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## **ARTICLE: Mass Arbitration**

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### **Reporter**

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## **Highlight**

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**Abstract.** For decades, the class action has been in the crosshairs of defense-side procedural warfare. Repeated attacks on the class action by the defense bar, the U.S. Chamber of Commerce, and other defense-side interest groups have been overwhelmingly successful. None proved more successful than the *arbitration revolution*, a forty-year campaign to eliminate class actions through forced arbitration provisions in private contracts. The effects of this revolution on civil justice have been profound. Scores of claims vanished from the civil justice landscape--claims concerning civil rights, wage theft, sexual harassment, and consumer fraud. The effects on social justice, racial justice, gender justice, and economic justice have been especially profound, as the legal claims of minorities, women, wage-and-hour workers, and the working poor were systematically and disproportionately foreclosed.

Yet now, just when one would expect the defense bar to be taking a victory lap, prominent defendants are abandoning the hard-fought right to disable the class action through arbitration and instead seeking refuge in class-action suits. Why the about-face? A surprising counteroffensive designed to use individual arbitration to the plaintiff's advantage: *mass arbitration*. This Article presents a foundational analysis of the subject.

The Article develops the first and only case study of mass arbitration and provides a taxonomy of the results. What emerges is not a variation on old themes, but instead a new and distinct model of dispute resolution. The investigation reveals significant ways in which the mass-arbitration model challenges conventional wisdom about the economics of individual claims; uncovers important differences between the mass-arbitration model and existing forms of aggregate dispute resolution; recasts long-standing debates in litigation theory and jurisprudence; and provides new perspective on the relationships among private procedural ordering, public procedural reform, and civil justice. Mass arbitration, in other words, is a phenomenon in its own right. More importantly, mass arbitration offers a window into the future of civil justice.

## **Text**

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## [\*1287] Introduction \*

In 2018, the minimum wage in Massachusetts and California was \$ 11.00. <sup>1</sup>In Illinois, \$ 8.25. <sup>2</sup>In New Jersey it was \$ 8.60, up from \$ 8.44 the previous year. <sup>3</sup>And in New York it was \$ 10.40, up from a previous \$ 9.70. <sup>4</sup>Drivers in these states for the rideshare service Uber, however, alleged that they had routinely been paid less than those minimum wages--often far less. <sup>5</sup>The Fair Labor Standards Act of 1938 (FLSA) <sup>6</sup>seemed like a good candidate to combat what appeared to be fairly blatant wage theft. Indeed, Congress included a collective-action provision in the FLSA because most wage-theft claims by wage-and-hour workers are not economically viable on an individual basis. <sup>7</sup>According to their employment agreements with Uber, however, drivers were required to arbitrate any claims individually. Putative FLSA collective-action claims by many Uber drivers were therefore stayed pending arbitration. <sup>8</sup>

[\*1288] To any individual driver--and, just as importantly, to any individual driver's lawyer--pursuing an individual claim in arbitration appeared to be a nonstarter. Under the applicable fee schedule for Judicial Arbitration and Mediation Services (JAMS), the nonrefundable filing fee for arbitration was \$ 1,500 per demand. <sup>9</sup>Given the value of

\* This Article is current as of March 2022. Unless otherwise stated, subsequent changes in the mass-arbitration landscape are not addressed.

<sup>1</sup> Office of Commc'ns, Wage & Hour Div., *Changes in Basic Minimum Wages in Non-farm Employment Under State Law: Selected Years 1968 to 2021*, U.S. DEP'T LAB., <https://perma.cc/VU6S-KSJW> (last updated Jan. 2022).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Petition for Order Compelling Arbitration PP 2, 8, *Abadilla v. Uber Techs., Inc.*, No. 18-cv-07343 (N.D. Cal. Dec. 5, 2018), ECF No. 1 [hereinafter *Abadilla* Petition for Arbitration] (providing a general summary of the arbitration demands of Uber drivers from California, Illinois, Massachusetts, New Jersey, and New York, all of whom brought claims against Uber under the Fair Labor Standards Act and relevant state labor laws).

<sup>6</sup> Ch. 676, [52 Stat. 1060](#) (codified as amended in scattered sections of 29 U.S.C.).

<sup>7</sup> **29 U.S.C. § 216(b)**; see, e.g., [Calvillo v. Bull Rogers, Inc.](#), *267 F. Supp. 3d 1307, 1310 (D.N.M. 2017)* ("The purpose of collective action under the FLSA is to give 'plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources,' and to benefit the judicial system 'by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity.'" (alteration in original) (quoting [Hoffmann-La Roche Inc. v. Sperling](#), *493 U.S. 165, 170 (1989)*)).

<sup>8</sup> See, e.g., *Olivares v. Uber Techs., Inc.*, No. 16-cv-06062, [2017 WL 3008278, at \\*1, \\*4 \(N.D. Ill. July 14, 2017\)](#) (granting Uber's motion to compel arbitration for a class of drivers subject to Uber's arbitration agreement, which prohibited class actions); [Singh v. Uber Techs., Inc.](#), *571 F. Supp. 3d 345, 347-52, 365-67 (D.N.J. 2021)* (same), *appeal filed*, No. 21-3234 (3d Cir. Dec. 6, 2021). Claims under analogous state laws met the same result. See, e.g., [Mumin v. Uber Techs., Inc.](#), *239 F. Supp. 3d 507, 518-20, 541 (E.D.N.Y. 2017) (granting Uber's motion to compel arbitration for those claimants who had not opted out of their arbitration agreements); [Capriole v. Uber Techs., Inc.](#), *460 F. Supp. 3d 919, 922-24, 934 (N.D. Cal. 2020)* (doing the same, in a case transferred pursuant to a forumselection clause, for Massachusetts drivers who had not opted out of their agreements with Uber), *aff'd*, [7 F.4th 854 \(9th Cir. 2021\)](#); [O'Connor v. Uber Techs., Inc.](#), *904 F.3d 1087, 1090, 1095 (9th Cir. 2018)* (reversing the district court's denial of Uber's motions to compel arbitration for three putative driver classes).*

<sup>9</sup> See, e.g., *Abadilla* Petition for Arbitration, *supra* note 5, P 21; Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L. (Feb. 11, 2019, 3:06 AM), <https://perma.cc/XT8Y-TW2S>. Although Uber's arbitration agreement provided that Uber would pay at least some of the \$ 1,500, it refused to pay any portion of the fees in the face of multiple arbitration demands (that is, mass arbitration). See Declaration of Michael Colman in Support of Defendant's Motion to Compel Arbitration & to Dismiss the Action at 56, [Olivares](#), *2017 WL 3008278* (No. 16-cv-06062), ECF No. 14-1 (providing for

a single driver's claim for unpaid or underpaid wages, the up-front investment to advance this filing fee <sup>10</sup>would not be an economically rational proposition for either individual claimants or their attorneys. <sup>11</sup>In effect, then, the arbitration agreement eliminated drivers' [\*1289] FLSA claims, just as similar agreements had done to hundreds of thousands of legal claims for decades. But then a funny thing--an improbable, nearimpossible thing--happened. In a series of filings, the Uber drivers served more than 12,500 *individual* arbitration demands on Uber. <sup>12</sup>And their lawyers demanded that Uber reimburse the filing fees--\$ 18.75 million in total--just as Uber had agreed to do in its arbitration agreement. <sup>13</sup>This was not a collective action, or a class action, or even class arbitration. This was *mass arbitration*.

By mass arbitration <sup>14</sup>I mean the following. Some enterprising and (highly) capitalized attorneys file arbitration demands on behalf of individual claimants subject to mandatory arbitration agreements. The claims are brought against the same defendant for the same course of conduct. The attorneys then do this again. And again. And again. Mass arbitration is a new model of claiming that is at once entirely individualized (one-on-one arbitration) and aggregate. The individual claims that make up the multifarious one-on-one arbitrations are brought against a single defendant, arising out of similar alleged misconduct.

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equal sharing of fees unless otherwise required by law); *Abadilla* Petition for Arbitration, *supra* note 5, P 21 ("JAMS has repeatedly advised Uber that JAMS is 'missing the . . . filing fee of \$ 1,500 for each demand, made payable to JAMS.'" (quoting a JAMS notice to Uber)). On costs in arbitration generally, see *Arbitration in America: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter *Senate Arbitration Hearing*] (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law), <https://perma.cc/93RQ-6PW2> ("Under these class-banning arbitration clauses, any claimant must bear 100% of the costs of proceeding in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks.").

<sup>10</sup>The portion of the filing fee for which claimants bear responsibility may be capped by the applicable arbitral forum's fee schedule at the time of filing. See, e.g., *Arbitration Schedule of Fees and Costs*, JAMS, <https://perma.cc/U8F6-TZKK> (archived May 9, 2022) ("For matters based on a clause or agreement that is required as a condition of employment, the employee is only required to pay \$ 400."). The relevant arbitration agreement may also provide that the employer will pay a portion of the claimant's filing fees. See *supra* note 9. Faced with mounting fees from arbitration demands, Uber settled with almost 60,000 of its drivers in 2019 for more than \$ 146 million. See Chris Isidore, *Uber Settles Disputes with Thousands of Drivers Ahead of Its IPO*, CNN (May 9, 2019, 8:10 AM EDT), <https://perma.cc/PTM3-36T6>. Other companies faced with mass arbitration have responded similarly, leading California to enact a law penalizing any company that refuses to pay arbitration fees. *CAL. CIV. PROC. CODE § 1281.97* (West 2022); see also *Postmates Inc. v. 10,356 Individuals*, No. 20-cv-02783, [2021 WL 540155](https://perma.cc/2021-WL-540155), at \*13 (C.D. Cal. Jan. 19, 2021) (denying Postmates' attempt to strike down the California law); Alison Frankel, *Calif. Judge Upholds State Law Penalizing Companies for Stalling on Arbitration Fees*, REUTERS (Jan. 20, 2021, 4:49 PM), <https://perma.cc/P9V7-MUWE> (describing Postmates' efforts to avoid arbitration as "unrelenting").

<sup>11</sup> Cf., e.g., *AT&T Mobility LLC v. Concepcion*, [563 U.S. 333, 365 \(2011\)](https://perma.cc/563-U.S.-333-365) (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions . . . for the possibility of fees stemming from a \$ 30.22 claim?"); *Senate Arbitration Hearing*, *supra* note 9 (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law) ("Most [consumers] cannot find lawyers to represent them in arbitration . . .").

<sup>12</sup> Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019, 12:03 PM), <https://perma.cc/4VQT-FHHM>.

<sup>13</sup> *Id.*

<sup>14</sup>The term "mass arbitration" has been used by one scholar to describe the ubiquity of arbitration agreements in the post-arbitration revolution landscape. David Horton, *Mass Arbitration and Democratic Legitimacy*, [85 U. COLO. L. REV. 459, 476-79 \(2014\)](https://perma.cc/85-U.COLO.L.REV.459-476-79) (reviewing MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)). What the author meant in that book review, though, was a massive number of actual agreements. That is not mass arbitration as described in this Article; indeed, it is almost the opposite, given that those agreements tend to result in almost no arbitration. See *infra* Part I.C.

Mass arbitration is both a response to and a product of a decades-long, wildly successful campaign by defense-side interests to dismantle the infrastructure for enforcing substantive rights.<sup>15</sup> This campaign, waged by the defense bar, the U.S. Chamber of Commerce, multiple Republican presidential administrations, and various defense-side interest groups, involved a series of procedural offensives in the Supreme Court and before Congress.<sup>16</sup> Many [\*1290] decades and scores of victories after its inception, the campaign achieved wide deregulation across the American legal landscape.<sup>17</sup>

In the crosshairs of the campaign: the class-action device. At the urging of conservative administration officials, President Ronald Reagan's judicial appointees received careful vetting as to their views on the class action.<sup>18</sup> President George W. Bush pushed Congress to examine litigation practices and the perceived explosion of "junk" litigation in nearly every State of the Union address.<sup>19</sup> A group of Fortune 100 corporate lawyers helped draft the

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<sup>15</sup> See generally Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 *FORDHAM L. REV.* 37, 37, 59 (2018) (explaining how rights-creating statutes enacted during the 1960s and 1970s brought about a procedural counterrevolution against federal litigation); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 *WM. & MARY L. REV.* 1137, 1140-41 (2012) (detailing the dismantling of private enforcement mechanisms in litigation and noting the United States' unique reliance on private litigation to regulate wrongdoing).

<sup>16</sup> See, e.g., Joanna C. Schwartz, *The Cost of Suing Business*, 65 *DEPAUL L. REV.* 655, 655-56 (2016) (describing how the Supreme Court adopted the position of the Chamber of Commerce and other business amici in recent class-action suits); Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 *U. PA. L. REV.* 1495, 1524-25 (2017) (characterizing Republican anti-class-action bills in the early 1990s and the Chamber of Commerce's increased amicus activity since 1995 as "part of a wider and concerted campaign of litigation retrenchment"); Brianne J. Gorod, *The First Decade of the Roberts Court: Good For Business Interests, Bad for Legal Accountability*, 67 *CASE W. RES. L. REV.* 721, 722-23 (2017) ("[T]he Chamber of Commerce . . . appears to have been more successful before the Roberts Court than it was before either of the two Courts that preceded it."); see also Joanne Doroshov, *Federal Legislative Attacks on Class Actions*, 31 *LOY. CONSUMER L. REV.* 22, 30-36 (2018) (recounting the history of attacks on *Federal Rule of Civil Procedure 23* by corporate lobbying groups and Republican legislators).

<sup>17</sup> See *Epic Sys. Corp. v. Lewis*, 138 *S. Ct.* 1612, 1647 (2018) (Ginsburg, J., dissenting) (citing Glover, *supra* note 15, at 1150-51) (explaining how private litigation is critical to the regulation of wrongdoing in the United States).

<sup>18</sup> See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 *U. ILL. L. REV.* 371, 378-83 (noting that "[t]he President personally met every judicial nominee to ensure their . . . fidelity to his vision," which included a "[s]pecial ire" toward class-action impact litigation).

<sup>19</sup> See President George W. Bush, Address Before a Joint Session of the Congress on Administration Goals (Feb. 27, 2001), <https://perma.cc/GK57-GS2L> (discussing the need to avoid "frivolous lawsuits" against medical providers); President George W. Bush, 2003 State of the Union Address (Jan. 28, 2003), <https://perma.cc/E9AJ-GXLJ> (discussing the need for medical liability reform); President George W. Bush, 2004 State of the Union Address (Jan. 20, 2004), <https://perma.cc/5HA3-PLSM> (calling for the elimination of "wasteful and frivolous medical lawsuits"); President George W. Bush, 2005 State of the Union Address (Feb. 2, 2005), <https://perma.cc/4XAL-FL5Z> ("Justice is distorted and our economy is held back by irresponsible class actions . . ."); President George W. Bush, 2006 State of the Union Address (Jan. 31, 2006), <https://perma.cc/5AYL-TQGZ> ("I ask . . . Congress to pass medical liability reform this year."); President George W. Bush, 2007 State of the Union Address (Jan. 23, 2007), <https://perma.cc/ZZ8Z-NU6Q> (calling for legislation against "junk lawsuits"); President George W. Bush, 2008 State of the Union Address (Jan. 28, 2008), <https://perma.cc/S25K-BDFZ> (calling on Congress to address an "epidemic of junk medical lawsuits"); see also Gilles, *supra* note 18, at 387. Whether the perceived "litigation explosion" reflects reality is not so obvious. For instance, the number of civil cases filed in state courts decreased by 7.7% between 2008 and 2012. CT. STAT. PROJECT, NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 4 (2014), <https://perma.cc/K9G3-8NDL>. The picture in federal courts is more nuanced: Federal civil appeals decreased by 11% between 2009 and 2018, but civil filings in U.S. district courts rose 7.1% during the same period (although they declined by 5.2% between 2017 and 2018). *Federal Judicial Caseload Statistics 2018*, U.S. CTS., <https://perma.cc/L5ST-JV9K> (archived May 13, 2022). Civil filings rose a further 3.4% between 2018 and 2019, *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <https://perma.cc/9SDL-WXPE> (archived May 13, 2022), and 16.2% between 2019 and 2020, *Federal Judicial Caseload Statistics 2020*, U.S. CTS., <https://perma.cc/W89J-F74F> (archived May 13, 2022).

Class [\*1291] Action Fairness Act (CAFA)--which aimed to reduce the overall number of class certifications in the litigation landscape<sup>20</sup>--and spent somewhere between \$ 50 to \$ 200 million in support of the bill.<sup>21</sup> Meanwhile, the defense bar secured Supreme Court victories in case after class-action case. The Court (often, but not always, in 5-4 decisions) ratcheted up class-certification standards under [Rule 23\(a\) of the Federal Rules of Civil Procedure](#); <sup>22</sup>effectively removed the class action from the products liability landscape; <sup>23</sup>made civil rights claims more difficult to pursue on a class-wide basis; <sup>24</sup>and embraced the defense coalition's conception of the class action as procedural pariah.<sup>25</sup>

The campaign's focus on the class action was grounded in conventional wisdom regarding claiming economics. This wisdom holds--and empirical research tends to support<sup>26</sup>--that for an individual with a low-value but [\*1292] potentially meritorious claim, the costs of pursuing an individual case are typically too high for individual claiming to be a rational proposition.<sup>27</sup> The class-action device changes that calculus by allowing cost spreading among claimants, thereby enabling claiming.<sup>28</sup> Destroy the class action, the logic went, destroy the claims.

And indeed, the defense coalition came to bury the class action, not restrict it. None of the coalition's efforts went so far as to eliminate the class action altogether: Doing so would have required upending long-standing precedent or amending the Federal Rules of Civil Procedure. Instead, the coalition waged a forty-year campaign to gain the

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<sup>20</sup> See S. REP. NO. 109-14, at 4-5, 13-14, 22-23, 53-54 (2005) (expressing concern with the "dramatic explosion of class actions in state courts" and describing how CAFA makes removal to federal courts--which are less likely to grant certification--easier).

<sup>21</sup> See David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, [48 WM. & MARY L. REV. 1247, 1288 \(2007\)](#). Despite CAFA's success, more dramatic legislative efforts by class-action opponents met with resistance. See Gilles, *supra* note 18, at 396-97 (describing one bill that would have limited contingency fees for plaintiffs' attorneys).

<sup>22</sup> E.g., [Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 \(1997\)](#) (holding that "undiluted, even heightened, attention" is required for settlement-only class certification under Rule 23); [Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 \(2011\)](#) (adopting Richard Nagareda's heightened "predominance" standard for purposes of Rule 23(a) commonality and stating that the only questions relevant for commonality are those that generate "answers apt to drive the resolution of the litigation" (emphasis omitted) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, [84 N.Y.U. L. REV. 97, 132 \(2009\)](#))); see also Robert H. Klonoff, *The Decline of Class Actions*, [90 WASH. U. L. REV. 729, 764 \(2013\)](#) (arguing that courts have "inject[ed] confusion over what is required to satisfy each element of Rule 23(a)" by applying the rule's requirements to class definitions).

<sup>23</sup> See, e.g., [Amchem, 521 U.S. at 609-11](#) (discussing the impediments to class certification presented by an asbestos products liability suit); [Ortiz v. Fibreboard Corp., 527 U.S. 815, 853 \(1999\)](#) (noting that having "enough assets to pay all projected claims" would preclude the "certification of any mandatory class on a limited fund rationale").

<sup>24</sup> See [Dukes, 564 U.S. at 372-78](#) (Ginsburg, J., concurring in part and dissenting in part).

<sup>25</sup> See, e.g., [AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 \(2011\)](#) (describing class actions as imposing *in terrorem* settlement pressure and stating that "class arbitration would be no different"); [Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686-87 \(2010\)](#) (stating that the "stakes of class-action arbitration are comparable to those of class-action litigation" and holding that class arbitration may not be compelled absent explicit agreement); see also [In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1296-98 \(7th Cir. 1995\)](#) (emphasizing the potential for class actions to impose "intense" settlement pressure and refusing to certify an issue class based on this pressure).

<sup>26</sup> See *infra* notes 112-17 and accompanying text.

<sup>27</sup> See [Am. Express Co. v. It. Colors Rest., 570 U.S. 228, 245 \(2013\)](#) (Kagan, J., dissenting).

<sup>28</sup> See Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 236-38 (1991).

ability to contract the class action out of existence. Its focus? Mandatory arbitration agreements with class-action waivers in take-it-or-leave-it consumer and employee contracts.

Defendants played the long game.<sup>29</sup> They convinced the Supreme Court to bless arbitration provisions prohibiting class action for state-law claims,<sup>30</sup> for federal claims,<sup>31</sup> and finally for claims under statutes like the FLSA that explicitly provide a right to collective action.<sup>32</sup> The result was a roadmap for corporations to engineer, as a practical matter, contractual immunity against a vast array of claims. The result was also nothing short of a revolution: an *arbitration revolution*.<sup>33</sup>

Yet less than a decade later, some of the very entities that waged and seemingly won the war are abandoning the whole project. Corporations that engineered the arbitration revolution are now "scared to death" of arbitration.<sup>34</sup> So scared, in fact, that some are retreating to the device they spent decades trying to eliminate: the class action. In May 2021, one of the [\*1293] biggest corporations of all--Amazon--dropped the arbitration requirement from its terms of service entirely. "Fine," it essentially declared, "sue us."<sup>35</sup>

How could this total victory transform into a massive retreat not even a decade later? The answer lies in an unforeseen (and largely unforeseeable) counteroffensive by a small subset of the plaintiffs' bar--a counteroffensive that I term mass arbitration. This Article presents a foundational analysis of the subject.

Part I traces the backdrop against which mass arbitration emerged. It first provides a short history of the arbitration revolution (in which the Supreme Court allowed for mandatory arbitration agreements in virtually all take-it-or-leave-it contracts) and the concomitant class-action counterrevolution (in which the Supreme Court not only made class certification more difficult but also permitted the use of class-action waivers in mandatory arbitration agreements).<sup>36</sup> It then details the profound consequences of the arbitration revolution for the civil justice landscape. Today,

<sup>29</sup> See, e.g., Aaron Bruhl, *AT&T's Long Game on Unconscionability*, PRAWFSBLAWG (May 5, 2011, 9:40 AM), <https://perma.cc/DY38-XECL> (speculating that counsel for AT&T had, for over a decade, been crafting a strategy for creating, testing, and ultimately bringing a "consumer-friendly" arbitration agreement with a class waiver to the Supreme Court).

<sup>30</sup> *Concepcion*, 563 U.S. at 337-38, 352.

<sup>31</sup> *It. Colors*, 570 U.S. at 231-32, 238-39.

<sup>32</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619-20, 1626 (2018).

<sup>33</sup> See David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 457-60 (2016).

<sup>34</sup> Michael Corkery & Jessica Silver-Greenberg, "Scared to Death" by Arbitration: Companies Drowning in Their Own System, N.Y. TIMES (Apr. 6, 2020) (quoting an internal DoorDash document), <https://perma.cc/T34V-PJ9X>.

<sup>35</sup> Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM ET) (capitalization altered), <https://perma.cc/R5JQ-J26V>; Amanda Robert, *Amazon Drops Arbitration Requirement After Facing over 75,000 Demands*, ABA J. (June 2, 2021, 11:45 AM CDT), <https://perma.cc/TYG3-GMDU> ("Many companies require their employees and customers to resolve disputes through arbitration rather than in the courtroom. Now, Amazon is no longer one of them.").

<sup>36</sup> Stephen Burbank and Sean Farhang characterize efforts to retrench the class-action device as a counterrevolution against federal litigation. See Burbank & Farhang, *supra* note 16, at 1496-98. In the context of the arbitration revolution, those same efforts constitute a counterrevolution against the class action itself--and against civil litigation generally. For additional literature discussing the retrenchment of rights through procedural warfare, see generally Glover, *supra* note 15, at 1162-70; LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 291-93 (2014); STEPHEN B. BURBANK & SEAN P. FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017); and J. Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-worker Activism*, 2019 J. DISP. RESOL., no. 1, at 129.

virtually all Americans are subject to mandatory arbitration agreements with class-action waivers. And a broad swath of claims--for consumer fraud, racial discrimination, gender discrimination, wage theft, and workplace sexual harassment--have been all but eliminated.

Decades of attempts at public procedural reform have largely failed. Nonetheless, the analysis of the Supreme Court's arbitration jurisprudence in Part II shows that the arbitration revolution left (narrow) room for private procedural counteroffensives. To be sure, the Supreme Court has made quite clear that neither unconscionability nor the effective-vindication doctrine is sufficient to salvage a representative procedure--the class action--that the Court itself disfavors. But what could happen if defendants "didn't have the [\*1294] class action to kick around anymore"? <sup>37</sup>What *did* happen--improbably, unexpectedly--was mass arbitration.

The best way to understand mass arbitration is to observe it in a realworld context. Parts III, IV, and V of this Article accordingly provide and analyze a foundational mass-arbitration case study. One scholar has aptly referred to private arbitration as a "black hole."<sup>38</sup>To see beyond the event horizon, I drew from an extensive set of materials, some not publicly available, to create a broad study dataset. These materials included all available claim data from the American Arbitration Association (AAA), JAMS, and the International Institute for Conflict Prevention & Resolution (CPR); all relevant judicial filings, opinions, and orders; and all relevant corporate financial disclosures.<sup>39</sup>I also interviewed the principal architects of mass arbitration,<sup>40</sup>leading plaintiffs' attorneys,<sup>41</sup>and a number of leading defense attorneys, including some of the architects of the defense coalition's arbitration revolution.<sup>42</sup>

The study in Part III first uncovers the origin story of mass arbitration--a story about how a few entrepreneurial attorneys marshaled an unlikely combination of experience, capital, innovation, and appetite for risk in an effort to call corporate defendants' arbitration bluff by, well, arbitrating. They demanded the same thing those defendants had sought before the Supreme [\*1295] Court: the enforcement of arbitration agreements "according to their terms."<sup>43</sup>And they did so repeatedly.

The study in Part III also reveals that mass arbitration is a new and distinct form of aggregate dispute resolution. Part III explains the mass-arbitration model's distinctive features, strategic elements, risks, and benefits. In so doing, it reveals the counterintuitive ways in which mass arbitration challenges--indeed, inverts--the conventional

<sup>37</sup> To quote Richard Nixon, speaking before reporters at the Beverly Hilton Hotel in 1962: "You won't have Nixon to kick around anymore, because gentlemen, this is my last press conference . . . ." Jason Schwartz, *55 Years Ago--"The Last Press Conference,"* RICHARD NIXON FOUND. (Nov. 14, 2017), <https://perma.cc/DQ45-B2BN>.

<sup>38</sup> Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, [\*96 N.C. L. REV.\* 679, 682 \(2018\)](#).

<sup>39</sup> See *infra* Part III.A.2.

<sup>40</sup> Interview with Travis Lenkner, Managing Partner, Keller Lenkner LLC & Warren Postman, Partner, Keller Lenkner LLC, in Queenstown, Md. (Jan. 14, 2021); Interview with Warren Postman, Partner, Keller Lenkner LLC, in Wash., D.C. (July 23, 2021); Interview with Cory L. Zajdel, Principal Att'y, Z Law, LLC, in Wash., D.C. (July 22, 2021); Interview with Matthew C. Helland, Managing Partner, Nichols Kaster, PLLP, in Kennebunk, Me. (Sept. 2, 2021). All transcripts and notes are on file with the Author.

<sup>41</sup> Interview with Anonymous No. 5 in Wash., D.C. (Nov. 8, 2021); Interview with Jonathan D. Selbin, Partner, Lief Cabraser Heimann & Bernstein, LLP, in Wash., D.C. (July 26, 2021); Interview with Anonymous No. 2 in Wash., D.C. (Mar. 13, 2020); Interview with Adam T. Klein, Managing Partner, Outten & Golden LLC, in Wash., D.C. (Aug. 10, 2021); Interview with Nancy Erika Smith, Att'y, Smith Mullin, P.C., in Kennebunk, Me. (Aug. 24, 2021). All transcripts and notes are on file with the Author.

<sup>42</sup> Interview with Anonymous No. 4 in Wash., D.C. (July 29, 2021); Interviews with Anonymous No. 3 in Wash., D.C. (Apr. & June 2021); Interview with Anonymous No. 1 in Nashville, Tenn. (Jan. 2006). Additionally, I interviewed leading defense attorneys or former defense attorneys who had experience with mass arbitration. Interview with Jonathan E. Paikin, Partner, Wilmer Cutler Pickering Hale & Dorr LLP, in Wash., D.C. (Nov. 9, 2021); Interview with Anonymous No. 5, *supra* note 41. All transcripts and notes are on file with the Author.

<sup>43</sup> See, e.g., [\*AT&T Mobility LLC v. Concepcion\*, 563 U.S. 333, 344 \(2011\)](#) (explaining that requiring class-wide arbitration interferes with the Federal Arbitration Act's aim of enforcing arbitration agreements "according to their terms").



wisdom regarding the economics of claiming. Mass arbitration *harnesses* individual claiming and *eschews* class claiming in order to extract settlements for claimants.

Part IV provides a window into the future of mass arbitration by uncovering a series of challenges to the mass-arbitration model. Part V then taxonomizes the case study's findings and compares the mass-arbitration model to more familiar and established models of aggregate dispute resolution--namely, class actions and multidistrict litigation (MDL) consolidations.

As Part VI details, the impact of mass arbitration on the civil justice landscape will be profound. First, mass arbitration recasts long-standing debates in civil justice, particularly those at the intersection of claim facilitation and settlement pressure. Second, because defendants will have to contend with the mass-arbitration model in dispute-resolution contexts they cannot unilaterally change by contract, mass arbitration illuminates the possibilities and pitfalls of informal aggregate dispute resolution in the civil justice landscape. Third, mass arbitration suggests a larger critique of the U.S. civil justice system: It is at best agnostic to many of the systemic injustices it perpetuates, and it increasingly shirks its countermajoritarian commitments as it outsources resolutions to moneyed corporate interests.

The *counter-counter*revolution is upon us. Mass arbitration has already driven some corporate defendants into the arms of their longtime nemesis, the class action. But we have only begun to glimpse the enormous change that mass arbitration portends.

## I. The Arbitration Revolution and the Class-Action Counterrevolution

The defense coalition tried to kill the class action by shifting dispute resolution from public litigation to private arbitration. This involved a significant sleight of hand. As this Part explains, what the defense coalition really wanted was to eliminate--or at least drastically reduce--plaintiffs' ability [\*1296] to assert claims anywhere. Arbitration emerged as an important fig leaf in that effort.

Though disfavored in early American jurisprudence,<sup>44</sup> private procedural ordering is now widely accepted by American courts.<sup>45</sup> Public rules of procedure are increasingly treated as default rules subject to waiver.<sup>46</sup> Judicial endorsement of private procedural ordering paved the way for the expansion of "alternative dispute resolution," namely arbitration. Arbitration agreements in private contracts, in turn, provided the vehicle by which the defense bar achieved the "near-total demise" of the class action.<sup>47</sup> This one-two punch of mandatory arbitration agreements and class-action waivers has now touched virtually all Americans, and it has all but eliminated a wide range of consumer, employee, and civil rights claims.

This Part traces the above developments in three stages. First, it describes the birth of forced arbitration agreements in take-it-or-leave-it contracts--the arbitration revolution. Second, it details the near-total death of class actions--the class-action counterrevolution. Third, it examines the aftermath of the revolution and the counterrevolution, both for American citizens and for scores of claims across the legal landscape.

### A. The Arbitration Revolution

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<sup>44</sup> See Robin J. Efron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, [98 B.U. L. REV. 127, 128, 134 \(2018\)](#).

<sup>45</sup> See Jaime Dodge, *The Limits of Procedural Private Ordering*, [97 VA. L. REV. 723, 734-38 \(2011\)](#).

<sup>46</sup> See H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, [95 NEB. L. REV. 787, 788-91 \(2017\)](#).

<sup>47</sup> See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, [104 MICH. L. REV. 373, 375-79 \(2005\)](#) (predicting the "near-total demise of the modern class action" due to the "rise of contractual class action waivers" that "work[] in tandem with standard arbitration provisions").

The history of binding arbitration agreements begins in the first part of the twentieth century. Following a period of perceived hostility toward arbitration in federal courts,<sup>48</sup> Congress passed the Federal Arbitration Act (FAA) in 1925.<sup>49</sup> The FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>50</sup> During debates about the FAA's [\*1297] potential passage, one senator expressed concern that contracts with arbitration clauses might be offered on a take-it-or-leave-it basis to captive customers or employees. The bill's supporters responded that the FAA was intended to facilitate the enforcement of freely and fully negotiated agreements between merchants of equal bargaining power.<sup>51</sup> For decades, the Supreme Court's arbitration jurisprudence aligned with this view of the FAA and disallowed ex ante arbitration agreements when bargaining power was unequal.<sup>52</sup>

The story does not pick up in any meaningful way until the 1980s. After the election of President Ronald Reagan, the defense bar, corporate entities, and related interest groups launched what would become a decades-long campaign to expand the universe of permissible contexts for mandatory arbitration agreements. In a series of cases decided in the 1980s and 1990s, the defense coalition persuaded the Supreme Court to approve the use of forced arbitration for claims under federal antitrust laws,<sup>53</sup> securities laws,<sup>54</sup> and antidiscrimination statutes.<sup>55</sup> Lower courts, meanwhile, enforced arbitration agreements found in mail inserts,<sup>56</sup> in shrink-wrap licenses,<sup>57</sup> and even in "add-ons" to contracts already entered into by consumers.<sup>58</sup> By 2012, the arbitration revolution for legal claims was

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<sup>48</sup> See [Gilmer v. Interstate/Johnson Lane Corp.](#), 500 U.S. 20, 24 (1991). For an alternative historical account regarding early treatment of arbitration agreements, see Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 480-81 (1995).

<sup>49</sup> Federal Arbitration Act, ch. 213, [43 Stat. 883](#) (1925) (codified as amended at [9 U.S.C. §§ 1-14](#)).

<sup>50</sup> [9 U.S.C. § 2](#).

<sup>51</sup> See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, [89 N.Y.U. L. REV. 1939, 1948](#) & n.42, 2007 & n.321 (2014) (citing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 8-11 (1923)); see also Pamela S. Karlan, David C. Baum Memorial Lecture, *Disarming the Private Attorney General*, [2003 U. ILL. L. REV. 183, 204](#) (noting that Congress may have intended to exclude employment contracts from the FAA); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, [1997 WIS. L. REV. 33, 38](#) (asserting that the FAA was not intended to cover contracts of adhesion).

<sup>52</sup> See, e.g., [Wilko v. Swan](#), 346 U.S. 427, 435-38 (1953), overruled by [Rodriguez de Quijas v. Shearson/Am. Express, Inc.](#), 490 U.S. 477 (1989).

<sup>53</sup> [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.](#), 473 U.S. 614, 628-29 (1985).

<sup>54</sup> [Rodriguez de Quijas](#), 490 U.S. at 480-81, 484-85.

<sup>55</sup> [Gilmer v. Interstate/Johnson Lane Corp.](#), 500 U.S. 20, 23-24, 29, 35 (1991).

<sup>56</sup> *Sanders v. Comcast Cable Holdings*, No. 07-cv-00918, [2008 WL 150479, at \\*1-3, \\*12 \(M.D. Fla. Jan. 14, 2008\)](#).

<sup>57</sup> [Hill v. Gateway 2000, Inc.](#), 105 F.3d 1147, 1148, 1151 (7th Cir. 1997).

<sup>58</sup> For a recent example, see *Miracle-Pond v. Shutterfly, Inc.*, No. 19-cv-04722, [2020 WL 2513099, at \\*1-2, \\*6 \(N.D. Ill. May 15, 2020\)](#) (permitting the addition of an arbitration clause to existing consumer contracts without notice of modification). *But see*, e.g., [Douglas v. U.S. Dist. Ct.](#), 495 F.3d 1062, 1065-67 (9th Cir. 2007) (per curiam) (requiring notice in order to enforce an add-on arbitration clause).

largely complete: The Court held [\*1298] that all federal statutory claims are arbitrable unless Congress expressly provides otherwise.<sup>59</sup>

After these successes, the scope of the defense coalition's goals expanded. If arbitration agreements could be used to *move* legal claims out of court and into private dispute resolution, perhaps they could be used to *remove* them altogether. Aware that directly retrenching substantive rights was politically impractical,<sup>60</sup> the coalition sought to eliminate rights indirectly by targeting the principal mechanism for their enforcement--the class action. And so, as the next Subpart traces, the coalition also waged a class-action counterrevolution.

## B. The Class-Action Counterrevolution

In the 1980s, in response to a perceived "litigation explosion" and an increase in Rule 23(b)(3) suits (which tended to extract large settlements from corporate defendants<sup>61</sup>), business leaders and conservative politicians launched a series of public attacks on the class action.<sup>62</sup> According to these individuals, class actions allowed "radical" lawyers to use litigation to subvert "the democratic will as expressed through legislatures or executive action."<sup>63</sup> President Reagan's judicial appointees were vetted on the class-action issue to confirm that they would help effectuate the Reagan Administration's anti-litigation agenda.<sup>64</sup> Conservative groups, particularly in the 1990s and 2000s, engaged in numerous efforts to retrench class actions through congressional action.<sup>65</sup>

The defense coalition had even more success before the federal judiciary, where its lawyers contested the interpretation of nearly every element of Rule 23. Conservative judges, many of them skeptical of mass-harm claims, [\*1299] were increasingly amenable to these broadsides.<sup>66</sup> The defense coalition's challenges ultimately reached a receptive Supreme Court, which ratcheted up certification standards for 23(b)(2) and 23(b)(3) class actions.<sup>67</sup> The Court's restrictive interpretation of Rule 23(a)'s commonality requirement went a long way toward eliminating nationwide employment-discrimination classes.<sup>68</sup> Its decisions in two asbestos class-action suits made

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<sup>59</sup> See [CompuCredit Corp. v. Greenwood](#), 565 U.S. 95, 103-05 (2012) ("Because the [Credit Repair Organizations Act] is silent on whether claims under the Act can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms.").

<sup>60</sup> See Burbank & Farhang, *supra* note 15, at 43.

<sup>61</sup> See Gilles, *supra* note 18, at 376 ("Beginning in the 1980s, class actions racked up many billions of dollars in settlements, spread across an ever-expanding range of subject areas and industries . . . . By the 2000s, as multimillion dollar range settlements became almost commonplace, the power of class cases to coerce lucrative settlements was not much in dispute." (footnotes omitted)).

<sup>62</sup> [Id. at 378-81, 395-96.](#)

<sup>63</sup> DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 301 (1988).

<sup>64</sup> See *supra* note 18 and accompanying text.

<sup>65</sup> See Burbank & Farhang, *supra* note 16, at 1508-10, 1509 tbl.1 (finding that the bulk of anti-class-action bill activity occurred between 1991 and 2014, and detecting a statistically significant party effect in favor of anti-class-action measures as congressional power shifted from Democrats to Republicans).

<sup>66</sup> See Gilles, *supra* note 18, at 397.

<sup>67</sup> See, e.g., [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. 338, 350 (2011) (explaining that 23(a)(2) commonality requires generating "common answers apt to drive the resolution of the litigation" (emphasis omitted) (quoting Nagareda, *supra* note 22, at 132)); [Comcast Corp. v. Behrend](#), 569 U.S. 27, 34 (2013) (holding that a class action could not be certified absent evidence that damages were common to the class); J. Maria Glover, *The Supreme Court's "Non-transsubstantive" Class Action*, 165 U. PA. L. REV. 1625, 1626 (2017) (noting that in *Dukes* and *Comcast*, the Supreme Court "increas[ed] the cost and difficulty of obtaining [class] certification").

class certification for most mass-tort claims impossible.<sup>69</sup> Choice-of-law issues prevented the certification of nationwide class actions involving state-law claims.<sup>70</sup> Consumer classes ran [\*1300] up against judicially created certification requirements.<sup>71</sup> Although a number of legal justifications were offered for these shifts,<sup>72</sup> judges' motivations were clear to those paying attention: "[I]t is a judicial empathy for the complaint of corporate defendants that large class actions present a great deal of pressure to settle cases."<sup>73</sup>

But the coalition's goals became more ambitious. Also beginning in the 1980s, the coalition launched a broad initiative to harness private procedural ordering,<sup>74</sup> and specifically private contracts for forced arbitration, to all but eliminate the class action.<sup>75</sup> During the campaign, the coalition became more explicit about its normative view that class actions had no place in the regulatory landscape. In its 2000 brief in *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>76</sup> for instance, the U.S. Chamber of Commerce argued for the validity of an arbitration agreement in connection with the Truth in Lending Act because class actions were not critical to the Act's enforcement regime.

<sup>68</sup> See [Dukes, 564 U.S. at 357](#); Scott A. Budow, *How the Roberts Court Has Changed Labor and Employment Law*, 2021 U. ILL. L. REV. ONLINE 281, 285 (describing the reduction in employment class actions after *Dukes* and noting that the decision was "undeniably favorable to employers"); Robert H. Klonoff, *Class Actions Part II: A Respite From the Decline*, [92 N.Y.U. L. REV. 971, 992 \(2017\)](#) ("[S]everal circuits have held that employment class actions involving decentralized decision making cannot go forward under *Dukes* because of a lack of commonality."); Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After Wal-Mart v. Dukes*, [48 AKRON L. REV. 803, 829-30 \(2015\)](#) (observing that *Dukes* led plaintiffs "to file smaller regional class actions" rather than nationwide suits); Terrence Reed, Jacqueline Harding & William Kelly, *Employee Class Actions Four Years After Wal-Mart v. Dukes*, [82 DEF. COUNSEL J. 255, 255-56 \(2015\)](#) (observing that *Dukes* was a victory for employers and made employment-discrimination class actions smaller and more regional, even if it did not end all such class actions); Nina Martin, *The Impact and Echoes of the Wal-Mart Discrimination Case*, PROPUBLICA (Sept. 27, 2013, 9:53 AM EDT), <https://perma.cc/5Z56-4LY6> (noting a steep drop-off in the filing of employment-discrimination class actions in the two years after *Dukes*).

<sup>69</sup> See [Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597, 622-28 \(1997\)](#); [Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 \(1999\)](#); Burbank & Farhang, *supra* note 16, at 1522 (noting that " *Amchem* and *Ortiz* effectively ended mass tort class actions"); David Marcus, *The Short Life and the Long Afterlife of the Mass Tort Class Action*, [165 U. PA. L. REV. 1565, 1588 \(2017\)](#) ("[The *Amchem* Court] hammered the penultimate nail in the mass tort class action's coffin."); see also Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, [58 U. KAN. L. REV. 775, 793-99 \(2010\)](#) (tracing the "increasing importance of MDL aggregation" for mass-tort claims following *Amchem* and *Ortiz*).

<sup>70</sup> See [Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 799, 814-823 \(1985\)](#); [In re Am. Med. Sys., Inc., 75 F.3d 1069, 1085-86 \(6th Cir. 1996\)](#) (decertifying a nationwide class based in part on differences in negligence law across jurisdictions).

<sup>71</sup> See, e.g., [Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-94 \(3d Cir. 2012\)](#) (joining other circuits by introducing an ascertainability requirement into the class-certification inquiry).

<sup>72</sup> Cf., e.g., Gilles, *supra* note 47, at 388-89 (describing the "plausible but shaky" doctrinal underpinnings of the decertification cases).

<sup>73</sup> *Id.* at 389; see, e.g., [In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 \(7th Cir. 1995\)](#) (explaining that class certification would put the defendants under "intense pressure to settle"); [AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 \(2011\)](#) (noting that class action and class arbitration can both produce *in terrorem* settlement effects).

<sup>74</sup> The term "procedural private ordering" was first used in the scholarly literature by Jaime Dodge to refer to the modification or elimination of procedure through private contract. See Dodge, *supra* note 45, at 724-26.

<sup>75</sup> See, e.g., Gilles, *supra* note 47, at 393-96; J. Maria Glover, Feature: Arbitration, Transparency, and Privatization, *Disappearing Claims and the Erosion of Substantive Law*, [124 YALE L.J. 3052, 3064-68 \(2015\)](#); Judith Resnik, Feature: Arbitration, Transparency, and Privatization, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, [124 YALE L.J. 2804, 2872-74 \(2015\)](#).

<sup>76</sup> [531 U.S. 79 \(2000\)](#).

<sup>77</sup>Ten years later, in its amicus brief in *AT&T Mobility v. Concepcion*, the Chamber was far less measured: "[W]hether through litigation or arbitration," it argued, "class actions . . . [do] not discourage unlawful behavior."

<sup>78</sup>The *Concepcion* Court agreed, holding in 2011 that the FAA preempted any state law "conditioning the enforceability of arbitration agreements on the availability of classwide arbitration procedures." <sup>79</sup>Critically, this included state **[\*1301]** unconscionability doctrines. Under the FAA, arbitration agreements are "valid, irrevocable, and enforceable, *save upon* such grounds as exist at law or in equity for the revocation of any contract."

<sup>80</sup>Unconscionability is, of course, one such ground for contract revocation.

Prior to its watershed decision in *Concepcion*, the Supreme Court had already been moving in the defense bar's direction regarding arbitration and the class action. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, <sup>81</sup>decided one year before *Concepcion*, the Court held that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."

<sup>82</sup>This is an astonishing statement. The agreement at issue in *Stolt-Nielsen* specified that arbitrators would determine whether the claimants could proceed as a class. <sup>83</sup>Yet the Court took it upon itself to impose its own crabbed understanding of what arbitration entails.

Moreover, the Court's determination in *Stolt-Nielsen* that "arbitration" under the FAA meant "bilateral arbitration," not class arbitration, flowed directly from an all-but-explicit judgment that class arbitrations were normatively undesirable. <sup>84</sup>The Court made this judgment fully explicit in *Concepcion*:

[C]lass arbitration greatly increases risks to defendants. . . . [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. <sup>85</sup>

Arbitration lacks the "multilayered review" of judicial proceedings, particularly those involving class certification, <sup>86</sup>so it is conceivable that the Court could have limited its disdain for class actions to those that occur in arbitration. But it

<sup>77</sup> Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 1-4, [Green Tree Fin. Corp., 531 U.S. 79](#) (No. 99-1235), 2000 WL 744157.

<sup>78</sup> Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 3, [Concepcion, 563 U.S. 333](#) (No. 09-893), 2010 WL 3167313 [hereinafter *Concepcion* Chamber of Commerce Brief].

<sup>79</sup> [563 U.S. at 336-38, 344, 352](#).

<sup>80</sup> [9 U.S.C. § 2](#) (emphasis added).

<sup>81</sup> [559 U.S. 662 \(2010\)](#).

<sup>82</sup> [Id. at 685](#).

<sup>83</sup> [Id. at 668-69](#) ("The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators . . .").

<sup>84</sup> See [id. at 685-87](#) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited." (citations omitted)).

<sup>85</sup> [AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 \(2011\)](#).

<sup>86</sup> See *id.*

did not. The Court instead made clear that its negative view of class actions was far broader: "[C]ourts have noted the risk of 'in terrorem' [\*1302] settlements that class actions entail, and class arbitration would be no different." <sup>87</sup>

Together, the opinions in *Stolt-Nielsen* and *Concepcion* achieved a bit of a statutory-interpretation sleight of hand. The Court defined arbitration as "bilateral arbitration"--based on its own normative judgment about the *in terrorem* settlement effects of class actions--and injected that new definition into the meaning of "arbitration" in the FAA. This maneuver was of profound consequence: The notion that the FAA defines "arbitration" as bilateral, nonclass, private dispute resolution was the cornerstone of the defense coalition's revolution and counterrevolution strategy.

The coalition's movement reached its apex when the Supreme Court decided *American Express Co. v. Italian Colors Restaurant* <sup>88</sup>in 2013. The Court in *Italian Colors* made clear that the statutory term "arbitration"--explicitly defined as both bilateral and anti-class action--applied regardless of whether arbitration would eliminate claims. <sup>89</sup>Before *Italian Colors*, the Supreme Court had strongly suggested, and courts of appeals had held, that contractual provisions foreclosing the "effective vindication" of federal statutory claims could not be enforced. <sup>90</sup> *Italian Colors* came to the Court with a factual record demonstrating that it would be wholly uneconomical for most American Express-accepting merchants to assert their federal antitrust claims on an individual basis (as required by their contract). <sup>91</sup>Nonetheless, the Court rejected the effective-vindication principle, <sup>92</sup>holding that the FAA required courts to "'rigorously enforce' arbitration agreements according to their terms." <sup>93</sup>If enforcement of the agreement eliminated statutory claims, that was "[t]oo darn bad." <sup>94</sup>The Court's decisions in *Stolt-Nielsen*, *Concepcion* and *Italian Colors* represent the culmination of the defense bar's near-total victory in the arbitration revolution and class-action counterrevolution.

**[\*1303]** The Court has only reinforced and expanded the scope of its arbitration jurisprudence since deciding *Italian Colors*. Notably, in 2018, a 5-4 majority held in *Epic Systems Corp. v. Lewis* that employment contracts could require employees to pursue their claims individually in arbitration despite a federally guaranteed right to collective action under the National Labor Relations Act (NLRA). <sup>95</sup>The holding in *Epic Systems* was a stinging blow to American workers. But in broader context, it merely confirmed what was largely understood in the civil justice

<sup>87</sup> *Id.* (citation omitted).

<sup>88</sup> [570 U.S. 228 \(2013\)](#).

<sup>89</sup> See [id. at 231-32, 235-38](#).

<sup>90</sup> See [14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 \(2009\)](#); [Kristian v. Comcast Corp., 446 F.3d 25, 29 \(1st Cir. 2006\)](#); [In re Am. Express Merchs.' Litig., 667 F.3d 204, 214, 219 \(2d Cir. 2012\)](#), *rev'd sub nom. It. Colors, 570 U.S. 228*; see also [Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-92 \(2000\)](#) (stating that arbitration agreements are enforceable so long as "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" (alteration in original) (quoting [Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 \(1991\)](#))).

<sup>91</sup> [It. Colors, 570 U.S. at 231-32](#).

<sup>92</sup> See [id. at 235-38](#).

<sup>93</sup> [Id. at 233](#) (quoting [Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 \(1985\)](#)).

<sup>94</sup> [Id. at 240](#) (Kagan, J., dissenting); *cf.* [id. at 236](#) (majority opinion) ("[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.").

<sup>95</sup> [138 S. Ct. 1612, 1619 \(2018\)](#). *Epic Systems* grew out of a decision by the National Labor Relations Board (NLRB) that class-action waivers in mandatory arbitration agreements violated the NLRA's collective-action guarantee. [D.R. Horton, Inc., 357 N.L.R.B. 2277, 2277 \(2012\)](#). Circuits split as to whether the NLRB decision was correct. Compare [D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 \(5th Cir. 2013\)](#) (disagreeing with the NLRB), with [Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1154-57 \(7th Cir. 2016\)](#) (agreeing with the NLRB), *rev'd*, [138 S. Ct. 1612](#).

landscape after *Concepcion* and *Italian Colors*: Corporate entities could use private procedural ordering to avoid civil liability for wrongdoing.

Of course, that was always the gambit.

### C. The Aftermath

Today, virtually all Americans are subject to forced arbitration agreements with class-action waivers.<sup>96</sup> They are ubiquitous: in employee handbooks, nursing home admissions forms, credit card bills, cell phone statements, insurance contracts, housing leases, job applications, and countless other contracts.<sup>97</sup>

Indeed, the changes in the legal landscape brought about by the arbitration revolution have been staggering. In the early 1990s, only 2% of nonunionized employee contracts contained arbitration clauses.<sup>98</sup> As of 2019, more than half of such contracts included them.<sup>99</sup> According to a 2017 study, some 40% of [\*1304] private-sector employers with mandatory arbitration clauses had adopted them in the previous five years.<sup>100</sup> A more recent study showed that seventy-eight companies in the Fortune 100 use arbitration agreements with class-action waivers.<sup>101</sup> Analysts predict that by 2024, more than 80% of private-sector nonunion workers will be subject to such agreements.<sup>102</sup>

From 2011 to 2019, the number of businesses that used arbitration agreements with class-action waivers in their consumer contracts tripled.<sup>103</sup> Today, as many as 76.9% of consumer contracts include pre-dispute arbitration clauses;<sup>104</sup> virtually all of these include class-action waivers.<sup>105</sup> The Consumer Financial Protection Bureau (CFPB)

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<sup>96</sup> See *Senate Arbitration Hearing*, *supra* note 9 (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law).

<sup>97</sup> See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, [79 U. CHI. L. REV. 623, 627 \(2012\)](#); see also Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, [80 BROOK. L. REV. 1309, 1310 \(2015\)](#).

<sup>98</sup> See Mary Martin, Note, *When Flexibility Sacrifices Security: An Analysis of Amazon's Flex Program*, [54 NEW ENG. L. REV. 131, 144 \(2019\)](#).

<sup>99</sup> *Id.*; see also ALEXANDER J.S. COLVIN, ECON. POL'Y INST., *THE GROWING USE OF MANDATORY ARBITRATION 2* (2018), <https://perma.cc/TB4G-952Z> (noting that 53.9% of nonunion private-sector employers have mandatory arbitration procedures). According to the U.S. Bureau of Labor Statistics, 10.8% of American wage and salary workers (14.3 million individuals) were members of unions as of 2020. Less than 7% of private-sector workers were union members as of that year. Press Release, U.S. Bureau of Lab. Stat., *Union Membership (Annual) News Release* (Jan. 22, 2021), <https://perma.cc/Y789-VFYG>.

<sup>100</sup> See Alexander J.S. Colvin, Piper Lecture, *The Metastasis of Mandatory Arbitration*, [94 CHI.-KENT. L. REV. 3, 8, 10-11 \(2019\)](#).

<sup>101</sup> Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019).

<sup>102</sup> KATE HAMAJI, RACHEL DEUTSCH, ELIZABETH NICOLAS, CELINE MCNICHOLAS, HEIDI SHIERHOLZ & MARGARET POYDOCK, CTR. FOR POPULAR DEMOCRACY & ECON. POL'Y INST., *UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK 1* (2019), <https://perma.cc/Q4UB-6VZZ>.

<sup>103</sup> Ryan Miller, Current Development 2018-2019, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After Concepcion and American Express*, [32 GEO. J. LEGAL ETHICS 793, 795, 806, 824-25 \(2019\)](#). This finding is consistent with the Consumer Financial Protection Bureau's 2015 finding that arbitration agreements typically preclude consumer class actions. CFPB, *ARBITRATION STUDY* § 3.4.3, at 24, § 4.8, at 20-21 (2015).

found mandatory arbitration agreements in 53% of credit card contracts, 98.5% of storefront payday-loan contracts, and 99.9% of mobile-wireless contracts,<sup>106</sup> and it noted that these agreements "generally extinguish the consumer's ability to participate in class lawsuits."<sup>107</sup> In 2020, *Consumer Reports* found that over two-thirds of the most popular products on its website came with mandatory arbitration clauses.<sup>108</sup>

The widespread use of forced arbitration agreements with class-action waivers has enabled corporations to reduce costs by eliminating aggregate [\*1305] claims altogether.<sup>109</sup> Accordingly, the defense bar routinely and publicly advises clients to "avoid [the] risk" of class actions by requiring arbitration agreements.<sup>110</sup> Indeed, for businesses *not* yet using them, the question is: "Shouldn't you be using arbitration agreements to reduce . . . the risk of class action claims?"<sup>111</sup>

And no wonder: Eliminating aggregate claims also tends to eliminate claims generally. Studies have found that almost no one pursues individual arbitration.<sup>112</sup> Although there were about 826,537,000 consumer arbitration provisions in effect in 2018, the AAA and JAMs recorded only 6,000 consumer arbitrations that year.<sup>113</sup> Without mandatory arbitration, consumers likely would have brought many more claims.<sup>114</sup> One 2018 study found that, if employees filed arbitration claims at the same rate they filed claims in court, some 320,000 to 727,000 employment arbitration claims would be filed annually--around 60 to 140 times the current rate.<sup>115</sup> That means forced arbitration has eliminated more than 98% of employment claims.<sup>116</sup> A recent study by the Economic Policy Institute reinforces

<sup>104</sup> See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, [41 U. MICH. J.L. REFORM 871, 883](#) tbl.2 (2008).

<sup>105</sup> *Id.* at 884 tbl.3.

<sup>106</sup> CFPB, *supra* note 103, § 2.3, at 8 tbl.1.

<sup>107</sup> *Id.* § 3.4.3, at 24.

<sup>108</sup> Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), <https://perma.cc/D5QE-W7KR>.

<sup>109</sup> Cf. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, [16 FRANCHISE L.J. 141, 141-42 \(1997\)](#) (urging franchisors to use arbitration to prevent "catastrophic" class actions by franchisees).

<sup>110</sup> See, e.g., Robert Fojo, *12 Reasons Businesses Should Use Arbitration Agreements*, LEGAL.IO, (Apr. 1, 2015), <https://perma.cc/U5NK-HLA9>.

<sup>111</sup> Jay N. Varon & Jennifer M. Keas, *Shouldn't You Be Using Arbitration Agreements to Reduce the Costs of Litigation and the Risk of Class Action Claims?*, FOLEY & LARDNER LLP (May 10, 2017) (capitalization altered), <https://perma.cc/X6AX-YCD3>.

<sup>112</sup> See, e.g., Colvin, *supra* note 100, at 17-18 ("Mandatory arbitration has a tendency to suppress claims."); see also Dunham, *supra* note 109 at 141.

<sup>113</sup> See *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 117th Cong. (2021) [hereinafter *House Arbitration Hearing*] (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law), <https://perma.cc/V4YS-YZ2K>; see also Szalai, *supra* note 101, at 238.

<sup>114</sup> See CFPB, *supra* note 103, § 1.4.3, at 11, § 1.4.7, at 16 (noting that less than 2,000 consumer arbitration claims were filed with the AAA between 2010 and 2012, while comparable class actions from 2008 to 2012 involved hundreds of millions of claims).

<sup>115</sup> Estlund, *supra* note 38, at 696-97.

<sup>116</sup> *Id.* at 696.



these findings: Of workers with potentially meritorious claims subject to forced arbitration, virtually none pursue those claims. Indeed, only 1 in 10,400 employees subject to forced arbitration files a claim each year.<sup>117</sup>

Individuals tend to fare poorly even when they do arbitrate,<sup>118</sup> a fact many attribute to the repeat-player advantages that corporate entities enjoy in [\*1306] arbitration.<sup>119</sup> Indeed, the CFPB found that businesses won 93% of business-initiated arbitrations and recovered ninety-one cents per dollar claimed, whereas consumers prevailed in about 20% of consumer-initiated arbitrations and recovered twelve cents per dollar claimed.<sup>120</sup> Similarly, a recent study found that employees win only 19% of AAA arbitrations,<sup>121</sup> as opposed to 29.7% of federal employment-discrimination cases.<sup>122</sup> Sexual-harassment claimants also tend to fare worse in arbitration than they do in litigation, particularly with regard to remedies.<sup>123</sup> One study found that, over thirty years and across ninety-seven industry arbitrations, only seventeen women on Wall Street explicitly won their sexual-harassment claims.<sup>124</sup>

Critics of the above studies argue that the CFPB and others overstate the extent to which the judicial system is a "realistic means for obtaining [\*1307] redress,"<sup>125</sup> an assertion consistent with the findings of key legal scholars.<sup>126</sup> Critics also challenge the empirical findings of the CFPB and academic commentators as incomplete, inasmuch as those findings do not take into account the number of claims that are resolved by pre-dispute settlements

<sup>117</sup> COLVIN, *supra* note 99, at 11.

<sup>118</sup> See Estlund, *supra* note 38, at 688. *But see* Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, [46 U. MICH. J.L. REFORM 789, 858 \(2013\)](#) (finding that some low-wage workers were able to use arbitration to vindicate their claims).

<sup>119</sup> See, e.g., Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, [15 OHIO ST. J. ON DISP. RESOL. 19, 32-33, 38-39 \(1999\)](#) (noting that "representatives of consumers, patients, employees, and other individual claimants" believe arbitration "redound[s] to the benefit of repeat players," including corporations); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974) (explaining that, among other advantages, the prototypical repeat player "anticipates repeated litigation," "has low stakes in the outcome of any one case," and "has the resources to pursue its . . . interests"); see also Interview with [Nancy Erika Smith, supra note 41](#) (observing that arbitrators are often former defense lawyers and that businesses enjoy important advantages in arbitration); Letter from Nancy Erika Smith, Att'y, Smith Mullin, P.C., to Laura E. VanEtten, Supervisor, Am. Arb. Ass'n & Linda S. Hendrickson, Case Manager, Am. Arb. Ass'n 2-3 (Jan. 14, 2011) (on file with author) (seeking to strike defense attorneys and litigation adversaries from a list of possible arbitrators).

<sup>120</sup> CFPB, *supra* note 103, § 5.6.6, at 41-42, § 5.6.7, at 43-45.

<sup>121</sup> Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR REV. 1019, 1028 tbl.1 (2015).

<sup>122</sup> Estlund, *supra* note 38, at 688. Earlier studies reached similar findings. See, e.g., Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5 tbl.1 (2011) (reporting a 21.4% employee win rate in AAA employment arbitration); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44, 48 tbl.1 (finding a 36.4% employee win rate in federal employment-discrimination cases and a 56.6% employee win rate in state non-civil rights employment cases).

<sup>123</sup> See Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, [2 U. PA. J. LAB. & EMP. L. 1, 2-6 \(1999\)](#) (describing "inadequate . . . arbitration remedies for sexual harassment" and noting that victims' remedies can be limited by arbitration agreements themselves).

<sup>124</sup> See Susan Antilla, *FINRA's Black Hole*, TYPE INVESTIGATIONS (Apr. 18, 2018), <https://perma.cc/HTC5-6AWN>.

<sup>125</sup> The CFPB's Flawed Arbitration "Study" 1 (n.d.), <https://perma.cc/A4RF-3NFW>.

<sup>126</sup> See Eisenberg & Hill, *supra* note 122, at 53 ("In the majority of court actions the cases likely were brought by highly paid employees, while in the arbitrations, high-pay employees represented only a minority of the claimants.").

secured before the filing of formal arbitral demands.<sup>127</sup> Given the significant filing fees in arbitration, critics are likely correct that corporations have incentives to settle claims via pre-dispute resolution.

It is not arbitration alone, however, that eliminates most claims. Instead, it is the combination of forced arbitration and class-action waivers in contracts of adhesion. The types of claims that tend to arise from these contracts--civil rights claims, wage-theft claims, workplace sexual-harassment claims, and consumer-fraud claims--are those that tend to gain viability from aggregation.<sup>128</sup> Most discrimination suits, for instance, depend on aggregation in order to be feasible, as the Advisory Committee explicitly recognized when promulgating [Rule 23 of the Federal Rules of Civil Procedure](#) in 1966.<sup>129</sup> The same is true for wage-and-hour claims under the FLSA, and the FLSA explicitly enables collective action for that reason.<sup>130</sup>

At least to the extent that the arbitration revolution eliminates classable claims, the implications are troubling: Elimination of those claims would tend to be due to the economics of claiming,<sup>131</sup> *not* due to their underlying merits. Again, individually unmarketable does *not* mean meritless; individually marketable does not mean meritorious. Settlement pressure is perfectly desirable when produced by the merits of claims.<sup>132</sup> It is only undesirable--or **[\*1308]** *in terrorem*--when it derives in whole or substantial part from factors unrelated to the merits of claims.<sup>133</sup> The fact that a claim's value is less than the cost of pursuing that claim says nothing of the claim's worth. It may say something about the high cost of litigation.<sup>134</sup> It may also reveal something about the type of claim, the type of claimant, or both--for instance, that the claim is for wage theft by a minimum-wage worker. All of that is orthogonal to whether the claims have legal merit.<sup>135</sup>

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<sup>127</sup> The CFPB's Flawed Arbitration "Study," *supra* note 125, at 11.

<sup>128</sup> See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, [87 IND. L.J. 239, 241-42 \(2012\)](#); Brittany Cangelosi, Note, *Wage War: Arbitration and Class Action Waivers at the Expense of Wage and Hour Claims*, [48 HOFSTRA L. REV. 483, 488 \(2019\)](#).

<sup>129</sup> See Interview by Samuel Issacharoff with Arthur R. Miller, Professor, N.Y. Univ. Sch. of L., in N.Y.C., N.Y. (Dec. 3, 2016), *reprinted in* N.Y. UNIV. SCH. OF L. CTR. ON CIV. JUST., *RULE 23 @ 50: THE 50TH ANNIVERSARY OF RULE 23*, at 1, 5 (Peter Zimroth, Arthur R. Miller, Samuel Issacharoff & David Siffert eds., 2016).

<sup>130</sup> See *supra* note 7 and accompanying text; see also SEYFARTH SHAW LLP, 13TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 20 (2017), <https://perma.cc/JT3H-4ZRZ> ("Virtually all FLSA lawsuits are filed as collective actions . . .").

<sup>131</sup> See Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, [35 BERKELEY J. EMP. & LAB. L. 71, 84-85 \(2014\)](#).

<sup>132</sup> See J. Maria Glover, *The Federal Rules of Civil Settlement*, [87 N.Y.U. L. REV. 1713, 1750-78 \(2012\)](#) (arguing that the Federal Rules of Civil Procedure should be recalibrated to align settlement values with the merits of underlying claims); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, [106 COLUM. L. REV. 1872, 1894 \(2006\)](#) ("What one should make of the amplification effect [of aggregation] in normative terms depends crucially on what explanation one embraces for the underlying probability of plaintiff success that aggregation would amplify.").

<sup>133</sup> See Glover, *supra* note 132, at 1727-44 (tracing the numerous ways that non-merits "distortions" can affect settlement values).

<sup>134</sup> See Samuel Estreicher, Dwight D. Opperman Professorship Inaugural Lecture, *Beyond Cadillacs and Rickshaws: Towards a Culture of Citizen Service*, [1 N.Y.U. J.L. & BUS. 323, 329-30 \(2005\)](#) (describing the "[m]ushrooming" costs of litigation); see also Robert Bovarnick, *When Is Litigation Worth the Hassle?*, FORBES (July 21, 2010, 6:40 PM EDT), <https://perma.cc/RG3B-MN4T> (noting that the hardest decision for a claimant is whether litigation is worth the high cost, and that in many cases it is more economically rational to settle).

<sup>135</sup> In fact, research shows that the filing of meritless claims to extract shakedown settlements is rare. See, e.g., Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, [78 N.Y.U. L. REV. 1357, 1359 \(2003\)](#) ("[T]he risks of . . . blackmail settlements have been overstated." (alterations in original) (quoting Bruce Hay & David Rosenberg, "Sweetheart" and

Many claims eliminated by forced arbitration and class-action waivers, then, are not so much low merit as they are low value. For a majority of the Supreme Court, though, those two may as well be the same thing. In essence, the Supreme Court's FAA jurisprudence deems a broad range of legal entitlements *the wrong types of claims*, and by extension, effectively deems a broad swath of Americans--and in particular, racial minorities, women, and the working poor<sup>136</sup>-- *the wrong types of claimants*.

Mandatory arbitration clauses appear more frequently in contracts for frontline jobs like education and healthcare.<sup>137</sup> They are also more common in "low-wage workplaces" and industries that are "disproportionately composed [**\*1309**] of women . . . [and] African American workers."<sup>138</sup> Indeed, 59.1% of African American workers--7.5 million individuals--are subject to mandatory arbitration agreements that tend to eliminate claims.<sup>139</sup>

Along similar lines, 57.6% of women in the workforce are subject to mandatory arbitration agreements.<sup>140</sup> These agreements suppress a host of claims, from wage theft to gender discrimination to sexual harassment. Notably, forced arbitration agreements tend to prevent sexual-assault and sexual-harassment survivors from speaking up about their experiences.<sup>141</sup> This is true even (and perhaps especially) when well-known, well-capitalized claimants are involved. Famously, Donald Trump used a mandatory arbitration clause to help fend off a lawsuit by Stormy Daniels.<sup>142</sup> And Fox News used forced arbitration to silence scores of women who were sexually harassed by Roger Ailes.<sup>143</sup> Although forced arbitration has come under scrutiny following its use in a range of cases involving sexual harassment allegedly perpetrated by famous men,<sup>144</sup> companies have only recently started to move away from forced arbitration, and even then only in response to sustained public outcry.<sup>145</sup>

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"Blackmail" *Settlements in Class Actions: Reality and Remedy*, **75 NOTRE DAME L. REV. 1377, 1379 (2000)**); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, [42 MD. L. REV. 215, 225-26 \(1983\)](#) (stating that, if anything, certain class actions settle too cheaply); Warren F. Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Legal Uncertainty*, 8 LEGAL THEORY 297, 298 (2002) ("[T]he hostility to 'long-shot' class actions is . . . unsupported on any basis currently articulated in judicial opinions or legal scholarship.").

<sup>136</sup> *A Profile of the Working Poor*, 2019, U.S. BUREAU LAB. STAT.: BLS REPS. (May 2021), <https://perma.cc/2MVM-966N>.

<sup>137</sup> COLVIN, *supra* note 99, at 8.

<sup>138</sup> *Id.* at 2.

<sup>139</sup> *Id.* at 9. By comparison, only 55.6% of white, non-Hispanic workers are subject to mandatory arbitration agreements. *Id.*

<sup>140</sup> *Id.* at 8-9. By comparison, only 53.5% of men in the workforce are subject to mandatory arbitration agreements. *Id.* at 9.

<sup>141</sup> See Rachel M. Schiff, Note, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, [53 U.C. DAVIS L. REV. 2693, 2709-14 \(2020\)](#); Gretchen Carlson, Opinion, *After Bill Cosby and Fox News, Something Good Is Going to Come of This*, USA TODAY (updated July 6, 2021, 4:21 PM ET), <https://perma.cc/3ZKXHWBA> (describing how forced arbitration "can cover up, and allow for, repeated ugly behavior from harassers in every industry").

<sup>142</sup> See Jeremy Stahl, *Donald Trump Basically Just Said He Should Lose the Litigation with Stormy Daniels*, SLATE (Apr. 5, 2018, 9:54 PM), <https://perma.cc/MM63-C35P>.

<sup>143</sup> See Emily Martin, *Keeping Sexual Assault Under Wraps*, U.S. NEWS & WORLD REP. (Sept. 28, 2016, 2:10 PM), <https://perma.cc/VV93-D3FD>.

<sup>144</sup> See *id.*; Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://perma.cc/C6V5-SF85>; *cf.* Carlson, *supra* note 141 (noting that highly publicized sexual-harassment scandals can draw greater societal attention to the forced arbitration of workplace harassment claims). *But cf.* Inez Feltscher Stepman, *Once Again, #MeToo Becomes Political Tool to Line Lawyer Pockets*, INDEP. WOMEN'S F. (Sept. 21, 2021), <https://perma.cc/V8U2-ZK7D> (arguing that "the issue of sexual assault has been politically weaponized" to harm arbitration, which the author states may be good for employees).

Publicly, corporations #MeToo their websites and don "Time's Up" ribbons. Privately, many corporations continue to subject their employees to [\*1310] forced arbitration and class-action waivers.<sup>146</sup> Some states have taken steps to limit forced arbitration for sexual-harassment claims.<sup>147</sup> At the federal level, Representatives Pramila Jayapal (D-WA), Cheri Bustos (D-IL), and Morgan Griffith (R-VA), and Senators Kirsten Gillibrand (D-NY), Lindsey Graham (R-SC), and Dick Durbin (D-IL) introduced the Ending Forced Arbitration of Sexual Harassment Act in July 2021.<sup>148</sup> That bill has since passed both Houses of Congress,<sup>149</sup> but work to ameliorate forced arbitration's disproportionate impact on women remains.

The arbitration revolution has also disproportionately impacted the working poor, many of whom are racial minorities and women. One 2021 study found that forced arbitration helped employers pocket \$ 9.2 billion from workers in low-paid jobs in 2019 alone.<sup>150</sup> Arbitration is almost always too expensive for typical wage-and-hour employees to pursue, and employees are routinely dismayed to learn that no attorney can afford to represent them in light of forced arbitration agreements and class-action waivers.<sup>151</sup> And the conclusion that the Supreme Court's arbitration jurisprudence effectively deems the working poor the "wrong type of claimant" is hard to avoid when comparing it to the Court's class-action-friendly jurisprudence for securities fraud.<sup>152</sup>

[\*1311] All told, the defense coalition's decades-long effort to retrench aggregate dispute resolution through arbitration agreements and class-action waivers resulted in a resounding victory for corporate interests. But that victory was a tremendous loss for consumers and employees, particularly those who were already vulnerable based on race, gender, and class.

## II. Can't Stop The Revolution: Public-Reform Pitfalls, Private-Reform Possibilities

<sup>145</sup> See Jena McGregor, *New Database Aims to Expose Companies that Make Employees Arbitrate Sexual Harassment Claims*, WASH. POST (Feb. 27, 2020), <https://perma.cc/5GTF-42P7>.

<sup>146</sup> Some corporations (for example, Facebook, Google, Microsoft, and Uber) have responded to public pressure by rolling back forced arbitration, particularly for claims of sexual harassment. Abha Bhattarai, *As Closed-Door Arbitrations Soared Last Year, Workers Won Cases Against Employers Just 1.6 Percent of the Time*, WASH. POST (Oct. 27, 2021, 7:00 AM EDT), <https://perma.cc/YY95-U7BD>. Many others, however, have "doubled down" on the practice. *Id.*; see AM. ASS'N FOR JUST., *FORCED ARBITRATION DURING A PANDEMIC: CORPORATIONS DOUBLE DOWN* 4, 6 (2021), <https://perma.cc/3JFT-W9VM>.

<sup>147</sup> See Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, *87 FORDHAM L. REV.* 2653, 2677-83 (2019).

<sup>148</sup> Press Release, Rep. Pramila Jayapal, *Jayapal Helps Reintroduce Bipartisan Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* (July 14, 2021), <https://perma.cc/4UFG-TDL6>.

<sup>149</sup> Emily Peck & Sophia Cai, *Congress Passes Landmark #MeToo Bill*, AXIOS (updated Feb. 10, 2022), <https://perma.cc/SVF3-Y4C3>.

<sup>150</sup> See HUGH BARAN & ELISABETH CAMPBELL, NAT'L EMP. L. PROJECT, *FORCED ARBITRATION HELPED EMPLOYERS WHO COMMITTED WAGE THEFT POCKET \$ 9.2 BILLION IN 2019 FROM WORKERS IN LOW-PAID JOBS* 1 (rev. 2021), <https://perma.cc/LB8K-S3QZ>.

<sup>151</sup> See, e.g., Estlund, *supra* note 38, at 700-02; Interview with [Nancy Erika Smith](#), *supra* note 41 ("Minimum-wage workers get screwed by arbitration. . . . [An arbitration agreement with a] class-action waiver is the first thing lawyers look for."); Interview with Cory L. Zajdel, *supra* note 40 (observing that lawyers screen out consumer cases with arbitration agreements).

<sup>152</sup> See Glover, *supra* note 67, at 1628-33 (describing the Supreme Court's tendency toward "pro-class action" opinions in the securities-fraud context); Brian T. Fitzpatrick, *The End of Class Actions?*, *57 ARIZ. L. REV.* 161, 181 (2015) (noting that securities fraud is the one "exception" to the arbitration revolution's elimination of claims).

As the prior Part detailed, the arbitration revolution and class-action counterrevolution had sweeping effects on the civil justice landscape. For over a decade, legal commentators, legislators, policymakers, interest-group advocates, the plaintiffs' bar, and others have called for reform, largely from Congress. As Subpart A below details, however, few public procedural-reform efforts have succeeded, and none have provided a meaningful response to the arbitration revolution. Given public procedural ordering's inability to stem the arbitration revolution's tide, the general perception has been that arbitration agreements with class-action waivers are (and will remain) near-bulletproof claim eliminators.<sup>153</sup>

My analysis of the Supreme Court's arbitration jurisprudence in Subpart B, however, challenges this view. I do not think reform by way of public procedural ordering is particularly likely to occur, at least not on any broad scale. Instead, it is my long-held view that the Court's FAA jurisprudence--broad as it may be--left narrow room for a *private* procedural response to the arbitration revolution. It left room for a procedural offensive like mass arbitration.

#### A. The Failure of Public Procedural-Ordering Efforts

In one of her very last dissents, the late Justice Ginsburg recognized that the Court's reading of the FAA<sup>154</sup> had reached, in the words of one [\*1312] commentator, a "critical tipping point."<sup>155</sup> Accordingly, Justice Ginsburg "urgently" pled for "[c]ongressional correction of the Court's elevation of the FAA over' the rights of employees and consumers 'to act in concert.'"<sup>156</sup> Justice Ginsburg no doubt knew that her plea to Congress was a long shot. For decades, Congress has been presented with opportunity upon opportunity to reform arbitration through "arbitration-fairness" bills. Almost all have died in committee.<sup>157</sup> And though Congress in 2010 passed the Dodd-Frank Act and created the CFPB, which it directed to study mandatory arbitration agreements,<sup>158</sup> hope for reform was short-lived. The CFPB formulated a rule that restricted the use of class-action waivers,<sup>159</sup> but the Senate rejected it 51-50

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<sup>153</sup> See, e.g., Efron, *supra* note 44, at 136 (explaining that although certain substantive rights may exist in theory, they are eliminated in practice through class-action waivers); Fitzpatrick, *supra* note 152, at 162-63 (concluding that, given *Concepcion*, "businesses will eventually be able to eliminate virtually all class actions that are brought against them"); Resnik, *supra* note 75, at 2836-40 (describing certain waivers as erasing substantive rights); Gilles & Friedman, *supra* note 97, at 628 (questioning whether any grounds remain for finding class-action waivers unenforceable).

<sup>154</sup> For criticisms of the Court's reading, see, for example, Anthony J. Sebok, *The Unwritten Federal Arbitration Act*, [65 DEPAUL L. REV. 687, 688, 720 \(2016\)](#) (arguing that the FAA supports "a substantive theory of arbitration" and suggesting that states "can experiment with different interpretations of the FAA's theory"); and Aragaki, *supra* note 51, at 1946-53 (arguing that the Supreme Court's expansive reading of the FAA is based on "isolated snippets" of legislative history that do not correctly capture the history and purpose of the law). *But see* Amalia D. Kessler, Feature: Arbitration, Transparency, and Privatization, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, [124 YALE L.J. 2940, 2943-44, 2991 \(2015\)](#) (noting that, in part because of the FAA's progressive history, efforts to determine whether the Act was intended to enable access to justice or empower corporate elites are "bound to disappoint").

<sup>155</sup> *House Arbitration Hearing*, *supra* note 113 (statement of Myriam Gilles, Professor, Benjamin N. Cardozo School of Law).

<sup>156</sup> ***Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1422 (2019)** (Ginsburg, J., dissenting) (quoting [Epic Sys. Corp. v. Lewis](#), [138 S. Ct. 1612, 1633 \(2018\)](#) (Ginsburg, J., dissenting)).

<sup>157</sup> Thomas V. Burch, *Regulating Mandatory Arbitration*, [2011 UTAH L. REV. 1309, 1332-33](#), app. (cataloging 139 arbitration bills introduced between 1995 and 2010, most of which did not make it past the committee stage). "[T]he few [bills] that ultimately passed" from 1995 to 2010 "applied only to relatively narrow categories of disputes." *Id.* at 1333.

<sup>158</sup> See CFPB, *supra* note 103, § 1, at 1.

<sup>159</sup> Press Release, CFPB, CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court (July 10, 2017), <https://perma.cc/VG92-9Q9Q>.

under the Congressional Review Act. Then-Vice President Mike Pence, himself no stranger to the business community,<sup>160</sup> cast the tiebreaking vote.<sup>161</sup>

While the narrow Ending Forced Arbitration of Sexual Harassment Act, which had rare bipartisan support, finally passed in February 2022,<sup>162</sup> the Forced Arbitration Injustice Repeal (FAIR) Act, a sweeping arbitration-reform bill, remains in the Senate Judiciary Committee.<sup>163</sup> The defense coalition is actively fighting the FAIR Act; the Chamber of Commerce has even offered to **[\*1313]** pay attorneys if their clients sign op-eds opposing the bill.<sup>164</sup> And although there have been rumblings of congressional action after forced arbitration provisions appeared in payments made under the Coronavirus Aid, Relief, and Economic Security (CARES) Act,<sup>165</sup> the passage of broad arbitration reform remains unlikely.<sup>166</sup>

Congress has introduced more targeted bills on the issue of forced arbitration with varying success. The Ending Forced Arbitration of Sexual Harassment Act was one such successful bill. But compare this Act to the Nursing Home Improvement and Accountability Act of 2021, which would prohibit forced arbitration clauses in contracts between nursing home facilities and their patients.<sup>167</sup> Congress has tried to end the use of forced arbitration in nursing homes for over a decade; the Nursing Home Improvement and Accountability Act, a Charlie Brown football of a bill, is simply the latest version of that effort.<sup>168</sup> It is unclear, then, whether Congress will be able to enact even targeted reforms going forward.

There have been a few modest arbitration-reform successes at the state level, but none have had a particularly meaningful impact on the post-arbitration revolution landscape. Some scholars had hoped that suits brought under the *parens patriae* doctrine (which provides a state with third-party standing to bring a case on behalf of its citizens for their well-being) would help fill the void created by the elimination of class actions.<sup>169</sup> But these suits

<sup>160</sup> See Jane Mayer, *The Danger of President Pence*, NEW YORKER (Oct. 16, 2017) <https://perma.cc/Q4GV-TYZC>.

<sup>161</sup> Zachary Warmbrodt, *Pence Breaks Tie in Senate Vote to Ax Arbitration Rule*, POLITICO (updated Oct. 24, 2017, 11:25 PM EDT), <https://perma.cc/72KR-9ZQ3>.

<sup>162</sup> See *supra* notes 148-49 and accompanying text.

<sup>163</sup> See *S.505--Forced Arbitration Injustice Repeal Act*, CONGRESS.GOV, <https://perma.cc/L9R5-8ECG> (archived June 26, 2022).

<sup>164</sup> See Amelia Pollard, *Corporate Lobbyists Seek "Grassroots" Support for Forced Arbitration*, AM. PROSPECT (Aug. 10, 2021), <https://perma.cc/SUF6-MYUG> (reporting that the Chamber of Commerce offered an attorney \$ 2,000 in exchange for a client willing to sign a prewritten op-ed opposing the FAIR Act); Karl Bode, *U.S. Chamber of Commerce Paying People \$ 2,000 to Pretend Binding Arbitration Is Good*, TECHDIRT (Aug. 13, 2021, 6:14 AM), <https://perma.cc/3932-BXYE> (same).

<sup>165</sup> See David Dayen, *Unsanitized: Stimulus Debit Cards Come with a Forced Arbitration Clause*, AM. PROSPECT (June 26, 2020), <https://perma.cc/H976-4EYY>.

<sup>166</sup> See Glover, *supra* note 75, at 3083-91; David L. Noll & Zachary D. Clopton, *An Arbitration Agenda for the Biden Administration*, 2021 U. ILL. L. REV. ONLINE 104, 105-06; Mike LaSusa, *Dems' Bid to Ban Workplace Arbitration Faces Uphill Fight*, LAW360 (Aug. 5, 2021, 7:09 PM EDT), <https://perma.cc/4MPH-3449> (to locate, select "View the live page").

<sup>167</sup> See H.R. 5169, 117th Cong. § 105 (2021); S. 2694, 117th Cong. § 105 (2021).

<sup>168</sup> See, e.g., Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong. (2008); Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. (2012); Fairness in Nursing Home Arbitration Act, H.R. 5326, 116th Cong. (2019); Fairness in Nursing Home Arbitration Act, H.R. 2812, 117th Cong. (2021); see also Glover, *supra* note 75, at 3090-91 (detailing the failed legislative efforts to end forced arbitration in various contexts, including in nursing home contracts, that began in 2008).

[\*1314] are limited by political and resource constraints.<sup>170</sup>As an alternative, private- attorneys general acts (PAGAs) can circumvent the problems that hinder *parens patriae* suits by allowing citizens to take on the mantle of the state and bring suit, in a representative capacity, against a defendant with whom they would otherwise be required to arbitrate. California currently has an employment-litigation PAGA.<sup>171</sup>A number of other states have been considering similar legislation, but some bills have struggled to gain passage and the future of PAGA-like laws is uncertain.<sup>172</sup>In addition, the Supreme [\*1315] Court dealt a recent blow to PAGAs by holding that an individual PAGA claim can be severed from a representative PAGA claim--the former of which can be compelled to arbitration, leaving the individual without standing to pursue the representative claim in court.<sup>173</sup>And new, controversial uses of the private attorney general (most notably S.B. 8, Texas's "heartbeat" abortion ban) could generate reticence around private-attorneys general enforcement frameworks.<sup>174</sup>

## B. The Possibility of Private Procedural Counteroffensives

<sup>169</sup> See Gilles & Friedman, *supra* note 97, at 629-30, 661.

<sup>170</sup> See, e.g., Jack Ratliff, *Parens Patriae : An Overview*, [74 TUL. L. REV. 1847, 1857-58 \(2000\)](#) (describing how the "political motivations" behind *parens patriae* decisions can create "intractable conflicts" between states and individuals); Gilles & Friedman, *supra* note 97, at 668 n.205 ("[Industry groups] know that public officials don't have the resources to finance complicated law suits [sic] that often take years to work their way through the courts." (alterations in original) (quoting Ohio Att'y Gen. Marc Dann, Address to the City Club of Cleveland 5 (June 29, 2007), <https://perma.cc/4X3L-RLBU>)); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, [126 HARV. L. REV. 486, 523 n.154 \(2012\)](#) (noting "instances where states were outgunned by large corporations [and] there was substantial pressure to settle on terms that were not desirable and not in the public interest" (alteration in original) (quoting remarks made by Iowa Attorney General Tom Miller at a 2003 Columbia Law School symposium)).

<sup>171</sup> See [CAL. LAB. CODE § 2699, 2699.3](#) (West 2022).

<sup>172</sup> At least nine states were actively considering PAGA-like bills by the 2019-2020 legislative session. Charles Thompson, Anthony Guzman & Linda Ricci, *Employers Must Brace for PAGA-Like Bills Across US*, LAW360 (June 18, 2021, 3:25 PM EDT), <https://perma.cc/CKQ8-M26H> (to locate, select "View the live page") (noting that Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington were considering bills with the same basic structure as California's law). In Connecticut, Massachusetts, New Jersey, New York, and Washington, these bills are still pending as of this writing. See H.R. 5245, 2022 Gen. Assemb., Feb. Sess. (Conn. 2022) (allowing plaintiffs to sue for labor law violations on behalf of the state even "after having waived their personal rights to sue by signing forced arbitration agreements"); H.R. 1959, 192d Gen. Ct. (Mass. 2021) (creating a "public enforcement action" for whistleblowers or "representative organization[s]" to sue employers for wage theft); S. 362, 220th Leg. (N.J. 2022) (permitting an employee or representative to bring the same action as state officials against an employer for unlawful work-scheduling practices); S. 12, 244th Leg., Reg. Sess. (N.Y. 2021) (creating "a means of empowering citizens as private attorneys general to enforce" labor laws through "a public enforcement action to collect civil penalties"); H.R. 1076, 67th Leg., Reg. Sess. (Wash. 2021) (creating a "qui tam action" for whistleblowers or "representative organization[s]" to sue for violations of workplace laws). PAGA-like bills in Oregon and Vermont have died. See H.R. 2205, 81st Leg., Reg. Sess. (Or. 2021) (creating a "public enforcement action" for an individual or "representative organization" to seek "civil penalties" for violation of state laws); S. 139, 2019 Leg. (Vt. 2019) (allowing "an aggrieved employee, representative organization, or whistleblower" to bring a "public enforcement action" for labor law violations). Maine's PAGA-like bill passed both houses but was vetoed by the governor. See S. 525, 130th Leg., 1st Spec. Sess. (Me. 2021) (providing a "private enforcement action" for a "whistleblower" or "representative organization" to enforce employment law violations); Letter from Maine Governor Janet T. Mills to the 130th Legislature of the State of Maine 1-2 (July 12, 2021), <https://perma.cc/3CSD-WRAS>.

<sup>173</sup> See *Viking River Cruises, Inc. v. Moriana*, [142 S. Ct. 1906, 1915-17, 1924-25 \(2022\)](#). In her concurrence, however, Justice Sotomayor noted that state legislatures are "free to modify the scope of statutory standing under [their PAGAs] within state and federal constitutional limits." [Id. at 1925-26](#) (Sotomayor, J., concurring).

<sup>174</sup> See generally, e.g., Jon D. Michaels and David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. (forthcoming 2023), <https://perma.cc/RB6P-5JC2>; Aziz Huq, *What Texas's Abortion Law Has in Common with the Fugitive Slave Act*, WASH. POST (Nov. 1, 2021, 10:42 AM EDT), <https://perma.cc/5WLP-JH6N>.

With government entities unwilling or unable to engage in meaningful reform, the focus returns to the private sphere. Private procedural warfare, after all, created the current landscape; perhaps it could reverse it. The defense coalition, however, has long sought to anticipate and block any potential counteroffensive by the plaintiffs' bar. This Subpart analyzes how the defense coalition and the Court left little room--but not *no* room--for private procedural innovations to reverse the revolution.

Every year since the Supreme Court decided *Italian Colors*, I have told my complex-litigation students about a lucrative dispute-resolution opportunity lurking in arbitration agreements themselves. That opportunity, I warned, would be high-risk. It would be costly (perhaps prohibitively so). It would be legally uncertain. If it worked, though, it might well stop the arbitration revolution in its tracks. That opportunity was mass arbitration.

How could any plaintiffs' attorney, enterprising or otherwise, get away with mass arbitration--especially given the Supreme Court's arbitration jurisprudence? I believed that something like mass arbitration could happen for three main reasons. One, nature abhors a vacuum. The elimination of a mechanism for aggregating claims does not eliminate mass harm or the mass of individuals affected by such harm.<sup>175</sup>

Two, the terms of arbitration agreements made something like mass arbitration tempting, at least for plaintiffs' attorneys with the resources and **[\*1316]** risk tolerance to attempt it. As I have traced in prior work, arbitration agreements in the early 2000s tended to get struck down on unconscionability and effective-vindication grounds.<sup>176</sup>To avoid such rulings, corporations removed some of their more draconian arbitration-related clauses and added provisions that they described as "friendly" to consumers and employees: provisions requiring them to reimburse some or all of a claimant's arbitration fees, or even to pay bonuses to prevailing claimants.<sup>177</sup>Effectively, corporations injected fee shifting into any arbitral proceedings pursuant to their contracts.

The not-so-secret secret behind these "friendly" fee-shifting provisions was that none of them were intended to have any real effect. That is because these provisions existed alongside the one provision businesses would not remove from their agreements: the class-action waiver. More than that, the "friendly" fee-shifting provisions existed to *facilitate the enforcement* of class-action waivers. While dodging unconscionability rulings might have been a short-term benefit to corporations, the long-term (and far more ambitious) strategy of the "friendly" provisions was to tee up for the Supreme Court an arbitration agreement that contained a class-action waiver, but which otherwise seemed to bend over backwards to facilitate individual claiming--thus creating a plausible basis to deny that upholding the class waiver would abrogate the substantive claim.<sup>178</sup>

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<sup>175</sup> See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, [57 VAND. L. REV. 1571 \(2004\)](#) (challenging the perception of American litigation as typically individualized and tracing the importance of repeat-play agents for tort claimants).

<sup>176</sup> See J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, [59 VAND. L. REV. 1735, 1751-55, 1767-69 \(2006\)](#).

<sup>177</sup> See Miller, *supra* note 103, at 799-800.

<sup>178</sup> See Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party at 4-7, *T-Mobile USA, Inc. v. Laster*, **553 U.S. 1064 (2008)** (No. 07-976), [2008 U.S. S. Ct. Briefs LEXIS 2319, at \\*5-9](#) (encouraging the Court to deny certiorari and suggesting that T-Mobile's arbitration clause did not look "friendly" enough to be a vehicle for evaluating the legality of class-action waivers); see also Interview with Anonymous No. 1, *supra* note 42 (stating that AT&T wanted its arbitration clause in front of the Supreme Court, believing it to be the best vehicle for obtaining a favorable ruling on class-action waivers); Bruhl, *supra* note 29 (speculating that AT&T filed briefs opposing certiorari in cases involving other companies' arbitration clauses because it "had developed a brand new arbitration clause that was so amazingly consumer-friendly that if any court struck it down, such a ruling would [in AT&T's view] have to be preempted because it would represent a per se bar against class waivers even when consumers could profitably pursue individual arbitration," a move that made AT&T's attorneys "very unpopular at cocktail parties for a while").



The calculus by corporations here was as obvious as it was rational. Even with the fee-shifting provisions in arbitration agreements, individual arbitration would not frequently be economically feasible for an ordinary claimant or her lawyer.<sup>179</sup> From the corporate perspective, far better to foot the bill associated with "friendly" fee-shifting provisions in a small handful of [\*1317] individual arbitrations than to bear the expense of litigating class actions that purported to resolve the claims of all customers or employees. The gambit worked.

The opportunity for mass arbitration, then, lurked in the unlikely but devastating possibility that a significant number of individual arbitration claims would be filed all at once.

Given this possibility, remote as it may have been, why did corporations keep "friendly" arbitration provisions in their contracts? One likely reason is that the "friendly" provisions did a fair amount of work for Justice Scalia in *Concepcion*. Justice Scalia recounted these provisions in some detail in his opinion for the Court, and he essentially offered them up as a template for corporations to use in their contracts with consumers and employees going forward.<sup>180</sup> Another likely reason is that post- *Concepcion*, businesses believed they had arrived at a "more or less optimal form of blocking consumer disputes."<sup>181</sup> Even after the Court cast doubt on the necessity of "friendly" provisions to the enforceability of arbitration agreements in *Italian Colors*,<sup>182</sup> corporations generally did not remove pro-consumer terms or add probusiness ones.<sup>183</sup> The class-action waiver was all that mattered. The Court's full-throated embrace of class-action waivers directed the pressure generated by mass harm away from private enforcement; mass arbitration, which required both arbitration and aggregation, seemed conceptually incoherent (and thus a dead letter).

Yet my third reason for thinking that something like mass arbitration could happen, at least theoretically, was that the Supreme Court's *class* arbitration jurisprudence did not give defendants a strong basis to foreclose *mass* arbitration. To be sure, the Court's arbitration opinions, particularly *Italian Colors*, read broadly. And cases like *Italian Colors* likely leave room--perhaps substantial room--for less "friendly" arbitration contracts under the FAA.<sup>184</sup> Expressing this concern, Justice Kagan criticized the *Italian Colors* majority for essentially limiting its effective-vindication jurisprudence to "baldly exculpatory provisions."<sup>185</sup> But Justice Kagan may have overstated the point.

**[\*1318]** One can conceive of other provisions, not quite baldly exculpatory, that would seem to ask too much of the FAA. Consider a provision requiring an individual claimant to pay the defendant a \$ 100,000 up-front fee to pursue statutory claims. Or a provision specifying that all disputes will be arbitrated by someone on the board of directors of the defendant company. Surely the preemptive scope of the FAA is not so broad as to prohibit legislatures (or courts) from deeming "pay-defendant-to-play" or "adjudication-by-defendant" provisions void as against public policy.<sup>186</sup> Surely those provisions interfere impermissibly with the effective vindication of rights.

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<sup>179</sup> See *supra* notes 26-28 and accompanying text.

<sup>180</sup> See [AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336-38, 351-52 \(2011\)](#); see also Miller, *supra* note 103, at 800-01 (describing how *Concepcion* "ensur[ed] companies that [contracts like AT&T's] were undoubtedly safe").

<sup>181</sup> Miller, *supra* note 103, at 824.

<sup>182</sup> See Glover, *supra* note 75, at 3057.

<sup>183</sup> Miller, *supra* note 103, at 826.

<sup>184</sup> See *supra* note 182 and accompanying text.

<sup>185</sup> See [Am. Express Co. v. It. Colors Rest., 570 U.S. 228, 240-43, 247-48, 253 \(2013\)](#) (Kagan, J., dissenting).

<sup>186</sup> Some courts have said as much. See, e.g., [Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 926-27 \(9th Cir. 2013\)](#) ("If state law could not require some level of fairness in an arbitration agreement, there would be nothing to stop an employer from imposing an arbitration clause that, for example, made its own president the arbitrator of all claims brought by its employees.").

Along similar lines, the logic of the Court's arbitration jurisprudence does not easily extend to individual claims--even a substantial number of them--as opposed to claims brought on a representative basis. In representative litigation, one individual can litigate on behalf of 999 others who do not have to participate at all.<sup>187</sup> The class-waiver cases hinge on the fact that representative devices like the class action create a form of dispute resolution that (at least according to the Court) is fundamentally inconsistent with the FAA's preference for *bilateral* arbitration.<sup>188</sup> But having established bilateral arbitration as the paradigm the FAA was intended to protect, it would be a stretch, even for a defense-minded Court, to disapprove of any quantity of bilateral arbitration proceedings.

Of course, the Court has not addressed mass arbitration. In my mind, however, the Supreme Court's jurisprudence cannot go so far as to prohibit a parade of proverbial fools and fanatics from pursuing negative-value claims on an individual basis.<sup>189</sup> Imagine that 1,000 similarly situated individuals filed individual arbitration claims. There is no doubt that a judge--at least one who views aggregation as a mechanism for imposing *in terrorem* settlement pressure--would find the settlement pressure generated by these 1,000 claims normatively undesirable. But it is doubtful that the same judge could use *Stolt-Nielsen*, *Concepcion*, *Italian Colors*, *Epic Systems*, or any other arbitration case to prevent those 1,000 claimants from pursuing their 1,000 individual cases. [\*1319] Indeed, during oral argument in *Italian Colors*, Chief Justice Roberts all but stated as much.<sup>190</sup>

For decades, the defense coalition proceeded on the assumption that a campaign targeting the class-action device, but not underlying substantive rights, would achieve the holy grail of defense-side goals: avoiding legal liability.<sup>191</sup> Defendants' extended honeymoon with the class action, however, may have obscured the ways in which the aggregate unit itself was the true source of their discontent. The *potential* for low-value cases to generate significant settlement pressure comes from a mass of claims, which can exist independently of any specific aggregate device.<sup>192</sup> But the Supreme Court's jurisprudence has targeted the class action, not the aggregate unit generally. Individual

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<sup>187</sup> See [Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 810 \(1985\)](#).

<sup>188</sup> See *supra* notes 81-87 and accompanying text. Indeed, the *Stolt-Nielsen* Court indicated that the "shift from bilateral arbitration to class-action arbitration" would cause "fundamental" (and presumably undesirable) changes. See [Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686-87 \(2010\)](#) (expressing concern that, among other things, the arbitrator's award would "adjudicate[] the rights of absent parties").

<sup>189</sup> Cf. [Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 \(7th Cir. 2004\)](#) ("[O]nly a lunatic or a fanatic sues for \$ 30.").

<sup>190</sup> The full exchange was as follows:

CHIEF JUSTICE ROBERTS. Well, again, that doesn't seem too difficult. You either have your trade association or you have a big meeting of all [the plaintiffs] and say we need to pay for this expert report and once we've got it, you know, I'm going to represent each of you individually in individual arbitrations and I'm going to win the first one, and then the others are going to fall into place and they'll get a settlement from American Express that's going to . . . satisfy their concerns.

MR. KELLOGG. Absolutely right.

CHIEF JUSTICE ROBERTS. Okay. And you have no problem with that.

MR. KELLOGG. I have no problem with that.

Transcript of Oral Argument at 21-22, [It. Colors, 570 U.S. 228](#) (No. 12-133).

<sup>191</sup> See *generally* Gilles, *supra* note 47.

<sup>192</sup> Cf. Nagareda, *supra* note 132, at 1882-85 ("Aggregation operates harmoniously with remedial design by making feasible private litigation . . . to enforce strictures against misconduct that otherwise would not give rise to marketable claims . . .").

claims are the boundary--and a mass of individual claims now the price--of the arbitration revolution's legal immortality.<sup>193</sup>

### III. Mass-Arbitration Case Study

Consistent with the analysis in Part I.C above, the opportunity for mass arbitration arose from two consequences of the arbitration revolution. First, the revolution produced orphaned aggregate claim units--groups of classable claims deprived of any civil justice home, but which still had potential legal merit. Second, the revolution produced millions of "friendly" arbitration agreements. If corporations were forced to comply with the "friendly" contractual terms they had drafted, orphaned aggregate claim units could increase the settlement pressure stemming from their claims. As it turns out, enforcement of those terms is not only expressly permitted but explicitly [\*1320] required: After all, the FAA says that "courts must 'rigorously enforce' arbitration agreements according to their terms."<sup>194</sup>

To say that an opportunity for mass arbitration existed, however, is not to say that mass arbitration was likely to occur. As this Part demonstrates, mass arbitration's path from theoretical opportunity to viable model of dispute resolution was economically prohibitive, legally uncertain, and, in the view of most attorneys who considered it, intolerably risky.<sup>195</sup> And yet, mass arbitration emerged.

Parts III, IV, and V now present the first and only case study of mass arbitration. Part III investigates the origins of and obstacles to mass arbitration and describes mass arbitration's key features. Part IV uncovers and analyzes a number of contemporaneous developments to which mass arbitration must adapt. What emerges from this investigation is a new and distinct model of aggregate dispute resolution, which Part V.A taxonomizes and compares to taxonomies I developed for two other firmly established models of aggregate dispute resolution (class actions and MDL consolidations). Part V.B discusses some limitations of this Article's case study and highlights important open questions that those limitations reveal.

The case-study method "explores a real-life, contemporary bounded system (a case) or multiple bounded systems (cases) over time."<sup>196</sup> As such, it is the most effective way to understand a real-life phenomenon like mass arbitration. The case study begins with a brief background section, followed by a discussion section that investigates two questions. One, what were the principal obstacles to the development of viable mass arbitration, and how were they overcome? Two, what are the key features of the mass-arbitration model? The case study continues by asking a third question: What are the current challenges to mass arbitration, and what do they reveal about its future? After investigating these questions, the case study presents the taxonomy described above.

A quick note on taxonomy: I chose to compare mass arbitration to class actions and MDL consolidations for two reasons. First, class action and MDL consolidation are the most established mechanisms for aggregate claiming in litigation.<sup>197</sup> As such, they serve as important reference points against which [\*1321] other forms of formal or informal aggregate dispute resolution can be compared. Second, mass arbitration is fundamentally a reactionary phenomenon. It is almost impossible to imagine the development of a mass-arbitration model without the existence of some external driving force. Corporations created such a force not only through their resistance to the class

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<sup>193</sup> Cf. *INDIANA JONES AND THE LAST CRUSADE*, at 01:54:16 (Steven Spielberg dir., 1989) ("But the [Holy] Grail cannot pass beyond the great seal. That is the boundary, and the price, of immortality.").

<sup>194</sup> *It. Colors*, 570 U.S. at 233 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

<sup>195</sup> See, e.g., Interview with Cory L. Zajdel, *supra* note 40.

<sup>196</sup> JOHN W. CRESWELL, *QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* 97 (3d ed. 2013) (emphasis omitted).

<sup>197</sup> See, e.g., Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 *DEPAUL L. REV.* 497, 499-504 (2016) (describing the "golden age" of class-action suits); Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 *U. PA. L. REV.* 831, 833 (2017) ("With the Supreme Court and lower courts cutting back the viability of the class action . . . MDL has become the leading mechanism for resolving mass torts.").

action, but also through their resistance to MDL consolidation.<sup>198</sup> Contractual avoidance of MDL consolidation has received relatively little discussion, but it is not insignificant: Like class actions, MDL consolidations allow cost spreading among claimants,<sup>199</sup> thereby facilitating claiming and imposing significant settlement pressure on defendants.<sup>200</sup>

## [\*1322] A. Background

### 1. Definitions

There are two distinct models of dispute resolution that one might hear referred to as "mass arbitration." The first model, which has existed for many years, was developed principally by a subset of labor and employment firms, which would arbitrate the relatively small number of claims by employee-clients against their employers.<sup>201</sup> After proceeding through arbitration on those test cases, the firms would attempt to leverage successful individual results as de facto bellwethers to obtain settlements for unfiled claims.<sup>202</sup> This model might sound a bit familiar: It closely resembles Chief Justice Roberts's observations about arbitration during oral argument in *Italian Colors*. As a claimant, Chief Justice Roberts noted, you could "have your trade association . . . represent each of you individually in individual arbitrations and . . . win the first one, and then the others are going to fall into place and [you'll] get a settlement."<sup>203</sup> This "test-case" model is not what this Article terms mass arbitration.

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<sup>198</sup> See generally [28 U.S.C. § 1407](#) (providing for the transfer of related cases "to any district for coordinated or consolidated pretrial proceedings"). The most recent and high-profile attempt by a corporation to avoid MDL consolidation involved Johnson & Johnson, which tried to channel consolidated mass-tort claims through a new legal entity, LTL Management LLC, in Chapter 11 bankruptcy proceedings. Informational Brief of LTL Management LLC at 1, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C. Oct. 14, 2021), ECF No. 3; Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case PP 1-3, [In re LTL Mgmt., LLC, 637 B.R. 396 \(Bankr. D.N.J. 2022\)](#) (No. 21-30589), ECF No. 632-1; Memorandum of Law of Amici Curiae by Certain Complex Litigation Law Professors in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case PP 4-6, [In re LTL Mgmt., 637 B.R. 396](#) (No. 21-30589), ECF No. 1410 (describing, in a brief submitted by the Author, the MDL process as an alternative to such a novel bankruptcy plan); Memorandum of Law of Amicus Curiae by Erwin Chemerinsky in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case P 4, [In re LTL Mgmt., 637 B.R. 396](#) (No. 21-30589), ECF No. 1396 (warning that the "bankruptcy petition stretches the Bankruptcy Code beyond the breaking point"). Despite the arguments of complex-litigation, constitutional law, and bankruptcy professors, Judge Michael Kaplan of the Bankruptcy Court of the District of New Jersey denied the tort claimants' motions to dismiss. [In re LTL Mgmt., 637 B.R. at 399-400](#). In his sweeping opinion, Judge Kaplan stated that LTL's Chapter 11 filing "was not undertaken to secure a tactical advantage" and that, to the extent such a tactic would open the floodgates to the use of bankruptcy proceedings to terminate and resolve legal claims, "maybe the gates . . . should be opened." [Id. at 421, 428](#) (capitalization altered).

<sup>199</sup> Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, [64 EMORY L.J. 329, 347-48 \(2014\)](#).

<sup>200</sup> *Id.* at 345-46 ("[T]he cost-spreading MDL enables counsel to pursue many meritorious cases that would have been negative-value claims outside of an aggregative context."); John M. Majoras, Steven N. Geise, Christopher R.J. Pace, Sharyl A. Reisman & Leon F. DeJulius, Jr., *Settlement Strategy in MDL*, in 2 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 19:52 (Robert L. Haig ed., West 2021) (describing how MDL consolidation can encourage settlement).

<sup>201</sup> Interview with Travis Lenkner & Warren Postman, *supra* note 40.

<sup>202</sup> *Id.*

<sup>203</sup> Transcript of Oral Argument at 21, [Am. Express Co. v. It. Colors Rest., 570 U.S. 228 \(2013\)](#) (No. 12-133); see *supra* note 190 and accompanying text.

In the second model--what this Article refers to as mass arbitration--firms amass thousands of clients who have allegedly suffered a common harm by a common defendant.<sup>204</sup> Rather than file a handful of claims in arbitration for potential use as bellwethers or test cases,<sup>205</sup> the firms then file hundreds or thousands of individual arbitration demands. And they do so with the stated intent of arbitrating each individual case until a satisfactory aggregate settlement is reached.

The first example of this second model occurred, largely unnoticed, in 2011. That year a California firm, Bursor & Fisher, filed over 1,000 identical arbitral demands seeking to enjoin a proposed merger between AT&T and T-Mobile.<sup>206</sup> [\*1323] AT&T responded with eight separate lawsuits arguing that the demands, which arose under the Clayton Act, fell outside the scope of the arbitration agreement with its customers.<sup>207</sup> Courts agreed with AT&T in at least five of these cases;<sup>208</sup> several stated that the demands bore "all the hallmarks of 'class arbitration' laid out in *Concepcion*."<sup>209</sup> Nothing about this attempted mass arbitration seems to have been written since.<sup>210</sup>

A few other small-scale mass arbitrations popped up in the mid-2010s. Small-scale mass arbitrations share some of the same features as large-scale mass arbitrations, and they may have laid some of the groundwork for the mass-arbitration model. Accordingly, this Article includes them in its study.<sup>211</sup> But small-scale mass arbitrations did not provide a meaningful substitute for the class actions eliminated by the arbitration revolution, in large part because of their size. As such, they did not capture much attention, much less affect the arbitration revolution generally.

Mass arbitration on a significant scale did not materialize until around 2018, when (seemingly out of nowhere) a group of plaintiffs' firms and attorneys--a startup named Keller Lenkner LLC, a small Maryland consumer firm called Z Law Group, and a Minnesota lawyer named Kent Williams--began filing thousands of arbitration demands against

<sup>204</sup> Between 2010 and 2018, some employment firms filed what might be called "mini mass arbitrations" in the employment context. These arbitrations generally consisted of 100 or 200 claims. See, e.g., *Aguilera v. Prospect Mortg., LLC*, No. 13-cv-05070, [2013 WL 4779179, at \\*1-2 \(C.D. Cal. Sept. 5, 2013\)](#) (describing how 188 plaintiffs who signed arbitration agreements with the defendant company filed individual demands against the company through the AAA and JAMS).

<sup>205</sup> This model closely tracks that of a large MDL. See, e.g., Richard J. Arsenault & J.R. Whaley, Practice Tip, *Multidistrict Litigation and Bellwether Trials: Leading Litigants to Resolution in Complex Litigation*, BRIEF, Fall 2009, at 60, 60-62 (discussing the MDL bellwether model).

<sup>206</sup> See Daniel Fisher, *AT&T's Arbitration Victory Breeds Swarm Of Antitrust Cases*, FORBES (Aug. 18, 2011, 4:36 PM EDT), <https://perma.cc/Y6TX-M4H4> (noting that Bursor & Fisher attracted "more than 1,000 people who agreed to file arbitration complaints against AT&T seeking to block the merger"); Letter from Kevin Ranlett to the Hon. Dennis M. Cavanaugh at 1, *AT&T Mobility LLC v. Keller*, No. 11-cv-04671 (D.N.J. Oct. 28, 2011), ECF No. 34 [hereinafter Ranlett Letter] (describing the arbitral demands as identical).

<sup>207</sup> Ranlett Letter, *supra* note 206, at 1 (describing the relevant case as "one of eight lawsuits"); see, e.g., *AT&T Mobility LLC v. Fisher*, No. 11-cv-02245, [2011 WL 5169349, at \\*3 \(D. Md. Oct. 28, 2011\)](#) (describing AT&T's contention that "the Clayton Act claim brought in the demand for arbitration exceeds the scope of the Arbitration Agreement.").

<sup>208</sup> *Fisher*, [2011 WL 5169349, at \\*7](#); *AT&T Mobility LLC v. Bernardi*, Nos. 11-cv-03992 & 11-cv-04412, [2011 WL 5079549, at \\*13 \(N.D. Cal. Oct. 26, 2011\)](#); *AT&T Mobility LLC v. Smith*, No. 11-cv-05157, [2011 WL 5924460, at \\*11 \(E.D. Pa. Oct. 7, 2011\)](#); *AT&T Mobility LLC v. Gonnello*, No. 11-cv-05636, [2011 WL 4716617, at \\*5 \(S.D.N.Y. Oct. 7, 2011\)](#); *AT&T Mobility LLC v. Bushman*, No. 11-cv-80922, [2011 WL 5924666, at \\*4 \(S.D. Fla. Sept. 23, 2011\)](#).

<sup>209</sup> *Smith*, [2011 WL 5924460, at \\*7](#); see also, e.g., *Bernardi*, [2011 WL 5079549, at \\*7](#). The remaining arbitral demands likely disappeared in light of judicial skepticism. Interview with Daniel Fisher, Senior Ed., Forbes, in Wash., D.C. (Aug. 5, 2021).

<sup>210</sup> That said, the attorneys pursuing these types of claims were later referred to as "arbitration entrepreneurs." David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, [104 GEO. L.J. 57, 63](#) & n.38 (2015).

<sup>211</sup> See *infra* Appendix.

some of the biggest corporations in the United States. In 2018: Uber. Lyft. Chipotle. In 2019: [\*1324] CenturyLink. DoorDash. Family Dollar. Peloton. Intuit. In 2020: Chegg. Amazon. In 2021: DoorDash, again (different claimants; different claims). Uber, again (different claimants; different claims). These corporate defendants are represented by some of the most well-known firms in "big law": Gibson Dunn, Morrison & Foerster, and Mayer Brown.

## 2. Methodology

"When a study includes more than one single case, a multiple case study is needed."<sup>212</sup>This case study draws from multiple cases and therefore uses the "multiple-case study" method.<sup>213</sup>A multiple-case study enables the researcher to understand key similarities and differences and allows her to analyze data both within and across cases.<sup>214</sup>The multiple-case study method calls for "detailed . . . data collection involving multiple sources of information."<sup>215</sup>Accordingly, for this study, I collected case-related materials from multiple sources to form the underlying dataset. Those materials included (1) all publicly available data on arbitral claims in the AAA, JAMS, and CPR databases;<sup>216</sup>(2) publicly available filings, judicial opinions, and orders from a broad and representative sample of mass-arbitration cases; (3) publicly available financial disclosures relevant to certain companies' mass-arbitration liability; (4) interviews I conducted with the principal architects of mass [\*1325] arbitration<sup>217</sup> and with other leading plaintiffs' attorneys;<sup>218</sup>(5) interviews I conducted with the principal architects and leaders of the defense coalition's arbitration revolution;<sup>219</sup>and (6) public media reports on mass arbitration.

Given that mass arbitration did not emerge until around 2018, I established the following criteria to ensure a sufficiently developed and representative case sample for the study's dataset. These criteria ensured that the dataset was representative across time (criteria 1 and 2), claim size and number (criteria 3, 4, and 5), substantive legal context (criteria 6 and 7), and procedural origin (criteria 8 and 9).

1. First-mover cases<sup>220</sup>(necessary to investigate how mass arbitration emerged);

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<sup>212</sup> Johanna Gustafsson, *Single Case Studies vs. Multiple Case Studies: A Comparative Study* 3 (2017), <https://perma.cc/2XD7-GUSC>.

<sup>213</sup> See ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* 46-47 (3d ed. 2003) (comparing single-case and multiple-case study designs); see also, e.g., Mark Gil A. Vega, *Investigating the Learning Action Cell (LAC) Experiences of Science Teachers in Secondary Schools: A Multiple Case Study*, IOER INT'L MULTIDISCIPLINARY RSCH. J., Mar. 2020, at 20, 20-22 (evaluating an educational program in the Philippines via "multiple case studies that utilized . . . survey questionnaires, individual interviews, focus group discussions, and . . . observations").

<sup>214</sup> See YIN, *supra* note 213, at 47-48.

<sup>215</sup> See CRESWELL, *supra* note 196, at 97 (emphasis omitted).

<sup>216</sup> See *Consumer and Employment Arbitration Statistics*, AM. ARB. ASS'N, <https://perma.cc/J6R8-GRHC> (archived May 14, 2022) (to locate, select "View the live page," and then select the first link under "AAA Consumer and Employment Arbitration Statistics") (listing AAA consumer cases closed within the last five years); *JAMS Consumer Case Information Spreadsheet*, JAMS, <https://perma.cc/7V8J-MFCX> (archived May 14, 2022) (to locate, select "View the live page," and then select "JAMS Consumer Case Information spreadsheet") (listing consumer arbitrations administered by JAMS and completed in the last five years); *CPR Consumer Case Information*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <https://perma.cc/GV8C-PCH6> (archived May 14, 2022) (to locate, select "View the live page," and then select "CPR Consumer Case Information") (providing information on CPR consumer matters closed within the last five years); see also Colvin, *supra* note 122, at 21 (describing the AAA's records as a "best-case example" of arbitration).

<sup>217</sup> See *supra* note 40.

<sup>218</sup> See *supra* note 41.

<sup>219</sup> See *supra* note 42.

2. Second-mover cases <sup>221</sup>(necessary to investigate the evolution and future of mass arbitration);
3. At least one case with claims that are claim-marketability failures in arbitration <sup>222</sup>(necessary to investigate the claim-value threshold <sup>223</sup>of the mass-arbitration model in the abstract and in comparison with other aggregate dispute resolution mechanisms);
4. Cases of diverse scale, as measured by number of claimants (necessary to investigate the mass-arbitration model's scaling capabilities);
5. Cases involving (relatively) high-value individual claims and (relatively) low-value individual claims (necessary to investigate claim-value ranges for the mass-arbitration model's economic viability);
6. Cases arising out of employment contracts;
7. Cases arising out of consumer contracts;
8. Cases that began as class actions; and
9. Cases that were initiated in arbitration. **[\*1326]**

Once a sufficient number of mass arbitrations emerged and developed to satisfy these criteria, I compiled them into a dataset for study here. <sup>224</sup>The overall dataset spans the mass-arbitration landscape (including some mass arbitrations that never appear publicly), enabling thorough investigation of the mass-arbitration model as it exists today.

## B. Overcoming the Principal Obstacles to Mass Arbitration

The path to a viable model of mass arbitration was a narrow one. Corporate defendants and their attorneys were experienced, sophisticated, well-capitalized, and steadfastly devoted to preserving the bounty of the arbitration revolution. <sup>225</sup>The win-loss and recovery rates for consumers and employees in arbitration were too discouraging

<sup>220</sup> I classify first-mover cases as those mass arbitrations where claim filing began in 2018.

<sup>221</sup> I classify second-mover cases as those mass arbitrations where claim filing began in 2019 or later.

<sup>222</sup> For purposes of this study, I define a claim that is a "claim-marketability failure" in arbitration as one that would have been economically viable in litigation (via a class action or other aggregate claiming mechanism) but is *not* economically viable in arbitration, as the costs of arbitration relative to the value of the claim make it economically irrational to pursue.

<sup>223</sup> By "claim-value threshold," I mean the following: the value of individual claims that mass-arbitration attorneys have found to be the minimum--the threshold--for such claims to be economically viable in the mass-arbitration model.

<sup>224</sup> The full dataset is on file with the Author. A subset of the data is reproduced in the Appendix below.

<sup>225</sup> Indeed, in many ways they still are. In a 2021 study, the American Association for Justice (AAJ) noted that "[c]onsumer and employee win rates decreased" and "consumer and employment forced arbitrations increased during the pandemic." AM. ASS'N FOR JUST., *supra* note 146, at 2. Many of the cases studied by the AAJ, however, involved claims in the mass arbitrations analyzed in this Article. See *id.* at 4 (listing the top ten corporate defendants for employment arbitration in 2020, including Family Dollar, Dollar Tree, and Chipotle); *infra* Appendix. The increase in arbitration between 2018 and 2021 is thus partly attributable (if not highly attributable) to the emergence of mass arbitration. Accordingly, any analysis of the AAJ's study must consider the distinction between an increase in *arbitration cases* and an increase in mandatory arbitration agreements. *Cf.*, e.g., Bhattarai, *supra* note 146 (using the fact that Family Dollar closed 1,135 arbitration cases in 2020, as opposed to three cases in 2019, to show that "U.S. companies are increasingly relying [on] . . . arbitration . . . during the pandemic," a conclusion that conflates an increase in cases with an increase in arbitration agreements). For any given defendant, and in particular Family Dollar, the increase in 2020 cases would seem largely (if not exclusively) due to mass arbitration. Indeed, the fact that Family Dollar closed three arbitration cases in 2019 likely reflects the general tendency of mandatory arbitration agreements to *suppress* case filings, not facilitate them. See *supra* Part I.C.

for even optimistic attorneys to ignore.<sup>226</sup>The startup costs of mass arbitration were likely too high for most attorneys, particularly those with the experience needed to go toe-to-toe with the defense bar.

How, then, did mass arbitration ever come to be? Who could do it? Who *would* do it?

### 1. Competing with the defense bar

Any path to mass arbitration had to go through the defense bar--the same defense bar that engineered the arbitration revolution and the class-action counterrevolution. While the proverbial "enterprising young attorney" might [\*1327] be willing to devote countless hours to individualized claim management and pursuit, that young attorney would be no match for the defense bar. And an attorney with the skill and experience necessary to challenge the defense bar would almost certainly lack the willingness to abandon a well-established and lucrative practice for a risky and unfamiliar endeavor.<sup>227</sup>

Unsurprisingly, then, first-mover firms in mass arbitration were unique among plaintiffs' firms. Keller Lenkner, the firm behind the Uber, Lyft, Postmates, DoorDash, Intuit, Amazon, and FanDuel mass arbitrations, is uniquely well capitalized for a startup firm, especially one founded just three years ago. Two years before starting Keller Lenkner, Adam Gerchen, Ashley Keller, and Travis Lenkner sold Gerchen Keller Capital--a litigation-funding firm Gerchen and Keller had founded in 2013--to Burford Capital for \$ 160 million.<sup>228</sup>Keller Lenkner is also unusual among plaintiffs' firms in that its attorneys were "trained at leading defense firms and commercial litigation boutiques."<sup>229</sup>Indeed, Keller Lenkner's ranks include Warren Postman, the former vice president and chief counsel for appellate litigation at the U.S. Chamber of Commerce.<sup>230</sup>Other attorneys come from shops like Kirkland & Ellis, Williams & Connolly, and Kellogg Hansen.<sup>231</sup>The marketing implication is obvious: "Keller Lenkner's lawyers can match the best lawyers on the other side because they've been there."<sup>232</sup>

Cory Zajdel, whose firm, Z Law Group, is behind both the Chegg and DoorDash (consumer) mass arbitrations, is also unique among plaintiffs' attorneys. Zajdel invested his life savings into mass arbitration.<sup>233</sup>His reasoning? The arbitration revolution left consumers, including many of his [\*1328] clients, with virtually no access to justice. Zajdel knew that attorneys across the country would routinely screen out cases where an arbitration clause was present.

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<sup>226</sup> See Interview with Cory L. Zajdel, *supra* note 40.

<sup>227</sup> Even now, well-capitalized plaintiff-side powerhouses are hesitant about the risk-benefit calculus. Interview with Jonathan D. Selbin, *supra* note 41.

<sup>228</sup> Press Release, Burford Cap., Burford Capital Adds Scale and Significant Private Capital Management Business Through Acquisition of Gerchen Keller Capital (Dec. 14, 2016), <https://perma.cc/V8PU-M3BJ>; Press Release, Gerchen Keller Cap., LLC, Gerchen Keller Capital, LLC Launches New \$ 250 Million Commercial Litigation Finance Fund (Jan. 13, 2014), <https://perma.cc/9YNP-LP5H>.

<sup>229</sup> *About Us*, KELLER POSTMAN LLC, <https://perma.cc/U574-WY4X> (archived July 12, 2022). Keller Lenkner changed its name to Keller Postman after the departure of Travis Lenkner in April 2022. Andrew Strickler, "Mass Action" Firm Keller Lenkner Becomes Keller Postman, LAW360 (Apr. 25, 2022, 4:54 PM EDT), <https://perma.cc/9RWD-YRN5> (to locate, select "View the live page"). I refer to the firm as Keller Lenkner throughout the Article.

<sup>230</sup> *Our Team*, KELLER POSTMAN LLC, <https://perma.cc/R3WZ-TBHD> (archived May 14, 2022). Lenkner himself worked as an attorney at Gibson Dunn. Press Release, Burford Cap., *supra* note 228.

<sup>231</sup> See *Our Team*, *supra* note 230.

<sup>232</sup> Alison Frankel, *DQ from Facebook Class Action Shows Risk of Keller Lenkner's Model*, REUTERS (July 21, 2021, 1:34 PM PDT), <https://perma.cc/32JS-NFTW>.

<sup>233</sup> Interview with Cory L. Zajdel, *supra* note 40.



<sup>234</sup>Because of this, he was concerned that no consumers subject to arbitration agreements would be able to secure representation for their claims. <sup>235</sup>If Zajdel didn't do it, who would? <sup>236</sup>

Other plaintiffs' firms that have gotten involved in mass arbitration are well established and well capitalized. Quinn Emanuel joined Keller Lenkner in the DoorDash (employment) mass arbitration, <sup>237</sup>and it is on record as counsel in the Ticketmaster mass arbitration. <sup>238</sup>Lieff Cabraser, class council against Fitbit, <sup>239</sup>is considering dipping its toes into the mass-arbitration waters in the context of Telephone Consumer Protection Act (TCPA) claims against DirecTV. <sup>240</sup>Firms like Lieff Cabraser and Quinn Emanuel are large enough to handle the volume of individual cases--and the attendant ethical obligations to clients--generated by mass arbitration.

## 2. Overcoming substantial startup costs

The economic barriers to initiating a mass arbitration are substantial. Creating the "mass" is a particularly expensive endeavor, both in the abstract and relative to class actions and MDL consolidations. The filing of even a single arbitration demand requires the claimant to pay a filing fee. (That is generally true even if that filing fee is reimbursable under the terms of the relevant arbitration agreement.)

The thousands of arbitration demands in this study were subject to a web of multifarious, frequently amended fee schedules. Initial filing fees for individual arbitration claims during the study period often fell somewhere [**\*1329**] between \$ 200 and \$ 400, <sup>241</sup>although under some schedules and some agreements they could have been much higher. <sup>242</sup>

In many cases, just the filing fee for the arbitration demand can exceed the value of any individual claim. Indeed, the initial filing fee is the reason that most individual consumer and employment demands, at least if unconnected to a mass arbitration, are never brought. As an example: To a couple earning \$ 32,877 a year, \$ 200 owed by Intuit is a significant amount of money. <sup>243</sup>But pursuant to the couple's arbitration agreement, the filing fee to recover that \$

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Alison Frankel, *DoorDash Accused of Changing Driver Rules to Block Mass Arbitration Campaign*, REUTERS (Nov. 20, 2019, 3:34 PM), <https://perma.cc/EFW9-7SW7>.

<sup>238</sup> Complaint, Heckman v. Live Nation Ent., Inc., No. 22-cv-00047 (C.D. Cal. Jan. 4, 2022), ECF No. 1 (listing Keller Lenkner and Quinn Emanuel as counsel for the plaintiffs).

<sup>239</sup> See *infra* notes 384-88 and accompanying text.

<sup>240</sup> Interview with Jonathan D. Selbin, *supra* note 41 (noting that privacy claims stemming from a TCPA class action had been sent to arbitration and that Lieff Cabraser was seeking individual names in order to help claimants arbitrate). The underlying case is Cordoba v. DirectTV, LLC, No. 15-cv-03755 (N.D. Ga. filed Oct. 27, 2015).

<sup>241</sup> See Am. Arb. Ass'n, *Consumer Arbitration Rules: Costs of Arbitration 1* (2016), <https://perma.cc/TQ3J-H22N> (setting out a default filing fee of \$ 200 for consumers); *Arbitration Schedule of Fees and Costs*, JAMS, <https://perma.cc/L7US-MB6T> (archived May 19, 2022) (setting default fees of \$ 250 for consumers and \$ 400 for employees). These fees can generally be altered via contract. At least prior to mass arbitration, agreements that amended filing fees tended to lower the claimant's fee or provide that the defendant would reimburse the claimant's fee. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-37 (2011).

<sup>242</sup> See, e.g., *Rule 13900. Fees Due When a Claim Is Filed*, FIN. INDUS. REGUL. AUTH., <https://perma.cc/C9BD-GGPJ> (archived May 19, 2022) (setting up a sliding scale where filing fees vary based on the amount in controversy).

200 would have been \$ 200. <sup>244</sup>This made the claim economically irrational for the couple (and their counsel) to pursue.

In order to launch a mass arbitration, then, a law firm typically must advance the filing fees owed by its clients. <sup>245</sup>Given the number of individual demands that mass arbitration entails, this is a substantial (and potentially risky) up-front investment. In the Intuit mass arbitration, Keller Lenkner invested more than \$ 8 million dollars of its own capital to advance filing fees for the first wave of individual arbitration demands. <sup>246</sup>In the DoorDash [\*1330] (employment) mass arbitration, filing the first wave of claims for wage theft cost counsel around \$ 1.2 million. <sup>247</sup>By May 2020, Keller Lenkner had fronted more than \$ 10 million in filing fees for its clients. <sup>248</sup>In the Chegg mass arbitration, Cory Zajdel put up his "life savings" to front the filing fees for more than 15,000 arbitration demands. <sup>249</sup>There is no analogue to this up-front capital outlay in a class action. In a class action in court, there is typically only one filing for which a fee could be assessed--the class complaint.

Before a firm can even reach this expensive filing stage, it must expend significant time and resources in order to amass claims to file. The "mass" in a mass arbitration is the sum of hundreds or thousands of individual claimants, all of whom the firm must identify, notify, contact, and ultimately retain. Creating the "mass" requires firms to develop (internally) or hire (externally) an advertising and marketing team capable of designing and implementing an expansive, but also targeted, multimedia campaign. That campaign must not only identify and reach a diffuse set of potential claimants; it must also persuade those individuals to reach out to the firm so that the firm can file claims on their behalf. <sup>250</sup>

<sup>243</sup> [Proposed] Brief of Amici Curiae the Office of the Los Angeles City Attorney & the Office [sic] the County Counsel, County of Santa Clara Opposing Plaintiffs' Motion for Preliminary Approval at 40, *Arena v. Intuit Inc.*, No. 19-cv-02546, [2021 WL 834253 \(N.D. Cal. Mar. 5, 2021\)](#), ECF No. 176-1.

<sup>244</sup> See Motion to Intervene & in Opposition to Preliminary Approval of Class Action Settlement at 5, [Intuit, 2021 WL 834253](#) (No. 19-cv-02546), ECF No. 177 [hereinafter *Intuit* Motion to Intervene]. The AAA changed its fee schedule in November 2020 to adjust for mass arbitration, reducing the required outlay for similarly situated claimants to as low as \$ 50. Mark Levin, *New AAA Consumer Fee Schedule Addresses Mass Arbitration Costs*, JD SUPRA (Mar. 2, 2021), <https://perma.cc/6YR9-C9EB>; Am. Arb. Ass'n, *Consumer Arbitration Rules: Costs of Arbitration 1* (2020), <https://perma.cc/K43E-URXP>.

<sup>245</sup> This is not always the case. For instance, the AAA waives filing fees when a California consumer-claimant establishes a condition of "poverty" via affidavit. See Am. Arb. Ass'n, *American Arbitration Association Affidavit for Waiver of Fees Notice 1* (n.d.), <https://perma.cc/AJW2-45FM>.

<sup>246</sup> Defendant Intuit Inc.'s Opposition to Motion to Intervene & Motion for Leave to File Brief of Amici Curiae at 7, [Intuit, 2021 WL 834253](#) (No. 19-cv-02546), ECF No. 189 [hereinafter *Intuit* Opposition to Motion].

<sup>247</sup> See Susan Antilla, *Arbitration Storm at DoorDash*, AM. PROSPECT (Feb. 27, 2020) <https://perma.cc/AWE3-C6P4>.

<sup>248</sup> Declaration of Warren Postman in Opposition to CenturyLink's Motion to Disqualify Counsel & Require Corrective Notice P 6, *In re CenturyLink Sales Pracs. & Sec. Litig.*, No. 17-md-02795, [2020 WL 3513547 \(D. Minn. June 29, 2020\)](#), ECF No. 715 [hereinafter *CenturyLink* Postman Declaration].

<sup>249</sup> Interview with Cory L. Zajdel, *supra* note 40; Alison Frankel, *Mass Consumer Arbitration is On! Ed Tech Company Hit with 15,000 Data Breach Claims*, REUTERS (May 12, 2020, 1:51 PM), <https://perma.cc/68TS-KCMH>.

<sup>250</sup> One example of such a campaign is Labaton Sucharow's outreach via Facebook to individuals who might have claims against MoneyLion for charging excessive interest rates. The MoneyLion advertisement did not appear on Labaton Sucharow's main Facebook feed. Instead, the ad appeared on a targeted subset of Facebook users' feeds. A copy of the ad is on file with the Author. For more on advertising campaigns, see generally Interview with Cory L. Zajdel, *supra* note 40 (discussing the need for a marketing budget and a targeted advertising plan); and Interview with Warren Postman, *supra* note 40 (listing as a mass-arbitration startup requirement an intake process to target and find clients).

The outlay of resources required to create the "mass" in a mass arbitration substantially exceeds that required in a typical class-action proceeding. First, in a class action, the relevant "mass" (a class) is created through the relatively inexpensive process of crafting a class definition in the complaint. Second, notifying individuals of their inclusion in the class is typically done via a formal court-ordered and court-supervised notice campaign.<sup>251</sup> And while Rule 23(c)(2)(B) requires plaintiffs to bear the costs of notice, at least at the outset, a judge can order reimbursement of those costs by the defendant at the [\*1331] end of the case.<sup>252</sup> Reimbursement can also occur through the negotiated terms of a settlement agreement.<sup>253</sup>

Finally, unlike mass-arbitration counsel, class counsel does not need to individually retain the members of a class. At most, a court might require counsel to produce a class list for purposes of satisfying the class-action ascertainability requirement.<sup>254</sup>

The outlay of resources required to create the "mass" in a mass arbitration likely also exceeds that required in an MDL consolidation. In contrast with MDL proceedings, which are public and often widely publicized,<sup>255</sup> arbitration proceedings are private and less publicized (if publicized at all).<sup>256</sup> Potential MDL claimants are thus more likely to know about the case against the relevant defendant(s) and more likely to self-identify their claims. One might [\*1332] think of it this way: In mass arbitration, attorneys must find the would-be claimants, typically by way of costly and proprietary targeted advertising systems. In an MDL consolidation, would-be claimants can and often do find the attorneys. Relatedly, the public (and publicized) nature of an MDL allows plaintiff leadership to rely on a nationwide network of firms to amass and refer claims.<sup>257</sup> Referral networks like those seen in MDL consolidations

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<sup>251</sup> See [FED. R. CIV. P. 23\(c\)\(2\)\(B\)](#).

<sup>252</sup> See, e.g., [Irving Tr. Co. v. Nationwide Leisure Corp., 93 F.R.D. 102, 111 \(S.D.N.Y. 1981\)](#) ("Notice must be financed by the class claimants. However, class claimants may apply to this court for an order shifting the costs of some class member identification procedures . . . . And, of course, if the class claimants prevail, an application to garner costs and fees from the recovery fund can be made." (citations omitted)).

<sup>253</sup> See, e.g., Brief in Support of Unopposed Motion for Certification of Settlement Class, Preliminary Approval of Settlement, & Approval of Class Notice at 25, *In re Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig.*, No. 14-cv-03722 (D.N.J. Apr. 11, 2016), ECF No. 211-1 ("The costs of [class] notice will be paid out of the Settlement Fund.").

<sup>254</sup> Compare, e.g., [Cherry v. Dometic Corp., 986 F.3d 1296, 1304 \(11th Cir. 2021\)](#) ("[A] proposed class is ascertainable if it is adequately defined such that its membership is *capable of* determination." (emphasis added)), and [Seeligson v. Devon Energy Prod. Co., 761 F. App'x 329, 334 \(5th Cir. 2019\)](#) (rejecting the idea that a class must be currently ascertainable), with [Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-94 \(3d Cir. 2012\)](#) (holding that "[a] class must be currently and readily ascertainable based on objective criteria" and noting that class-member identification must be administratively feasible). Although it insisted it was not changing circuit precedent, the Third Circuit recently issued an opinion that seemed to weaken its heightened ascertainability standard. [Hargrove v. Sleepy's LLC, 974 F.3d 467, 477-81 \(3d Cir. 2020\)](#) (finding the district court "too exacting" in its demand that the plaintiffs "identify the class members at the certification stage"); see James Bogan III, *Third Circuit Weakens Ascertainability Requirement by Lowering Evidentiary Bar*, JD SUPRA (Oct. 1, 2020), <https://perma.cc/3VGY-Z5UW>.

<sup>255</sup> See, e.g., Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://perma.cc/RDF3-Y6G3> (covering the Judicial Panel on Multidistrict Litigation's transfer of opioid cases to Northern District of Ohio Judge Dan Polster for MDL consolidation); Alyse Shorland, *Johnson & Johnson Lawsuits Raise Fears Over Baby Powder*, N.Y. TIMES: THE WKLY. (updated Dec. 8, 2019), <https://perma.cc/S3AM-7G37> (to locate, select "View the live page") (covering the Johnson & Johnson asbestos-in-baby-powder products liability MDL); see also Interview with Cory L. Zajdel, *supra* note 40 (noting that aggregate proceedings in court tend to generate more publicity than arbitration proceedings, even those related to mass arbitration).

<sup>256</sup> See, e.g., Judith Resnik, Norman Shachoy Lecture, *Courts: In and out of Sight, Site, and Cite*, [53 VILL. L. REV. 771, 799-810 \(2008\)](#) (advocating for more "sunshine" in arbitration and other private dispute-resolution arrangements).

are less conceivable in mass arbitration. Without some form of publicity or an expensive advertising apparatus, claim-collection websites by potential mass-arbitration referral firms would be largely invisible.

Along these lines--and perhaps unsurprisingly--all of the first-mover mass arbitrations and most of the second-mover mass arbitrations occurred after or alongside the stay (or dismissal) of a class or collective action<sup>258</sup> on a defendant's motion to compel arbitration.<sup>259</sup> This procedural posture makes [\*1333] sense for two reasons. One, the contractual right to arbitration is generally waivable. Plaintiffs' firms may well file class actions (or in the FLSA context, collective actions) as a matter of strategy to see whether defendants will exercise their right to compel arbitration via motion.<sup>260</sup> Two, the filing of a class or collective action often leads to the formation and release of a class list (that is, a list of claimants), and many mass arbitrations need something like a class list to get started. According to Kent Williams, one of the lead attorneys in the Chipotle mass arbitration: "Had the claimants not already been in a collective action, the mass arbitration strategy likely wouldn't have been possible . . . ." <sup>261</sup>

Investigation shows, however, that a class list is not necessary in all cases. In some instances, the amassing of wage-and-hour claims against a defendant can grow organically--at least when employees are connected and vocally disgruntled about wage theft.<sup>262</sup> Family Dollar, for example, started and ended as a mass arbitration.<sup>263</sup> In

<sup>257</sup> See generally, e.g., D. Theodore Rave, *Closure Provisions in MDL Settlements*, [85 FORDHAM L. REV. 2175, 2190 \(2017\)](#) ("The network of client solicitation and referral arrangements that exists on the plaintiffs' side in mass litigation tends to consolidate groups of claimants in the hands of major aggregators.").

<sup>258</sup> Note that the FLSA provides for class-wide proceedings by way of an opt-in collective action. See **29 U.S.C. § 216(b)**.

<sup>259</sup> For example: (1) Uber (employment): First arbitration claims filed in August 2018 after *Mohamed v. Uber Technologies, Inc.*, [848 F.3d 1201, 1206 \(9th Cir. 2016\)](#) (reversing the denial of Uber's motion to compel arbitration regarding certain labor law claims), and alongside *O'Connor v. Uber Technologies, Inc.*, [904 F.3d 1087, 1090-91 \(9th Cir. 2018\)](#) (doing the same, and reversing class certification, for cases involving wage-theft claims by Uber drivers); (2) Lyft: First arbitration claims filed in October 2018 after *Bekele v. Lyft, Inc.*, [199 F. Supp. 3d 284, 288 \(D. Mass. 2016\)](#) (granting Lyft's motion to compel arbitration and dismissing the putative labor class action), *aff'd*, [918 F.3d 181 \(1st Cir. 2019\)](#); (3) Postmates: First wave of arbitration demands filed in March 2019 after *Lee v. Postmates Inc.*, No. 18-cv-03421, [2018 WL 6605659, at \\*1-3, \\*11 \(N.D. Cal. Dec. 17, 2018\)](#) (granting Postmates' motion to compel arbitration and dismissing the plaintiffs' wage-theft claims) and alongside *Adams v. Postmates, Inc.*, [414 F. Supp. 3d 1246, 1248, 1255-56 \(N.D. Cal. 2019\)](#) (staying wage-theft claims pending arbitration), *aff'd*, [823 F. App'x 535 \(9th Cir. 2020\)](#); (3) DoorDash (employment): First arbitration demands filed in August 2019 after *Magana v. DoorDash, Inc.*, [343 F. Supp. 3d 891, 895-96, 901-02 \(N.D. Cal. 2018\)](#) (same); (4) Chipotle: First arbitration claims filed in August 2018 after *Turner v. Chipotle Mexican Grill, Inc.*, No. 14-cv-02612, [2018 WL 11314701, at \\*1 \(D. Colo. Aug. 3, 2018\)](#) (dismissing plaintiffs bound by Chipotle's arbitration agreement from the wage-theft action); (5) Intuit: First arbitration claims filed in October 2019 alongside *Arena v. Intuit Inc.*, [444 F. Supp. 3d 1086, 1088 \(N.D. Cal.\)](#) (denying Intuit's motion to compel arbitration regarding deceptive consumer practices), *rev'd sub nom.* *Dohrmann v. Intuit, Inc.*, [823 F. App'x 482 \(9th Cir. 2020\)](#); (6) Fitbit: Named plaintiff filed arbitration demand following *McLellan v. Fitbit, Inc.*, No. 16-cv-00036, [2017 WL 4551484, at \\*1, \\*5 \(N.D. Cal. Oct. 11, 2017\)](#) (granting, for those plaintiffs who did not opt out of arbitration, Fitbit's motion to compel arbitration regarding deceptive consumer practices); (7) FanDuel/DraftKings: First arbitration claims filed in October 2019 alongside *In re Daily Fantasy Sports Litigation*, No. 16-md-02677, 2019 WL 6337762, at \*1-5, \*13 (D. Mass. Nov. 27, 2019) (granting the defendants' motions to compel arbitration for certain classes of plaintiffs); (8) Chegg: First arbitration claims filed in April 2020 just after *Lyles v. Chegg, Inc.*, No. 19-cv-03235, [2020 WL 1985043, at \\*1, \\*4 \(D. Md. Apr. 27, 2020\)](#) (granting Chegg's motion to dismiss and compel arbitration regarding data-breach claims). If Ticketmaster becomes a mass arbitration, it will follow on the heels of *Oberstein v. Live Nation Entertainment, Inc.*, No. 20-cv-03888, [2021 WL 4772885, at \\*1 \(C.D. Cal. Sept. 20, 2021\)](#) (granting the defendants' motion to compel arbitration regarding antitrust claims and staying proceedings), *appeal filed*, No. 21-56200 (9th Cir. Oct. 29, 2021).

<sup>260</sup> See, e.g., Interview with Matthew C. Helland, *supra* note 40.

<sup>261</sup> Wallender, *supra* note 9.

<sup>262</sup> Interview with Matthew C. Helland, *supra* note 40.

other instances, and in an ironic procedural reversal, mass arbitrations can spawn class actions preferred by defendants who refuse to arbitrate individual demands.<sup>264</sup> But both of these scenarios still require spending on advertising, marketing, and outreach.<sup>265</sup>

Nonetheless, in many cases the class list (or a similar data source) is necessary for a mass arbitration to begin. This is especially true in cases where claimants are disconnected or otherwise diffuse. In the potential Arise mass [\*1334] arbitration, for instance, employees are spread out, isolated, and working from home.<sup>266</sup> Arise has a list of its employees, but unless a court orders that list to be released, a mass arbitration will be challenging to initiate.<sup>267</sup> The same result is likely when claimant information is in the hands of defendants and not easily obtainable by others. This is the situation in the potential mass arbitration against DirecTV.<sup>268</sup> Ultimately, the class-list element of mass arbitration faces an uncertain future. Some courts have begun to disallow the release of class lists--or disallow notifications to employees regarding their claims--in cases involving arbitration agreements.<sup>269</sup>

The up-front costs associated with the preparation of individual arbitration demands are another financial obstacle to mass arbitration. To prepare an arbitration demand, attorneys must gather and record all personal information for each individual: name, age, address, contact information, employer, employment dates, company customer status, and so on. In some instances, the attorneys might also have to collect factual documentation to support each claim: receipts, financial statements, pay stubs or other employment records, gig-economy driving and/or delivery records, and the like.<sup>270</sup> To be sure, claimants' attorneys have sought to achieve economies of scale by submitting

<sup>263</sup> See Plaintiff 's Complaint PP 8-9, *Fam. Dollar, Inc. v. Am. Arb. Ass'n*, No. 20-cv-00248 (E.D. Va. May 15, 2020), ECF No. 1 [hereinafter *Family Dollar Complaint*] (discussing the arbitration demands brought against Family Dollar without any reference to a prior class action).

<sup>264</sup> See, e.g., *Fishon v. Peloton Interactive, Inc.*, 336 F.R.D. 67, 68 (S.D.N.Y. 2020) (indicating that, after more than 2,700 Peloton consumers filed individual arbitration demands with the AAA, Peloton failed to pay its required arbitration fees and instead chose to defend a class-action suit in federal court); John O'Brien, *Peloton Shifts Focus from Arbitration to Courtroom to Defend Itself*, LEGAL NEWSLINE (July 30, 2020), <https://perma.cc/6UAE-KPY9> ("Peloton first tried to fight the case by pointing to an arbitration clause in its terms of service, but it appears to prefer defending one class action instead of dozens of arbitration claims.").

<sup>265</sup> See *supra* notes 250-57 and accompanying text (discussing the high costs of advertising and intake in mass arbitrations relative to class actions and MDL consolidations).

<sup>266</sup> Plaintiff 's Motion for Notice to Be Issued Pursuant to **29 U.S.C. § 216(b)**, & Suggestions in Support at 1, *Bell v. Arise Virtual Sols., Inc.*, No. 21-cv-00538, 2022 WL 567841 (*W.D. Mo. Feb. 24, 2022*), ECF No. 2.

<sup>267</sup> See, e.g., Ken Armstrong & Ariana Tobin, *A New Suit Seeks to Turn Arbitrations, a Tool of Big Corporations, Against a Top Customer Service Provider*, PROPUBLICA (Aug. 3, 2021, 5:00 AM EDT), <https://perma.cc/Z8A3-73MF> ("Without a court-ordered list, finding and contacting Arise's network of customer service agents would present significant challenges.").

<sup>268</sup> See *Cordoba v. DirecTV, LLC*, 801 F. App'x 723, 724-25 (11th Cir. 2020) (per curiam) (noting that DirecTV allegedly violated the law when it created and shared a data file containing customers' personal information); Alison Frankel, *Latest Mass Arbitration Wrinkle: Plaintiffs' Lawyers Want Court Permission to Contact DirecTV Customers*, REUTERS (July 6, 2020, 1:22 PM), <https://perma.cc/JCM2-9B6B> (describing efforts by plaintiffs' firms to contact clients based on the data file); *Plaintiffs Seek Release of DirecTV Customer Contact Info Sealed in Earlier Improper Texting Lawsuit*, LIEFF CABRASER HEIMANN & BERNSTEIN (July 7, 2020), <https://perma.cc/JM5J-V7QJ> (emphasizing that, without the release of contact information held by DirecTV, "those impacted by the company's wrongdoing will never know of privacy right breaches or have the opportunity to bring their contractually-mandated individual arbitration claims").

<sup>269</sup> See, e.g., *Cordoba v. DirecTV, LLC*, No. 15-cv-03755, 2022 WL 575117, at \*1-2, \*4 (*N.D. Ga. Jan. 7, 2022*) (refusing to let firms use the data file described in note 268 above for client outreach); *In re JPMorgan Chase & Co.*, 916 F.3d 494, 497-98, 501 (5th Cir. 2019) (holding that a district court may not provide notice of FLSA collective-action claims to employees bound by individual arbitration agreements); *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1046-47 (7th Cir. 2020) (limiting the circumstances under which a court can authorize FLSA notice when arbitration agreements are present).

something resembling a master complaint (with a [\*1335] spreadsheet of individual information linked or attached)<sup>271</sup> and by filing nearly identical complaints for thousands of demands.<sup>272</sup> Some defendants have argued that these "generic" filings are both invalid and abusive;<sup>273</sup> Postmates even sued 10,356 of its couriers on these grounds.<sup>274</sup> But the AAA has not deemed such demands--including 1,000 demands in the CenturyLink mass arbitration and more than 15,000 in the Postmates mass arbitration--insufficient.<sup>275</sup>

[\*1336] Claim preparation, claim filing, and other tasks involved in mass claiming typically require a substantial technology apparatus.<sup>276</sup> Building out such an apparatus requires millions of dollars in up-front investment and continued spending on maintenance and management.<sup>277</sup> Z Law and Keller Lenkner ultimately created their own technology systems to handle mass claiming.<sup>278</sup> Independent developers have also built software for handling mass claims and sold this software to firms.<sup>279</sup>

<sup>270</sup> See Interview with Warren Postman, *supra* note 40.

<sup>271</sup> See, e.g., *In re CenturyLink Sales Pracs. & Sec. Litig.*, No. 17-md-02795, [2020 WL 7129889, at \\*8 \(D. Minn. Dec. 4, 2020\)](#) ("Keller's pre-arbitration demand consisted of a generic complaint alleging overcharging and fraud and a list of 9,000 clients with their names, phone numbers, emails, and addresses."), *appeal dismissed*, [No. 21-1030, 2021 WL 2792967 \(8th Cir. Feb. 23, 2021\)](#); Letter from Douglas H. Meal, Partner, Orrick, Herrington & Sutcliffe LLP, to Cory L. Zajdel, Principal Att'y, Z Law, LLC 1 (June 26, 2020) (on file with author) (noting that Z Law compiled a "spreadsheet regarding the claimants" in the Chegg mass arbitration).

<sup>272</sup> Second Amended Complaint for Declaratory & Injunctive Relief P 7, *Postmates Inc. v. 10,356 Individuals*, No. 20-cv-02783 (C.D. Cal. July 1, 2020), 2020 WL 8167433, ECF No. 61 [hereinafter *Postmates* Second Amended Complaint] ("[C]ounsel then sent Postmates a single email that contained a link to 10,356 virtually identical arbitration demands . . .").

<sup>273</sup> See, e.g., Complaint for Declaratory & Injunctive Relief at 2, *Postmates, Inc. v. 10,356 Individuals*, No. 20-cv-02783 (C.D. Cal. Mar. 25, 2020), ECF No. 1 [hereinafter *Postmates* Initial Complaint]; Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order at 4, *Abernathy v. DoorDash, Inc.*, No. 19-cv-07545 (N.D. Cal. Nov. 22, 2019), ECF No. 35 [hereinafter *DoorDash* Opposition to Motion] (referring to Keller Lenkner's "mass arbitration scheme" as a "ransom"); see also, e.g., Supplemental Declaration of Professor Nancy J. Moore PP 19-24, *In re CenturyLink Sales Pracs. & Sec. Litig.*, No. 17-md-2795, [2020 WL 3513547 \(D. Minn. June 29, 2020\)](#), ECF No. 637 (contending that Keller Lenkner violated its fiduciary duties and ethical responsibilities); Interview with Jonathan E. Paikin, *supra* note 42 (noting that, in arbitration, "there's really nothing you [the defendant] can do to get to the merits before you have to pay").

<sup>274</sup> See *Postmates* Second Amended Complaint, *supra* note 272, PP 2-14. Postmates detailed a number of potential deficiencies in the couriers' arbitration demands, including that some claimants never accepted the relevant arbitration agreement, some never did work for Postmates, and some had released their claims as part of a separate settlement. *Id.* P 7.

<sup>275</sup> For CenturyLink, see [In re CenturyLink, 2020 WL 7129889, at \\*1](#) (noting that, after Keller Lenkner "submitted 1,000 simultaneous arbitration demands against CenturyLink to the AAA," CenturyLink rather than the AAA attempted to halt arbitration proceedings). For Postmates, see *Postmates* Second Amended Complaint, *supra* note 272, PP 6, 8-10 (describing how the AAA handled proceedings for 10,356 "boilerplate" arbitration demands); and [Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1250-51 \(N.D. Cal. 2019\)](#) ("Postmates refused to pay any fees, claiming that the [5,274] individual arbitration demands were insufficient . . . to initiate arbitration proceedings. The AAA, however, indicated that the arbitrations would move forward . . . ." (citation omitted)), *aff'd*, [823 F. App'x 535 \(9th Cir. 2020\)](#).

<sup>276</sup> See, e.g., Interview with Cory L. Zajdel, *supra* note 40; Interview with Warren Postman, *supra* note 40; Interview with Adam T. Klein, *supra* note 41; Interview with Jonathan D. Selbin, *supra* note 41. *But cf.* Interview with Matthew C. Helland *supra* note 40 (indicating that existing tools for bringing FLSA collective actions can be repurposed for mass-arbitration claims); Interview with Jonathan E. Paikin, *supra* note 42 (noting that mass-arbitration attorneys can use Facebook and similar technologies to find potential claimants).

<sup>277</sup> See sources cited *supra* note 276; *CenturyLink* Postman Declaration, *supra* note 248, P 5 ("Keller has invested millions of dollars in proprietary software and infrastructure to make litigating clients' claims more efficient . . .").

<sup>278</sup> Interview with Cory L. Zajdel, *supra* note 40; Interview with Warren Postman, *supra* note 40.

Some of the up-front work to prepare individual demands can be automated, at least with the technology mentioned above.<sup>280</sup> But much of it cannot be. Emails (at least on the intake side) and phone calls with clients are not automatable, either practically or ethically. And document review is not fully automatable given legal and ethical strictures.<sup>281</sup> For these tasks a firm needs attorney hours and a fully staffed client-services team<sup>282</sup>--both of which come at additional, significant cost.

**[\*1337]** The investments of capital, time, and other resources needed to launch a mass arbitration are distinct from those required in other forms of aggregate claiming in another critical respect: temporal placement in the dispute. The individualized information required at the *outset* of a mass arbitration, for example, is similar (in both type and quantum) to what is required at the *conclusion* of a class action.<sup>283</sup> This distinction is economically consequential. For one thing, high startup costs diminish the present value of an asset. Economic models of litigation bear this out: A party that incurs asymmetric costs early in the litigation process suffers a devaluation of the underlying claim.<sup>284</sup> For another, when the costs of individualized production are front-loaded (as in mass arbitration) versus back-loaded (as in class actions), those costs will tend to raise the risk profile of the underlying claims. Back-loaded costs tend not to affect the risk profile of claims, at least not so substantially, because an outlay of capital is only required after attorney compensation has been secured. Those back-loaded costs, in other words, are baked into a deal that already exists. In mass arbitration, a capital outlay is typically required prior to any deal being reached.

This distinction also separates mass arbitrations from MDL proceedings, although to a lesser degree. In mass-tort MDLs, for instance, all claimants know that their complaints will be consolidated into aggregate proceedings before a single judge to streamline costs.<sup>285</sup> And all attorneys know that they will either be a part of the MDL leadership (and get paid in that way) or will not (and will get paid by amassing claims while waiting for a resolution in the MDL proceedings). Thus, while the MDL still has up-front costs--amassing claims and claimants, drafting and filing complaints, comporting with ethical obligations regarding attorney-client representation, and so on--those costs are incurred against the backdrop of guaranteed cost-effective procedures. In contrast, for first-mover mass arbitrations

<sup>279</sup> Ray Gallo is one of the leaders in this emerging industry. See GALLO LLP, <https://perma.cc/6JUR-C3LL> (archived Aug. 8, 2022) (noting that Gallo is "supported by truly cutting-edge technology" backed by the firm's "affiliate Gallo Digital and its software engineering team"); LEVERAGE, <https://perma.cc/2TKT-68ER> (archived Aug. 8, 2022) (describing how Leverage, developed by Gallo Digital, can help with "mass actions and arbitration swarms" (capitalization altered)).

<sup>280</sup> See Interview with Cory L. Zajdel, *supra* note 40.

<sup>281</sup> Cf., e.g., [FED. R. CIV. P. 11\(b\)\(3\)](#) (noting that an attorney, by presenting a document in court, certifies that "the [underlying] factual contentions have [valid] evidentiary support").

<sup>282</sup> See, e.g., Interview with Warren Postman, *supra* note 40 (describing Keller Lenkner's elaborate client-services apparatus, which includes more than one client-services representative per attorney and "elevation attorneys" dedicated to answering client questions); u/dant\_punk, *Keller Lenker Settlement*, REDDIT: R/DOORDASH (Sept. 30, 2020, 3:27:50 PM PDT), <https://perma.cc/H29F-MHV3> (containing copies of email exchanges between claimants and Keller Lenkner client-services staff); u/J\_Reigns5, *Postmates Keller/KCC Settlement*, REDDIT: R/POSTMATES (Aug. 2, 2021, 1:39:57 PM PDT), <https://perma.cc/5FLV-EV94> (sharing the text of email from Keller Lenkner's support team updating claimants on the status of settlement payments); see also Interview with Jonathan D. Selbin, *supra* note 41 (noting that a "huge" client-services apparatus is necessary for mass arbitration).

<sup>283</sup> See, e.g., *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 450-51, 460-61 (2016) (discussing an award-distribution plan for class-action claimants based on the post-verdict production of hours worked along with statistical modeling to make up for Tyson's failure to keep records).

<sup>284</sup> Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1312 (2006) (describing how front-loaded costs tend to reduce a lawsuit's settlement value because "a plaintiff must . . . incur larger expenses before gaining the [bargaining] advantage of the information that is disclosed" later on in the lawsuit).

<sup>285</sup> See [28 U.S.C. § 1407](#).

and many second-mover mass [\*1338] arbitrations, the up-front investments were made with no guarantee of any dispute-resolution procedure, cost-effective or otherwise.

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In short, mass arbitration is an expensive and therefore risky proposition. How, then, did a viable mass-arbitration model emerge? This investigation reveals several answers, many of which lie in the structure of the mass-arbitration model. Part III.C below explores these structural answers in more detail. The investigation also reveals the importance of two developments in the civil justice landscape--both external to arbitration agreements and to the plaintiffs' bar--that emerged or evolved in the 2010s.

The first is the expansion of social media platforming in the late aughts and early 2010s, relevant here in two respects. One, this expansion brought to social media a broad group of users, some of whom joined "mass litigation" groups via online platforms. These groups enabled users to connect with similarly situated potential plaintiffs.<sup>286</sup> That the social media expansion facilitated access to justice was happenstance: The express purpose of these platforms had nothing to do with civil justice.<sup>287</sup> Nonetheless, the claimant groups that appeared on social media played a significant role in the mass-arbitration model. Many of the settlement releases studied here warned claimants that they would be ineligible for payouts if they shared any settlement information with others. Some releases even said that claimants would be ineligible for payouts if they informed other potential claimants of their legal rights. Whether these draconian provisions are actually enforceable is beside the point--they are meant to deter information sharing among would-be claimants, who are likely to remain silent given the prospect of losing their own benefits. Claimant groups on anonymized social media platforms have emerged as one of the only ways in which these individuals can meaningfully communicate.<sup>288</sup>

[\*1339] Two, as the number of social media platforms grew, increasingly niche platforms emerged. With interfaces growing more sophisticated and new options coming to market, companies began to develop technology for the express purpose of bringing arbitration claimants together. The most prominent example of this technology is a startup called FairShake, which seeks to "level[] the playing field" between consumers and big companies.<sup>289</sup> FairShake uses an automated system to help individuals initiate arbitration proceedings in exchange for a cut of any eventual payout.<sup>290</sup> FairShake began by advertising to AT&T and Comcast customers and inviting them to file claims through its platform. Shortly after its targeted advertising campaign, FairShake had collected over 1,000 individual interest forms and prepared to submit those forms as arbitration demands.<sup>291</sup> To be clear, FairShake is a

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<sup>286</sup> See, e.g., Elizabeth Chamblee Burch, *Litigating Groups*, [61 ALA. L. REV. 1, 23, 32](#) & n.144 (2009) (describing the emergence of litigation-centered groups online and noting that Yahoo! groups were used to achieve coordination among participants in the Merck settlement).

<sup>287</sup> This is merely a descriptive point; it is not to diminish the democratizing effect of social media platforms on the consumers, employees, and franchisees denied access to justice by the arbitration revolution. See, e.g., Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, [45 COLUM. J.L. & SOC. PROBS. 451, 455 \(2012\)](#) (discussing how social media can enable participation in mass litigation and bring mass-litigation proceedings closer to the people actually harmed).

<sup>288</sup> See, e.g., u/Glqp, *Keller/Lenkner Law Firm*, REDDIT: R/POSTMATES (Dec. 23, 2020, 11:01:51 AM PST), <https://perma.cc/6936-BRSF> (discussing individual claims and settlement amounts in the Postmates mass arbitration, and crowdsourcing questions such as whether to provide Social Security numbers to Keller Lenkner).

<sup>289</sup> FAIRSHAKE, <https://perma.cc/CY6H-PVCD> (archived May 19, 2022).

<sup>290</sup> *Common Questions About FairShake*, FAIRSHAKE, <https://perma.cc/H8BF-62FT> (archived May 19, 2022).

<sup>291</sup> See Debra Cassens Weiss, *Lawyer and Startup Resort to Mass Filings to Fight Company Bans on Class Arbitration*, ABA J. (Apr. 13, 2020, 10:37 AM CDT), <https://perma.cc/V222-HD5B> ("Soon, FairShake had enough consumers to file 1,000 arbitration claims against companies like AT&T and Comcast.").



facilitator of individual claiming in arbitration. It does not appear to go any further, and it has not stepped into the (traditionally legal) role of aggregator or aggregate litigator.

The second important development in the 2010s was the arrival and subsequent explosion of third-party litigation funding in the United States. Third-party litigation funding enables a party with no relationship to a lawsuit to pay some or all of the litigant's costs in exchange for a cut of any ultimate award.<sup>292</sup> The viability of third-party funding was not clear at the time of *Concepcion* and *Italian Colors*, and the practice was not permitted in many states.<sup>293</sup> In fact, as of 2010, third-party litigation funding in the United States was little more than an idea in a law review article.<sup>294</sup> Today, it is a multibillion-dollar industry.<sup>295</sup>

**[\*1340]** The emergence of a multibillion-dollar litigation-funding industry is relevant to the development of mass arbitration in at least three ways. One, third-party funding may well have enabled a number of mass arbitrations, especially at the beginning.<sup>296</sup> Two, the availability of third-party funding--nonexistent during the arbitration revolution--made mass arbitration a more realistic possibility for firms that needed (or wished) to hedge against the model's substantial risks. Three, third-party litigation-funding arrangements are more available for individualized claiming models like mass arbitration than they are for class-action suits.<sup>297</sup>

### C. Key Elements of the Mass-Arbitration Model

By studying the mass-arbitration model in its real-world context, this Article shows that mass arbitration is more than just a procedural offensive. Indeed, mass arbitration is a distinct form of dispute resolution with unique operational features, strategic elements, benefits, and risks. The four principal elements of the mass-arbitration model are: (1) leveraging arbitration fees and fee-shifting provisions in arbitration agreements; (2) arbitrating individual claims--or credibly threatening to do so--to impose asymmetric costs on the defendants; (3) selecting higher-threshold-value individual claims (relative to, say, class-action claims); and (4) generating aggregate settlements (within the arbitration process, as opposed to other settlement processes defendants might prefer) from a mass of individual claims.

#### 1. Leveraging arbitration fees and fee-shifting provisions in arbitration agreements

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<sup>292</sup> See Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, [95 MINN. L. REV. 1268, 1275-78 \(2011\)](#).

<sup>293</sup> See J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, [12 N.Y.U. J.L. & BUS. 911, 914 \(2016\)](#) (noting that "alternative litigation finance is still in its early stages in the United States"); *id.* at 939 (describing champerty and maintenance, common law doctrines prohibiting the third-party encouragement and financial support of a lawsuit, as "more or less colorable defenses").

<sup>294</sup> See Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, [99 GEO. L.J. 65, 73 \(2010\)](#).

<sup>295</sup> See, e.g., Bill Tilley, *How Litigation Financing Became a Multi-billion Dollar Industry During the Pandemic*, LINKEDIN (Feb. 11, 2021), <https://perma.cc/FQ8Y-PVGJ>. The existence and details of litigation-funding arrangements are often confidential and therefore unobtainable. See generally Glover, *supra* note 293, at 913-14 (finding that many courts protect litigation-funding arrangements from disclosure during discovery).

<sup>296</sup> Interview with Cory L. Zajdel, *supra* note 40. Because litigation-funding arrangements tend to be confidential, it is not possible to determine whether a particular mass arbitration was funded. See *supra* note 295.

<sup>297</sup> For example, a 2018 New York City ethics opinion held that arrangements between third-party funders and lawyers violated rules prohibiting fee splitting. Ass'n of the Bar of the City of New York Comm. on Pro. Ethics, Formal Op. 2018-5 (2018). The opinion distinguished these arrangements from arrangements between funders and clients, which it noted were acceptable. See *id.* Because firms are inclined to comply with the opinion, see Interview with Anonymous No. 2, *supra* note 41, there are naturally fewer options for third-party funding in class-action suits: These suits proceed on a representative basis, and absent plaintiffs do not enter into financial agreements with attorneys.

A viable procedural offensive--especially one with the up-front costs of mass arbitration--needs some mechanism to recoup spending and generate a return on the initial investment. The mass-arbitration model does this, or at [\*1341] least did this in the beginning, by leveraging arbitration fees and fee-shifting provisions in arbitration agreements to obtain global settlements from defendants. When successful, this mechanism counters the effects of the arbitration revolution: Claims that were rendered unmarketable by class-action waivers suddenly become capable of generating settlement pressure greater than that produced by class certification.

Recall AT&T's arbitration agreement in *Concepcion*, which included both a class-action waiver and provisions requiring AT&T to pay or reimburse various arbitration fees (including up-front filing fees).<sup>298</sup> Recall too that AT&T included these "friendly" provisions to avoid unconscionability and effective-vindication rulings and to soften the perceived blow of the class-action waiver.<sup>299</sup> The mass-arbitration model exploits the tradeoffs made by AT&T and other corporate defendants: Plaintiffs' firms essentially called the defendants' bluff by filing demands under their "friendly" agreements and insisting that courts "rigorously enforce" . . . [those] agreements according to their terms."<sup>300</sup>

The enforcement of arbitration agreements "according to their terms" would seem to be a foregone conclusion. After all, this was the precise command of the Supreme Court in *Concepcion*, *Italian Colors*, and *Epic Systems*. Yet claimants' attempts to do exactly that have been met with unrelenting resistance by defendants desperate to avoid the catastrophic consequences of taking the Court at its word.

Across the universe of mass-arbitration demands, defendants have consistently refused, in whole or in part, to pay fees or to participate in arbitration in any way.<sup>301</sup> This inaction has led arbitral fora to close or refuse to proceed with claims.<sup>302</sup> It has also generated an odd, and deeply ironic, procedural posture in many mass arbitrations: After or alongside decisions in which courts granted defendants' motions to compel arbitration of putative [\*1342] class-action claims,<sup>303</sup> those same courts were asked to revisit the claims via new motions to compel arbitration--this time filed by the plaintiffs.<sup>304</sup>

Corporations' arguments that their agreements should not be enforced "according to their terms" have taken myriad forms. Uber, Chegg, and FanDuel, for example, argued--somewhat oddly--that arbitrators lacked the authority to decide whether to enforce their arbitration agreements. Uber made this argument despite having just convinced the Ninth Circuit that enforceability questions fell to the arbitrator.<sup>305</sup> Chegg raised the argument even though its

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<sup>298</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-37 (2011). The agreements governing the mass-arbitration claims in this Article generally include similar provisions. All relevant agreements are on file with the Author.

<sup>299</sup> See *supra* notes 176-78 and accompanying text.

<sup>300</sup> *Am. Express Co. v. It. Colors Rest.*, 570 U.S. 228, 233 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

<sup>301</sup> See, e.g., *Abadilla* Petition for Arbitration, *supra* note 5, P 3 (noting that, as of late 2018, Uber had only paid the initial filing fee in 296--and the arbitrator's retainer fee in 6--of 12,501 pending arbitration demands); *DoorDash* Opposition to Motion, *supra* note 273, at 2-3 (explaining DoorDash's decision not to pay fees as a way of repudiating Keller Lenkner's "shakedown scheme" (capitalization altered)).

<sup>302</sup> See, e.g., *Abadilla* Petition for Arbitration, *supra* note 5, P 21 ("JAMS has . . . informed Uber that '[u]ntil the Filing Fee is received we will be unable to proceed with the administration of these matters.'" (alteration in original) (quoting a JAMS notice to Uber)).

<sup>303</sup> See *infra* Appendix.

<sup>304</sup> See, e.g., *infra* note 305.

<sup>305</sup> *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1206-08 (9th Cir. 2016) ("Thus, all of Plaintiffs' challenges to the enforceability of [Uber's newest] arbitration agreement . . . should have been adjudicated in the first instance by an arbitrator and

agreement explicitly stated that an AAA arbitrator, and an AAA arbitrator alone, would determine whether the agreement was enforceable.<sup>306</sup> And FanDuel made the argument a mere six weeks after persuading a federal judge that its clause required an arbitrator to resolve all threshold issues.<sup>307</sup> No judge has yet to bless this particular argument.

**[\*1343]** Postmates, on the other hand, argued that its agreements should not be enforced because the mass filing of related individual demands violates the FAA. Its basic argument was this: The manner in which the claims were pressed--all at once, possibly with deficiencies in individual cases--amounted to "de facto class arbitration" in violation of the parties' agreed-upon class waiver.<sup>308</sup> Accordingly, allowing the claims to proceed would prevent the underlying arbitration agreements from being enforced "according to their terms." This argument also has yet to succeed.<sup>309</sup> It is premature at this juncture, however, to speculate as to whether courts--and ultimately the Supreme Court--will find that *mass* arbitration violates the FAA by treading too close to *class* arbitration. So premature, in fact, that even some defense attorneys have not given the matter much thought.<sup>310</sup> But in order for this argument to prevail, the Supreme Court will need to further expand its (already expansive) interpretation of the FAA.<sup>311</sup>

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not in court."). After the Ninth Circuit functionally granted Uber's motion to compel arbitration, Uber drivers filed 12,501 individual demands with JAMS pursuant to the terms of Uber's arbitration agreement. *Abadilla* Petition for Arbitration, *supra* note 5, PP 2-3. When Uber refused to pay the JAMS-assessed fees in all but six cases, the claimants filed their own motion to compel arbitration. *Id.* PP 3-4, 13. In its opposition to the claimants' motion, Uber asked the district court to submit the fee dispute to JAMS for collective resolution. Memorandum of Law in Opposition to Petitioners' Motion to Compel Arbitration at 14, *Abadilla v. Uber Techs., Inc.*, No. 18-cv-07343 (N.D. Cal. Jan. 14, 2019), ECF No. 53. But Uber had earlier argued that every dispute should be resolved in individual arbitration, and its new position favored judicial intervention over the individual arbitrator's authority. See Petitioners' Reply to Respondent Uber Technologies, Inc.'s Opposition to Petitioners' Motion to Compel Arbitration at 1-2, *Abadilla v. Uber Techs., Inc.*, No. 18-cv-07343 (N.D. Cal. Jan. 24, 2019), ECF No. 66 (criticizing Uber's "newfound preference for judicial relief").

<sup>306</sup> Although Chegg argued that its user agreement delegated enforceability questions to an arbitrator when it moved to compel arbitration in the District of Maryland, it purported to unilaterally terminate its agreements (stating that mass-arbitration claimants had asserted "frivolous or improper demands") after the AAA ordered it to pay arbitration fees. If accepted, this position would give Chegg--rather than the arbitrator--the authority to determine whether claims are proper and therefore enforceable. Alison Frankel, *Chegg Tries a New Way to Avert Mass Arbitration: Cancel Users' Contracts*, REUTERS (July 2, 2020, 12:52 PM), <https://perma.cc/V7WH-69ES>; see Memorandum in Support of Defendant's Motion to Compel Arbitration & Dismiss or, Alternatively, Stay at 16, *Lyles v. Chegg, Inc.*, No. 19-cv-03235, [2020 WL 1985043 \(D. Md. Apr. 27, 2020\)](https://www.courtlistener.com/doc/2020/04/27/2020-WL-1985043-D-Md-Apr-27-2020/), [2019 WL 8013607](https://www.courtlistener.com/doc/2019/04/27/2019-WL-8013607-D-Md-Apr-27-2019/), ECF No. 21-1; Letter from Cory L. Zajdel, Principal Att'y, Z Law, LLC, to Cathe Stewart, Assistant Vice President, Am. Arb. Ass'n 1-3 (July 1, 2020), <https://perma.cc/9V6S-RFVQ>.

<sup>307</sup> See *In re Daily Fantasy Sports Litig.*, No. 16-md-02677, 2019 WL 6337762, at \*1, \*10, \*13 (D. Mass. Nov. 27, 2019) (agreeing with FanDuel and holding that certain classes of plaintiffs had "entered into valid agreements to arbitrate their claims, including threshold questions of arbitrability"). After that decision, and after FanDuel users filed 1,000 arbitration demands, the AAA assessed \$ 300,000 in initial filing fees against FanDuel and FanDuel refused to pay. Verified Petition PP 2, 18, *FanDuel Inc. v. Badii*, No. 650211/2020 (N.Y. Sup. Ct. Jan. 9, 2020) ("FanDuel has not currently paid that [\$ 300,000] initial filing fee . . ."). Instead, FanDuel asked a New York trial court to decide whether the arbitral demands were time-barred--the very type of threshold enforceability question it had just persuaded the District of Massachusetts must be decided by an arbitrator. See *id.* PP 19-26.

<sup>308</sup> *Postmates* Initial Complaint, *supra* note 273, at 2.

<sup>309</sup> *Postmates Inc. v. 10,356 Individuals*, No. 20-cv-02783, [2020 WL 1908302, at \\*7 \(C.D. Cal. Apr. 15, 2020\)](https://www.courtlistener.com/doc/2020/04/15/2020-WL-1908302-C-D-Cal-Apr-15-2020/) ("[Postmates'] arguments focus . . . on arguably abusive tactics by [the drivers'] counsel to seek a settlement, but do not point to anything about . . . [the] claims themselves that make them 'class actions.'"); see also Daniel Wiessner, *Arbitration Bid by 10,000 Postmates Drivers Not a "De Facto Class Action"--Judge*, REUTERS (Apr. 16, 2020, 4:06 PM), <https://perma.cc/99Z8-WCF3>.

<sup>310</sup> See, e.g., Interview with Anonymous No. 4, *supra* note 42.

<sup>311</sup> See *supra* Parts I.A.-B.

Defendants have also sought to moot mass-arbitration claims, and by extension the relevant arbitration agreements. In 2016 the Supreme Court decided *Campbell-Ewald Co. v. Gomez*, a putative class action in which the defendant tried to moot the class claims by offering to settle with the named plaintiff.<sup>312</sup> In a 6-3 decision, the Court held that "an unaccepted settlement offer . . . does not moot a plaintiff's case."<sup>313</sup> Despite this holding, Fitbit tried a similar strategy in anticipation of mass arbitration. The company argued that its arbitration agreement--an agreement it had just relied on to achieve the [\*1344] dismissal of a consumer class action<sup>314</sup>--no longer applied after it made a satisfactory settlement offer to the named plaintiff of the putative class.<sup>315</sup> In response to this argument, the judge threatened to hold Fitbit and its attorneys in contempt.<sup>316</sup>

Not to be outdone on this score, Chegg argued that arbitral claimants breached the duty of good faith by filing demands, thereby terminating their contracts--and thus Chegg's fee requirements.<sup>317</sup> This argument, which conflates a breach of good faith in the overall contract with a breach of the arbitration agreement, likely runs counter to Supreme Court jurisprudence dating back to 1967.<sup>318</sup> Chegg, however, continues to raise it.<sup>319</sup>

Finally, all defendants have argued that the enforcement of *their* arbitration agreements according to *their* terms would be fundamentally unfair-- to *them*.<sup>320</sup> DoorDash described Keller Lenkner's attempts to enforce the agreements DoorDash wrote as a "shakedown scheme."<sup>321</sup> Postmates also referred to Keller Lenkner's filing of arbitration demands as a "shakedown," a position it supported by claiming that some of the demands were invalid or defective.<sup>322</sup> And Fitbit stated that enforcing its agreements and requiring it to pay arbitration fees would offend common sense: After all, "a claim that is [\*1345] \$ 162--an individual claim--is not one that any rational litigant would litigate" given the AAA's \$ 750 up-front filing fee.<sup>323</sup> Fitbit's argument is not new. A near-identical point on the

<sup>312</sup> [577 U.S. 153, 157-60 \(2016\)](#).

<sup>313</sup> [Id. at 165-66](#); [id. at 169](#) (Thomas, J., concurring in the judgment) ("The Court correctly concludes that an offer of complete relief on a claim does not render that claim moot.").

<sup>314</sup> *McLellan v. Fitbit, Inc.*, No. 16-cv-00036, [2017 WL 4551484, at \\*1, \\*5 \(N.D. Cal. Oct. 11, 2017\)](#).

<sup>315</sup> See Transcript of Proceedings at 7-11, *McLellan v. Fitbit, Inc.*, No. 16-cv-00036, [2018 WL 3549042 \(N.D. Cal. July 24, 2018\)](#), ECF No. 143 [hereinafter *Fitbit* Transcript].

<sup>316</sup> See *id.* at 12-13; see also [McLellan, 2018 WL 3549042, at \\*6-7](#) (assessing attorney's fees and costs against "Fitbit and its lawyers . . . for their bad-faith litigation tactics").

<sup>317</sup> See Memorandum of Law in Support of Defendant Chegg, Inc.'s Motion for Clarification or Modification of the Court's April 27, 2020 Order at 20-24, *Lyles v. Chegg, Inc.*, No. 19-cv-03235 (D. Md. Aug. 4, 2020), ECF No. 26-1 (arguing that the claimants' bad-faith acts--colluding "to bring frivolous arbitration demands against Chegg" in order to impose large fees--relieved Chegg "of all obligations under" its agreements).

<sup>318</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, **388 U.S. 395, 402-04 (1967)** (finding that an arbitration clause is severable from the rest of a contract, meaning that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate," not issues related to contract formation as a whole).

<sup>319</sup> See, e.g., Respondent Chegg, Inc.'s Memorandum of Points & Authorities in Support of Motion to Stay the Proceedings at 5-6, 9-10, *Theisen v. Chegg, Inc.*, No. 20CV371775 (Cal. Super. Ct. Dec. 2, 2020).

<sup>320</sup> See, e.g., *DoorDash* Opposition to Motion, *supra* note 273, at 22-23.

<sup>321</sup> *Id.* at 2 (capitalization altered).

<sup>322</sup> Respondent Postmates Inc.'s Opposition to Petitioners' Motion to Compel Arbitration at 1, [Adams v. Postmates, Inc.](#), **414 F. Supp. 3d 1246 (N.D. Cal. 2019)** (No. 19-cv-03042), 2019 WL 11093949, ECF No. 112 ("This is a shakedown."); *Postmates* Initial Complaint, *supra* note 273, at 2. In lawsuits against the AAA, see *infra* notes 338-55 and accompanying text, Family Dollar and Uber made similar allegations regarding the validity of some of the filed demands.

economic irrationality of individual arbitration appeared in *Italian Colors*--in a brief written by the plaintiff merchants.  
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Whatever their precise form, at bottom these arguments are all about enforceability. Whether it is for the arbitrator, through the relevant arbitral process, to decide if a demand has merit is a question of whether a given arbitration agreement--an agreement that assigns that very issue to the arbitrator--should be enforced. And whether it is for the arbitrator, through the relevant arbitral process, to decide if the costs of arbitration are so high relative to claim value as to violate due process<sup>325</sup> or common sense is also a question of enforcement.<sup>326</sup>

However ironic (or sympathetic) the argument that defendants' own arbitration agreements cannot be enforced "according to their terms," that argument is entirely rational given the dramatic financial consequences of enforcement for a defendant. The fees assessed in a mass arbitration are astounding. In the Uber mass arbitration, for instance, initial filing and the retention of an arbitrator cost Uber over \$ 1,500 *per claim*.<sup>327</sup> In both the DoorDash (employment) and Postmates mass arbitrations, initial fees were \$ 1,900 *per demand*.<sup>328</sup> As of January 2019, Uber faced over \$ 18 million in arbitration fees alone.<sup>329</sup> In October 2019, after DoorDash drivers paid over **[\*1346]** \$ 1.2 million in arbitration fees, DoorDash refused to pay the \$ 12 million it owed to the AAA. The AAA accordingly closed over 6,000 demands.<sup>330</sup> As of April 2019, Postmates owed--and refused to pay--\$ 10 million in fees.<sup>331</sup> The Northern District of California declined to relieve Postmates of those fees,<sup>332</sup> and Postmates' potential debt grew as more demands were filed.<sup>333</sup> Postmates continued its refusal to pay and instead tried to settle its mass-arbitration

<sup>323</sup> *Fitbit* Transcript, *supra* note 315, at 10, 15.

<sup>324</sup> Brief for Respondents at 54, [Am. Express Co. v. It. Colors Rest., 570 U.S. 228 \(2013\)](#) (No. 12-133), 2013 WL 267025.

<sup>325</sup> This could either be due process generally or the due process protocols of the specific arbitral forum. See generally, e.g., AM. ARB. ASS'N, CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES (1998), <https://perma.cc/R6JP-AZYV>; AM. ARB. ASS'N, EMPLOYMENT DUE PROCESS PROTOCOL (1995), <https://perma.cc/3Q3M-RDEL>.

<sup>326</sup> Judge John Kane of the District of Colorado recognized that these arguments go to enforceability in the Chipotle mass arbitration. When Chipotle requested to stay the individual arbitration proceedings that followed its successful motion to dismiss and compel arbitration, Judge Kane wrote: "Chipotle challenged whether the Arbitration Plaintiffs were proper members of the collective, and . . . I agreed and dismissed them [pursuant to Chipotle's arbitration agreement]. I refused to interfere with the arbitration proceedings of individuals who were dismissed from this litigation . . ." *Turner v. Chipotle Mex. Grill, Inc.*, No. 14-cv-02612, [2018 WL 11314702, at \\*2 \(D. Colo. Nov. 20, 2018\)](#) (footnote omitted).

<sup>327</sup> See *Abadilla* Petition for Arbitration, *supra* note 5, PP 18, 21.

<sup>328</sup> [Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1250 \(N.D. Cal. 2019\)](#) ("[T]he AAA informed Postmates that it had until May 31, 2019, to pay its share of the filing fees . . . which was \$ 1,900 per claimant . . ."), *aff'd*, [823 F. App'x 535 \(9th Cir. 2020\)](#); [Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1064 \(N.D. Cal. 2020\)](#) (noting that the applicable AAA rules required DoorDash to pay \$ 1,900 per filing and claimants \$ 300 per filing).

<sup>329</sup> Frankel, *supra* note 12.

<sup>330</sup> [Abernathy, 438 F. Supp. 3d at 1064](#).

<sup>331</sup> See *Adams v. Postmates, Inc.*, No. 19-cv-03042, [2020 WL 1066980, at \\*1 \(N.D. Cal. Mar. 5, 2020\)](#).

<sup>332</sup> *Id.* at \*6.

<sup>333</sup> Alison Frankel, *Beset by Arbitration Demands, Postmates Resorts to Class Action to Settle Couriers' Claims*, REUTERS (Nov. 19, 2019, 3:04 PM), <https://perma.cc/Q4SM-2PEC> (reporting that Keller Lenkner told Postmates it was "signing more [claimants] every day" and that Postmates' arbitration fees "would exceed \$ 20 million"); see also Declaration of Dhananjay S. Manthripragada in Support of Postmates' Opposition to Cross-Petitioners' Motion to Compel Arbitration P 45, Postmates Inc.

claims by way of a class action.<sup>334</sup> By December 2020, Intuit had paid \$ 13 million to the AAA but still faced \$ 23 million in additional fees.<sup>335</sup>

Even small-scale mass arbitrations can generate significant up-front fees. In a confidential mass arbitration waged by Nichols Kaster on behalf of 150 employees with FLSA wage-and-hour claims, for instance, the defendant's filing costs alone could have been over \$ 850,000.<sup>336</sup> Accordingly, it does not take many claims for mass arbitration's fee-leveraging mechanism to begin generating settlement pressure. If the Chipotle mass arbitration is any indication, it might only take about 150 cases to generate significant pressure for all claims.<sup>337</sup>

**[\*1347]** Avoiding the enforcement of arbitration agreements "according to their terms" is so consequential that both Family Dollar and Uber have sued the AAA for carrying out their arbitration provisions.<sup>338</sup> Filing suit against an arbitral forum that you yourself selected is a bold and significant move. As such, these suits warrant brief examination here.

In Family Dollar's complaint against the AAA, it contended that its arbitration agreements could not be enforced in the context of a wage-theft mass arbitration because "[m]ass arbitration . . . with little regard of the claims' validity is not a proper use of the arbitration system where the arbitration filing fees *may far exceed the merits of the claim.*"<sup>339</sup> Through this contention Family Dollar made two arguments. First, it asserted that the claimants' arbitration filings were "invalid." This invalidity was largely procedural: Family Dollar did not dispute the substantive merits of the claimants' wage-theft allegations.<sup>340</sup> Instead, Family Dollar's "validity" argument was that some of the individual

v. 10,356 Individuals, No. 20-cv-02783, [2021 WL 540155 \(C.D. Cal. Jan. 19, 2021\)](#), ECF No. 57 (noting that the AAA assessed over \$ 4 million in filing fees against Postmates for a different set of arbitration demands).

<sup>334</sup> Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS (Dec. 2, 2019, 2:19 PM), <https://perma.cc/26UZ-75ME> ("Postmates came up with a tactic to short-circuit the mass arbitration campaign: its counsel . . . negotiated an \$ 11.5 million class action settlement in California state court that purports to resolve the claims of all of its California couriers."); see also Frankel, *supra* note 333.

<sup>335</sup> Alison Frankel, *Judge Breyer Rejects \$ 40 Million Intuit Class Action Settlement amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 2:09 PM), <https://perma.cc/363Y-U8ME>.

<sup>336</sup> Matthew C. Helland, *Costs of Defense in Mass Individual Wage-and-Hour Arbitrations: A Case Study*, 3 PLI CURRENT 213, 213, 218-19 (2019) ("The plaintiffs had filed 106 arbitration demands at the time of mediation, meaning the defendant had paid (or owed) over \$ 626,000 to JAMS just in initial filing costs. If mediation had failed and the remaining plaintiffs had all filed their claims, the defendant would have owed JAMS another \$ 226,200 in initial filing fees."); see also *id.* at 219 (noting that fully arbitrating the FLSA claims could have cost the defendant upwards of \$ 3 million).

<sup>337</sup> Following the dismissal of nearly 3,000 Chipotle employees from an FLSA collective action on the grounds that those employees were required to arbitrate their claims, around 150 employees filed individual arbitration demands. Turner v. Chipotle Mex. Grill, Inc., No. 14-cv-02612, [2018 WL 11314701, at \\*1 \(D. Colo. Aug. 3, 2018\)](#); Dave Jamieson, *Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly*, HUFFPOST (updated Dec. 21, 2018), <https://perma.cc/Z9QJ-XWV7>. Faced with these demands, Chipotle "squeal[ed] for mercy," Michael Hiltzik, *Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits over Wage Theft*, L.A. TIMES (Jan. 4, 2019, 7:00 AM PT), <https://perma.cc/N488-3FRB>, and asked the district court to suspend arbitration proceedings lest Chipotle suffer "irreparable harm," Turner v. Chipotle Mex. Grill, Inc., No. 14-cv-02612, [2018 WL 11314702, at \\*1, \\*3 \(D. Colo. Nov. 20, 2018\)](#). Judge Kane rejected Chipotle's arguments. *Id.* at \*3.

<sup>338</sup> *Family Dollar* Complaint, *supra* note 263; Declaratory Judgment Complaint, Uber Techs., Inc. v. Am. Arb. Ass'n, No. 655549/2021 (N.Y. Sup. Ct. Sept. 20, 2021) [hereinafter *Uber* Complaint].

<sup>339</sup> *Family Dollar* Complaint, *supra* note 263, P 1 (emphasis added).

<sup>340</sup> Although Family Dollar claimed that it "never employed many of the claimants and had no arbitration agreement with them," this does not go to the substance of the wage-theft claims. See *Family Dollar, Inc.'s Brief in Support of Motion to Dismiss*

filings were defective--they were filed in the wrong arbitral forum, were untimely filed, were not tendered to Family Dollar first, did not include precise damages amounts, and so on.<sup>341</sup> Indeed, as Family Dollar pointed out, some of the demands were in fact withdrawn as invalid.<sup>342</sup> (The [\*1348] others were unilaterally withdrawn pursuant to a settlement agreement.)<sup>343</sup> Because of these withdrawals, Family Dollar argued, it should not be responsible for a single penny of the more than \$ 2.5 million in filing fees assessed by the AAA.<sup>344</sup>

Second, Family Dollar argued that *mass arbitration itself* was improper because the filing fees could "far exceed the merits of the claim[s]." <sup>345</sup>At a surface level, this is a new argument in that it comes close to a broadside on mass arbitration in general. Family Dollar's assertion that filing arbitration demands "with little regard of the claims' validity is not a proper use of arbitration" <sup>346</sup>strongly suggests that mass arbitration is a practice divorced from the merits. Fundamentally, though, Family Dollar's argument--that its filing fees improperly exceeded the value of the underlying demands--is the same argument that was raised by the plaintiffs in *Italian Colors*.<sup>347</sup> The Eastern District of Virginia never had the chance to rule on Family Dollar's arguments; Family Dollar and the AAA reached a settlement agreement in December 2020.<sup>348</sup>

In September 2021, Uber moved for a preliminary injunction against the AAA in New York state court <sup>349</sup>--and lost.<sup>350</sup> In both its complaint and its motion, Uber argued that the AAA's assessment of \$ 10 million in initial fees (and possibly \$ 91 million in total fees) constituted a "ransom" coordinated by "politically-motivated lawyers" who were filing "baseless claims."<sup>351</sup> After a [\*1349] two-day hearing, New York State Supreme Court Justice Robert Reed ruled that while there may be "a more reasonable path" to handling 31,000 claims than individual arbitration, Uber's

American Arbitration Association, Inc.'s Counterclaim [sic] at 3-4, *Fam. Dollar, Inc. v. Am. Arb. Ass'n*, No. 20-cv-00248 (E.D. Va. Aug. 21, 2020), ECF No. 10 [hereinafter *Family Dollar* Motion to Dismiss].

<sup>341</sup> See *Family Dollar* Complaint, *supra* note 263, PP 1, 10-12. Among other things, Family Dollar asserted that (1) many of the agreements enforced by the AAA actually required claimants to arbitrate before JAMS; (2) some parties to the enforced agreements had already released their claims through prior settlements or bankruptcies; and (3) some claimants had not agreed to arbitrate with Family Dollar. *Id.*

<sup>342</sup> *Id.* P 2.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* PP 1-2; see also *Family Dollar* Motion to Dismiss, *supra* note 340, at 1-2 ("Family Dollar does not owe [the] AAA anything."). The \$ 2.5 million represents a fee of \$ 2,200 for 1,166 of the roughly 2,000 total claimants. *Family Dollar* Complaint, *supra* note 263, PP 1, 15-16.

<sup>345</sup> *Family Dollar* Complaint, *supra* note 263, P 1.

<sup>346</sup> *Id.*

<sup>347</sup> See *supra* note 324 and accompanying text.

<sup>348</sup> Settlement Conference Order P 1, *Fam. Dollar, Inc. v. Am. Arb. Ass'n*, No. 20-cv-00248 (E.D. Va. Oct. 27, 2020) (scheduling a settlement conference for December 2, 2020); Rule 41(a)(1)(A)(ii) Stipulation of Dismissal at 1, *Fam. Dollar, Inc. v. Am. Arb. Ass'n*, No. 20-cv-00248 (E.D. Va. Dec. 4, 2020).

<sup>349</sup> Plaintiffs' Memorandum of Law in Support of Their Motion for a Preliminary Injunction at 1, *Uber Techs., Inc. v. Am. Arb. Ass'n*, No. 655549/2021, 2021 WL 4789153 (N.Y. Sup. Ct. Oct. 14, 2021) [hereinafter *Uber* Motion].

<sup>350</sup> *Uber Techs.*, 2021 WL 4789153, at \*2-3, *aff 'd*, [167 N.Y.S.3d 66 \(App. Div. 2022\)](#).

<sup>351</sup> *Uber* Complaint, *supra* note 338, PP 1, 5; see *Uber* Motion, *supra* note 349, at 1-2. Uber alleged that the fees were part of an effort by politically conservative D.C. firm Consovoy McCarthy to "punish Uber for supporting the Black community in the wake of George Floyd's murder." *Uber* Complaint, *supra* note 338, PP 1, 3, 46. The firm "sought out and acquired clients--tens of thousands of them--and filed boilerplate, single-sentence arbitration demands against Uber, asserting a type of 'reverse discrimination' claim." *Id.* P 3.

arbitration agreement did not provide for such a path, and it was not for the court to rewrite Uber's contract.<sup>352</sup> Justice Reed seemed persuaded by AAA counsel Theodore Hecht, who "lampooned Uber's claim that it was a victim faced with a ransom."<sup>353</sup> If anything, Hecht noted, Uber was "hostage to [its] own agreement."<sup>354</sup>

In the above suits, both Uber and Family Dollar leaned heavily into the following argument: The assessment of fees pursuant to a valid arbitration agreement is improper because the claims at issue are meritless. However, whether claims have merit and *what process can decide* whether claims have merit are separate issues. In their contracts with consumers and employees, Family Dollar and Uber designed the process for litigating claims, including the process by which the merits of claims would be evaluated.<sup>355</sup> The Family Dollar and Uber complaints took issue with the processes for determining validity and merit--the very processes Uber and Family Dollar specified. Effectively, then, the complainants were arguing against themselves.

\* \* \*

In sum, the make-or-break event of a mass arbitration, at least in current form, is the enforcement (or credibly threatened enforcement) of arbitration agreements "according to their terms." This event triggers the fee-leveraging mechanism of mass arbitration, which can spell financial catastrophe for a potential defendant.<sup>356</sup> While many of the claims studied here appear quite colorable,<sup>357</sup> the fee-leveraging mechanism of the mass-arbitration model [\*1350] could impose settlement pressure for more dubious claims--that is to say, it could impose illegitimate, *in terrorem* settlement pressure.<sup>358</sup> The same has been said of the class-certification event,<sup>359</sup> which is perhaps the closest analogue to the agreement-enforcement event in mass arbitration.<sup>360</sup> But *in terrorem* or otherwise, the settlement pressure created by class certification is no match for the pressure that defendants created through their

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<sup>352</sup> Transcript of Proceedings Before the Honorable Robert R. Reed at 136-39, *Uber Techs.*, 2021 WL 4789153 (No. 655549/2021).

<sup>353</sup> Frank G. Runyeon, *Uber Has Itself to Blame for \$ 91M Arbitration Bill, Judge Says*, LAW360 (Oct. 13, 2021, 7:54 PM EDT), <https://perma.cc/9NPK-7WHV> (to locate, select "View the live page").

<sup>354</sup> *Id.* (quoting Hecht).

<sup>355</sup> See, e.g., Andrew Strickler, *Uber Wrote the Script It Now Attacks in Arbitration Suit*, LAW360 (Oct. 4, 2021, 1:00 PM EDT), <https://perma.cc/9TSR-94WL> (to locate, select "View the live page").

<sup>356</sup> Even when the underlying claims have merit, the fee-leveraging mechanism tends to extract a settlement premium deriving from the threat of cost imposition. See Glover, *supra* note 132, at 1729 ("Economic models of litigation, as well as recent empirical studies, strongly support the conclusion that litigation costs can significantly affect settlement outcomes.").

<sup>357</sup> See, e.g., *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 931-32 (N.D. Cal. 2016) (rejecting a proposed \$ 12.25 million settlement of Lyft drivers' misclassification claims because counsel had underestimated the settlement value); Nandita Bose, *U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, REUTERS (Apr. 29, 2021, 8:50 AM PDT), <https://perma.cc/JQ97-4Z3Y> (noting that Secretary of Labor Marty Walsh believes "[a] lot of gig workers . . . should be classified as 'employees' who deserve work benefits," a position that bolsters misclassification claims like Cotter's).

<sup>358</sup> Some of the attorneys I interviewed for this study indicated that firms have begun to demand settlements without filing a class complaint or any arbitral demands, and on the basis of fairly dubious claims. See, e.g., Interview with Anonymous No. 4, *supra* note 42.

<sup>359</sup> See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

<sup>360</sup> See, e.g., Nagareda, *supra* note 22, at 99 (describing the certification of a putative class as the make-or-break event that has the power to impose a great deal of settlement pressure on a defendant); see also *In re Rhone-Poulenc Rorer*, 51 F.3d at 1298 (making the same point).



arbitration agreements. Against this monster of the defendants' own making, the class action may begin to look like a safe harbor.<sup>361</sup>

## 2. Arbitrating claims individually, or credibly threatening to do so

The second distinctive feature of the mass-arbitration model is that its claims proceed individually rather than being merged into something like a single class action or MDL consolidation. In other words, mass arbitration eschews the strategy of class proceedings: the formal aggregation of claims to make claiming cost-effective for plaintiffs. Mass arbitration instead proceeds on the premise that plaintiffs can aggregate individual proceedings in a way that makes the claims economically viable--perhaps even more viable than class or otherwise consolidated proceedings.

Here, Intuit is illustrative. Claimants in the Intuit mass arbitration had more valuable claims than similarly situated claimants in class proceedings, in part because the mass-arbitration claimants could command a "premium to reflect Intuit's potential arbitration costs."<sup>362</sup> This premium would not have existed without attorneys willing and able to arbitrate (or credibly threaten to arbitrate) a meaningful number of *individual* cases.

**[\*1351]** More than any other, this feature of mass arbitration will likely strike readers as counterintuitive. Conventional wisdom holds that the expense of individual proceedings can make claims economically irrational to pursue. Indeed, this wisdom not only bears out empirically but also lies at the core of the arbitration revolution and the class-action counterrevolution.<sup>363</sup> Mass arbitration challenges the conventional wisdom in two key ways. First, it challenges the long-standing premise that disaggregation disables claiming. Second, it challenges the corollary of that premise: that those with negative-value or low-value claims will fare better, as a matter of economics, in an aggregated case than they will in a disaggregated one.<sup>364</sup>

Mass arbitration was able to challenge conventional wisdom regarding aggregation (typically a claim facilitator) and disaggregation (typically a claim disabler) for three interrelated reasons. First, as a general matter, litigating many related claims *on an individual basis* is more expensive than litigating many related claims in a single class action or a set of consolidated cases.<sup>365</sup> Second, litigating many related claims on an individual basis *in arbitration* is more expensive than litigating many related claims on an individual basis in court, especially given that arbitral organizations impose fee after fee at just about every stage of the proceedings.<sup>366</sup> While defendants have insisted

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<sup>361</sup> Intuit, for example, attempted to negotiate a class settlement in order to "resolve" the claims of individuals it had previously compelled to arbitrate. Presumably, Intuit preferred a single class action to the settlement pressure imposed by the fees and costs of many individual arbitrations. See *Intuit Motion to Intervene*, *supra* note 244, at 1-3, 12-13; see also, e.g., Randazzo, *supra* note 35.

<sup>362</sup> *Intuit Motion to Intervene*, *supra* note 244, at 7 (quoting Declaration of Stephen McG. Bundy in Support of Intuit's Opposition to Defendants' Motion for a Preliminary Injunction P 3.f, *Intuit Inc. v. 9,933 Individuals*, No. 20STCV22761, 2020 WL 7866018 (Cal. Super. Ct. Nov. 20, 2020)); see Glover, *supra* note 132, at 1729.

<sup>363</sup> See *supra* Part I.C.

<sup>364</sup> Judges and commentators have long maintained that economy and efficiency are key benefits of joinder and aggregation. See, e.g., Sherman, *supra* note 28, at 236; Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, [69 B.U. L. REV. 659, 671 \(1989\)](#) (analyzing an asbestos suit and finding that "[t]he cost to the judicial system for the class action approach in both time and money was substantially less than what an equivalent number of individual trials would have generated, even taking into account the supplemental judicial resources devoted to appeals, pre-trial matters, and settlement negotiations").

<sup>365</sup> For recent commentary on the transaction-cost-leveraging feature of mass arbitration, see Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, BLOOMBERG L. (Oct. 28, 2021, 10:01 AM), <https://perma.cc/QDZ5-DLB9> (quoting Cohen Milstein partner Joseph Sellers, who commented that while it is tempting for companies "to use [arbitration] agreements to avoid class claims," those companies "may be forced to incur large amounts of transaction costs to handle multiple claims that are very similar").

for decades that arbitration is "cost-effective," <sup>367</sup>cost-effective is not the same as [\*1352] inexpensive. And arbitration is very, very expensive. <sup>368</sup>Third, and perhaps most importantly, mass-arbitration attorneys have found ways to impose arbitration's expenses on defendants asymmetrically, thus driving up the settlement value of individual claims. <sup>369</sup>Simply put, mass arbitration shows that when it comes to *in terrorem* effects (the bogeyman of the class-action counterrevolution), the leverage of a large number of individual arbitrations can sometimes exceed the leverage created by aggregate proceedings.

This study uncovered a number of ways in which mass-arbitration attorneys can asymmetrically impose the costs of arbitration on corporate defendants. First, by filing individual arbitration demands as opposed to a single class-wide complaint (as required by some arbitration agreements), mass-arbitration attorneys can harness fee-shifting provisions not just once, but hundreds or thousands of times. This can quickly drive a defendant's arbitration costs into the tens or hundreds of millions of dollars. <sup>370</sup>

Second, as much as defendants may wish to remove the fee-shifting provisions from their arbitration agreements, <sup>371</sup>it is not clear to what extent an adhesion contract requiring arbitration can shift costs to claimants. California, for instance, restricts how far contracts of adhesion can go in forcing a claimant to pay arbitration fees. <sup>372</sup>Accordingly,

<sup>366</sup> Compare Am. Arb. Ass'n, *supra* note 241, at 1-3, and *Arbitration Schedule of Fees and Costs*, *supra* note 241, with District Court Miscellaneous Fee Schedule, U.S. CTS., <https://perma.cc/7QQ7-G2B4> (archived May 19, 2022).

<sup>367</sup> For example, defendants argued that because arbitration reduced their spending on class-action defense, they could pass along their savings to consumers in the form of lower prices. See, e.g., Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89. The argument changed in and after *Concepcion*: Arbitration was now easier and less expensive for individuals than judicial proceedings, particularly where defendants were contractually required to pay arbitration fees. See, e.g., *Concepcion* Chamber of Commerce Brief, *supra* note 78, at 1, 3-4, 12; Brief of Amicus Curiae New England Legal Foundation in Support of Petitioner at 10-11, 15-16, [AT&T Mobility LLC v. Concepcion](https://perma.cc/99U6-MQZ8), 563 U.S. 333 (2011) (No. 09-893), 2010 WL 3232489.

<sup>368</sup> In one instance, three arbitrations for wage theft against a Florida construction company generated over \$ 100,000 in costs to the employer. [Hernandez v. Acosta Tractors Inc.](https://perma.cc/99U6-MQZ8), 898 F.3d 1301, 1303 (11th Cir. 2018); see also, e.g., Helland, *supra* note 336, at 217 ("The defendant would certainly spend more than \$ 49,000 in JAMS fees and defense fees on each individual hearing."); Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (updated Sept. 28, 2021), <https://perma.cc/99U6-MQZ8> ("Just to hire the arbitrator and to get the process started for a single claim cost Amazon about \$ 2,900.").

<sup>369</sup> See generally Glover, *supra* note 132, at 1729-32, 1729 nn.58-60, 1730 n.63 (tracing how the credible threat of litigation-cost imposition can either (1) drive settlement values down if deployed asymmetrically by defendants; or (2) drive settlement values up if deployed asymmetrically by plaintiffs). This point is critical, as arbitration costs are not borne by the defendants alone. See, e.g., Am. Arb. Ass'n, *supra* note 241, at 1.

<sup>370</sup> See *infra* Appendix.

<sup>371</sup> Many defendants have already begun to do so. See *infra* Part IV.C.1 (noting that revised agreements without fee-shifting provisions are already emerging and characterizing these agreements as one of the biggest challenges to the sustainability of the massarbitration model).

<sup>372</sup> See [Armendariz v. Found. Health Psychcare Servs., Inc.](https://perma.cc/99U6-MQZ8), 6 P.3d 669, 687-89 (Cal. 2000) (holding that, "when an employer imposes mandatory arbitration as a condition of employment," claimants cannot be required to pay fees unique to arbitration and in excess of litigation costs). Some courts view *Concepcion*'s broad preemption holding to undermine the *Armendariz* rule. See, e.g., [James v. Conceptus, Inc.](https://perma.cc/99U6-MQZ8), 851 F. Supp. 2d 1020, 1033 (S.D. Tex. 2012) ("The general *Armendariz* rule is in serious doubt following *Concepcion*. . . . To the extent *Armendariz* precludes arbitration in any employment dispute if the employee is required to bear any type of expense not present in litigation, it appears preempted . . . ." (emphasis omitted)); Mercado v. Drs. Med. Ctr. of Modesto, Inc., No. F064478, 2013 WL 3892990, at \*6-7 (Cal. Ct. App. July 26, 2013) (noting that *Concepcion* and *Italian Colors* "cast doubt on the continued validity of . . . *Armendariz*"). The law on *Armendariz*, however, is not settled. See, e.g., Fred W. Alvarez, *Enforcement of California-Based Employment Arbitration Agreements*, in ALI-CLE COURSE MATERIALS:

although the issue [\*1353] will undoubtedly be litigated in the future, mass-arbitration attorneys can challenge defendants' efforts to avoid cost asymmetries through revised contracts.

Third, mass-arbitration attorneys can rely on structural differences to impose asymmetric costs on defendants.<sup>373</sup> Corporate defendants tend to be represented by large national or multinational firms--often more than one in a single case--that earn profits by billing their clients by the hour. And do they ever: These firms often assign many high-billing partners and associates to each matter.<sup>374</sup> Mass-arbitration claimants, on the other hand, are generally represented by firms that seek to profit via a contingency percentage of any recovery.<sup>375</sup> While this arrangement carries more risk for counsel, claimants themselves face far fewer litigation costs. In other words, hour by hour and pound for pound, corporate defendants generally pay more for their lawyers than mass-arbitration claimants do. Because defendants face high litigation costs while claimants do not, defendants may be more inclined to settle and avoid the paying for the litigation itself.<sup>376</sup>

Fourth, entrepreneurial attorneys pursuing the mass-arbitration model can specifically select for remedial schemes with fee-shifting provisions and statutory damages.<sup>377</sup> Bringing claims under these schemes can introduce fee-leveraging mechanisms beyond those described above, driving up settlement pressure, settlement values, and individual payouts.

### 3. Selecting higher-threshold-value claims

The threshold value required for a claim to be marketable in the mass-arbitration model is typically higher than the threshold value required for a class-action or MDL claim. This is true for two reasons. First, the initial [\*1354] investment required to collect, process, and file claims for a mass arbitration exceeds that required for a class action or MDL consolidation. Second, the economies of scale achieved by the class-action device and MDL are not present to the same degree in mass arbitration.<sup>378</sup> These differences are a significant source of leverage in the mass-arbitration model.<sup>379</sup> The price of that leverage, however, is that mass-arbitration claims must often be worth more to make economic sense.

Firms often use an individual-recovery threshold to determine whether mass-arbitration claims are marketable. Although the precise threshold varies by firm (given risk tolerance) and remedial scheme (given differences in fee shifting and penalties), it generally starts in the high hundreds for some firms and rises to a few thousand dollars for others.<sup>380</sup> Anything below the high-hundred mark would almost certainly not be economically viable in mass arbitration, even if the firm carefully crafted a flat-fee structure.<sup>381</sup>

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ADVANCED EMPLOYMENT LAW AND LITIGATION (2013), Westlaw SU033 ALI-CLE 1279 (cautioning employers to "comply with *Armendariz* until the law is more settled"). The Supreme Court has not confronted the *Armendariz* rule directly. The Court quoted *Armendariz* for the basic definition of unconscionability in *Concepcion*, but it did not otherwise mention the case. See [563 U.S. at 340](#).

<sup>373</sup> See Interview with Warren Postman, *supra* note 40.

<sup>374</sup> See Interview with Anonymous No. 2, *supra* note 41.

<sup>375</sup> See Interview with Warren Postman, *supra* note 40.

<sup>376</sup> See Glover, *supra* note 132, at 1729-32.

<sup>377</sup> See *infra* Appendix.

<sup>378</sup> See *supra* Part III.B.2.

<sup>379</sup> See *supra* Part III.C.2.

<sup>380</sup> See, e.g., Interview with Warren Postman, *supra* note 40; Interview with Jonathan D. Selbin, *supra* note 41. Note that these figures take current fee-leveraging mechanisms into account.

The range above may actually be conservative. Most mass-arbitration claims arise under remedial schemes that include some combination of statutory damages, treble damages, and fee shifting.<sup>382</sup> And the claims most suitable for mass arbitration typically require minimal discovery or rely on uniform proof, thereby enabling claimants to spread evidentiary costs.<sup>383</sup> Without these generous remedial schemes and limitations on discovery and proof, firms' thresholds could be driven even higher.

The fact that mass-arbitration claims require a higher threshold value to be deemed marketable is apparent in the potential Fitbit mass arbitration. Fitbit is an example of what this Article terms a mass-arbitration claim-marketability failure. The case began as a putative class action for consumer fraud, arising out of allegations that Fitbit's inaccurate heart-rate monitoring was misleading and posed serious health and safety risks to consumers.<sup>384</sup> These allegations were supported by independent studies, including a study [\*1355] done by the Cleveland Clinic.<sup>385</sup> The district court granted Fitbit's motion to compel arbitration,<sup>386</sup> and the named plaintiff, Kate McLellan, decided to arbitrate her claim. Lief Cabraser, counsel for the Fitbit plaintiff class, subsequently determined that the other claims (which ranged in value from \$ 20 to \$ 80) were not marketable in a mass arbitration.<sup>387</sup> This was so even though the claims had been marketable in the original class action. While the details of McLellan's arbitration proceedings are confidential, both the fact of the arbitration and the studies mentioned above suggest that the claims had merit. Accordingly, it is likely accurate to say that Fitbit's arbitration clause, and Fitbit's arbitration clause alone, eliminated the remaining consumer claims.<sup>388</sup>

#### 4. Generating aggregate settlements from individual claims

If settlements in litigation are a black box,<sup>389</sup> settlements in arbitration are a black hole.<sup>390</sup> Under nondisclosure agreements (NDAs) in many settlement contracts, claimants may be deemed ineligible for payouts if they share *any* information about their claim or the settlement.<sup>391</sup> Moreover, for some mass arbitrations there are no records of the settlement--or even of the claims. These "secret" or "shadow" mass arbitrations are off the books, either for an

<sup>381</sup> Even a 40% flat fee on \$ 60 claims would not be profitable under the mass-arbitration model.

<sup>382</sup> See *infra* Appendix.

<sup>383</sup> See, e.g., Frankel, *supra* note 268 (noting that, in the potential mass arbitration against DirecTV, the underlying legal question for all claimants is simply whether DirecTV improperly disclosed a data file).

<sup>384</sup> See McLellan v. Fitbit, Inc., No. 16-cv-00036, [2017 WL 4551484, at \\*1 \(N.D. Cal. Oct. 11, 2017\)](#).

<sup>385</sup> See Robert Wang, Gordon Blackburn, Milind Desai, Dermot Phelan, Lauren Gillinov, Penny Houghtaling & Marc Gillinov, Research Letter, *Accuracy of Wrist-Worn Heart Rate Monitors*, 2 JAMA CARDIOLOGY 104, 104 (2017).

<sup>386</sup> [McLellan, 2017 WL 4551484, \\*5](#).

<sup>387</sup> Interview with Jonathan D. Selbin, *supra* note 41.

<sup>388</sup> See *id.* This findings in this Subpart align with David Horton and Andrea Cann Chandrasekher's conclusion that "very few individuals bother to arbitrate minor grievances" post- *Concepcion*. See Horton & Chandrasekher, *supra* note 210, at 116-19. In this regard our studies reinforce one another: Arbitration--mass or otherwise--does not tend to capture low-value claims.

<sup>389</sup> See Glover, *supra* note 132, at 1745-50; see also, e.g., Ben Depoorter, Essay, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, [95 CORNELL L. REV. 957, 974-77 \(2010\)](#).

<sup>390</sup> See Estlund, *supra* note 38, at 682.

<sup>391</sup> Interview with Warren Postman, *supra* note 40; see, e.g., u/steezefabreeze, *Hey All! I've Received an Email from Keller Lenkner*, REDDIT: R/POSTMATES (June 8, 2021, 5:19:14 PM PDT), <https://perma.cc/V4FL-JJHH>; see also Interview with Nancy Erika Smith, *supra* note 41 (discussing how NDAs can force information "out of the light of day").

extended period of time or entirely. This typically occurs for one of two reasons: Either (1) claims are filed in fora that do not keep public records; or (2) claims are settled prior to the filing of any demands.

Secrecy notwithstanding, this study revealed a number of details about settlements in mass arbitration. To date, there is no formalized procedural structure for mass-arbitration settlements. For all the time defendants spent [\*1356] designing their arbitration contracts, they spent little time designing or designating post-dispute settlement structures. That makes sense, of course: The one-off arbitral demands anticipated by defendants hardly called for a complex settlement regime. More to the point, given that the goal of the arbitration revolution was to eliminate claim resolution, spending time on claim-resolution structures would have seemed irrational.

Yet even without formal structures for settlement, global settlements in mass arbitrations are happening.<sup>392</sup>In some mass arbitrations, the parties attempt to settle after a number of demands are filed or arbitrated on an individual basis.<sup>393</sup>To the extent that demands are arbitrated, they function like bellwether trials in mass-tort MDLs: The individual results help create a global deal aimed at resolving the remaining claims.<sup>394</sup>Other mass arbitrations involve few (if any) filings or individual proceedings prior to settlement; still others do not get past the threat of mass filings before settlement talks ensue. Regardless of how many demands are actually filed or arbitrated, mass-arbitration defendants generally agree to global settlements given claimant fee leveraging and the expense and risk of claims. This is true even if fees have already been paid.

Investigation reveals three additional trends. First, even global deals in mass arbitration must be effectuated on an individual basis. As a de facto matter, the aggregate-settlement consent requirement of Model Rule of Professional Conduct 1.8 operates in the background of the mass-arbitration settlement process.<sup>395</sup>Second, global settlements in mass arbitration often hinge on the participation of a prespecified supermajority of claimants.<sup>396</sup>Finally, while the claimants' firm is ultimately in charge of securing releases [\*1357] and distributing payouts, firms (at least for distribution) have tended to contract with settlement administrators.<sup>397</sup>

The settlement amounts in mass arbitration have so far tended to be substantial, both relative to class-action settlements for similar claims and on their own terms. Indeed, some settlements have provided claimants with awards approximating their actual damages. But while generous settlements are the norm, there are exceptions. In the Family Dollar mass arbitration, for instance, the highest settlement amount reported to date is \$ 4,000.<sup>398</sup>This

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<sup>392</sup> See, e.g., Erin Mulvaney, *DoorDash Got Its Arbitration Wish, Costing Millions Upfront*, BLOOMBERG L. (updated Feb. 12, 2020, 12:47 PM), <https://perma.cc/BN5Y-LK7V> (noting that "mass arbitration leads to settlements" (capitalization altered)).

<sup>393</sup> See, e.g., *Arena v. Intuit Inc.*, No. 19-cv-02546, [2021 WL 834253, at \\*1 \(N.D. Cal. Mar. 5, 2021\)](#); see also Interview with Warren Postman, *supra* note 40 (comparing the massarbitration process to a mass-tort process with test cases and global settlements).

<sup>394</sup> See Interview with Warren Postman, *supra* note 40.

<sup>395</sup> MODEL RULES OF PRO. CONDUCT r. 1.8(g) (AM. BAR ASS'N 1983) (stating that an attorney "who represents two or more clients shall not participate in making an aggregate settlement" unless each client provides informed consent); see Declaration of Richard Zitrin in Support of Respondent DoorDash, Inc.'s Opposition to Petitioners' Motion for a Temporary Restraining Order PP 1, 11-14, *Abernathy v. DoorDash, Inc.*, No. 19-cv-07545 (N.D. Cal. Nov. 22, 2019), ECF No. 35-1 ("My own plaintiffs' firm clients, desirous of representing clients in mass action cases, were hamstrung by the hoops they would have to jump through to do so ethically [as a result of Model Rule 1.8]."); Interview with Warren Postman, *supra* note 40 (noting that Model Rule 1.8 operates unofficially in mass arbitration).

<sup>396</sup> Interview with Warren Postman, *supra* note 40.

<sup>397</sup> See, e.g., u/Majestic-Key2066, *Keller Lenkner Settlement*, REDDIT: R/POSTMATES (July 21, 2021, 11:49:49 AM PDT), <https://perma.cc/5B94-SWCZ> (referencing KCC as the settlement administrator hired by Keller Lenkner).

<sup>398</sup> See Allana Akhtar, *Family Dollar Workers Said They Put in 80-Hour Weeks and Slept on Cardboard to Keep Stores Open*, BUS. INSIDER (Dec. 20, 2021, 1:13 PM), <https://perma.cc/K4FV-CVRE>.

is less than what some employees believe they are owed for "years of poor working conditions," including having to sleep on cardboard boxes during double and triple (unpaid) overtime shifts and having to contend with snakes and lizards in breakrooms.<sup>399</sup> It is worth noting, however, that Family Dollar is an unusually intransigent litigant in many respects--including with regard to settlement.<sup>400</sup>

By January 2021, just over three years after launching its practice, Keller Lenkner had secured more than \$ 200 million in settlements for claimants.<sup>401</sup> (This number is rather astonishing given that mass arbitration only began in earnest in 2018; one advantage that mass arbitration has over settlements and trials in court is speed.)<sup>402</sup> In the Intuit mass arbitration, claimants obtained [**\*1358**] settlement offers for 100% of their out-of-pocket damages for each year they had a claim.<sup>403</sup> The only public disclosure of mass-arbitration settlement specifics--contained in a 2019 free writing prospectus Uber filed with the Securities and Exchange Commission (SEC)--reveals that Uber had reserved \$ 132 million for anticipated settlements with 60,000 of its drivers who had filed individual arbitration demands.<sup>404</sup> Uber estimated that its ultimate liability to these drivers would fall somewhere between \$ 146 million and \$ 170 million.<sup>405</sup> And although FairShake is (largely) a different model of mass arbitration,<sup>406</sup> it reports similarly high settlement figures: Consumers who settled with "major corporations" like AT&T and Comcast using FairShake's platform received an average of \$ 700.<sup>407</sup> Finally, reviewing (confidential) individual settlement data

<sup>399</sup> *Id.*; Jack Newsham & Peter Coutu, *Family Dollar Forced Employees to Sign Arbitration Agreements. Here's What Happened When They Tried to Sue the Company over Unpaid Wages.*, BUS. INSIDER (Dec. 21, 2021, 6:53 AM), <https://perma.cc/F2LF-9QM2> (to locate, select "View the live page").

<sup>400</sup> One claimant who spoke with journalists thought that her \$ 400 settlement was low, but she also reported that Family Dollar initially balked at her claim. Newsham & Coutu, *supra* note 399. The claimant, Carrie Boles Lear, stated that she wished she had fought harder in arbitration, but "Family Dollar took the position that she wasn't entitled to anything." *Id.* An attorney who represented Family Dollar managers in a 2001 class-action suit noted that Family Dollar was "one of the most arrogant companies I've ever dealt with in my 32 years of practicing law." *Id.* (quoting Alabama plaintiffs' attorney Mark Petro).

<sup>401</sup> Press Release, Keller Lenkner LLC, Keller Lenkner LLC Celebrates Third Anniversary (Jan. 12, 2021), <https://perma.cc/SQ5K-SL8F>.

<sup>402</sup> For example, in 2018, 37,000 female managers reached a \$ 45 million settlement with Family Dollar over gender-discrimination claims. *Scott v. Fam. Dollar Stores, Inc.*, No. 08-cv-00540, [2018 WL 1321048](https://perma.cc/2018-WL-1321048), at \*1-2, \*5 (*W.D.N.C. Mar. 14, 2018*); Katherine Peralta, *Family Dollar Agrees to Pay \$ 45 Million to Settle Long-Running Gender Bias Lawsuit*, RALEIGH NEWS & OBSERVER (updated Mar. 29, 2018, 9:57 AM), <https://perma.cc/PG4A-UUZM> (to locate, select "View the live page") (reporting that the settlement purported to resolve the claims of 37,000 plaintiffs). That settlement was the product of ten years of class-wide litigation, [Scott, 2018 WL 1321048](https://perma.cc/2018-WL-1321048), at \*1, and the underlying lawsuit dated back to 2002, Peralta, *supra*. Claimants in the Family Dollar mass arbitration, in contrast, got checks in under two years. See Newsham & Coutu, *supra* note 399.

<sup>403</sup> See *Intuit* Motion to Intervene, *supra* note 244, at 6.

<sup>404</sup> Uber Techs., Inc., Free Writing Prospectus (May 9, 2019), <https://perma.cc/L9M6-DZAP>.

<sup>405</sup> *Id.* DoorDash did not disclose specific numbers in its 2021 SEC registration statement, but it nonetheless warned that mass-arbitration settlements posed a financial risk to the company. See DoorDash, Inc., Registration Statement (Form S-1), at 54 (Nov. 13, 2020), <https://perma.cc/3XSU-D4S3> ("It is possible that a resolution of one or more such [arbitration] proceedings could result in substantial . . . settlement costs . . . that could adversely affect our business, financial condition, and results of operations.").

<sup>406</sup> See *supra* notes 289-91 and accompanying text.

<sup>407</sup> Alison DeNisco Rayome, *Overcharged by a Tech Company? New Service Could Help Get Your Money Back*, CNET (Mar. 3, 2020, 7:00 AM PT), <https://perma.cc/H5KT-WV3J> ("The FairShake platform uses AI to resolve customer claims with major corporations within two months, with a typical settlement of \$ 700."); see also Weiss, *supra* note 291 (discussing FairShake settlements in the context of Comcast and AT&T); Corkery & Silver-Greenberg, *supra* note 34 (same).

reinforces the findings in this Subpart and Part III.C.3 above: The average value of mass-arbitration claim marketability starts in the high hundreds, and a number mass-arbitration payouts track claimants' actual damages.<sup>408</sup> That being said, mass arbitration is simply too new of a practice (involving too few defendants, too few claim types, and too few firms) and settlement data too difficult to obtain to draw anything more than tentative conclusions about mass-arbitration settlement amounts.

Given generally high settlement values, it is perhaps not surprising that defendants have erected a number of hurdles to the distribution of mass-arbitration settlements. Although the precise details must again be kept confidential, some generalized examples are illustrative. For one, defendants often include provisions in arbitration agreements and settlement releases [\*1359] warning claimants that they will forfeit their payouts if they share any information about the settlement.<sup>409</sup> For another, defendants have sought to impose various artificial conditions on settlement payouts. In one case, a defendant mailed claimants a nondescript postcard containing a unique "settlement ID" and then insisted that claimants present this ID in order to resolve their claims. If a claimant could not locate her ID--even if she could provide other proof of settlement eligibility--her claim would be forfeited.<sup>410</sup> Similarly, some defendants have tried to require wet signatures for all settlement documents; others have insisted that those wet signatures be tendered in person. Still others have demanded that *all* signatures be wet and sometimes even notarized.<sup>411</sup>

Finally, many defendants have tried to avoid mass-arbitration settlement altogether. In November 2019, Postmates (unsuccessfully) attempted to settle its wage-theft litigation for \$ 11.5 million in California court; the settlement purported to resolve all claims by Postmates' California couriers, many of whom were already in arbitration.<sup>412</sup> In February 2020, DoorDash offered to resolve all wage-theft claims brought by its drivers through a \$ 39.5 million state-court class-action settlement.<sup>413</sup> Northern District of California Judge William Alsup declined to stay federal proceedings pending the settlement's approval, stating that he would not bless DoorDash's "hypocrisy" regarding [\*1360] arbitration.<sup>414</sup> And in November 2020, Intuit agreed to a \$ 40 million class settlement that purported to settle all claims against it, including those that were in arbitration.<sup>415</sup> Northern District of California Judge Charles Breyer refused to approve the settlement.<sup>416</sup> Intuit, Judge Breyer noted, was being "hoisted by [its] own petard."<sup>417</sup>

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<sup>408</sup> Individual settlement data is on file with the Author.

<sup>409</sup> See *supra* note 391 and accompanying text.

<sup>410</sup> See Interview with Travis Lenkner & Warren Postman, *supra* note 40; Interview with Cory L. Zajdel, *supra* note 40.

<sup>411</sup> See Interview with Travis Lenkner & Warren Postman, *supra* note 40; Interview with Cory L. Zajdel, *supra* note 40. *But cf.* Interview with Jonathan E. Paikin, *supra* note 42 (indicating that some of these formalities may be necessary to vet the underlying claims).

<sup>412</sup> See Frankel, *supra* note 334. In August 2021, San Francisco County Superior Court Judge Suzanne Bolanos granted preliminary approval to a revised settlement that increased the deal to \$ 32 million and included new opt-out procedures for couriers. Order Granting Preliminary Approval of Class Action Settlement at 2, Postmates Classification Cases, No. CJC-20-005068 (Cal. Super. Ct. Aug. 12, 2021); see Plaintiffs' Supplemental Briefing in Support of Motion for Preliminary Approval of Revised Class Action Settlement at 3-5, *Rimler v. Postmates, Inc.*, No. CGC-18-567868 (Cal. Super. Ct. Dec. 14, 2020) (laying out the revised settlement terms).

<sup>413</sup> "DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate." [Abernathy v. DoorDash, Inc.](#), 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020); Alison Frankel, "This Hypocrisy Will Not Be Blessed": Judge Orders DoorDash to Arbitrate 5,000 Couriers' Claims, REUTERS (Feb. 11, 2020, 4:10 PM), <https://perma.cc/7LRR-B2L9> (reporting that "[i]nstead of paying the requisite AAA fees" of \$ 12 million, DoorDash tried to use a pending state-court class action--"a case in which [it had] once attempted to compel arbitration"--to settle its couriers' claims for \$ 39.5 million).

<sup>414</sup> [Abernathy](#), 438 F. Supp. 3d at 1067-68 ("This hypocrisy will not be blessed, at least by this order.").

<sup>415</sup> See *Arena v. Intuit Inc.*, No. 19-cv-02546, [2021 WL 834253, at \\*1-3 \(N.D. Cal. Mar. 5, 2021\)](#).

#### IV. Contemporaneous and Future Developments

Part III showed that mass arbitration is a distinct business model and a distinct form of aggregate dispute resolution. A mass-arbitration model, if you can keep it.<sup>418</sup>

This Part examines three significant ways in which the mass-arbitration model must adapt. First, mass arbitration will require smaller firms to scale up, rapidly and exponentially, both to comply with the ethical obligations of individual representation and to cope with the increasing demands of mass individual claiming. Second, mass arbitration will likely require scaled-up arbitral fora to handle growing claim volume. Third, mass arbitration must cope with and adapt to revised arbitration agreements--and where necessary, challenge the legality of those revised contracts.

##### A. Scaled-Up Mass-Arbitration Firms

A viable aggregate dispute resolution practice must be able to retain its clients. Ouster of counsel based on firm rivalries has long been a feature of aggregate dispute resolution given the vast sums of money at stake;<sup>419</sup> mass [\*1361] arbitration is not meaningfully different in this regard. This dynamic was at play, for instance, during Intuit's attempt to settle mass-arbitration claims out from under mass-arbitration counsel by way of a class that purported to include the arbitration claimants.<sup>420</sup> Indeed, the Intuit story is just as much about Intuit trying to cripple a mass arbitration as it is about rival plaintiffs' firms trying to collect hefty fees for themselves by engineering a reverse-auction class settlement.<sup>421</sup>

It is defense-initiated attempts to oust counsel, however, that have so far dominated the mass-arbitration landscape. A number of defendants have tried to disqualify mass-arbitration firms--especially Keller Lenkner--from

<sup>416</sup> *Id.* at \*1.

<sup>417</sup> Transcript of Proceedings at 10, [Intuit, 2021 WL 834253](#) (No. 19-cv-02546), ECF No. 206 ("I did think when I looked at this, and saw that, really, that this was a way to avoid or otherwise circumscribe arbitration, that it seemed to be that Intuit was . . . hoisted by [its] own petard.").

<sup>418</sup> With regards (and apologies) to Benjamin Franklin. As delegates left Independence Hall in 1787 following the Constitutional Convention, Franklin was asked: "Doctor, what have we got? A republic or a monarchy?" "A republic," Franklin supposedly replied, "if you can keep it." See Gillian Brockell, "A Republic, if You Can Keep It": Did Ben Franklin Really Say Impeachment Day's Favorite Quote?, WASH. POST (Dec. 18, 2019, 6:36 PM EST), <https://perma.cc/RK86-WMQJ>.

<sup>419</sup> For example, the adequacy objection that helped destroy the settlement class in [Amchem Products, Inc. v. Windsor, 521 U.S. 591, 607-08, 625-28 \(1997\)](#), was brought by Fred Baron, a plaintiffs' attorney whose asbestos-heavy portfolio would have been eliminated by the Amchem settlement. See Linda S. Mullenix, *Standing and Other Dispositive Motions After Amchem and Ortiz: The Problem of "Logically Antecedent" Inquiries*, [2004 MICH. ST. L. REV. 703, 713](#) (observing that the Amchem objectors were represented by Baron's firm); David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy 1981-1994*, [86 FORDHAM L. REV. 1785, 1823-24 \(2018\)](#) (noting that asbestos class actions "jeopardized fee-generating relationships individual tort lawyers had with their clients," and describing Baron as "[i]mplacably and bitterly opposed to an asbestos class action"--so much so that he "spent \$ 4.5 million fighting major asbestos class settlements").

<sup>420</sup> See *supra* notes 415-17 and accompanying text.

<sup>421</sup> The notion of a reverse-auction class settlement is well understood and well traced in the scholarly literature and in class-action jurisprudence. A reverse-auction class settlement is one that results when a defendant harnesses the competition among plaintiffs' firms for control of the class litigation (and, by extension, associated attorney's fees), with the lowest bidder among the firms "winning" the right to settle with the defendant. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, [95 COLUM. L. REV. 1343, 1354 \(1995\)](#) (explaining the reverse-auction phenomenon); [Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282-83, 289 \(7th Cir. 2002\)](#) (reversing the district court's approval of a class settlement in part because the settlement could have been the product of a reverse auction).



representing clients in mass-arbitration proceedings. Importantly, defendants have sought to disqualify these firms based on key features of the mass-arbitration model.

For example, some defendants have argued that Keller Lenkner's representation of many individual claimants violates ethical constraints on group representation, particularly given the firm's small size.<sup>422</sup> Keller Lenkner has responded to this concern by disclosing its relationships with other law firms, including Quinn Emanuel and Troxel Law.<sup>423</sup> And while courts have recognized the concern in a few mass-arbitration rulings, it generally has not been sufficient to warrant disqualification.<sup>424</sup> Nonetheless, [\*1362] Keller Lenkner has reacted to the defendants' arguments by scaling up--and scaling up fast. The firm now has more than 100 employees, a full client-services department, and an advanced technology apparatus.<sup>425</sup> And at least according to its attorneys, the firm is willing and able to litigate as many arbitration demands as possible, as quickly as possible.<sup>426</sup> Although defense attorneys still believe Keller Lenkner lacks the staffing necessary to pursue thousands of individual demands,<sup>427</sup> it is clear that mass arbitration will require large, well-resourced firms going forward.

It may also require many different firms. In addition to size-related concerns, defendants have tried to leverage procedural posture--recall that mass arbitrations often follow the stay (or dismissal) of a class or collective action<sup>428</sup>--to disqualify counsel. Chipotle, for instance, said that law firms representing plaintiffs dismissed from a wage-and-hour collective action should not be allowed to represent those plaintiffs in arbitration.<sup>429</sup> By encouraging claimants to (initially) pursue their claims in court, Chipotle argued, the firms had compromised their clients' interests.<sup>430</sup> The District of Colorado rejected this argument.<sup>431</sup> But had Chipotle succeeded, new firms would have needed to step in and fill the gap.

Disqualification motions are not just a tactic in mass arbitration; they are common across the aggregate dispute resolution landscape.<sup>432</sup> Accordingly, defendants will almost certainly file these motions against mass-arbitration firms in the future. Firms can fend off disqualification, at least in part, by scaling up. And in the meantime, having many mass-arbitration firms will allow claims to continue even if disqualification motions succeed.

## B. Scaled-Up Arbitral Fora

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<sup>422</sup> See, e.g., *Intuit* Opposition to Motion, *supra* note 246, at 1-2, 6-7.

<sup>423</sup> See *CenturyLink* Postman Declaration, *supra* note 248, P 7.

<sup>424</sup> See, e.g., *In re CenturyLink Sales Pracs. & Sec. Litig.*, No. 17-md-02795, [2020 WL 3513547, at \\*7-8, \\*10-11 \(D. Minn. June 29, 2020\)](#); see also, e.g., *Arena v. Intuit Inc.*, No. 19-cv-02546, [2021 WL 834253, at \\*4, \\*7-11 \(N.D. Cal. Mar. 5, 2021\)](#) (noting that Keller Lenkner may not be "looking out for its clients' best interests" but rejecting a proposed settlement on other grounds).

<sup>425</sup> See *CenturyLink* Postman Declaration, *supra* note 248, P 5; Interview with Warren Postman, *supra* note 40.

<sup>426</sup> See, e.g., Interview with Warren Postman, *supra* note 40.

<sup>427</sup> See Interview with Anonymous No. 4, *supra* note 42.

<sup>428</sup> See *supra* notes 258-59 and accompanying text.

<sup>429</sup> *Chipotle Mexican Grill, Inc.'s Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement* at 21-23, *Turner v. Chipotle Mex. Grill, Inc.*, No. 14-cv-02612, [2018 WL 11314701 \(D. Colo. Aug. 3, 2018\)](#), ECF No. 172.

<sup>430</sup> See *id.* at 22-23.

<sup>431</sup> [Turner, 2018 WL 11314701, at \\*7.](#)

<sup>432</sup> See, e.g., *Diva Limousine, Ltd. v. Uber Techs., Inc.*, No. 18-cv-05546, [2019 WL 144589, at \\*1-2 \(N.D. Cal. Jan. 9, 2019\)](#).

The sustainability of the mass-arbitration model also depends on arbitral fora that can expeditiously handle a large volume of claims. The ability to arbitrate claims individually (or credibly threaten to do so) is not just a [\*1363] function of a firm's economic wherewithal; it is also a function of the designated forum's demand-processing capabilities. In more concrete terms, arbitration fees are assessed as the proceeding progresses: There are unique costs associated with filing, arbitrator retention, preliminary review, and so on. If a defendant knows that arbitration proceedings will not realistically move forward, a plaintiffs' firm--even one with the means to bring thousands of claims--will not be able to leverage fees.<sup>433</sup>

Arbitral fora, then, must also scale up. The speed at which these fora operate is not suitable for mass arbitration today. In the Postmates mass arbitration, for example, assigning arbitrators to fifty individual cases took over three months.<sup>434</sup>As Postmates put it, the "AAA is [just not] equipped to handle that many arbitrations at the same time."<sup>435</sup>

An individual mass-claiming model could never function in the taxpayer-funded, resource-strapped court system. The AAA or JAMS, however, could easily handle \$ 50 million worth of claims across a large set of individual proceedings.<sup>436</sup>Scaling up these fora, then, is largely a matter of logistics.<sup>437</sup>But the fora must also have an incentive to grow, and that incentive likely depends on whether mass arbitrations will stay in front of AAA and JAMS arbitrators. This is significant, as both the AAA and JAMS have reason to suspect mass arbitrations could go elsewhere.

Because mass arbitration depends on the ability to actually litigate (or threaten to litigate) claims, defendants might move arbitration proceedings from heavily capitalized, large fora like the AAA and JAMS to small outfits incapable of processing more than a few claims a year. Changes along these lines would not only deter the AAA and JAMS from scaling up; they would also hamstring mass arbitration's settlement power in cases sent to smaller fora. Corporate strategy here would most likely look similar to AT&T's strategy in *Concepcion*: point to the presumably "friendly" rules of the new forum in hopes that the court will not notice (or care) that the forum is [\*1364] literally incapable of processing claims.<sup>438</sup>To date, corporations have not taken this approach. Yet as the next Subpart explains, corporations have attempted to achieve similar results by specifying defendant-friendly fora in their revised agreements.

### C. Revised Agreements

With their "friendly" arbitration agreements, corporate defendants may well have been hoisted by their own petards.<sup>439</sup>But defendants still have the power: They drafted the agreements, which means they can change them.<sup>440</sup>Live by the sword, die by the sword.

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<sup>433</sup> See *supra* Parts III.C.1-.2.

<sup>434</sup> *Postmates* Initial Complaint, *supra* note 273, P 49 ("Although Postmates paid filing fees for fifty arbitrations in December 2019, as of March 25, 2020, only 21 arbitrators had been confirmed and only two arbitrators had conducted individual hearings.").

<sup>435</sup> First Amended Complaint for Declaratory & Injunctive Relief P 43, *Postmates Inc. v. 10,356 Individuals*, No. 20-cv-02783 (C.D. Cal. Apr. 2, 2020), ECF No. 7.

<sup>436</sup> Because these private fora obtain funding through fees, they do not rely on taxpayer dollars and are not subject to statutory resource limitations. See, e.g., *supra* text accompanying note 351 (noting that a set of arbitration proceedings before the AAA could cost Uber more than \$ 90 million).

<sup>437</sup> Indeed, both the AAA and JAMS have gotten better at handling mass arbitrations in recent years. See Interview with Matthew C. Helland, *supra* note 40.

<sup>438</sup> See *supra* notes 178-79 and accompanying text; see also Miller, *supra* note 103, at 800 (noting that arbitration agreements like the one in *Concepcion* "typically offered a wide variety of goodies to customers").

Indeed, perhaps the most significant challenge to the future of mass arbitration is revised arbitration agreements. This Subpart focuses on three types of revisions with which the mass-arbitration model must cope: (1) the elimination of fee-shifting provisions; (2) the insertion of "batching" provisions; and (3) the insertion of provisions that move mass-arbitration claims to defendant-friendly arbitral fora.

### 1. Eliminating fee provisions

One judge has referred to mass arbitration's leveraging of fee-shifting provisions as "poetic justice."<sup>441</sup> Some take the view, however, that the price tag of this particular justice--whatever its poetic force--might be a bit excessive. Across the arbitration-services industry, organizations have scrambled to adapt their protocols to mass arbitration. The AAA recently adopted a sliding-scale fee schedule that reduces up-front filing fees as more related claims are filed.<sup>442</sup> And new arbitration outlets are engaged in fierce competition with one another (not to mention the AAA) to cash in on what they see as a mass-arbitration business opportunity. Some small arbitration services--for instance, New Era ADR and FedArb--openly court businesses with promises of cost savings by way of virtual platforms (New Era)<sup>443</sup> or [\*1365] protocols designed to ease the burdens of mass arbitration (FedArb).<sup>444</sup> In October 2021, National Arbitration and Mediation issued a "customized fee structure to address issues that have arisen as a result of mass filings of arbitration demands in the Employment and Consumer arenas."<sup>445</sup>

Whatever arbitral fora do with their fee schedules, many fee-shifting provisions in arbitration contracts are not long for this world. In May 2021, Gibson Dunn recommended that defendants rethink provisions committing them to paying arbitration fees.<sup>446</sup> Gibson Dunn further suggested that companies add new fee-shifting provisions--this time shifting fees *to the plaintiffs*--for claims deemed by an arbitrator to be frivolous.<sup>447</sup> Scores of companies have already changed their arbitration agreements to avoid undesirable fee shifting.<sup>448</sup> And some companies have gone even further, battling to get their revised agreements applied retroactively.<sup>449</sup>

<sup>439</sup> See *supra* note 417 and accompanying text.

<sup>440</sup> See Glover, *supra* note 75, at 3059; Fitzpatrick, *supra* note 152, at 176-79.

<sup>441</sup> Transcript of Proceedings at 27, *Abernathy v. Doordash, Inc.*, No. 19-cv-07545 (N.D. Cal. Nov. 27, 2019), ECF No. 67; see also, e.g., Michael E. McCarthy, Jeff E. Scott & Robert J. Herrington, *Stemming the Tide of Mass Arbitration*, GREENBERG TRAURIG (June 7, 2021), <https://perma.cc/F3SK-LU9M>.

<sup>442</sup> See Am. Arb. Ass'n, *supra* note 244, at 1-3.

<sup>443</sup> See Press Release, New Era ADR, Tech Startup New Era ADR Aims to Disrupt Traditional Litigation and Dispute Resolution with New Business Platform (Apr. 20, 2021), <https://perma.cc/GMC5-MCLB>; see also *Digital Arbitration*, NEW ERA ADR, <https://perma.cc/YA8K-W4ZL> (archived Aug. 23, 2022) ("[W]e made the entire [arbitration] process fully digital and fully virtual so you can tell your story to an experienced arbitrator from anywhere in the world.").

<sup>444</sup> FedArb promises a structure that "backends the administrative costs, . . . adjudicate[s] the claims on a fixed cost basis[,] and . . . [uses] an MDL type procedure to deal with common issues." Alison Frankel, *Another Arbitration Service--FedArb--Establishes New Mass Arbitration Protocol 1* (2020), <https://perma.cc/7CHS-YJK5> (quoting an email statement from FedArb CEO Ken Hagen).

<sup>445</sup> Press Release, Nat'l Arb. & Mediation, NAM Introduces a Customized Fee Structure for Mass Arbitration Filings in the Employment and Consumer ADR Arenas (Oct. 20, 2021), <https://perma.cc/HR8L-VJUL>.

<sup>446</sup> See Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, GIBSON DUNN (May 24, 2021), <https://perma.cc/WH45-7NLZ>.

<sup>447</sup> *Id.*

<sup>448</sup> See Interview with Cory L. Zajdel, *supra* note 40. Compare, e.g., *Terms of Use* P 17, TICKETMASTER, <https://perma.cc/5MMJ-Y7V8> (archived May 19, 2022) [hereinafter *Ticketmaster 2022 Terms*] ("If you commence an arbitration

Mass-arbitration attorneys no doubt anticipated the removal of at least some fee-shifting provisions. Fee leveraging at the current scale was always going to be a one-time opportunity--essentially a chance to short sell on a market error. As companies remove fee-shifting provisions and claimant leverage begins to decrease, the mass-arbitration model will almost certainly [\*1366] become less attractive to firms and third-party funders. Are the agreements above, then, the death knell for mass arbitration?

Likely not. For one, individual arbitration is expensive even without fee shifting. Defendants incur substantial arbitration costs beyond filing fees; multiplied by 1,000 or 10,000, these costs are still sufficient to generate significant settlement pressure.<sup>450</sup> For another, established mass-arbitration firms will not always need to front the filing fees for tens of thousands of demands. In mass arbitration's infancy, the fronting of fees was no doubt necessary for firms to show that their threats were not empty. In 2018, a defendant corporation may well have laughed at a new firm's threat to file 12,500 demands and to advance 12,500 filing fees. Today, less so. For yet another, current law imposes limits on the arbitration fees defendants can force claimants to pay.<sup>451</sup> Accordingly, companies trying to contract around their fee obligations will likely find their agreements struck down on unconscionability or effective-vindication grounds.<sup>452</sup>

Further, not all corporate defendants will remove fee-shifting provisions from their arbitration agreements. Corporations with fewer resources, less legal sophistication, or less flexibility (or some combination of the three) will likely be less able to adapt. Companies that cannot quickly revise their agreements--agreements essentially copied and pasted from AT&T (or a [\*1367] similar corporate entity) pursuant to general legal advice<sup>453</sup>--will almost certainly be mass-arbitration defendants soon enough. The future of mass arbitration will likely involve fewer claims against the biggest and most sophisticated national corporations and more claims against less nimble regional and local outfits. For these outfits, after all, the full range of fee-leveraging mechanisms will remain available.

Of course, changes to fee schedules and the removal of fee-shifting provisions will still be consequential. These shifts will force claimants and firms to rely more on mass arbitration's other features, including the imposition of

in accordance with the Terms, you will be required to pay New Era ADR's \$ 300 filing fee."), *with Terms of Use*, TICKETMASTER (archived Oct. 1, 2013) ("We will reimburse [JAMS] fees for claims totaling less than \$ 10,000 . . ."), *reprinted in* Exhibit 51 to Declaration of Kimberly Tobias in Support of Defendants' Amended Motion to Compel Arbitration, Oberstein v. Live Nation Ent., Inc., No. 20-cv-03888, [2021 WL 4772885 \(C.D. Cal. Sept. 20, 2021\)](#), ECF No. 85-51.

<sup>449</sup> See Interview with Cory L. Zajdel, *supra* note 40.

<sup>450</sup> See, e.g., Helland, *supra* note 336, at 217, 222; Am. Arb. Ass'n, *supra* note 241, at 2-3: *Arbitration Schedule of Fees and Costs*, *supra* note 241; see also, e.g., Interview with Anonymous No. 4, *supra* note 42 (noting that mass arbitration relies on the general leveraging of arbitration fees); Interview with Travis Lenkner & Warren Postman, *supra* note 40 (observing that, beyond just up-front fees, defendants have created an expensive dispute-resolution process filled with transaction costs).

<sup>451</sup> [Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687-89 \(Cal. 2000\)](#); see also *supra* note 372 and accompanying text. It is possible that the Supreme Court will modify or reject the *Armendariz* rule; the rule's validity has been central to recent certiorari petitions. See, e.g., Petition for a Writ of Certiorari at 1-3, [Winston & Strawn LLP v. Ramos, 140 S. Ct. 108 \(2019\)](#) (No. 18-1437), 2019 WL 2140500.

<sup>452</sup> Indeed, courts have already struck down agreements that improperly shift costs to arbitration claimants. See, e.g., [Armendariz, 6 P.3d at 687-89](#); [Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 368-73 \(N.C. 2008\)](#) (holding an arbitration agreement unconscionable in part because of its "loser pays" provision); [Delta Funding Corp. v. Harris, 912 A.2d 104, 111-13 \(N.J. 2006\)](#) (finding a provision allowing an arbitrator "unfettered discretion to allocate the entire cost of arbitration to a consumer" unconscionable under New Jersey law); [Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 175-76, 175 n.62 \(Wis. 2006\)](#) (citing *Armendariz* and invalidating an arbitration provision that required short-term, high-interest loan recipients to pay a filing fee of \$ 125); see also [Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1035 \(Ariz. 2021\)](#) (noting that the "financial costs of arbitration [can] prohibit a plaintiff from vindicating her rights," particularly when the plaintiff cannot pay and the arbitration agreement contains no hardship provision); S. 707, 2019 Leg. (Cal. 2019) (affirming the *Armendariz* decision and imposing penalties on companies that do not pay their arbitration fees).

<sup>453</sup> See, e.g., Miller, *supra* note 103, at 820 n. 123.

asymmetric costs through individual arbitration proceedings. But even these other features are not safe: As the next Subpart explains, defendants are also targeting asymmetric cost imposition.

## 2. Inserting "batching" provisions

To reduce the settlement pressure imposed by the asymmetric costs of individual arbitration proceedings, <sup>454</sup>defendants have inserted "batching" provisions into their agreements. <sup>455</sup>In addition, arbitration outfits have adopted mass-arbitration protocols that include batching. <sup>456</sup>While precise details vary across agreements and fora, the basic idea is that after a certain number of legally and factually related demands are filed, those demands are "batched" into a group for resolution in one proceeding. <sup>457</sup>The "batch" then gets assigned to an arbitrator or panel of arbitrators, and it triggers a single filing fee. <sup>458</sup>Notably, some batching provisions exist alongside contractual class-action waivers. <sup>459</sup>

Batching provisions may diminish the attractiveness of the mass-arbitration model by reducing its ability to use individual claiming to the plaintiff's advantage. Indeed, FedArb markets its batching protocol--under which a panel of arbitrators conducts a single proceeding to resolve, in a binding fashion, common pretrial issues--along these lines: "[T]here will be [\*1368] little need for individual arbitrations, thereby expediting payment and greatly reducing costs--including the elimination of millions in arbitration fees." <sup>460</sup>

Batching could accordingly put pressure on other parts of the mass-arbitration model, particularly the claim-value threshold. <sup>461</sup>Batching ensures that only easy-to-prove, near-slam-dunk cases will be economically attractive for firms to pursue. <sup>462</sup>As a result, claims of racial discrimination and sexual harassment--which are typically of nominal value and present challenges regarding proof--could be left out of the mass-arbitration equation. <sup>463</sup>

Despite the increase in batching provisions and protocols, it is not clear that batching will be desirable in the long run. Batching is not guaranteed to create efficiency or reduce costs, and batching provisions could ultimately disadvantage both claimants and defendants in mass-arbitration proceedings.

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<sup>454</sup> See *supra* Part III.C.2.

<sup>455</sup> See Holecek, *supra* note 446.

<sup>456</sup> See *infra* notes 460, 464-66, 471 and accompanying text.

<sup>457</sup> This resolution could be a general determination regarding common issues, or it could be a set of decisions on the merits for a small group of test cases.

<sup>458</sup> Holecek, *supra* note 446.

<sup>459</sup> See, e.g., *Terms of Use: Dispute Resolution* PP III, VII, GRUBHUB, <https://perma.cc/8RXH-XL7M> (archived May 19, 2022) (containing both a class-action waiver and a batching provision, and stating that the batching provision "shall in no way be interpreted as authorizing class arbitration of any kind"); *Terms of Service (U.S.)* P 19(c), (g), DRIZLY, <https://perma.cc/6JWB-7YQ4> (archived May 19, 2022) (same).

<sup>460</sup> Kennen D. Hagen, *Mass Arbitrations*, TODAY'S GEN. COUNS., Sept. 2021, at 12, 13. Hagen is the CEO and president of FedArb. *Id.*

<sup>461</sup> See *supra* Part III.C.3.

<sup>462</sup> Because batching makes fee leveraging more challenging, the claims that are filed are more likely to move forward. The merits of those claims will therefore be more important, and firms will be more selective in which claims they take on.

<sup>463</sup> See Glover, *supra* note 132, at 1772 & n.221 (noting that "employment discrimination cases often concern low-value claims held by low-wage earners"); *infra* notes 524-25 and accompanying text.

By way of example, consider the CPR's batching protocol. When more than thirty employment demands of a "nearly identical nature" come before the CPR, the CPR randomly selects ten demands to proceed as test cases.<sup>464</sup> After the test cases have concluded, both sides enter into a mediation process.<sup>465</sup> If mediation does not produce a global resolution, the remaining demands move forward either in arbitration or in court.<sup>466</sup> The threat of individual proceedings on the back end of mediation may incentivize both parties to reach a global settlement based on the test cases--at least to the extent those cases generated uniform results.<sup>467</sup> This would be an efficient outcome.

But this potentially desirable outcome is not required, and it does not appear particularly inevitable given that the test cases are not binding or precedential. Nonbinding bellwethers are not well poised to guard against strategic holdout, where a party threatens inefficiency or delay to change the [\*1369] price of settlement.<sup>468</sup> Even if the first ten claimants lost, for example, the eleventh claimant could threaten to reject the defendant's offer and proceed with arbitration to drive up the settlement price.<sup>469</sup> And even if those ten claimants won, the defendant could still threaten to sabotage mediation and opt out of arbitration to drive the settlement price down.<sup>470</sup> These results benefit neither party.

Even binding test cases may not solve the problem--at least not under existing protocols. Unlike the CPR, New Era ADR provides for three bellwether trials, the results of which are precedential in cases involving common issues of law and fact.<sup>471</sup> Three binding bellwethers could usher in a global settlement without the challenges described above. But two additional things must be true for this to occur, and neither seems particularly likely under the New Era protocol. First, the findings and outcomes of the three bellwethers must be in accord with one another. Each side selects one of the bellwethers,<sup>472</sup> however, meaning that the results could easily differ. Second, the selected bellwethers must actually represent the mass of claims.<sup>473</sup> With only three bellwethers (two of which are selected by the parties), this seems improbable at best.

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<sup>464</sup> INT'L INST. FOR CONFLICT PREVENTION & RESOL., WHAT IS THE EMPLOYMENT-RELATED MASS CLAIMS PROTOCOL? 2-3 (2019), <https://perma.cc/9ZDN-DVLN>.

<sup>465</sup> *Id.* at 5-6.

<sup>466</sup> *Id.* at 1, 6-7.

<sup>467</sup> *Cf.*, e.g., Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-legal Analysis*, 59 *BROOK. L. REV.* 961, 979-80 (1993) (noting that the Bendectin mass-tort litigation "dwindled away" after a bellwether jury ruled against the plaintiffs on causation).

<sup>468</sup> *See*, e.g., Alain Frécon, *Delaying Tactics in Arbitration*, DISP. RESOL. J., Nov. 2004/Jan. 2005, at 40, 46 ("Sometimes, a party seeks to delay arbitration . . . in the hope that the other side will be forced to abandon the proceedings or agree to a settlement.").

<sup>469</sup> *See* INT'L INST. FOR CONFLICT PREVENTION & RESOL., *supra* note 464, at 7.

<sup>470</sup> *See id.* at 6-7.

<sup>471</sup> *Rules and Procedures* PP 2(x)-(y), 6(b)(iii), NEW ERA ADR, <https://perma.cc/FF5P-XNRA> (last updated Mar. 2, 2022).

<sup>472</sup> *Id.* P 6(b)(iii)(3)(b) ("Claimant(s), collectively on the one hand, and Respondent(s), collectively on the other hand, will each select one 'Bellwether Case' from all the cases that were filed.").

<sup>473</sup> That is, they must not offend long-standing notions of due process. *See*, e.g., *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1017, 1020-21 (5th Cir. 1997) (rejecting the trial court's plan to use bellwether cases for settlement purposes, finding that the cases "lack[ed] the requisite level of representativeness so that the results could permit a court to draw sufficiently reliable inferences about the whole"). While the *Chevron* court was "sympathetic to the efforts of the [trial] court to control its docket and to move this case along," its "sympathies . . . [did] not outweigh . . . due process concerns." *Id.* at 1021.

More fundamentally, to the extent batching protocols shift the mass-arbitration model into a class-action or MDL model, it is not clear that this shift would be preferable for either defendants or claimants. All else equal, if defendants are stuck with an arbitration that looks like a class action or an MDL consolidation, they would probably prefer to be in court. Indeed, court proceedings are less expensive, provide for substantial judicial review, and [\*1370] generally present defendants with favorable doctrine.<sup>474</sup> And for plaintiffs' attorneys, batching transforms the lucrative mass-arbitration model into a more expensive version of a class action or an MDL.

### 3. Provisions that change the arbitral forum

In response to mass arbitration, some defendants have sought to change the arbitral forum--either by designating a new forum or designing new procedures for the forum, or both. Defendants have already begun using contractual revisions to move arbitration proceedings from neutral fora like the AAA or JAMS to more defendant-friendly outfits. In 2019, for instance, DoorDash found itself "dissatisfied with the AAA's due process protocol requirements and [its] requirements for . . . filing fees" in light of mass-arbitration demands.<sup>475</sup> In response, Gibson Dunn reached out to the CPR to request protocols "created for DoorDash, at DoorDash's request, and with the input of DoorDash and its lawyers."<sup>476</sup> The CPR agreed to create these protocols,<sup>477</sup> at which point DoorDash sent its drivers revised agreements [\*1371] designating the CPR as its arbitral forum.<sup>478</sup> Emails reveal that the CPR saw DoorDash's request as a lucrative business opportunity, especially given Gibson Dunn's "large book" of clients.<sup>479</sup> Claimants challenged the new agreement, but Northern District of California Judge Edward Chen was not persuaded there

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<sup>474</sup> See, e.g., Charles Silver & Maria Glover, *Zombie Class Actions*, SCOTUSBLOG (Sept. 8, 2011, 10:16 AM), <https://perma.cc/J6Y6-KZG9>. The favorable-doctrine point might help explain Amazon's recent retreat to the class action. See *supra* note 35 and accompanying text. Facing a host of novel strict-liability claims arising under state law, see, e.g., *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 605 (Ct. App. 2020) ("Under established principles of strict liability, Amazon should be held liable if a product sold through its website turns out to be defective."); *Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 779 (Ct. App. 2021) ("[W]e are persuaded that Amazon's own business practices make it a direct link in the vertical chain of distribution under California's strict liability doctrine."), Amazon issued new contracts requiring all claims against the company to be brought in its home state of Washington, Robert, *supra* note 35. Washington does not have case law resembling *Bolger* or *Loomis*; accordingly, Amazon could have removed its arbitration provision (in part) to obtain favorable precedent in the state. See *Will Amazon Be Liable for Defective Products in Washington?*, RUSSELL & HILL, PLLC: BLOG (Aug. 17, 2020), <https://perma.cc/3FZY-CPB4> ("Right now, there is no consensus [in Washington] as to whether . . . Amazon should be considered only a neutral middle-man distributor of products or if they should be held legally liable for injuries . . ."); Todd Bishop, *Landmark Product Liability Ruling Puts Amazon's Third-Party Marketplace in a New Legal Pinch*, GEEKWIRE (updated Aug. 14, 2020, 2:30 PM), <https://perma.cc/6DYK-55TZ> (noting Amazon's hostility to the *Bolger* decision). Amazon would not have been able to obtain similar precedent through private arbitration.

<sup>475</sup> [Unredacted] Declaration of Aaron Zigler in Support of Petitioners' Reply in Support of Amended Motion to Compel Arbitration PP 11-12, *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2020) (No. 19-cv-07545), ECF No. 180-3 (quoting a CPR email describing a conversation with Gibson Dunn attorney Michael Holecek).

<sup>476</sup> *Id.* PP 8-14.

<sup>477</sup> *Id.* P 9; see Declaration of Joshua Lipshutz in Support of Respondent DoorDash, Inc.'s Opposition to Petitioners' Amended Motion to Compel Arbitration at 414, *Abernathy*, 438 F. Supp. 3d 1062 (No. 19-cv-07545), ECF No. 157-5.

<sup>478</sup> Motion for a Temporary Restraining Order at 7, *Abernathy v. DoorDash, Inc.*, No. 19-cv-07545 (N.D. Cal. Nov. 17, 2019), ECF No. 10 (noting that DoorDash "began imposing a new arbitration agreement . . . provid[ing] for arbitration governed by" CPR rules a mere three days after the CPR issued its new protocols); see, e.g., Press Release, Int'l Inst. for Conflict Prevention & Resol., CPR Launches New Mass Claims Protocol and Procedure (Nov. 6, 2019), <https://perma.cc/2DSS-B5BV>.

<sup>479</sup> Alison Frankel, *The Problem with Outsourcing Justice to Mass Arbitration Services*, REUTERS (Feb. 27, 2020, 5:21 PM) (quoting an email from CPR vice president Helena Erickson), <https://perma.cc/E94Q-QXGL>.

had been any "catering or favoritism" or that the protocols were "so biased that [they] negate[d] the agreement to arbitrate."<sup>480</sup> For its part, the CPR said that it did not draft its new protocols to "woo employers."<sup>481</sup>

Other defendants are following DoorDash's lead. Ticketmaster, for example, changed its arbitral forum to New Era ADR shortly before a court granted its motion to compel arbitration on antitrust claims.<sup>482</sup> This timing does not seem coincidental: New Era bills itself as cheaper for businesses than other arbitral fora.<sup>483</sup> The new Ticketmaster agreement also provides that consumers must pay attorney's fees, not to mention the \$ 300 New Era filing fee.<sup>484</sup>

In the short term, these sorts of revisions are unlikely to meet with much resistance. Arbitral fora are businesses, after all, and corporations can decide which organizations get their business. Market pressure may lead smaller [\*1372] outfits to develop defendant-friendly protocols,<sup>485</sup> but defendants are free to forum shop so long as everything seems "fair and impartial."<sup>486</sup>

Long term, though, there may be limits to how far defendants can go in revising their agreements to select new and friendly fora. Revisions that provide for unfair procedures or specify a forum with unfair procedures (or both)<sup>487</sup> may collide with state unconscionability and effective-vindication limitations. Indeed, these sorts of revisions would look like the arbitration provisions defendants tried in the days before "friendly" agreements and *Concepcion*.<sup>488</sup> Contracts that specify wholly defendant-created arbitration procedures are not contracts for alternative dispute resolution permitted by the FAA; they are contracts designed to ensure defendant-friendly outcomes and eliminate claims.

But drawing the line is challenging. Defendants are smart, and they are unlikely to embrace blatantly unfair provisions or fora. This is true not just because unfair revisions could meet with resistance in the courts, but also because subtler and more effective revisions are possible. Consider a revision providing for an arbitral forum that is functionally incapable of processing more than a few claims each year. Perhaps this revision would fail (say, for

<sup>480</sup> McGrath v. DoorDash, Inc., No. 19-cv-05279, [2020 WL 6526129, at \\*9-11 \(N.D. Cal. Nov. 5, 2020\)](#) (noting, however, that "Gibson Dunn's involvement in the development of the [protocols] may raise some concern").

<sup>481</sup> Frankel, *supra* note 479 (quoting a CPR statement). More recently, the CPR created an "employment-related mass claims task force" comprised of attorneys from various plaintiffs' and defense firms "in an effort to continue to improve its procedures." See *Employment-Related Mass Claims Task Force*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (capitalization altered), <https://perma.cc/7C93-26MZ> (archived May 19, 2022). In 2021 DoorDash changed its arbitral forum once again, this time selecting ADR Services. See *Terms and Conditions--United States: DoorDash Consumers* P 12(c), DOORDASH, <https://perma.cc/2NQZ-Z4FK> (archived May 19, 2022) (to locate, select "View the live page"); *Terms of Service--United States: DoorDash Merchants* P 13.2, DOORDASH, <https://perma.cc/4RUC-G57T> (archived May 19, 2022) (to locate, select "View the live page"). For more on ADR Services, see *About ADR Services, Inc.*, ADR SERVS., INC., <https://perma.cc/76CS-AZWJ> (archived May 19, 2022).

<sup>482</sup> Complaint, *supra* note 238, PP 1-2, 6; Oberstein v. Live Nation Ent., Inc., No. 20-cv-03888, [2021 WL 4772885, at \\*1 \(C.D. Cal. Sept. 20, 2021\)](#), appeal filed, No. 21-56200 (9th Cir. Oct. 29, 2021); see also *supra* note 448.

<sup>483</sup> See, e.g., Press Release, New Era ADR, *supra* note 443.

<sup>484</sup> Ticketmaster 2022 Terms, *supra* note 448, P 17.

<sup>485</sup> See, e.g., *supra* notes 475-79 and accompanying text.

<sup>486</sup> See McGrath v. DoorDash, Inc., No. 19-cv-05279, [2020 WL 6526129, at \\*9-11 \(N.D. Cal. Nov. 5, 2020\)](#). Of course, "fair and impartial" does not mean "as neutral or claimant friendly as established outfits like JAMS and the AAA."

<sup>487</sup> Cf. Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, [101 VA. L. REV. 129, 132-35 \(2015\)](#) (describing the dangers of corporate "settlement mills," which "private parties may exclusively design, operate, and . . . oversee").

<sup>488</sup> See *supra* notes 176-77 and accompanying text.



contractual impossibility<sup>489</sup>). But it is ostensibly neutral, and there is always the risk that courts will be unwilling to peek behind the curtain.

That said, some revisions push dispute resolution beyond the traditional bounds of arbitration more clearly than others. The Supreme Court, for example, has defined arbitration to involve bilateral proceedings;<sup>490</sup> revisions related to fees would likely be acceptable under this definition, but revisions involving batching could be suspect. Although the Court has not fully [\*1373] examined the FAA's outer limits,<sup>491</sup> it has made clear that the Act has boundaries<sup>492</sup> and that its terms have independent meaning.<sup>493</sup>

For decades, private parties' authority to select arbitration has been premised on the idea that the FAA "places arbitration agreements on equal footing with all other contracts."<sup>494</sup> But it is difficult to put arbitration agreements on equal footing if "arbitration" is meaningless. Could a process that indefinitely drags out the resolution of claims be fairly described as "arbitration"? What about a process that only adjudicates bellwether claims, five at a time, until the claimants agree to a global deal? The selection of a forum that, as a functional matter, can only hear one or two claims yearly? Mass arbitration's future hinges in no small part on these fundamental questions of statutory interpretation.

The same is true of mass arbitration's potential to upend the class-action counterrevolution. From a defendant's perspective, a class action may well be preferable to a mass arbitration--but nothing would be more preferable than a private dispute-resolution system of the defendant's own design. If courts allow "adjudication by defendant" or permit dispute resolution that looks nothing like traditional arbitration, then mass arbitration will have made consumers and employees better off in the short term, but worse off in the long term.

## V. Case-Study Findings and Limitations

### A. Mass-Arbitration Taxonomy

The previous Parts uncovered and distilled the principal features of the mass-arbitration model and revealed what the future of the model may look like. This Subpart synthesizes the Article's findings and develops the first working taxonomy of the mass-arbitration model. It also situates mass arbitration--as a distinct model of aggregate dispute resolution--within the broader landscape of complex procedure.

[\*1374] Table 1 below taxonomizes what I term "Mass Arbitration 1.0," which is the mass-arbitration model as it originated (and still exists for thousands of claims). It also taxonomizes what I term "Mass Arbitration 2.0 (Projected)," which draws from the findings in this study to predict the future of mass arbitration. Table 1 presents these two models alongside the two most established forms of aggregate dispute resolution: class action and MDL consolidation.

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<sup>489</sup> See [9 U.S.C. § 2](#) (noting that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").

<sup>490</sup> See, e.g., [AT&T Mobility LLC v. Concepcion](#), 563 U.S. 333, 347-48 (2011); [Am. Express Co. v. It. Colors Rest.](#), 570 U.S. 228, 238-39 (2013); see also *supra* notes 81-89 and accompanying text.

<sup>491</sup> See, e.g., [Zaborowski v. MHN Gov't Servs., Inc.](#), 601 F. App'x 461, 463 (9th Cir. 2014) (finding unconscionable an arbitration agreement that, inter alia, gave the defendant "near-unfettered" control over arbitrator selection and required claimants to pay a filing fee of \$ 2,600), *cert. granted*, 136 S. Ct. 27 (2015), and *cert. dismissed*, 136 S. Ct. 1539 (2016).

<sup>492</sup> See [Hall St. Assocs. v. Mattel, Inc.](#), 552 U.S. 576, 578-81, 585-88 (2008) (holding that a contract for de novo review of arbitral decisions was foreclosed by the FAA, which provides the terms for judicial review of arbitration).

<sup>493</sup> [New Prime Inc. v. Oliveira](#), 139 S. Ct. 532, 536, 538-41, 543-44 (2019) (holding that the term "employment" in the FAA has a historical meaning separate from and unalterable by private contracts).

<sup>494</sup> [Buckeye Check Cashing, Inc. v. Cardegna](#), 546 U.S. 440, 443 (2006).

**Table 1**

Aggregate Dispute Resolution Taxonomy

	<b>Mass</b>	<b>Mass</b>		<b>MD</b>
	<b>Arbitration 1.0</b>	<b>Arbitration 2.0</b>	<b>Class Action</b>	<b>Con</b>
Procedural Posture	Dismissal of antecedent class action; motion to compel arbitration	<b>(Projected)</b> Antecedent class actions possible (DirecTV, Ticketmaster);  direct filings	Class complaint filed	JPM MD
Creation of the "Mass"	Attorneys retain all individuals as clients	Attorneys retain all individuals as clients	Class definition in class complaint	Com pret proc U.S
Review of the "Mass"	Sufficiency of demands  determined by arbitrator	Filing threat alone in some cases; in others, sufficiency of demands determined by (potentially) new arbitrators in new contracts	Class certification analysis under  Rule 23(a), (b), (c)(4)	Mot mot  sum judg settl eligi
Claim-Value Threshold	Minimum: High hundreds to > \$ 2,000	Likely minimum: ~\$ 1,000 to ~\$ 3,000	Minimum: Low (\$ 20 for Fitbit) or individually unmarketable	Low indi mar
Claim Filing	Individual demand and high filing fee	Individual demand and group  arbitration fee; fee schedules	Single class complaint and low (or waived) filing  fee	Indi com mas  in M

	<b>Mass Arbitration 1.0</b>	<b>Mass Arbitration 2.0 (Projected)</b>	<b>Class Action</b>	<b>MD Con</b>
Claim Management	Significant: Ethical rules regarding individual representation (intake/outflow)	Significant: Ethical rules regarding individual representation (intake/outflow)	Minimal: Absent class members do not need to (or do not) participate	Mini stay con pret proc

**[\*1375]**

	<b>Mass Arbitration 1.0</b>	<b>Mass Arbitration 2.0 (Projected)</b>	<b>Class Action</b>
Claim Litigation	Individual proceedings	Individual proceedings; possible batches with test-case sets	Common question of law and fact determined on class-wide basis
Settlement Leverage (Global)	Claimant mass; statutory remedial schemes; leveraging of significant up-front fees and arbitration fees; transaction-cost imposition (or threat thereof)	Claimant mass; statutory remedial schemes; "slam-dunk" claims; leveraging of nonwaivable arbitration fees and costs	Claimant mass; certification of class; publicity (maybe)
Settlement Structure (Global)	Similar to mass-tort grids	Potential for lowball settlements and reverse auctions with defendants' potential class-action optionality	Settlement grids
Settlement Distribution (Global)	Individual; contractually imposed	Individual; contractually imposed	Class-wide notice (cost shared); court-appointed

	<b>Mass</b>	<b>Mass</b>	
	<b>Arbitration 1.0</b>	<b>Arbitration 2.0</b>	<b>Class Action</b>
	procedural hurdles; administration by counsel and counsel-hired settlement administrator	<b>(Projected)</b> procedural hurdles; administration by counsel and counsel-hired settlement administrator	(typically) settlement administrator
Settlement Review (Global)	Little to no judicial review; Model Rule 1.8	Little to no judicial review; Model Rule 1.8	Rule 23(e); judge as class fiduciary; appeal
Forum Rules	Arbitral forum's rules, except as amended by contract or allowed under the FAA	Forum rules developed with (potentially significant) defendant input or by defendant's design in contract	Federal Rules of Civil Procedure or state equivalent
Firm Profile	Well capitalized (or sacrificial); entrepreneurial; risk seeking	Well established, big firms; more repeat players	Class counsel dominated by repeat players

### **[\*1376]** B. Study Limitations

This Subpart briefly discusses the limitations of the Article's study. Two limitations in particular are worth noting. First, mass arbitration is a rapidly evolving phenomenon. Although this study captures the mass-arbitration model at a critical moment in time, it is still only a single moment; future developments will require future investigation. Second, the private nature of arbitration means that the study does not cover the full universe of arbitration demands. Some information is, and will remain, unobtainable.<sup>495</sup>

These limitations shed light on several important points. Three bear emphasis here. One, because some mass arbitrations do not appear in any arbitral records, the precise size and scope of mass arbitration is a somewhat open question. The arbitration market is comprised of both institutional and ad hoc fora, and moves to ad hoc organizations will undoubtedly increase in the coming years.<sup>496</sup> Together, the ad hoc market and the rise in direct-to-arbitration filings (as opposed to filings that follow a class or collective action) mean that some mass arbitrations will proceed entirely in secret--if they do not do so already.

Two, with the exception of confirmed arbitration decisions,<sup>497</sup> it is an open question whether (and how far) a given arbitral demand proceeded.<sup>498</sup> Relatedly, it is an open question for a given demand what (if anything) was litigated and what (if anything) was decided.

Three, because arbitrator decisions on fees are confidential, it is not entirely clear to what extent claimants, defendants, or both were granted fee waivers. Many of the claimants in this investigation were eligible for fee waivers--particularly for economic hardship--but information regarding which claimants obtained those waivers is not available. Therefore, it is impossible to pin down with precision the exact fee burdens in a given mass arbitration.

The above limitations and the points that they raise would be (and are) present in any study of arbitration.<sup>499</sup> Indeed, these shortcomings and issues stem from features, not bugs, of the arbitration model. Arbitral proceedings **[\*1377]** and decisions are confidential. Settlements are confidential, and defendants threaten to deny payouts to individuals who discuss them. Defendants have even attempted to make legal rights confidential by threatening to deny payouts to individuals who mention those rights to others. Many individuals do not understand the nature of their legal rights. Many defendants use arbitration to keep it that way.

### C. Study Takeaways

The discussion above reveals that mass arbitration is a new and distinct model of dispute resolution. But it is more than that: It is also the first (and only) meaningful response to the arbitration revolution and the class-action counterrevolution. In its current form, however, mass arbitration's half-life may be short. Defendants--especially sophisticated, nimble, well-resourced ones--are already adapting in ways that suggest Mass Arbitration 1.0 is not long for this world. Importantly, though, defendants are not adapting by abandoning arbitration. Instead, it seems

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<sup>495</sup> See, e.g., Estlund, *supra* note 38, at 684-86; Resnik, *supra* note 256, at 799.

<sup>496</sup> See *supra* Part IV.C.3.

<sup>497</sup> See, e.g., Simpson v. Peloton Interactive, Inc., No. 20-cv-07630, [2021 U.S. Dist. LEXIS 125416, at \\*1-3, \\*6-8 \(S.D.N.Y. July 2, 2021\)](#).

<sup>498</sup> I have, however, been able to uncover general data on this "known unknown." In the gig-economy mass arbitrations, proceedings have occurred to some degree in over 100 cases per defendant (close to 1,000 cases total). In the Amazon mass arbitration, hundreds of demands have proceeded in some manner in the arbitral forum.

<sup>499</sup> For another arbitration case study discussing similar limitations, see Horton & Chandrasekher, *supra* note 33, at 476-78.



like defendants are leaning into a renewed campaign to "take back the revolution."<sup>500</sup> If webinars, continuing legal education (CLE) programs, conferences, podcasts, and the like are any indication, all parties are seeking to adjust to the new landscape--of which mass arbitration will certainly be a part.<sup>501</sup>

That said, it is possible that mass arbitration will eventually be its own undoing. Whether this is for ill or for good depends on the form that the undoing takes. On the one hand, mass arbitration could help create an even bleaker civil justice landscape for large swaths of the American public. This is possible if the defense coalition manages to (1) prevent the passage of broad [\*1378] reform bills like the FAIR Act (rather likely as things stand now<sup>502</sup>); and (2) convince courts, especially the Supreme Court, to bless new, draconian arbitration agreements (less likely, but not inconceivable<sup>503</sup>).

On the other hand, mass arbitration could catalyze much-needed reform. Mass arbitration has challenged both the arbitration revolution and the class-action counterrevolution, and in doing so it has helped to make civil justice work again--especially for the most disadvantaged members of our society. Indeed, the movement has already started a *counter-counterrevolution*: Corporate giants like Amazon have fled arbitration,<sup>504</sup> and others will likely follow if mass arbitration persists. And unlike the arbitration revolution, which barely registered outside of academic circles,<sup>505</sup> mass arbitration has captured significant national attention.<sup>506</sup> Accordingly, public pressure for reform has never been greater. If mass arbitration continues on its current path, its greatest trick may not just be to upend the defense coalition's push toward arbitration, but to reverse it.

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<sup>500</sup> See, e.g., *supra* note 164 and accompanying text (describing efforts by the Chamber of Commerce to oppose the FAIR Act); *supra* notes 475-84 and accompanying text (noting that DoorDash and Ticketmaster were able to change arbitral fora to their advantage).

<sup>501</sup> See, e.g., *Mitigating Mass Arbitration: Revising Arbitration Clauses and Rethinking Defense Strategies*, STRAFFORD, <https://perma.cc/FF64-33EN> (archived May 19, 2022); *CLE Speaker Series: Arbitration 360--What Companies Need to Know About International, Domestic and Consumer Mass Arbitration*, COOLEY, <https://perma.cc/93K6-JEG2> (archived Aug. 18, 2022); *The New Mass Arbitration: Just Deserts or Just Another Abuse?*, FEDERALIST SOC'Y, <https://perma.cc/CUP7-HKCN> (archived Aug. 26, 2022) (featuring the Author, Brian Fitzpatrick, and Daniel Fisher); *Miami Law Class Action & Complex Litigation Forum*, UNIV. MIA. SCH. L., <https://perma.cc/3UYM-NPJ7> (archived May 19, 2022) (featuring a panel on arbitration comprised of the Author, Judge Roy Altman, Rachel Furst, Lawrence Silverman, and Tal Lifshitz); *Consumer Fin. Monitor, A Deep Dive into Mass Arbitration: Part II*, BALLARD SPAHR (Feb. 24, 2022), <https://perma.cc/47PL-6YBG> (featuring the Author and Alan Kaplinsky); *Program Details: What Does the Future Hold for Mass Arbitration?*, W. LEGALEDCENTER, <https://perma.cc/4JJZ-49HR> (archived May 19, 2021) (featuring a lecture by the Author hosted by Celesq AttorneysEd Center).

<sup>502</sup> See, e.g., LaSusa, *supra* note 166.

<sup>503</sup> See *supra* Part IV.C.3.

<sup>504</sup> See *supra* notes 34-35 and accompanying text.

<sup>505</sup> In October 2015, the *New York Times* published an article entitled "Arbitration Everywhere, Stacking the Deck of Justice." See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://perma.cc/BS9P-7XWL>. By that time, the Supreme Court had already decided *Stolt-Nielsen*, *Concepcion*, and *Italian Colors*. Myriam Gilles and Jean Sternlight's pathbreaking articles, which sounded the alarm about mandatory arbitration agreements, had been in print for around a decade. See generally Gilles, *supra* note 47 (describing how class-action waivers in arbitration agreements pose a threat to the availability of mass relief); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005) (discussing the proliferation of mandatory arbitration agreements and arguing that mandatory arbitration is unjust). Even if the public had wanted to do something about the arbitration revolution at that point--and that is assuming a single article in the *New York Times* would have been sufficient to inform and galvanize them--it was too late.

<sup>506</sup> See, e.g., Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), <https://perma.cc/SMT3-KQQB> (featuring this Article's study); Alison Frankel, *Postmates Brings Mass Arbitration to SCOTUS, Sort Of*, REUTERS (Aug. 2, 2021, 5:02 PM EDT), <https://perma.cc/LNX6-W5UH> (same); Armstrong & Tobin, *supra* note 267; Corkery & Silver-Greenberg, *supra* note 34; Randazzo, *supra* note 35.

## VI. Applications, Expansions, and Implications

Mass arbitration is a transformational phenomenon in civil justice. Following the arbitration revolution and the class-action counterrevolution, defendants had two clear options: either litigate a class action in court (quite undesirable) or use arbitration agreements with class-action waivers to [\*1379] virtually eliminate claims (the obvious choice). With the advent of mass arbitration, however, the calculus changed: Defendants could now either litigate a class action in court (quite undesirable) or drown in a sea of arbitration demands (more undesirable still). Faced with this second set of choices, it is no wonder that corporate defendants are seeking refuge in the class-action device. After more than forty years, defendants are on the defensive.

Even if Mass Arbitration 1.0 is fleeting--indeed, even if mass arbitration writ large is somehow fleeting<sup>507</sup>--mass arbitration has already taught us a number of lessons about aggregate dispute resolution and civil justice. This Part explores three. It first examines the civil justice issues laid bare by mass arbitration, particularly those issues concerning access to justice and the resolution of claims on the merits. Next, this Part situates mass arbitration within the larger universe of aggregate dispute resolution. Far from being tethered to the world of arbitration, the mass-arbitration model is relevant across the universe of individual adjudication. This includes areas of dispute resolution that defendants cannot unilaterally change. The Part concludes by discussing, in the context of mass arbitration, a central critique of our civil justice system: that its fundamental commitments have been abandoned through outsourcing to moneyed corporate interests.

### A. Claim Facilitation and Merits-Based Claim Resolution

Mass arbitration reveals profound shortcomings in the aggregate dispute resolution landscape. To be sure, it is laudable that many mass-arbitration claimants have recovered close to their actual damages. And the fact that claimants were able to achieve these outcomes through private procedural innovation speaks to the value of adversarialism in civil justice.<sup>508</sup> Yet these [\*1380] results are also lamentable, at least to the extent they stem from *in terrorem* settlement pressure imposed by mass-arbitration fee leveraging.

If we care about poetic justice in aggregate dispute resolution, mass arbitration fits the bill. If we care about settlement outcomes driven by the merits of claims, mass arbitration is also acceptable (although somewhat by happenstance). But if we care about a functional infrastructure designed to vindicate meritorious but low-value claims, mass arbitration shows that no such infrastructure exists--at least not judicially.

Mass arbitration is, in large part, a response to the Supreme Court's destruction of that infrastructure.<sup>509</sup> The mass-arbitration model operates on its ability to impose significant *in terrorem* settlement pressure; without the class action or other means of aggregate dispute resolution, this pressure is necessary to access *any* sort of justice. So far, many mass-arbitration claims have proved meritorious and been successful. Absent mass arbitration, these

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<sup>507</sup> As of this writing, mass arbitration, while still rare, appears to be growing--and of growing concern to defendants. See, e.g., *supra* note 501 (listing numerous CLE offerings, podcasts, and conferences devoted to the rise of mass arbitration in civil justice); *supra* note 250 (discussing Labaton Sucharow's targeted outreach to potential mass-arbitration clients); Margaret M. Clark, *Mass Arbitration Strains Employers*, SHRM: HR MAG. (Nov. 22, 2021), <https://perma.cc/UZR6-HQZF>; Charles Balmain, Matthew Devine, Sonja Hoffmann & Sheldon Philp, *Class and Group Actions Laws and Regulations: Developments and Trends in Collective Actions 2022*, ICLG.COM (Aug. 11, 2021), <https://perma.cc/H4KV-5R65> (describing mass arbitration as a new development with which defendants must cope); Alison Frankel, *Lieff Cabraser's Gambit: Contacting Potential 9,100 Clients Despite Protective Order*, REUTERS (Jan. 13, 2022, 2:03 PM PST), <https://perma.cc/8XS3-4YZ8> (discussing Lieff Cabraser's continued outreach efforts in the potential DirecTV mass arbitration).

<sup>508</sup> See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2d ed. 2019) (discussing the virtues of adversarial legalism and describing how it can empower citizens to challenge unlawful conduct).

<sup>509</sup> See *supra* Part I; see also, e.g., Glover, *supra* note 15, at 1160-75 (detailing various efforts to curtail mechanisms of private enforcement); Burbank & Farhang, *supra* note 15, at 62-64 ("We anticipate that the Court will continue as the institutional leader in the project to retrench private enforcement in the near future . . .").

claims may not have received awards anywhere close to actual damages--or may not have been heard in the first place. In other words, mass arbitration may well impose *in terrorem* settlement pressure. But that is because corporations left mass-arbitration claimants, many of whom are frontline workers, with no alternative but to upend the contractual provisions that eliminated their claims.

That individuals with meritorious but low-value claims have so little access to justice (to say nothing about access to systems capable of ensuring adequate recovery) is as unfortunate as it is unsurprising. The civil justice system has been under concerted attack for over forty years. Corporate interests have waged a methodical and relentless campaign to characterize small claims as frivolous and eliminate them. Many of the claims in mass arbitration, though, are *not* frivolous. They are claims by some of the most vulnerable members of our society, brought against the corporations that exploited them secure in the knowledge that there was no real way to fight back. Enterprising lawyers identified a glitch in the matrix, and mass arbitration was born.

Properly understood and properly contextualized, mass arbitration does not create civil justice problems so much as it exposes them.

## B. Informal Aggregate Dispute Resolution

Mass arbitration is both a new mode of dispute resolution and a new method of individualized aggregate claiming. Although the mass-arbitration [\*1381] model owes its origins to the world of arbitration created by the arbitration revolution, it is hardly constrained by that world. As such, this Subpart examines mass arbitration in other contexts.

Commentators have long offered accounts of lawyers, organizers, and corporations privately aggregating claims to achieve economies of scale. Samuel Issacharoff and John Fabian Witt, for instance, have noted that translators historically acted as intermediaries for groups of workers with claims against their employers.<sup>510</sup> Nora Freeman Engstrom has shown that some personal-injury firms ("settlement mills") collect and file automobile claims in high volume.<sup>511</sup> And on the defense side, Dana Remus and Adam Zimmerman have detailed how corporations informally aggregate claims in their own high-volume settlement operations.<sup>512</sup>

Each of the above investigations reveals a model of aggregate dispute resolution distinct from the formal mechanisms for mass claiming (like the class action or the MDL consolidation). Each also reveals that the traditional "poles" of litigation--individual on the one hand, formally aggregated on the other--are somewhat mythical.<sup>513</sup> The world of mass litigation is more of a spectrum, with various models designed to aggregate claims using a mix of public and private tools. Mass arbitration is simply a new addition to that spectrum.

Mass arbitration is at once individualized (it centers around one-on-one arbitration) and collective (it relies on venture capital, technology, firm expertise, and mass claiming to enable and resolve disputes). As such, mass arbitration can be situated alongside the informal modes of aggregation described above. Although detailed comparisons among these modes are necessarily the subject of other work,<sup>514</sup> a few important distinctions are worth noting here. Unlike the informal aggregation process described by Issacharoff and Witt, mass arbitration involves the formal representation of claimants by firms. And while mass arbitration involves individual claims against a single defendant for a common course of conduct, Engstrom's "settlement mills" principally deal with

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<sup>510</sup> Issacharoff & Witt, *supra* note 175, at 1631 (listing "translators in immigrant factory communities" as a "historical example[] of aggregation").

<sup>511</sup> Nora Freeman Engstrom, *Sunlight and Settlement Mills*, [86 N.Y.U. L. REV. 805, 816-23 \(2011\)](#).

<sup>512</sup> Remus & Zimmerman, *supra* note 487, at 136-37.

<sup>513</sup> *Accord*, e.g., Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMPAR. & INT'L L. 179, 181-82, 189-91 (2001).

<sup>514</sup> See J. Maria Glover, *Informal Aggregation* (unpublished manuscript) (on file with author).

individual claims arising out of [\*1382] different events and against different drivers--even if insurers are present as repeat players.

Situating mass arbitration on the spectrum of informal aggregation illuminates the model's importance in the civil justice landscape. One could imagine a similar model in small-claims court, with claimants' attorneys formally out of view but functionally performing the same role as mass-arbitration attorneys. One could also imagine a similar model for common disputes before administrative agencies.<sup>515</sup> It is also conceivable that key elements of the mass-arbitration model could be used for claims that cannot be certified in a class or consolidated for pretrial proceedings under [28 U.S.C. § 1407](#).<sup>516</sup> And a mass-arbitration--type model (albeit a flipped one) is already emerging outside of arbitration: Corporate plaintiffs are filing thousands of small-dollar claims against unrepresented individuals in state courts.<sup>517</sup>

To be sure, mass arbitration's effects on the aggregate dispute resolution landscape are still unclear.<sup>518</sup> It is unlikely, though, that the pre--arbitration revolution or the post-- *Italian Colors* status quos will be restored. Instead, the mass-arbitration model (or some structural analogue) will likely remain a distinct option for aggregate dispute resolution going forward. In this new status quo, defendants will not be able to eliminate low-value claims arising from aggregate harm.<sup>519</sup> They will instead have to resolve at least a subset of those claims through informal aggregate models--models that will look a lot like mass arbitration.

### C. Mass Arbitration and the Civil Justice System

Mass arbitration is not just a distinct form of dispute resolution; it is a potentially *preferable* form of dispute resolution for both consumers and employees. This is true for at least three reasons. One, mass-arbitration settlement payouts have tended to be higher than settlement payouts in [\*1383] parallel class actions.<sup>520</sup> Two, mass arbitration is often more efficient. Well-capitalized arbitral fora have greater resources with which to effectively resolve claims than their judicial counterparts; what is a Roach Motel in an MDL consolidation<sup>521</sup> could be a relatively short stay in a mass arbitration. Three, mass arbitration provides more opportunities for participation and attorney interaction.<sup>522</sup> (Nothing approaching the level of participation in one-on-one litigation, of course, but certainly greater than the level of participation typical in a class action.)

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<sup>515</sup> See Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, [126 YALE L.J. 1634, 1658-63 \(2017\)](#) (noting that very few agencies formally aggregate claims).

<sup>516</sup> See, e.g., J. Maria Glover, *Mass Litigation Governance in the Post--Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. TORT L. 3, 9 (2012); Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, [115 NW. U. L. REV. 1649, 1702-03, 1713 \(2021\)](#).

<sup>517</sup> See Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, [135 HARV. L. REV. 1704, 1707-09 \(2022\)](#).

<sup>518</sup> This lack of clarity stems in large part from mass arbitration's uncertain future. See *supra* Part IV.

<sup>519</sup> See generally D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, [50 GA. L. REV. 475 \(2016\)](#) (describing how class-action waivers, whether ex ante or ex post, can leave claimants with no chance to vindicate their substantive rights).

<sup>520</sup> See *supra* Part III.C.4.

<sup>521</sup> See *In re TJX Cos. Retail Sec. Breach Litig.*, [584 F. Supp. 2d 395, 405 n.16 \(D. Mass. 2008\)](#) (borrowing Issacharoff's comparison of an MDL to a Roach Motel: Cases "check in--but they don't check out" (quoting a Roach Motel ad)).

<sup>522</sup> See generally, e.g., Robert G. Bone, *Procedure, Participation, Rights*, [90 B.U. L. REV. 1011 \(2010\)](#) (discussing the importance of participation in the broader context of procedural rights).

But even if mass arbitration were always preferable, it would not (and could not) be a panacea for the class-action counterrevolution. In its current form, there are some claims that mass arbitration simply cannot reach. For one, a number of meritorious claims will still cost more to litigate than their individual values. The threshold value for claim marketability is higher in a mass arbitration than it is in a class action,<sup>523</sup> and that value will tend to increase as mass arbitration adapts to the defense bar's counteroffensives. For another, to the extent that mass arbitration can facilitate claims, it facilitates those that benefit from aggregation as an economic matter. Claims that stem from discrimination, sexual harassment, sexual assault, and other civil rights violations depend on aggregation to obtain company-wide data or class-wide proof. As I explore in other work,<sup>524</sup> mass arbitration generally cannot help these claims.<sup>525</sup>

Further, that the mass-arbitration model is potentially preferable for consumers and employees does not mean that mass arbitration is preferable from a regulatory standpoint. Although mass arbitration can help patch the holes of a regulatory apparatus damaged by decades of procedural warfare, [\*1384] mass arbitrations are still smaller than class actions. This size difference (as measured by the total number of claimants) is likely a feature of the mass-arbitration model: Mass arbitration's ability to grow is constrained by the expense of arbitral proceedings, the necessity of up-front production, the challenge of filing individual demands, and a host of ethical constraints regarding representation. As such, mass arbitrations may not hold the same promise as class actions for achieving deterrence and changing defendant behavior.<sup>526</sup> And at least to the extent mass arbitration continues to occur in arbitration, the private, secretive nature of arbitral proceedings means less public precedent, less publicity, less public outcry, and less pressure on defendants to abandon harmful practices.

In sum, mass arbitration cannot restore all the claims eliminated by the arbitration revolution and the class-action counterrevolution. But it can restore some of those claims, and it can do so to the claimants' advantage. A happy ending, at least in part? Not quite. Corporate defendants are in the claim-elimination business, and to the extent that mass arbitration interferes with claim elimination, defendants will take their procedural war machine elsewhere. Amazon may be a harbinger of what is to come.<sup>527</sup>

Some might say that mass arbitration is merely the latest and most consequential offensive in an otherwise moribund theater of procedural warfare. And they are right, to a degree. But mass arbitration is much more than that. It is also a phenomenon that sheds a harsh light on the sad state of American civil justice. Our current system has become, at Congress and the Supreme Court's behest, the product of (and the battlefield for) a mutually destructive private procedural arms race. It is a system that is increasingly indifferent to systemic injustices faced by minorities, women, the working poor, and other marginalized groups--injustices created and perpetuated by that arms race. A system that destroyed its infrastructure for vindicating meritorious claims, only to criticize the *in terrorem* settlement pressure that necessarily arose in the vacuum. A system that refuses to distinguish between low-value claims that matter to real people and claims that matter only to attorneys, thereby abrogating its

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<sup>523</sup> See *supra* Part III.C.3.

<sup>524</sup> See J. Maria Glover, *Disaggregated Proof, Dismantled Rights* (unpublished manuscript) (on file with author).

<sup>525</sup> This is true because, as a general matter, the whole of the evidence gathered across individual cases is not greater than the sum of its parts. Consider employment-discrimination cases, which typically require proof of a pattern or practice of discrimination. See, e.g., [Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1105-06 \(10th Cir. 2001\)](#) (distinguishing aggregate "pattern-or-practice" cases from cases "involving one or more claims of individualized discrimination"). The data generated in each case is distorted because there is no company-wide view, and limitations on obtaining company-wide data (such as cost) could mean that no such data is available to any claimant. It is hard to prove a pattern or practice using only a single perspective.

<sup>526</sup> See Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, in *THE CLASS ACTION EFFECT* 181, 194-95 (Catherine Piché ed., 2018) ("[T]he theory of general deterrence is sound. We still have every reason to think that lawsuits--including class action lawsuits--deter corporate misconduct.").

<sup>527</sup> See *supra* note 35 and accompanying text.

responsibility to hear the former and push out the latter. A system that shirks its constitutional countermajoritarian commitments<sup>528</sup> and outsources the allocation of justice to the moneyed corporate majority.

**[\*1385]** What can be done? Discussions of procedural reform often incorporate both public and private procedural ordering,<sup>529</sup> but that combination offers little purchase here. For more than forty years, public procedural ordering produced nothing that could meaningfully counterbalance the arbitration revolution or the class-action counterrevolution. Instead, it was the private response to those movements that harnessed the economic potential in defendants' arbitration agreements. That response stopped the arbitration revolution in its tracks, and it seems to be our best hope going forward--at least until the wind changes.

But civil justice--and almost coterminously, social justice--that is so deeply dependent on shifts in the political and economic winds is likely to be little justice at all.

## Conclusion

This Article is the first to study mass arbitration, which has upended the defense bar's forty-year campaign to eliminate claims through forced arbitration and class-action waivers. Whatever mass arbitration's future, that is quite a lot for a day's work. But mass arbitration is more than a response to the arbitration revolution and the class-action counterrevolution. Mass arbitration has vital implications for broad questions about aggregate dispute resolution, the regulatory apparatus for low-value claims in the United States, and for civil justice--its conceptions, its ideals, and its failures. And our own.

## **[\*1386]** Appendix

Table 2 summarizes the mass arbitrations included in this Article's study. The study took place from January 2019 to December 2021; the data below is from that time period unless otherwise noted. For purposes of Table 2, I estimated up-front fee obligations based on the best available data (estimate disclosures in public filings, agreement terms, fee schedules for arbitral fora, and so on).<sup>530</sup>

## Table 2

### Mass Arbitrations **[\*1387]**

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<sup>528</sup> See, e.g., Martin H. Redish & Matthew Heins, *Premodern Constitutionalism*, [57 WM. & MARY L. REV. 1825, 1834-35 \(2016\)](#).

<sup>529</sup> See, e.g., Dodge, *supra* note 45, at 724-31; Owen M. Fiss, Comment, *Against Settlement*, [93 YALE L.J. 1073, 1073-78 \(1984\)](#) (criticizing both public and private efforts to encourage settlement); Resnik, *supra* note 75, at 2806-17; Remus & Zimmerman, *supra* note 487, at 134-35 ("Corporate settlement mills thus raise the question of how far policymakers should be permitted to go to privatize our public . . . process of adjudication."); Engstrom, *supra* note 511, at 829-33. Some commentators have argued that public procedural ordering is at least more democratically legitimate. See, e.g., Glover, *supra* note 75, at 3076-83; Richard A. Nagareda, *The Litigation--Arbitration Dichotomy Meets the Class Action*, [86 NOTRE DAME L. REV. 1069, 1077 \(2011\)](#) ("The central argument against class waivers is they purport to do something that public legislation may do but that private contracts may not . . ."); see also Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, [73 U. CHI. L. REV. 157, 172-75 \(2006\)](#); Nagareda, *supra* note 132, at 1902; David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, [105 MINN. L. REV. 619, 646 \(2020\)](#); David L. Noll & Luke Norris, *Federal Rules of Private Enforcement 1* (unpublished manuscript) (on file with author) (deriving its title from Glover, *supra* note 132). One can debate whether and to what extent public procedural ordering better aligns with democratic values. But even if public procedural ordering offers greater democratic legitimacy than private procedural ordering, it is unclear what functional good that legitimacy has done for the scores of claimants whose rights were erased by the defense coalition.

<sup>530</sup> It is worth noting that arbitrators have some discretion to adjust fee assessments.

			Lead		Demands		Up-front
Mass	Principal	Underlying	Plaintiffs'	Defense	Filed,	Damages	Fees:
Arbitration	Claims	Law	Counsel	Counsel	Inventory	Available	Defendants
Amazon	Privacy action based on Amazon Alexa devices secretly recording minors	California Invasion of Privacy Act	Keller Lenkner	Fenwick & West	~75,000 filed	Statutory damages of \$ 100 to \$ 750 per violation	~\$ 127 million
CenturyLink	Consumer action based on fraudulent CenturyLink billing practices	Various consumer- fraud statutes	Keller Lenkner	Cooley	~1,000 filed,  ~20,000 inventory	All legal and equitable remedies allowed by law	~\$ 1.5 million to ~\$ 30 million
Chegg	Breach of consumer data	California Civil Code section 1798.80 et seq.	Z Law	Orrick	~15,000 filed	Actual,  compensatory, and punitive damages, attorney's fees	~\$ 7.5 million  (used to be \$ 56 million)
Chipotle	Wage-theft	Fair Labor	Kent	Messner	~150 filed,	Restitution	~\$ 260,000 to

			<b>Lead</b>		<b>Demands</b>		<b>Up-front</b>
<b>Mass</b>	<b>Principal</b>	<b>Underlying</b>	<b>Plaintiffs'</b>	<b>Defense</b>	<b>Filed,</b>	<b>Damages</b>	<b>Fees:</b>
<b>Arbitration</b>	<b>Claims</b>	<b>Law</b>	<b>Counsel</b>	<b>Counsel</b>	<b>Inventory</b>	<b>Available</b>	<b>Defendants</b>
	action based	Standards	Williams,	Reeves	~3,000	(back pay),	~\$ 5 million
	on unpaid overtime	Act, Colorado labor law	Williams Law Group		inventory	liquidated damages, pre-judgement interest, attorney's fees	



**[\*1388]**

			Lead		Demands		Up-front	Up-
Mass	Principal	Underlying	Plaintiffs'	Defense	Filed,	Damages	Fees:	Fee
Arbitration	Claims	Law	Counsel	Counsel	Inventory	Available	Defenda nts	Pla
Dollar Tree (Family Dollar)	Wage theft	Fair Labor Standards Act, state wage-and- hour laws	Keller Lenkner	Hunton Andrews Kurth	~2,000 filed	General damages, pre- and post-judgement interest, attorney's fees, injunctive relief	~\$ 2.5 million	Not dat pro est
DoorDash (consumer)	Consumer- fraud action based on skimming tips	New York General Business Law sections 349 to 350, state consumer- protection statutes	Z Law	Gibson Dunn	Unknown	Actual, compensatory, punitive, and statutory damages, pre-judgement interest, attorney's fees	Unknow n	\$ 2 clai
DoorDash (employment)	Wage-and- hour action based on classification	Fair Labor Standards Act, California	Keller Lenkner	Gibson Dunn	~6,000 filed	General damages, pre-and post-judgement	~\$ 12 million	~\$

			Lead		Demands		Up-front	Up
Mass	Principal	Underlying	Plaintiffs'	Defense	Filed,	Damages	Fees:	Fee
Arbitration	Claims	Law	Counsel	Counsel	Inventory	Available	Defenda nts	Pla
	of employees as independent contractors	labor law				interest, attorney's fees, injunctive relief		
DraftKings,	Consumer- fraud	New York	Keller	ZwillGen	~1,000 filed,	Actual and	~\$ 300,000 to	~\$ to
FanDuel	action,  fraudulent advertising	General  Business Law sections 349 to 350	Lenkner		~17,000  inventory	punitive  damages, injunctive relief, attorney's fees	~\$ 5 million	~\$

**[\*1389]**

			<b>Lead</b>		<b>Demands</b>	<b>Damages</b>	<b>Up-front</b>	
<b>Mass</b>	<b>Principal</b>	<b>Underlying</b>	<b>Plaintiffs'</b>	<b>Defense</b>	<b>Filed,</b>	<b>Available</b>	<b>Fees:</b>	
Arbitration	Claims	Law	Counsel	Counsel	Inventory		Defendants	
Intuit	Consumer-fraud	California,	Keller	Wilmer	~16,000 filed	Nominal, actual,	Up to ~\$ 36	
(TurboTax )	action	New York,	Lenkner	Cutler		compensatory,	million	
	based on	and		Pickering		consequential,		
	advertising	Pennsylvania		Hale and		punitive, and		
	that steered	consumer-protection		Dorr		statutory		
	consumers to					damages, pre-		
	paid tax	laws				and post-judgement		
	services					interest,		
						attorney's fees		
Lyft	Wage-and-hour	Fair Labor	Keller	Keker, Van	~3,500 filed	Declaratory	~\$ 9 million	
	action	Standards	Lenkner	Nest &		judgement,		
	based on	Act,		Peters		equitable relief,		
	classification	California				restitution (back		
	of employees	labor law				pay), statutory,		
	as					general, and		
	independent					punitive		
	contractors					damages,		
						attorney's fees		
Peloton	False advertising	New York and Michigan	DiCello	Hueston	~2,700 filed	Actual and	~\$ 2.1 million	
		consumer-protection	Levitt, Keller	Hennigan,		statutory		
		laws	Lenkner	Beys		damages,		
		(Michigan		Liston		restitution,		
				&		injunctive relief,		
				Mobargha				

<b>Mass</b>	<b>Principal</b>	<b>Underlying</b>	<b>Lead Plaintiffs'</b>	<b>Defense</b>	<b>Demands Filed,</b>	<b>Damages Available</b>	<b>Up-front Fees:</b>	<b>U F</b>
		plaintiffs dropped out July 2021)				attorney's fees, pre- and post- judgement interest		

**[\*1390]**

			Lead		Demands	Damages	Up-front
Mass	Principal	Underlying	Plaintiffs'	Defense	Filed,	Available	Fees:
Postmates	Wage-and-hour action based on classification of employees as independent contractors	Fair Labor Standards Act, California labor law	Keller Lenkner	Gibson Dunn	~15,000 filed	General damages, pre- and post-judgement interest, attorney's fees, injunctive relief	Up to ~ \$ 20 million
Uber (race) (data updated April 2022)	Challenge to Uber's waiver of certain delivery fees in 2020	42 U.S.C. § 1981 et seq., Unruh Civil Rights Act	Consovo y McCarthy	Kaplan Hecker & Fink	~31,000 filed	Compensatory, punitive, and statutory damages (of \$ 4,000 per violation)	~\$ 91 million
Uber (employment)	Wage-and-hour action based on classification of employees as independent contractors	Fair Labor Standards Act, California and other state labor laws	Larson	Gibson Dunn	~12,500 filed, ~60,000 inventory	Equitable relief, restitution (back pay), statutory, general, and punitive damages, attorney's fees	~\$ 18 million to ~\$ 90 million



**[\*1391]**

			Lead		Demands		Up-front
Mass	Principal	Underlying	Plaintiffs'	Defense	Filed,	Damages	Fees:
Arbitration	Claims	Law	Counsel	Counsel	Inventory	Available	Defendants
Prior Small-Scale Mass Arbitrations Prospect	Wage theft	Fair Labor	Nichols	Seyfarth	~180	General	\$ 396,000
Mortgage		Standards Act, state wage-and-hour laws	Kaster	Shaw	(Aguilera) and ~50 (Aldrich) filed	damages, pre- and post-judgement interest, attorney's fees, injunctive relief	
Undisclosed	Wage theft, overtime, employee classification	Fair Labor Standards Act, California labor law	Nichols Kaster	Unknown	150 filed	Unknown	~\$ 870,000
Potential Mass Arbitrations							
Arise (pending release of class list)	Wage theft	Fair Labor Standards Act	Lichten & Liss-Riordan	Tucker Ellis	~70,000 inventory	Liquidated damages (unpaid compensation), attorney's fees	Unknown

			<b>Lead</b>		<b>Demands</b>		<b>Up-front</b>
<b>Mass</b>	<b>Principal</b>	<b>Underlying</b>	<b>Plaintiffs'</b>	<b>Defense</b>	<b>Filed,</b>	<b>Damages</b>	<b>Fees:</b>
<b>Arbitration</b>	<b>Claims</b>	<b>Law</b>	<b>Counsel</b>	<b>Counsel</b>	<b>Inventory</b>	<b>Available</b>	<b>Defendants</b>
DirecTV (pending release of class list)	Improper disclosure of consumer information	Telephone Consumer Protection Act, Satellite Television Extension and Localism Act	Lieff Cabraser	Mayer Brown	At least ~9,100 inventory	Statutory damages of \$ 500 per violation, trebled if knowing violation	Unknown

**[\*1392]**

			<b>Lead</b>		<b>Demands</b>		<b>Up-front</b>
<b>Mass</b>	<b>Principal</b>	<b>Underlying</b>	<b>Plaintiffs'</b>	<b>Defense</b>	<b>Filed,</b>	<b>Damages</b>	<b>Fees:</b>
<b>Arbitration</b>	<b>Claims</b>	<b>Law</b>	<b>Counsel</b>	<b>Counsel</b>	<b>Inventory</b>	<b>Available</b>	<b>Defendants</b>
Ticketmaster,  Live Nation (pending release of class list)	Consumer  antitrust claims	Sherman Act	Quinn  Emanuel, Keller Lenkner	Latham &  Watkins	Unknown	Treble and  punitive damages, pre- and post- judgement interest, injunctive relief, attorney's fees	Unknown
Fitbit	Consumer-  fraud action based on incorrect user heart-rate calculations	California  Consumer Legal Remedies Act	Lieff  Cabraser	Morrison &  Foerster	N/A	Disgorgement,  restitution for cost of purchase, compensatory, punitive, and statutory damages, injunctive relief, notification as to defect, attorney's fees	N/A

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