

PUTTING THEIR MONEY WHERE THEIR MOUTH IS: MASS EMPLOYMENT ARBITRATION FILINGS AND THE NONPAYING PARTY PROBLEM

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Introduction

In February 2020, a federal judge ordered the food delivery company DoorDash to pay \$9.5 million in fees in a case brought by 5,010 delivery drivers against the company.¹ “You’re going to pay that money,” U.S. District Judge William Alsup said in court.² “You don’t want to pay millions of dollars, but that’s what you bargained to do and you’re going to do it.”³

Unlike many court orders, Alsup’s was unique because no liability had yet been determined. Instead, the judge required DoorDash to pay \$9.5 million just to initiate arbitration proceedings.

Long criticized as a mechanism for corporate actors to avoid liability, over the last few years arbitration has begun to be wielded by workers to gain recourse against their employers. By collectively initiating arbitration proceedings en masse, workers are challenging employers to act on their word: to participate in the expensive arbitration proceedings that they fought for years in court to preserve as a contractual right.

The phenomenon of mass arbitration filings sits at the intersection of mandatory arbitration and class action waivers. Unable to organize to bring their employers to court together, workers are now banding together to bring their employers to arbitration proceedings. In doing so, they have exposed employers’ resistance to actually participating in arbitration—and in particular, their fear of paying for it. Through these actions, workers have thus identified an opportunity to dramatically shift the status quo: to force the creation of mechanisms that would enable workers to practically resolve disputes against their employers.

¹ Nicholas Iovino, *DoorDash Ordered to Pay \$9.5M to Arbitrate 5,000 Labor Disputes*, Courthouse News Service (Feb. 10 2020), <https://www.courthousenews.com/DoorDash-ordered-to-pay-12m-to-arbitrate-5000-labor-disputes/>

² *Id.*

³ *Id.*

This paper aims to describe the current status quo in mass employment dispute resolution procedures and assess the viability of possible alternatives. Part I explores the history of mandatory arbitration and class action waivers. Part II describes the recent mass arbitration filings and their outcomes. Part III analyzes the nonpaying party problem and the means by which employers have both succeeded and failed at using nonpayment to stall arbitration. Part IV describes possible legislative and procedural mechanisms for improving today's arbitral system. The last section concludes.

I. The Evolution of Mandatory Arbitration and Class Action Waivers

In 1925, Congress passed the Federal Arbitration Act (FAA), requiring courts to enforce arbitration agreements.⁴ Passed under pressure by the business community, who believed arbitration to be faster and cheaper than litigation, the FAA's stated purpose was to put arbitration agreements on "equal footing" with other contracts and overcome "judicial hostility to arbitration."⁵ Over the last forty years, however, the U.S. Supreme Court has expanded the scope of the FAA's applicability dramatically, authorizing the use of arbitration for a broad range of disputes. These disputes, such as those arising out of statutory and constitutional law, differ dramatically from the commercial contracts that had motivated its creation.⁶

Until the early 2010s, the Supreme Court largely treated arbitration and class actions as compatible with one another. In the 2003 case *Green Tree Financial Corp. v. Bazzle*, a plurality decision of the Supreme Court concluded that arbitrators, not courts, must determine whether an arbitration contract forbids class arbitration, with limited judicial review.⁷ In doing so, *Bazzle* indicated that class arbitration could be compatible with the FAA, and thus and that class arbitration agreements were fully enforceable.⁸ In the wake of this decision, both of the United States' largest arbitration providers, AAA

⁴ 9 U.S.C. Sec. 2.

⁵ Deborah Hensler & Damira Khatam, "Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication," 18 *Nevada Law Journal*: 388 (2018).

⁶ *Id.* at 389.

⁷ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447, 123 S. Ct. 2402, 2404 (2003)

⁸ *Id.*

and JAMS, issued rules for the administration of class arbitration.⁹ Both sets of rules were either modeled off of, or directly reference, Rule 23 of the Federal Rules of Civil Procedure.¹⁰ In the subsequent years, arbitral tribunals not infrequently found that parties had agreed to class arbitration, particularly in cases involving consumer contracts—resulting in a caseload of more than three hundred pending class arbitrations by 2011.¹¹

The Supreme Court's approach to class arbitration took a marked turn in its 2010 decision *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* In spite of its expression of deference to arbitrators in *Bazzle*, the *Stolt-Nielsen* decision overturned an arbitral tribunal's finding that class arbitration was implicitly permitted by the parties' agreement.¹² Instead, the Court found that the arbitrators' decision was based on supposed policy considerations, and thus that because the parties had stipulated that there was "no agreement" regarding class arbitration, the parties could not be compelled to participate in class arbitration.¹³ Notably, the Court also held that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed that the parties consented to it by simply agreeing to submit their dispute to an arbitrator."¹⁴

Vastly expanding upon its decision in *Stolt-Nielsen*, in the landmark 2011 case *AT&T Mobility v. Concepcion*, the Supreme Court interpreted the FAA to allow businesses to require consumers to bring claims solely in individual arbitrations, rather than also as part of a class.¹⁵ The justices overturned the California Supreme Court's decision in *Discover Bank v. Superior Court*, which had previously found class action waivers in contracts of adhesion unconscionable

⁹ Gary Born, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, Kluwer Arbitration Blog (July 1, 2011), <http://arbitrationblog.kluwerarbitration.com/2011/07/01/the-u-s-supreme-court-and-class-arbitration-a-tragedy-of-errors/>

¹⁰ JAMs rules directly reference Rule 23, requiring arbitrators to allow a class member to serve as a representative only if the conditions of the Rule are satisfied. AAA rules for certification closely follow those of Rule 23. See JAMS Class Action Procedures (effective May 1, 2009); AAA Supplementary Rules for Class Arbitrations (effective Jan 1. 2010)

¹¹ Born, *supra*.

¹² *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010).

¹³ *Id.*

¹⁴ *Id.* at 685.

¹⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

under California state law, both for litigation and arbitration.¹⁶ In *Concepcion*, the Court found that California’s rule unfairly disfavored arbitration because it required class arbitration, which the Court found to be incompatible with the “fundamental” or true historic character of arbitration.¹⁷ In particular, because of the “procedural formality” it would require, “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”¹⁸ As such, the Court ruled that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹⁹ *Concepcion* thus found the FAA to preempt California’s claim of the unconscionability of class action waivers.

In 2018, the court extended this holding to employment contracts in *Epic Systems Corp. v. Lewis*, finding that despite protections afforded employees under the National Labor Relations Act, forced individual arbitration agreements are enforceable under the FAA in employee-employer disputes.²⁰ As in *Concepcion*, the court emphasized the importance of protecting “the traditionally individualized and informal nature of arbitration,” which the court believed would allow for faster and less costly dispute resolution than litigation.²¹

Last year, the Supreme Court reiterated its commitment to individual arbitration in *Lamps Plus, Inc. v. Varela*. The case centered on whether a contract requiring arbitration with no mention of class arbitration—unlike the contract in *Stolt-Nielsen*, which had explicitly stipulated silence on the issue—should allow for class arbitration. The Court held that courts cannot infer consent to class arbitration from an “ambiguous” contract.²² Borrowing language from its *Stolt-Nielsen* opinion, the Court explained that in arbitration, “parties forgo procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater

¹⁶ *Id.* at 333.

¹⁷ *Id.* at 334.

¹⁸ *Id.*

¹⁹ *Id.* at 344.

²⁰ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018).

²¹ *Id.* at 1623.

²² *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019).

efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”²³ In contrast, “class arbitration not only introduces new risks and costs for both sides, it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class—again, with only limited judicial review.”²⁴ As such, without an affirmative contractual basis for determining consent to class arbitration, such proceedings would be preempted by the FAA.²⁵

Thus, in the span of less than twenty years, the options available to employees frustrated with their employers have dramatically contracted due to the Supreme Court’s interpretation of the FAA. Today, more than half—54%—of nonunion private-sector employers mandate arbitration for their employees.²⁶ Large employers are more likely than small employers to mandate arbitration: among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.²⁷ Of employers mandating arbitration, 30.1 percent include class action waivers in their procedures.²⁸ Large employers are also more likely than small employers to mandate class action waivers; as a result, 41.1% of *employees* subject to mandatory arbitration have also waived their right to be part of a class action claim.²⁹ For a significant portion of America’s labor force, individual arbitration is their only recourse.

II. Mass Arbitration Filings: A Crack in the System

Over the last two years, drivers for both Uber and DoorDash have been testing the limits of the judicial system’s commitment to employment arbitration en masse. In August 2018, 12,501 drivers for Uber filed for arbitration with JAMS, arguing that they were misclassified as independent contractors and should be considered employees under the Fair Labor Standards Act.³⁰ The cost for Uber to initiate all of the proceedings, each with a required \$1,500 filing fee,

²³ *Id.* at 1416.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (2018), available at <https://www.epi.org/files/pdf/144131.pdf>

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Pet. for Order Compelling Arbitration, Abadilla v. Uber Technologies*, No. 3:18-cv-7343 (W.D.N.C. Dec. 5, 2018).

was more than \$18.7 million.³¹ Similarly, in August 2019, DoorDash drivers filed individual demands for arbitration with the AAA on behalf of 2,250 individuals with the same miscategorization claims.³² In September 2019, 4,000 additional DoorDash drivers filed.³³ The cost for DoorDash to initiate all of the proceedings would have been nearly \$12 million.³⁴

Rather than entering into the very arbitration proceedings that they had inserted into their workers' contracts, both Uber and DoorDash refused to pay their share of the filing fees. Three months after receiving 12,501 demands for arbitration from its drivers, Uber had paid the filing fees necessary for an arbitration to commence in only 296 cases.³⁵ Similarly, although AAA imposed a deadline for DoorDash's payment a few months after drivers paid over \$1.2 million in filing fees, DoorDash chose to instead email AAA and petitioners' counsel stating that they had "determined that there are significant deficiencies with the claimants' filings," and that "DoorDash is under no obligation to, and will not at this time, tender to AAA the nearly \$12 million in administrative fees."³⁶

Because of Uber and DoorDash's refusal to pay, the arbitration administrators refused to proceed with arbitration. JAMS advised Uber that JAMS is "missing the NON-REFUNDABLE filing fee of \$1,500 for each demand, made payable to JAMS."³⁷ JAMS also informed Uber that "[u]ntil the Filing Fee is received we will be unable to proceed with the administration of these matters."³⁸ Similarly, AAA advised DoorDash and its drivers in November 2019 that "Respondent has

³¹ Andrew Wallender, *Uber Settles 'Majority' of Arbitrations for at least \$146M*, Bloomberg Law (May 9, 2019) https://www.bloomberglaw.com/document/X7CP2DJ4000000?bna_news_filter=daily-labor-report&jcsearch=BNA%25200000016a9d12d981abeafd1382090001#jcite.

³² *Abernathy v. DoorDash, Inc.*, No. C 19-07545 WHA, 2020 U.S. Dist. LEXIS 23312, at *23-24 (N.D. Cal. Feb. 10, 2020).

³³ *Id.*

³⁴ *Id.*

³⁵ Pet. for Order Compelling Arbitration, *Abadilla v. Uber Technologies*, No. 3:18-cv-7343 (W.D.N.C. Dec. 5, 2018) at 3.

³⁶ *Abernathy*, 2020 U.S. Dist. LEXIS 23312 at 24.

³⁷ Pet. for Order Compelling Arbitration, *Abadilla v. Uber Technologies*, No. 3:18-cv-7343 (W.D.N.C. Dec. 5, 2018) at 21.

³⁸ *Id.*

failed to submit the previous requested fees for the 6,250 individual matters; accordingly, we have administratively closed our files.”³⁹

Unable to proceed without their employers’ payment, Uber and DoorDash drivers thus filed motions to compel arbitration. The Uber motion commenced a multi-month back and forth with the company over the adequacy of their counsel and whether the arbitration fees should be split.⁴⁰ Ultimately, the drivers entered into a settlement with Uber in May 2019 in which the company agreed to pay between \$146 million and \$170 million.⁴¹ Under the agreement, a “large majority” of the more than 60,000 Uber drivers filing arbitration claims for employment misclassification received settlement payments.⁴² In contrast, no such settlement was reached between DoorDash and its drivers: as mentioned above, in February 2020, a District Court judge ordered DoorDash to pay its share of the filing fees to proceed with arbitration.⁴³

The Uber and DoorDash cases exemplify the precarious situation of employment disputes today. Workers cannot engage in litigation against their employers, let alone consolidate their claims in a class action. But they also face difficulty initiating arbitration: due to employer incentives to stall arbitration proceedings through non-payment, in order to even initiate an arbitration proceeding required by their contracts, workers must navigate the cost and complexity of litigation in court. Under the current system, neither worker nor employer is satisfied: workers are forced to litigate in order to take advantage of a dispute resolution system they did not themselves choose, while employers, as indicated by Uber’s large settlement with its workers, are so afraid of the cost of such proceedings that they may be willing to pay enormous amounts to avoid them. Mass arbitration filings thus reveal that the status quo in worker-employer disputes is in a state far from equilibrium: from the perspective of both workers and employers, there are strong incentives to move towards an alternative system.

³⁹ *Abernathy*, 2020 U.S. Dist. LEXIS 23312 at 24.

⁴⁰ Alison Frankel, *JAMS to Uber: Our Rules And Your Contracts Demand Individual Arbitration*, Reuters (Jan. 25 2019) <https://www.reuters.com/article/legal-us-otc-jams/jams-to-uber-our-rules-and-your-contracts-demand-individual-arbitrations-idUSKCN1PJ2I0>

⁴¹ Wallender, *supra*.

⁴² *Id.*

⁴³ *Abernathy*, 2020 U.S. Dist. LEXIS 23312 at 34.

III. Arbitral Fees and the Issue of Nonpayment

A. History of the Nonpaying Party Problem

Arbitral refusal to pay is hardly a new phenomenon. The dispute currently playing out through mass filings has been playing out for more than fifteen years, albeit at a smaller scale.⁴⁴ Core to this dispute is the fact that arbitration comes with an up-front cost that does not exist in litigation: the arbitrators. While taxpayers pay for state and federal judges, the parties themselves pay for their arbitrators. As such, a party interested in stalling proceedings can refuse to pay their share of arbitration fees.

In 2005, Richard Dewitt and Rick Dewitt wrote an overview of the nonpaying party problem in their paper “No Pay No Play,” which stemmed from an AAA roundtable on the issue.⁴⁵ They argued that when a commercial party refuses to pay its share of arbitration, the other party is left with three flawed options: 1) fronting the nonpaying party’s costs and later seeking reimbursement; 2) filing an action in court to obtain an order requiring the nonpaying party to pay; or 3) discontinuing the arbitration and filing suit in court, claiming that the nonpaying party has waived the right to arbitrate.⁴⁶

As the Dewitts argued, for commercial parties, each of these options may not only be onerous and time-consuming, but also potentially ineffective. The first not only requires a large fronting of capital, which the paying party may not have access to, but also invites a substantial risk that the nonpaying party will not be able to pay the amount advanced or any eventual award.⁴⁷ Commercial arbitrations involving three arbitrators and ten or more hearings often engender fees totaling upwards of \$50,000 per party—a large sum to front on behalf of an opposing party.⁴⁸ The second and third options, taking court action, may not only require expensive and time-consuming litigation, but also may not end in the paying party’s favor. Courts have been split

⁴⁴ See Richard DeWitt & Rick DeWitt III, *No Pay No Play: How to Solve the Nonpaying Party Problem in Arbitration*, 60 DISP. RESOL. J. 28 (Feb.–Apr. 2005).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Neal M. Eiseman & Brian Farkas, *Stiffing the Arbitrators: The Problem of Nonpayment in Commercial Arbitration*, Harvard Negotiation Law Review 15 (April 2015).

on how to decide such cases. In *Sanderson Farms, Inc. v. Gatlin*, the Supreme Court of Mississippi ruled in 2003 that a party who refused to pay its share of filing fee and arbitrator's expenses had breached the parties' arbitration agreement and, therefore, had waived its right to arbitrate and to contest liability.⁴⁹ In contrast, in *Lifescan, Inc. v. Premier Diabetic Service*, the Ninth Circuit held that because AAA rules were incorporated into the parties' agreement, and these rules give the arbitrators discretion to apportion fees and expenses as appropriate, arbitrators are authorized to decide whether an arbitration should proceed in the case of a nonpaying party.⁵⁰ Accordingly, the court held that the relevant arbitrators in the case acted within their discretion in deciding to allow the arbitration to continue, conditioned on the paying party advancing the nonpaying party's fees, rather than compel payment.⁵¹ Thus, courts have taken vastly different approaches to the nonpaying party problem, leaving commercial parties agreeing to arbitration with a significant risk of bearing the costs themselves.

B. Nonpayment in Employment Arbitration

In contrast to commercial parties, employees facing a nonpaying employer have often been able to find a satisfactory remedy in the courts, who have recognized a power imbalance between workers and their employers. Although many employees are unlikely to be able to front their employer's arbitration costs, most courts have either forced arbitration to proceed, as in DoorDash's *Abernathy* case, or held that the claimants may bring their claim in court instead. For example, in *Stowell v. Toll Bros.*, the Eastern District of Pennsylvania found that a former employer had waived its right to arbitrate when it failed to pay the arbitration filing fee in a case of employee sexual discrimination.⁵² Similarly, in *Brown v. Dillard's Inc.*, the Ninth Circuit denied an employer the contractual right to compel an employee's participation in arbitration after the employer refused to pay for and participate in the employee's prior attempt to initiate arbitration.⁵³ For those workers able and willing to initiate litigation, court proceedings will thus likely enable them to either initiate arbitration or continue in court.

⁴⁹ *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828 (Miss. 2003).

⁵⁰ *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010 (9th Cir. 2004).

⁵¹ *Id.*

⁵² *Stowell v. Toll Bros.*, No. 06-cv-2103, 2007 WL 30316 (E.D. Penn. 2007).

⁵³ *Brown v. Dillard's Inc.*, 430 F.3d 1004, 1006 (9th Cir. 2005).

However, employee-initiated arbitration is intended to be cheap and accessible—not to require litigation as an entrance requirement. The United States’ leading arbitration administrators both intentionally limit employee fees so as to enable employees contractually required to arbitrate to be able to afford to do so. Under AAA rules, an employee’s fees are capped at \$300 for an individual arbitration.⁵⁴ Similarly, under JAMS rules, an employee contractually required to arbitrate is subject to a max of \$400 in fees.⁵⁵ Under both sets of rules, the employer is responsible for paying the remainder of the arbitrator’s fees.

Despite their employee-friendly fee structure, arbitration administrators allow the nonpaying problem to persist through their own rules. Today, both AAA and JAMS of rules are ambiguous as to what recourse remains for an employee if the employer refuses to pay these fees. In its rules regarding employment disputes, JAMS states that if a party fails to pay its fees, JAMS may either suspend or terminate the proceedings, or allow the paying party to advance the required payment, to be reimbursed via the final award.⁵⁶ In its rules for commercial disputes, AAA outlines a similar rule; however, its rules for employment-specific disputes do not mention non-payment.⁵⁷ As seen in the Uber and DoorDash cases, this often means that arbitration proceeds can be stalled indefinitely through nonpayment.

This ambiguity in AAA and JAMS rules has recently become a focal point in the public discourse on arbitration. In November 2019, a coalition of twelve Attorneys General issued letters to AAA and JAMS seeking clarification on their policies on employer non-payment.⁵⁸ In their letters, the Attorneys General requested documents on rules related to non-payment, as well as answers to specific questions such as:

⁵⁴ AAA Employment/Workplace Fee Schedule (effective Nov. 1 2019).

⁵⁵ JAMS Schedule of Fees and Costs, U.S. Domestic.

⁵⁶ JAMS Employment Arbitration Rules and Procedure (effective July 2, 2014).

⁵⁷ AAA Commercial Arbitration Rules and Mediation Procedures, R-57 (effective July 1, 2016).

⁵⁸ Letter to JAMS: Letter from Office of the Attorney General for the District of Columbia to Kimberly Taylor, Senior Vice President, Judicial Arbitration and Mediation Services, Inc, *Re: Request for Information Regarding Arbitration of Employment-Related Claims* (Nov. 12, 2019); Letter to AAA: Letter from Office of the Attorney General for the District of Columbia to Ann Lesser, Vice President - Labor, Employment, and Elections, American Arbitration Association, *Re: Request for Information Regarding Arbitration of Employment-Related Claims* (Nov. 12, 2019).

In the event a claimant-worker makes an arbitration demand for an employment-related claim and pays the claimant filing fee, can the arbitration proceed if the respondent-employer fails to pay the employer filing fee? If not, what recourse does the claimant-worker have to resolve their arbitration demand, other than a costly legal action?⁵⁹ As of this writing, AAA and JAMS' responses have not been made public, and the ambiguities in their rules remain.

So long as employers are able to stall arbitration proceedings through nonpayment, workers will be forced to court to take advantage of their contractual right. For a procedure that is intended to provide both parties with "lower costs" and "greater efficiency and speed,"⁶⁰ mandatory employment arbitration as practiced is thus a far cry from the rosy vision outlined by the Supreme Court.

I. Alternatives to Mass Filings: Towards the Future of Employment Disputes

Given not only the inefficiency and inaccessibility of today's employment arbitration environment, but also employers' own frustrations with the possibility of incurring fees en masse, the status quo is ripe for disruption. However, what such an alternative system could look like is still largely unsettled. While state legislators are focused on enabling workers' access to arbitration by alleviating the nonpaying party problem, liberal federal legislators have an eye for moving beyond arbitration altogether and restoring workers' access to class procedures. In the current judicial and political environments, neither approach may be viable. As such, frustrated and savvy workers are likely to turn to alternative procedural mechanisms within the confines of arbitration. Such mechanisms may allow for workers to benefit from joining their claims together, while inducing employer cooperation through the promise of increased efficiency and cost reduction.

A. Legislative Interventions Addressing Refusal to Pay

Given the consistency of Supreme Court precedent on FAA preemption, states interested in protecting workers have largely focused their efforts on making arbitration more accessible, rather than

⁵⁹ Letter from Office of the Attorney General for the District of Columbia to Kimberly Taylor, *supra*.

⁶⁰ *Lamps Plus*, 139 S. Ct. at 1416.

trying to enable litigation directly. By tackling, or even considering, the problem of employer nonpayment, these states have attempted to work within the Supreme Court's arbitration requirements to provide workers with a remedy against their employers. However, it remains to be seen whether even relatively small efforts to change the incentive structure of today's arbitration system in favor of workers can survive judicial scrutiny.

1. Requiring Employers to Pay or Waive Their Rights

California has tried to enable workers to act on their right to arbitration by creating a strong incentive for employers to pay their share of the costs of arbitration. As of January 1st, 2020, California has enacted SB 707, a bill mandating that employers pay their designated arbitration fees or waive their right to compel arbitration.⁶¹ If an employers' fees are not paid within thirty days of the due date, the employer is then considered in material breach of the arbitration agreement and resultantly waives its right to compel arbitration.⁶² The bill then authorizes the employee to withdraw the claim from arbitration and proceed with an action in court.⁶³ The bill also requires the court to impose a monetary sanction on the employer and authorizes the court to elect to impose other possible sanctions.⁶⁴

Although SB 707 is yet untested in court, the California legislature has argued that the bill will survive judicial scrutiny because it does not "frustrate the purposes of the FAA."⁶⁵ During the May 2019 Senate Floor discussion of the bill, members of the legislature supported the bill's judicial viability by pointing to the Ninth Circuit's decision in *Sink v. Aden Enterprises*, which found that a party is in default of an arbitration agreement if it fails to pay required arbitration fees.⁶⁶ Because the *Sink* court ruled that allowing a party refusing to cooperate with arbitration to indefinitely postpone litigation is "inconsistent with the structure and purpose of the FAA," the

⁶¹ Arbitration Agreements: Enforcement, CA S.B. 707, § 4 (2019).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ SB 707: Hearing Before the Senate Judiciary Committee, 2019-2020 Regular Session at 9.

⁶⁶ *Id.* at 8.

California legislature argued that a bill intended to stop such behavior should be consistent with the purpose of the FAA.⁶⁷

Despite the legislature's arguments, SB 707 is unlikely to hold up to judicial scrutiny because courts can find that it infringes on the parties' federal right to delegate questions regarding the conduct of the arbitration to the arbitrator. The Supreme Court held in *Rent-A-Center, Inc. v. Jackson* that this federal right extends so far as to require a plaintiff who contended that the arbitration agreement was unconscionable to arbitrate that claim.⁶⁸ Other courts have found that when it is not clear whether a party has violated the forum's rules, the court will generally defer to the arbitrator because "arbitrators are the experts about the meaning of their own rules, and are comparatively better able to interpret and apply them than courts."⁶⁹ As such, a court is likely to find that in the case of an employer's refusal to pay its fees, an arbitrator, rather than a court, should decide on the appropriate remedy. Because this contradicts SB 707's mandate, California's law is thus unlikely to survive judicial scrutiny.

2. Requiring Arbitrators to Proceed or Abandon the Arbitration

Because regulating employers refusing to pay their fees is unlikely to survive strict judicial scrutiny, some experts argue that regulation intended to aid workers in securing their ability to arbitrate should instead regulate the arbitrators themselves. In the "Model State Consumer & Employee Justice Enforcement Act," the National Consumer Law Center (NCLC) proposes that states adopt regulation that targets arbitrators directly.⁷⁰ Title VIII of the model bill regulates arbitration providers who administer a minimum number of disputes brought by employees.⁷¹ The bill requires that if an employer fails to pay arbitration fees, the arbitration administrator must either administer the arbitration or refuse to move forward with it.⁷² If the arbitrator refuses to continue, the employee would practically be allowed to move to court because the arbitration administrator would notify the parties in writing that the "arbitration forum designated by

⁶⁷ *Id.*

⁶⁸ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

⁶⁹ *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 872 (8th Cir. 2004).

⁷⁰ David Seligman, *The Model State Consumer & Employee Justice Enforcement Act*, National Consumer Law Center (November 2015).

⁷¹ *Id.*

⁷² *Id.*

the parties is unavailable to resolve this dispute.”⁷³ For those administrators who would choose to proceed, the bill creates a cause of action to recover fees.⁷⁴

The NCLC argues that its proposed bill would survive judicial scrutiny because it respects the autonomy of both employers and arbitrators.⁷⁵ This argument hinges on the idea that the bill simply requires arbitration administrators to ensure that they enforce their existing rules for fee-sharing, without requiring businesses to choose specific arbitrators or rules.⁷⁶ The NCLC also argues that by allowing arbitrators to decide whether to proceed with or abandon the case, the proposed bill avoids treating arbitration proceedings with disfavor relative to judicial or administrative proceedings, which was the cornerstone of the Supreme Court’s reasoning in *Concepcion*.⁷⁷

Although the Model Bill might withstand judicial scrutiny in court, the environment of fear that recent judicial precedent has created around any limitation on arbitration makes it unlikely to be adopted by individual states. When Maryland considered adopting other portions of the NCLC’s Model State Act in 2018, the legislature abandoned those provisions out of fear of federal preemption.⁷⁸ This decision was made under the influence of testimony by the Maryland Bankers Association (MBA) emphasizing the breadth of federal preemption law.⁷⁹ While this self-serving testimony was likely exaggerated, its impact underscores both the perceived and often real risk that any state legislation imposing constraints on arbitration faces today.

B. Legislative Interventions Enabling Class Action

Given the constraints of FAA preemption, state legislatures’ narrow focus on arbitral fees is likely to persist. However, at the federal level, legislators may be able to tackle the core issue underlying mass arbitration filing: protecting workers’ ability to consolidate their claims into class action. Indeed, in February 2020, the House of Representatives passed H.R. 2474, The Protecting the Right to

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Maryland Financial Consumer Protection Commission, 2018 Final Report 1, 50.

⁷⁹ *Id.*

Organize Act of 2019 (PRO Act).⁸⁰ In addition to other sweeping reforms, the PRO Act overturned the Supreme Court's decision in *Epic Systems Corp. v. Lewis* by explicitly stating that employers may not require employees to waive their right to collective and class action litigation.⁸¹ Although the PRO Act is unlikely to progress through the current Senate and become law, it serves as a model for changes that might occur in a different political climate. Clearly, passing such legislation would render the mass filing of arbitration complaints unnecessary; the broader impact of such legislation on employment cases is yet unknown, but likely to be monumental.

It is worth noting that ironically, and likely only in the short-term, the passage of a bill like the PRO Act might lead to smaller settlement values for workers, as they would lose the bargaining power that mass arbitration fees currently provide them with. Indeed, just as Uber drivers were beginning to file arbitration claims in mass in *Abadilla*, a different cohort of drivers—those who had explicitly opted out of arbitration in earlier contracts with Uber—reached a settlement agreement resulting from a class action against Uber for significantly less money than in *Abadilla*, over the same underlying cause of action.⁸² While the *Abadilla* settlement allocated around \$150 million to 60,000 drivers, the previous settlement, which stemmed directly from a class action suit of 5,200 drivers, was capped at only \$1.3 million.⁸³ Because during the class action plaintiffs acknowledged that defendants had a significant chance of prevailing on the merits or significantly limiting damages, their bargaining power was limited.⁸⁴ The resulting difference in settlement amounts indicates how in today's precarious mass arbitration environment, the threat of mass filing fees serves as a forceful incentive for companies to settle—even in cases they would be likely to win on the merits. Although such incentives are unlikely to persist in the long term as corporations modify their approach to engaging with mass arbitration, in today's environment savvy groups of plaintiffs may continue to be able to leverage AAA and JAM's employee-friendly fee structure to their advantage.

⁸⁰ Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Congress §2(d)(3).

⁸¹ *Id.*

⁸² *Hood v. Uber Techs., Inc.*, No. 1:16-CV-998, 2019 U.S. Dist. LEXIS 670, at *7 (M.D.N.C. Jan. 3, 2019).

⁸³ *Id.*

⁸⁴ *Id.* at *17.

C. Innovating Arbitration Procedure

1. Private Agreement to Consolidate Claims

While comprehensive legislative reform allowing for workers to pursue class action is likely far off, some form of claim aggregation procedures might be attainable within the current judicial and legislative environment, within the confines of arbitration. Contrasting the Uber and DoorDash cases provides insight into the variety of ways such procedures could be incorporated into arbitration: either through a private agreement between the parties, or directly through the rules of an arbitration administrator.

For a period of time during the *Abadilla* dispute, private agreement to claim aggregation procedures was on the table: exhibits attached to the Uber drivers' reply brief indicate that for several weeks before settlement, the company's lawyers negotiated with plaintiffs around the terms of a proposed series of "bellwether" arbitrations.⁸⁵ On both sides, parties' proposals indicated an interest in utilizing a procedural mechanism to consolidate the thousands of pending arbitrations to increase efficiency. While the negotiations were a far cry from an agreement to binding "bellwether" arbitration similar to a class action, they indicate the potential viability within today's pro-arbitration judicial environment of private consent to a procedure that allows workers some form of collective consolidation.

During negotiations with Uber, plaintiffs proposed a procedural scheme that would rely on the results of "bellwether" arbitrations to influence or determine the outcomes of the remaining cases, similar to existing procedural schemes in the United States and Germany. Plaintiffs proposed that they would undergo nine "bellwether" arbitrations, and then participate in mediation in order to decide on a formula for extrapolating the results of those arbitrations to the remaining plaintiffs.⁸⁶ If the two parties could not reach a deal in mediation, plaintiffs proposed that they would then allow a single arbitrator to decide on rules for extrapolating the "bellwether" arbitration results to other drivers.⁸⁷

Plaintiffs' proposed procedures resemble those of Multi-District Litigation (MDL) in the United States, as well of the

⁸⁵ Pet. for Order Compelling Arbitration, *Abadilla v. Uber Technologies*, No. 3:18-cv-7343 (W.D.N.C. Jan. 24, 2019), Ex. A.

⁸⁶ *Id.*

⁸⁷ *Id.*

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(Kapitalanlegermusterverfahrensgesetz, otherwise known as the KapMuG) in Germany. In an MDL, mass claims arising from the same facts and laws are assigned to a single court and judge for pre-trial management and discovery purposes.⁸⁸ The judge's decisions on the relevant motions, such as motions for dismissal, summary judgement, or class certification, are shared across cases.⁸⁹ After the discovery stage, litigation usually settles.⁹⁰ The use of MDLs as a procedural mechanism has significantly increased in the United States since its inception in 1968, as certification of mass injury claims for class action has decreased.⁹¹ In the most analogous German procedure, the KapMuG, a model case is chosen to progress through the entire judicial process, with a liability decision that is binding across cases.⁹² Remedies are then pursued individually by each claimant.⁹³ Because they did not yet propose a formula for extrapolation, plaintiffs' proposal leaves open the possibility that the decisions regarding the "bellwether" arbitrations would either be fully binding across cases, as under the KapMuG scheme, or that as in an MDL, individual motions, such as rulings on the admissibility of evidence, could be shared across cases. Either option would allow for more streamlined and efficient proceedings, within the confines of non-class arbitration.

Although Uber rejected plaintiffs' proposed procedure, its counter-offer exhibited a similar willingness to modify and streamline arbitration procedures through aggregation. In its response to plaintiffs, Uber proposed that four, rather than nine, proceedings move forward immediately, omitting the explicit "bellwether" language that plaintiffs had used in their proposal.⁹⁴ The company then refused to agree to any sort of mediation afterwards to determine how to apply the ruling.⁹⁵ Instead, the company proposed that after the results of those arbitrations were determined, negotiations could continue regarding

⁸⁸ Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Action Are Spreading Globally*, 65 *The University of Kansas Law Review* 965, 979 (2017).

⁸⁹ *Id.* at 980.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Pet. for Order Compelling Arbitration, *Abadilla v. Uber Technologies*, No. 3:18-cv-7343 (W.D.N.C. Jan. 24, 2019), Ex. A.

⁹⁵ *Id.*

next steps.⁹⁶ Likely afraid of the financial risk of accepting any given deliberation en masse, Uber insisted that each worker would have to be categorized as an independent contractor or employee individually.⁹⁷ However, the company also suggested that the remaining arbitrations could proceed in small groups.⁹⁸ In doing so, the company recognized that the much-lauded “efficiency” of arbitration did not apply to the mass claims involved in their case, and that alternative procedures focused on aggregation would likely be preferable for both sides. The company’s subsequent agreement to pay between \$146 million and \$170 million to settle the cases nine months later further exemplifies its recognition of the inefficiency and cost of proceeding within the confines of today’s individual arbitration rules.⁹⁹ Although the case ultimately settled without any arbitration proceedings, the discussion between Uber and its workers indicates that private agreement to some form of collective arbitration proceedings may be viable in the future.

2. Formalized Bellwether Arbitration Proceedings

While employers and workers may choose to consolidate claims through private agreement, arbitration administrators themselves may also intervene by developing protocols for such procedures that will be contractually adopted. Indeed, the International Institute for Conflict Prevention and Resolution (CPR) recently adopted such procedures, largely as a result of DoorDash’s dispute with its drivers.¹⁰⁰

In response to the mass claims filed by its workers, in November DoorDash introduced new arbitration terms in its worker contract, which workers must agree to before they can log onto the DoorDash app to work and get paid.¹⁰¹ The new terms required that rather than arbitrating disputes individually with the AAA, workers will arbitrate disputes through the CPR, which had a few days prior adopted protocols for employment-related mass claims.¹⁰² Under the updated CPR rules, when more than thirty cases are filed for similar claims, ten cases will proceed at once in arbitration proceedings paid

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Wallender, *supra*.

¹⁰⁰ Iovino, *supra*.

¹⁰¹ *Id.*

¹⁰² *Id.*

for by the employer; these cases will function as “bellwether” cases followed by a mandatory 90-day mediation process to resolve other claims.¹⁰³ If mediation proceedings do not end in global settlement, workers can either proceed with arbitration or can go to court.¹⁰⁴ If the proceedings do produce such a settlement, individual workers retain the option to opt out and pursue individual claims in arbitration.¹⁰⁵

CPR has proclaimed that it developed these procedures in order to fill a needed gap in the arbitration space. In a Dec. 12 brief, CPR wrote that Gibson Dunn, Uber’s law firm, had reached out and “expressed concern over the current options for administration of a mass of claims and the fee structures being imposed.”¹⁰⁶ CPR claims it was thus “eager to innovate in the area of mass claims and, rather than just focusing on alternative fees, took the opportunity presented to lend its expertise and resources to think anew and find an efficient and fair process for resolving these claims.”¹⁰⁷ CPR then consulted with Gibson Dunn and DoorDash in-house lawyers as it came up with its procedures, as well as plaintiff lawyers not involved in the *Abernathy* dispute.¹⁰⁸

Although the development of CPR’s mass-claim procedures has been criticized due to DoorDash’s significant involvement, the end product does not appear to be clearly biased towards employers.¹⁰⁹ In fact, the procedures closely resemble those of the established American MDL, discussed above, as well as the “bellwether” proceedings that Uber drivers had requested as plaintiffs against the company. In addition to the obviously significant decrease in costs for the employer, the core differences between CPR’s rules and those requested by the Uber drivers appear to be the 90-day time period allocated for the mandatory mediation, as well as the random selection of “bellwether”

¹⁰³ Employment-Related Mass-Claims Protocol, International Institute for Conflict Resolution and Prevention (effective Nov. 4 2019).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Alison Frankel, *Ex-Judge Atop Controversial Mass Arbitration Process: Give It a Chance To Work*, Reuters (Dec. 23, 2019) <https://www.reuters.com/article/us-otc-massarb/ex-judge-atop-controversial-mass-arbitration-program-give-it-a-chance-to-work-idUSKBN1YR1ZI>

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* U.S. District Judge William Alsup of San Francisco authorized Keller Lenkner to conduct limited discovery to determine what role DoorDash’s lawyers played in the development of the CPR mass arbitration protocols.

cases. In addition, plaintiffs dissatisfied with a mediated settlement explicitly maintain the right either to proceed in individualized arbitration proceedings.

Although CPR's procedures are still too new to evaluate empirically, in theory they seem to present an innovative solution to the problem of mass employment arbitration. While they do not provide workers with the complex procedural protections of a class action, CPR's procedures do enable workers to aggregate their claims in proceedings paid for by their employer, while ultimately retaining the right to proceed in individual arbitration. Indeed, in today's political and judicial environment, these procedures may provide frustrated workers interested in collective action with their greatest chance at actually having their dispute heard.

Conclusion

Employment arbitration today stands at a crossroads. More and more employers are forcing workers to arbitrate their disputes, while simultaneously decreasing their opportunities to join collectively to vindicate common claims. But in parallel, these employers are now starting to be called on their bluff. As Judge Alsup captured in his February 2020 *Abernathy* opinion:

The irony... is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer... faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause.¹¹⁰

By engaging collectively in mass arbitration filings, workers are thus forcing employers to put their money where their mouths are, and engage with the actual costs of arbitrating worker disputes. Still in its early days, this nascent tactic has received judicial approval and, for some plaintiffs, resulted in large settlement awards. Perhaps more importantly, it has disrupted the status quo of forced arbitration by calling legislative, judicial, and employer attention to the inefficiencies, inaccessibility, and costs of today's system—and in doing so, opened what had previously seemed to be a closed door towards more worker-friendly dispute resolution procedures.

Although legislative options for increasing worker's ease of access to arbitration or class action proceedings are unlikely to take

¹¹⁰ *Abernathy*, 2020 U.S. Dist. LEXIS 23312 at 33-34.

hold in today's judicial and political climate, workers may find recourse within innovations on arbitration procedures themselves. Either through private agreement to aggregated arbitration proceedings, or through the development of such proceedings by arbitration administrators, the pressure that recent mass filings has put on today's employment arbitration system may force employers to adopt procedures that allow workers to come together to have their claims heard.