THE TRUTH ABOUT FORCED ARBITRATION

Americans are more likely to be struck by lightning than win in forced arbitration

SEPTEMBER 2019

AMERICAN ASSOCIATION *for* JUSTICE®

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EXECUTIVE SUMMARY

Forced arbitration is a rigged system designed by corporations in which injured workers and consumers have no meaningful chance of finding justice. Forced arbitration requires Americans to "agree" to surrender fundamental constitutional rights – often without ever realizing they've done so. When corporations harm workers and consumers by cheating, stealing, or even breaking the law, cases that should be heard by a judge or jury are instead funneled into a secret system controlled by the wrongdoers in which there is no right to go to court, no right to a jury, no right to a written record, no right to discovery, no transparency, no legal precedents to follow, no opportunity for group actions when it would be too difficult or costly to file a claim alone, no guarantee of an adjudicator with legal expertise, and no meaningful judicial review. Without such checks and balances, the deck is stacked heavily against workers, patients, and consumers, and systemic misconduct is allowed to continue in secret.

Forced arbitration's proponents counter that the process is faster, fairer, and better for workers and consumers than going to court. However, this comprehensive analysis of the self-reported data provided by the arbitration organizations makes clear that forced arbitration is not an alternative judicial process, but instead eliminates claims, immunizes corporations, and allows abuse, discrimination, fraud, and essentially all other corporate wrongdoing to go unchecked. Americans are more likely to be struck by lightning than they are to win a monetary award in forced arbitration.

Claim Elimination

- It is estimated that more than 800 million arbitration provisions permeate our everyday lives.[1] However, the American Arbitration Association (AAA) and JAMS, the two most dominant consumer arbitration providers, recorded only approximately 30,000 consumer arbitrations over five years (2014-2018), an average of just 6,000 per year.
- In contrast, there are more than 2 million small claims cases filed in court every year.[2]
- **Despite having millions of customers—all subject to forced arbitration agreements—corporations such as Amazon (101 million Prime subscribers but just 15 forced arbitrations over five years), GM (8 million vehicles sold a year but just 5 forced arbitrations over five years), and Walmart (275 million customers a week but just 2 forced arbitrations over five years) rarely face any claims.**

Consumer Winners

- Only 1,909 consumers won a monetary award over the five-year period.
- On average, approximately 382 consumers won a monetary award each year—less than the number of people struck by lightning each year in the United States.[3]
- Only 6.3% of cases arbitrated at either AAA or JAMS resulted in consumers winning a monetary award over the five years.
- **Over the last five years, no corporation has used forced arbitration more than AT&T. Nearly 1,000 consumers attempted to go through the forced arbitration process between 2014 and 2018, claiming more than $440**

million in damages. Seventeen consumers won a monetary award, collecting a total of just $376,251.

Nursing Home Forced Arbitration

- Forced arbitration clauses allow nursing homes to avoid accountability for everything from negligent care to sexual assault.
- Over five years, consumers pursuing a nursing home claim with wither AAA or JAMS won a monetary award in only four cases.
- **In one case, the corporation—The Rehabilitation & Nursing Center at Greater Pittsburgh—was awarded $20,000 more than it had claimed. The arbitrator in that case was a former human resource counsel to a large hospital system in Ohio.**

Employment Forced Arbitration

- Of the 60 million employees subject to forced arbitration, only 11,114—0.02%—tried to pursue a dispute in forced arbitration.
- Just 282 of these employees were awarded monetary damages over the five-year period, an average of 56 workers per year—less than one-ten-thousandth of one percent of covered workers.
- **The corporation with the most employment arbitration cases at AAA was Darden Restaurants, owners of the Olive Garden and LongHorn Steakhouse chains. Since 2005, Darden has paid over $14 million to settle lawsuits filed in court over reprehensible working conditions. However, in forced arbitration, Darden faced just 329 claims. Employees won an award in just eight cases, for a total of $73,961.**

Forced Arbitration Involving Credit Cards and Banks

- Consumers pursued 6,012 forced arbitrations involving financial claims, claiming at least $3.7 billion in damages. They won monetary awards in just 131 cases (2.2%), totaling $7.4 million—0.2% of the claimed damages.
- Corporations pursued 137 financial claims through arbitration, but remarkably won monetary awards in twice as many as they initiated, winning $5.4 million in 314 cases.
- **No bank used forced arbitration more than Spain-based Santander. Consumers initiated 848 arbitrations against the corporation, claiming $44 million in damages. Only three consumers won a monetary award, for a total of $10,978, equivalent to 0.000002% (two one-hundred-thousandths of one percent) of the corporation's $315 billion in revenues.**

Data Manipulation

- AAA, the country's largest consumer arbitration provider, deletes data every quarter in a way that significantly distorts arbitration results.
- AAA deletes cases by *filed date*, instead of *closed date*, even though this is a database of *closed claims*. This has the effect of systematically scrubbing claims that take a long time from its database.
- The longer a case takes, the quicker it is purged from the database. All research claiming that arbitration is faster than litigation has been skewed by this data elimination.
- **The oldest known filed case was filed in August of 2009—a business-initiated residential construction case—and was closed four and half years later in March 2014. However, because the case was pending it did not appear in any published database until the second quarter of 2014, and then was deleted in the very next quarter because of its early filing date.**

INTRODUCTION: HOW FORCED ARBITRATION ELIMINATES CLAIMS

Forced arbitration clauses are endemic in today's marketplace—hidden in everything from credit card agreements to pest control contracts. It is estimated that more than 800 million arbitration provisions infiltrate our everyday lives.[4] Given how common such forced arbitration clauses are, it is surprising how few cases are ever pursued through arbitration. AAA and JAMS are the predominant arbitration organizations for consumers forced into arbitration.[5] Yet over the last five years, the two organizations have recorded only approximately 30,000 consumer arbitrations, an average of 6,000 per year.[6]

To put that number in context, there are more than 2 million claims in small claims court each year.[7]

As this report shows, there is a clear reason for the disparity between the number of forced arbitration clauses in effect and the number of cases that are ever filed by consumers. Forced arbitration is a rigged corporate-friendly scheme in which consumers have the odds stacked against them.

Although some states have passed laws requiring arbitration organizations to disclose information to the public about consumer arbitrations, this information is limited, error-filled, and subject to manipulation by the issuing organizations.[8] Nor is there any access to the underlying materials, meaning that individual case information detailing systematic negligence and wrongdoing remain concealed from the public eye. These limited, incomplete disclosures pale in comparison to the information available in traditional court cases.

It is difficult to quantify how many consumer arbitrations there are because of the way the arbitration providers count cases. Neither AAA nor JAMS publish cases in their databases until the cases are concluded (other arbitration organizations include "pending" cases), so information on the number of cases filed is incomplete.

In addition, AAA deletes data every quarter. In fact, not only does AAA delete data but it deletes data by "filing date," which has the effect of removing closed cases from subsequent years. In effect, AAA is not deleting cases based on how old they are but on how long they took.

Because AAA deletes cases by filed date instead of closed date, claims that take a long time are automatically scrubbed from its database. For instance, archived records preserved by Yale Law School show that more than 1,000 closed cases in 2014 have been deleted from AAA's current records for 2014.[9] At least 389 of those cases took more than a year, 90 took more than two years, and 20 took more than three years—all of which have been purged. The oldest known filed case was filed in August of 2009 and was closed four -and-a-half years later in March 2014, but it was deleted from the database that same year (the third quarter of 2014). In reality many more cases closed in 2014 are likely to be missing and any cases that took longer than four years will have been deleted.

This data manipulation—whether done purposefully or by accident—has major ramifications for researchers and policymakers trying to judge the efficiency and fairness of forced arbitration.

This analysis of AAA and JAMS closed claims examines cases that were filed and terminated during the five years from 2014 to 2018. We attempted to compensate for AAA's data deletion by restoring missing data culled from archived databases. To pinpoint consumer success, we focused on the only true measure of a documented consumer victory: monetary awards. The number of successful consumers identified this way was actually higher than the given number of "prevailing" consumers and appears to be a more accurate measure of how many consumers are truly successful.

How Many Consumer Forced Arbitrations Are There?

Over the last five years, the two major arbitration providers have only recorded around 30,000 consumer arbitrations, an average of 6,000 per year. To put that number in context, AAA's total alternative dispute resolution (ADR) caseload, including commercial arbitration, is approximately 200,000 cases *each year*.[10]

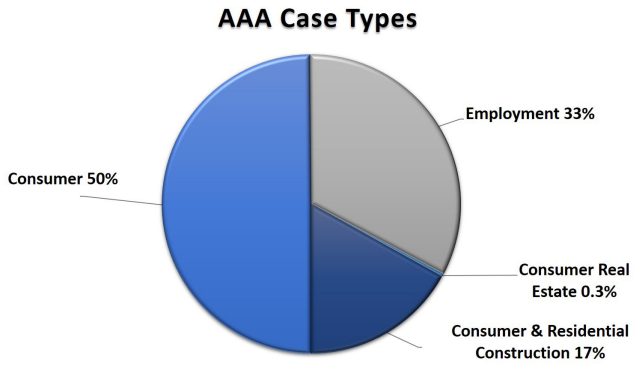
YEAR	CASES CLOSED
2014	3,569
2015	4,304
2016	5,892
2017	7,409
2018	9,165
TOTAL	**30,339**

Total consumer arbitrations at AAA and JAMS - 2014-2018.

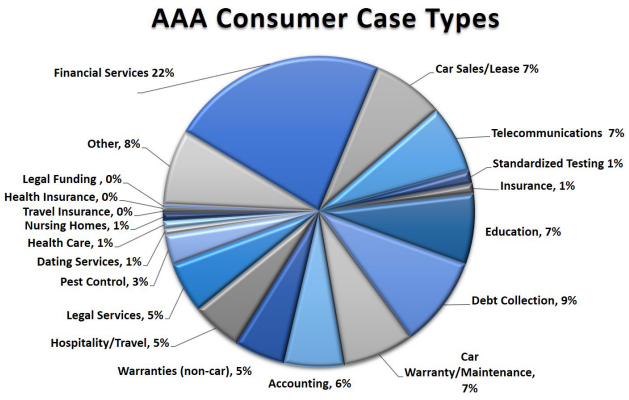
Case Types

Forced arbitration provisions are most frequently associated with financial services agreements, like credit cards, or employment contracts. But they are also found in a wide variety of other situations, including everything from dating apps to nursing home contracts.

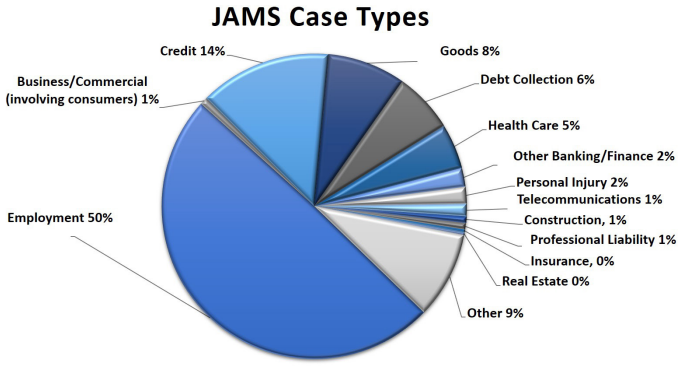
AAA's cases are split into five broad categories.[11]



The "Consumer" cases are then split into further subsets.



JAMS does not use the same categories, though there is some overlap.



Why Don't Consumers File in Forced Arbitration?

As mentioned above, over the last five years, the two major forced arbitration providers have recorded only approximately 30,000 consumer arbitrations. This is not an indication that forced arbitration does not work but rather that it works just as intended: by eliminating claims. As University of Wisconsin-Madison Law professor David S. Schwartz puts it:

> "*It is not a justice system… It is not demonstrably fair. It is not imposed to promote small claims or otherwise help the "little guy" who is excluded from meaningful access to the courts. Finally, let's stop calling it "mandatory arbitration," that bloodless, hypertechnical, and misleading term. "Mandatory" implies that the arbitration process is binding on both sides, but that is less than half true: it is voluntarily chosen by the defendant, who drafts the arbitration clause, and "mandatory" only on the party who doesn't want it, typically the plaintiff. So what is this thing? It is claim-suppressing arbitration. It is designed and intended to suppress claims, both in size and number.*"[12]

Other researchers have come to the same conclusion.[13] A 2015 *New York Times* investigation backed up these conclusions, finding that some of the country's largest corporations, with millions of customers subject to pervasive forced arbitration clauses, only ever faced a handful of consumer arbitrations. "*Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily,*" the *Times* wrote. "*But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.*"[14]

> "Once blocked from going to court as a group, most people dropped their claims entirely."
>
> – *The New York Times*

The *Times* investigation found that between 2010 and 2014, "*only 505 consumers went to arbitration over a dispute of $2,500 or less. Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations in those five years, the data shows. Time Warner Cable, which has 15 million customers, faced seven.*"

Consumers Do Not Understand Forced Arbitration

The Consumer Financial Protection Bureau (CFPB) studied forced arbitration extensively, and concluded few consumers chose to try their chances in forced arbitration. According to the CFPB, "*almost no consumers filed arbitrations about disputes under $1,000.*"[15] The agency also noted that out of 13 million consumers in conventional class actions, only 3,605 opted out of the settlements, and only a handful of those chose to file an arbitration claim.[16]

One reason the CFPB suggested that consumers did not pursue arbitration claims was that the arbitration agreements were too impenetrable for them to understand. A 2015 survey conducted by St. John's University Law Professor Jeff Sovern found definitive evidence of such confusion and concluded consumers had a "*profound lack of understanding about the existence and effect of arbitration agreements.*"[17] The survey found that while 43% of consumers recognized a sample contract included an arbitration clause, 61% believed they would, nevertheless, have a right to go to court. Less than nine % realized the truth: that there was a clause that would prevent them from exercising their constitutional right to go to court. Writing in *American Banker*, Sovern concluded, "*the consent consumers provide when they sign a contract taking away their right to sue is no more meaningful to most consumers than if the clause had been printed in a foreign language.*"[18]

"The consent consumers provide when they sign a contract taking away their right to sue is no more meaningful to most consumers than if the clause had been printed in a foreign language."

– St. John's University Law Professor Jeff Sovern

Alan Kaplinsky, one of forced arbitration's leading proponents, has also acknowledged that there are few consumer arbitrations. Kaplinsky claims that's because instead they either call the company to complain or go to the Better Business Bureau: "*That's why you don't see a heck of a lot of arbitration or litigation when there's a clause.*"[19] There are no data to back this up though, and long-standing research suggests consumers don't complain to the company or Better Business Bureau.[20]

Company	Number of Customers (U.S.)	Number of Arbitration Cases from 2014-2018 (AAA & JAMS)
Amazon	101 million Prime subscribers	15
AT&T (includes DirecTV)	177 million AT&T subscribers	940
CVS	5 million customers per day	46
FedEx	15 million shipments per day	8
GM	8.38 million vehicles sold in 2018	5
Kroger	8.5 million customers per day	2
United Health Group	142 million individuals served	239
Walmart	275 million customers per week	2

Despite having millions of customers and employing forced arbitration agreements, corporations face a comparatively small number of claims.

FAIRER? WHO WINS IN FORCED ARBITRATION?

- 1,909 – Number of Consumer Winners at AAA/JAMS over five years
- 382 – Average Number of Consumer Winners at AAA/JAMS per year
- 6.3% – Percentage of Consumer Winners at AAA/JAMS averaged over five years

Perhaps the most compelling theory for why consumers do not pursue forced arbitration claims against corporations is that they may suspect that a dispute resolution process suggested by the corporation (in fact, required by the corporation) is unlikely to offer them much chance of success. In this, consumers are correct.

The 2015 CFPB analysis of arbitrations in six consumer financial markets found that consumers were successful just 20% of the time.[21] However, analysis of AAA and JAMS' databases shows consumers are far less successful across all industries.

As the CFPB has pointed out, it is not easy to figure out who wins in forced arbitration or even what should count as a win.[22] Both AAA and JAMS list "prevailing" parties, but many cases finished in ways that were inconsistent with the given "prevailing" party. In hundreds of cases at AAA, one party would be listed as prevailing when the other received a monetary award. In one case, a consumer was listed as prevailing but a note mentioned he or she was ordered to return a car. In another case, an employee was listed as prevailing and winning a $390,000 award, only for the corporation to receive $59 million.[23] Conversely, many of those consumers who did win a monetary award are not listed as prevailing. Similarly, JAMS listed 306 prevailing consumers, but only 227 featured an award, monetary or otherwise. Seven of the "prevailing consumer" cases were, in fact, abandoned, withdrawn, or dismissed.[24] "Both" parties were listed as winners in 11 cases. JAMS also often listed "both" parties as prevailing but then did not specify which party received the award, making it impossible to know if a consumer was truly successful.

Both organizations also list "awarded" as an outcome, but hundreds of these "awarded" cases feature no monetary or non-monetary award.

Yale Law School Professor Judith Resnik highlighted the challenges of figuring out case winners when trying to investigate AT&T's arbitration cases:

> "*In the 316 cases in which AT&T was involved between 2014-2017, thirty-nine were described as ending in decisions, called "awards," 251 settled, and twenty-six fell under the categories of "administrative," "dismissed," or "withdrawn." Within the thirty-nine "awarded" cases, twenty-two involved instances when AT&T "prevailed." Of those cases, in three, consumers were to pay the company in amounts ranging from $566 to $2103. In the other seventeen cases that ended in awards, the AAA compilation listed "zero" as funds that would be ordered paid; in nine instances, the compilation listed no party prevailing. In one case, no party was listed as prevailing, but the consumer was described as receiving a positive award. Counting this case along with the other seven claims in which consumers were listed as prevailing, these eight consumer awards ranged from $2.23 to $1,449, with a median of $525.36.*" [25]

Non-Monetary Awards

Both AAA and JAMS include limited data on non-monetary relief but again the data here are misleading in terms of indicating wins and losses. At AAA, 2,249 consumers were listed as receiving non-monetary relief. However, in more than 100 of these cases, corporations were said to have prevailed and in 36 of these cases, corporations won monetary awards, rendering them inconsistent with a successful consumer outcome. In 1,356 of these cases, the non-monetary relief was listed as "other." The relief in the rest of the cases was either recission/reinstatement (as in the reinstatement of a loan), or declaratory judgments (the details of which remain unclear).

JAMS offered more concrete details about non-monetary awards in 30 cases in which consumers allegedly prevailed. In seven cases, the consumers' "award" turned out to be a complete denial of claims and explicit recognition of the corporation as the winning party. In five cases, the "award" was a dismissal, including two which explicitly denied "class-wide arbitration." In eight cases, there was some recognizable consumer relief, including continued phone service, deletion of an item from a credit score, reinstatement and back pay, and repair of an air bag.

Monetary Awards

Given the inadequacies of the data on "prevailing" parties and non-monetary awards, this analysis focuses on the only true measure of a documented consumer victory: monetary awards. This study sought to identify consumers who won a monetary award greater than the corresponding business award (in many cases consumers won an award but the opposing corporation won the same or an even higher award). The number of successful consumers defined this way was actually higher than the given number of "prevailing" consumers, but appears to be a more accurate measure of consumer success.

JAMS offered its own unique challenge by listing "both" parties as prevailing but not distinguishing which party won the listed award (to be conservative, this analysis considered these consumer wins).

	Number of Consumer Winners		
	AAA	JAMS	AAA + JAMS Combined
Consumer v. Any Corporation	1,686 (7.1%)	223 (3.3%)	1,909 (6.3%)

On average, approximately 382 consumers win a monetary award in arbitration each year. **More people are struck by lightning each year in the United States**.[26]

Consumer Winners by Case Type

Overall, in consumer cases, consumers won monetary awards in 5.5% of cases (employment cases saw employee monetary awards even less frequently at 2.3%). But the type of dispute made a significant difference to consumer success. The highest rate of consumers winning a monetary award was in pest control cases (22.8%). On the other hand, no consumer received a monetary award in any nursing home case over the entire five years.

AAA—Consumers Winning Monetary Awards by Case Type	
Pest Control	22.4%
Health Care (Patient/Provider)	22.2%
Consumer & Residential Construction	20.9%
Car Warranty/Maintenance	14.9%
Consumer Real Estate	14.5%
Car Sales/Lease	12.6%
Education	12.6%
Travel Insurance	12.5%
Insurance (Other)	10%
Hospitality/Travel	7.4%
Warranties (Non-Car)	7.2%
Accounting	6.6%
Telecommunications (Phone, Cable)	5.8%
ALL CONSUMER CASES	5.5%
Legal Services	4.7%
Debt Collection	3.6%
Employment	2.3%
Financial Services	2.1%
Health Insurance	zero %

Standardized Testing	zero %
Nursing Home	zero %

JAMS—Consumers Winning Monetary Awards by Case Type	
Insurance	20%
Goods	7%
Telecommunications (phone, cable)	4.8%
Other	4%
Business/Commercial (still involving consumers)	3.8%
Health Care	3.4%
Employment	3.1%
Credit	2.8%
Other Banking or Finance	2.3%
Professional Liability/Malpractice	2.3%
Personal Injury	1.7%
Debt Collection	0.9%
Construction	zero %
Real Estate	zero %

When Corporations File Against Consumers

When businesses initiated a case against a consumer, they won a monetary award 24.8% of the time. When consumers initiated a case, they won an award 7.4% of the time. Beyond that were several curious findings. Consumers actually did better when a corporation initiated a case than when they themselves initiated a case, "prevailing" more often (5% of the time in corporate-initiated cases versus 4.6% of the time in their own cases) and winning monetary awards more often (9.1% of the time in corporate-initiated cases versus 7.4% of the time in their own cases).

No company initiated more cases than ACT, Inc.—the company that administers the ACT test for high school students. ACT initiated 208 cases, all but two of which ended as "awarded" (one was settled and another withdrawn). However, none featured any monetary award and only two suggested any kind of non-monetary relief. Only two consumers "prevailed." Consumers did not fare much better in cases they brought either, with no monetary awards and only three consumers prevailing. The non-profit Level Playing Field has highlighted ACT's arbitration practices before, suggesting that AAA has manipulated data on the company.[27]

Few consumers ever try to pursue an arbitration claim and fewer still win. But beyond that, forced arbitration has other pitfalls. Forced arbitration's proponents like to suggest that corporations usually pay for the cost of the arbitration, and AAA and JAMS themselves claim to cap the consumer contribution to a filing fee of $200 and $250 respectively:

> "*In cases before a single arbitrator where the consumer is the Claimant, a nonrefundable filing fee, capped in the amount of $200, is payable in full by the consumer when a case is filed unless the parties' agreement provides that the consumer pay less… All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the business.*" - AAA[28]

> "*With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is $250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company.*" - JAMS[29]

However, as Public Justice Executive Director Paul Bland has highlighted, many corporations go back on their promises to pay arbitration's costs, forcing consumers to choose between paying for everything or dropping the case.[30] AAA even reprimanded Comcast for refusing to pay fees and told it to stop using the AAA name in its contracts.

Such bait-and-switch behavior is neither cheaper or fairer than traditional litigation. In over 112 cases at AAA, consumers initiated arbitrations and either lost completely or won a lesser award than the defending corporation, and then had to pay 100% of the arbitration fees as well. In those cases, consumers claimed an average of $170,000 per case, won an average of $1,400, but were forced to pay an average of $27,000 in arbitration fees and payments to the defendant and its attorneys.[31]

Consider the experience of these consumers from the AAA/JAMS' databases who chose not to drop their cases and ended up far poorer for it:

- The consumer who apparently initiated an arbitration claim against Fairfield Imports Three LLC, over a car sale/lease for $60,000, and ended up not only losing but also was charged $600,000 for Fairfield's attorney fees.
- The employee who took IPC Healthcare—the healthcare company that agreed to pay $60 million in 2017 to settle a whistleblower employee's claims that the company routinely encouraged staff to overbill Medicare and Medicaid—to arbitration over $15,001, and left with a $300,000 bill for IPC's attorneys' fees.[32]
- The homeowner who took Advantage Contractor Solutions to arbitration claiming $300,000 in a new home construction case, and

who won one-tenth of that 18 months later ($30,228), only to be hit with an arbitration fee of $52,000.[33]

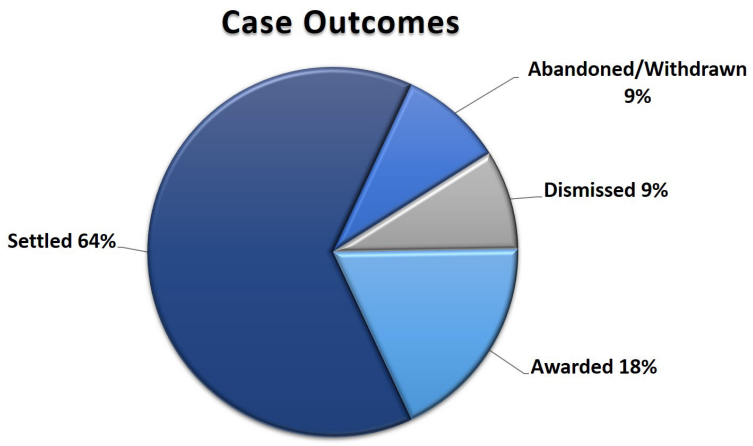
- The employee who took Litchfield Cavo, LLP to arbitration claiming $13 million, only for the arbitrator to award $13 million to the other side.
- The employee who took Document Technologies, LLC to arbitration claiming $16 million, only for the arbitrator to apparently award the defending corporation $59 million.

Numerous such cases apparently exist. Did arbitrators really award corporations defending claims millions of dollars in each case? Or are these database errors? There is no way of knowing because arbitration proceedings conceal access to any and all underlying materials.

Are Forced Arbitration's "Settlements" Favorable to Consumers?

The majority of consumer arbitration cases are "settled." Does this mean consumers won some kind of relief, as is often the case with traditional litigation? It's hard to know because of the secretive nature of forced arbitration and the lack of access to underlying materials. The CFPB pointed out that it is impossible to know what the true outcome of "settled" cases are in arbitration: "*Because our ability to review substantive outcomes is generally limited to arbitration decisions on the merits, the substantive outcomes of most consumer financial arbitration disputes are unknown and largely unknowable to reviewers.*"[34]

However, there is much to suggest that such settlements are not always favorable to consumers. Of the more than 4,000 cases "settled" at JAMS, information was apparently available on the nature of the settlement in 60:[35]



The vast majority of consumer arbitrations are "settled," but provide little to no information about the settlement.

The vast majority of cases listed in AAA and JAMS' databases are "settled." However, there is no way of knowing if these are truly settled or if they have just been closed.

Of the nearly 4,000 cases "settled" at JAMS, information was apparently available on the nature of the settlement in 29:

- In 10 cases, there was an apparent non-monetary award.
- In two of these, both involving Sprint, the consumer received continued service. In three more, the non-monetary award was simply "settled."

- In one case, the corporation appeared to have won.
- The other 4 of the 10 cases were in fact dismissals, two of which also listed "Ruling Denying Class-Wide Arbitration."
- In 19 cases, the settlement listed a monetary award. Nine awards were linked to the consumer prevailing, three were linked to the corporation prevailing, one was linked to both prevailing (but did not identify to whom the award went), one was a monetary award of $0, and five were linked to "Not Applicable" winners.
- All told, in the 29 settled cases for which the outcome could be discerned, consumers received some sort of documented relief in 11, and corporations won documented relief in 8. The other 3,900 feature no information about the nature of the settlement.

At AAA, roughly one in seven of the approximately 15,000 settled cases gave some information about the type of settlement. "Recission" or "reinstatement" was listed as the outcome in several hundred cases, mostly involving car sales or leases, implying that consumers had reinstated auto loans or redeemed repossessed cars. Other outcomes included "declaratory judgment" and "other." Another three% of all AAA cases ended as "administrative," with no more information available. Thus, the vast bulk of AAA's settled cases provided no information about the real outcome.

It may be that some settled cases are actually cases that have been closed with no true settlement. In 2018, lawyers for FitBit unveiled some of the mystery behind arbitration proceedings in a case where they argued no rational party would pay hundreds of dollars in fees to arbitrate a claim over a $162 fitness tracker. FitBit's lawyer said they offered the consumer a settlement, and when they did not hear back, considered the matter "concluded."[36]

As FitBit's lawyer told the court, "*What she is asking us to do is go to arbitration on a claim of $162; that we have to pay $750 just to get the arbitrator… I said, we felt no rational litigant would require that.*"[37]

U.S. District Judge James Donato disagreed, telling FitBit's lawyer,

> "*I could not disagree more. I am developing a very slow but distinct burn over what appears to be an absolutely unacceptable level of gamesmanship by Fitbit in this case. Now, you all came to me and said this case could not be heard in court -- no way, no how -- because it was subject to arbitration. And I litigated that, and I issued an Order, and I sent you to arbitration. For Fitbit now to say, unilaterally,* This case is not arbitrable, because we think it's a cheap case, and we offered her plenty money to get rid of it, and she said "No," and she's crazy as a result of that, so our hands are not tied*, strikes me as profoundly troubling; troubling to the point where I'm beginning to consider whether this is a form of civil contempt.*"[38]

No FitBit case appears in either database.

FASTER?
TIME TO RESOLUTION

Forced arbitration's proponents claim arbitration is faster than traditional litigation. Unfortunately, it appears these proponents have been misled by AAA's data manipulation.

To comply with a variety of state laws, consumer arbitration providers are required to publicly release data on the outcomes of cases.[39] Around a third of all consumer arbitration providers do not appear to comply with these laws, but AAA and JAMS do.[40] AAA and JAMS release databases of their consumer cases each quarter but AAA also deletes a quarter each time.

The longer a case takes, the quicker it is purged from the database.

This is not simply a case of deleting the "oldest" quarter as they add the "newest" quarter. AAA deletes cases by *filed date*, instead of *closed date*, even though this is a database of *closed claims* (other organizations include "pending" claims but neither AAA or JAMS goes beyond closed claims). This has the effect of systematically scrubbing claims that take a long time to resolve from its database. For instance, archived records of previous iterations of the AAA database show that more than 1,000 claims closed in 2014 are missing from AAA's current records for 2014 because they were filed before 2014 and have been deleted. At least 389 of those cases took more than a year to close, 90 took more than two years, and 20 took more than three years—all of which are now gone. In reality, many more cases closed in 2014 are likely to be missing and any cases that took longer than four years will have been deleted.

Other analyses of the AAA database are similarly corrupted by this data deletion—for instance, at least $8.2 million in awards *to corporations* in 2014 has disappeared—but no other statistic has been more tainted than the duration of a case. **The longer a case takes, the quicker it is purged from the database.**

On January 6, 2012, a homeowner filed a "new home construction" claim against Tri State Building Specialties. The case was eventually settled on April 17, 2014—27 months later. However, because AAA deleted cases by filing date, the case no longer appears under 2014's closed claims. The oldest known filed case was filed in August of 2009—a business-initiated residential construction case—and was closed four and half years later in March 2014,. However, because the case was pending it did not appear in any published database until the second quarter of 2014, and then was deleted in the very next quarter because of its early filing date.

By way of comparison, JAMS' database features 18 cases filed *before* 2009—cases that *could not* show up in AAA's database because of the deletion strategy. These cases took between and five and six years to close. Any analysis claiming that arbitration is faster than litigation benefits from the automatic deletion of such cases.

It is impossible to know—at least without AAA agreeing to release deleted data—how many cases have been deleted beyond the thousands found in the Yale archive. Neither AAA nor JAMS includes pending claims in their databases (other arbitration providers do). The result is that any claim filed any time before March 2014 that was still pending by July 1, 2014, **has been deleted from the database**. Analysis of a 2017 archive, courtesy again of Yale Law School, finds more than 200 cases that fit this criteria. Any case that takes more than five years, by definition, **can never appear in the AAA database**.

BETTER? REPEAT PLAYERS IN FORCED ARBITRATION

"Repeat players" is a term describing corporations that appear frequently in forced arbitration. Forced arbitration's repeat player problem renders it inherently unfair. Corporate repeat players become highly adept at navigating arbitration proceedings and can potentially select arbitrators with favorable track records. Arbitrators themselves are also at risk of favoring corporate repeat players because they, and their organization, rely on them—not consumers—for repeat business. In contrast, arbitrators who rule in favor of consumers have found themselves occasionally frozen out.[41]

The 2015 CFPB study found that corporate repeat players were represented in 84% of arbitration filings.[42] The CFPB also found that consumers won less often when facing a repeat player corporation (winning 20% of the time against a non-repeat player and 11% of the time versus a repeat player).[43] Other researchers have found that when consumers go up against a corporation with even a limited history of participation in arbitration, they are 79% less likely to win than if they faced a corporation with little to no arbitration history.[44]

This analysis found similar results. Corporate repeat players were represented in 77% of cases.[45]

Number of Repeat Appearances	Number of Corporations in Each Category
1 or more	23,253 (76.6%)
10 or more	15,717 (51.8%)
50 or more	10,895 (29.1%)
100 or more	8,814 (29.1%)
1000 or more	2,452 (8.1%)

Consumer win rates also dropped when facing corporate repeat players. The more frequently a corporation appeared in arbitration, the less likely a consumer was to win a monetary award.

	Consumers Winning a Monetary Award
Consumer v. Any Corporation	1,904 (6.3%)
Consumer v. Repeat Player Corporation	1,042 (4.5%
Consumer v. Repeat Player Corporation with at least 10 prior arbitrations	528 (3.6%)
Consumer v. Repeat Player Corporation with at least 100 prior arbitrations	243 (2.8%)
Consumer v. Repeat Player Corporation with at least 1,000 prior arbitrations	60 (2.5%)

Top Corporate Repeat Players

When the CFPB analyzed consumer arbitrations, it also examined class actions as a comparison. Their analysis of five years of class action settlements involving corporate misconduct in consumer financial markets found that class actions had forced corporations to return at least $2.7 billion in compensation and in-kind relief to an estimated 34 million consumers.[46] It is no surprise then that the most frequent corporate users of forced arbitration are some of the country's (and other countries') biggest banks.

The 10 corporations to use AAA and JAMS most frequently over the last five years were involved in nearly one-fifth of all cases (19%).

Corporation	Cases
AT&T (incl. DirecTV)	940
Santander	852
Citibank	627
Discover	623
American Express	618
Credit One	560
Kaiser Permanente	478
Windstream Communications	421
Darden Restaurants	328
Wells Fargo	327

Top Ten Repeat Player Corporations, 2014-2018 – AAA & JAMS, All Cases.

Over the last five years, no corporation has used forced arbitration more than AT&T. AT&T and its subsidiary, DirecTV, have 177 million customers.[47] A 2017 CBS News investigation uncovered more than 4,000 complaints against the company related to misleading deals, promotions, and overcharging. AT&T forces such disputes into arbitration, using both AAA and JAMS.

Nearly 1,000 consumers attempted to go through the arbitration process between 2014 and 2018, claiming more than $440 million in damages. Seventeen consumers won a monetary award, collecting a total of $376,251.[48]

AT&T recorded revenues of $774 billion over the same period.[49] **Thus, the amount consumers recovered in arbitration against the corporation equaled approximately 0.0005% of the corporation's revenues.**

AT&T's arbitration clause does offer consumers the alternative of pursuing their claim in small claims court. In 2012, Matt Spaccarelli, an AT&T customer with an unlimited data plan who discovered the company was throttling his phone, succeeded in winning $850 in small claims court. AT&T responded by threatening to terminate Spaccarelli's service if he did not sign a non-disclosure agreement.[50]

Repeat Player Arbitrators

Corporations are not the only identifiable repeat players in forced arbitration.[51] Arbitrators themselves frequently appear in multiple cases.

- The top 10 arbitrators each at AAA and JAMS handled 1,776 cases claiming nearly a quarter of a billion dollars ($241,897,611 – the true claim amount was undoubtedly more because 980 JAMS cases listed the claim amount as "unknown").
- These 20 arbitrators ordered nearly $4 million to consumers ($3,935,917) but took in nearly three times as much in arbitrator fees ($9,733,034).
- Of the 1,064 cases handled by the top 10 most frequently appearing arbitrators at JAMS, only 51 (4.8%) resulted in a documented consumer victory. Remarkably, 32 of these consumer-winning cases were handled by one arbitrator—a former in-house corporate counsel—and all but two of those involved payday lender CashCall, Inc.
- The other nine top arbitrators handled an average of 102 cases each but ordered consumers a monetary award in less than three cases each over five years.
- The top 10 most frequently used arbitrators at AAA handled a total of 712 cases.
- Consumers won monetary awards just 34 times in five years when these 10 were in charge. Again, most of those wins were handled by a minority of arbitrators: 28 of the 34 consumer wins were handled by one of three arbitrators. Three of the top 10 arbitrators never

awarded a single consumer a monetary award over the entire five-year period.

- The most frequently used AAA arbitrator—a former insurance agent turned corporate defense attorney from West Virginia—handled 84 consumer arbitrations claiming a total of $6.8 million. He ordered a consumer a monetary award in just one case, for $1,682.[52]
- The second most frequently used AAA arbitrator—a California-based career arbitrator—handled more than 80 employment arbitrations. The employee prevailed in one, winning just $771. The third most frequently used AAA arbitrator—a Florida-based career arbitrator—ordered no consumer awards over five years.

NURSING HOMES, EMPLOYMENT, AND FINANCIAL SERVICES

Nursing Home Arbitration

While financial products, such as bank accounts and credit cards, and employment contracts may make up the bulk of forced arbitration cases, no example of forced arbitration raises more questions about the fundamentally unfair nature of this system than nursing home admission contracts.

Forced arbitration clauses in nursing home admission contracts exploit senior citizens and people with disabilities in their most vulnerable state. People most commonly enter nursing homes when too sick or debilitated to care for themselves, or when no one else is available to care for them. They may suffer from injuries or dementia to the extent that admission to a nursing home is less a choice than a necessity. It is at this point that they or their loved ones are told (or often not told) they must sign away their rights.[53]

A 2011 study by Atlanta's John Marshall Law School professor Lisa Tripp found that 43%—and in some counties, 100%—of nursing homes used pre-dispute forced arbitration clauses for seniors being admitted into nursing homes, and that the American Health Care Association (AHCA)—the nursing home industry trade organization—was pushing a model contract.[54] Since then, experts believe as many as 90% of large nursing home chains and senior living centers have embraced such clauses.[55]

Forced arbitration clauses in nursing homes are not only unreasonable for the residents and families who must sign them but also deprive the public at large of information about problematic facilities. A 2017 CNN investigation found that the federal government had cited more than 1,000 nursing homes for mishandling or failing to prevent alleged cases of rape, sexual assault, and sexual abuse at their facilities between 2013 and 2016.[56] Forced arbitration helps to cover up such abuse.

A 2016 Obama administration rule promulgated by the U.S. Centers for Medicare and Medicaid Services (CMS) and supported by groups such as AARP and the American Bar Association, sought to prohibit such agreements

in long-term care facilities, but was challenged in court by the nursing home industry and never took effect.[57] In June 2017, the Trump administration offered a contrary rule: nursing homes would be allowed to *require* residents to sign forced arbitration agreements or find somewhere else to live.[58]

If pre-dispute forced arbitration clauses in nursing home contracts represent the lowest moral use of such clauses, the AAA/JAMS data also suggest they represent the worst possible consumer outcomes:

- Over the five-year period, there were only 16 nursing home cases at AAA, 10 brought by consumers and 6 brought by corporations.
- No consumer won any of the nursing home cases at AAA over the entire period.
- Corporations won four of the six cases they initiated, receiving a total of $217,010.
- In one case, the corporation—The Rehabilitation & Nursing Center at Greater Pittsburgh—was awarded $20,000 more than it had claimed. The arbitrator in that case was a former a human resource counsel to a large hospital system in Ohio.

JAMS did not list "nursing homes" as a category, however, this analysis was able to identify 65 cases within the "health care" category that involved nursing homes or their parent corporations.

- Consumers brought 52 of the 65 cases, but won only four for a total of $780,959.
- Corporations brought 12 cases (another was brought by "unknown") and were listed as prevailing in 10, and won a monetary award in 5.

Employment Arbitration

Forced arbitration provisions in employment contracts (and sometimes not even in contracts but in employee handbooks and manuals provided post-hiring) allow corporations to push employee disputes, including those involving employment discrimination or sexual harassment, into arbitration procedures that overwhelmingly favor employers. According to the Economic Policy Institute (EPI), at least 60 million employees are covered by such forced arbitration clauses.[59] By 2024, more than 80 percent of private-sector, nonunion workers will be covered by forced arbitration clauses.[60] Employee opt-out options are rare and sometimes impractical: in the case of Kindred Health Care, for instance, employees who wish to opt out of the arbitration provision must terminate their own employment. If they continue to show up for work, Kindred regards them as having "opted-in."[61]

Thus, it is no surprise that of the 60 million employees subject to forced arbitration, only 11,114—0.02%—tried to pursue a dispute.

There are good reasons why employees do not tend to look at forced arbitration as a genuine option when involved in a dispute. A 2011 analysis of AAA employment proceedings in California by Cornell Law Professor Alexander Colvin found that employees won arbitrations with their employer just 21% of the time, as compared to success rates in state and federal courts of between 33 and 60%.[62] The median award when the employee was successful was $36,500, as compared to awards in employment cases in state and federal courts of between $150,500 and $297,000.

This analysis paints a similarly pessimistic picture:

- Just 282 employees were awarded monetary damages over the five-year period at either AAA or JAMS, an average of 56 workers a year.
- Only 2.5% of employment cases resulted in an employee award (that was not outweighed by an even larger employer award).[63]
- Compared to the 60 million covered workers, successful claimants amounted to a vanishingly small 0.00007% (less than one-ten-thousandth of one %) of covered workers.[64]

Other studies have commented on the salary range of the employees involved, but more than half of all employment claims did not list such information rendering such comments unreliable.[65]

In Colvin's employment arbitration study, approximately 66% of arbitrations involved corporate repeat players, and they were almost twice as likely to win as non-repeat players, or "one-shotters" (employees won 32% against one-shot companies, but only 17% against repeat-players).

This analysis of AAA and JAMS found even higher rates of corporate repeat players:

- Out of 11,114 employment cases 8,692 (78.2%) involved repeat player corporations.
- 5,190 cases (46.7%) involved repeat player corporations with at least 10 prior arbitrations.[66]
- 3,121 cases (28.1%) involved repeat player corporations with at least 50 prior arbitrations.
- 2,242 cases (20.2%) involved repeat player corporations with at least 100 prior arbitrations.
- 602 cases (5.4%) involved repeat player corporations with at least 1,000 prior arbitrations.

The corporation with the most employment arbitration cases at AAA was

Darden Restaurants, owners of the Olive Garden and LongHorn Steakhouse chains, among others.

Darden has long suffered from labor problems because of drastic cuts to employee pay. The company, which has 150,000 workers, admits it pays at least 20% of its U.S. workforce no more than the federal tipped minimum wage of $2.13 an hour, and then pushes those tipped workers to do as much non-tipped work (for instance cleaning and table prep) as possible.[67] Since 2005, Darden has paid over $14 million to settle lawsuits over such working conditions. The company has also spent an average of $1.8 million a year since 2008 to lobby against legislation promoting higher wages and better working conditions.

At AAA and JAMS, Darden faced 329 employment arbitrations claiming more than $20 million in wages and damages. Employees won an award in just eight cases, for a total of $73,961.

The corporation with the most employment arbitration claims at JAMS was CashCall, a payday lender that has been sanctioned by the CFPB and state regulators for charging consumers interest rates approaching 350% that were illegal in many states.[68] The company faced 123 employment arbitrations, and awards were made in a relatively high 35 cases (28.5%).

CashCall had previously made news among arbitration providers and lawyers with its bizarre arbitration provisions. Prior to turning to AAA/JAMS, CashCall had provided that disputes would be arbitrated by the laws of the Cheyenne River Sioux Tribe. However, because the tribe had nothing to do with CashCall's loans and had no arbitration law, procedures, or even arbitrators, courts had ruled the clause was unenforceable.[69]

Credit Cards, Banks, and Other Financial Services Forced Arbitration

The single largest category of forced arbitration clauses outside of employment contracts was financial services, including bank accounts and credit cards, with a combined 6,751 cases.[70]

- Consumers brought 6,012 of these cases between 2014 and 2018, claiming at least $3.7 billion in damages (JAMS did not reveal the claim amount in three-quarters of all cases).

- They won monetary awards in just 131 cases (2.2%), totaling $7.4 million—0.2% of the claimed damages.
- Corporations brought 137 cases, but remarkably won monetary awards in twice as many as they initiated, winning $5.4 million in 314 cases.

This finding matches those of other researchers. EPI also found that consumers initiating claims against financial institutions often ended up paying out of pocket. "*While the average consumer who* wins *a claim in arbitration recovers $5,389, this is* not even close *to a typical consumer outcome. Because consumers win so rarely, the average consumer ends up* paying *financial institutions in arbitration—a whopping $7,725.*"[71]

The second-most frequent corporate user of forced arbitration over the five-year period was the Spain-based bank Santander.

Many banks force consumers into arbitration but none as often as Santander. Consumers initiated 848 arbitrations against the corporation, claiming $44 million in damages (Santander itself initiated another four). Only three consumers won a monetary award, for a total of $10,978.[72] Santander's revenue over the five-year period was $315 billion. Thus, the amount consumers recovered in arbitration equaled approximately 0.000002% (two one-hundred-thousandths of one %) of the corporation's revenues. Consumers have fared better against Santander when able to go to court. In 2018, Santander settled with the CFPB for $11.8 million over claims it misled consumers into extending auto loans.[73] In 2017, Santander settled with Massachusetts and Delaware over similar claims for $26 million.[74] In 2015, Santander was forced to settle with the U.S. Department of Justice for $9.35 million over claims the company was illegally repossessing servicemembers' cars.[75]

CONCLUSION

This analysis examined data from the two most prominent consumer arbitration providers. The same data, in fact, used by forced arbitration's keenest proponents, though here data purged by AAA's data deletion policy was somewhat restored. The findings demonstrate that very few consumers or workers subject to a forced arbitration clause ever pursue a claim, that they rarely win monetary awards, and that non-monetary awards and settlements are not aligned with anything that could be described as favorable to wronged consumers and employees.

All of these conclusions speak to a system that is clearly not "fairer" than the Seventh Amendment right to a trial by jury.

This study also highlighted how seriously AAA's data deletion policy has distorted case duration statistics. The average time to conclude an arbitration can never be properly known when the country's largest consumer arbitration provider systematically removes cases based on their duration. Arbitration may or may not be "faster" than traditional litigation, but the picture portrayed by the available data cannot establish this because it has been so seriously affected by inappropriate deletion.

Finally, can forced arbitration be said to be "better" than litigation? For corporations, clearly the answer is yes, as the U.S. Chamber of Commerce and any number of defense counsel will attest. Corporations face fewer claims in arbitration, lose less often and lose less money, face no precedence, no group actions, and can hide any negligence or wrongdoing in a veil of secrecy. But for consumers and workers, the answer is no.

METHODOLOGY

This analysis used databases provided by the two largest consumer arbitration providers, AAA and JAMS. It examined cases that were filed and terminated during the five years from 2014 to 2018. Because AAA deletes data by filing date, thereby removing cases that closed during the representative time period, researchers attempted to repair the database with the addition of identified missing data culled from archived databases.

Both arbitration providers' databases contain other imperfections common with any database, including missing data, duplicate records, and differing categories between databases. At AAA, at least 37 cases listed the involved corporation as simply "Corporate Legal" and at least 300 cases listed the corporation as "None." Similarly, at JAMS at least 25 cases listed the involved corporation as "Private Party." AAA listed monetary awards by party but offered no details on non-monetary awards. JAMS occasionally offered details on non-monetary awards but did not differentiate between awards to corporations and awards to consumers (in some cases "both" parties were listed as prevailing but no information was present to identify which party received the listed award).

AAA's databases includes multiple duplicate records and partial duplicates. The organization claims these are not mistakes but represent multiple defendants or claimants. In truth, that is not the case, as other researchers have found.[76] This analysis found hundreds of duplicate records – in some cases the records were completely identical, in others there were differences likely attributable to errors filling out forms, such as records identical except for blank fields.[77]

Both AAA and JAMS list "prevailing" parties but many cases finished in ways that were inconsistent with the given "prevailing" party. In hundreds of cases at AAA, one party would be listed as prevailing when the other received a monetary award. Both organizations also list "Awarded" as an outcome, but hundreds of these "awarded" cases feature no monetary or non-monetary award.

Given the inadequacies of the data on "prevailing" parties and non-monetary awards, we focus here on the only true measure of a documented consumer

victory: monetary awards. This study sought to identify consumers and workers who won a monetary award greater than the corresponding business award (in many cases consumers won an award, but the opposing corporation won the same or an even higher award). The number of winning consumers defined this way was actually higher than the given number of "prevailing" consumers, but appears to be a more accurate measure of how many consumers are successful.

JAMS offered its own unique challenge by listing "both" parties as prevailing but not distinguishing which won the listed award (to be conservative, we considered these consumer wins).

The final, and most damaging, limitation of the data was the lack of access to underlying materials. Not only can records not be verified, but specific details cannot be identified. For instance, AAA's categorization of dispute types does not allow researchers to pinpoint disputes as fundamental as credit cards. Nor is there any way of knowing how many employment claims featured discrimination or sexual harassment.

While confidentiality is not unknown in traditional litigation, courts do not systematically withhold data on issues like discrimination or sexual harassment, nor do they delete case records arbitrarily.

ENDNOTES

1 Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, UC Davis Law Review, February 2019, https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf.

2 The National Center for State Courts (NCSC) lists 2,035,090 small claims cases in the 37 states for which it has data in 2017.

3 *Lightning Strike Probabilities*, National Lightning Safety Institute, http://lightningsafety.com/nlsi_pls/probability.html; Jacob D. Jenson, Andrew L. Vincent, *Lightning Injuries*, StatPearls, February 19, 2019, https://www.ncbi.nlm.nih.gov/books/NBK441920/.

4 Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, UC Davis Law Review, February 2019, https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf.

5 *Arbitration Study Preliminary Results*, Consumer Financial Protection Bureau (CFPB), December 2013, at 34, https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

6 As detailed later, there is good reason why an exact number is hard to reach. *AAA Consumer and Employment Arbitration Statistics*, American Arbitration Association (AAA), https://www.adr.org/consumer; *Consumer Case Information*, JAMS, https://www.jamsadr.com/consumercases/.

7 In reality there are even more small claims cases, as the National Center for State Courts only retains data on 37 states: *2017 Civil Caseloads – Small Claims*, National Center for State Courts (NCSC), http://www.courtstatistics.org/Explore-the-Data.aspx.

8 See, for instance, state statutes such as the California Code of Civil Procedure §1281.96 and Maryland Commercial Law §§ 14-3901 to 3905. Both require arbitration organizations to publish information, including the name of the non-consumer party and whether it has previously appeared before the arbitration organization, the type of claims, and the prevailing party. Not all arbitration organizations comply with such laws: *Arbitration Reporting in California: Compliance with CCP* §1281.96, Public Law Research Institute, UC Hastings College of the Law, June 28, 2017, http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf.

9 *Yale Law School Consumer Arbitration Data Archive*, Yale Law School, May 23, 2018, https://library.law.yale.edu/news/yale-law-school-consumer-arbitration-data-archive.

10 AAA's website indicates a caseload of 150,000 (*AAA Statement of Ethical Principles*, https://www.adr.org/StatementofEthicalPrinciples), but AAA's Vice President for Statistics and In-House Research, Ryan Boyle, has indicated the true total is closer to 200,000 – see, Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, Yale Law School, 2015, at fn 653, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5950&context=fss_papers.

11 In addition, 13 cases are categorized as "Texas Non-Subscriber."

12 David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239, 2012, https://www.repository.law.indiana.edu/ilj/vol87/iss1/15/.

13 See, for instance, University of Nevada Law professor Jean R. Sternlight: "it is not true that mandatory employment arbitration affords employees increased access to justice. Rather, it seems that the imposition of mandatory arbitration is

actually suppressing the claims of employees." – Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, Scholarly Commons @ UNLV Law, 2015, https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1959&context=facpub.

14 *Arbitration Everywhere, Stacking the Deck of Justice*, New York Times, October 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

15 *CFPB Finds Few Consumers File Arbitration Cases*, Consumer Financial Protection Bureau (CFPB), December 12, 2013, https://www.consumerfinance.gov/about-us/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/.

16 *Arbitration Study*, CFPB, at p.104, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

17 Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, University of Maryland Law Review, 2015, https://digitalcommons.law.umaryland.edu/mlr/vol75/iss1/2/.

18 Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, University of Maryland Law Review, 2015, https://digitalcommons.law.umaryland.edu/mlr/vol75/iss1/2/.

19 *Bank Customers May Get Their Day in Court*, Bloomberg Businessweek, March 20, 2015, https://www.bloomberg.com/news/articles/2015-03-20/bank-customers-may-get-their-day-in-court.

20 Jeff Sovern, *Kaplinsky on Why Consumers Don't File Arbitration Claims*, Consumer Law & Policy Blog – Public Citizen, March 20, 2015, https://pubcit.typepad.com/clpblog/2015/03/kaplinsky-on-why-consumers-dont-file-arbitration-claims-.html.

21 *Arbitration Study*, Consumer Financial Protection Bureau (CFPB), March 2015, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

22 *Arbitration Study*, CFPB, at Section 5, p.5, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

23 As this case was initiated by the employee there may be some error involved. Otherwise, the possibility of losing an arbitration case one brought and being forced to pay $59 million would be a compelling reason to never bring an arbitration case.

24 JAMS does not distinguish between consumer and business awards, so it is possible that consumers are listed as prevailing and have a monetary award listed even though the corporation won more money, as happened with the AAA cases. JAMS also listed 21 cases with a prevailing party of "both" and 74 cases with a prevailing party of "Not Applicable." Because JAMS does not distinguish between awards to corporations and awards to consumers, it is impossible to know which party was successful in these cases.

25 Judith Resnick, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, North Carolina Law Review, March 1, 2018, at 651, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5971&context=nclr.

26 *Lightning Strike Probabilities*, National Lightning Safety Institute, http://lightningsafety.com/nlsi_pls/probability.html; Jacob D. Jenson, Andrew L. Vincent, *Lightning Injuries*, StatPearls, February 19, 2019, https://www.ncbi.nlm.nih.gov/books/NBK441920/.

27 *Is the AAA manipulating its arbitration case data?* Level Playing Field, March 21, 2018, https://blog.levelplayingfield.io/is-data-being-manipulated/.

28 *Consumer Arbitration Rules*, American Arbitration Association (AAA), https://www.adr.org/sites/default/files/Consumer_Rules_Web.pdf.

29 *Consumer Arbitration Minimum Standards*, JAMS, https://www.jamsadr.com/consumer-minimum-standards/

30 Paul Bland, *Bait and Switch: Many Corporations Promise to Pay Arbitration Fees, But Don't*, Public Justice, March 25, 2014, https://www.publicjustice.net/bait-and-switch-many-corporations-promise-to-pay-arbitration-fees-but-dont/.

31 JAMS listed only two consumers as paying 100 percent of fees, though they may or may not have been duplicates of

each other. The consumer(s) in that case won.

32 *IPC Healthcare Agrees to Settle Qui Tam Lawsuit Alleging Company Engaged in Fraudulent Medicaid and Medicare Billing Scheme; Agrees to Pay $60 Million*, National Law Review, February 9, 2017, https://www.natlawreview.com/article/ipc-healthcare-agrees-to-settle-qui-tam-lawsuit-alleging-company-engaged-fraudulent.

33 Many corporations pay arbitration fees up to a point for consumers. In this case, the homeowner was apparently on the hook for 100 percent of the fee, despite winning.

34 *Arbitration Study*, CFPB, at Section 5, p.6, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

35 AAA and JAMS do not use the same case outcome categories. JAMS included "consolidated" and "default" categories not included by AAA. Each of these was less than one percent of cases. AAA featured an "administrative" category, which made up 2.9 percent of cases – as the administrative category featured no awards or and only two prevailing corporations (and no prevailing consumers) it was included with dismissals. AAA formerly also included an "impasse" category, but this is no longer used, and, in fact, AAA's data deletion policy has scrubbed it entirely from records. Using archival records 69 cases (less than one percent) with an "impasse" outcome were reinstated in our version of the AAA database.

36 Transcript of Recordings, *McClellan v. FitBit, United States District Court Northern District of California, No. C 16-00036 JD, May 31, 2018,* https://static.reuters.com/resources/media/editorial/20180601/fitbitclassaction--hearing5.31.pdf.

37 Transcript of Recordings, *McClellan v. FitBit, United States District Court Northern District of California, No. C 16-00036 JD, May 31, 2018,* https://static.reuters.com/resources/media/editorial/20180601/fitbitclassaction--hearing5.31.pdf.

38 Transcript of Recordings, *McClellan v. FitBit, United States District Court Northern District of California, No. C 16-00036 JD, May 31, 2018,* https://static.reuters.com/resources/media/editorial/20180601/fitbitclassaction--hearing5.31.pdf.

39 See, for instance, state statutes such as the California Code of Civil Procedure §1281.96 and Maryland Commercial Law §§ 14-3901 to 3905.

40 *Arbitration Reporting in California: Compliance with CCP §1281.96*, Public Law Research Institute, UC Hastings College of the Law, June 28, 2017, http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf.

41 *Testimony of Elizabeth Bartholet*, Hearing before the United States Senate Committee on the Judiciary, "Courting Big Business: The Suprreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations," July 23, 2008, http://www.judiciary.senate.gov/imo/media/doc/Bartholet%20Testimony%20072308a.pdf.

42 *Arbitration Study*, Consumer Financial Protection Bureau (CFPB), March 2015, at 56-60, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

43 *Arbitration Study*, Consumer Financial Protection Bureau (CFPB), March 2015, at 65-68, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; *Forced Arbitration: How Corporations Use The Fine Print To Bully Americans*, American Association for Justice (AAJ), July 2016, https://www.justice.org/sites/default/files/file-uploads/Forced_Arbitration2016WebFINAL.pdf.

44 David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, The Georgetown Law Journal, Vol. 104:57, 2015, at 111, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614773.

45 AAA and JAMS count previous arbitrations differently. AAA counts all arbitrations, hence every single corporation is considered to have at least one arbitration (there are no companies with zero cases). JAMS only lists prior arbitrations, hence companies that appear just once in the database are listed as having zero prior arbitration .

46 *Arbitration Study*, CFPB, at Section 8, p.4, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

47 AT&T has 153 million phone subscribers and DirecTV has 23.9 million subscribers to DirecTV and DirecTV Now: *AT&T's wireless customer growth slows, revenue misses estimates*, CNBC, January 30, 2019, https://www.cnbc.com/2019/01/30/att-misses-revenue-estimates-on-slower-wireless-customer-growth-.html; *AT&T misses on revenue, loses more DirecTV Now customers*, CNET, April 24, 2019, https://www.cnet.com/news/at-t-misses-on-revenue-loses-more-directvnow-customers/.

48 AT&T itself initiated 10 cases and 18 more were brought by AT&T employees.

49 AT&T's operating revenue worldwide from 2006 to 2018 (in billion U.S. dollars), Statistia, https://www.statista.com/statistics/272308/atundts-operating-revenue-since-2006/.

50 *AT&T allegedly trying to silence lawsuit-winner Matt Spaccarelli*, CBS News, March 15, 2012, https://www.cbsnews.com/news/att-allegedly-trying-to-silence-lawsuit-winner-matt-spaccarelli/.

51 In theory consumers themselves could be repeat players but data is not available to identify consumers, nor is repeat players consumers likely a significant factor.

52 The arbitrator awarded the consumer $7,960 but offset that with a $6,278 award to the defending corporation.

53 Professor Lisa Tripp's research found that nursing home staff frequently insisted on the signing of forced arbitration agreements as a condition of admission, even when such contracts included language stating it was voluntary: Lisa Tripp, *Arbitration in Nursing Home Cases: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 2011, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884279.

54 Lisa Tripp, *Arbitration in Nursing Home Cases: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 2011, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884279.

55 *An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here's Why She Couldn't Sue*, Time, November 16, 2017, https://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/.

56 *Sick, dying and raped in America's nursing homes*, CNN, February 2017, https://www.cnn.com/interactive/2017/02/health/nursing-home-sex-abuse-investigation/.

57 *Nursing Home Residents Could Lose Their Day in Court*, AARP, August 15, 2017, https://www.aarp.org/caregiving/health/info-2017/trump-nursing-home-arbitration-fd.html; *Should CMS Prohibit Arbitration in Nursing Home Admission Contracts?* American Bar Association, October 15, 2018, https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_36/issue_6_august2015/cms_binding_arbitration_comments/.

58 *An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here's Why She Couldn't Sue*, Time, November 16, 2017, https://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/.

59 *The growing use of mandatory arbitration*, Economic Policy Institute (EPI), April 6, 2018, https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

60 *Unchecked corporate power*, Economic Policy Institute (EPI), May 20, 2019, https://www.epi.org/publication/unchecked-corporate-power/.

61 *Dispute Resolution Agreement v.12-15*, Kindred Health Care, on file with AAJ.

62 Alexander Colvin, *An empirical study of employment arbitration: Case outcomes and processes*, Journal of Empirical Legal Studies, 8(1), 2011, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles.

63 Data on "prevailing" parties did not match awards. 308 employees were listed as prevailing and 601 corporations were listed as prevailing.

64 Again, listed "prevailing" parties did not correspond with monetary awards: cases listed as having no prevailing party had awards for one side or the other, and cases with an employee or corporation listed as prevailing actually featured monetary awards for the other side. JAMS listed both sides as prevailing in many cases, some of which featured awards but did not discern to which party.

65 See, for instance, the discussion over "characteristics of employment arbitration cases" in *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration*, NDP Analytics for the Institute for Legal Reform, May 2019.

66 Of those corporations in the JAMS employment claim database listed as having no previous arbitrations, 321 had previously done business with JAMS through "mediation" procedures. Including these as repeat players would increase the percentage of repeat players to 79 percent.

67 *Olive Garden has unlimited breadsticks -- also lots of labor issues, illness outbreaks, and an icky sexual harassment policy*, Salon, February 1, 2016, https://www.salon.com/2016/02/01/olive_garden_has_unlimited_breadsticks_also_lots_of_labor_issues_illness_outbreaks_and_an_icky_sexual_harassment_policy/.

68 *CashCall stopped making loans, but its founder, targeted by regulators, is still in the business*, Los Angeles Times, September 2,

2018, https://www.latimes.com/projects/la-fi-reddam-cashcall-loanme/.

69 *Reference to Nonexistent Arbitration Forum Nullifies Arbitration Agreement*, American Bar Association, March 8, 2018, https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2018/reference-non-existent-arbitration-forum-nullifies-agreement/.

70 Specifically, "financial services" that were not also categorized as employment claims at AAA and "credit" and "other banking or finance" at JAMS. For the sake of clarity we did not include related categories such as "accounting" and "debt collection."

71 *Forced arbitration is bad for consumers*, Economic Policy Institute (EPI), October 2, 2017, https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/.

72 Only two consumers were listed as prevailing. Another 384 consumers were listed as having received some other unspecified relief.

73 *Santander Bank to Pay $11.8 Million to Settle Auto Loan, Insurance Claims*, Insurance Journal, November 21, 2018, https://www.insurancejournal.com/news/national/2018/11/21/509895.htm.

74 *Santander to pay $26m to settle subprime auto-loan case*, Boston Globe, March 29, 2017, https://www.bostonglobe.com/business/2017/03/29/santander-pay-million-settle-auto-loan-securitization-case-healey-says/cSdMsa6xp9J5FnPhKfddML/story.html.

75 *Justice Department Reaches Settlement with Santander Consumer USA to Resolve Allegations Concerning Over 1,100 Illegal Car Repossessions Against Service Members*, U.S. Department of Justice, February 25, 2015, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-santander-consumer-usa-resolve-allegations-concerning.

76 See, for instance, Yale Law School's discussion of database errors at *Consumer Arbitrations with The American Arbitration Association 2009 to Present*, Open Science Framework, https://osf.io/qmtsu/; and *Arbitration Reporting in California: Compliance with CCP §1281.96*, Public Law Research Institute, UC Hastings College of the Law, June 28, 2017, http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf.

77 137 cases were exact duplicates except for "salary range" which was left blank in some cases.

About the American Association for Justice (AAJ)

The American Association for Justice works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations.

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