

FORCED ARBITRATION DURING A PANDEMIC: CORPORATIONS DOUBLE DOWN

OCTOBER 2021



AMERICAN
ASSOCIATION FOR
JUSTICE®

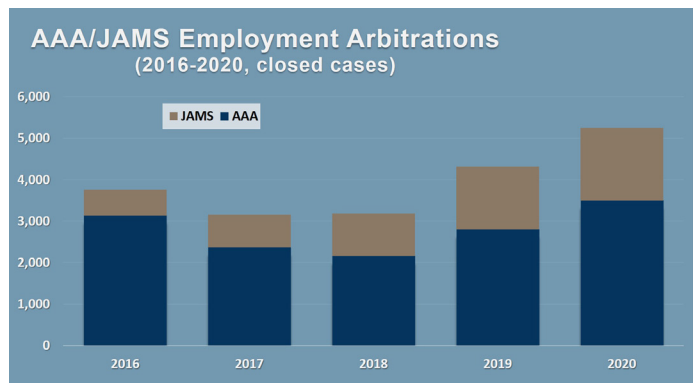
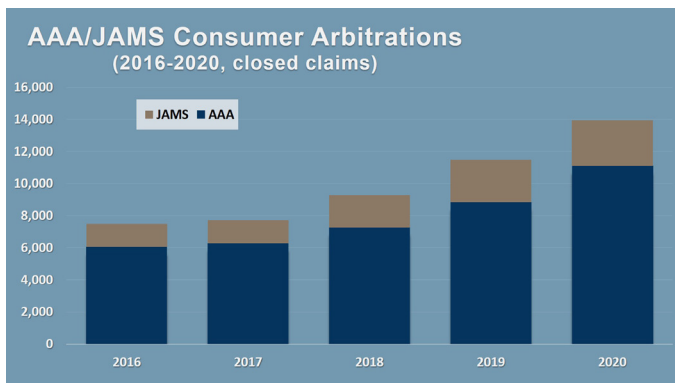
The Association for Trial Lawyers

FORCED ARBITRATION IN A PANDEMIC

Highlights

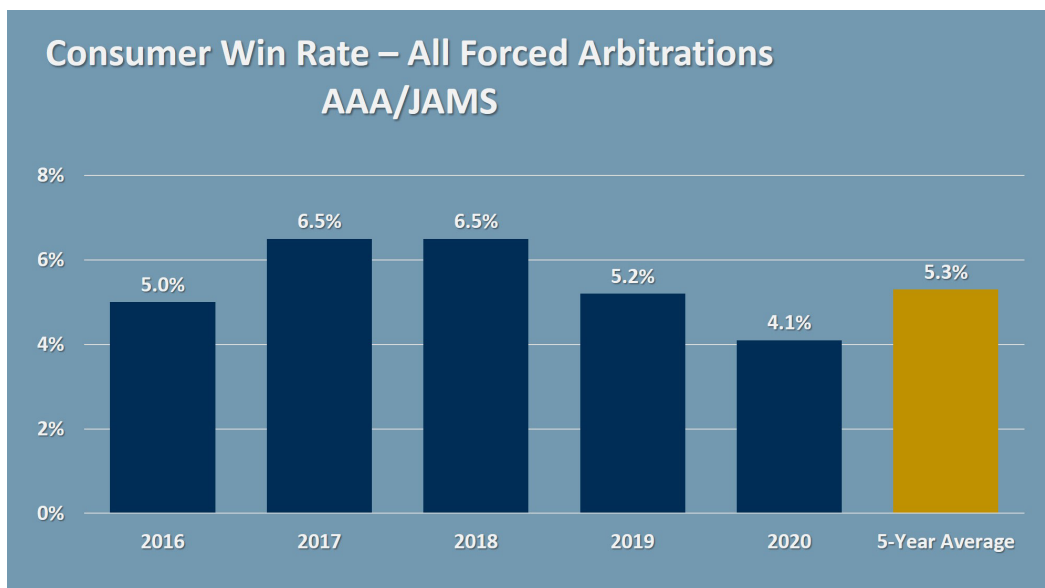
- Consumer and employment forced arbitrations increased during the pandemic.
- Consumer and employee win rates decreased.
- One in three employment forced arbitrations was against Family Dollar or its corporate parent Dollar Tree.

While the 2020 pandemic forced courtrooms across the country to shut down or take halting steps towards Zoom trials, the secretive world of forced arbitration kept going strong. An analysis of closed arbitration claims at the nation's two largest forced arbitration providers—the American Arbitration Association (AAA) and JAMS—shows that consumer and employment forced arbitrations increased during the pandemic.

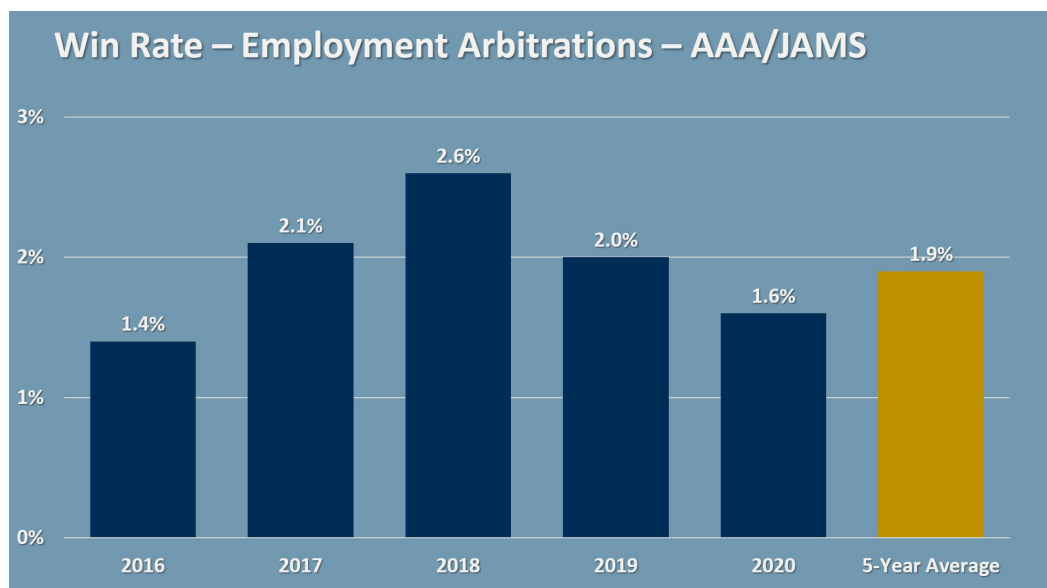


Unlike federal and state courts, forced arbitration providers do not provide data on how many cases are filed each year, just how many are closed. Nevertheless, year-over-year comparisons of closed case filing rates showed a 17% jump in new cases closed in 2020 over 2019.

What hasn't changed is the likelihood of success. In years past, consumers were more likely to be struck by lightning than win a monetary award in forced arbitration.¹ In 2020, that win rate dropped even further. Just 577 Americans won a monetary award in forced arbitration in 2020, a win rate of 4.1%--below the five-year-average win rate of 5.3%. More people climb Mount Everest in a year (and they have a better success rate) than win their consumer arbitration case.²



For employees forced into arbitration, the likelihood of winning was even lower. Despite roughly 60 million workers being subject to forced arbitration provisions at their place of employment, just 82 employees won a monetary award in forced arbitration in 2020.³



Over the last few years, many companies have dropped forced arbitration in limited circumstances. Facebook, Google, Lyft, Microsoft, Uber, and Wells Fargo have all yielded to pressure to drop forced arbitration for sexual harassment claims.⁴

Other corporations have gone in a different direction. Tesla continued to embrace forced arbitration, closing nearly as many cases in 2020 as in the past five years combined. What the more than 50 non-employment arbitrations Tesla closed in 2020 can tell us about any issues with Tesla cars isn't known, because forced arbitration is a locked box when it comes to revealing systemic problems. The retail corporation Family Dollar went from being an occasional user of forced arbitration to the #2 corporate defendant in employment arbitrations over the last five years. In 2020, one in three employment arbitrations was against Family Dollar or its corporate parent Dollar Tree. Wells Fargo may have dropped forced arbitration in some employee cases but continued to close approximately 100 cases a year for customer claims. And Tinder proved the course of true love doesn't run smooth, closing 288 cases in 2020—five times as many as the year before (the surge in Tinder arbitrations likely had much to do with Tinder's new forced arbitration agreement, which is retroactive).⁵

Forced Arbitration 2020 Top 10 Corporate Defendants (all categories)	
1	Family Dollar
2	Windstream Communications
3	AT&T
4	American Express
5	Western Culinary Institute
6	Tinder
7	Conn Appliances
8	American Home Shield
9	Citibank
10	Charter Communications

Forced Arbitration 2020 Top 10 Corporate Defendants (employment)	
1	Family Dollar
2	Dollar Tree
3	TBC Retail
4	Menards
5	Chipotle
6	Charter Communications
7	Corelogic
8	Macy's
9	e-Telequote Insurance
10	Halliburton

Group Actions

Family Dollar's ascent to #2 corporate defendant in forced arbitration over the last five years came courtesy of over 1,000 employment claims settled on the same day in mid-June 2020. Though each was an individual claim, together they effectively formed a "group action," something corporations thought they had managed to eliminate with forced arbitration.

One of the driving factors for corporations' inclusion of forced arbitration clauses in contracts is to prevent harmed individuals from banding together and going to court as a class action. However, corporations are now seeing a rise in large numbers of arbitration claims filed by individuals on the same day, in what is effectively a "group action."

Corporations that thought forced arbitration was an effective way to eliminate claims have not appreciated consumers and employees turning the tables against them, putting corporations in the ironic position of trying to undermine the very system they themselves set up. Amazon, American Express, Anderson Financial, AT&T, Bechtel, Chime, Green Dot, and Zenimax Media all faced more than 10, and sometimes over 100, claims in a single day in an apparent sign of group actions.

Eliminating group actions—such as class actions—is a major selling point for corporations using forced arbitration.⁶ For decades, the class action lawsuit has proved a powerful tool for holding corporations accountable. Class actions can bring together claims that allege widespread misconduct—such as fraud, breach of contract, price-fixing—but which are financially unfeasible to pursue on an individual basis. The possibility of facing a class action also deters such misconduct in the first place, whereas forced arbitration not only eliminates the majority of claims but also gives corporations carte blanche to take advantage of consumers.

To make such poison pills more palatable to consumers, the corporate lawyers who pioneered forced arbitration had corporations pick up most of the fees charged by arbitration providers. However, when claims are filed in large numbers, it can have the effect of exposing corporate defendants to significant arbitration fees. That's how the delivery service Postmates found itself ironically opposing its own forced arbitration provision when more than 10,000 of its couriers filed arbitration demands regarding Postmates' improperly classifying them as contractors, rather than employees, to avoid providing employment benefits.⁷

Similarly, DoorDash tried, and failed, to get out of its own forced arbitration agreement after more than 5,000 of its couriers filed to arbitrate wage-and-hour claims in late 2019.⁸ The claims ironically forced DoorDash to pay roughly \$12 million in non-refundable fees to its arbitration provider,

AAA. DoorDash went to court seeking to use a class action—the very recourse it had tried to eliminate for its workers—to settle the claims. U.S. District Judge William Alsup was not impressed, “Faced with having to actually honor its side of the bargain, (DoorDash) now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration.” Judge Alsup concluded, “This hypocrisy will not be blessed.”⁹

Dropping Forced Arbitration

Faced with the prospect that forced arbitration might not be the corporate Get Out of Jail card it was designed to be, Amazon dropped forced arbitration requirements as part of its “conditions of use.” The company had been hit with roughly 75,000 claims alleging that its Alexa-equipped devices were recording customers without their consent. Since each claim involved upwards of \$2,900 in fees just to start the arbitration proceedings, Amazon found itself potentially on the hook for tens of millions of dollars before a claim was even heard.¹⁰

Other corporations have also tried to pick and choose between forced arbitration and the court system, depending on which looks the most beneficial. AirBnB, Facebook, Google, and Uber, among others, have announced that they would no longer require sexual assault or harassment complaints to be resolved in forced arbitration. Such promises are hardly ironclad, however. They are not reflected in the actual arbitration provisions or terms and conditions, leaving it up to the corporations’ whim whether or not an individual will be forced into arbitration or have their day in court. AirBnB, for instance, claims its forced arbitration clause will no longer apply to sexual assault and harassment cases but continues to force customers into forced arbitration for what it deems regular assault.¹¹ And it’s AirBnB itself that gets to decide what counts as sexual assault and what is just plain assault.

Re-weaponizing Forced Arbitration

Despite these major corporations disavowing forced arbitration—at least in some circumstances—there’s no sign that corporations as a whole have soured on forced arbitration’s ability to eliminate claims. Some 240 corporations registered forced arbitration clauses with AAA since the beginning of the pandemic, including the likes of Twitter, Square, StubHub, Marshalls, TJ Maxx, and more than 70 auto dealerships.¹²

What's more, the corporate defense lawyers who pioneered forced arbitration for consumers and employees have already begun thinking of ways to thwart group arbitration claims. In a recent podcast, Alan Kaplinsky and Mark Levin—attorneys with Ballard Spahr who were instrumental in designing forced arbitration provisions and getting corporations to embrace them—spoke about their next steps in weaponizing forced arbitration, including:¹³

- Convincing arbitration providers to change fee schedules for corporate defendants;
- Shifting fees to the plaintiffs;
- Advising corporations not to work with AAA and JAMS at all.

After being burned by forced arbitration, DoorDash took the latter option, dropping AAA and working with a new arbitration provider to create a whole new set of hoops for its contractors to jump through. Its new arbitration agreement directs claimants to the International Institute for Conflict Prevention and Resolution (CPR), which allows only 10 arbitration claims at once when more than 30 are filed, and mandates 90-day mediation sessions that would have the effect of delaying claims for years.¹⁴

Conclusion

Unlike courts, arbitration providers do not reveal data on the number of cases filed, only on cases closed, so the full impact of the pandemic on consumers and employees remains to be seen. But with consumer success at historic lows, it is already clear that forced arbitration remains as unfair as ever.

ENDNOTES

- 1 The Truth About Forced Arbitration, American Association for Justice, September 2019, <https://www.justice.org/resources/research/the-truth-about-forced-arbitration>.
- 2 Everest 2019 Results, Alarnette.com, June 7, 2019, <https://www.alanarnette.com/blog/2019/06/07/everest-2019-season-summary-the-year-everest-broke/>.
- 3 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/>; The Truth About Forced Arbitration, American Association for Justice, September 2019, <https://www.justice.org/resources/research/the-truth-about-forced-arbitration>.
- 4 Google and Facebook ended forced arbitration for sexual harassment claims. Why more companies could follow, Washington Post, November 12, 2018, <https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/>; Wells Fargo ends forced arbitration for sexual harassment claims, Reuters, February 12, 2020, <https://www.reuters.com/article/us-wells-fargo-harassment/wells-fargo-ends-forced-arbitration-for-sexual-harassment-claims-idUSKBN2062J4>.
- 5 Tinder's Diabolical RETROACTIVE Arbitration Clause, Public Citizen, May 11, 2018, <https://pubcit.typepad.com/clpblog/2018/05/tinders-diabolical-retroactive-arbitration-clause.html>.
- 6 Shouldn't You Be Using Arbitration Agreements to Reduce the Costs of Litigation and the Risk of Class Action Claims? , Foley & Lardner LLP, May 10, 2017, <https://www.foley.com/en/insights/publications/2017/05/shouldnt-you-be-using-arbitration-agreements-to-re>; Minimizing Class Action Exposure: The Power of Mandatory Arbitration Clauses, Olshan Law Firm, July 2013, <https://www.olshanlaw.com/resources-alerts-Class-Action-Mandatory-Arbitration-Clause.html>.; Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse? Law and Contemporary Problems, 2004, <https://www.jstor.org/stable/27592035>.
- 7 Postmates Abandons Appeals in Courier Mass Arbitrations Cases, Arbitration Law Review - Penn State, April 9, 2021, <https://sites.psu.edu/arbitrationlawreview/2021/04/09/postmates-abandons-appeals-in-courier-mass-arbitration-cases/>.
- 8 'This hypocrisy will not be blessed': Judge orders DoorDash to arbitrate 5,000 couriers' claims, Reuters, February 11, 2020, <https://www.reuters.com/article/us-otc-doordash/this-hypocrisy-will-not-be-blessed-judge-orders-doordash-to-arbitrate-5000-couriers-claims-idUSKBN2052S1>.
- 9 'This hypocrisy will not be blessed': Judge orders DoorDash to arbitrate 5,000 couriers' claims, Reuters, February 11, 2020, <https://www.reuters.com/article/us-otc-doordash/this-hypocrisy-will-not-be-blessed-judge-orders-doordash-to-arbitrate-5000-couriers-claims-idUSKBN2052S1>.
- 10 Amazon Ends Use of Arbitration for Customer Disputes, New York Times, July 22, 2021, <https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html>.

- 11 Airbnb Says Mass. Woman Must Arbitrate Abduction Claim, Law360, August 25, 2021, <https://www.law360.com/massachusetts/articles/1416310/airbnb-says-mass-woman-must-arbitrate-abduction-claim>.
- 12 Forced arbitration clauses registered at AAA are viewable at <https://www.adr.org/consumer>.
- 13 A Deep Dive Into Mass Consumer Arbitration, Ballard Spahr, April 1, 2021, <https://www.ballardspahr.com/insights/blogs/2021/04/pod-a-deep-dive-into-mass-consumer-arbitration>.
- 14 DoorDash Ordered to Pay \$9.5M to Arbitrate 5,000 Labor Disputes, Courthouse News Service, February 10, 2020, <https://www.courthousenews.com/door-dash-ordered-to-pay-12m-to-arbitrate-5000-labor-disputes/>.

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.



777 6th Street, NW, Suite 200
Washington, D.C. 20001
www.justice.org

Copyright © 2021 American Association for Justice®. Reproduction of any kind is prohibited. For more information, please contact AAJ Research at research@justice.org or at (800) 424-2725 or (202) 965-3500, ext. 2811.