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Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge

Judith Resnik, Stephanie Garlock, and Annie Wang[1]

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"You and we agree that the arbitration will be confidential. You and we agree that we will not disclose the content of the arbitration proceeding or its outcome to anyone, but you or we may notify any government authority of the claim as permitted or required by law."

American Express "Cardmember Agreement,"
September 29. 2019[2]

I. Information-Forcing and Information Blocking

What is the relationship between American Express's effort to impose a nondisclosure obligation on its customers and the focus of this symposium, dedicated to the uses and impact of aggregation through class actions and multidistrict litigation (MDL) in mass torts? Central to both are the generation, dissemination, and control over information. This paper examines the stakes of information control in light of the recent Supreme Court interpretations of the Federal Arbitration Act (FAA) that permit preclusion of court-based and of collective actions.

As is familiar, to bring claims requires "naming," "blaming," and "claiming," which in turn requires knowledge and resources.[3] The efficacies, efficiencies, and potential for misuse of aggregation have occupied the literature for some time. One focus by critics has been on the low level of responses by individuals who receive notices of pending actions and settlements.[4] But whether or not information delivered to individuals via electronic or paper mail prompts personal responses, such notice broadcasts the pendency of claims to a wide audience. Multidistrict litigation has other means of information dissemination. Individual claims are each publicly recorded on court dockets; the bulk of claims

makes them newsworthy, as evident in the volume of tag-alongs and direct filings that follow.

In short, aggregate litigation is information-providing and information-forcing. Through open court procedures and formal mechanisms for notice and participation in class actions and through inventive methods of information sharing in both class actions and MDLs,[5] the nature of underlying claims and the processes used to resolve them make their way into the public realm. The last sixty years of debates about the legitimacy of aggregation is one artifact of public knowledge.

The utilities of aggregation are not intrinsically one-sided. At some points during the twentieth century, potential defendants saw aggregation as desirable if law would permit the bringing together of claimants to preclude future litigation. In the 1940s, banks lobbied states to authorize the use of pool trusts.[6] The resulting New York statute also permitted banks to file lawsuits to settle accounts (producing in essence a declaratory judgment) confirming that they had been prudent fiduciaries during a given timeframe.[7] The key was to bind all beneficiaries, and the mechanism was a representative action. Hence, the famous font of aggregation, the 1950 U.S. Supreme Court decision in *Mullane v. Central Hanover Bank*, came into being at the behest of the banks. The Court licensed state courts to exercise nation-wide jurisdiction over beneficiaries of trusts -- conditioned not on individual participation but on adequate notice.[8]

In the contemporary era, some defendants still seek "global peace." But many potential defendants instead impose obligations to proceed single-file. The equally (if more recently) famous license to do so comes from the 2011 decision of *AT&T Mobility LLC v. Concepcion*, in which five members of the U.S. Supreme Court held enforceable a ban on collective action for customers of that wireless phone service.[9]

The Court ruled that the FAA preempted state law that would have prevented potential defendants from barring joint actions if doing so served to insulate those defendants from fraud.[10] In 2017, in *Kindred Nursing Centers Limited. Partnership v. Clark*, the Court applied that precept to individuals who entered nursing homes and alleged that tortious negligence had resulted in wrongful death.[11] In 2018, in *Epic Systems Corp. v. Lewis*, the Court expanded that authority by finding enforceable a ban on joint

action for workers whom lower courts had thought the 1935 National Labor Relations Act empowered to engage in "joint" and collective actions.[12]

When reaching these decisions, justices read the FAA as valorizing "bilateral" arbitration; invoke the importance of contracts; and posit that single-file arbitration is preferable because it provides more access to quicker dispositions than do group processes in courts or arbitration.[13] The obvious questions are about the validity of these rationales and their impact on information and its dissemination.

We join a group of commentators aiming to provide some answers. A body of work has mined the history and interpretation of the 1925 FAA. Several justices and many scholars (one of us included) have argued that the statute governed federal court enforcement of contracts to arbitrate negotiated by parties of relatively equal capacity and did not reach federal statutory rights for which Congress had subsequently provided court access or one-sided impositions of obligations on employees and consumers. Those critiques have pointed to how a majority of justices have rewritten the statute rather than applied it.[14]

In addition, criticism has been leveled at the Court's approach to "contract."[15] The opening epigraph quotes the words sent to people holding American Express credit cards to tell recipients that a unilateral amendment to their "agreement" has been put into place. As Arthur Leff said long ago, when words are neither negotiated nor negotiable, they do not form a "contract" but instead are a "thing."[16]

In addition, researchers (one of us again included) have tried to learn about the use of arbitration by individuals as one metric of whether it enhances access.[17] This paper builds on that work, as we explore the political economy of control over information about arbitration.

Doing so entails attending to different forms of information sheltering, which requires distinguishing the interrelated uses of privacy, confidentiality, nondisclosure, and secrecy. Each of those terms has a rich literature parsing their content and import.[18] In brief, in dispute resolution, privacy is used to denote interactions shielded from third parties and is often justified as enhancing unfettered exchanges.[19] For example, in the United States, private deliberations are valorized for grand

juries and judges,[20] as well as for some alternative dispute resolution mechanisms promoted by courts,[21] but not when judges or juries listen to evidence or render judgments. Attitudes towards privacy are not trans-substantive but turn on the status of the participants (juveniles, families, corporations), the subject matter (mental health and disability or business transactions), and the issues or goals of information-shielding (such as future productive exchanges in personal or business interactions).[22]

Confidentiality is often used to protect privacy. Indeed, law imposes obligations of confidentiality on a host of fiduciaries, lawyers included. "Nondisclosure" has become a term of art deployed in service of privacy. Yet, as the #MeToo movement exemplifies, these nondisclosure obligations do not always reflect agreement (making inapt a shorthand of NDA) and have become a source of concern. Nondisclosure requirements can produce long-term secrets that, like mandates for arbitration, may not reflect decisions made by parties with equal bargaining capacity and may prevent third parties from information that could help them avoid harm or obtain redress.[23]

The impression that adjudication (with or without aggregation) is presumptively open comes from centuries during which polities enlisted the public as spectators to witness and legitimate state power. While the traditions predate constitutional democracies, these public-facing practices have been enshrined in American law. The phrase "all courts shall be open" appears in dozens of state constitutions.[24] Although the federal constitution does not use those words, the commitment to third-party access to observe criminal and civil in-court proceedings and to obtain docketed materials has been embraced by federal constitutional and common law.[25]

In prior centuries, the public also had some role in witnessing arbitrations.[26] However, by the time of the enactment of the FAA in 1925, the model of business-to-business and labor-management arbitrations shaped assumptions that arbitrations were to be closed to third parties. Since the American Arbitration Association's (AAA) founding in 1926, the AAA has described privacy as a central feature of arbitrations.[27] Indeed, arbitration is often celebrated for offering the confidentiality that courts do not.[28]

The 1925 federal statutory endorsement of arbitration did not, however, detail its attributes, such as whether it can be

multi-lateral, entail discovery, include layers of internal review, or take place in private.[29] Moreover, the statute provides enforcement mechanisms that bring disputes about compelling arbitration or vacating awards into public courts.[30] Furthermore, in the 1990s, Congress authorized district courts to create programs for "court-annexed arbitration," which, while used infrequently, sometimes permit public attendance.[31] States also send cases to arbitration, and in some jurisdictions, those proceedings take place in courthouses or comparable venues that permit public attendance.[32]

During the twentieth century, the institutions shaping the practices of privately conducted arbitration anchored its identity as distinct from adjudication in part by limiting access to the interactions among disputants and arbitrators. That demarcation was vivid in *Delaware Coalition for Open Government, Inc. v. Strine*,[33] when the Third Circuit struck a proposed program that would have given disputants an opportunity to pay chancery judges to preside at private arbitrations in the state's courthouses.[34] Moreover, the paying parties could also access the appellate court system,[35] and at the time when the Third Circuit looked at the question, rules about whether such proceedings were also to be sealed were not clear.[36] The federal appellate court concluded that the state could not close its courts to the public. Rather, the First Amendment protected the public's access to "government-sponsored arbitrations," because open courts were "deeply rooted in the way the judiciary functions in a democratic society."[37] Indeed, "the exposure of parties to public scrutiny is one of the central benefits of public access."[38] Courts could run arbitration, but not if their doors were closed.

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Return then to American Express's September 2019 mailing, which arrived as we were writing this paper. What prompts the decision to impose this mandate? Is it "legal"? Who is bound? How does it affect the potential to respond to the company's subsequent mailing, appearing mid-October, with another "important notice" in which American Express "updated" cardholders on "benefits" by retracting the "roadside assistance hotline," the "travel accident insurance," the "extended warranty," the "purchase protection," and the "return protection"? What are the means to contest those unilateral changes, and what are the routes

by which information about arbitration can make its way into the public realm?

Below, we join others also seeking to respond to these questions about arbitration's purposes, use, and scope.[39] For this article, we mined the case law to learn more about efforts to ward off public access, the entities or participants who are required to be silent, and the scope of the information not to be disclosed. The U.S. Supreme Court has not directly addressed privacy/confidentiality/non-disclosure provisions such as that imposed by American Express.

What justices have discussed is confidentiality, sometimes to praise it and other times to warn about its impact. In 2010, in *Stolt-Neilson*, Justice Alito expressed skepticism about class action arbitrations when he wrote for the Court about the "presumption of privacy and confidentiality that applies in many bilateral arbitrations."[40] In *AT&T Mobility LLC v. Concepcion*, Justice Scalia, enforcing a single-file mandate, wrote that a benefit of arbitration is that "proceedings [could] be kept confidential."[41] In contrast, in dissent in *American Express v. Italian Colors*, Justice Kagan expressed concern that the arbitration mandate's "confidentiality provision prevents [the plaintiff] from informally arranging with other" potential claimants to produce evidence necessary to sustain its claim.[42] Justice Ginsburg, dissenting five years later in *Epic Systems Corp. v. Lewis*, worried that "provisions requiring that outcomes be kept confidential" could lead to inconsistent application of the law.[43]

In contrast to these invocations of the costs and benefits of closure, many lower courts have addressed nondisclosure directly. In some cases decided in prior decades, lower courts found silencing provisions unenforceable, often because asymmetry in access to knowledge would have resulted. Providers would know the portfolio of claims, while individuals would not.[44] In contrast, our survey of more recent cases shows that, in the wake of the Supreme Court's exuberance about arbitration, lower courts have shifted away from questioning the imposition of privacy, confidentiality, non-disclosure, and secrecy.

A vivid example comes from a 2004 opinion by the Fifth Circuit in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, which discussed a pre-dispute arbitration mandate instructing parties that "the existence and result of any arbitration must be kept confidential."[45] Rejecting the plaintiffs' challenge to this

secrecy provision, the court commented that the requirement was "probably more favorable to the cellular provider than to its customer," yet decided that it was not "so offensive as to be invalid." [46] The consumers' "attack on the confidentiality provision" failed, the court opined, because it was "in part, an attack on the character of arbitration itself."[47] The court did not differentiate between confidentiality of the process and nondisclosure of the "existence and result" of arbitration.

We can also see that, as the American Express new "agreement" on arbitration reflects, providers of goods and services are expanding efforts to impose blanket prohibitions on information sharing. Indeed, we found one example purporting to require potential claimants to place under seal any *court* filings arising from the arbitration mandate.[48]

Litigation about arbitration is thus one route into understanding this dispute resolution mechanism. Another source is the web, as state statutes require organizations overseeing arbitration to post data about that work. In this article, we detail the methods we used to mine AAA data and summarize findings on consumers and employees in arbitration,[49] as well as hone in on claims under the AAA that involve AT&T,[50] which was the first provider to obtain permission from the U.S. Supreme Court to ban aggregate proceedings.

Despite "noise" in the data, we can gain some insights into the prevalence of filed arbitration. In prior analyses, we had identified 115 individual claims filed per year against AT&T during the period of 2014 to 2017,[51] when AT&T had more than 100-140 million customers. For this paper, we looked at filings from 2017-2019 and learned that the number of filings against AT&T had increased. In that interval, on average of 172 individuals filed claims.

We cannot know the baseline of potential claims, the number settled through consumer to business direct interactions, whether by individuals without lawyers or with lawyers, some of whom bundle claims. What we do know is that AT&T had about 130 million customers during that time, and it is rare for any of them during the ten years between 2009 and 2019 to bring single-file arbitrations.

Turning to all consumer arbitrations administered by the AAA, we found that the numbers had increased. The AAA recorded an

average of 2,432 consumer-filed arbitrations per year from July 2017 to 2019, up from 1,762 annually from 2009 to June 2017.[52] The summary is below.

Number of Claims involving AT&T 2009-2019 by Date Filed according to AAA Arbitration Database

(Excluding Fifty Claims or More Filed by the Same Firm Against the Same Provider)

	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
AT&T				
Consumer-Filed	39	115	172	**90**
Company-Filed	0	0	0	**0**

Between 2009 and 2019, AT&T's customers increased from 87 to 137 million.

AAA Consumer Arbitrations 2009-2019 (including those involving AT&T)				
Consumer-Filed	1,068	1,924	2,280	**1,576**
Company-Filed	272	170	124	**211**

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Combing the filings, we also found that some law firms have become claims "aggregators," which we pegged as fifty or more filings by a single law firm against a particular provider. Given that state arbitration disclosure provisions have not been read to ide the basis for the action (as contrasted with the kind of claim,

such as consumer or employment), the database does not tell us if the fifty or more filings relate to the same allegedly wrong practice.

Correlation is not causation, and we do not have the data (nor are all the variables readily gathered) to do analyses to make causal claims about what an optimal level of filings would be. Nor do we argue that aggregate and single-file litigation in courts is the only mechanism for information to reach the public. (See #MeToo!) Moreover, in this world of disinformation, trolls, and web-harassment, we are not asserting that disclosure necessarily produces more egalitarian rules or outcomes.

What we can conclude is that the argument put forth by arbitrations' proponents (including Supreme Court justices) that single-file arbitration produces more readily usable processes than do courts is not borne out by the number of users. Not surprisingly, we have also been able to see that single-file mandates prompt alternative methods of bundling claims. Through contact with lawyers, we have also learned that bundling before filing at times results in resolutions without using the arbitration system. The privatization of process coupled with nondisclosure mandates can prevent others, similarly situated, from learning about the potential to obtain redress.

We can also see that the celebration of arbitration has prompted some entities to seek to widen their prelusion net by layering non-disclosure mandates on top of non-aggregation mandates. Thus far, courts have not been a robust source of protection of rights to give or get information about arbitration.

As the clauses mandating nondisclosure become bolder and broader, it is possible that some reviewing courts, relying on state and federal common law, will find substantively unconscionable some of the bans, such as those aiming to prevent blanket nondisclosure after arbitrations have ended. Courts could do so by relying on a mix of sources that include the FAA provisions on court-based enforcement, federal and state common law, and constitutional rights. Moreover, legislatures could (consistent even with current expansive FAA interpretations) impose regulations that reject enforcement of nondisclosure mandates.

Turn then from the (wobbly) "is" of the law to the "ought." The political and social conflicts about the scope of aggregate litigation fueled the "class action wars," and MDLs are now

becoming embattled.[53] Related conflicts are underway about information gained in arbitration. Single-file arbitration requirements are linked to efforts to keep disputes and the means of resolving them out of the public eye. When information is suppressed, the chance for more people to follow in the footsteps of the very few who pursue remedies is reduced, as is the chance for public oversight of either the decision-makers or the disputants. Moreover, while we can identify individual interests in keeping information about some aspects of consumer interactions outside the public realm, it is difficult to see the utilities for individuals of being bound not to disclose the fact or outcome of arbitrations.

Long ago, Marc Galanter wrote about how "repeat players" obtain advantages by being able to shape rules.[54] Courts in the last decades have acknowledged his insight while ignoring his concerns. Rather than seek to level playing fields, judges have permitted asymmetries to remain in place. Efforts are underway by some state and federal legislators to intervene. The term "preclusion" is often in law linked to court decisions specifying that one individual is estopped from bringing claims in light of prior efforts to use courts. What we document here is an expansive effort at generic preclusion that walls off access and information. Our hope is that, by providing a picture of the extent of the "information wars," we can help courts, legislators, and potential disputants see the unfairness that increasingly is being baked in and which does harm, including to arbitration itself.

II. The Practices of Information Access, Dissemination, and Nondisclosure in Arbitration

A. Government Mandates

Arbitration comes in many forms, and some of it is linked to, required or sponsored by federal and state courts. For example, what is called "court-annexed arbitration" is a process in which, after a case if filed and meets certain parameters, judiciaries direct parties to use lawyers who serve as arbitrators to render decisions that, the hope is, will end the litigation. These arbitrations are governed by court-produced public rules, and some of them take place in courthouses or other venues to which the

public may have access.[55] What could be termed "government-regulated arbitration" stem from statutes likewise imposing a public regime of rules. For example, the Securities and Exchange Commission has to approve the procedures of the Financial Industry Regulatory Authority (FINRA) that conducts investor-securities arbitrations. FINRA arbitrators are required not to disclose information about the proceedings,[56] while the results are made public in online databases.[57]

During the last decades, agencies have sought to regulate and a series of "Fairness in Arbitration Acts" (with variations in title and scope) have been introduced in Congress to impose more guidance and constraints. Examples are plentiful. President Obama's Fair Pay and Safe Workplaces Executive Order would have required federal contractors to disclose violations of a number of different federal labor laws and executive orders—including when substantiated by "arbitral award or decision."[58] After litigation and a change in administration, the provision was rescinded.[59] The Consumer Financial Protection Bureau (CFPB) in July of 2017 promulgated a rule that administrators of arbitration submit redacted records to detail claims, counterclaims, answers, predispute arbitration agreement, judgment or award, and communication about certain fee payment disputes.[60] However, in November of 2017, a joint congressional resolution rescinded that provision.[61]

The issues returned to Congress in 2019, when both Houses considered bills to limit the enforceability of arbitration mandates.[62] One proposal included the requirements that consent to arbitrate be given after a dispute arose and that arbitrators "provide the parties to the contract with a written explanation of the factual and legal basis for any award or other outcome, which shall not be made under seal by the arbitrator or a court."[63] As of this writing, none of the current bills have passed both Houses of Congress.

States are also an important source of regulation, as our introduction providing data on filings reflects. A few states mandate reporting by arbitration providers of the fact and outcomes of arbitrations.[64] Further, as a result of the #MeToo movement, more than a dozen states have considered legislation to limit the enforcement of nondisclosure provisions in sexual harassment cases.[65] Several have put provisions into place.[66] For example, Washington made "void and unenforceable" as against public policy

any provisions in employment contracts that "requires an employee to waive the employee's right to publicly pursue a cause of action arising under" state or federal antidiscrimination laws or "resolve claims of discrimination in a dispute resolution process that is confidential."[67] Moreover, in 2018, fifty attorney generals signed a letter to Congress calling for (unspecified) legislative limits on nondisclosure in sexual harassment employment litigation.[68]

B. Providers' and Obligators' Rules

Absent such regulations, rules on public access come from arbitration providers or from specific mandates in clauses directing the use of arbitration. Major private providers address the question of third-party access to arbitration by insisting on the privacy of proceedings but not the fact of their existence. (Indeed, their businesses require some way to advertise the scope and use of their services.) Illustrative are rules for consumer arbitrations promulgated by AAA and JAMS. Both instruct that arbitrators not be the source of information about the proceedings unless required by law.[69] As AAA's Statement of Ethical Principles outlines, it is "AAA staff and AAA neutrals [who] have an ethical obligation to keep information confidential."[70] In addition, both AAA and JAMS authorize arbitrators to bar non-parties from attending proceedings.[71] These standing rules do not, however, address obligations of parties to keep information about arbitrations secret.

In the 2019 hearings on proposals to amend the FAA, a lawyer representing the U.S. Chamber of Commerce's Institute of Legal Reform argued that concerns about shielding information about arbitration were overblown[72] and that assertions "that arbitration imposes confidentiality obligations that allow wrongdoers to cover up their offenses . . . [were] simply false."[73] AAA's Statement of Ethical Principles likewise suggest information access. "The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement," and the AAA expressly "takes no position" on whether such party-centered obligations should or should not be made.[74]

What obligations, then, do parties put into place? Both AAA and JAMS offer model language for confidentiality provisions in their online guidance for drafting arbitration clauses.[75] The AAA

offers an example that comes close to blanket closure, albeit framed as a genuine choice for parties negotiating clauses. If parties wish to "impose limits . . . as to how much information regarding the dispute may be disclosed outside the hearing," a clause could say: "[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties."[76] JAMS's suggested language outlines the "confidential nature of the arbitration proceeding and the Award, including the Hearing," but does not direct parties to maintain the secrecy of the existence of a dispute.[77] The JAMS clause also carves out information from confidentiality as necessary to "prepare for or conduct the arbitration hearing on the merits," or "as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or unless otherwise required by law or judicial decision."[78]

Whatever happens in negotiated agreements, the American Express and the Cingular Wireless provisions are imposed. How common are such clauses? The Consumer Financial Protection Bureau reviewed more than 250 documents between 2010 and 2013 that covered credit card, checking account, prepaid card, storefront payday loan, private student loan, and mobile wireless services.[79] The CFPB's 2015 arbitration study reported that "most arbitration clauses in the sample were silent on confidentiality and did not impose any nondisclosure obligation on the parties."[80] As far as we are aware, that kind of survey has not been repeated. But litigation about the enforcement of such clauses (and American Express's new "amendment") suggest that they are becoming more common.

Before turning to case law of their enforceability, an overview of the range of mandates is in order. Some restrictions are couched in general terms, such as an AT&T consumer arbitration provision from 2002 instructing that "[n]either you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award."[81] Others are more specific. The marketing firm Quixtar put into place, as soon as any claimant became "aware of a potential . . . claim,"[82] prohibitions on disclosing "to any other person not directly involved in the arbitration" a broad range of information, including "(a) the substance of, or basis for, the claim; (b) the content of any testimony or other evidence presented

at an arbitration hearing or obtained through discovery; or (c) the terms [or] amount of any arbitration award."[83]

The scope of addressees is another question. The clauses can purport to bind the parties in dispute,[84] their lawyers,[85] and witnesses in arbitration proceedings.[86] As we have already discussed, some impose obligations of nondisclosure after a dispute has ended, and some aim to sweep courts into the net of closure. An insurance company, for instance, has imposed on its sales associates the requirement that "all papers filed in court in connection with any action to enforce this Arbitration Agreement or the arbitrators' award shall be filed under seal."[87]

Clauses can also forbid disclosure of information generated. As discussed by a California appellate court in *Baxter v. Genworth North America Corp,*[88] a company sought to prohibit employees from discussing claims outside of the formal discovery structures of the arbitration process. The clause directed "[a]ny employee who is questioned by another employee or by someone else on behalf of another employee concerning another employee's claim" not to respond directly, but instead "direct the inquiring individual to the Company counsel so that information may be provided through the discovery process."[89]

Another illustration comes from a CarMax store mandate that maintained that "[a]ll aspects of an arbitration pursuant to these Dispute Resolution Rules and Procedures, including the hearing and record of the proceeding, shall be confidential and shall not be open to the public."[90] Other clauses limit the dissemination of information related to underlying claims. A Pfizer, Inc. employment agreement, for example, required parties to "maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award . . . ."[91] Some clauses also rule out talking about the decisions. In addition to the illustrations thus far, a 2009 Citibank arbitration provision required both parties to "keep confidential any decision of an arbitrator."[92]

A variation is that some clauses set out a default rule of disclosure but authorize any party to elect to keep information secret. An example comes from a life insurance policy, considered by the Eleventh Circuit in 2019, that directed that "[u]pon request by either party, the 'rulings and decisions of the arbitrators' must 'be kept strictly confidential.'"[93]

These many provisions may also have exceptions and caveats. In some cases, disclosure is allowed when both parties consent.[94] (Whether such consent is ever given, and what the procedures for seeking such consent would be, is hard to find in reported case law and commentary.) Many clauses (like the ones mailed out by American Express in 2019) acknowledge that state or federal law may constrain the operative scope of such nondisclosure obligations.[95] Further, provisions may permit limited disclosure of arbitral proceedings as necessary to enforce awards, thereby acknowledging the openness of any subsequent court proceedings.[96]

III. The Law of Information Access, Dissemination, and Nondisclosure in Arbitration

Voluntary compliance with mandates is the bedrock of private and public legal ordering. When obligations not to disclose are in place, they shield a great deal of information from the public.

Yet as the #MeToo movement exemplifies, even with nondisclosure mandates, information can make its way into the public realm.[97] One vivid example comes from investigative reports that revealed how Sterling Jewelers' mandate for private arbitration under AAA confidentiality rules shielded allegations of widespread sexual harassment and pay disparity from public view and resolution.[98] Even as the arbitration moved forward on a collective basis—aggregating allegations on behalf of 69,000 women—the details of the dispute remained confidential.[99] After the press and claimants' lawyers brought the issues to the fore, the company agreed to release redacted version of hundreds of sworn statements by class members detailing the bases for their allegations.[100] More generally, public outcries have prompted private entities to make changes without being required by federal or state law to do so. In the fall of 2018, for example, both Google and Facebook announced that they would stop enforcing private arbitration mandates against employees bringing sexual harassment claims.[101]

Yet these examples, as well as litigation, document the myriad of restrictions in place. The success of challenges has varied widely, depending on the interpretation of state or federal common law or statutes, the information-access restrictions at issue, the remedy sought, and the background attitudes of courts toward arbitration.

Here, we summarize a large and growing body of law to provide its contours. Challengers have not been able to persuade courts not to enforce standing rules of organizations (often referenced in arbitration mandates) that require arbitrators to keep information confidential and that preclude third party attendance at arbitration proceedings.[102] Sometimes, judges assessing these terms have underscored the limits of what is closed off. One federal court, for example, approved the incorporation of AAA privacy rules in a security firm's employment contract and noted that the restrictions still "allow Plaintiffs or other potential class plaintiffs" to "investigat[e] claims, engag[e] in discovery, and discuss . . . their investigation, discovery, and arbitration outcomes with one another."[103] A parallel approach comes a California appellate court, explaining in a July 2019 unpublished opinion that the provisions pose no problem because, unlike clauses that precluded "the parties from publicly discussing the arbitration," the texts at issue did not amount to a total "gag order."[104]

That phrase has been reiterated both in case law and by champions of arbitration, also positing that such a provision would be inappropriate. In May of 2019, a lawyer for the U.S. Chamber Institute for Legal Reform testified before a House Judiciary subcommittee that, if "an arbitration agreement purported to impose a 'gag order,' . . . that restriction would be invalidated in court."[105]

That assertion is not borne out in the case law nor the practice. We have already provided an example from a 2004 Fifth Circuit ruling upholding such a provision. Below we sort more of the law and its variables, as in dozens of decisions, judges assess the specific burdens the nondisclosure provisions impose, the state and federal law argued as governing, policy arguments, and the remedies sought.

For example, the subject matter of a claim and the governing federal or state law have on occasion been the basis for rejection of prohibitions on disclosure. Illustrative is a 2019 decision from the federal district court in the District of Columbia refusing to enforce a provision imposed by a contracting company to bar a homeowner from disclosing the existence of a dispute or the result of an arbitration.[106] Such a provision, the court found, was unenforceable under §45b(b) of the Federal Trade Commission Act, which protects consumers' rights to communicate opinions on

work or services provided under a form contract.[107] As of this writing, the NLRB is considering an appeal from an Administrative Law Judge (ALJ) ruling that a broad non-disclosure mandate chilled the exercise of employee's Section 7 rights under the National Labor Relations Act, which protects concerted action; the ALJ concluded that the clause covered talking about conditions of employment including arbitration activities.[108]

Another ground for refusing to enforce limitations on disclosure is unconscionability protected by state and federal common law. Courts evaluating unconscionability challenges are to decide what state's law applies (including whether to enforce a choice-of-law provision), whether that law provides guidance, and then how to resolve the specific question before them. These decisions sometimes delineate between "substantive" and "procedural" unconscionability and at times muddy the sources of either. The formal distinction is that procedural unconscionability focuses on abuse or unfairness in the formation of a contract, while substantive unconscionability looks at the terms to assess whether they are unfair or unreasonably harsh.[109] Objections to unequal bargaining power could be framed as either. Courts considering challenges to confidentiality provisions are not always clear, albeit many describe themselves as using the rubric of substantive unconscionability.

State law has, historically, been the source of contract law.[110] But the U.S. Supreme Court's expansive preemption law has limited the role of state courts in assessing arbitration clauses. Moreover, some of the Court's decisions (such as *Green Tree Financial Corp. v. Randolph*[111] and *American Express Co. v. Italian Colors Restaurant*[112] take up the question of access to arbitration in language that resembles unconscionability.

Nonetheless, a few states have stated their approach. Washington has consistently held that "a confidentiality clause in a contract of adhesion is a one-sided provision designed to disadvantage claimants and may even help conceal consumer fraud."[113] In *McKee v. AT&T Corp.*, the state's Supreme Court considered AT&T's mandate that

> ""Any arbitration shall remain confidential. Neither you nor AT & T may disclose the existence, content, or results of any arbitration or award, except as may be required by law or to confirm and enforce an award."

The court found it to be substantively unconscionable because it "unreasonably favors repeat players."[114]

The reminder is that the AT&T clause in *McKee* was the same as the one struck under the Ninth Circuit's 2003 reading of California law in *Ting*, and the Ninth Circuit had commented that AT&T had retracted some of those terms during pendency of that litigation,[115] yet obviously revived them or kept them in place in other jurisdictions.[116] And, as exemplified by the Fifth Circuit's 2003 toleration in *Iberia* of the Cingular Wireless clause that had the same locution, a clause illicit in one jurisdiction can be tried – and sometimes used – in another.[117] (AT&T has since acquired Cingular.)

The *McKee* court reasoned that nondisclosure provisions could conceal patterns of illegal activity that would prevent potential plaintiffs from learning about meritorious claims and sharing information, discovery, or work product; repeat-player defendants, in contrast, would gain "a wealth of knowledge" about the arbitration process.[118]

The federal district court in the Western District of Washington thereafter applied that test when it held that a clause shielding from public view all "statements and information made or revealed during the arbitration process" was substantively unconscionable because claimants would be "substantially disadvantaged by the inability to benefit from repeat-player status."[119] (Not all judges share that concern, and a few have stated that asymmetry in a particular instance was not worrisome.[120])

Other discussions show how state and federal law are intermeshed and, in some instances, how federal courts extrapolate from state law. A sequence of Ninth Circuit decisions shows the impact of federal court interpretation and the thinness of state law that is sometimes used as a source. In 2003, in *AT&T v. Ting*, the Ninth Circuit held unenforceable a clause that mirrored the one put forth in 2019 by American Express.[121] In 2007, in *Davis v. O'Melveney and Meyers*, the Circuit concluded that law firm's dispute resolution procedure was substantively unconscionable because its provisions would "handicap if not stifle an employee's ability to investigate and engage in discovery" and would ultimately place the employer "in a far superior legal posture."[122] The court described itself as applying California contract law as

it cited Ninth Circuit cases (which included reliance on a D.C. Circuit opinion) and the Washington Supreme Court.[123]

In 2010, the Ninth Circuit decided *Pokorny v. Quixtar, Inc.*, invalidating a nondisclosure provision that provided defendants with a "repeat player" advantage as to information about disputes and prevented plaintiffs from "investigating or engaging in discovery."[124] There, the court stated that it was applying California law even as it cited its prior precedents, which described themselves as interpreting state law. In 2014, the California Court of Appeal for the Second District issued a brief decision finding that a provision requiring the confidentiality of the arbitration, hearing, and record was not substantively unconscionable.[125] In the 2017 case *Poublon v. C.H. Robinson Co.*, the Ninth Circuit reevaluated its prior approach and concluded that this intervening state court decision was "directly on point" and stood for a rejection of the asymmetry assessment on which the court had relied in *Ting* and *Davis*.[126]

Another factor influencing enforcement of nondisclosure provisions is the extent of the closure imposed. As the Supreme Court of Hawaii reasoned in its 2018 decision in *Narayan v. The Ritz-Carlton Development Company, Inc.*, a clause that prevents any "party, witness, or the arbitrator" from disclosing "the facts of the underlying dispute or the contents or results of any negotiation, mediation, or arbitration" is unconscionable because it "impairs the . . . ability to investigate and pursue their claims."[127] In 2006, the Illinois Supreme Court similarly opined that a "strict" confidentiality clause "burden[ed] an individual customer's ability to vindicate this claim . . . [because it] means that even if an individual claimant recovers on the illegal-penalty claim, neither that claimant nor her attorney can share that information with other potential claimants."[128] In contrast, courts have upheld nondisclosure requirements perceived to be less onerous. Some courts have found that clauses that "allow for disclosure as required by law or the prior written consent of both parties" pose no unconscionability problems.[129]

One illustration comes from *Asher v. E! Entertainment Television, LLC.*, decided in 2017; a federal district court judge ordered an employee's dispute to arbitration over an unconscionability objection to a clause that prohibited parties from sharing information generated during arbitration or the arbitrator's resulting award.[130] The court concluded that, unlike

requirements the Ninth Circuit had rejected in 2007, this clause did not "prohibit mere mention of the proceedings."[131] Likewise, a Second Circuit unpublished summary order in 2019 found that a similar restriction did "not render the entire Agreement substantively unconscionable," although the court explained that the parties could still contest the enforceability of the provision in any resulting arbitration.[132] In contrast, in an unpublished 2017 opinion, a California appellate court found that a provision that "either party may demand the arbitrated dispute remain confidential" was an unconscionably "one-sided term" because the defendant had already stated a preference for confidentiality.[133]

Courts also disagree about remedies upon finding a clause to be invalid. Some judges have concluded that an unenforceable confidentiality mandate makes unenforceable the entire arbitration mandate.[134] Other courts have determined that the unenforceable or unconscionable confidentiality provisions are severable from the arbitration mandate.[135] And some judges courts have decided that the question of enforceability must be remitted to the arbitrator.[136]

One might think that a way to make the case law cohere is by turning to the subject matter of the underlying dispute. In the reported law, lines cannot be drawn between cases involving employees and those involving consumers. Courts have found confidentiality provisions substantively unconscionable (or not)in both. Courts have, of course, referenced the context when explaining their decisions. The Washington Supreme Court has held that a confidentiality provision is substantively unconscionable in an employment contract because it "benefits only the" employer and "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations."[137] In contrast, the Eleventh Circuit has reasoned that a confidentiality agreement was "not so offensive as to be invalid" in an employment contract because in "many employment claims, both sides might well prefer confidentiality."[138] In the consumer arena, courts have used the context of a case to reason about the effect of confidentiality. Several courts, for example, have found that a provision was not substantively unconscionable because they saw the harm of the repeat-player effect as diminished given that fewer potential claimants were to be affected.[139]

Another variable is the era in which a case was decided. Looking at the law on nondisclosure over the course of the last twenty years, one can see that the reluctance to enforce provisions signaled in the 2003 Ninth Circuit decision rejecting nondisclosure obligations that AT&T had imposed has declined in the Ninth Circuit and elsewhere.[140] More recent decisions tolerate nondisclosure, as lower courts regularly invoke the Supreme Court's pro-arbitration jurisprudence.[141]

IV. Aggregate Information Access

A. State-Mandated Disclosure

We turn then from information suppression clauses to what information *can* be learned through mandates for providers of arbitration to report about its use on publicly accessible databases. Thus far, states have played the leading role in forcing some information about arbitration into public view. (As noted, a few federal statutes require reporting, and proposals for federal law to do more are plentiful.[142])

California, Maryland, Maine, and the District of Columbia require arbitration organizations to make public some information.[143] The template from California, enacted in 2002 and amended in 2014 and in 2019, requires companies that administer consumer arbitrations to publish, on a quarterly basis on the internet, information on these arbitrations, including the name of the nonconsumer party, the nature of the dispute (such as "finance," "debt collection," "employment,"), the prevailing party, whether a consumer was represented by an attorney, time to disposition, kind of disposition, the amount of the claim and award, attorneys' fees, and more.[144]

Before turning to what can be gleaned and the challenges, we should note that not all providers comply, nor are disclosures complete. A 2017 report from UC Hastings' Public Law Research Institute found that 11 of the 32 consumer arbitration providers in California published some of the information required by law, and "only three firms can be said to evidence robust and full compliance with the statutory regime."[145] Data may be missing about the claimed amount, the salary range in employment disputes, and the identity of the prevailing party, among other data points

required by statute.[146] Further, even when compliance is more complete, challenges and gaps remain, as we explain based our exploration of the AAA reporting. [147]

One other caveat is that, given our focus on the impact of single-file obligations and nondisclosure attempts, we did not delve into another database, organized by the AAA, to provide public access to information on aggregate arbitrations, an option it has offered for more than a decade. [148] Under current interpretations of the FAA, courts may not infer agreement to use aggregation,[149] but parties may still expressly agree to group-based arbitrations.[150] As of October of 2019, the AAA's website listed 574 class arbitrations.[151] That public docket includes "to the extent known to the AAA," a copy of the demand for arbitration, the identities of the parties, the names and contact information of counsel, a list of awards made by the arbitrator, and the date, time, and place of any scheduled hearings.[152] The AAA has delineated five categories of class claims: commercial, consumer, construction, employment, and international. Searching by category, a majority (323) fell under the employment category,[153] and 51 involved consumer claims. Sorting by date, as of October of 2019, the last consumer class filing (which involved claims against a for-profit college) was in February of 2014.[154] In contrast, more than twenty employment class arbitrations have been filed in 2019.[155] Because our focus is on the individual arbitration docket, we did not delve into these materials.[156]

B. Understanding the AAA Data

The AAA's website on individual claims provide windows into whether, how, and how successfully individuals use the arbitrations that it administers. As we detail, the data demonstrate infrequent individual use as well as that law firms can collect case and create what we term *de facto* aggregations. Moreover, parsing the data makes plain the choices to be made when interpreting the state reporting obligations, as well as the errors that can make their way into the database. [157]

As we learned with the help of AAA research staff, because it is the recipient of arbitration requests, the AAA, through its coding staff, is the source of the posted information about initial filings. [158] Information about outcomes comes from individual arbitrators. Within the last few years, the AAA has created a

coding sheet to direct arbitrators about how to report the data points. The AAA does not independently verify the data it receives,[159] nor is documentation available for review by the public.

California's arbitration reporting statute calls for the posting, "at least quarterly . . . a single cumulative report that contains" detailed information "regarding each consumer arbitration within the preceding five years."[160] The AAA has interpreted this requirement to oblige it to release data every three months; in addition, the AAA has decided to take down the data from the five years and three months before. These quarterly releases include claims that have been opened and closed within the previous five years. Each row of the dataset represents one claim, and multiple claims may be aggregated into one case. Because the data before the rolling five-year periods are not databased by the AAA, two years ago, Yale Law School Library created a data repository on the Open Science Foundation website to continue to make the data available.[161] In addition, a website called Level Playing Field has done similar work.[162]

The AAA administers provides in a variety of contexts, such as commercial arbitration, construction industry arbitration, employer arbitration, and consumer arbitration.[163] The California statute and the AAA dataset sets forth "consumer" and "nonconsumer" claims that involve employer arbitration.

For this article, the earliest dataset that we examined comes from the second quarter (Q2) beginning April 1 of 2014. This dataset includes all claims that originated and closed between 2009 Q3 and 2014 Q2. The next earliest dataset is 2017 Q1, which includes claims that originated and closed between 2012 Q2 and 2017 Q1. Beginning with the 2017 Q1 dataset, we downloaded datasets each quarter.[164] Throughout our analysis, we have grouped claims into three periods: claims that closed between 2009 Q3 and 2014 Q2; 2014 Q3 and 2017 Q1; and 2017 Q2 and 2019 Q2. These periods correlated with prior analyses we have done of the AAA data,[165] to which we add claims closing between 2017 Q2 and 2019 Q2 to create a new overview that includes more claims and reflects what we have learned about the challenges posed by the data. (The number of claims varies slightly when the focus shifts from claims filed to claims closed.)

After collecting the data sets, we created an aggregated dataset by combining all available quarterly records. We include

all records from the most recent dataset (2019 Q2), then append claims[166] from the second-most recent dataset (2019 Q1) that are not already present in the most recent dataset, and so on.[167] The dataset includes 44,628 cases and 47,915 claims in total, of which 19,716 cases related to consumers and 21,219 consumer claims. That more claims exist than cases comes from the fact that an individual case can involve more than one claim brought against more than one party.

This analysis taught us about data gaps. First, the time to disposition is an important topic of discussion in the case law on arbitration; proponents of arbitration argue its speediness. Hence, comprehensive data on the length of time that cases pend would be helpful. However, the data posted by AAA includes only cases that were opened *and* closed within five years.[168] When cases took longer than five years, those cases are not part of the dataset. We have identified in the materials we have more than 133 claims that took longer than 4.5 years to resolve; the longest was 4.92 years. We therefore believe that some unspecified number of other claims pend for more than five years.

Second, when posting information, the AAA sometimes updates or changes what had been put up initially. Some of the changes are relatively minor (such as altering the spelling of a business name) while others are substantive (such as updating the claims or fees awarded). For example, in our 2017 analysis, we identified a significant computer coding error; several claims were reported to have outcomes in excess of $600,000.[169] Once the problem was pointed out, the AAA made corrections.

However, the AAA does not flag when information has changed, nor does it archive the prior information as posted. In the set we have analyzed for this article, we found changes in the closing date of the filing,[170] the amount of the fee awarded,[171] the name of the business,[172] and the disposition of the filing.[173] all of which are caught and corrected, and none of which are identified, nor are corrected versions of previous datasets posted.

C. Filing Trends from 2009 to 2019

Within these constraints, we have identified that the numbers of claims are small, and that the total number of employment and consumer claims has increased over time. The percentage of claims

that are consumer claims may have slightly increased. Again, the numbers are small. From 2009 Q3 to 2014 Q2, the percentage of claims related to consumers was 42.2% while 48.9% of claims were related to consumers for the 2017 Q2 to 2019 Q2 period. The median length of arbitration (excluding those that pend for more than five years and those discussed below that are de facto aggregations) appears to have remained roughly constant since 2015. The time from filing to disposition runs from about 200-250 days.

As noted, we defined "de facto collective actions" to be instances when the same law firm brought 50 or more claims within the same twelve-month period against the same business entity. Between 2014 and 2019, we identified 33 such collective actions, of which 19 were consumer claims and 14 involved employment claims.

We have also seen that more information about dollar awards has been provided than in prior analyses; the number of dollar awards specified on the AAA website has increased since 2017. Again, these findings are subject to the caveat that AAA appears to update and modify its data more than we had understood in the 2017 analysis.

1. Total Number of Claims

Table 1 shows the raw number of claims, the consumer claims, and the percentage of consumer claims between 2009 Q2 and 2014 Q2, 2014 Q3 and 2017 Q1, and 2017 Q1 to 2019 Q3. The claims are organized into time periods based on their closing dates. For example, a claim that was filed in 2016 Q4 and closed in 2018 Q1 is included in the 2017 Q1 - 2019 Q3 time period.

The proportion of consumer claims as a percentage of the AAA dataset stayed roughly constant between 2009 Q3 to 2017 Q1.[174] However, it appears to have risen from 2017 Q2 to 2019 Q2, although this conclusion may not hold if more claims are "backfilled" in the future.

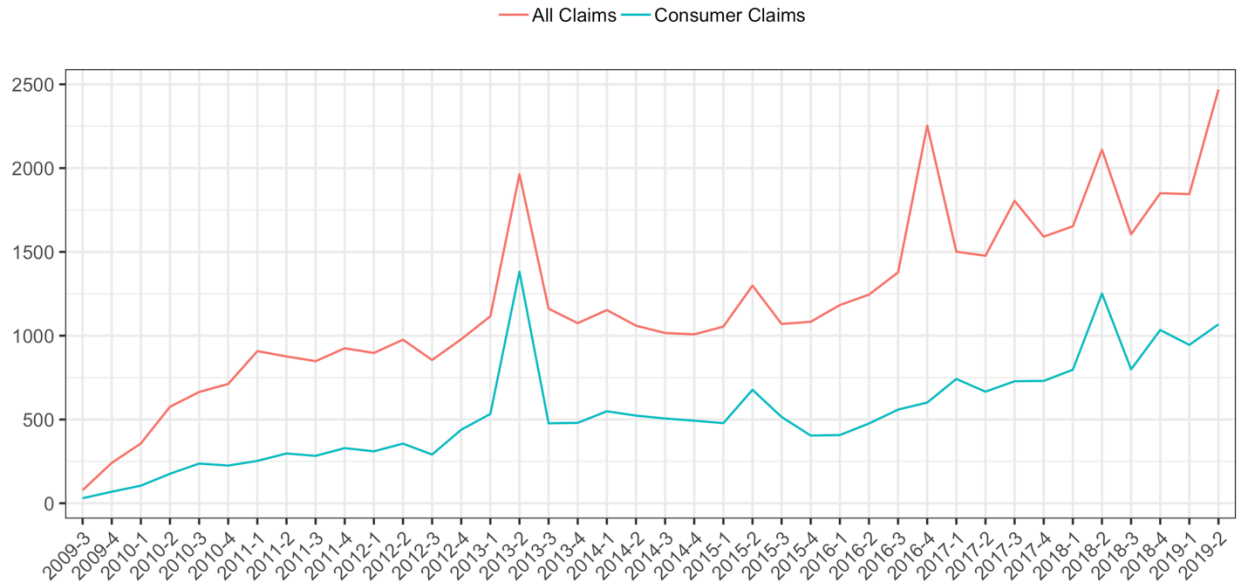
Table 1: Number of Claims, 2009-2019

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Claims	17,420[175]	14,090	16,405	47,915

Consumer Claims	7,343	5,858	8,018	21,219
% Consumer	42.2%	41.6%	48.9%	44.3%

Figure 1 shows the number of total claims and consumer claims by quarter. As in the 2017 analysis, we used the quarter of closing rather than the quarter of filing because it more accurately represents recent activity. If quarter of filing were used instead, many recently filed cases will not appear in the dataset because they have not closed.[176]

Figure 1: Total Claims and Total Consumer Claims by Quarter of Closing



2. Collective or Joint Consumer Action

As shown in Figure 1, the general trend in the number of filings is marked by a series of "spikes," at least some of which we believe reflect what we term "de facto collective actions." These collective actions may take one of two forms. In the first, the lawyers are the lynchpin and file individual claims. The AAA data do not provide information on the nature (as compared to the category) of the claim, so we cannot verify from the website whether, as we surmise, the same lawyers are bringing the same kind of claim on behalf of different individuals said to have been harmed by a particular provider of goods or services. Tables 2 and 3 display a list of these actions, which we

have defined as at least 50 filings by a single law firm against a single business within one year.[177]

Again, caveats are in order. This analysis may undercount the number of collective actions in two ways. First, some law firms adopt a strategy of compiling multiple arbitration claims from consumers and alerting the business before filing. Businesses may decide to settle, just as they may settle before cases are filed in court. We did learn from interviews with some lawyers who do consumer arbitration work that bundling of claims takes place with some regularity. Second, as a matter of data quality, the AAA database frequently lists law firms inconsistently, e.g., displaying filings by "Consumer Fraud Legal Services, LLC," "Consumer Fraud Legal Services LLC" or "Consumer Fraud Legal Services." Given this variation, we counted each name separately, even as they overlapped and may be the same entity. Third, under the AAA Consumer Arbitration Rules, the parties may pick the arbitrators and, if they have not, the AAA decides who the arbitrators are and could use arbitrators as aggregators as well.[178]

In addition, non-lawyer advocates may also bundle claims. An example is Radvocate, is a web-based tool that helps consumers file arbitrations against companies such as Verizon, American Express, and Comcast.[179] Radvocate uses software to automate the filings and to give guidance on how the arbitration process works. Consumers are not charged upfront; the service relies on contingent fees. If successful, consumers must pay 15% of the proceeds to Radvocate. Because California's statute calls for information about the "attorney" and "law firm" and not other kinds of representatives or assistance, databased information does not provide information on their use. Thus, as we identify a small uptick in the number of individual filings, we cannot know if those additional filings are artifacts of this form of help.

Below we detail the collective actions we identified through our own aggregation by law firm. As noted, slight variations in firm names produce separate entries, that we have replicated here.

Table 2: Collective Actions by Attorneys in Consumer Claims

Business	Law Firm	Num. Filings	Oldest Filing	Newest Filing
AT&T Mobility, LLC	Bursor & Fisher, PA*	1095	10/15/12	11/16/12
Santander Consumer USA, Inc.	Davis & Norris, LLP	349	12/11/15	11/30/16
Sallie Mae, Inc.	The Googasian Firm, PC	252	8/31/12	3/4/13

American Express	Consumer Fraud Legal Services LLC	201	9/1/17	8/24/18
Discover Bank	World Law Group*	186	6/21/13	6/13/14
Windstream Communications, Inc.	Davis & Norris, LLP	171	11/9/16	3/15/17
VIP PDL Services LLC	Lakeshore Law Center	140	8/18/15	7/15/16
CCA EduCorp, Inc.	Kershaw, Cutter & Ratinoff, LLP	113	4/29/11	8/26/11
Citibank, NA	World Law Group*	103	12/19/12	12/6/13
The O'Quinn Law Firm	The Kassab Law Firm	83	9/30/13	2/7/14
Discover Financial Services	World Law Group*	79	6/13/14	5/29/15
Century Negotiations, Inc.	The Scott Law Group, PS	69	1/13/12	10/22/12
TDS Telecom Service, LLC	Davis & Norris, LLP	67	5/12/18	1/18/19
NONE[180]	The Kassab Law Firm	66	9/30/13	2/7/14
American Express	World Law Group	65	7/3/13	7/1/14
Navient Solutions, LLC	Agruss Law Firm, LLC	64	5/6/16	4/19/17
FullBeauty Brands, LP	Dostart Hannink & Coveney LLP	58	3/23/17	4/7/17
Citibank, N.A.	LoScalzo & Associates, PLLC	52	3/7/11	5/4/11
Customers Bank	Legal Foundry LLC	51	7/17/17	7/18/17

* Indicates that we confirmed with the law firm that the set of filings concerned the same type of claims.

Table 3: Collective Actions by Attorneys In Employment Claims

Business	Law Firm	Num. Filings	Oldest Filing	Newest Filing
Macy's, Inc.	Initiative Legal Group APC	1583	9/23/13	10/28/13
Blazin Wings, Inc.	Outten & Golden LLP*	392	10/24/17	12/16/17
Central Refrigerated Service, Inc.	Getman & Sweeney, PLLC*	172	12/3/12	8/5/13
ETS PC, Inc.	Starzyk & Associates, PC	151	5/6/16	9/2/16
General Mills, Inc.	Snyder & Brandt, PA	104	3/29/17	11/10/17
Darden Restaurants, Inc.	Trief & Olk	92	2/23/16	1/9/17
Central Refrigerated Service, Inc.	Getman, Sweeney & Dunn, PLLC	87	11/15/13	11/12/14
Austin Industrial, Inc.	Reaud Morgan & Quinn, LLP	85	8/26/14	4/15/15
Maxim Healthcare Services, Inc.	Sommers Schwartz, PC	85	5/15/15	8/25/15
Solomon Edwards Group, LLC	Rob Wiley, PC	83	5/7/13	3/27/14
Darden Restaurants, Inc.	Lichter Law Firm	74	12/16/15	11/30/16
Winghouse of Daytona Beachside, LLC	Morgan & Morgan, PA	57	10/5/12	8/28/13
Mobility Plus Transportation LLC	Nelson Law Group	56	8/10/12	9/13/12
Twin Cities Community Hospital, Inc.	Teukolsky Law, APC	56	10/3/16	10/14/16

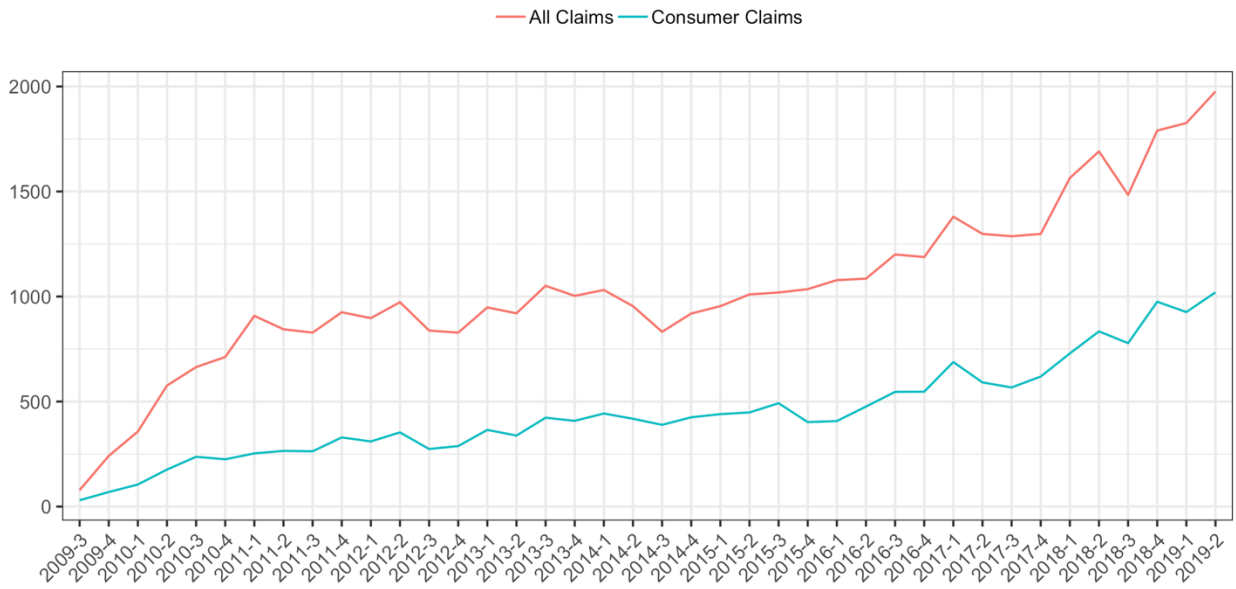
* Indicates that the authors confirmed with the law firm that the set of filings concerned the same type of claims, as would be the case in a traditional class action

To focus on individual filings, we removed instances when fifty or more claims were filed by the same attorney against the same provider. We then assessed the number of claims per year. As the chart shows, the total numbers of employment and consumer claims are modest (peaking at

2,000 claims), and the number of consumer filings has, since the beginning of our dataset in 2009, increased.

Figure 2: Total Claims and Total Consumer Claims by Quarter of Closing

(Excluding Fifty Claims or More by the Same Firm Against the Same Provider)[181]



3. Duration of Pending Arbitration Claim

Figures 3 and 4 show the median time period during from filing date to closing date by quarter of closing (again with the caveat that cases pending more than five years are not in the data.) We use median rather than the average length of arbitration to account to avoid skews from outliers.. The gradual increase at the beginning of the period is because only claims filed during or after the third quarter of 2009 are included in the dataset. The data towards the end of the period recorded is not necessarily reliable since on-going claims are not recorded.

In Figure 3, the spike in arbitration duration in 2016 Q4 is due to employment claims by Initiative Legal Group APC against Macy's, many of which took over three years to resolve. Figure 5 shows the median duration after removing our defined "de facto collective actions" by Initiative Legal Group APC and by the other nineteen actions listed in Tables 2 and 3.

Figure 3: Median Duration of Consumer and Employment Arbitration by Quarter of Closing

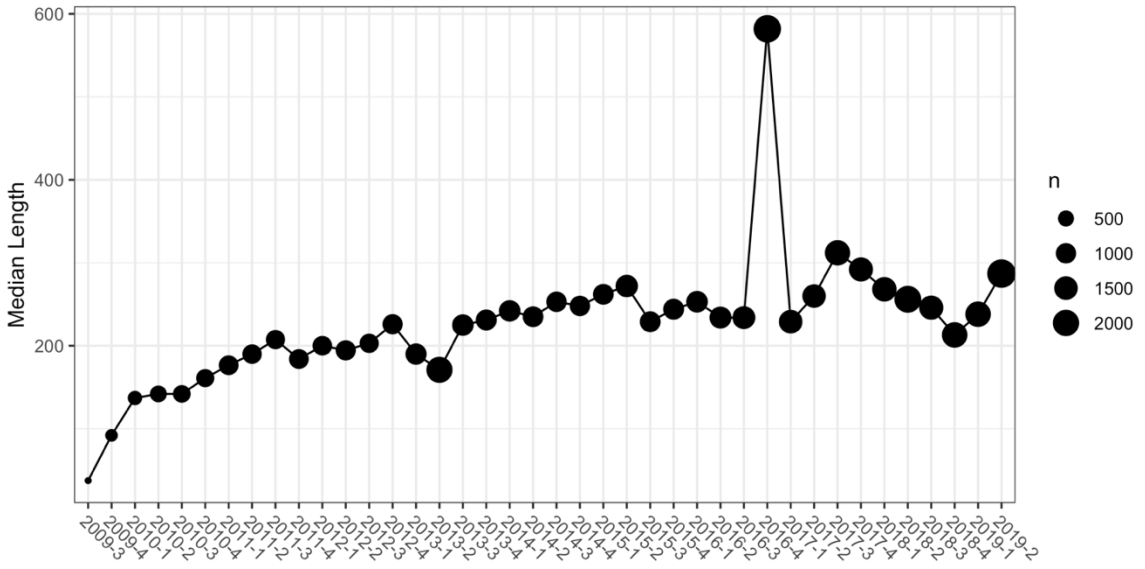
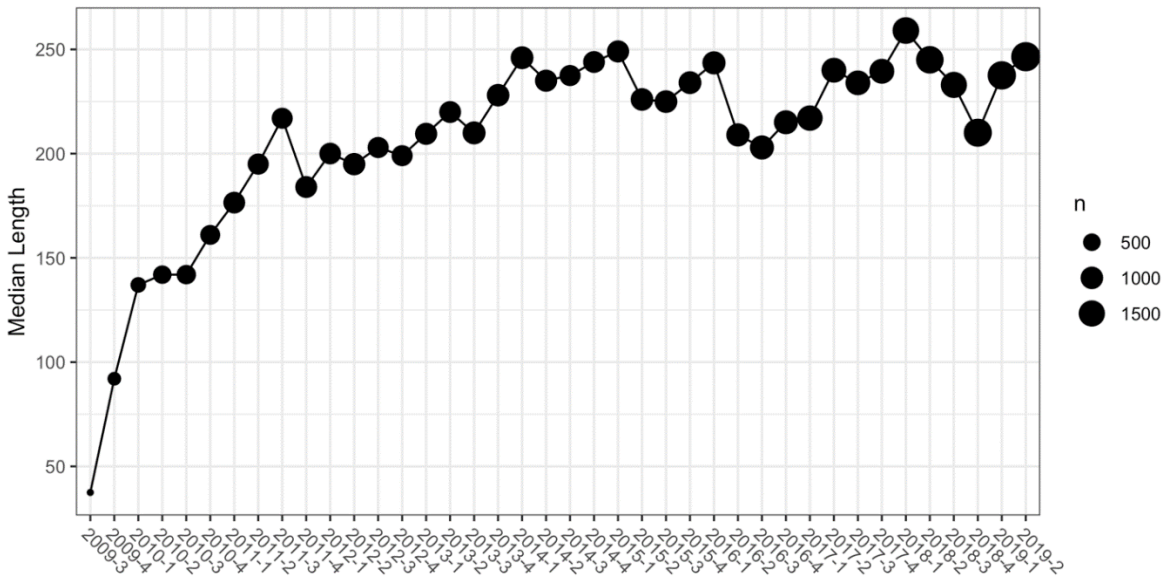


Figure 4: Median Duration Consumer and Employemnt Claims by Quarter of Closing

(Excluding Fifty Claims or More Filed by the Same Firm Against the Same Provider)



4. Amount Sought, Awarded, and Fees

Under the California statute, administrators of consumer arbitrations are to provide "the amount of the claim," "the amount

of any monetary award," and the arbitrator's "total fee" for the case.[182] We sought to understand how many records contained the amount sought, the dollar award, and the fee charged by the arbitrator. Across the entire dataset, 71.3% of all records contain an amount sought. The remaining 29.7% records either had a missing value or a value of zero. California statute requires that administrators of consumer arbitrations disclose whether "whether equitable relief was requested or awarded"[183]; it is unclear whether a zero or missing value in the "amount claimed" filed is a data entry error, or reflects a request only for equitable relief.

Compared to consumer claims generally, a higher percentage of consumer claims against AT&T included the claim amount (86.2% for claims against AT&T as contrasted with 71.3% overall). However, consumer claims against AT&T that were "terminated by an award" included the dollar award amount less often than consumer claims generally (33.3% as contrasted with 49.5%). Consumer claims against AT&T also did not display the arbitrator's fee as often (30.3% as contrasted with 66.4%).

Tables 4 and 5 detail how many consumer claims recorded by the AAA include the amount that was sought in the claim.[184] In the last two years, the percentage of consumer claims where an amount is recorded has diminished from roughly 75% in the 2009-2017 period to 66.1%.

Table 4: Consumer Claims with Claim Amounts by Closing Date

	Consumer Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Claims	7,343	5,858	8,018	21,219
Claims with Amt.	5,457	4,370	5,301	15,128
% Amt.	74.3%	74.6%	66.1%	71.3%
Median Claim (among amts 0+)	$10,000	$16,163	$13,000	$10,001

Tables 5 and 6 show how many claims "terminated by an award" include a dollar figure and the amount.[185] As in our discussion of the duration that arbitration claims were pending, we report the median rather than mean value to account for any outliers. These outliers might result from extreme claims or data entry errors. Given the assumption that all claims seek monetary awards, all terminated claims should record a dollar amount or that no funds were awarded. Instead, fewer than 50% of all such claims include the information. In the 2017 analysis, as we noted, we found a significant coding error, in which several awards were listed with the same amount in excess of $600,000. We did not find a similar red flag; less vivid errors would be difficult to identify.

Within the constraints of obtaining less than 50 percent of the recorded information, the percentage of consumer claims with dollar awards stayed roughly constant from 2009 to 2019. The percentage of employment claims with dollar awards listed increased during this period from 50% to 70%. The dollar figures also appear to be increasing, for both consumer and employment claims, but this increase could be due to the lack of information in more than half the outcomes as well as the ongoing claims. If recent ongoing claims have lower awarded amounts than closed claims, the median award value in recent years will decrease.

Table 5: Number of Consumer Claims with Dollar Figures by Closing Date

	Consumer Claims with Awards Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Claims Terminated by Award	2,679	1,536	1,175	5,390
Claims with Dollar Figure	1,308	772	586	2,666
% Dollar Figure	48.8%	50.3%	49.9%	49.5%

Median Award[186] (Business + Consumer)	$7,847.49	$8,119	$10,412	$8,446.13

Table 6: Number of Employment Claims with Dollar Figures by Closing Date

	Non-Consumer Claims with Awards Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Claims Terminated by Award	2,546	1,463	1,272	5,281
Claims with Dollar Figure	1,327	839	899	3,065
% Dollar Figure	52.1%	57.3%	70.7%	58.0%
Median Dollar Figure	$21,930	$23,993	$31,260	$25,000

5. Arbitrators' Fees

California requires arbitration providers to provide information on arbitrators' fees and attorney fees,[187] but does not seek data on administrative fees charged by the arbitration provider. For consumer claims, the AAA has set the filing fee at $200.[188] For employees, the AAA charges a filing fee of $300.[189] The AAA website records "total fees" (not including its administrative fees) and "attorney's fees." The attorney's fees field refers to fees designated to offset the expenses of the attorney. The "total fees" field refers to arbitrator's fees. Under the AAA rules, the entity obliging the use of the services (such as AT&T) has to pay the fees of arbitrators. The AAA regulates the charges for arbitrators and, as of the fall of 2019, the fee was $2,500 per day of hearing for an in-person arbitration and $1,500 for a document-only arbitration.[190]

Again, data questions exist. The amount of the arbitrator's fee in a given case appeared to change as quarterly updates were made to the AAA website. According to AAA, the changes reflect receipt of updated information from arbitrators, such as fees that had been imposed but then cancelled if the processing activities changed.[191]

Tables 7 and 8 describe our findings. From what is reported thus far, we identified more than 68% of all claims (32,752 out of 47,915 total claims) that resulted in reported fees.

Table 7: Number of Consumer Claims with Recorded Fees by Closing Date

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	7,343	5,858	8,018	21,219
Claims with Fee	5,973	3,579	4,530	14,082
% Claims w/ Fee	81.3%	61.1%	56.5%	66.4%
Median Total Fee (Among Claims with Fee)	$750	$1,034	$1,250	$750

Table 8: Number of Employment with Recorded Fees by Closing Date

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	10,077	8,232	8,387	26,696
Claims with Fee	8,186	5,085	5,399	18,670
% Claims w/ Fee	81.2%	61.8%	64.4%	69.9%

Median Total Fee (Among Claims with Fee)	$5,311	$1,680	$1,800	$2,800

Who pays? In the 21,219 consumer claims, the fees were allocated to the business 76.6% of the time (10,785 of 14,982 claims). In 9.2% of cases (1,300 of 14,082), the report indicates that fees were evenly split between the business and the consumer. In 4.2% of cases (1,746 of 14,082), the fee was split in some other way between the consumer and business. We found 1.8% of cases (251 of 14,082) reporting that consumers paid all the fees.

D. Consumer Claims involving AT&T

At the outset, we provided an overview of the claiming rates against AT&T. Between 2017 and 2019, AT&T had about 130 million wireless subscribers.[192] For this paper, we looked at filings from 2017-2019 and learned that the number of filings against AT&T had increased. In that interval, on average of 172 individuals filed claims. (The numbers shift somewhat when the focus is on filings as compared to closed claims and awards.)

Between 2017 Q3 to 2019 Q2, we identified 398 individual claims against AT&T, or approximately 199 per year. The range was 124 to 205. In 2017 Q1, the number of claims spiked. Ten appear to have been brought by Consumer Fraud Legal Services; those ten have different filing dates and amounts sought. The number of claims also spiked in 2018 Q4 and 2019 Q2, and no single law firm brought more than four claims during this period.

To summarize, during the 2009 Q3 to 2019 Q2 period, we identified a total of 849 consumer claims that closed against AT&T. Between 2014 and 2017, on average, 107 consumers brought claims per year. Between 2017 and 2019, on average, 172 consumers brought claims per year. Over the same period, we did not locate any claims brought by AT&T against a consumer.

Of the 849 claims, 69.8% (593 claims) were settled, and 11.3% (96 claims) were terminated in an award. The remainder were either dismissed, withdrawn, or codes as "administrative." Of the claims

that were either settled or terminated in an award, the median award was $503, and the maximum award was $20,000.

Figure 5 shows the number of consumer claims against AT&T by quarter. The more than 1000 claims filed as collective actions by attorneys have been removed, as they were for the prior analyses of this data. In the 2017-2019 period, no one law firm filed fifty or more claims against AT&T. [193]

Figure 5: Total Claims Against AT&T by Quarter of Closing

(Excluding Fifty Claims or More by the Same Firm Against the Same Provider)

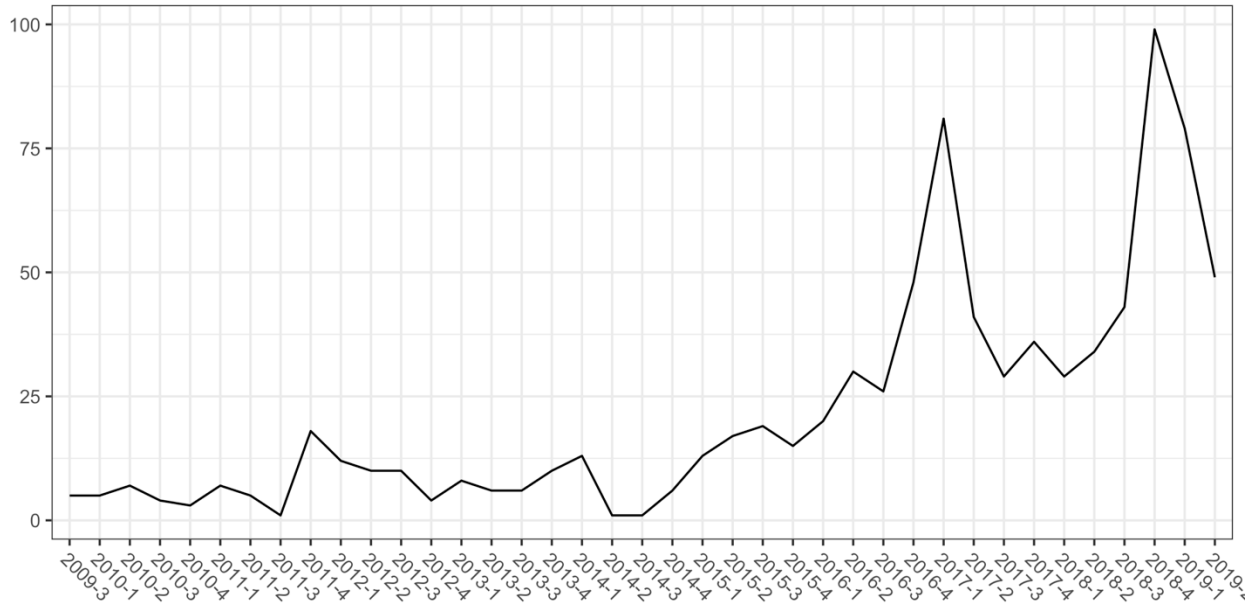


Table 9 displays the number and percentage of claims that were brought against AT&T by individuals without legal representation.[194] (The reminder is that if Radvocate or other nonlawyer services were providing assistance, that information would not be in the database.) Most claims reported are brought by lawyer-less individuals. In the 2009-2014 period, 66.7% were without lawyers. From 2017-2019, 76.3% were without lawyers.

Table 9: Consumer Claims Against AT&T by Representation Status
(Excluding Fifty Claims or More by the Same Firm Against the Same Provider)

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	135	275	439	849
Self-Represented	90	213	335	638
% Self-Represented	66.7%	77.5%	76.3%	75.1%

Table 10 shows how many consumer claims against AT&T include the amount that was sought in the claim. Table 11 describes how many consumer claims against AT&T that were "terminated in an award" include the amount awarded. Table 12 displays the amount of consumer claims against AT&T that disclosed the amount of the arbitrator's fees.

Compared to consumer claims generally, a higher percentage of consumer claims against AT&T include the claim amount (86.2% for claims against AT&T as contrasted with 71.3% overall). However, consumer claims against AT&T that were "terminated by an award" were less likely to include the dollar award amount than consumer claims generally (33.3% as contrasted with 49.5%). Consumer claims against AT&T were also less likely to display the arbitrator's fee (30.3% versus 66.4%).

Yet much more needs to be known (and complete award information is needed) before the impact of lawyers can be assessed. In this data slice, claims brought by self-represented individuals appear to be slightly less successful than claims brought by those represented by an attorney. According to the AAA data, 10.5% of claims brought by self-represented claimants result in an award, and 68% are settled. By contrast, 13.7% of claims brought by individuals with legal representation result in an award, and 75.4% are settled.

Table 10: Consumer Claims Against AT&T with Claim Amounts by Closing Date

(Excluding Fifty Claims or More Filed by the Same Firm Against the Same Provider)

	Consumer Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Claims	135	275	439	849
Claims with Amt.	124	251	357	732
% Amt.	91.9%	91.3%	81.3%	86.2%
Median Claim (among amts 0+)	$1,380	$1,250	$2,000	$1,500

Table 11: Number of Consumer Claims Against AT&T with Dollar Figures by Closing Date

(Excluding Fifty Claims or More by the Same Firm Against the Same Provider)

	Consumer Claims with Awards Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Claims Terminated by Award	29	32	35	96
Claims with Dollar Figure	6	10	16	32
% Dollar Figure	20.7%	31.3%	45.7%	33.3%
Median Award (Business + Consumer)	$727	$576	$945	$762

Table 12: Number of Consumer Claims Against AT&T with Fees by Closing Date

(Excluding Fifty Claims or More by the Same Firm Against the Same Provider)

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	135	275	439	849
Claims with Fee	83	67	107	257
% Claims w/ Fee	61.5%	24.4%	24.4%	30.3%
Median Total Fee (Among Claims with Fee)	$750	$750	$1,250	$750

V. Knowledge, Power, and Legitimacy

We have provided a deep dive into extant data through excavating case law and delving into arbitration websites in an effort to assess some of the effects of cutting off access to courts. This accounting makes plain the critical role played by state mandates for information, their uneven implementation, and the lack of knowledge about the nature of claims brought through arbitration. The case law – itself always a fragmented and skewed resource - documents ongoing efforts to reduce information all the more.

That mix underscores the need for more targeted regulation. For example, federal and state statutes could require arbitration providers to produce, archive, and provide ready access to much more information and then not withdraw the information provided. Such regulation could also address nondisclosure obligations. To avoid "targeting" arbitration in a way that runs afoul of current Supreme Court interpretations of the FAA, state regulation of nondisclosure provisions could address their use in courts as well as in arbitration. Moreover, as suggested by fifty attorneys general, prohibitions could be area specific – such as sexual harassment claims. Further, common law and legal ethics could be sources of constraint[195] on what Professors David Hoffman and Erick

Lampmann have termed "hushing contracts." They believe that "public policy" ought to preclude courts when interpreting these materials as "contracts" to enforce them.[196]

Yet another source of regulation is federal constitutional law. Peter Rutledge has argued that for federal judges to delegate adjudication to arbitrators in federal claims violated Article III.[197] Further, as outlined in Judith Resnik's *Diffusing Disputes*, the impoverished processes of arbitration turn the mandate to use it when people have legal claims into a deprivation of property without sufficient process, in violation of protections in the Fifth and Fourteenth Amendments.[198] The information suppression activities detailed here also raise the possibility of First Amendment arguments that court enforcement turns them into interference with the right to petition for redress.

Return then to the American Express September 2019 mailing, beginning with its assertion of "changes . . . effective immediately." Might an individual consumer want to keep private information about conflicts with this credit card company? Possibly, and if so, American Express could acquiesce in response to that concern, just as it could also request closure in a particular instance. In contrast, its blanket bar on disclosure is not a "contract," nor is American Express acting because of its desire to respect individuals' privacy, autonomy, agency, or to nurture and preserve future relationships for generative interactions. Rather, imposing silence is in service of limiting opportunities to know about challenges to its actions. (As noted, a month later, American Express unilaterally retracted "benefits" of its credit card services.)

The closure and silencing is yet more troublesome because it reflects that American Express does not perceive the *need* to legitimate its imposition of private dispute resolution. Its act of authority comes with no public face seeking to anchor it in fairness or justice through some forms of accounting of the decisions made. An ironic contrast comes from Google, which since 2015, has had to respond to a decision from the Court of Justice of the European Communities that on occasion items have to be removed from the web as part of what is sometimes called a "right to be forgotten."[199]

To do so, Google and other search engines have become courts, in that they must decide how to apply the obligation to balance data protection rights and public access to the information in question. After the ruling, the company created an ad hoc Advisory

Council that proposed guidelines, many of which were adopted.[200] Requests to take down information come from individuals as well as governments arguing security needs.[201] Refusals to delist are appealable to data protection agencies at the national level, and that access to appeals may prompt Google, as a repeat player, to develop presumptions of taking down information.[202]

Google has decided to put a public face on its processes developed in service of a mandate to make some information private. Google has created what it terms a "transparency report" to explain that it makes decisions on a "case-by-case basis," that it sometimes asks for more information, and that no requests are "automatically rejected by humans or by machines."[203] Further, Google described the process as "complex," requiring evaluation of factors such as the "requester's professional life, a past crime, political office, position in public life," and the authorship of the materials.[204] Examples provided included the delisting, at the behest of the wife of a deceased individual, of information on alleged sex offenses, and decisions that delisted some URLs but not others related to individuals who were in political life.[205] As of the winter of 2018, Google reported that it had received more than two million requests for delisting and responded by removing more than forty percent, or some 900,000 URLs.[206]

Much more could be and has been said about Google as a court and the complex interactions of public and private domains and regulation.[207] My point here is that Google perceived itself as in need of a mechanism to speak to the public in an effort to legitimate its adjudicatory activities and it has done so by naming its accounting a "transparency report." The concern about the link between publicity and legitimacy can also be found in European regulation of alternative dispute resolution[208] and in rules on arbitration involving sovereign investments.[209] Both aim to open up and regulate decision-making of non-court but court-like adjudicatory bodies.

Those illustrations make plain the breadth of the power claimed by disclosure bans. Instead of wanting users of alternative dispute system to talk about their experiences as one way to legitimate that process or provide other methods to engage the public, American Express appears to have so much confidence in its authority that it thinks it has does not have to justify that power.

The reminder is that the tradition of public processes in courts stems from centuries when governments presented spectacles

to impress on the public that sovereignties had the power to make and to enforce their laws, including implementing edicts through force.

In the last three centuries, democratic obligations changed the norms of judging. Instead of obligations to demonstrate allegiance and loyalty to gods and kings, judges are supposed to demonstrate their independence from the states that empower them. With the rise of popular sovereignty and of democratic egalitarianism, the "rites" of watching sovereign power became "rights" of access not only to observe but also to criticize the exercise of power that adjudication entails. That is what American Express aims to shut down.

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[1] All rights reserved. NOT FOR DISTRIBUTION WITHOUT PERMISSION OF THE AUTHORS. Thanks to Robert Klonoff for inviting us to participate in this symposium, and to Mary Collishaw for her wise organization and oversight. We greatly appreciate the help we received from Ryan Boyle, Vice-President, Statistics and In-House Research at the American Arbitration Association (AAA), who patiently and generously helped us to understand and to use the data website of the AAA. This research builds on the work of many former law students, including Adam Margulies, Greg Conyers, Michael Morse, and Devon Porter. We have been aided by Jason Eiseman, Associate Law Librarian for Technology and Digital Initiatives as the Yale Law Library, who helped us to create the Open Source Consumer Arbitration data archive (https://osf.io/qmtsu/). Thanks are also due to Denny Curtis and to David Noll for thoughts on these issues and to Bonnie Posick for expert editorial advice.

[2] American Express, Notice of Important Changes to Your Cardmember Agreement, September 2019. We produce parts of the document in Appendix A. These words reiterate a clause imposed by AT&T in 2002 that was subsequently withdrawn after litigation. See "Neither you nor [the company] may disclose the existence, content or results of any arbitration or award, except as may be required by law [or] to confirm and enforce an award." *See* Ting v. AT&T, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003), discussed infra [cross cites].

[3] *See generally* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 Law & Socy' Rev. 631 (1980).

[4] *See, e.g.*, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 10 (Dec. 2013), http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf. In a 2008 study, Nicholas M. Pace and William B. Rubenstein concluded that claims response data in concluded federal court class actions was too limited to enable meaningful study of claims and compensation rates. *See* Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* at 34 (Rand Institute for Civil Justice Working Paper No. WR-599-ICJ, July 2008).

[5] See, e.g., Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action* 92 N.Y.U. L. REV. 846, 856 (2017).

[6] For a detailed account of the New York State Legislature's practices that led to *Mullane*, see John Leubsdorf, *Unmasking* Mullane*: Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS L.J. 1693 (2015); Judith Resnik, *Vital State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1788-89 (2017). See also 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, 134-42 (2011).

[7] N.Y. Banking Law § 188-a (1937) (codified as revised at N.Y. Banking Law § 100-c (Consol. 2008)).

[8] 339 U.S. 306 (1950).

[9] 563 U.S. 333 (2011).

[10] *Id.* at 352. In 2005, the California Supreme Court held that collective action waivers embedded in arbitration clauses in adhesive consumer materials were unconscionable under California law. *See* Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005). Under this *Discover Bank* rule, courts applying California law found such mandates unenforceable under the court's statutory authority to refuse to enforce any contract found "to have been unconscionable at the time it was made." Cal. Civ.Code Ann. § 1670.5(a) (1985). *See Concepcion*, 563 U.S. at 340. In 2011, the U.S. Supreme Court abrogated the *Discovery Bank* rule, finding it preempted by the FAA. *See id.* at 352.

[11] *See* 137 S. Ct. 1421, 1425 (2017).

[12] *See* 138 S. Ct. 1612, 1632 (2018). Two lower courts had read the FAA to be limited by the NLRA. *See* Morris v. Ernst & Young, LLP, 834 F.3d 975, 984 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016).

[13] *See Concepcion*, 563 U.S. at 347-48, 351.

[14] *See, e.g.*, THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW OF ARBITRATION (2014); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013); OREN BAR-GILL, SEDUCTION BY CONTRACT 185, 196-97 (2012); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MED. 56, 71-72 (2014). The Court's interpretations from the 1930s through 2015 are analyzed in Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804, 2855-2673 (2015) [hereinafter Resnik, Diffusing Disputes].

Justices from O'Connor to Thomas to Stevens have criticized the expansion. In 1984, when the majority held that the FAA preempted state law, Justice O'Connor concluded that the Court had "discovered a right" not found in the text or purpose of the statute. See *Southland Corp. v. Keating*, 465 U.S. 1, 35 (1984) (O'Connor, J., dissenting). Thereafter, she saw that the Court had been "building . . . , case by case, an edifice of its own creation." See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). Justice Stevens likewise wrote that the Court had "effectively rewritten the statute" by applying the FAA to statutory claims and to employees. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 43 (1991) (Stevens, J., dissenting); Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting).

[15] *See, e.g.*, Margaret Jane Radin, supra note _; Robin Bradley Kar & Margaret Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 Harv. L. Rev. 1135 (2019); Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183 (2015).

[16] Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147 (1970).

[17] *See* Resnik, *Diffusing Disputes*, *supra* note__, at 2901-10; Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Calif. L. Rev. 1, 51 (2019); Cynthia Estlund, *The Black*

Hole of Mandatory Arbitration, 96 N.C. L. REV. 679, 689-700 (2018); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015); Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUDIES 1 (2011);Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 843-44 (2010); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 813-16 (2008).

[18] *See, e.g.*, ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988); SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1983); David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221 (2016).

[19] *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006); Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 4 (2002).

[20] Many court systems have commitments to "open courts" but close off different aspects of their proceedings, such as filings when cases are pending. *See* Judith Resnik, *The Functions of Publicity and of Privatization in Courts and their Replacements (from Jeremy Bentham to #MeToo and Google Spain)* 6–7 *in* OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY (Burkhard Hess and Ana Koprivica, eds., Max Planck Institute, Luxembourg, Nomos, 2019). On the criminal side, the U.S. Supreme court has "consistently . . . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218 (1979).

[21] See Judith Resnik, *Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1654 (2015).

[22] *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 383 (2006); Jennifer L. Rosato, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & POL'Y 149, 151 (2000); Samuel Broderick Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 912 (1998).

[23] In 2018, sixteen state legislatures considered bills to limit the enforceability of nondisclosure agreements related to harassment. *See* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#Metoo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 59 (2019). *See also* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U.L. REV. 165, 220 (2019).

[24] See, e.g., Ala. Const. Art. I, § 13; Conn. Const. Art. I, § 10. A list of those provisions can be found in Appendix I of Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 St. Louis Univ. L.J. 917, 999 (2012).

[25] *See* JUDITH RESNIK & DENNIS E. CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS [JUMP CITES TO CHAPTER 13, PAGES] (2011). Whether those practices survive is an open question. *See* Resnik, *Contingency of Openness in Courts, supra note .*

[26] *See* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 191-92 (2017); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 468 (1984). Accounts of English arbitrations from pre-Roman Britannia through the Elizabethan Age documents the mélange of public and private that endowed third-party arbitrators with authority to resolve disputes and that included public access to many of the proceedings. *See* DEREK ROEBUCK, EARLY ENGLISH ARBITRATION (2008); DEREK ROEBUCK, THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I (2015). My thanks to John Langbein for suggesting this resource.

[27] *See* FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS (1948).

[28] *See, e.g.*, Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 525 (3d Cir. 2013) (Roth, J., dissenting).

[29] Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. ch. 1).

[30] The FAA permits parties to petition any U.S. District Court that would otherwise have jurisdiction over a dispute for an order directing another party to arbitrate. *See* 9 U.S.C. § 4. Motions to vacate awards for specified grounds are governed by 9 U.S.C. § 10. *See generally* Hall St. Assocs. LLC v. Mattel, 552 U.S. 576 (2008).

[31] *See* 28 U.S.C. §§ 651-658 (2012). Details of some of its use can be found in *Resnik, Diffusing Disputes, supra note _,* at 2921-24.

[32] Illinois offers one example; it sends "some types of civil disputes" to arbitration to help reduce "court congestion, costs, and delay. . . . The goal of the process . . . is to deliver a high quality, low cost, expeditious hearing in eligible cases, resulting in an award that will enable, but not mandate, parties to resolve their dispute without a formal trial." ALT. DISPUTE RESOLUTION COORDINATING COMM. OF THE ILL. JUDICIAL CONFERENCE, COURT-ANNEXED MANDATORY ARBITRATION PROGRAM: UNIFORM ARBITRATOR REFERENCE MANUAL 2 (2010), http://www.dupageco.org/courts/33051/. [need update cite to 2019 materials] For discussion of the Illinois program, see Resnik, *Contingency of Openness in Courts*, *supra* note __, at 1652, 1667.

[33] 733 F.3d 510, 518 (3d Cir. 2013).

[34] *Id.* at 513. The history and details of the Delaware Chancery Program are discussed in Resnik, *Contingency of Openness in Courts*, *supra* note_ , at 1674-82.

[35] *Delaware Coalition for Open Government, 733 F.3d at 513; Resnik, Contingency of Openness in Courts*, *supra* note __, at 1674.

[36] *Id. See also* Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349 (2013).

[37] *Del. Coalition for Open Gov.*, 733 F.3d at 518.

[38] *Id.* at 519. The dissent argued that without confidentiality, disputants would use private providers or systems set up in other countries. *See id.* at 524, 526 (Roth, J., dissenting).

[39] *See, e.g.,* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233 (2019). Szalai looked at Fortune 100 companies and their subsidiaries or affiliates, and identified 81 mandates in consumer arbitration materials, of which 78 had class-action waivers. The focus on workers comes from Alexander J.S. Colvin, who found that more than fifty percent of workers in the United States were subjected, as of July of 2017, to arbitration mandates. See Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/files/pdf/144131.pdf.

A 2008 study made plain that obligations imposed on consumers and employees are not regularly imposed by entities with bargaining power on each other. Rather, looking at major companies in telecommunications credit, and financial services industries, the researchers found that their agreements may have provided an arbitration option but not court-preclusion. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J. L. Reform 871, 882-83, 888 (2008).

[40] StoltNielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 686 (2010).

[41] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011). *See also* Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 525 (3d Cir. 2013) ("Confidentiality is one of the primary reasons why litigants choose arbitration to resolve disputes—particularly commercial disputes, involving corporate earnings and business secrets." (Roth, J., dissenting)).

[42] Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 246 (2013).

[43] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1648, 200 L. Ed. 2d 889 (2018).

[44] *See* Pokorny v. Quixtar, Inc., 601 F.3d 987, 1002 (9th Cir. 2010); Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003), discussed *infra* texts accompanying notes __.

[45] 379 F.3d 159, 175 (5th Cir. 2004).

[46] *Id.*

[47] *Id.*

[48] *See* Br. of Respondents-Appellants at 24-25, American Family Life Assurance Company of New York v. Baker, 778 Fed. App'x 24 (2d Cir. July 16, 2019) (unpublished summary order) (No. 18-1960), 2018 WL 5806825. The clause required the parties to "agree that all papers filed in court in connection with any action to enforce this Arbitration Agreement or the arbitrators' award shall be filed under seal." *Id.* With no discussion of these details, the Second Circuit, in an unpublished summary order, found that the confidentiality requirement did not render the arbitration agreement substantively unconscionable. *See* Am. Family Life Assurance Co. of N.Y. v. Baker, 778 Fed. App'x 24, 27-28 (2d Cir. July 16, 2019) (unpublished summary order). The fact that we were able to read the opinions and briefs reflect that, at least in this instance, the company did not seek to enforce and the individual did not follow that mandate.

[49] *See* Consumer and Employment Arbitration Statistics, AM. ARBITRATION ASS'N (last visited Oct. 21, 2019), https://www.adr.org/ConsumerArbitrationStatistics.

[50] *See* Resolve a Dispute with AT&T via Arbitration, AT&T (last visited Oct. 18, 2019), https://www.att.com/esupport/article.html#!/wireless/KM1045585.

[51] Discussion of that analysis is in Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts*

and Arbitrations, 96 N.C. L. Rev. 605, 650-51 (2018), and in Judith Resnik, Diffusing Disputes, supra note _, at 2901-03.

[52] The 1,762 figure is larger than the 1,485 previously reported. *See* Resnik, *A2K/A2J, supra* note _, at 652. The difference stems from the availability of updated data. As of the 2017 analysis, only claims filed and closed before June 2017 were included. Subsequent data includes claims filed before June 2017 but resolved later.

[53] See the Fairness in Class Action Litigation Act of 2017, which included proposals to make both class actions and MDLs more difficult to bring by imposing obligations to ascertain the identities of group members and limiting fee recoupment until after all distribution. *See* H.R. 985, 115th Cong. §§ 103(a), 105 (2017). Thereafter, proposals seek to regulate MDLs through new rules. *See* Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure 2 (Dec. 4, 2018), https://www.uscourts.gov/sites/default/files/cv12-2018_0.pdf; Alison Frankel, *Defense group argues new MDL stats prove need to change rules for mass torts*, REUTERS: ON THE CASE (Oct. 4, 2018, 2:29 pm), https://www.reuters.com/article/legal-us-otc-mdl/defense-group-argues-new-mdl-stats-prove-need-to-change-rules-for-mass-torts-idUSKCN1ME2EJ.

[54] Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

[55] Illinois's mandatory, court-annexed arbitration, arbitrations are open and often conducted in courthouses or special centers. *See, e.g.*, ANN B. JORGENSEN & HOLLIS L. WEBSTER, STATE OF ILL., CNTY. OF DUPAGE COURT-ANNEXED MANDATORY ARBITRATION PROGRAM, ARBITRATOR'S BENCH BOOK 13-14 (3d rev. 2011), http://www.dupageco.org/Courts/Docs/34145/. The "use of courthouse facilities provides a desirable quasi-judicial atmosphere" and easier ability to monitor the progress of cases. *See* Ill. Sup. Ct. R. 88 cmt.

[56] *See* Administrative FAQ, FINRA (2019), https://www.finra.org/arbitration-mediation/overview/additional-resources/faq/administrative.

[57] *See* FINRA Code of Arbitration Procedure for Customer Disputes § 12904(h).

[58] E.O. 13673, Fair Pay and Safe Workplaces, 79 Fed. Reg. 45,309 (July 31, 2014).

[59] In October 2016, a federal judge enjoined enforcement because the court concluded it exceeded the President's authority and impermissibly mandated speech that the First Amendment protected. *See* Associated Builders & Contractors of Se. Texas v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *7-9 (E.D. Tex. Oct. 24, 2016). President Trump later issued an Executive Order rescinding the regulation. *See* 82 Fed. Reg. 41, 358 (Nov. 6, 2017).

[60] *See* Consumer Fin. Prot. Bureau, Arbitration Agreements § 1040.4(b), 82 Fed. Reg. 33,210, 33,430 (July 19, 2017).

[61] *See* Joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to "Arbitration Agreements," Pub. L. No. 115-74, 131 Stat. 125 (Nov. 1, 2017).

[62] Several witnesses testified in support of several of the provisions, including the Forced Arbitration Injustice Repeal Act (H.R. 1423/S. 610), the Restoring Justice for Workers Act (H.R. 7109), and the Justice for Servicemembers Act (H.R. 2631), and cited the need for public information about disputes. See, e.g., *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing Before the H. Comm. Judiciary Subcomm. On Antitrust, Commercial & Admin. Law* (May 16, 2019), https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-GillesM-20190516.pdf (statement of Myriam Gilles).

[63] Safety Over Arbitration Act of 2019, S.620, 116th Cong. § 402(b)(2019).

[64] *See* Alyssa S. King, *Arbitration and the Federal Balance*, 94 Indiana L.J. 1447, 1476 (2019).

[65] See generally Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#Metoo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 60 (2019); *States move to limit workplace confidentiality agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/.

[66] Among the states that have enacted legislation limiting the use of confidentiality clauses are Arizona, Maryland, New York, Tennessee, Vermont and Washington. [need cites to each's legislation and a bit of text.

[67] Wash. Rev. Code Ann. § 49.44.085.

[68] *See* Letter from Nat'l Ass'n of Attys. Gen. to Congressional Leadership, Mandatory Arbitration of Sexual Harassment Disputes (Feb. 12, 2018), https://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20-%20NAAG%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf.

[69] *See* AAA Consumer Arbitration Rule 30, https://www.adr.org/sites/default/files/Consumer%20Rules.pdf ("The arbitrator and the AAA will keep information about the arbitration private except to the extent that a law provides that such information shall be shared or made public."); JAMS Arbitration Rule 26, https://www.jamsadr.com/rules-comprehensive-arbitration/ ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.").

[70] AAA Statement of Ethical Principles, AM. ARBITRATION ASS'N (2019), https://www.adr.org/StatementofEthicalPrinciples.

[71] *Id.*

[72] *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing Before the H. Comm. Judiciary Subcomm. On Antitrust, Commercial & Admin. Law* (May 16, 2019), https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-PincusA-20190516.pdf (Statement of Andrew J. Pincus on behalf of the U.S. Chamber Institute for Legal Reform).

[73] *Id.*

[74] AAA Consumer Arbitration Rule 30, *supra* note _.

[75] *AAA-ICDR® Clause Drafting*, AM. ARBITRATION ASS'N, https://adr.org/Clauses; JAMS Clause Workbook, JAMS, https://www.jamsadr.com/clauses/#Confidentiality.

[76] ClauseBuilder Tool, AM. ARBITRATION ASS'N (2019), https://www.clausebuilder.org/cb/faces/options/standardreview.

[77] JAMS Clause Workbook, JAMS, https://www.jamsadr.com/clauses/#Confidentiality.

[78] *Id.*

[79] *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 136 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[80] *See id.* at 51–52.

[81] *See* Ting v. AT&T, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003). In *Ting*, California residential customers and a consumer advocacy group brought a putative class action directly challenging the collective action waiver in AT&T's "consumer services agreement" under California's Consumer Legal Remedies Act and Unfair Practices Act. *See id.* at 1130. The Ninth Circuit found that the confidentiality provision in the consumer services agreement was substantively unconscionable. *See id.* at 1151-52.

[82] *Id.* at 1151 n.16.

[83] Pokorny v. Quixtar, Inc., 601 F.3d 987, 1001 (9th Cir. 2010). Individual distributors of the marketing and products company Amway Corporation (through its successor-in-interest Quixtar) brought suit alleging that the defendant operated an illegal pyramid scheme in violation of the Racketeer Influenced and Corrupt Organizations Act and of California law. *Id.* at 991. The Ninth Circuit affirmed a district court's finding that the confidentiality clause was substantively unconscionable. *Id.* at 1002.

[84] *See, e.g.*, Schnuerle v. Insight Commc'ns Co., L.P., 376 S.W.3d 561, 578 (Ky. 2012) ("[N]either you nor Insight may disclose the existence, content or results of any arbitration or award . . . ."). That putative class of Kentucky residents sued their internet service provider for violations of the Kentucky Consumer Protection Act; the bases were a series of service outages. *Id. at* 565. The Supreme Court of Kentucky held that the confidentiality provision in the provider's arbitration clause was unenforceable. *Id.* at 589.

[85] *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1071 (9th Cir. 2007). That clause provided: "all claims, defenses and proceedings (including, without limiting the generality of the foregoing, the existence of a controversy and the fact that there is a mediation or an arbitration proceeding) shall be treated in a confidential manner by the mediator, the Arbitrator, the parties and their counsel, each of their agents, and employees and all others acting on behalf of or in concert with them."). The Ninth Circuit analyzed this provision in the context of a lawsuit by an employee suing the firm under the Fair Labor Standards Act and other federal and state labor law statutes for the alleged failure to pay overtime and the denial of rest and meal periods. *Id.* at

1070. The court found the confidentiality clause was substantively unconscionable because it was "written too broadly." *Id.* at 1080.

[86] *See, e.g.*, Narayan v. The Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556, *reconsideration denied*, 400 P.3d 581 (Haw. 2017), and *cert. denied sub nom*. Ritz-Carlton Dev. Co. v. Narayan, 138 S. Ct. 982 (2018). That clause provided: "Neither a party, witness, or the arbitrator may disclose the facts of the underlying dispute or the contents or results of any negotiation, mediation, or arbitration hereunder without prior written consent of all parties." The clause became an issue in a lawsuit filed by a group of condominium purchasers against the developer of a failed condominium project. *See id.* at 548-49. The Supreme Court of Hawaii found the confidentiality provision substantively unconscionable. *Id.* at 555-56.

[87] *See* Br. of Respondents-Appellants at 24-25, Am. Family Life Assurance Co. of New York v. Baker, 778 Fed. App'x 24 (2d Cir. July 16, 2019) (unpublished summary order) (No. 18-1960), 2018 WL 5806825. This decision arose in a case involving employment claims by insurance sales associates; the Second Circuit held that the confidentiality clause did not render the entire arbitration mandate substantively unconscionable. *See* Am. Family Life Assurance Co. of New York v. Baker, 778 Fed. App'x 24, 27-28 (2d Cir. July 16, 2019). The court did not discuss the scope or enforceability of the broad confidentiality mandate. *Id.* As our discussion of the case makes plain, the confidentiality obligation was not, in this instance, in fact enforced.

[88] Baxter v. Genworth N. Am. Corp., 224 Cal. Rptr. 3d 556, 566 (Cal. Ct. App. 2017). *Baxter* involved an individual worker's wrongful termination and related employment claims against her former employer. *Id.* at 562.

[89] *Id.* The Court found that the provision that prevented only employees but not the employer from communicating about a claim outside of formal discovery was "unfairly one-sided and therefore a substantively unconscionable provision" under California law. *Id.*

[90] CarMax Auto Superstores California LLC v. Hernandez, 94 F. Supp. 3d 1078, 1120 (C.D. Cal. 2015). In *Hernandez*, CarMax filed a petition for

an order compelling arbitration after a former employee sued it in state court for claims of employment discrimination, sexual harassment and assault, retaliation, violation of California civil rights laws, and more. *Id.* at 1085-86. The former employee argued that the arbitration provision was procedurally and substantively unconscionable. *Id.* at 1102-03. The court rejected the challenge to the arbitration provision on the grounds that connfidentiality clauses were "generally unobjectionable" under California law and noting that, "in any event, 'the enforceability of the confidentiality clause is a matter distinct from the confidentiality of the arbitration clause in general.'" *Id.* at 1122.

[91] Pfizer, Inc., 2019 WL 1314927 (N.L.R.B. Div. of Judges Mar. 21, 2019), *appeal pending* as of October 2019. Two employees of a pharmaceutical company filed an unfair labor practice charge with the National Labor Relations Board after their employer required, as a condition of employment, that they sign an arbitration provision and class action waiver with a confidentiality clause. *Id.* The Administrative Law Judge found that *Epic Systems* did not preclude the ruling that the confidentiality clause in the arbitration provision violated § 8(a)(1) of the National Labor Relations Act.

[92] Larsen v. Citibank FSB, 871 F.3d 1295, 1318 (11th Cir. 2017).

[93] Am. Family Life Assurance Co. of Columbus v. Hubbard, 759 F. App'x 899, 901 (11th Cir. 2019). In the per curium opinion in *Hubbard*, the Eleventh Circuit found that a group of insurance agents had waived the argument as to the unconscionability of the confidentiality provision in the insurance company's arbitration clause, but posited that it would nonetheless fail under Georgia law. *Id.*

[94] *See, e.g.*, African Methodist Episcopal Church, Inc. v. Smith, 217 So. 3d 816, 825-26 (Ala. 2016) ("Neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of both parties."); Guyden v. Aetna Inc., 544 F.3d 376, 384 (2d Cir. 2008) ("Arbitration decisions may not be published or publicized without the consent of both the Grantee and the Company").

[95] *See, e.g.*, CarMax Auto Superstores California LLC v. Hernandez, 94 F. Supp. 3d 1078, 1120 (C.D. Cal. 2015) ("Procedures, including the hearing and record of the proceeding, shall be confidential and shall not be open to the public, except (I) to the extent both Parties agree otherwise in writing; (ii) as may be appropriate in any subsequent proceeding between the Parties; or (iii) as may otherwise be appropriate in response to a governmental agency or legal process.").

[96] *See, e.g.*, Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 700-01 (Cal. Ct. App. 2018*), review denied* Feb. 13, 2019, petition for certiorari pending ("Except to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence."). *But see* Br. of Respondents-Appellants at 24-25, Am. Family Life Assurance Co. of New York v. Baker, 778 Fed. App'x 24 (2d Cir. July 16, 2019) (unpublished summary order) (No. 18-1960), 2018 WL 5806825 (outlining requirement that court filings "in connection with any action to enforce this Arbitration Agreement or the arbitrators' award . . . be filed under seal").

[97] Conflicts over the enforceability of mandates to resolve disputes in confidential arbitration have made headlines in disputes involving Stormy Daniels and President Donald Trump, Gretchen Carlson and Roger Ailes, and others. *See, e.g.*, Maggie Astor & Jim Rutenberg, Stormy Daniels Case Should Be Resolved Privately, Trump's Lawyers Say, N.Y. Times (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/politics/stormy-daniels-trump-arbitration.html; Noam Scheiber & Jessica Silver-Greenberg, *Gretchen Carlson's Fox News Contract Could Shroud Her Case in Secrecy*, N.Y. Times (July 13, 2018), https://www.nytimes.com/2016/07/14/business/media/gretchen-carlsons-contract-could-shroud-her-case-in-secrecy.html. *See generally*. Hoffman & Lampmann, *Hushing Contracts*, supra note _, at 2061; Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV 155 (2019).

[98] *See* Drew Harwell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company*, WASH. POST (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html; Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark*

Secret, N.Y. TIMES MAG. (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html.

[99] Drew Harwell, *Sterling Case Highlights Differences Between Arbitration Litigation*, Wash. Post (Mar. 1, 2017), https://www.washingtonpost.com/business/economy/sterling-discrimination-case-highlights-differences-between-arbitration-litigation/2017/03/01/cdcc08c6-fe9b-11e6-8f41-ea6ed597e4ca_story.html.

[100] Harwell, *Hundreds Allege Sex Harassment*, supra note __.

[101] *See* Jaclyn Jaeger, *Firms follow Google trend in ending mandatory arbitration*, Compliance Week (Nov. 19, 2018, 10:15 AM), https://www.complianceweek.com/opinion/firms-follow-google-trend-in-ending-mandatory-arbitration/24751.article. Some law firms have responded to distress about their policies and moved away from the use of arbitration clauses in employment contracts, at least prospectively. Many credit law students organizing through the Pipeline Parity Project for this result. *See* Melissa Heelan Stanzione, *Law Students Put More Pressure on Big Law Over Arbitration*, Bloomberg Law (Mar. 26, 2019, 12:27 PM), https://news.bloomberglaw.com/us-law-week/law-students-put-more-pressure-on-big-law-over-arbitration.

[102] *See, e.g.*, Clotfelter v. Cabot Inv. Properties, LLC, No. 5:10-CV-235-OC-10GRJ, 2011 WL 1196698, at *10 (M.D. Fla. Mar. 29, 2011).

[103] Boatright v. Aegis Defense Services, LLC, 938 F. Supp. 2d 602, 609 (E.D. Va. 2013).

[104] Bogue v. Anesthesia Service Medical Group, Inc., No. D073518, 2019 WL 3214245, at *5 (Cal. Ct. App. July 17, 2019) (unpublished).

[105] *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing Before the H. Comm. Judiciary Subcomm. On Antitrust,*

Commercial & Admin. Law (May 16, 2019), https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-PincusA-20190516.pdf (Statement of Andrew J. Pincus on behalf of the U.S. Chamber Institute for Legal Reform).

[106] Seibert v. Precision Contracting Sols., LP, No. CV 18-818 (RMC), 2019 WL 935637 (D.D.C. Feb. 26, 2019). The Attorney General for the District of Columbia has filed [declaratory? Relief] to prevent a contractor from imposing confidentiality provisions that forbid disclosure of even the existence of a dispute. *See* Press Release: AG Racine Sues Precision Contracting Solutions Over Shoddy and Destructive Home Construction Work, OFFICE OF ATT'Y GEN. KARL A. RACINE (July 31, 2019), https://oag.dc.gov/release/ag-racine-sues-precision-contracting-solutions.

[107] *Seibert*, 2019 WL 935637, at *7.

[108] Pfizer, Inc., 2019 WL 1314927 (N.L.R.B. Div. of Judges Mar. 21, 2019), *appeal pending.*

[109] *See id.*

[110] Illustrative is the unself-conscious assumption of the autonomy of state contract law in Fox Film Corp. v. Muller , 296 U.S. 207 (1935), used in many casebooks to illustrate the "independent and adequate state ground" under which the U.S. Supreme Court concludes that it should stay its hand.

[111] Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

[112] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[113] McKee v. AT & T Corp., 191 P.3d 849, 858 (Wash. 2008), *abrogated on other grounds by* AT & T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). *See* Hoober v. Movement Mortg., LLC, 382 F. Supp. 3d 1148, 1160 (W.D. Wash. 2019) (noting abrogation). *See also* Czerwinski v. Pinnacle Prop.

Mgmt. Servs., LLC, No. 79665-8-I, 2019 WL 2750183 (Wash. Ct. App. July 1, 2019) (unpublished).

[114] McKee v. AT & T Corp., 164 Wash. 2d 372, 398, 191 P.3d 845, 858 (2008). *See also* Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753 (Wash. 2004).

[115] The clause read: "Any arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award." Ting v. AT&T, 319 F.3d 1126, 1152 n.16 (9th Cir. 2003).

[116] AT&T impose identical obligations several years apart in the consumer documents in *Ting* and *McKee*. *See Ting*, 319 F.3d at 1152 n.16; *McKee*, 191 P.3d at 865. AT&T does not, as of October 2019, impose confidentiality obligations in its arbitration procedures. *See Resolve a Dispute with AT&T Via Arbitration*, AT&T https://www.att.com/esupport/article.html#!/wireless/KM1045585.

[117] That clause read: "Any arbitration shall be confidential, and neither you nor we may disclose the existence, content or results of any arbitration, except as may be required by law or for purposes of enforcement of the arbitration award." See Brief of Plaintiffs/Appellees, Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 2003 WL 23894400 (5th Cir. Dec. 7, 2003).

[118] McKee, 191 P.3d at 858.

[119] *Id.*

[120] *See, e.g.* Machado v. System4 LLC, 28 N.E.3d 401, 415 (Mass. 2015). The Court held nondisclosure provision not substantively unconscionable

because it applied to a relatively smaller group of potential claimants, and thus the "repeat player effect [was] therefore diminished."

[121] *Ting*, 319 F.3d at 1151 n.16.

[122] Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007)

[123] *Id.* at 1078-79 (citing Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) (citing Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997)); Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004)).

[124] 601 F.3d 987, 1001–03 (9th Cir. 2010).

[125] Sanchez v. Carmax Auto Superstores California, LLC, 168 Cal. Rptr. 3d 473, 482 (Cal. Ct. App. 2014).

[126] *See* Poublon v. C.H. Robinson Company, 846 F.3d 1251, 1266 (9th Cir. 2017) (citing Sanchez v. Carmax Auto Superstores California, LLC, 168 Cal. Rptr. 3d 473, 481 (Cal. Ct. App. 2014)).

[127] Narayan v. The Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556, reconsideration denied, 400 P.3d 581 (Haw. 2017), and cert. denied sub nom. Ritz-Carlton Dev. Co. v. Narayan, 138 S. Ct. 982 (2018).

[128] Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 275 (Ill. 2006). The court declined to decide the issue because the company had eliminated the nondisclosure provision and agreed to retroactively waive it for pending cases.

[129] Zipkin v. Kaiser Found. Health Plan, Inc., No. B245252, 2014 WL 1219317, at *8 (Cal. Ct. App. Mar. 25, 2014) (unpublished). *See also* Sanchez v. Carmax Auto Superstores California, LLC, 168 Cal. Rptr. 3d 473, 481 (Cal. Ct. App. 2014).

[130] Asher v. E! Entertainment Television, LLC, CV 16-8919-RSWL-SSx, 2017 WL 3578699, at *7-9 (C.D. Cal. Aug. 16, 2017).

[131] *Id.* at *7 (citing Davis v. O'Melveny & Myers, 485 F.3d 1066, 1079 (9th Cir. 2007)). *See also* Prasad v. Pinnacle Property Management Services, LLC, No. 17-cv-02794-VKD, 2018 WL 4599645, at *10-11 (N.D. Cal. Sept. 25, 2018). The court found a confidentiality clause not substantively unconscionable because it was similar to the one considered in *Poublon v. C.H. Robinson Company*, 846 F.3d 1251, 1266 (9th Cir. 2017) and "not nearly as broad as those" other Ninth Circuit panels had rejected in *Davis*, 485 F.3d at 1079. Pokorny v. Quixtar, Inc., 601 F.3d 987, 1002 (9th Cir. 2010)); Fox v. Vision Serv. Plan, No. 2:16-CV-2456-JAM-DB, 2017 WL 735735, at *8 (E.D. Cal. Feb. 24, 2017). The court held a provision substantively unconscionable in part because of its broader scope that did not permit waiver by party consent.

[132] Am. Family Life Assurance Co. of New York v. Baker, 778 Fed. App'x 24, 27-28 (2d Cir. July 16, 2019).

[133] Heywood v. Casa Cabinets, Inc., No. E066122, 2017 WL 6523859, at *8 (Cal. Ct. App. Dec. 21, 2017) (unpublished).

[134] *See, e.g.*, Narayan v. The Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556, *reconsideration denied*, 400 P.3d 581 (Haw. 2017), and *cert. denied sub nom*. Ritz-Carlton Dev. Co. v. Narayan, 138 S. Ct. 982 (2018).

[135] *See, e.g.*, Hoober v. Movement Mortg., LLC, 382 F. Supp. 3d 1148, 1160 (W.D. Wash. 2019).

[136] *See* Kilgore v. KeyBank, Nat. Ass'n, 718 F.3d 1052, 1059 (9th Cir. 2013); Velazquez v. Sears, Roebuck & Co., No. 13CV680-WQH-DHB, 2013 WL 4525581, at *5-6 (S.D. Cal. Aug. 26, 2013).

[137] Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753 (Wash. 2004).

[138] Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1379 (11th Cir. 2005).

[139] *See, e.g.*, Kilgore v. KeyBank, Nat. Ass'n, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013); Machado v. System4 LLC, 28 N.E.3d 401, 415 (Mass. 2015).

[140] *See, e.g.*, African Methodist Episcopal Church, Inc. v. Smith, 217 So. 3d 816, 825-26 (Ala. 2016); Sanchez v. Carmax Auto Superstores California, LLC, 168 Cal. Rptr. 3d 473, 481 (Cal. Ct. App. 2014).

[141] *See, e.g.*, Clotfelter v. Cabot Inv. Properties, LLC, No. 5:10-CV-235-OC-10GRJ, 2011 WL 1196698, at *10 (M.D. Fla. Mar. 29, 2011) (citing dicta in *StoltNielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 686 (2010) that the "presumption of privacy and confidentiality that applies in many bilateral arbitrations").

[142] As we noted, concerns about the confidential nature of arbitration helped animate several federal regulatory initiatives under the Obama administration that would have limited the imposition of pre-dispute arbitration clauses, including the Fair Pay and Safe Workplaces Executive Order, which would have required federal contractors to disclose violations of a number of different federal labor laws and executive orders—including violations substantiated by "arbitral award or decision." E.O. 13673, Fair Pay and Safe Workplaces, 79 Fed. Reg. 45,309 (July 31, 2014). See supra note -. In 2019, the House of Representatives passed a bill to amend the FAA to prohibit enforcement of predispute arbitration mandates for any employment dispute, consumer dispute, antitrust dispute, or civil rights dispute. *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019). Several 2020 Democratic presidential candidates have pledged support to ban the enforcement of arbitration clauses in employment, consumer, antitrust, and civil rights contexts. *See, e.g.*, Corporate Accountability and Democracy, BERNIESANDERS.COM, https://berniesanders.com/issues/corporate-accountability-and-democracy/; End Washington Corruption, ELIZABETHWARREN.COM (Sept. 16, 2019), https://elizabethwarren.com/plans/end-washington-corruption.

[143] *See* King, *Arbitration and the Federal Balance*, supra note _, at 1476.

[144] *See id.; see also* Cal. Code Civ. Proc. Code § 1281.96. The 2019 amendment, effective January 1, 2020, seeks "[d]emographic data, reported in the aggregate, relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as self-reported by the arbitrator." SB 707, amending 1281.96 (a)(adding cl. 12). That statue also required payment within 30 days by the initiator of the arbitration of fees and costs, and if in breach, that failure precludes the right to compel arbitration. *Id.* amending sec. 4. California also enacted a provision making the obligation to mandate in employment impermissible. See AB-51, "Employment discrimination: enforcement," section 432.6. (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government ..., available at leginfo.legislature.ca.gov.

[145] Pub. L. Research Inst., U.C. Hastings Coll. of the Law, Arbitration Reporting in California: Compliance with CCP § 1281.96, at 4 (2017), http://carsfoundation.org/pdf/arbitration UC-Hastings-report final.pdf [hereinafter 2017 Hastings Report]. *See also* David J. Jung, Jamie Horowitz, Jose Herrera & Lee Rosenberg, Pub. Law. Research Inst., Reporting Consumer Arbitration Data in California: AN Analysis of Compliance with California Code of Civil Procedure § 1281.96, at 1 (2014), http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update. That report noted that "[m]any published reports are incomplete, either omitting categories of information entirely or reporting information inconsistently or ambiguously."

[146] 2017 HASTINGS REPORT, *supra* note _, at 42-46.

[147] *See Consumer and Employment Arbitration Statistics*, AM. ARBITRATION ASS'N (last visited Sept. 4, 2019), https://www.adr.org/ConsumerArbitrationStatistics.

[148] *See* Supplementary Rules for Class Arbitration § 9(b), Am. Arbitration Ass'n (2003), https://www.adr.org/sites/default/files/document_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

[149] *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019).

[150] *See* Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).

[151] Class Action Case Docket, Am. Arbitration Ass'n (last searched Oct. 15, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf.

[152] Supplementary Rules for Class Arbitration § 9(b), Am. Arbitration Ass'n (2003), https://www.adr.org/sites/default/files/document_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

[153] Class Action Case Docket, Am. Arbitration Ass'n (last searched Oct. 15, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf

[154] *Id.*

[155] *Id.*

[156] A review of arbitrators' decisions from 2010 to 2015 to permit or deny class action status in class arbitrations was undertaken by Alyssa king. *See* Alyssa King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 Lewis & Clark L. Rev. 1031 (2018). King examined 64 claims and found arbitrators "split nearly 50-50 on whether ambiguous clauses permit class arbitration." *Id.* at 1031.

[157] For example, there are 42 consumer-initiated consumer claims where the disposition was marked as "Awarded" and the award amount was a positive value for the consumer and a value of zero for the business. Nevertheless, the "Business" was marked as the prevailing party. AAA staff confirmed that these records involved data entry errors; the award amount was erroneously entered because the Business prevailed. E-mail with Ryan Boyle (Friday, October 11, 2019).

[158] Telephone interview with Ryan Boyle, Vice President of the AAA (Sept. 20, 2019).

[159] Id.

[160] Cal. Civ. Proc. Code § 1281.96(a).

[161] https://osf.io/qmtsu/

[162] https://levelplayingfield.io/. Whereas the Yale database, *id.*, deposits the raw data provided by the AAA, Level Playing Field presents data in an easily-searchable format. Level Playing Field does not allow for bulk downloads of the data.

[163] See https://www.adr.org, practice areas.

[164] These datasets are available at https://osf.io/qmtsu/, *supra* note ___.

[165] 2009 Q3 and 2014 Q2 corresponds to the original paper: TKTK. 2014 Q3 and 2017 Q1 corresponds to the UNC paper. 2017 Q2 and 2019 Q2 is entirely new.

[166] A claim is identified by the CASE_ID variable, coupled with the filing and closing date. A case record may include multiple claims. Across the dataset, all claims associated with any given case have the same filing date, but in 0.3% of cases (151 out of 44,628 cases), a case will contain claims with two different closing dates. No case contains claims with more than two different closing dates.

We considered an alternate approach that identified "cases" based on the case ID number, the business name, total fees imposed, amount claimed against the business, amount claimed against the consumer, filing date, and closing date. I decided against this approach because it appears that AAA updates the amounts claimed, total fees, and business name from one dataset to another.

[167] This approach differs from 2017 analysis. *See* Resnik, *A2J/A2K*, supra __ at 650 n.213 ("The caveat is that there were minor differences when information overlapped on claims in 2012-2014, and in those instances, we used the earlier posted data."). While it is possible to use the earlier posted data, it seems more likely that updated versions of the data are more accurate. The number of cases affected are small.

[168] The AAA has interpreted the statute five year call for data in this manner, while the text of the statute does not specify that arbitration providers should report on cases both opened *and* closed within five years, nor does the statute address whether the data should be removed. See Cal. Civ. Proc. Code § 1281.96(a).

[169] Details are in Resnik, *A2J/A2K*, supra ___, at 649.

[170] *See, e.g.*, Case 11800019200 from 2018 Q4 data and 2019 Q2 data (showing that the closing date was updated from December 4, 2018 to June 3, 2019). The 2019 Q1 data did not include this case.

[171] *See, e.g.*, Case 011400001557 from 2018 Q1 and 2019 Q1 records (showing the difference is that $90 fee was recorded in the 2018 Q1 dataset but not the 2019 Q1 dataset); Case 011500035184 in the 2019 Q1 and 2017 Q4 (showing fee of $6000 in 2017 Q4 dataset and $4200 in the 2019 Q1 dataset).

[172] *See, e.g.*, Case 011400002444 from the 2018 Q1 dataset and 2019 Q1 data (showing the only difference between the two records is reporting the business name as "Randstad" versus "Ranstad Professionals US, LP"); Case 011400005567 from the 2019 Q1 dataset and the 2017 Q4 dataset (same except business was reported as "Navient Solutions, LLC" versus "Navient Solutions, Inc.").

[173] *See, e.g.*, Case 11400021123 was noted as "Dismissed" in the 2017 Q1, 2017 Q2 (Revised), 2017 Q3, 2017 Q4, and 2018 Q1 dataset. It was not recorded in the 2018 Q2 dataset. In the 2018 Q3, 2018 Q4, 2019 Q1, and

2019 Q2 dataset, the case was noted as "Awarded" with the consumer prevailing.

[174] This approach differs from the 2017 analysis, which noted an increase in consumer filings from 2014-2017. We find different results due to "backfilling" of records from employment arbitrations in the residential construction context.

[175] This period contains 52 more records than the 2017 analysis. This is because, in datasets after 2017 Q2, fifty-two claims with the same filing dates and case numbers as earlier datasets had different closing dates. Because it is not clear if these updates are due to new claims, we include them, but it is possible they represent an update in the closing date.

[176] To be included in the dataset, the claim must be filed after the beginning of the five-year window and be closed before the end of the 5-year window.

[177] Westlaw/Lexis provides reports of arbitrators' awards, when written decisions are made. [cite and check]. We have yet to check by the name of the provider whether those materials provide illuminate. Further, our plan is to contact some of the lawyers to learn more.

[178] *See* CONSUMER ARBITRATION RULE 16(A), AM. ARBITRATION ASS'N (2018), https://www.adr.org/sites/default/files/Consumer Rules Web 0.pdf. "If the parties have not appointed an arbitrator and have not agreed to a process for appointing the arbitrator, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint an arbitrator from the National Roster."

[179] MYRADVOCATE (last visited Oct. 27, 2019), https://myradvocate.com/.

[180] The name of the opponent was not disclosed and hence the question is whether the opponent is a business or an individual. California law

requires the disclosure of the non-consumer entity, if a corporation or if the non-consumer party is a corporation or other business entity. Cal. Civ. Proc. Code § 1281.96(a)(2).

[181] This Figure likely undercounts the number of claims that closed between 2009 and 2014, when we began to track regularly quarterly updates of the AAA data.

[182] Cal. Civ. Proc. Code §§ 1281.96(a)(10), (11).

[183] *Id.* § (10).

[184] We defined a "claim" as a non-zero amount listed in "claim_amt_consumer" field (in contrast to values that are zero or missing).

[185] We defined an "award" in this context as a non-zero amount listed in the "award_amt_business" or "award_amt_consumer" fields (in contrast to values that are zero or missing).

[186] The median award amount is the sum of any award to the business and any award to the consumer among records where the total award is greater than zero.

[187] Cal. Civ. Proc. Code § 1281.96(a)(10)-(11).

[188] https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf

[189] https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf

[190] https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf

[191] Email from Ryan Boyle (Sept. 23, 2019 2:02 PM).

[192] AT&T 2018 Annual Report at 23, https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/annual-reports/2018/complete-2018-annual-report.pdf.

[193] Further, as noted in the 2017 analysis, we found coding problems in 2017 Q1 and 2017 Q2 release. *See* Resnik, *A2J/A2K*, *supra* note __, at 649.

[194] The representation status of 1 record (out of 849) was left blank. Since no firm or attorney is listed on this record, we categorize it as a self-represented claim.

[195] See Richard Moorhead, Ethics and NDAs (Centre for Ethics and Law, UCL Faculty of Laws, Apr. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3302567.

[196] Hoffman & Lampmann, *Hushing Contracts*, supra note _, at 214-15.

[197] *See* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION (2013); Peter B. Rutledge, *Arbitration and Article III*, 61 Vand. L. Rev. 1189, 1208 (2008).

[198] Resnik, *Diffusing Disputes*, *supra* note __, at 2823.

[199] [Google Spain decision.]

[200] *See* Luciano Floridi, Sylvia Kauffman, Lidia Kolucka-Zuk, Frank La Rue, Sabine Leutheusser-Schnarrenberger, José-Luis Piñar, Peggy Valcke & Jimmy Wales, Report of the Advisory Council to Google on the Right to be Forgotten, (Feb. 6, 2015), https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/adzvisory-report.pdf.

[201] *See* Transparency Report: Government Requests to Remove Content, Google, https://transparencyreport.google.com/government-removals/overview. [date]

[202] *See, e.g.*, Daphne Keller, *The New, Worse "Right to be Forgotten,"* STANFORD CENTER FOR INTERNET & SOCIETY BLOG (Jan. 27, 2016), http://cyberlaw.stanford.edu/publications/new-worse-%E2%80%98right-be-forgotten%E2%80%99 ("A platform that simply erases users' content on demand risks nothing."); Daphne Keller, *Empirical Evidence of "Over-Removal" By Internet Companies Under Intermediary Liability Laws*, Stanford Center for Internet & Society Blog (Oct. 12, 2015), http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws (discussing how in the notice-and-takedown context for illegal content, the most risk-avoidant path for any technical intermediary is simply to process a removal request and not question its validity).

[203] *See* Requests to Delist Content Under European Privacy Law, https://transparencyreport.google.com/eu-privacy/overview at page 2.

[204] *Id.*

[205] *Id.* at 3.

[206] *Id.* at 1, with a chart mapping the requests from May 2014 to October 2019. Google reported that it had taken down 45.0% of the requested removals. *Id.*

[207] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); Resnik, *The Functions of Publicity and of Privatization in Courts and their Replacements*, *supra* note __.

[208] *See* Directive 2013/11, of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/63).

[209] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention), Mar. 18, 1965, 575 U.N.T.S. 159. *See also* Kathleen Claussen, *The International Claims Trade*, 41 CARDOZO L. REV. __(forthcoming, 2019).