104 Georgetown Law Journal – (forthcoming 2015).

AFTER THE REVOLUTION: AN EMPIRICAL STUDY OF CONSUMER ARBITRATION

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For decades, mandatory consumer arbitration has been ground zero in the war between the business community and the plaintiffs' bar. Some courts, scholars, and interest groups argue that the speed, informality, and accessibility of private dispute resolution create a conduit for everyday people to pursue claims. However, others object that arbitration's loose procedural and evidentiary rules dilute substantive rights, and that arbitrators favor the repeat playing corporations that can influence their livelihood by selecting them in future matters. Since 2010, the stakes in this debate have soared, as the U.S. Supreme Court has expanded arbitral power and mandated that consumers resolve cases that once would have been class actions in two-party arbitration. But although the Court's jurisprudence has received sustained scholarly attention, both its defenders and critics do not know how it has played out behind the black curtain of the extrajudicial tribunal.

This Article offers fresh perspective on this debate by analyzing nearly 5,000 complaints filed by consumers with the American Arbitration Association between 2009 and 2013. It provides sorely-needed information about filing rates, outcomes, damages, costs, and case length. It also discovers that the abolition of the consumer class action has changed the dynamic inside the arbitral forum. Some plaintiffs' lawyers have tried to fill this void by filing numerous freestanding claims against the same company. Yet these "arbitration entrepreneurs" are a pale substitute for the traditional class mechanism. Moreover, by pursuing scores of individual disputes, they have inadvertently transformed some large corporations into "extreme" repeat players. The Article demonstrates that these frequently-arbitrating entities win more and pay less in damages than one-shot entities. Thus, the Court's consumer arbitration revolution not only shields big businesses from class action liability, but gives them a boost in the handful of matters that trickle into the arbitral forum.

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INTRODUCTION

Consider three recent cases filed by consumers against large companies. John Feeney accused a computer manufacturer of charging tens of thousands of its customers an illegal $13 sales tax.[1] Elizabeth Dean brought a class action against a private, for-profit vocational school for misleading its students about the costs and marketability of their degrees.[2] Ernestine Hawkins sued a bank after she was injured by an accident in its lobby.[3] Anyone who has tracked the evolution of the U.S. civil justice system can predict what happened next. The businesses did not deny the plaintiffs' allegations or debunk their legal theories. Instead, they moved to compel arbitration.[4]

The use of private dispute resolution as the first line of defense against consumer lawsuits has long been controversial. In 1925, Congress passed the Federal Arbitration Act (FAA) to abolish common law rules that made it

1 *See* Plaintiffs' Memorandum in Support of Motion for Reconsideration of Orders Granting Defendants' Motions to Compel Arbitration, Feeney v. Dell Inc., No. 03-01158, 2007 WL 6048106, at *3 (Mass. Super. Ct. Nov. 30, 2007).

2 *See* Dean v. Draughons Junior Coll., Inc., 917 F. Supp. 2d 751, 753 (M.D. Tenn. 2013).

3 Hawkins v. Region's, 944 F. Supp. 2d 528, 529 (N.D. Miss. 2013).

4 *See id.*; Dean v. Draughons Junior Coll., Inc., No. 3:12-CV-0157, 2012 WL 3308370, at *1 (M.D. Tenn. Aug. 13, 2012); Feeney v. Dell Inc., 993 N.E.2d 329, 332 (Mass. 2013); Feeney v. Dell Inc., 989 N.E.2d 439, 442 (Mass. 2013).

impossible to obtain specific performance of an agreement to arbitrate.[5] The statute lay largely dormant until the 1980s, when the U.S. Supreme Court held that it preempts state law,[6] governs statutory claims,[7] and embodies a "liberal federal policy favoring arbitration."[8] Countless firms added arbitration clauses to their contracts, making arbitration "a phenomenon that pervade[s] virtually every corner of the daily economy."[9] Some Justices, business groups, and the defense bar applauded this development, arguing that arbitration's speed, flexibility, and affordability pave the way for customers to pursue claims.[10] But other courts, plaintiffs' lawyers, and consumer advocates objected that abridged procedures thwart substantive rights, and that arbitrators—who, unlike judges, are paid by the case—are reluctant to rule against the repeat playing firms that may select or veto them again in the future.[11]

Since 2010, these issues have been thrust back into the spotlight. For decades, judges maintained the legitimacy of alternative dispute resolution by policing arbitration clauses for fairness.[12] If a consumer proved that arbitral expenses or one-sided procedures thwarted her rights, a court would strike down all or part of the arbitration clause under the unconscionability doctrine.[13] But in 2010, the Court held in *Rent-A-Center, West, Inc. v. Jackson* that drafters could bypass this layer of judicial review by delegating questions about the scope or validity of the arbitration clause to the arbitrator.[14] By allowing private judges to define their own powers, the Court rejected concerns that they are biased against consumers. Similarly, until 2011, most jurisdictions refused to enforce class arbitration waivers when plaintiffs asserted numerous low-value claims.[15] These judges reasoned that because small-dollar grievances will either be aggregated or abandoned, class arbitration waivers liberated firms from liability.[16] However, in

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5 Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)).

6 *See* Southland Corp. v. Keating, 465 U.S. 1, 11 (1984).

7 *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985).

8 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

9 Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008); *see also* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880–83 (2008) (finding that 75% of major telecommunications, banking, and financial services companies employ mandatory arbitration provisions).

10 *See, e.g.*, PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION –A GOOD DEAL FOR CONSUMERS 6 (2008) ("[b]y streamlining the dispute resolution process and reducing the costs associated with it, arbitration makes it easier for individuals to find an attorney willing to take their case or, alternatively, to represent themselves").

11 *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction,* 1996 SUP. CT. REV. 331, 346 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60–61 (1997); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 677–97 (1996).

12 *See infra* text accompanying notes 98-102.

13 *See, e.g.*, Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997).

14 *See* 561 U.S. 63, 72 (2010).

15 *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1108–09 (Cal. 2005).

16 *See id.*

AT&T Mobility LLC v. Concepcion[17] and *American Express v. Italian Colors Restaurant* (*Italian Colors*)[18] the Court made class arbitration waivers bulletproof, placing the onus on customers to initiate their own arbitrations rather than ride the wake of class proceedings.[19]

The cases from the first paragraph of this Article illustrate the profound impact of the Court's recent FAA jurisprudence. In *Feeney*, the Massachusetts Supreme Judicial Court held that *Concepcion* and *Italian Colors* required each plaintiff to pursue their small-dollar lawsuits in individual arbitration.[20] The state high court speculated that few customers would do so, and called this result "untenable," but felt bound to obey "a controlling statement of Federal law."[21]

Similarly, in *Dean*, the plaintiff urged a district judge in Tennessee to exempt her and the other former students from arbitration because they were "buried in debt" and could not afford to pay the arbitrator's fees.[22] Yet the defendant's arbitration clause stated that its "scope or enforceability . . . shall be determined by the arbitrator, and not by a court."[23] The judge reasoned that, as paradoxical as it sounds, under *Rent-A-Center*, the issue of whether the plaintiffs should be arbitrating was for the arbitrator to decide.[24] The court sent the matter to the private tribunal, but not before flying a red flag of protest:

> [T]his holding present[s] a serious fairness issue . . . . [T]he court is concerned that one or more of the named plaintiffs in this action will not be able to afford the out-of-pocket costs to arbitrate, even under conservative cost assumptions. Indeed, several of the plaintiffs have represented that they have no income and no unencumbered assets whatsoever . . . . While required by the FAA, this result strikes the court as manifestly unjust and, perhaps, deserving of legislative attention.[25]

However, the Mississippi district court in *Hawkins* had no such misgivings. The plaintiff asserted that she could not be forced to arbitrate her tort claim because she had closed her account at the bank where she fell three years before the incident.[26] She contended that there was no contract—and therefore no agreement to arbitrate—between her and the institution.[27] The court held that this argument was irrelevant because the plaintiff's original deposit agreement provided that "[a]ny dispute regarding whether a particular controversy is subject

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17 131 S. Ct. 1740 (2011).

18 133 S. Ct. 2304 (2013).

19 *See id.* at 2312; *Concepcion*, 131 S.Ct. at 1753.

20 *See* Feeney v. Dell Inc., 993 N.E.2d 329, 331 (Mass. 2013).

21 *Id.*

22 *See* Dean v. Draughons Junior Coll., Inc., No. 3:12-CV-0157, 2012 WL 3308370, at *7 (M.D. Tenn. Aug. 13, 2012).

23 *See id.* at *1.

24 *See* Dean v. Draughons Junior Coll., Inc., 917 F. Supp. 2d 751, 758 (M.D. Tenn. 2013).

25 *Id.* at 765.

26 Hawkins v. Region's, 944 F. Supp. 2d 528, 530 (N.D. Miss. 2013).

27 *See id.*

to arbitration . . . shall be decided by the arbitrator(s)."[28] The court sent the dispute to arbitration and defended this result:

> The Supreme Court's decision[s] . . . might be regarded by some as creating a legal 'black hole' which inevitably sucks in disputes and sends them to arbitration . . . . [However,] while many plaintiffs seem to regard arbitration as the place where 'lawsuits go to die,' at least one empirical study of consumer arbitrations conducted by the American Arbitration Association found, among other things, that [c]onsumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255.[29]

These opinions reveal that the Court's reading of the FAA inspires strong, divergent reactions. But they also highlight a flaw in the fabric of this debate. Both critics and proponents of the Court have only the dimmest sense of what actually happens in the extrajudicial forum. Are the many commentators who have condemned *Concepcion* and *Italian Colors* correct that class arbitration waivers "deny a willing plaintiff any and all practical means of pursuing a claim"?[30] Or is individual arbitration superior to the class action because it is faster, cheaper, and allows consumers to act pro se?[31] Is the expansion of arbitral sovereignty in *Rent-A-Center* unwise because arbitrators favor repeat players?[32] Or do private judges resolve cases in a "completely fair and impartial manner"?[33] These are empirical questions about a system that does not lend itself to empirical inquiry.[34] For

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28 *See id.*

29 *Id.* at 531–52 (internal quotation marks omitted).

30 Feeney v. Dell Inc., 989 N.E.2d 439, 454 (Mass. 2013); *see also* James Dawson, Comment, *Contract After* Concepcion: *Some Lessons from the State Courts*, 124 YALE L.J. 233, 247 (2014); J. Maria Glover, *Disappearing Claims and the Erosion of Public Law*, 125 YALE LJ. (forthcoming 2015), at http://papers.ssrn.com/sol3/papers.cfm?abstract*f*id=2534481; Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011).

31 *See* Press Release, U.S. Chamber of Commerce, U.S. Chamber Commends Supreme Court for Preserving Availability of Arbitration to Consumers and Businesses (June 19, 2013), https://www.uschamber.com/press-release/us-chamber-commends-supreme-court-preserving-availability-arbitration-consumers-and.

32 *See, e.g.*, David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 248 (2012) (arguing that "arbitration as a structural matter creates financial incentives to decide questions of arbitrator jurisdiction ('who decides') and even merits issues favorably toward those who pay them"); *cf.* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 329 (2013) (asserting that repeat playing firms "have a built-in adjudicatory and tactical advantage in arbitration," including "the possibility of favoritism").

33 Hawkins v. Region's, 944 F. Supp. 2d 528, 532 (N.D. Miss. 2013).

34 *See, e.g.*, Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen*,* Rent-A-Center*,* Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 422 (2011) (noting that it is notoriously difficult to "obtain[] sufficient reliable data on largely private arbitration processes"). The dearth of data about arbitration has long been a major impediment to crafting sound policy. *See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283 (2009) ("Ten years of empirical research into the fairness of mandatory arbitration have produced only a handful of empirical studies, and these have told us very little."); David Sherwyn et. al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*,

example, the paper that *Hawkins* cites for the proposition that consumer plaintiffs hold their own in arbitration—a 2009 publication by the Searle Civil Justice Institute at Northwestern University School of Law (Searle Report)[35]—predates *Rent-A-Center*, *Concepcion*, and *Italian Colors*.[36] Even the Consumer Financial Protection Bureau's Arbitration Study (CFPB Study)—released as this Article was being edited—only analyzes arbitral awards from 2010 and 2011 in the financial service industry, and thus does not capture the full impact of the Court's game-changing decisions.[37]

This Article shines fresh light on these issues by analyzing 4839 cases filed by consumers with the American Arbitration Association (AAA) between July 2009 and December 2013. We reach three main conclusions. First, the eclipse of the consumer class action has affected the nature and volume of filings within the arbitral forum. After *Concepcion*, some plaintiffs' lawyers, who we call "arbitration entrepreneurs,"[38] have tried to overcome their inability to aggregate disputes by bringing scores of discrete proceedings against the same company. Nevertheless, they have been unable to prosecute enough matters to replicate the deterrent or compensatory functions of the traditional class action.

Second, we discover that consumers "win"—defined as recovering $1 or more—491 of the 1,407 arbitral awards (35%). Admittedly, fully-arbitrated cases, like those that progress all the way to a judgment in court, may not be

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57 STAN. L. REV. 1557, 1559 (2005) (observing that both "critics and advocates" of arbitration "level[ ] assertions that [a]re generally devoid of empirical support").

35 *See* SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION: BEFORE THE AMERICAN ARBITRATION ASSOCIATION (2009) [hereinafter SEARLE REPORT]. Conversely, employment arbitration has received much more attention from empiricists. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997) [hereinafter Bingham, *Repeat Player Effect*]; Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) [hereinafter Bingham, *Statistics*]; Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011); 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 (2003).

36 *See* Hawkins v. Region's, 944 F. Supp. 2d 528, 532 (N.D. Miss. 2013).

37 *See* CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY § 5.6 (2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter CFPB STUDY]. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 tasks the CFPB with investigating and then possibly regulating arbitration clauses in the financial services industry. *See* Pub. L. No. 111-203, § 1028, 124 Stat. 1376 (codified at 12 U.S.C. §5518(a) (2012)). In December 2013, the CFPB released an initial report that focused largely on the prevalence of arbitration clauses in the regulated industries. *See* CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS (2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (last accessed Mar. 1, 2015). The March 2015 Arbitration Study builds on this preliminary study. *See* CFPB STUDY, *supra*.

38 *Cf.* Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in A Post-Class Action Era*, 63 DEPAUL L. REV. 447, 456 (2014) (using "arbitration entrepreneurs" to describe "lawyers or non-lawyers [who] buy[] up legally identical, potentially valuable individual claims that are subject to arbitration"). We use this phrase more broadly to mean plaintiffs' lawyers who have tried to pursue numerous arbitrations against single defendants. *See infra* Part II.B.1.

representative of all disputes.[39] Thus, it would be unwise to use win rates as the springboard for bold policy prescriptions. Nevertheless, it is sobering that the consumers in our data prevailed less often than those in previous studies of AAA records.[40] Even more disturbingly, due mainly to arbitrators' fees, 39% of individuals who prosecute their cases to the award stage lose money.

Third, we show that repeat player issues have acquired new urgency since the consumer arbitration revolution. Arbitral bias has become more important after *Rent-A-Center* opened the door for arbitrators to determine whether an arbitration clause is unconscionable. After all, if private judges skew their rulings to serve their pecuniary needs, then it would be perverse to allow them to decide whether the arbitral process is fair. But less intuitively, we show that *Concepcion* has also raised the stakes in the repeat player debate. Companies that once faced a single lawsuit brought by thousands of customers now find themselves embroiled in dozens of bilateral arbitrations. As a result, the Court's class arbitration opinions have bred a cadre of "high level" and "super" repeat playing defendants (collectively "extreme" repeat players).[41] Our multivariate regression analyses demonstrate that these elite corporations outperform their one-shot counterparts on win rates and damage payments. Thus, to the extent that extreme repeat players owe their success to experience within the extrajudicial tribunal, *Concepcion* is more pernicious than believed: not only does it shield big companies from class action liability, but it allows them to dominate individual cases as well.

The Article contains three Parts. Part I sets the stage by describing how arbitration has displaced litigation as the primary method by which consumers resolve disputes against companies. It reveals that this massive shift has occurred even though courts, lawmakers, and scholars know very little about what transpires in the extrajudicial forum. Part II lays out our research methodology and offers descriptive statistics about win rates, damages, and arbitral costs. It then presents striking evidence that high level and super repeat players are harder to beat and pay less in damages than one-shot firms. Part III sifts through potential explanations for our findings and discusses their normative significance.

I. THE EVOLUTION OF CONSUMER ARBITRATION

This Part traces the history of consumer arbitration. It shows that private dispute resolution was once seen as less hospitable to plaintiffs than the judicial system. It then explains how the Court has gone to great lengths to abolish that perspective. Finally, it demonstrates that the paucity of evidence about arbitration has made it difficult to assess these competing views.

A. *From Rough Justice to Litigation's Peer*

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39 *See, e.g.,* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4-5 (1984) (arguing that civil trial verdicts are a unique subsample of all cases).

40 *See infra* Part II.B.2

41 For definitions of these classes of defendants, see *infra* Part II.B.5.2.b.

Suspicion of arbitration was deeply ingrained in the common law. Under the ouster doctrine, courts invalidated agreements to arbitrate future controversies as improper attempts to override their jurisdiction.[42] Similarly, under the rule of revocability, parties could retract their assent to arbitrate at any time before the arbitrator issued an award.[43] As Justice Story explained in 1845, these principles reflected the fear that extrajudicial tribunals were "instrument[s] of injustice" that would "deprive parties of rights."[44]

Nevertheless, in 1925, after intense lobbying by business interests and the American Bar Association, Congress passed the FAA.[45] For our purposes, the statute contains two critical components. First, section 2 declares that written arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[46] This passage makes arbitration agreements specifically enforceable unless they violate traditional contract rules, such as fraud, duress, or unconscionability. By giving arbitration clauses the same dignity as other terms, lawmakers sought to stamp out "anachronis[tic]" anti-arbitration measures like the ouster and revocability doctrines, which stemmed from "the jealousy of the English courts for their own jurisdiction."[47] Second, after the arbitrator rules on the merits of a case, section 10 permits a party to return to court and overturn the award by proving that "there was evident partiality or corruption in the arbitrators."[48]

Although the FAA gave arbitration a foothold, it did not eliminate distrust of the practice. In the decades after Congress passed the statute, state legislatures sometimes declared that certain causes of action—often those designed to protect consumers, franchisees, or employees—were not arbitrable.[49] Similarly, judges refused to compel arbitration of federal statutory claims, reasoning that these important matters did not belong in a venue that features narrow appellate review and idiosyncratic procedural and evidentiary standards.[50] The specter of arbitral

42 *See, e.g.*, Kill v. Hollister, (1746) 95 Eng. Rep. 532 (K.B.) 532 (opining that "the agreement of the parties cannot oust this [c]ourt").

43 *See, e.g.*, Vynior's Case, (1609) 77 Eng. Rep. 595 (K.B.) 597 (declining to specifically enforce arbitration clause in light of one party's ex post objection).

44 Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845).

45 Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)); *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 84–91 (1992) (discussing the lobbying efforts that prompted Congress to pass the FAA).

46 9 U.S.C. § 2 (2012).

47 H.R. REP. NO. 68-96, at 1–2 (1924).

48 *Id.* § 10(a)(2).

49 *See, e.g.*, CAL. LAB. CODE § 229 (West 2014) ("Actions . . . for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."); WASH. REV. CODE ANN. § 48.18.200 (West 2014) (barring insurance contracts from "depriving the courts of this state of the jurisdiction of action against the insurer").

50 *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436 (1953) (exempting securities claims from arbitration, in part, because arbitral "award[s] may be made without explanation of their reasons and without a complete record of their proceedings"); Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (exempting patent claims from arbitration because "the expertise of arbitrators has always lain in resolving . . . contractual disputes rather than in interpreting the import of complicated federal legislation").

bias also hung over these policy choices. As the Second Circuit explained while exempting Sherman Act claims from arbitration, "the business community . . . is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues."[51] Even the Court opined that arbitration "cannot provide an adequate substitute for a judicial trial,"[52] explaining that "the record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and . . . discovery, compulsory process, cross-examination, and testimony under oath[] are often severely limited or unavailable."[53]

But during the second half of the twentieth century, there were also glimmers of a sunnier view of arbitration. One of the clearest signals that the Court was starting to place more faith in extrajudicial tribunals came in 1967, when it decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[54] Prima Paint and Flood & Conklin signed a consulting agreement that contained a broad arbitration clause that covered "[a]ny controversy or claim arising out of or relating to this [a]greement."[55] Prima Paint then learned that Flood & Conklin was teetering on the edge of bankruptcy, and filed a lawsuit seeking to invalidate the consulting agreement on the grounds of fraud.[56] The issue before the Court was not the merits of Prima Paint's fraud allegation, but the threshold question of whether a judge or an arbitrator should preside over that claim. This created a nasty conundrum. On the one hand, the validity of the consulting agreement was a "controversy or claim" within the meaning of the arbitration clause, and thus seemed to belong in arbitration. On the other hand, it seemed bizarre to send Prima Paint's case to that forum given the risk that the arbitrator might strike down the very contract that served as the wellspring of her authority.

The Court solved this puzzle by creating the separability doctrine, which deems arbitration clauses to be distinct "from the contracts in which they are embedded."[57] Separability is a legal fiction that treats every agreement that includes an arbitration provision as two agreements: (1) the larger "container" contract and (2) the arbitration clause, which is its own independent contract.[58] Seen this way, it is only when a party assails the arbitration provision itself—and not the overarching container contract—that courts settle the matter.[59] Conversely, if a litigant merely argues that the container contract is void, the arbitrator entertains the case.[60] In turn, because arbitration clauses stand alone, arbitrators are free to rule that the container contract is unenforceable without

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51 Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968).

52 McDonald v. City of West Branch, 466 U.S. 284, 292 (1984).

53 Alexander v. Gardner-Denver Co., 415 U.S. 36, 57–58 (1974).

54 388 U.S. 395 (1967).

55 *Id.* at 398.

56 *See id.*

57 *See id.* at 402–04.

58 *See id.*

59 *See id.* at 403–04.

60 *See id.* at 404 ("[T]he statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

undercutting their own jurisdiction. Under this rubric, Prima Paint's fraud claim targeted the container contract; thus, the Court compelled arbitration.[61]

Separability was instantly controversial. Justice Black's vigorous dissent highlighted the perversity of allowing arbitrators to resolve matters in which they had a financial interest:

> The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation.[62]

Although scholars would echo these concerns,[63] separability became a fixture in federal arbitration law, widening the domain of arbitrators.[64]

Then, in the 1980s, the Court kicked its expansion of the FAA into high gear. In *Southland v. Keating*, Chief Justice Burger held that the statute—long regarded as a procedural rule for federal courts[65]—binds state tribunals too and preempts California legislation that excludes franchise cases from arbitration.[66] Chief Justice Burger reasoned that the text of section 2 only permits states to invalidate agreements to arbitrate under "grounds . . . for the revocation of *any* contract," and the California statute was not a generally applicable contract rule.[67] The Court soon clarified that the FAA serves as an equal protection clause for arbitration: it forbids states from reviving the ouster and revocability doctrines by "singling out arbitration provisions for suspect status"[68] or "rely[ing] on the

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61 *See id.* at 406–07.

62 *See id.* at 416 (Black, J., dissenting).

63 *See, e.g.*, Richard C. Reuben, First Options*, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819 (2003); Stephen J. Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107 (2007).

64 *See, e.g.*, Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 29–30 (2003) (partially defending the doctrine as a majoritarian default rule).

65 The FAA's legislative history declares that it "relate[s] to the procedure in the [f]ederal courts" and "is no infringement upon the right of each [s]tate." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924); *see also* H.R. REP. NO. 68-96, at 1 (1924) ("The bill declares that [arbitration] agreements shall be recognized and enforced *by the courts of the United States*.") (emphasis added).

66 *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). Many Justices and scholars have criticized *Southland*. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting) ("*Southland* clearly misconstrued the Federal Arbitration Act."); *id.* at 286 (Thomas, J., dissenting) ("The statute that Congress enacted actually applies only in federal courts."); *Southland*, 465 U.S. at 22–23 (O'Connor, J., dissenting) ("Congress intended to require federal, not state, courts to respect arbitration agreements."); MACNEIL, *supra* note 45, at 83–147 (critiquing *Southland* extensively); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 23–26 (2004) (same).

67 *See Southland*, 465 U.S. at 16 n.11 (emphasis added).

68 Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

uniqueness of an agreement to arbitrate" to hold "that enforcement would be unconscionable."[69]

Similarly, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court overruled the line of cases that had excluded federal statutory claims from arbitration.[70] The Court explained that because arbitration had matured, it would not "presum[e] that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."[71] In a passage that the Court would repeat a half-dozen times over the course of the next three decades, it explained that the switch from litigation to arbitration did not affect the outcome of a dispute:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[72]

Thus, the Court swung from one extreme to the other. Private tribunals were no longer a cartoonish approximation of the judicial system; rather, they were equal to—in fact, arguably better than—the public model.

As firms rushed to place mandatory arbitration clauses in their standard form contracts,[73] fine print became a divisive issue. Some Justices, the defense bar, and right-leaning commentators took the position that arbitration was good for consumers because it was faster, cheaper, and less intimidating than the court system.[74] Yet other judges, consumer advocates, plaintiffs' lawyers, and liberal scholars posited that the opposite is true—that arbitration's limited discovery, loose evidentiary rules, narrow appellate review, and lack of reasoned awards tilted the scales of justice toward businesses.[75]

Several of these critics also drew on Marc Galanter's canonical article, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*.[76] Galanter famously divided participants in the legal system into repeat players, who are

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69 Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

70 473 U.S. 614, 640 (1985).

71 *Id.* at 634.

72 *Id.* at 628; *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 266 (2009); Preston v. Ferrer, 552 U.S. 346, 359 (2008); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 229–30 (1987).

73 *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623–24 (2010).

74 *See, e.g.*, Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 280 (1995) ("Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.").

75 *See, e.g.*, Carrington & Haagen, *supra* note 11, at 346–47; Schwartz, *supra* note 11, at 60–61; Sternlight, *supra* note 11, at 680–86.

76 Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

regularly embroiled in litigation, and one-shotters, who are not.[77] Galanter outlined a variety of ways in which repeat players could capitalize on their experience to gain the upper hand over one-shotters, such as stockpiling information, making short-term sacrifices for long-term gains, and cultivating relationships within institutions.[78] In the late 1990s, several influential law review articles asserted that Galanter's theory fit mandatory arbitration like a glove.[79] After all, private judges, unlike their public counterparts, are paid by the hour.[80] In addition, litigants cannot handpick a specific decision maker to resolve their case, but parties in arbitration can. Accordingly, as David Schwartz observed, "arbitrators have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a 'track record' of decisions that corporate repeat-users will view approvingly."[81] Likewise, Jean Sternlight noted that "[a]n arbitrator who issues a large punitive damages award against a company may not get chosen again by that company or others who hear of the award."[82] Moreover, these scholars argued that repeat players could come out ahead even if arbitrators took pains to remain even-handed.[83] If nothing else, firms that arbitrated regularly could compile data on particular decision makers' predilections, while one-shot plaintiffs and their lawyers could not.[84]

But for several reasons, the repeat player critique failed to sway courts. For one, concerns about systemic prejudice do not fit gracefully within the doctrinal framework of federal arbitration law. As noted, section 10 of the FAA allows courts to vacate awards "where there was evident partiality or corruption in the arbitrators."[85] Yet because of the overwhelming interest in the finality of dispute resolution, judges reserve this rule for unusual situations. Indeed, "bias that might disqualify a judge will not disqualify an arbitrator."[86] Thus, courts have overturned awards when an arbitrator failed to disclose that he was the son of the vice president of the union involved in the dispute,[87] or that he had received a handsome consulting fee from one of the parties.[88] Compared to these concrete

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77 *See id.* at 97.

78 *See id.* at 98–101.

79 *See, e.g.*, Carrington & Haagen, *supra* note 11, at 346–47; Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 32–34 (1999); Schwartz, *supra* note 11, at 60–61; Sternlight, *supra* note 11, at 680–86.

80 *See, e.g.*, Schwartz, *supra* note 11, at 50–51.

81 *Id.* at 60–61.

82 Sternlight, *supra* note 11, at 685; *cf.* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 33 (1998) (noting that in employment arbitration, a company "is likely to be a repeat player, with the opportunity to reject arbitrators whose previous rulings displeased it").

83 *See* Sternlight, *supra* note 11, at 685-86.

84 *See* Schwartz, *supra* note 11, at 61; Sternlight, *supra* note 11, at 685-86 (noting that "[r]epeat-player companies can gain . . . information through private channels").

85 9 U.S.C. § 10(2) (2012)

86 Florasynth, Inc. v. Pickholz, 750 F.2d 171, 174 (2d Cir. 1984); *see, e.g.*, Lagstein v. Certain Underwriters at Lloyd's London, 607 F.3d 634, 645–46 (9th Cir. 2010).

87 *See* Morelite Constr. Corp. (Div. of Morelite Elec. Serv.) v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).]

88 *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 146–47 (1968).

and fact-specific showings, bald speculation about an arbitrator's motives rang hollow.

In addition, other forms of regulation seemed to minimize the repeat player problem. Even under *Prima Paint*, judges can exercise their prerogative under section 2 to nullify the arbitration clause itself under the contract defense of unconscionability.[89] Thus, courts struck down terms that gave the firm "the unilateral right to choose an arbitrator."[90] This check against egregious system rigging made arbitral neutrality seem like a less pressing problem. Similarly, providers such as the AAA and JAMS adopted Due Process Protocols: internal standards that require arbitrators to divulge "any past or present relationship or experience with the parties or their representatives," and to give consumers an equal voice in the selection of the decision maker.[91] These protections spurred the D.C. Circuit to declare in 1997 that "[c]orrupt arbitrators will not survive long in the business,"[92] and other jurisdictions to reject assertions that "the 'repeat player effect' is enough to render an arbitration agreement unconscionable."[93]

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89 *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967) (reasoning that if a claim pertains to "the arbitration clause itself . . . the federal court may proceed to adjudicate it").

90 Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 726–27 (N.D. Cal. 2012); *see also* Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So. 2d 779, 784 (Ala. 2002) ("Our research has not disclosed a single case upholding a provision in an arbitration agreement in which appointment of the arbitrator is within the exclusive control of one of the parties."); Bd. of Educ. of Berkeley Cnty. v. W. Harley Miller, Inc., 236 S.E.2d 439 (W. Va. 1977) ("this [c]ourt would not countenance an arbitration provision by which the parties agree that all disputes will be arbitrated by a panel chosen exclusively by one of the parties"); *cf.* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–41 (4th Cir. 1999) (holding that employer materially breached its duty to promulgate arbitral rules by taking steps to "ensure a biased decisionmaker").

91 AM. ARBITRATION ASSC'N, CONSUMER DUE PROCESS PROTOCOL 3.4, 3.5 (1998), *available at* https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [hereinafter AAA Due Process Protocol]; JAMS, JAMS CONSUMER ARBITRATION MINIMUM STANDARDS 2 (2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009 ("The arbitrator(s) must be neutral and the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s)."); *see also* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 292 (2012).

92 Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997).

93 Mercuro v. Superior Court, 16 Cal. Rptr. 2d 671 (Ct. App. 2002); *see also* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1285 (9th Cir. 2006) (en banc) ("[M]erely raising the 'repeat player effect' claim, without presenting more particularized evidence demonstrating impartiality, is insufficient under California law to support an unconscionability finding."); Pan Am Flight 73 Liaison Grp. v. Davé, 711 F. Supp. 2d 13, 26 (D.D.C. 2010) (dismissing the argument that "arbitrators will rule consistently in favor of [one party], as it will be the source of future business"); Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1181 (W.D. Wash. 2002) ("[E]xpressly reject[ing]" the claim that "corporations utilizing the arbitration process might enjoy an unfair advantage over consumers because arbitrators may be wary of 'biting the hand that feeds them.'"). This is not to say that the repeat player theory completely failed to shape the law. Some courts struck down confidentiality provisions in arbitration clauses, reasoning that they allowed "repeat participant" companies to compile information about the arbitral process, while denying customers the same courtesy. *See* Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 578–79 (Ky. 2012); *see also* Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) ("[I]f the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player.").

Thus, by the dawn of the new millennium, arbitration had moved out of the peripheries and into the center of the civil justice landscape. Judges, scholars, and interest groups were deeply divided about whether this was a positive development. However, as we discuss next, the Court would soon decide a series of far-reaching cases that would widen this rift.

B. *The Consumer Arbitration Revolution*

By the early 2000s, an equilibrium had developed in the arbitration war. Although firms often tested the boundaries of their ability to create a parallel procedural universe for consumer cases, courts pushed back by finding unfair arbitration terms to be unconscionable.[94] Similarly, when a plaintiff asserted federal statutory claims, courts nullified one-sided provisions under a federal common law analogue known as the vindication of rights doctrine.[95] Invoking these rules, courts invalidated clauses that slashed discovery,[96] or prohibited punitive damages,[97] or saddled consumers with excessive costs.[98]

Frustrated with this degree of judicial regulation, companies began trying to insulate their dispute resolution regimes from courts with "delegation clauses": provisions that empower the arbitrator to resolve disputes about the scope or validity of the arbitration clause itself. When these provisions began to appear in adhesion contracts, courts first gave them the cold shoulder. Although judges had previously held that the mere possibility of repeat player bias was insufficient to exempt claims from arbitration,[99] here the calculus changed. As one California appellate panel noted while refusing to honor a delegation clause in an employment contract, allowing the arbitrator to decide whether the arbitration clause was unconscionable would invite trouble:

> [When] one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable . . . . Indeed, an arbitrator who finds an arbitration agreement unconscionable would not only have nothing further to arbitrate, but could also reasonably expect to obtain less business in the future, at least from the provider in question.[100]

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[94] *See, e.g.*, *Nagrampa*, 469 F.3d at 1285.

[95] *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669 (6th Cir. 2003) (en banc).

[96] *See, e.g.*, Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 786–87 (9th Cir. 2002) (holding that arbitration clause improperly limited "deposition[s] of a corporate representative . . . to no more than four designated subjects").

[97] *See, e.g.*, Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 671 (S.C. 2007) (striking down a "provision prohibiting double and treble damages").

[98] *See, e.g.*, Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267, 277 (Ct. App. 2003) ("[W]here a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay.").

[99] *See supra* note 97.

[100] Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 480–82 (Ct. App. 2008); *see also* Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 15 (1st Cir. 2009) (holding that courts should conduct a preliminary examination of whether the "arbitration regime . . . is structured so as to prevent a litigant from having access to the arbitrator to resolve claims").

Nevertheless, in 2010, the Court offered a fundamentally different perspective on delegation clauses in *Rent-A-Center, West, Inc. v. Jackson*.[101] Rent-A-Center makes its workers sign an arbitration agreement that gives the arbitrator the "exclusive authority to resolve . . . any claim that all or any part of this [a]greement is void or voidable."[102] Antonio Jackson, a former employee, sued the company for race discrimination, and argued that the arbitration clause was unconscionable because it limited discovery and saddled him with paying half of the arbitrator's fees.[103] In response, Rent-A-Center asked a federal court to honor the delegation clause, contending that its bare text was "crystalline" proof that the parties wished "to have enforceability issues decided by the arbitrator."[104]

In an opinion authored by Justice Scalia, the Court did more than simply agree with Rent-A-Center. Instead, the Court went out of its way to expand the separability doctrine. The Court reasoned that just as arbitration clauses are independent mini contracts within larger container contracts, delegation clauses are contracts within contracts within contracts: (1) an agreement to arbitrate the validity of the arbitration clause (2) within an agreement to arbitrate the merits of the parties' dispute (3) within the container agreement.[105] In turn, this "Russian nesting dolls" approach[106] triggered the separability rule. If Jackson could not avoid arbitration by challenging the container contract (rather than the arbitration clause), then he could also not escape arbitration by attacking the arbitration clause (instead of the delegation provision). To show why he should not be forced to "arbitrate threshold issues concerning the arbitration agreement,"[107] he needed to demonstrate that the delegation clause—the "*particular sentences*" that assign unconscionability claims to the arbitrator—were invalid.[108] Accordingly, Jackson's arguments in district court were arrows fired at the wrong target. He had only asserted that the one-sided arbitral provisions thwarted his civil rights lawsuit.[109] But he had not explained why these terms prevented him from arbitrating the more self-contained issue of whether the arbitration clause was unconscionable.[110] Thus, the Court held that he had waived the relevant issue and compelled arbitration.[111]

Rent-A-Center creates a straight-to-arbitration pipeline. To invalidate a delegation clause, a consumer must convince a judge of the mind-bending fact that it is unfair to arbitrate the issue of whether it is unfair to arbitrate the merits

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101 561 U.S. 63 (2010).

102 *Id.* at 66.

103 *See id.* at 65–66, 74.

104 Brief for the Petitioner at *12, Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010) (No. 09-497).

105 *See Rent-A-Center, W., Inc.*, 561 U.S. at 70–71.

106 *Id.* at 85 (Stevens, J., dissenting).

107 *Id.* at 68 (majority opinion).

108 *Id.* at 86 (Stevens, J., dissenting).

109 *See id.* at 72–75 (majority opinon).

110 *See id.* at 73 ("[N]one of Jackson's substantive unconscionability challenges was specific to the delegation provision.").

111 *See id.* at 74–76.

of a case. Only a few legal theories fit this logical straightjacket.[112] One is that the plaintiff cannot afford to pay the arbitrator to decide whether the arbitration clause is enforceable.[113] Another is that the arbitrator is unlikely to throw out a remunerative dispute before it begins. However, judges have been increasingly unreceptive to these arguments, refusing to give plaintiffs an opportunity to prove that arbitral fees prevent them from arbitrating their unconscionability challenges[114] and calling concerns about arbitrator bias "nothing more than an expression of a judicial hostility to arbitration."[115] As a result, arbitral autonomy has swollen to its greatest proportions yet.

Yet the hue and cry over *Rent-A-Center* was soon drowned out by an even more contentious issue. Around the same time that firms began to experiment with delegation clauses, they also ramped up their efforts to use arbitration as a buffer against class actions. In rising numbers, they laced their arbitration provisions with terms that deleted the right to join, consolidate, or aggregate claims.[116]

In *Discover Bank v. Superior Court*, the California Supreme Court held that a class arbitration waiver was unconscionable when applied to allegations that a credit card company had cheated each of its customers out of about $30.[117] The

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112 As Justice Scalia explained in *Rent-A-Center*, many common grounds for overturning arbitration clauses are impotent against delegation provisions:

> Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination.

Rent-A-Ctr., W., Inc., 561 U.S. at 74; *see also* Rai v. Ernst & Young, LLP, No. 09-13194, 2010 WL 3518056, at *5 (E.D. Mich. Sept. 8, 2010) ("*Rent-A-Center* makes it it significantly more difficult to challenge discovery restrictions and cost-splitting provisions as unconscionable."); Tiri v. Lucky Chances, Inc., 171 Cal. Rptr. 3d 621, 635 (Ct. App. 2014) (holding that the plaintiff failed to "demonstrate that the confidentiality clause *as applied to the delegation clause* renders *that* clause unconscionable by impeding her ability to arbitrate whether the arbitration agreement as a whole is unconscionable")

113 One might think that a drafter's choice of an inconvenient forum would also be a viable basis for challenging a delegation clause. After all, it would be impossible to obtain a ruling that the agreement to arbitrate the merits is unfair without enduring the cost and hassle of actually travelling to the distant venue. *See* David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 396 (2012). However, a burgeoning line of authority now holds that even in contracts *without* delegation clauses, "the validity of [a] forum selection clause is a procedural issue presumptively for the arbitrator to decide." Duran v. J. Hass Grp., L.L.C., 531 F. App'x 146, 147 (2d Cir. 2013); *see also* Weddle Enterprises, Inc. v. Treviicos-Soletanche, J.V., No. 1:14CV-00061-JHM, 2014 WL 5242904, at *4 (W.D. Ky. Oct. 15, 2014) (holding that the arbitrator should decide whether it is unreasonable to force a Kentucky company to arbitrate in Massachusetts).

114 *See* Dean v. Draughons Junior Coll., Inc., 917 F. Supp. 2d 751, 763 (M.D. Tenn. 2013).

115 Malone v. Superior Court, 173 Cal. Rptr. 3d 241, 255 (Ct. App. 2014).

116 *See, e.g.,* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?,* 42 WM. & MARY L. REV. 1, 6 (2000); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375–77 (2005).

117 113 P.3d 1100, 1108–09 (Cal. 2005).

state high court reasoned that because no single plaintiff will pursue such a minor grievance, the class arbitration waiver served as a "get out of jail free card" for corporate liability.[118] Soon many other jurisdictions adopted similar rules, striking down class arbitration waivers under the unconscionability defense[119] or the vindication of rights doctrine[120] where the cost of litigating a claim dwarfed any single plaintiff's potential damages.

But corporate counsel were not so easily dissuaded. If courts disliked the fact that class arbitration waivers deterred negative-value causes of action, then businesses could remedy this flaw themselves. Like legislatures, which prod plaintiffs to bring certain lawsuits by offering bounties such as treble damages,[121] companies amended their class arbitration waivers to encourage individual customers to arbitrate small-bore complaints. For example, Verizon Wireless promises to pay any consumer who wins an arbitral award that exceeds its settlement offer at least $5,000 and reimburse her attorneys' fees.[122] AT&T Mobility LLC pledges $10,000 and double attorneys' fees to any consumer who recovers more in bilateral arbitration than it offers to resolve the case.[123] When courts continued to annul these souped-up class arbitration waivers, firms protested that they were doing precisely what the FAA prohibits: "discriminating" against arbitration clauses by employing "a novel version of 'unconscionability' that bears little resemblance to the traditional, generally applicable doctrine."[124]

In April 2011, this gambit paid off, as the Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempts the *Discover Bank* rule.[125] Plaintiffs sued AT&T Mobility under a California consumer protection statute for levying a $30

118 *Id.* at 1108 (quoting Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002)).

119 *See*Homa v. Am. Express Co., 558 F.3d 225, 231 n.2, 233 (3d Cir. 2009); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218–19 (9th Cir. 2008); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (applying Georgia law); Cooper v. QC Fin. Servs., Inc., 503 F. Supp. 2d 1266, 1285–90 (D. Ariz. 2007); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 274–75 (Ill. 2006); Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 22–23 (Mo. 2010) (en banc); Fiser v. Dell Computer Corp., 188 P.3d 1215, 1221 (N.M. 2008); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 373 (N.C. 2008); Vasquez-Lopez v. Beneficial Or., Inc., 152 P.3d 940, 948–54 (Or. Ct. App. 2007); Thibodeau v. Comcast Corp., 912 A.2d 874, 884–86 (Pa. Super. Ct. 2006); Herron v. Century BMW, 693 S.E.2d 394, 399–400 (S.C. 2010); Scott v. Cingular Wireless, 161 P.3d 1000, 1007–08 (Wash. 2007) (en banc); Coady v. Cross Country Bank, Inc., 729 N.W.2d 732, 748–50 (Wis. Ct. App. 2007).

120 *See, e.g.*, *In re* Am. Express Merchs. Litig., 554 F.3d 300, 319 (2d Cir. 2009), *vacated*, 130 S.Ct. 2401 (2010); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007); Kristian v. Comcast Corp., 446 F.3d 25, 58 (1st Cir. 2006);.

121 *See, e.g.*, 15 U.S.C. § 15(a) (2012) (permitting successful antitrust plaintiffs to recover "threefold the damages by him sustained").

122 *Customer Agreement*, VERIZON WIRELESS, http://www.verizonwireless.com/customer-agreement.shtml (last visited Feb. 15, 2015).

123 *Wireless Customer Agreement*, AT&T, http://www.att.com/legal/terms.wirelessCustomerAgreement.html# (last visited May 20, 2015).

124 Brief of DRI - The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner, AT&T Mobility, LLC v. Concepcion, 131 S.Ct. 1740 (2010) (No. 09-893), 2010 WL 3183854, at *4.

125 131 S.Ct. 1740, 1753 (2011).

tax on supposedly free cell phones.[126] The district court and the Ninth Circuit refused to enforce the wireless giant's "consumer-friendly" class arbitration waiver, reasoning that few plaintiffs would spend the time and effort necessary to exploit its ostensible generosity.[127] The Supreme Court reversed, reasoning that class arbitration is slower and more formal than bilateral arbitration, and thus *Discover Bank*'s insistence that plaintiffs be able to aggregate numerous small-dollar claims violated the FAA's purpose of "facilitat[ing] streamlined proceedings."[128]

Two years later, the Court extended this logic in *American Express Co. v. Italian Colors Restaurant* (*Italian Colors*).[129] A class of merchants accused American Express of violating the Sherman and Clayton Acts.[130] They established that pursuing the case on a non-class basis would be economic suicide: the expert fees alone would be $1 million, but any individual plaintiff's potential recovery, even if trebled, was no greater than $40,000.[131] The Second Circuit struck down the class arbitration waiver, noting that the merchants had asserted federal statutory claims, and reasoning that *Concepcion* only governed the unconscionability defense (a state contract rule), not the vindication of rights doctrine (a creature of federal common law).[132] Again, however, the Supreme Court reversed.[133] The Court explained that "our decision in [*Concepcion*] all but resolves this case . . . . [by] specifically reject[ing] the argument that class arbitration [i]s necessary to prosecute claims 'that might otherwise slip through the legal system.'"[134]

This new chapter in the Court's FAA jurisprudence has been polarizing. In amicus briefs and policy statements, big businesses, the U.S. Chamber of Commerce, the Heritage Foundation, and other right-leaning groups and commentators have defended *Concepcion and Italian Colors* as "pro-consumer."[135] This constituency contends that plaintiffs are better off initiating their own arbitrations rather than riding the plodding dinosaur of the class action:

> A consumer who was able to successfully resolve a dispute in a few months and with minimal expense would likely prefer arbitration (even pre-dispute mandatory arbitration) to a class action in which, after years of litigation, he or she receives a $5 check or a coupon towards a future purchase while the attorneys for the class obtain millions in 'class counsel' fees.[136]

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126 *See id.* at 1744.

127 *See* Laster v. T-Mobile USA, Inc., No. 05CV1167DMS (AJB), 2008 WL 5216255, at *13 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT & T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).

128 *See Concepcion*, 131 S.Ct. at 1748.

129 133 S.Ct. 2304 (2013).

130 *In re* Am. Express Merchs. Litig., 554 F.3d 300, 317 (2d Cir. 2009).

131 *See id.*

132 *Id. at* 315–16, 321.

133 *Italian Colors*, 133 S.Ct. at 2312.

134 *Id.*

135 *See, e.g.*, TED FRANK, MANHATTAN INSTIT., LEGAL POLICY REPORT: CLASS ACTIONS, ARBITRATION, AND CONSUMER RIGHTS: WHY CONCEPCION IS A PRO-CONSUMER DECISION, (Feb. 2013), *available at* http://www.manhattan-institute.org/html/lpr_16.htm#.VOZvjPnF-So.

136 Alan S. Kaplinsky & Mark J. Levin, *Some Thoughts on the St. John's School of Law's Analysis of Consumer Understanding of Arbitration Agreements*, CFPB MONITOR (Nov. 10, 2014),

Moreover, these voices argue, forcing class arbitration down business' throats will hurt customers in the long run. Regimes like *Discover Bank* will cause firms to abandon arbitration; in turn, the loss of this speedy and inexpensive forum will "make it very difficult for individuals to recover for many claims, particularly those that are relatively small . . . ."[137]

But most legal academics see this as magical thinking. They counter that arbitration's virtues are irrelevant, because few consumers have the ability to pursue low-value disputes. Indeed, to obtain relief, customers must endure "missed work time, travel time, and the very limited potential reward for the effort spent."[138] In turn, by discouraging claiming, the Court has not only stripped plaintiffs of rights, but also cleared the way for corporate lawlessness.[139]

Ultimately, though, both sides in this debate are hamstrung by the same defect: they have little insight into the clandestine world of consumer arbitration.[140] Indeed, from the Court's cheery declaration that private dispute resolution does not affect rights to the jaundiced view that arbitrators are less trustworthy than judges, this discussion often boils down to competing empirical claims. But as we discuss next, there has never been much hard evidence about consumer arbitration.

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http://www.cfpbmonitor.com/2014/11/10/some-thoughts-on-the-st-johns-school-of-laws-analysis-of-consumer-understanding-of-arbitration-agreements/; *see also* Daniel Fischer, *General Mills Consumers Give Up Rights To What, Exactly?*, FORBES (Apr. 18, 2014, 11:18 AM), http://www.forbes.com/sites/danielfisher/2014/04/18/general-mills-consumers-give-up-rights-to-what-exactly (arguing that class actions permit "lawyers to assemble huge groups of consumers, typically without their knowledge or participation, into zombie armies that can compel companies into settling on lucrative terms"); Frank, *supra* note 135 (calling individual arbitration "superior in many cases to class actions for vindicating consumer rights").

137 Hans. A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, THE HERITAGE FOUND. (July 17, 2013), at http://www.heritage.org/research/reports/2013/07/the-unfair-attack-on-arbitration-harming-consumers-by-eliminating-a-proven-dispute-resolution-system; *see also* Brief of the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae in Support of Petitioners, American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (No. 12-133), 2012 WL 6759408, at *27-31 [hereinafter Chamber of Commerce Brief] ("If consumers, employees, and small businesses with small individualized claims do not have access to simplified, low-cost arbitration and are forced into court, they will be priced out of the judicial system entirely.")

138 John Campbell, *Mis-Concepcion Why Cognitive Science Proves the Emperors Have No Robes*, 79 BROOK. L. REV. 107, 143 (2013); *see also* Peter Danysh, Comment, *Employing the Right Test: The Importance of Restricting* AT&T v. Concepcion *to Consumer Adhesion Contracts*, 50 HOUS. L. REV. 1433, 1450 (2013) ("[I]ndividual arbitration is not always practical for . . . . consumers with small value claims.").

139 *See, e.g.,* Resnik, *supra* note 30, at 128; *see also* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 727 (2012) ("*Concepcion* has caused a tsunami wave that is threatening to eliminate many consumers' and employees' abilities to enforce their substantive rights by participating in class actions").

140 As this article entered the editing stage, we became aware of one possible exception. In a forthcoming article, Judith Resnik uses data about filing levels in the AAA to conclude that "virtually no consumers or employees 'do' arbitration at all." *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 125 YALE L.J. (forthcoming 2015) (manuscript at p. 23, on file with authors).

C. *Data on Consumer Arbitration*

There have been just four prominent studies of consumer arbitration records. First, the California Dispute Resolution Institute (CDRI) surveyed 2,175 cases decided in 2003.[141] Second, Ernst & Young (E&Y) analyzed 226 filings against lenders between 2000 and 2004 in the National Arbitral Forum (NAF).[142] Third, the Searle Report reviewed 301 AAA matters that ended in an award between April and December 2007.[143] Fourth, and most recently, the CFPB examined 1,847 AAA disputes involving financial services companies between 2010 and 2012.[144]

This section summarizes these glimpses inside the black box of the arbitral forum. It first lays out the methodological challenges that commonly arise in this research. It then relays what this research tells us about outcomes, case length, informal procedures, arbitral costs, and repeat players.

1. Methodological Issues

Studies of consumer arbitration awards are important but challenging to execute well. At first blush, win rates and damage recoveries may seem like good bellwethers of whether the process is fair. Yet for several reasons, it is difficult to draw meaningful inferences from these statistics.

First, to truly assess arbitration, one must be able to contrast its output with results in litigation. Unfortunately, though, there is little data on civil verdicts—let alone consumer cases specifically.[145] Accordingly, even reliable surveys of arbitral awards provide a numerator without a denominator.

Second, gauging claimant success in arbitration raises slippery definitional issues. Most researchers deem any plaintiff who obtains $1 or more in damages to have "prevailed."[146] However, this approach is underinclusive because it ignores the possibility that arbitrators willaward equitable relief, rather than cash. It is also overinclusive in the sense that it counts recoveries of nominal damages or pennies on the dollar as plaintiff "victories."

Third, disputes that are arbitrated differ from those that end up in the judicial system. For instance, an oft-voiced critique of mandatory arbitration is that it

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141 CAL. DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA 5 (2004) [hereinafter CDRI Study].

142 *See* ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES 2 (2005) [hereinafter E&Y STUDY]. The E&Y project was funded by the American Bankers' Association. *See id.* at 2.

143 *See* SEARLE REPORT, *supra* note 35, at 2, 67.

144 *See* CFPB STUDY, *supra* note 37, § 5.5.1, at 19.

145 For two partial exceptions, see generally U.S. DEP'T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001 (2004) (reporting the results of a study of about 12,000 tort, property, and contract cases decided in state court) [hereinafter CIVIL TRIALS, 2001]; U.S. DEP'T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2005 (2009) (updating the earlier study) [hereinafter CIVIL TRIALS, 2005].

146 *See, e.g.*, E&Y STUDY, *supra* note 149, at 9; Bingham, *Repeat Player Effect*, *supra* note 35, at 208; Colvin, *supra* note 35, at 5.

deters plaintiffs from even filing claims.[147] Perhaps, then, arbitrated cases tend to be stronger than litigated cases, because individuals with borderline causes of action are more easily discouraged than those with compelling stories or slam-dunk legal arguments. Or the opposite could be true: attorneys willing to pursue matters in the arbitral forum might be hungrier for business, leading to a parade of weaker claims. Either way, the streams diverge, complicating comparisons between them.

Fourth as George Priest and Benjamin Klein argued in a seminal article, one should hesitate to prescribe policy based on trial results.[148] Priest and Klein began with the premise that plaintiffs and defendants should be able to value—and thus resolve—most matters themselves.[149] As a result, only close cases, where the parties disagree about the potential outcome, will progress all the way to a judgment.[150] The observation that only tough cases will be fully litigated led Priest and Klein to predict that each side should prevail in roughly 50% trials.[151] In fact, they explained, this split-the-baby win rate should hold no matter the applicable legal standard.[152] Indeed, whether the governing rule or system is pro-plaintiff or pro-defendant, settlement will leave behind a narrow band of cases that could go either way.[153] Thus, because both parties will prevail about half the time, win rates may be less revealing than one might think.[154]

This is not to say that surveys of arbitral awards are meaningless. Even under the Priest and Klein theory, deviations from the 50% success rate are not only possible, but enlightening. For instance, a lopsided win ratio can indicate that the parties have asymmetrical stakes.[155] Suppose a defendant wishes to avoid negative publicity.[156] Its eagerness to settle would eliminate all but the weakest cases, driving down the number of plaintiff victories.[157] Similarly, a low plaintiff win rate could stem from an informational imbalance.[158] If defendants are better at forecasting outcomes, then they will rarely settle flimsy cases, and they will prevail more often.[159] In addition, win rates may be more probative in contexts where the black-letter law is unclear or the decision-maker is unpredictable—an

[147] *See, e.g.*, Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 133, 161 (2004).

[148] *See* Priest & Klein, *supra* note 39, at 14-15.

[149] *See id.* at 14-15.

[150] *See id.* at 15.

[151] *See id.* 15–17.

[152] *See id.* at 15–19.

[153] *See id.*

[154] *See id.* at 4–5.

[155] *See id.* at 24–25.

[156] *See id.* Of course, it is unclear that this rationale applies to the often-confidential arbitration process.

[157] *See id.*

[158] *See id.* at 19.

[159] *See id.*; *see also* Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 500 (1996) ("[T]he Priest-Klein assumptions rule out a situation where, for example, defendants have superior knowledge of trial outcomes.").

apt description of the Wild West of arbitration.[160] Introducing randomness into the equation makes it harder for the parties to predict the outcome and thus "means that any case might be litigated."[161] In turn, this opens the door for the percentage of plaintiff victories to "reflect[] not just the 50 percent probability that [they] will win close cases but also the full array of factors that influence plaintiff victories in other cases," including the calibration of the forum's procedural and evidentiary rules.[162]

For these reasons, studies of consumer arbitration awards are not referenda on whether arbitration favors plaintiffs or defendants. At the same time, they can provide vital clues about litigant behavior and dispute system design. With that in mind, we turn now to their results.

2. Outcomes

In 2004, the CDRI reviewed cases brought under the auspices of six arbitration providers, including the AAA and JAMS, during the previous year.[163] The CDRI concluded that consumers and employees had been victorious in 215 of the 303 matters (71%) that listed a "prevailing party."[164] Unfortunately, though, the CDRI did not specify how many of these disputes featured consumer or employee plaintiffs (as opposed to say, debt collection matters, where a consumer would likely be a defendant).[165] Also, a whopping 1,873 of the 2,175

160 *See, e.g.*, Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002) (claiming that arbitrators "neither follow the law, nor contribute to it"); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719 (1999) ("[A]rbitrators often do not apply the law."). Admittedly, there have been several thoughtful challenges to this conventional account. *See, e.g.*, Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 203 (2006) (examining a variety of sources and finding that "the evidence on whether arbitrators follow the law in their awards is inconclusive"); W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1139–40 (2012).

161 Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 212 (2014).

162 *Id.* There is also a risk that anecdotal and empirical evidence about arbitral awards can have a "hall of mirrors" effect, where the mere perception that plaintiffs struggle in the extrajudicial forum can dilute the value of their claims. As Alexander Colvin has observed, reports that arbitrators are stingier with remedies than juries or judges can embolden defendants during settlement negotiations:

To the degree that employers are motivated [to settle] by the likelihood of a relatively large damage award in a trial, this motivation will decrease with mandatory arbitration because those damage awards, for whatever reason, are much smaller. This may, in turn, significantly impact other resolution processes, particularly settlement . . . . If the mean damage award for cases proceeding to a hearing in mandatory arbitration is much lower than the mean damage award at trial, this will reduce employee bargaining power in settlement negotiations and be likely to produce lower settlement amounts, because the likely award, and thus the risk for employers, is not as great.

Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 81 (2014).

163 CDRI STUDY, *supra* note 148, at 14.

164 *Id.* at 25.

165 *See id.* at 21–25.

awards (86%) did not list a "prevailing party."[166] Finally, although the CDRI discovered an average award amount of $33,112, with a median of $7,615, this figure also included cases in which a business had recovered damages against a consumer or employee.[167] Thus, the CDRI candidly admitted that "inconsistencies [and] ambiguities . . . limit this study's utility for the purposes of informing policy."[168]

A year later, E&Y published a study of consumer filings against financial services companies in the NAF between 2000 and 2004.[169] E&Y noted that most plaintiffs sought relatively small amounts of damages: 73% asked for less than $15,000, 20% demanded between $15,001 and $75,000, and 7% requested $75,001 or more.[170] E&Y determined that consumers "won"—defined as recovering $1 or more—in fifty-three of the ninety-seven awards (55%).[171] Accordingly, E&Y cited the fact that "consumers are not losing a disproportionate number of cases" as proof that they "are [not] harmed by the arbitration process."[172]

In 2009, the Searle Report upped the ante by reviewing 301 AAA consumer cases that ended in an award in the last nine months of 2007.[173] Two hundred and forty such matters featured consumer plaintiffs.[174] In 128 of these (53%), consumers "won some relief."[175] The average damage award was $19,255, or 52% of the amount requested in the complaint.[176] In addition, the Searle Report discovered that consumers with large claims outpaced their counterparts. Specifically, twelve of the twenty consumers who demanded more than $75,000 prevailed (60%), compared to only 112 of 215 (52.1%) who sought less than that figure.[177]

Finally, in March 2015, the CFPB released its sprawling Arbitration Study.[178] The agency examined disputes on the AAA docket that arose from credit cards, checking accounts, prepaid cards, and auto, payday, and student loans.[179] It began with a general overview of all 1,847 matters involving financial services companies between January 1, 2010 and December 31, 2012.[180] It found that consumers brought 1,234 of these cases, businesses initiated 438, and 175 were coded as joint filings.[181] Consumer plaintiffs sought an average of about $25,000 in damages,

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166 *See id.* at 24.

167 *See id.* at 20.

168 *Id.* at 18.

169 *See* E&Y STUDY, *supra* note 149, at 2, 6.

170 *See id.* at 8–9.

171 *See id.* at 9.

172 *See id.* at 10.

173 *See* SEARLE REPORT, *supra* note 35, at 2.

174 *See id.* at 67.

175 *Id.*

176 *See id.* at 69. The median award was $5,000, or 42% of the demand. *See id.*

177 *See id.* at 68.

178 CFPB STUDY, *supra* note 37.

179 *See id.* § 5.4, at 17–18.

180 *See id.* § 1.3, at 7.

181 *See id.* § 5.5.1, at 19.

with a median of roughly $13,000.[182] Only seventy-four consumers requested $1,000 or less.[183]

The CFPB then focused on dispositions in the 1,060 matters that were filed in 2010 and 2011.[184] The CFPB found 341 awarded cases (32%).[185] However, the agency noted that it could not always determine the fate of other disputes, because files often ended abruptly without specifying whether the parties had reached an agreement or the plaintiff had simply abandoned the claim.[186] Ultimately, the CFPB confirmed that 246 cases settled (23%), 362 may have settled (34%), and 111 were probably withdrawn (11%).[187] The Bureau then turned its attention to awards, observing that consumer-plaintiff arbitrations fell into two broad camps: those that featured a challenge to an underlying debt and those that did not.[188] In debt-related matters, arbitrators awarded relief to seven of the sixty-six consumers (11%).[189] The average and median awards were $4,972 and $3,000, respectively.[190] In other cases, twenty-five of ninety-two consumers prevailed (27%), recovering and average of $5,505 and a median of $2,578.[191] Combining these figures, the CFPB concluded that consumer-plaintiffs won 32 out of 158 times (20%).[192]

3. Informality

Arbitration's singular virtue is supposed to be its ability to streamline conflict resolution. Its proponents argue that the judicial system requires consumers "to 'take a number' on already crowded court dockets," but private tribunals put them "at the front of the line."[193] Likewise, arbitral rules are considered more pliable than their court-based analogues.[194] Without full-fledged discovery and motion practice, cases move quickly, and some consumers can even navigate the process themselves.[195]

Researchers have unearthed some support for these propositions. Perhaps the least controversial assertion is that arbitration is faster than litigation. The U.S. Department of Justice has estimated that the average span between a civil

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182 *See id.* § 5.5.2, at 21. The CFPB observed that plaintiffs sometimes changed the amount of their demands as the arbitration progressed, making the precise claim amount a moving target. *See id.*

183 *See id.* at 23.

184 *See id.* § 5.6, at 32. The CFPB did not include cases from 2012, because many were still pending or featured incomplete information when it completed data collection in 2013. *See id.*

185 *See id.* 32–33.

186 *See id.* at 32.

187 *See id.* at 32–33.

188 *See id.* § 5.6.6, at 39.

189 *See id* at 40.

190 *Id.*

191 *See id.* at 39.

192 *See id.* at 41.

193 RUTLEDGE, *supra* note 10, at 7.

194 *See id.* at 6.

195 *See id.*

complaint and verdict in state court is about two years.[196] Conversely, the Searle Report found that the average time from filing to award in consumer-initiated arbitrations is seven months.[197] In particular, the Searle Report authors observed that consumers who forfeited a hearing and permitted the arbitrator to rule on the documents alone obtained a decision in a mean of four months.[198] Likewise, the CFPB determined that awarded cases lasted about half a year, with documents-only proceedings and telephonic hearings clocking in at roughly five months.[199]

Issues related to self-representation are slightly cloudier. In federal court, just 26% of plaintiffs have no attorney, and the majority of these are prisoners.[200] Conversely, consumers seem more willing to act pro se in arbitration. For instance, E&Y conducted phone interviews with some of the consumer plaintiffs from its dataset and reached the striking conclusion that twenty-five of twenty-nine (86%) did not hire a lawyer.[201] In a much less dramatic finding, the Searle Report listed 103 out of 240 consumer plaintiffs as pro se (43%).[202] Yet the Searle Report concluded that the choice to go it alone had drawbacks: consumers with lawyers won 60% of the time, while their self-represented counterparts prevailed in only 45% of disputes.[203] Finally, the CFPB determined that about 30% of consumer-plaintiffs represented themselves.[204] The Bureau detected "no marked variance" in win rates between this cohort and consumers with attorneys.[205]

4. Costs

Arbitration has alternatively been described as "one of the most cost-effective means of resolving disputes"[206] and "cost . . . prohibitive."[207] Both halves of this schizophrenic split in opinion seem plausible. After all, if the private system hums along quickly and facilitates self-help, consumers probably pay less in attorneys' fees than they do in litigation. But then again, arbitration also imposes

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196 *See* CIVIL TRIALS, 2001, *supra* note 152, at 8 (finding an average span between complaint and verdict of 25.6 months for tort cases, 21.7 months for real property disputes, and 21.5 months for contract disputes); CIVIL TRIALS, 2005, *supra* note 152, at 8 (reaching similar conclusions).

197 *See* SEARLE REPORT, *supra* note 35, at 63. CDRI found that the mean time between demand and award in arbitration was less than four months. *See* CDRI STUDY, *supra* note 148, at 19. Again, though, the study was plagued by problems, including the fact that thirteen cases listed the date of the award as earlier than the filing date. *See id.*

198 *See* SEARLE REPORT, *supra* note 35, at 64.

199 *See* CFPB STUDY, *supra* note 37, § 5.7.3, at 72–73.

200 *See Pro Se Law Clerks: A Valuable Resource* THE THIRD BRANCH (United States Federal Courts), Apr. 2011, *available at* http://www.uscourts.gov/news/TheThirdBranch/11-04-01/Pro_Se_Law_Clerks_A_Valuable_Resource.aspx.

201 *See* E&Y STUDY, *supra* note 149, at 13.

202 *See* SEARLE REPORT, *supra* note 35, at 73.

203 *See id.* at 72–74.

204 *See* CFPB STUDY, *supra* note 37, § 5.5.3, at 28–30.

205 *See id.* § 5.6.11, at 55.

206 153 CONG. REC. S4614 (daily ed. Apr. 17, 2007) (statement of Sen. Sessions); *see also* S. REP. NO. 68-536, at 3 (1924) (noting that arbitration permits parties to "avoid[] the delay and expense of litigation").

207 Knapp, *supra* note 168, at 781; *see also* Budnitz, *supra* note 154, at 161 ("The costs of arbitration can be so high that they deny consumers access to a forum in which to air their disputes.").

an array of expenses that courts do not, including a decision maker who bills by the hour.

The CDRI paper offers some evidence about arbitral costs.[208] It surveyed 1,404 matters and determined that the mean amount of arbitrators' fees was $2,256, with a median of $870.[209] However, there was tremendous variation, ranging from a low of $58 to a high of $105,550.[210] Moreover, as noted above, the CDRI painted with an extremely broad brush, failing to distinguish between consumer cases and employment cases and lumping together matters that featured consumers and employee plaintiffs with those that involved consumer and employee defendants.[211] Finally, the CDRI did not pinpoint the share of fees that consumers or employees (as opposed to firms) actually paid.

The Searle Report provided more detail.[212] It first explained that many arbitral providers, such as the AAA, impose filing fees that rise with the size of the complaint. For instance, the AAA charges $125 to consumers who seek less than $10,000 and $375 for claims of $10,000 to $75,000.[213] The Searle Report calculated that consumer plaintiffs paid an average of $129 in these administrative costs.[214] In addition, the Searle Report determined that the average arbitrators' fee in disputes initiated by consumers was $1,346.[215] Consumers contributed a mean of $247 (18%) toward the private judge's services, while businesses picked up the balance.[216]

The CFPB reached similar results. It found that consumers paid an initial deposit toward arbitrator's fees in 831 of the 1,060 disputes from 2010 and 2011 (78%).[217] These expenses averaged $206, with a median of $125.[218] However, the CFPB also noted that consumers were sometimes reimbursed for these costs.[219] In addition, arbitrators required consumers to pay administrative fees in 54 of 326 awarded matters (17%), although most of these cases appeared to revolve around a company's attempt to collect a debt, and thus seemed better characterized as involving consumer-defendants.[220]

5. Repeat Players

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208 CDRI STUDY, *supra* note 148, at 21.

209 *See id.*

210 *See id.*

211 *See supra* text accompanying notes 173-176.

212 SEARLE REPORT, *supra* note 35.

213 *See id.* at 25–26.

214 *See id.* at 56.

215 *See id.* at 56.

216 *See id.*

217 *See* CFPB STUDY, *supra* note 37, § 5.7.5, at 78. The CFPB did not divide these cases into those that consumers filed and those that businesses initiated. *See id.*

218 *See id.*

219 *See id.*

220 *See id.* & n.139. The CFPB speculated that this was due to the fact that many financial services agreements require consumers to pay the cost of a company's debt-collection efforts. *See id.*

Some scholars have suggested that arbitrators shy away from ruling against repeat players. As we discuss in this section, the empirical work on this issue is fiercely contested.

In a series of groundbreaking articles in the 1990s, Lisa Bingham investigated whether arbitrators favored repeat playing employers (which she defined as companies that arbitrated more than once in her dataset).[221] Bingham first surveyed 186 employment matters decided under the AAA Commercial Arbitration Rules (which governed labor disputes at that time) and 84 cases from the AAA Employment docket.[222] She found that employees prevailed 71% of the time and recovered an average of 48% of their requested damages against non-repeaters.[223] Conversely, employees were victorious in only 16% of cases and received 11% of what they demanded against repeat players.[224] In a companion piece, Bingham analyzed 203 hearings conducted under the AAA Employment Rules.[225] Again, she found that the employee win rate was a healthy 67% against one-shot companies, but plunged to 23% against repeat players.[226]

To locate the root of the repeat player advantage, Bingham focused on cases in which a company appeared more than once before the same arbitrator (repeat pairings).[227] She found twenty such disputes, and noted that employees won five (25%).[228] Conversely, when there was no repeat -pairing, employees prevailed 86 out of 155 times (55%).[229] Bingham thus concluded that "[e]mployees lose more frequently when the arbitrator is one the employer has used at least once before."[230]

Then, in 2003, Elizabeth Hill drew different conclusions about repeat players from her review of 200 AAA employment cases from 1999 and 2000.[231] Overall, Hill found that employees won 43% of disputes against employers.[232] Unlike Bingham, she did not actually compare the win rates of companies that arbitrated multiple times with that of one-shot businesses. Nevertheless, she argued that if certain companies outperformed others, it was for a reason that Bingham had ignored: because they have *internal* dispute resolution programs.[233] Cases against these companies featured what Hill called the "appellate effect":

> The appellate effect is an above-average win rate for an employer, caused by the effective functioning of the employer's in-house dispute

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221 *See* Bingham, *Repeat Player Effect*, *supra* note 35, at 207; Bingham, *Statistics*, *supra* note 35.

222 *See* Bingham, *Repeat Player Effect*, *supra* note 35, at 206.

223 *See id.* at 209–10.

224 *See id.* at 213.

225 *See* Bingham, *Statistics*, *supra* note 35, at 236.

226 *See id.* at 238. Bingham also noted that employees prevailed in only five of the twenty cases (25%) when the employer had used the same arbitrator before. *See id.*

227 *See id.*

228 *See id.*

229 *Id.*

230 *Id.*

231 Hill, *supra* note 35, at 814.

232 *See id.* at 806.

233 *See id.* at 807–08.

> resolution program. The program isolates and resolves claims with merit in-house, leaving meritless claims for final appeal to external arbitration with the AAA. The result is an AAA docket of meritless claims against that company, virtually all of which end up being dismissed.[234]

Also, because Hill unearthed only two instances of a business appearing before the same arbitrator twice, she rejected the view that arbitration "is a 'kangaroo court' dominated by an 'old boys' network' of individuals who know one another, and that arbitrators render prejudiced verdicts for that reason."[235]

However, in the most sophisticated study to date, Alexander J.S. Colvin reached a verdict similar to Bingham's.[236] Colvin analyzed 1,213 AAA matters decided between January 1, 2003 and December 31, 2007 and determined that employees prevailed in 32% of cases against one-shotters but just 17% of the time against repeat players.[237] Colvin then ran several regressions.[238] In each one, he used either employee win or award amount as a dependent variable, and repeat employer, repeat pairing, and employee self-representation as independent variables.[239] He also included dummy variables for the year of the ruling to control for changes in the law and clustered standard errors by employer.[240] Based on these regression results, he first concluded that a company's repeat player status exerted a statistically significant effect on employee win rate, reducing the odds of a victory by nearly 49% ($p < 0.01$).[241] He then revealed that the same was true of repeat pairings: the odds of an employee prevailing fell by 40% ($p < 0.05$) when the business and the decision maker had crossed paths before.[242] For these reasons, Colvin declared that he had unearthed "strong evidence of a repeat employer advantage and, more problematically, evidence of an advantage to employers in repeat-employer–arbitrator pairings."[243]

Nevertheless, in 2009, the Searle Report rejected the idea that arbitrators bend over backwards to accommodate repeat players in the consumer setting. The Searle Report tackled this issue from two angles. First, it defined "repeat player" the same way that Bingham, Hill, and Colvin had: as companies that appeared

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234 *See id.* Hill's explanation has since proven popular among defenders of mandatory arbitration. *See, e.g.*, Sherwyn et. al., *supra* note 34, at 1582 (arguing that studies should consider not just cases that culminate in a verdict or award, but those that are resolved "during conciliation, mediation, and settlement negotiations"); W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 849 (2008) ("[T]he debate over arbitration's fairness as a disputing forum . . . obscures an equally and perhaps more important development: the internalization of dispute resolution within the workplace.").

235 Hill, *supra* note 35, at 815.

236 *See* Colvin, *supra* note 35, at 13.

237 *See id* at 2, 13.

238 *See id.* at 17–20.

239 *See id.* at 17–18.

240 *See id.* at 18.

241 *See id.*

242 *See id.* In addition, Colvin noted that employee win rates were lower in 2006 ($p < 0.05$), but found no "consistent time trend in the data." *Id.* at 19.

243 *Id.* at 21.

twice or more in the data.[244] The Searle Report labelled these "repeat(1) businesses"[245] Looking just at consumer victories and damage amounts, the Searle Report concluded that repeat(1) companies enjoyed no special privileges.[246] Indeed, the consumer win rate was 52% against repeat(1) entities and 55% against one-shotters: a statistically insignificant divergence.[247] In fact, consumers obtained higher mean damage awards against repeat(1) businesses ($20,084, or 61% of the sum sought in the complaint) than they did against firms that arbitrated once ($18,256, or 41% of the claim amount).[248]

Second, the Searle Report examined what it called "repeat(2) firms."[249] These businesses had informed the AAA of how to serve them with demands for arbitration, which implied that they had already been defendants in a case administered by the institution.[250] The Searle Report admitted that repeat(2) companies seemed to fare particularly well: consumers prevailed 43% of the time against repeat(2) corporations, but 56% of the time against other firms.[251] However, the Searle Report rejected the idea that this success was the product of arbitral favoritism. For one, the Searle Report cited the fact that consumers recovered the same percentage of damages—52% of the amount demanded—against both repeat(2) and non-repeat companies.[252] Likewise, the Searle Report hypothesized that repeat(2) firms' higher win rates stemmed from their strategy of "settl[ing] meritorious claims and arbitrat[ing] only weaker claims," whereas less experienced businesses could not as easily separate the wheat from the chaff and therefore "arbitrate[d] all claims, even meritorious ones."[253] To support this supposition, the Searle Report observed that repeat(2) firms resolved 133 of their 187 cases (71%) before the arbitrator ruled on the merits, while other firms settled only 226 of 414 disputes (55%).[254] Thus, the Searle Report concluded that any repeat player effect was likely "due to case screening."[255]

Finally, the CFPB also addressed repeat players, albeit from a slightly different angle.[256] Rather than delving into consumer win rates, the CFPB focused more

[244] *See* SEARLE REPORT, *supra* note 35, at 76.

[245] *Id.*

[246] *See id.* at 76–77.

[247] *See id.*

[248] *See id.* at 77–78.

[249] *See id.* at 76.

[250] *See id.*

[251] *See id.* at 78–79.

[252] *See id.* at 79.

[253] *Id.* at 80.

[254] *See id.* at 81–82.

[255] *Id.* at 82. The Searle Report also noted the paucity of repeat pairings. *See id.* at 81–82. Indeed, only 35 of 301 cases (12%) "involved any combination of repeat players, such as repeat pairs of arbitrators and businesses, arbitrators and attorneys for businesses, arbitrators and consumers, arbitrators and attorneys for consumers, as well as businesses and consumers." *Id.* at 80. Although consumers prevailed in just twelve of the twenty-eight (43%) repeat -pairings in which they were plaintiffs, the Searle Report suggested that this might be due to the fact that sixteen of them were *pro se*. *See id.* at 81.

[256] *See* CFPB STUDY, *supra* note 37, § 5.6.12.

on repeat player prevalence.[257] The Agency noted that arbitration increasingly involved familiar faces on both sides of the lectern: repeat playing plaintiffs' lawyers squaring off against repeat playing corporations.[258] The Agency sorted both repeat playing plaintiffs' attorneys and businesses into two categories: "light" and "heavy."[259] The former appeared in two or three arbitrations in the same product market in 2010 through 2012, while the latter surfaced four or more times.[260] The CFPB observed that 45% of cases featured heavy repeat playing plaintiffs' lawyers and an astounding 80% of matters involved heavy repeat playing companies.[261]

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In sum, *Rent-A-Center*, *Concepcion*, and *Italian Colors* are a sea change in the way consumers resolve claims against companies. Yet only the CFPB has tested the waters inside the arbitral forum recently. And although the Agency's report is meticulous, it is limited in several important respects. For one, by only analyzing awarded cases that were filed in 2010 and 2011, it precedes *Italian Colors* (decided in 2013) and cannot capture the full impact of *Rent-A-Center* (decided in 2010) and *Concepcion* (decided in April 2011). In addition, the Bureau's exclusive focus on the financial services sector neglects the many other industries—from telecommunications to for-profit education—in which mandatory arbitration clauses are rampant. Accordingly, in the next Part, we begin to fill these gaps.

II. Empirically Assessing Consumer Arbitration

This is the heart of our Article. It begins by explaining how we collected and distilled our data. It then discusses how our findings inform the debate over consumer arbitration after the Court's controversial trilogy.

A. *Data Description and Sample Selection*

In 2003, California passed a novel law designed to ferret out data about consumer arbitration.[262] The statute, Code of Civil Procedure section 1281.96, requires private entities that offer dispute resolution services to publish information about every consumer case they have overseen in the last five years.[263] These disclosures must be updated at least quarterly, and include the species of dispute, the claim amount, the defendant's identity, the number of times the defendant has previously appeared before the arbitration provider, whether the consumer was represented, the filing and disposition dates, the prevailing party, the arbitrator's name, the arbitrator's fees, and the amount of the

257 *See id.* at 57–58. The Bureau chose to focus on repeat playing defendants (rather than repeat playing defense-side lawyers) because "the possible presence of in-house counsel provides an opportunity for institutional learning, notwithstanding differing outside counsel." *Id.* at 57.

258 *See id.* at 57.

259 *See id.* at 58.

260 *See id.*

261 *See id.* at 59–60.

262 CAL. CIV. PROC. CODE § 1281.96 (West 2014).

263 *See id.* § 1281.96(a).

award.[264] The legislation does not merely govern matters with a link to California; rather, firms must furnish statistics about every consumer dispute on their docket.[265] Eight institutions are currently releasing this data: the AAA,[266] ADR Services, Inc.,[267] Alternative Resolution Centers,[268] JAMS,[269] Judicate West,[270] National Arbitration and Mediation,[271] the Office of the Independent Administrator for Kaiser Foundation Health Plan,[272] and Resolution Remedies.[273]

For three reasons, we decided to focus on the AAA. First, this choice allows us to follow in the footsteps of the vast majority of previous empirical studies, including the Searle Report and pieces by Bingham, Hill, and Colvin. Second, both the AAA and section 1281.96 define "consumer arbitration" expansively, making it less likely that relevant cases will slip through our net.[274] Third, the AAA's statutory disclosures are more reliable than those of its rival institutions, which are plagued by omissions and ambiguities.[275]

Our goal was to isolate consumers who would have been plaintiffs in court—the core of the mandatory arbitration controversy. We started with the 17,638

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264 *See id.* § 1281.96(a)(1)–(11).

265 *See id.* § 1281.96(a).

266 *See* Am. Arbitration Ass'n, *Consumer Arbitration Statistics*, AAA, https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat (last visited Feb. 6, 2015).

267 *See Consumer Arbitration Disclosures*, ADR SERVICES, INC., http://www.adrservices.org/disclosure.php (last visited Feb. 6, 2015).

268 *See* Alt. Resolution Ctrs., *Consumer Arbitration Reporting Disclosures*, ARC, http://www.arc4adr.com/car.html (last visited Feb. 6, 2015).

269 *See Consumer Case Information*, JAMS, http://www.jamsadr.com/consumercases (last visited Feb. 6, 2015).

270 *See Arbitration Disclosures*, JUDICATE WEST, http://www.judicatewest.com/library/disclosures?page=doc&area=disclosures (last visited Feb. 6, 2015).

271 *See* Nat'l Arbitration & Mediation, *Disclosures for California Consumer Arbitrations*, NAM, http://www.namadr.com/consumer_cases_main.cfm (last visited Feb. 6, 2015).

272 *See* Office of the Indep. Admin., *Disclosures by the OIA*, OIA, http://www.oia-kaiserarb.com/11/consumer-case-information/disclosures-by-the-oia (last visited Feb. 6, 2015).

273 *See Disclosures for California Consumer Arbitrations*, RESOLUTION REMEDIES, http://www.resolutionremedies.com/disclosures.asp (last visited Feb. 6, 2015).

274 The AAA defines "consumer" cases as those that grow out of a non-negotiable contract for "standardized, consumable goods or services" for "personal or household use." AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES, *available at* http://www.adr.org (2014) (last visited Feb. 7, 2015). Although section 1281.96 does not define "consumer arbitration," it requires providers to classify "the nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment; or other." CAL. CIV. PROC. CODE § 1281.96(a)(3) (West 2014). Thus, it has been understood as encompassing any arbitration that falls into one of those categories. *See* Schwartz, *supra* note 34, at 1285 n.90.

275 *See* DAVID J. JUNG ET. AL, PUB. LAW RESEARCH INST., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96, 1 (2013) (noting that "[m]any published reports are incomplete, either omitting cat egories of information entirely or reporting information inconsistently").

cases in the AAA's July 2014 report. After we dropped duplicate records[276] and narrowed the date range to matters filed between July 1, 2009, and December 31, 2013,[277] we cut filings that the AAA had labeled as employment, debt collection, construction, or real estate. Next, we focused on matters (1) initiated by the consumer, (2) which requested $1 or more, and (3) in which the plaintiff's demand exceeded the value of any counterclaim by the defendant.[278] Finally, we dropped cases that were missing a business name[279] and also consolidated cases that had multiple defendants into one representative case.[280]

We ended with a sample of 4,839 arbitrations. Ultimately, 1,446 of these disputes were withdrawn (30%),[281] 1,407 were awarded (the arbitration equivalent of a trial verdict) (29%), 1,825 settled (38%),[282] 150 terminated on administrative grounds (3%), and 11 were dismissed on the merits (less than 1%).

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[276] In fifty-nine cases, each variable was identical to the previous record. We assumed that these were typographical or data-entry errors.

[277] Because the statute only requires companies to disclose arbitrations conducted in the past five years, see CAL. CIV. PROC. CODE § 1281.96(a) (West 2014), July 1, 2009 was the earliest date in the dataset. We also cut cases filed after December 31, 2014 because many were still pending and thus had incomplete information.

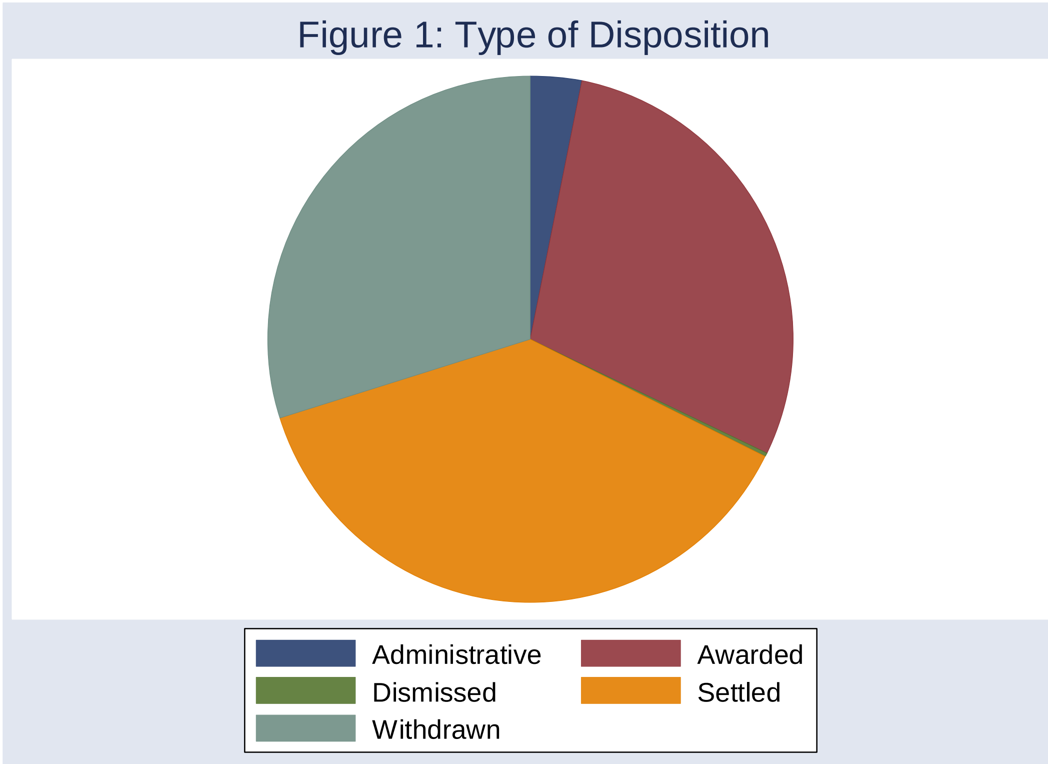
[278] In total, these three restrictions resulted in a total of 1,145 case deletions.

[279] Twenty-one cases were deleted because of a missing business name.

[280] The process of consolidating multiple-defendant cases into single records resulted in 276 deletions.

[281] As we discuss in greater depth below, the number of "withdrawn" cases was artificially inflated by the fact that a single law firm filed—and then withdrew—over one thousand arbitrations against AT&T Mobility LLC in October 2012. *See infra* Part II.B.1.ii.

[282] It is not clear how the AAA differentiates "withdrawn" cases from "settled" cases. As noted above, the CFPB also struggled to categorize non-awarded cases. *See* CFPB STUDY, *supra* note 37, § 5.6, at 32.



These cases offer a unique window into the current state of consumer arbitration. As Table 1 reveals, our population of 1,407 awarded matters is much larger and more recent than previous studies of consumer arbitration.

Table 1. Empirical Studies of Consumer Arbitration		
	Sample Size of Awarded Consumer-Plaintiff Cases	Sample Period
Ernst & Young	226	January 2000 to January 2004
Searle Report	240	April 2007 to December 2007
CFPB	158	January 2010 to December 2011
Horton & Chandrasekher	1,407	July 2009 to December 2013

But we also must acknowledge some limitations in our data. First, like the CFPB, we were not able to draw a bright line between settled cases and those that were withdrawn.[283] It appears that many disputes that are resolved informally are nevertheless listed as "withdraw," making it impossible to identify plaintiffs who walked away without receiving any form of compensation. Second, the section 1281.96 disclosures do not include the full rainbow of information about each case. For instance, the AAA files do not identify the precise causes of action

283 *See supra* text accompanying note 194.

underlying each complaint. Likewise, they list awards as a lump sum but do not distinguish between compensatory or punitive damages, and reveal arbitrator's fees but not filing and administrative costs. Third, and more generally, focusing on the AAA may paint an overly rosy picture. As noted, the institution has adopted Consumer Due Process Protocols, which strive for "fundamental fairness."[284] For example, in disputes of $10,000 or less, the AAA caps a consumer's total share of the arbitrator's fees and administrative costs at $125.[285] Similarly, it attempts to safeguard consumers' interests during the arbitrator-selection process. Unless the parties have agreed otherwise, the AAA will appoint an arbitrator from its roster, task that individual with divulging potential conflicts of interest, and consider objections to her nomination.[286] Because not all providers follow these prophylactic steps, the AAA may be more amenable to consumer plaintiffs than other venues.[287]

B. *Results*

This section begins by evaluating filings. It then focuses on awarded matters to investigate win rates, damage amounts, informal procedures, and arbitral costs. Finally, it uses multivariate regression analysis to assess the role of repeat players in the consumer setting.

1. Filings

As noted, there were 4,839 consumer plaintiff arbitrations in our dataset. This works out to be an average of about 1,075 per year, or 97 each month.[288] As we explain below, our most striking findings about these filings are the shift toward bigger-stakes cases and the impact of *Concepcion*.

i. Claim Amounts

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284 AAA Due Process Protocol, *supra* note 95, at 1.

285 *See* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 818 (2008).

286 *See* AM. ARBITRATION ASSOC'N, CONSUMER-RELATED DISPUTES, SUPPLEMENTARY PROCEDURES C-4, at 9 (2005) [hereinafter AAA Supplementary Rules]. The AAA once administered consumer matters under its Commercial Rules as modified by its Consumer Supplementary Procedures. *See id.* at 8. In September 2014, the AAA issued a series of principles designed specifically for consumer cases. *See* AM. ARBITRATION ASSC'N, CONSUMER ARBITRATION RULES, *supra* note 272. It did not change its arbitrator-selection and disclosure requirements. *See id.* at R-16, R-17, R-19.

287 *See, e.g.*, Colvin, *supra* note 35, at 21 (citing the AAA's reputation as a reason to think that its records may be a "best-case example" of employment arbitration).

288 The CFPB Study provides an interesting point of comparison. As noted, the agency discovered 1,409 consumer plaintiff arbitrations in the financial services industry between the start of 2010 and the end of 2012. *See* CFPB STUDY, *supra* note 37, at § 5.5.1. During that period, we found 3,784 consumer-initiated matters (although, as we discuss below, over 1,000 of these were filed by one law firm against AT&T Mobility LLC and thus may be atypical). This suggests that are a healthy plurality of all AAA arbitrations involve lending and credit issues.

We first investigated complaint amounts. Of course, there are reasons not to take these figures at face value. Plaintiffs may exaggerate their injuries to seem sympathetic or to try to obtain a larger settlement. In addition, the AAA rules in effect during our research may have encouraged puffing. They capped a consumer's share of the arbitrator's fees at $125 for causes of action seeking $10,000 and under and $375 for those between $10,001 and $75,000.[289] These benchmarks undoubtedly influenced the way that consumers plead damages. For instance, a consumer with a relatively modest loss has little incentive to demand less than $10,000 (or even $75,000).

Subject to these caveats, we found an increase in large claims and a decline in small grievances relative to previous studies. For instance, our mean demand was $164,363.[290] That is more than three times the Searle Report's average of $46,131 in AAA files from 2007.[291] Only 24% of consumers in our data sought less than $10,000, while 39% of Searle plaintiffs fit that description.[292] Likewise, 21% of our complaints requested $75,000 or more, compared to just 9% in Searle.[293] Finally, our average damages are conspicuously higher than the CFPB's mean of $26,924 in AAA financial services cases between 2010 and 2012.[294] This suggests that lending cases tend to involve lower-value claims—a point to which we will return in Part III.

ii. *Concepcion*

If companies and their sympathizers are correct about the virtues of individual arbitration, plaintiffs should have responded to the Court's class arbitration waiver jurisprudence by flooding the arbitral forum with low-value cases.[295] Focusing on *Concepcion*—the first and most influential of the Court's decisions—this section shows that the number of bilateral arbitrations has risen, but only mildly. In addition, it unveils an overlooked consequence of the Court's handiwork. By increasing the number of bilateral arbitrations brought against big companies, it has spawned a new species of defendant: extreme repeat players.

Between July 1, 2009 (when our data begin), and April 21, 2011 (when the Court decided *Concepcion*), consumers filed 1,154 claims, or an average of fifty-two per month. After the Court's opinion, this volume more than doubled. From April 22, 2011, to December 31, 2013, plaintiffs brought 3,685 complaints, or an average of 115 per month. One reason for this upswing is that some plaintiffs'

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289 *See* AAA Supplementary Rules, *supra* note 300, at C-8.

290 This statistic includes the 1,094 arbitrations filed against AT&T Mobility, all of which sought $10,000. *See supra* note 293. Due to these cases, our median complaint amount was $10,000. Eliminating those disputes causes our average damage request to swell to $183,093 and our median to rise to $15,000.

291 *See* SEARLE REPORT, *supra* note 35, at 48. Admittedly, some of the discrepancy could stem from the fact that Searle based its complaint amount calculations on awarded cases, whereas we used all filings.

292 *See id.*

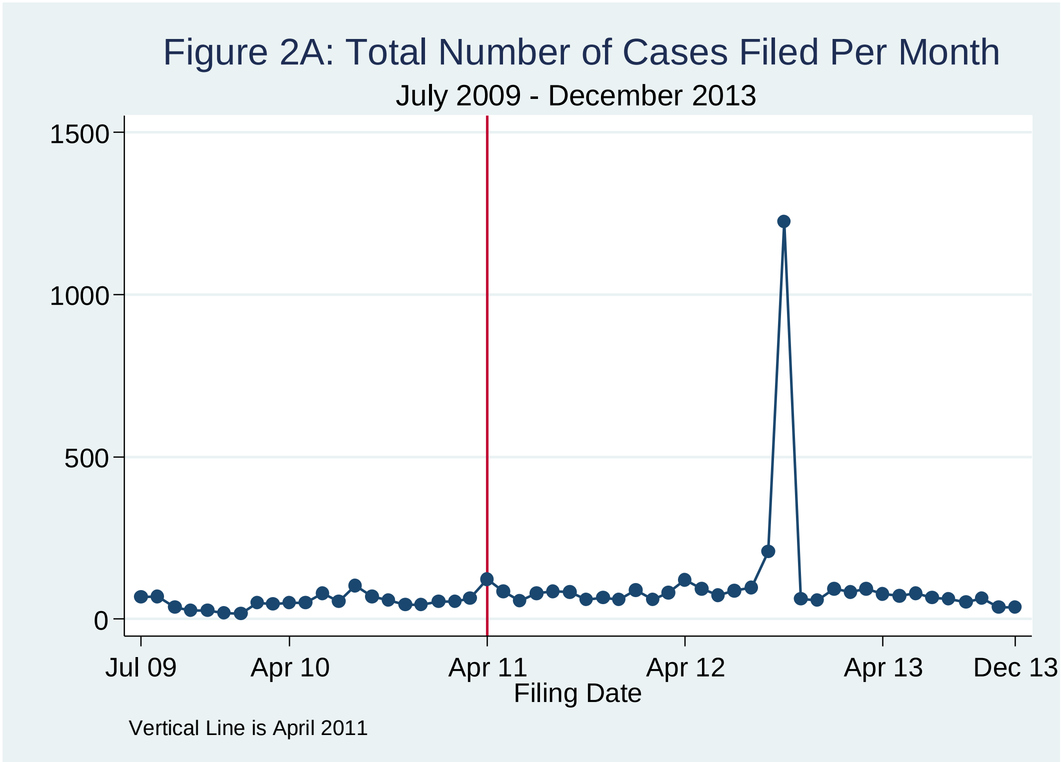
293 *See id.* Likewise, E&Y's review of NAF awards determined that 73% of consumers sought less than $15,000 and a mere 7% demanded more than $75,000. *See* E&Y STUDY, *supra* note 149, at 8.

294 *See* CFPB STUDY, *supra* note 37, at § 5.5.2.

295 *See supra* Part I.B.

lawyers have been trying to recreate the mosaic of the class action by filing scores of arbitrations. For example, in October 2012, a single law firm commenced (and then withdrew) 1,094 separate cases against AT&T Mobility LLC.[296] To put that number in perspective, it is nearly equals the total number of other cases filed by consumers in the entire 2012 calendar year (1,162). Figure 2A captures this disproportionate surge.

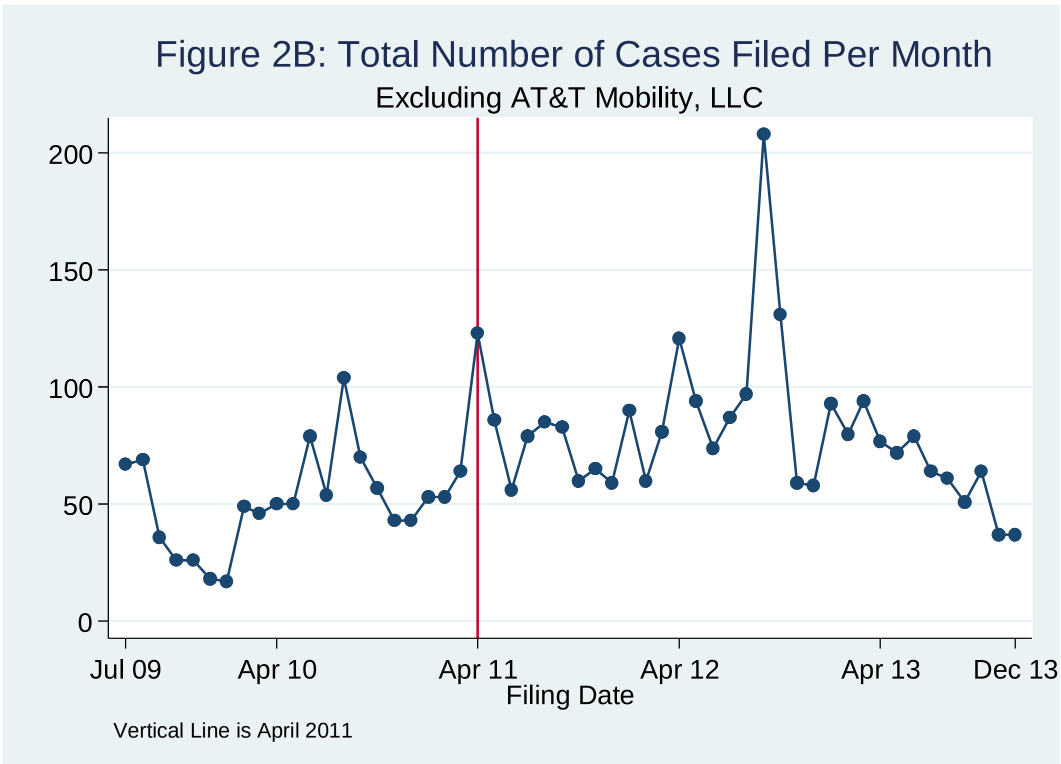
[296] These cases are puzzling. On the one hand, the plaintiffs' firm, Bursor & Fisher, P.A., announced that it had filed over a thousand individual arbitrations in 2011 seeking to stop the then-pending merger between AT&T Mobility and T-Mobile. *See* Daniel Fisher, *AT&T's Arbitration Victory Breeds Swarm Of Antitrust Cases*, FORBES (Aug. 18, 2011) at http://www.forbes.com/sites/danielfisher/2011/08/18/atts-arbitration-victory-breeds-swarm-of-antitrust-cases/ (last accessed April 8, 2015). AT&T Mobility struck back by obtaining a series of rulings in federal court enjoining some of these arbitrations on the grounds that its contract prohibited plaintiffs from either bringing "any form of a representative or class proceeding" or seeking equitable relief designed to impact third parties. *See* AT & T Mobility LLC v. Bernardi, No. C 11-03992 CRB, 2011 WL 5079549, at *6-9 (N.D. Cal. Oct. 26, 2011); *see also* AT&T Mobility LLC v. Smith, No. 11-cv-5157, 2011 WL 5924460 (E.D. Pa. Oct. 7, 2011); AT&T Mobility LLC v. Gonnello, No. 11 Civ. 5636(PKC), 2011 WL 4716617 (S.D.N.Y. Oct. 7, 2011); AT&T Mobility LLC v. Bushman, No. 11-80922-CIV, 2011 WL 5924666 (S.D. Fla. Sept. 23, 2011). Perhaps as a result of these decisions—or perhaps for other reasons—the AAA has no record of any arbitrations against AT&T Mobility in 2011. Then, in December 2011, after pushback from the Obama administration, AT&T Mobility withdrew its bid to acquire T-Mobile. *See, e.g.,* Michael J. De La Merced, *AT&T Ends $39 Billion Bid for T-Mobile*, N.Y. TIMES (Dec. 19, 2011) at http://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/?_r=0 (last accessed April 8, 2015). This prompted Bursor & Fisher to announce that it had "won," despite having "to file more than 2,000 arbitration demands on behalf of AT&T customers." Scott Bursor, *Fight the Merger!*, at http://fightthemerger.com/ (last accessed April 8, 2015). Oddly, the 1,094 Bursor cases against AT&T Mobility in our dataset come nearly a year *after* the merger fizzled. The AAA classifies them as being "withdrawn" in the spring of 2013; because they are covered by a confidentiality agreement, we are unable to learn more about them. *Cf.* Resnik, *supra* note 147, at 72. Thus, we are not sure if they are the initial burst of arbitrations from 2011 (and have been mis-dated in the AAA records) or if they were independent claims brought for reasons unrelated to the merger.



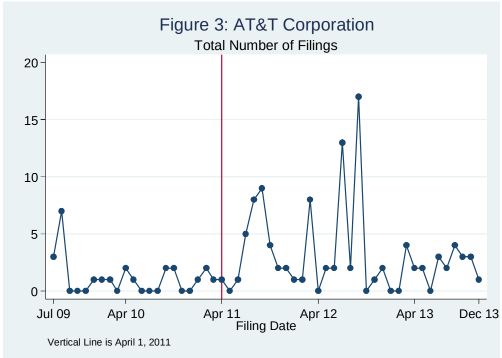
Putting aside the AT&T Mobility cases, filings were slightly higher and more variable after *Concepcion* than before. Figure 2B displays the number of non-AT&T Mobility consumer-initiated arbitrations each month. Specifically, the median number of cases filed per month climbed from 50 before *Concepcion* to 79 after *Concepcion*; similarly, the average climbed from 51.14 to 80.76. In addition, the standard deviation of monthly filings, a measure of the trend's average variability, increased from 20.78 to 31.65. Part of the reason for the higher variability after *Concepcion* is that other, less prominent examples of the AT&T Mobility phenomenon began to crop up. This increased the number of spiky, outlier months, and thus inflated the overall variability of monthly filings. Indeed, as Figures 3 through 8 elucidate, some plaintiffs' lawyers—"arbitration entrepreneurs"—have initiated multiple individual cases against the same company. As far as we can tell, these swarms of discrete claims are ghosts of class actions: they are filed by the same firm on roughly the same date, and seek the same amount of damages.[297] The only difference is magnitude: unlike

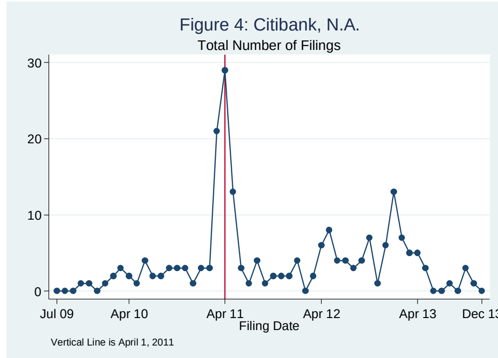
[297] A handful predate *Concepcion*, which is not surprising: even under the *Discover Bank* regime, judges enforced class arbitration waivers when each plaintiff's stakes were high enough to attract counsel. *See, e.g.,* Discover Bank v. Superior Court, 36 Cal. 4th 148, 162 (Cal. 2005) (holding that class arbitration waivers can be unconscionable where they appear "in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages"); *see also* Carideo v. Dell, Inc., 520 F. Supp. 2d 1241, 1247 (W.D. Wash. 2007) (enforcing class arbitration waiver where "[p]laintiffs allege actual damages between $1,300 and $1,700, plus statutory and punitive damages, interest, and attorney's fees"); Omstead v. Dell, Inc., 533 F. Supp. 2d 1012, 1040 (N.D. Cal. 2008) (finding that *Discover Bank* does not govern "the sales of high-end electronics, such as computers"). *But see* Oestreicher v. Alienware Corp., 322 F.

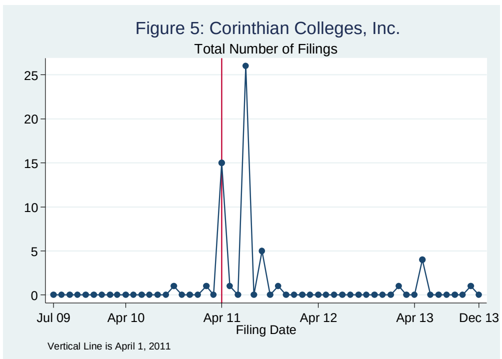
traditional class action attorneys, who frequently represent thousands of plaintiffs, arbitration entrepreneurs string together a few dozen consumers at most. Indeed, after AT&T Mobility, there is a precipitous decline in the number of arbitrations filed against the next most-sued defendants, Citibank (602 cases) and Sallie Mae (195 cases).

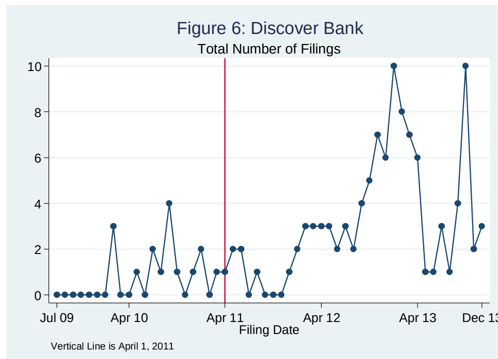


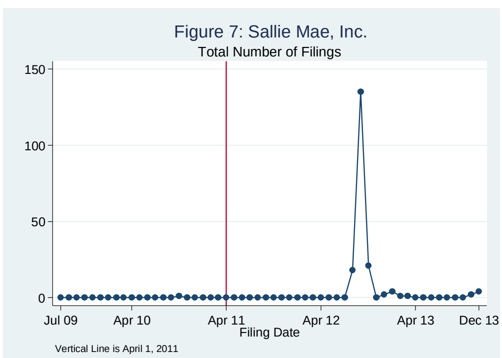
App'x 489, 492 (9th Cir. 2009) (holding that damages of $4,000 "is a 'small amount'" and thus suffices under *Discover Bank*). As a result, even before the Court's opinion, some would-be class actions were forced into bilateral arbitration. But as Figures 3 through 8 show, the overwhelming majority of these swarms of discrete cases came on *Concepcion*'s heels.

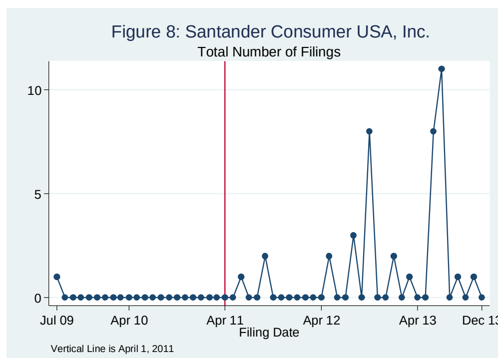












Although these arbitration entrepreneurs lack the punch of the genuine class device, they have altered the balance of power in the arbitral forum. Before *Concepcion*, large corporations faced the occasional class action brought by many customers. Today, these epic cases have fragmented into thousands of individual disputes. It appears that many of these claims are then abandoned. But some of these dissolved class actions do trickle into the AAA. And as a result, firms that once arbitrated sporadically now arbitrate routinely. Entities that might have been low-level repeat players in 2010 have become perpetual defendants by 2013.[298]

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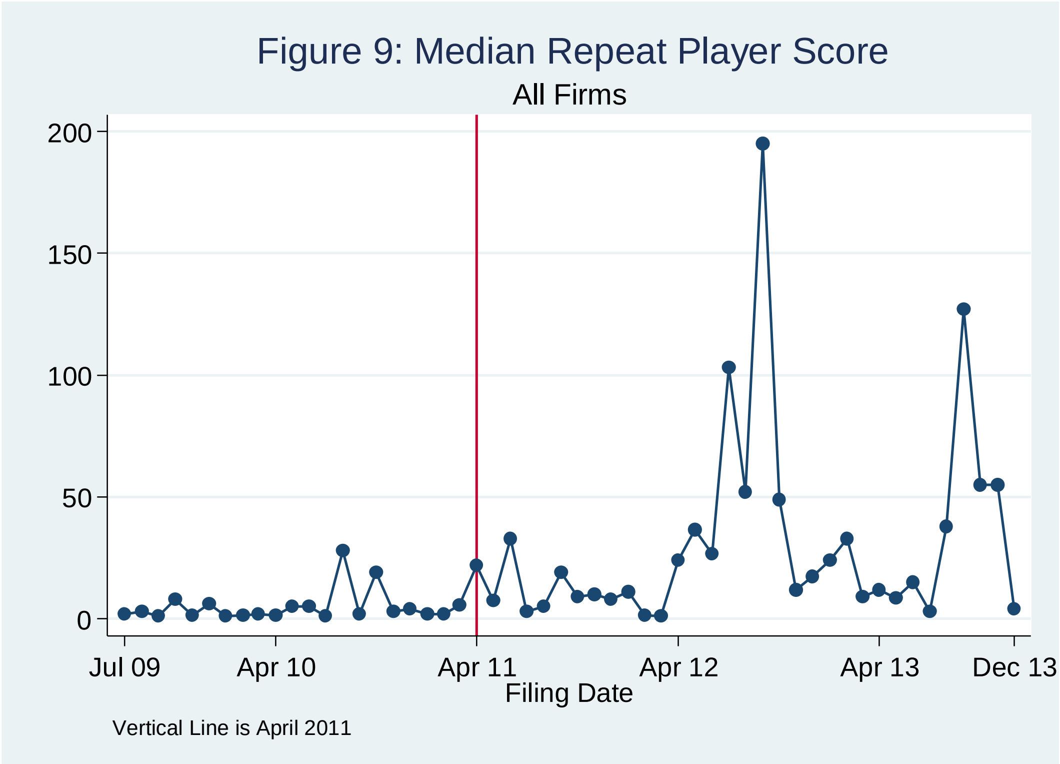
[298] Of course, *Concepcion* is not solely responsible for the emergence of ultra-active repeat playing companies. Recall that the CFPB examined financial services arbitrations from 2010 and 2011—a period that mostly precedes the Court's decision—and determined that 80% of cases involved a defendant who also appeared in more than three other matters in the same commercial niche. *See* CFPB STUDY, *supra* note 37, at § 5.6.12. Yet it is not clear how often the "heaviest" of these

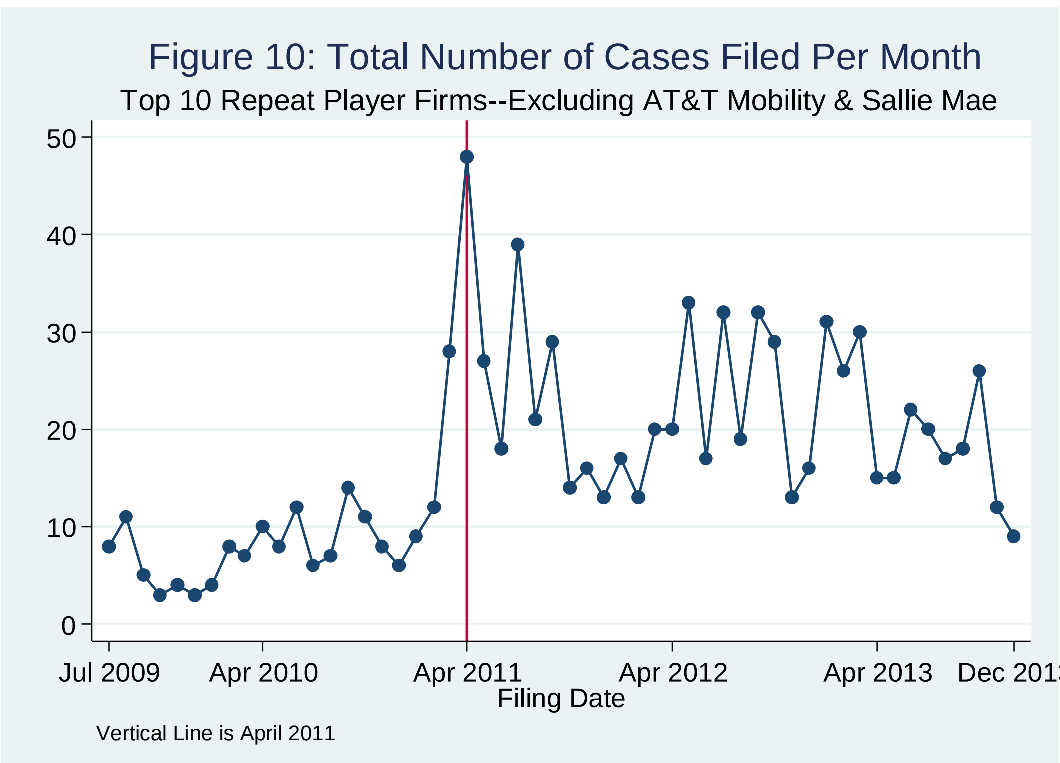
To illustrate this point, we created a variable called "repeat player score," which reflects the number of times a company appears in the overarching 17,638-case AAA disclosures. Figure 9 calculates the median repeat player score of all firms in each month. It shows that, since *Concepcion*, defendants have become increasingly familiar with the AAA process.[299] Likewise, Figure 10 examines the link between *Concepcion* and filings against businesses with the highest repeat player scores. As the figure shows, beginning in April 2011, there was a discontinuous jump in the number of cases filed against these top-playing businesses. In fact, Figure 10 underreports this increase because it excludes AT&T Mobility and Sallie Mae, which faced so many individual arbitrations after the opinion that displaying them would greatly increase the range of the y-axis, flattening out the rest of the trend in monthly filings.[300]

"heavy" repeat players surfaced in the CFPB's data. Our research suggests that the upper quartile of these firms began to arbitrate more often after *Concepcion*.

[299] One would not expect the median repeat player score to rise over time. We calculate each firm's repeat player score by counting its appearances in our dataset as of December 31, 2013, and then using that number to calculate each month's median. For example, Sallie Mae pops up 195 times in our records. We thus input 195 into the repeat player median whether a customer sues Sallie Mae in April 2010 or April 2013. Thus, the increase in median repeat player score reflects the fact that repeat players have been sued more after *Concepcion*.

[300] In addition, our data may underestimate the current number of extreme repeat players. In July 2010, Chase Bank, Bank of America, Capital One, and HSBC settled an anti-trust lawsuit by agreeing not to enforce their arbitration clauses and class arbitration waivers for three and a half years. *See* Final Judgment and Order of Dismissal, Ross, et al. v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. July 22, 2010), available at https://arbitration.ccfsettlement.com/documents/ (last accessed Feb. 20, 2015). Thus, four huge companies who are likely to become high level or super repeat players were not arbitrating during the period covered by our investigation.





Accordingly, individual arbitrations have become more common since *Concepcion*, although not on a scale that matches the class action. In addition, cases pit consumers against increasingly savvy repeat playing defendants. We will discuss the normative implications of these trends in Part III. Now, though, we turn our attention to awarded cases.

2. Outcomes

We found that consumers "won"—defined as recovering an award of $1 or more—491 of 1,407 cases (35%).[301] Prevailing consumers received an average of $18,721 (54% of the amount requested in the complaint), with a median award of $5,145.[302] But because most consumers were not victorious, the overall damage figures are lower. In the full sample of awarded cases, including consumer losses, the mean award was $6,533 (19% of the demand), with a median of $0.

Table 2. Outcomes

	Mean (SD)	Median	N
Consumer Wins	35%	0	1,407
Claim Amount	74,042 (520,141)	15,000	1,407
If Consumer Wins:			
Award Amount	18,721 (54,542)	5,145	491
Award as a Percent of Claim Amount	54%	39%	491
All Consumers (including Losses):			
Award Amount	6,533 (36,266)	0	1,407
Award as a Percent of Claim Amount	19%	0%	1,407

Although we cannot draw sweeping conclusions from these results, they provide several instructive points of comparison. For one, recall that the E&Y and Searle authors determined that roughly half of consumer-plaintiffs

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301 This is the most common way of conceptualizing a "victory" in the empirical arbitration literature. *See, e.g.*, E&Y STUDY, *supra* note 149, at 9 n.11; Bingham, *Repeat Player Effect*, *supra* note 35, at 208; Colvin, *supra* note 35, at 5. Conversely, the Searle Report and the CFPB Study respectively based their win rates on consumers who obtained "damages of some kind" or "some form of relief." *See* SEARLE REPORT, *supra* note 35, at 67; CFPB STUDY, *supra* note 37, § 5.6.12, at 67. Unfortunately, we were not able to slice the data so finely, because the "other form of relief" column in the AAA disclosures was blank. However, sixteen matters listed a consumer who recovered no damages as the "prevailing party," raising the possibility that they obtained an injunction or other nonmonetary damages. If we deem these to be consumer victories, the win rate rises to 36%.

302 These results are similar to the Searle Report's. *See* SEARLE REPORT, *supra* note 35, at 69 (determining that, among plaintiffs who prevailed on the merits, the mean award amount was $19,255 (52.1% of the demand) and the median was $5,000).

prevailed.[303] Some courts and commentators have cited this as proof that that extrajudicial proceedings "provide consumers with fair and affordable access to justice"[304] and "actually leave[] individuals better off than in litigation."[305] Even putting aside the fact that a 50% win rate is precisely what one would expect under the Priest-Klein theory,[306] our data suggest that consumer-plaintiffs are no longer as successful. Indeed, the Searle Report calculated a win rate that was 18% higher using AAA data from 2007.[307]

3. Informality

We found that some of arbitration's sleek procedures benefitted consumers while others did not. For starters, we confirmed that arbitration is almost certainly faster than litigation. The average fully-litigated case in state or federal court clocks in at about two years.[308] Conversely, the Searle Report found that the mean time between filing and the arbitrator's ruling was seven months,[309] and the CFPB put this number at six months.[310] Likewise, we determined that the average lifespan of an awarded case was eight months (or 243 days) and median time was 6.86 months (or 206 days).

In other ways, informality yielded mixed results. In our files, 35% of consumers represented themselves—a little more than the CFPB's 31% figure,[311] slightly beneath the 43% statistic from the Searle Report,[312] and nowhere near E&Y's 86%.[313] Less than half of plaintiffs invoked one of the AAA's rough and tumble options: 32% chose to submit the case on the documents, and 45% opted for phone-only hearings. There was no statistically significant difference in win rates between *pro se* consumers and represented consumers, consumers who

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303 *See supra* Part I.B.1.

304 Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 469 (2011).

305 S. 1782: the Arbitration Fairness Act of 2007: Hearing of the Subcomm. on the Constitution, S. Comm. on the Judiciary, 110th Cong. (Dec. 12, 2007) (statement of Peter B. Rutledge).

306 *See* Priest & Klein, *supra* note 39, at 15–19.

307 *See* SEARLE REPORT, *supra* note 35, at 67–68. For whatever it is worth, studies of state courts find that plaintiffs prevail in 55% to 60% of tort, contract, and real property trials, *see* CIVIL TRIALS, 2001 *supra* note 152, at 1; CIVIL TRIALS, 2005, *supra* note 152, at 1, and in a staggering 85% to 89% of small claims matters. *See*, *e.g.*, Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 358 (1994); Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 507 (1990).

308 *See supra* note 204; *see also* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison,* DISP. RESOL. J., Nov. 2003-Jan. 2004, at 44, 51 & tbl.3. *But see* Schwartz, *supra* note 34, at 1312-14 (arguing that these figures are misleading because they omit settlement and other forms of pre-trial dispositions).

309 *See* SEARLE REPORT, *supra* note 35, at 63–64.

310 *See* CFPB STUDY, *supra* note 37, § 5.7.3, at 73.

311 *See id.* § 5.5.3, at 30.

312 *See* SEARLE REPORT, *supra* note 35, at 73.

313 *See* E&Y STUDY, *supra* note 149, at 13.

elected documents-only hearings versus full hearings, and consumers who elected phone hearings versus in-person hearings.[314]

Table 3. Access			
	Mean (SD)	Median	N
Length of Time Until Disposition	243 (132)	206	1,407
	Number of Consumers	Percent of Sample	N
Self-Representation	493	35%	1,401
Document Only Review	454	32%	1,407
Phone Proceeding	627	45%	1,407
Note: Seven consumers are missing data on self-representation status.			

4. Costs

We also discovered that consumers paid more in arbitrator's fees than has been reported. For instance, as noted above, the Searle Report authors discovered that the mean arbitrator's fee was $1,346, and that consumers were responsible for an average of $247 of this amount.[315] Similarly, the CFPB determined that consumers surrendered a mean of $206 in fees.[316] In our data, the mean cost of the private judge came to $3,011, and the average consumer was responsible for $1,025.[317]

Table 4. Costs: Arbitrator Fees							
	Number	Total Fee: Mean (SD)	Total Fee: Median	Proportion of Fee Allocated to Consumer: Mean (SD)	Proportion of Fee Allocated to Consumer: Median	Final Fee Paid By Consumer: Mean (SD)	Final Fee Paid By Consumer: Median

314 None of these differences were significant at the 10% significance level. On the other hand, for self-representation status, the Searle Report discovered that *pro se* consumers won 45% of cases as compared to 60% for their lawyered-up counterparts. The Searle Report did not report the statistical significance of this difference. *See* SEARLE REPORT, *supra* note 35, at 73.

315 *See id.* at 56. The Searle Report also found that consumers with claims of less than $10,000 paid an average of $95 in arbitrator's fees, and consumers with claims of between $10,000 and $75,000 paid $204. *See id.* at 57. Our figures for this cohort was slightly higher: $121 and $324, respectively.

316 *See* CFPB STUDY, *supra* note 37, § 5.7.5, at 78.

317 *Cf.* CDRI STUDY, *supra* note 148, at 21 (finding an average fee of $2,256 across all complaint types, including those initiated by businesses).

Consumer Losses	916	3,144 (17,439)	750	0.28 (0.29)	0.17	1,249 (8,804)	125
Consumer Wins	490	2,763 (11,064)	750	0.20 (0.24)	0.02	605 (3,483)	5
All Cases	1,406	3,011 (15,515)	750	0.25 (0.28)	0.15	1,025 (7,416)	125
Note: One case is missing data on fee information.							

5. Repeat Players

As noted earlier, there is no consensus about whether plaintiffs tend to fare worse against repeat players win more than against one-shot businesses. The employment studies point in opposite directions, and only the Searle Report has addressed the outcome of consumer cases. This section bears down on this issue. It begins by providing bivariate statistics, and then conducts a multivariate regression analysis, inspired by—and yet improving upon—the technically advanced literature in the employment realm.

i. Bivariate Analysis

This section conducts a simple two-variable analysis. It does so (1) to generate results that we can compare to the Searle Report and (2) to lay the foundation for our more illuminating multivariate regression analysis below.

Although the Searle Report provides welcome insight into the misty realm of consumer arbitration, its repeat player conclusions are hardly definitive. For one, it used a small sample size of 240 cases decided over the span of just nine months.[318] More significantly, it employed a bivariate rubric that cannot control for the fact that other variables, apart from facing a repeat player business, influence consumer win rates. We slowly ramp up to our more nuanced approach by feeding our data into the Searle authors' approach and contrasting our output with theirs.

We begin by defining our key terms. First, we call an entity that arbitrates more than once in the full AAA sample of 17,638 cases a "repeat player business."[319] Second, we refer to a company and an arbitrator that meet at least twice as a "repeat pair." Third, like the CFPB, we train our attention on a new kind of repeat player: plaintiff's lawyers.[320] Scholars have theorized that consumers can neutralize any advantage that corporations enjoy by hiring an

[318] *See* SEARLE REPORT, *supra* note 35, at 37, 66-67.

[319] This is the classical definition employed by Bingham, Hill, and Colvin. *See supra* Part I.B.4. After we made the initial determination of whether a firm was a repeat player, we double-checked our work by comparing it to the AAA's "number of cases involving business" variable. The results were identical in every relevant respect.

[320] We also studied repeat player law firms (as opposed to lawyers). However, these results were similar the repeat player lawyer results along all significant dimensions, so we decided to omit them.

attorney who also arbitrates frequently.[321] Thus, a "repeat player lawyer" is one who appears more than once in our records.

Tables 5A through 5C showcase our results. For starters, we found that the majority of consumers (71%) faced a repeat player business. The consumer win rate was 42% against one-shotters but just 31% against repeat players (p<0.0001). Average awards were statistically indistinguishable between the two groups. Next, we discovered that 24% of consumers encountered repeat pairs. Again, these plaintiffs suffered a win rate penalty but received awards that were statistically indistinguishable from plaintiffs who faced repeat pairs. Specifically, their win rate was fifteen percentage points lower than other consumers (p<0.0000). Finally, our data on repeat playing plaintiffs' lawyers was sharply counterintuitive. We found that nearly half of all consumers were represented by a repeat player lawyer (46%). Contrary to our ex ante predictions, having a repeat player plaintiff's lawyer does not seem to give consumers an advantage in liability or damages decisions. If anything, it hamstrings consumers at the liability stage: repeat playing lawyers actually had a lower win rate than pro se consumers (32% vs 37%).

Table 5A. Repeat Player Prevalence

	Win Rate	Award Amount	Number	Percent of Sample
Consumers facing a one-shot defendant	42%	$6,308	389	29%
Consumers facing a repeat player business (defined as a defendant that appeared in arbitration at least twice)	31%*** (p=0.0001)	$6,854 (p=0.81)	940	71%
Total			1,329	100

Notes:

(1) We dropped seventy-eight awarded cases in which consumers faced multiple defendants, all with different repeat player prevalence values. In these matters, there was no single repeat player value that we could use. In an alternative analysis, we used the median repeat player prevalence value as the single repeat player value for consumers facing multiple defendants and the percent of consumers facing repeat player defendants was substantially similar.

(2) We used T-tests to test for significant differences in win rates and award amounts between consumers who face one-shotters and consumers who face repeat players. For these tests, we denoted significance levels in the following conventional way: $^{*}\,p < 0.05$, $^{**}\,p < 0.01$, $^{***}\,p < 0.001$.

Table 5B. Business-Arbitrator Repeat Pairing Prevalence

	Win Rate	Award Amount	Number	Percent of Sample
Consumer not facing a	38%	$6,464	1,004	76%

[321] *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 566 (2001); W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 74–75 (2007) (noting "the extent to which modern plaintiffs' firms, like other repeat players, aggregate claims").

Repeat Pair				
Consumer facing a Repeat Pair (defined as a business-arbitrator pair that met at least twice in arbitration)	23%*** (p=0.0000)	$7,548 (p=0.64)	321	24%
Total			1,325	100

Notes:

(1) As before, we dropped seventy-eight awarded cases in which the consumers faced multiple defendants, all with different repeat player prevalence values. (See notes to Table 5A for a more detailed explanation.)

(2) We dropped an additional four cases because of missing repeat pair information.

(3) We used T-tests to test for significant differences in win rates and award amounts between consumers who face one-shotters and consumers who face repeat players. For these tests, we denoted significance levels in the following conventional way: $^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$.

Table 5C. Plaintiff Repeat Lawyer Prevalence

	Win Rate	Award Amount	Number	Percent of Sample
Consumer is Pro Se (defined as consumer having no lawyer and no law firm)	37%	$3,391	493	35%
Consumer has One Shot Lawyer	39% (p=0.68)	$11,908*** (p=0.0000)	265	19%
Consumer has Repeat Player Lawyer	32% (p=0.04)	$6,783 (p=0.12)	639	46%
Total			1,397	100

Notes:

(1) We dropped seven cases because they have missing self-representation information.

(2) We dropped five additional cases because they have no reported lawyer, even though they have a reported law firm.

(3) We used T-tests to test for significant differences in win rates and award amounts between consumers who have one-shot lawyers and consumers who are pro se. We also used T-tests to test for significant differences between consumers who have repeat player lawyers and consumers who are pro se. For these tests, we denoted significance levels in the following conventional way: $^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$

In sum, unlike the Searle Report, our bivariate assessment reveals a repeat player bias in consumer cases, but only with respect to win rates. In addition, it demonstrates that the conventional wisdom about repeat playing plaintiffs' lawyers is exactly backwards: experienced attorneys tend to hurt consumers, rather than help them. We will return to that issue below. Now, however, we subject these results to the scrutiny of a multivariate regression analysis.

ii. Regression Analysis

This section conducts two separate regressions analyses. First, replicating Colvin's state of the art regression analysis in the employment context, it offers baseline results of the impact of repeat playing businesses and repeat pairs on win rates and award levels in consumer cases. Second, it takes Colvin's work to the next level by supplementing the baseline regression model with a rich set of control variables.

a. Baseline Models

In his pioneering work, Colvin sought to determine the effect of business repeat player status, repeat pair status, and consumer *pro se* status on win rates and award amounts in the employment setting.[322] Specifically, Colvin used (1) a logit model to estimate the impact of each variable on the probability of an employee win and (2) an ordinary least squares (OLS) model to estimate the effect of these factors on the square root of award amounts.[323] To synchronize with his paper, we will adopt these as our "baseline" regression specifications before we add new dimensions to them in Part (b) below.

The functional forms for these models are as follows:

Equation 1—Logit Model: Effect of Repeat Player Issues on the Probability of Winning[324]

$$\begin{aligned} P(Win = 1) = \Lambda(&\beta_0 + \beta_1 Repeat\ Player\ Business \\ &+ \beta_2\ Repeat\ Business\ Arbitrator\ Pairing \\ &+ \beta_3 Self Represented\ Consumer \\ &+ \beta_4 Decision\ Year\ 2010 + \cdots + \beta_8 Decision\ Year\ 2014) \end{aligned}$$

$$where\ \Lambda(x) = \frac{\exp(x)}{[1 + \exp(x)]}$$

Equation 2—OLS Model: Effect of Repeat Player Issues on Award Amounts, Conditional on Winning and Generally[325]

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322 Colvin also included year dummies as controls in his regressions. Note that in this section, for the sake of brevity, we report all results relating to consumer self-representation in the footnotes.

323 *See* Colvin, *supra* note 35, at 18.

324 Following Colvin, *Win* is a dichotomous variable equal to one if the consumer wins at least $1 and zero otherwise. *Repeat Player Business* is a dummy variable equal to one if the consumer faces a repeat player business and zero otherwise. *Repeat Business Arbitrator Pairing* is a dummy variable equal to one if the consumer faces a business and an arbitrator that has met at least once in arbitration and zero otherwise. *Self-Represented Consumer* is a dummy variable equal to one if the consumer is *pro se* and zero otherwise. The specification also includes decision year dummies to control for the effect on win rates of any factors that might be fixed within a given decision year but change between decision years. Λ(.) is the logit function which guarantees that predicted win probabilities will lie between zero and one. We clustered standard errors at the individual business level.

325 Equation 2 uses the same definitions as Equation 1 and also clusters standard errors at the business level. We use this model to investigate damages issues in both the subsample of consumer victories and in all cases. When we analyze the full sample, we use zero as the award amount for consumers who lose. Consumer award amounts are positively skewed, which is

$$
\begin{aligned}
\sqrt{Award\ Amount} \\
&= \beta_0 + \beta_1 Repeat\ Player\ Business \\
&+ \beta_2\ Repeat\ Business\_Arbitrator\ Pairing \\
&+ \beta_3 Self\_Represented\ Consumer \\
&+ \beta_4 Decision\ Year\ 2010 + \cdots + \beta_8 Decision\ Year\ 2014 \\
&+ \varepsilon
\end{aligned}
$$

We present our regression results from the baseline logit model in column 1 of Table 6. At first blush, we seem to uncover no statistically significant relationship between repeat player businesses and consumer wins.[326] However, as we discuss below, the baseline approach treats "repeat player business" as a binary concept: either an entity fits the description or it does not. Because it cannot tease out various degrees of firm sophistication, it masks the fact that repeat player status *does* negatively impact the consumer win rate but only for those consumers facing the very companies that arbitrate the most often.[327] In addition, like Colvin, we discern that consumers are less likely to win when they confront a repeat pairing. The logit coefficient is statistically significant ($p<0.05$) and the related odds ratio is 0.588, which implies that plaintiffs facing repeat pairs have a win rate that is 41.2% lower (or 1-0.588=0.412) than other consumers.

Our baseline analysis is less damning when it comes to damages. Column 2 of Table 6 presents damages results for those consumers who prevail on the merits. These results show that victorious consumers do not receive lower awards against repeat businesses or repeat pairs (relative to victorious consumers who face one-shot businesses or non-repeat pairs).[328] Column 3 of Table 6, then, presents damages results for the entire sample of consumers—including those consumers who lose their cases. At first glance, it may seem strange to include losing consumers in analysis of damage amounts since their yield is zero. However, doing so allows us to approximate the general repeat player effect on damages for all consumers *if they were to win*. As with the winners' sample, we

problematic because the OLS model requires the dependent variable to follow a positive distribution. *Cf.* Colvin, *supra* note 35, at 18 (discussing the same problem in the employment realm). There are several possible econometric fixes for this problem. One is to use the logarithm of award amounts as our dependent variable. Colvin decided against this method because it is inappropriate when applied to a full sample where some of the award amounts are zero, since the logarithm of zero is not defined. Another possible solution, which Colvin adopts (and thus we do too) is to use the square root of award amounts as the dependent variable. *See id.* The square root function helps to "normalize" award amounts but also allows for the inclusion of zero award amounts in consumer losses.

[326] We also found that pro se plaintiffs suffer no win rate disadvantage relative to their represented counterparts.

[327] Conversely, in employment arbitration, the repeat player effect may be spread more evenly throughout various firms, rather than concentrated at the top. That would explain why Colvin's baseline analysis found that employees facing a repeat player have a 48.6% lower chance of winning, *see* Colvin, *supra* note 35, at 18, but our baseline analysis detects no general repeat player effect in the consumer setting.

[328] However, self-represented consumers receive awards that are significantly less than consumers with lawyers ($p<0.001$). This is similar to Colvin's conclusion that *pro se* employees win at roughly the same rate as represented employees, but recover less damages. *See id.* at 18-20.

again find that facing a repeat player business or repeat business-arbitrator pair does not seem to disadvantage consumers in terms of award amounts. This full-sample result suggests that repeat player issues do not generally influence award amounts.

Table 6. Baseline Model: Effect of Repeat Players on Win Rates and Award Amounts			
	(1)	(2)	(3)
	Outcome Variable: Consumer Win Logit Coefficient (Clustered SE's) [Odds Ratio]	Outcome Variable: Square Root of Award Amounts OLS Coefficient (Clustered SE's)	Outcome Variable: Square Root of Award Amounts OLS Coefficient (Clustered SE's)
Sample Used:	All Consumers	Winners Only	All Consumers
Independent Variables:			
Business Repeat Player†	-0.297 (0.206) [0.743]	-2.958 (10.323)	-9.326 (5.873)
Repeat Business-Arbitrator Pair††	-0.530* (0.260) [0.588]	9.873 (23.045)	-10.072 (8.331)
Pro Se Consumers†††	0.099 (0.177) [1.104]	-43.883*** (9.491)	-13.749** (4.279)
Constant	-0.663 (0.565)	88.526*** (11.630)	29.687*** (8.608)
N	1319	452	1319

Notes:

(1) Standard errors are clustered at the business level.
(2) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$
(3) All specifications include decision year dummies.
(4) The regression samples are smaller than the original sample of 1,407 cases because some cases are missing data.
(5) † The reference group for consumers facing repeat player businesses is the group of consumers facing one-shot businesses.
(6) †† The reference group for consumers facing repeat business-arbitrator pairs is the group of consumers facing non-repeat pairs.
(7) ††† The reference group for *pro se* consumers is the group of consumers who are self-represented.

Accordingly, when we import the leading multivariate regression model from the employment literature into the consumer setting, we reach the following conclusions: (1) consumers perform equally well against repeat playing businesses both on the merits and in terms of damages and (2) consumers win less often in cases featuring repeat pairs, but suffer no penalty at the award stage.

Nevertheless, as we explain next, there are several ways in which we can drill down even further.

b. Rich Models

This section improves on the baseline regression model in four ways. First, as noted above, we jettison the one-dimensional definition of "repeat player." Rather than treating business sophistication as a monolithic concept, we sort firms into five groups based on sophistication levels: one-shotters, low-level repeat players, mid-level repeat players, high level repeat players, and super repeat players.[329] As noted above, we will sometimes call high level and super repeat players "extreme" repeat players. Second, we add subtlety to the "repeat pair" dummy variable. Instead of simply asking *whether* a company and a decision maker had crossed paths before, we look at *how often* they have worked together. We use four shades of familiarity: non-repeat pairs, low-level repeat pairs, mid-level repeat pairs, and high level repeat pairs.[330] Third, we add a missing component to the baseline model: a dummy variable keyed to the plaintiff's lawyer's experience with the AAA arbitral process. We break this category down into consumers who are *pro se* versus those who hire one-shotters, low-level repeat players, mid-level repeat players, and high level repeat players.[331] Fourth, the baseline model is somewhat parsimonous. Other than the three main independent variables (repeat player status, repeat pair status, and consumer *pro se* status), the baseline models only include year fixed effects to explain variations in win rates and award amounts. Our preferred specifications additionally control for consumer claim amount, telephonic hearings, documents-only submissions, and case length. Our win rate results are presented in Table 7 and our damages results are presented in Table 8.

When we calibrate the antenna this way, we detect that consumers facing corporations that arbitrate routinely suffer a pronounced disadvantage (Table 7). Indeed, consumers fare much worse on the merits against high level and super repeat playing firms than they do against the reference group of consumers facing one-shot entities. The logit coefficient for high level businesses is statistically significant ($p<0.001$) and the odds ratio of 0.209 indicates that the probability that a consumer will win is 79% lower (1-0.209=0.791) than the chances she will

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[329] One-shot players make a single appearance in arbitration. Low-level repeat players are involved with two to 11 disputes. Mid-level repeat players surface 12 to 127 times. High level repeat players pop up in 128 to 276 matters. Super repeat players arbitrate more than 276 times. The median prevalence level in the dataset is 11, the third quartile is 127, and the 90th percentile is 276. The maximum number of cases involving any one firm is 1,100.

[330] Firms and arbitrators that encounter each other once are non-repeat pairs. Low-level repeat pairs meet twice, mid-level repeat pairs meet three to fifteen times, and high level repeat pairs meet sixteen or more times. The maximum number of joint appearances was twenty-one.

[331] *Pro se* consumers have neither a reported lawyer nor a reported law firm. One-shot lawyers make one appearance, low-level repeat player lawyers appear 2 to 53 times, mid-level repeat player lawyers appear 54 to 179 times, and high level repeat player lawyers make more than 179 appearances. The median number of appearances is one, the third quartile is 53, and the 90th percentile is 179. The maximum number of appearances is 368.

defeat a one-shotter. Super repeat companies are even tougher: their logit coefficient is statistically significant (p<0.001), and their odds ratio of 0.060 implies that the likelihood of a plaintiff victory is 94% lower than it is against one-shotters. Conversely, there is no repeat player effect on win rates for low-level and mid-level repeat players: their logit coefficients are not statistically different from zero and their odds ratios are not statistically different from one.[332] In addition, unlike our baseline regression, we found no meaningful relationship between repeat pairings and case results.

Our richer model reaches a counterintuitive conclusion about plaintiffs' attorneys. Consumers who hire high level repeat players have *lower* win rates relative to *pro se* plaintiffs (the reference group). Specifically, consumers who entrust their cases to high level repeat playing counsel are 91.7% less likely to prevail than self-represented plaintiffs (odds ratio is 0.083, (p<0.05)).[333]

Table 7. Rich Model: Effect of Repeat Players on Win Rates	
	Consumer Win Logit Coefficient (Clustered SE's) [Odds Ratio] (Sample with All Consumers)
Business Sophistication *(Reference Category is Consumers Facing One-Shot Businesses)*	
Low-Level Repeat Player	-0.051
	(0.177)
	[0.950]
Mid-Level Repeat Player	-0.103
	(0.245)
	[0.902]
High level Repeat Player	-1.562^{***}
	(0.423)
	[0.210]
Super Repeat Player	-2.802^{***}
	(0.234)
	[0.061]
Business-Arbitrator Familiarity *(Reference Category is Consumers Facing Non-Repeat Pairs)*	
Low-Level Repeat Pairs	0.288
	(0.295)
	[1.334]

[332] The same held true for other control variables, including consumer claim amounts, documents-only hearings, telephonic proceedings, and the length of the arbitration.

[333] One-shot plaintiff's lawyers, low-level plaintiff's lawyers, and mid-level plaintiff's lawyers fare no better in terms of win probability than plaintiffs that represent themselves (the reference group).

Mid-Level Repeat Pairs	0.091
	(0.404)
	[1.095]
High level Repeat Pairs	-0.470
	(0.439)
	[0.625]
Plaintiff's Lawyer's Sophistication *(Reference Category is Pro Se Consumers)*	
One-Shot Lawyer	-0.047
	(0.179)
	[0.955]
Low-Level Repeat Player Lawyer	0.093
	(0.216)
	[1.098]
Mid-Level Repeat Player Lawyer	0.122
	(0.331)
	[1.129]
High level Repeat Player Lawyer	-2.494*
	(0.994)
	[0.083]
Other Controls	
Consumer Claim Amount (in Millions)	-1.140
	(0.643)
	[0.320]
Documents-Only Submission	0.318
	(0.188)
	[1.375]
Telephonic Hearing	-0.219
	(0.175)
	[0.803]
Case Length	0.000
	(0.001)
	[1.000]
Constant	-0.727
	(0.577)
N	1313

Notes:
(1) Standard errors are clustered at the business level. (2) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$ (3) This specification includes decision year dummies. (4) This regression sample is smaller than the original sample of 1,407 cases because some cases are missing data.

Our results from our damages regressions (Table 8) fall in line with our win rate regression results. First, as with the win rate results, we find that consumers facing high level and super repeat playing businesses are disadvantaged in terms of award amounts, but those facing less sophisticated businesses are not. Specifically, when we confine our analysis to prevailing plaintiffs (Table 8, column 1), we discover that awards against high level repeat players that are statistically smaller than those rendered against one-shotters ($p < 0.01$). When we broaden our focus to include all cases, including consumer losses, (Table 8, column 2) both high level and super repeat players exert a negative and statistically significant influence on damage amounts ($p < 0.001$).[334]

In addition, we find that business-arbitrator familiarity has no significant bearing on award amount—a result that is in line with our win rate results from Table 7.

Finally, with respect to plaintiffs' lawyer's sophistication, we find that having a one-shot lawyer gives consumers a damages boost, relative to proceeding *pro se*. This is true both for consumers who are actually victorious on the merits (Table 8, column 1; $p<0.01$) and for all consumers (Table 8, column 2; $p<0.05$). Having a plaintiffs' lawyer with any higher level of sophistication may lead to an awards penalty, though this effect only is statistically significant in the winner's sample.

Table 8. Rich Model: Effect of Repeat Players on Award Amounts		
	(1)	(2)
	Outcome Variable: Square Root of Award Amounts OLS Coefficient (Clustered SE's)	Outcome Variable: Square Root of Award Amounts OLS Coefficient (Clustered SE's)
Sample Used:	Winners Only	All Consumers
Independent Variables:		
Business Sophistication *(Reference Category is Consumers Facing One-Shot Businesses)*		
Low-Level Repeat Player	12.524 (8.492)	13.184 (7.739)
Mid-Level Repeat Player	-4.626	-6.788

334 The award penalty against high level repeat players is consistent with the one in the winners-only sample, which suggests that it is not primarily a byproduct of the low win rate. However, the super repeat player result likely reflects the predominance of "zero" awards and therefore likely represents mostly a win rate effect. Finally, one other control variable was positively related to consumer award amount in cases where the consumer won at least $1—claim amount (p<0.001).

	(10.009)	(7.893)
High level Repeat Player	-31.207** (11.581)	-28.873*** (6.342)
Super Repeat Player	†	-29.855*** (6.758)
Business-Arbitrator Familiarity *(Reference Category is Consumers Facing Non-Repeat Pairs)*		
Low-Level Repeat Pairs	26.780 (16.016)	19.895 (12.537)
Mid-Level Repeat Pairs	16.456 (9.819)	2.783 (9.147)
High level Repeat Pairs	†	-7.609 (8.161)
Plaintiff's Lawyer's Sophistication *(Reference Category is Pro Se Consumers)*		
One-Shot Lawyer	23.082** (8.003)	13.201* (5.698)
Low-Level Repeat Player Lawyer	-2.479 (10.612)	9.482 (8.449)
Mid-Level Repeat Player Lawyer	-32.270** (10.779)	-4.189 (7.954)
High level Repeat Player Lawyer	†	-4.048 (4.420)
Other Controls		
Consumer Claim Amount (in Millions)	603.783*** (95.077)	53.751 (44.659)
Documents-Only Submission	-4.188 (7.343)	0.916 (3.868)
Telephonic Hearing	-17.511 (9.390)	-16.656** (5.707)
Case Length	0.088 (0.045)	0.029 (0.038)
Constant	54.417*** (12.588)	15.945 (10.969)
N	440	1315

Notes:

(1) Standard errors are clustered at the business level.

(2) $^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$

(3) Both specifications include decision year dummies.

(4) The regression samples are smaller than the original sample of 1,407 cases because some cases are missing data.

(5) † Unfortunately, our analysis of the square root of award size in plaintiff victories was hamstrung by the fact that wins against super repeat playing firms were extremely rare. Thus, the number of consumers available for our highest repeat player categories—super repeat playing *businesses*, high level repeat *pairs*, and consumers using high level repeat player *lawyers*—were three, one, and seven, respectively. These cells are too small to produce reliable statistical results, and so we dropped them.

To conclude, consumers facing high level and super repeat playing defendants are strongly disadvantaged in the arbitral forum relative to consumers facing one-shot defendants; consumers facing businesses with low or mid level arbitration experience do not suffer any disadvantage. Furthermore, it seems that hiring a sophisticated plaintiffs' lawyer only makes matters worse. Specifically, lawyers with high levels of arbitral sophistication hurt their clients' chances of winning and lawyers with medium levels of arbitral sophistication can lower their clients' award amounts. Representation is not completely without value, however. Consumers that hire one-shot lawyers do better at the awards stage than consumers who enter arbitration solo. In Part III, we weigh possible explanations for these phenomena and explore their normative consequences.

III. POLICY IMPLICATIONS

This Part connects our findings to debates over the future of the FAA. We first challenge the conventional wisdom that arbitration allows consumers to bring low-value claims. We then turn our attention to repeat players, focusing on how the Court has empowered corporate defendants.

A. *Access to Justice*

Supposedly, one of arbitration's primary benefits is its friendliness to plaintiffs with small-dollar disputes. But as we explain in this section, this virtue appears to be more theoretical than real.

The assertion that arbitration opens the door to low-stakes disputes runs throughout the caselaw and commentary in the field. Perhaps the best-known expression of this perspective is Justice Breyer's remark in *Allied-Bruce Terminix Companies, Inc. v. Dobson* that the FAA caters to "individuals, say, complaining about a product, who need a less expensive alternative to litigation."[335] Similarly, scholars routinely assert that arbitration allows for "the swift resolution of small disputes"[336] and "permit[s] claimants to bring claims they could not afford to bring in court."[337]

This proposition has become pivotal to two discussions about whether to amend the FAA. First, the Court's blockbuster cases have rekindled calls for Congress to pass the Arbitration Fairness Act ("AFA").[338] Most recently introduced by Minnesota Senator Al Franken, the AFA would invalidate any provision that "requires arbitration of an employment dispute, consumer dispute,

[335] Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 280 (1995).

[336] Metro E. Ctr. for Conditioning & Health v. Quest Commc'ns Int'l, Inc., 294 F.3d 924, 927 (7th Cir. 2002).

[337] Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contract*s, 59 VAND. L. REV. 729, 733 (2006).

[338] *See, e.g.,* Schwartz, *supra* note 32, at 240; Sternlight, *supra* note 146, at 726; Imre Stephen Szalai, *More Than Class Action Killers: The Impact of* Concepcion *and* American Express *on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 55-56 (2014).

antitrust dispute, or civil rights dispute."[339] However, the nascent statute faces the vociferous objection that it "will result in less access to a remedy for plaintiffs with small claims."[340] Second, some scholars have urged lawmakers to override *Concepcion* and *Italian Colors* by banning class arbitration waivers.[341] But corporations and their supporters have protested that individual arbitration is "superior in many cases to class actions in vindicating consumer rights."[342] These defenses of the status quo share a common thread: the idea that many plaintiffs' "*only* realistic access to justice is through arbitration."[343]

Our research casts doubt on this entrenched belief. The truth is that very few individuals bother to arbitrate minor grievances. Statistics from state court supply a rough point of comparison. In 2013 alone, California entertained 554,858 lawsuits seeking $25,000 or less,[344] Florida reported 195,232 disputes for under $5,000,[345] and Kentucky weighed in with 11,034 complaints beneath the threshold of $2,500.[346] The corresponding number of filings from all over the country in the AAA during that same period were 476, 152, and 98. In fact, in all four-and-a-half years covered by our study, only 184 of all 4,839 consumers in our sample demanded under $1,000. Thus, Justice Breyer's archetypical arbitration plaintiff "complaining about a product"[347] is practically a myth.

Moreover, this reticence to pursue small-dollar causes of action may be rational. Indeed, consumers often leave the arbitral forum with an overall pecuniary loss. To get a fine-grained sense of the consequences of arbitrating, we created a variable called "net recovery" for all awarded cases. This figure consists of the damages and attorneys' fees awarded to consumers, minus the consumer's share of the arbitrator's fees. Among losing consumers (n=916), the average and median net awards were about negative $2,000 and negative $125, respectively.[348]

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339 Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013) § 402(a). Liberals have floated the law several times before. *See, e.g.,* Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

340 Darren P. Lindamood, Comment, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291, 310 (2010); *see also* Amy J. Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, 28 BANKING & FIN. SERVICES POL'Y REP. 16, 21 (2009) ("[A]rbitration may be faster and cheaper than litigation, thereby providing consumers with greater access to remedies than they can obtain through traditional court processes."); *cf.* Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet Instead of a Scalpel?*, 74 ALB. L. REV. 769, 784 (2011) (raising similar concerns in the employment milieu); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 314 (2012) (same).

341 *See, e.g.,* Cole, *supra* note 332, at 468; Sternlight, *supra* note 133, at 726; Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767, 793 (2012).

342 von Spakovsky, *supra* note 141.

343 Chamber of Commerce Brief, *supra* note 141, at *31.

344 Judicial Council of California, Courts Statistics Report XV, at http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf.

345 Florida Courts, Florida Office of the State Courts Administrator, at 8-2, http://www.flcourts.org/core/fileparse.php/250/urlt/reference-guide-1213-county-civ.pdf.

346 Kentucky, Court of Justice, Statewide Caseload Report, http://courts.ky.gov/aoc/statisticalreports/Documents/StatewideCaseloadReport_District.pdf.

347 Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 280 (1995).

348 This result does not include filing fees, which likely set many consumers back even further.

The outlook is not that much brighter when one factors in consumer claim amount. Specifically, the net recovery for consumers who demand $1,000 or less is $227 on average and the median net recovery is negative $25. Accordingly, consumers and their lawyers may have good reason to be gun shy about arbitrating minor claims.

Table 9: Net Recovery			
	Number	Net Recovery: Mean (SD)	Net Recovery: Median
Consumer Losses	916	-2,042 (14,099)	-125
Consumer Wins	490	32,873 (236,226)	6,338
All Cases	1,406	10,126 (140,812)	0
Note: We dropped one case from the analysis due to missing data.			

Finally, contrary to the business community's predictions, the demise of the consumer class action has not sparked a barrage of low-value arbitrations. Admittedly, within our sample of 4,839 cases, the percentage of consumers seeking $10,000 or less did rise from 47% to 60% after *Concepcion*. But that increase stems entirely from the 1,094 filings against AT&T Mobility in October 2012, which demanded $10,000 each. This flurry of complaints is an outlier: recall that the wireless titan goes to great lengths to encourage its customers to arbitrate against it.[349] Because few other entities provide these bells and whistles, they are unlikely to be as tempting a target.[350] Indeed, without the AT&T Mobility matters, only 44% of post-*Concepcion* claims requested under $10,000. In addition, other metrics suggest that small-dollar causes of action have become less common. Before the opinion, 19% of plaintiffs sought less than $5,000. Afterwards, that figure fell to 11%—a statistically significant difference ($p<0.0000$). Likewise, the ratio of self-represented consumers and documents-only hearings—hallmarks of low-stakes cases—declined from 36% to 19% ($p<0.0000$) and 27% to 9% ($p<0.0000$), respectively.[351]

Of course, these figures only prove so much. Corporate wrongdoing could have tapered off, leading to fewer lawsuits. Similarly, some companies have regimes in place to prevent customer gripes from degenerating into arbitration. For example, major wireless service providers require consumers to mail them a

349 *See supra* note 127. As noted, they may have been a creative attempt to enjoin the AT&T Mobility/T-Mobile merger. *See supra* note 310.

350 *See, e.g.,* Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 853 (2012) (surveying thirty-seven class arbitration waivers and determining that "only six companies offered anything close to AT&T [Mobility]'s set of incentives, and none were quite as generous").

351 One might object that these calculations also include the AT&T Mobility claims, which were lawyer-driven (not *pro se*) and full-on hearings (rather than documents-only). Yet even excluding these matters, the percentage of self-represented cases (26%) and documents-only hearings (13%) fell after *Concepcion*.

notice and wait thirty days before filing a claim.[352] These internal conflict resolution measures—like the employer programs that inspired Hill's "appellate effect"[353]—could keep disputes off our radar. And last but not least, the AAA Due Process Protocol insists that drafters "make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."[354] Perhaps consumers have picked up the slack left by the absence of the class action by pursing minor grievances in "the people's court."[355]

Nonetheless, we are skeptical of these explanations. Before *Concepcion*, these defendants routinely faced class actions brought by tens or hundreds of thousands of plaintiffs.[356] After the opinion, many of the same firms, including AT&T Mobility and Sallie Mae, have been censured by governmental agencies for widespread misconduct.[357] It would take an enormous, energetic customer service department to soak up this ocean of potential arbitrations. Finally, the small claims theory is hard to square with the fact that filings in that tribunal have generally declined since 2011.[358]

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352 *See, e.g.*, *Customer Agreement*, VERIZON WIRELESS, http://www.verizonwireless.com/b2c/support/customer-agreement (last visited Feb. 28. 2015) ("IF EITHER OF US INTENDS TO SEEK ARBITRATION UNDER THIS AGREEMENT, THE PARTY SEEKING ARBITRATION MUST FIRST NOTIFY THE OTHER PARTY OF THE DISPUTE IN WRITING AT LEAST 30 DAYS IN ADVANCE OF INITIATING THE ARBITRATION."); *T-Mobile Terms and Conditions*, T-MOBILE, https://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true (last visited Feb. 28, 2015) ("[Y]ou agree to notify us of any dispute regarding your bill or Charges to your account within 60 days . . . . If you do not notify us of your dispute in writing within this time period, you may not pursue a claim in arbitration or in court."); *Wireless Support, File a Complaint*, AT&T, http://www.att.com/esupport/article.jsp?sid=47114 (last visited Feb. 28, 2015) ("A party who intends to seek arbitration must first send to the other, by certified mail, a written Notice of Dispute . . . . [that] must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought . . . .".

353 *See supra* text accompanying note 243.

354 AAA Due Process Protocol, Principle 5, *supra* note 95.

355 *Small Claims Court*, OREGON STATE BAR, https://www.osbar.org/public/legalinfo/1061_SmallClaims.htm (last updated May 2013) (noting that small claims court has acquired this nickname).

356 *See, e.g.,* First Amended Class Action Complaint, Washkoviak v. Student Loan Mktg.Ass'n, No. 01-9282, 2004 WL 3676117 (D.C. Super. Ct. Sept. 15, 2004) (bringing a nationwide class action against Sallie Mae); Class Action Complaint, Strawn v. Cingular Wireless, No. 2:06-cv-00988 2006 WL 3845321 (S.D. W.Va. Nov. 21, 2006) (alleging that Cingular, now AT&T Mobility, violated a state consumer protection statute and affected over 1,000,000 customers).

357 *See, e.g.*, Danielle Douglas, *Sallie Mae to Pay $97 Million For Unlawfully Charging Troops on Student Loans*, WASH. POST (May 13, 2014), http://www.washingtonpost.com/business/economy/sallie-mae-to-pay-97-million-for-cheating-troops-on-student-loans/2014/05/13/bd76c2d8-dabb-11e3-b745-87d39690c5c0_story.html; Resnik, *supra* note 147 at 76–77 (describing Federal Trade Commission allegations that wireless service providers inflated customers' bills by "cramming"). To be sure, one could cite these state-based enforcement actions as evidence that private enforcement via the class action is unnecessary. But as the CFPB concluded, private enforcement often comes before—and appears to catalyze—a governmental response. *See* CFPB STUDY, *supra* note 37, § 9.4, at 13–14.

358 *See, e.g.*, ADMIN. OFFICE OF PA. COURTS, 2013 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 164 (2014), *available at* http://www.pacourts.us/news-and-statistics/research-and-statistics/caseload-statistics (reporting that filings in Philadelphia Municipal Court dropped from 123,473 in 2009 to 104,041 in 2013); JUDICIAL COUNCIL OF CAL., 2014

Thus, the argument that arbitration facilitates low-value claims is hard to square with reality. In turn, this suggests that the dangers of banning consumer arbitration clauses or class arbitration waivers are overblown.

B. *Repeat Players*

Mid-level and high-level repeat-playing plaintiffs' lawyers performed poorly, while extreme repeat-replaying companies dominated awarded cases. This section explains these observations, offers several tentative normative prescriptions, and plants flags for future research.

1. Plaintiffs' Lawyers

Scholars assume that arbitration-savvy plaintiffs' lawyers operate as a counterweight to repeat-playing businesses.[359] Yet we discovered that high-level repeat-playing plaintiffs' lawyers are dramatically more likely to lose than *pro se* consumers. In addition, we found that a customer's choice to hire a mid-level repeat-playing attorney lowered her expected damage recovery. What animates these topsy-turvy results? As we discuss below, the win rate issue proves to be a solvable mystery, but award amounts are more puzzling.

The spectacular failure of high-level repeat player plaintiffs' counsel has an easily-discernable origin. When we scoured the data, we discovered that all seventy-six matters in this group featured the same law firm, which represents consumers in debt collection matters.[360] Apparently, part of its modus operandi is to file a boilerplate complaint in the AAA on behalf of its clients against lenders.[361] These zombie arbitrations are allegedly designed to harass, rather than to lead to genuine relief.[362] Thus, the counter-intuitive, negative effect of high-level repeat playing counsel on win rates derives entirely from one deviant firm.

COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2003–2004 THROUGH 2012–2013, 40 (2014), *available at* http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf (finding a persistent drop in small claims filings from 2009 to 2013); MASS. DIST. COURT, SUMMARY OF FILINGS: FY 2014 (2014), *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/dc-allstats2014.pdf (tallying over 120,000 small claims filings in 2009 but never more than approximately 92,000 since then); OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2013, 85 (2014), *available at* http://www.txcourts.gov/media/467863/2013-Annual-Report9_26_14.pdf (uncovering a similar pattern); THE SUPREME COURT OF OHIO, 2013 OHIO COURTS STATISTICAL SUMMARY 46 (2014), *available at* http://www.supremecourt.ohio.gov/publications/annrep/13OCS/summary/trend.pdf ("Small Claims case filings have trended remarkably down over the past 10 years, with particularly sharp declines each year beginning in 2008.").

359 *See supra* note 353.

360 *See* Steve Rhode, *World Law Group Still Slogging It Out With North Carolina*, https://getoutofdebt.org/62592/world-law-group-still-slogging-north-carolina (last accessed May 13, 2015).

361 *See* Affidavit of Michael B. Stein, at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Ex%20C%20Stein%20Affidavit.pdf (last accessed Feb. 20, 2015).

362 *See id.*

Conversely, the question of why mid-level repeat-playing plaintiffs' attorneys obtain less in damages than *pro se* consumers defies a simple answer. The lawyers in this group come from eight different organizations. Three of them represent consumer-debtors, which might be relevant.[363] As noted, mean complaint and award amounts are lower in lending disputes than other matters.[364] Thus, if our mid-level sample is flush with practitioners from this field, it might contain an unrepresentative slice of small-stakes cases, seeming to diminish the recoveries of successful plaintiffs. Yet the five other members of this cohort ranged from class action attorneys to civil rights specialists.[365] These lawyers, their cases, and the defendants have little in common. Accordingly, it is unclear why seasoned plaintiffs' lawyers underperform at the award stage.

2. Defendants

This section ventilates three explanations for the extreme repeat player defendant effect: arbitral bias, settlement incentives, and mismatched skill levels. It concludes that the most plausible theory is the last one: the fact that high-level and super repeat players have become proficient within the arbitral forum.

i. Arbitrator Bias

High-level and super repeat players might thrive because arbitrators compete for their patronage. This would be especially troubling after *Rent-A-Center*'s expansion of arbitral power.[366] If arbitrators are biased against consumers, then the Court's decision allows them to flex new muscles by holding that tenuously-related claims are arbitrable and enforce unfair terms.[367] Fortunately, we found little proof that private judges are prejudiced against consumers. In fact, our research goes further and casts doubt on existing evidence of arbitral bias.

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363 These firms include The Delta Law Group, http://deltalawgroup.net, the Philadelphia Debt Clinic, http://philadelphiadebtclinic.net, The Scott Law Group, P.S., http://www.thescottlawgroup.com/Thescottlawgroup/Debt_Settlement_Litigation/Debt_Settlement_Litigation.html.

364 *See supra* note 308.

365 These lawyers worked for The Blakely Law Firm, http://blakeleylawfirm.com/brianlblakeley.php, The Car Law Firm,. www.carlawfirm.com, Carton & Rudnick http://www.consumer-attorney.com, The Googasian Firm, P.C., http://www.googasian.com, and Kershaw, Cutter, Ratinoff LLP http://www.kcrlegal.com.

366 *See supra* text accompanying notes 116-119.

367 Permitting arbitrators to decide whether a dispute falls within the scope of an arbitration clause creates a risk of bootstrapping. Indeed, it allows companies to argue that the arbitrator should decide whether an arbitration provision governs completely unrelated fact patterns. To avoid this result, some courts have ignored delegation clauses when confronted with "wholly groundless" assertions that a particular claim is arbitrable. *See, e.g.,* Douglas v. Regions Bank, 757 F.3d 460, 462-63 (5th Cir. 2014) ("[t]he mere existence of a delegation provision . . . cannot possibly bind [the plaintiff] to arbitrate gateway questions of arbitrability in all future disputes with the other party, no matter their origin"); *see also* Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006); Marriott Ownership Resorts, Inc. v. Flynn, No. CIV. 14-00372 JMS, 2014 WL 7076827, at *15 (D. Haw. Dec. 11, 2014).

The most disquieting hint that arbitrators are guided by their pocketbooks has been Bingham and Colvin's conclusions that defendants win more often and pay lower award amounts in repeat pairings.[368] These findings seem to show that private judges give special privileges to entities they have seen before or expect to meet again.

But our research tells a different story. Initially, it appears to fall in line with Bingham and Colvin's papers: our baseline regression reveals that corporations enjoy a win rate advantage in repeat pairings. Critically, though, this simple model, like Bingham and Colvin's, lumps all repeat players into a single category. As soon as we divide repeat players into tiers, the repeat pairing effect vanishes.[369] This is significant for two reasons. First, it belies the idea that businesses do better when they encounter the same arbitrator more than once. Second, it suggests that Bingham and Colvin did not actually detect a repeat pairing effect. Because they did not control for different levels of company sophistication, they may have inadvertently picked up on the extreme repeat player effect and attributed it to repeat pairings. It is easy to see why the two signals could bleed together: repeat pairings tend to involve high-level and super repeat players. After all, the fact that a company arbitrates routinely increases the odds of it encountering the same decision-maker multiple times. For example, in our research, extreme repeat players appear in 23% of awarded cases, but a hefty 64% of repeat pairings. In turn, because repeat pairings oversample extreme repeat players, they feature a lower consumer success rate than non-repeat pairings. Thus, Bingham and Colvin's corroboration of rank arbitral favoritism appears to be nothing more than a shadow of the extreme repeat player effect.

In addition, a repeat pairing effect would be surprising in light of the AAA's Due Process Protocol, which makes it harder for arbitrators to feather their own nests. Unless the parties agree otherwise, the institution takes the initiative and picks a decision-maker from its roster.[370] Because there were 1,279 different arbitrators in our dataset, companies no longer have much control over the identity of the private judge. To be sure, both sides can challenge the appointment,[371] which means that a decision-maker who acquires a pro-consumer reputation might lose future business. Yet given the growing clout of repeat-playing plaintiffs' lawyers—who also hold a veto during the AAA selection process—it would be equally unwise for an arbitrator to seem predisposed toward defendants.

To be clear, this does not mean that *Rent-A-Center* is wise, or that the Court should further aggrandize arbitrators at the expense of judges. We simply do not find evidence linking the extreme repeat player effect to arbitrator partiality. Likewise, as we discuss next, it also does not appear to be related to strategic behavior by the parties.

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368 *See* Colvin, *supra* note 35, at 21; Bingham, *Statistics*, *supra* note 35, at 238.

369 In fact, simply controlling for degrees of business sophistication—and not adding any of the other controls from our rich model—causes the repeat pair variable to lose statistical significance.

370 *See supra* text accompanying note 300.

371 *See id.*

ii. Asymmetrical Stakes

A more benign account for the extreme repeat player effect is that the parties have unusual incentives in these cases. As noted above, even under the Priest/Klein theory, asymmetrical stakes can cause the win rate to deviate from 50%.[372] However, we are unable to confirm that this is the culprit.

Perhaps high-level and super repeat-players are more motivated to settle than other firms. A defendant's willingness to settle can inflate its level of success in awarded matters. Such a company will resolve most colorable claims, leaving behind a trail of anemic cases for the arbitrator.[373] Our cohort of extreme repeat players includes three corporations that have unique reasons to reconcile with plaintiffs.[374] AT&T, AT&T Mobility, and Sallie Mae will pay consumers $7,500 for procuring an award that exceeds their last settlement offer.[375] Thus, these firms may prevail frequently because they dispose of any lawsuit with even a spark of merit before the arbitrator rules.

Alternatively, plaintiffs may be more likely to reject settlement proposals from extreme repeat players. Again, the AT&T, AT&T Mobility, and Sallie Mae premiums might generate this result. In small-dollar disputes, individuals or their counsel might turn down generous overtures from these businesses in the hopes of obtaining the $7,500 bonus. This too would warp the win rate. Consumers who battle until the bitter end will arbitrate tepid cases and lose a greater share of awards.

Yet our data on the extreme repeat player settlement rate are inconclusive. Admittedly, our information about this critical issue is sketchier than we would prefer: as noted above, the AAA classifies some settled cases as "withdrawn," making it impossible to distinguish matters that were resolved from those that were simply abandoned.[376] The best we can do is to calculate the percentage of arbitrations that terminated before the arbitrator ruled. Using this yardstick, we found no statistically significant difference between high-level repeat players and one-shot companies. Although super repeat-players did resolve more cases prior to an award than one-shotters, this divergence stemmed from the AT&T Mobility cases.[377] Excluding that abnormal burst of filings makes super repeat players and one-shotters statistically equivalent.

Moreover, the settlement hypotheses are less plausible on close inspection. First, they are at war with each other. Suppose high-level and super repeat players are particularly eager to resolve claims *and* plaintiffs refuse to compromise against these entities. Then these forces would cancel each other out. Second, the three

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372 *See supra* text accompanying notes163-165.

373 This hypothesis has surfaced before in the consumer arbitration debate: recall that the Searle Report argued that repeat(2) businesses outperformed one-shot entities because they settled more frequently. *See supra* text accompanying notes 262-264.

374 Our high-level repeaters are AT&T, American Express Centurian, Discover Bank, and Sallie Mae. The super repeaters are AT&T Mobility LLC and Citibank.

375 *See* Gilles, *supra* note 389, at 857-59; *see also supra* notes 126-127 (discussing "pro-consumer" arbitration provisions in the wireless services industry).

376 *See supra* text accompanying note 297.

377 *See supra* Part II.B.1.

extreme repeat player bonuses may not be substantial enough to alter litigant conduct. The mean demand in cases filed against these firms was $34,294[378]—enough to raise questions about whether a $7,500 dividend is capable of scaring companies into extending an olive branch or inspiring plaintiffs to roll the dice at the award stage.

In sum, settlement patterns do not seem to be a key that solves the extreme repeat player conundrum. Next, we analyze whether these companies are more skilled than other businesses.

iii. Arbitration Prowess

Finally, extreme repeat players may be more dexterous within the arbitral forum than other companies. This could stem from top-flight legal services, superior information, or the ability to pool resources.

First, high-level and super repeat players might hire exceptional attorneys. After all, they are deep-pocketed companies who attract skilled in-house counsel and rub shoulders with prestigious law firms. Unfortunately, the AAA does not identify defense counsel, so we cannot investigate further. It is worth noting, though, that many well-endowed firms do not qualify as extreme repeat players. For instance, American Family Mutual Insurance Company, Corinthian Colleges, H&R Block, Santander Consumer USA, Rent-A-Center, Inc., T-Mobile, Verizon, and Wells Fargo are mid-level repeat players. These companies presumably also have access to first-class legal representation, but did not outperform one-shotters on win rates or award amounts.

Second, extreme repeat players might parlay their experience into better outcomes. Priest and Klein's 50% win rate prediction assumes that plaintiffs and defendants are equally informed.[379] Conversely, if one party has learned to read the proverbial tea leaves, they will screen out longshot cases and consistently prevail on the merits. This lopsided dynamic is especially likely to exist in a confidential, non-precedential legal system like arbitration. When cases are not reported and flexible norms trump bright-line rules, firsthand knowledge can be invaluable.

Third, and similarly, *Concepcion* might have created a structural bias that favors extreme repeat players over one-shotters. As David Korn and David Rosenberg have argued, there is a silver lining to being sued multiple times by individual plaintiffs for the same purported wrongdoing:

> A common defendant always has the greater stake (indeed, a classwide stake) and consequently the greater incentive (usually by many orders of magnitude) to spend than the plaintiff . . . . On the realistic assumption that the amount spent on lawyers, experts, discovery, and other litigation needs correlates with their quality, and hence with the odds of winning at trial, the defendant's

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[378] This amount excludes the October 2012 filings against AT&T Mobility, which all sought $10,000. Including these cases lowers the mean complaint amount to $19,586.

[379] See *supra* text accompanying notes 166-167.

> resulting superior litigation power will skew outcomes in its favor classwide, across all claims.[380]

Accordingly, frequently-arbitrating companies may be able to sink time, energy, and money into cases in ways that one-shotters cannot.

In one important way, our research dovetails with these final two theories. High-level and super repeat players appear to be getting more formidable with time. The overall consumer win rate against these firms was 9%, but it fluctuated from 14% in 2010 to 17% in 2011, before falling to just 9% in 2012 and a woeful 3% in 2013.[381] If this trend continues, it would suggest that there is a link between serial arbitrations and brute strength within the extrajudicial forum.

In turn, this might furnish an independent reason for Congress to forbid class arbitration waivers. Indeed, *Concepcion* and *Italian Colors* may give big businesses a double-barreled benefit. For starters, these opinions insulate firms from class action liability. But less obviously, the individuation of claims also allows high-level and super repeat-players to hone their arbitral skills and therefore flourish in bilateral arbitrations. Reestablishing class arbitration would prevent the gulf between large companies and consumers from deepening.

CONCLUSION

This Article has analyzed three-and-a-half years' worth of records to assess consumer arbitration after *Rent-A-Center*, *Concepcion*, and *Italian Colors*. Our major findings include the facts that few plaintiffs pursue low-value claims, that consumers often pay more in fees than they recover in damages, and that high level and super repeat playing companies perform particularly well. We hope that our data will guide judges and policymakers as they grapple with the fallout from the Court's monumental consumer arbitration decisions.

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380 David Korn & David Rosenberg, Concepcion*'s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1153-54 (2013).

381 There were only four awarded cases against high-level and super repeat players in 2009, and consumers lost them all.