

RECENT DEVELOPMENTS IN MANDATORY ARBITRATION WARFARE: WINNERS AND LOSERS (SO FAR) IN MASS ARBITRATION

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INTRODUCTION

Mass arbitration has sent shock waves through the civil justice system and unnerved the defense bar. To see how quickly and dramatically this phenomenon has entered both the civil justice landscape and the public discourse, one need look no further than the January 2023 filings of hundreds of individual arbitration demands by former Twitter employees against Elon Musk,¹ along with threats to file hundreds more—threats that were announced, no doubt intentionally, on Twitter itself.² Plaintiffs are increasingly more aware of mass arbitration as a tool in their arsenal, and

1. Shannon Liss-Riordan (@SLissRiordan), TWITTER (Jan. 13, 2023, 10:01 PM), <https://twitter.com/SLissRiordan/status/1614110404187230208> [<https://perma.cc/D6QP-EJEL>].

2. As with many arbitration claimants in the mass-arbitration space, the Twitter claimants originally attempted to bring their claims as a class action. J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022). In late 2022, former Twitter employees filed a class action complaint against Twitter. Class Action Complaint, *Cornet v. Twitter, Inc.*, No. 3:22-cv-6857, 2022 WL 16708812 (N.D. Cal. Nov. 3, 2022). Claims came after Elon Musk acquired Twitter in October 2022 and eliminated approximately 3,700 employees—around 50% of its workforce. *Id.* at *3. Plaintiffs alleged that Musk’s actions violated the federal Worker Adjustment and Retraining Notification Act (the “WARN” Act), 29 U.S.C. §§ 2101–09 (mandating a sixty-day notice for company-wide layoffs for corporations or entities with more than 100 employees), as well as its California state-law counterpart, CAL. LAB. CODE §§ 1400–08 (West 2023). *Cornet*, 2022 WL 16708812, at *4. Plaintiffs also alleged breach of contract for written and oral promises made to them regarding severance pay, benefits, and remote work. *Id.* at *3–4. Shortly after plaintiffs filed their class complaint, Twitter moved to compel arbitration, Defendant Twitter, Inc.’s Notice of Motion and Motion to Compel Arbitration and Strike and/or Dismiss Class Claims at *2, *Cornet*, No. 3:22-cv-06857-JD (N.D. Cal. Dec. 29, 2022), pursuant to its Dispute Resolution Agreement, which every Twitter employee was required to sign upon hiring. *Id.* at *1–3. In January of 2023, Judge Donato granted Twitter’s motion to compel, over objections by plaintiffs that the agreement was both procedurally and substantively unconscionable. *Cornet*, No. 3:22-cv-06857-JD, 2023 WL 187498, at *1 (N.D. Cal. Jan. 13, 2023). That same day, Shannon Liss-Riordan publicly announced that she had already filed more than 500 arbitration demands on behalf of plaintiffs. Liss-Riordan, *supra* note 1. Liss-Riordan has not been the only attorney representing former employees seeking—and, more to the point, threatening—to file individual arbitration demands against Twitter and Elon Musk. Akiva Cohen, a partner at Kameron, Uncyk, Soniker & Klein, penned a letter to Musk in early December 2022, stating that if Musk did not in the next six days “unequivocally” promise to pay former employees severance, Cohen would “commence an arbitration campaign on [the employees’] behalf.” Akiva Cohen (@AkivaMCohen), TWITTER (Dec. 1, 2022, 7:21 PM), <https://twitter.com/akivamcohen/status/1598487532764798983> [<https://perma.cc/KSH7-EPG8>]. In his letter, Cohen stated that “Twitter will pay far more in attorneys’ fees and arbitration costs than it could possibly ‘save’ in severance due our clients.” *Id.* Facing approximately two thousand claims, Twitter recently made a request to JAMS for a consolidated discovery protocol, despite the deliberate decision to not consolidate the cases themselves. *See* Letter from Sari M. Alamuddin, Partner, Morgan Lewis, to Sheri F. Eisner, Senior Vice President and General Counsel, JAMS (May 31, 2023), <https://www.llrlaw.com/wp-content/uploads/2023/06/Twitter-Incs-Request-for-Universal-Discovery-Protocol-5.31.23.pdf> [<https://perma.cc/RQX3-4CJD>] (“Twitter does not seek full consolidation of all employee arbitrations, but rather, more modestly, only coordination of discovery.”).

defendants are, perhaps for the first time in decades of mandatory arbitration warfare, on the defensive.

From 2018 to 2021, I conducted a large study of this relatively new phenomena and published the results.³ In *Mass Arbitration*, the first and only case study of the phenomenon, I detailed the history of mandatory arbitration warfare, whereby a coalition of defense-side interests waged a decades-long effort to retrench aggregate dispute resolution through arbitration agreements and class-action waivers imposed in contracts of adhesion.⁴ This mandatory arbitration warfare achieved nothing short of an arbitration revolution—it eliminated scores of legal claims across the civil landscape and saved corporations billions of dollars.⁵ Yet, just when everyone expected the defense interests to take a victory lap, prominent defendants started to abandon the hard-fought war against class actions and, instead, began to take refuge in them. The study chronicled the genesis of mass arbitration, the transformation of mandatory arbitration from a windfall for defendants to a weapon for the plaintiffs' bar. *Mass Arbitration* concluded by capturing early responses from the defense coalition and offered predictions for the future of mass arbitration.⁶

This Article updates and expands the original study of *Mass Arbitration*. Of course, mass arbitration is constantly evolving. Neither the initial study nor an updated analysis in 2023 here mean that investigation and study is complete. However, as with the initial study, this Article provides important snapshots of what is now one of the most substantial developments in the civil justice landscape.⁷

3. See generally Glover, *supra* note 2.

4. See *id.* at 1311.

5. See *id.*

6. At this juncture, terminological clarity is important. By mass arbitration, I mean the following: “[E]nterprising and (highly) capitalized attorneys file arbitration demands on behalf of individual claimants subject to mandatory arbitration agreements [that prohibit class actions]. The claims are brought against the same defendant[s] for the same course[s] of conduct. The attorneys then do this again. And again. And again.” *Id.* at 1289. At the time I conducted the study published in 2022, this phenomenon, to the extent judges, practitioners, legal commenters, and the media were aware of it, was typically referred to as “mass arbitration.” While I adopted that moniker in my study, it is useful at the outset to ensure that referring to the phenomenon as such does not create confusion about what, precisely, this model of claiming is, namely, one that is “at once entirely individualized (one-on-one arbitration) and aggregate . . . [in that] [t]he individual claims that make up the . . . one-on-one arbitrations are brought against a single defendant [or set of defendants] [and] aris[e] out of similar alleged misconduct.” *Id.*

7. See, e.g., Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, GIBSON DUNN (May 24, 2021), <https://www.gibsondunn.com/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them/> [<https://perma.cc/7DGD-MRDV>]; Mia Farber et al., *Class Action Trends Report: Mass Arbitration Monkey Wrench*, NAT’L L. REV. (June 30, 2022), <https://www.natlawreview.com/article/class-action-trends-report-mass-arbitration-monkey-wrench> [<https://perma.cc/VN3X-7NAU>]; Andrew Soukup, Ashley Simonsen & Kanu Song, *A Closer Look:*

Part I of this Article summarizes the rise of mandatory arbitration, the emergence of mass arbitration, and what my prior study identified as the key elements of the mass arbitration model. Part II updates and expands on the original study, with a particular focus on responses to the phenomenon that have emerged. Specifically, Part II catalogs and briefly analyzes an array of responses to mass arbitration that have arisen in the past two years—both those that were anticipated in the *Mass Arbitration* study and those unanticipated. Part III takes a step back and considers who, so far, can be described as “winners” and “losers” in the mass arbitration landscape. Among other things, taking this step back reveals arbitration warfare’s arbitrariness, which has important implications for claiming by way of mandatory arbitration in particular and in our civil justice system more generally.

I. THE ARBITRATION REVOLUTION AND THE EMERGENCE OF MASS ARBITRATION: A BRIEF SUMMARY

Today, nearly every American is subject to forced arbitration agreements with class action waivers—over 50% of nonunionized employee contracts, 76% of consumer contracts, and 99.9% of mobile-wireless contracts contain a forced arbitration clause, and “virtually all” consumer contracts also include class-action waivers.⁸ Despite its modern pervasiveness, the inclusion of arbitration provisions in contracts of adhesion is a relatively recent practice.

Early American jurisprudence disfavored private procedural ordering and, up to the early twentieth century, the federal judiciary was seen as

Avoiding a “Mass”-ive Arbitration Problem, COVINGTON & BURLING, LLP (Mar. 2, 2022), <https://www.insideclassactions.com/2022/03/02/a-closer-look-avoiding-a-mass-ive-arbitration-problem/> [<https://perma.cc/6P9B-VU3L>]; Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), <https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/> [<https://perma.cc/2TDB-BUYD>]; *Recent Developments in Arbitration*, CTR. ON CIV. JUST. N.Y.U. SCH. L. (Nov. 12, 2022), <https://www.law.nyu.edu/centers/civiljustice/recent-developments-in-arbitration> [perma.cc/JDR5-FM9G]; *Cutting Edge Issues in Mediating and Arbitrating Consumer Class/Mass Action Claims*, JAMS, <https://www.jamsadr.com/events/2021/cutting-edge-issues-in-mediating-and-arbitrating-consumer-class-mass-action-claims> [<https://perma.cc/NYS7-BW9L>] (last visited Feb. 28, 2023); *ABA Litigation Section Roundtable: Mass Arbitration Filings: How Are Arbitral Institutions Handling Them*, JAMS, <https://www.jamsadr.com/events/2022/aba-litigation-section-roundtable-mass-arbitration-filings> [<https://perma.cc/S6UA-4KJH>] (last visited Feb. 28, 2023); Cheryl Wilson, *Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence Has Created a Brand New Private Enforcement Regime in the Gig Economy Era*, 69 UCLA L. REV. 372 (2022); Sam Heavenrich, *Concerted Arbitration*, 132 YALE L.J.F. 29 (2022); Andrew B. Nissensohn, *Mass Arbitration 2.0*, 79 WASH. & LEE L. REV. 1225 (2022); Annick Masselot & Martha Ceballos, *Mass Arbitration Trumps Waiver of Class Action: Is Arbitration Good Business for Businesses?*, 68 LOY. L. REV. 41 (2021).

8. Glover, *supra* note 2, at 1303–04.

skeptical, if not hostile, toward arbitration.⁹ When Congress passed the Federal Arbitration Act (FAA) in 1925, proponents of the bill argued that it was “intended to facilitate the enforcement of freely and fully negotiated agreements between merchants of equal bargaining power.”¹⁰ For decades after the FAA’s enactment, the Supreme Court’s arbitration jurisprudence was consistent with that objective and disallowed *ex ante* arbitration agreements between parties with unequal bargaining power.¹¹

This changed in the 1980s when the defense bar, corporate entities, and related interest groups commenced the arbitration revolution, a “campaign to expand the universe of permissible contexts for mandatory arbitration agreements.”¹² They succeeded. Through a series of litigation victories, the defense coalition convinced the Supreme Court to permit the use of forced arbitration for an immense array of substantive claims, and, in lower courts, they secured approval to enforce arbitration agreements ostensibly created by notice via mail inserts, shrink-wrap licenses, and even “add-ons” to contracts consumers had already entered.¹³ Emboldened by these successes, the defense coalition pursued an even more ambitious agenda: eliminate the class action by combining arbitration agreements with class action waivers.¹⁴ Again, they prevailed. The Court blessed the enforcement of arbitration agreements with class action waivers, which eliminated both class actions and the underlying claims that could not be viably pursued without the device.¹⁵

As civil rights, wage-theft, sexual-harassment, and consumer-fraud claims are often only economically viable through aggregation, eliminating access to the class action device effectively eliminated the ability of plaintiffs to bring these claims altogether.¹⁶ The resultant windfall to the defense coalition was enormous. Forced arbitration is estimated to have eliminated “more than 98% of employment claims,” and in 2019 alone, employers pocketed \$9.2 billion from workers via wage theft without fear of litigation.¹⁷ The arbitration revolution was “a resounding victory for

9. *Id.* at 1296.

10. *Id.* at 1297.

11. *Id.* (referencing *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)).

12. *Id.*

13. *Id.*

14. *Id.* at 1300.

15. *Id.* at 1302–03.

16. *Id.* at 1307.

17. *Id.* at 1305, 1310.

corporate interests” and a “tremendous loss for consumers and employees, particularly those . . . already vulnerable based on race, gender, and class.”¹⁸

Public reform efforts have not yet provided a meaningful response to the arbitration revolution. While the narrowly tailored Ending Forced Arbitration of Sexual Harassment Act passed with bipartisan support in February 2022, the broader Forced Arbitration Injustice Repeal Act languishes in the Senate Judiciary Committee in the face of staunch opposition by the Chamber of Commerce and the defense coalition.¹⁹ Though there have been a few modest arbitration-reform successes at the state level, they have not significantly changed the arbitration landscape.²⁰ While state Attorneys General could, in theory, fill the void left by the elimination of class actions, political and resource constraints limit their ability to bring actions on behalf of their citizens, and private attorneys general acts that would allow citizens to bring these suits on the state’s behalf have struggled to gain passage.²¹

To date, the most meaningful response to the arbitration revolution has come in the form of *private* procedural warfare. Indeed, an opportunity for rejoinder to the arbitration revolution brought about by way of private arbitration contracts was lurking, in no small part, in those private arbitration contracts themselves. “That opportunity was mass arbitration.”²²

Mass arbitration²³ is the latest step in private procedural warfare and a direct response to the proliferation of forced arbitration. It is a new model of claiming that is both “entirely individualized . . . and aggregate,” in the sense that “the individual claims that make up . . . multifarious one-on-one arbitrations are brought against a single defendant, arising out of similar alleged misconduct.”²⁴ At a very basic level, the claiming model works like

18. *Id.* at 1311. Mandatory arbitration’s tentacles are reaching beyond even the expansive world of contracts between corporations and their consumers and employees. David Horton has traced how, in recent years, corporations have attempted to impose mandatory arbitration clauses on parties who never signed the container contract or who have claims that arise after the contract has lapsed. Horton terms these clauses “infinite” arbitration clauses, in that they mandate arbitration for all disputes between “any related party in perpetuity.” David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 633 (2020).

19. Glover, *supra* note 2, at 1312.

20. *Id.* at 1313.

21. *Id.* at 1313–14.

22. *Id.* at 1315.

23. By using the term “mass arbitration,” I am not suggesting that claimants seek, or obtain, a mass *proceeding*. Nor is it to suggest that individual arbitral demands are combined, for representation or litigation purposes, into a “mass.” A “mass” of legal claimants, properly understood here, results from the reality that the primary conduct of an entity (or entities), exogenous to dispute resolution systems and structures, tends to affect many people similarly. To the extent that conduct gives rise to legal claims, there will be many potential claimants. *See generally, e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006).

24. Glover, *supra* note 2, at 1289.

this: (often highly) capitalized attorneys file arbitration demands on behalf of individual claimants that are subject to arbitration agreements against the same defendant for the same or substantially similar course of conduct. These attorneys do this repeatedly for hundreds, thousands, or more claims, and by doing so, they can generate enormous settlement pressure.²⁵

As my study explained, mass arbitration became possible for three core reasons:

First, civil litigation in the United States, a bit like nature, abhors a vacuum. Eliminating one mechanism for individuals to aggregate their claims will not eliminate the widespread legally cognizable harms nor the mass of individuals that suffered those harms.²⁶ Without settlement, some other resolution, or some other regulation, the claims will continue to exist—and a mechanism to resolve those claims will be forced to evolve to meet the need.

Second, to avoid invalidation on unconscionability or effective-vindication grounds, would-be defendants placed “friendly” terms in their arbitration agreements, such as fee-shifting provisions that required them to reimburse some or all of a claimant’s arbitration and filing fees.²⁷ Defendants placed these provisions in their agreements alongside a class action waiver believing it would have no real effect since, even with fee shifting, individual arbitration is not economically viable for an ordinary claimant.²⁸ However, the highly capitalized attorneys that began mass arbitration were not ordinary claimants. For them, the fee-shifting provisions mitigated risk and created favorable claiming economics that incentivized mass arbitration.

And third, my own analysis of the Supreme Court’s FAA jurisprudence²⁹ is that mass arbitration was not, and perhaps could not be, foreclosed by it. Instead, the precedents that the defense coalition procured—chiefly, that arbitration is bilateral and that arbitration agreements are binding on the parties, and that they must be enforced strictly—tend to reinforce rather than refute the legal validity of mass arbitration.³⁰ While the arbitration revolution built a fortress to protect defendants from the class action, it has become a prison of their own making, entrapping them with mass arbitrations.

But as the study noted, just because mass arbitration was possible did not mean that it was certain or even likely to occur. Indeed, from the historical

25. *See id.*

26. *Id.* at 1315.

27. *Id.* at 1316.

28. *Id.*

29. *See AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

30. Glover, *supra* note 2, at 1317–18, 1341.

vantage point post-*Concepcion* (2011) and *Italian Colors* (2013), something like mass arbitration was “economically prohibitive, legally uncertain, and, in the view of most attorneys who considered it, intolerably risky.”³¹ In many ways, it still can be some or all those things. But, as my study also traced, various changes in the legal landscape in the mid-2010s made the prospect more realistic.³² Despite the costs and the risks, a group of entrepreneurial plaintiffs’ firms and attorneys decided to take on the obstacles to the development of a mass-arbitration model. And how! These attorneys invested significant capital and launched a series of high-profile mass arbitrations: In 2018, Uber, Lyft, and Chipotle; in 2019, Centurylink, DoorDash, Family Dollar, Peloton, and Intuit; in 2020, Chegg and Amazon; and in 2021, DoorDash and Uber were again targets of mass arbitrations, by different claimants with different claims.³³

A key challenge in studying an unfolding phenomenon, however, is finding an appropriate stopping point. Since the study in *Mass Arbitration* spanned the course of three years and the arbitration landscape shifted dramatically during that time, this struggle was particularly acute—the catalog of mass arbitrations would be complete only for new claims to emerge and for contemporaneous developments to transform what would have been prescient insights into now-seemingly-obvious hindsight. And of course, publication of a study on mass arbitration does not put a lid on its development. As I acknowledged, the *Mass Arbitration* study, while capturing the model at a critical moment in time, could still only capture that “single moment.”³⁴ “Future developments [would] require future investigation.”³⁵ The same is true with this Article, which traces recent developments in the mandatory arbitration wars—it captures the landscape of mass arbitration at a single moment.

Importantly, though, this Article captures and details the key *responses* to mass arbitration. At the time of the publication of the initial study, defense-side responses to mass arbitration were either in their infancy or mere predictions. Since that time, these responses have evolved or become more concrete. Indeed, in February of 2023, the United States Chamber of Commerce—among the principal architects of the mandatory arbitration revolution itself—issued its eighty-plus-page polemic against mass

31. *Id.* at 1320.

32. *See id.* at 1326–40; *see also infra* Part III.B (overcoming the principal obstacles to mass arbitration).

33. Glover, *supra* note 2, at 1323–24. These mass arbitrations and others form the basis of the large case study I provided in *Mass Arbitration*. Thus, while that study serves as a critical introduction point for scholars, practitioners, judges, and others interested in mass arbitration’s origins and early development, I will not replicate or regurgitate the extensive analysis of those cases here.

34. *Id.* at 1376.

35. *Id.*

arbitration.³⁶ This next Section of this Article traces the responses to mass arbitration (including, but not limited to, the United States Chamber of Commerce's response).

II. THE VIEW FROM 2023: RESPONSES (SO FAR) TO MASS ARBITRATION

One of the most dynamic aspects of the initial study on mass arbitration was anticipating and capturing responses to mass arbitration by defendants, as well as those of alternative-dispute-resolution providers, in real time.³⁷ At this juncture, many of the initial study's predictions about the responses by defendants and arbitral fora have become realities. This Part reviews the predictions made in *Mass Arbitration* and brings them to present while also noting novel and less expected developments. Some of these responses have already shown greater and lesser propensities for success; for others, it is simply too early to tell.

A. *Quit: Defendants Drop Mandatory Arbitration Clauses Altogether*

Perhaps the most dramatic response to the advent of mass arbitration was the decision by some high-profile corporations to drop mandatory arbitration clauses in their contracts altogether. “Fine . . . sue us,” Amazon effectively exclaimed when it famously dropped its forced arbitration provision from its “terms of service entirely” after being confronted with tens of thousands of individual arbitration demands.³⁸ The claims in those demands against Amazon stemmed from “news reports in 2019 that Alexa devices stored recordings of users.”³⁹ Initially, these claims were brought through class actions but “Amazon successfully argued the claims belonged in arbitration.”⁴⁰

It was a success they would soon come to regret. Starting in 2020, Keller Lenkner and other plaintiffs' firms piled on thousands of individual arbitration demands which soon totaled over 75,000.⁴¹ Rather than return to (likely unsympathetic) courts to seek relief or revise their arbitration

36. ANDREW J. PINCUS, ARCHIS A. PARASHARAMI, KEVIN RANLETT & CARMEN LONGORIA-GREEN, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *MASS ARBITRATION SHAKEDOWN: COERCING UNJUSTIFIED SETTLEMENTS* (2023) [hereinafter CHAMBER OF COM. MASS ARBITRATION].

37. Glover, *supra* note 2, at 1364–73.

38. *Id.* at 1293 (quoting Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 6:30 AM), <https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000> [<https://perma.cc/596T-V24C>]).

39. Randazzo, *supra* note 38.

40. *Id.*

41. *Id.*

protocols, Amazon abandoned arbitration as a mechanism in favor of resolving disputes through the traditional legal system.⁴²

As scholars have traced, the “not-so-secret” secret motive for forced arbitration provisions was to eliminate claiming entirely.⁴³ Corporations assumed that this benefit would outweigh the cost of arbitrating the few stray and uncoordinated individual claims. But advances in information technology and the increasing sophistication of the plaintiffs’ bar undermine that assumption. Given the rise of mass arbitration, perhaps Amazon and other defendants may be correct to conclude that when it comes to the arbitration game, “the only winning move is not to play.”⁴⁴

While mass arbitration seems to have given a number of corporations that use mandatory arbitration agreements in their contracts pause about the precise *terms* of those agreements,⁴⁵ Amazon’s response of quitting the game entirely has not (or at least not yet) become widespread. One reason for this may be that many corporations—not yet directly affected by mass arbitration and/or not particularly focused on or nimble about frequent changes to their own contractual arrangements—have not had much occasion to consider whether to drop out.

Another reason seems to be that, for some corporations, the balance for and against mandatory arbitration still comes out in favor of the clauses. Uber, for example, remained in the mandatory arbitration game even *after* being hit with an initial round of multiple individual arbitration demands by employees in 2018 and 2019. By the time it became subject to yet another round of arbitration demands in 2020—filed by an entirely different set of claimants, represented by a different law firm, and pertaining to entirely different claims⁴⁶—it could hardly be said that Uber’s legal team had not at least thought about the relative pros and cons of staying in the arbitration

42. *Id.*

43. See, e.g., David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3064–68 (2015); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 21 (2017); BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1165–66 (2012); 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); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623, 660 (2012); David L. Noll & Zachary D. Clopton, *An Arbitration Agenda for the Biden Administration*, 2021 U. ILL. L. REV. ONLINE 104, 104–05.

44. WARGAMES (United Artists, Sherwood Productions 1983).

45. See, e.g., *infra* Part II.C.

46. See, e.g., *Uber Techs., Inc. v. Am. Arb. Ass’n*, 167 N.Y.S.3d 66, 68 (App. Div. 2022) (“From October 26, 2020 to December 9, 2020, the Consovoy Firm filed over 31,000 substantively identical arbitration demands with the AAA on behalf of the Uber Eats customers against Uber.”).

game. The balance for Amazon on its decision to quit forced arbitration may well have been influenced by considerations unique to Amazon itself—reasons related to generating positive tort-law precedent vis-à-vis brick-and-mortar versus online distributor liability.

I suspect that an additional reason that scores of corporations have not simply quit mandatory arbitration is that many are taking a “wait and see” approach to the entire phenomenon. Specifically, and as I trace in the following sub-sections, the future contours of mass arbitration—indeed, the future of mass arbitration itself—will be shaped in substantial part by the fate of various responses to it by the defense bar, judges, plaintiffs’ attorneys, and arbitral fora old and new. In other words, the game is changing in real time; many entities are no doubt waiting to see how it evolves before deciding whether to keep playing.

B. Ignore the Rules: Defendants Balk on Arbitral Fees, Seek Relief from Their Own Agreements

Equal parts eyebrow-raising and unsurprising was the following response by defendants to mass arbitration: refuse to pay arbitration fees or to follow the terms of their own agreements when confronted with massive numbers of individual claims and turn to the courts to seek relief.⁴⁷ Uber, Chegg, and FanDuel each made arguments “that arbitrators lacked the authority to decide whether to enforce their arbitration agreements.”⁴⁸ Uber made the argument “despite having just convinced the Ninth Circuit that enforceability questions fell to the arbitrator,” Chegg did so “even though its agreement explicitly stated” that only an American Arbitration Association (AAA) arbitrator would determine whether the agreement was enforceable, 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.”⁴⁹ These and similar attempts often “generated an odd, and deeply ironic procedural posture”—after courts granted defendants’ motions to compel arbitration, they would be petitioned once more to compel the enforcement of those arbitration agreements—this time by the plaintiffs.⁵⁰

Other defendants like Postmates took a more philosophical procedural approach. They refused to pay fees or participate in arbitration, arguing that “the mass filing of related individual demands” amounted to a “de facto class arbitration” in violation of the class arbitration waiver in their

47. Glover, *supra* note 2, at 1341.

48. *Id.* at 1342.

49. *Id.*

50. *Id.* at 1341–42.

agreement and thus was impermissible under the FAA.⁵¹ The California court rejected that argument.⁵²

Almost universally, “defendants have argued that the enforcement of *their* arbitration agreements according to *their* terms would be fundamentally unfair—to *them*.”⁵³ DoorDash and Postmates characterized the enforcement of the fee provisions that they drafted as a “shakedown” and FitBit objected to the irrationality of facing negative value claims—those worth less than the arbitration fees they agreed to pay—ironically echoing the very same argument made by the plaintiffs in *Italian Colors*.⁵⁴ Though defendants’ arguments to escape their agreements border on absurdity, the motivation behind them is imminently “rational given the dramatic financial consequences of enforcement.”⁵⁵ Whether the situation evokes sympathy or schadenfreude, corporate defendants now face a “monster of [their] own making.”⁵⁶

Courts have largely been unsympathetic to defendants’ attempts to avoid enforcement of their own arbitration agreements “according to their terms.”⁵⁷ The California legislature went one step further and imposed penalties for non-payment of arbitral fees. On October 13, 2019, the California State Senate approved Senate Bill 707 (SB 707), which became effective on January 1, 2020.⁵⁸ SB 707 requires that, in employment or consumer arbitration agreements, the drafting party must pay the fees and costs initially associated with an arbitration, and that if these fees and costs are not paid within thirty days of their due date, the drafting party is in material breach of the agreement and thus waives its right to arbitration.⁵⁹ At this time, the consumer or employee may either (1) withdraw from the arbitration and proceed in court; (2) pay the unpaid fees and continue in arbitration, recovering the amount paid once the case has concluded; (3) petition a court to compel the defendant to pay the fees; or (4) simply proceed in arbitration if the arbitrator agrees.⁶⁰ The law also affirmed the

51. *Id.* at 1343 (citing *Postmates Inc. v. 10,356 Individuals*, No. CV 20-2783 PSG (JEMx), 2020 WL 1908302, at *7 (C.D. Cal. Apr. 15, 2020)).

52. *Postmates*, 2020 WL 1908302, at *7 (“[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.’”).

53. Glover, *supra* note 2, at 1344.

54. *Id.* at 1344–45.

55. *Id.* at 1345.

56. *Id.* at 1350.

57. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

58. S.B. 707, 2019 Cal. Legis. Serv. Ch. 870 (West) (codified at Cal. Civ. Proc. Code §§ 1280, 1281.96–1281.99 (West)).

59. *Id.*

60. *Id.*

California Supreme Court's earlier decision⁶¹ to prohibit cost shifting to a non-drafting party.

Postmates has already tried to test both the potential success of a non-payment strategy as well the application and reach of SB 707 to arbitration agreements governed by the FAA. In 2021, Postmates' refusal to pay fees led the Central District of California to impose sanctions against it in the form of attorneys' fees, costs, and compelled arbitration.⁶² After their protests—which sounded in a “mass-arbitration-as-de-facto-class-arbitration-in-violation-of-the-FAA” theory—failed, Postmates shifted gears to SB 707. Specifically, Postmates contended that the FAA preempted SB 707 and that SB 707 violated the United States and California Constitutions.⁶³ But the California court rejected this argument and held that SB 707 was not preempted and did not violate either constitution, and it granted cross-petitioners' motion to compel arbitration, attorneys' fees, and costs related to arbitration proceedings.⁶⁴

Judicial and legislative reactions to defendants' responses to mass arbitration so far portend positively for claimants, at least those with already pending arbitration demands and/or non-pending but relatively marketable claims. That said, fee non-payment and the need for potentially protracted and expensive litigation over the (surely not settled) legal issues involved, however, surely imposes more costs on the model generally and thus would tend to affect the economics of claiming and settlement. And, given the reliability of this response by defendants to arbitral demands, one question any entity considering pursuing a campaign of multiple individual arbitration demands must consider is whether those additional costs can be sustained. Indeed, the threat of non-payment, or even significant delay of payment, could well have a chilling effect on the pursuit of this model of claiming. Nonetheless, without a shift in the legal landscape—principally regarding defendants' seeking of continued expansion of the FAA to protect them from multiple individual demands—the “refuse to play by the rules” response has not emerged as a promising tactic for defendants.

C. Squeeze Your Opponent: Defendants Try to Cut Mass-Arbitration Counsel, and the Mass-Arbitration Model, Out of the Picture

Another response by the defense bar to the advent of mass arbitration was to retreat to the class action and to cut mass-arbitration counsel out of

61. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

62. *Postmates Inc. v. 10,356 Individuals*, No. CV 20-2783 PSG (JEMx), 2021 WL 540155, at *13 (C.D. Cal. Jan. 19, 2021).

63. *Id.* at *4.

64. *Id.* at *13.

the picture in the process.⁶⁵ While, at first glance, such a retreat might appear to effectuate what many plaintiffs and plaintiffs' advocates have asserted—the way in which defendants to mass arbitrations have sought to use the class action against the backdrop of pending mass arbitrations is not properly understood as some about-face return to the *status quo ante*.⁶⁶ Instead, the move has taken the form of what is more properly viewed as a twist on a classic defense tactic for defendants facing aggregate liability—an effort to thwart mass arbitration claimants and counsel and to drive down settlement values by engineering a reverse auction settlement. Such a move, if successful, would provide an additional benefit to defendants: namely, to ratchet up, perhaps intolerably, the financial risk of mass arbitration practice to attorneys engaged in or considering it.

Reverse-auction class settlements are well understood in scholarly literature and class-action jurisprudence.⁶⁷ Here is how it works: defendants harness the competition among plaintiffs' firms to find the firm that will settle a class action with them for the lowest dollar amount or most favorable terms.⁶⁸ The lowest bidder among the firms “wins” the right to settle with the defendant, control over the class litigation, and most importantly, the associated attorneys' fees.⁶⁹ This process results in a race to the bottom where claims are settled by attorneys whose interest in being the lowest bidder directly conflicts with the interest of the class they purport to represent: the interest of maximizing the recovery.

Intuit pursued this strategy after mass arbitration pioneer Keller Lenker (now Keller Postman) filed over 100,000 arbitration demands against Intuit on behalf of customers who used Intuit's TurboTax online tax preparation service and were subject to a mandatory arbitration provision.⁷⁰ In the midst of that mass arbitration, plaintiffs' counsel to a class action lawsuit that had been compelled to arbitrate suddenly filed a motion for preliminary

65. Glover, *supra* note 2, at 1360–61.

66. *Id.*

67. See, e.g., John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995) [hereinafter Coffee, *Class Wars*]; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 169 (2003).

68. *China Agritech, Inc. v. Resh*, 138 S.Ct. 1800, 1814–15 (Sotomayor, J., concurring) (“Each class lawyer knows that only the lawyers in the first-resolved case will get paid, because the other suits will then be dismissed on claim-preclusion grounds. Defense lawyers know this, too, so they are ‘able to engage in a ‘reverse auction,’ pitting the various class counsel against one another and agreeing to settle with the lawyer willing to accept the lowest bid on behalf of the class.’ This gamesmanship is not in class members’ interest, nor in the interest of justice. I therefore think it unwise to encourage the filing of such dueling class actions outside the PSLRA context.” (quoting Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 472–473 (2000)) (internal citations omitted)).

69. Glover, *supra* note 2, at 1361 n.421.

70. *Arena v. Intuit Inc.*, No. 19-cv-02546-CRB, 2021 WL 834253, at *2, *4 (N.D. Cal. Mar. 5, 2021).

approval of a class action settlement on behalf of an estimated “19 million people,” including the arbitration claimants.⁷¹ The court denied the motion and discussed the “unique due process concerns” class settlements present, “[f]or example . . . the risk that class counsel will ‘collude’ with defendants, ‘tacitly reducing the overall settlement in return for a higher attorney’s fee.’”⁷²

Postmates and DoorDash engaged in similar efforts.⁷³ In February 2020, DoorDash—against plaintiffs’ motion to compel arbitration—moved to settle all wage-theft claims with a \$39.5 million class action settlement in state court and stay the motion to compel.⁷⁴ This attempt to settle out of arbitration was met with a stern rebuke by Northern District of California Judge William Alsup:

[T]he workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches . . . [t]his hypocrisy will not be blessed.⁷⁵

DoorDash’s motion was denied, and the company was forced to arbitrate.⁷⁶

In the end, though, Postmates achieved partial success with this strategy. In a first attempt in November of 2019, Postmates made an unsuccessful bid to settle all wage-theft litigation in court by way of a class action.⁷⁷ California Superior Court Judge Anne-Christine Massulo refused to approve the settlement initially but did not foreclose approval of some class settlement altogether, pending revisions.⁷⁸ A revised settlement was eventually approved in July 2022, which included new opt-out-to-arbitration procedures and increased settlement funding.⁷⁹ Importantly,

71. *Id.* at *2, *5.

72. *Id.* at *6 (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)).

73. Glover, *supra* note 2, at 1359 nn.412–13.

74. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1063–64 (N.D. Cal. 2020); Glover, *supra* note 2, at 1359.

75. *Abernathy*, 438 F. Supp. 3d at 1067–68.

76. *Id.* at 1066, 1068.

77. Glover, *supra* note 2, at 1359; Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS (Dec. 2, 2019, 4:19 PM), <https://www.reuters.com/article/legal-us-otc-massarb/after-postmates-again-balks-at-arbitration-fees-workers-seek-contempt-order-idUSKBN1Y62E8> [<https://perma.cc/TL3F-TAET>]. Postmates’ initial settlement proposal purported to settle all claims by California couriers. *Id.*

78. *See* Frankel, *supra* note 77.

79. *See* Amended Order Granting Final Approval of Class Action Settlement, Attorneys’ Fees, Costs, and Service Awards, *Rimler v. Postmates, Inc.*, No. CGC-18-567868 (Cal. Super. Ct. July 22, 2022); *see also* Plaintiffs’ Further Supplemental Briefing in Support of Motion for Preliminary Approval

counsel for the individual claimants in arbitration was permitted to effectuate these opt-outs on behalf of their clients.⁸⁰

The reverse-auction phenomenon has long been traced by scholars as harnessing the economic incentives and risk tolerance of plaintiffs' counsel in normatively undesirable ways, particularly for claimants.⁸¹ In the class action context, the primary aim of a reverse-auction is to eliminate exposure at a lower cost by "negotiat[ing] a more favorable settlement" with counsel willing to "to grab attorney's fees instead of . . . secur[ing] the best settlement possible for the class."⁸² However, reverse auctions pose a much greater threat in mass arbitration where defendants can reap the same benefits of lower settlements while simultaneously threatening to destroy the firms engaged in mass arbitration and the viability of the claiming model itself.

This is true for at least two key reasons. First, effectively pursuing scores of individual arbitration demands is extremely capital intensive—the claimant-plaintiffs' firms that initiate mass arbitrations "typically must advance the filing fees owed by its clients," often amounting to millions of dollars, a "substantial" and "risky . . . up-front investment."⁸³ In its initial Intuit mass arbitration, Keller Lenkner invested over \$8 million dollars of capital to cover initial filing fees; in the DoorDash employment mass arbitration Keller Lenkner invested over \$1.2 million dollars.⁸⁴ The risk that these firms take is that the filing fees will not be reimbursed,⁸⁵ which would result in a tremendous loss on their investment. If defendants succeed in reverse auction strategies, that risk materializes. Second, trying to squeeze out counsel helping individuals pursue claims *in arbitration* in favor of a class action *in court* is not simply a strategy of pitting plaintiffs' counsel

of Class Action Settlement at 3–12, *Rimler v. Postmates, Inc.*, No. CGC-18-567868 (Cal. Super. Ct. Apr. 28, 2020) (laying out the revised settlement terms).

80. Third Amended Class Action Settlement Agreement and Release at 30–32, *Rimler v. Postmates, Inc.*, No. CGC-18-567868 (Cal. Super. Ct. Aug. 9, 2021) ("[T]he Settlement Class Member's counsel may submit an opt-out request on behalf of the individual Settlement Class Member[.]"), *approved in* Amended Order Granting Final Approval of Class Action Settlement, Attorneys' Fees, Costs, and Services Awards, *Rimler v. Postmates, Inc.*, No. CGC-18-567868 (Cal. Super. Ct. July 22, 2022).

81. *See, e.g.*, *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002) (reversing approval of class settlement that appeared to be the product of a reverse-auction); 4 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:60 (6th ed. 2022) (explaining the concept of reverse-auction and how it should impact a judge's determination of settlement approval); Coffee, *Class Wars*, *supra* note 67; Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 960 (2014).

82. *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 695, 697 (11th Cir. 2017).

83. *Glover*, *supra* note 2, at 1329.

84. *Id.* at 1329–30.

85. *See, e.g.*, *supra* Part II.B (discussing defendants' strategy of refusing to pay or reimburse arbitral fees).

against one another. Mass arbitration is still a fundamentally new, and fundamentally different, model of claiming for plaintiffs' firms; it is not simply a variation on existing investments. Thus, trying to squeeze out mass-arbitration attorneys is to pit those attorneys who have made the significant investments in the model against those who have not; the latter have little to no incentive to hesitate about participating in a tactic that might destroy a claiming model they do not use. Squeeze the attorneys that have the model; squeeze the model itself.

Putting into place a mass- or multiple-arbitration practice model and launching any given multiple arbitration requires serious investments from firms. Those investments, and the claiming model to which they are devoted, are jeopardized by reverse-auction and similar strategies. So far, courts appear attuned to that reality. Even in *Postmates*, which ultimately resulted in a class-action settlement for a large number of claimants, counsel for arbitration claimants successfully argued for the right to opt out their clients and thereby preserve at least some of their investment. For a number of reasons, including but not limited to a lack of established law or precedent on counsel-initiated opt-outs as well as a history of settlement-fairness doctrine that tends to focus principally on fairness to claimants (*viz.* dollar amount of payouts), questions about the long-term viability of this strategy for defendants as a response to mass arbitration remain somewhat open.

D. Blame the Ref: Defendants Sue the Arbitrators

While many defendant responses were predicted,⁸⁶ one especially aggressive defense response was a bit more bizarre. To wit, some defendants faced with mass arbitrations sued their arbitrators. These defendants launched disputes against the very entities that they, the defendants, had selected in their contracts.⁸⁷ In other words, they picked the game, when the game did not go as hoped, they went after the referees—whom they had also picked.

For instance, facing a wage-theft mass arbitration, Family Dollar sued the American Arbitration Association, arguing that its arbitration agreements could not be enforced and that the AAA could not charge the corresponding fees, because Family Dollar believed the claims lacked “validity” and that the “filing fees may far exceed the merits of the

86. See Glover, *supra* note 2, at 1360–73.

87. *Id.* at 1347.

claim[s].”⁸⁸ The matter was resolved out of court before the Eastern District of Virginia ruled on these arguments.⁸⁹

Uber also sued the AAA, its (now former) arbitration provider for “breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment . . . and unfair competition” after the AAA demanded the fees it was owed under their arbitration agreement.⁹⁰ Uber demanded a preliminary injunction enjoining the AAA from issuing additional invoices or closing arbitrations against it.⁹¹ The court found that Uber’s attempt to “avoid paying the arbitration fees” that resulted from its “business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers” was not sufficient to grant preliminary injunction and that the “balance of the equities weigh[ed] in favor of AAA.”⁹² The problem with Uber’s complaint against the AAA, as I have said earlier, is that it “almost reads like a complaint against itself.”⁹³

At this juncture, my own view is that this aggressive and, frankly, fairly apoplectic response to mass arbitration seems somewhat unlikely to catch on at a broad level. As a general matter, virtually none of what arbitrators do is subject to meaningful judicial review under the FAA;⁹⁴ this reality is in no small part a product of various (largely) defense-side victories in the first place. More specifically, one of the principal bases for their claims against the AAA, namely, that the claims brought in arbitration, in effect, “failed to state a claim upon which relief can be granted”⁹⁵ is largely a claim—or at least case-specific argument. Accusing the arbitrator of failing on this score in any given case would seem to lack appeal as a broad-sweeping and reliable strategy for countering mass arbitration. Along these lines, more fundamentally, the argument makes little logical sense. Whether a claim is deemed to lack merit solely by way of a particular process—here, arbitration—is a wholly separate question from what process was selected, during which such a determination might be made. And more to the point, whether a claim lacks merit is a wholly separate question from what *fees* are associated with the process that was selected.

88. *Id.* (quoting Plaintiff’s Complaint at ¶ 1, *Fam. Dollar, Inc. v. Am. Arb. Ass’n*, No. 2:20-cv-00248 (E.D. Va. May 15, 2020), ECF No. 1).

89. Settlement Conference Order at ¶ 1, *Fam. Dollar, Inc. v. Am. Arb. Ass’n*, No. 2:20-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. 2:20-cv-00248 (E.D. Va. Dec. 4, 2020).

90. *Uber Techs., Inc. v. Am. Arb. Ass’n*, 167 N.Y.S.3d 66, 68 (App. Div. 2022).

91. *Id.*

92. *Id.* at 70.

93. Andrew Strickler, *Uber Wrote The Script It Now Attacks in Arbitration Suit*, LAW360 PULSE (Oct. 4 2021, 12:00 PM), <https://www.law360.com/pulse/articles/1427278/uber-wrote-the-script-it-now-attacks-in-arbitration-suit> [<https://perma.cc/7JUG-R8UW>].

94. *See, e.g., Moshonov v. Walsh*, 996 P.2d 699 (Cal. 2000).

95. FED. R. CIV. P. 8, 12(b)(6).

Analogically, it would be nonsensical to argue that the question of whether a court could impose a required filing fee is bound up with whether, in fact, the relevant claims do or do not survive a motion to dismiss for failure to state a claim. Even assuming every last one of thousands of hypothetical arbitral demands against a defendant are ultimately legally or factually insufficient, it was the defendant who required those claims to be filed in an arbitral forum, and arbitral fora all have initiation fee schedules. Arguments about the merits come at additional cost. Might this reality create poor incentives for plaintiffs to file unmeritorious claims? Perhaps. Did defendants choose this reality—nay, often design it? Yes. Arguments along these lines are fundamentally against a reality they created, which is why—unsurprisingly—many now seek to alter it, as the next section traces.

III. LOOKING FORWARD FROM 2023: ATTEMPTS TO CHANGE ARBITRATION

Faced with what has so far largely been an unsympathetic response by judges to attempts to avoid the consequences of the mandatory arbitration reality they created, corporate defendants have sought alternative and additional ways to shut down, or at least stem the tide of, the mass arbitration model and the attorneys who pursue it by changing what the reality of mass arbitration looks like. As with many elements of the dispute resolution process set forth in contracts of adhesion, corporate defendants drafted the contracts; they can amend them, changing the arbitral rules, arbitral forum, or both. The following sub-sections trace these types of responses.

A. Hate the Game, Not the Player: Defendants Change the Terms of Their Arbitration Agreements

Since arbitration is a “creature of contract,” it is natural that defendants would turn to their own agreements to tame the terms that lead to mass arbitration and insert language to blunt mass arbitration’s effectiveness.

1. Eliminate “Friendly” Provisions

The lowest hanging fruit in the arbitration contracts were the fee-shifting provisions; one of the least surprising changes many corporations made in the wake of mass arbitration was to eliminate those. Unsurprisingly, these sorts of contractual revisions had already begun to happen during the initial study. In May 2021, Gibson Dunn advised its clients to “rethink provisions committing them to paying arbitration fees,” and “[s]cores of companies”

were quick to do so.⁹⁶ But these changes alone may not effectively deter mass arbitration for three key reasons. First, even without fee shifting, the cost for defendants to respond to individual arbitration demands already “generate[s] significant settlement pressure.”⁹⁷ Second, “friendly” fee-shifting provisions exist for a reason—to avoid invalidation under “unconscionability or effective-vindication grounds”—there is only so far defendants can go and have their contracts upheld in court.⁹⁸ Third, “[c]orporations with fewer resources, less legal sophistication, or less flexibility” may not be able to adapt before becoming mass-arbitration defendants.⁹⁹ Despite these limitations, “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 asymmetric costs through individual arbitration proceedings.”¹⁰⁰ Eliminating fee-shifting provisions, however, was just the beginning of a tide of other contractual changes to arbitration agreements.

2. *Switch Direction: Require Aggregation of Individual Claims*

As an alternative deterrent to the individualized pressure of mass arbitration, corporations have adopted “batching” provisions into their agreements, either directly through changing the terms of their contracts or indirectly, by reference to mass arbitration protocols used by their arbitration providers.¹⁰¹ While the parameters of batching provisions vary, the basic idea is the same—after a certain number of legally or factually related demands are filed, they are “batched” into a group for resolution at a single proceeding or streamlined procedure that does not trigger individual filing fees for each claim.¹⁰² “While precise details will vary across agreements and fora, the basic idea” of batching or test-case grouping is that, after a certain number of legally and factually related arbitral demands are filed, those claims will be “batched” into groups, assigned to an arbitrator, and will trigger a single filing fee or reduced filing fees.¹⁰³ Notably, some contractual batch provisions explicitly preserve the

96. Glover, *supra* note 2, at 1365.

97. *Id.* at 1366.

98. *Id.*

99. *Id.*

100. *Id.* at 1367.

101. *Id.*

102. *Id.*

103. *Id.*

contractual class-action waiver.¹⁰⁴ Batching provisions may tend to diminish the attractiveness of the Mass Arbitration model by diminishing its ability to leverage one of its most interesting and surprising elements, namely, the use of individualized claiming to *plaintiffs'* advantage. Indeed, FedArb markets its three-bellwether test-case model along these lines: “[T]here will be little need for individual arbitrations, thereby expediting payment and greatly reducing costs—including the elimination of millions in arbitration fees.”¹⁰⁵ The U.S. Chamber of Commerce went as far as to claim that “JAMS and the AAA” had an “obligation” to “adopt a new fee schedule for mass arbitrations” that would deviate from their contractually agreed upon rates, and instead charge fees which “reflect[ed] [their] actual work” to “reduce the incentive of plaintiffs’ lawyers” to pursue mass arbitrations.¹⁰⁶

Only time will tell whether the defense bar will secure a dispute-resolution world in which claims are resolved not by way of the class action, but by way of something that looks a lot like class arbitration—or whether they would even want to.¹⁰⁷ My own view—for now—is that faced with the choice between class actions and potential class arbitrations, defendants may well prefer to be in court.¹⁰⁸

104. See, e.g., *Terms of Use*, GRUBHUB (Dec. 14, 2021), <https://www.grubhub.com/legal/terms-of-use> [<https://perma.cc/B4G9-GWRU>]; *Terms of Service (U.S.)*, DRIZLY (Feb. 7, 2022), <https://drizly.com/terms/US> [<https://perma.cc/3ADE-4GSK>] (containing a class-action waiver and stating that “‘Batch Arbitration’ provision shall in no way be interpreted as authorizing class arbitration of any kind”); *Consumer Terms and Conditions—United States (Including Puerto Rico)*, DOORDASH (Feb. 3, 2023), <https://help.doordash.com/legal/document?type=cx-terms-and-conditions®ion=US&locale=en-US> [<https://perma.cc/HL46-Z86G>] (requiring that any claims be arbitrated and barring pursuit of “a class action or similar proceeding in any forum”).

105. Kennen D. Hagen, *Mass Arbitrations*, TODAY’S GEN. COUNS. (Aug. 27, 2021), <https://www.todaysgeneralcounsel.com/mass-arbitrations/> [<https://perma.cc/E2YQ-55GQ>].

106. CHAMBER OF COM. MASS ARBITRATION, *supra* note 36, at 56–57.

107. Class arbitration is not unheard of in the United States; indeed, prior to the Supreme Court declaring “arbitration” to be “bilateral” in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the two parties to the contract at issue had negotiated to have disputes resolved in front of the AAA, pursuant to AAA protocols—which included protocols for class-wide arbitration. 559 U.S. 662, 685–87 (2010); see also Glover, *supra* note 2, at 1301–02 (showing how the Supreme Court’s holding in *Stolt-Nielsen* effectuated the Court’s own view of “arbitration” as opposed to the parties’ or the arbitral fora’s, despite styling the decision as effectuating the parties’ freedom to contract for arbitration under the FAA). Class-wide arbitration is also not unheard of in other countries. See generally Brian T. Fitzpatrick & Randall S. Thomas, *The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?*, 40 NW. J. INT’L L. & BUS. 203 (2020).

108. See Glover, *supra* note 2, at 1369; see also Alison Frankel, *Verizon Appeal Will Be Early Test of Corporate Strategy to Combat Mass Arbitration*, REUTERS (Nov. 22, 2022, 3:48 PM), <https://www.reuters.com/legal/government/verizon-appeal-will-be-early-test-corporate-strategy-combat-mass-arbitration-2022-11-22/> [<https://perma.cc/Q3AU-3XBT>].

3. *Switch Fields: Designate a New Arbitral Forum*

Recently, defendants have been leaving arbitral outfits like AAA and JAMS and heading for different arbitral fora. By revising their contracts, defendants have shifted their “arbitration proceedings from neutral fora like the AAA or JAMS” to alternative “defendant-friendly” outfits that will arbitrate matters using mass-arbitration procedures either developed by defendants or perceived as less mass-arbitration friendly for plaintiffs.¹⁰⁹

One of the first movers on this score was DoorDash. Dissatisfied with AAA’s due process protocols and filing fee arrangements, DoorDash worked with its counsel Gibson Dunn to select a new arbitration provider, one that would use protocols “created for DoorDash, at DoorDash’s request, and with the input of DoorDash and its lawyers.”¹¹⁰ The International Institute for Conflict Prevention & Resolution (CPR) agreed to DoorDash’s request and, shortly after, DoorDash “sent its drivers revised agreements designating . . . CPR as its arbitral forum.”¹¹¹ Though claimants challenged the enforceability of this new agreement in the Northern District of California, the court was “not persuaded there had been any ‘catering or favoritism’ or that the protocols were ‘so biased’” that they invalidated the arbitration agreement.¹¹² DoorDash successfully compelled arbitration at a new provider under a process it had a hand in making.¹¹³ As of May 2023, the status of the DoorDash cases that were moved out of AAA has not been reported by CPR, which (somewhat typically, within the industry) provides data when cases close.

Other corporations have followed DoorDash’s lead. Uber and Postmates (postacquisition by Uber) shifted to ADR Services, Inc. as their arbitral fora.¹¹⁴ In mid-2021, Ticketmaster amended its contracts to designate a new arbitral forum—New Era ADR, a dispute resolution provider that “bills

109. Glover, *supra* note 2, at 1370.

110. *Id.* (quoting [Unredacted] Declaration of Aaron Zigler in Support of Petitioners’ Reply in Support of Amended Motion to Compel Arbitration ¶¶ 8–14, *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2020) (No. 19-cv-07545), ECF No. 180-3).

111. *Id.* at 1370–71.

112. *Id.* at 1371 (quoting *McGrath v. DoorDash, Inc.*, No. 19-cv-05279-EMC, 2020 WL 6526129, at *9–11 (N.D. Cal. Nov. 5, 2020)).

113. CPR developed new Mass Arbitration Protocols after the DoorDash cases were transferred. For a detailed analysis of these protocols and those of other arbitral fora, see J. Maria Glover, *The Private Reformation of Civil Justice: Remaking Mass Litigation* (unpublished manuscript) (draft on file with author). CPR has not reported the status of the DoorDash cases transferred from the AAA at the time of this Article’s publication. All data used herein is the latest publicly available as of May 2023.

114. *Compare* Petitioners’ Marciano Abadilla, et al.’s Motion to Compel Arbitration at 10, *Abadilla v. Uber Techs., Inc.*, No. 3:18-cv-07343-KAW (N.D. Cal. Dec. 5, 2018) (noting that JAMS Rules apply to agreement), *with U.S. Terms of Use, UBER* (Jan. 17, 2023), <https://www.uber.com/legal/tr/document/?country=united-states&lang=en&name=general-terms-of-use> [<https://perma.cc/M7LE-DC38>] (citing Uber’s current policy designating ADR Services Inc. as its default arbitral forum for disputes arising in California).

itself as cheaper for businesses than other arbitral fora.”¹¹⁵ New Era ADR has a number of rules and protocols that Ticketmaster and other entities might find attractive. Notably, New Era ADR constrains the evidence that can be submitted to “the lesser of 10 total files, 25 pages across all files or 25MB of aggregate uncompressed uploads for expedited arbitrations.”¹¹⁶

The ability of Ticketmaster to shift its disputes to New Era ADR is the subject of dispute and litigation. At the heart of this dispute is a set of claims that started, as many mass arbitrations do, as a class action.¹¹⁷ Specifically, patrons of the online ticketing service Ticketmaster brought a class action against Ticketmaster and its parent company, Live Nation, alleging anticompetitive and monopolistic practices in violation of the Sherman Act.¹¹⁸ Defendants moved to compel arbitration, which Ticketmaster’s current consumer arbitration agreement required New Era ADR to oversee.¹¹⁹

In their initial response to the defendants’ motion to compel, plaintiffs take issue with defendants delegating arbitration oversight to New Era ADR for three main reasons. First, plaintiffs question New Era’s “validity and impartiality” as an arbitral forum.¹²⁰ Specifically, plaintiffs allege that New Era enters into financial relationships with defendant businesses by “taking annual retainer fees from them and providing a friendly forum to them.”¹²¹ Plaintiffs contend that these particular defendants, Ticketmaster and Live Nation, provided the vast majority of New Era’s 2021 revenue and that New Era “considers Defendants its ‘anchor client.’”¹²² Procedurally, plaintiffs seek documents that would prove these conflicts, which defendants currently refuse to provide.¹²³ The underlying theory from plaintiffs’ attorneys is that such a conflict would speak to the “substantive unconscionability” of the defendants’ arbitration agreement and boost their opposition to defendants’ motion to compel arbitration.¹²⁴

Second, plaintiffs oppose the specific terms of New Era’s rules and procedures on discovery—concerned that those terms limit the substantive

115. Glover, *supra* note 2, at 1371.

116. See, e.g., *Rules and Procedures*, NEW ERA ADR, <https://www.neweraadr.com/rules-and-procedures/> [<https://perma.cc/58XB-BWC2>].

117. Glover, *supra* note 2, at 1332, 1386–92 tbl. 2.

118. Complaint at 3–11, *Heckman v. Live Nation Ent., Inc.*, No. 2:22-cv-00047-GW-GJS (C.D. Cal. Jan. 4, 2022).

119. See *Terms of Use*, TICKETMASTER, https://help.ticketmaster.com/s/article/Terms-of-Use?language=en_US#section17 [<https://perma.cc/2THX-LTJG>] [hereinafter *Ticketmaster Terms*].

120. Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Discovery Related to Whether a Valid Arbitration Agreement Exists at 2, *Heckman*, No. 2:22-cv-00047-GW-GJS (C.D. Cal. Apr. 6, 2022) [hereinafter Plaintiffs’ Motion].

121. *Id.*

122. *Id.*

123. *Id.* at 2–3.

124. *Id.* at 9–11.

rights of claimants.¹²⁵ New Era’s Rules and Procedures state that, “New Era ADR operates on the premise that limitations on discovery are one of the primary ways efficiencies are achieved in arbitration,” and that “[b]y using the Website and its platform, you acknowledge that you will forego the presentation of certain evidence which might otherwise be available for presentation in a federal or state judicial forum or through other alternative dispute resolution services.”¹²⁶ Plaintiffs also take issue with the fact that New Era’s rules on discovery were amended just a week before defendants’ motion to compel arbitration.¹²⁷ Further, plaintiffs point out that connections between Gibson Dunn, DoorDash, and CPR were only revealed *in* discovery,¹²⁸ and that such discovery is needed in *Heckman* along these lines.

Third, plaintiffs were concerned with apparent coordination between New Era and the defendants, via their shared law firm representation, Latham & Watkins. Ticketmaster initially designated JAMS as its arbitration forum, but in 2021, changed its terms of use to designate New Era ADR as its forum.¹²⁹ Plaintiffs alleged that Latham & Watkins played a role in securing the partnership between New Era and the defendants, even as Latham & Watkins was trying to compel arbitration to JAMS, not New Era, in a similar suit against Ticketmaster.¹³⁰ In the similar suit, *Oberstein v. Live Nation Entertainment, Inc.*,¹³¹ Ticketmaster’s arbitration agreement in place at the time the arbitration demanded mandated arbitration to JAMS, not New Era.¹³²

Their concerns appear to have been well founded. In March 2023, plaintiffs submitted their response in opposition to compel arbitration which outlined the “Kafkaesque arbitration procedure designed by Defendants” and administered by New Era to tilt the playing field to the defendants’ advantage and “deter filing claims.”¹³³ According to the response, complaints are limited to ten pages and do not entitle plaintiffs to discovery; instead, plaintiffs must “‘make a request to be upgraded to New Era ADR’s Standard Arbitration process’ and pay additional fees of \$15,000.”¹³⁴ But

125. *Id.* at 10–12.

126. *Id.* at 5, 11.

127. *Id.* at 11–12.

128. *Id.* at 7.

129. *See Ticketmaster Terms*, *supra* note 119; Plaintiffs’ Motion, *supra* note 120, at 1.

130. Plaintiffs’ Motion, *supra* note 120, at 6.

131. No. CV 20-3888-GW-GJSx, 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021), *aff’d*, 60 F.4th 505 (9th Cir. 2023).

132. Memorandum of Points and Authorities in Support of Defendants’ Motion to Compel Arbitration at 6, *Oberstein*, No. CV 2:20-3888-GW-GJSx, 2021 WL 4772885 (C.D. Cal. Apr. 28, 2020), *aff’d*, 60 F.4th 505 (9th Cir. 2023).

133. Plaintiff’s Response in Opposition to Defendants’ Motion to Compel Arbitration at 1, *Heckman*, No. 2:22-cv-00047-GW-GJS (C.D. Cal. Mar. 17, 2023), ECF No. 135.

134. *Id.* at 3 (quoting Exhibit A to O’Mara Declaration, ECF No. 30-3, the New Era Rules).

even that request requires defendant's approval.¹³⁵ If granted, claimants must rely on evidence from less than 250 pages of discovery and draft a brief limited to five pages "to prove liability, damages, and an entitlement to injunctive relief."¹³⁶ If the arbitrator grants injunctive relief, defendants may appeal; if the arbitrator denies injunctive relief, claimants cannot appeal.¹³⁷ The arbitrator must be selected from a pool chosen by New Era and can be changed at any time for any reason by New Era.¹³⁸ That arbitrator then decides whether a claim is part of a particular mass arbitration, and if it is, the right of individual bilateral arbitration is forfeited and the claimant's case decided by the outcome of three bellwethers,¹³⁹ even for claims filed after the bellwethers where claimant's interests would not be represented or their own arguments advanced.¹⁴⁰ If the bellwethers are unfavorable, they can be applied to claimants such that they "*lose en masse*," but if they are favorable to claimants, then each claimant must proceed and prevail on "individual issues."¹⁴¹ And they must proceed before a single arbitrator when there can be over 100,000 individual claims, which means individual claimants may wait "decades" or "near-indefinite[ly]" for resolution of their claims.¹⁴² For all of these reasons, the plaintiffs argued that this arbitration would be unconscionable and defendants' motion to compel arbitration should be denied.¹⁴³ The hearing on Ticketmaster's motion to compel will be heard on May 1, 2023.¹⁴⁴

As a matter of general contract law and the Court's freedom-of-contract FAA jurisprudence, changes to the arbitration agreements that move the arbitral fora have not been met with much resistance in the courts.¹⁴⁵ After all, corporations can decide which arbitral fora get their business, and they are free to forum shop and search for defendant-friendly protocols. That said, there may be limits to how far they can go before risking invalidation under state unconscionability, effective vindication, or other grounds.¹⁴⁶ The court that upheld the enforceability of DoorDash's revised arbitration agreement cautioned that it had "some concern" and its decision hinged on its conclusion that the new protocol and forum appeared "fair and

135. *Id.* at 4.

136. *Id.*

137. *Id.*

138. *Id.* at 10.

139. *Id.* at 4–5.

140. *Id.* at 11–12.

141. *Id.* at 13.

142. *Id.*

143. *Id.* at 25.

144. Order on Joint Stipulation Setting Briefing Schedule, *Heckman*, No. 2:22-cv-00047-GW-GJS (C.D. Cal. Feb. 16, 2023), ECF No. 132.

145. Glover, *supra* note 2, at 1370–71.

146. *Id.* at 1371–72.

impartial.” And though defendants could consider moving to an arbitral forum that is fair and impartial but “functionally incapable of processing more than a few claims each year,”¹⁴⁷ the *DoorDash* court also took this possibility into account, finding that there was “little concrete evidence” that DoorDash’s arbitral forum change would “result in significant delay”—implying that a dilatory forum change could risk invalidation.¹⁴⁸

This is only the tip of the iceberg. The last two years alone have brought in a dizzying array of revised (and revised again) mass arbitration protocols; revisions to arbitral fee schedules; and contractual provisions providing for changes in the arbitral fora, among others. Details about and analysis needed of these various protocols and provisions and their implications for claims resolution are extensive and necessarily set forth in other work.¹⁴⁹ Moreover, battles about the permissible contents and scope of these protocols are the subject of ongoing and future dispute. At this juncture, it is sufficient to note that these sort of responses to mass arbitration are among the most widespread, the most quickly introduced, the least tested and, in part because of all those things, likely to be some of the most consequential.

4. *Limit Access to the Field: Defendants Insert “Notice” and Other Similar Provisions into Their Arbitration Agreements*

Defendants have also attempted to change the front end and back end of the arbitration process to restrict how claims are brought or attach conditions to settlements and payments. Defendants understand that the “preparation of individual arbitration demands” presents a “financial obstacle to mass arbitration” as firms bringing mass arbitrations need to gather personal information from each individual claimant as well as factual evidence sufficient to support a claim.¹⁵⁰ While a class action allows for the assertion of substantially identical claims through a single complaint, a mass arbitration arising out of the same set of facts would require “filing nearly identical complaints for thousands of demands.”¹⁵¹ Defendants have seized on the “generic” or highly duplicative nature of filings, necessitated by the unavailability of the class action device, as if they evidenced frivolity or an “invalid and abusive” practice.¹⁵² However, the AAA has not found such “generic” demands to be deficient, including over a thousand demands in a

147. *Id.* at 1371 n.480, 1372 (quoting *McGrath v. DoorDash, Inc.*, No. 19-cv-05279-EMC, 2020 WL 6526129, at *10 (N.D. Cal. Nov. 5, 2020).

148. *DoorDash*, 2020 WL 6526129, at *10.

149. See J. Maria Glover, *Remaking Reality* (unpublished manuscript) (draft on file with author) (detailing and analyzing the Mass Arbitration protocols of AAA, JAMS, NewEra, FedArb, CPR, and others).

150. Glover, *supra* note 2, at 1334.

151. *Id.* at 1335.

152. *Id.*

CenturyLink mass arbitration and more than fifteen thousand demands filed in a mass arbitration against Postmates.¹⁵³ The Chamber of Commerce suggested that JAMS and the AAA should adopt rules requiring claimants to submit additional information, such as “account number[s], product serial number[s], [and] employee identification number[s]” to make the proceedings “more efficient and less susceptible to abuse.”¹⁵⁴ But, given that the need for these highly duplicative filings is a direct result of defendants’ elimination of the more efficient class action device, the case for raising the requirements for individual claims seems to have little sway before courts or arbitrators.

Several defendants have also made similar attempts to complicate or obstruct mass arbitration on the back end through the terms of settlements.¹⁵⁵ A common tactic is to include “provisions in arbitration agreements and settlement releases” that “warn[] claimants” that any disclosure of information about the settlement will “forfeit their payout[.]”¹⁵⁶ Several have also attempted to impose “artificial conditions on settlement payouts”—for instance, by mailing a “nondescript postcard” bearing a unique settlement ID to claimants and refusing to pay if claimants cannot present the ID, or imposing upon claimants the cumbersome task of tendering wet signatures, sometimes notarized or in person.¹⁵⁷ While these efforts could be cast as necessary to vet claims or secure the confidentiality that is a common benefit of settlement, they create friction which will impede, if not eliminate, at least some number of claims. Such provisions could pose a substantial threat to the economic viability of mass or multiple arbitration (or any individualized claiming model), though whether judges will permit defendants to impose them—particularly when doing so would make arbitration more onerous than litigation—is an open question.

B. Return to the Glory Days: The Architects of the Arbitration Revolution Seek to Restore the Post-Revolution, Pre-Mass Arbitration Landscape

Perhaps the least surprising defense response is that the architects of the arbitration revolution are now fighting to restore the world to its post-*Concepcion* and *Italian Colors*, but pre-mass arbitration, state. The strategy, and the fundamental argument behind it, should be fairly unsurprising as well. The same entities that brought class-action waivers to the Supreme Court now seek judicial approval, under the Supreme Court’s FAA

153. *Id.*

154. CHAMBER OF COM. MASS ARBITRATION, *supra* note 36, at 57.

155. Glover, *supra* note 2, at 1358–59.

156. *Id.*

157. *Id.* at 1359.

jurisprudence, of contractual provisions banning mass or multiple arbitration.

The procedural road to litigation over mass-arbitration bans in a post-arbitration revolution world should now be familiar. In 2021, a group of plaintiffs brought a class action against Verizon Wireless alleging that Verizon had been deceptively charging—and misleading the nature of—monthly administrative charges to customers’ cell phone bills.¹⁵⁸ Customers were required to accept Verizon’s Customer Agreement before activating their wireless service; the Customer Agreement contained an express arbitration agreement and class action prohibition.¹⁵⁹ Verizon moved to compel arbitration pursuant to the agreement.¹⁶⁰

In July 2022, U.S. District Judge Edward Chen of the Northern District of California denied Verizon’s motion to compel arbitration because the agreement was both procedurally—due to its nature as a contract of adhesion—and substantively unconscionable.¹⁶¹ In so holding, Judge Chen made a critical threshold determination that he—rather than an arbitrator—was to decide whether the Customer Agreement was enforceable.¹⁶² The Agreement’s substantive unconscionability was due in large part to its mass-arbitration-ban provision, which effectively prohibits claimants from bringing arbitration claims en masse.¹⁶³ The provision mandates that when more than twenty-five similar claims are filed, the cases are to be batched into groups of ten and arbitrated as a group; if a settlement is not reached after the first ten groups arbitrate, the process begins anew and continues “until the parties are able to resolve all of the claims.”¹⁶⁴ Judge Chen was concerned with the time it would take to undergo this process to completion and that, when coupled with the Agreement’s statute of limitations provisions, it would effectively bar certain claimants from bringing claims altogether on account of timing issues.¹⁶⁵

Verizon appealed Judge Chen’s ruling to the Ninth Circuit, challenging Chen’s conclusions and his authority to make such a determination in the first place (as opposed to an arbitrator), as well as the unconscionability of the Agreement.¹⁶⁶ Verizon maintains that the Agreement is neither procedurally nor substantively unconscionable. Specifically, “the contract’s adhesive nature is the sole basis for finding procedural unconscionability,”

158. *MacClelland v. Cellco P’ship*, 609 F. Supp. 3d 1024, 1028 (N.D. Cal. 2022).

159. *Id.* at 1029.

160. *Id.*

161. *Id.* at 1033–44.

162. *See id.* at 1030–32.

163. *See id.* at 1040–44.

164. *Id.* at 1040.

165. *See id.* at 1041–43.

166. *See* Brief of Appellants at 1–2, *MacClelland v. Cellco P’ship*, No. 22-16020 (9th Cir. Nov. 21, 2022).

meaning that the Agreement remains valid “unless the degree of substantive unconscionability is high.”¹⁶⁷ And Verizon argues the mass arbitration provision is not unconscionable because it “[e]mploys [a] [f]air [a]nd [e]stablished [p]rocess [f]or [r]esolving [n]umerous [s]imilar [c]laims” and uses bellwether proceedings similar to those “regularly employed in mass litigation.”¹⁶⁸ Verizon’s petition has been supported by the U.S. Chamber of Commerce and the California Employment Law Council.¹⁶⁹

For reasons I have detailed elsewhere, it is a stretch under the Supreme Court’s FAA jurisprudence—expansive as it is—to conclude that a provision banning *individualized claiming* (however numerous) falls in the same category as a provision banning *class actions*.¹⁷⁰ That is not to say the Supreme Court might not interpret their FAA cases in such a way as to achieve this “stretch,” however disingenuous or otherwise incorrect one thinks such a holding might be. Of course, part of the contractual setup by Verizon is that the provision does not *explicitly* ban individualized claiming—perhaps just as the contracts in *Italian Colors* did not *explicitly* prohibit merchants from pursuing rights under federal statutes.¹⁷¹ What the contract does is impose a form of “batching” provision that, in design, amounts largely to a mass-arbitration ban; to the extent the latter is disallowed (an open question), anything short of that might be permissible. Again, this should all sound familiar: The players who scored the winning touchdowns in the arbitration revolution are drawing from their old playbook.

Among the many open questions about this response is one that goes to the heart of the FAA jurisprudence Verizon seeks to invoke. That jurisprudence hinges, quite fundamentally, on the Supreme Court’s own view that “arbitration” or “traditional arbitration” under the FAA is by its nature bilateral, and more than that, *not* class-wide.¹⁷² Moreover, central to much of the FAA jurisprudence of the past 20 years are holdings that provisions *banning* collective procedures in arbitration are not only permissible, but in line with the nature of arbitration. Viewed this way, the old plays in the playbook seem inapt: Verizon is effectively seeking to retain the ability to *ban* class-wide procedures, supported by a jurisprudence built on a conception of arbitration as bilateral, and at the same time seeks to

167. *Id.* at 35 (citing *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261 (9th Cir. 2017)).

168. *Id.* at 37.

169. See Jess Krochtengel, *Biz Groups Urge 9th Circ. to Stop Mass Arbitration ‘Blackmail,’* LAW360 (Nov. 29, 2022, 4:21 PM), <https://www.law360.com/articles/1553105> [<https://perma.cc/TFN9-ZEHD>].

170. See Glover, *supra* note 2, at 1296–98 (analyzing and theorizing the scope of the Supreme Court’s FAA jurisprudence); *id.* at 1318 (explaining the Supreme Court’s position that the FAA is incompatible with class actions due to its preference for bilateral arbitration).

171. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

172. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685–87 (2010).

impose *aggregate procedures* into arbitration—which is, again by the Supreme Court’s description, bilateral. Of course, it remains to be seen whether the Supreme Court could well be willing to make room under the expansive conceptual umbrella of contractual party agreement contained in its FAA jurisprudence for the sorts of provisions Verizon seeks to impose here—however uncomfortable the fit.

For its part, the Chamber of Commerce appears to be laying the public relations groundwork for such a move. In February 2023 it published a position paper entitled *Mass Arbitration Shakedown*, which advocates for a return to a legal landscape in which claimants are forced through contracts of adhesion to forfeit their right to what the Chamber calls the “abusive class actions that characterized the last part of the 20th century” and must arbitrate individually and not in a manner that is “abusive” according to the Chamber.¹⁷³ Per the Chamber’s 2023 position paper, claimants must only proceed with their claims by way of an “efficient and effective method of dispute resolution for businesses”; mass or multiple arbitration, the Chamber asserts, does not fit the bill.¹⁷⁴ Moreover, the Chamber contends, this “efficient and effective” (*viz.*, individual, but not mass, arbitration) is good for consumers. This last point is a now-familiar refrain from the Chamber. In fact, in support of that argument, the Chamber cites a study they themselves commissioned¹⁷⁵: “If an arbitration proceeds to a decision on the merits, claimants are more likely to prevail . . . recover[,]” and “receive[] [a] higher award.”¹⁷⁶ This statement minimizes the power of the word “if.” Neither the Chamber’s prior arbitration studies nor its February 2023 paper provide data regarding how many arbitration claims “proceed[] to a decision on the merits.”¹⁷⁷ The rise of mass arbitration itself is, if nothing else, a market response to the impossibility for most claims subject to the Court’s FAA jurisprudence of converting from an “if” into a “when.”

The Chamber sets forth a number of prescriptions for curbing “abusive” mass arbitration. Some of its prescriptions will sound familiar: For instance, the Chamber suggests that arbitration providers “reform their fee schedules” to make the pursuit of arbitral demands more costly for claimants; as another example, the Chamber suggests that arbitral fora “borrow[] . . . procedures developed by courts to process large numbers of claims in the context of

173. CHAMBER OF COM. MASS ARBITRATION, *supra* note 36, at 5, 62.

174. *Id.*

175. NAM D. PHAM & MARY DONOVAN, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, FAIRER, FASTER, BETTER III: AN EMPIRICAL ASSESSMENT OF CONSUMER & EMPLOYMENT ARBITRATION 3 (2022) (“The U.S. Chamber of Commerce Institute for Legal Reform provided financial support to conduct this study.”).

176. CHAMBER OF COM. MASS ARBITRATION, *supra* note 36, at 10.

177. The Chamber’s study also explicitly “exclude[d] class actions” which exemplify the “negative value claims” that are not typically marketable on an individual basis. *Id.*

federal multidistrict litigation” (e.g., batching and bellwethers).¹⁷⁸ It also makes other and perhaps even more aggressive prescriptions, including the policing of and/or prohibition on “online and social media advertising for . . . mass arbitrations,” which the Chamber criticizes for emphasizing “potential payments” and the ability to make real recoveries for consumers;¹⁷⁹ the Chamber even calls for state bar authorities to initiate investigations of any firm that represents clients in a mass arbitration for “potential [ethical] violations.”¹⁸⁰

The Chamber’s broadsides against mass arbitration exist in rather considerable tension with its prior assertions, including those in the Chamber’s amicus brief in *Italian Colors*. In that amicus brief, the Chamber asserted that forced arbitration agreements with class action waivers should not be voided on effective vindication grounds because forced arbitration could serve as an effective substitute for class actions.¹⁸¹ To support this, they argued that “arbitration claimants have ready access to . . . informal means to pool resources and share . . . costs” and emphasized that while “bilateral arbitration requires each claimant to bring a separate proceeding,” “claimants bringing overlapping or identical claims based on common facts are not each required to reinvent the wheel.”¹⁸² In fact, they noted that:

“[g]iven the strong financial incentives, it is no surprise that at least some plaintiffs’ lawyers are beginning to recognize that pursuing serial individual arbitrations . . . can be an economically viable business model—especially in view of the ability to reach multiple similarly situated individuals by means of websites and social media.”¹⁸³

“[N]othing precludes plaintiffs’ attorneys from sharing successful strategies,” they explained.¹⁸⁴ Time, and likely the Supreme Court, will tell whether *this* hypocrisy will be blessed.

IV. TAKING STOCK: WINNERS AND LOSERS (SO FAR) IN MASS ARBITRATION

Whatever the ultimate fate of these and other potential responses to mass arbitration, at a high level, the phenomenon has had the effect of flipping

178. *Id.* at 48.

179. *Id.* at 21.

180. *Id.* at 48.

181. Brief of the Chamber of Com. of the U.S. & Bus. Roundtable as Amici Curiae in Support of Petitioners at 26, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (No. 12-133).

182. *Id.* at 26–27.

183. *Id.* at 29.

184. *Id.* at 27 n.14.

the long-standing “winners” and “losers” positions in the mandatory arbitration landscape of the past forty years.¹⁸⁵ To wit, the corporate defense-side juggernaut, the undisputed winner of the arbitration revolution, has at least for a time found itself on the losing side in the mandatory arbitration game. Conversely, consumers and employees, as claimants, have found themselves in a uniquely advantageous, and dare one say, “winning” position.

Taking stock of “winners” and “losers” at such a high level and in such broad strokes, however, misses some important nuances in the landscape. The pyrrhic victory of the arbitration revolution has been described by many as a bit of poetic justice. Indeed, the irony that corporate defendants are now in a pickle because of their own actions is lost on virtually no one. Dig beneath the surface, however, and that obvious irony, while no less obvious, is not as clean as it first appears. This Article concludes by taking a closer look.

For starters, the direct “winners” of the arbitration revolution—the leaders and architects of that revolution, i.e., defense-side interests—are not actually the ones who have been the “losers” in the mass arbitration world. At the time of *Concepcion*, some of the gig economy companies that have found themselves on the receiving end of tens of thousands of arbitration demands did not even exist.¹⁸⁶ Amazon Prime had only just been introduced; Postmates was only an idea; Uber came into being the year prior. Indeed, however aligned defense-side interests may be on any number of issues, they are not a monolith. While it may be hard to imagine this now, at the time of *Concepcion*, not everyone on the defense side agreed either with AT&T’s strategy generally or that AT&T should be the flagbearer for the strategy in particular.

In the case of Uber, Doordash, Postmates, and other corporate defendants hit hardest by the mass arbitration phenomenon, they literally had no say at all. Importantly, moreover, the architects of the arbitration revolution are not likely poised to be the “losers” in mass arbitration anytime soon. It is far

185. Mass arbitration is an evolving phenomenon. Moreover, the arbitration revolution to which mass arbitration responded—a revolution that culminated in what appeared to be a near-total victory for the defense bar and defense-side interests and eliminated scores of legal claims—did not happen overnight. Accordingly, to take stock of “winners” and “losers” is to take stock of “winners” and “losers” at this time and so far. To the extent this game has an ending (a dubious proposition), it certainly is not over now; it is not even clear we are through the first half. So much will depend on the fate of a number of responses to mass arbitration, some of which have already started to unfold, some of which we have yet to see emerge.

186. Lyft launched in 2012 as a service under Zimride and DoorDash was founded in 2013. Andrew Greiner, Matt McFarland, Ivory Sherman & Jen Tse, *A History of Lyft, from Fuzzy Pink Mustaches to Global Ride Share Giant*, CNN BUSINESS (Apr. 2, 2019), <https://www.cnn.com/interactive/2019/03/business/lyft-history/index.html> [<https://perma.cc/LMV6-Z5VJ>]; *The DoorDash Story*, DOORDASH (Oct. 4, 2013), <https://medium.com/@DoorDash/the-doordash-story-b370c2bb1e5f> [<https://perma.cc/6XNE-KF37>].

more likely that less nimble, less constantly vigilant corporations will be. Depending on one's vantage point then, there is a bit of a wrong time/wrong place (or right time/right place) element to all of this. Who "wins" and "loses" in mandatory arbitration warfare, as it turns out, has been a bit arbitrary.

On the claimants' side, it is both an overstatement and too early to declare mass arbitration a victory for consumers and employees generally. For starters, while mass arbitration is the most substantial response to the arbitration revolution to date, as I traced in *Mass Arbitration*, the model is both too expensive¹⁸⁷ and too individualized¹⁸⁸ to capture all the claims that were eliminated by the arbitration revolution. The latter problem will not change under a model of multiple individualized claiming, and as defendants rush to change their arbitration agreements,¹⁸⁹ the former problem will only increase.

Further, and to a larger observation about mandatory arbitration warfare's arbitrariness, whether a claimant will succeed on a potentially meritorious claim or even be able to pursue that claim will tend largely to collapse into a question about when that claimant was injured and when they sought redress. An employee subject to mandatory arbitration and denied wages and overtime in 2015 would likely have had their claim screened out by every plaintiffs' attorney in the United States, on account of the arbitration clause.¹⁹⁰ That same individual, in 2020, could have pursued their claim in arbitration and perhaps received something close to actual damages. As the responses to mass arbitration continue to roll in, that same claimant in 2026 may find themselves the beneficiary of the counter-revolution, or they may find themselves in a reshaped world that is somehow even more dire for individual consumers and employees than the one that existed post-*Concepcion* and *Italian Colors*.

There is one last bit of irony to appreciate: in light of mass arbitration, what was once seen as a defeat, namely, the "failed" attempts of shareholder advocates to impose arbitration agreements on securities transactions, now appears to be a victory in disguise. Proponents of this effort argued that in response to "the uncertain benefits and high costs of securities class actions" stockholders could—and should—"vote to adopt mandatory individual

187. See Glover, *supra* note 2, at 1325 (describing the high claim-value threshold for mass arbitration relative to class actions).

188. *Id.* at 1383 (for instance, claims that require company-wide and/or collective proof, like discrimination, would not seem to be meaningfully aided by the advent of a model of individualized claiming like mass arbitration).

189. See *supra* Part II.

190. See Glover, *supra* note 2, at 1327–28 (citing Interview with Cory L. Zajdel, Principal Att'y, Z Law, LLC, in Wash. D.C. (July 22, 2021)). Cory Zajdel, and his firm Z Law Group, spearheaded mass arbitrations against Chegg and DoorDash.

arbitration” provisions to govern claims arising under federal securities laws.¹⁹¹ One rationale they offered closely paralleled those of the defense coalition that led the arbitration revolution in the consumer and employment contexts—that class action litigation “work[ed] to the advantage of plaintiffs’ attorneys” who could “represent a large class comprised of many plaintiffs” including “smaller investors, with very little interest in the case or its handling.”¹⁹² They noted that absent the class action, these “stockholders would each have to bring their own claims in individual arbitration” resulting in “fewer strike suits” and “lower costs of individual arbitration . . . [that] would provide savings to the corporation and, by extension, to the corporation’s stockholders.”¹⁹³ In short, eliminate the mechanism, eliminate claims.

In November of 2018, the argument became more than merely academic when Harvard Law Professor and stockholder activist Hal S. Scott through the Doris Behr 2012 Irrevocable Trust submitted a “shareholder proposal for inclusion” in Johnson & Johnson’s (J&J) 2019 proxy materials.¹⁹⁴ The proposal would amend J&J’s bylaws and require the shareholders to arbitrate all federal securities law claims, foreclosing the possibility of class actions.¹⁹⁵ In response, J&J sought a no-action letter from the SEC to “support the exclusion of the Trust’s proposal from its proxy materials.”¹⁹⁶ After several years of litigating the issue, in 2022 J&J included the proposal in its proxy statement, however—for now—it has been withdrawn by the Trust.¹⁹⁷ A possible explanation presents itself. The Trust had proposed a nearly identical resolution to amend Intuit’s bylaws in January 2020, which shareholders overwhelmingly rejected by a margin of 213 to 5.3 million when it came to a vote.¹⁹⁸ Regardless, as these efforts did not succeed, corporate securities class actions—and their potential claimants—were not subject to mandatory arbitration under corporate bylaws.

Of course, the question remains as to whether arbitration and securities class-action law actually allow for the mandatory and individual arbitration of securities claims. The SEC has taken the position that there is “some

191. Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL’Y 1187, 1189 (2013).

192. *Id.* at 1208–09.

193. *Id.* at 1209–10.

194. Doris Behr 2012 Irrevocable Tr. v. Johnson & Johnson, No. 19-8828, 2021 WL 2722569, at *1 (D.N.J. June 30, 2021).

195. *Id.*

196. *Id.*

197. Johnson & Johnson, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) (Mar. 16, 2022), <https://www.investor.jnj.com/annual-meeting-materials/2022-proxy-statement> [<https://perma.cc/89WA-LT25>].

198. Alison Frankel, *Intuit Shareholders Overwhelmingly Reject Mandatory Arbitration Proposal*, WESTLAW TODAY (Jan. 28, 2020), <https://fingfx.thomsonreuters.com/gfx/legaldocs/yzdvxlkazvx/frankel-shareholderarb--intuitdefeat.pdf> [<https://perma.cc/BY6P-LNFL>].

basis” that “arbitration proposal[s] . . . if adopted, [would] violate the anti-waiver provision of the Exchange Act.”¹⁹⁹ However, Supreme Court guidance is dated and unclear. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court upheld the enforcement of arbitration agreements to a securities claim, finding that the “resort to the arbitration process d[id] not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.”²⁰⁰ However, that arbitration agreement was part of a signed customer agreement entered into directly with their broker, not a purchase on an open exchange, which does not implicate public and collective action the same way that securities traded on exchange might.²⁰¹ Nor does it as sharply invoke effective vindication concerns.

Nonetheless, given the prospect of mass arbitration, these particular corporate defendants may have dodged a bullet. Especially since the initial model proposed arbitration bylaws would have included the provision that “the corporation w[ould] cover *all* costs of the arbitration in nonfrivolous claims as well as the payment of attorneys’ fees in the event the stockholder is successful.”²⁰² Here, the naysayers are out ahead; after all, the rationale behind shifting to arbitration was to “result in savings” and avoid the “*in terrorem*” pressure of “securities class action litigation.”²⁰³ Faced with mass arbitration, however, many corporate defendants might rather prefer to just be in court.

CONCLUSION

As I often tell my students, there are two types of “hard” legal problems. There are problems that are hard because they are complicated: they require understanding how precedents and rules interact with each other and the facts at hand but, when the law and facts are understood and applied, these problems have discernable answers. Then there are problems that are “hard” because they are, well, hard: they cannot be resolved by following some preordained series of steps. They instead require reasoning from first principles and normative priors, and even then, there may not be a clear answer because the problem is *just hard*. Some of the questions raised by mass arbitration are hard because they are complicated. At a surface level, procedural warfare in the realm of these complicated questions will generate “winners” and “losers.” At a deeper level, other questions—including many

199. Scott & Silverman, *supra* note 191, at 1220–21.

200. 490 U.S. 477, 486 (1989).

201. *Id.* at 478.

202. Scott & Silverman, *supra* note 191, at 1224 (emphasis added).

203. *Id.* at 1210, 1215.

raised by the responses to mass arbitration traced here—implicate fundamental inquiries about aggregate dispute resolution, the regulatory apparatus for low-value claims in the United States, and civil justice. These questions are hard because they are hard. Ultimately, who “wins” and “loses” in mass arbitration will depend far more on answers to these truly hard questions.