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# Is This the End of Mandatory Arbitration?

BY DAVE ROCHELSON

ON JULY 19, 2021, AMAZON SENT AN email to its customers (including the author) to announce a change in its terms and conditions. The email read, "One of our updates involves how disputes are resolved between you and Amazon. Previously, our Conditions of Use set out an arbitration process for those disputes. Our updated Conditions of Use provides for dispute resolution by the courts."[1]

Just a few years ago, such a change would have been unthinkable. For decades, many large companies have required claimants to address any legal disputes in arbitration, and typically in individual arbitration, via provisions in their employment or consumer agreements. The Supreme Court blessed such provisions in decisions such as *AT&T Mobility LLC v. Concepcion*[2] and more than half a dozen cases applying *Concepcion* to causes of action under various federal statutes—including, for purposes of the antitrust laws, *American Express Co. v. Italian Colors Restaurant*.[3]

In a handful of recent cases, attorneys for employees and consumers have called the companies' bluff by filing individual arbitrations on behalf of thousands of claimants. Defendants have cried foul that these "mass arbitrations" are improper attempts to circumvent class action waivers that employment or consumer agreements often contain. Courts have generally avoided such disputes, deferring to arbitrators on these questions and occasionally castigating defendants for trying to deny plaintiffs a forum *either* in court or in arbitration.

Mass arbitration may not be an option for all plaintiffs subject to mandatory arbitration provisions. But where cases do proceed as mass arbitrations, the approach undoubtedly requires a reevaluation of the costs and benefits for both plaintiffs and defendants. Such considerations may determine whether mass arbitrations remain a niche tactic or spread more broadly through the world of complex litigation, particularly in the antitrust context.

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## The Supreme Court Permits Companies to Require Individual Arbitration

***The Court's Landmark Decision in* Concepcion *Blesses Pre-Dispute Arbitration Provisions.*** The Supreme Court's modern jurisprudence on arbitration culminated in the 2011 decision in *Concepcion*. In that case, plaintiffs sued on behalf of a putative class of purchasers of cell phone plans, alleging that the carrier falsely advertised that the plans included "free" mobile phones for which the company then charged consumers sales tax.[4] Plaintiffs signed agreements requiring them to resolve any such disputes through arbitration and waiving any right to pursue claims collectively.[5] The District Court denied AT&T's motion to compel arbitration, holding that the collective action waiver was unconscionable and unenforceable under the California Supreme Court's decision in *Discover Bank v. Superior Court*.[6] After the Ninth Circuit affirmed, the Supreme Court reversed, finding that the Federal Arbitration Act (FAA) preempted the *Discover Bank* rule.[7] The Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[8] That fundamental attribute of arbitration is its "bilateral" nature, the Court found, and therefore "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[9] The Court also found that aggregation placed undue pressure on defendants because, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."[10]

***The Court Extends* Concepcion *to the Antitrust Laws in* Italian Colors.** In the wake of *Concepcion*, the U.S. Supreme Court has held that various other laws or rules do not limit the enforceability of mandatory arbitration provisions or collective action waivers.

In *Italian Colors*, the Court found that even though most individual antitrust actions are negative value cases—i.e., they cost more to litigate than any individual plaintiff is likely to recover—that fact does not render a waiver of collective treatment unenforceable.[11] Plaintiffs sued on behalf of a putative class alleging that American Express used its monopoly power in the market for charge cards to exact anticompetitive fees.[12] Although their agreement with American Express required them to resolve any such dispute through individual arbitration, Plaintiffs argued that Supreme Court precedent rendered that provision unenforceable if it prohibited "effective vindication" of their statutory rights.[13] Because an individual plaintiff would have to spend far more pursuing its case than it hoped to recover, Plaintiffs asserted that they had "no economic incentive to pursue their antitrust claims individually in arbitration," and thus had no path for effective vindication of these claims.[14] The Court agreed that the effective vindication rule *would* bar "a provision in an arbitration agreement forbidding the assertion of certain statutory rights," or a provision requiring "filing and administrative fees attached to

arbitration that are so high as to make access to the forum impracticable."[15] But the Court held that the rule did not bar collective action waivers, even if they rendered vindication of the plaintiffs' rights uneconomical, because "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[16]

In a forceful dissent, Justice Kagan argued that the "necessity" of the effective vindication carve-out to the FAA "is nowhere more evident than in the antitrust context," because without it, "a company could use its monopoly power to protect its monopoly power."[17] Justice Kagan argued that the effective vindication rule "applies when an agreement thwarts federal law by making arbitration prohibitively expensive," not only when plaintiffs face "outlandish filing fees" but also when it prohibits sharing costs among plaintiffs or shifting costs to a defendant.[18] The dissenters expressed concern that under the majority opinion, "arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."[19]

As it did in its decision in *Italian Colors* regarding the antitrust laws, the Supreme Court in *Epic Systems Corp. v. Lewis* held that the National Labor Relations Act's provision for collective actions does not displace the FAA.[20] The Court noted other decisions in which it has rejected arguments that the FAA conflicts with federal statutes, including the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.[21]

***Arbitration Companies Typically Require Payment of Filing Fees Before Proceedings Can Begin***. One response to decisions like *Concepcion* and *Italian Colors* has been the filing of thousands of individual arbitrations, which may create leverage for plaintiffs because private arbitrations typically require each side to pay some portion of the fees before the arbitration will proceed. For example, the American Arbitration Association's (AAA) Consumer Arbitration Rules provide that a consumer (sometimes called the claimant) filing an arbitration must pay $200, "payable in full by the consumer when a case is filed."[22] The business (sometimes called the respondent) then must pay its $300 filing fee, plus a $1,400 case management fee, $500 hearing fee, up to $2,500 for each day of the arbitrator's time,[23] and "additional arbitrator compensation" as applicable.[24] As discussed below, the AAA responded to the phenomenon of mass arbitrations in part by enacting a new fee schedule and new rules specifically for such matters. AAA's primary competitor for arbitration services, JAMS, similarly requires that, in the consumer context, "the only fee required to be paid by the consumer is $250" (roughly equivalent to court filing fees), and that "[a]ll other costs must be borne by the company," including the balance of the $1,750 case management fee and the arbitrator's fee.[25] If a claimant pays its filing fee but the company does not, JAMS suspends the arbitration and notifies the parties of their right to seek relief in court.[26]

## The Recent Wave of Mass Arbitrations

*Concepcion* and the cases that followed triggered a myriad of responses. Commentators decried an "arbitration epidemic" that denied millions of workers and consumers access to the courts.[27] The Consumer Financial Protection Bureau (CFPB) commissioned a report on the use of pre-dispute arbitration provisions in connection with consumer financial products and services, which found that while "[t]ens of millions of consumers . . . are subject to pre-dispute arbitration clauses," only a few hundred actually file arbitrations each year, and only a handful win.[28] In 2017, the CFPB enacted a rule prohibiting financial institutions from requiring arbitration, but Congress overturned the rule and barred the agency from adopting it again.[29]

Another response came from private attorneys. Until recently, actions by plaintiffs subject to mandatory arbitration and collective action waivers tended to follow a similar course: plaintiffs would file a class action; defendants would move to compel individual arbitration; the court would send the claims to arbitration; and, because the expense of arbitrating would outstrip any possible award, the case would die on the vine. But a recent spate of cases has turned that conventional wisdom on its head, as plaintiffs have moved forward with individual arbitrations on behalf of thousands of plaintiffs.[30] In some instances, defendants have responded with a handful of recurring tactics: returning to court to seek class treatment (placing plaintiffs in the unusual posture of being the ones to enforce arbitration provisions), moving to disqualify plaintiffs' counsel, countersuing plaintiffs or even the arbitration service, or refusing to pay filing fees in an effort to short-circuit the arbitrations.[31] Although counsel have pursued mass arbitrations most often in the labor context, they have begun to appear in the antitrust and consumer fraud contexts as well.

***DoorDash.*** In *Abernathy v. DoorDash, Inc.*, 6,250 couriers filed individual AAA arbitrations accusing the food delivery company of labor law violations, incurring over $1.2 million in filing fees.[32] But DoorDash refused to pay *its* fees of nearly $12 million, so AAA closed the files.[33] Plaintiffs then moved to compel arbitration and the court agreed, ordering DoorDash to "immediately commence AAA arbitration" with 5,010 of the petitioners.[34] Judge Alsup rejected defendant's argument that the court should stay the arbitrations pending resolution of a parallel state court class action, describing it as "poetic justice,"[35] "irony upon irony," and "hypocrisy" that "DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate."[36] DoorDash ultimately agreed to pay $85 million to resolve the arbitrations of 35,000 couriers.[37]

Documents produced in the *DoorDash* litigation revealed that, while the case was pending, DoorDash's counsel reached out to an AAA competitor, the Institute for Conflict Prevention and Resolution (CPR), to develop a competing

arbitration regime that would minimize a respondent's filing fees.[38] The result is CPR's Employment-Related Mass Claims Protocol (the "CPR Protocol"), discussed further below. The CPR Protocol went into effect on November 9, 2019—a Saturday, and just one day after AAA closed the DoorDash Petitioners' files due to DoorDash's failure to pay.[39] DoorDash promptly revised its form agreement with its couriers to require them to arbitrate under the CPR Protocol rather than the AAA rules.[40] The court refused to seal the emails discussing development of the CPR protocol, finding that the information therein "concerns an arbitration organization that holds itself out to the public as impartial."[41]

***Postmates.*** Couriers filed thousands of arbitrations against Postmates, another gig economy company, but again the respondent refused to pay its share of the fees.[42] Postmates claimed that Petitioners' "demands are tantamount to a de facto class action in violation of the class action waiver" because it submitted a single document "setting forth the grievances in generic terms . . . along with a spreadsheet listing the names of the claimants."[43] This time, *both* parties moved to compel arbitration: plaintiffs demanded that Postmates pay its share of the fees, and Postmates demanded that Plaintiffs refile their demands with additional details specific to each claimant.[44] Judge Armstrong rejected Postmates' argument that Petitioners were improperly "using the cost of the arbitration process as a means of coercing Postmates."[45] To the extent that Postmates was facing a "sizeable arbitration fee," the court held, it had no one to blame but itself, as it was "a direct result of the mandatory arbitration clause and class action waiver that Postmates has imposed upon each of its couriers."[46] At the end of the day, the court concluded that only the arbitrator could address the relief each party sought.[47]

Postmates then sued the plaintiffs, this time seeking, *inter alia*, a declaratory judgment that it "cannot be compelled to arbitrate on a de facto class basis."[48] But the court disagreed because, even if the demands followed a template, the couriers had still "filed individual demands in their own names" and were not seeking to represent absent class members.[49] In January 2021, the court granted plaintiffs' motion to compel arbitration for approximately 10,000 couriers.[50] In April 2021, the parties settled for undisclosed terms.[51]

***Uber.*** In another gig economy case, Uber drivers sued for labor law violations.[52] After the Ninth Circuit required the drivers to arbitrate all of their claims except for their claim under California's Private Attorneys General Act,[53] 12,501 drivers filed individual arbitrations.[54] Uber paid its filing fees in only 296 of those arbitrations, and the arbitrator's fee in only six—despite Uber's representations to the Ninth Circuit that it would cover all fees.[55] In March 2019, Uber settled with classes of drivers not subject to arbitration for $20 million, or about $2,200 per driver.[56] Two months later, Uber settled arbitrations with approximately 60,000 drivers for $146 million to $170 million, or about $2,800 each.[57]

Uber is also facing a mass arbitration with consumers related to its policy, enacted in the wake of the 2020 death of George Floyd, of temporarily waiving Uber Eats delivery fees for Black-owned restaurants.[58] More than 30,000 Uber Eats customers filed single sentence arbitration demands, accusing Uber of "charging discriminatory delivery fees based on race"—i.e., of reverse discrimination against business owners who are *not* Black.[59] AAA invoiced Uber for more than $4 million in filing fees related to those demands and announced its intention to charge $91 million more.[60] On September 20, 2021, Uber brought an action in state court in New York, seeking a declaration that AAA had breached its agreement with Uber by charging fees that "bear no relation" to its "actual costs and expenses."[61] Uber argued that AAA was contractually obligated to reduce its fees in light of "the basic fact" that the 30,000 demands "do not realistically require the AAA to individually administer each such arbitration."[62] According to Uber, AAA's actions—including communicating with counsel about all of the claims collectively, creating batches of hundreds or thousands of cases, and issuing Uber a single invoice for thousands of proceedings—confirmed that it was not treating the arbitrations individually.[63] On October 15, 2021, the court denied Uber's motion for a preliminary injunction.[64] Uber appealed that motion to the New York Appellate Division First Department, which appeal remains pending.[65]

***Lyft.*** Claims against Lyft, another ride-hailing app, followed a similar trajectory as some of the other cases noted above. In 2018, 3,661 Lyft drivers served demands for arbitration on Lyft.[66] According to the drivers, Lyft failed to pay the filing fees in arbitration for the first 1,123 demands, and AAA refused to invoice Lyft for the remainder until Lyft paid that initial set of fees.[67] Lyft then filed a separate suit against plaintiffs' counsel, seeking to disqualify them from representing the drivers.[68] On March 1, 2019, petitioners voluntarily dismissed their case[69] and Lyft withdrew its case against plaintiffs' counsel.[70]

***Intuit.*** One of the first mass arbitration actions on behalf of consumers rather than employees involved class action claims asserted in court by users of Intuit's TurboTax software, who alleged they were induced to pay for tax preparation software that should have been free.[71] Users initially brought a putative class action in federal court, but Intuit successfully persuaded the Ninth Circuit to send the users to arbitration.[72] TurboTax customers—eventually totaling 127,000—had already begun filing arbitration demands, which included allegations that Intuit violated the antitrust laws.[73] The arbitration demands put Intuit on the hook for tens of millions of dollars in filing fees, plus potentially more under a cost-shifting provision.[74]

Three months after the Ninth Circuit agreed that the consumers must arbitrate their claims, Intuit returned to federal court to settle the class action for $40 million.[75] But even though the Ninth Circuit's ruling extinguished the possibility of plaintiffs recovering anything in court, the court rejected the settlement's per-claimant award of $28 as inadequate.[76] It also found that the settlement's opt-out provisions imposed

"onerous burdens" on absent class members, including those currently pursuing claims in arbitration.[77] On May 26, 2021, Plaintiffs voluntarily dismissed the class action.[78] As of December 2021, the arbitrations appear to be ongoing.[79]

## State Legislatures and Several Large Companies Respond to the Phenomenon

The recent wave of mass arbitrations has triggered several responses in the form of new laws and changes to the form agreements that employees and consumers must sign.

California enacted SB 707[80] to address the "concerning and troubling trend" of companies "refusing to pay required fees to initiate arbitration, effectively stymieing the ability of [claimants] to assert their legal rights."[81] Effective January 1, 2020, the law provides that if a drafting party fails to pay its share of fees, it is in breach of the agreement,[82] waives its right to compel arbitration, faces sanctions,[83] and may be on the hook for *all* fees and costs.[84] Challenges that SB 707 conflicts with the FAA, purportedly because it hampers arbitration, have failed.[85] The law has already had an impact; in the Uber Eats reverse discrimination matter noted above, AAA explicitly cited SB 707 in its invoice to Uber.[86]

As noted above, several large companies have stepped away from mandatory arbitration provisions. After winning a motion to compel plaintiffs to arbitrate claims that the company's Echo devices were improperly recording users,[87] Amazon found itself facing 75,000 individual arbitrations, and thus tens or even hundreds of millions of dollars in fees.[88] In May 2021, the company changed its terms of service, permitting users to sue it in state or federal court in Washington.[89] Google and Facebook likewise permit their users to sue them in court,[90] and recently took action to allow their employees to litigate rather than arbitrate harassment claims.[91] It remains to be seen whether this phenomenon will spread beyond the big tech companies, particularly as other aspects of arbitration—including that it happens behind closed doors—continue to make it an attractive alternative to proceeding in court.

To that end, other companies have doubled down on mandatory arbitration by seeking to undercut the effectiveness of the mass arbitration tactic. As noted above, counsel for DoorDash worked with the arbitration provider CPR to develop a new Mass Claims Protocol that minimizes a respondent's fees. The heart of the CPR Protocol is the use of ten "test" cases to help a mediator develop criteria to resolve the remaining claims.[92] This practice reflects a key departure from other companies' rules, which typically require respondents to pay filing fees on all pending arbitrations before any of them proceed.[93] Perhaps as an effort to fend off competition from CPR, AAA has introduced a fee schedule that reduces a respondent's per-case fee as the number of cases exceeds certain thresholds,[94] as well as new "Supplementary Rules for Multiple Case Filings."[95] Companies have also revised their contractual arbitration provisions to place more of the fee burden on claimants,[96] though at some point this tactic may run afoul of the effective vindication rule discussed above.

While the CPR Protocol may reduce some of the leverage mass arbitrations can create for plaintiffs, it still places the burden for the majority of fees on businesses.[97] It also reduces the upfront cost that plaintiffs must incur. In some ways, the CPR Protocol reflects an extension of the "bellwether" trial model from the mass tort context to the employment arbitration context. That approach has occasionally been deployed in the antitrust context as well and may be a useful approach for antitrust cases in the future.[98]

## The Shifting Cost-Benefit Calculus

The increasing prevalence of mass arbitration as a litigation tactic will require plaintiffs and defendants to consider the unique costs and benefits of the approach and, for defendants, alternative ways to mitigate the risks that it creates.

***The Changing Calculus for Plaintiffs.*** For plaintiffs' counsel, the cost-benefit calculus for mass arbitrations differs from that of a typical class action in at least two ways. First, while it is not uncommon for plaintiffs' counsel to spend millions of dollars litigating a complex case on a contingent basis, those fees and expenses tend to be spread over years. Discovery developments or the outcome of dispositive motions may provide "off ramps" that cause counsel to reevaluate the value of the case at various points. In the mass arbitration context, by contrast, plaintiffs' counsel must put up millions of dollars at the outset.[99] That massive initial investment shifts the risk of a contingent case almost entirely to a single moment in time.

Second, while a class action will typically involve just a handful of class representatives, a mass arbitration requires hundreds or thousands of claimants. That means counsel must spend a substantial amount on advertising and attorney or other staff time to identify and process claimants. Counsel must also expend resources on fact gathering and discovery work. This not only increases costs, but also requires unique staffing and technology solutions.[100]

***The Changing Calculus for Defendants.*** Defendants are facing a shifting landscape as well. Companies like Amazon, Google, and Facebook have recently scaled back their use of mandatory arbitration provisions. Several considerations may have contributed to those decisions.

*First*, for years, mandating individual arbitration had been a reliable way to shift disputes out of the court system and, as a practical matter, limit the number of individual claimants who challenge particular conduct in arbitration. The success of mass arbitration makes that assumption less reliable, though companies like Postmates continue to enforce their arbitration provisions.[101]

*Second*, while conventional wisdom holds that class actions primarily benefit plaintiffs by granting them leverage over defendants, claim aggregation may also benefit defendants. Collective actions allow defendants to address

a large number of similar claims in a single proceeding in a single forum.[102] After facing the daunting prospect of thousands of individual arbitrations, defendants in *DoorDash* and *Intuit* sought to return to federal court. Uber has sued AAA precisely because it refused to administer thousands of arbitrations collectively. In light of the mass arbitration phenomenon, some defense counsel have advised their clients to add provisions to their form agreements expressly reserving the right to settle claims on a class-wide basis.[103] Given the changes in terms of service described above, Amazon, Google, and Facebook may have reached the same conclusion.

*Third*, given the current scrutiny that Amazon and other big tech companies are facing from antitrust and consumer protection enforcement agencies and legislators, they may see public relations or political value in agreeing to be held accountable in the court system. This makes sense if the greater risk to their bottom lines comes from regulation or other government action, rather than from private class actions.

## Conclusion

The recent wave of mass arbitrations suggests that the interplay between arbitration and litigation is not quite as resolved as the past decade of Supreme Court jurisprudence would lead one to believe. Yet one important takeaway from the cases discussed above is that, despite criticizing defendants' efforts to deny plaintiffs a forum, courts have not explicitly blessed the practice of mass arbitration. Rather, they have deferred to the arbitrators. Because most matters settle before the arbitrators reach the issue, the viability of the tactic remains unsettled.

Like class actions, mass arbitrations are a useful way to pursue negative value cases that would otherwise be uneconomical to bring. But mass arbitrations can never fully replace the class-action device, because it is not practicable for plaintiffs' counsel to represent as many individual arbitration claimants as a class action would cover. In *Uber*, for instance, the putative class included hundreds of thousands of drivers; the arbitrations settled on behalf of 60,000. While mass arbitration may work for a subset of injured parties, class-action waivers may still cause many individual claimants not to pursue their claims.

Finally, mass arbitration is unlikely to be an appropriate approach in all cases, including (potentially) antitrust cases. Given the higher upfront costs of mass arbitration, the approach may be a more effective tool for small businesses that aggregate antitrust claims, and less so consumers, where the recovery may be smaller.[104] It is likely no coincidence that most of the mass arbitrations discussed above involved labor claims with recoveries of hundreds or thousands of dollars per claimant. It remains to be seen whether mass arbitration under the evolving rules of arbitration tribunals will be a viable way to pursue a broader range of claims, including in particular antitrust and consumer protection claims.

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[1] *See* Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, Wall St. J. (June 1, 2021 7:30 a.m.), https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000?st=8ykel81j3swsu6a.

[2] 563 U.S. 333 (2011).

[3] 570 U.S. 228 (2013).

[4] *Concepcion*, 563 U.S. at 337.

[5] *Id.* at 336–37.

[6] *Id.* at 338. *See Discover Bank v. Super. Ct.*, 36 Cal. 4th 148 (2005).

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

[8] *Id.* at 344.

[9] *Id.* at 348.

[10] *Id.* at 350. *See also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (holding that courts may not infer consent to participate in class arbitration absent an affirmative indication that the party agreed to do so).

[11] *Italian Colors*, 570 U.S. at 233.

[12] *Id.* at 231.

[13] *Id.* at 235; *see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (enforcing arbitration clause only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"), and Green Tree Financial Corp.–Ala. v. Randolph, 531 U.S. 79, 81 (2000) (applying *Mitsubishi Motors* and allowing a party to "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," upon a showing of "the likelihood of incurring such costs") (internal citations omitted)).

[14] *Italian Colors*, 570 U.S. at 235.

[15] *Id.* at 236.

[16] *Id.* at 233.

[17] *Id.* at 241 (Kagan, J., dissenting).

[18] *Id.* at 243, 246.

[19] *Id.* at 253.

[20] 138 S. Ct. 1612, 1632 (2018).

[21] *Id.* at 1627 (citing cases).

[22] Am. Arb. Ass'n, Consumer Arbitration Rules: Costs of Arbitration 1 (Nov. 1, 2020), https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf.

[23] *Id.* at 1–2. The arbitrator is compensated $1,500 per arbitration if it is a document-only proceeding, and $2,500 per day for hearings. *Id.* at 1.

[24] *Id.* at 1, 2.

[25] *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, JAMS (July 15, 2009), https://www.jamsadr.com/consumer-minimum-standards/. Similar rules apply in the employment context. *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS (July 15, 2009), https://www.jamsadr.com/employment-minimum-standards/.

[26] *Arbitration Schedule of Fees and Costs*, JAMS, https://www.jamsadr.com/arbitration-fees (last visited Oct. 16, 2021).

[27] Katherine V.W. Stone & Alexander J.S. Colvin, Econ. Pol'y Inst., The Arbitration Epidemic 6 (2015), https://files.epi.org/2015/arbitration-epidemic.pdf; *see also* Alexander J.S. Colvin, Econ. Pol'y Inst., The Growing Use of Mandatory Arbitration (2018), https://files.epi.org/pdf/144131.pdf; *see generally* Myriam Gilles, *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights*, Testimony before the H. Jud. Subcomm. on Antitrust, Com. & Admin. Law (Feb. 9, 2021), https://docs.house.gov/meetings/JU/JU05/20210211/111171/HHRG-117-JU05-Wstate-GillesM-20210211.pdf.

[28] Consumer Fin. Prot. Bureau, Arbitration Study 9, 12 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[29] Ian McKendry, *Senate Votes to Repeal CFPB Arbitration Rule in Win for Financial Institutions*, Am. Banker (Oct. 24, 2017 10:21 p.m.), https://

www.americanbanker.com/news/senate-repeals-cfpb-arbitration-rule-in-win-for-financial-institutions.

[30] *See* David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 672 (2020) ("[I]n a jaw-dropping development, plaintiffs' lawyers have found a way to 'turn[] class action waivers into a weapon for [consumers and] workers.' They have achieved this goal by doing what nobody expected them to do: *arbitrating*.") (citation omitted)).

[31] *See* Michael Corkery & Jessica Silver-Greenberg, *"Scared to Death" by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html.

[32] 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

[33] *Id.* The core of the couriers' complaint was that DoorDash had improperly designated them as independent contractors rather than employees. In November 2020, California voters approved Proposition 22, establishing that "gig economy" companies like DoorDash may treat drivers as independent contractors rather than employees. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES, (Nov. 7, 2020) https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html. DoorDash was one of several large companies that backed the measure, along with Uber and Lyft. In August 2021, however, a state court found that the voter referendum violated the California Constitution. Castellanos v. State, No. RG21088725, 2021 WL 3730951, at *5 (Cal. Super. Aug. 20, 2021).

[34] *DoorDash*, 438 F. Supp. 3d at 1066.

[35] *See* Corkery & Silver-Greenberg, *supra* n. 31.

[36] 438 F. Supp. 3d at 1068; *see also* Ian Millhiser, *DoorDash's Anti-Worker Tactics Just Backfired Spectacularly*, VOX (Feb. 12, 2020 3:30 p.m.) https://www.vox.com/2020/2/12/21133486/DoorDash-workers-10-million-forced-arbitration-class-action-supreme-court-backfired.

[37] Randazzo, *supra* note 1.

[38] Unredacted Decl. of Aaron Zigler in Support of Petitioners' Reply in Support of Amended Mot. To Compel Arb. ¶¶ 8–9, Abernathy v. DoorDash, No. 19-cv-7545 (Feb. 26, 2020), ECF No. 180-3.

[39] *Id.* ¶ 28.

[40] *Id.*

[41] *DoorDash*, 438 F. Supp. 3d at 1067. In another case against DoorDash, the court found that the CPR Protocol "is not so biased that it negates the agreement to arbitrate." McGrath v. DoorDash, Inc., No. 19-cv-5279, 2020 WL 6526129, at *11 (N.D. Cal. Nov. 5, 2020), *reconsideration denied*, 2020 WL 7227197 (N.D. Cal. Dec. 8, 2020).

[42] Adams v. Postmates, 414 F. Supp. 3d 1246, 1250 (N.D. Cal. 2019).

[43] *Id.* at 1248, 1251.

[44] *Id.* at 1248.

[45] *Id.* at 1252 n.2.

[46] *Id.*

[47] *Id.* at 1255–56. Defendant argued that it should not be compelled to pay millions in arbitration fees until the court decided whether the mass arbitrations impermissibly circumvented the class action waiver. *Id.* at 1254. The court held that while the agreement gave the court authority to consider certain questions pertaining to the waiver, that authority extended only to whether the waiver was unconscionable; otherwise, all questions of arbitrability were for the arbitrator. *Id.* The Ninth Circuit affirmed. Adams v. Postmates, Inc., 823 F. App'x 535 (9th Cir. 2020) (mem.). *See also* McClenon v. Postmates Inc., 473 F. Supp. 3d 803, 812 n.5 (N.D. Ill. 2020) (reaching a similar decision and expressing "frustrat[ion]" that a hearing on the merits was delayed while the lawyers engaged in "procedural gymnastics").

[48] Postmates Inc. v. 10,356 Individuals, No. CV 20-2783, 2020 WL 1908302, at *4 (C.D. Cal. Apr. 15, 2020).

[49] *Id.* at *7 (citing *Concepcion*, 563 U.S. at 347–48 ("Classwide arbitration includes absent parties.")).

[50] Postmates Inc. v. 10,356 Individuals, No. CV 20-2783, 2021 WL 540155, at *13 (C.D. Cal. Jan. 19, 2021) (granting the motion to compel arbitration as to all but several hundred couriers).

[51] Max Kutner, *Postmates, Couriers Agree to End Mass Arbitration Appeals*, LAW360 (Apr. 8, 2021, 2:54 p.m.), https://www.law360.com/articles/1373233/postmates-couriers-agree-to-end-mass-arbitration-appeals.

[52] Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1206 (9th Cir. 2016).

[53] *Id.* at 1207. Other cases against Uber have reached similar outcomes. *See* O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1095 (9th Cir. 2018) (citing *Mohamed*, 848 F.3d at 1206); *see also* Lawson v. Grubhub, Inc., No. 18-15386, 2021 WL 4258826, at *5 (9th Cir. Sept. 20, 2021) (citing *O'Connor*, 904 F.3d at 1094).

[54] *See* Petition for Order Compelling Arb. ¶ 3, Abadilla v. Uber Techs, Inc., No. 18-cv-7343 (N.D. Cal. Dec. 5, 2018), ECF No. 1.

[55] *Id.* ¶¶ 3, 14.

[56] Hannah Albarazi, *Uber's $20M Driver Misclassification Deal Gets Final OK*, LAW360 (Aug. 29, 2019, 10:25 p.m.), https://www.law360.com/articles/1194189.

[57] Dave Simpson, *Uber Pegs Driver Employment Deal Costs at $146M to $170M*, LAW360 (May 9, 2019, 11:22 p.m.), https://www.law360.com/articles/1158448/uber-pegs-driver-employment-deal-costs-at-146m-to-170m.

[58] Summons & Declaratory Judgment Complaint ¶ 44, Uber Techs, Inc. v. Am. Arbitration Assoc., No. 655549/2021 (N.Y. Sup. Ct. N.Y. Cnty Sept. 20, 2021), NYSCEF Doc. No. 1.

[59] *Id.* ¶ 49.

[60] *Id.* ¶¶ 54, 62.

[61] *Id.* ¶¶ 96–97.

[62] *Id.* ¶¶ 30.

[63] *Id.* ¶¶ 66–67, 87.

[64] Decision + Order on Motion, *Uber v. AAA*, NYSCEF Doc. No. 106 (Oct. 15, 2021)

[65] Letter re: Request for Adjournment, *Uber v. AAA*, NYSCEF Doc. No. 110 (Oct. 21, 2021)

[66] Pet. to Compel Arb. ¶ 3, Abarca v. Lyft, No. 18-cv-7502 (N.D. Cal. Dec. 13, 2018), ECF No. 1.

[67] *Id.* ¶ 4.

[68] *Id.* ¶ 23; *see* Complaint for Declaratory & Injunctive Relief, Lyft, Inc. v. Postman, No. 18-cv-6978 (N.D. Cal. Nov. 16, 2018), ECF No. 1.

[69] Notice of Voluntary Dismissal, Abarca v. Lyft, No. 18-cv-7502 (N.D. Cal. Mar. 1, 2019), ECF No. 69.

[70] Notice of Voluntary Dismissal, Lyft v. Postman, No. 18-cv-6978 (N.D. Cal. Mar. 1, 2019), ECF No. 39.

[71] Arena v. Intuit Inc., 444 F. Supp. 3d 1086, 1088 (N.D. Cal. 2020), *rev'd and remanded sub nom.* Dohrmann v. Intuit, Inc., 823 F. App'x 482 (9th Cir. 2020).

[72] *Dohrmann*, 823 F. App'x at 484–85.

[73] Arena v. Intuit Inc., No. 19-cv-2546, 2021 WL 834253, at *4 (N.D. Cal. Mar. 5, 2021). As in *Postmates*, Intuit filed a separate action against the claimants, arguing that their Sherman Act claims converted the mass arbitration into a "de facto class action," but the court disagreed. Intuit Inc. v. 9,933 Individuals, No. B308417, 2021 WL 3204816, at *3, 8 (Cal. Ct. App. July 29, 2021). Intuit also pursued the "increasingly common tactic for mass arbitration defendants" of requiring plaintiffs to file their claims in small claims court. Alison Frankel, *Mass Arbitration Firm Scrambles to Keep 125,000 Clients Out of $40 Million Intuit Class Action,* REUTERS (Nov. 18, 2020 10:53 a.m.), https://www.reuters.com/article/legal-us-otc-intuit/mass-arbitration-firm-scrambles-to-keep-125000-clients-out-of-40-million-intuit-class-action-idUSKBN27X2ZK. The court rejected that tactic as well. *Id.*

[74] *Arena*, 2021 WL 834253, at *4.

[75] Mot. for Settlement, Arena v. Intuit Inc., No. 19-cv-2546 (N.D. Cal. Nov. 12, 2020), ECF No. 162.

[76] *Arena*, 2021 WL 834253 at *8.

[77] *Id.* at *11.

[78] Notice of Voluntary Dismissal, Arena v. Intuit Inc., No. 19-cv-2546 (N.D. Cal. May 26, 2021), ECF No. 215.

[79] Other examples of mass arbitration involving consumers include the action against the online betting sites FanDuel and DraftKings and the

educational technology company Chegg. *See* Alison Frankel, *FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration*, Reuters (Jan. 14, 2020 5:31 p.m.), https://www.reuters.com/article/us-otc-fanduel-idINKBN1ZD2SK; Alison Frankel, *Mass Consumer Arbitration Is On! Ed Tech Company Hit with 15,000 Data Breach Claims,* Reuters (May 12, 2020 4:51 p.m.), https://www.reuters.com/article/legal-us-otc-chegg/mass-consumer-arbitration-is-on-ed-tech-company-hit-with-15000-data-breach-claims-idUSKBN22033E.

[80] 2019 California Senate Bill No. 707, California 2019–2020 Regular Session, *now codified at* Cal. Civ. Proc. Code § 1281.96 *et seq* (West). In September 2021, the Ninth Circuit allowed another state statute, 2019 California Assembly Bill 51—providing that employers cannot require employees to arbitrate claims related to state labor laws—to take effect. Chamber of Com. v. Bonta, No. 20-15291, 2021 WL 4187860, at *3 (9th Cir. Sept. 15, 2021). The Chamber of Commerce has petitioned the Ninth Circuit for en banc review. See Dave Simpson, *Chamber Seeks Full 9th Circ. Look at Forced Arbitration Ban*, Law360 (Oct. 21, 2021 7:03 p.m.), https://www.law360.com/articles/1433354. The federal Forced Arbitration Injustice Repeal (FAIR) Act would go even further, providing that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." FAIR Act, H.R. 963, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/963/text. The House of Representatives passed the bill in 2019 and reintroduced it in 2021. Levi Sumagaysay, *FAIR Act Is Being Revived in Washington, Raising Hopes for End to Forced Arbitration*, MarketWatch (Feb. 11, 2021 10:44 a.m.), https://www.marketwatch.com/story/reintroducing-the-fair-act-bill-would-end-forced-arbitration-11613057369.

[81] *S. Judiciary Comm. Hr'g on SB 707*, 2019–2020 Reg. Session, at 6 (Cal. Apr. 23, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB707#.

[82] Cal. Civ. Proc. Code § 1281.97(a), § 1281.98 (West). The statute arguably enshrines a rule that courts had already adopted. *See* Brown v. Dillard's, Inc., 430 F.3d 1004, 1013 (9th Cir. 2005) ("[W]hen an employer enters into an agreement requiring its employees to arbitrate, it must participate in the process or lose its right to arbitrate.").

[83] Cal Civ. Proc. Code § 1281.97(b), (d); § 1281.99.

[84] *Id.* § 1281.97(b).

[85] *See* Postmates Inc. v. 10,356 Individuals, No. 20-cv-2783, 2021 WL 540155, at *7 (C.D. Cal. Jan. 19, 2021) ("SB 707 is pro-arbitration because it makes arbitration more effective and efficient . . . by preventing parties such as Postmates from holding hostage employees' or consumers' validly arbitrable claims."); *see also* Agerkop v. Sisyphian LLC, No. 19-cv-10414, 2021 WL 1940456, at *6 (C.D. Cal. Apr. 13, 2021) (similar).

[86] *See* Summons & Declaratory Judgment Complaint ¶ 87, Uber v. AAA, Index No. 655549/2021 (N.Y. Sup. Ct. N.Y. Cnty), Docket No. 1.

[87] Tice v. Amazon.com, Inc., 845 F. App'x 535, 536 (9th Cir. 2021).

[88] Randazzo, *supra* note 1; Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. Times (Sept. 28, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html.

[89] *Id.*

[90] *Google Terms of Service*, Google (Mar. 31, 2020), https://policies.google.com/terms?hl=en-US ("[D]isputes will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA . . ."); *Terms of Service*, Facebook (Oct. 22, 2020), https://www.facebook.com/terms.php ("For any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms or the Facebook Products . . ., you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County.")

[91] Tim De Chant, *After 75,000 Echo Arbitration Demands, Amazon Now Lets You Sue It*, Ars Technica (June 1, 2021 12:58 p.m.), https://arstechnica.com/tech-policy/2021/06/after-75000-echo-arbitration-demands-amazon-now-lets-you-sue-it/; Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. Times (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html ("Facebook acted one day after Google announced similar plans.").

[92] Int'l Inst. for Conflict Prevention & Resolution, Employment-Related Mass-Claims Protocol 6 (Version 1.1, 2020), https://www.cpradr.org/dispute-resolution-services/employment-related-mass-claims-documents/emp-mass-claims-protocol.

[93] *See, e.g.*, *Postmates*, 2020 WL 1908302, at *4 (C.D. Cal. Apr. 15, 2020) (noting AAA's demand that Postmates pay fees for all 10,356 arbitrations); *but see* Petition for Order Compelling Arb. ¶ 4, Abarca v. Lyft, No. 18-cv-7502 (N.D. Cal. Dec. 13, 2018), ECF No. 1 (noting that AAA declined to invoice Lyft for thousands of arbitrations until it paid fees for the first 1,123).

[94] *Compare* Am. Arb. Ass'n, *Consumer Arbitration Rules: Costs of Arbitration*, https://www.adr.org/sites/default/files/ Consumer_Fee_Schedule_2.pdf (Nov. 1, 2020) *with* Am. Arb. Ass'n, *Consumer Arbitration Rules: Costs of Arbitration*, https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf (Sept. 1, 2018).

[95] Am. Arb. Ass'n, Supplementary Rules for Multiple Case Filings https://www.adr.org/sites/default/files/Supplementary_Rules_MultipleCase_Filings.pdf (Aug. 1, 2021). Although the purpose of the Supplementary Rules is to "streamline the administration of large volume filings," they still require that a "separate Demand for Arbitration be filed in each individual case." *Id.* at 3, 5. Yet some aspects of the procedure resemble a class proceeding. For instance, the section on mediation provides that the parties should try to resolve all of the related claims at once. *See id.* at 8 ("[T]he parties shall initiate a global mediation of the Multiple Case Filings . . . .").

[96] *See, e.g.*, *Adams*, 414 F. Supp. 3d at 1250 (explaining that while Postmates' agreement with its couriers originally provided that the company would pay *all* arbitration filing fees, it amended the agreement in 2019 to require couriers to split the cost); *see generally* Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, Gibson Dunn (May 24, 2021), https://www.gibsondunn.com/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them/ (recommending that companies adopt cost-splitting and fee-shifting provisions).

[97] *See Pricing & Fees*, Int'l Inst. for Conflict Prevention & Resolution, https://www.cpradr.org/dispute-resolution-services/pricing-fees.

[98] For instance, the antitrust litigation related to pricing of generic drugs will proceed under a bellwether model. *See* Christopher Cole, *Generic Cos. Argue for Heritage Bellwether in Antitrust MDL*, Law360 (Mar. 30, 2021 2:49 p.m.), https://www.law360.com/articles/1370209/generics-cos-argue-for-heritage-bellwether-in-antitrust-mdl.

[99] *See Abernathy*, 438 F. Supp. 3d at 1064 ("Petitioner couriers paid over $1.2 million in filing fees."); Frankel, *Ed Tech Company*, *supra* n. 77.

[100] *See* Frankel, *Ed Tech Company*, *supra* n. 77 (discussing the cost of vetting prospective clients); Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, Consumer Reports (Aug. 13, 2021), https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/ ("These steps, plus ongoing communication, require special technology and teams of client-relationship managers.").

[101] *See* Alison Frankel, *Postmates Brings Mass Arbitration to SCOTUS, Sort of*, Reuters (Aug. 2, 2021, 5:02 p.m.), https://www.reuters.com/legal/government/postmates-brings-mass-arbitration-scotus-sort-2021-08-02/.

[102] *See* 1 McLaughlin on Class Actions § 1:1 (18th ed. 2021) ("Class actions thus are a mechanism for a single, binding adjudication of multiple claimants' rights, while assuring due process to absent class members and *repose to defendants*.") (emphasis added).

[103] *See* Holecek, *supra* note 94 ("A company facing a mass arbitration may wish to obtain global peace by entering into a class settlement that extinguishes all claims. . . . [I]n an abundance of caution, companies might consider adding a clause to their arbitration agreements that allows any party to settle claims on a class-wide basis.").

[104] *See* Medintz, *supra* note 98 (attributing to Georgetown University Law Center professor Maria Glover the view that "many claims with legal merit but minimal 'marketability' will likely never find a lawyer to champion them as mass arbitrations").