HOW *CONCEPCION* AND *ITALIAN COLORS* AFFECTED TERMS OF SERVICE CONTRACTS IN THE GIG ECONOMY

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ABSTRACT

This study examines whether companies in the gig economy altered their contract terms following two landmark Supreme Court decisions affirming the enforceability of class action waivers in arbitration agreements: AT&T Mobility, LLC v. Concepcion and American Express v. Italian Colors Restaurant. A number of the companies in the study appear to have been influenced by the decisions.

The study analyzes Terms of Service contracts from 38 gig companies between 2009 and 2016. Prior to 2012, only about one third of companies used arbitration agreements, and few such agreements contained a class action waiver. By 2016, however, nearly two thirds of gig companies included an arbitration agreement, and almost all included a class action waiver. These class action waivers remove the future threat of aggregate liability for claims brought by workers and consumers alike. The addition of such waivers could also explain in part why gig companies have not reclassified their workers, even after experiencing substantial litigation.

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I. INTRODUCTION

This study analyzes Terms of Service contracts[1] from thirty-eight companies in the "gig economy",[2] drawn from an eight-year period spanning 2009 to 2016. Examining how these contracts have changed over time illustrates the influence of two Supreme Court decisions regarding class action waivers in arbitration agreements: the 2011 *AT&T v. Concepcion*[3] case, and the 2013 *American Express v. Italian*

1. Charlotte Garden wrote a related article, which provides a more in-depth analysis of the contract provisions and its implications for labor and employment law. *See* Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205. We recommend reading Garden's article in conjunction with this article.

2. The term "gig economy" refers to companies that offer software platforms for users to sell access to their physical property, labor, or a combination of property and labor to others users. Familiar examples of companies in the gig economy include Uber, Lyft, Airbnb, and Amazon's MTurk. *See* LISA GANSKY, THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING 15–16 (2d ed. 2012); Elizabeth Tippett, *Using Contract Terms to Detect Underlying Litigation Risk: An Initial Proof of Concept*, 20 LEWIS & CLARK L. REV. 549, 552–54 (2016). *See also* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94–95 (2016) (providing a more complex definition based on business attributes).

3. 563 U.S. 333 (2011).

Colors[4] case. Broadly speaking, *AT&T v. Concepcion* held that arbitration agreements containing a class action waiver are enforceable—parties to such agreements may bring individual claims in arbitration, but cannot bring claims on a class-wide basis in court or in arbitration.[5] *Italian Colors* reinforced and extended *Concepcion*, holding that class action waivers in arbitration are enforceable even as to claims involving small amounts of money that can only be effectively vindicated through a class action.[6]

Results suggest that only a minority of gig companies included arbitration provisions in their Terms of Service contracts before *AT&T v. Concepcion*. Of those that did, only one included a class action waiver. By 2016, company practices had changed substantially, with nearly two thirds of gig companies including an arbitration agreement in their Terms of Service contracts. Additionally, by 2016, almost all contracts with an arbitration provision also included a class action waiver.

Terms of Service contracts in the gig economy represent a fruitful source of data for researchers partly because they are publicly available through their websites and periodically archived through the WayBack Machine.[7] These contracts are also unique because they can apply to contractors and workers alike. In other industries, companies typically use separate contracts for their customers and workers, although there is often substantial overlap with respect to their use of arbitration provisions.[8] In the gig economy, by contrast, companies attempt to blur the boundaries between customers and workers. These contracts insist that workers qualify as "customers" of the gig company, which serves as a mere intermediary. Gig companies then attempt to use this framing to advance their argument that workers are properly classified as independent contractors. While this approach can present a challenge for researchers (in the sense that one cannot know with certainty whether workers are or are not covered by the Terms of Service contract), it also presents an opportunity to analyze contracts that have implications for workers and consumers alike.

The gig economy has also become a fixture of the consumer landscape. "Nearly half of [American] consumers are familiar with the [gig] economy," and nineteen percent have transacted with a gig

4. 133 S. Ct. 2304 (2013).

5. 563 U.S. at 343–52.

6. 133 S. Ct. at 2310–12.

7. *Internet Archive Wayback Machine*, ARCHIVE.ORG, https://archive.org/web/ (last visited Mar. 20, 2018).

8. *See generally* Theodore Eisenberg et al., *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118 (2008).

company in the past.[9] Consumers familiar with gig companies consider them convenient and affordable.[10] As of 2016, several gig economy companies were valued at $1 billion or more.[11] This represents substantial growth for an industry that barely existed ten years ago.[12]

This growth may have been enabled in part through noncompliance with a variety of legal rules, which has been characterized as a "regulatory hack."[13] While some such noncompliance—for example tax laws and zoning laws—primarily injure government interests, other forms of noncompliance could directly injure consumers. One study, for example, found that Airbnb hosts discriminate against African American customers.[14] To the extent that affected customers have a class action claim against the gig company, those claims would be affected by arbitration agreements containing class action waivers. Disabled passengers have also sought to challenge the practices of ride-sharing companies for refusing rides and failing to accommodate disabled passengers.[15] Consumers are also vulnerable to more garden-variety violations of consumer law, such as unauthorized fees and fraudulent transactions.[16] Here too, to the extent that consumers could

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9. PRICEWATERHOUSE COOPER, CONSUMER INTELLIGENCE SERIES: "THE SHARING ECONOMY" 8 (2014), https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf.

10. *Id.* at 9.

11. Jeremiah Owyang & Philippe Cases, *Sharing Economy's 'Billion-Dollar Club' is Going Strong, but Investor Risk is High*, VENTUREBEAT (Feb. 7, 2016, 10:00 AM), https://venturebeat.com/2016/02/07/sharing-economys-billion-dollar-club-is-going-strong-but-investor-risk-is-high/.

12. *See id.*

13. *See* Chris Dixon, *Regulatory Hacks*, CDIXON BLOG (Oct. 10, 2012), http://cdixon.org/2012/10/10/regulatory-hacks/; Matthew Yglesias, *When is a Taxi Not a Taxi?*, SLATE (Dec. 15, 2011, 1:09 PM), http://www.slate.com/articles/technology/technocracy/2011/12/uber_car_service_exposing_the_idiocy_of_american_city_taxi_regulations_.html. For a discussion of the origins of the term, "Regulatory Hack," see Charlotte Alexander & Elizabeth Tippett, *The Hacking of Employment Law*, 82 MO. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016624.

14. Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J.: APPLIED ECON., Apr. 2017, at 1, 2.

15. *See, e.g.*, First Amended Complaint at 2, Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc., 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (No. 14-cv-4086 NC) (alleging that Uber drivers in California and across the United States are denying rides to blind individuals and in some cases, "seriously mishandle guide dogs, harass blind customers with guide dogs, or give low feedback scores to passengers with service animals.").

16. CONSUMER FIN. PROT. BUREAU, *Appendix A: 2013 Preliminary Results*, *in* ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), 143–45 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (enumerating consumer harms in financial transactions, such as unauthorized fees, fraudulent promotions, improper transactions, and information sharing). These types of

only vindicate small value claims against gig companies through class actions, such claims would be precluded by arbitration agreements containing class action waivers.

The gig economy has been the subject of considerable interest among scholars generally and among employment law commentators in particular.[17] Most companies in the gig economy classify their workers as independent contractors.[18] Independent contractors are not covered by basic employment law protections, such as wage and hour laws, workers' compensation, unemployment insurance, health and safety rules, and antidiscrimination protections.[19] The million-dollar question (or in the case of Uber, the $100 million-dollar question)[20] in employment law is whether gig economy workers are misclassified as independent contractors under existing law. To the extent that existing law does not cover some or all workers in the gig economy, scholars have questioned whether existing law should be changed to protect a wide swath of employees.

This study suggests that the substantive legal question of employee classification has been, and will increasingly be, subsumed by arbitration agreements containing class action waivers. To the extent that vindication of a particular right depends upon a class or collective claim, such remedy is no longer available once a worker is bound to an arbitration agreement containing a class action waiver. Distinctions between independent contractors and employees matter little when employees have no effective remedy for a substantive legal violation.

Results of this study help explain why gig companies, particularly Uber and Lyft, have stubbornly refused to reclassify workers as employees even after facing litigation and substantial settlements over the status of their employees. Misclassification lawsuits may reflect an ever-narrowing window of opportunity to litigate employment terms that predated contracts containing arbitration clauses with class action waivers. Because similar lawsuits are no longer available to workers under current contracts, gig companies can continue to misclassify workers with little risk of aggregate litigation.

This article proceeds as follows: Part II explains the legal background, with a brief overview of relevant arbitration law, and the law governing employee classification. Part III describes the study's

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harms could likewise apply in the gig economy, since gig companies have consumer credit cards on file. *See id.*

17. *See infra*, Section II.B.

18. *Id.*

19. *Id.*

20. Davey Alba, *Judge Rejects Uber's $100 Million Settlement with Drivers*, WIRED (Aug. 18, 2016, 8:04 PM), https://www.wired.com/2016/08/uber-settlement-rejected/.

methodology, and Part IV summarizes the results. Part V places the results within the context of scholarly commentary and considers possible implications.

II. LEGAL BACKGROUND

A. The Law Governing Arbitration

Congress passed the 1925 Federal Arbitration Act ("FAA")[21] to prevent state courts from ignoring arbitration agreements favored by merchants to resolve commercial disputes.[22] Merchants preferred using arbitration to resolve commercial disputes because it enabled them to select arbitrators with relevant expertise and avoid complex court procedures and crowded dockets.[23] At that time, courts disfavored arbitration, allowing parties to revoke their arbitration agreements or declining to enforce them altogether.[24] The FAA thus sought to ensure that agreements to arbitrate would be enforceable in the same manner as other contracts. The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[25]

As many scholars have documented, the FAA's reach has expanded beyond this narrow purpose through Supreme Court decisions in recent decades.[26] The FAA has come to represent a "liberal federal policy

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21. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as 9 U.S.C. §§ 1–16 (2012)).

22. IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 9–10, 188 (2013); Kenneth F. Dunham, *Sailing Around* Erie*: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 203–04 (2006).

23. SZALAI, *supra* note 22, at 24–25, 188.

24. *Id.* at 9; Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1942–43 (2014).

25. 9 U.S.C. § 2 (2012).

26. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 480–91 (2011) [hereinafter *On Babies and Bathwater*]; Christopher R. Drahozal & Quentin R.

favoring arbitration agreements" and "a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate."[27] The FAA demands that courts "[e]nforce[] [arbitration agreements] according to their terms," even when those terms "limit the issues they choose to arbitrate," specify the "rules under which any arbitration will proceed,"[28] and delegate the question of arbitrability to the arbitrator.[29] The Supreme Court has also interpreted the FAA to preempt state contract law if it treats arbitration less favorably than other contracts.[30] This jurisprudence, which other commentators have examined in depth,[31] reflects what Thomas Stipanowich describes as an "extreme, non-nuanced pro-arbitration position" where the FAA "trump[s] the authority of courts to deny or limit the enforcement of arbitration agreements" under state law.[32]

For the limited purpose of providing sufficient background to contextualize the empirical results in this study, we will focus on four cases that paved the way for arbitration-based class action waivers in employment and consumer context: *Gilmer v. Interstate/Johnson Lane*

Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 275, 292–93 (2009); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 631–39 (2012); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 400–13 (2005); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1072–74, 1090–91 (2011); Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 325–27 (2011); Imre Stephen Szalai, *More Than Class Action Killers: The Impact of* Concepcion *and* American Express *on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 32–34 (2014) [hereinafter *More Than Class Action Killers*].

27. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 n.32 (1983)).

28. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682–83 (2010). *See also* Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767, 772 (2012) ("A fundamental principle underlying the FAA is to respect freedom of contract.").

29. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84–85 (2002).

30. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011); Hiro N. Aragaki, AT&T Mobility v. Concepcion *and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. ON ARB. & MEDIATION 39, 41–42 (2012).

31. *See* sources cited *supra* note 30; sources cited *supra* note 26.

32. Stipanowich, *supra* note 26, at 326–27; *see also* Nagareda, *supra* note 26, at 1092 ("As to the types of claims that may be allocated to arbitration, the modern Court has never yet met an arbitration clause that it didn't like.").

Corp.,[33] *Stolt-Nielsen v. AnimalFeeds International Corp.*,[34] *AT&T v. Concepcion*,[35] and *American Express v. Italian Colors Restaurant*.[36]

Gilmer, a 1991 Supreme Court case, established the arbitrability of statutory employment claims.[37] That case involved an employee registered as a securities representative with the New York Stock Exchange.[38] Gilmer's agreement with the Stock Exchange required him to arbitrate any claims with his employer, Interstate.[39] Gilmer later sought to sue Interstate for age discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA").[40] He opposed arbitration on the basis that it did "not provide for broad equitable relief and class actions," as guaranteed by the ADEA.[41] The Supreme Court disagreed, citing the absence of any language in the ADEA "indicating a congressional intent to preclude enforcement of arbitration agreements."[42]

Gilmer meant that employers could require employees to arbitrate all claims—statutory, common law, and contractual—unless the specific statute at issue expressly prohibited arbitration.[43]

Nevertheless, arbitration offered a mixed bag for companies deciding whether to include an arbitration clause in their contracts with

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33. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). *See also* Circuit City Stores, Inc. v. Adams, 532 US 105, 109 (2001) (interpreting the FAA's exclusion of "contracts of employment of seamen, railroad employees, or other class of workers engaged in foreign or interstate commerce" to be limited to transportation workers (quoting 9 U.S.C. § 1 (2000)).

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

35. *Concepcion*, 563 U.S. at 333.

36. American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

37. *Gilmer*, 500 U.S. at 24, 35. *See* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1559 (2005) ("Fourteen years after *Gilmer*, the applicable law is relatively stable and clear: employers outside of the transportation industry may require employees to agree to arbitrate all employment disputes as a condition of employment so long as certain due process requirements are met."); Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 15–16 (1999); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1344–45 (1997); Weston, *supra* note 28, at 772 (discussing *Gilmer*).

38. *Gilmer*, 500 U.S. at 23.

39. *Id.*

40. *Id.*

41. *Id.* at 32.

42. *Id.* at 24.

43. *See id.* at 26–27. Under *Gilmer*, employees retained their right to bring administrative claims. *See id.* at 28–29. *See also* EEOC v. Waffle House, Inc., 534 U.S. 279, 285–98 (2002) (holding that an arbitration agreement between employer and employee does not bar an EEOC complaint to pursue employee-specific judicial relief).

customers and employees. It offered several possible benefits.[44] Empirical studies suggested that arbitration is faster.[45] Arbitration is also private[46]—pleadings would be filed with the arbitrator, rather than

44. The question of whether employers benefit from arbitration as "repeat players" is the subject of considerable debate. The "repeat-player effect" theory argues that employers who arbitrate more than once enjoy better results than employers who arbitrate just once, due to a variety of factors. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 223–24 (1998) [hereinafter *On Repeat Players*] (examining the results of employment arbitrations in which the employer was a repeat player and finding that employees fare very poorly in such situations); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUDY 1, 1 (2011) [hereinafter *An Empirical Study*].

> The results provide strong evidence of a repeat employer effect in which employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases, which could be explained by various advantages accruing to larger organizations with greater resources and expertise in dispute resolution procedures. The results also indicate the existence of a significant repeat employer-arbitrator pairing effect in which employees on average have lower win rates and receive smaller damage awards where the same arbitrator is involved in more than one case with the same employer, a finding supporting some of the fairness criticisms directed at mandatory employment arbitration.

Id. But see Stephen J. Ware, *The Effects of* Gilmer*: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 751–53 (2001) (arguing that such studies overstate the repeat player effect).

David Sherwyn, Samuel Estreicher, and David Heise also disagree, noting the critical informal processes that often precede formal arbitration, and "perform critical filtering functions" absent from litigation or EEOC processes. Sherwyn et al., *supra* note 37, at 1565–66. These filtering functions "likely skew win/loss arbitration results in favor of employers: Employers might use the internal filters to better determine if a case has merit and then to settle the meritorious cases." *Id.* at 1566. In reviewing a follow-up study by Lisa Bingham, Sherwyn, Estreicher, and Heise argue that the repeat-player effect disappeared once the effect of an internal dispute resolution program was taken into account. *Id.* at 1571. *See also* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 814–15 (2003) (finding, in sample of 200 cases, only 2 cases in which an employer previously made use of the same arbitrator).

45. *See, e.g.*, *An Empirical Study*, *supra* note 44, at 1 (finding that the "mean time to disposition in arbitration was 284.4 days for cases that settled and 361.5 days for cases decided after a hearing, which is substantially shorter than times to disposition in litigation"); Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 79 (2014) (establishing that arbitration is faster); Beth A. Rowe, *Binding Arbitration of Employment Disputes Opposing Pre-Dispute Agreements*, 27 U. TOL. L. REV. 921, 934 (1996) (citing a finding by the Civil Justice Institute of the Rand Corporation that the average arbitration decision is reached in approximately 8.6 months (262 days)); Sherwyn et al., *supra* note 37, at 1572–73 (summarizing evidence that arbitration is faster).

46. *See On Repeat Players*, *supra* note 44, at 228; Nagareda, *supra* note 26, at 1069; Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 294–95 (1999) ("The worrisome

becoming a matter of public record[47]—allowing companies to escape potential public or journalistic scrutiny over embarrassing fact patterns.[48] Because arbitration is a creature of contract,[49] it also allows companies to specify more streamlined procedures or more relaxed rules of evidence.[50] There is some empirical evidence that employment arbitration is associated with lower damage awards, although other research finds no difference.[51] However, efforts to constrain substantive

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question today centers on the resolution of *public disputes in private fora*."); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30–32 (1998).

47. *See* Sarah Rudolph Cole, *Arbitration and State Action,* 2005 BYU L. REV. 1, 40–41 [hereinafter *Arbitration and State Action*] (arguing that it is "uncommon to have a transcript of the proceedings" and that "arbitrators rarely publish their opinions").

48. Whether or not a party to the dispute is free to disclose the arbitral proceedings to the public will depend on whether the arbitration provision includes a confidentiality provision and whether the rules of the entity presiding over the arbitration prohibits such disclosure. *See* Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes* (March 2012) (unpublished brochure), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf ("Confidentiality is an important feature for many corporations, particularly when dealing with disputes involving intellectual property and trade secrets or when there are concerns about publicity or damage to reputation or position in the marketplace.").

49. Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp., 559 U.S. 662, 683 (2010) ("Underscoring the consensual nature of private dispute resolution, we have held that parties are 'generally free to structure their arbitration agreements as they see fit.'" (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995))). *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (recognizing that the Federal Arbitration Act "is at bottom a policy guaranteeing the enforcement of private contractual agreements"); H.R. REP. NO. 68–96, at 1 (1924) ("Arbitration agreements are purely matters of contract . . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs."); Nagareda, *supra* note 26, at 1069 (asserting that "arbitration is a creature of the private law of contracts").

50. *See Arbitration and State Action*, *supra* note 47, at 39–41 (stating that arbitration proceedings "need not follow the rules of evidence and often limit, or even eliminate, discovery"); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 710 ("[P]arties generally have a more limited ability to obtain discovery in arbitration than in court."); Maltby, *supra* note 46, at 33 (finding arbitration rules could prohibit either side from being represented by counsel and could limit discovery); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 [hereinafter *Paying the Price of Process*] (noting that "arbitration can reduce the amount of discovery").

51. *Compare* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 565 (2001) (suggesting lower arbitration awards), *with* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 44–45 (2004) (finding no statistically significant differences), Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–83 (2008) (summarizing evidence for and against lower damage awards), *and* Neil Vidmar &

employee rights were limited by state law rules regarding unconscionability.[52] For example, a 2000 California case regarding unconscionability, *Armendariz v. Foundation Health Psychcare Services, Inc.*,[53] required arbitration to "meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, [and] a written decision that will permit a limited form of judicial review."[54] The *Armendariz* rule also required employers to pay the arbitrator's fees.[55] Corporate overreach in arbitration provisions was also constrained by the procedural rules adopted by the primary arbitration service providers,[56] the American Arbitration Association[57] and JAMS.[58]

Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 883–84 (1993) (finding no difference).

52. For an explanation of these efforts, see Gilles, *supra* note 26, at 399–402; Gilles & Friedman, *supra* note 26, at 632–33 (explaining the wave of challenges to class action waivers grounded in state unconscionability laws).

53. 6 P.3d 669 (Cal. 2000).

54. *Id.* at 674. *See More Than Class Action Killers*, *supra* note 26, at 45–48 (noting that *Concepcion* and *Italian Colors* "seriously undermine" *Armendariz*).

55. *Armendariz*, 6 P.3d at 685–86. *See also* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310–11 (2013) (noting that administrative fees of arbitration may not be so high as to "make access to the forum impracticable"); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights . . . ."); Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 925–26 (9th Cir. 2013).

56. *See generally* Zev J. Eigen & David S. Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J.L. & PUB. POL'Y 217, 221 (2016). *See also* Colvin & Pike, *supra* note 45, at 62 ("[T]he AAA has written its employment arbitration rules to comply with the terms of the Due Process Protocol developed by a number of leading participants in arbitration .... [I]t will not administer cases that violate its rules." (footnotes omitted)).

57. Examples of procedural safeguards in the AAA's employment arbitration rules include an option to petition for a stay of arbitration from a court, the availability of a neutral arbitrator with experience in the field of employment law, the requirement that the arbitrator disclose any biases or conflicts, and the guarantee of representation by counsel. The AAA rules also require the employer to pay the arbitrator's fee for any arbitration arising from an employer-promulgated plan (as opposed to an individually-negotiated employment agreement, which are typically limited to executives and other powerful employees). AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 1, 10–17, 23 (2009), https://www.adr.org/sites/default/files/Employment%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Nov%2001%2C%202009.pdf.

58. JAMS likewise limits employee liability for arbitrator fees and costs where an arbitration agreement "is required as a condition of employment," in which case, the "only fee that an employee may be required to pay is the initial JAMS Case Management Fee." JAMS, JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES 1, 23–26 (2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_

Prior to 2010, arbitration also imposed potential costs and risks for corporations.[59] Arbitrator fees can range in the hundreds of dollars per hour,[60] which add up quickly for a lengthy arbitral process and can be especially daunting for small companies. Arbitrators may also be less likely to consider or grant dispositive motions, which remove the prospect of dismissing a case at an early stage of the arbitration.[61] Arbitral decisions are extremely difficult to overturn on appeal,[62] which can be attractive from a finality standpoint,[63] but can also increase the perceived riskiness of arbitration because unfavorable opinions lie beyond judicial review.[64] In sum, there was much for companies to like

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rules-2014.pdf.

59. *See* Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682, 1687–88 (2014) (discussing how prior to 2010, class action arbitration could have been imposed by a court without an arbitration agreement expressly providing for it).

60. *See, e.g.*, AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES, COSTS OF ARBITRATION 1, 2 (2016), https://www.adr.org/sites/default/files/Consumer%20Fee%20Schedule_0.pdf ("(ii) Neutral Arbitrator's Compensation Arbitrators serving on a case with an in-person or telephonic hearing will receive compensation at a rate of $1,500 per day. Arbitrators serving on a case with a desk arbitration/documents-only hearing will receive compensation at a rate of $750 per case."); Colvin & Pike, *supra* note 45, at 74 (describing an empirical study of employment arbitration cases, reporting median arbitrator fee of $9,450 and average arbitrator fee of $15,097, which was paid for by the employer in each case, and noting that it may "affect[] the employer['s] decision whether or not to promulgate a mandatory arbitration procedure in the first place").

61. *See, e.g.*, Michael D. Young & Brian Lehman, *Arbitrators Less Prone to Grant Dispositive Motions Than Courts*, N.Y.L.J. (June 26, 2009), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/018.authcheckdam.pdf; Sherwyn et al., supra note 37, at 1566, 1569 (noting the "rarity of summary judgment motions in arbitration" and discussing the empirical evidence on dispositive motions). *Contra* Colvin & Pike, *supra* note 45, at 81 (noting that "summary judgment motions have become a feature of the employment arbitration process as well").

62. *See* Federal Arbitration Act, 9 U.S.C. § 16 (2012) (enumerating limited grounds for appealing arbitration); *see also* Drahozal, *supra* note 50, at 710 ("[A]rbitration does not ordinarily provide a right to appeal.").

63. *See* Edna Sussman, *Why Arbitrate? The Benefits and Savings*, 81 N.Y. ST. B. ASS'N J. 20, 20 (2009) ("Judicial review of awards is restricted to very limited issues. The finality of awards is particularly important in business transactions. In many instances, with the cost of capital and the paralysis that indecision can bring to businesses, the most important consideration in a commercial dispute is that it be quickly and definitively decided."); *Paying the Price of Process*, *supra* note 50, at 90 ("[A]rbitration's finality (near absence of appellate review) saves businesses the costs of appeals.").

64. *See On Repeat Players*, *supra* note 44, at 228; *Arbitration and State Action*, *supra* note 47, at 41 ("Judicial review of arbitral awards . . . is quite restricted either by contract or statute. The Federal Arbitration Act (FAA), which governs arbitration procedure, limits the grounds for refusing to enforce an arbitral award to procedural irregularities in the arbitral decision-making process, as, for example, in instances when the arbitrator has acted in excess of her authority. Misunderstanding or misapplication of the law are not bases upon which an arbitral award may be reversed." (footnotes omitted)).

about arbitration, but also factors that weighed against it. Even as scholars at that time viewed arbitration as strongly favoring corporate interests,[65] companies (and their counsel) could have different preferences regarding arbitration provisions.

Class action waivers were not central to the debate over arbitration until the Supreme Court's ruling in *Stolt-Nielsen v. AnimalFeeds International Corp.*[66] In that case, the Court held that when an arbitration provision is silent on the question of class actions, courts should not read in an intent to permit class arbitration.[67] Class action arbitration should not be implied, the Court reasoned, because it "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it"[68]—it involves "many disputes"; "the presumption of privacy . . . [does] not apply"; it "adjudicates the rights of absent parties"; and the stakes are higher, without the possibility of judicial review.[69]

Stolt-Nielsen was somewhat favorable to corporations, in that it removed the risk of involuntary class-based arbitration when the employer failed to specifically address it in its form agreements.[70] But the case did not answer the question of whether companies could use arbitration provisions to avoid any form of class-based remedy. In 2010,

65. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 200 (1997) [hereinafter *The Repeat Player Effect*] ("[I]t is easier for an employer to take the position they will arbitrate every case, to avoid a reputation for settling which might encourage more claims."); Gilles, *supra* note 26, at 395–96 ("Buoyed by . . . extraordinary judicial deference, corporate lawyers and business executives naturally sought ways to expand the reach of arbitration clauses, sharing their tactical insights in trade journals, at conferences, and in high-level, top-secret planning sessions."); Maltby, *supra* note 46, at 29 ("Thousands of employers are abandoning the civil justice system, establishing their own systems of resolving disputes, and requiring employees to use them."); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5 (2000) [hereinafter *Mandatory Binding Arbitration*] ("It is no secret that . . . potential corporate defendants do not like class actions.").

66. 559 U.S. 662, 687 (2010). *See also On Babies and Bathwater*, *supra* note 26, at 468–69 ("Before the Court decided *Concepcion* and *Stolt-Nielsen*, courts often disagreed about whether a consumer's waiver of the right to pursue class actions in court or arbitration was unconscionable."); Stipanowich, *supra* note 26, at 330–40 (discussing *Stolt-Nielsen*); Weston, *supra* note 28, at 768–69 (same).

67. *Stolt-Nielsen*, 559 U.S. at 687.

68. *See id.* at 685.

69. *See id.* at 686 (citations omitted).

70. *On Babies and Bathwater*, *supra* note 26, at 485 ("The Court's decision [in *Stolt-Nielsen*] appears to prohibit future arbitrators from interpreting an arbitration agreement that is silent on the issue of class action arbitrations to allow for such arbitrations unless the parties, post-agreement, explicitly consent to the class action arbitration process.").

an arbitration provision that provided no forum for class-based claims was arguably unconscionable.[71]

The Supreme Court resolved this question in a 2011 decision, *AT&T v. Concepcion*, which relied heavily on its reasoning in *Stolt-Nielsen*.[72] *Concepcion* overturned a series of California decisions that deemed class action waivers in arbitration agreements unconscionable.[73] Following *Stolt-Nielsen*, the Court treated the California rule as equivalent to a class-arbitration mandate,[74] which would require "additional[,] different," and more formal procedures,[75] "mak[ing] the process slower [and] more costly."[76] The Court emphasized that class arbitration also involves greater risks for defendants.[77] Class arbitration represented such a substantial departure from individual arbitration that the California rule interfered with the FAA's "principle purpose": to ensure that private arbitration agreements are enforced "according to their terms."[78] The Court thus concluded that the FAA preempted the California unconscionability rule as applied to class action waivers.[79]

AT&T v. Concepcion removed considerable uncertainty about the enforceability of class action waivers. Class action waivers are generally considered unenforceable as a matter of public policy outside of the arbitration context.[80] Following *Concepcion*, companies could enforce

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71. *Id.* at 486 ("Following *Stolt-Nielsen*, one might have believed that a consumer could still argue that an arbitration agreement that is silent on the issue of class arbitration is unconscionable if it is interpreted to preclude class actions or class arbitration."); Nagareda, *supra* note 26, at 1104 (referencing "a spate of decisions from federal appellate courts and state supreme courts invalidating class waivers"); Gilles & Friedman, *supra* note 26, at 632–33 (describing case law challenging class actions under state law as unconscionable); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1737 (2006) ("Prominent among these challenges is that class action waivers in contracts of adhesion are unenforceable under state-law doctrines of unconscionability. This strategy has met with some success . . . .").

72. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346–47 (2011) ("[T]o examine classwide arbitration, our decision in *Stolt-Nielson* is instructive.").

73. *Id.* at 352.

74. *Id.* at 346 ("Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*." (emphasis in original)).

75. *Id.* at 348.

76. *Id.*

77. *Id.* at 350.

78. *Id.* at 339 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

79. *Id.* at 357.

80. *See* Discover Bank v. Super. Ct. of L.A., 113 P.3d 1100, 1108–09 (Cal. 2005); Drahozal & Wittrock, *supra* note 26, at 278 ("For those contracts that do not include arbitration clauses, class relief generally remains available in court."). Additionally, the

class action waivers in their arbitration agreements, which enabled them to avoid class action claims in any forum.[81] Per *Stolt-Nielsen*, courts could not imply or require class arbitrations.[82] A judicial forum would likewise be unavailable for class claims, because any such claims would be subject to a motion to compel arbitration.[83] Following *Concepcion*, several lower court rulings interpreted *Concepcion* to this effect.[84] This meant that a company otherwise disinclined towards arbitration, for all of the reasons previously discussed—limited judicial review, arbitrator fees, a lower likelihood of dispositive rulings—now faced a strong reason to choose arbitration.[85]

"legal effectiveness" of class action waivers in forum selection clauses "is uncertain." *Id.* at 279.

81. *See* Drahozal & Wittrock, *supra* note 26, at 276 ("An arbitration clause, when coupled with a clause waiving class arbitrations, acts as a 'collective action waiver,' that, if enforced, would effectively eliminate the availability of class relief in court and in arbitration."). *See generally* Frank Blechschmidt, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 544–45 (2012); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 704–05 (2012) [hereinafter *Tsunami*]; Stipanowich, *supra* note 26, at 325–27; Weston, *supra* note 28, at 770.

82. *On Babies and Bathwater*, *supra* note 26, at 489–90 ("[T]he Court's holding [in *Concepcion*] clearly precludes lower courts from requiring parties subject to an arbitration agreement to participate in a class action arbitration to avoid a finding of unconscionability.").

83. As Drahozal and Wittrock explain,

> [T]he arbitration clause acts as a class action waiver because it precludes the parties to the clause from proceeding on a class basis in court. The rationale is straightforward. Parties who have agreed to arbitrate have, by contract, agreed to have their claims resolved in arbitration instead of in court. Permitting them to participate in a class action in court would circumvent their agreement to arbitrate, contrary to the mandate of the Federal Arbitration Act that arbitration agreements be enforced according to their terms.

Drahozal & Wittrock, *supra* note 26, at 281.

84. *See* Weston, *supra* note 28, at 782 (referencing Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1206–07 (11th Cir. 2011); Bernal v. Burnett, 793 F. Supp. 2d 1280, 1286 (D. Colo. 2011); Lewis v. UBS Fin. Servs. Inc., 818 F. Supp. 2d 1161, 1166–67 (N.D. Cal. 2011)). "[S]ome courts have refused to enforce class action waivers in arbitration agreements by relying on the vindication of federal statutory rights doctrine." Weston, *supra* note 28, at 788.

> In *AT&T Mobility LLC v. Concepcion*, the Supreme Court potentially allowed for the evisceration of class arbitration, and indeed most class actions, in consumer and employment settings where contracts contain a pre-dispute arbitration provision that only authorizes claims brought in an individual capacity or that expressly bans representative class actions in arbitration or court . . . .

Id. at 767.

85. *See* Weston, *supra* note 28, at 782–83. "After *Concepcion*, a rubber-stamp effect seemed to ensue in the courts addressing the enforceability of class action waivers in arbitration agreements. Courts largely considered their rulings bound to follow *Concepcion*, even where state law would invalidate the contractual bans." *Id.* at 782.

Commentator Jean Sternlight observed:

> Prior to *Concepcion*, some companies may have feared that inserting an arbitral class action waiver would backfire—leading them into lots of costly litigation over the viability of the clause and perhaps ultimately being held invalid by the courts. Now, however, *Concepcion* and its progeny are giving companies reason to believe that an arbitral class action waiver would be upheld . . . .[86]

However, *Concepcion* left one lingering source of uncertainty for employers, based on dicta from the 1985 Supreme Court decision, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[87] In that case, the court suggested that an arbitration agreement may be unenforceable as a matter of public policy where it operates as a "prospective waiver of a party's right to pursue statutory remedies[.]"[88] This language, buried in a footnote, gave rise to the "effective vindication" exception to the FAA: an arbitration agreement may not operate to prevent parties from effectively vindicating their rights.[89] As applied to the class action waiver context, the effective vindication doctrine left open the possibility that a class action waiver would not be enforceable as to claims that could only be enforced through a class action.[90]

"Extending *Concepcion* to the employment context, the United States District Court for the Northern District of California, in *Lewis v. UBS Financial Services Inc.*, dismissed an employee's putative class action, holding that a class action waiver was enforceable even if unconscionable under California law." *Id.* at 783 (internal citations omitted). *See also Tsunami*, *supra* note 81, at 718 ("In the near future, we can expect that even more companies will impose arbitral class action waivers as a means to insulate themselves from class actions because *Concepcion* has changed the calculus.").

86. *Tsunami*, *supra* note 81, at 718.

87. 473 U.S. 614, 637 n.19 (1985); American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013) (discussing the dicta of *Mitsubishi Motors*, and the origination of the effective vindication exception to the FAA). *See also* Gilles & Friedman, *supra* note 26, at 633–34 (discussing challenges to class action waivers under the effective vindication doctrine).

88. *Mitsubishi Motors*, 473 U.S. at 637 n.19.

89. Nesbitt v. FCNH, Inc., 811 F.3d 371, 376–77 (10th Cir. 2016); *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (invoking the principle of effective vindication).

90. *See* Gilles & Friedman, *supra* note 26, at 628 ("*Concepcion* tells us little about what happens when a claimant can prove as a factual matter that an arbitration clause containing a class action waiver precludes her from being able to vindicate rights that she would otherwise be able to vindicate."); *Tsunami*, *supra* note 81, at 713–14 (discussing the applicability of the effective vindication doctrine following *Concepcion*); Weston, *supra* note 28, at 784 (discussing the same).

The Supreme Court removed any lingering doubt in its 2013 decision, *American Express Co. v. Italian Colors Restaurant*.[91] In that case, merchants sued a credit card issuer on a class action basis for antitrust violations.[92] The claim was only economically viable as a class action: the maximum recovery for each individual case was $38,549, while the cost of proving the case would be hundreds of thousands or more.[93] Nevertheless, the court enforced the class action waiver, reasoning that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[94] Absent clear language in the statute to that effect, class actions are not critical to the "vindication of statutory rights."[95] In sum, "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."[96] With that, the enforceability of class action waivers in arbitration agreements was beyond question.

Commentators have characterized class action waivers as the "single most contentious issue surrounding consumer and employment arbitration agreements."[97] In his dissent in *Concepcion*, Justice Breyer argued that "[c]onsolidated proceedings may be necessary to effectively pursue small claims on behalf of consumers, and 'nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims' due to the transaction costs associated with individual actions."[98] Some individual claims have such "small amounts at stake" that most consumers would not "find it worthwhile to seek legal advice" because of such a "formidable barrier."[99] Thus, even if would-be defendants have "allegedly engaged in illegal conduct,"[100] many cases may not be brought without the availability of class actions.[101]

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91. 133 S. Ct. at 2304; *see also More Than Class Action Killers*, *supra* note 26, at 39.
92. 133 S. Ct. at 2308.
93. *See id.*
94. *Id.* at 2309.
95. *Id.*
96. *Id.* at 2311.
97. Stipanowich, *supra* note 26, at 336.
98. *Id.* at 379 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting)).
99. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 88–89 (2004).
100. *Mandatory Binding Arbitration*, *supra* note 65, at 13.
101. *See* Glover, *supra* note 71, at 1747 ("[T]he ability to aggregate claims is crucial to protect the rights of those individuals . . . who do not have the resources to litigate individual claims . . . . [M]any individual claims are *only* viable if brought on a class-wide basis.") (emphasis in original); Bryon Allyn Rice, *Enforceable or Not?: Class Action*

B. Litigation in the Gig Economy

The gig economy has attracted considerable attention among employment law scholars[102] because almost all of these companies classify their workers as independent contractors.[103] Classifying

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Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard, 45 HOUS. L. REV. 215, 228 (2008) (noting that without the class action mechanism, plaintiffs cannot afford to bring their claims); Sternlight & Jensen, *supra* note 99, at 90 ("The federal court in *Ting* pointed out another critical aspect of class actions: Many types of relief can be afforded only on a group basis."); *Mandatory Binding Arbitration*, *supra* note 65, at 12 ("[C]lass actions historically have proved critical to the protection of rights of employees, consumers, medical patients, racial or ethnic minorities, and others who lack the resources to litigate individual claims."); Weston, *supra* note 28, at 770–71 ("Class actions are . . . regarded as serving an important public function allowing 'those who are less powerful to band together—using lawyers as their champions'—to seek redress of grievances that would 'go unremedied if each litigant had to fight alone.'") (internal citations omitted); Charles Sullivan & Timothy Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1055 (2013) ("[T]he right to engage in concerted activity for mutual aid and protection—to make a joint demand, walk out together, etc.—could be and likely would be rendered empty by arbitration clauses in individual employment contracts.").

102. Valerio De Stefano, *The Rise of the "Just-In-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* 37 COMP. LAB. L. & POL'Y J. 471, 472 (2016); Lobel, *supra* note 2, at 92; Noah D. Zatz, *Does Work Law Have a Future If the Labor Market Does Not?*, 91 CHI.-KENT L. REV. 1081, 1093 (2016); *see also* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1684 (2016); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1511 (2016); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 480 (2016).

103. *See* Tippett, *supra* note 2, at 552, 562 (explaining that only one of the twenty-five sharing companies in the study classified its workers as employees; the rest treated them as independent contractors). The parties' agreement as to whether the service provider is an employee or contractor is not part of the test; some courts ignore the agreement entirely, while others treat it as a relevant but not dispositive fact. *See, e.g.*, Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989 (9th Cir. 2014) (stating that California law does not consider the parties' agreement dispositive); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1148–53 (N.D. Cal. 2015) (finding that the agreement disclaiming employment relationship was relevant, but not dispositive, as a "secondary" factor under California's *Borello* test); Honeycutt v. Deutschmann, 976 So. 2d 753, 755–56 (La. Ct. App. 2008) (finding that the written agreement provided evidence of question of material fact of whether plaintiff was an employee); Bee v. Prof'l Courier Int'l, Inc., No. S-99-030, 2000 WL 376310, at *2 (Ohio Ct. App. Apr. 14, 2000) (applying control test despite independent contractor relationship established within contract); Brown v. Who's Three, Inc., 457 S.E.2d 186, 191 (Ga. Ct. App. 1995) (explaining that the contractual characterization of the relationship was not controlling when clearly negated by other factors); Toyota Motor Sales U.S.A., Inc. v. Super. Ct., 269 Cal. Rptr. 647, 654 (Cal. Ct. App. 1990) (stating that agreements "will be ignored if the parties, by their actual conduct, act like 'employer–employee'"); *cf.* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989) ("The label placed by the parties on their relationship is not dispositive . . . .").

workers as independent contractors is financially advantageous in the short term because the company can avoid all of the costs associated with complying with legal rules that apply only to employees, such as workers' compensation, unemployment insurance, and wage and hour laws.[104] Conversely, independent contractor status is disadvantageous to workers because they are denied all of the protections of employment laws.[105] Many commentators have argued that the gig companies leave these workers vulnerable to the various harms employments laws were intended to address.[106] Commentators have thus assessed whether these workers have been misclassified as independent contractors and have examined whether existing rules need to be changed to better protect them.[107]

No single test determines whether a worker qualifies as an employee; the applicable test varies by statute.[108] However, most tests are a variation of the common law control test, which examines the extent to which the putative employer exercises control over the "manner and means by which the [work] product is accomplished."[109] Factors relevant to control include "the skill required; the source of the

104. Tippett, *supra* note 2, at 522–56.

105. *Id.* at 554.

106. *See, e.g.*, Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 597 (2016); Cunningham-Parmeter, *supra* note 102, at 1684; De Stefano, *supra* note 102, at 481; Means & Seiner, *supra* note 102, at 1529. *See generally* Rogers, *supra* note 102, at 519–20; Tippett, *supra* note 2, at 551.

107. Lobel, *supra* note 2, at 137 ("[R]egulators should prefer solutions that directly address any negative consequences that people or society may experience from the rise of the platform, rather than blanket prohibitive solutions that stymie its development."); *see also* Cunningham-Parmeter, *supra* note 102, at 1707; Means & Seiner, *supra* note 102, at 1529–30; Paul M. Secunda, *Uber Retirement*, 2017 U. CHI. LEGAL F. 435, 447–59.

108. Whether an individual providing services to a company is an employee or an independent contractor depends on the statute at issue. *See* Tippett, *supra* note 2, at 554–56. If such an individual satisfies the definition of employee under the applicable statute, then that person is entitled to the protections that law provides. *Id.* at 554. On the other hand, if the individual is an independent contractor, the person is not covered by the law or entitled to its protections. *See id.* at 554–56. However, not all statutes provide a definition of "employee." Rather,

> Where the statute provides a meaningful definition, courts will apply that definition. For example, the Fair Labor Standards Act (FLSA), which requires employers to pay minimum wage and overtime, defines 'employ' as 'includ[ing] to suffer or permit to work.' Courts have [read] this definition [broadly] and from it derived the 'economic realities' test . . . .

Id. at 554 (citing 29 U.S.C. § 203(g) (2012)). The economic realities test measures whether the service provider is "dependent upon the business to which they render service." Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987) (quoting Mednick v. Albert Enters., Inc., 508 F.2d 297, 299 (5th Cir. 1975)).

109. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989)).

instrumentalities and tools; the location of the work; the duration of the relationship between the parties . . .; [and] the extent of the hired party's discretion over when and how long to work," among other factors.[110] As one of us documented in prior research, a few gig companies appear to be exercising levels of control over their workers similar to comparator businesses whose workers are often considered employees.[111]

In theory, classifying workers as independent contractors is only advantageous in the short run. If those workers meet the legal definition(s) of employee, the employer's decision to misclassify them gives rise to considerable liability and associated penalties over time.[112] Damages and penalties can be assessed by state agencies, such as the state workers' compensation authority or the unemployment insurance division.[113] However, most employment laws are primarily enforced through private causes of action.[114] In such a case, an individual worker—or a group of workers through a class or collective action—argues that the employer violated a particular employment statute (for example, minimum wage or overtime laws) and that the plaintiffs were covered under the statute as employees.[115]

This system of private enforcement only works if employees can, and do in fact, bring private claims to vindicate their employment rights.[116] Discrimination claims, for example, can be viably brought as individual claims.[117] However, some employment claims are only

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110. *Darden*, 503 U.S. at 323–24 (citing *Reid*, 490 U.S. at 751–752). Again, "no one factor [is] decisive," and the greater the extent of the putative employer's control over the service provider, the more likely will the court consider the service provider an employee. *Darden*, 503 U.S. at 324 (quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)).

111. *See* Tippett, *supra* note 2, at 560–63.

112. *See* Cherry, *supra* note 106, at 578, 581–84.

113. *See e.g.* CAL. ANN. UNEMP. INS. CODE §§ 1112, 1113, 2118 (West 2017); CAL. ANN. LAB. CODE § 3700.5 (West 2017).

114. *See* Stephanie Plancich et al., *Trends in Wage and Hour Settlements: 2015 Update*, NERA ECONOMIC CONSULTING (July 14, 2015), http://www.nera.com/content/dam/nera/publications/2015/PUB_Wage_and_Hour_Settlements_0715.pdf.

115. Tippett, *supra* note 2, at 554–55. Courts first assess the threshold question of whether the plaintiffs qualify as employees under the statutory or common law test. *Id.* at 555. If they meet the standard, courts will then assess the merits of their claim. *See id.*

116. Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1314 (2015) (noting the wide variety of possible employment claims and also that "a dispute resolution system that works well for certain kinds of claims may not work well for others").

117. Colvin & Pike, *supra* note 45, at 79 (showing, in an empirical study of employment arbitration claims, that the average award in successful discrimination cases was $116,191).

economically viable if litigated through class or collective actions.[118] Wage and hour claims, for example, may only be worth a few hundred or thousand dollars per employee.[119] But through aggregation, class action settlements can result in millions of dollars in recovery for employees.[120] If wage and hour claims cannot be brought on a collective basis, those workers have little in the way of an effective remedy, and the employer is not deterred from violating those rules.[121]

Similar incentives apply to consumer claims in the gig economy. Many consumer claims are of limited value, and can only be remedied effectively through class actions.[122] As commentator Jean Sternlight observed, the Supreme Court's decision in *Concepcion* effectively provides "companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued."[123] "The potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable."[124] Sternlight

118. *Id.* at 75.

119. Garden, *supra* note 1, at 211 (explaining that "'[l]ow-dollar' is a fitting term to describe many gig workers' claims", when describing an Uber driver's $4,152.20 award).

120. *See* Plancich et al., *supra* note 114 (identifying "total wage and hour settlement payments of $445 million in 2013, $400 million in 2014, and $39 million through the first three months of 2015" and signaling to employers that class action claims are an effective tool against employers' wrongdoing).

121. Sternlight & Jensen, *supra* note 99, at 90. ("Thus, the class action not only provides financial feasibility through combining small claims but also surmounts deterrents to filing of claims caused by the average [person's] lack of information."); *Tsunami*, *supra* note 81, at 725 ("If we allow companies to insulate themselves from class actions, we are effectively allowing companies to escape many legal regulations and thereby eliminating a great deterrent to company misconduct.").

122. *See generally* CONSUMER FIN. PROT. BUREAU, *Section 1: Introduction and Executive Summary*, *in* ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. For example, the study found that "[t]he average consumer affirmative claim amount in arbitration filings with affirmative consumer claims was around $27,000. The median was around $11,500 [and] . . . about 25 disputes a year involved affirmative consumer claims of $1,000 or less." *Id.* at 12. Comparatively, for class settlements, "the annual average of the aggregate amount of the settlement was around $540 million per year." *Id.* at 16.

123. *Tsunami*, *supra* note 81, at 704; *see also* Maltby, *supra* note 46, at 29 (predicting that "if employers are able to establish private court systems under employer control, equal employment opportunity laws may become completely unenforceable"); Rice, *supra* note 101, at 224 ("Slipping these class action prohibitions into the mandatory arbitration clause in standard forms and adhesion contracts provides for an effective defense against 'the threat of class action' and too often ensures the defendant will escape liability.").

124. *Mandatory Binding Arbitration*, *supra* note 65, at 9. "[I]n their own industry publications, defense counsel and other arbitration advocates readily observe that arbitration can be used to deter the filing of a class action suit, or secure dismissal of a class action that was nonetheless brought." *Id.*

predicted that *Concepcion* would "caus[e] many plaintiffs in class actions or putative class actions to abandon their claims"[125] and "eliminat[e] a great deterrent to company misconduct."[126] Commentators have thus characterized class action waivers as the "'do it yourself' approach to law reform,"[127] a "'get out of class actions free' card,"[128] or as a class action shield.[129]

In this way, changes in arbitration jurisprudence directly affect compliance with substantive employment and consumer rights.[130] Once companies have an avenue to preclude employees or consumers from bringing class or collective claims, they can disregard laws primarily enforced through class or collective claims. Thus, a gig company that might otherwise have altered its practices following a class action lawsuit (or after observing successful class action lawsuits against its competitors) can maintain the status quo once insulated from future class claims by using an arbitration agreement containing a class action waiver.

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125. *Tsunami*, *supra* note 81, at 711; *see also id.* (noting that "[t]he incentive to settle a claim increases as plaintiffs and their attorneys realize that they may or will be forced out of class action litigation into individualized arbitration."). "Available evidence suggests that very few consumers will choose to bring individual arbitration claims against a company." *Id.* at 723.

126. *Id.* at 725. *See also* Glover, *supra* note 71, at 1747 ("Indeed, by prohibiting class actions in the context of 'negative-value' lawsuits, where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim, individuals are effectively prevented from pursuing their claims. As a result, businesses are able to engage in unchecked market misbehavior that results in small and seemingly insignificant consequences upon individuals, but which leads to sizeable windfalls for the particular corporation in the aggregate."); Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L. J. 103, 103 (2008) ("By limiting consumers' ability to hold businesses liable, these waivers allow companies to continue illegal activity.").

127. *Mandatory Binding Arbitration*, *supra* note 65, at 11 ("One might call this the 'do it yourself' approach to law reform: the company need not convince any legislature to pass revised laws, nor persuade any judicial body to change court rules, but rather merely choose to eliminate the pesky class action on its own."); *see also* Maltby, *supra* note 46, at 29 ("Thousands of employers are abandoning the civil justice system, establishing their own systems of resolving disputes, and requiring employees to use them." (internal citations omitted)); *Tsunami*, *supra* note 81, at 720 (noting that "by using the private tool of arbitration, corporate defenders will be able to achieve far more than they have been able to achieve through Congress or the federal and state rules committees: the total elimination of class actions in many contexts").

128. Weston, *supra* note 28, at 770.

129. *See* Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L. J. 141, 141–42 (1997).

130. Blechschmidt, *supra* note 81, at 542 ("[C]lass actions are so intimately linked to the vindication of substantive rights . . . .").

This sequence of events may be developing in the gig economy, as companies continue to classify their workers as contractors despite substantial litigation.[131] Miriam Cherry documented fourteen misclassification cases against gig companies as of 2016,[132] which represents a significant amount of litigation for an industry with relatively few players.[133] The most famous of such cases involved ride-sharing companies, Uber and Lyft.[134] Both were subject to class action lawsuits in California alleging wage and hour violations.[135] In both cases, the California trial court denied summary judgment on the question of whether the workers were properly classified as independent contractors or employees.[136] The lawsuit against Lyft settled for $27 million.[137] Parties to the Uber case agreed to a $100 million settlement, which the presiding judge rejected as inadequate.[138] Nevertheless, both Uber and Lyft continue to classify their workers as independent contractors,[139] suggesting that neither company is especially fearful of future litigation.

The Uber case is now on appeal to the Ninth Circuit on the question of the enforceability of Uber's arbitration provision containing a class action waiver.[140] Should Uber prevail on the arbitration issue, the lawsuit against the company will collapse. As the plaintiffs' lawyer explained on her website, "it is possible that the class in this case may be reduced to the few Uber drivers who opted out of arbitration (or who stopped working for Uber before the arbitration clause was first introduced in August 2013)."[141] Of the fourteen misclassification cases Cherry identified, four others involved motions to compel arbitration.[142] Three of these motions were granted.[143] Even if plaintiffs prevail in the remaining cases, the influence on future employer behavior will be short lived to the extent that workers in those companies, and others in

131. Cherry, *supra* note 106, at 582–83.
132. *Id.* at 584–87.
133. *See id.* at 577–78.
134. *Id.* at 583–84.
135. *Id.*
136. *See* Cotter v. Lyft, Inc., 176 F. Supp. 3d 930, 933 (N.D. Cal. 2016); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).
137. David Kravets, *Lyft Agrees to Pay $27 Million to Settle Driver Classification Lawsuit*, ARS TECHNICA (Mar. 18, 2017, 9:00 AM), https://arstechnica.com/tech-policy/2017/03/lyft-agrees-to-pay-27-million-to-settle-driver-classification-lawsuit/.
138. *Id.*
139. *See* Cherry, *supra* note 106, at 584–85.
140. *Uber Drivers*, UBER LAWSUIT INFORMATION, http://uberlawsuit.com/ (last visited Mar. 20, 2018).
141. *Id.*
142. Cherry, *supra* note 106, at 584–87 tbl.1.
143. *Id.* at 584–85.

the sharing economy, are now bound to arbitration agreements containing class action waivers.

Arbitration clauses have also served as a barrier to class-based claims in the consumer context. For example, Airbnb recently avoided a class action suit that accused hosts of engaging in racial discrimination toward potential guests.[144] In *Selden v. Airbnb*, Gregory Seldon, an African-American man, brought an individual and class claim against Airbnb for racial discrimination under Title II of the Civil Rights Act of 1964 and the Fair Housing Act.[145] Airbnb moved to compel arbitration, according to the terms of its User Agreement.[146] Ultimately, the judge held that regardless of the controversy surrounding the "practice of requiring consumers to relinquish their fundamental right to a jury trial—and to forego class actions—as a condition of simply participating in today's digital economy," so long as the arbitration provisions are "made reasonably known to consumers—[they] are enforceable, in commercial disputes and discrimination cases alike."[147]

Similarly, in 2017, John Applebaum filed a class action complaint against Lyft, claiming that Lyft overcharged New York customers for toll crossings.[148] Lyft moved to compel arbitration based on two versions of its Terms of Service agreement from 2016, both of which included an arbitration provision with a class action waiver.[149] The court found that the earlier version of the contract presented insufficient notice of the arbitration provision.[150] However, it enforced the later version of the contract and compelled arbitration.[151]

III. METHODS

A. Sample

The sample consisted of Terms of Service contracts gathered from thirty-eight gig companies.[152] Companies included in the study were

144. *See* Selden v. Airbnb, Inc., No. 16-cv-00933 (CRC), 2016 WL 6476934, at *1–2 (D.D.C. Nov. 1, 2016).

145. Amended Complaint at 1–3, *Selden*, 2016 WL 6476934.

146. *Selden*, 2016 WL 6476934, at *1–2.

147. *Id.* at *2–3.

148. Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454, 456–57 (S.D.N.Y. 2017).

149. *Id.* at 456–63.

150. *Id.* at 468–69.

151. *Id.* at 469–70.

152. The companies included in the sample were 99Designs, AgentAnything, AppFutura, Desksurfing, Donanza, DogVacay, Elance, Expertbids, FlexJobs, Flipkey, Freelancer, Getaround, Gigwalk, Grubhub, Guru, Handy, Lionbridge/Smartcrowd, Lyft, Amazon's MTurk, Neighborgoods, Poshmark, Redbacon, Sidecar, Skillshare, Sortfolio,

primarily identified in 2014 through websites and press articles listing businesses in the "sharing economy," although some companies were added to the sample in 2015. Consequently, the sample tends to over-represent larger, more established players in the market. Some companies originally included in the sample have gone out of business or have been acquired[153] over the intervening years. They were nevertheless included in the analysis for those years when contracts were available.

Between 2014 through 2016, contracts were gathered manually from company websites on an annual basis. We then used the Wayback Machine, an internet archiving organization,[154] to identify and download contracts posted to each company's respective website from 2009 to 2013. We also used the Wayback Machine to fill in gaps in the sample between 2014 and 2016. Because the sharing economy is relatively new, only 14 companies had contracts available through the Wayback Machine dating back to 2009 or 2010. For that reason, contracts from those two years are analyzed together. Some companies included code on their website that prevented the Wayback Machine from archiving their content (of particular note, Airbnb, Lyft, and Amazon). For those companies, we relied exclusively on contracts gathered during the manual collection between 2014 and 2016.

Some companies posted multiple contracts on their websites that specified the terms of their arrangements with site users. In other cases, contracts were gathered more than once in a given year. All of the contracts available for a company in a given year were analyzed jointly, producing one unit of analysis per company per year ("snapshots"). The sample contained approximately 226 contracts, which were aggregated into 173 snapshots. The snapshots are itemized in Appendix A, which lists the years for which at least one contract was available for analysis for each gig company. Table 1, below, summarizes the number of companies included in each year of analysis.

Spinlister, TaskRabbit, Thumbtack, Uber, Upwork/Odesk, Wello, Zaarly, iFreelance, Postmates, RelayRides/Turo, Rover, and RentaFriend.

153. Flipkey, Redbeacon, ODesk, and Smartcrowd.

154. *Internet Archive Wayback Machine*, *supra* note 7.

Table 1. Number of Companies included in Analysis by Year

Year(s)	Companies
2009/2010	14
2011	20
2012	23
2013	26
2014	28
2015	29
2016	33
Total	**173**

B. Coding Methodology

The contracts were subject to an initial review to ensure that they included substantive provisions regarding the terms governing the relationship between gig companies and their users, typically entitled "Terms of Service Agreement," "Terms of Use Agreement," or "User Agreements." Contracts consisting solely of privacy policies were excluded from the analysis.

The coding methodology consisted of keyword searches associated with contract provisions of interest—for example, the words "arbitration" or "class"—using QDA Miner Lite. Paragraphs containing those keywords were then reviewed individually and assigned codes according to the type of provision, for example, an arbitration provision or a class action waiver. If multiple contracts were analyzed for a single company in a given year and one of those contracts included a relevant provision (e.g., an arbitration provision), that provision was counted as present for that snapshot.

C. Limitations

This data is subject to a number of limitations. First, and most importantly, these contracts may not represent agreements between workers and gig companies in every case. Our analysis was limited to variations of the "Terms of Service" agreements or "User Agreements." These contracts generally govern terms of service with software "users."

The term "users" would generally encompass customers, but it can also encompass workers that "use" the software to perform work. It was not clear from the face of the contracts whether they were intended to cover both customers and workers or customers only. As previously discussed, the contracts tend to blur the distinction between customers and workers—although customers pay and workers receive payment, both are software "users." This is especially so because gig companies often take pains to assert in their contracts that they are mere intermediaries between individual software users, providing only a software platform for others to use.

It is possible that some of the contracts we analyzed did not reflect the contracts companies used with their workers. In particular, Uber's contracts with its drivers, as submitted as an exhibit to their court pleadings, differed from its terms of service contract and involved a different legal entity than Uber called Rasier, LLC.[155] Although the version of the contract submitted to the court was included in the analysis, there may be other contracts where the company uses different terms for customers and workers. Nevertheless, the content of terms of service contracts may correlate with content in independent contractor agreements to the extent that companies revise all of their form contracts at once and that their motivations for adopting an arbitration provision are shared across all of their contracts.[156]

A second important limitation arises from the inconsistent frequency for which contracts were available for each company. Because contracts were not available for each company for each year, the subsample of contracts analyzed each year represents a different mix of companies.[157] Consequently, observed trends from year to year in part reflect changing practices within companies, but also reflect the random differences between companies included in one year versus the next.

A third limitation arises from the small number of gig companies appearing in the sample in 2009 and 2010.[158] This makes each company

155. See Mohamed v. Uber Techs., 115 F. Supp. 3d 1024 (N.D. Cal. 2015), and RASIER, LLC, TECHNOLOGY SERVICES AGREEMENT (2015) (on file with author), for references to Rasier, LLC.

156. A 2007 study by Eisenberg, Miller and Sherwin engaged in a within-firm analysis to assess whether companies used arbitration provisions across all of their contracts. They found that while companies tended not to include arbitration provisions in peer-to-peer contracts with other companies (only six percent of contracts), they tended to include them in employment contracts (ninety percent) and consumer contracts (seventy-five percent). Eisenberg et al., *supra* note 51, at 882–83. This result would suggest that practices regarding consumer contracts and employment contracts tend to be correlated.

157. *See infra* Appendix A.

158. *See infra* Figure 1.

included in those years disproportionately influential in the overall results. The sharing industry was somewhat nascent at that time. It may be that changes in contracting practices over the eight-year period reflect the maturation and growth of the industry over time, rather than changes in case law. For example, it is possible that larger, more established companies in 2009 and 2010 made more frequent use of arbitration provisions and class actions waivers. In addition, because this study was limited to companies in the sharing economy, its findings may not be generalizable to other industries.

IV. RESULTS

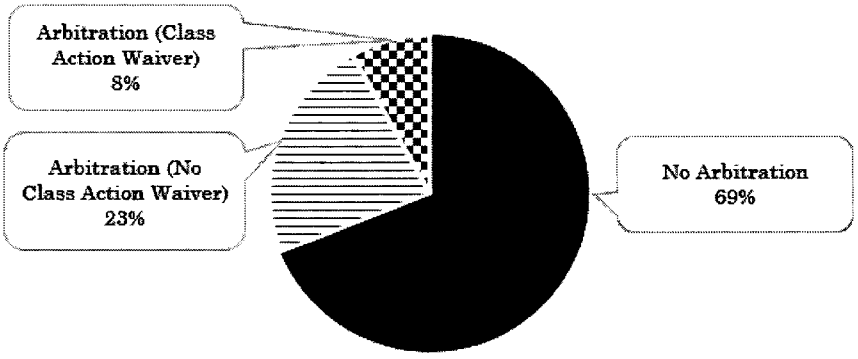
A. Adoption of Arbitration Provisions and Class Action Waivers

In 2009/2010, only 31% of the companies (5 out of 14) in the sample used arbitration provisions in their Terms of Service contracts. Of those with arbitration provisions, only one contained a class action waiver. (See Figure 1). This remained true in 2011 as well, when only 35% of the companies (7 out of 20) had an arbitration provision, of which only one had a class action waiver.[159] The remaining 13 companies had no arbitration provision.[160]

159. This result is similar to the prevalence of arbitration agreements observed for senior executives in their employment contracts, which was observed in the thirty-seven to forty-two percent range. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 234 (2006); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 351 (2007). It is, however, lower than the arbitration rate observed in a sample of sixteen employment agreements from publicly traded companies in 2007, ninety percent of which contained an arbitration clause. Eisenberg et al., *supra* note 51, at 883.

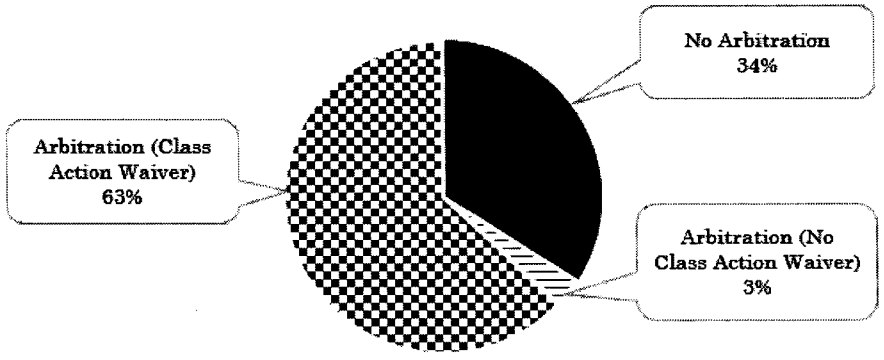
160. *See infra* Figure 1.

Figure 1. Proportion of Gig Companies with Arbitration Provisions in 2009/2010



However, five years later, these proportions were essentially reversed.[161] (See Figure 2). By 2016, 66% of companies (22 out of 33) made use of an arbitration provision, and all but one contained a class action waiver. The remaining third of companies did not use an arbitration provision.[162]

Figure 2. Proportion of Gig Companies with Arbitration Provisions in 2016

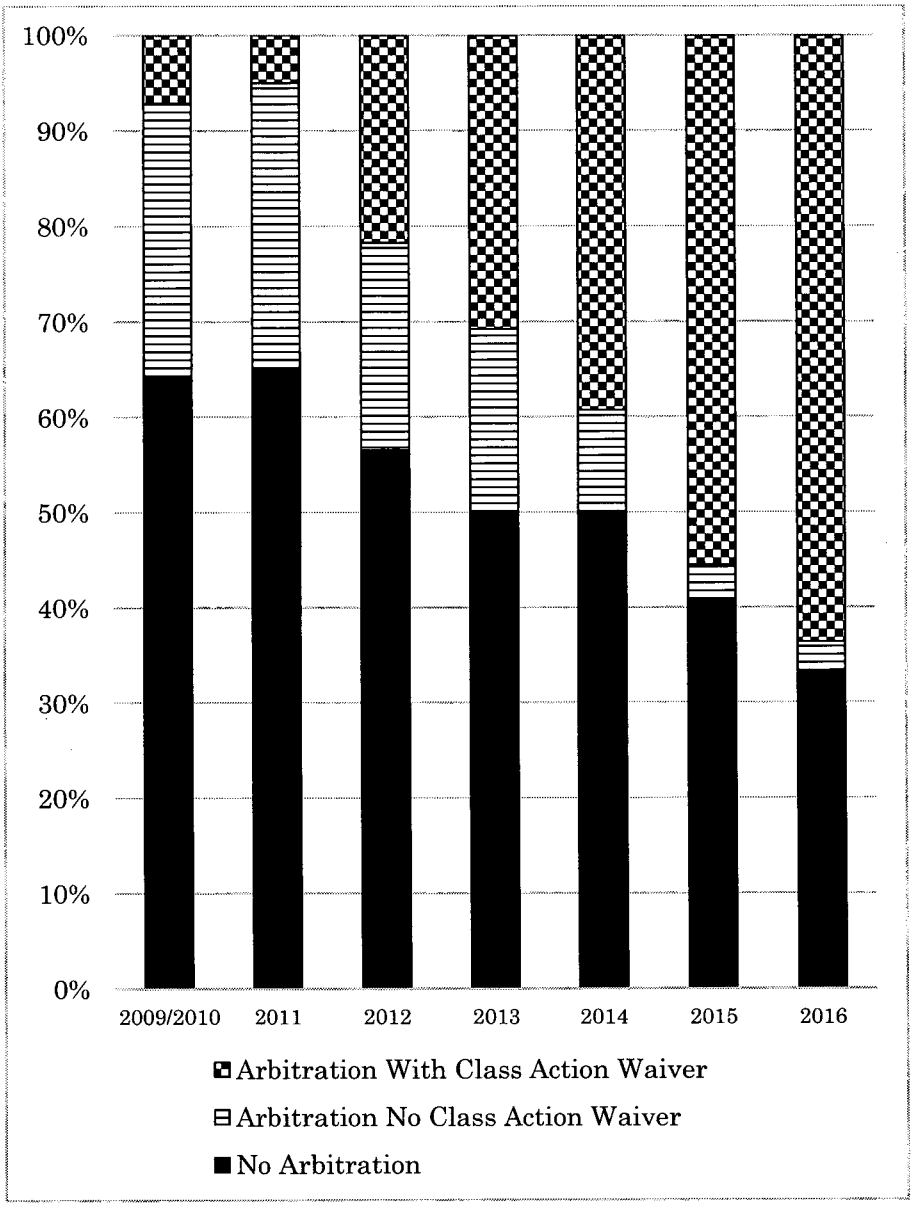


161. *See infra* Figure 2.
162. *See infra* Figure 2.

Figure 3 presents a year by year breakdown of the proportion of companies in the sample using an arbitration provision with or without a class action waiver. It suggests a gradual shift toward contracts containing arbitration clauses with class action waivers. There was no observable change in the prevalence of arbitration provisions in 2011, when *AT&T v. Concepcion* was decided. By 2012, several companies had adopted arbitration provisions containing class action waivers (5 out of 23, or 22%), and more companies overall included arbitration provisions. By 2013 and 2014, half of the companies used arbitration provisions, and the proportion of those provisions containing class action waivers continued to grow. By 2015, more than half of companies used arbitration provisions containing class action waivers (15 out of 29, or 52%). Overall, Figure 3 suggests somewhat of a gradual adoption of class action waivers following *Concepcion*. None of the companies in the sample added a class action waiver and later removed it in a subsequent version of the contract.[163]

163. *See infra* Figure 3.

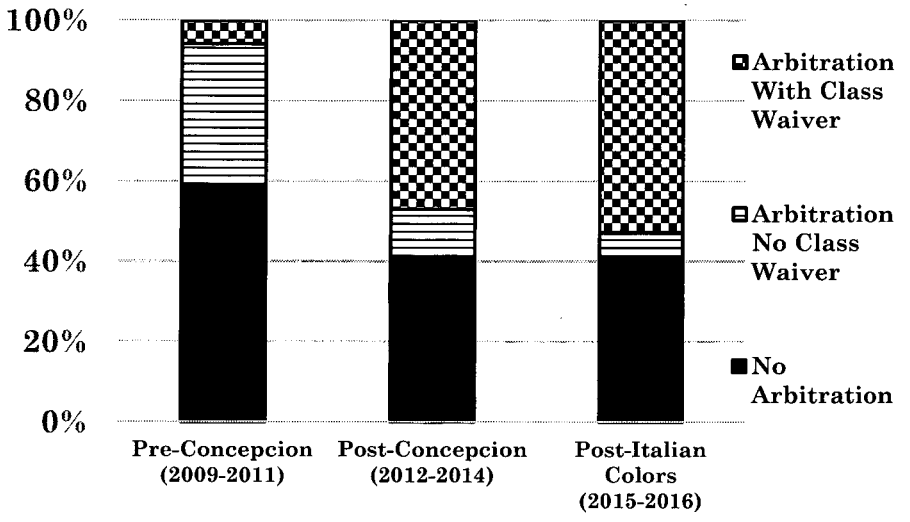
Figure 3. Proportion of Agreements Containing Arbitration Provision



The apparent gradual shift could be attributable to the sporadic frequency with which companies updated their Terms of Service agreements. The Terms of Service contracts often contained a notation indicating the last date of revision, which provided some insight into how frequently they were revised. It was not uncommon to download a contract on a specified date, but to have a "last revised" date from a year or more earlier. Companies may be updating their agreements according to a pre-specified schedule or in response to certain internal crises or media coverage, rather than in response to changes in the law.

To control for differences in the composition of the sample over time, Figure 4 presents a subsample consisting of 17 companies for which a snapshot was available at three points in time: pre-*Concepcion* (2009–2011), post-*Concepcion* (2012–2014) and post-*Italian Colors* (2015–2016). Figure 4 illustrates changes in the proportion of contracts containing an arbitration provision at each juncture. If the employer's practice varied within a snapshot period (for example, arbitration without a class action waiver in 2013, but with a class action waiver in 2014), we selected the provision that was most restrictive for the employee/customer.[164]

Figure 4. Subsample – Changes in Contract Provisions over Time



164. In other words, using the prior example, we would have counted the arbitration provision containing a class action waiver. *See infra* Figure 4.

Figure 4 suggests a similar trend to Figure 3. The largest shift occurred in the years immediately following the *Concepcion* decision, when a number companies that already used an arbitration provision included a class action waiver. A few companies also added an arbitration provision to contracts that previously lacked such a provision. However, a substantial proportion of companies started out without an arbitration provision and did not add one in subsequent years.[165] Figure 4 suggests that companies do not appear to have altered their practices much in response to *Italian Colors*, with only one company adding a class action waiver to its contract.

Some companies responded almost immediately to *Concepcion* by adding an arbitration provision containing a class action waiver. Uber, Rover, and Redbeacon had no arbitration provision in the 2011 contracts, but included one in 2012.[166] A few took longer to adapt their contracts. Postmates, for example, did not add an arbitration provision with a class action waiver until 2014. RelayRides (rebranded as Turo) did not add an arbitration provision with a class action waiver until 2016.[167]

Some companies had an arbitration provision in 2011 or earlier, but added a class action waiver in 2012 or later (e.g., Elance, Freelancer, and Getaround).[168] In addition, a few companies had no arbitration agreement in 2009/2010 and added an arbitration provision without a class action waiver in 2011 or later.[169] These companies added a class action waiver to their arbitration agreement in subsequent years.[170] For example, Lyft included a mandatory arbitration provision in 2013, but did not add a class action waiver until 2015.[171] This delay in adding a class action waiver could have reflected caution on the part of the company or its lawyers as to the enforceability of class action waivers. The *Italian Colors* case may have allayed those concerns and resulted in a subsequent revision of the contract.

The sample included a few non-U.S. companies, which also appear to have altered their terms following *Concepcion*. 99Designs, an Australian company, included an arbitration provision containing a

165. *Compare supra* Figure 3, *with supra* Figure 4.
166. *See infra* Appendix A.
167. *See infra* Appendix A.
168. *See infra* Appendix A.
169. *See infra* Appendix A.
170. *See infra* Appendix A.
171. Appendix B compares Lyft's 2013 dispute resolution clause to its 2015 clause. We did not have a contract for 2014; it is possible Lyft modified its contract in 2014, but it was not observed in our sample until 2015.

class action waiver in 2013 for all its American customers, but not for its customers anywhere else in the world.[172] The inclusion of such a provision suggests that even non-U.S. companies have received the message that U.S. law permits class action waivers through some form of arbitration provision.

Only one company used an arbitration provision containing a class action waiver prior to 2011. TaskRabbit had an arbitration provision containing a class action waiver dating back to 2009.[173] The agreement provided that

> [t]o the full extent permitted by law, (a) no arbitration will be joined with any other; (b) there is no right or authority for any Dispute to be arbitrated on a class-action basis or to utilize class action procedures; and (c) there is no right or authority for any Dispute to be brought in a purported representative capacity on behalf of the general public or any other persons.[174]

This may explain, in part, why TaskRabbit managed to avoid the lawsuits faced by its competitors.[175]

About forty percent of companies do not appear to have modified their contracts in light of *Concepcion* or *Italian Colors*. Even in 2016, one third of companies did not include any form of arbitration clause (e.g., AgentAnything, Flexjobs, Zaarly, AppFutura, Flipkey, Lionbridge, Sortfolio, and Expertbids).[176] Another company, Guru.com, has had a weak arbitration provision since 2009 and has never included a class action waiver.[177] Bike-gig company, Spinlister, included an arbitration

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172. *See infra* Appendix C.

173. *See infra* Appendix A.

174. *TaskRabbit.com Terms of Use*, ARCHIVE.ORG, http://web.archive.org/web/20100412135850/http://www.taskrabbit.com:80/main/tos (last updated Feb. 11, 2009).

175. The only vaguely employment-related lawsuits we were able to identify against TaskRabbit consisted of a California lawsuit brought by a pro se litigant alleging non-compliance with California's background check laws and an appeal of an unemployment insurance determination. *See* Complaint at 1, Miletak v. TaskRabbit, Inc., No. 16-CV-292981 (Cal. Super. Ct. Mar. 21, 2016). We were unable to locate any details about the unemployment insurance appeal and thus could not assess whether it related to an allegedly misclassified contractor, or an employee working for TaskRabbit headquarters. *See* TaskRabbit, Inc. v. Cal. Unemployment Ins. Appeals Bd., No. CPF-16-515405 (Cal. Super. Ct. Dec. 15, 2016).

176. *See infra* Appendix A.

177. The contract provided for "arbitration" but only as to disputes between "an Employer" and a "Freelancer". The arbitration provision provided for negotiation or mediation, followed by "arbitration" in which Guru served as the arbitrator. The arbitration provision did not appear to cover disputes between users and Guru. *See Terms of Service*, GURU, https://www.guru.com/terms-of-service/ [http://web.archive.org/web/

provision in 2011 but removed it in 2012 and has not included one since.[178]

Nevertheless, the largest companies in the sample—Airbnb, TaskRabbit, Lyft, Uber, and Amazon's MTurk—all make use of arbitration provisions containing class action waivers. This means that most workers, and customers, interacting with the gig economy will be subject to such provisions.

B. *Using Severability Clauses to Approximate Company Preferences Regarding Arbitration*

Severability clauses offer an additional window for understanding company motivations with respect to arbitration provisions. Severability clauses instruct courts on how to interpret the contract if the class action waiver, the arbitration provision, or other provisions of the contract are declared unenforceable.[179] If companies instruct courts to sever the entire arbitration section in the event the class action waiver is deemed unenforceable, it suggests that the company is using the arbitration clause primarily or exclusively for the class action waiver. If instead the severability clause instructs courts to enforce the arbitration provision without the class action waiver, it suggests the company values arbitration independently of the class action waiver.[180]

As of 2016, several contracts in the sample containing arbitration provisions included specific terms instructing courts in this regard.[181] In 2016, eight of the companies instructed courts (or the arbitrator) to declare the entire arbitration provision void if the class action waiver was deemed unenforceable. This represented 36% of all contracts with

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20100116105410/http://answers.guru.com:80/about-Guru/Legal/Terms-of-Service.aspx] (last visited Mar. 20, 2018).

178. *See Terms of Service*, SPINLISTER, https://www.spinlister.com/terms [https://web.archive.org/web/20111227124117/http://spinlister.com:80/terms] (last updated May 10, 2017).

179. Eisenberg, Miller and Sherwin used this approach in assessing company preferences in consumer contracts. Eisenberg et al., *supra* note 51, at 876.

180. Charlotte Garden's article includes an analysis of severability provisions in a sample of gig economy contracts. *See* Garden, *supra* note 1, at 213–15.

181. Some of the contracts included multiple contingencies for handling unenforceable claims. We included a given contract in the category associated with the most specific provision. So, if a contract included both a provision for the handling of unenforceable class action provisions and unenforceable provisions generally, we sorted them into the category associated with class action provisions. This is consistent with the principle of contract interpretation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (AM. LAW INST. 1981); *see infra* Table 2.

arbitration provisions and 25% of the companies in the sample.[182] The presence of such a clause suggests that these companies adopted arbitration solely for the purpose of availing themselves of a class action waiver.[183] These companies otherwise preferred a judicial venue when the prospect of a class action waiver is removed.

Other companies expressed different preferences for handling unenforceable class action claims. Two companies instructed the court/arbitrator to send any class claims to court, and one instructed the court to interpret the agreement as "silent" on the arbitrability of class claims, seemingly invoking *Stolt-Nielsen*, perhaps to resurrect the class action waiver or to refer it back to a judicial forum. The remaining contracts did not include a specific contingency for handling an unenforceable class action waiver but included a general provision on the severability of any term in the contract (11 contracts, or 50% of contracts containing arbitration provisions).[184] These clauses provided that the remainder of the contract would survive an unenforceable provision, though they varied as to whether the unenforceable provision should be severed, modified, or interpreted according to the nearest intent of the parties.[185] As applied to an unenforceable class action waiver, such a provision would likely result in the continued enforceability of the arbitration provision as to individual claims. The absence of a provision specifically addressing unenforceable class action waivers might suggest a high degree of confidence as to the enforceability of class action waivers. It could also suggest an overall preference for arbitration even if the class action waiver is not enforced.

182. This result is lower than that measured in other studies. A study by Eisenberg, Miller, and Sherwin found that in "[sixty percent] of the consumer contracts that contained mandatory arbitration clauses, companies' contracts deemed those clauses void if the arbitration process allows for classwide activity." Eisenberg et al., *supra* note 51, at 884. Differences in the observed result may be attributable to sample selection; Eisenberg, Miller and Sherwin looked only at contracts adopted by public companies. *See id.* at 871. The different result may also be attributable to a difference in time period. The study was based on 2007 data, which pre-dated *Concepcion*. *Id.*; *see also* Drahozal & Wittrock, *supra* note 26, at 278 (noting that in 2009, "an increasing number of franchisors and other parties that draft form contracts now include nonseverability provisions in their arbitration clauses").

183. Eisenberg, Miller, and Sherwin reached the same conclusion in their study of similar such provisions, finding that "[t]he growth of mandatory consumer arbitration clauses appears to be part of a broader initiative by corporations to preclude or limit aggregate litigation." Eisenberg et al., *supra* note 51, at 895.

184. *See* Drahozal & Wittrock, *supra* note 26, at 288.

185. *See id.* at 290–91.

Table 2. Severability Provisions, 2016 Agreements with Arbitration Provisions.

	Number of contracts	% of contracts with arbitration provisions
If class action waiver invalid, entire arbitration provision void.	8	36%
If class action waiver invalid, treat contract as silent on class actions.	1	5%
If class action waiver invalid, send to court.	2	9%
If any provision invalid, modify or sever.	11	50%

Notably, none of the contracts included provisions for class arbitration in the event the class action waiver fails, suggesting an overall distrust of class arbitration.[186] This contractual preference is consistent with judicial assumptions about company preferences articulated in *Stolt-Nielsen* and *Concepcion*, both of which assumed that class arbitration was so different from individual arbitration that parties could not be assumed to have consented to it.[187]

C. Prevalence of Carve-Outs

Various forms of carve-outs have become more prevalent over time.[188] Although class action waivers saw the biggest gain over the sample period, other exceptions and carve outs have also become popular. Another common provision consisted of an exception to the arbitration provision for actions seeking injunctive relief, included in

186. *See* Drahozal & Wittrock, *supra* note 26, at 278 ("However, an increasing number of franchisors and other parties that draft form contracts now include nonseverability provisions in their arbitration clauses, specifying by contract that if the class arbitration waiver is held invalid, the entire arbitration clause is unenforceable." (footnote omitted)).

187. *See* AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 346–50 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."); Weston, *supra* note 28, at 781 ("The Court's perception is that arbitration is quick, informal, and cheap, but that, based on reports from the commercial arbitration community, class arbitration does not align with these ideals.").

188. *See infra* Figure 5.

over 50% of arbitration provisions since 2013.[189] Sometimes these equity-based carve-outs use intellectual property disputes as an example.[190] Other times, the arbitration provision included a separate carve-out for intellectual property claims.[191] The inclusion of carve-outs for injunctive relief and/or intellectual property claims suggests that companies do not trust arbitrators with legal matters that are core to their business interests. The specific reference to injunctive relief may also suggest that companies prefer the provisional relief offered by courts, perhaps because requests for temporary injunctive relief can be filed on short notice[192] or because court injunctions can be enforced through contempt proceedings.

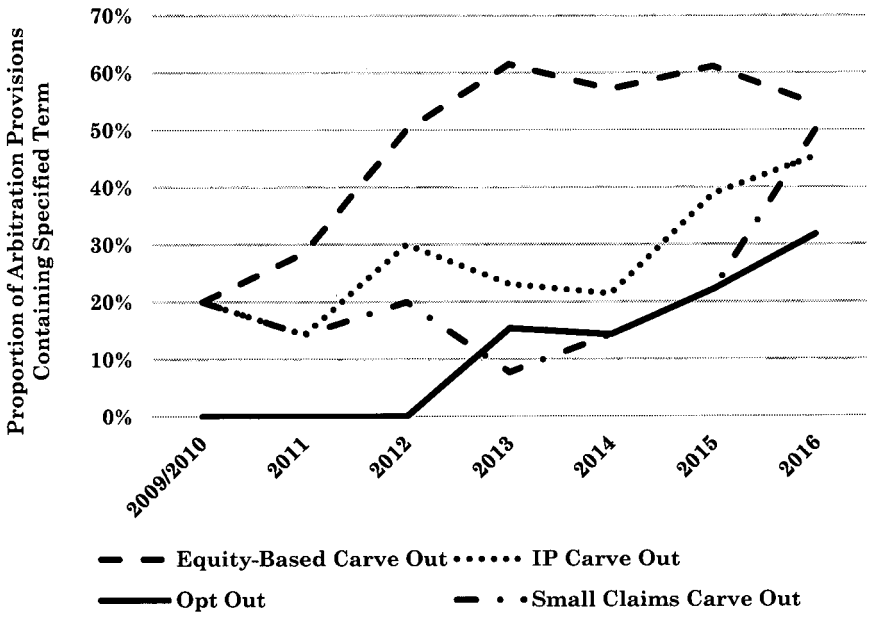
189. Both such references to intellectual property (either a standalone carve-out, or as an example of equity-based relief) were counted as an "IP carve out" for the purposes of Figure 5. *See Terms of Service*, AIRBNB (last updated Apr. 16, 2018), https://www.airbnb.com/terms [http://web.archive.org/web/20130816112832/https://www.airbnb.com/terms?cdn_locale_redirect=1] ("You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively, "Disputes") will be settled by binding arbitration , [sic] except that each party retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents, or other intellectual property rights.").

190. *See, e.g.*, *id.*

191. *See, e.g.*, *id.*

192. Note that arbitration rules increasingly include options for provisional relief. *See id.*

Figure 5. Rise of the Carve Outs



As shown in Figure 5, several arbitration provisions also contained carve-outs for cases brought in small claims court.[193] Company motives for a small-claims carve-out are more difficult to discern. They may prefer to do so to avoid arbitration costs, particularly since paying filing fees or arbitral costs are often required by the arbitrator administrator.[194] Alternatively, companies may include a small-claims carve-out to enable them to bring collections claims against consumers;[195] a few contracts make reference to collections claims.[196]

193. Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 65 (2004) (noting that 30.8% of arbitration agreements included a carve out for small claims).

194. *See supra* note 44.

195. *See* CONSUMER FIN. PROT. BUREAU, *Section 7: Do Consumers Sue Companies in Small Claims Courts?*, *in* ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015) [hereinafter *Section 7*], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

196. *See id.*

They may also do so to bring the express terms of the contract in line with rules adopted by the arbitration provider specified in the contract. The American Arbitration Association rules permit parties to a consumer dispute to bring the claim in small claims court.[197]

Gig companies have also been using "opt out" provisions with greater frequency, through which employees can decline to consent to arbitration if they notify the company within a specified period.[198] Such a provision helps companies buttress claims of unconscionability under state law.[199] As Charlotte Garden observed, few workers opt out of such clauses.[200]

When these carve-outs are combined with legal exceptions to arbitration provisions, a rather complicated dispute resolution system emerges. First, as a matter of law, employees retain the right to file administrative claims, so all such claims are automatically excluded from the purview of the clause.[201] If the employee's claims fall under the jurisdictional limits of small claims court, perhaps a few thousand dollars, the agreement might permit the employee to bring the claim in small claims.[202] More valuable claims, such as discrimination or retaliation claims, would need to be filed in arbitration.[203] The class action waiver would preclude the employee from bringing any class action claims.

The employer, for its part, has few claims to assert against an employee. Employers have, in the past, asserted claims against employees in arbitration over unpaid salary advances or over severance

197. AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES 15 (2014) ("R-9. Small Claims Option for the Parties"), https://www.adr.org/sites/default/files/Consumer%20Rules.pdf.

198. *See also* Garden, *supra* note 1, at 218–20 (noting that many gig economy arbitration provisions include an opt-out provision).

199. In commenting on so-called "kinder and gentler arbitration clauses" containing opt-out provisions or subsidies for arbitration costs, Eisenberg, Miller, and Sherwin observe that their "apparent purpose . . . is to avoid the appearance of one-sidedness, and thus to protect both the basic choice of arbitration over litigation and the connected waiver of class proceedings from challenges based on unconscionability." Eisenberg et al., *supra* note 51, at 893.

200. Garden, *supra* note 1, at 219–20 (noting the small number of workers that had opted out of Grubhub's arbitration clause, and Uber's arbitration clause).

201. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002).

202. THE LEGAL AID SOCIETY OF SAN FRANCISCO, DO-IT-YOURSELF RECOVERY OF UNPAID WAGES 7–8 (2004), legalaidatwork.org/wp-content/uploads/2017/01/Recovering_Unpaid_Wages.pdf (advising California litigants that they could choose to file wage claims of less than $5,000 in either small claims court or with the state Labor Commissioner, though noting that the Labor Commissioner had more expertise).

203. *See id.*

agreements breached by the employee.[204] Otherwise, the primary claim an employer might assert against an employee or former employee would be for breach of a non-compete or misappropriation of trade secrets, both of which would fall into an equity based carve-out, or a carve out for intellectual property claims. Thus, for employers with an equity or intellectual property carve-out, the carve-out allows them to largely avoid arbitration for their most important claims against employees. However, they would still be bound to arbitration in defending claims filed by employees.

For example, Uber used a relatively complex arbitration provision.[205] Between 2011 and 2012, Uber substantially revised its Terms of Service Agreement, which included adding an 865-word dispute resolution provision with a class action waiver.[206] The agreement included a carve-out for small claims court and a thirty-day opt-out provision.[207] Arbitrations valued at less than $10,000 would be conducted solely based on the documents submitted to the arbitrator, thus reducing the transaction costs of arbitration.[208] The contract also gave parties the right to seek injunctive relief for disputes relating to intellectual property, although presumably only Uber would avail itself of the contingency.[209] The provision also provided that if the class action waiver is deemed unenforceable, the entire dispute resolution provision will be deemed unenforceable.[210] As previously discussed, such a provision suggests that Uber's primary interest in using the arbitration clause was to avail itself of the class action waiver.

The proliferation of exceptions and carve-outs over time may also reflect a trend toward mandatory, rather than optional, arbitration provisions. Before *Concepcion*, arbitration provisions tended to be more flexible. For example, Getaround's policy from 2011 provided that parties with claims valued at less than $10,000 "may elect" to use

204. Colvin & Pike, *supra* note 45, at 66. Colvin and Pike's review of employment arbitration outcomes noted that 8.6% of cases were initiated by employers and consisted of "efforts to recover salary advances paid to employees who quit their employment prior to the end of the pay period or claims seeking to recover severance payments where the employee subsequently breaches the terms of the agreement." *Id.*

205. *See infra* Appendix D.

206. *See infra* Appendix D. Note that the plaintiff's lawyer in the Uber litigation stated on her website that Uber introduced the arbitration agreement in August 2013, suggesting that the Terms of Service Agreement analyzed here may have been different from the agreement that applied to California drivers. *See Uber Drivers*, *supra* note 140.

207. *See infra* Appendix D.

208. *See infra* Appendix D.

209. *See infra* Appendix D.

210. *See infra* Appendix D.

arbitration.[211] The use of the phrase "may elect" suggests that parties could elect to opt out of arbitration post-dispute, particularly in the absence of other language suggesting that such disputes are "subject to" arbitration.[212] The arbitration clause was limited to claims below $10,000, suggesting that the company may have distrusted arbitrators to resolve more valuable claims.[213] By 2012, Getaround's policy required all claims to be arbitrated, with the exception of claims asserted by Getaround seeking injunctive relief.[214] The 2012 version also included a class action waiver.[215] Similarly, Thumbtack had a short and flexible dispute resolution provision as late as 2015, which "strongly encourage[d]" customers to seek a resolution via e-mail, after which Thumbtack would "consider reasonable requests to resolve the dispute through alternative dispute resolution procedures, such as mediation or arbitration, as alternatives to litigation."[216] However, by 2016, Thumbtack traded this approach for a 1,254-word dispute resolution clause that included arbitration and a class action waiver.[217]

V. DISCUSSION

Even before *Concepcion*, scholars observed an increase in the use of class action waivers.[218] Maria Glover traced the use of class action waivers to "the late 1990s, when trade-journal articles first started encouraging corporations to consider including class action prohibitions in arbitration agreements."[219] As Jean Sternlight explained, before *Concepcion*, "[t]he use of such [arbitration] clauses varied by industry, by jurisdiction, and by time period."[220] In a 2001 study, Linda Demaine and Deborah Hensler found that approximately 35.4% of consumer contracts contained arbitration clauses, of which approximately 30.8% contained a class action waiver.[221] The study ultimately showed that

211. *See infra* Appendix E.
212. *See infra* Appendix E.
213. *See infra* Appendix E.
214. *See infra* Appendix F.
215. *See infra* Appendix F.
216. *See infra* Appendix G.
217. *See infra* Appendix H.
218. *See, e.g.*, Sternlight & Jensen, *supra* note 99; *Mandatory Binding Arbitration*, *supra* note 65; Stipanowich, *supra* note 26; *Tsunami*, *supra* note 81; Weston, supra note 28; Blechschmidt, *supra* note 81; Glover, *supra* note 71; Vidmar & Rice, *supra* note 51.
219. Glover, *supra* note 71, at 1746. *See also* Drahozal & Wittrock, *supra* note 26, at 282 (describing case law dating back to the 1990s in which arbitration clauses acted as a class action waiver in the franchise context).
220. *Tsunami*, *supra* note 81, at 717.
221. Demaine & Hensler, *supra* note 193, at 60, 62, 65.

"thirty-five percent of the consumer contracts in an average California consumer's life required arbitration, and thirty-one percent of those excluded class actions."[222] A 2009 study by Drahozal and Wittrock found that 78.6% percent of arbitration clauses in franchise agreements contained a class action waiver as of 2007.[223] By contrast, a study of 597 end-user software license agreements found that none contained class action waivers.[224]

A 2008 study by Professors Eisenberg, Miller, and Sherwin compared the use of arbitration clauses by twenty-one publicly-traded companies.[225] The results showed that "more than 75 percent of consumer contracts" and 90 percent of employment contracts included an arbitration clause.[226] They found that all of the consumer contracts containing an arbitration provision also included a class action waiver.[227] By contrast, none of the consumer contracts without an arbitration provision included a class action waiver.[228]

Scholars likewise warned of the demise of class actions even before *Concepcion*. In a 2004 law review article, Elizabeth Jensen and Jean Sternlight observed that "many courts have allowed companies to use arbitration clauses to elude class actions," even as others declared them unconscionable.[229] A 2005 article by Myriam Gilles argued that arbitration clauses and arbitration jurisprudence would lead to the virtual extinction of class-based relief.[230] Gilles predicted that "it will

222. *Tsunami*, *supra* note 81, at 717 (footnote omitted) (referencing Demaine & Hensler, *supra* note 193).

223. Drahozal & Wittrock, *supra* note 26, at 288. *See also* Drahozal, *supra* note 50, at 731–32 (noting that fifty-three percent of arbitration clauses in franchise agreements precluded class relief).

224. Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado About Nothing?*, BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 45, 47–48, 51 (Omri Ben-Shahar ed., 2007).

225. Eisenberg, Miller & Sherwin, *supra* note 51, at 120.

226. *Id.* at 121.

227. *Id.*

228. *Id.* at 121–22.

229. Sternlight & Jensen, *supra* note 99, at 76 (noting, however, that other courts have struck such clauses unconscionable). This analysis predated *Concepcion* and its progeny. *See id.*

230. Gilles, *supra* note 26, at 375–76. Gilles recognizes that the majority of class actions are "based on some sort of contractual relationship," and where that contract contains an arbitration clause with a class action waiver (or a collective action waiver), the "waiver works in tandem with standard arbitration provisions to ensure" the elimination of the availability of class relief in arbitration. *Id.* at 375. This is one of several "tools," she argues, that corporate interests can use "to imperil the very viability of class actions." *Id.* Gilles considers it "inevitable" that companies will do so, since their economic interests dictate that they "opt out of exposure to class action liability." *Id.* at 377.

become malpractice for corporate counsel" not to include class action waivers in company contracts,[231] especially because "courts are likely to prove hospitable [to them] for as far as the eye can see."[232] In 2006, Maria Glover observed that "it is not farfetched to suggest that [class action waivers] will appear in more and more contracts, in light of a judicial climate largely favorable toward arbitration in general and class action waivers in particular."[233] Drahozal and Wittrock, writing in 2009, disagreed, noting an increase in class actions over the preceding years and case law declaring class action waivers unconscionable.[234] They also observed that some contracts do not contain arbitration clauses, and where those contracts govern, "class actions will continue to be brought in court."[235] But most scholars consider *Concepcion* a grave development likely to accelerate the trend towards class action waivers[236] and to reduce the number and value of class action claims.[237]

The results of this study provide some grist for assessing these trends and predictions. First, in the gig economy at least, arbitration provisions were not especially common between 2009 and 2011; they were used by only 31 to 35% of companies in terms of service contracts.[238] This is similar to the level measured in Demaine and

231. Gilles, *supra* note 26, at 377.

232. *Id.* at 428.

233. Glover, *supra* note 71, at 1748. "Indeed, such a result seems especially likely in light of recent articles in trade journals advising companies to include class action waivers in arbitration agreements." *Id.* at 1748–49.

234. Drahozal & Wittrock, *supra* note 26, at 277. Drahozal and Wittrock reason, based on empirical evidence, that "total class action filings may be increasing," with no "events [having] borne out the assumption that courts would uphold class action waivers across the board," that there "is no indication" that all contracts would include arbitration clauses. *Id.* at 277, 293. They rest on the assumption that a business's decision "to include an arbitration clause in a contract is based on a variety of considerations, not only whether it limits the availability of class relief." *Id.* at 278. *See also* EMERY G. LEE III & THOMAS E. WILLGING, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3 (2008), http://www.fjc.gov/sites/default/files/2012/CAFA 0408.pdf.

235. Drahozal & Wittrock, *supra* note 26, at 278, 293 ("[N]ot all contracts include arbitration clauses or were likely to do so even before the recent round of court decisions invalidating class arbitration waivers. For those contracts that do not include arbitration clauses, class relief generally remains available in court.").

236. *See, e.g.*, *On Babies and Bathwater*, *supra* note 26, at 481 (following *Concepcion*, "it is likely that businesses will increase their use of consumer arbitration agreements, even in those industries that were initially slow to adopt them."); Gilles & Friedman, *supra* note 26, at 627.

237. Jean Sternlight predicts "a substantial reduction in the number of class actions brought in federal and state court" absent legislative reform. *Tsunami*, *supra* note 81, at 724, 727.

238. *See infra* Appendix A.

Hensler's 2001 study of consumer contracts,[239] but lower than the levels observed in Drahozal's 2001 study of franchise agreements[240] or in Eisenberg, Miller, and Sherwin's 2007 study of consumer and employment contracts.[241] Results of this study also suggest that class action waivers were quite rare in the gig economy before *Concepcion*; only one company in the sample used an arbitration provision containing class action waiver prior to 2012.[242]

Concepcion appears to have substantially influenced the contracting behavior of gig companies. Around 30% more companies now include an arbitration provision than in 2009–2011.[243] This result is consistent with a 2014 study by Peter Rutledge and Christopher Drahozal, which found that "the use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically."[244] Likewise, the Consumer Financial Protection Bureau also observed an increase in arbitration clauses in credit card contracts, but it was "not as dramatic as predicted by some commentators."[245]

Results of this study also suggest that *Concepcion* influenced the content of arbitration provisions among companies that previously used an arbitration provision, as well as those that adopted arbitration post-*Concepcion*. And almost all companies with an arbitration provision now include a class action waiver.[246] In addition, several companies appear to have adopted arbitration solely for the purpose of availing themselves of the class action waiver.[247] As of 2016, 36% of the companies with an arbitration provision included it to avail themselves of the class action waiver[248] since they instruct courts to void the arbitration agreement entirely if the waiver is deemed unenforceable. These companies are presumably the most influenced by *Concepcion* and might be expected to remove their arbitration clause if the law changes in the future.

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239. Demaine & Hensler, *supra* note 193, at 62.
240. Drahozal, *supra* note 50, at 726.
241. Eisenberg et al., *supra* note 51, at 876–78.
242. *See infra* Appendix A.
243. *See infra* Appendix A.
244. Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 961 (2014).
245. CONSUMER FIN. PROT. BUREAU, *Section 2: How Prevalent are Pre-Dispute Arbitration Clauses and What are Their Main Features?*, *in* ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), 12 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (footnote omitted).
246. *See infra* Appendix A.
247. *See infra* Appendix A.
248. *See infra* Appendix A.

Nevertheless, a surprising number of companies continue to decline to use arbitration, despite Gilles's assessment that it would be tantamount to malpractice.[249] Around one third of companies appear unaffected by *Concepcion*[250] and have not included an arbitration provision. As Drahozal and Wittrock observed, class action claims will be preserved for customers and employees of these companies.[251] However, most of these holdout companies are smaller gig companies.[252] Their motives for declining arbitration are unclear. It is possible that they rely on small customer and employee bases who pose little threat of a class action. Smaller companies may be poorly funded and may not be able to afford a high-priced lawyer to review and revise their contracts in detail. Companies short on funding may also be effectively judgment proof in the event of a class action. By contrast, the biggest players in the industry—Uber, Lyft, Amazon, Airbnb, and TaskRabbit—all use arbitration agreements that contain a class action waiver.[253]

The increased use of various carve-outs and exceptions offer a more nuanced portrait of company preferences around dispute resolution.[254] One possible explanation for such carve-outs might be that companies have only limited trust in arbitration. While they trust arbitrators to decide individual employment disputes, they may not be willing to entrust them with their core asset—intellectual property. Alternatively, it is possible that all of the observed carve-outs (injunctive relief, intellectual property-related, and small claims) reflect a single preference for more streamlined and efficient processes. Court processes for temporary and injunctive relief represent the most efficient slice of the civil litigation process, allowing litigants to obtain quick relief on an emergent basis, with limited discovery. Likewise, small claims court—for all its problems—offers cheap justice with low filing fees and no lawyers.

Class action waivers aside, the carve-outs represent a clever variation of Thomas Stipanowich's "multi-door contract", where parties

249. Gilles & Friedman, *supra* note 26, at 632.

250. *See infra* Appendix A.

251. Drahozal & Wittrock, *supra* note 26, at 298 ("If drafting parties do not include arbitration clauses in their contracts, obviously there is no arbitration clause to act as a class action waiver.").

252. *See infra* Appendix A.

253. *See supra* Sections II.B., IV.A.

254. *See* Drahozal, *supra* note 50, at 740 (finding, in study of arbitration provisions in franchise agreements, that forty-four percent contained a carve out for equitable relief).

tailor the contract terms to their dispute resolution preferences.[255] The term played off a 1976 concept developed by Frank Sander for a "multi-door courthouse" where the "public justice system [would be] more responsive to the different kinds of conflict which make their way to the courthouse."[256] In a way, the above carve-outs are consistent with that vision because they allow companies to retain the portions of the civil justice system that they consider most efficient.[257] For some disputes, businesses believe that the "forum" does fit the "fuss",[258] even as they prefer arbitration for others.[259] It also suggests that companies do not think about the court system in a monolithic way, entering and leaving the courthouse for specified needs.[260]

The presence of a small claims carve out in at least some of the arbitration agreements also forces a more precise examination of the policy objections to class action waivers, at least as applied to consumer claims.[261] Class action waivers are most commonly opposed as a policy matter on the basis of transaction costs—that some claims cannot efficiently be asserted in arbitration because the attorneys' fees and transaction costs outweigh the value of the claim.[262] However, costs are not a barrier in small claims, where individuals do not need a lawyer,

255. Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998) [hereinafter *Multi-Door Contract*]. *See also* Sherwyn et al., supra note 37, at 1560 ("[A]rbitration does not operate in a vacuum. Indeed, arbitration systems are implemented partly to replace the EEOC/litigation system.").

256. *Multi-Door Contract*, *supra* note 255, at 308 (citing Frank E.A. Sander, *Varieties of Dispute Processing, The Pound Conference*, 70 F.R.D. 111 (1976)).

257. This relates to an observation made by David Sherwyn, Samuel Estreicher, and David Heise: "[A]lternative dispute resolution (ADR) systems . . . provide a relatively low-cost alternative for resolving a high volume of relatively low-value cases . . . . Replacing litigation with an arbitration system allows such employers and their employees to address issues in a relatively nonadversarial, low-cost forum." Sherwyn et al., supra note 37, at 1560. This may be also true for the disputes covered by the arbitration agreements in this study. But unlike the companies in Sherwyn, Estreicher, and Heise's study, these companies are partially opting back into the court system where they consider the court more efficient than arbitration. *Id.*

258. *See generally* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

259. Charlotte Garden's study of arbitration provisions in the gig economy revealed additional variations and tweaks to the arbitration process, with some requiring pre-arbitration negotiation, many providing for limited discovery, and some providing for "arbitration based on documents alone." Garden, *supra* note 1, at 215–16.

260. *See generally* Sander & Goldberg, *supra* note 258.

261. Small claims is more problematic in the employment context because such claims may be jurisdictionally excluded or require discovery, which is unavailable in small claims court.

262. *On Babies and Bathwater*, *supra* note 26, at 464 ("[T]he most pressing issue in consumer arbitration [is] . . . the lack of a viable forum for consumers with low value claims.").

and the filing fees are minimal.[263] Claims that are worth more than the $30 filing fee imposed by small claims court would remain economically viable.[264]

Cost, perhaps, represents a convenient first line of defense for the public policy basis for class actions while avoiding the more fraught role that lawyers play in class actions.[265] Class actions depend on lawyers to identify the class potential in individual claims and undertake the work involved in proving injury across the class (or in the case of collective actions, injury among those that have joined the claim).[266] As Jean Sternlight observed, individuals often lack the information to recognize a legal wrong.[267] Even if individuals had the time and energy to prosecute a dispute in small claims court, potential claimants lack the expertise to do so successfully.[268] Lawyers do so out of their own self-interest, to obtain the fees associated with a large class or collective recovery.[269] As some commentators have observed, class actions do not always provide meaningful relief to affected individuals.[270] Other times they do. As Myriam Gilles and Gary Friedman observed, "[s]tate and local enforcement agencies in particular (and many federal ones, too) are funded and organized on the clear, if largely unspoken, understanding that a vigorous and well-stocked private bar sits ready to deploy its ample resources to redress frauds and other harms perpetrated upon the general public."[271] The Consumer Financial Protection Bureau ("CFPB") documented both the costs and benefits of class actions in its study of consumer class actions.[272] In particular, the

263. *Id.* at 464–66.

264. *Id.*

265. Glover, *supra* note 71, at 1737 ("The confluence of mandatory arbitration and class action waivers is particularly problematic for 'negative-value claims' where the expected recovery does not justify the cost of a stand-alone claim . . . .").

266. *Tsunami*, *supra* note 81, at 721.

267. *Id.* at 722 ("The idea that individual arbitration might adequately replace class actions neglects to consider one of the major but too-little-discussed virtues of class actions—they allow people to be represented as to claims they may not have known they had.").

268. *Id.* at 722–23.

269. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (2003); Charles W. Wolfram, *Mass Torts – Messy Ethics*, 80 CORNELL L. REV. 1228, 1231 (1995).

270. *Tsunami*, *supra* note 81, at 720–21 ("[Some] urge that litigation may be beneficial to attorneys but not for claimants."); *Paying the Price of Process*, *supra* note 50, at 93 ("Businesses can incur substantial liability in consumer class actions, both in cases that provide significant relief to the class and in cases that provide insignificant relief to the class but significant fees to plaintiffs' lawyers."); Redish, *supra* note 269, at 77–79.

271. Gilles & Friedman, *supra* note 26, at 626.

272. *See Section 7*, *supra* note 195.

CFPB described a class action claim resulting in $1 billion in recovery for consumers over unfair bank overdraft practices.[273]

Analogously, small-claim carve-outs may be insufficient to protect gig workers to the extent that some portion of those workers should have been classified as employees and would have been entitled to employment protections. The most significant such protection would be wage and hour laws, which have been the source of considerable litigation in the gig economy. There is some preliminary evidence from the wage and hour context suggesting a drop off in all wage and hour claims in recent years.[274] One study of wage and hour claims observed a decrease in wage and hour settlements since 2011.[275] Although the authors of the study do not offer any hypotheses for the cause of the decrease, it could be attributable to more widespread use of class action waivers among employers generally, which would substantially impair the value and volume of litigation.

As applied to the gig economy, we expect to observe a drop off in wage and hour claims commensurate with the rise of class action waivers over time. The drop off may be even more significant than the 63% of gig companies with an arbitration provision suggests, since the largest companies tend to have arbitration agreements.[276] As previously discussed, Miriam Cherry has already documented a motion to compel arbitration in four out of fourteen prior cases.[277] The increased adoption of class action waivers also explains why the gig economy continues to rely almost exclusively on independent contractors. Even after substantial litigation, neither Uber nor Lyft have reclassified their workers as employees.[278] Ordinarily, litigation tends to motivate corporate actors to alter their practices to cut off future litigation risks.

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273. CONSUMER FIN. PROT. BUREAU, *Section 8: What is the Value of Class Action Settlements?*, *in* ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), 39–46 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

274. *See, e.g.*, Plancich et al., *supra* note 114, at 2 fig.1 (noting that wage and hour claims were highest in 2011, decreased from 2012 to 2013, increased in 2014, and actual and estimated decrease in 2015). *See also Tsunami*, *supra* note 81, at 724 (forecasting a reduction in FLSA claims following *Concepcion*).

275. *See* Plancich et al., *supra* note 114, at 2.

276. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?mcubz=0 ("Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration.").

277. *See* Cherry, *supra* note 106, at 584–85.

278. *See id.* at 593–94; Cotter v. Lyft, Inc., 176 F. Supp. 3d 930, 933 (N.D. Cal. 2016); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

Now insulated by a class action waiver, past or even ongoing litigation no longer serves as a deterrent to the corporate actors involved or to competitors in the industry.[279]

Several commentators of the gig economy have argued that existing rules may be insufficient to address the challenges of the gig economy.[280] They recommend changes to the substantive rules defining employee status, hoping that such changes will bring workers under the protection of employment law.[281] However, the results of this study suggest that it is not the substantive rules, but instead the procedural ones—through the Supreme Court's interpretation of the Federal Arbitration Act—that leave workers beyond the protection of certain employment laws.

To be sure, not all workers in the gig economy would be properly classified as employees under existing law[282] or even under revised rules that broaden their scope. However, for the subset of workers that might be misclassified, class action waivers place them even further beyond the reach of existing protections. Unless the Supreme Court reverses course in its upcoming decision in *Lewis v. Epic Systems Corp.*,[283] meaningful progress would likely require an amendment to the FAA to restrict class action waivers, as recommended by Maureen Weston.[284]

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279. Gilles, *supra* note 26, at 378 ("I take it as beyond dispute that the threat of class action liability plays a vital role in deterring corporate wrongdoing.").

280. *See* sources cited *supra* note 106.

281. *See* sources cited *supra* note 106.

282. Tippett, *supra* note 2, at 579 (finding only some sharing economy companies exercised levels of control that might indicate employee status).

283. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). In these cases, the Court must decide whether class action waivers in arbitration agreements violate Section 7 of the National Labor Relations Act ("NLRA"). For a detailed analysis as applied to the gig economy, see Garden, *supra* note 1, at 226–30. *See also* Timothy P. Glynn & Charles A. Sullivan, Murphy Oil *and Norris LaGuardia to the Rescue: Preserving Employee Rights to Concerted Dispute Resolution in an Era of Mandatory Individual Arbitration*, 70 RUTGERS U. L. REV. 401 (2018).

284. Maureen Weston states the need for similar legislative reform after *Concepcion*, arguing that Congress can "simply amend[] the FAA to restrict class [action] waivers," as long as it does so explicitly, since the Supreme Court would not be inclined to imply such a provision. Weston, *supra* note 28, at 793. *See also On Babies and Bathwater*, *supra* note 26, at 468 ("[A] better approach . . . would be to amend the FAA to permit class action arbitration, or, at the least, prohibit businesses from precluding class action arbitration or class actions in court through the use of a predispute arbitration agreement."). *See also* Gilles & Friedman, *supra* note 26, at 652 (noting that "Congress could provide that class action waivers shall be unenforceable - at least in standard-form consumer and employment contracts" but acknowledging that the 2011 Arbitration Fairness Act "stands little chance of passage in the current political environment").

VI. CONCLUSION

In 2015, Fast Company magazine featured an article titled *The Gig Economy Won't Last Because It's Being Sued to Death*—a prediction that did not take into account the protective effect of arbitration agreements containing class action waivers.[285] In fact, the opposite prediction may be true—the class action lawsuits won't last because they have been contracted out of existence. Because of *Concepcion* and *Italian Colors*, gig companies may have managed and will continue to avoid litigation over misclassification of their employees. By including arbitration provisions and class action waivers in their Terms of Service contracts, gig companies insulate themselves from aggregate litigation and arbitration over the status of their workers, which may help explain why gig companies continue to refuse to classify their workers as employees.

When employees have no viable remedy for employment rights that can only be vindicated on an aggregate basis, distinctions between independent contractor and employee status matter little. Employees are rendered nearly as powerless as independent contractors excluded from coverage by the applicable statute. Broadening the definition of "employee" under wage and hour laws, for example, will not provide meaningful protection for misclassified workers in the gig economy. If they are covered by an arbitration provision containing a class action waiver, their nominal status as employees may not impel gig companies to reclassify them and comply with wage and hour laws.

285. Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST COMPANY (Feb. 17, 2015), https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death.

APPENDIX

A. Table of Contracts in Sample

Legend:
No Arbitration Provision (0); Arbitration Without Class Action Waiver (1); Arbitration With Class Action Waiver (2); No Contract Available (Shaded Cell)

	2009 2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
99Designs	0	0	0	2	2	2	2
AgentAnything	0	0	0	0	0	0	0
Airbnb						2	2
AppFutura			0	0	0	0	0
Desksurfing							0
DogVacay			2	2	2	2	2
Donanza		0	0	0	0		
Elance	1	1	1	2	2	2	2
Expertbids	0	0	0		0		0
FlexJobs	0	0	0	0	0	0	0
Flipkey	0	0	0		0	0	
Freelancer	1	1	1	2	2	2	2
Getaround	1	1	2	2	2	2	2
Gigwalk							2
Grubhub							2
Guru	1	1	1	1	1	1	1
Handy							2
iFreelance					0		2
Lionbridge/ SmartCrowd		0	0	0	0	0	0
Lyft				1		2	2
Mturk						2	2
Neighborgoods	0	0	0	0	0	0	
Poshmark				1	1	1	2
Postmates		0	0	0	2	2	2
Redbeacon	0	0	2		2		
RelayRides/Turo			0	0	0	0	2
RentaFriend						2	2
Rover		0	1	1	2	2	2
Sidecar				2	2	2	
Skillshare							0

	2009 2010	2011	2012	2013	2014	2015	2016
Sortfolio	0			0	0	0	0
Spinlister		1	0	0	0	0	0
TaskRabbit	2	2	2	2	2	2	2
Thumbtack	0	1	1	1	1	1	2
Uber		0	2	2	2	2	2
Upwork/Odesk				0		2	2
Wello				0	0	0	0
Zaarly		0	0	0	0	0	0

B. Lyft Arbitration Provision 2013 vs. 2015

Agreement to Arbitrate All Disputes and Legal Claims

You and We agree that any legal disputes or claims arising out of or related to the Agreement (including but not limited to the use of the Lyft Platform and/or the Services, or the interpretation, enforceability, revocability, or validity of the Agreement, or the arbitrability of any dispute), that cannot be resolved informally shall be submitted to binding arbitration in the state in which the Agreement was performed. The arbitration shall be conducted by the American Arbitration Association under its Commercial Arbitration Rules (a copy of which can be obtained here), or as otherwise mutually agreed by you and we. Any judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Claims shall be brought within the time required by law. You can we agree that any claim, action or proceeding arising out of or related to the Agreement must be brought in your individual capacity, and not as a plaintiff or class member in any purported class, collective, or representative proceeding. The arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative, collective, or class proceeding.

You acknowledge and agree that you and Lyft are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding.

C. 99Designs Terms of Service 2013

14.2. Governing Law.

a. Dispute Resolution.

If you located are in the United States, the following applies to you. PLEASE READ THIS CAREFULLY. IT AFFECTS YOUR RIGHTS.

1. Except for either party's claims of infringement or misappropriation of the other party's patent, copyright, trademark, or trade secret, any and all disputes between you and 99designs arising under or related in any way to this Agreement, must be resolved through binding arbitration as described in this section. This agreement to arbitrate is intended to be interpreted broadly. It includes, but is not limited to, all claims and disputes relating to your use of any of the 99designs Site and Service.

2. YOU AGREE THAT BY ENTERING INTO THIS AGREEMENT, YOU AND 99DESIGNS ARE EACH WAIVING THE RIGHT TO TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION. YOU AND 99DESIGNS AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. ANY ARBITRATION WILL TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED.

3. The arbitration will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes of the American Arbitration Association ("**AAA**"), as modified by this section. For any claim where the total amount of the award sought is $10,000 or less, the AAA, you and 99designs must abide by the following rules: (a) the arbitration shall be conducted solely based on written submissions; and (b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties. If the

claim exceeds $10,000, the right to a hearing will be determined by the AAA rules, and the hearing (if any) must take place in your choice of the following locations: San Francisco, CA, Denver, CO, or New York, NY. The arbitrator's ruling is binding and may be entered as a judgment in any court of competent jurisdiction. In the event this agreement to arbitrate is held unenforceable by a court, then the disputes that would otherwise have been arbitrated shall be exclusively brought in the state or federal courts located in San Francisco County, California. Claims of infringement or misappropriation of the other party's patent, copyright, trademark, or trade secret shall be exclusively brought in the state and federal courts located in San Francisco County, California. This Agreement shall be governed by and construed solely and exclusively in accordance with the laws of the State of California, USA without giving effect to any law that would result in the application of the law of another jurisdiction.

b. If you are located in Australia or elsewhere in the world, this Agreement is governed by, and must be construed in accordance with, the laws of the State of Victoria, Australia and the parties irrevocably submit to the exclusive jurisdiction of the courts of the State of Victoria, Australia and their Courts of Appeal.

D. Uber Terms and Conditions as of 2012, Dispute Resolution Provision

You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "**Disputes**") will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.** Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate

more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "**Dispute Resolution**" section will be deemed void. Except as provided in the preceding sentence, this "**Dispute Resolution**" section will survive any termination of this Agreement.

Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("**AAA**") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "**AAA Rules**") then in effect, except as modified by this "**Dispute Resolution**" section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this Section.

Arbitration Process. A party who desires to initiate arbitration must provide the other party with a written Demand for Arbitration as specified in the AAA Rules. (The AAA provides a form Demand for Arbitration at www.adr.org/si.asp?id=3477 and a separate form for California residents at http://www.adr.org/si.asp?id=3485".) The arbitrator will be either a retired judge or an attorney licensed to practice law in the state of California and will be selected by the parties from the AAA's roster of consumer dispute arbitrators. If the parties are unable to agree upon an arbitrator within seven (7) days of delivery of the Demand for Arbitration, then the AAA will appoint the arbitrator in accordance with the AAA Rules.

Arbitration Location and Procedure. Unless you and Company otherwise agree, the arbitration will be conducted in the county where you reside. If your claim does not exceed $10,000, then the arbitration will be conducted solely on the basis of documents you and Company submit to the arbitrator, unless you request a hearing or the arbitrator determines that a hearing is necessary. If your claim exceeds $10,000, your right to a hearing will be determined by the AAA Rules. Subject to the AAA Rules, the arbitrator will have the discretion to direct a reasonable exchange of information by the parties, consistent with the expedited nature of the arbitration.

Arbitrator's Decision. The arbitrator will render an award within the time frame specified in the AAA Rules. The arbitrator's decision will include the essential findings and conclusions upon which the arbitrator based the award. Judgment on the arbitration award may be entered in any court having jurisdiction thereof. The arbitrator's award damages must be consistent with the terms of the "**Limitation of Liability**" section above as to the types and the amounts of damages for which a

party may be held liable. The arbitrator may award declaratory or injunctive relief only in favor of the claimant and only to the extent necessary to provide relief warranted by the claimant's individual claim. If you prevail in arbitration you will be entitled to an award of attorneys' fees and expenses, to the extent provided under applicable law. Company will not seek, and hereby waives all rights it may have under applicable law to recover, attorneys' fees and expenses if it prevails in arbitration.

Fees. Your responsibility to pay any AAA filing, administrative and arbitrator fees will be solely as set forth in the AAA Rules. However, if your claim for damages does not exceed $75,000, Company will pay all such fees unless the arbitrator finds that either the substance of your claim or the relief sought in your Demand for Arbitration was frivolous or was brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)).

Changes. Notwithstanding the provisions of the modification-related provisions above, if Company changes this "**Dispute Resolution**" section after the date you first accepted this Agreement (or accepted any subsequent changes to this Agreement), you may reject any such change by sending us written notice (including by email to support@uber.com) within 30 days of the date such change became effective, as indicated in the "**Last Updated Date**" above or in the date of Company's email to you notifying you of such change. By rejecting any change, you are agreeing that you will arbitrate any Dispute between you and Company in accordance with the provisions of this "**Dispute Resolution**" section as of the date you first accepted this Agreement (or accepted any subsequent changes to this Agreement).

E. Getaround Arbitration Provision as of 2011 (no class action waiver)

For any claim (excluding claims for injunctive or other equitable relief) under this Agreement where the total amount of the award sought is less than $10,000, the party requesting relief may elect to resolve the dispute through binding non-appearance-based arbitration. The party electing such arbitration shall initiate the arbitration through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: a) the arbitration shall be conducted by telephone, online and/or be solely based on written submissions, as selected by the party initiating the arbitration; b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and c) any

judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

F. Getaround Arbitration Provision as of 2012 (with class action waiver)

In the unlikely event that Getaround has not been able to resolve a dispute it has with you after attempting to do so informally, we each agree to resolve any claim, dispute, or controversy (excluding any Getaround claims for injunctive or other equitable relief) arising out of or in connection with or relating to this Agreement, or the breach or alleged breach thereof (collectively, "Claims"), by binding arbitration by the American Arbitration Association ("AAA") in the country of Santa Clara, California under the commercial rules then in effect for the AAA, except as provided herein. The award rendered by the arbitrator shall include costs of arbitration, reasonable attorneys' fees and reasonable costs for expert and other witnesses, and any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. Nothing in this Section shall be deemed as preventing Getaround from seeking injunctive or other equitable relief from the courts as necessary to protect any of Getaround's proprietary interests. ALL CLAIMS MUST BE BROUGHT IN THE PARTIES' INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. YOU AGREE THAT, BY ENTERING INTO THIS AGREEMENT, YOU AND GETAROUND ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION.

G. Thumbtack 2015 Dispute Resolution Provision

If a dispute arises between you and Thumbtack, our goal is to provide you with a neutral and cost effective means of resolving the dispute quickly. Accordingly, you and Thumbtack hereby agree that we will resolve any claim or controversy at law or equity that arises out of the Terms of Use or the Website in accordance with this Section O or as we and you otherwise agree in writing. Before resorting to the filing of a formal lawsuit, we strongly encourage you to first contact us directly to seek a resolution via e-mail at support@thumbtack.com. We will consider reasonable requests to resolve the dispute through alternative dispute resolution procedures, such as mediation or arbitration, as alternatives to litigation.

H. Thumbtack 2016 Dispute Resolution Provision

ARBITRATION AND CLASS ACTION WAIVER

PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS YOUR LEGAL RIGHTS, INCLUDING YOUR RIGHT TO FILE A LAWSUIT IN COURT.

You and Thumbtack agree that these Terms affect interstate commerce and that the Federal Arbitration Act governs the interpretation and enforcement of these arbitration provisions.

This Section is intended to be interpreted broadly and governs any and all disputes between us including but not limited to claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; claims that arose before this Agreement or any prior agreement (including, but not limited to, claims related to advertising); and claims that may arise after the termination of this Agreement. **The only disputes excluded from this broad prohibition are the litigation of certain intellectual property and small court claims, as provided below.**

By agreeing to these Terms, you agree to resolve any and all disputes with Thumbtack as follows:

Initial Dispute Resolution: Most disputes can be resolved without resort to litigation. You can reach Thumbtack's support department at support@thumbtack.com. The parties agree to use their best efforts to settle any dispute, claim, question, or disagreement directly through consultation with the Thumbtack support department, and good faith negotiations shall be a condition to either party initiating a lawsuit or arbitration.

Binding Arbitration: If the parties do not reach an agreed-upon solution within a period of thirty (30) days from the time informal dispute resolution is initiated under the Initial Dispute Resolution provision above, then either party may initiate binding arbitration as the sole means to resolve claims, subject to the terms set forth below. Specifically, all claims arising out of or relating to these Terms (including the Terms' or Privacy Policy's formation, performance, and breach), the parties' relationship with each other, and/or your use of the Platform shall be finally settled by binding arbitration administered by JAMS in accordance with the JAMS Streamlined Arbitration Procedure Rules in effect at the time the arbitration is initiated, excluding any rules or procedures governing or permitting class actions. The arbitrator, and not any federal, state, or local court or agency, shall

have exclusive authority to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability, or formation of these Terms or the Privacy Policy including but not limited to any claim that all or any part of these Terms or Privacy Policy is void or voidable, or whether a claim is subject to arbitration. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award shall be written and shall be binding on the parties and may be entered as a judgment in any court of competent jurisdiction. To start an arbitration, you must do the following: (a) Write a Demand for Arbitration that includes a description of the claim and the amount of damages you seek to recover (you may find a copy of a Demand for Arbitration at www.jamsadr.com); (b) Send three copies of the Demand for Arbitration, plus the appropriate filing fee, to JAMS, Two Embarcadero Center, Suite 1500, San Francisco California 94111; and (c) Send one copy of the Demand for Arbitration to us at 360 9th Street, San Francisco, California 94103, ATTN: Legal.

To the extent the filing fee for the arbitration exceeds the cost of filing a lawsuit, Thumbtack will pay the additional cost. If the arbitrator finds the arbitration to be non-frivolous, Thumbtack will pay the fees invoiced by JAMS, including filing fees and arbitrator and hearing expenses, provided your claim does not exceed $75,000. You are responsible for your own attorneys' fees unless the arbitration rules and/or applicable law provide otherwise.

The parties understand that, absent this mandatory arbitration provision, they would have the right to sue in court and have a jury trial. They further understand that, in some instances, the costs of arbitration could exceed the costs of litigation and the right to discovery may be more limited in arbitration than in court.

If you are a resident of the United States, arbitration may take place in the county where you reside at the time of filing. For residents outside the United States, arbitration shall be initiated in the State of California, United States of America, and you and Thumbtack agree to submit to the personal jurisdiction of any federal or state court in San Francisco County, California in order to compel arbitration, to stay proceedings pending arbitration, or to confirm, modify, vacate, or enter judgment on the award entered by the arbitrator.

Class Action Waiver: The parties further agree that the arbitration shall be conducted in their individual capacities only and not as a class action or other representative action, and the parties expressly waive their right to file a class action or seek relief on a class basis. **YOU AND THUMBTACK AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL**

CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. If any court or arbitrator determines that the class action waiver set forth in this paragraph is void or unenforceable for any reason or that an arbitration can proceed on a class basis, then the arbitration provisions set forth above shall be deemed null and void in their entirety and the parties shall be deemed to have not agreed to arbitrate disputes.

Exception: Litigation of Intellectual Property and Small Claims Court Claims: Notwithstanding the parties' decision to resolve all disputes through arbitration, either party may bring enforcement actions, validity determinations or claims arising from or relating to theft, piracy or unauthorized use of intellectual property in state or federal court or in the U.S. Patent and Trademark Office to protect its intellectual property rights ("intellectual property rights" means patents, copyrights, moral rights, trademarks, and trade secrets, but not privacy or publicity rights). Either party may also seek relief in a small claims court for disputes or claims within the scope of that court's jurisdiction.

30-Day Right to Opt Out: You have the right to opt out and not be bound by the arbitration and class action waiver provisions set forth above by sending (from the email address you use on Thumbtack) written notice of your decision to opt out toopt-out@thumbtack.com with the subject line, "ARBITRATION AND CLASS ACTION WAIVER OPT-OUT." The notice must be sent within thirty (30) days of your first use of the Platform, otherwise you shall be bound to arbitrate disputes in accordance with the terms of those paragraphs. If you opt out of these arbitration provisions, Thumbtack also will not be bound by them.

Changes to This Section: Thumbtack will provide thirty (30) days' notice of any changes to this section by posting on the Platform or sending you an email. Amendments will become effective thirty (30) days after they are posted on Thumbtack.com or sent to you by email. Changes will apply prospectively only to claims arising after the thirtieth (30th) day. If a court or arbitrator decides that this subsection on "Changes to This Section" is not enforceable or valid, then this subsection shall be severed from the section entitled Arbitration and Class Action Waiver, and the court or arbitrator shall apply the first Arbitration and Class Action Waiver section in existence after you began using the Platform.

Survival: This Arbitration and Class Action Waiver section shall survive any termination of your Account or the Platform.

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