the “public-life conception” of adjudication.<sup>423</sup>

The public-life conception of adjudication posits that court decisions provide an authoritative interpretation of the law, which in turn enforce societal values embodied and reflected in the law.<sup>424</sup> This theory states that the function of the court system is not merely to resolve private disputes, but to safeguard public values.<sup>425</sup> To that effect, it is not the court's job simply to maximize the interests of private parties or merely to bring about peace, but rather to explain and give force to the values embodied in authoritative texts, like the Constitution and federal statutes.<sup>426</sup> Pursuant to this theory, court judgments are necessary to ensure that society's most fundamental democratic ideals are realized.<sup>427</sup> For example, adjudication would lend itself to cases where there are “significant distributional inequalities” between the parties, or cases “where there is a genuine social need

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420. Administrative agencies (such as the EEOC), along with the courts, are uniquely positioned to address systemic issues. The EEOC has, in fact, recently identified this as a priority. In 2005, the EEOC launched a Systems Task Force that published recommendations in 2006 for how the EEOC could better address systemic discrimination. U.S. Equal Employment Opportunity Commission, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*, March 2006, available at [http://www.eeoc.gov/abouteeoc/task\\_reports/systemic.html](http://www.eeoc.gov/abouteeoc/task_reports/systemic.html) (last visited Apr. 10, 2009). The EEOC is empowered to bring “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location,” and has rededicated itself to this effort. *Id.* See also Terence Gordon, *Third Annual Workplace Class Action Report from Seyfarth Shaw of 2006: Collective Action Litigation Defines Trends for 2007*, Jan. 22, 2007, available at [http://www.seyfarth.com/index.cfm/fuseaction/news\\_pub.news\\_pub\\_detail/object\\_id/df06cccc-f23f-4d42-85d6-ae4f43818960/SeyfarthShawClassActionReport2007Edition.cfm](http://www.seyfarth.com/index.cfm/fuseaction/news_pub.news_pub_detail/object_id/df06cccc-f23f-4d42-85d6-ae4f43818960/SeyfarthShawClassActionReport2007Edition.cfm) (last visited Apr. 10, 2009) (predicting a rise in pattern or practice cases because of the EEOC's recent systemic discrimination initiative). For example, the EEOC filed a case against Walgreens on behalf of approximately 10,000 employees alleging race discrimination in store assignments and locations. See Diane Stafford, *Class-action lawsuit alleges discrimination at Walgreens*, KANSAS CITY STAR, Mar. 8, 2007, at C1; See also *Walgreens to pay \$20 million to settle bias lawsuit*, HR.BLR.COM, July 16, 2007, available at <http://hr.blr.com/news.aspx?id=76198> (last visited Apr. 10, 2009).

421. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1083, 1085 (1984).

422. *Id.* at 1085, 1089.

423. David Luban, Essay, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2633-35 (1995). But see Carrie Menkel-Meadow, Essay, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2694-95 (1995).

424. Fiss, *supra* note 421, at 1085.

425. *Id.* at 1083, 1085-86.

426. *Id.* at 1085-86.

427. *Id.* at 1086-87.

for an authoritative interpretation of law.”<sup>428</sup> Under the public-life conception, the judiciary plays an important role in not only resolving individual disputes, but in safeguarding democracy through process.

The court system’s numerous procedural safeguards enable it to play this uniquely critical role. A subsidized forum gives people access. Discovery affords the parties an opportunity to fully prosecute their claims or defend themselves. A jury trial offers a standard set by one’s peers. A written record and trial provide transparency, accountability, and deterrence. Binding legal precedents create uniform enforcement of the law, predictability, and stability. Appellate review ensures proper checks and balances. Altogether, these features lend credence and legitimacy to the outcome—which is particularly important where the stakes are high and the impact on the public is large. Indeed, Coke itself recognizes the impropriety of its *Solutions* program for addressing systemic, company-wide conduct.<sup>429</sup> While one-way binding arbitration offers many advantages, its limitations are important to recognize.

## VI. CONCLUSION

Even considering some of the limitations of one-way binding arbitration, given its transformative potential, employers and employee advocates should consider it as an alternative to compulsory binding pre-dispute arbitration, subject to certain important safeguards. One-way binding arbitration should emphasize employee choice, by allowing employees to select alternative ways of communicating and resolving problems with the employer, in addition to allowing employees to go to court instead of accepting the outcome of arbitration. In addition to preserving access to the courts, one-way binding arbitration should take place in an internal process with key safeguards that, at a minimum, toll the statute of limitations, cover significant costs, offer robust discovery, and provide transparency and accountability through hearings, written records, and review procedures. With such features in place, this alternative to the alternative provides employers enormous benefits such as confidential and amicable resolution of workplace disputes, reduction of EEOC charges and litigation, and improved employee relations, while respecting the due process rights of the employees. One-way arbitration also provides employees an alternative way of seeking the relief they deserve but may not receive under the current administrative agency restraints and federal court system climates. Finally, one-way binding arbitration offers society another option along the continuum between mandatory pre-dispute arbitration and civil litigation—forcing society to reconsider the desirability of

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428. *Id.* at 1087.

429. E-mail from Joseph P. Moan to Suzette M. Malveaux (Mar. 27, 2009) (on file with author); E-mail from Edward N. Gadsden, Jr. to Suzette M. Malveaux (Mar. 27, 2009) (on file with author). The Coke Rules also state:

*Solutions* cannot be used . . . to challenge, establish, modify, or object to the Company’s policies and procedures, except claims that allege discriminatory or inequitable *application* of the Company’s policies or procedures . . .

Coke Rules, *supra* note 5, at 3 Section 3.B. (emphasis added). Only individual application of Coke’s policies or procedures are covered by *Solutions*, not collective or class actions. See Mar. 27, 2009 e-mail from Moan, *supra* note 429.

each and how they might be reconciled. One-way binding arbitration—it just might be the “real thing.”<sup>430</sup>

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430. Fittingly, at the final meeting with the counsel and the Task Force, Judge Story recognized Coke's Human Resources System, of which *Solutions* is a part, as a potential model:

They're proud of what they have done. They [the Task Force] want to tell the world about what they have done. You know, they are proud of this. They want other people to mimic it.

See Transcript of Task Force Final Report Before the Honorable Richard W. Story, Dec. 1, 2006, at 21-23. See also Dec. 23, 2008, telephone interview with Goldstein, *supra* note 296 (on file with author) (describing *Solutions* as “the best that was out there”).

