

## Employment Arbitration After the Revolution

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## EMPLOYMENT ARBITRATION AFTER THE REVOLUTION

David Horton\* & Andrea Cann Chandrasekher\*\*

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### INTRODUCTION: THE ARBITRATION REVOLUTION

In 2013, Keeya Malone brought a wage and hour class action against her former employer, California Bank & Trust (CB&T).<sup>1</sup> In response, CB&T cited three provisions in Malone’s employment handbook.<sup>2</sup> The first required her to arbitrate any dispute against the company.<sup>3</sup> The second waived her right to file or participate in a class-wide arbitration.<sup>4</sup> And the third was a delegation clause, which gave the arbitrator—not a court—exclusive jurisdiction to decide the very question of whether the arbitration clause was enforceable.<sup>5</sup>

In some ways, CB&T’s defense strategy was nothing new. In 1925, Congress passed the Federal Arbitration Act (FAA)<sup>6</sup> to make arbitration provisions presumptively enforceable.<sup>7</sup> Although lawmakers did

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 1. *Malone v. Superior Court*, 173 Cal. Rptr. 3d 241, 243–44 (Cal. Ct. App. 2014).  
 2. *Id.* at 244–45.  
 3. *Id.* at 244.  
 4. *Id.* at 245.  
 5. *Id.*  
 6. Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)).  
 7. 9 U.S.C. § 1.

not intend the statute to cover employment agreements,<sup>8</sup> the U.S. Supreme Court extended the FAA into the workplace in 2001,<sup>9</sup> opening the door for companies to funnel their nonunionized employees' grievances outside of the judicial system.<sup>10</sup>

The privatization of employment disputes has sparked fierce debate. Some courts and scholars see arbitration provisions in employment contracts as particularly coercive. After all, unlike consumers, who can usually decide not to buy an item if they object to the fine print, "few employees are in a position to refuse a job because of an arbitration requirement."<sup>11</sup> In addition, these critics argue that arbitration's loose procedural and evidentiary rules dilute employees' rights, and arbitrators—who, unlike judges, bill by the hour—have financial incentives to appease the repeat-playing employers who are in the position to select them again in future cases.<sup>12</sup> Conversely, propo-

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8. To be sure, the statute's centerpiece, § 2, sweeps broadly and makes arbitration clauses in "contract[s] evidencing a transaction involving [interstate] commerce" presumptively enforceable. *Id.* § 2. But before the New Deal, most employment agreements did not affect interstate commerce. Thus, only workers who literally moved between jurisdictions would have fallen within § 2. In fact, lawmakers took pains to exclude this very class of individuals, specifying in § 1 that the FAA did not govern "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce." *Id.* § 1. Then-Secretary of Commerce Hebert Hoover proposed this language to assuage organized labor, which had objected to the "inclusion of workers' contracts in the law's scheme." Letter from Herbert Hoover, Sec'y of the Dep't of Commerce, to Senator Thomas Sterling (Jan. 31, 1923) reprinted in *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong.* 14 (1923).

9. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that § 1 only exempts transportation workers). A decade earlier, the Court foreshadowed this conclusion by requiring a plaintiff to arbitrate his Age Discrimination in Employment Act claim against his employer. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (noting that the plaintiff waived the argument that he fell within the scope of § 1's exclusion).

10. Arbitration clauses in collective bargaining agreements fall under § 301 of the Labor Management Relations Act of 1947 (LMRA). Pub. L. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 401-531 (2012)).

11. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000); see Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 292-93 (1998).

12. See, e.g., Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 134 (1996) ("A danger exists that the decisions of some arbitrators may be motivated, at least in part, by a desire to secure their own future employment."); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 684-685 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1046 n.196 (1996) ("While arbitrators are not accountable to the public, they may be accountable to the repeat players in the arbitral world—those who pick arbitrators on a regular basis."); David M. Kinnecome, Note, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B.U. L. REV. 745, 762 (1999); see also, e.g.,

nents of extrajudicial dispute resolution argue that its speed, informality, and relative cheapness pave the way for employees with modest claims.<sup>13</sup> Seen this way, arbitration increases access to justice by creating a forum for plaintiffs who are shut out of the court system.<sup>14</sup>

But, as the arc of Malone's lawsuit illustrates, these issues have taken a sudden turn. For decades, courts balanced the rival views of extrajudicial dispute resolution by reviewing arbitration clauses for fairness.<sup>15</sup> For instance, California once invalidated delegation clauses in employment contracts on the ground that arbitrators have "a unique self-interest in deciding that a dispute is arbitrable."<sup>16</sup> Likewise, the California Supreme Court held that class arbitration waivers could be unconscionable if they prevent employees from banding together to seek redress for many low-value causes of action.<sup>17</sup> Recently, though, in *Rent-A-Center, West, Inc. v. Jackson*,<sup>18</sup> the U.S. Supreme Court upheld a delegation provision in the employment setting.<sup>19</sup> A year later, in *AT&T Mobility LLC v. Concepcion*,<sup>20</sup> the Court determined that the FAA eclipsed the California rule that ex-

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Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401; David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 38. This repeat-player critique owes its genesis to Marc Galanter, who famously argued that parties who were regularly embroiled in litigation enjoyed advantages that "one-shotters" did not. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-101 (1974).

13. See, e.g., Samuel Estreicher, *Predispute Agreements To Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349-52 (1997); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001) [hereinafter Estreicher, *Saturns for Rickshaws*]; David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99-100 (1999).

14. Estreicher, *Saturns for Rickshaws*, *supra* note 13, at 563.

15. See, e.g., *Armendariz*, 6 P.3d at 690-95.

16. *Ontiveros v. DHL Exp. (USA), Inc.*, 79 Cal. Rptr. 3d 471, 480-82 (Ct. App. 2008), *abrogation recognized by Pinela v. Neiman Marcus Grp., Inc.* 190 Cal. Rptr. 3d 159 (Ct. App. 2015).

17. *Gentry v. Superior Court*, 165 P.3d 556, 564 (Cal. 2007), *abrogation recognized by Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014) (extending *Discover Bank* to an employment class action); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that class arbitration waivers in consumer contracts can be unconscionable when applied to cases that "predictably involve small amounts of damages" and feature allegations that the drafter "deliberately cheat[ed] large numbers of consumers out of individually small sums of money").

18. 561 U.S. 63 (2010).

19. *Id.* at 72.

20. 563 U.S. 333 (2011).

empted numerous small-dollar claims from class arbitration waivers.<sup>21</sup> Thus, in 2010, when CB&T fired Malone, none of its private procedural rules would have been valid. However, by the time Malone's case reached the California court of appeals in 2014, the opposite was true. Her challenge to the class arbitration waiver was almost certainly doomed.<sup>22</sup> And, in any event, the delegation provision required her to address this argument to the arbitrator.<sup>23</sup>

The Court's recent cases have deepened the rift between arbitration skeptics and proponents. For instance, David Schwartz has faulted *Rent-A-Center* for playing ostrich with the fact that arbitrators are unlikely to annul arbitration clauses when doing so means alienating a repeat-playing firm and dismissing a lucrative case at its inception.<sup>24</sup> Likewise, J. Maria Glover,<sup>25</sup> Judith Resnik,<sup>26</sup> and Jean Sternlight<sup>27</sup> have argued that *Concepcion* liberates businesses from liability by destroying incentives for plaintiffs to pursue low-value claims. The National Labor Relations Board (NLRB) has declared that class arbitration waivers in employment contracts violate the National Labor Relations Act (NLRA)<sup>28</sup>—a view that academics have embraced<sup>29</sup> but courts have rejected.<sup>30</sup> Finally, commentators have

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21. *Id.* at 351–52. Two years later, the Court extended *Concepcion's* logic and required negative-value, federal statutory claims to be arbitrated on an individual basis. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

22. See *Malone v. Superior Court*, 173 Cal. Rptr. 3d 241, 253 (Ct. App. 2014) (noting that *Concepcion* precluded a court from “forcing the parties to arbitrate on a class basis when they had not agreed to do so”).

23. See *id.* at 254–56.

24. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 246–48 (2012).

25. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3070–71 (2015).

26. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2893 (2015); 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, *passim* (2011).

27. Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 721–22 (2012).

28. The NLRA guarantees employees' rights to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2012). In *D.R. Horton, Inc.*, the NLRB declared that this provision invalidated a class arbitration waiver in an employment contract. 357 N.L.R.B. No. 184, 6–8, 2012–2013 NLRB Dec. (CCH) ¶ 15,546 (Jan. 3, 2012), *enforcement granted in part, rev'd in part* by *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The Board recently reaffirmed this holding. See *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2, 2014–2015 NLRB Dec. (CCH) ¶ 15,878 (Oct. 28, 2014) (acknowledging the rejection by the U.S. Court of Appeals for the Fifth Circuit, but, after independent reexamination, affirming *D.R. Horton*).

29. See, e.g., Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 179 (2014); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted*

called for Congress to reinstitute class arbitration or ban predispute arbitration clauses in employment contracts by passing the Arbitration Fairness Act of 2013 (AFA).<sup>31</sup>

However, the business community has rallied around the Court's opinions. Members of this camp claimed that the repeat-player critique lacks empirical support.<sup>32</sup> In addition, they argued that *Concepcion* actually benefits workers by encouraging employers to use arbitration in the first place.

No company would willingly enter into arbitration agreements if the price were to require class arbitration whenever an employee claimed to be acting on behalf of a putative class. That would harm employees, because for the most common employment disputes—individual claims too small to attract a contingent-fee lawyer—the choice is ‘arbitration—or nothing.’<sup>33</sup>

Accordingly, the argument concludes that banning class arbitration waivers or enacting the meat-cleaver AFA “would make worse off the very people whom Congress is seeking to protect.”<sup>34</sup>

This Article, an invited contribution to the Twenty-First Annual Clifford Symposium: *The Supreme Court, Business and Civil Justice*, hosted by the *DePaul Law Review*, holds these competing views to the fire by examining 5,883 matters brought by employees in the Ameri-

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*Dispute Resolution*, 64 ALA. L. REV. 1013, 1017–18 (2013). See generally Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164 (2013) (examining the procedural posture and history of *D.R. Horton*).

30. See, e.g., *D.R. Horton*, 737 F.3d at 362; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 142 (Cal. 2014).

31. See, e.g., Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 468 (2011); Sternlight, *supra* note 27, at 726; Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 55–56 (2014); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 793 (2012). See generally S. 878, 113th Cong. (2013). The AFA would nullify any provision that “requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” *Id.* § 402(a).

32. E.g., Hans A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, in Legal Memorandum No. 97 from the Heritage Foundation 10 (July 17, 2013), [http://thf\\_media.s3.amazonaws.com/2013/pdf/lm97.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/lm97.pdf). (“Some opponents argue that arbitrators have a strong incentive to favor business clients because they are repeat players in arbitration. . . . [H]owever, the empirical research does not support that claim.”).

33. Brief for Amicus Curiae Cal. Emp’t Law Council in Support of Affirmance at 17, *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072 (9th Cir. 2013) (No. 12-55578), 2012 WL 6801859, at \*17 [hereinafter Brief for Amicus Curiae], (citation omitted) (quoting Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008)).

34. von Spakovsky, *supra* note 32, at 11 (quotation omitted).

can Arbitration Association (AAA) between July 1, 2009 and December 31, 2013. Our goal is to shed light on what actually happens inside the arbitral forum after *Rent-A-Center* and *Concepcion*.<sup>35</sup> In addition, we expand on another article, “After the Revolution: An Empirical Study of Consumer Arbitration” (“Consumer Arbitration”), which focuses on consumer cases initiated during the same period.<sup>36</sup>

We first examine filings. We find little support for the argument that employment arbitration creates a conduit for “individual claims too small to attract a contingent-fee lawyer.”<sup>37</sup> Indeed, few employees bother to arbitrate low-value complaints. At the same time, though, *Concepcion* has changed the environment in the arbitral forum. As the class action has receded, plaintiffs have responded by pursuing more individual arbitrations against large companies. Although this phenomenon is more acute in the consumer setting, it also impacts firms that arbitrate both consumer and employment disputes, increasing their fluency with the AAA process.

We then consider arbitral awards. We find that employees “win”—defined as recovering \$1 or more—18% of matters. These successful plaintiffs recovered an average of \$203,362, with a median of \$52,129. We then perform logit regressions to investigate the impact of several variables on case outcomes. We conclude that employees are less likely to be victorious when they face a “high-level” or “super” repeat-playing employer (collectively “extreme repeat players”). Con-

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35. There is rich empirical literature on employment arbitration that uses data from before the Court’s game-changing decisions. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGEORGE L. REV. 223, 232–35 (1998) [hereinafter Bingham, *Statistics*] (examining a range of studies that have dates prior to 2000 as examples); see, e.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189–90 (1997) [hereinafter Bingham, *Repeat-Player Effect*] (examining a 270 case sample of awards decided under the AAA Commercial Arbitration Rules and the AAA Employment Dispute Resolution Rules); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. LEGAL STUD. 1 (2011) (analyzing arbitration outcomes on cases from 2003–2007); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44 (conducting empirical research on the outcome of employment disputes); Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91 (2014) (using surveys to assess lawyers’ perceptions of how arbitration affected their client’s claims); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003); J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113 (2014).

36. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63 (2015).

37. Brief for Amicus Curiae, *supra* note 33, at 17.

versely, we determine that a company's status as an extreme repeat player does not affect award amounts. Similarly, the fact that a case involves a "repeat pairing"—an employer that has appeared at least once before the same arbitrator—does not influence win rates or damage levels.

The Article contains two main Parts. The first describes our dataset and sample selection process. The second analyzes filed and awarded cases.

## II. DATA DESCRIPTION AND SAMPLE SELECTION

Section 1281.96 of the California Code of Civil Procedure requires entities that offer conflict resolution services to publish data about matters arising from employer-drafted arbitration clauses.<sup>38</sup> This information must include the type of dispute, the claim amount, the identity of the employer, the number of times the employer has appeared before the arbitration provider, the identity of the employee's lawyer, the opening and closing dates, the prevailing party, the name of the arbitrator, the arbitrator's fees, and the amount of any award.<sup>39</sup> Of the eight entities that are currently attempting to satisfy this mandate,<sup>40</sup> the AAA's disclosures are the most complete and easiest to use.<sup>41</sup> Thus, like previous researchers,<sup>42</sup> we decided to exclusively focus on cases administered by that institution.

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38. CAL. CIV. PROC. CODE § 1281.96(a) (West 2015). On its face, the statute only covers "consumer arbitration[s]." *Id.* However, some of its disclosure mandates suggest that it also extends to the employment sphere. *See id.* § 1281.96(a)(2) (requiring the arbitration provider to divulge "the employee's annual wage" if a dispute "involve[s] employment"). Likewise, the California Judicial Council has interpreted the law to cover cases stemming from an "employee's employment or [an] applicant's prospective employment." ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, STANDARD 2(e)(4) (last amended and effective as of Jan. 1, 2003), [http://www.courts.ca.gov/documents/ethics\\_standards\\_neutral\\_arbitrators.pdf](http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf).

39. CAL. CIV. PROC. CODE §§ 1281.96(a)(1)–(9).

40. *See, e.g., Commercial Arbitration Disclosures*, JUDICATE W., <http://judicategwest.com/Resources/ConsumerArbDisclosures> (last visited Nov. 2, 2015); *Consumer Arbitration Disclosures*, ADR SERVICES, INC., <http://www.adrservices.org/disclosure.php> (last visited Feb. 6, 2015); *Consumer Arbitration Statistics*, AM. ARB. ASS'N, <https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat> (last visited Feb. 6, 2015); *Consumer Case Information*, JAMS, <http://www.jamsadr.com/consumercases> (last visited Feb. 6, 2015); *Disclosures*, ALT. RESOL. CENTERS, <http://www.arc4adr.com/consumerreporting.html> (last visited Feb. 6, 2015); *Disclosures by the OIA*, OFF. INDEP. ADMIN., <http://www.oia-kaiserarb.com/11/consumer-case-information/disclosures-by-the-oia> (last visited Feb. 6, 2015); *Disclosures for California Consumer Arbitrations*, RESOL. REMEDIES, <http://www.resolutionremedies.com/disclosures.asp> (last updated Oct. 28, 2015); *NAM Disclosures for California Consumer Arbitrations*, NAM, [http://www.namadr.com/consumer\\_cases\\_main.cfm](http://www.namadr.com/consumer_cases_main.cfm) (last visited Feb. 6, 2015).

41. Other companies' reports "either omit[] categories of information entirely or report[] information inconsistently." DAVID J. JUNG ET AL., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96, at 1 (2013).

Unfortunately, there are limitations to this approach. For one, because Section 1281.96 only governs employer-promulgated arbitration provisions, it does not cover individually negotiated contracts. This may be significant because scholars have suggested that wealthier employees may bring different kinds of claims and prevail more often than their lower-income counterparts.<sup>43</sup> Thus, our analysis only pertains to adhesive arbitration provisions not employment arbitration generally.

The AAA disclosures also leave much to be desired. Section 1281.96 does not require the organization to identify an employee's causes of action, report filing fees or administrative costs, or distinguish between compensatory and punitive damages. Perhaps worst of all, the AAA spreadsheet is often missing key variables. Three thousand two hundred and eighty-eight of the 5,883 entries (56%) list the employee claim amount as zero.<sup>44</sup> Although plaintiffs sometimes request equitable relief instead of damages, we doubt that all of the purportedly nonmonetary cases have been correctly reported. Similarly, twenty awarded matters state that the employee was the "prevailing party" but contain no award amount.<sup>45</sup> We will try to be clear about how these glitches affect our analysis.

Finally, selecting the AAA over its rival service providers might skew our results. To its credit, the AAA has passed due process protocols for employment cases.<sup>46</sup> For instance, in disputes arising out of employer-promulgated agreements, the AAA caps an employee's filing fee at \$200 and requires the company to pay the arbitrator's compensation.<sup>47</sup> Likewise, the institution has taken pains to try to establish a fair process for choosing an arbitrator. Unless the parties' contract states otherwise, the AAA sends them a list of candidates and allows them to strike specific names.<sup>48</sup> The institution also re-

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42. *E.g.*, Colvin, *supra* note 35 (using the Section 1281.96 disclosures to analyze employment arbitration awards filed by the AAA). R

43. *See, e.g.*, Eisenberg & Hill, *supra* note 35, at 48 (suggesting that in noncivil rights disputes, higher-paid employees prevailed in higher rates than lower-paid employees). R

44. Am. Arbitration Ass'n, AAA Employment Spreadsheet [hereinafter AAA Spreadsheet] (on file with author).

45. *Id.*

46. AM. ARBITRATION ASS'N, RESOLVING EMPLOYMENT DISPUTES: A PRACTICAL GUIDE 6 (July 1, 2006); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 292-304 (2012).

47. AM. ARBITRATION ASS'N, EMPLOYMENT: ARBITRATION RULES AND MEDIATION PROCEDURES 33 (Nov. 1, 2009). The AAA's rule is consistent with some courts that have held that when employees assert statutory claims, companies cannot require them to pay any "type[] of cost[] that [is] unique to arbitration." *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

48. *See* AM. ARBITRATION ASS'N, *supra* note 47, at 20. R

quires its private judges to disclose “any circumstance likely to give rise to justifiable doubt as to [their] impartiality or independence, including . . . any past or present relationship with the parties or their representatives.”<sup>49</sup> Because not all arbitration administrators follow these steps, the AAA may be a particularly hospitable environment for employee claims.

We populated our dataset in the following manner. We took the 17,638 cases in the AAA’s July 2014 report, dropped duplicate records, narrowed the filing date to between July 1, 2009 and December 31, 2013, and limited the type of dispute to “employer promulgated employment.” To zoom in on employees who would have been plaintiffs in litigation, we cut all arbitrations that were not initiated by an employee or in which the company’s counterclaim exceeded the employee’s complaint. Finally, we consolidated cases involving multiple defendants into a single entry and eliminated files that did not reveal the name of the employer or in which the employee’s claim amount was missing.<sup>50</sup>

That left us with 5,883 matters. Ultimately, 3,751 of these cases were settled (64%), 1,082 were awarded (18%), 399 were withdrawn (7%),<sup>51</sup> 376 were coded as impasse (6%), 262 were terminated on administrative grounds (4%), and thirteen were dismissed on the merits (less than 1%).

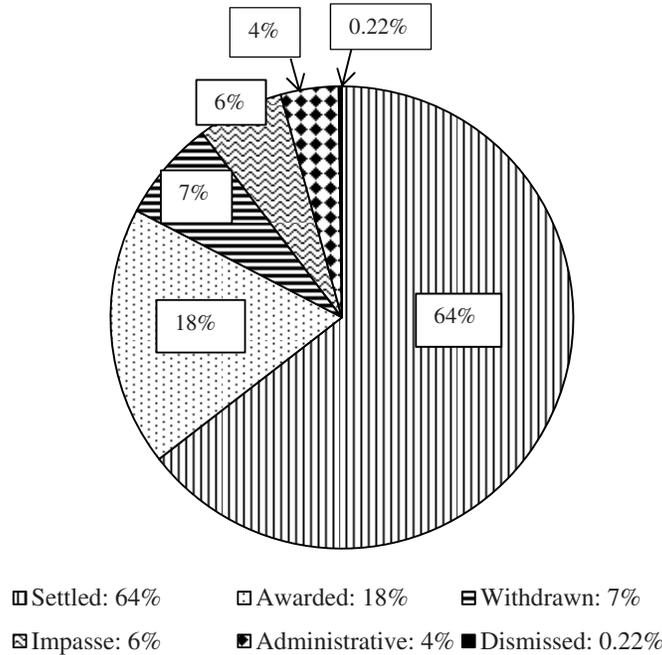
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49. *Id.* at 21–22.

50. Our sample selection process was nearly identical to the one in *Consumer Arbitration* with only one difference. The AAA classifies consumer and employment cases by subtype. For consumer cases, these groups include “debt collection” and “standardized testing,” neither of which seemed germane to our interest in the how the Court’s recent jurisprudence has impacted consumer-plaintiff arbitration. Thus, we limited our data to consumer cases that the AAA had coded as “other.” For employment matters, however, the dispute subtypes are “energy,” “financial services,” and “other.” Because the Court’s decisions pertain to these categories equally, we retained them all.

51. It is not clear how the AAA differentiates withdrawn cases from settled cases.

FIGURE 1: TYPE OF DISPOSITION  
EMPLOYMENT CLAIMS, N=5883



### III. RESULTS

This Part begins by parsing the full dataset of 5,883 cases for information on how *Concepcion* has affected the volume and nature of employee filings. It then considers the 1,082 awards with an eye on repeat-player issues.

#### A. Filings

According to some, private dispute resolution allows low-income workers to pursue small claims because it is “quicker, cheaper, and more efficient” than court.<sup>52</sup> Thus, corporations and their advocacy groups contend that “[r]equiring class arbitration will deprive employees of those benefits by effectively shutting down arbitration.”<sup>53</sup> In addition, they argue that employees can pool their resources, obviating the need for formal aggregation.

Claims that might be assertable through a class action can be vindicated effectively through arbitration. Individuals filing arbitration

52. Reply Brief for Defendants-Appellants at 17 n.8, *Raniere v. Citigroup Inc.*, 533 F. App’x. 11 (2d Cir. 2013) (No. 11-5213), 2012 WL 2366530.

53. *Id.*

claims may share litigation expenses, including by hiring the same lawyer. Indeed, a lawyer seeking to represent employees should have no difficulty mustering cooperation from a sufficient number of claimants needed to make individual arbitration cost effective . . . .<sup>54</sup>

This Section tests these arguments against the AAA data. It begins by summarizing our discussion of these issues in “Consumer Arbitration.” It then explains why our skepticism about arbitration empowering consumers extends into the employment milieu.

In “Consumer Arbitration,” we confirmed that consumer filings did, in fact, increase post-*Concepcion*.<sup>55</sup> After April 2011, when the opinion came down, the average number of arbitrations commenced by consumers more than doubled, swelling from approximately fifty-two claims per month to 115.<sup>56</sup> As it turned out, this dramatic increase was driven by “arbitration entrepreneurs”: plaintiffs’ lawyers who brought numerous stand-alone cases against a particular corporation.<sup>57</sup> These flurries of claims created spikes in the monthly filing figures and pulled up the overall post-*Concepcion* average. As Figure 2 illustrates, the most extreme example occurred in October 2012, when a single firm initiated 1,094 individual arbitrations against AT&T Mobility LLC.<sup>58</sup> This arbitration barrage was an outlier—indeed, it featured nearly as many cases as all other consumers filings in 2012 (1,162).

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54. Brief for Amicus U.S. Curiae Chamber of Commerce in Support of Petitioner/Cross-Respondent at 30–31, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, (5th Cir. 2013) (No. 12-60031), 2012 WL 2245129.

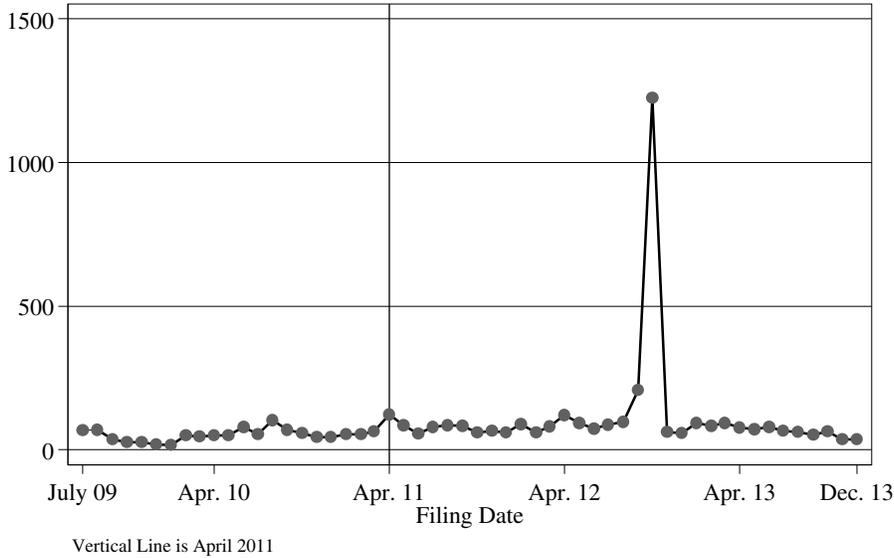
55. Horton & Chandrasekher, *supra* note 36, at 93.

56. *Id.* at 93.

57. *Id.* at 94.

58. *Id.* at 93–94, 94 fig.2A.

FIGURE 2: TOTAL NUMBER OF CASES FILED PER MONTH  
JULY 2009–DECEMBER 2013



Although no other corporation faced as many lawsuits, there were similar—albeit smaller—bursts of claims against defendants, such as AT&T Mobility, Citibank, Corinthian Colleges, Inc., Discover Bank, Santander Consumer USA, Inc, and SLM Corporation (Sallie Mae).<sup>59</sup> Figures 3 and 4 provide two examples of these “class action lite” cases.

FIGURE 3: CONSUMER CASES AGAINST  
SALLIE MAE, INC.  
TOTAL NUMBER OF FILINGS

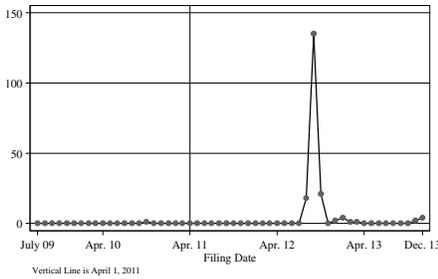
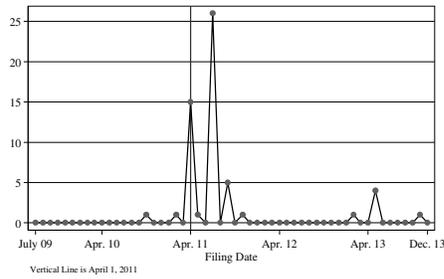


FIGURE 4: CONSUMER CASES AGAINST  
CORINTHIAN COLLEGES, INC.  
TOTAL NUMBER OF FILINGS



Nevertheless, we decided that these swarms of bilateral arbitrations lacked the punch of the genuine class device. For one, the AT&T Mobility cases were unique. Unlike most companies, the wireless goliath goes to great lengths to encourage customers to arbitrate low-value claims, such as promising to pay a \$10,000 bonus and double attor-

59. *Id.* at 94–97, 39 figs.3–8.

neys' fees for anyone who recovers more than its last written settlement offer.<sup>60</sup> Because the company has 120,600,000 subscribers<sup>61</sup> and recently settled allegations by the Federal Trade Commission that it engaged in “cramming” beginning in 2009,<sup>62</sup> it is actually astonishing that it was so infrequently sued. Likewise, many of the other companies targeted by arbitration entrepreneurs went from staring down the barrel of nationwide class actions to arbitrating several dozen cases.<sup>63</sup> Indeed, as Figure 5A demonstrates, without the 1,094 AT&T Mobility cases, the number of consumer filings per month increased only modestly—by about an average of thirty per month—after *Concepcion*.<sup>64</sup> Thus, we determined that the Court’s critics have the better argument, and *Concepcion* likely shields firms from liability.

In some ways, the picture in the employment setting is even gloomier. Unlike the overall number of consumer arbitrations, which rose slightly after *Concepcion*, employee cases tapered off. To be sure, Figure 5B, which traces monthly filings in both the consumer and employment spheres, reveals some symmetry between them. The consumer and employee caseloads behaved similarly near the end of 2012, first increasing sharply and then beginning to fall. In the employment sector, however, this plunge was even more pronounced. For example, employees brought 112 actions in January 2013. In December, they initiated only thirty-nine (39), a 65% decrease.

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60. *Wireless Customer Agreement*, AT&T, <http://www.att.com/legal/terms.wirelessCustomerAgreement.html#arbAgreement> (last visited Feb. 15, 2015).

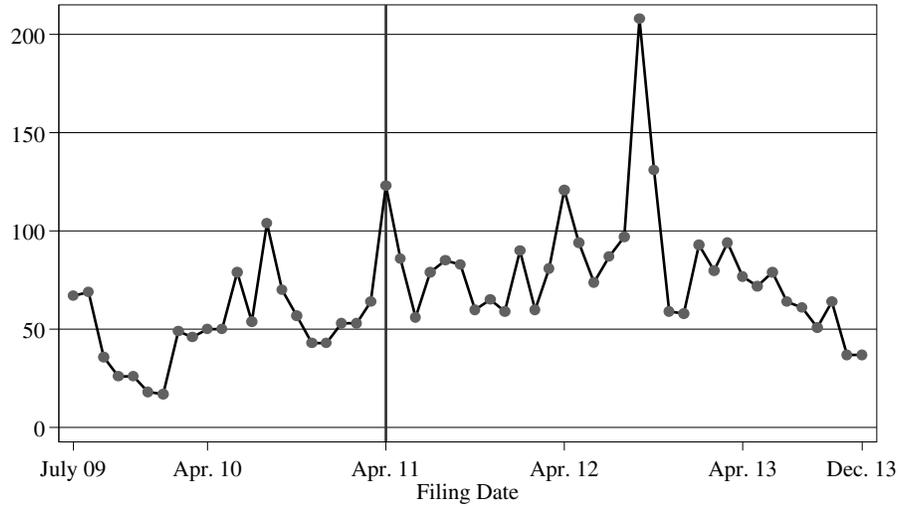
61. AT&T 1Q2015 AT&T BY THE NUMBERS (2015), [https://web.archive.org/web/20151004053854/http://www.att.com/Common/about\\_us/pdf/att\\_btn.pdf](https://web.archive.org/web/20151004053854/http://www.att.com/Common/about_us/pdf/att_btn.pdf).

62. *AT&T Refunds*, FED. TRADE COMM’N (Oct. 2014), <https://www.ftc.gov/enforcement/cases-proceedings/refunds/att-refunds>. “Cramming” refers to the practice of “charg[ing] customers additional money for services they have not asked for, such as monthly ringtone subscriptions, wallpapers, celebrity gossip, or horoscope text messages.” *How To Get a Refund for AT&T Mobile Cramming*, USA.GOV: BLOG DAILY UPDATE (Oct. 9, 2014, 1:00 PM), <http://content.govdelivery.com/accounts/USAGOV/bulletins/d4c2d9>.

63. See Horton & Chandrasekher, *supra* note 36, at 94–97, 95–97 figs.3–8.

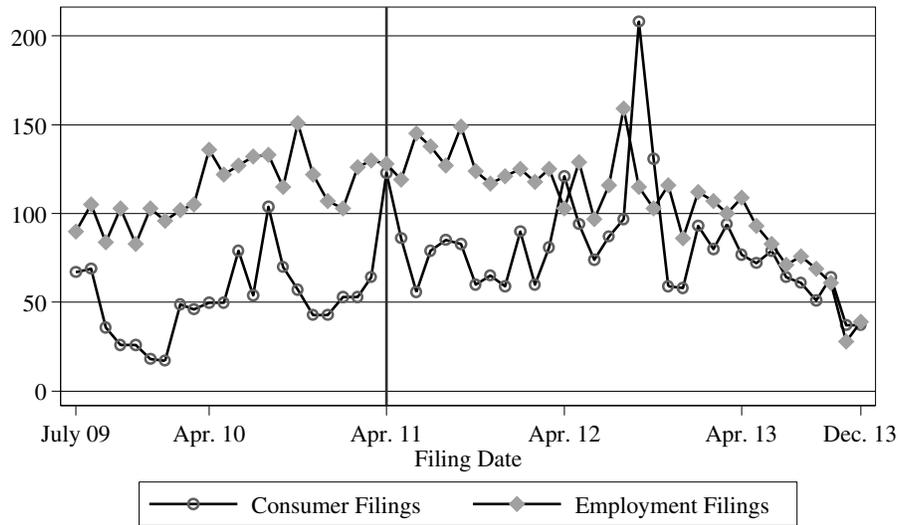
64. *Id.* at 93–94, 94 fig.2B.

FIGURE 5A: TOTAL NUMBER OF CONSUMER CASES FILED PER MONTH EXCLUDING AT&T MOBILITY, LLC



Vertical Line is April 2011.  
Consumer case filings excluding 1,094 cases filed against AT&T Mobility in October 2012

FIGURE 5B: TOTAL NUMBER OF CASES FILED PER MONTH JULY 2009–DECEMBER 2013



Vertical Line is April 2011.  
Consumer case filings excluding 1,094 cases filed against AT&T Mobility in October 2012

Of course, this decline in employment filings does not mean that arbitration deters righteous claims. Complaints may have dropped because employers behaved lawfully. Information from the Equal

Employment Opportunity Commission (EEOC) on this topic is inconclusive. On one hand, the EEOC received nearly the same number of charges (a prerequisite for filing many employment discrimination lawsuits) each year between 2009 and 2013.<sup>65</sup> On the other hand, the number of EEOC enforcement actions declined during the last three years of our study, which implies that there were fewer meritorious claims to pursue.<sup>66</sup> In addition, companies' internal dispute resolution systems may resolve most employee gripes before they degenerate into adversarial proceedings.<sup>67</sup> These competing explanations must be ventilated before we can draw firm conclusions.

Likewise, we are cautiously pessimistic about the notion that arbitration encourages employees to file low-value claims. Indeed, the median damages sought in the 2,595 filings that have nonzero claim amounts is a whopping \$247,233.<sup>68</sup> Only ninety-seven employees (4%) demanded less than \$10,000, and a mere 403 employers (16%) sought under \$50,000.<sup>69</sup> It is possible, however, that these claim amounts may be overinflated if plaintiffs exaggerate their damage requests for strategic reasons. This may be particularly likely under the AAA's rules for adhesive employment agreements because plaintiffs pay a flat filing fee rather than one that rises with the sum in controversy.<sup>70</sup> Still, as we will discuss in more depth *infra*, one brightly colored clue suggests that these claim amounts are legitimate: the mean and median damages awards are quite high (more than \$200,000 and \$50,000, respectively).<sup>71</sup> Thus, at least based on the evidence we have, the idea that arbitration invites meager claims is hard to square with the reality that few employees accept this invitation.

In addition, plaintiffs' employment lawyers do not string together related cases like consumer attorneys. Figures 6 through 9 showcase claims against the four most named defendants in our employment

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65. *Charge Statistics: FY 1997 Through FY 2014*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Aug. 10, 2015).

66. *EEOC Litigation Statistics, FY 1997 Through FY 2014*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Aug. 10, 2015).

67. Hill, *supra* note 35, at 807–08 (arguing that employment arbitration featured an “appellate effect” in which “the effective functioning of the employer’s in-house dispute resolution program . . . isolates and resolves claims with merit in-house, leaving meritless claims for final appeal to external arbitration with the AAA”); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1586 (2005); W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 849 (2008).

68. AAA Spreadsheet *supra* note 44.

69. *Id.*

70. See AM. ARBITRATION ASS'N, *supra* note 47, at 33–34.

71. AAA Spreadsheet *supra* note 44.

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dataset. Unlike the consumer arena, in which there are periodic surges of filings by arbitration entrepreneurs, in the employment arena, there is a more steady flow of claim activity over the sample period. Thus, attempts to bring class-action-style cases in arbitration may be a consumer-only phenomenon.

FIGURE 6: MACY'S, INC. TOTAL EMPLOYMENT CLAIMS

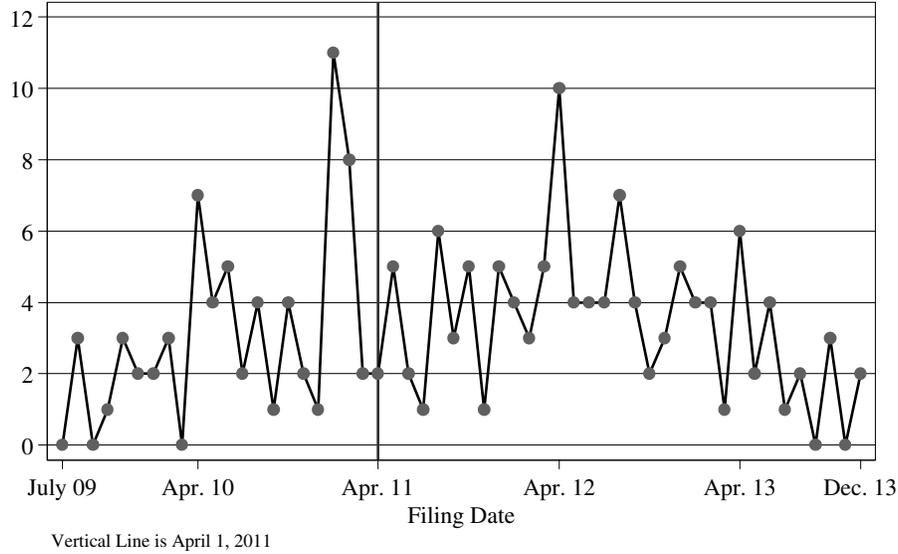


FIGURE 7: DARDEN RESTAURANTS, INC. TOTAL EMPLOYMENT CLAIMS

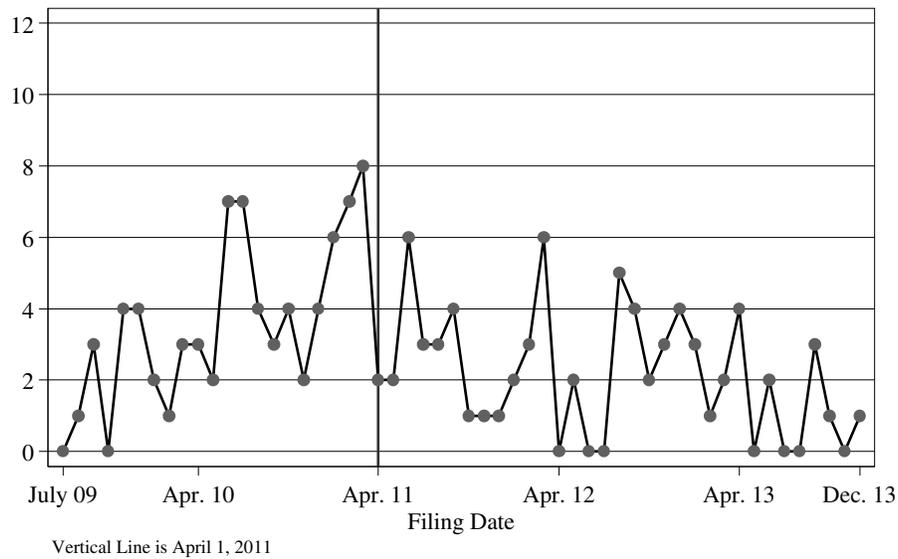


FIGURE 8: MARRIOTT INTERNATIONAL, INC.  
TOTAL EMPLOYMENT CLAIMS

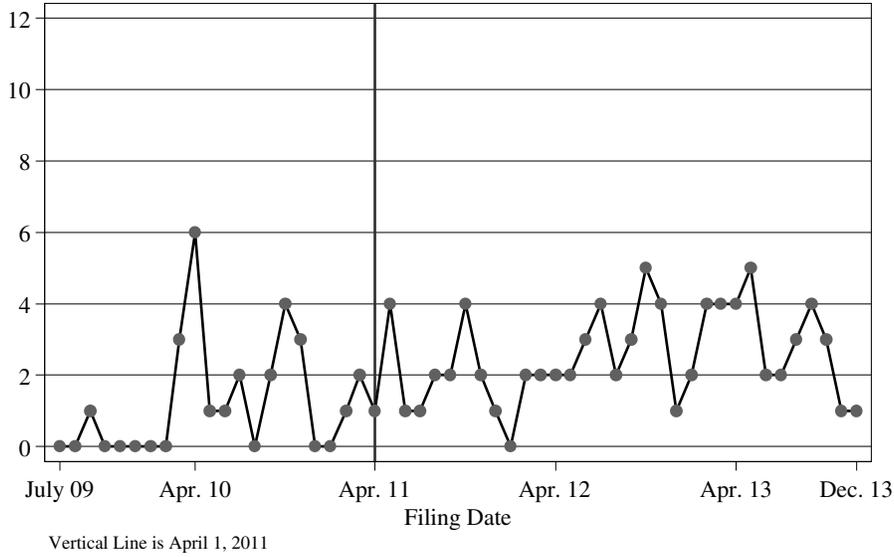
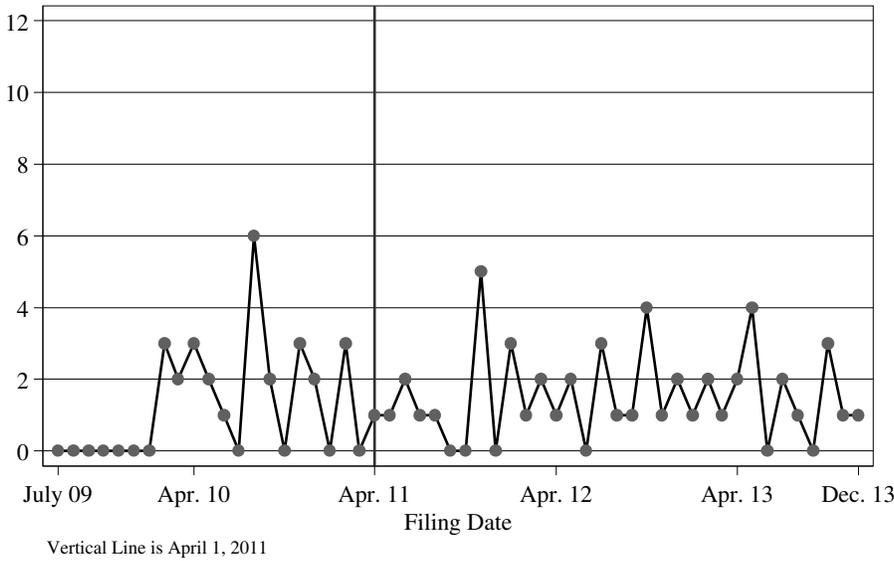


FIGURE 9: UPS CORPORATE EMPLOYEE RELATIONS, INC.  
TOTAL EMPLOYMENT CLAIMS



A final point of comparison is worth mentioning. In “Consumer Arbitration” we discovered that the individuation of disputes had a

perverse effect.<sup>72</sup> After *Concepcion*, mammoth class actions fractured into many bilateral arbitrations. Although many consumers (or their lawyers) did not chase these claims into the private forum, there were exceptions. As a result, large firms found themselves hailed before the AAA more frequently than before.<sup>73</sup> More specifically, to gauge a company's experience with extrajudicial dispute resolution, we plugged the number of times it appears in the 17,638-case AAA disclosures into a variable called "repeat-player score."<sup>74</sup> We found that the median repeat-player score increased after *Concepcion*.<sup>75</sup> In addition, the most active defendants—high-level and super repeat players—began to arbitrate more frequently after the Court's decision than before.<sup>76</sup> Thus, we concluded that large companies were becoming increasingly familiar with the specialized world of arbitration.<sup>77</sup>

We unearthed a similar—albeit milder—effect in the employment field. As Figure 10 reveals, the median repeat-player score of employers in the AAA has slightly increased—and occasionally skyrocketed—since *Concepcion*.<sup>78</sup>

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72. Horton & Chandrasekher, *supra* note 36, at 96–97.

73. *Id.* at 98–99.

74. *Id.* at 98.

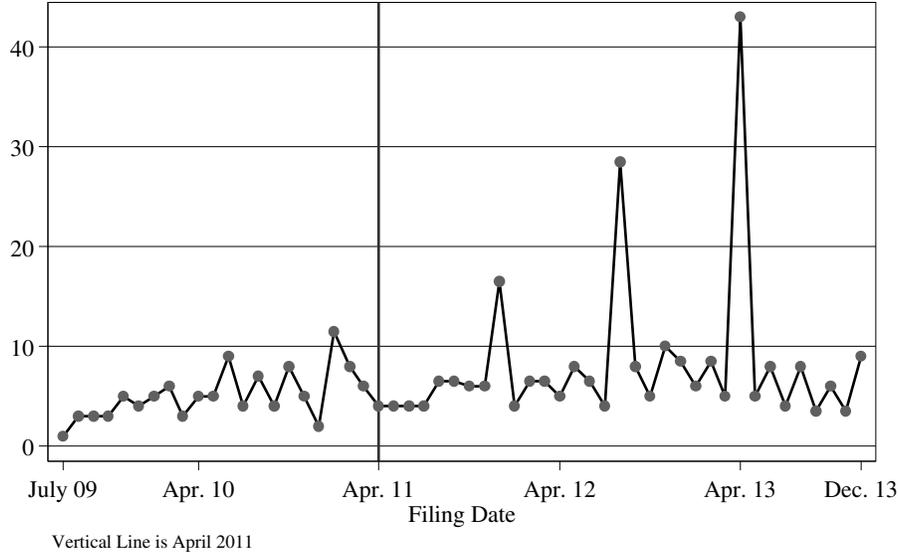
75. *Id.* 98–99, 98 fig.9.

76. *Id.* 98–99, 99 fig.10.

77. *Id.*

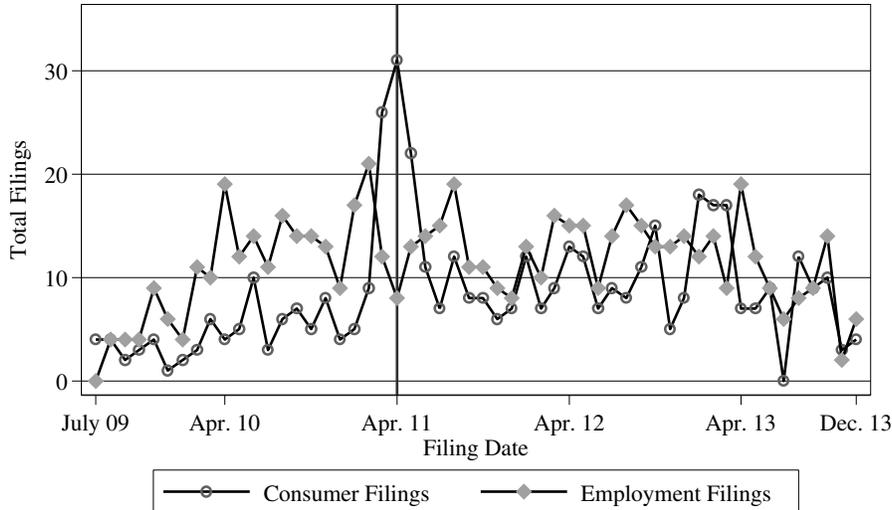
78. Because we determine the repeat-player score retrospectively, one would not necessarily expect the median repeat-player score to increase over time. For example, Macy's appears 200 times in the data. We thus use 200 as Macy's repeat-player score regardless of whether an employee sued the company in May 2010 or May 2013.

FIGURE 10: MEDIAN REPEAT-PLAYER SCORE: FULL SAMPLE, ALL EMPLOYERS



Similarly, although overall employment filings dropped after *Concepcion*, the number of arbitrations against high-level and super repeat-playing employers rose. Figure 11 illustrates this point by tracing suits over time against the ten employers in our data with the highest repeat-player scores. Admittedly, this jump was not nearly as abrupt as the one we found among extreme repeat players in the consumer setting. Moreover, as Figure 11 makes clear, the volume of employment filings against high-level and super repeat-playing employers did not necessarily change after the Court’s opinion. Many companies arbitrate both consumer and employment matters, and we include all cases in a firm’s repeat-player score. As a result, some companies that qualify as extreme repeat-playing employers experienced a post-*Concepcion* increase in arbitrations that was actually driven by an uptick in consumer complaints. Thus, the Court’s decision seems to have made extreme repeat-playing employers slightly more sophisticated in the arbitral forum—at least to the extent that they are able to draw on skills built in the consumer realm when arbitrating employment matters.

FIGURE 11: TOTAL NUMBER OF CASES FILED PER MONTH  
TOP TEN EMPLOYMENT REPEAT PLAYER FIRMS



Vertical Line is April 2011

Note: Only five (5) of the top ten (10) employment repeat-player firms have consumer filings.

In sum, employees have filed fewer arbitrations since *Concepcion*. In addition, these complaints rarely seek small amounts of money. Finally, since the Court’s watershed decision, some extreme repeat-playing employers have arbitrated more often (although most of these have been consumer disputes).

B. Awarded Cases

This Section follows in the footsteps of previous empirical studies of employment arbitration by examining awarded disputes. It begins with some caveats about the significance of case outcomes. It then reports our findings on win rates, damage amounts, and repeat players.

1. Methodological Issues

For several reasons, it is unwise to use awarded matters as the springboard for bold policy prescriptions. For one, determining what counts as an employee “win” can be arbitrary. Most researchers define any matter in which the plaintiff recovers \$1 or more in damages as a “victory.”<sup>79</sup> However, this ignores the fact that employees sometimes seek equitable relief, such as reinstatement, rather than money.

79. See, e.g., Bingham, *Repeat-Player Effect*, supra note 35, at 208; Colvin, supra note 35, at 5.

And, on the flip side, it deems plaintiffs who obtain trivial sums to have “prevailed.”

In addition, awarded cases are not a representative sample of all disputes. At the outset, arbitrated matters differ from litigated matters. Certain types of claims (e.g., breach of contract) may more likely be covered by arbitration clauses than others (e.g., employment discrimination). Likewise, particular plaintiffs, such as executives, often negotiate their own employment arrangements and, thus, may be less likely to end up in arbitration than blue collar workers. These kinds of divergences make it difficult to compare statistics from each arena.

Similarly, because most matters settle, those that end in an award suffer from a selection bias. In their well-known article, George Priest and Benjamin Klein argued that parties only litigate when they cannot agree on the probable outcome.<sup>80</sup> In turn, because close cases will reach the verdict stage, Priest and Klein predicted that plaintiffs should prevail in roughly 50% of trials.<sup>81</sup> Critically, this ratio should not change even if the applicable rule or legal regime becomes more proplaintiff or prodefendant. Once the parties acclimate and adjust their expectations, settlement will still weed out all lawsuits except for the true nail-biters and coin flips.<sup>82</sup> Eventually, the plaintiff win rate will swing back to about one-half.

Nevertheless, arbitral awards may be more revealing than judgments at trial. First, the Priest–Klein theory assumes that most plaintiffs and defendants are capable of foreseeing the ultimate result. This kind of clarity may be unrealistic in the nonprecedential, confidential universe of arbitration. In turn, the more the parties’ expectations diverge, the more room there is for factors, such as the content of procedural, substantive, and evidentiary rules or a decision maker’s biases, to influence outcomes.<sup>83</sup> Likewise, Priest and Klein base their model on parties who have equal access to information.<sup>84</sup> Yet if repeat-playing employers can read the proverbial tea leaves in a way that one-shot plaintiffs cannot, they will arbitrate fewer strong claims. The result would be an employee win rate that is lower than 50%.

Accordingly, we cannot determine whether arbitration is fair simply by tallying up victories or damage recoveries. At the same time,

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80. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14–15, 15 fig.6 (1984).

81. *Id.* at 17–19, 18 fig.7.

82. *Id.* at 19.

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

84. Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 500 (1996).

awards can provide valuable insight into how the process functions. With that in mind, we now turn to our data.

## 2. *Win Rates and Damage Amounts*

Researchers find that employees achieve varying levels of success in arbitration. For instance, Lisa Bingham published two influential articles in the late 1990s that reported that employees “won”—recovered \$1 or more—63% and 52% of AAA cases, respectively.<sup>85</sup> In the first piece, Bingham determined that successful plaintiffs earned an average of \$87,178 in damages;<sup>86</sup> in the second, she put that figure at \$49,030.<sup>87</sup> Theodore Eisenberg and Elizabeth T. Hill then took up the mantle and discovered that plaintiffs prevailed in 46% of AAA matters from 1999–2000.<sup>88</sup> Eisenberg and Hill observed that awards ranged from an average of \$30,732 to \$211,720, depending on the economic status of the plaintiff and the type of dispute.<sup>89</sup> Notably, all three studies included disputes rising from individually negotiated agreements—a niche in which arbitration is less controversial. Nevertheless, businesses and arbitration proponents trumpeted the work as elucidating that “the assertions of many arbitration critics were either overstated or simply wrong.”<sup>90</sup>

In 2011, Alexander J.S. Colvin published an article using an earlier version of the same dataset that we use in this Article—AAA disclosures related to employer-promulgated arbitration agreements under

85. See Bingham, *Repeat-Player Effect*, *supra* note 35, at 209–10; Bingham, *Statistics*, *supra* note 35, at 238.

86. Bingham, *Repeat-Player Effect*, *supra* note 35, at 208–09, 209 tbl.2.

87. Bingham, *Statistics*, *supra* note 35, at 237 tbl.1. One reason for this discrepancy may be that Bingham’s first study calculated the mean damages award among the universe of successful plaintiffs, while her second piece used all plaintiffs—even those that lost and, thus, received awards of zero.

88. See Eisenberg & Hill, *supra* note 35, at 46. Eisenberg and Hill concluded that employees prevailed in 51% of noncivil rights matters, which was roughly comparable to the 57% success rate for those lawsuits in state court. *See id.* at 48 tbl.1. In turn, employees with discrimination claims performed worse across the board, winning 26% of arbitrations, 36% of federal court verdicts, and 44% of state court trials. *See id.* However, the differences between arbitration and federal court were not statistically significant. *Id.* at 48. Finally, Eisenberg and Hill noted that higher-paid employees enjoyed better results in arbitration than their lower-income counterparts. *Id.*

89. *Id.* at 49–50, 50 tbl.2. Specifically, Eisenberg and Hill concluded that higher-paid employees won a mean of \$32,500 in civil rights disputes and \$211,720 in other matters, whereas lower-income plaintiffs obtained average awards of \$259,795 in civil rights cases and \$30,732 in other disputes. *Id.*

90. See, e.g., Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL’Y 549, 551 (2008) (“[M]ost of the methodologically sound empirical research does not validate the criticisms of arbitration.”); Sherwyn et al., *supra* note 67, at 1567.

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Section 1281.96 of the California Code of Civil Procedure.<sup>91</sup> Colvin reviewed 1,213 awards in cases filed between January 1, 2003 and December 21, 2007.<sup>92</sup> He determined that employees won 260 times (21%).<sup>93</sup> Just looking at the subset of victorious employees, the average award was \$109,858 with a median of \$36,500.<sup>94</sup> Yet pulling back to consider all cases—including the vast majority that employees lost—injecting a slew of “zero” recoveries into the damage calculations.<sup>95</sup> Under this rubric, the mean award fell to \$23,548, and the median (presumably) was zero dollars.<sup>96</sup>

Our results are similar to Colvin’s. First, under the traditional conception of a win as a recovery of \$1 or more, employees prevailed in 193 out of 1,082 cases (18%). Second, to include plaintiffs who obtained equitable relief, we tried broadening this definition to include both positive award amounts and cases with zero award amounts but in which the arbitrator had designated the plaintiff as the prevailing party. Seen through this prism, twenty additional employees were victorious, increasing the win rate to 20%. The outcomes generated by these divergent methods were not different enough to affect the qualitative results in the vast majority of our descriptive and regression analyses. Therefore, for simplicity’s sake, we will use the more conventional definition of an employee win as an award of \$1 or more for the rest of the Article.

Switching our focus to damages, we find that in the sample of successful employees, the mean damage amount was \$203,362 with a median of \$52,129. Among all employees, including those who lost on the merits (and, thus, recovered nothing), these figures fell to \$36,274 and zero dollars.<sup>97</sup>

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91. See Colvin, *supra* note 35, at 3.

92. *Id.* at 4.

93. *Id.* at 6.

94. *Id.* at 7.

95. *Id.*

96. See *id.*

97. We gathered data about other facets of the arbitral process as well. First, the mean case length was about thirteen months. Second, 334 employees (31%) went pro se, 114 (11%) elected a documents-only hearing, and 287 (27%) chose to proceed by phone. Third, the mean arbitrator’s fee was \$23,696, and employees paid an average of \$292 of this amount.

TABLE 1. WIN RATES

	Win Definition #1 (Employee Award is Positive)		Win Definition #2 (Employee Award is Positive or Prevailing Party is Employee)		N
	Mean (SD)	Median	Mean (SD)	Median	
<b>Employee Wins</b>	0.178 (0.383)	0	0.197 (0.398)	0	1,082

TABLE 2. DAMAGES

	Mean (SD)	Median	N
<b>If Employee Wins: (Win Definition #1)</b>			
<b>Award Amount</b>	203,362.1 (761,893.7)	52,129.4	193
<b>Award Amount as Percent of Claim Amount (for Positive Claim Amounts)</b>	0.5746 (0.7194)	0.4229	155
<b>All Employees (Including Losses):</b>			
<b>Award Amount</b>	36,274.38 (330,405.7)	0	1,082
<b>Award Amount as Percent of Claim Amount (for Positive Claim Amounts)</b>	0.1608 (0.4591)	0	554

3. Repeat Players

Do arbitrators favor repeat-playing employers? This issue has become more important since *Rent-A-Center* empowered arbitrators to decide whether arbitration clauses are unconscionable. Indeed, if private judges are guided by their pocketbooks, then they should not be trusted to define the very rules of the game. Less obviously, repeat-player questions have acquired new salience after *Concepcion*. As noted *supra*, large firms appear to arbitrate more individual cases now that it is harder for consumers and employees to bring class actions. Are these extreme repeat players able to capitalize on their experience within the arbitral forum? This Section examines these questions. It begins by describing the fiercely contested empirical work on repeat players. It then discusses our findings, first with a simple bivariate approach and then with a more complex pair of regressions.

Bingham’s path-breaking study of AAA employment arbitrations in the late 1990s piqued interest in the repeat-player advantage. Survey-

ing 270 awards, she determined that employees prevailed 71% of the time and recovered an average of 48% of their requested damages against nonrepeaters.<sup>98</sup> Conversely, employees won 16% of cases and received 11% of what they sought against repeat players.<sup>99</sup> In a companion piece, Bingham analyzed 203 disputes and again found that plaintiffs were successful in 67% of the cases against one-shot firms but in merely 23% of cases versus repeaters.<sup>100</sup>

Rather than blaming this dichotomy on arbitrator self-interest, Bingham acknowledged that it could stem from several factors. For one, she opined that the kinds of lawsuits employees bring against repeat players might differ from those that employees assert against one-shotters.<sup>101</sup> Specifically, she noted that many claims against repeat players seemed to rise from personnel manuals rather than individually negotiated contracts.<sup>102</sup> In turn, because personnel manuals give employers greater rights, it might be more difficult for an employee to prove wrongful discharge in the shadow of such a document.<sup>103</sup> Likewise, Bingham hypothesized that employers might have access to better counsel or simply “learn to settle the cases they otherwise would lose.”<sup>104</sup>

Bingham then located cases in which a company appeared at least twice before the same arbitrator (repeat pairings).<sup>105</sup> She uncovered twenty of these disputes and observed that employees won five (25%).<sup>106</sup> On the other hand, when there was no repeat pairing, employees prevailed eighty-six out of 155 times (55%).<sup>107</sup> Bingham therefore concluded that “[e]mployees lose more frequently when the arbitrator is one the employer has used at least once before.”<sup>108</sup> Yet she was also careful to note that because most repeat pairings rose from personnel manuals, it was unclear whether the root of the problem was arbitrator bias or the prevalence of weaker claims.<sup>109</sup>

98. Bingham, *Repeat-Player Effect*, *supra* note 35, at 209 tbl.2, 210 tbl.3.

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99. *Id.* at 209 tbl.2, 210 tbl.3, 213.

100. Bingham, *Statistics*, *supra* note 35, at 238 tbl.2. Bingham also noted that employees prevailed in only five of the twenty cases (25%) when the employer had used the same arbitrator before. *Id.*

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101. Bingham, *Repeat-Player Effect*, *supra* note 35, at 213.

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102. *Id.*

103. *Id.* Bingham later confirmed that employees won only thirteen out of sixty-one (21%) cases stemming from a personnel manual, compared to seventy-five out of 109 (69%) matters that arose from a negotiated contract. Bingham, *Statistics*, *supra* note 35, at 239 tbl.4.

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104. Bingham, *Repeat-Player Effect*, *supra* note 35, at 214.

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105. Bingham, *Statistics*, *supra* note 35, at 238 tbl.3.

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106. *Id.*

107. *Id.*

108. *Id.* at 238.

109. *Id.*

Bingham's work sparked considerable discussion. Some judges, scholars, and even the EEOC, cited it as proof that "the more frequent a user of arbitration an employer is, the better the employer fares in arbitration."<sup>110</sup> However, other commentators faulted her for using such a small sample size<sup>111</sup> and for "not control[ing] for some rather obvious variables that may explain positive employer outcomes, such as the size of the employer."<sup>112</sup> In addition, David Sherwyn, Samuel Estreicher, and Michael Heise argued that Bingham had defined "repeat player" incorrectly.<sup>113</sup> According to these authors, Bingham should not have counted the first matter involving a firm that later became a repeat player.<sup>114</sup> They contended that the arbitrator in Case 1 could not have known that the same entity would return in Case 2 and, thus, had no reason to cozy up to it when resolving Case 1.<sup>115</sup>

Yet Colvin echoed Bingham's findings in his 2011 article.<sup>116</sup> Colvin found that the employee win rate was 32% against one-shotters but just 17% against repeat players.<sup>117</sup> He then examined repeat pairings. No matter whether he used Bingham's or Sherwyn, Estreicher, and Heise's definition of repeat player,<sup>118</sup> employees were less successful when their opponent had previously appeared before the same deci-

110. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997) (citing Lisa Bingham, *Employment Arbitration: The Effect of Repeat-Player Status, Employee Category and Gender on Arbitration Outcomes* (on file with author)); *See, e.g.,* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (citing Bingham, *Repeat-Player Effect, supra* note 35) (relying on Bingham's study for the proposition that arbitration "reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system"); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 34 (1998) (citing Bingham, *Repeat-Player Effect, supra*, note 35, at 209–10) (opining that Bingham found "employees fared very poorly" in cases against repeat players).

111. *See, e.g.,* Rutledge, *supra* note 90, at 566 n.84; Sherwyn et al., *supra* note 13, 144 (citing Bingham, *Repeat-Player Effect, supra* note 35).

112. *See, e.g.,* Estreicher, *Saturns for Rickshaws supra* note 13, at 566; *see also* Hill, *supra* note 35, at 807–08 (arguing that the higher repeat-player win rate stems from an "appellate effect" in which an employer's in-house dispute resolution system resolves meritorious cases, resulting in "an AAA docket of meritless claims against that company, virtually all of which end up being dismissed").

113. Sherwyn et al., *supra* note 67, at 1570.

114. *Id.*

115. *Id.* ("[H]ow did the arbitrator who decided in favor of the employer in the employer's first case know that this large employer would be a repeat player while other large employers would not?").

116. Colvin, *supra* note 35, at 13 tbl.3.

117. *Id.*

118. Colvin defended Bingham's technique, arguing that crooked arbitrators could intuit in Case 1 that a large company might eventually be hunting for a favorable decision maker in Case 2 and beyond:

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sion maker.<sup>119</sup> Under both methodologies, employees recovered damages 23% of the time when there was no repeat pairing but 12% of the time when there was a repeat pairing.<sup>120</sup> The average award was also smaller in the latter cases: down from \$27,039 to \$7,451 under Bingham's method and decreasing from \$25,865 to \$3,009 under Sherwyn, Estreicher, and Heise's method.<sup>121</sup> Colvin then performed regressions using employee win rates and award amounts as dependent variables, as well as repeat employer, "repeat-employer-arbitrator pairing" and employee self-representation as independent variables.<sup>122</sup> Using a logit model, he determined that a business's repeat-player status reduced the likelihood of an employee victory by about 49% ( $p < 0.01$ ).<sup>123</sup> He reached a similar conclusion about repeat pairings, which lowered the odds of a plaintiff win by 40% ( $p < 0.05$ ).<sup>124</sup> Finally, using an ordinary least squares (OLS) regression, he determined that employees could expect substantially lower damages in cases with repeat players ( $p < 0.01$ ) and repeat pairings ( $p < 0.05$ ).<sup>125</sup>

How do our results stack up? We first report bivariate statistics to lay the foundation for our regression analysis in Part III.B.3.ii.

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[M]y view is that in selecting an arbitrator a second and subsequent times, the employer will take into consideration the arbitrator's decision in the initial case involving the employer. From the arbitrator's side, if there is a temptation to be biased toward an employer in hopes of obtaining future arbitration business, the arbitrator can signal this to the employer by more employer-favorable decision making in the initial case for which the arbitrator is selected. Thus, if there is a repeat-employer-arbitrator bias, it should be manifested in more favorable decisions toward employers in the first as well as subsequent cases involving a repeat-employer-arbitrator pairing.

*Id.* at 13–14. Perhaps for this reason, Colvin uses Bingham's technique to calculate the overall difference in win rates and damage awards between repeat players and one-shooters. *Id.* at 12–13 (defining "repeat player" as "any employer with more than one case in the data set"). However, Colvin only employs Sherwyn, Estreicher, and Heise's definition when examining the more nuanced issue of repeat-player-arbitrator pairings. *See id.* at 13–14.

119. *Id.*

120. *Id.* at 14.

121. *Id.*

122. *See* Colvin, *supra* note 35, at 17–18.

123. *Id.* at 18, 19 tbl.7.

124. *Id.*

125. *Id.* Colvin obtained this result by considering all awarded cases, including recoveries of "zero damages." *Id.* at 20. He acknowledged that this approach might conflate the threshold matter of whether employees win with the secondary issue of how much they win. *Id.* Thus, he also analyzed the impact of repeat player and repeat-player-arbitrator pairings on award amounts in the narrower band of disputes that culminated in an employee victory. *Id.* at 19 tbl.7. In this subset, he determined that employees recovered lower damages if they were self-represented ( $p < 0.01$ ) or if they encountered a repeat-player-arbitrator-pairing ( $p < 0.10$ ). *Id.* Finally, the fact that an employee was self-represented did not affect her chance of prevailing on the merits but was meaningfully linked to lower damages in both all awarded cases ( $p < 0.01$ ) and employee victories ( $p < 0.05$ ). *Id.* at 18–20, 19 tbl.7.

i. Bivariate Analysis

Our data on awarded cases contain several points of interest. First, the vast majority of employees (72%) went up against a repeat player. This cohort prevailed just 16% of the time, which was a statistically significant difference from the 23% win rate against one-shot companies ( $p < 0.05$ ). (Table 3A).

TABLE 3A. REPEAT PLAYER PREVALENCE

	<b>Win Rate #1</b>	<b>Award Amount</b>	<b>Number</b>	<b>Percent of Sample</b>
	<b>Mean (Standard Error)</b>	<b>Mean (Standard Error)</b>		
<b>Employees facing a one-shot defendant</b>	0.225 (0.024)	63,439.19 (34,575.16)	293	27.51%
<b>Employees facing a repeat-player defendant (defined as a defendant that appeared in arbitration at least twice)</b>	0.161* (0.013) $p=0.0139$	25,030.05 (4,990.90) $p=0.0920$	772	72.49%
Total			1,065	

Note: We used t-tests to test for significant differences in win rates and award amounts between employees who face one-shotters and employees who face repeat players. For these tests, significance levels are denoted in the following conventional way: \* $p < 0.05$ , \*\* $p < 0.01$ , \*\*\*  $p < 0.001$ .

Second, 17% of cases featured a repeat pairing; however, employees in these matters suffered neither a win-rate nor an award-amount penalty as illustrated in Table 3B.

TABLE 3B. REPEAT-EMPLOYER-ARBITRATOR PAIRING PREVALENCE

	<b>Win Rate #1</b>	<b>Award Amount</b>	<b>Number</b>	<b>Percent of Sample</b>
	<b>Mean (Standard Error)</b>	<b>Mean (Standard Error)</b>		
<b>Employee not facing a repeat pair</b>	0.1701 (0.0127)	35,865.12 (12,048.32)	876	82.95%
<b>Employee facing a repeat pair</b>	0.1944 (0.0296) $p=0.4332$	12,475.07 (4,973.48) $p=0.3809$	180	17.05%
Total			1,056	

Note: We used t-tests to test for significant differences in win rates and award amounts between employees who face one-shotters and employees who face repeat players. For these tests, significance levels are denoted in the following conventional way: \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ .

Third, plaintiffs who were pro se won just 7% of matters, whereas those with one-shot lawyers prevailed 19% of the time ( $p < 0.001$ ) and those lucky enough to hire repeat-playing counsel were victorious in 28% of matters ( $p < 0.001$ ). Likewise, plaintiffs with one-shot and repeat-playing lawyers enjoyed a statistically significant boost in award amounts relative to employees who were pro se Table 3C.

TABLE 3C. PLAINTIFFS' REPEAT-PLAYING-LAWYER PREVALENCE

	<b>Win Rate #1</b>	<b>Award Amount</b>	<b>Number</b>	<b>Percent of Sample</b>
	<b>Mean (Standard Error)</b>	<b>Mean (Standard Error)</b>		
<b>Employee is pro se</b>	0.0689 (0.0139)	2,121.50 (783.87)	334	31.42
<b>Employee has one-shot lawyer</b> (t-test compares employees with one shot lawyers to pro se employees.)	0.1901*** (0.0200)  p=0.0000	59,476.51* (26,886.87)  p=0.0471	384	36.12
<b>Employee has repeat-player lawyer</b> (t-test compares employees with repeat-player lawyers to pro se employees.)	0.2754*** (0.0241)  p=0.0000	44,183.09*** (9,562.84)  p=0.0000	345	32.46
<b>Total</b>			1,063	
Note: For t-tests, we denoted significance levels in the following conventional way: * $p < 0.05$ , ** $p < 0.01$ , *** $p < 0.001$ .				

Finally, and most surprisingly, although there was no repeat pairing effect on the defense side of the lectern, plaintiffs' lawyers performed better by every metric when they had encountered the same arbitrator at least once before (Table 3D).

TABLE 3D. PLAINTIFFS’ LAWYER–ARBITRATOR REPEAT PAIRING PREVALENCE

	<b>Win Rate #1</b> <b>Mean</b> <b>(Standard Error)</b>	<b>Award Amount</b> <b>Mean</b> <b>(Standard Error)</b>	<b>Number</b>	<b>Percent of Sample</b>
<b>Employee is pro se</b>	0.0689 (0.0139)	2,121.50 (783.87)	334	31.66
<b>Plaintiff’s lawyer has not met arbitrator in arbitration before</b> (t-test compares employees whose lawyer has not previously met the arbitrator before to pro se employees.)	0.2016*** (0.0159)  p=0.0000	48,920.08* (16,622.92)  p=0.0416	635	60.19
<b>Plaintiff’s lawyer has met arbitrator at least twice in arbitration</b> (t-test compares employees whose lawyer has previously met the arbitrator before to pro se employees.)	0.4070*** (0.0533)  p=0.0000	32,401.29*** (10,475.92)  p=0.0000	86	8.15
Total			1,055	

Note: For t-tests, we denoted significance levels in the following conventional way:  
\* $p < 0.05$ , \*\* $p < 0.01$ , \*\*\* $p < 0.001$ .

ii. Regression Analysis

This Section excavates deeper by conducting two regressions. The first focuses on the effect of a company’s repeat-player status on employee win rates. The second probes that variable’s influence on damages.

In “Consumer Arbitration,” we attempted to add nuance to Colvin’s baseline regression model.<sup>126</sup> First, Colvin,<sup>127</sup> like previous researchers,<sup>128</sup> defined repeat player in a strictly binary fashion: either an entity appeared one time in the dataset (making it a one-shotter) or it surfaced two or more times (a repeat player). But, arguably, the gulf between tiers of repeat-playing firms is just as important as the threshold distinction between repeat players and one-shotters. Thus, we classified defendants by sophistication quintiles: one-shotters, low-

126. Horton & Chandrasekher, *supra* note 36, at 111–13, 112 tbl.7.

127. Colvin, *supra* note 35, at 13–16.

128. Bingham, *Repeat-Player Effect*, *supra* note 35, at 207; Bingham, *Statistics*, *supra* note 35, at 223.

level repeat players, mid-level repeat players, high-level repeat players, and super repeat players.<sup>129</sup> In addition, commentators have suggested that plaintiffs can level the playing field by hiring counsel who are also familiar with the extrajudicial forum.<sup>130</sup> Thus, we labeled consumers as either pro se, represented by one-shot attorneys, or in the hands of low-level, mid-level, or high-level repeat-playing advocates.<sup>131</sup> Finally, we replaced the single repeat pair dummy (reflecting whether an arbitrator–business pair had ever met before) with a series of arbitrator–business repeat-pair dummy variables (reflecting four levels of pair familiarity: none, low, medium, and high). We concluded that consumers who faced one-shot companies won more often and paid less in damages relative to their counterparts who faced high-level and super repeat-playing firms.<sup>132</sup> Counterintuitively, we also found that consumers who were represented by the upper tiers of repeat-playing plaintiffs’ lawyers—the arbitration entrepreneurs who filed class-action-style cases—had lower win rates and award amounts than pro se consumers.<sup>133</sup> Accordingly, we concluded that *Conception* had not only insulated big companies from aggregate liability but magnified their advantage within arbitration.

We further refine our method here. We start by adding various levels of plaintiffs’ lawyer–arbitrator repeat pairings to the mix (rather than just examining various levels of employer–arbitrator repeat pairings). We also add a range of control variables, including: (1) claim amount; (2) time between filing and hearing; (3) time between hearing and decision; (4) dispute subtype (either energy, financial, or other industry); (5) whether the arbitration took place in the employee’s home state; and (6) whether the employee elected a telephonic hearing or an in-person hearing. We use a logit model and an OLS model to investigate the effect of repeat players on employee win rates and the square root of employee damage recoveries, respectively.<sup>134</sup>

We present our logit results in Table 4, which shows that an employer’s status as a high-level or super repeat player reduces the likelihood of a plaintiff victory in a statistically significant manner. Specifically, the logit coefficients corresponding to the high-level re-

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129. Horton & Chandrasekher, *supra* note 36, at 110–13, 112 tbl.7.

130. See, e.g., Estreicher, *Saturns for Rickshaws*, *supra* note 13, at 566; W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 74–75 (2007).

131. Horton & Chandrasekher, *supra* note 36, at 110–13, 112 tbl.7.

132. *Id.* at 114 tbl.8.

133. *Id.* However, we also discovered that the win-rate results were a product of a single law firm that apparently files waves of meritless arbitrations against defendants. See *id.* at 119–20.

134. The functional forms for our logit and OLS models appear in Horton & Chandrasekher, *supra* note 36, at 107–08.

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peat-player effect and the super repeat-player effect are -0.852 and -0.878, respectively, with related odds ratios of 0.426 and 0.416. These numbers imply that employees who square off against one of these elite firms have win probabilities that are about 58% lower ( $1 - 0.42 = 0.58$ ) than employees that face one-shotters ( $p < 0.05$ ). Thus, just as in the consumer context, employers that arbitrate the most outperform other firms.

TABLE 4. THE EFFECT OF REPEAT PLAYERS ON WIN RATES

	<b>Consumer Win (Employee Award is Positive)</b>  <b>Logit Model</b>  <b>Logit Coefficient (Clustered Standard Errors)</b> <b>[Odds Ratio]</b>
<b>Employer Sophistication (Reference Category Is Consumers Facing One-Shot Employer)</b>	
<b>Low-level Repeat Player</b>	-0.218 (0.244) [0.804]
<b>Mid-level Repeat Player</b>	-0.126 (0.250) [0.882]
<b>High-level Repeat Player</b>	-0.852** (0.321) [0.426]
<b>Super Repeat Player</b>	-0.878* (0.417) [0.416]
<b>Employer–Arbitrator Familiarity (Reference Category is Employees Facing Non-Repeat Pairs)</b>	
<b>Low-level Repeat Pairs</b>	-0.241 (0.363) [0.786]
<b>High-level Repeat Pairs</b>	0.485 (0.487) [1.625]

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<b>Plaintiffs' Lawyer's Sophistication (Reference Category is Pro Se Consumers)</b>	
<b>One-Shot Lawyer</b>	0.790**
	(0.280)
	[2.204]
<b>Low-level Repeat-Player Lawyer</b>	0.918*
	(0.363)
	[2.504]
<b>Mid-level Repeat-Player Lawyer</b>	1.195***
	(0.358)
	[3.302]
<b>High-level Repeat-Player Lawyer</b>	0.587
	(0.411)
	[1.798]
<b>Plaintiffs' Lawyer-Arbitrator Familiarity (Reference Category Is Employees Whose Lawyer and Arbitrator Are Unfamiliar)</b>	
<b>Low-level Repeat Pairs</b>	0.700
	(0.456)
	[2.013]
<b>High-level Repeat Pairs</b>	0.951
	(0.620)
	[2.588]
<b>Other Controls</b>	
<b>Consumer Claim Amount (in hundred millions)</b>	0.090
	(1.488)
	[1.094]
<b>Telephonic Hearing</b>	-1.279**
	(0.397)
	[0.278]
<b>Time from Filing to Hearing (in years)</b>	0.727
	(0.484)
	[2.068]
<b>Time from Hearing to Decision (in years)</b>	0.583**
	(0.197)
	[1.791]
<b>Energy Dispute</b>	-0.427
	(0.660)
	[0.653]

<b>Financial Dispute</b>	2.204***
	(0.391)
	[9.062]
<b>Arbitration Hearing Is in Employee's Home State</b>	-0.123
	(0.226)
	[0.885]
<b>Constant</b>	-1.933***
	(0.550)
<i>N</i>	928

Notes:

- (1) Decision-month fixed effects as well as decision-year fixed effects are included.
- (2) In our sample, ninety-two cases are document-only cases. In all ninety-two of these cases, the employee lost, so the documents-only dummy variable ends up predicting non-wins (or failures) perfectly, which makes the logit model inestimable. We therefore dropped the documents-only dummy variable and the ninety-two documents-only cases from the logit regression.
- (3) In our sample, there were also fifteen observations in which the employees arbitrated against CLS Transportation of Los Angeles, LLC and were victorious. To control for the fact that being involved in the CLS litigation strongly increased win probability, we initially included a CLS variable. However, as with the documents-only variable, the CLS variable perfectly predicted wins, again making the logit model inestimable. We therefore dropped the CLS dummy variables as well as the fifteen CLS cases.
- (4) Standard errors are clustered at the employer level.

What causes this extreme repeat-player phenomenon? One possibility is that arbitrators intentionally cater to large companies to try to obtain future business. However, if this were true, we would expect to find a repeat-pairing effect: employers would prevail more when they encountered the same self-serving arbitrator again. But as in “Consumer Arbitration,” we find that repeat pairing does not impact win rates.<sup>135</sup>

How does this square with Bingham and Colvin, both of whom determined that employers won more often when they encountered a familiar arbitrator?<sup>136</sup> Perhaps differences in our sample period are the culprit. Likewise, the divergence could flow from the fact that we define “repeat pair” differently than Bingham and Colvin. We coded a case as a “repeat pair” if a company had appeared before the same arbitrator at least once in the 17,638-case AAA disclosures, which include both consumer and employment disputes. Conversely,

135. The fact that a case involves a repeat pairing between a plaintiffs’ lawyer and an arbitrator, which we examine for the first time in this Article, is also irrelevant to win rate probabilities.

136. See Bingham, *Statistics*, *supra* note 35, at 238; Colvin, *supra* note 35, at 17–18.

Bingham and Colvin looked exclusively at businesses and arbitrators who had met in previous *employment* matters.<sup>137</sup> Finally, what seems like a repeat pairing effect in Bingham and Colvin's work might be a result of the fact that they do not control for tiers of employer sophistication. Because high-level and super repeat players arbitrate more frequently, they are more likely to be embroiled in repeat pairings. For instance, in our regression sample of 928 cases, only 19.7% (155/784) of employees not facing a repeat pair faced an extreme repeat player. In sharp contrast, for employees facing a repeat pair, the chance of also encountering an extreme repeat player was 56.9% (82/144). Thus, the dominance of high-level and super repeat-playing firms could easily be mistaken for evidence that employers win more in repeat pairings. In fact, in our regression, we find that controlling for repeat pairings (both business repeat pairings and lawyer repeat pairings) with simple zero-one dummy variables but omitting all other repeat-playing dummies and controls reveals a negative and (almost) statistically significant ( $p < 0.073$ ) impact on win rate. This indicates that the repeat-pairing effect is a signal that appears if one treats "repeat player" as a monolithic concept but vanishes when one controls for various tiers of repeat playing. Accordingly, we find no evidence of arbitral bias.

Alternatively, case selection might explain the extreme repeat-player effect. Some commentators have hypothesized that serially arbitrating companies will boast higher win rates because they settle more often than other defendants.<sup>138</sup> This would be consistent with the Priest–Klein model: if a business is eager to sort things out informally, only especially weak claims will survive until the award stage. Yet our data reveals that high-level and super repeat players resolved fewer disputes before the arbitrator ruled than one-shot firms.<sup>139</sup> Indeed, 68% of high-level repeaters and 68% of super-repeaters terminated cases prior to an award as compared to 74% of one-shotters (both  $p < 0.01$ ). This is precisely the opposite of what one would expect: extreme repeat players both fully prosecute more disputes and prevail more often.

Likewise, "Consumer Arbitration" considered the possibility that the extreme repeat player effect rose from plaintiffs' strategic

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137. See Bingham, *Statistics*, *supra* note 35, at 236; Colvin, *supra* note 35, at 4.

138. See, e.g., SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION: BEFORE THE AMERICAN ARBITRATION ASSOCIATION 82 (2009); Bingham, *Repeat-Player Effect*, *supra* note 35, at 214.

139. Like the Searle Report, we include both settled and withdrawn cases in this calculation. As noted *supra* note 55, the AAA seems to use these labels interchangeably.

behavior. As we mentioned in that Article, some high-level and super repeat players in the consumer setting will pay \$7,500 to any customer who recovers more in arbitration than the company offers to settle the claim.<sup>140</sup> These bonuses encourage consumers to bring low-value grievances and prosecute them to completion.<sup>141</sup> In turn, this might cause arbitrators to rule on a higher number of anemic claims, depressing the consumer win rate.<sup>142</sup> But if this were the root of the extreme repeat-player effect, then, presumably, we would not find that high-level and super repeat-playing employers outperform their one-shot counterparts. Indeed, no extreme repeat-playing employer of whom we are aware pays a bounty to victorious employees. Thus, the persistence of the repeat-player effect in the employment milieu undercuts the idiosyncratic incentives story in the consumer sphere.

Finally, several other findings relating to win rates are noteworthy. First, recall that “Consumer Arbitration” reached the seemingly backwards conclusion that repeat-playing plaintiffs’ lawyers actually achieve *lower* levels of success. We did not discover this anomaly in the employment data. To the contrary, employees reap the rewards of legal representation.<sup>143</sup> Measured against the baseline of pro se plaintiffs, the odds of employees prevailing increase when they hire one-shot counsel, low-level repeat players, or mid-level repeat players; all three increases are statistically significant. Second, our control variables reveal that some features of arbitration are plaintiff-friendly whereas others are not. Specifically, we determined that telephonic hearings are associated with lower win rates than in-person hearings ( $p < 0.01$ ). On the other hand, a longer disposition time is positively related to an employee’s probability of winning ( $p < 0.01$ ).

When we shift our focus from win rate to damage amounts (Table 5), we find that the disadvantages of going up against a high-level or super repeat player disappear. Our OLS estimates indicate that employees that arbitrate against repeat-playing employers suffer no damages penalty relative to employees that take on one-shot employers. There is, however, a statistically significant awards benefit to hiring a repeat-playing plaintiff’s lawyer as opposed to proceeding pro se. Finally, repeat pairings do not impact damages, and telephonic

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140. See Horton & Chandrasekher, *supra* note 36, at 122.

141. See *id.*

142. See *id.*

143. High-level repeat playing plaintiffs’ lawyers had lower win rates; however, as we mentioned *supra*, this result stemmed from a single outlying law firm. Yet, we also found that mid-level repeat-playing plaintiffs’ lawyers obtained lower damage recoveries than pro se consumers—a result that is harder to explain. See *id.* at 119-20.

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hearings ( $p < 0.05$ ) and longer decision times ( $p < 0.05$ ) are associated with more favorable damages recoveries.

Overall, it seems that employees fare better than consumers, at least when it comes to repeat-player issues. In the consumer context, having a highly experienced lawyer or going up against a highly experienced business disadvantages consumers both in terms of win rates and damage awards. However, in the employee context, having a seasoned plaintiffs' lawyer boosts both win rates and damage amounts. Moreover, employees only suffer a win rate disadvantage when countering an extreme repeat-playing employer not a damages disadvantage.

TABLE 5. EFFECT OF REPEAT PLAYERS ON EMPLOYEE  
AWARD AMOUNTS

	(1)	(2)
	Square Root of Award Amounts OLS Regression (Clustered Standard Errors)  (Winners' Sample)	Square Root of Award Amounts OLS Regression (Clustered Standard Errors)  (Sample with All Employees)
<b>Employer Sophistication</b> (Reference Category Is Consumers Facing One-Shot Businesses)		
<b>Low-level Repeat Player</b>	-3.708	-20.228
	(56.459)	(19.488)
<b>Mid-level Repeat Player</b>	30.819	-10.554
	(55.114)	(20.809)
<b>High-level Repeat Player</b>	61.530	-29.690
	(61.253)	(17.551)
<b>Super Repeat Player</b>	97.860	-23.844
	(139.134)	(16.706)
<b>Employer-Arbitrator Familiarity</b> (Reference Category Is Consumers Facing Non-Repeat Pairs)		
<b>Low-level Repeat Pairs</b>	-23.977	-3.708
	(86.135)	(15.590)
<b>High-level Repeat Pairs</b>	-74.107	11.027
	(87.384)	(12.643)

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<b>Plaintiffs' Lawyer's Sophistication (Reference Category is Pro Se Consumers)</b>		
<b>One-Shot Lawyer</b>	158.084*	38.680***
	(61.904)	(11.056)
<b>Low-level Repeat-Player Lawyer</b>	79.182	31.892
	(84.692)	(20.014)
<b>Mid-level Repeat-Player Lawyer</b>	238.234**	71.589**
	(72.969)	(24.742)
<b>High-level Repeat-Player Lawyer</b>	175.011*	17.067
	(83.353)	(18.199)
<b>Plaintiffs' Lawyer-Arbitrator Familiarity (Reference Category Is Employees Whose Lawyer and Arbitrator Are Unfamiliar)</b>		
<b>Low-level Repeat Pairs</b>	-108.558	-11.530
	(75.658)	(22.784)
<b>High-level Repeat Pairs</b>	103.676	95.693
	(112.297)	(59.539)
<b>Other Controls</b>		
<b>Consumer Claim Amount (in hundred millions)</b>	9944.574	332.389
	(5788.591)	(452.755)
<b>Telephonic Hearing</b>	20.779	-35.924*
	(80.563)	(16.125)

<b>Time from Filing to Hearing (in years)</b>	-109.773	15.466
	(68.477)	(19.161)
<b>Time from Hearing to Decision (in years)</b>	-18.584	34.847*
	(64.793)	(16.155)
<b>Energy Dispute</b>	235.028	9.087
	(188.732)	(36.072)
<b>Financial Dispute</b>	-76.865	23.672
	(142.497)	(12.324)
<b>Arbitration Hearing is in Employee's Home State</b>	6.990	-3.568
	(49.589)	(15.727)
<b>Constant</b>	203.178*	27.727
	(97.084)	(26.652)
<i>N</i>	167	928
Notes:		
(1) Decision-month fixed effects as well as decision-year fixed effects are included.		
(2) In logit win rate regression, we dropped ninety-two cases that were document-only cases. To be consistent in our OLS damages regression, we also drop these ninety-two cases.		
(3) In logit win rate regression, we dropped fifteen cases in which the employees arbitrated against CLS Transportation of Los Angeles, LLC. To be consistent in our OLS damages regression here, we also dropped these fifteen cases.		
(4) Standard errors are clustered at the employer level.		

#### IV. CONCLUSION

Courts and scholars disagree over whether the Court's recent FAA decisions are good for employees. By reviewing four-and-a-half years' worth of AAA employment arbitrations, we have tried to offer preliminary answers to some of the hot-button empirical questions that underlie this debate. Our major conclusions are that: (1) employee claims have declined since *Concepcion*; (2) few employees pursue low-value cases; (3) the mere fact that an employee faces an extreme repeat-playing company decreases the odds of winning by a statistically significant degree but does not affect damages; and (4) employees fare just as well in repeat pairings as they do when the employer and the arbitrator have not crossed paths before.