Mass Arbitration Shakedown

Coercing Unjustified Settlements

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Contents

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Executive Summary

Chapter

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Using arbitration to resolve disputes, instead of litigating in the complex and overcrowded court system, provides significant benefits for consumers, employees, and businesses. Arbitration is faster, simpler, and less expensive than lawsuits in court. Consumers and employees also win more often and receive awards that are equal to, or better than, decisions in courts.[2]

Moreover, arbitration's simple procedures allow consumers and employees to redress wrongs that cannot be litigated in court because they are too small and too individualized to attract the services of a lawyer, a category that includes most of the alleged harms that these groups typically suffer.

One group does not benefit from arbitration and has consistently opposed it: plaintiffs' lawyers. Arbitration's simplified procedures produce lower attorneys' fees. And, because the U.S. Supreme Court has held that federal law protects the right to individualized arbitration, these lawyers have not been able to use arbitration to assert the class action claims that force settlements regardless of the merits and generate huge legal fees. As courts have recognized, and multiple government studies have confirmed, class actions provide little or no benefits to class members—and arbitration provisions can, and often do, provide individuals with a much better chance of obtaining full compensation.

Mechanics of Mass Arbitration

Abusive mass arbitration is the latest plaintiff-lawyer strategy to try to eliminate arbitration. Ironically, it is based on the fact that—in order to increase access to arbitration for consumers and employees—businesses routinely pay all, or virtually all, of the fees charged by arbitration providers.

Here's the gambit: the lawyers file simultaneously tens of thousands of essentially-identical arbitration demands, triggering an immediate, massive bill to businesses for arbitration fees—often totaling hundreds of millions of dollars. Even if the claims are meritless, or completely frivolous, the business is between a rock and a hard place: it is either pressured to settle (or abandon arbitration altogether) or forced to pay that huge fee bill simply to have the chance to defend itself. And that sunk cost cannot be recovered even if the business wins every single arbitration.

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A Coercive Gambit

Critics of these campaigns explain that the lawyers' purpose is not to obtain an arbitrator's decision on the merits for each of the underlying claims.[3] The lawyers generally appear to lack the resources to handle tens of thousands of arbitration proceedings simultaneously, and arbitration providers certainly do not have tens of thousands of arbitrators to resolve them.

Rather, as companies have explained, the apparent goal of plaintiffs' lawyers is to saddle the company with an immediate obligation to pay tens of millions of dollars in fees to the arbitration provider if the company wants to have any opportunity at all to defend itself.[4] For example, under the fee schedule of the largest arbitration provider, the American Arbitration Association (AAA), a business facing 5,000 cookie-cutter consumer arbitration demands requesting telephonic hearings must pay the AAA over $13 million in fees immediately after the arbitrations are filed. And if the business wants to have arbitrators appointed and to obtain rulings on the claims, the business must pay another $9.5 million in fees.

Faced with that reality, the company will either pay a hefty settlement to resolve the claims *en masse*—regardless of how weak the underlying claims might be—or abandon arbitration altogether and return to the overburdened and inefficient court system, as some companies have done.[5] Either way, the plaintiffs' lawyers win.

Of course, these coercive gambits can succeed only if the plaintiffs' lawyers are able to amass a large "inventory" of claimants. Not surprisingly, as companies have explained, the route to that goal can be paved with abusive practices: claims filed in the names of nonexistent individuals, former customers without grievances, and others obviously not eligible for relief; misrepresentations and ethical violations in connection with the search for claimants, often placed in the hands of third parties; and lawyers' failure to convey settlement offers to their clients—in order to keep their claims "live" and therefore impose the risk of massive arbitration fees that is the essential element of the entire scheme.[6]

To be sure, there is nothing intrinsically improper about a set of lawyers coordinating representations of multiple consumers or employees with similar individual claims in arbitration. The benefits of individual arbitration—a forum that is more efficient and accessible than the overburdened judicial

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system, and that provides claimants with results that are at least as favorable, and often more favorable, than the judicial system—are no less real in the context of multiple similar claims.

The Class Action Playbook, Revisited

That said, abusive mass arbitrations are the 21st-century equivalent of the abusive class actions that characterized the last part of the 20th century—claims that can be brought solely for the purpose of extracting a settlement unrelated to the merits by leveraging the threat of huge costs. For class actions, it was gigantic litigation defense costs and the threat of draconian liability. For abusive mass arbitrations, it is the immediate obligation to pay tens, or hundreds, of millions of dollars in arbitration fees.

The goal of any fair system for resolving disputes should be outcomes that are driven by the merits of the claim. But mass arbitrations force settlements wholly unrelated to the merits. If a company is going to have to pay $10 million, or $100 million simply to be

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able to defend itself—and defense costs on top of those sums—settlement, or dropping arbitration and going back to class actions in court, become the rational alternatives, even when a claim is entirely meritless.

Solving the Problem

How can we ensure that arbitration will be able to resolve large numbers of claims and preserve the merits-based outcomes and other benefits of arbitration? One possibility is to borrow from a well-known case-management tool long used by the federal courts: the bellwether trial. The appropriate use of bellwether arbitrations can facilitate the swift resolution of mass arbitrations: the parties can arbitrate a set of jointly-selected test cases (the company paying the arbitration fees solely for those cases), with the other cases suspended (subject to a tolling agreement that protects the plaintiffs' rights to pursue their claims). The parties can then use the rulings on the merits of the test cases to settle all of the remaining cases, or they can arbitrate another set of jointly-selected cases.

This approach avoids the most abusive aspect of mass arbitrations—leveraging the aggregate up-front arbitration fees of all of the cases to coerce a settlement—while structuring the process to encourage settlement tied to assessments of the merits. It also ensures that every claimant ultimately has an opportunity to have his or her dispute resolved on the merits.

Chapter 2 of this paper describes the recent rise of abusive mass arbitrations. Chapter 3 explains the particular features of these mass arbitrations and the problems they entail. Chapter 4 discusses the ineffective responses by courts and major arbitration providers to abusive mass arbitrations. And Chapter 5 describes the use of the bellwether process to resolve mass arbitrations efficiently and fairly for all involved, as well as steps that the major arbitration providers and state bar authorities should consider to reduce the abuses that appear to be associated with mass arbitrations.

Judicial Validation of Individualized Arbitration and the Rise of Mass Arbitrations

Chapter

02

Recognizing that the costs and delays of litigating in the judicial system increasingly burden all involved—employees, customers, and businesses—companies have turned to bilateral arbitration as a fair, efficient, and less adversarial means to resolve disputes.

The Federal Arbitration Act requires courts to enforce arbitration agreements according to their terms. Because bilateral arbitration is inherently an individualized process, courts, including the U.S. Supreme Court, have stopped plaintiffs' lawyers from trying to convert individualized arbitration proceedings into class-wide proceedings. That is because the greater formality, procedural complexity, and massive stakes of class-wide proceedings are inconsistent with traditional arbitration.

These decisions left plaintiffs' lawyers unable to exploit the huge defense costs and massive aggregated damages claims of class actions in order to force settlements. Plaintiffs' lawyers looked for a new way to coerce companies to enter settlements unrelated to the merits of the claims. Their solution was to turn to abusive mass arbitrations—resulting in claims that have skyrocketed over the past decade.

Bilateral Arbitration Agreements Benefit Claimants and Defendants

Over the last 20 years, agreements for individual arbitration have become commonplace in both the consumer and employment contexts. Companies, consumers, and employees all benefit from this development, which reduces the cost of dispute resolution and makes it feasible for individuals to pursue modest claims that normally would be priced out of court. Moreover, as many empirical studies demonstrate,[7] individual arbitration is superior to class actions as a method of dispute resolution.

An Efficient and Fair Method for Resolving Meritorious Claims

Modern consumer and employee arbitration rules ensure that pursuing arbitration is affordable and fair. Indeed, as explained more fully below, claimants win at least as

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often, and recover as much or more, in arbitration as they would in litigation.[8]

Many arbitration agreements require companies to pay all of the fees charged by the arbitrator or arbitration provider, provided that the value of the claim is relatively modest and the claim is not determined to be frivolous.[9] Even if a company does not pay all arbitration fees, it will heavily subsidize them. Under the rules of both the AAA and JAMS, which are the most widely used consumer and employee arbitration administrators, the company pays the entire cost of the arbitration except for a small filing fee, which is usually less than or equal to court filing fees.[10]

Some businesses go even further and include additional benefits for customers or employees who pursue meritorious claims. For example, some arbitration agreements provide that a successful complainant will be awarded her attorney's fees—even if fee-shifting would not be available in court.[11] Other companies go further and commit to paying special bounties—such as a $5,000 minimum recovery—to customers if the arbitrator awards the customer more than the company's last settlement offer before the arbitrator was appointed.[12] These types of remedies make arbitration even more attractive for consumers and employees and give companies a strong incentive to settle all legitimate claims before arbitration is even necessary.

Even without those special payments, arbitration agreements create significant incentives for settlement even before initiation of the arbitration process. For instance, agreements typically require claimants to submit an initial notice of the dispute to the company's legal department, so that the company can make a settlement offer before the claimant ever files a demand for arbitration.[13] Some companies also give claimants the right to schedule a pre-arbitration settlement discussion, by phone or videoconference, with a company representative (and attorneys for both sides can participate, if appropriate).[14]

This procedure benefits claimants, who can recover compensation more quickly and with fewer procedural hurdles. And companies have a strong incentive to settle because they can avoid paying arbitration fees if they can make the claimant whole before a demand is filed—because the arbitration fees paid by the company, which can range from $3,275 to $5,000 for a typical arbitration, often exceed the amount of the claim.

If an arbitration proceeds to a decision on the merits, claimants are more likely to prevail than they would be in litigation; recover as much or more than in litigation; and receive a decision more quickly. An empirical study examining arbitrations from 2014 through 2021 determined that consumers prevailed in 41.7 percent of arbitrations that terminated in awards, compared to only 29.3 percent of litigations in court.[15] Employees, meanwhile, succeeded 37.7 percent of the time in arbitration and only 10.8 percent of the time in litigation.[16]

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Claimants also received higher awards in arbitration. The median award won by consumers in arbitration "was more than three times the dollar amount in litigation."[17] For employees, "the median award in arbitration was more than double the dollar amount in litigation."[18] Finally, the same study determined that "it took consumer-claimants an average of 321 days ... to prevail in arbitration," compared to an average of 439 days in litigation, making arbitration 27 percent faster.[19] For employee-claimants, the average time to prevail was 659 days, while the average time in litigation was 715 days.[20] Other studies have also found that complainants fare better in arbitration.[21]

A Better Option for "Modest" Claims

Then-Justice Breyer explained that arbitration is especially beneficial for individuals with modest claims—which means that abandoning arbitration would "leav[e] the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[22]

Indeed, claimants with these individualized claims often will not be able to find a lawyer willing to file suit on their behalf, because the low stakes and high costs of litigation in court mean that it is not worth it for the lawyer to accept the case on a contingency-fee basis. Studies indicate that a claim must exceed $60,000 for a lawyer to be willing to accept the case.[23] In some markets, this threshold may be as high as $200,000.[24] Court litigation simply is not a viable alternative for these claims.

Slim Chances, Meager Rewards

Even if a class is certified, the likelihood that absent class members will receive significant compensation remains low. Of the 20 percent of putative class actions that are certified, the overwhelming majority (82 percent) settle[25] and class counsel's fees often eat up much of those settlements. A study by the Consumer Financial Protection Bureau (CFPB) on consumer class actions found that the average fee paid to plaintiffs' lawyers was nearly 41 percent of the settlement, with a median of about 46 percent.[26] The total attorneys' fees in the cases studied by the Bureau added up to $424 million for 419 cases, which works out to an average of more than $1 million per case.[27] The result is that absent class members receive pennies on the dollar. According to the data compiled by the Bureau, the average settlement payment was no better than $32.35 per class member.[28]

But a consumer or employee can navigate arbitration's informal procedures without a lawyer (although arbitration procedures give claimants the right to use counsel if they wish to do so). For example, under the AAA rules, to commence arbitration, the claimant merely submits a short online form to provide the parties' contact information, a few sentences to explain the dispute, and the requested resolution.[29] The business is given an opportunity to respond. After that, the AAA will appoint an impartial arbitrator from its roster (which includes retired judges and experienced lawyers), with input from both parties.[30]

The arbitrator holds a teleconference with the parties to schedule the hearing.[31] The parties then exchange information, including witness lists and the exhibits that they plan to submit at the hearing.[32] The case then generally proceeds to a simple one-day hearing before the arbitrator—and to accommodate the consumer's or employee's schedule, the hearing can be in person, by telephone or videoconference, or dispensed with entirely, with the arbitrator ruling on the papers.[33] And at the hearing, the consumer or employee is not required to follow the "legal rules of evidence" that often trip up pro se plaintiffs in court.[34]

Arbitration is thus a straightforward process. It is the equivalent of presenting one's case on *Judge Judy*—which in fact is a private arbitration.[35]

Consumers and employees who have disputes with businesses are not the only ones who will be harmed if companies abandon arbitration. Because arbitration reduces the cost of dispute resolution for companies, the forces of market competition generally cause much of that cost savings to be passed along to consumers in the form of lower prices and to employees in the form of higher wages.[36] Without arbitration, those cost savings are lost, with negative effects throughout the economy.

Class Actions: Costly, Time-Consuming, Inefficient

Despite the many benefits of bilateral arbitration, critics of arbitration contend that arbitration should be prohibited unless class actions remain available.[37] That is wrong for multiple reasons.

To begin with, many of the small-dollar claims that can be asserted in arbitration are not susceptible to class treatment.[38] Rule 23 of the Federal Rules of Civil Procedure imposes a rigorous standard for class certification, requiring—among other things—that named plaintiffs show that their claims are typical of those of the class and that questions common to the class predominate over individualized questions. The typical billing dispute or other one-off issue that a consumer or employee experiences could never satisfy this standard.[39]

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Second, few class members actually benefit from class actions. For example, about four-fifths of class actions filed in court are never certified—which means that the members of the putative classes in those cases get nothing.[40]

In the case that a class action is certified and a settlement is secured, absent class members must often submit a claim in order to receive a share of the settlement fund. Very few individuals bother to file claims when the amount at stake is modest. A pair of recent government studies from the Federal Trade Commission and CFPB report that the “weighted mean” or “weighted average” claims rate in consumer class-action settlements is a paltry four percent, meaning that 96 percent of class members in the relatively small set of class actions that do settle get nothing from those settlements.[41]

That figure comports with academic studies, which regularly conclude that only “very small percentages of class members actually file and receive compensation from settlement funds.”[42] Indeed, in some cases, far fewer than one percent of the absent class members submit claims.[43] This phenomenon has caused Congress to find that “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed.”[44]

It therefore is not surprising that the U.S. Supreme Court observed in 2011 that customers with AT&T arbitration agreements—which provided that AT&T would pay arbitration fees for non-frivolous claims and a bonus if a claimant won more than the last settlement offer—“were *better off* … than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.”[45]

Furthermore, class actions force settlements of even patently unmeritorious claims.[46] That reality stems from the severe asymmetries in the risks and rewards in class-action litigation. The direct costs of class actions fall almost entirely on defendants—especially the enormous costs of class-wide electronic discovery. A 2021 survey found that corporate spending on the defense of class actions had reached $2.9 billion among the survey’s 400 respondents, and that “[c]lass action spending is growing at more than twice the rate of other litigation spending.”[47] In addition, the lost productivity and business disruption caused by the discovery process may “dwarf the expense of attorneys’ fees.”[48] Plaintiffs and their counsel face no such comparable costs or burdens.

Next, although plaintiffs who lose a class action face no downside, defendants who lose face the catastrophic consequence of a class-wide judgment. Indeed, the sheer size of the damages demanded in class actions makes it attractive for defendants to forgo the adversarial process and settle even meritless suits to avoid the prospect of ruinous liability. The arithmetic is unyielding, no matter how weak the underlying claims might be. For example, even a one percent chance of facing a $1 billion judgment makes a settlement of $9.9 million look economically rational as insurance against a low-probability risk of a catastrophic event.

Finally, the procedures governing class-action claims prior to discovery and class certification have a significant blind spot—they cannot weed out claims based on erroneous factual allegations. The motion-to-dismiss process assumes the truth of all of the plaintiff's allegations. The class certification standards focus on the extent to which class members' claims have common factual and legal questions—not class members' chances of prevailing on those factual questions. Thus, a lawsuit can frequently survive a motion to dismiss and often be certified as a class action without any meaningful assessment of its merits.

For all these reasons, class actions place defendants under "substantial pressure … to settle"[49] even "questionable claims."[50] Class-action settlements therefore say less about the value or merits of the plaintiffs' underlying claims, and more about the "*in terrorem*" settlement pressure "that class actions entail."[51] That settlement pressure, in turn, incentivizes plaintiffs' lawyers—who receive a large chunk of the settlement as attorney's fees—to file claims without regard to whether they have merit. The costs of these abusive class actions and resulting blackmail settlements then spread throughout the economy in the form of higher prices and lower wages.

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Keeping Arbitration Available and Affordable

When a company sets up an arbitration program, it takes on significant ongoing administrative costs that it does not incur in connection with litigation in court. For example, as noted above, businesses heavily subsidize the arbitration fees, with many picking up the entire tab. Companies will be unwilling to expend these resources and set up fair, affordable, and effective arbitration programs unless they know that it will save them the transaction costs of litigating in court—

particularly with regard to class actions, which are especially costly to defend.

In addition, as explained above, arbitration makes it possible for customers and employees to bring small, individualized claims that otherwise would be priced out of court[52]—and these are the claims most often suffered by consumers and employees.[53] Why would a company accept the additional costs of maintaining arbitration programs, which open the door to numerous claims that can't practically be asserted in court, if it also had to bear the huge costs of defending against and settling class actions?

Accordingly, if a company is faced with the prospect of maintaining an arbitration program and simultaneously having to deal with class-action lawsuits in court, the rational response would be to reduce company-wide transaction costs associated with alternative dispute resolution. And the only way to do that is to decide not to have an arbitration program at all—because that would be the only cost that the company has the power to eliminate.

In sum, when bilateral arbitration and class-action litigation are compared, it is unsurprising that the Supreme Court concluded that complainants are "better off under their arbitration agreements ... than they would have been as participants in a class action."

Thus, as one group of businesses explained in a Supreme Court amicus brief, "when there is no assurance that all claims will be arbitrated in lieu of litigation, and a [company] must shoulder the additional costs of class-action litigation, subsidizing the costs of individual arbitration is no longer a rational business option"; the only logical decision is to "disengage from arbitration altogether."[54]

In sum, when bilateral arbitration and class-action litigation are compared, it is unsurprising that the Supreme Court concluded that complainants are "*better off* under their arbitration agreements ... than they would have been as participants in a class action."[55] Bilateral arbitration gives employees and consumers access to justice for the sorts of injuries they suffer most often, and enables all claims to be decided on the merits quickly and inexpensively. That benefits consumers and employees who have genuine disputes—because they have a greater chance of receiving a larger payment more quickly, with less of their winnings being eaten up by attorneys' fees. And it also benefits defendants, who save on transaction costs and are able to allocate a greater percentage of their dispute-resolution expenditures to compensating customers and employees with meritorious claims.

The U.S. Supreme Court's Defense of Arbitration

The most vocal critics of arbitration are the lawyers who benefit from the class-action system and the outsized fees it yields. It is no surprise, therefore, that the plaintiffs' bar has mounted an extensive and extended campaign against the enforceability of consumer and employee arbitration agreements.

Courts have long had the power to refuse to enforce arbitration agreements subject to the limitations of federal law. That power allows courts to police arbitration agreements for unfair terms—for example, those that saddle the non-drafting party with prohibitive costs, allow one party to pick a biased arbitrator, or bar the arbitrator from awarding the claimant remedies available under applicable law.[56]

But for years plaintiffs' lawyers did not focus their attention on the fairness of the arbitration process to consumers or employees. Instead, they principally attacked the individualized nature of arbitration. They recognized that if they could force companies to bear the costs of defending class actions as well as the costs of arbitration, then companies were likely to abandon arbitration. For plaintiffs' lawyers, the benefits of maintaining class actions—in terms of forced settlements and attorneys' fees—were worth eliminating the ability of employees and customers to vindicate the individualized claims that are effectively priced out of court and for which arbitration is their only realistic avenue for redress. That is so even though those claims are likely to be the ones most important to customers and employees.[57]

The response to these attacks was mixed. Many courts around the country ruled that agreements for individual arbitration should be enforced so long as the procedures for individual arbitration were fair and accessible. But some states—with California leading the way—bucked the trend. In 2005, the California Supreme Court decided in *Discover Bank v. Superior Court* that consumer arbitration agreements are unconscionable under state law (and therefore unenforceable) unless consumers could bring claims on a class-wide basis in arbitration.[58]

Courts applying California's *Discover Bank* rule held that the fairness of the individual arbitration process was beside the point. For example, under the AT&T arbitration clause that the U.S. Supreme Court ultimately considered in *AT&T Mobility LLC v. Concepcion*, AT&T paid all of the costs of arbitration for non-frivolous claims.[59] And if the arbitrator awarded the customer any amount greater than AT&T's last written settlement offer before the arbitrator was selected, the customer's minimum recovery was $7,500, and the customer's attorney was entitled to double his or her fee.[60] One federal district judge in California described it as containing "perhaps the most fair and consumer-friendly provisions this Court has ever seen."[61]

Another judge concluded that AT&T customers "would be better off to individually pursue their claim[s] in arbitration" rather than through a class action.[62] Indeed, the judge noted that the special premium provision of the applicable AT&T clause "prompts [AT&T] to *accept liability*, rather than 'escape liability,' for small dollar claims" and that "a consumer is virtually guaranteed a payment by" AT&T "simply by filling out a one-page form to initiate the informal claims process."[63] The Ninth Circuit agreed that "aggrieved customers" were "essentially guarantee[d]" to be made whole.[64] But these courts nonetheless held that, under California's *Discover Bank* rule, AT&T's arbitration clause was unconscionable because

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customers could not bring class proceedings in arbitration.[65]

The U.S. Supreme Court rejected that approach, holding in *Concepcion* that the Federal Arbitration Act protects the enforceability of agreements providing for individualized dispute resolution and preempts state law rules, like the one in *Discover Bank*, that would invalidate those agreements. Over the next few years, the Supreme Court rejected other challenges to the enforceability of agreements for individual arbitration. Thus, in *American Express Co. v. Italian Colors Restaurant* in 2013, the Court rejected arguments that the federal antitrust laws—or Federal Rule of Civil Procedure 23 itself—guaranteed plaintiffs the right to sue on a class basis.[66] And in *Epic Systems Corp. v. Lewis* in 2018, the Court rejected the argument that the National Labor Relations Act barred employers and employees from agreeing to arbitrate disputes on an individual basis.[67]

By 2018, therefore, *Concepcion, American Express*, and *Epic Systems* had made it clear that agreements for individual arbitration must be enforced. As a result, the plaintiffs' class-action bar turned to a new tactic: mass arbitration.

The Mass Arbitration Backlash

Concepcion and *Epic Systems* ushered in benefits for claimants and defendants, but they did disadvantage one group—plaintiffs' lawyers who had fewer opportunities to bring class actions and thus fewer potential avenues to force settlements and the accompanying fee awards.

The same year that *Epic Systems* was decided, therefore, plaintiffs' lawyers turned to a new tactic for extorting settlements and huge attorneys' fees—mass arbitration filings. As discussed in detail below,[68] the mass-arbitration gambit turns against companies one of the benefits of arbitration—that the company pays all or most of the arbitration fees. By simultaneously filing thousands of arbitration demands with identical claims, plaintiffs' lawyers seek to trigger an immediate obligation to pay millions of dollars in fees. Their goal appears not to be to obtain simultaneous decisions on the merits in these thousands of cases—the firms filing mass arbitrations appear to lack the resources to manage these large numbers of claims. Rather, the goal appears to be to use the threat of a huge fee payment to force

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companies to settle the claims *en masse*, regardless of the underlying merits. In other words, mass arbitrations recreate the same unjustified pressure to settle that inexorably forces settlements in class actions.

The mass-arbitration avalanche was led by the firm now known as Keller Postman (previously Keller Lenkner):

Uber

In 2018, Keller Postman filed 12,501 arbitration demands against Uber on behalf of drivers asserting that they had been improperly classified as independent contractors.[69] After Uber paid arbitration fees for only 296 of the demands, the plaintiffs filed suit to compel Uber to arbitrate the remaining 12,200 demands.[70] The initial filing fees for those arbitrations would exceed $18 million, and Uber also would have been required to pay arbitrator fees in every case.[71] Uber ultimately settled these and other arbitrations for between $146 million and $170 million rather than pay the filing fees or fight the mass arbitrations in court.[72]

Doordash

In 2019, Keller Postman filed more than 6,000 arbitration demands against DoorDash on behalf of individuals asserting that they were DoorDash couriers who had been improperly classified as independent contractors.[73] When DoorDash refused to pay the nearly $12 million in arbitration fees, the plaintiffs filed a motion in federal court to compel arbitration and require DoorDash to pay the fees; the district court granted their motion as to 5,010 of the arbitration demands.[74]

Postmates

In April and May 2019, Keller Postman filed 5,274 arbitration demands

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against Postmates, Inc. on behalf of individuals who alleged that they were Postmates couriers who had been misclassified as independent contractors.[75] Plaintiffs successfully moved to compel arbitration after Postmates refused to pay $9.36 million in arbitration fees.[76] In February 2020, Keller Postman filed another 10,356 arbitration demands, again against Postmates, alleging the same types of labor violations.[77]

CenturyLink

In May 2019, Keller Postman threatened to file 12,000 consumer fraud arbitration demands against CenturyLink, "warn[ing] CenturyLink that, if it did not agree to a mass settlement, it would have to pay the AAA more than $30 million in initial fees and costs."[78] Five months later, Keller Postman informed CenturyLink that it had recruited 8,293 additional clients.[79]

FanDuel and DraftKings

In October 2019, Keller Postman filed 1,000 arbitration demands against online-betting platforms FanDuel and DraftKings, asserting that the companies had deceived customers about the odds of winning contests.[80] Keller Postman claimed that it represented another 17,000 customers, whose arbitration demands could follow in short order.[81]

Intuit TurboTax

In 2019, Keller Postman filed 125,000 demands for arbitration against Intuit, the owner of TurboTax, on behalf of taxpayers who had used TurboTax to prepare their tax returns.[82] As of November 2020, Intuit had paid $13 million in arbitration fees, only a small fraction of the hundreds of millions it would have owed in fees if the mass arbitration had continued.[83]

Of course, Keller Postman is not alone. A variety of other plaintiffs' law firms have filed dozens of other mass arbitrations. For example:

Amazon

In 2021, Amazon faced 75,000 demands for arbitration asserting claims regarding the company's Echo device.[84]

Chegg

In May 2020, Chegg, an education technology company, received 15,107 arbitration demands asserting that it had failed to protect customers' personal data,[85] which resulted in Chegg being charged $7.5 million in arbitration fees.[86] The mass arbitration followed after a federal judge compelled to individual arbitration a class action against Chegg brought by the same law firm.[87]

Samsung

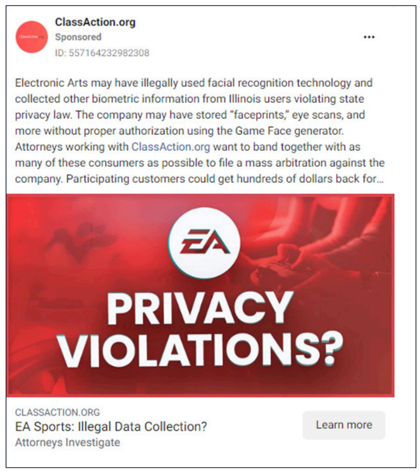
In 2022, Samsung faced nearly 50,000 arbitration demands from Labaton Sucharow alleging that the company had violated Illinois' Biometric Information Privacy Act.[88] Labaton Sucharow allegedly told Samsung that unless Samsung made an immediate "opening settlement offer of at least $50,000,000," the firm would file the arbitration in order to force Samsung to pay "in excess of $400 million" in AAA arbitration fees.[89] Samsung reports that Labaton has further threatened to file arbitrations for even more claimants, bringing the total number to 104,334.[90]

Other mass arbitrations have been reported against Buffalo Wild Wings (391 demands), Chipotle (2,814 demands), Dollar Tree (2,000 demands),[91] and Peloton (2,700 demands).[92]

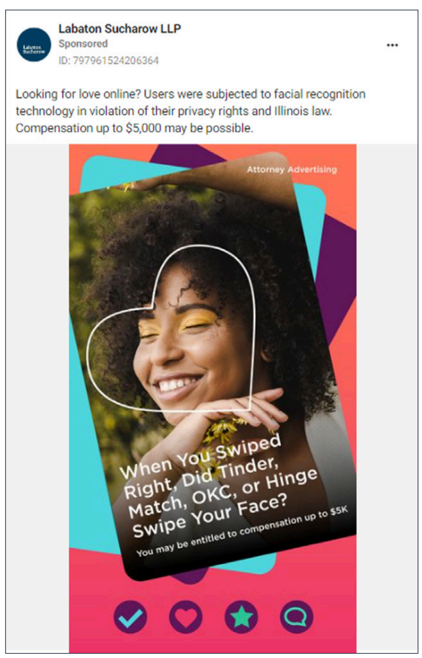
Because arbitrations are not publicly filed and many mass arbitrations are threatened—and produce settlements before arbitrations are filed—this list of publicly known mass arbitrations is necessarily incomplete.[93] Nevertheless, even these examples demonstrate that the number of mass-arbitration filings has been steadily increasing.

Generating Claims Through Advertising

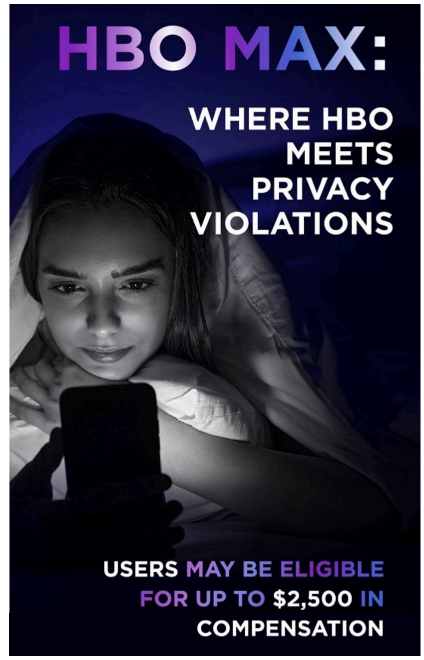
To amass these large numbers of claimants, plaintiffs' firms advertise heavily on websites (such as topclassactions.com),[94] social media, and even radio.[95] And online and social media advertising for additional mass arbitrations is growing rapidly, as the following ad samples show:[96]



Milberg Coleman Bryson Phillips Grossman. Facebook. Retrieved Jan. 20, 2023.



Labaton Sucharow LLP, Aug. 12, 2021 and Sept. 4, 2021. Facebook, Instagram. Retrieved Feb. 17, 2023.



Labaton Sucharow LLP. Instagram. Retrieved Dec. 4, 2022.

Labaton Sucharow LLP, Feb. 10, 2023. Facebook, Instagram. Retrieved Feb. 17, 2023.

Indeed, these and similar social media and website ads often focus entirely on claimed potential payments to the user, often giving little or no information about the underlying allegations, and sometimes not even identifying the law firm behind the ads.

Because arbitrations are not publicly filed and many mass arbitrations are threatened—and produce settlements before arbitrations are filed—[the] list of publicly known mass arbitrations is necessarily incomplete. Nevertheless, even these examples demonstrate that the number of mass-arbitration filings has been steadily increasing.

Mass Arbitrations Recreate the Identical Harms Inflicted by Abusive Class Actions

Chapter

03

Abusive mass arbitrations appear to be a blatant attempt to coerce settlements. The plaintiffs' lawyers who file them often do not have the ability to arbitrate the merits of thousands of claims. Their entire goal seems to be to threaten the target company with tens or hundreds of millions of dollars in arbitration fees—and use that threat to force a settlement wholly unrelated to the claims' merits.

But coerced settlements are not the only way in which abusive mass arbitrations resemble abusive class actions. These arbitrations can raise serious legal ethics concerns because it is difficult—and probably impossible—for the plaintiffs' firms bringing them to vet and communicate with each of their tens of thousands of clients, as required by the rules of professional conduct.[97] Mass arbitrations thus recreate the class-action system in which lawyers, rather than clients, are in control of the process, and the focus is on maintaining the threat from enormous arbitration fees to achieve a big settlement and attorneys' fees, not enabling claimants to decide whether and how to resolve their claims.

Leveraging Arbitration Fees to Extract Blackmail Settlements

Nearly a half-century ago, Judge Henry J. Friendly famously declared that class actions can lead to "blackmail settlements."[98] Today, for plaintiffs' firms threatening mass arbitrations, blackmail settlements appear to be the entire point. Georgetown Professor J. Maria Glover has stated candidly—after interviewing key plaintiffs' lawyers who originated the mass-arbitration strategy—that "[t]he mass-arbitration model operates on its ability to impose significant *in terrorem* settlement pressure" through the imposition of "astounding" fees that "can spell financial catastrophe for a potential defendant."[99] Indeed, Professor Glover asserts that the settlement pressure imposed by a mass arbitration—even one asserting "more dubious claims"—can be greater than that imposed by a certified class action.[100]

She is not alone in her assessment. A vendor that provides a software

> "Georgetown Professor J. Maria Glover has stated candidly … that '[t]he mass-arbitration model operates on its ability to impose significant *in terrorem* settlement pressure' through the imposition of 'astounding' fees that 'can spell financial catastrophe for a potential defendant.'"

platform to plaintiffs' attorneys seeking to bring mass arbitrations brags that settlement of mass arbitrations "can be equally or even more profitable" than a settlement of "similar class action cases."[101] In its experience, a settlement in a mass arbitration "may often be reached within months, while class action or mass tort settlements may take years."[102]

It therefore is not surprising that defendants have characterized the fees imposed by a mass arbitration as a "ransom" and a "shakedown."[103]

Mass Arbitrations Impose Overwhelming Fees

The following chart summarizes the fees triggered simply by the filing of an arbitration demand—long before an arbitrator is even appointed, discovery occurs, and the case is decided—under the rules of the two major arbitration providers, the AAA and JAMS. Both providers require a claimant to pay an initial filing fee with the demand for arbitration—but companies often agree to pay that fee under the terms of their arbitration agreements. The remaining case-opening fees are assessed against the defendant.

Fees Triggered Per Case Opening

	Consumer Claims		Employment Claims	
AAA[104]	Plaintiff	Filing Fee: $225	Plaintiff	Filing Fee: $350
	Defendant[105]	Filing Fee: $375 Arbitrator Compensation: $1,500 – desk[106] $2,500 – hearing[107] Case Management: $1,400[108] **Total: $3,275-$4,275**	Defendant	Filing Fee: $2,100 Case Management: $750[109] **Total: $2,850**
JAMS[110]	Plaintiff	Filing Fee: $250	Plaintiff	Filing Fee: $400
	Defendant	Filing Fee: $1,750	Defendant	Filing Fee: $1,600

Moreover, these numbers do not reflect the full cost of arbitration. For example, for consumer claims filed with the AAA, if the arbitrator holds a telephonic, videoconference, or in-person hearing, the business must pay an additional $500 hearing fee when the hearing is scheduled.[111] For claims filed with JAMS, defendants must pay the arbitrator's hourly rate—which often exceeds $1,000[112]—and an additional 13 percent of that amount to JAMS as a case management fee.[113]

The AAA has recently changed its fee schedule for cases involving 25 or more similarly situated consumer or employee plaintiffs. Under that change, businesses must pay filing fees of $325 per case for the first 500 cases, $250 per case for cases 501-1,500, $175 per case for cases 1,501-3,000, and $100 per case for any additional cases.[114] The filing fees for claimants also are reduced.[115] But the AAA left the other fees (such as arbitrator and case management fees) unchanged.

The AAA fee changes for mass arbitrations do not have much of an impact. The following chart shows the impact of the change on the upfront fees if plaintiffs' counsel files 50,000 consumer arbitrations requesting telephonic hearings:

Total Upfront AAA Arbitration Fees

	Old Fee Schedule	New Fee Schedule
Claimants' Share*	$11,250,000[116]	$3,775,000
Defendant's Share	$213,750,000[117]	$200,375,000[118]

*Not owed if arbitration agreement shifts this cost to the company, as many do.

The result is to make mass arbitration even cheaper for plaintiffs' counsel—thereby only further incentivizing more mass filings—while keeping the business' share of fees virtually as sky high as before.

In other words, despite the economies of scale in a mass arbitration (and the reality that most claims will not be arbitrated), the business' upfront cost in arbitration fees is reduced only about six percent—while claimants see an almost 75 percent reduction. The result is to make mass arbitration even cheaper for plaintiffs' counsel—thereby only further incentivizing more mass filings—while keeping the business' share of fees virtually as sky high as before. Even if the company were guaranteed to win every case, it would be forced to pay tens or hundreds of millions of dollars in arbitration costs simply to have the opportunity to defend itself.[119]

Importantly, the filing and case-management fees are all non-refundable.[120] Thus, even though the vast majority of these cases are never arbitrated, the company still must bear these huge costs immediately upon the filing of an arbitration demand.

Plaintiffs' counsel bringing mass arbitrations use these costs to great effect, threatening targeted businesses with enormous arbitration fees. For example, take the recent mass arbitration pursued against CenturyLink, which involved over 20,000 threatened or filed arbitrations.[121] Under the AAA's current fee schedule for mass arbitrations, CenturyLink would have been required to pay almost $82 million in AAA fees, simply to have a chance to mount a defense.

The numbers are even more stark for other mass arbitrations with large numbers of claimants. For example, under the AAA's current fee schedule, Amazon (75,000 threatened arbitrations) would have been required to pay over $300 million in AAA fees, and Intuit (125,000 threatened arbitrations) would have been required to pay over $500 million in AAA fees.[122] And those astronomical fees apply even if the company wins every case.[123]

Targeted Businesses Cannot Avoid the Fees

Businesses cannot simply decline to pay these fees once they are assessed in the context of a mass arbitration, even if the business can prove that a significant number of the arbitrations are filed by individuals who in fact are not customers or employees. The AAA, for example, states in its fee schedule that if a business fails to timely pay an invoice, the AAA "may decline to administer future consumer arbitrations with that business."[124]

"Businesses cannot simply decline to pay [arbitral] fees once they are assessed in the context of a mass arbitration, even if the business can prove that a significant number of the arbitrations are filed by individuals who in fact are not customers or employees."

Because companies typically choose a single provider in their arbitration agreements to administer arbitrations, the nonpayment of fees could effectively end the company's arbitration program.[125]

Moreover, mass-arbitration plaintiffs can go to court to try to force a company to pay arbitration fees—or punish them for seeking to avoid doing so. For instance, plaintiffs can file a motion to compel arbitration and can ask not only for an order compelling the business to pay the arbitration costs but also for sanctions if the business does not comply.[126] Alternatively, the plaintiffs sometimes file a class action and argue that the business' non-payment constitutes a breach of the arbitration agreement, making it completely unenforceable.[127]

The pressure on companies is even greater in California, which has enacted legislation that imposes harsh penalties on businesses that seek to resist payment of improperly assessed arbitration fees. Under California law, if a "drafting party" to an "employment or consumer arbitration" agreement fails to pay the arbitration fees owed under that agreement "within 30 days" of the invoice, the drafting party is in "default" of the agreement as a matter of law.[128] This default entitles the plaintiff consumer or employee either to (1) "[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction," in which case "the court shall impose sanctions on the drafting party"; or (2) "[c]ompel arbitration in which [case] the drafting party shall pay reasonable attorney's fees and costs related to the arbitration."[129]

> "The pressure on companies is even greater in California, which has enacted legislation that imposes harsh penalties on businesses that seek to resist payment of improperly assessed arbitration fees."

In addition, regardless of which path the plaintiff chooses, the plaintiff also can request nonmonetary sanctions, such as an order "prohibiting the [business] from conducting discovery in the civil action" or arbitration, an order deeming the business "in contempt of court," or even entry of default judgment on the underlying claims.[130]

Pressure to Settle Regardless of Merit

Businesses targeted by an abusive mass arbitration that weaponizes the consumer-friendly subsidies of arbitration costs face enormous pressure to agree to a settlement, regardless of the merits of the claims.

Mass arbitrations thus reprise the principal harmful effect of class actions—reliance on the exorbitant costs of defense to extract unjustified settlements unrelated to the merits of the underlying claims. The costs of defense in class actions are replaced by an even more potent weapon: an immediate obligation to pay huge amounts of fees in mass arbitrations.

But mass arbitrations are even more open to abuse than class actions. In the class-action system, a plaintiffs' lawyer must at least overcome a motion to dismiss and stand a strong chance of prevailing on class certification in order to exert maximal settlement leverage. Although those requirements do not assess the factual merits of the claim, they at least assess the legal merits of the claim and whether it should be permitted to proceed on a class-wide basis.

In the mass arbitration setting, by contrast, there is no briefing, no argument, and no decision by a neutral authority holding that the plaintiffs have satisfied some baseline requirements and demonstrated that their case should move forward. Mass arbitrations are thus a new iteration of the "blackmail settlements" that Judge Friendly warned about, but with even fewer protections for defendants.[131]

The ability of plaintiffs' counsel to impose massive arbitral fees on defendants, regardless of the merits of their claims, forces defendants to choose between paying blackmail settlements or abandoning arbitration. Both options will impose significant additional costs. If a business chooses to retain arbitration and pay the blackmail settlements to lawyers bringing mass arbitrations, the business will incur increased costs that inevitably get passed along to their customers in the form of higher prices and to their employees in the form of lower wages. If the business instead chooses to abandon arbitration, it will be subject to the expenses and burdens of class actions—which have their own form of blackmail settlements. Once again, higher prices and lower wages will follow.

Consumers and employees are the clearest victims if a company abandons

The ability of plaintiffs' counsel to impose massive arbitral fees on defendants, regardless of the merits of their claims, forces defendants to choose between paying blackmail settlements or abandoning arbitration.

"It is hard to imagine that any plaintiffs' counsel could solicit and represent that many individuals and pursue or settle their claims while complying with the ethical rules designed to ensure that clients are not victimized …."

arbitration, because they lose the ability to vindicate the individualized claims that matter to them but are too small to attract a plaintiffs' lawyer for litigation. As explained earlier in this paper, in former Justice Breyer's view, the absence of arbitration "leav[es] the typical consumer … without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[132] Nor are class actions an efficient substitute for would-be plaintiffs with small-value claims. As discussed above, most claims, such as common, run-of-the-mill billing disputes, are too individualized to be amenable to class-wide adjudication.[133]

In sum, mass arbitrations represent a dangerous abuse of the arbitration process, subverting it into a tool to extract blackmail settlements from businesses, to the detriment of businesses and their customers and employees alike.

Mass Arbitration and Potential Ethics Violations

A mass arbitration's "bite" comes from the aggregation of many individuals' claims to force the company to pay a gigantic fee. Bringing a mass arbitration therefore requires a law firm to simultaneously represent tens of thousands of individual clients. And some plaintiffs' firms are bringing multiple mass arbitrations each year.[134]

It is hard to imagine that any plaintiffs' counsel could solicit and represent that many individuals and pursue or settle their claims while complying with the ethical rules designed to ensure that clients are not victimized—and the legal system is not abused—by overly aggressive attorneys who are focused on their own interests rather than those of their clients. As discussed in detail below, there is increasing evidence that plaintiffs' lawyers are cutting corners to maximize the number of claimants they represent, which harms claimants and the entire legal system.

Unauthorized Practice of Law

All states prohibit the practice of law by lawyers who are not admitted to practice in that state (unless they are admitted *pro hac vice* by a court presiding over a particular case).[135] Those laws are designed to ensure that clients have competent advice and counsel in the jurisdiction where services are provided, given the enormous consequences that clients suffer "from incompetence in the preparation of legal documents" or from receiving "inaccurate legal

> "Mass-arbitration claimants often are recruited from across the country—and the plaintiffs' counsel may well be filing demands and engaging in settlement discussions on behalf of clients who live in states where their lawyers are not licensed to practice."

advice."[136] The bar admission system and *pro hac vice* process also ensure that local courts and bar authorities have jurisdiction to discipline lawyers who either are incompetent or breach fiduciary duties of care, loyalty, confidentiality, and communication to their clients.[137]

Mass-arbitration claimants often are recruited from across the country—and the plaintiffs' counsel may well be filing demands and engaging in settlement discussions on behalf of clients who live in states where their lawyers are not licensed to practice. To the extent that such representations require (1) appearing before arbitrators in a state where plaintiffs' counsel is not admitted, or (2) asserting or negotiating the settlement of claims on behalf of a client from a state where plaintiffs' counsel is not admitted, these representations may very well constitute the unauthorized practice of law.[138]

Some states have adopted procedures by which out-of-state counsel can be admitted *pro hac vice* for purposes of representing a client in an arbitration, often by paying a fee, submitting an application, and obtaining consent from the arbitrator or from a court in the county where the arbitration will take place.[139] Some states require the out-of-state lawyer to designate properly-barred local counsel or limit the number of *pro hac vice* admissions per year for arbitrations.[140] Others permit *pro hac vice* admission only if the client is also from the lawyer's home state.[141] But these *pro hac vice* requirements are often ignored by plaintiffs' lawyers filing mass arbitrations.

These lawyers may believe—mistakenly—that their mass arbitrations fall under ABA Model Rule of Professional Conduct 5.5(c), which has a widely-cited exception from unauthorized practice of law rules for some kinds of arbitrations.[142] The exception states that the "unauthorized practice of law" rule does not apply if the legal services in question are "reasonably related to a pending or potential arbitration," provided the legal services "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[143] Comment 14 to the rule explains that the "arises out of" requirement is satisfied when "[t]he lawyer's client … ha[s] been previously represented by the lawyer, or [is] resident in a or ha[s] substantial contacts with the jurisdiction in which the lawyer is admitted."[144]

This rule would thus allow a Georgia lawyer representing a Georgia client to represent the client at an arbitration in Illinois—but only to the extent that arbitration relates to the lawyer's representation of that client in Georgia. This exception does not seem at all applicable to mass arbitrations, where plaintiffs' lawyers are soliciting out-of-state clients who are strangers to them. In that situation, there is no preexisting client relationship in the lawyer's home state to which the out-of-state arbitration could relate.

Nor is the unauthorized practice of law remedied if the lawyer signs up the same clients again and again—as some plaintiffs' firms are reported to be doing—seeking to represent them in additional mass arbitrations. When the initial attorney-client relationship was itself an unauthorized practice of law, subsequent similar attorney-client relationships would appear to remain unauthorized.

Solicitation

All states have adopted ethics rules regarding lawyers' solicitation of clients, and many of these provisions are based on ABA Model Rule of Professional Conduct 7.3.[145] The ABA explains that lawyer solicitation creates a "situation … fraught with the possibility of undue influence, intimidation, and overreaching."[146] In light of that reality, anti-solicitation rules are intended to protect the public from "[the] assertion of fraudulent claims" by lawyers eager to make pecuniary gains and serve to protect the "solicited client" from advertising that "exert[s] pressure" or interferes with "informed and reliable decisionmaking."[147] For lawyers who seek to identify and retain tens of thousands of clients each year as part of their business model, these ethical rules ought to be a matter of constant concern.

The rules take several forms. Most commonly, they restrict in-person cold solicitation, as well as solicitation through telephone contact or through real-time electronic messaging. Texas, for instance, prohibits soliciting individuals through "in-person contact, or through regulated telephone, social media, or other electronic contact" when those individuals have not approached the lawyer in order to seek legal advice.[148] California similarly prohibits lawyers from using "real-time electronic contact"—such as instant messaging—to solicit clients.[149] Similar restrictions exist in other states.[150] To the extent that plaintiffs' firms use real-time electronic communication—including online chat functions and various social-media platforms—those communications may run afoul of anti-solicitation rules.[151]

Plaintiffs' lawyers also cannot solicit clients by using false statements.[152] That rule may be violated by assertions

"For lawyers who seek to identify and retain tens of thousands of clients each year as part of their business model, [ethical rules regarding solicitation] ought to be a matter of constant concern."

that falsely guarantee that the claimant will receive compensation or that falsely promise to arbitrate tens of thousands of claims that the law firm has no intention or capacity to handle or even the legal right to file, when filing would constitute the unauthorized practice of law.

Moreover, separate and apart from the restrictions imposed by ethics rules, plaintiffs' lawyers who receive personal information about a company's customers or employees during discovery in a lawsuit are often bound by court orders not to disclose or use that information for any other purpose other than litigating that particular case.[153] Indeed, courts have sanctioned plaintiffs' lawyers for violating protective orders by using confidential class member information provided to them to solicit them to file other lawsuits or arbitrations.[154]

Yet some defendants contend that plaintiffs' lawyers may be violating these protective orders so that they can find more mass arbitration claimants. Samsung, for example, has accused Labaton of using confidential class member information it

... [S]ome defendants contend that plaintiffs' lawyers may be violating ... protective orders so that they can find more mass arbitration claimants.

received from a class action against Facebook to solicit for unrelated arbitrations against Samsung, in violation of the court's protective order.[155]

Ethics in Advertising

Limitations on attorney advertising exist for much the same reasons as restrictions on solicitation. The advertising currently used to solicit mass arbitration claimants may be crossing the line imposed by applicable ethics rules.

Static display advertisements on social media such as Facebook or Instagram may not constitute impermissible cold solicitations, but if construed to constitute advertisements they would need to contain required disclaimers. These disclaimers may include statements explaining that past successes do not guarantee future results, that plaintiffs may be liable for an opposing party's fees and costs, or that someone at the advertised firm is barred in the state where the advertisement appears.[156] Some states require that the advertisement include the name, address, and phone number of at least one lawyer or law firm responsible for the content of the advertisement.[157] Moreover, several states, such as Texas, require that all attorney advertising be submitted to the state bar[158] or be kept on file by the lawyer for a set period of time.[159]

It is unclear whether mass-arbitration plaintiffs' firms, especially ones that advertise to potential clients outside of the state where the firm is located, are complying with these requirements when they are advertising online.[160] Indeed, social media ads often fail to include the required information, and advertisements on websites used to recruit mass arbitration claimants, such as ClassAction.org, routinely fail to identify the law firm behind the advertisement at all unless the user digs far more deeply by clicking on links in the advertisement.

Additionally, some plaintiffs' firms appear to be using

"It is unclear whether mass-arbitration plaintiffs' firms, especially ones that advertise to potential clients outside of the state where the firm is located, are complying with [ethics] requirements when they are advertising online."

online client portals or other types of electronic messaging to ask individuals who have expressed interest in bringing an arbitration against one company to allow the firm to file arbitrations in their names against a wide variety of other companies.[161] To the extent that advertising rules do not exempt statements made to current or former clients, these attempts to recruit former clients for new mass arbitrations are also limited by these ethical rules—and again, it is by no means clear that plaintiffs' firms are following these requirements.

Client-Specific Investigation

"Blindly trusting the word of a stranger who types a name into an online form and claims to be a customer or employee of a defendant company likely is not sufficient [to satisfy Rule 3.1]."

Ethics rules require attorneys not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so."[162] That is part of the lawyer's core obligation not to abuse the legal system. Indeed, to the extent that an attorney violates this obligation to ensure that a claim is not baseless, the attorney also may run into anti-barratry requirements, which have been widely adopted.[163]

Barratry aside, the Comments to ABA Rule of Professional Conduct 3.1 explain that "[t]he filing of an action ... or similar action taken for a client" requires lawyers to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."[164] Courts and commentators therefore agree that a lawyer has a duty to investigate claims before filing a legal proceeding.[165] In the mass-arbitration context, this rule should require attorneys to conduct an inquiry into each client's claim and ensure that there is a good-faith basis for filing an arbitration demand on that client's behalf.[166]

Blindly trusting the word of a stranger who types a name into an online form and claims to be a customer or employee of a defendant company likely is not sufficient. Courts have admonished or sanctioned lawyers for "send[ing] out form complaints without undertaking a reasonable inquiry into their validity with respect to a particular client."[167] If "blind reliance upon information provided by one's client is seldom a sufficient inquiry,"[168] the need to verify the client's allegations when he or she is a stranger who filled out an online form seems even more clear.

Despite that need for investigation, it does not appear that mass-arbitration firms are doing much to verify their clients' allegations. For instance, Keller Postman admits that it selects clients based (at least in part) on their responses to online advertisements.[169] Other plaintiffs' firms seem to follow the same model, appearing to represent and to be ready to bring claims on behalf of anyone who types basic identifying information into an online form.

Some plaintiffs' lawyers may be attempting to do some screening, but it is not clear that these claimed efforts avoid meritless claims. For example, in 2019, a Keller Postman attorney asserted in a declaration that the firm placed radio advertisements encouraging Uber drivers to call a toll-free number on the basis that they may have been underpaid.[170] The telephone number was not answered by lawyers but by "trained agents" who had been provided with a "script."[171] Drivers were offered engagement letters stating that the firm would undertake to file an individual arbitration on the driver's behalf if, in the telephone operator's assessment, the driver qualified.[172] The average length of a would-be client's phone call with a non-lawyer representative was approximately seven and a half minutes.[173]

These techniques certainly explain how, in 2019 alone, Keller Postman purported to have been retained by over 150,000 clients.[174]

Businesses targeted by mass arbitration have argued that plaintiffs' firms may not be conducting the necessary inquiries to satisfy their ethical obligations. Businesses often contend that, when hit with a mass arbitration, they have found mistakes in the claimant list—such as claims asserted in the names of non-existent customers.

"Businesses often contend that, when hit with a mass arbitration, they have found mistakes in the claimant list—such as claims asserted in the names of non-existent customers."

For instance, CenturyLink has asserted that Keller Postman approached it with about 9,000 (later increased to 22,000) potential arbitration demands in an attempt to secure a settlement without having to file the demands. But for many of Keller Postman's clients, CenturyLink "could not identify any potential customer account," and "some clients claimed to receive services at addresses in states in which CenturyLink does not provide services."[175] Keller Postman denied the allegation.[176]

Intuit has had a similar experience: Keller Postman withdrew 8,282 of the arbitration demands it filed against Intuit after Intuit argued that the claimants could not have experienced the harm alleged, either because they had never been Intuit's customer or because they had actually received the services to which they were entitled.[177]

Samsung, which faced 50,000 demands for arbitration filed by Labaton Sucharow in 2022, has likewise asserted that the plaintiffs' firm failed to vet its clients' purported claims. Samsung explained that Labaton's list of claimants includes, among other things, individuals who:

- were "deceased";
- provided obviously "fictitious personal information" (such as a purported address of "This Fi Dhkhj");
- were "not Illinois residents" (and thus have no claims under the Illinois law they invoked);
- were never a Samsung "customer" or never "own[ed] any of the [Samsung] devices at issue";

- had filed duplicative demands (sometimes "under different names"); or
- were "represented by entirely different counsel on the same threatened claim against Samsung."[178]

According to Samsung, these "glaring deficiencies ... raised concerns as to whether Labaton had performed any due diligence regarding its purported clients."[179] The AAA agreed that "[i]n conducting [its] review of the claimants' filing materials ..., the AAA has found inaccurate and/or incomplete information on the [s]preadsheet" identifying the claimants that their counsel had "submitted."[180]

Nor are the claimed experiences of these companies isolated. Companies regularly face mass arbitrations (or threatened mass arbitrations) in which the companies contend that high percentages of the claims are fatally defective, such as claims on behalf of claimants who:

- are not customers or workers for the company;

"Judge Alsup of the U.S. District Court for the Northern District of California determined that, for 869 demands for arbitration filed against DoorDash, he could not find that the plaintiffs had provided sufficient evidence that those individuals actually had an arbitration agreement with DoorDash."

- had never purchased the product or service at issue, never paid the challenged fee, or otherwise never suffered the injury alleged;
- did not make their purchase or did not work in the state alleged—meaning that they lacked the right to sue under the state laws invoked in the form demand for arbitration;
- had filed duplicative demands; or
- had previously released their claims.

Defense counsel report that the number of obviously groundless claims in mass arbitrations often exceeds 30 percent of claims—and on a number of occasions has exceeded 90 percent.[181]

For example, one defense counsel reported a threatened mass arbitration in which "nearly 80%" of the purported claimants "were either not the company's customers or did not own" the product at issue.[182] Another lawyer described an arbitration in which "less than 20% had actually bought the product" at issue, and "only 5% had" also "incurred the [disputed] charge"—meaning that fewer than five percent of claims were non-frivolous.[183] Another defense counsel pointed to a mass arbitration in which only "4.7%" of claims were legitimate, with the bulk of the filings in the names of non-customers or customers who either had not purchased the disputed product or duplicative filings in the names of the same customers who had.[184]

Publicly available information points to the same phenomenon. Judge Alsup of the U.S. District Court for the Northern District of California determined that, for 869 demands for arbitration filed against DoorDash, he could not find that the plaintiffs had provided sufficient evidence that those individuals actually had an arbitration agreement with DoorDash. If those filings were improper, that represents an error rate of approximately 14 percent in a filing of approximately 6,000 claims.[185]

These types of errors doubtless would have been corrected had the plaintiffs' lawyers in question obtained verification from the would-be clients (for example, by asking for written proof of a customer or workplace relationship). But given the sheer volume of arbitrations that are aggregated in mass arbitrations—thousands or tens of thousands of claimants signed up within a period of a few months—it is quite possible that arbitration demands are being filed merely because someone submitted an online form asserting that he or she is among the group of people that the firm is seeking to represent, without any real investigation at all.

The Client's Role in Settlement Decisions

Ethics rules also provide that clients have the right to be told about settlement offers, to get individualized advice about whether to respond with an acceptance, rejection, or counteroffer, and to make their own decisions regarding settlement.[186] That principle is obviously critical: it empowers clients to exercise their right to make fundamental decisions about their own claims. Further, when a lawyer represents multiple clients, the rules provide that the lawyer should not make "an aggregate settlement of the claims of or against the clients ... unless each client gives informed consent, in a writing signed by the client."[187]

It is not clear how counsel with tens of thousands of clients can communicate meaningfully with each of those clients regarding any settlement offers and the means by which they will accomplish the clients' objectives, let alone receive meaningful written consent from all of them. Indeed, given the rapidity of settlement communications in the mass-arbitration setting, these individualized communications likely often do not take place.

Certainly at least some mass-arbitration lawyers are reluctant to have those conversations: in their engagement letters, they ask their clients to waive the right to control the decision whether to settle, specifying that the lawyer is authorized in advance immediately to

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accept or reject offers under certain parameters.[188] That approach is questionable at best and may be disallowed in some jurisdictions. For example, according to a New York City Bar committee report, while clients may give advance authority to settle in some circumstances, "the client may revoke such authority at any time and the lawyer is under a continuing duty to communicate with the client concerning material developments and to keep the client reasonably informed about the status of the matter, including *all* settlement offers."[189]

Indeed, state rules of professional responsibility generally require lawyers to notify their clients promptly of all settlement offers.[190] To the extent that plaintiffs' lawyers obtain advance consent to settle and then fail to provide their clients with material updates about the case or to educate their clients about the fact that the client may revoke the settlement authorization at any time, the lawyers are running the risk of violating well-established ethical requirements.

Conflicts of Interest

Finally, mass arbitrations raise numerous conflicts issues, both among clients and between the clients and their counsel.

> It is unclear whether any of these "bare minimum" requirements [for mitigating conflicts of interest] are being satisfied.

Legal ethics expert and Hastings College of Law Professor Richard Zitrin has explained that where "plaintiffs' counsel purports to represent thousands of clients against a particular defendant, red flags go up ... about whether such representation meets the ethical requirements all lawyers must abide by."[191] For instance, "[h]ow can counsel be loyal to Plaintiff 1, Plaintiff 300, and every plaintiff in between if she suggests more money go to one person than another?"[192] Another hurdle is that counsel must honor each client's unwaivable right to decide whether to settle, greatly complicating aggregate settlements.[193]

To satisfy these ethical requirements, Prof. Zitrin makes a number of recommendations that, in his view, plaintiffs' counsel in mass arbitrations should adopt as a "bare minimum," including obtaining "extensive conflict of interest waivers" from each client and developing a method for protecting the wishes and interests of both those clients who want to settle and those who do not.[194] Without at least these protections in place, Professor Zitrin states, "massive mass actions cannot be done ethically."[195] It is unclear whether any of these "bare minimum" requirements are being satisfied.

For instance, one law firm's retainer agreement for mass arbitration clients provides that "[i]f we bring you a settlement offer from the [defendant] company or about your claim" and "you disagree with our advice" to accept the settlement, "we may withdraw as counsel."[196] There is no provision to protect the interests of clients who do not want to accept the settlement. Instead, the agreement provides that "if we withdraw as counsel and you later obtain a settlement, recovery, or judgment, you agree to pay us reasonable fees and expenses for legal services rendered."[197]

In other words, clients must accept whatever settlement the plaintiff's firm decides is appropriate, and if they do not, they will both lose their counsel and face the possibility of paying additional attorneys' fees should they succeed in finding other counsel and ultimately prevailing. Yet in many states, the ethics rules prohibit lawyers from "burden[ing] the client's ability to make settlement decisions by structuring the representation agreement so as to allow the lawyer to withdraw, or to ratchet up the cost of representation, if the client refuses an offer of settlement."[198]

The ethical questions raised by mass arbitrations are numerous and not easily answered. Because the ethics rules at issue are designed to safeguard clients' interests and ensure the undivided loyalty that a lawyer must show her client, the risk that these rules are being violated puts the interests of mass-arbitration claimants in jeopardy and threatens the integrity of the legal system.

Mass-Arbitration Abuses Are a Challenge for Providers and Courts

Chapter

04

Unsurprisingly, businesses have been searching for a solution to plaintiffs' lawyers' use of the sudden, gigantic fee bills triggered by an abusive mass-arbitration filing to force a settlement without regard to the merits. But so far, neither the major arbitration providers nor the courts have intervened to prevent this abuse.

Arbitration Providers

The major arbitration providers—JAMS and the AAA—have faced challenges in adapting to handle mass arbitrations. JAMS has taken no action to address the mass-arbitration phenomenon; it has not adopted a new fee schedule or developed new procedures to address mass filings.

The AAA did adopt a new fee schedule and rules for mass arbitrations. But neither change addressed the fundamental problem with mass arbitrations—the coercive settlement pressure exerted by massive non-refundable arbitration fees, calculated on a per-case basis, that become due from the defendant company soon after a mass arbitration is filed.

The AAA's New Fee Schedule

The AAA adopted a sliding scale for initial filing fees in cases involving 25 or more similarly situated consumer plaintiffs. But, as explained above, the result is that the total amount of that set of initial fees is reduced by only about six percent—which means that when a plaintiffs' lawyer files 50,000 arbitrations, the company pays $200 million rather than $213 million.

The AAA could—but so far has chosen not to—reduce the whole set of arbitration fees further in light of the economies of scale inherent in administering numerous boilerplate arbitrations. Indeed, as Uber observed of the $91 million that the AAA was charging it for a single mass arbitration, that amount "represents almost 90 percent of the AAA's total annual operating revenue in 2020."[199]

"... [N]either [the AAA's nor JAMS' changes] addressed the fundamental problem with mass arbitrations—the coercive settlement pressure exerted by massive non-refundable arbitration fees, calculated on a per-case basis, that become due from the defendant company soon after a mass arbitration is filed."

The AAA's New Mass-Arbitration Rules

Along with its new fee schedule, the AAA also adopted new "Supplementary Rules

"The rules continue to allow all of the claims to be 'initiated' at once, which means that the fees become due for all cases at once. Even at the reduced rate, the total cost remains gigantic, as just discussed, so the blackmail settlement pressure remains."

for Multiple Case Filings." But these procedures are unlikely to produce swifter or more efficient adjudication of all of the claims. The rules continue to allow all of the claims to be "initiated" at once, which means that the fees become due for all cases at once. Even at the reduced rate, the total cost remains gigantic, as just discussed, so the blackmail settlement pressure remains.

And the timing of the claims' filing has little to do with the speed of their resolution. Plaintiffs' counsel often assert that they would like all claims to move forward on the merits immediately and in lockstep. But that is a cynical scheme to impose fees on defendants, because plaintiffs' counsel know that it is impossible to have claims decided at that rate.

To begin with, the plaintiffs' lawyer likely does not have the thousands of co-counsel who would be needed to litigate tens of thousands of arbitrations simultaneously. In addition, the claims have to be adjudicated by a limited number of available arbitrators. The AAA's rules contemplate that all of the cases will be assigned to a small "roster of arbitrators" with "multiple cases" being "assign[ed] ... to a single Merits Arbitrator, who will decide each case on its own merits."[200] That necessarily means that the cases will be resolved seriatim. Indeed, in recognition of the potential need for more efficient alternatives for resolving mass arbitrations, the preamble to the AAA's rules specifically acknowledges that "[p]arties are encouraged to agree to additional processes that make the resolution of Multiple Case Filings more efficient."[201]

"The failure of providers to adopt [mitigating] rules serves to promote abusive mass arbitrations and the coerced settlements that they engender."

But the AAA unfortunately declined to modify its rules to mandate the use of procedures that make mass arbitrations more efficient and less susceptible to abuse. Many contracting parties count on arbitration providers to promulgate appropriate rules for the fair and efficient resolution of disputes. The failure of providers to adopt such rules serves to promote abusive mass arbitrations and the coerced settlements that they engender (we discuss the changes that arbitration providers should consider making to their fee schedules and rules in detail in Chapter 5, *infra*).

The Courts

Efforts by defendants to obtain court intervention to stop mass-arbitration abuse have been similarly unsuccessful.[202]

Arguing "De Facto Class Manner"

For example, Postmates argued that mass-arbitration claimants had acted in concert in "a de facto class manner" in violation of their agreement to individualized arbitration.[203] Postmates explained that plaintiffs' counsel had submitted "virtually identical" arbitration demands for all claimants and then "insist[ed] that all the arbitrations move in lockstep, that all arbitration filing fees be paid up front, and that all the arbitrations be administered together and proceed at the same time."[204] But the court concluded that these were questions of arbitrability that the parties' agreement delegated to the arbitrator to decide.[205] And of course, an arbitrator would not decide those issues until after Postmates had paid millions of dollars in non-refundable arbitration fees, presenting the company with a Catch-22 scenario.

Other courts have similarly declined to address these issues when arbitration agreements delegate arbitrability issues to the arbitrator.[206]

Transferring to Small Claims Court

Intuit attempted to transfer to small claims court the tens of thousands of arbitration demands filed against it—invoking the provision of the arbitration agreement that permitted resolution of claims in that court.[207] Intuit initially argued to the AAA that it was entitled to do so under its arbitration agreement, but when plaintiffs' counsel objected, the AAA concluded that the issue had to be decided by the arbitrator in each case—and only after Intuit had paid the full AAA fees for each case.[208] Intuit then went to court, seeking a declaratory judgment that it was entitled to remove claims from arbitration to small claims court under its arbitration agreement, but the court disagreed, finding that the agreement granted that power only to consumers.[209]

Asserting "Excessive" Fees

Uber tried a different approach. In response to a mass arbitration involving 31,000 demands, Uber filed suit against the AAA for invoicing excessive arbitration fees.[210] Uber "asserted declaratory judgment claims based upon breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and restitution, and unfair competition" under California law, arguing that the fees charged far exceeded the actual cost of administering the cases.[211] But the court found all of Uber's arguments unpersuasive. The AAA had "sole discretion" regarding its fees, the court held, and the "AAA was fully within its express rights ... to charge the fees set forth in the fee schedule."[212]

Courts Largely Unmoved

Indeed, some courts appear to applaud mass arbitration. One judge accused DoorDash of "hypocrisy" because it "blanche[d] at the cost of the filing fees it agreed to pay in [its] arbitration clause,"[213] and remarked that the mass arbitration that DoorDash faced was "poetic justice."[214] And another judge remarked that Intuit had been "hoisted by [its] own petard" when it faced its own mass arbitration.[215]

These types of metaphor are sometimes used by those who believe that arbitration itself is an unfair "gambit" to "avoid civil liability for wrongdoing."[216] But as discussed in detail above, empirical studies confirm that consumers and employees are better off under agreements for individual arbitration than under the old class action system, in which unscrupulous lawyers could pursue blackmail settlements and people with modest individualized claims were priced out of court.[217] Individual arbitration addressed both problems: it reduced class-action abuse and made it feasible to pursue small individualized claims.

By contrast, the lawyers bringing mass arbitrations do not appear to be seeking a fair forum to hear their claims on the merits. To the contrary, they seem only to be seeking to leverage the fact that arbitration is subsidized by businesses to make it too expensive for businesses to defend themselves. No one should applaud the misuse of arbitration programs as a tool for extracting payoffs from targeted businesses.

So far courts have not recognized these abuses, much less confronted them head on. Accordingly—at least for now—it appears unlikely that courts will intervene to stop abusive mass arbitrations filed under arbitration provisions like the ones used by Intuit, DoorDash, and Uber.

[Lawyers bringing mass-arbitration claims] seem only to be seeking to leverage the fact that arbitration is subsidized by businesses to make it too expensive for businesses to defend themselves. No one should applaud the misuse of arbitration programs as a tool for extracting payoffs from targeted businesses.

Solutions to Mass-Arbitration Abuses

Chapter

05

Companies faced with the possibility of a mass arbitration find themselves in an unenviable position. With the AAA, JAMS, and the courts unwilling or unable to stop the elements of mass arbitration that blackmail companies into settlement, businesses are left on their own to figure out how to prevent abusive claims.

Amazon responded by removing the arbitration clause in its consumer agreement entirely.[218] That is one option, although (for the reasons discussed above) it deprives both companies and consumers of a beneficial means of dispute resolution.

Other companies are exploring a different approach, borrowing from procedures developed by courts to process large numbers of claims in the context of federal multidistrict litigation (MDL). Just as MDLs use bellwether trials as a means of encouraging global settlements, businesses facing mass arbitrations should consider incorporating the use of bellwether arbitrations—interspersed with mediation—to efficiently reach a global resolution of all claims.

At the same time, arbitration providers should reform their fee schedules and rules governing mass arbitrations to address the abuses of that procedure. And state bar authorities should consider investigating what appears to be potential violations of ethical rules in mass arbitrations.

The Experience of Bellwethers in MDLs

MDLs have long been used for mass torts, product-liability claims, and other forms of alleged widespread injury involving large numbers of individual cases asserted against a single defendant or set of defendants.[219] Although the MDL system has rightly been criticized for its flaws, some of the practices and procedures developed in that system can help rein in the abuses of mass arbitration.

Congress' mandatory MDL statute provides that "civil actions involving one or more common questions of fact" "may be transferred to any district for coordinated or consolidated pretrial proceedings."[220] Whether a group of cases "involve[s] one or more common questions of fact" is determined by the Judicial Panel on Multidistrict

"Although the MDL system has rightly been criticized for its flaws, some of the practices and procedures developed in that system can help rein in the abuses of mass arbitration."

Mitigating a Massive Backlog

The MDL process grew out of a massive backlog of antitrust lawsuits filed across the country alleging a bid-rigging scheme in the 1960s in the electrical equipment industry.[221] Then-Chief Justice Earl Warren assembled an ad hoc Coordinating Committee on Multiple Litigation to handle the cases.[222] The judges on the committee recommended various measures to help coordinate discovery and settlement.[223] But because those measures required voluntary cooperation of all of the parties and courts to work—and cooperation by future litigants and courts was not guaranteed—Congress, on the Committee's recommendation, enacted a mandatory MDL statute.[224]

Litigation, which is itself composed of seven federal judges who are appointed to the Panel by the Chief Justice.[225] Once a MDL is identified by the Panel—either on its own initiative or in response to a motion filed by a party in one of the actions at issue—the Panel issues a "transfer order,"[226] which consolidates the cases and moves them to a transferee district court.

Once the cases have been centralized in a single court and the court considers pre-trial issues (such as motions to dismiss and discovery),[227] bellwether trials are often used with the agreement of the parties to facilitate a global settlement.[228] When administered appropriately, a few representative cases are selected and set for trial out of the—likely—thousands of cases in the MDL.[229] The litigation of those few bellwether trials then encourages settlement in two distinct ways.

First, by requiring litigants to engage in fact-finding and to prepare witnesses and arguments for trial, the bellwether trials necessarily require litigants to take a more realistic assessment of the evidence that they will be able to offer to a factfinder.[230]

Second, the bellwether trials provide "real-world evaluations of the litigation by multiple juries."[231] To be sure, the selection of unrepresentative cases as bellwether trials in MDLs can distort the picture.[232] But as the Fifth Circuit has explained, "[i]f a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts."[233] One judge experienced with the MDL process has stated that "the knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries."[234]

MDLs have resulted in a high rate of settlements.[235] Since 1968, when Congress passed the MDL statute, over one million (1,056,706) civil actions have been transferred to MDL courts.[236] Of the cases no longer pending as of September 30, 2021, less than three percent were ever transferred back to the original court—which means that the MDL courts resolved almost all cases themselves.[237]

An NYU Law School study determined that between 2000 and 2015, 72 percent of the MDL case terminations resulted from settlement.[238] While not all of those settlements were due to the influence of bellwether trials, those well-versed in MDLs have noted that "nothing encourages global MDL settlement like setting bellwether trials."[239]

Applying the Bellwether Model to Arbitrations

Mass arbitrations and MDLs both present a similar problem of how an adjudicatory system can appropriately process a large volume of similar claims. More than 50 years of experience with MDLs teaches that selecting and adjudicating a handful of representative claims is a powerful tool for global resolution.

Building on that insight, businesses are beginning to include in their arbitration agreements a provision specifically designed to tackle mass arbitrations. For example, an arbitration provision can provide that, if multiple demands for arbitration are filed by the same law firm or coordinating firms, and those demands assert related claims, then the parties will use a bellwether process to reach a global resolution. Each side will choose a number of test cases to place into the first round of arbitrations. Only that first batch of cases may be accepted for filing by the arbitration provider, with the rest subject to tolling agreements (built into the arbitration provision) in order to protect the claimants' rights while everyone awaits the result of the test cases.

The test cases are then heard and decided by separate arbitrators. With the results in hand, the parties can then participate in a mediation, with the goal of settling all of the outstanding cases. The parties' track records in the bellwether arbitrations will provide critical information to guide the mediation: the parties will know both whether their legal claims or defenses are convincing and, to the extent that the claimants are successful, will have sample valuations for making the claimants whole. If the mediation is unsuccessful in settling some of the claims, the parties will arbitrate another batch of bellwether arbitrations, and thus continue the process until all claims are resolved. This approach has multiple benefits.

"... [B]usinesses are beginning to include in their arbitration agreements a provision specifically designed to tackle mass arbitrations."

First, as compared to unvarnished mass arbitration, it facilitates merits-based resolution. The threat of gigantic arbitration fees will no longer compel a settlement unrelated to the merits, because companies will only pay the fees as they become due with each tranche of bellwether proceedings. Arbitration providers will also benefit because they will not be tasked with administering tens of thousands of arbitrations at once.

Second, meritorious claims will be paid much sooner than if every case were arbitrated individually—because of the high likelihood of settlement.[240] Additionally, by encouraging global settlement, meritorious claims will be compensated without the claimant attending an arbitration.

"The threat of gigantic arbitration fees will no longer compel a settlement unrelated to the merits, because companies will only pay the fees as they become due with each tranche of bellwether proceedings."

Third, this approach is close to what parties seeking to resolve a large number of arbitration demands would naturally adopt if they were selecting a fair method of adjudication, as opposed to one based on extortionate fees. Indeed, before the recent spate of abusive mass arbitrations—in which a coerced settlement appears to be the only goal—mass arbitrations were often resolved in this manner. A few test cases informed a global mediation, which was followed by individualized settlements.

For example, in one mass arbitration of 150 cases in 2013, the parties arbitrated five cases then conducted a global mediation of the remaining cases.[241] Although the initial mediation was unsuccessful, the parties ultimately settled at a second mediation immediately before a second set of bellwether arbitrations were scheduled to take place.[242] Other mass arbitrations were also efficiently resolved in the same manner.[243]

There are, of course, potential criticisms of this proposal. But none is persuasive.

Tolling the Statute of Limitations

Judge Edward M. Chen of the U.S. District Court for the Northern District of California identified one such concern: if claimants must wait until test cases are resolved, the statute of limitations could expire before their case is selected as a test case.

That was the situation that Judge Chen evaluated in *MacClelland v. Cellco Partnership*, which involved Verizon's bellwether provision for mass arbitrations. The arbitration agreement had no express tolling provision, yet stated that consumers could not "file" their arbitration demands "until all preceding traunches [of demands] are adjudicated."[244] Because the agreement could cause the "forfeiture of entire legal rights," Judge Chen held that it was unconscionable and therefore unenforceable.[245]

The concern about expiring statutes of limitations is easily addressed. Verizon has explained that its arbitration agreement already implicitly tolled the limitations period for customers waiting for bellwether cases to be decided, and Verizon immediately amended its arbitration agreement to include an express provision tolling the limitations period when the bellwether process is triggered, even before Judge Chen issued his decision in *MacClelland*.[246] Certainly any bellwether protocol for handling mass arbitrations should provide for tolling—ideally by including an express provision stating that any statute of limitations applicable to a claim is tolled while the claimant waits for the bellwether process to proceed.

Conditions for Timely Settlement

Judge Chen raised a second concern in his *MacClelland* decision—that adjudicating arbitrations in bellwether "batches" could mean that, practically speaking, claimants will have to wait years to receive a decision on their claim. *MacClelland* involved a bellwether protocol that provided that 10 cases could be arbitrated at a time.[247] Assuming that each arbitration took seven months to resolve—a figure that the plaintiffs based on AAA statistics—the plaintiffs asserted that it would take 156 years for all 2,712 claimants in the related mass arbitration to receive a decision.[248] This risk, Judge Chen determined, made the provision unconscionable.[249]

But if a bellwether provision encourages settlement through mediations between bellwether batches, it is unlikely that all cases would have to be individually arbitrated. The most likely scenario is that the vast majority of claims would settle. That is

Certainly any bellwether protocol for handling mass arbitrations should provide for tolling—ideally by including an express provision stating that any statute of limitations applicable to a claim is tolled while the claimant waits for the bellwether process to proceed.

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what happens with cases consolidated into MDLs, and it is already what happens when companies incorporate a Notice of Dispute provision into their arbitration agreements, which enables pre-arbitration settlements.

Most importantly, how long it would take all arbitration demands to be individually adjudicated under a bellwether procedure means little without a comparison to other forms of adjudication. For instance, absent a bellwether procedure, it is highly unlikely that arbitrations will proceed at a significantly faster rate. Arbitration providers such as the AAA and JAMS do not have an infinite number of arbitrators. Instead, a limited number of arbitrators will be assigned to handle all cases in the mass arbitration, adjudicating the cases individually in the order in which they were filed.[250] The AAA's new rules for mass arbitrations codify this approach, indicating that in a mass arbitration, all cases will be assigned to a roster of arbitrators, who then adjudicate each claim individually.[251] That process would not be faster than arbitrating repeated rounds of bellwether cases.

MDLs are another useful comparison. MDLs in their current form take a significant amount of time to conclude. MDLs terminated in 2015 lasted an average of 6.07 years.[252] MDLs terminated in the 12 months ending September 30, 2021 lasted an average of 7.43 years.[253] But that is with the bellwether process in place and district court judges encouraging global settlement as part of their litigation-management duties. If each case consolidated into a MDL had to be transferred back to its originating court for trial—a procedure analogous to Judge Chen's hypothetical that every claim in a mass arbitration must be individually arbitrated—then plaintiffs would wait decades for their cases to be tried.

Of course, not every case in a MDL is litigated to trial. And for good reason: the judiciary lacks the capacity to oversee that many trials and parties lack the resources to participate in that many trials. Arbitration is similarly resource-constrained. The goal—and the extremely likely real-world outcome —is resolution through non-coerced settlements so that each individual with a meritorious claim is expeditiously compensated, not individual arbitration for every one of the thousands, or tens of thousands, of claimants. The process may take some time so that claimants' counsel can communicate the offers to each of their clients and answer their questions—which in itself should facilitate settlement. But that process would be far

"Of course, not every case in a MDL is litigated to trial. And for good reason: the judiciary lacks the capacity to oversee that many trials and parties lack the resources to participate in that many trials."

swifter than the time it would take to arbitrate all of the claims. Indeed, after the parties see the outcome of a representative batch of test cases, any additional arbitrations should be rare; all reasonable parties would be able to see the writing on the wall.

Few Incentives to Stall

Professor Glover offers a different critique. She believes that defendants will use bellwether proceedings as an excuse to drag their feet. Even if they lose every single claim in the first bellwether "batch," she asserts, defendants will not come to the settlement table absent the threat of massive arbitration fees. In her estimate, they will pay off the bellwether claims as they are adjudicated, and balk at the large sum required for a global settlement. In that scenario, she asserts, claimants would wait years for compensation.[254]

That scenario is wholly unrealistic. Companies already settle claims at a high rate to avoid arbitration fees and defense costs, both of which make arbitration expensive for businesses. There is little reason to believe that companies would intentionally add the equivalent of millions of dollars in expenses when a much smaller sum would end the legal matter once and for all.[255]

In addition, many companies, like AT&T, offer additional remedies in arbitration—such as a $10,000 minimum award and double attorney's fees—if the customer is awarded in arbitration an amount greater than the company's last written settlement offer. These premiums result in consumers being better off in arbitration than in court, where these premiums are not available. And—relevant to the question of delay—these premiums ensure that it is economically disadvantageous for companies to stonewall meritorious claims in arbitration, as refusing to make reasonable settlement offers to those claimants would risk being required to

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pay the premiums in those cases when they eventually are arbitrated.

Finally, as mentioned before, any criticism must be viewed in light of realistic alternatives. Absent a bellwether process, claimants in a mass arbitration would not receive a swift adjudication from an army of arbitrators. They would have to wait for a handful of arbitrators to complete the herculean task of adjudicating thousands of claims over the course of many years. With that alternative in mind, claimants are far better off in a system that prioritizes global settlement informed by an actual evaluation of the merits.

Preventing Abuses by Updating Arbitration Rules and Fees

Companies' ability to address mass arbitration abuses should not relieve the nation's largest arbitration providers, JAMS and the AAA, of the obligation to change the way they administer mass arbitrations in order to prevent the misuse of the arbitration process.

Indeed, JAMS' failure to change its fee schedule or rules at all when dealing with mass arbitrations has done a profound disservice to parties who selected JAMS as their arbitration provider because of its long reputation as a fair forum. JAMS' inaction has left these businesses vulnerable to abusive mass arbitrations.

Unlike JAMS, the AAA did change its fee schedule and adopt supplementary rules to apply to mass arbitrations.[256] But those changes are inadequate to address the problem, and the AAA should consider revisiting its fees and rules.

Fee Schedule Changes

To begin with, both JAMS and the AAA should adopt a new fee schedule for mass arbitrations under which the fees charged reflect the arbitration provider's actual work in administering the claims rather than increase linearly with the number of cases filed. For example, instead of charging fixed filing and case-management fees for every case, which when aggregated due to mass filings become an absurd multiple of any conceivable actual administration cost, JAMS and the AAA should consider charging a fixed fee whenever a mass arbitration is filed, and then an additional hourly rate for the assigned case administrator's time. This approach would dispense entirely with separate filing, case-management, and hearing fees for each case. Moreover, arbitrator fees should be billed as arbitrators are appointed

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in particular cases, rather than all at once at the outset, in recognition of the reality that the vast majority of mass arbitrations are resolved by settlement before most arbitrators are chosen or do any work on the case.

These changes to the fee schedule would make it feasible for a business targeted by dubious claims to actually defend itself, while at the same time ensuring that JAMS and the AAA are fairly compensated for their work in administering these cases. In addition, by deferring the imposition of arbitrator fees for later cases until work relating to those cases is actually done, the fee schedule would reward parties who reach a global settlement after a few test cases were first resolved, without the need to arbitrate additional cases. Finally, this change in fee schedule would reduce the incentive of plaintiffs' lawyers to file large numbers of groundless (and often frivolous) arbitrations simply to increase the number of per-case fees that a defendant must pay.

Mass Arbitration Rule Changes

In addition, JAMS should adopt, and the AAA should modify, rules applicable to mass arbitrations to make those proceedings more efficient and less susceptible to abuse.

First, JAMS and the AAA should adopt clear rules regarding the information that a mass-arbitration claimant must submit before a demand for arbitration is properly filed. At a minimum, given the high rate at which individuals who are not customers or who never worked for the defendant seem to be included improperly as claimants in mass arbitrations, claimants should be required to include adequate identifying information (for example, an account number, product serial number, employee identification number, and the like).

Second, before separate arbitrators are appointed to handle the merits of any claims, preliminary challenges to the administration of particular claims should be resolved by either the administrator itself or a process arbitrator who is charged with resolving preliminary administrative matters. For example, the administrator or the process arbitrator could resolve disputes over what information is required before claims may proceed to administration or over the manner in which merits arbitrators are appointed. And the administrator or the process arbitrator should be fully authorized to impose sanctions for improper filings or grant other appropriate relief, without the need to await appointment of a separate merits arbitrator.

Third, unless both parties agree to a different procedure, the rules should require the parties to agree on a process for selecting representative test cases that must be arbitrated first, before the remaining cases proceed to selecting a merits arbitrator. The administrator or the process arbitrator would also be charged with resolving disputes about the selection of test cases and preservation of the status quo for the remaining cases. Then, after the test cases are resolved, the parties could have more fruitful discussions about settling the remaining cases, without having to appoint merits arbitrators to decide those cases.

These changes to JAMS' and the AAA's fee schedules and rules will help preserve arbitration as a realistic and fair way of obtaining merits-based resolution of disputes—rather than as a tool to extract blackmail settlements from companies.

Scrutinizing Mass Arbitrations for Potential Ethics Violations

As discussed in detail above, the manner in which mass arbitrations are currently threatened and litigated appears to entail a number of potential ethical violations, including breaches of rules against

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unauthorized practice of law, rules governing attorney advertising and solicitation, rules protecting the client's role in the settlement process, and rules against frivolous claims.[257]

State bar authorities certainly have the power to investigate suspected violations. The victims of these potential violations—the companies targeted by mass arbitrations and the claimants in whose names arbitrations are filed or threatened—often will be reluctant to report these suspected violations. For example, companies may have reason to believe that opposing counsel has not conducted an appropriate pre-suit investigation or is failing to communicate settlement offers to individual claimants, but may lack the confidence to take the serious step of filing a complaint. They also have additional reasons not to bring grievances to bar authorities—for example, to avoid predictable accusations that the grievance was filed to try to obtain an advantage in the dispute, or because of non-disclosure provisions in settlement agreements. The claimants face different hurdles: they are (understandably) often unaware of the grievance process and their lawyers' ethical responsibilities.

Perhaps state bar authorities can be excused for allowing abusive mass arbitrations to proceed in the past without any scrutiny. But at this point, there have been several years of experience with mass arbitrations, and there are (at minimum) serious questions about whether the rules of professional responsibility are being honored. Rather than allowing these problems to fester and ultimately develop into a significant ethical scandal,[258] state bar authorities should consider looking into the ethical issues that mass arbitrations can raise.

Perhaps state bar authorities can be excused for allowing abusive mass arbitrations to proceed in the past without any scrutiny. But at this point, there have been several years of experience with mass arbitrations, and there are (at minimum) serious questions about whether the rules of professional responsibility are being honored.

Conclusion

Chapter

06

The plaintiffs' bar—eager to find a way to replicate the coerced settlements enabled by the class action process—has seized upon the fact that arbitration fees are heavily subsidized by businesses and filed abusive mass arbitrations that appear designed to coerce settlements regardless of the merits of the underlying claims. Aggregating large numbers of claimants asserting identical claims can inflict immediate fee obligations of hundreds of millions of dollars on companies under the procedures currently employed by the nation's largest arbitration providers.

Thus far, many companies have been forced to choose between paying blackmail settlements or abandoning arbitration. Either of those choices inflicts systemic harm. Blackmail settlements produce huge costs that ultimately are borne by employees and consumers. And eliminating arbitration means that individuals with small claims will lose an important (and perhaps their only viable) route for vindicating their rights.

There is a better way. Instead of abandoning arbitration, companies should consider adopting a bellwether process for mass arbitrations, under which batches of test arbitrations are interspersed with mediations that seek to produce a global settlement with the payment of filing fees on a batch-by-batch basis. That approach will promote the valuation—and payment—of claims based on their merits and will ensure that arbitration remains available as an efficient and effective method of dispute resolution for businesses, consumers, and employees alike.

At the same time, the largest arbitration providers—JAMS and the AAA—should adopt new fee schedules and rules applicable to mass arbitrations. These providers can and should take action to halt these abuses of the arbitration process, rather than continue allowing themselves to be the weapon used to coerce merits-free settlements from companies.

Finally, state bar authorities should consider investigating what appear to be the many violations of state rules of professional conduct that likely are occurring in mass arbitrations.

"Blackmail settlements produce huge costs that ultimately are borne by employees and consumers. And eliminating arbitration means that individuals with small claims will lose an important (and perhaps their only viable) route for vindicating their rights."

Endnotes

[1] The authors of this paper regularly represent businesses defending against mass arbitrations. This paper does not discuss any of those mass arbitrations. Nor do the authors provide or rely on data they have obtained from clients about mass arbitrations.

[2] *See* p. 10, *infra* (discussing studies).

[3] *See, e.g.*, Resps.' Mot. to Dismiss Pet. to Compel Arbitration at 1, *Wallrich v. Samsung Elecs. Am., Inc.*, No. 1:22-cv-5506 (N.D. Ill. Dec. 5, 2022), ECF No. 26.

[4] *See, e.g.*, *id.*

[5] *See, e.g.*, Amanda Robert, *Amazon Drops Arbitration Requirement After Facing Over 75,000 Demands*, ABA J. (June 2, 2021), https://bit.ly/3URJuTj; Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us,* Wall St. J. (June 1, 2021), https://on.wsj.com/3ro1jvl; Michael Corkery, *Amazon Ends Use Of Arbitration For Customer Disputes,* N.Y. Times (July 22, 2021), https://nyti.ms/3SvVIiQ.

[6] *See, e.g.*, Resps.' Opp. to Pet'rs' Mot. to Compel Arbitration 6-15, *Wallrich v. Samsung Elecs. Am. Inc.*, No. 1:22-cv-5506 (N.D. Ill. Dec. 5, 2022), ECF No. 27.

[7] *See* pp. 8-16, *infra.*

[8] *See* p. 10, *infra*.

[9] *See, e.g.*, T-Mobile, Terms and Conditions, https://www.t-mobile.com/responsibility/terms-and-conditions ("Upon filing of the arbitration demand, we will pay or reimburse all filing, administration, and arbitrator fees."); Verizon Wireless Customer Agreement, https://vz.to/3DU1EMO ("We'll reimburse any filing fee that the [arbitration provider] charges you for arbitration of the dispute at the conclusion of the arbitration if you fully participate in the proceeding. We'll also pay any administrative and arbitrator fees charged by the arbitration tribunal." (capitalization altered)); Instagram Terms of Use, https://help.instagram.com/581066165581870 ("We will pay all arbitration filing fees, administration and hearing costs, and arbitrator fees for any arbitration we bring or if your claims seek less than $75,000 and you timely provided us with a Notice of Dispute."); Microsoft Services Agreement, https://www.microsoft.com/en-us/servicesagreement ("We will promptly reimburse your filing fees and pay the AAA's and arbitrator's fees and expenses if … the dispute involves less than $75,500 ….").

[10] *Compare* AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3 ($225 default filing fee); AAA, *Employment/Workplace Fee Schedule* (Jan. 1, 2023), https://bit.ly/3IyvSbT ($350 default filing fee); JAMS, *Arbitration Schedule of Fees and Costs,* https://www.jamsadr.com/arbitration-fees ($250 filing fee for consumer arbitrations and $400 filing fee for employee arbitrations), with U.S. District Court for the District of Columbia, *Fee Schedule*, https://www.dcd.uscourts.gov/fee-schedule ($402 filing fee); Superior Court of California, *Statewide Civil Fee Schedule*, https://bit.ly/3fEB4PH ($435 filing fee).

[11] *See, e.g.*, T-Mobile Terms of Service, http://bit.ly/3UFfDg5 ("[F]or claims under $75,000 as to which you provided notice and negotiated in good faith as required above before initiating arbitration, if the arbitrator finds that you are the prevailing party in the arbitration, you will be entitled to recover reasonable attorneys' fees and costs."); Verizon Wireless Customer Agreement, https://vz.to/3DU1EMO ("… We also agree to pay any reasonable attorneys' fees and expenses, regardless of whether the law requires it for your case.").

[12] *See, e.g.*, Verizon Wireless Customer Agreement, https://vz.to/3DU1EMO ("If you don't accept the offer and the arbitrator awards you an amount of money that's more than our offer but less than $5,000, or if we don't make you an offer, and the arbitrator awards you any amount of money but less than $5,000, then we agree to pay you $5,000 instead of the amount awarded.") (capitalization altered); *see also, e.g., AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 336-37 (2011) (describing premiums available under consumer arbitration agreement).

[13] *See, e.g.*, Airbnb Terms of Service, http://bit.ly/3DOI8RH ("At least 30 days prior to initiating an arbitration, you and Airbnb each agree to notify the other party of the dispute in writing and attempt in good faith to negotiate an informal resolution."); Verizon Wireless Customer Agreement, https://vz.to/3DU1EMO ("[T]he party seeking arbitration must first notify the other party of the dispute in writing at least 60 days in advance of initiating the arbitration …. The notice must include enough information to allow us to identify your account as well as to assess and attempt to resolve your claim …. The notice requirement is designed to allow Verizon to make a fair, fact-based offer of settlement if it chooses to do so." (capitalization altered)); T-Mobile Terms of Service, http://bit.ly/3UFfDg5 ("For any and all disputes or claims you have, you must first give us an opportunity to resolve your claim by sending a written description of your claim to the address provided …"); Microsoft Services Agreement, https://www.microsoft.com/en-us/servicesagreement ("[I]f you wish to pursue arbitration, you must first send an individualized Notice of Dispute ….").

[14] *See, e.g.*, AT&T Consumer Service Agreement, https://www.att.com/consumerserviceagreement ("During that period [after receipt of a Notice of Dispute], either you or AT&T may request an individualized discussion (by phone call or videoconference regarding settlement …. [A]n AT&T representative must personally participate …. Your and AT&T's lawyers (if any) also can participate."); Intuit Terms of Service, https://www.mint.intuit.com/terms ("[B]efore either you or Intuit commence arbitration …, we will personally meet, via telephone or videoconference, in

a good-faith effort to confer with each other and try to resolve informally any Claim ….").

15 Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration,* U.S. Chamber of Commerce Institute for Legal Reform 11 (Mar. 2022), https://bit.ly/3SK7QwA ("*Fairer, Faster, Better III*").

16 *Id.* at 11-12.

17 *Id.* at 14.

18 *Id.*

19 *Id.* at 15-16.

20 *Id.*

21 *See, e.g.*, Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers,* 107 Cal. L. Rev. 1, 51 (2019) (awarded arbitrations took an average of just 11 months to decision, versus an average of 26.6 months to verdict in state court jury trial cases); *see also id.* at 52 (the majority of plaintiffs in arbitration who "fully prosecuted their claims pay no fees"); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations,* 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010) (consumers won relief 53.3 percent of the time in arbitration); *see also* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court,* 7 Hastings Bus. L.J. 77, 80 (2011) (in a study of debt-collection cases, "consumers prevailed more often in arbitration than in court").

22 *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281 (1995).

23 Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association,* 18 Ohio St. J. on Disp. Resol. 777, 783 (2003).

24 Minn. State Bar Ass'n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), https://perma.cc/VJ8L-RPEY.

25 *Id.* at 638; *see also* Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015* § 8, p. 34 (Mar. 2015), perma.cc/8AX5-AYWN ("*CFPB Study*") (finding that only 12.3 percent of all class actions initiated on behalf of consumers end in a class settlement).

26 *CFPB Study* at section 8, page 34; *see also* Darren Cottriel et al., *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)* 12 (April 2020), https://bit.ly/3ykxBvF (in a study of 44 class-action settlements, an average of 33.2 percent of the settlement award was paid to class counsel, while only 38.42 percent was paid to class members, the remaining money going to costs and *cy pres* distributions).

27 *CFPB Study* at section 8, page 33; *see also* Chamber Statement at App., p. 5 (explaining calculation).

28 *CFPB Study* at section 8, pages 27-28; *see also* Chamber Statement at App., p. 5 (explaining calculation).

29 *See, e.g.*, AAA, Demand for Arbitration Consumer Arbitration Rules, at https://www.adr.org/sites/default/files/Consumer_Demand_for_Arbitration_Form_3.pdf.

30 *See, e.g.*, AAA Consumer Arbitration Rules R-2, R-16.

31 *See, e.g.*, *id.* R-21.

32 *See, e.g.*, *id.* R-22.

33 *See, e.g.*, *id.* R-26, R-29, R-32(b).

34 *See, e.g.*, *id.* R-34(a).

35 *See Kabia v. Koch,* 713 N.Y.S.2d 250, 253-55 (Civ. Ct. 2000) (explaining that "The People's Court" was an arbitration under New York law and that "Judge Judy" used a "similar" arbitration agreement and procedure).

36 Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements,* 23 Harv. Negotiation L. Rev. 29, 85 (2017) ("[S]tandard economic analysis suggests that enforcement of adhesive consumer arbitration agreements tends over time to lower the prices of the goods and services consumers buy."); Omri Ben-Shahar, *Arbitration and Access to Courts: Economic Analysis,* in Regulatory Competition in Contract Law and Dispute Resolution 461 (Horst Eidenmüller, ed. 2013) (explaining that because "arbitration is cheaper for business than litigation," without arbitration, "some of the cost of access to litigation would be rolled into the price of the service," and "most if not all this cost would be reflected in higher prices to consumers").

37 *See, e.g.*, Thomas M. Madden, *Mandatory Pre-Dispute Arbitration: An Alternative Approach,* 2019 Mich. St. L. Rev. 1033, 1035 n.6 (2019) (listing academic attacks on arbitration).

38 *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (Federal Rule of Civil Procedure 23 "imposes stringent requirements for certification that in practice exclude most claims.").

39 *See* Statement of the U.S. Chamber of Commerce to House Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (May 18, 2016) ("Chamber Statement") at App., pp. 1-3 (explaining that a study of consumer complaints submitted to the CFPB found that most claims are individualized and lack "the common factual basis required for a class action"), perma.cc/TJ92-CE9G.

40 Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 635-36 (2006).

[41] Fed. Trade Comm'n, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* 11 (Sept. 2019), https://perma.cc/CM66-ZVCX; *CFPB Study* at § 8, p. 30.

[42] *See* Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action,* 64 Emory L.J. 399, 419 & n.87 (2014) (listing studies).

[43] *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions,* 10 & n.20 (Dec. 11, 2013), https://bit.ly/3C4ByW8.

[44] Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(3), 119 Stat 4.

[45] *Concepcion,* 563 U.S. at 351 (internal quotation marks omitted); *see also* p. 17, *infra* (discussing findings by courts that the heightened recoveries available in arbitration prompted the company to make generous settlement offers before arbitration, effectively guaranteeing that customers with colorable claims will be made whole).

[46] *See, e.g.*, Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (observing that class actions force defendants into "blackmail settlements"); *see also, e.g., In re Rhone Poulenc Rorer, Inc.,* 51 F.3d 1293, 1298 (7th Cir. 1995) (collecting studies of class action abuses).

[47] *See* Carlton Fields, *Class Action Survey* 7 (2021), https://bit.ly/3SN5flJ.

[48] A.C. Prichard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Security Fraud Enforcers,* 85 Va. L. Rev. 925, 953 (1999).

[49] *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,* 568 U.S. 455, 474-75 (2013).

[50] *Concepcion,* 563 U.S. at 350.

[51] *Id.*

[52] *See* p. 10, *supra.*

[53] *See, e.g.*, Chamber Statement at App., p. 2 (reporting that of a random sample of the 271,600 complaints submitted by consumers to the CFPB, 90 percent were individualized disputes that could not be brought as a class action), perma.cc/TJ92-CE9G.

[54] Br. of Am. Cur. CTIA—the Wireless Association at 21, *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), 2010 WL 318385 (Aug. 9, 2010).

[55] *Concepcion,* 563 U.S. at 352.

[56] *See, e.g.*, *Viking River Cruises, Inc. v. Moriana,* 142 S. Ct. 1906, 1919 (2022) ("[T]he FAA does not require courts to enforce contractual waivers of substantive rights and remedies"); *Green Tree Fin. Corp.–Ala. v. Randolph,* 531 U.S. 79, 90-92 (2000) (courts may refuse to compel arbitration under an agreement that imposes "prohibitive" costs on the consumer); *Chavarria v. Ralphs Grocery Co.,* 733 F.3d 916, 923-26 (9th Cir. 2013) (invalidating an arbitration agreement that "would always produce an arbitrator proposed by [the company]"); *Nagrampa v. MailCoups, Inc.,* 469 F.3d 1257, 1287 (9th Cir. 2006) (*en banc*) (the arbitration agreement improperly required claimants to travel from California to Massachusetts to arbitrate).

[57] *See, e.g.*, Chamber Statement at App., p. 2 (reporting the results of a study showing that consumer complaints to the CFPB overwhelmingly are individualized disputes).

[58] *Discover Bank v. Super. Ct.,* 36 Cal. 4th 148, 162-63 (2005).

[59] 563 U.S. 333, 337 (2011).

[60] *Id.*

[61] *Makarowski v. AT&T Mobility, LLC,* 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009).

[62] *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *14 n.10 (S.D. Cal. Aug. 11, 2008).

[63] *Id.* at *11.

[64] *Laster v. AT&T Mobility LLC,* 584 F.3d 849, 856 n.9 (9th Cir. 2009).

[65] *Id.* at 855; *Laster,* 2008 WL 5216255, at *14.

[66] 570 U.S. 228, 231 (2013).

[67] 138 S. Ct. 1612, 1632 (2018).

[68] *See* pp. 25-28, *infra.*

[69] Pet. for Order Compelling Arbitration ¶ 1, *Abadilla v. Uber Techs., Inc.,* No. 18-cv-7343 (N.D. Cal. Dec. 5, 2018), ECF No. 1 (*Abadilla* Pet.); Uber Opp. to Mot. to Compel Arbitration 1, *Abadilla v. Uber Techs., Inc.,* No. 18-cv-7343 (N.D. Cal. Jan. 14, 2019), ECF No. 53 (*Abadilla* Opp.); *see also* Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers,* Reuters (Jan. 16, 2019), https://reut.rs/3MX3GzR.

[70] *Abadilla* Pet. ¶¶ 3-4.

[71] *Abadilla* Opp. at 1-3.

[72] Andrew Wallender, *Uber Settles 'Majority' of Arbitrations for at Least $146M,* Bloomberg Law (May 9, 2019), https://bit.ly/3z5E0LD.

[73] *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020); *see also* Nicholas Iovino, *DoorDash Ordered to Pay $9.5 Million to Arbitrate 5,000 Labor Disputes,* Courthouse News Service (Feb. 10, 2020), https://bit.ly/3D1oTDQ.

[74] *Abernathy,* 438 F. Supp. 3d at 1066.

[75] *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019), *aff'd,* 823 F. App'x 535 (9th Cir. 2020); *see also McClenon v. Postmates, Inc.,* 473 F. Supp. 3d 803, 806 (N.D. Ill. 2020).

[76] *Adams,* 414 F. Supp. 3d at 1250.

[77] *Postmates, Inc. v. 10,356 Individuals*, 2021 WL 540155, at *3 (C.D. Cal. Jan. 19, 2021).

[78] *In re CenturyLink Sales Prac. & Secs. Litig.*, 2020 WL 3513547, at *2 (D. Minn. June 29, 2020) (internal quotation marks omitted).

[79] *Id.* at *3.

[80] Alison Frankel, *FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration,* Reuters (Jan. 14, 2020), https://reut.rs/3Spv5v5.

[81] *Id.*

[82] Alison Frankel, *Intuit Defends $40 Million Class Settlement, Attacks Mass Arbitration Firm,* Reuters (Dec. 9, 2020), https://reut.rs/3eU2vV0; *see also Intuit Inc. v. 9,933 Individuals,* 2021 WL 3204816, at *2 (Cal. Ct. App. July 29, 2021); Justin Elliott, *TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud,* ProPublica (Feb. 23, 2022), https://bit.ly/3TLz0Uh.

[83] Alison Frankel, *Intuit Defends $40 Million Class Settlement, Attacks Mass Arbitration Firm,* Reuters (Dec. 9, 2020), https://reut.rs/3eU2vV0; Decl. of Rodger Cole ¶ 20, *In re Intuit Free File Litig.,* No. 3:19-cv-2546-CRB (N.D. Cal. Dec. 7, 2020), ECF No. 192.

[84] *See, e.g.*, Amanda Robert, *Amazon Drops Arbitration Requirement After Facing 75,000 Demands,* ABA J. (June 2, 2021), https://bit.ly/3URJuTj; Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us,* Wall St. J. (June 1, 2021), https://on.wsj.com/3ro1jvl.; Michael Corkery, *Amazon Ends Use Of Arbitration For Customer Disputes,* N.Y. Times (July 22, 2021), https://nyti.ms/3SvVIiQ.

[85] Alison Frankel, *Mass Consumer Arbitration Is On! Ed Tech Company Hit With 15,000 Data Breach Claims,* Reuters (May 12, 2020), https://reut.rs/3z1uwAU.

[86] Alison Frankel, *Chegg Tries a New Way to Avert Mass Arbitration: Cancel Users' Contracts,* Reuters (July 2, 2020), https://reut.rs/3FaowJY.

[87] *See Lyles v. Chegg, Inc.*, 2020 WL 1985043, at *4 (D. Md. Apr. 27, 2020).

[88] Skye Witley & Christopher Brown, *Samsung's Biometric Data Clash Opens New Mass Arbitration Front,* Bloomberg Law (Oct. 21, 2022), https://bit.ly/3ssefBe; Christopher Brown, *Samsung Facing Almost 50,000 Arbitration Claims Over Selfies,* Bloomberg Law (Oct. 11, 2022), https://bit.ly/3gEIgLL; Pet. to Compel Arbitration, *Wallrich v. Samsung Elecs. Am., Inc.,* No. 1:22-cv-05506 (N.D. Ill. filed Oct. 7, 2022).

[89] Resps.' Mot. to Dismiss Pet. to Compel Arbitration 2, *Wallrich v. Samsung Elecs. Am. Inc.*, No. 1:22-cv-5506 (N.D. Ill. Dec. 5, 2022), ECF No. 26 (emphasis omitted).

[90] *Id.* at 16 & n.21.

[91] J. Maria Glover, *Mass Arbitration,* 74 Stan. L. Rev. 1283, 1387-90 (2022).

[92] *Id.* at 1387-90; John O'Brien, *Peloton Shifts Focus from Arbitration to Courtroom to Defend Itself,* Legal Newsline (July 30, 2020), https://perma.cc/6UAE-KPY9; *Fishon v. Peloton Interactive, Inc.,* 336 F.R.D. 67, 68 (S.D.N.Y. 2020).

[93] Glover, 74 Stan. L. Rev. at 1376 ("[T]he private nature of arbitration means that the study does not cover the full universe of arbitration demands. Some information is, and will remain, unobtainable.").

[94] *See, e.g.,* Decl. of Rodger Cole ¶¶ 12, 14, *In re Intuit Free File Litig.,* No. 3:19-cv-2546-CRB (N.D. Cal. Dec. 7, 2020), ECF No. 192 (explaining that "Keller Lenkner appears to have partnered with Troxel Law to solicit many of these individuals [who are participating in a mass arbitration against Intuit] through a sign-up website, http://signup.turbotaxclaims.com/start-claim (last visited December 3, 2020).").

[95] Decl. of Tom Kayes in Support of Reply to Mot. to Compel Arbitration ¶¶ 36-38, *Abadilla v. Uber Techs., Inc.,* No. 3:18-cv-07343-EMC (N.D. Cal. Jan. 24, 2019), ECF No. 66-1 ("One way that our clients found us [at Keller Postman] was by calling a 1-800 number in a radio advertisement. The advertisement advised Uber drivers that Uber may owe them unpaid wages, said that Uber previously settled a case brought by the Federal Trade Commission alleging that Uber lied about how much it pays drivers, and directed Uber drivers to call a toll-free number for more information. Phone calls to that number are answered by trained agents.").

[96] *See also* Alison Preece, *Labaton Is Keeping Open The Doors To Justice,* Lawdragon (Sept. 27, 2022), https://bit.ly/3GivInt (mass arbitration firm obtains clients by "advertis[ing] on social media and search engines"); Labaton Sucharow, *Samsung Galaxy User In Illinois?,* https://bit.ly/3WJJZ1X (example of online form for signing up for participation in a mass arbitration).

[97] *See* pp. 35-38, *infra.*

[98] Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

[99] Glover, 74 Stan. L. Rev. at 1345, 1349, 1380.

[100] *Id.* at 1350; *see also id.* at 1352 ("Simply put, mass arbitration shows that when it comes to *in terrorem* effects (the bogeyman of the class-action counterrevolution), the leverage of a large number of individual arbitrations can sometimes exceed the leverage created by aggregate proceedings.").

101 Pallas Enterprise, *Mass Arbitration: The Ultimate Pawn Promotion Strategy Of Legal Chess* (May 24, 2021), https://bit.ly/3WquUT8.

102 Pallas Enterprise, *Portfolio Litigation & Mass Arbitration: Overlooked Business Models For Consumer Protection Attorneys?* (May 23, 2021), https://bit.ly/3vhx2Ru (emphasis omitted).

103 *See, e.g.*. Defs.' Opp. to Mot. for Temporary Restraining Or. 9, 11, *Abernathy v. DoorDash, Inc.,* 3:19-cv-7545-WHA (N.D. Cal. Nov. 22, 2019), ECF No. 35; Witley & Brown, *supra* (Samsung characterized the mass arbitration filed against it as "an attempt to abuse" its arbitration program and "weaponize" filing fees).

104 *See* AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3; AAA, *Employment/Workplace Fee Schedule* (Jan. 1, 2023), https://bit.ly/3IyvSbT.

105 The AAA has changed its fee schedule when 25 or more substantially similar claims are filed by the same or coordinated counsel, as explained in more detail, *infra* at pp. 26-27.

106 A "desk" arbitration is decided solely on the papers.

107 The AAA charges the business a $2,500 arbitrator fee at the outset if the claimant requests either a telephonic, videoconference, or in-person arbitration hearing. AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3.

108 The non-refundable case-management fee is charged as soon as 14 days after a case is accepted for arbitration, when the AAA deems the case ready to begin the arbitrator-selection process. *See* AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3; AAA, *Employment/Workplace Fee Schedule* (Jan. 1, 2023), https://bit.ly/3IyvSbT.

109 The "non-refundable case management fee of $750 will be assessed to the company 90 calendar days after the date of receipt of a demand for arbitration." AAA, *Employment/Workplace Fee Schedule* (Jan. 1, 2023), https://bit.ly/3IyvSbT.

110 *See* JAMS, *Arbitration Schedule of Fees and Costs,* https://bit.ly/3DJzu8a.

111 *See* AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3; *see also 9,933 Individuals,* 2021 WL 3204816, at *2 (Cal. Ct. App. July 29, 2021) (describing AAA fee schedule).

112 *See* Neal Koch, *How Mediation Firm JAMS Became the Dominant Player in the LA Market,* L.A. Business Journal (July 5, 2020), https://bit.ly/3UaA8kG.

113 *See* JAMS, *Arbitration Schedule of Fees and Costs,* https://bit.ly/3DJzu8a.

114 *See* AAA, *Consumer Arbitration Rules* 36 (Nov. 1, 2020), https://bit.ly/3FyPYl3; AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3; AAA, *Employment/Workplace Fee Schedule* (Jan. 1, 2023), https://bit.ly/3IyvSbT.

115 *See id.*

116 Under the AAA's prior consumer fee schedule, the consumer's only cost was a $250 filing fee.

117 Under the AAA's prior consumer fee schedule, the business paid a $375 filing fee, a $1,400 case-management fee, and a $2,500 arbitrator fee, for a total upfront charge of $4,275 per case.

118 Under the new AAA fee schedule, the business' filing fees are reduced from $18,750,000 to $5,375,000. But case-management and arbitrator fees remain the same $3,900 per case, or another $195,000,000.

119 As discussed below, these arbitration organizations should consider reforming their fee structures to avoid imposing a (figurative) death by thousands of fees on businesses. *See* pp. 56-57, *infra*.

120 *See* AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3; AAA, *Employment/Workplace Fee Schedule* (Jan. 1, 2023), https://bit.ly/3IyvSbT.

121 *See* p. 20, *supra.*

122 *See* p. 20, *supra.*

123 Indeed, public filings indicate that in the mass arbitration against Intuit, the parties arbitrated a significant number of claims—and Intuit won 80 percent of the time. *See* Decl. of David Gringer in Supp. of Intuit Inc.'s Opposition to Complaint Counsel's Motion for Summary Decision ¶ 15, *In re Intuit Inc.,* No. 9408 (FTC Aug. 30, 2022) ("Intuit prevailed in over eighty percent of the cases [in arbitration] that were decided on the merits, and in many of the decisions, the arbitrator expressly rejected Complaint Counsel's theory of deception.").

124 AAA, *Consumer Arbitration Rules: Costs of Arbitration* (Jan. 1, 2023), https://bit.ly/3CVqts3.

125 *Fishon*, 336 F.R.D. at 68 (S.D.N.Y. 2020) (after more than 2,700 Peloton consumers filed individual arbitration demands with the AAA, Peloton failed to pay the required fees and the AAA refused to accept any more demands against Peloton).

126 *See Abadilla* Pet. ¶ 1; *Abernathy*, 438 F. Supp. 3d at 1066 (compelling DoorDash to "immediately commence AAA arbitrations," but "impos[ing] on claimants' counsel "a requirement to fully reimburse DoorDash for all arbitration fees and attorney's fees and expenses incurred by DoorDash in defending the arbitration" "[i]f it turns out that [claimants' counsel] has overstated its authority, or for any procedural reason,

[the claimants] have not perfected their right to arbitrate"); *Adams,* 414 F. Supp. 3d at 1250, 1256 (compelling arbitration and delegating issue of payment of AAA fees for arbitrator to decide).

127 *See, e.g., Dekker v. Vivint Solar, Inc.,* 479 F. Supp. 3d 834 (N.D. Cal. 2020), rev'd, 2021 WL 4958856 (9th Cir. Oct. 26, 2021).

128 *See* Cal. Code Civ. Proc. § 1281.97.

129 *See id.; see also Abernathy,* 438 F. Supp. 3d at 1066.

130 Cal. Code Civ. Proc. §§ 1281.98(d), 1281.99(b). It is the Chamber's position that the FAA preempts California's attempts to punish companies that draft arbitration agreements and fail, for whatever reason, to pay arbitration fees. This is because the provisions target one party to the arbitration agreement in an attempt to discourage the use of arbitration agreements altogether and impose special penalties on arbitration agreements as compared to other contractual agreements. *See Concepcion,* 563 U.S. at 341 (state law rules may not be "applied in a fashion that disfavors arbitration"); *see also* Amicus Curiae Br. of the Chamber of Commerce of the United States in Supp. of Pls.-Appellants 15-30, *Intuit Inc. v. 9,933 Individuals,* No. B308417 (Cal. Ct. App. Mar. 19, 2021).

131 Friendly, *supra,* at 120.

132 *Allied-Bruce,* 513 U.S. at 281; *see also* pp. 8-12, *supra.*

133 *See also* p. 12, *supra.*

134 *See* pp. 19-21, *supra*. *See also* Preece, *supra* (describing mass arbitration firm that "now represents over a quarter million people, and counting").

135 *See, e.g.*, ABA Model R. of Professional Conduct 5.5.

136 Victor D. Lopez, *Unauthorized Practice of Law in the U.S.: A Survey and Brief Analysis of the Law,* 26 Ne. J. Legal Stud. 60, 60 (2011).

137 *See* Restatement (Third) of the Law Governing Lawyers § 5 cmt. h (2000) ("In general and in most states, jurisdiction to impose discipline depends on whether the lawyer in question is admitted in the state[.]").

138 *See, e.g.*, *Disciplinary Counsel v. Alexicole, Inc.,* 822 N.E.2d 348, 350 (Ohio 2004) (only an attorney barred in Ohio could represent an individual in Ohio arbitration); *The Florida Bar v. Rapoport,* 845 So.2d 874, 877 (Fla. 2003).

139 *See* Cal. Civ. Proc. Code § 1282.4(b); Fla. Bar R. 1-3.11; Ky. Sup. Ct. R. 3.030(2); Md. R. Governing Admission to Bar 14(a); Mich. Ct. R. 8.126(A)(1)(c); N.J. R. Prof. Conduct 5.5(b)(3)(ii); N.J. Comm. on Unauthorized Practice of Law, Op. 43, *Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey,* Jan. 2007, https://www.judiciary.state.nj.us/notices/ethics/UPLC_Opinion43supplementingop28.pdf; N.D. Admission to Practice R. 3(B)(1)-(2); Or. R. Prof. Conduct 5.5(e); S.C. Sup. Ct. R. 404(l); Va. R. Prof. Conduct 5.5(d)(4)(iii).

140 *See* Ky. Sup. Ct. R. 3.030(2) (requiring local counsel); Md. R. Governing Admission to Bar 14(a) (same); Mich. Ct. R. 8.126(A)(1)(C) (limiting an out-of-state lawyer to no more than five arbitrations per year); S.C. Sup. Ct. R. 404(k) (three arbitrations per year).

141 *See* Fla. Bar R. 1-3.11.

142 States adopting the rule in material respect are: Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* Alaska R. Prof. Conduct 5.5(c)(3); Ariz. Sup. Ct. R. 42, ER 5.5(c)(3); Ark. R. Prof. Conduct 5.5(c)(3); Conn. R. Prof. Conduct 5.5(c)(3); Del. R. Prof. Conduct 5.5(c)(3); Ga. Bar R. 4-102, R. Prof. Conduct 5.5(c)(3); Idaho R. Prof. Conduct 5.5(b)(1); Ill. R. Prof. Conduct 5.5(c)(3); Ind. R. Prof. Conduct 5.5(c)(3); Iowa R. Prof. Conduct 32:5.5(c)(3); Kan. Sup. Ct. R. 240, R. Prof. Conduct 5.5(c)(3); La. R. Prof. Conduct 5.5(c)(3); Me. R. Prof. Conduct 5.5(c)(3); Mass. Sup. Jud. Ct. R. 3:07, R. Prof. Conduct 5.5(c)(3); Minn. R. Prof. Conduct 5.5(c)(3); Mo. Sup. Ct. R. 4-5.5(c)(3); Neb. Ct. R. Prof. Conduct § 3-505.5(c)(3); Nev. R. Prof. Conduct 5.5(b)(1); N.H. R. Prof. Conduct 5.5(c)(3); N.M. R. Prof. Conduct 16-505(F)(1); N.C. R. Prof. Conduct 5.5(c)(3); Ohio R. Prof. Conduct 5.5(c)(3); Okla. Stat. tit. 5, ch. 1 app. 3-A, R. Prof. Conduct 5.5(c)(3); Penn. R. Prof. Conduct 5.5(c)(3); R.I. Sup. Ct. R. Prof. Conduct 5.5(c)(3); Tenn. Sup. Ct. R. 8, R. Prof. Conduct 5.5(c)(3); Utah R. Prof. Conduct 5.5(c)(3); Vt. R. Prof. Conduct 5.5(c)(3); Wash. R. Prof. Conduct 5.5(c)(3); W. Va. R. Prof. Conduct 5.5(c)(3); Wis. Sup. Ct. R. 20:5.5(c)(3); Wyo. R. Prof. Conduct 5.5(c)(3). Fifteen other states either permit out-of-state lawyers to represent parties in arbitration or do so in limited circumstances if the lawyer complies with various procedural requirements, such as obtaining admission *pro hac vice. See* Ala. R. Prof. Conduct 5.5(b)(2); Cal. Code Civ. Proc. § 1282.4(b); Colo. R. Civ. P. 205.1; D.C. Ct. App. R. 49(c)(12); Fla. Bar. R. 1-3.11; Ky. SCR 3.030(2); Md. R. Governing Admission to Bar 14(a); Mich. Ct. R. 8.126(A)(1)(c); N.J. R. Prof. Conduct 5.5(b)(3)(ii) & (c); *Prudential Equity Grp., LLC v. Ajamie,* 538 F. Supp. 2d 605, 608 (S.D.N.Y. 2008); N.D. Admission to Practice R. 3(B)(1)-(2); Or. R. Prof. Conduct 5.5(c)(3) & (e); S.C. Sup. Ct. R. 404(1); S.D. R. Prof. Conduct 5.5(d)(1); Va. R. Prof. Conduct 5.5(d)(4).

143 *See, e.g.*, ABA Model R. of Prof. Conduct 5.5(c).

144 *See, e.g.*, *id.* cmt. 14.

145 *See* ABA, *Variations of the ABA Model Rules of Professional Conduct: Rule 7.3 Solicitation of Clients,* CPR Policy Implementation Committee (Jul. 20, 2022), https://bit.ly/3HbJQ2Y;

Debra T. Landis, *Modern Status of Law Regarding Solicitation of Business by or for Attorney,* 5 A.L.R. 4th 866 (2021).

146 ABA Model R. of Prof. Conduct 7.3, cmt. 3; *see also id.* ("A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response.").

147 *Ohralik v. Ohio St. Bar Ass'n,* 436 U.S. 447, 457-58, 461 (1978) (internal quotation marks omitted); *see also id.* at 461 ("potential harm[s] to the solicited client" include "overreaching, overcharging, underrepresentation, and misrepresentation").

148 *See* Tex. Disciplinary R. of Prof. Conduct 7.03(b); *id.* 7.03(a)(1) ("'Regulated telephone, social media, or other electronic contact' means telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner."). Texas criminal code also applies to limits on solicitation. *See* Tex. Penal Code § 38.12(a) ("A person commits an offense if, with intent to obtain an economic benefit the person … solicits [professional] employment, either in person or by telephone, for himself or for another."); *see also* Tex. Gov't Code § 82.0651 (requiring an attorney committing barratry to forfeit attorneys' fees, pay a $10,000 fine, and pay the attorneys' fees of the opposing party).

149 *See* Cal. Ethics R. 7.3(a).

150 *See, e.g.*, Alaska R. of Prof. Conduct 7.3(a); Ariz. R. of Prof. Conduct 7.3(a); Haw. R. of Prof. Conduct 7.3(a); Nev. R. of Prof. Conduct 7.3(a) ("The term 'solicit' includes contact in person, by telephone, telegraph or facsimile, by letter or other writing, or by other communication directed to a specific recipient.").

151 *See* Fla. Bar Advertising Op. A-00-1 (Jan. 29, 2016) ("A lawyer may solicit prospective clients through Internet chat rooms, defined as real time communications between computer users, only if the lawyer complies with the rules on direct written communications and files any unsolicited communications with The Florida Bar for review.").

152 *See, e.g.*, ABA Model R. of Prof. Conduct 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.").

153 *See, e.g.*, *Cahill v. Nike, Inc.,* 2020 WL 1330434, at *4 (D. Or. Mar. 23, 2020) (granting protective order); *Rinky Dink, Inc. v. World Bus. Lenders, LLC,* 2014 WL 5421247, at *4 (W.D. Wash. Oct. 23, 2014) (same).

154 *See, e.g.*, *Gonzales v. Charter Commc'ns, LLC,* 2022 WL 570003, at *2-6 (C.D. Cal. Jan. 26, 2022) (sanctioning plaintiffs' counsel); *O'Connor v. Uber Techs., Inc.,* 2017 WL 3782101, at *5 (N.D. Cal. Aug. 31, 2017) (finding that counsel violated protective order by "attempt[ing] to solicit Class Members as clients in separate arbitration proceedings that would be initiated outside of *this* litigation"); *see also, e.g., Gonzalez v. Diamond Resorts Int'l Mktg., Inc.,* 2020 WL 4925702, at *6 (D. Nev. Aug. 21, 2020) (refusing to add class representatives found by violating protective order).

155 Resps.' Opp. to Pet'rs' Mot. to Compel Arbitration 9-10, *Wallrich v. Samsung Elecs. Am. Inc.,* No. 1:22-cv-5506 (N.D. Ill. Dec. 5, 2022), ECF No. 27.

156 *See, e.g.*, Ala. R. of Prof. Conduct 7.2(e) ("No communication concerning a lawyer's services shall be published or broadcast, unless it contains the following language, which shall be clearly legible or audible, as the case may be: 'No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.'"); Ark. R. of Prof. Conduct 7.2(d) ("Any communication made pursuant to this Rule shall include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law."); Conn. R. of Prof. Conduct 7.2(e) ("Any communication made under this Rule must include the name and contact information of at least one lawyer admitted in Connecticut responsible for its content."); Ga. R. of Prof. Conduct 7.2(c) ("Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written[.]"); Nev. R. of Prof. Conduct 7.2(b)(7) ("If the advertisement contains any reference to past successes or results obtained …, [t]he advertisement shall also contain a disclaimer that past results do not guarantee, warrant, or predict future cases."); *id.* 7.2(b)(4) ("Every advertisement and written communication indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall contain a disclaimer that the client may be liable for the opposing parties' fees and costs.").

157 *See, e.g.*, N.Y. R. of Prof. Conduct 7.1(h) ("All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being

offered."); Tenn. R. of Prof. Conduct 7.1(b) (similar); *see also, e.g.,* Ill. Sup. Ct. R. 7.2 (requiring name and address); Utah R. of Prof. Conduct 7.1(c) (same).

[158] *See* Tex. Disciplinary R. of Prof. Conduct 7.04; *see also* Ala. R. of Prof. Conduct 7.2(b) ("A true copy or recording of any such advertisement shall be delivered or mailed to the office of the general counsel of the Alabama State Bar at its then current headquarters within three (3) days after the date on which any such advertisement is first disseminated[.]"); Conn. Super. Ct. Gen. Provisions Sec. 2-28A ("Any attorney who advertises services to the public through any media, electronic or otherwise … shall file a copy of each such advertisement … with the Statewide Grievance Committee either prior to or concurrently with the attorney's first dissemination of the advertisement[.]"); Nev. R. of Prof. Conduct 7.2A(a) ("A lawyer or law firm shall file with the state bar (1) a copy or recording of all advertisements disseminated in exchange for something of value: and (2) written or recorded communications the lawyer causes to be disseminated for the purpose of advertising legal services.").

[159] *See, e.g.*, Ala. R. of Prof. Conduct 7.2(b) ("a copy or recording of any such advertisement shall be kept by the lawyer responsible for its content … for six (6) years after its last dissemination"); Ark. R. of Prof. Conduct 7.2(b) (similar); Conn. R. of Prof. Conduct 7.2(b)(1) (similar); Ga. R. of Prof. Conduct 7.2(b) (similar).

[160] *See* Robert N. Holtzman et al., *Social Media Ethics Guidelines of the Commercial & Federal Litigation Section of the N.Y. State Bar Ass'n,* at 6 (June 20, 2019), https://bit.ly/3up1RTJ ("Attorneys should also be aware that if they advertise and provide their services in multiple states, they need to comply with the attorney advertising and solicitation rules in each of those states.").

[161] *See also* Preece, *supra* (mass arbitration firm explaining that "[w]e also have now built a base of clients over the past couple years that we communicate with about new cases.").

[162] *See, e.g.*, ABA Model R. of Prof. Conduct 3.1.

[163] *See, e.g.*, Cal. Penal Code § 158 ("Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months and by fine not exceeding one thousand dollars ($1,000).").

[164] ABA Model R. of Prof. Conduct 3.1, cmt. 2.

[165] *See, e.g.*, *Weatherbee v. Va. State Bar ex rel. Fourth Dist.-Section I Committee,* 689 S.E.2d 753, 756 (Va. 2010) (lawyer violated Rule 3.1 when he filed a lawsuit after conducting no pre-suit investigation); 7 Harry M. Reasoner et al., *Business & Commercial Litigation in Federal Courts* § 85.14 (5th ed. Supp. 2022) ("Like Fed. R. Civ. P. 11, Model Rule 3.1 and analogous state rules generally impose a duty of investigation on the lawyer."); Ellen J. Bennett, *Annotated Model Rules of Professional Conduct* § 3.1 (9th ed. 2019) (compiling cases on a lawyer's duty to investigate).

[166] *See* Steven C. Bennett, *Who Is Responsible for Ethical Behavior by Counsel in Arbitration,* 63 Disp. Res. J. 38, 40 (2008) ("Attorneys are subject to relevant state codes of lawyer conduct, generally modeled on the American Bar Association's Model Code of Professional Conduct (ABA Model Code). The prevailing view is that these codes apply to lawyers who serve as advocates in litigation."); *see also, e.g., Tiller v. Semonis,* 635 N.E.2d 572, 574 (Ill App. Ct. 1994) (applying rules of professional responsibility to counsel in arbitration).

[167] *Fobare v. Weiss, Neuren & Neuren,* 2000 WL 654969, at *1 (N.D.N.Y. May 16, 2000); *see also, e.g., Nieves v. City of Cleveland,* 153 F. App'x 349, 353 (6th Cir. 2005) (affirming Rule 11 sanctions imposed on lawyer who "did not do any reasonable investigation to establish the truth of [his client's] claims, but only blindly relied on his client's accusations"); *S. Leasing Partners, Ltd. v. McMullan,* 801 F.2d 783, 788 (5th Cir. 1986) ("Blind reliance on the client is seldom a sufficient inquiry" under Rule 11), *overruled in part on other grounds by Thomas v. Capital Sec. Servs., Inc.,* 836 F.2d 866 (5th Cir. 1988) (en banc); *Bernal v. All Am. Inv. Realty, Inc.,* 479 F. Supp. 2d 1291, 1327 (S.D. Fla. 2007) (sanctioning a lawyer who "simply, and solely, relied on the word of his client," without conducting a "reasonable investigation"); *Willis v. City of Oakland,* 231 F.R.D. 597, 599 (N.D. Cal. 2005) (sanctioning plaintiffs' lawyers under Rule 11 and 28 U.S.C. § 1927 in part because of "inadequate investigation," which consisted almost entirely of a "single interview with plaintiffs").

[168] *Coates v. First Guar. Bank,* 2007 WL 9706402, at *4 (M.D. La. Oct. 19, 2007).

[169] *In re CenturyLink Sales Pracs. & Sec. Litig.,* 2020 WL 3513547, at *2 (D. Minn. June 29, 2020) (Keller Postman engaged in online advertising and "decided whether to represent potential clients based on their responses to questionnaires").

[170] Decl. of Tom Kayes in Support of Reply to Mot. to Compel Arbitration ¶¶ 36-41, *Abadilla v. Uber Techs., Inc.,* No. 3:18-cv-07343-EMC (N.D. Cal. Jan. 24, 2019), ECF No. 66-1.

[171] *Id.*

[172] *Id.*

[173] *Id.* ¶ 38 ("Since mid-July 2018, those agents have received calls from more than 29,000 individuals, conducted roughly 63,500 separate phone calls, and spent more than 476,000 minutes on the phone with our clients and potential clients.").

[174] *See* pp. 19-20, *supra* (in 2019 alone, Keller Postman filed or threatened to file 6,000 demands against DoorDash, 5,274 demands against Postmates, 125,000 demands against Intuit,

22,000 demands against CenturyLink, and 1000 demands against FanDuel and DraftKings).

[175] *In re CenturyLink Sales Pracs. & Sec. Litig.,* 2020 WL 3513547, at *3 (D. Minn. June 29, 2020).

[176] Proposed Intervenors and Movants' Br. Opposing CenturyLink's Mot. to Disqualify Counsel and Require Corrective Notice at 9, *In re CenturyLink Sales Pracs. & Secs. Litig.,* No. 17-md-02795 (D. Minn. May 15, 2020).

[177] Decl. of Rodger Cole ¶ 21, *In re Intuit Free File Litig.,* No. 3:19-cv-2546-CRB (N.D. Cal. Dec. 7, 2020), ECF No. 192.

[178] Resps.' Opp. to Pet'rs.' Mot. to Compel Arbitration 14, *Wallrich v. Samsung Elecs. Am. Inc.,* No. 1:22-cv-5506 (N.D. Ill. Dec. 5, 2022), ECF No. 27.

[179] *Id.*

[180] *Id.* at 17 (quoting Ex. 3) (emphasis omitted).

[181] *See* emails from anonymous defense counsel on file with author (reporting frivolous claim rates of 95.3 percent, over 95 percent, 42.3 percent, "nearly 80%," 25.4 percent, 36 percent, and "25-40%"). The mass arbitrations discussed here are not ones in which any authors of the report have represented the defendant.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Abernathy,* 438 F. Supp. 3d at 1065. DoorDash itself asserted that it had no record that 936 of the claimants had ever worked for DoorDash. *See* Decl. of Richard Zitrin ¶ 18, *Abernathy v. DoorDash, Inc.,* No. 19-7545 (N.D. Cal. Nov. 22, 2019), ECF No. 35-1.

[186] *See, e.g.*, ABA Model R. of Prof. Conduct 1.4; Cal. Ethics R. 1.4.1 ("A lawyer shall promptly communicate to the lawyer's client … all amounts, terms, and conditions of any written offer of settlement made to the client[.]").

[187] ABA Model R. of Prof. Conduct 1.8(g).

[188] For instance, Labaton Sucharow's retainer agreement for some mass arbitration clients provides: "[y]ou give us the right to reject any settlement offer that is not equal to your actual loss, or the maximum allowable damages, whichever is greater, unless we believe that we have achieved the likely best settlement possible under the circumstances." Labaton Sucharow Attorney-Client Retainer Agreement for Misleading Advertising Claims § 3 (on file with authors).

[189] Op. 2022-2: Qualification of Advance Settlement Authority, N.Y. City Bar Comm. Rep. (Aug. 31, 2022), https://bit.ly/3UAoWOb.

[190] *See, e.g.*, Cal. R. Prof. Conduct 1.4.1(a)(2) ("A lawyer shall promptly communicate to the lawyer's client … all amounts, terms, and conditions of any written offer of settlement made to the client …."); Fla. R. Prof. Conduct 4-1.4(a) ("A lawyer shall … promptly inform the client of any decision or circumstance with respect to which the client's informed consent … is required[.]"); *In re Grievance Proceeding,* 171 F. Supp. 2d 81, 85 (D. Conn. 2001) ("Implicit in Rule 1.2(a)'s requirement that a lawyer 'shall abide by a client's decision whether to accept an offer of settlement' is both a requirement to communicate all settlement offers to the client and a requirement that the client be permitted to decide whether to accept or not to accept any such offer.").

[191] Decl. of Richard Zitrin ¶ 17, *Abernathy v. DoorDash, Inc.,* No. 3:19-cv-7545-WHA (N.D. Cal. Nov. 22, 2019), ECF No. 35-1.

[192] Zitrin Decl. ¶ 12; *see also* ABA Model R. of Prof. Conduct 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, … unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.").

[193] Zitrin Decl. ¶ 13.

[194] *Id.* ¶ 15.

[195] *Id.* ¶ 16.

[196] Labaton Retainer Agreement, supra, § 3.

[197] *Id.*; *see also id.* § 5 ("We may withdraw from our representation of you [when] … [y]ou don't follow our advice, tactics, or strategy.").

[198] *Nehad v. Mukasey,* 535 F.3d 962, 971 (9th Cir. 2008) ("a lawyer may not burden a client's decisionmaking by threatening to withdraw if the client refuses to settle"); *see also Compton v. Kittleson,* 171 P.3d 172, 176-77 (Ala. 2007) ("Alaska's Rules of Professional Conduct follow the mainstream in recognizing that clients, and not attorneys, possess the right to decide whether to settle or drop a case. Because this right is personal to the client, an attorney cannot demand relinquishment of the right as a condition of representation."); *id.* at 178 (regarding a retainer agreement that indirectly burdened the client's ability to choose to settle, "[a]lthough a lawyer can and should forcefully argue against rejection of an offer that ought to be accepted, she cannot use this form of economic coercion to force the issue"); *Jones v. Feiger, Collison & Killmer,* 903 P.2d 27, 34 (Colo. App. 1994) (representation agreement that permitted the law firm to withdraw if the client refused a "reasonabl[e]" settlement offer and entitled the firm to "recover costs and fees equal to the law firm's 'normal' hourly rates for the work it had performed" was void as against public policy); *Ambrose v. Detroit Edison Co.,* 237 N.W.2d 520, 523-24 (1975) ("The refusal to settle by a client can never be sufficient grounds to constitute 'good cause' for an attorney to withdraw …."); Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal

Op. 95–24 (1995) (retainer agreement that stated lawyer could withdraw if client refused settlement offer that the lawyer deemed reasonable impermissibly infringed on client's right to decide whether to settle).

[199] Br. for Pls.-Apps. at 13, *Uber Techs., Inc. v. Am. Arbitration Ass'n,* No. 21-03782 (N.Y. App. Div., 1st Dept. Jan. 6, 2022).

[200] Am. Arbitration Ass'n, *Supplementary Rules for Multiple Case Filings* 8 (Aug. 1, 2021), https://bit.ly/3DioZax.

[201] *Id.* 3.

[202] *See generally* Abram I. Moore et al., *Litigation Minute: No Relief from Judges in Mass Arbitration Challenges,* Nat'l L. Rev. (Sept. 20, 2022), https://bit.ly/3FCh22u.

[203] Second Am. Compl. for Declaratory & Injunctive Relief ¶ 4, *Postmates Inc. v. 10,356 Individuals,* No. 20-cv-02783 (C.D. Cal. July 1, 2020), 2020 WL 8167433, ECF No. 61.

[204] *Id.* ¶¶ 44, 59.

[205] *See Postmates,* 2020 WL 1908302, at *6; *Adams,* 414 F. Supp. 3d at 1252-54.

[206] *See, e.g., McClenon,* 473 F. Supp. 3d at 811-12; *Croasmun v. Adtalem Global Educ., Inc.,* 2020 WL 7027726, at *4 (N.D. Ill. Nov. 30, 2020); *Adams,* 414 F. Supp. 3d at 1254.

[207] *9,933 Individuals,* 2021 WL 3204816, at *1-2 (Cal. Ct. App. July 29, 2021).

[208] *Id.* at *2.

[209] *Id.* at *6. While this action was pending in California Superior Court, the claimants filed a parallel action in federal court to compel Intuit to arbitrate and to stay the state-court action, but the federal court dismissed out of deference to the state court. *Id.* at *3.

[210] *Uber Techs., Inc. v. Am. Arbitration Ass'n, Inc.,* 204 A.D.3d 506, 507 (N.Y. Sup Ct. App. Div. 2022).

[211] *Id.* at 508.

[212] *Id.* at 508-09 ("AAA's enforcement of its fee schedule does not offend public policy, and is not immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.").

[213] *Abernathy,* 438 F. Supp. 3d at 1068.

[214] Transcript of Proceedings at 27, *Abernathy v. DoorDash, Inc.,* No. 19-cv-07545 (N.D. Cal. Nov. 27, 2019), ECF No. 67.

[215] Justin Elliott, *TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud,* ProPublica (Feb. 23, 2022), https://bit.ly/3TLz0Uh; *see also Intuit,* 2021 WL 3204816, at *7 ("An unwise outcome is not an absurd result, as courts are not in the business of rewriting contracts to relieve parties like Intuit from bad deals they drafted for themselves.").

[216] Glover, 74 Stan. L. Rev. at 1303.

[217] *See* pp. 8-16, *supra.*

[218] *See* p. 48, *supra*.

[219] NYU Center on Civil Justice, *What the Data Show: Mapping Trends in Multidistrict Litigation* (Sept. 2015), https://bit.ly/3zoDwAp.

[220] 28 U.S.C. §1407(a).

[221] *See* Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration,* 50 A.B.A. J. 621, 623 (1964).

[222] *Id.*; *see also* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation,* 59 Wm. & M. L. Rev. 1165, 1200 (2018).

[223] Bradt, 59 Wm. & M. L. Rev. at 1200.

[224] *Id.* at 1201; *see also* Pub. L. No. 90-296, 82 Stat. 109, 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2000)).

[225] Manual for Complex Litigation (Fourth) § 20.13 (2004).

[226] 28 U.S.C. §1407(c).

[227] *See* The Hon. Eldon E. Fallon, Jeremy T. Grabill, & Robert Pitard Wayne, *Bellwether Trials in Multidistrict Litigation,* 82 Tul. L. Rev. 2323, 2328 (2008) (Fallon) (explaining that "pretrial proceedings" include "issuing pretrial orders, resolving pretrial motions (including discovery motions, motions to amend, motions to dismiss, motions for summary judgment, and motions for class certification), and attempting to facilitate settlement").

[228] *See id.* at 2340-41 ("Transferee courts can contribute to the fulfillment of this important role [facilitating global settlement] through the initiation and management of the bellwether trial process."); *see also* 4 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 11:12 (6th ed. Supp. 2022) (describing use of bellwether trials to aid in the settlement process); Melissa J. Whitney, *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges* 4-5, Fed. J. Ctr. Pocket Guide Series (2019). For a description of how transferee judges receive authority to oversee a bellwether trial of a case that did not originate in their district, *see* Thomas Sekula, *Selective Settlement and the Integrity of the Bellwether Process,* 97 Tex. L. Rev. 859, 861-63 (2019).

[229] Fallon, 82 Tul. L. Rev. at 2338, 2342-46 ("Bellwether trials thus assist in the maturation of any given dispute by providing an opportunity for coordinating counsel to … evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation.").

[230] *Id.* at 2341-42.

[231] *Id.* at 2325; *id.* at 2342 ("[B]ellwether trials also allow MDL litigants and their lawyers to gain an understanding of the litigation that is exponentially more grounded in reality than that which has traditionally persisted in the absence of jury trials."); Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on Approaches to MDL Settlement,* 89 UMKC L. Rev. 971, 976 (2021) ("It may take more than one, but choosing MDL bellwethers and trying them to verdict provides information the parties need to value their litigation." (quoting Special Master David Cohen)); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible,* 82 Tul. L. Rev. 2205, 2208-09 (2008).

[232] The use of bellwether trials in MDLs can be improper in other ways as well, as the Chamber has previously discussed in detail. *See, e.g.,* U.S. Chamber of Commerce Institute for Legal Reform, *Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings* (Oct. 2019) ("Trials and Tribulations"), https://instituteforlegalreform.com/research/trials-and-tribulations-contending-with-bellwether-and-multi-plaintiff-trials-in-mdl-proceedings.

[233] *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997); *Campbell v. Boston Sci. Corp.,* 882 F.3d 70, 76 (4th Cir. 2018) (recognizing the potential "utility of bellwether trials to promote settlement"); *Briggs v. Merck Sharp & Dohme,* 796 F.3d 1038, 1051 (9th Cir. 2015) ("[a] bellwether trial is a test case that is typically used to facilitate settlement in similar cases"); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.,* MDL No. 1358, 2007 WL 1791258, at *2-3 (S.D.N.Y. June 15, 2007) ("A bellwether trial also allows a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action .... And every experienced litigator understands that there are often a handful of crucial issues on which the litigation primarily turns. A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact. Moreover, resolution of these issues often facilitates settlement of the remaining claims."); *In re Ampicillin Antitrust Litig.,* 88 F.R.D. 174, 178 (D.D.C. 1980) ("Indeed, where there is a relatively large number of actions and plaintiffs proceeding on the same theory or claim ... the bellwether concept seems particularly useful and appropriate."); Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process,* 25 Rev. Litig. 691, 697 (2006) ("[E]ven without preclusive effect, [bellwether trials] offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated.").

[234] Fallon, 82 Tul. L. Rev. at 2325.

[235] To be sure, while MDLs are routinely used for addressing thousands of similar cases filed against the same defendant, they have been subject to abuse as well. The Chamber previously has addressed some concerns with MDLs. *See generally Trials and Tribulations, supra.*

[236] U.S. Judicial Panel on Multidistrict Litigation, *Multidistrict Litigation Terminated Through September 30, 2021,* at 3, https://bit.ly/3feso28.

[237] *Id.*

[238] NYU Center on Civil Justice, *What the Data Show: Mapping Trends in Multidistrict Litigation* (Sept. 2015), https://bit.ly/3zoDwAp; Sherman, 82 Tul. L. Rev. at 2206 n.4 ("Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court.").

[239] Bough, 89 UMKC L. Rev. at 977 (quoting Special Master David Cohen).

[240] *See* p. 50, *supra*.

[241] *See, e.g.*, Matthew C. Helland, *Costs of Defense in Mass Individual Wage-and-Hour Arbitrations: A Case Study,* PLI Current Vol. 3, No. 1 at 215-16 (Winter 2019).

[242] *Id.*

[243] *See* Glover, 74 Stan. L. Rev. 1356 ("In some mass arbitrations, the parties attempt to settle after a number of demands are filed or arbitrated on an individual basis. To the extent that demands are arbitrated, they function like bellwether trials in mass-tort MDLs: [t]he individual results help create a global deal aimed at resolving the remaining claims.") (internal footnote omitted).

[244] *MacClelland v. Cellco P'ship,* 2022 WL 2390997, at *13 (N.D. Cal. July 1, 2022), appeal pending, No. 22-16020 (9th Cir.).

[245] *Id.* at *13.

[246] *Id.* at *13; *see also* Br. of Appellants at 43-45, *MacClelland v. Cellco P'ship,* No. 22-16020 (9th Cir. Nov. 21, 2022) (explaining why the original arbitration clause "is best understood as tolling the limitations period where the claimant provides timely notice of any claims and a coordinated proceeding is commenced" under the bellwether clause); Verizon's Mem. in Supp. for Request for Leave to File Notification of Change to Customer Agreement at 1, *MacClelland v. Cellco P'ship,* No. 3:21-cv-08592-EMC (N.D. Cal. June 8, 2022) (ECF No. 44) ("Verizon will consider all applicable statutes of limitations tolled for the duration of [any set of customers'] coordinated arbitration proceeding.").

[247] *MacClelland,* 2022 WL 2390997, at *11.

[248] *Id.*

[249] *Id.* at *12 ("Delaying the ability of one to vindicate a legal claim by years, possibly *156 years*, 'conflict[s] with one of the basic

principles of our legal system—justice delayed is justice denied.'" (quoting *Dietrich v. Boeing Co.*, 14 F.4th 1089, 1095 (9th Cir. 2021)).

250 *See* Helland, PLI Current Vol. 3, No. 1 at 215-16 (describing a handful of repeat arbitrators handling a relatively small mass arbitration).

251 *See* Am. Arbitration Ass'n, *Supplementary Rules for Multiple Case Filings* 7-8 (Aug. 1, 2021) (cases will be assigned to a small "roster of arbitrators" with "multiple cases" being "assign[ed] … to a single Merits Arbitrator, who will decide each case on its own merits").

252 NYU Center on Civil Justice, *What the Data Show: Mapping Trends in Multidistrict Litigation* (Sept. 2015), https://bit.ly/3zoDwAp.

253 *See In re Papst Licensing Digital Camera Prods. Liab. Litig.*, No. 1:07-mc-493 (D.D.C.) (terminated Mar. 16, 2021 after 13.67 years); *In re Zofran (Ondansetron) Prods. Liab. Litig.,* No. 1:15-md-2657 (D. Mass.) (terminated June 24, 2021 after 5.9 years); *In re Facebook, Inc. IPO Secs. & Deriv. Litig.,* No. 1:12-md-2389 (S.D.N.Y.) (terminated Mar. 15, 2021 after 8.75 years); *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.,* No. 1:17-md-2767 (S.D.N.Y.) (terminated July 13, 2021 after 4.54 years); *In re Nine West LBO Secs. Litig.,* No. 1:20-md-2941 (S.D.N.Y.) (terminated Aug. 17, 2021 after 1.38 years); *In re Inclusive Access Course Materials Antitrust Litig.,* No. 1:20-mnd-2946 (S.D.N.Y.) (terminated Aug. 3, 2021 after 1.25 years); *In re Aetna, Inc. Out-of-Network "UCR" Rates Litig.,* No. 2:07-cv-3541 (D.N.J.) (terminated Nov. 17, 2020 after 11.92 years); *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.,* No. 2:07-md-1817-LP (E.D. Pa.) (terminated Nov. 23, 2020 after 14.08 years); *In re Allura Fiber Cement Siding Prods. Liab. Litig.,* No. 2:19-mn-2886 (D.S.C.) (terminated Sept. 14, 2021 after 2.63 years); *In re Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.,* No. 2:12-md-2326 (S.D. W. Va.) (terminated Feb. 23, 2021 after 9.25 years); *In re Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig.,* No. 2:12-md-2327 (S.D. W. Va.) (terminated Mar. 22, 2021 after 9.32 years); *In re Iron Oak Techs., LLC Patent Litig.,* No. 3:18-md-2835 (N.D. Tex.) (terminated Aug. 31, 2021 after 3.52 years); *In re BP p.l.c. Secs. Litig.,* No. 4:10-md-2185 (S.D. Tex.) (terminated June 2, 2021 after 11.02 years); *In re Target Corp. Customer Data Sec. Breach Litig.,* No. 0:14-md-2522 (D. Minn.) (terminated July 29, 2021 after 7.6 years); *In re NuvaRing Prods. Liab. Litig.,* No. 4:08-md-1964 (E.D. Mo.) (terminated Sept. 7, 2021 after 13.33 years); *In re Arch Ins. Co. Ski Pass Ins. Litig.,* No. 4L20-md-2955 (W.D. Mo.) (terminated Sept. 16, 2021 after 1.25 years); *In re Transpacific Passenger Air Transp. Antitrust Litig.,* No. 3:07-cv-5634 (N.D. Cal.) (terminated Oct. 23, 2020 after 12.93 years); *In re Apple Inc. Device Performance Litig.,* No. 5:18-md-2827 (N.D. Cal.) (terminated Apr. 30, 2021 after 3.34 years); *In re PersonalWeb Techs., LLC & Level 3 Commc'ns, LLC Patent Litig.,* No. 5:18-md-2834 (N.D. Cal.) (terminated Dec. 2, 2020 after 2.24 years); *In re Midland Credit Mgmt., Inc. (TCPA) Litig.,* No. 3:11-md-2286 (S.D. Cal.) (terminated May 14, 2021 after 9.8 years); *In re Auto Body Shop Antitrust Litig.,* No. 6:14-md-2557 (M.D. Fla.) (terminated Dec. 28, 2020 after 6.61 years); *In re 21st Century Oncology Customer Data Sec. Breach Litig.,* No. 8:16-md-2737 (M.D. Fla.) (terminated Aug. 12, 2021 after 5.08 years); *In re AndroGel Antitrust Litig.,* No. 1:09-md-2084 (N.D. Ga.) (terminated Apr. 22, 2021 after 11.85 years).

254 Glover, 74 Stan. L. Rev. at 1368-69.

255 Helland, PLI Current Vol. 3, No. 1 at 217-20 (describing how much more expensive it was for an employer defendant to arbitrate a handful of cases rather than settle with all 150 claimants).

256 *See* pp. 42-43, *supra.*

257 *See* pp. 30-40, *supra.*

258 *See, e.g.*, Harriet Ryan & Matt Hamilton, *Tom Girardi faced more than 150 complaints before State Bar took action, records show,* L.A. Times (Nov. 3, 2022), at https://www.latimes.com/california/story/2022-11-03/california-state-bar-40-years-complaints-tom-girardi.

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