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## CROWD-CLASSING INDIVIDUAL ARBITRATIONS IN A POST-CLASS ACTION ERA

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*Class actions are in decline, while arbitration is ascendant. This raises the question: will plaintiffs' lawyers skilled in bringing small-value, large-scale litigation—the typical consumer, employment, and antitrust claims that have made up the bulk of class action litigation over the past forty years—hit upon a viable business model which would allow them to arbitrate one-on-one claims efficiently and profitably? The obstacles are tremendous: without some means of recreating the economies of scale and reaping the fees provided by the aggregative device of Rule 23, no rational lawyer would expend the resources to develop and arbitrate individual, small-value claims against well-heeled defendants. But despite these complications, we think there are at least two possible models that might allow for informal aggregation of like claims in at least some subset of cases.*

*One hybrid model would seek a judicial liability judgment upon which serial, individual arbitrations could later rely. The antecedent judicial judgment could take a number of different forms, so long as it has preclusive force that can be leveraged in subsequent arbitration hearings. A second, complementary model envisions “arbitration entrepreneurs” (either lawyers or nonlawyers) purchasing legally identical, individual claims which these legal capitalists believe to have value in the arbitral forum. Upon procuring as many discrete claims as the market will bear, the arbitration entrepreneur would seek to resolve the hundreds or even thousands of claims she has amassed in a single arbitral session. With one arbitration entrepreneur as the lawful owner of a multitude of claims, this form of aggregation implicates neither the prohibition against class arbitration nor the contractual definition of “a claim” subject to arbitration.*

### INTRODUCTION

The Supreme Court's recent rulings limiting class action litigation make it increasingly difficult, if not impossible, for lawyers to represent vast numbers of absent class members in court.<sup>1</sup> In particular, the Court has repeatedly endorsed class action waivers in arbitration agreements, sending parties to individually arbitrate claims that would

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1. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

otherwise have been litigated under Federal Rule of Civil Procedure 23 in the federal courts.<sup>2</sup>

While many commentators have questioned whether individuals will indeed seek to arbitrate their disputes in light of these developments,<sup>3</sup> we think the better question is whether plaintiffs' lawyers skilled in bringing small-value, large-scale litigation—the typical consumer, employment, and antitrust claims that have made up the bulk of class action litigation over the past forty years—will hit upon a viable business model, which would allow them to arbitrate one-on-one claims efficiently and profitably.

At first blush, the financial incentives for lawyers to seek out and arbitrate individual, small-value claims appear quite weak.<sup>4</sup> In the absence of some mechanism to achieve economies of scale—i.e., to reduce the otherwise exorbitant information and transaction costs of individual claiming—no rational lawyer would expend the resources to develop and arbitrate small-value claims against well-heeled defendants. Even in the best-case scenario,—say, a credit card company's undisclosed policy imposing late charges on payments posted after 1:00 PM on the due date<sup>5</sup>—determining the inception and extent of the policy, what forms of disclosure are required by relevant laws and regulations, the identity of the injured consumers, and other salient facts would require an army of lawyers and staff. And this army would necessarily have to deal with hundreds or thousands of individ-

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2. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2012); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

3. See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 646 (2012) (“Nor should anyone expect that consumers will actually go forward with one-on-one arbitrations, even as consumer arbitration clauses are liberalized to provide ostensible incentives to initiate proceedings . . .”); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 92 (2012) (exploring whether it is “realistic to think that class actions might be replaced by individual claims” and whether “many individuals who were blocked from filing class actions [will] proceed individually” in arbitration).

4. The financial incentives for the defendant run in exactly the opposite direction. As David Korn and David Rosenberg explain, the incentive for a defendant to invest heavily to defeat a small-value consumer claim is the same in individual arbitration as in a class action: *Concepcion*'s “pro-defendant bias is endemic to the process of resolving common question claims in individual arbitrations” and “occurs in the individual arbitration process because of the lack of symmetry between the defendant's classwide stake and each plaintiff's recovery-specific stake in the outcome of the common question litigation.” David Korn & David Rosenberg, *Concepcion's Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1155 (2012).

5. Based on allegations made in *Discover Bank v. Superior Court*, 113 P.3d 1100, 1104 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740.

ual clients, rather than simply a handful of class representatives, which would itself absorb a tremendous amount of time and money.<sup>6</sup>

In all but the simplest cases, expert testimony and other expensive forms of proof would be necessary—all of which would be on the lawyers' dime at the front-end and would be nonrecoupable,<sup>7</sup> even if the claims were subsequently successful.<sup>8</sup> Further, the rules governing the dominant arbitral bodies do not provide for consolidation of related cases before a single arbitrator, nor is there any intra-arbitration res judicata effect awarded to prior victories.<sup>9</sup> Informal cost-sharing achieved by centralizing expert work is further doomed by the confidentiality terms that are standard in contemporary arbitration agreements.<sup>10</sup> Procedurally, therefore, individual arbitration provides no incentives to consolidate or even serialize claims formally or informally: lawyers seeking to individually arbitrate our hypothetical consumer fraud case across multiple plaintiffs would be guaranteed neither the ability to bring these claims *seriatim* before the same arbitrator in a compressed time frame, nor to use the same expert report or other evidence across multiple arbitrations, nor to rely upon prior arbitral determinations of fraud, liability, or damage.

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6. Adam Zimmerman, *Flash Mob Litigation*, PRAWFSBLAWG (Jan. 3, 2012, 9:33 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/01/class-actions-v-flash-mob-litigation.html> (“Individuals must develop their own evidence, retain witnesses, expend time, and support their claim for damages with a well-grounded legal theory. Most studies of small claiming patterns suggest that these problems, combined with apathy, inertia and cognitive bias, will persist.”); see also Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1288 (2012) (reporting that plaintiffs’ lawyers and staff in the Vioxx Litigation Consortium spent 1,601,150 hours interviewing, meeting, reviewing individual clients’ files at a cost of \$13.5 million).

7. The bulk of expert fees constitute out-of-pocket costs that lawyers must pay during the course of litigation. While plaintiffs’ lawyers may seek reimbursement for costs associated with generating an expert report upon successful completion of the litigation, courts are bound by the limit of 28 U.S.C. § 1821(b), which sets expert fees at only \$40 per diem. See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) (holding that in ordering reimbursement of expert witness fees, the district court was limited to the amount prescribed by § 1821, which at the time was \$30 per day); see also *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 318 (2d Cir. 2009), *vacated sub nom.*, *Am. Express Co. v. Italian Colors Rest.*, 13 S. Ct. 2304 (2013).

8. This, of course, assumes that a single expert report could be retailed across multiple individual arbitrations, which remains an open legal question and may depend upon the confidentiality provisions of the underlying agreement. See, e.g., Oral Argument at 42:22, *Italian Colors Rest.*, 133 S. Ct. 2304 (No. 12-133), available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_12\\_133](http://www.oyez.org/cases/2010-2019/2012/2012_12_133).

9. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (denying preclusive effect to an arbitrator’s resolution of an employee’s Fair Labor Standards Act claim).

10. See, e.g., *In re Am. Express Merchs.’ Litig.*, 554 F.3d at 306–08 (finding the arbitration agreement contains a confidentiality provision that effectively blocks that method of informal cost-sharing because it precludes the introduction of evidence adduced in one arbitration in subsequent arbitrations).

Perhaps most critically, the amount of money an attorney could expect to make by bringing a series of individual arbitrations will not, in most (perhaps all) cases, justify these significant expenditures of time and money.<sup>11</sup> Again, take our credit card late-fee example: even if a group of attorneys were somehow able to identify a segment of affected consumers, develop a streamlined and efficient means of presenting the straightforward facts of each case to an arbitrator, and “win” a significant number of these individual arbitrations, these lawyers would still walk away with little or nothing for their efforts. For example, 33% of \$30, even if multiplied by ten thousand claims, is only \$100,000—which would be utterly insufficient to cover the costs of case intake, expert fees, neutrals’ fees, travel, and other expenses.<sup>12</sup> And the availability of attorneys’ fees under fee-shifting statutes is not, in itself, a reliable or realistic inducement in consumer cases. Furthermore, the rules of the arbitral bodies prohibit the separate award of costs (unless authorized by an underlying fee-shifting statute), rendering many arbitral claims net-negatives.<sup>13</sup>

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11. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”); see also *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 553 (S.D.N.Y. 2011) (“Even if [plaintiff] were willing to incur approximately \$200,000 to recover a few thousand dollars, she would be unable to retain an attorney to prosecute her individual claim. . . . [Plaintiff’s counsel] will not prosecute her individual claim without charge, and will not advance the required costs where the [arbitration] [a]greement’s fee-shifting provisions present little possibility of being made whole.”); *Picardi v. Eighth Judicial Dist. Court*, 251 P.3d 723, 725 (Nev. 2011) (noting plaintiffs’ argument that “the class action waiver was exculpatory because, in cases . . . where the individualized claims are relatively small, it is almost impossible to secure legal representation unless those claims are aggregated with the claims of other similarly situated individuals”); Gilles & Friedman, *supra* note 3, at 646 (“The main problem will be attracting plaintiffs’ counsel: rational lawyers will be deterred by prohibitive disincentives.”).

12. See Gilles & Friedman, *supra* note 3, at 646 (noting that even the Concepcions’ case is not as uncomplicated as it may appear and that they could “surely incur well over \$25,000 in legal fees to establish liability in a one-on-one proceeding”); see also J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1210 (2012) (“[I]t is inconceivable that a private attorney, who might have sufficient expertise in consumer fraud, will have the economic incentive to root out consumer fraud if the only economic gain to be had is through individual arbitrations. The significant investment of resources required to identify wronged individuals and to pursue their small claims on an individualized basis likely will not justify any eventual gains.”).

13. Although it is theoretically possible that a layperson could secure funding from a litigation funding company in a jurisdiction in which so-called alternative litigation funding is legal, it is obviously risky (and imprudent) to borrow against the possibility of later vindication—especially when, as noted above, the compensation in a consumer case can be so small. See generally Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (discussing the litigation funding industry in the United States); STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN (2010), available at [http://www.rand.org/pubs/occasional\\_papers/OP306.html](http://www.rand.org/pubs/occasional_papers/OP306.html) (discussing the same). In any event, it is highly unlikely that a consumer could obtain funds given that “consumer”-side funders do not

In sum, individual, small-claims arbitration seems to mean exactly that: claims are brought on behalf of one person without regard to others affected by the same or similar allegedly injurious conduct. An arbitrator decides the claim, and if the plaintiff is successful, the defendant pays the small amount at stake in the proceedings. Further, the presence of lawyers is discouraged (by the defendant, the rules of the arbitral associations, and the arbitrator) because the proceedings are meant to be quick and efficient, without procedural hiccups or substantive overkill. On this view, there seems little room to develop a business model that harnesses the potentially large number of people who are harmed in small ways by corporate practices, but who may not have any knowledge of the harm or lack any incentive to pursue their small claims.

Perhaps this analysis is too parochial, and in a post-class action universe, one must boldly consider options outside of traditional legal contexts.<sup>14</sup> Possibly, claimants themselves may become so frustrated with corporate malpractice that they will seek out efficient means of banding together through the use of social media and other technological developments. Indeed, we may already be witnessing the early stages of an Internet-driven movement towards democratizing the bringing of claims. For example, California lawyer Heather Peters, who had purchased a Honda Civic with electrical problems, decided to opt out of the class action settlement and instead filed her own lawsuit in small claims court.<sup>15</sup> She also created a website to blog about the process of filing and litigating the claim, opened a Twitter account for brief updates, and posted a YouTube video of the car's problems—all in the hope of sparking a “small claims flash mob” of other Honda purchasers to do the same.<sup>16</sup> And it partly worked: nearly one thousand claimants individually opted out of the class action settlement

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fund litigation but only purchase a property interest in the future proceeds of a case funded by a contingency fee attorney. *See id.* at 9.

14. And, it seems that corporate entities are sufficiently worried about this possibility to warrant our attention. *See, e.g.,* Alan S. Kaplinsky & Mark J. Levin, *Consumer Advocates Form “Anti-Arbitration” Organization*, BALLARD SPAHR LLP (Oct. 9, 2012), <http://www.ballard-spahr.com/alertspublications/legalalerts/2012-10-09-consumer-advocates-form-anti-arbitration-organization.aspx> (“The attempted use of mass arbitration to destroy consumer arbitration does a great disservice to consumers who stand to benefit from the efficiencies and economies inherent in the arbitral process.”).

15. Jerry Hirsch, *Civic Hybrid Owner Wins Lawsuit Against Honda*, L.A. TIMES, Feb. 2, 2012, at A1, available at <http://articles.latimes.com/2012/feb/02/business/la-fi-autos-honda-lawsuit-20120202> (reporting that Ms. Peters opted out of a class action settlement that would have paid her \$100 and coupons towards the purchase of another Honda vehicle).

16. Jerry Hirsch, *Car Owner Takes Legal Fight Away from Lawyers*, L.A. TIMES, Dec. 27, 2011, at A1, available at <http://articles.latimes.com/2011/dec/27/business/la-fi-autos-honda-small-claims-20111227>.

and filed their own small claims suits against Honda.<sup>17</sup> But Ms. Peters was ultimately unsuccessful: while she won nearly \$10,000 in small claims court, she lost on appeal and was required to pay Honda's court costs.<sup>18</sup> Nonetheless, her story underscores the possibilities that exist when a single person can leverage social media and her knowledge of an underlying claim to bring about a massive and untapped response by claimants all over the country. Indeed, Ms. Peters was able to accomplish something that massive print and mailer class notice rarely can: actual, engaged responses from injured parties seeking remedies.

A related example is Consumers Count, an organization designed to use social media "to help multiple consumers bring claims against companies without resort to class actions."<sup>19</sup> Consumers can post complaints about companies' practices or products on the Consumers Count website, and

once a "critical mass" of consumers have complained about the same practice, Consumers Count will "spring into action" and refer the complaints to a law firm which can then enter into fee agreements with the multiple consumers and attempt to pursue their claims whether in court, in arbitration, through referral to a governmental agency, or in the press.<sup>20</sup>

On this model, motivated claimants could use Facebook, Twitter,<sup>21</sup> Google+, and other social networking sites to locate and communicate with potential claimants; gather information on potential claims via YouTube, Shutterfly, Photobucket, Instagram, or Flickr; track claimants via Pinterest, Foursquare, and Yelp; manage information on blog-style platforms such as Tumblr; survey claimants on Reddit or Betterific to gauge experiences with specific arbitrators; raise money and solicit contributions on ActBlue or Kickstarter;<sup>22</sup> and perhaps even offer

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17. *Honda Hybrid Lawsuit: Heather Peters' Suit Is Taken into Submission by Judge*, HUFFINGTON POST (Apr. 20, 2012, 6:07 PM), [http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit\\_n\\_1441913.html](http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit_n_1441913.html) (reporting that 1,700 Honda owners were spurred by Ms. Peters to opt out of the settlement and bring claims on their own).

18. Jerry Hirsch, *Honda Wins Reversal of Civic Hybrid Small-Claims Judgment*, L.A. TIMES (May 9, 2012), <http://www.latimes.com/business/money/la-fi-mo-honda-civic-lawsuit-20120509,0,3088344.story>.

19. Sternlight, *supra* note 3, at 124; *see also* CONSUMERS COUNT, [www.consumerscount.org](http://www.consumerscount.org) (last visited June 26, 2013).

20. Sternlight, *supra* note 3, at 124 (quoting *How it Works*, CONSUMERS COUNT, <http://www.consumerscount.org/how-it-works> (last visited June 26, 2013)).

21. Twitter is "[a] very popular message broadcasting system that lets anyone send alphanumeric text messages up to 140 characters in length to a list of followers." *Definition of: Twitter*, PCMAG.COM, <http://www.pcmag.com/encyclopedia/term/57880/twitter> (last visited Feb. 4, 2014).

22. Kickstarter describes itself as "a funding platform for creative projects," and it works by having project creators post an idea and a funding goal, and if users like the idea, they can pledge money. If the project succeeds in reaching its funding goal, users' credit cards are

“litigation kits” via Groupon<sup>23</sup> to enable claimants to easily bring their own claims in arbitration. This grassroots, tech-savvy approach to accessing, identifying, and enabling individual claimants to effectively arbitrate disputes is further assisted by the increase in online arbitration methods.<sup>24</sup> By leveraging the Internet’s vast resources and connectivity,<sup>25</sup> as have social and commercial movements around the globe,<sup>26</sup> claimants may be empowered to engage the arbitral fora in new and powerful ways.<sup>27</sup>

But we think the grassroots model is ultimately incomplete, in part because it is not “scalable.”<sup>28</sup> While it may be trendy to contemplate the impact of social media on all aspects of modern life, we remain unconvinced that the ability to communicate in virtual communities and networks will have significant effects in engaging injured claimants. The impediments that many scholars have described remain,

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charged. 44% of Kickstarter projects have been fully funded, and Kickstarter applies a 5% fee to funds collected. See *Kickstarter Basics: Kickstarter 101 (FAQ)*, KICKSTARTER, <http://www.kickstarter.com/help/faq/kickstarter%20basics> (last visited Nov. 13, 2013).

23. Groupon is a social media site that offers discounts on goods and services offered by its advertisers. The advertiser then pays Groupon a percentage of the fee earned by the advertiser from registered Groupon users who obtain and use the discounts.

24. See Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 176; see also Daren C. Brabham, *Crowdsourcing as a Model for Problem Solving: An Introduction and Cases*, 14 CONVERGENCE: INT’L J. RES. INTO NEW MEDIA TECH. 75, 75 (2008) (“Crowdsourcing is an online, distributed problem-solving and production model . . .”).

25. See Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media: What Professional Teams and Clubs Should Consider*, ENT. & SPORTS LAW., Winter 2010, at 24, 24 (reporting on a recent study finding “that 73 percent of Americans regularly use social media”). See generally Matthew R. Auer, *The Policy Sciences of Social Media*, 39 POL’Y STUD. J. 709 (2011).

26. See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 166–68 (2008) (describing the striking use of flash mobs in antigovernment protests in Belarus, which used text messaging and weblogs to bring protesters together, with little or no advance planning). See generally Molly Beutz Land, *Networked Activism*, 22 HARV. HUM. RTS. J. 205 (2009).

27. A number of commentators have pointed to the increased reliance on networks and social norms to replicate or improve accountability, access, and information in complex litigation. See, e.g., Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87 (2011); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863.

28. By “scalable” we simply mean taking a well-functioning, smaller scale program and replicating its essential functions so that it can work in a similar fashion for more people. See Paul N. Bloom & Brett R. Smith, *Identifying the Drivers of Social Entrepreneurial Impact: An Exploratory Empirical Study*, in *SCALING SOCIAL IMPACT: NEW THINKING* 11 (Paul N. Bloom & Edward Skoot eds., 2010); see also Sternlight, *supra* note 3, at 118 (noting that, while using the internet to identify potential claimants may be “effective in some cases . . . [where] consumers’ claims are large enough and easy to identify,” but that it may not work in other contexts).



even with the help of the Internet.<sup>29</sup> We also worry that only the most egregious, widespread, or newsworthy corporate conduct would pique the interest of injured consumers, leaving most wrongdoing unremedied.<sup>30</sup> And, as Jean Sternlight writes, “it also seems unlikely that the Internet can help many consumers *win* their claims. Bringing a claim is one thing, and winning that claim yet another.”<sup>31</sup> In the end, it seems to us necessary to engage the ability and experience of plaintiffs’ lawyers or motivated entrepreneurs in any enterprise that involves “ferreting out,” investigating, and bringing small-value claims.<sup>32</sup> The question therefore remains: Is there a viable business model that would allow plaintiffs’ lawyers or entrepreneurs to arbitrate small, individual claims efficiently and profitably?

We think there are two potential approaches that might allow for informal aggregation of arbitral claims in at least some subset of appropriate cases. The first is a hybrid model, which seeks an initial public determination of liability in court, followed by the contracted-for, atomized serial arbitration proceedings (which, in our view, would function in effect like damages inquests). The public court determination might come about in several different ways. In some cases, the plaintiffs’ lawyers may be able to bring an individual claim in court, seeking a declaratory judgment of the defendant’s wrongdoing. This

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29. Zimmerman, *supra* note 6 (“There are many impediments for individuals who choose to litigate by themselves. Individuals must develop their own evidence, retain witnesses, expend time, and support their claim for damages with a well-grounded legal theory. Most studies of small claiming patterns suggest that these problems, combined with apathy, inertia and cognitive bias, will persist.”); *see also* Sternlight, *supra* note 3, at 118 (asserting that few consumers see notices or choose to respond, and are unlikely to be aware that “they are subjected to particular small but incorrect charges on[,] [for example,] their cell phone bill,” and further stating that “we all suffer from information overload as it is. How many of us have ever even looked at the websites that already list ongoing class actions from which one might seek relief, much less taken any steps to benefit from such a website?” (footnote omitted)).

30. *Cf.* Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (finding only an “infinitesimal” number of AT&T customers had filed arbitration claims), *rev’d on other grounds*, 673 F.3d 1155 (9th Cir. 2012); 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, 110–11 (2011) (reporting that between 2003 and 2007, only 170 consumers out of nearly 54 million subscribers saw fit to access AT&T’s inexpensive arbitration procedure). Critics of crowdsourcing have noted that participants are a nonrandom sample of the population, and that a crowdsourced project will often fail due to lack of motivation. *See, e.g.*, Daren C. Brabham, *Managing Unexpected Publics Online: The Challenge of Targeting Specific Groups with the Wide-Reaching Tool of the Internet*, 6 INT’L J. COMM. 1139 (2012), available at <http://ijoc.org/ojs/index.php/ijoc/article/view/1542/751>.

31. Sternlight, *supra* note 3, at 118.

32. Glover, *supra* note 12, at 1210 (“[T]he ferreting out of misconduct like consumer fraud requires expertise frequently not in the hands of consumers. They are thus unlikely, on their own, to possess or process relevant information in such a way that will motivate them to arbitrate.” (footnote omitted)).

may be possible where there are any claimants who are not covered by an arbitration clause, or where the demand for declaratory or injunctive relief is determined to be outside the authority of a single arbitrator.<sup>33</sup> In other cases, the judicial liability determination can come about through public enforcement actions, whether brought by agencies acting in a law enforcement capacity or by state attorneys general in *parens patriae*.<sup>34</sup> Indeed, enterprising plaintiffs' lawyers might even be well-advised to offer their services at a discount to public enforcers in order to obtain the springboard of a judicial liability holding.<sup>35</sup>

Once lawyers have obtained a judicial declaration of wrongdoing, many of the financial disincentives to individual arbitration described above are altered. Most significantly, lawyers are spared some of the expense of proving wrongdoing. For example, in the case of an arbitration-free client, lawyers would be able to recoup their fees and other related costs of proving wrongdoing. In the case of a public enforcement action, those costs have been absorbed by the state. In addition, once relieved of the financial burden of re-proving liability in each arbitration, lawyers need only identify and contract with similarly situated claimants for serialized arbitrations. And, even these transaction costs are significantly reduced when discovery under the hybrid model produces the identities of affected consumers, enabling lawyers to contact potential clients to determine their willingness to sell, assign, or otherwise have their claims arbitrated.<sup>36</sup>

With the fully enforceable judicial declaration in hand, lawyers could then move to the arbitral fora to individually arbitrate claims in

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33. There may be claimants whose contracts, by happenstance, do not yet contain a class action waiver. Lawyers representing those individual claimants in court can litigate liability, and if successful, this judgment can be used in subsequent arbitrations by similarly situated claimants. The persuasive effect of these judgments is for the arbitrator to decide. *See infra*, text accompanying notes 86-92.

34. Public entities litigate and obtain judgments on all manner of claims. Importantly, these enforcers are not subject to contractual waiver provisions; on the other hand, state actors often settle for consent decrees with no admission of liability, which have no preclusive force in subsequent arbitrations. *See infra* Part III.A.

35. After all, public lawyers already "face resource constraints that limit the scope of possible enforcement actions," and given these shrinking state budgets and the growing list of potential big-ticket claims involving harms to consumers and others, it would seem an ideal moment to partner with the private bar. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 761 (2011); *see also* David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 427.

36. Arguably the most straightforward means of using Rule 23 to obtain the identities of injured victims is through the notice requirement; although notice is often not required upon certification of a (b)(2) mandatory, non-opt-out class, the 2003 Amendments to Rule 23(c)(2) nevertheless authorize courts to direct notice of certification to (b)(2) classes where class members "have interests that may deserve protection by notice." FRCP Rule 23(c)(2).

what essentially becomes a series of damages inquests. Here, a liability judgment obtained may have preclusive effect on identical claims and may generate the functional equivalent of precedent. These effects are neither certain nor complete, as the major arbitral bodies currently do not provide for mass, serial arbitration of like claims; however, we predict that necessity will likely force these entities to change or amend their rules in order to better manage mass claiming. Up until now, the American Arbitration Association (AAA) and JAMs have had little reason to develop comprehensive solutions to mass arbitration. But in our view, these associations will inevitably consider consolidation procedures, appointment of arbitrators qualified to administer mass arbitrations, the admissibility of evidence and expert testimony from prior, similar hearings, and other aggregation-friendly rules.

The second and complementary model envisions “arbitration entrepreneurs”—either lawyers or nonlawyers—buying up legally identical, potentially valuable individual claims that are subject to arbitration.<sup>37</sup> Upon procuring as many discrete claims as the market will bear and which can net a profit, the arbitration entrepreneur would then file a single arbitration seeking to collectively resolve the hundreds, or even thousands, of claims she has amassed. This claims-buying model resembles previous efforts to individually process claims that had marginal, but not negligible, value when viewed in isolation and significant value when handled by a specialist or repeat player.<sup>38</sup>

We are taking the claims-buying model one step further and extending it to the next frontier for civil justice in the United States: arbitration. In doing so, we build on the precedent set in the debt-buying industry, where firms purchase debt claims from credit card companies, cell phone providers, and other providers of consumer

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37. This arbitration entrepreneur would resemble the claims agents of yore—nonlawyers who actively identified, investigated, processed, aggregated, and assisted injured parties in bringing their claims in exchange for a fee or percentage of recovery. Claims agents have a long and somewhat controversial history in Anglo-American society. Blackstone called them “the pests of civil society,” 4 WILLIAM BLACKSTONE, COMMENTARIES \*135, and early English courts renounced them as “prowling assignees.” Agents were held to be “officious intermeddlers” and the doctrines of champerty and maintenance were deployed by courts to stop them from “stirring up strife and contention” in pursuit of profit or some other self-interested motive. *Huber v. Johnson*, 70 N.W. 806, 807 (Minn. 1897). However, as the Supreme Court has noted, resistance to the claims agent gradually disappeared during the nineteenth century, so that “[m]any, probably most, American jurisdictions [allowed] an assignee” to help another enforce their legal rights. *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 282 (2008) (quoting Charles E. Clark & Robert H. Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 264 (1925)) (internal quotation marks omitted).

38. See, for example, the cases discussed in *Sprint Commc’ns*, 554 U.S. at 280–81, cases that involved “suits by individuals who were assignees for collection only.”

credit, and bring massive numbers of individualized recovery proceedings. Consumer credit is a powerful example of mass small-claims litigation that makes economic sense—although ironically, it is an example in which the consumer is the defendant, not the plaintiff.<sup>39</sup>

Part II of this Article describes the current state of class action and arbitration jurisprudence, with particular focus on the Supreme Court’s recent pronouncements approving class action waivers in arbitration agreements. Part III takes up the hybrid model of securing a “judicial launchpad” prior to engaging in mass arbitrations. Part IV focuses on the claims-buying model, which contemplates the intervention of an arbitration entrepreneur modeled against the practices of consumer debt buying companies in recent years. Additionally, Part IV explores the ability to freely buy, trade, assign, and sell claims in arbitration, as well as the question of whether a single arbitration seeking to represent collective claims can survive under current law and practice.

## II. THE END OF CLASS ACTIONS

Class action litigation is in decline.<sup>40</sup> Over the past decade, the Supreme Court and a number of influential circuit courts have revealed deep-seated skepticism (and hostility) to class action litigation, finding doctrinal and policy-based rationales to support cutting back on this potent procedural device.<sup>41</sup> Standards for certifying high-stakes class

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39. See Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2006).

40. Although some studies show that the number of class actions filed has remained fairly steady, others reveal that, given the increased evidentiary and burden of proof standards that plaintiffs must satisfy, a significant number of these classes are not certified. Compare Stephen C. Dillard et al., *7th Annual Litigation Trends Results*, FULBRIGHT & JAWORSKI LLP 18–19 (Nov. 2, 2010), <http://www.nortonrosefulbright.com/us/knowledge/publications/94436/7th-annual-litigation-trends-results>, with Joel S. Feldman et al., *Evidentiary and Burden of Proof Standards for Class Certification Rulings*, 11 CLASS ACTION LITIG. REP. (BNA) 536, 541 (June 11, 2010). Securities fraud class actions appear to be the exception. See JORDAN MILEV ET AL., NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2011 MID-YEAR REVIEW 1 (2011), available at [www.nera.com/nera-files/PUB\\_Mid-Year\\_Trends\\_0711\(3\).pdf](http://www.nera.com/nera-files/PUB_Mid-Year_Trends_0711(3).pdf) (reporting that securities class action filings remained steady and suggesting that “a wave of new cases alleging breach of fiduciary duty in connection with” mergers and acquisitions is the cause).

41. See, e.g., Gilles & Friedman, *supra* note 3, at 626 (asserting that judicial decisions limiting class action litigation are primarily concerned that “class practice allows private lawyers to assume the representation of vast sets of absent plaintiffs and to use that power, monitored by no one except overworked judges, as a club with which to extract massive settlements from risk-averse corporations”); Robert H. Klonoff, *Reflections on the Future of Class Actions*, 44 LOYOLA U. CHI. L.J. 533 (2012).

actions have become increasingly more demanding,<sup>42</sup> small-claims consumer class actions have been fundamentally circumscribed,<sup>43</sup> and employment class actions must now meet evermore restrictive interpretations of the commonality requirement of Rule 23(a).<sup>44</sup> With few exceptions,<sup>45</sup> the Supreme Court's jurisprudence in this area has been marked by an effort to limit, restrict, and reduce the availability of class remedies.

### A. Class Action Waivers

The real game-changer has been a series of Supreme Court decisions upholding class action waivers and instructing lower courts to enforce arbitration agreements according to their specific terms.<sup>46</sup> In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court held that the FAA prohibits arbitrators from imposing class arbitration on parties that have not agreed to such procedures.<sup>47</sup> Then in *AT&T*

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42. Whereas courts previously avoided any "preliminary inquiry into the merits" at the class certification stage, recent years have seen the development of a standard under which plaintiffs are required to prove by a preponderance of the evidence—just as they would at trial—any fact necessary to meet the requirements of Rule 23, even if it also goes to the merits. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316, 320 (3d Cir. 2008) ("[O]verlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met . . . . Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence."); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41–42 (2d Cir. 2006) (rejecting the "some showing" standard and adopting a requirement that plaintiffs provide "definitive" proof, through "affidavits, documents, or testimony, to . . . [establish] that each Rule 23 requirement has been met"); cf. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (finding that under a rigorous analysis of Rule 23(a)'s certification requirements, plaintiffs' expert failed to establish that damages can be measured on a class-wide basis).

43. Consumer class actions have been plagued by the adoption of an "implicit requirement" of ascertainability, under which courts in consumer cases have refused to certify classes in the absence of "reliable proof of purchase or a knowable list of injured plaintiffs." See Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 310 (2010). This ascertainability requirement has sounded a death knell for many (if not most) cases arising from small retail purchases, where consumers are unlikely to retain proof of purchase. See, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

44. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

45. See, e.g., *Amgen v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) (finding proof of materiality is not required before certifying a class based on the fraud-on-the-market theory); *Erika P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (plaintiff-friendly decision finding that loss causation is not a component of reliance, and therefore is irrelevant at the class certification stage); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437–38 (2010) (upholding Rule 23 over inconsistent state law).

46. See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671–73 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1754–56 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773–76 (2010).

47. *Stolt-Nielsen*, 130 S. Ct. at 1758.

*Mobility LLC v. Concepcion*, the Court struck California's so-called *Discover Bank* rule—a judge-made rule providing that arbitration agreements attended by class action waivers are unenforceable if those agreements are contained in standard-form consumer contracts.<sup>48</sup> Most recently, in *American Express Co. v. Italian Colors Restaurant*, a 5–3 majority held that class action waivers embedded in arbitration clauses are enforceable even where proving the violation of a federal statute in an individual arbitration would prove too costly to pursue.<sup>49</sup> In short, “the Court has nearly concluded its slow march toward universal arbitrability.”<sup>50</sup>

Not surprisingly, many corporate actors have shrewdly responded to this spate of judicial decisions by incorporating class action waiver language in their standard-form contracts with consumers and employees,<sup>51</sup> rendering these groups unable to band together and seek legal redress. Since 2000, when the Supreme Court began to develop its pro-arbitration jurisprudence in earnest,<sup>52</sup> a significant number of companies have inserted arbitration clauses into their contracts with consumers and employees.<sup>53</sup> And it is a fair bet that the number of

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48. *Concepcion*, 131 S. Ct. at 1746, 1748, *abrogating* *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

49. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (“[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

50. David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 724 (2012).

51. See, e.g., Myriam Gilles, *Killing Them With Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 847 (2012) (“[M]ost companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop.”); Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, 45 LOY. L.A. L. REV. 435, 440 (2012) (“It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.”).

52. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (“[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration . . .”).

53. See, e.g., Glover, *supra* note 12, at 1167 (reporting on a study of contracts imposed by financial services and telecommunications firms finding “that 75 percent contained mandatory arbitration clauses, and 80 percent contained class action waivers,” and that “a stunning 93 percent of these companies’ employment agreements mandated arbitration” (citing Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–84 (2008))); see also Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, *LAW & CONTEMP. PROBS.*, Winter/Spring 2004, at 55, 62 n.30 (finding that approximately 55% “of businesses that offer an ongoing product or service” included an arbitration clause in the written contract); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 8 (reporting that 48% of consumer credit card agreements contain arbitration clauses, and that 99% of those clauses contain class action waivers).

companies relying on arbitration clauses has spiked since the Court's 2011 decision in *Concepcion*, where the majority lauded AT&T's arbitration clause as being fundamentally fairer and better for consumers than litigation.<sup>54</sup> As a result of the Court's extended emphasis on AT&T's "consumer-friendly" arbitration clause, it "has become a sort of gold standard to transactional attorneys,"<sup>55</sup> and corporate advisors are actively urging clients to follow AT&T's model.<sup>56</sup> Our research indicates that clients have taken this advice to heart as an efficient means of avoiding nearly all forms of aggregate liability.<sup>57</sup>

In the aftermath of *Concepcion*, lower federal courts have compelled individual arbitration of otherwise class-able claims in the vast

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54. AT&T's arbitration clause provided that all fees and costs of suit were recoverable by a prevailing plaintiff, and offered cash bounties where claimants receive an arbitration award superior to defendant's final pre-award offer, among other features. See *Concepcion*, 131 S. Ct. at 1744 (discussing the AT&T Mobility Arbitration Agreement).

55. Gilles, *supra* note 51, at 848.

56. See, e.g., *U.S. Supreme Court Finds That Class Action Waivers in Arbitration Agreements Are Enforceable under the Federal Arbitration Act*, GIBSON, DUNN & CRUTCHER LLP (Apr. 27, 2011), <http://www.gibsondunn.com/publications/pages/USSupremeCourtFinds-ClassActionWaiversInArbitrationAgreementsAreEnforceableUnderFederalArbitrationAct.aspx> ("The wording of the majority decision in *AT&T Mobility* does not seem to require similar provisions in an arbitration agreement, although the Court did observe that the district court concluded that the guaranteed amounts would put the *Concepciones* in a better position than if they were participants in a class action."); Alan Kaplinsky, *Status of Overdraft Fee Litigation*, in 16TH ANNUAL CONSUMER FINANCIAL SERVICES INSTITUTE COURSE HANDBOOK 209 (2011) (recommending that banks facing class action liability on overdrafts—"only a handful [of which] have arbitration provisions"—draft "the types of consumer-friendly features necessary to ensure enforceability"); Hilary B. Miller, *What Payday Lenders Need to Do About Arbitration* (May 2, 2011), available at <http://myemail.constantcontact.com/What-Payday-Lenders-Need-To-Do-About-Arbitration-Now.html?soid=1101566873044&aid=SGkv356PqJU> ("Lenders should give serious consideration to updating their agreements to provide for every one of the consumer protections included in the AT&T arbitration agreement. In other words, at a minimum, the lender-eats-fees provision, venue, preservation of small court claims, opt-out and bump-up provisions of AT&T's clause should be an element of any class action waiver provision." (emphasis omitted)); see also JOSEPH MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 2.14 (8th ed. 2011) ("Although *Concepcion* was not predicated on the existence of consumer-friendly provisions, cautious drafting should lead companies to hew closely to the terms of the agreement involved in that case and: [m]ake consumer arbitration low cost or cost-free [and] . . . [c]onsider using premiums: financial incentives for customers or employees to arbitrate and allow arbitrators to award attorney's fees . . ." (footnote omitted)); *Second Circuit Strikes Down Class Arbitration Provisions in In re American Express Merchants Litigation*, WEIL BRIEFING: LITIG./REG. (Weil, Gotshal & Manges LLP, New York, N.Y.), Feb. 26, 2009, at 3, available at [http://www.weil.com/files/upload/WeilBriefing\\_LitReg\\_090226.pdf](http://www.weil.com/files/upload/WeilBriefing_LitReg_090226.pdf) ("Another option for businesses to consider, to the extent they wish to increase the possibility that their class arbitration waiver provisions will be enforceable under *In re American Express*, is the inclusion of a fee-shifting provision for attorneys' fees and expert costs.").

57. See Gilles, *supra* note 51, at 829 (showing that thirty-seven major U.S. consumer-oriented companies amended their arbitration clauses in the aftermath of *Concepcion* to add more consumer-friendly provisions).

majority of cases,<sup>58</sup> and courts will likely continue to do so in the wake of *American Express*. And there seems to be no help in sight: neither legislation overruling *Concepcion*<sup>59</sup> nor regulatory measures render-

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58. See, e.g., *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011) (finding that “[i]nsofar as Florida law would invalidate [class action waivers] as contrary to public policy . . . such a state law would ‘stand[] as an obstacle to the accomplishment and execution’ of the FAA, and thus be preempted” under *Concepcion* (third alteration in original) (citation omitted) (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011))); *Simpson v. Pulte Home Corp.*, No. C 11-5376 SBA, 2012 WL 1604840, at \*5 (N.D. Cal. May 7, 2012) (“In view of *Concepcion* and its progeny, the Court is not persuaded by Plaintiffs’ contention that the class action waiver is substantively unconscionable.”); *Emilio v. Sprint Spectrum L.P.*, No. 11 Civ. 3041 (BSJ), 2012 WL 917535, at \*4 (S.D.N.Y. March 16, 2012) (“Petitioner has not demonstrated that any of his statutory rights would be precluded through the Court’s enforcement of the class action preclusion provision . . . .”); *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318, at \*2 (W.D. Wisc. March 16, 2012) (finding plaintiff failed to prove that the costs of individually arbitrating her claims would be prohibitive “because she failed to conduct any comparison of the costs of litigating in federal court”); *Coiro v. Wachovia Bank, N.A.*, Civ. No. 11-3587, 2012 WL 628514, at \*6 (D.N.J. Feb. 27, 2012) (“After considering the evidence presented to it, the Court is not convinced that Plaintiff has met her burden in demonstrating that enforcement of the class-action waiver would effectively preclude any action seeking to vindicate proposed class members’ legal rights.”); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308 (BSJ) (JLC), 2012 WL 124590, at \*7–8 (S.D.N.Y. Jan. 13, 2012) (finding the evidence of prohibitive costs of individual arbitration “too speculative to justify the invalidation of an arbitration agreement” (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)) (internal quotation marks omitted)); *Alvarez v. T-Mobile USA, Inc.*, No. CIV. 2:10-27373 WBS GGH, 2011 WL 6702424, at \*7 (E.D. Cal. Dec. 21, 2011) (refusing to consider public policy-based arguments against enforcement of class action waiver because “those arguments are not viable post-*Concepcion* [as] state laws advancing those policies are preempted by the FAA”); *Khan v. Orkin Exterminating Co.*, No. C 10-02156 SBA, 2011 WL 4853365, at \*4 (N.D. Cal. Oct. 13, 2011) (where plaintiff is “seeking to establish that it is too costly for him to pursue consumer protection claims on an individual as opposed to a class basis, the Court notes that post-*Concepcion* decisions have rejected the cost of litigation as a basis for invalidating a class action waiver”); *Clemins v. Alliance Data Sys. Corp.*, No. 11-C-36 (E.D. Wis. Oct. 12, 2011) (applying *Concepcion* and enforcing class action waiver in credit card agreement); *Chavez v. Bank of Am.*, No. C 10-653 JCS, 2011 WL 4712204 (N.D. Cal. Oct. 7, 2011); *Tory v. First Premier Bank*, No. 10 C 7326, 2011 WL 4478437, at \*4 (N.D. Ill. Sept. 26, 2011) (“*Concepcion* moots any argument on the cost benefits to the plaintiff of a class action versus an individual arbitration.”); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048–49 (N.D. Cal. Sept. 20, 2011) (declaring that the vindication-of-right doctrine has no viability after *Concepcion*, at least insofar as class action waivers are concerned); *Black v. JP Morgan Chase & Co.*, Civil Action No. 10-848, 2011 WL 3940236, at \*21 (W.D. Pa. Aug. 25, 2011); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, No. C-10-02553 RMW, 2011 WL 2886407, at \*3 (N.D. Cal. July 19, 2011) (“Plaintiffs’ contention that their modest claims ‘simply do not provide sufficient motivation for an aggrieved customer to seek redress’ on an individual basis is the very argument that was struck down in *Concepcion*.” (citation omitted)); *In re Cal. Title Ins. Antitrust Litig.*, No. 08-014341 JSW, 2011 WL 2566449, at \*2–3 (N.D. Cal. June 27, 2011); *Villegas v. U.S. Bancorp*, No. C 10-1762 RS, 2011 WL 2679610, (N.D. Cal. June 20, 2011); *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1842712, at \*2 (N.D. Cal. May 16, 2011) (finding that *Concepcion* forecloses argument that an arbitration agreement is void because small claims might be prohibitively expensive to pursue on an individual basis).

59. Congress continues to consider various versions of the Arbitration Fairness Act, which would amend the FAA to invalidate all arbitration clauses in consumer or employment contracts. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4, 155 Cong. Rec. H1517



ing class action waivers unenforceable appear likely in the current political climate.<sup>60</sup> To sum it up: we now exist in a world where contractual bans on aggregate claiming are per se enforceable, where every company has the option to exempt itself from class action liability by simply adding a “consumer-friendly” arbitration clause to its terms and conditions, and where the Supreme Court has repeatedly hailed arbitration as providing a relatively inexpensive vehicle for addressing individual, small-value claims—one that is both more accessible than the courts and where claimants might fare at least as well as they might in court.

These developments in class action and arbitration jurisprudence foretell a massive transformation in adjudicative structures and procedures, as claims shift from wholesale into arbitral fora. Currently, however, the major arbitral bodies appear ill-prepared for the onslaught of claims that may be coming their way now that public courts have closed the door to many forms of aggregate litigation.

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(daily ed. Feb 12, 2009) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4, 153 Cong. Rec. S9144 (daily ed. July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4, 153 Cong. Rec. H7774 (daily ed. July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes).

In the immediate wake of the Supreme Court’s decision in *Concepcion*, Senators Al Franken and Richard Blumenthal, along with Congressman Hank Johnson, reintroduced a 2011 version of the bill, which would prohibit class waivers in all consumer, employment, and civil-rights-related contracts. This most recent version has also failed to garner much legislative support. See Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26 (noting that the chances of federal legislation overriding *Concepcion* “aren’t great in the current political environment”).

And again, in 2013, anticipating the outcome in *American Express*, another version of the bill was introduced in the House and Senate. See H.R. 1844, 113th Cong. (2013), available at <http://www.govtrack.us/congress/bills/113/hr1844/text>; S. 878, 113th Cong. (2013), available at <http://www.govtrack.us/congress/bills/113/s878>. And again, the odds of either even making it through committee seem slim.

60. For example, the Dodd-Frank Act created the Consumer Financial Protection Bureau (CFPB), and required the agency to conduct a study of and submit a report to Congress on the use of arbitration in consumer transactions, and “prohibit or impose conditions or limitations on the use of . . . arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028(b), 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C. § 5518(b) (Supp. V 2011)). The CFPB is currently running its arbitration study, but the embattled agency has other items on its plate. See, e.g., Jennifer Bendery, *Richard Cordray CFPB Confirmation Imperiled by Senate Republicans, Again*, HUFFINGTON POST (Feb. 1, 2013), [http://www.huffingtonpost.com/2013/02/01/richard-cordray-cfpb\\_n\\_2599838.html](http://www.huffingtonpost.com/2013/02/01/richard-cordray-cfpb_n_2599838.html).

### B. *Arbitral Unease with Aggregation*

Arbitration, in its ideal form, allows both sides of a legal dispute to trade the advantages of adjudication in a court of law in exchange for advantages gained in so-called alternative dispute resolution systems. Under basic economic theory, both contractual partners can benefit from arbitration.<sup>61</sup> It is theoretically possible that “individuals may be better off agreeing [to] arbitration clauses instead of retaining their right to go to court, if the resulting cost savings are passed on to consumers through reductions in the price of goods and services [or] to employees through higher wages.”<sup>62</sup> It is even more likely that the businesses—which employ and enforce arbitration clauses against consumers, employees, and others—benefit from a combination of fewer claims, reduced costs, and greater predictability in outcomes. The idea that arbitration could work to the mutual advantage of parties who were otherwise typically locked in conflict was a major reason for the early enthusiasm for arbitration among progressives and reformers.<sup>63</sup>

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61. See, e.g., Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5–7 (1995) (describing benefits that parties might derive from *ex ante* alternative dispute resolution agreements).

62. Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 741; see also Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) (“[W]hatever lowers costs to businesses tends over time to lower prices to consumers.”); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees).

63. Arbitration gained prominence in the labor industry, for example, as a means of fostering self-government and peace preservation. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 463 (1957) (Frankfurter, J., dissenting) (observing that judicial intervention in arbitration threatened “the going systems of self-government” (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955))). An early arbitration scholar, Frances Kellor, commenting on arbitration in general, noted that “any instrumentality which reduces the burden of waste and cost of disputes to a nation is an activating power for the advancement of civilization.” FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 117 (1948).

Laura Nader has argued that the ADR movement gained momentum when elite lawyers endorsed a “harmony model” of law, which turned away from a traditional conflict-driven legal system (which had dominated the nation’s first 150 years). Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 7 (1993). To illustrate her point, Nader cited Chief Justice Warren Burger, who extolled arbitration and “said lawyers should serve as healers, rather than warriors, procurers, or hired guns.” *Id.* at 6. See also Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85 (arguing that the premise under which parties with legal claims prefer to resolve their “claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts”).

The reality is more complex, and the debate over whether arbitration can be beneficial for most potential litigants is tied up in arguments over consent, access, cost, and the neutrality of decision makers.<sup>64</sup> This Article does not delve into these debates; rather, we take the arbitral rules and practices as a given. But we also predict that these rules and practices may prove insufficient to the task of administering and managing mass individual arbitrations under either model we describe in the next two Parts—necessitating amendment and revision to account for the impending surge of claims.

For example, the major arbitration associations and their supporters often tout the “streamlined and efficient” manner in which arbitration is conducted.<sup>65</sup> These efficiencies are largely achieved by rules limiting the parties’ ability to engage in fact discovery,<sup>66</sup> exchange prehearing briefs,<sup>67</sup> rely on standard admissibility of evidence,<sup>68</sup> or appeal arbitral decisions.<sup>69</sup> Arbitration hearings are restricted to brief presentations of sworn evidence, with few of the procedures that serve

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64. See, e.g., Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1395 (1997) (attacking mediation because of power imbalances for minorities in American society); Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 303 (2003) (asserting the importance of a conflict resolution “system that contains multiple procedures (e.g. both litigation and mediation)”). See generally Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002).

65. See, e.g., Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL’Y ANALYSIS (Cato Inst., Washington, D.C.), Apr. 18, 2002, at 1, 3 (“[A]rbitration typically reduces costs . . . by streamlining discovery.”).

66. For example, the American Arbitration Association (AAA) Healthcare Payor Provider Arbitration Rules, which govern billing-related disputes, limit discovery to one deposition per party unless ordered by the arbitrator. AAA HEALTHCARE PAYOR PROVIDER ARBITRATION RULES, R. 19, at 21 (2011) [hereinafter AAA RULES], available at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004106&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004106&revision=latestreleased). Similarly, American Health Lawyers Association (AHLA) rules provide that the “arbitrator may allow the parties to conduct such reasonable discovery and exchange exhibits as the arbitrator believes necessary or appropriate . . . .” AHLA RULES OF PROCEDURE FOR ARBITRATION, R. 4.02, at 6 (2012). See also *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa. 1960) (finding that the FAA does not make discovery procedures available to parties to an arbitration).

67. See AAA RULES, *supra* note 66, R. 21 (describing preparation of an “Arbitration Record” in advance of hearing, which should state facts both conceded and in dispute, in lieu of pretrial briefing).

68. See AAA RULES, *supra* note 66, R. 30(a), at 25 (“Conformity to legal rules of evidence shall not be necessary.”)

69. The FAA limits judicial review of arbitral awards to cases involving manifest disregard of the law, see 9 U.S.C. § 10(a) (2006), or “evident material mistake.” *Id.* § 11(a). The Uniform Arbitration Act and the acts adopted by most states allow an award to be vacated only upon the showing of: (a) corruption, fraud or other influence exercised as a means of obtaining the award; (b) evident partiality or misconduct on the part of the neutral arbitrators; (c) the arbitrators exceeding their powers; (d) arbitrator’s refusal to postpone a hearing or refusal to hear material evidence without sufficient cause; or (e) lack of agreement to arbitrate by the parties. UNIF. ARBITRATION ACT § 23, 7 U.L.A. 77 (2009); see also *infra* Part III.A.

as markers of due process in the civil justice system.<sup>70</sup> As critics of arbitration have long argued, these seemingly neutral rules may have disproportionately negative effects on consumers and employees.<sup>71</sup> But, for our limited purposes here, these privately ordered modifications of the public adjudicative system will not have distinctly negative effects on the models we describe, as they do not in themselves create any obstacles to informal aggregation of claims.

Other rules may, however, prove deeply problematic to any efficient massing of arbitrations. Formally, it is now broadly accepted that “[p]rinciples of stare decisis and res judicata do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings.”<sup>72</sup> This means that each arbitration stands on its own and has no precedential effect on similar, unrelated arbitration proceedings.<sup>73</sup> And, because arbitrators lack the authority to enjoin ongoing wrongful activity, each claimant bringing a separate claim has no overall impact on policy or practices that have widespread effect.

But even informally, the principal arbitral associations have promulgated a set of rules and expectations that hinder any attempt to generate precedent. For example, the AAA currently requires that “The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.”<sup>74</sup> Further, no arbitral body currently requires that a legal

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70. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1974) (“[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, often are severely limited or unavailable.”).

71. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 683–84 (1996) (asserting that the arbitral rules limiting discovery harm consumers because the corporation is the party with all the records, and the consumer is the one that needs access to them).

72. *Conn. Light & Power Co. v. Local 420, International Brotherhood of Electrical Workers*, 718 F.2d 14, 20 (2d Cir. 1983) (citing *Butler Armco Independent Union v. Armco Inc.*, 701 F.2d 253 (3d Cir.1983)); *accord Metro. Edison Co. v. NLRB*, 663 F.2d 478, 483 (3d Cir.1981), *aff’d*, 460 U.S. 693 (1983); *Riverboat Casino, Inc. v. Local Joint Exec. Bd.*, 578 F.2d 250, 251 (9th Cir. 1978).

73. As a practical matter, however, arbitrators may take prior decisions into account, and given the informal evidence rules of arbitration, it is hard to see on what grounds efforts to include information about prior decisions could be excluded, even if they do not have any binding effect. See Korn & Rosenberg, *supra* note 4, at 1186 n.89 (“Arbitrators increasingly rely on arbitral precedents—case records, orders, and awards—in making their decisions.”).

74. *Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)*, AM. ARB. ASS’N, [http://www.adr.org/aaa/faces/rules/search/rules/rulesdetail?doc=ADRSTG\\_004130&\\_afLoop=1835164840780937&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D1835164840780937%26doc%3DADRSTG\\_004130%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dk91veca6n\\_213](http://www.adr.org/aaa/faces/rules/search/rules/rulesdetail?doc=ADRSTG_004130&_afLoop=1835164840780937&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D1835164840780937%26doc%3DADRSTG_004130%26_afWindowMode%3D0%26_adf.ctrl-state%3Dk91veca6n_213)

record of the proceedings be kept.<sup>75</sup> This means that, even in a jurisdiction such as California that requires publicity of arbitral awards, there is no requirement that the arbitrator explain her reasons or provide any reliable analysis of the issues.<sup>76</sup> The rules that shroud arbitration decisions are bolstered by the underlying contracts of many consumer-oriented companies, which specifically provide that “no arbitration award or decision will have any preclusive effect as to the issues or claims in any dispute with anyone who is not a named party to the arbitration.”<sup>77</sup>

Moreover, it would be naive to assume that all of this can be dealt with by back-end judicial review of arbitral decisions. Section 10 of the FAA limits such review to cases involving “manifest disregard” of the law<sup>78</sup>—a high standard to satisfy that seems especially difficult when an arbitrator’s regard for “the law” is opaque.

Taken together, these rules contemplate and conspire to silo individual claims by removing any practical means of transmitting information adduced or determinations made in one arbitration to subsequent, related arbitrations. Broad confidentiality and the absence of a written record make it virtually impossible to reproduce in arbitration the collateral estoppel effects that create the efficiencies witnessed in traditional litigation.<sup>79</sup>

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(last visited Feb. 4, 2014). While parties in traditional litigation can also obtain confidentiality orders and submit documents and testimony under seal, obtaining privacy in traditional litigation is a far more burdensome and less certain process than in arbitration.

75. Cf. *House Grain Co. v. Obst*, 659 S.W.2d 903 (Tex. App. 1983); Gordon Firemark, *Arbitration in Entertainment Contracts: Worth Fighting About?*, LAW OFFICES OF GORDON P. FIREMARK (March 24, 2011), <http://firemark.com/2011/03/24/arbitration-entertainment-contracts-worth-fighting-about/> (“[S]ince no written opinion exists, an arbitration award has little or no significance as precedent for the parties or others to follow in future situations.”); Ted Johnson, *Arbitration Clauses Irk Creatives*, VARIETY (Oct. 28, 2011), <http://www.variety.com/article/VR1118045188> (asserting that because there is no precedential value from prior arbitration proceedings, it is as if each new proceeding is like “groundhog day”).

76. AAA RULES, *supra* note 66, R. 41(b), at 28; cf. Press Release, Am. Ass’n for Justice, Civil Justice System Uncovers Abuse and Neglect of Elderly Americans (Oct. 7, 2010), *available at* <http://www.justice.org/cps/rde/justice/hs.xsl/13464.htm> (predicting that “many offenses will never see the light of day due to arbitration clauses” because, “[w]hile litigation has revealed instances of abuse,” arbitration reveals nothing).

77. See, e.g., Am. Express Travel Related Servs. Co., Agreement for American Express Card Acceptance (Nov. 2012) [hereinafter AmEx Agreement] (on file with the authors).

78. *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); see also 9 U.S.C. § 10(a) (2006).

79. See, e.g., *Collins v. D.R. Horton, Inc.*, 361 F. Supp. 2d 1085, 1097 (D. Ariz. 2005) (“The reasons for requiring arbitrators to apply res judicata and collateral estoppel are the same as those underlying the doctrines themselves—finality, protection of judgments, prevention of duplicative litigation, and avoidance of inconsistent results.”).

Indeed, the problem may lie deeper than the arbitral bodies' positive rules or the unilateral ability of companies to add even more iron-clad promises of privacy to existing arbitration clauses; the utter absence of procedures designed to facilitate mass arbitrations is also striking. For example, neither the AAA nor JAMs currently have any discernible rules on how to obtain a single arbitrator for a set of related arbitrations, how to schedule related arbitrations in a compressed time frame, or how to use a single expert report across multiple arbitrations. There are no "best practices" governing damages calculations or the alignment of awards across arbitrations. Nor do the major arbitral associations currently offer volume discounts on arbitral costs or neutrals' fees for those seeking to arbitrate a mass of related claims.

Yet nothing *prevents* one or all of the arbitral bodies from adopting new practices designed to meet new needs of the parties before them. In fact, if, as the Supreme Court has repeatedly held, a "fundamental attribute" of arbitration (at least as intended by Congress) is "to facilitate streamlined proceedings," then it is hard to see why arbitral bodies would resist accommodating parties who must appear in related, separate arbitrations by coordinating schedules, offering volume discounts on arbitral costs or neutrals' fees, or even providing greater transparency about awards for similar claims.<sup>80</sup>

So while existing procedures are clearly designed to aid the individual claimant in the individual arbitration to resolve a specific, fact-intensive dispute, we think claimants and lawyers will push for more friendly procedures to maximize efficiencies, and that ultimately the arbitral bodies will find workable mechanisms to manage mass arbitrations. After all, there was a period (between *Green Tree Financial Corp.-Alabama v. Bazzle* in 2003 and *Stolt-Nielsen* in 2010) during which the AAA changed its rules to accommodate class arbitration. It eliminated the presumption of confidentiality and promulgated other class-friendly procedures.<sup>81</sup> These changes demonstrate that arbitration is a market-driven, private enterprise, and that the arbitral bodies are fully capable of responding to changes in client needs and the legal

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80. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to *facilitate streamlined proceedings*." (emphasis added)).

81. See AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES OF CLASS ARBITRATIONS, R. 9(a), at 5 (2003), available at [http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg\\_004129.pdf](http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf).

environment.<sup>82</sup> The models we describe in the next two Parts are heavily reliant on the ability of private arbitration to adapt to evolving public needs.

### III. THE HYBRID MODEL

One potential work-around to current anti-class action jurisprudence and the inefficiencies of individual arbitration is to leverage the rules and authority of a judicial judgment to maximize the efficiency of mass private arbitrations. This hybrid approach, drawing on both judicial and arbitral processes, will not work in all cases and faces serious challenges. Nonetheless, we think the various pathways to obtaining a public liability ruling will motivate entrepreneurial lawyers in a significant subset of claims.

#### A. *The Public Liability Ruling*

Lawyers seeking an enforceable judicial judgment upon which to base subsequent serial arbitrations have a number of options. This may be possible where, for example, the arbitration clause specifically denies the arbitrator the authority to grant injunctive relief in an individual arbitration. In this scenario, plaintiffs may argue that claims for injunctive relief are properly before the court.<sup>83</sup> One challenge that plaintiffs will confront, even in the subset of cases where they can show that broad injunctive relief is necessary, is the argument that even claims for injunctive or declaratory relief must nonetheless be brought in an individual arbitration hearing. In other words, defendants may argue that the individual plaintiff could obtain the broad, and even potentially market-wide, injunctive relief in an individual proceeding—and more specifically, in the contracted-for individual arbitration.<sup>84</sup> But it remains to be seen how many defendants will be

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82. For example, in 1999, the AAA significantly revised its rules in response to concerns relating to discretion and authority of arbitrators. Over the years, the Association has added Optional Procedures for Large, Complex Cases, and amended the Expedited Procedures for small cases to make them more efficient.

83. Of course, many of the cases comprising contemporary class practice do not implicate injunctive concerns. Oftentimes, the complained-of conduct has ceased by the time a class action is filed, or by the time certification is sought.

84. See, e.g., *Craft v. Memphis Light, Gas, & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976), (finding Rule 23(b)(2) class certification inappropriate where class treatment is not needed), *aff'd*, 436 U.S. 1 (1978); *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (“Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants . . . but all other persons subject to the practice under attack.”); *Ali v. Quarterman*, No. 9:09cv52, 2009 WL 1586691, at \*1 (E.D. Tex. June 4, 2009) (justifying denial of certification because injunctive relief in pending non-class action would provide same remedy); *Access Now Inc. v. Walt Disney World*

willing to allow plaintiffs to take aim at their nationwide practices in a string of individual, largely nonreviewable arbitrations.<sup>85</sup>

A second pathway to a judicial ruling on liability that can be used in the arbitral arena arises where there are some stray claimants who are not bound by arbitration clauses, but who are similarly situated with the claimants who are bound by such clauses. This arises more frequently than one might think<sup>86</sup>: large consumer-facing organizations encounter massive challenges in managing multiple iterations of agreements, phasing out legacy or grandfathered agreements, and regularizing terms and conditions in the wake of acquisitions and mergers.<sup>87</sup> Of course, the judicial liability ruling will have no value in the arbitral arena unless the requirements of nonmutual offensive issue preclusion are met. But here, where the arbitral claimants by defini-

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Co., 211 F.R.D. 452, 455 (M.D. Fla. 2001) (finding “complexity and expense” of class action unnecessary when injunctive relief in a single case would provide same remedy); *Fairley v. Forrest Cnty.*, 814 F. Supp. 1327, 1329–30 (S.D. Miss. 1993) (determining class action unnecessary because declaratory and injunctive relief would have same effect); *Green v. Williams*, No. CIV-4-78-34, 1980 U.S. Dist. LEXIS 17881, at \*5 (E.D. Tenn. Dec. 17, 1980) (finding that “certification of an action as a class action under Rule 23(b)(2) is inappropriate where the injunctive and declaratory relief sought . . . would automatically accrue to the benefit of the class members” (citation omitted)).

85. See *infra* text accompanying notes 118–120 (describing AT&T’s response to thousands of individual arbitrations filed to block its merger with T-Mobile); see also *Concepcion*, 131 S. Ct. at 1752 (finding “it hard to believe that defendants would bet the company with no effective means of review”); Barbara Black, *Arbitration of Investors’ Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS., no. 1, 2012, at 107, 109 (asserting that “the very narrow grounds for judicial review of arbitration awards may make the risk of an aberrational award unacceptably high”); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 454 (2010) (identifying high-risk categories where defendants prefer litigation over arbitration); Sternlight, *supra* note 3, at 91 (noting that “a company might hurt itself rather than consumers by eliminating class actions, because the company might then face numerous individual claims brought in arbitration”—which may create a greater financial threat if injunctive relief is sought that could force the company to change its practices in ways that harm its profitability).

86. Given how easy it is for businesses to add or amend arbitration clauses to their new and existing agreements, one might assume that all companies have done so effectively in response to recent pro-arbitration legal decisions. See, e.g., Gilles, *supra* note 51, at 847 (noting that “most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop”); Tracey & McGill, *supra* note 51, at 440 (“It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.”).

87. A surprising example comes from Alan Kaplinsky, who observes that, in the *Checking Overdraft* cases, where the players were sophisticated and well attuned to the dangers of class litigation, a number of the defendant institutions were vulnerable because they failed to maintain class waivers with respect to some subset of their consumers. Kaplinsky, *supra* note 56 (reporting that “only a handful [of banks] have arbitration provisions” leaving many vulnerable to class action liability on overdrafts”).



tion “could not [easily] have joined” the prior judicial proceeding,<sup>88</sup> the test boils down to whether the issue in the two proceedings is identical.

A third route to judicial resolution runs through the offices of public enforcers. If state attorneys general, administrative agencies, or others establish critical liability facts in the course of judicial enforcement actions, the predicate may be established for plaintiffs’ lawyers to avail themselves of serial arbitration strategies. For example, when a state attorney general pursues a claim against a wrongdoer on behalf of citizens of the state, she generally does so based on a state or federal remedial statute that specifically provides for a broad grant of *parens patriae* authority to seek injunctive or declaratory relief.<sup>89</sup> Those efforts can inure to the benefit of private lawyers, who may employ judgments attained in enforcement actions in later arbitral hearings alleging the same wrongdoing. Indeed, it may be in the interests of private lawyers to enlist public enforcers towards these ends, and even to offer their services at discounted rates.<sup>90</sup>

Whatever pathway to a judicial resolution is taken, this entire model depends upon the supposition that arbitrators will accord preclusive effect to the liability determinations made in court.<sup>91</sup> The caselaw suggests that they should—i.e., the doctrine of *Parklane Hosiery v. Shore* ought to apply with full force in the judicial-to-arbitral context: “Arbitrators are not free to ignore the preclusive effect of

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88. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–32 (1979) (“The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”).

89. See Gilles & Friedman, *supra* note 3, at 662.

90. *Id.* at 669. In these arrangements it will be particularly important for the state to retain control of the litigation, since the private counsel will have an interest in obtaining a judicial resolution that can be retailed in arbitrations. But that is nothing extraordinary: the state must retain ultimate authority in any event under the law of most states. *Id.* (“The principal legal constraint is the requirement, imposed by several courts, that the AG must maintain total control over all key decision making lest the retainer agreement [with private counsel] violate public policy as an unlawful delegation of the AG’s authority.”).

91. It appears settled that determinations made in the arbitral fora are accorded preclusive effects in subsequent litigation. See Wayne J. Positan & Domenick Carmagnola, *Employment Torts*, in *BUSINESS TORTS LITIGATION* 81, 123 (David A. Soley et al. eds., 2d ed. 2005) (citing examples where preceding arbitration decisions were deemed to have preclusive effect in subsequent court proceedings). This appears to be the case even where “the arbitration procedures, especially regarding discovery, may offer less protection than those of a civil trial.” Steven P. Nonkes, Note, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Limits*, 94 *CORNELL L. REV.* 1459, 1474 (2009).

prior judgments under the doctrines of res judicata and collateral estoppel.”<sup>92</sup>

### B. *The Return on Investment*

Tremendous benefits obtain from a judicial determination of liability. First, if there is an underlying fee-shifting statute,<sup>93</sup> lawyers can recover their fees and costs in the case of an individual claimant or in representing an arbitration-free client seeking an injunction or declaratory judgment. The current practice is for courts to grant class counsel attorneys’ fees on a rate-times-hours-worked lodestar basis (generally without a multiplier<sup>94</sup>) in non-common-fund, statutory fee-shifting cases.<sup>95</sup> If the claim is brought by the public enforcer—i.e., by the legal staff of a state attorney general, agency or other public entity, or in conjunction with private lawyers—the costs of proving wrongdoing are paid in salaries to public officials or in accordance with contracts entered into with private lawyers.<sup>96</sup> In either event, the ability to recover these initial investment costs is critical to the profitability of the next phase of the venture.

Importantly, however, expert costs are generally not recoupable.<sup>97</sup> The Supreme Court has repeatedly held that the “costs” recoverable under 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54(d) exclude expert witness fees, and that the cost-shifting provisions of statutes, such as the Clayton Act, simply do “not permit a shift of expert

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92. *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007) (quoting *Aircraft Braking Sys. Corp. v. Local 856, UAW*, 97 F.3d 155, 159 (6th Cir. 1996)); *see also* *Collins v. D.R. Horton, Inc.*, 361 F. Supp. 2d 1085, 1097 (D. Ariz. 2005) (“The reasons for requiring arbitrators to apply res judicata and collateral estoppel are the same as those underlying the doctrines themselves—finality, protection of judgments, prevention of duplicative litigation, and avoidance of inconsistent results.”); *Miller v. Runyon*, 77 F.3d 189, 193 (7th Cir. 1996); *John Morrell & Co. v. Local Union 304A, United Food and Commercial Workers*, 913 F.2d 544 (8th Cir. 1990).

93. Alexander G. Osevala, Comment, *Let’s Settle This: A Proposed Offer of Judgment for Pennsylvania*, 85 TEMP. L. REV. 185, 195 (2012) (noting that there are over “200 federal and close to 2,000 state statutes that allow the shifting of attorneys’ fees”). These include civil rights statutes, *see, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2006); Civil Rights Attorney’s Fee Act of 1976, 42 U.S.C. § 1988(b) (2006), employment-related statutes, *see, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(k) (2006), and consumer rights statutes.

94. *See, e.g.*, *Purdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1674 (2010) (finding that enhancement of the lodestar may only be awarded in “rare” and “exceptional” circumstances).

95. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 24.13 (1995) (noting that in statutory fee cases “the lodestar is the appropriate method”).

96. *See* Gilles & Friedman, *supra* note at 3, at 668–72 (describing contracting strategies between public and private enforcers).

97. *See* 28 U.S.C. § 1920 (2008).

witness fees.”<sup>98</sup> Not all cases require expensive or extensive expert engagement, but for those that do, counsel will necessarily factor this cost into the initial determination of whether the case is worth the investment.

Second, the antecedent court proceeding may make available a list of injured victims, either through discovery or in the case of judicially mandated class notice.<sup>99</sup> Once lawyers can contact victims to explain the nature of the claim, they can structure a variety of agreements that would allow the claimant to transfer, assign, or pay a percentage of recovery upon success of her claim in arbitration. Because the attorney is acting for herself and not representing the claim holder in a legal proceeding, ethical restrictions should not stand in the way. For example, neither Model Rule of Professional Conduct 1.8(a), which imposes special duties on attorneys who seek to enter into a business transaction with a *client*, nor Model Rule 7.3(a), which prohibits direct solicitation of a *client* and limits an attorney’s freedom of action compared to an arbitration entrepreneur who is not an attorney, would apply to our model.<sup>100</sup>

The transaction costs of contacting each claimant and negotiating each retainer agreement will be high, but attorneys will have an incentive to run as many arbitrations as possible off a single liability judgment to increase their overall profit.<sup>101</sup> Also, we can imagine lawyers negotiating volume discounts on arbitration rates and neutrals’ fees,

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98. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 94, 99–100 (1991); *see also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).

99. This assumes that the information is not protected by a protective order—which typically limits information to the instances of the litigation for which it was produced—which is far more likely in a case brought on behalf of an arbitration-free client or when representing the state.

100. Model Rule 1.8(a) limits the circumstances under which a lawyer may enter into a “business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client.” MODEL RULES OF PROF’L CONDUCT R. 1.8(a) (2013). Model Rule 7.3(a) prohibits “in-person, live telephone or real-time electronic contact” to solicit *professional* employment. *Id.* R. 7.3(a) A lawyer may contact a nonclient to solicit a nonprofessional business relationship. *See, e.g.*, Ind. State Bar Ass’n Legal Ethics Comm., Formal Op. 1 (2002) (finding that a lawyer may contact nonclients to market financial products and may market financial products to clients as long as safeguards required by Model Rule 1.8(a) are observed).

101. It is not obvious that the transaction costs of aggregating small-value claims are necessarily prohibitive. In Australia, for example, litigation funding firms such as IMF (Australia) Ltd. have built a successful business model based on opt-in consumer class actions. *See CHRISTOPHER HODGES ET AL., LITIGATION FUNDING: STATUS AND ISSUES 55–57, available at* <http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf>. (“Absent legislative change that would enable a funder to recover from all members of a class (and such a rule would be highly questionable on constitutional grounds), the right to recovery has to be contractual. Thus, funders need to have contracted with all, or at least a sufficient number, of class members before committing their money.”).

which would also incentivize greater numbers of claims in order to reduce overall transaction costs.

Importantly, profit margins in these individual arbitrations would remain small—but because other costs can be significantly reduced or recouped on the hybrid model, any damages awarded in the individual arbitrations are gravy. Nevertheless, the low profit margins will make many claims unattractive to many lawyers, and more generally, will render this model an imperfect substitute for class action litigation. Still, we think the hybrid approach has the potential to be a “second best” in a world purged of the class action device, where lawyers experienced in aggregate litigation are seeking ways to ply their trade, and where the alternative is that vast numbers of small-value claims are simply never brought.<sup>102</sup>

#### IV. THE CLAIMS-BUYING MODEL

A second and complementary model envisions “arbitration entrepreneurs”—either lawyers or nonlawyers—buying up the claims of similarly situated plaintiffs and then filing a single arbitration seeking to collectively resolve the hundreds, or even thousands, of accrued claims.<sup>103</sup> To some extent, this model proceeds from fairly straightforward business principles: for example, the initial legal research and reconnaissance into the strength and value proposition of the legal claim, as well as its potential risks and costs, resembles the inquiry that any entrepreneur would undertake prior to investment. Pricing and purchasing the claims on the open market should also be fairly clear cut. The questions that this model provokes will center on the buying of legal claims and the bundling of those claims into a single arbitral hearing or a series of informally aggregated, streamlined hearings.

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102. Some commentators believe that class action lawyers are moving entirely away from fields typically associated with aggregate litigation. *See, e.g.*, Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform* (July 12, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=1878966>.

103. From the perspective of the claims-buying model, lawyers and nonlawyers are the same in every respect: A lawyer buying a claim and litigating it on her own behalf is not representing a client nor earning a fee (although they may be a client and may pay a fee to a lawyer who may be in fact, themselves). *See* *Ness v. Gurstel Chargo, P.A.*, 933 F. Supp. 2d 1156 (D. Minn. 2013).

Note that in at least one state (New York) attorneys are prohibited from purchasing legal claims for themselves from anyone. *See* N.Y. JUD. LAW § 488 (McKinney 2005) (“An attorney or counselor shall not . . . take an assignment of or be in any manner interested in buying or taking an assignment of a . . . thing in action, with the intent and for the purpose of bringing an action thereon.”).

### A. *Buying Claims*

Consumers have legally enforceable rights and obligations, which may have monetary value. For example, if a consumer has purchased a product, she has rights in warranty and tort law in the event of a legally cognizable injury.<sup>104</sup> The conventional way to transfer these rights is by assignment.<sup>105</sup> An assignment is the act of transferring to another all or part of one's property, interest, or rights.<sup>106</sup> While the transfer of legal claims was prohibited at early common law, the rule of nonassignability has been almost fully abandoned,<sup>107</sup> with the exception of personal injury claims.<sup>108</sup> Importantly, for the purpose of the claims-buying model, the modern law of assignment does not distinguish between purchases of single claims as opposed to multiple claims.<sup>109</sup>

Indeed, bulk assignment of claims has a long history in the United States,<sup>110</sup> as courts have come to recognize the benefits of bundling

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104. See Robert Cooter, *Commodifying Liability*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 139 (F. H. Buckley ed., 1999).

105. See Andrea Pinna, *Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims*, in *NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE: A LEGAL, EMPIRICAL, AND ECONOMIC ANALYSIS* 119 (Mark Tuil & Louis Visscher eds., 2010); see also Harold R. Weinberg, *Tort Claims as Intangible Property: An Exploration from an Assignee's Perspective*, 64 *KY. L.J.* 49 (1975).

106. 6 *AM. JUR. 2D Assignments* § 1 (2010).

107. See *Osuna v. Albertson*, 184 *Cal. Rptr.* 338, 345 (Ct. App. 1982) (noting "the tendency of modern jurisprudence [to] strongly favor[] the assignability and the survivability of things in action" (emphasis omitted)); *McKenna v. Oliver*, 159 *P.3d* 697, 699 (Colo. App. 2006) (finding that Colorado law generally favors the assignability of claims, with an exception for causes of action for invasion of privacy); *Conrad Bros. v. John Deere Ins. Co.*, 640 *N.W.2d* 231, 236 (Iowa 2001) ("[T]he law now generally favors the assignability of choses in action, and courts have permitted the assignment of insurance policies under statutes providing for the assignment of contracts in exchange for a money payment."); *Lemley v. Pizzica*, 36 *Pa. D. & C.2d* 327, 330 (Ct. Com. Pl. 1964) ("The trend of judicial decisions as to the assignability of certain causes of action is to enlarge, rather than to restrict the causes that may be assigned."); *Wis. Bankers Ass'n Inc. v. Mut. Sav. & Loan Ass'n*, 291 *N.W.2d* 869, 876 (Wis. 1980) (describing the principle of assignability as "exemplifying a trend of increasing commercial flexibility," shared by the courts and legislature).

108. This exception is enforced everywhere except in Texas. See, e.g., *Beech Aircraft Corp. v. Jinkins*, 739 *S.W.2d* 19, 22 (Tex. 1987) ("[A] cause of action for damages for personal injuries may be sold or assigned [in Texas].").

109. The Supreme Court has held that an assignee could purchase the contract claims of approximately 1,400 payphone operators against various major long-distance phone companies, even if the assignment required the assignee to return all of the damages recovered to the assignors (in exchange for a fee, the assignee took the claims "lock, stock, and barrel" and promised to remit "all proceeds" collected from the defendants to the assignors). *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 *U.S.* 269, 272, 286 (2008).

110. See, e.g., *McCord v. Martin*, 166 *P.* 1014, 1015 (Cal. Dist. Ct. App. 1917) (assignment of other shareholders' fraud claims to one shareholder to prosecute upheld); *Metro. Life Ins. Co. v. Fuller*, 23 *A.* 193 (Conn. 1891) (policyholders assigned claims to Fuller to prosecute after he had successfully sued the defendant in a prior proceeding; assignments were upheld against allega-

claims.<sup>111</sup> Nonetheless, barriers may persist against the purchase of claims by laypersons or lawyers.<sup>112</sup> In a minority of jurisdictions, legislation imposes limitations on the assignment of claims for speculation or profit.<sup>113</sup> Other states have held that bulk assignments for profit by parties without any connection to the underlying claim are against public policy.<sup>114</sup> In those states where bulk assignments are illegal, arbitration entrepreneurs could get around the prohibition, either by offering their services as “representatives” of the consumer in exchange for a large portion—perhaps all—of the recovery (minus a

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tions of champerty). In the *Sprint* opinion, *Sprint Commc'ns*, 544 U.S. at 283–84, Justice Breyer pointed to *Spiller v. Atchison, T. & S. F. R. Co.*, which involved approximately 2,000 individual claims assigned to a single assignee who then brought 2,000 suits in order to collect (and remit) the damages suffered by the assignors. *Spiller v. Atchison, T. & S.F.R. Co.*, 253 U.S. 117 (1920).

111. *E.g.*, *Fuller*, 23 A. at 196 (“It would manifestly be both useful and convenient to policyholders of the plaintiff residing in this state, who . . . having . . . just demands, the individual enforcement of which, to any persons in ordinary circumstances, would be so expensive and difficult as to amount to a practical impossibility, that a more fortunate person, of experience, ability, and inclination, should assist them, and wait for his compensation until the suits were determined, and be paid out of the fruits of it.”).

112. It should be noted that the purchase of claims to be arbitrated by an attorney in her own name is not the same thing as the purchase of a claim by an attorney from her client, which may raise serious ethical issues. *See* MODEL RULES OF PROF'L RESPONSIBILITY R. 1.8(i) (2013) (lawyer may not acquire an interest in cause of action of client). This does not prohibit a lawyer from purchasing a claim from a nonclient, though some states prohibit this practice by statute. *See, e.g.*, N.Y. JUD. LAW § 489 (McKinney 2005) (prohibiting an attorney from taking an assignment of a claim in order to bring suit upon it).

113. For example, New York's Judicial Law section 489 provides, in part, that no person or corporation shall “solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of . . . [a] thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon.*” N.Y. JUD. LAW § 489 (emphasis added). This restriction has been interpreted quite broadly, and allows for the purchase of legal rights, which *may* require litigation to be realized if informal means fail. As the New York Court of Appeals recently stated, § 489 distinguishes between an assignee “who acquires a right in order to make money from litigating it” and “one who acquires a right in order to enforce it.” *Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.*, 918 N.E.2d 889, 894 (N.Y. 2009).

114. *See, e.g.*, *Accrued Fin. Servs., Inc. v. Prime Retail, Inc.*, 298 F.3d 291 (4th Cir. 2002) (company with expertise in forensic accounting took assignments of the legal claims of commercial tenants in over fifty shopping malls and promised to remit to the assignors between 50%–60% of any discrepancies discovered and paid to the company by the assignors' landlords, some of which were in Maryland; this was held to violate Maryland public policy against champerty). Minnesotan courts have struck down bulk assignments to claims agents on behalf of landowners. *See, e.g.*, *Gammons v. Gulbranson*, 80 N.W. 779 (Minn. 1899); *Gammons v. Johnson*, 78 N.W. 1035 (Minn. 1899); *Huber v. Johnson*, 70 N.W. 806 (Minn. 1897). In these cases, the Minnesota Supreme Court held the conduct of all the parties—including the layperson who took partial assignments in the causes of action and the lawyer who sued the railroad—violated Minnesota's public policy. This is still good law in Minnesota.

small payment paid in advance),<sup>115</sup> or by buying a share of the underlying property interest for a token amount.<sup>116</sup>

### B. Challenges to Aggregating Purchased Claims

When our arbitration entrepreneur has purchased as many discrete claims as possible at the right price, she will then seek to resolve them all in a single arbitral session. The claim-buying model is contingent upon successfully aggregating purchased claims in the arbitral fora, as this is crucial for the entrepreneur to recoup the costs of investigating and purchasing the claims. We suspect that defendants faced with these massive aggregations will immediately call foul and assert, among other things, that contractual definitions of a “claim” subject to arbitration do not contemplate multitudes of individual claims bundled together to be decided as a collective.<sup>117</sup> Defendants are clearly uncomfortable with nonclass aggregation of arbitration claims, as illustrated by AT&T’s post-*Concepcion* response to three law firms’ efforts to sign up individual AT&T customers to arbitrate claims that the company’s proposed merger with T-Mobile violated the Clayton Act.<sup>118</sup> One of the firms, Bursor & Fisher, P.A., sued the FCC for the release of data relating to the merger, and then posted this informa-

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115. Arbitral bodies generally permit a consumer to have a representative appear on her behalf before the neutral, and this right is almost certainly part of the “best practices” endorsed by major arbitral bodies. See, e.g., *Principle 9: Comments*, in NAT’L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS’N, ARBITRATION CONSUMER DUE PROCESS PROTOCOL (2010) [hereinafter AAA ARBITRATION PROTOCOL], available at <http://www.in.gov/dfi/2623.htm> (“The right to be counseled by an attorney or other representative is an important one that is frequently reflected in standard rules governing ADR proceedings.”).

116. Ironically, Justice Breyer argued that the fact that a prohibition against assignment could be so easily circumvented by purchasing a share of the property interest at stake for a dollar supported the Court’s conclusion that there was no “practical” argument for barring mass assignments to claims agents. *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008). Chief Justice Roberts argued that the lack of any interest in the underlying claim made all the difference in the world for Article III standing: “‘When you [ain’t] got nothing, you got nothing to lose.’” *Id.* at 301 (Roberts, C.J., dissenting) (quoting BOB DYLAN, *Like a Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965)).

117. Joel D. Rosen & James B. Shrimp, *Yes to Arbitration, but Did I Also Agree to Class Action and Consolidated Arbitration?*, 30 FRANCHISE L.J. 175, 176 (2011) (“A franchisor might opt for the streamlined procedures and limited review of arbitration for a single dispute with a franchisee that involves limited monetary exposure; however, the franchisor might not opt for the streamlined procedures and limited review of the arbitration of dozens, if not hundreds or thousands, of claims brought in a consolidated or class action arbitration with millions of dollars at stake.”).

118. In June 2011, AT&T announced a \$39 billion takeover of T-Mobile that was immediately controversial. The Justice Department, the Federal Communications Commission and various state regulators objected to the merger, and in August 2011, the DOJ filed suit alleging the proposed merger violated section 7 of the Clayton Act. Complaint at 4, *United States v. AT&T Inc.*, No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011).

tion on its website, urging consumers to individually arbitrate their claims in order to block the merger.<sup>119</sup> The firms filed more than 1,000 individual demands for arbitration—each “almost identical to each other aside from the names and addresses of the claimants”<sup>120</sup>—before AT&T eventually enjoined the arbitrations on the grounds that the demand to block the merger exceeded the scope of the arbitration agreement.<sup>121</sup> We should expect similar responses from defendants faced with mass arbitrations under our claims-buying model, although such challenges are belied by the prominent example of claims-buying and aggregation in the debt collection industry, which we consider in detail in the final subsection.

Nearly every arbitration clause we have examined broadly defines a “claim” as a dispute or controversy between the parties. Presumably, once our arbitration entrepreneur has lawfully purchased the “claim,” she has the right to adjudicate it to judgment in accord with the terms of the arbitration agreement. It is fairly clear that, where the underlying agreement does not contemplate or explicitly prohibits class arbitration, our entrepreneur cannot aggregate her claims in that form.<sup>122</sup> But nothing in the underlying agreement nor in the FAA itself appears to preclude informal aggregation of claims by a single owner in a single hearing. Indeed, even the most aggressive peddlers of class action waivers require only that “all parties to the arbitration must be individually named” and proclaim that “there is no right or authority for any claims to be arbitrated on a class action or consolidated basis . . . or joined or consolidated with claims of other parties.”<sup>123</sup> But the legal entrepreneur would name each claimant from whom she purchased a claim in her notice of arbitration. Further, resolving all purchased, related claims in one fell swoop is not the equivalent of joinder or consolidation as those terms are used in the Federal Rules.<sup>124</sup> Nor is this form of aggregation a class action, as it does not

119. See Scott A. Bursor, *Victory!*, FIGHT THE MERGER, <http://www.fightthemerger.com> (last visited June 26, 2013).

120. AT&T Mobility LLC v. Bernardi, Nos. C 11-03992 CRB, C 11-04412 CRB, 2011 WL 5079549, at \*2 (N.D. Cal. Oct. 26, 2011).

121. See, e.g., AT&T Mobility LLC v. Smith, No. 11-cv-5157, 2011 WL 5924460 (E.D. Pa. Oct. 7, 2011); AT&T Mobility LLC v. Gonnello, No. 11 Civ. 5636(PKC), 2011 WL 4716617 (S.D.N.Y. Oct. 7, 2011); AT&T Mobility LLC v. Bushman, No. 11-80922-CIV, 2011 WL 5924666 (S.D. Fla. Sept. 23, 2011).

122. See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1773–76 (2010) (finding that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to class arbitration).

123. AmEx Agreement, *supra* note 77.

124. While there seems currently to be no formal right of a participant in arbitration to demand that her arbitrations be scheduled on the same day if she has multiple claims against the same opponent, there is some evidence that arbitral bodies have, in the past, accommodated this



seek to meet the procedural requirements of Rule 23 and does not bar subsequent claims.<sup>125</sup>

### C. A Case Study: Small-Value Debt Collection Litigation

Despite the economic inefficiencies inherent in pursuing small-value claims, companies are nonetheless expending a great deal of time, money, and effort doing just that.<sup>126</sup> The nation's most vigorous civil law enforcement is the consumer debt collection industry, where professional companies pursue claims against consumers involving relatively small amounts.<sup>127</sup> Typically, these consumer debts are purchased for 4% of face value, a discount which reflects that “[d]ebt buyers typically do not attempt collections on all accounts they purchase, do not usually realize recoveries on every account for which collections are attempted, and do not typically recover the full face value on accounts for which they do realize recoveries.”<sup>128</sup> The basic

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rather simple and easy request. One arbitral body, the National Arbitration Forum (NAF), created a subsidiary (Forthright) whose purpose was to administer arbitrations on behalf of corporate clients who were plaintiffs in the hundreds of thousands of arbitrations brought before its neutrals. During Forthright board meetings, board members discussed “methods to increase the number of *large batch claims* being processed by arbitrators.” Complaint at 23, *State v. Nat'l Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009) (emphasis added), available at <http://www.ag.state.mn.us/pdf/pressreleases/signedfiledcomplaintarbitrationcompany.pdf>. The practicality of such coordination (and the pretextual nature of any objection from defendants party to the arbitration agreement) is illustrated by the best practices recommended by the AAA, which strongly encourages the use of remote arbitrations. See *Principle 7: Practical Suggestions*, in AAA ARBITRATION PROTOCOL, *supra* note 115 (“In some cases, it may be reasonable to conduct proceedings by telephone or electronic data transmission, with or without submission of documents. *Such options may be particularly desirable in the case of arbitration of small claims*, since the parties have the choice of going to small claims court.” (emphasis added) (citation omitted)).

125. The Court rejected the argument that mass assignments by multiple claimholders to a single claims agent who would litigate on their behalf was a “circumvention” of Rule 23. See *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 290–91 (2008). As the court noted in that case—which, we recognize, was not a mass arbitration but a mass lawsuit—class actions “are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum.” *Id.* at 291. We couldn't agree more, and the claims-buying model should be seen as a separate but parallel legal pathway to achieve many (but not all) of the same goals as a class action.

126. See Goldberg, *supra* note 39, at 742–43.

127. The FTC reports that the average face value of the consumer debt accounts purchased by companies whose only purpose is to sue on those accounts is \$1,348. JON LEIBOWITZ ET AL., FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, app. tbl.2 (2013) [hereinafter FTC REPORT]. The face value of the accounts purchased is not an accurate measure of the value of the claim made by the debt buyers as plaintiffs, since the debt sold is “charged off” debt, which means that the original owner of the debt (a bank) has determined that it was unlikely to recover it. *Id.*

128. *Id.* at 23 (footnotes omitted).

business model is to cast a broad net in the hope of catching a small piece of a portion of a large portfolio.<sup>129</sup>

Given a purchase price of four cents to the dollar, the actual recovery for any claim that is made (and there is no reason to assume that debt buyers make a claim on every debt they purchase) is most likely a fraction of the original face amount. For the debt buyer to turn a profit, however, the actual recovery must still be greater, in the aggregate, than his information and transaction costs, plus his original investment in the aggregate. Given that information and transaction costs typically exceed the compensation that any single case can produce, there is no reason to believe that merely aggregating small-value consumer cases changes that equation. Aggregation of a small-value claim without an additional source of savings merely reproduces the negative-value problem in bulk.<sup>130</sup> So how do the debt buyers enforce their legal rights without losing money?<sup>131</sup> They sue.

The number of cases filed against consumers by debt buying companies in recent years is staggering. A 2010 report from the National Consumer Law Center, based on data gathered by journalists and other sources, gave a snapshot of the volume of the litigation: Between 2000 and 2005 debt collectors in Massachusetts filed 575,000 lawsuits, or 60% of all that state's civil lawsuits.<sup>132</sup> Minnesota saw the volume of debt collection lawsuits double between 2006 to 2008, and default judgments rose 58% in a single year.<sup>133</sup> In the San Francisco

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129. *Id.* at 23 n.21 (“[Debt] buyers hope to make a profit by collecting at least a small percentage of [the accounts they purchase].” (alteration in original) (quoting RACHEL TERP & LAUREN BROWN, PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW 3 (2011))).

130. This is assuming that the variation in compensatory awards in small-value cases is not large and that the average compensatory award in a small-value case does not exceed the average sum of the information and transaction costs in an individual small-value case.

131. Some have suggested that debt buyers are able to keep transaction costs low by seeking payment by informal means, such as telephone calls and other contacts. See RICK JURGENS & ROBERT J. HOBBS, NAT’L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 6 (2010). But others observe that informal collection methods are decreasing, not increasing, as the ownership of debt moves from the original debt holders to professional debt purchasers. See JON LEIBOWITZ ET AL., FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 5 (2010) [hereinafter FTC, A BROKEN SYSTEM] (“Collectors may also employ litigation more quickly than in the past; industry sources ‘have noted that the growth of the debt-buying industry has resulted in increases in collection lawsuits because entities that purchase delinquent debt often use collection law firms as their *primary tool for recovery.*’” (emphasis added) (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 41 (2009))).

132. JURGENS & HOBBS, *supra* note 131, at 13 (“In Boston, 40,000 debt collection suits accounted for 85 percent of all small claims cases over a five year period.”).

133. *Id.* at 16.

Bay Area, lawsuits filed to collect consumer debt rose from 53,700 in 2007 to 96,000 in 2009.<sup>134</sup> In New York City, “researchers concluded that a surge in debt collection lawsuits was a major contributor to a near tripling in all civil court lawsuits, from 213,000 in 2000 to 618,000 in 2007.”<sup>135</sup> The use of outside attorneys ballooned to meet the demand of debt buyers. One debt buyer, Encore Capital Group, which hires outside law firms to do collections and bring its claims on a contingency fee basis, filed almost 450,000 lawsuits in 2008, which was an 18% increase over 2007. Portfolio Recovery Associates, Inc., which also used contingent fee firms, saw its legal fee expenses increase 14% in 2007, from \$29 million to \$33 million.<sup>136</sup> Academic research supports these observations.<sup>137</sup>

And it is not simply that debt collection companies are inexhaustible litigators, but that they have learned how to litigate on the margins in a highly cost-effective manner. Partly, this is a function of the lack of competition within the industry: the FTC reports that, even though “there do not seem to be significant barriers to entry into the debt buying industry,” the industry is dominated by “large debt buyers [who] purchase most debt.”<sup>138</sup> For example, one study of Indiana consumer debt litigation found that thirteen debt buying firms accounted for 79% of all filings, with one firm dominating the docket by filing 22% of all consumer debt plaintiff suits.<sup>139</sup> A similar pattern was found in Dallas: two firms appeared in 36% of all the consumer debt suits, and five plaintiffs comprised 64% of all the suits filed.<sup>140</sup>

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134. *Id.*

135. *Id.* (citing CONSUMER RIGHTS PROJECT, MFY LEGAL SERVS. INC., JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW YORK 5 (2008)).

136. *Id.*

137. See, e.g., Judith Fox, *Do We Have a High Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER. L. REV. 355, 370 (2012) (noting an increase in the civil docket between 2005 and 2009 in Indiana due to debt collection cases); Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 24–25 (2008) (“[T]he overwhelming majority of civil suits filed in Virginia are consumer debt collection filings, and the evidence suggests that consumer debt collection accounts for a very high percentage of the civil filings of other states.” (footnote omitted)); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 279 (2011) (describing debt buyer cases as making up a “sizeable portion” of the Dallas County docket).

138. FTC REPORT, *supra* note 127, at 14. In 2008, nine companies bought 76.1% of all consumer debt (with a face value of \$55 billion)—and 78% of that was bought directly from credit card issuers who, presumably, found it too expensive to try to enforce their legal rights. *Id.* at 14, app. tbl.1.

139. Fox, *supra* note 137, at 372.

140. Spector, *supra* note 137, at 280.

The concentration of claiming by a handful of firms necessarily produces a form of specialization. And, in turn, specialization by its very nature produces economies of scale by reducing both information and transaction costs. Finally, where there is concentration and specialization, cost-effective aggregation of like claims becomes possible. Not only are information and transaction costs reduced by lowering the cost of regularly performing certain tasks (or getting certain information) as compared to an individual who completes such tasks only occasionally, but also by transforming these tasks so they can be efficiently performed for thousands, if not tens of thousands, of similar legal claims.<sup>141</sup>

The debt collection industry has used the high volume of claims to take advantage of two features of small-claims courts: (1) the high default rate by defendant consumers;<sup>142</sup> and (2) the minimum factual foundation required by the fora to sustain a default judgment.<sup>143</sup> These two factors combine to lower the cost of making a claim by reducing transaction costs to a minimum and information costs to potentially near zero, since the risk of being challenged on the factual foundation of the claim is, it turns out, close to zero.

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141. There is some evidence that this is exactly what has happened after the debt buying industry took over the enforcement of the banks' and other creditors' legal rights. The main innovation was to figure out how to turn arbitration and small claims courts into creditor–plaintiff “judgment mills.” See Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 272 (2011) (“[S]mall claims courts’ have in reality become ‘creditor’s courts’ . . . .”); see also JURGENS & HOBBS, *supra* note 131, at 13 n.45 (“A large debt buyer said that filing cases against debtors in small claims and similar courts ‘allows us to work accounts that we would not normally pursue through the use of contingent fee collection attorneys because of cost.’” (quoting PORTFOLIO RECOVERY ASSOCS., FORM 10-K/A, at 11 (2008))).

142. See, e.g., FTC, A BROKEN SYSTEM, *supra* note 131, at 7 & n.18 (estimating that the rate of default judgments in consumer debt cases in small claims court is 60%–95%); CMTY. DEV. PROJECT, URBAN JUSTICE CTR., DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 21 (2007) (80%); CLAUDIA WILNER & NASOAN SHEFTEL-GOMES, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 1 (2010) (90%–95%); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 119 (1997) (70%–90%); Fox, *supra* note 137, at 379 (74%).

143. Spector concluded that more than 95% of the complaints filed by consumer debt plaintiffs in Dallas County “failed to provide any information regarding date of default or calculation of the amount allegedly owed, allegations the FTC suggests are necessary to insuring due process.” Spector, *supra* note 137, at 298. A further reason why debt buyers are rational to invest so little in information about their cases is that they can limit their losses if a defendant answers the complaint and challenges the plaintiff’s claim in court. As Spector observed in Dallas, there were a surprising number of voluntary dismissals without prejudice in the cases she observed when the defendant appeared (62%, but 75% if a lawyer appeared with the defendant). *Id.* at 295.

The debt buying industry's experience with mass small-value litigation has important lessons for us. First, while much of the mass litigation action has taken place in small-claims court in recent years, the debt buying industry initially launched its mass claiming campaign in the arbitral fora.<sup>144</sup> Plainly, these creditors perceived no legal barriers to exercising their rights under their contracts to arbitrate hundreds of thousands of claims. The arbitral bodies were able to handle the flood of cases, but only because they were dealing with a group of highly concentrated specialty debt purchasers who were repeat players before the neutrals.<sup>145</sup> Business Week described a firm that had grown to more than 1,000 employees and twenty-four offices, operated two call centers, and "had an infrastructure that supported 35,000 lawsuits per month, 20,000 arbitration filings per month and \$55 million in collections per month."<sup>146</sup>

Second, however, it is not clear the arbitral bodies are similarly equipped to handle the large volume of claims that arbitration entrepreneurs may bring to them on a claims-buying model in the post-class action era. In its 2010 report, the FTC concluded that consumer debt arbitration "failed" to provide consumers with "meaningful choice" and was not "fair to creditors, collectors, and consumers."<sup>147</sup> The justification for arbitration (and the sacrifice of traditional elements of adjudication) had not been realized, and the problem did not lie just in one "bad apple" like the NAF. Even the AAA's specialized consumer debt arbitration program was a dismal failure in part because 97.8% of consumers did not participate, which resulted in default

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144. See STAFF OF DOMESTIC POLICY SUBCOMM. OF THE H. COMM. ON OVERSIGHT & GOV'T REFORM, 111TH CONG., JUSTICE OR AVARICE: THE MISUSE OF LITIGATION TO HARM CONSUMERS 3-4 (2009) (describing the shift from arbitration to small claims court in consumer debt cases).

145. In 2006 the National Arbitration Forum heard 214,000 consumer debt arbitration claims, of which 125,000 were filed by two law firms (who also partly owned the companies that owned the debt). See *In re Nat'l Arbitration Forum Trade Practices Litig.*, 704 F. Supp. 2d 832, 835 (D. Minn. 2010). The number of arbitrators used to process this flood of cases was extraordinarily small, and the speed with which they disposed of the cases was remarkable. See Press Release, Public Citizen, Mandatory Arbitration Stacks Deck Against Credit Cardholders, Data Show (Sept. 27, 2007), available at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=2519> ("90 percent of the NAF cases were handled by just 28 arbitrators, who awarded businesses \$185 million. One arbitrator handled 68 cases in a single day—an average of one every seven minutes, assuming an eight-hour day . . .").

146. See ROBERT J. HOBBS & RICK JURGENS, NAT'L CONSUMER LAW CTR., FORCED ARBITRATION: CONSUMERS NEED PERMANENT RELIEF 10 (2010) (quoting Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESSWEEK, June 16, 2008, at 72).

147. FTC, A BROKEN SYSTEM, *supra* note 131, at 40-41.

judgments for creditors in 95.2% of the cases they brought before the arbitrators.<sup>148</sup>

We recognize, therefore, that the post-class action era poses both an opportunity and a challenge to entrepreneurs who want to do well by “doing good” for consumers. If the promise of mass arbitration for consumers becomes a reality, stakeholders in the arbitral profession will have to work together to help the major arbitral bodies develop structures that are large and robust enough to handle thousands of claims. The leading arbitral bodies have, until now, rarely attempted to process claims at this scale, and when they did, they failed miserably. An explicit commitment to developing truly meaningful mechanisms for virtual hearings and efficient scheduling are at the top of our list, and we see no legal reason why consumers cannot demand this sort of accommodation.<sup>149</sup>

## V. CONCLUSION

We have described two possible models that might overcome the anti-aggregation jurisprudence of recent years. Neither is a sure bet; both face serious challenges, and even if used in tandem by sophisticated legal risk takers, these approaches do not provide a very satisfactory substitute for class action litigation. But if we still believe that, in this post-class action moment, sound public policy requires that some form of aggregative procedure be available for small-claims plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings, then we must begin to examine second-best proposals, as imperfect as they may be. The alternative is too grim to conceive.

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148. See Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 92 & tbl.3 (2011). The program was designed to process thousands of claims brought by a single creditor against consumers. See *id.* at 104–05 (describing the program). This disappointing result is consistent with the FTC’s conclusion, which was that “over ninety percent of consumers do not participate in [consumer debt] arbitration.” FTC, A BROKEN SYSTEM, *supra* note 131, at 54. This estimate was based on a submission from Richard W. Naimark of the AAA. *Id.* at 54 n.268.

149. In fact, we would be curious to know why a defendant would resist an arbitration entrepreneur’s reasonable demands for this sort of flexibility. If arbitral bodies failed to adopt these mechanisms, then state legislatures could require them. We would be even more curious to know under what interpretation of the FAA a federal court would hold that such state regulation is inconsistent with Congress’s goal of promoting arbitration as an alternative to litigation.

