



2023

Unfair by Default: Arbitration's Reverse Default Judgment Problem

Alexi Pfeffer-Gillett

Washington and Lee University School of Law, apfeffer-gillett@wlu.edu

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Recommended Citation

Alexi Pfeffer-Gillett, Unfair by Default: Arbitration's Reverse Default Judgment Problem, 171 U. Pa. L. Rev. 459 (2023).

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ARTICLE

UNFAIR BY DEFAULT: ARBITRATION'S REVERSE DEFAULT JUDGMENT PROBLEM

ALEXI PFEFFER-GILLET[†]

It is a foundational principle of civil law that a defendant who fails to respond to allegations is deemed to have admitted those allegations and can be subjected to default judgment liability. This threat of default judgment incentivizes defendants to respond to claims, thereby discouraging delay tactics and helping ensure cases are resolved efficiently on the merits.

In consumer and employment arbitration, though, the fairness and efficiency benefits of traditional default judgment are flipped, rewarding rather than punishing unresponsive defendants. This difference from civil litigation arises out of arbitration's fee structures: if a defendant-company fails to pay its share of the fees required to initiate arbitration, which can exceed \$3,000, the financial burden shifts back to the plaintiff to pick up the tab—on top of the plaintiff's own required initial fees, which range from \$200 to \$400. A plaintiff unable or unwilling to pay the defendant's fees will face dismissal of the arbitration claims and be left with the choice of going to court—the very thing arbitration is meant to avoid—or simply walking away. By ignoring claims, then, defendant-companies can stall the process, significantly increase the financial burden on plaintiffs, and improve their own odds of escaping liability.

This Article confronts arbitration's problematic default rule, which I term the "Reverse Default Judgment Rule." Drawing on historical research into the development of arbitration's modern rules, the Article shows how the Reverse Default Judgment Rule came to be. It then reveals the potentially insurmountable financial

[†] Visiting Assistant Professor, University of Maryland Francis King Carey School of Law. Special thanks to Deborah Eisenberg, David Horton, Peter Kurtz, Stephen Lee, Xheni Llaguri, Michael Oswald, Eve Rips, and the participants of the Seventh Annual Civil Procedure Workshop and the Maryland Law Junior Faculty Workshop.

and procedural roadblocks that the Rule puts in the path of individual employees and consumers seeking to vindicate their rights. The burdens created by the Reverse Default Judgment Rule significantly undermine arbitration's supposed speed, informality, and fairness in resolving consumer and employment disputes.

But hope for reform has recently come from plaintiffs leveraging arbitration's same fee structures to bring coordinated, simultaneous "mass arbitration" claims against defendant-companies. Faced with paying tens of millions in court-ordered arbitration fees and the possibility of defending thousands of individual arbitration hearings, companies have quickly settled while demanding that arbitration providers change their fees. By turning the tables on defendants, mass-arbitration plaintiffs have thus not only scored major legal victories, but have also opened a political window to remedy arbitration's fee structures.

Understanding and confronting arbitration's Reverse Default Judgment Rule will shed light on whether consumer and employment arbitration can adequately replace the courts or if it is undeserving of the privileged legal status and judicial favoritism it has received.

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INTRODUCTION

Many American consumers have found themselves on the receiving end of harassing debt-collection calls.¹ One of these consumers, Juan Mason, sought to put an end to harassing auto-dialer calls he had been receiving from an automotive finance company, Coastal Credit, LLC, regarding delinquent car payments.² In 2017, Mason filed a lawsuit alleging that Coastal Credit's calls violated the federal Telephone Consumer Protection Act and the Florida Consumer Collection Practices Act.³ In response to Mason's complaint, Coastal Credit promptly filed a motion to compel arbitration based on the terms of the car payment agreement, which, like many other American consumer contracts, contained a clause mandating individual arbitration.⁴ Mason consented to the company's demand, dropped his court lawsuit, and, on January 18, 2018, voluntarily initiated arbitration through a leading

¹ See Margot Saunders & Chris Frascella, *Scam Robocalls: Telecom Providers Profit*, NAT'L CONSUMER L. CTR. 46 (June 2002), https://nclc.org/wp-content/uploads/2022/09/Rpt_Scam_Robocalls.pdf [<https://perma.cc/2RPT-BHAK>] (documenting sources of robocalls and estimating that "American consumers received an estimated 50,507,702,500 robocalls . . . in 2021").

² See *Mason v. Coastal Credit, LLC*, No. 18-CV-835, 2018 WL 6620684, at *1 (M.D. Fla. Nov. 16, 2018) ("Plaintiff alleges that Defendant . . . repeatedly plac[ed] non-emergency, auto-dialer calls to his cellular number without his prior express consent and after being notified to stop . . .").

³ *Id.* at *2.

⁴ *Id.*; see also CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY 9-10 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/PFU6-8XSF>] (finding mandatory individual arbitration clauses in the majority of consumer contracts studied).

provider, the American Arbitration Association (AAA).⁵ Mason then paid the AAA's required filing fee of \$200 and waited for the company's response.⁶

More than two months later, on March 27, 2018, the AAA followed up with a letter to both parties stating that Mason had paid his share of the arbitration fees and, per the AAA's consumer rules, the company owed the remaining \$1,700 in filing fees plus \$250 for expedited review and \$1,500 for the arbitrator's compensation deposit—\$3,450 in total.⁷

Rather than quickly paying this fee, as might be expected given the collection company's seeming eagerness to remove the case from federal court and force Mason into arbitration, Coastal Credit began dragging its feet. Five days before payment was due, the company responded to the letter by requesting "an extension of 15 days or so to comply" with the AAA's filing requirements.⁸ The AAA immediately granted the fifteen-day extension request.⁹

Despite the extension, Coastal Credit failed to pay any fees by the new deadline of April 25.¹⁰ The next day, the AAA sent another letter reiterating the need for payment of the \$3,450 in fees and providing a new payment deadline of May 10.¹¹ Importantly, the letter informed Coastal Credit that the AAA had also been "inquiring as to whether the consumer is willing to pay [Coastal Credit's] outstanding amount, minus the expedited review fee of \$250."¹² Although Mason was "not obligated to pay [Coastal Credit's] fee," the AAA explained, if the AAA did not "timely receive the business'[s] portion of the filing fees" from either party, it would "administratively close[]" Mason's case.¹³

Faced with the choice of paying \$3,450 to defend itself on the merits or further delaying Mason's claims while forcing him to front the remaining arbitration costs, Coastal Credit opted for the latter option. Five days after failing to meet the AAA's third deadline for payment, Coastal Credit emailed Mason's attorney stating that Mason, not the company, would "have to take care of the AAA fees," because the upfront fees were "objectionable to [the company]."¹⁴ The letter also advised Mason to refile his claim with a different

⁵ *Mason*, 2018 WL 6620684, at *2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *See id.* (granting the defendant-company's request "[t]he same day" it was made).

¹⁰ *Id.* at *3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

arbitration provider should he not wish to pay the fees, despite Mason's car payment contract specifically listing the AAA as a provider available at the customer's choosing.¹⁵

The AAA, having not received the remaining \$3,450 needed to accept the case for review, notified the parties that it "must decline to administer this case and have closed [the] file."¹⁶ As punishment for Coastal Credit's failure to comply with its own contractual payment responsibilities, the AAA threatened that it "may" refuse to administer future cases involving the company.¹⁷

Having tried unsuccessfully to comply with Coastal Credit's arbitration demand, Mason returned to federal court and filed a new complaint.¹⁸ In response, Coastal Credit filed another motion to compel arbitration identical to its motion the first time Mason sued, except this time the company demanded that Mason file arbitration with a provider other than the AAA.¹⁹ In November 2018, the district court denied this motion, finding that the company's failure to pay the required arbitration fees constituted a waiver of its right to compel arbitration and that Mason, having now twice paid \$400 in nonrefundable federal filing fees, could finally proceed with his claims in federal court.²⁰

Mason thus spent a year pursuing (and retaining legal counsel to pursue) the mere opportunity to have his consumer claim heard on the merits. This protracted process occurred not because of any failure by Mason or weakness in his case, but because of the convoluted and hidden rules governing

¹⁵ See *id.* (quoting Coastal Credit's letter instructing Mason to "look to JAMS or NAM arbitration alternatives, both of which are listed in the sales contract and whose initial fees are reasonable"); see also *id.* at *1 n.3 (reproducing the arbitration clause, which provides that "[t]he party electing arbitration may choose" the AAA, JAMS, or NAM).

¹⁶ *Id.* at *3.

¹⁷ *Id.*; see also *Page v. GPB Cars 12, LLC*, No. CV 19-11513, 2019 WL 5258164, at *2 (D.N.J. Oct. 17, 2019) (detailing the AAA sending a letter containing the same language in another instance of a defendant-company failing to pay fees in response to a consumer claim arising out of a car financing arrangement). The AAA does not publish any registry of businesses who have received this punishment as opposed to just the threat of punishment. There is little if any overall transparency into how frequently and under what circumstances providers ban businesses from using their arbitration services.

¹⁸ See *Mason*, 2018 WL 6620684, at *4 (describing Mason's unsuccessful efforts to resolve the matter with Coastal Credit).

¹⁹ See *id.* (detailing Coastal Credit's demand that Mason "initiate arbitration with either JAMS or NAM").

²⁰ *Id.* at *7-9.

arbitration's upfront fees and the consequences (or lack thereof) for defendants who fail to pay.²¹

This Article sheds light on the importance of these hidden arbitration rules. Given that the Supreme Court has frequently celebrated arbitration as a faster and cheaper alternative to the court system,²² one might assume that arbitration's fee structures would be at least as simple as those in court, where cases are automatically docketed and a judge assigned once the plaintiff makes the requisite fee payments and submits the required filings and notice.²³ And one might further expect that a plaintiff's submission of claims and payment of required filing fees would be sufficient to get the case docketed and have an arbiter appointed to hear the merits, as it would be in court,²⁴ and that the defendant would be required to respond or else be vulnerable to entry of default judgment in the plaintiff's favor, as in court proceedings.²⁵

²¹ In arbitration, the party bringing a claim is often called the "claimant" and the party responding is called the "respondent." *See, e.g.*, AM. ARB. ASS'N, CONSUMER ARBITRATION RULES 11 (2020) [hereinafter AAA CONSUMER RULES], https://adr.org/sites/default/files/Consumer_Rules_Web_2.pdf [<https://perma.cc/U473-MF2S>]. For the sake of simplicity, and because this Article often discusses parties in both arbitration and court contexts, I refer to those bringing suit, regardless of whether in arbitration or court, as "plaintiffs" and those defending suit as "defendants."

²² *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (disfavoring class arbitration, relative to bilateral arbitration, because it "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 649 n.14 (1985) (Stevens, J., dissenting) ("[I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution."); David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 628 (2020) ("[T]hanks in part to the sleek contours of the Arbitration Rules, private dispute resolution has long been regarded as quicker than litigation.").

²³ *See* 28 U.S.C. § 1914 (establishing a uniform filing fee for federal court filings); *see also* SAMUEL T. BULL, PRELIMINARY INJUNCTIVE RELIEF: PROCEDURE FOR OBTAINING PRELIMINARY INJUNCTIVE RELIEF (FEDERAL), Westlaw Practical Law Practice Note, at *11 ("The process of commencing an action through the CM/ECF system is relatively uniform among those courts that require new actions to be started electronically. In these courts, the plaintiff commences the action by uploading . . . its case-initiating documents . . . and paying the \$402 fee online. Once the documents are uploaded and the fee is paid, CM/ECF assigns the case a docket number and a judge.").

²⁴ *See* BULL, PRELIMINARY INJUNCTIVE RELIEF, *supra* note 23, at *11 ("Once the [case-initiating] documents are uploaded and the fee is paid . . . [the court] assigns the case a docket number and a judge.").

²⁵ *See* FED. R. CIV. P. 55(a) ("When a party against whom judgement for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise,

The rules of leading private arbitration providers appear on first blush to confirm these assumptions: under current arbitration rules, consumer and employee plaintiffs pay a one-time fee of \$200 to \$400 when filing their claims, and according to the providers, this initial fee is the maximum amount that individual plaintiffs will have to pay for the entire dispute resolution process.²⁶ As Mason's case shows, however, the reality is far different. To continue with arbitration, Mason would have needed to pay over \$3,000 on behalf of the noncompliant defendant-company. And not only was Mason unable to bypass the court system to quickly and cheaply resolve his claims through arbitration, but he actually had to go to court *twice* and spend a year fighting the defendant-company just to have the opportunity to have anyone—arbitrator or judge—hear his claims.²⁷

This highly inefficient and costly outcome arises because the plaintiff's capped filing fee in private arbitration is but a fraction of the total fees necessary to successfully initiate a claim. Thus, unlike in court, an arbitration plaintiff's satisfaction of the initial filing fee payment is insufficient to initiate a claim to which a defendant must respond. Instead, once the plaintiff pays the initial arbitration fee, the burden shifts to the defendant-company to pay the remaining upfront fees that—as seen in *Mason v. Coastal Credit*²⁸—can exceed \$3,000. If and only if these additional fees are paid does the arbitration provider consider a claim “filed” and proceed to appoint an arbitrator to hear the case.²⁹ And only an arbitrator—not the arbitration provider who receives the plaintiff's initial filing fees—is empowered to enter default judgment against an unresponsive or uncooperative defendant.³⁰ Thus, a plaintiff who

the clerk must enter the party's default.”); *see also* FED. R. CIV. P. 55(b) (“If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing . . .”).

²⁶ *See* discussion *infra* Section I.C (detailing arbitration providers' fee structures).

²⁷ *See supra* notes 2-20 and accompanying text.

²⁸ *Mason v. Coastal Credit, LLC*, No. 18-CV-835, 2018 WL 6620684, at *1-4 (M.D. Fla. Nov. 16, 2018); *see also supra* text accompanying note 7.

²⁹ *See* AAA CONSUMER RULES, *supra* note 21, at r. 2 (“The filing fee must be paid before a matter is considered properly filed.”); *see also* JAMS, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, r. 5(b) (2021) [hereinafter JAMS RULES], https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Comprehensive_Arbitration_Rules-2021.pdf [<https://perma.cc/D8AA-RL7Y>] (stating that the arbitration begins only after confirmation that JAMS “has received all payments required under the applicable fee schedule”).

³⁰ *See* AAA CONSUMER RULES, *supra* note 21, at 43 (“[T]he Administrator does not decide the merits of a case or make any rulings on issues such as what documents must be shared with each side.”); *see also* JAMS RULES, *supra* note 29, at r. 6(c) (“If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment.”).

refuses to front the defendant's fees will walk away from arbitration with nothing (or worse: nothing minus the fees incurred to file the claim).³¹

Although plaintiffs can technically go to court and seek to compel the defendant to arbitration or assert that the defendant's failure to pay amounts to a waiver of the right to compel arbitration (as Mason did in the above example), few are likely to pursue this option given the time, cost, and legal know-how required to do so.³² Instead, plaintiffs are more likely to simply abandon their claims, resulting in a victory for unresponsive defendants.³³ Thus, unlike traditional court default judgment rules that punish defendants who ignore claims, arbitration's payment structure and lack of pre-payment default rules actually reward defendants for neglect and gamesmanship.

This Article presents the first in-depth scholarly analysis of arbitration's perverse payment incentives and default procedures, which I collectively term the "Reverse Default Judgment Rule." In addition to defining the contours of the Reverse Default Judgment Rule and how it came to exist, this Article brings to light the Rule's effects on both plaintiffs and defendants. The Rule directly impedes the abilities of individual consumers and employees to vindicate their claims, because the supposed "capped" maximum fee for arbitration plaintiffs of just a few hundred dollars is an illusion: the cost for plaintiffs to have arbitration claims heard on the merits can be many times greater if the defendant fails to pay. A plaintiff who fails to satisfy these costs on behalf of an unresponsive defendant will walk away from arbitration empty-handed. The Reverse Default Judgment Rule, then, can put plaintiffs in arbitration at a significant disadvantage as compared to civil litigation.

But an interesting thing has happened even as the playing field has tilted further in favor of companies demanding individual arbitration instead of class actions: plaintiff employees and consumers have taken the companies up on their offers. With class-action protections now all but eliminated for most consumers and employees,³⁴ these plaintiffs exercised their only remaining

³¹ See discussion *infra* Section I.C (comparing leading providers' fee reimbursement policies, or lack thereof).

³² See discussion *infra* Section I.C (detailing complex fee systems adopted by the two largest arbitration providers, AAA and JAMS).

³³ Indeed, there are just a handful of cases in which plaintiffs have actually pursued unresponsive defendants for fees, compared to an untold number of arbitration claims filed but later abandoned. See generally Danielle Bolong, Annotation, *Failure to Pay Arbitration Fees or Costs as Cause to Remove Stay and Reopen Court Proceedings*, 67 A.L.R. Fed. 3d Art. 1 (2021) (collecting cases).

³⁴ See Imre S. Szalai, *The Supreme Court's Lamps Plus Decision: A Fading Light for Class Actions*, 25 HARV. NEGOT. L. REV. 1, 27 (2019) ("Through cases like *Concepcion*, *American Express*, *Stolt-Nielsen*, and the Court's most recent arbitration case involving class procedures, *Lamps Plus*, the Supreme Court continues to close the door on the availability of class proceedings through the use of arbitration clauses.").

means of collective action by bringing thousands of claims at once and imposing on businesses all of the logistical and financial difficulties of fighting the claims simultaneously.³⁵ Much of this leverage comes from the huge upfront fees companies have to pay—sometimes in the tens of millions of dollars—just to initiate and participate in so many individual “mass arbitration” claims at once.³⁶

Initially, numerous companies faced with mass-arbitration claims simply did not pay their required fees,³⁷ resulting in dismissal of the claims by the arbitration providers.³⁸ But the mass-arbitration plaintiffs did not abandon their claims, as individual plaintiffs faced with the prospect of going to court against multibillion-dollar companies and elite defense firms might have. Instead, these plaintiffs relied on collective representation from well-resourced plaintiffs’ lawyers who were able to seek judicial enforcement of

³⁵ See Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPORTS (Aug. 13, 2021), <https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827> [<https://perma.cc/2ZAY-GD34>] (“40,000 TurboTax customers . . . simultaneously filed thousands of arbitration claims, swamping Intuit with fees and prompting it to try to beat a hasty retreat.”).

³⁶ See, e.g., Alison Frankel, *Uber Tells its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019, 3:03 PM) [hereinafter Frankel, *Uber Tells its Side of the Story*], <https://www.reuters.com/article/legal-us-otc-uber/uber-tells-its-side-of-the-story-in-mass-arbitration-fight-with-12500-drivers-idUSKCN1PA2PD> [<https://perma.cc/9N2D-ZVSC>] (describing drivers’ efforts to compel Uber to pay \$18 million in initial arbitration fees); Erin Mulvaney, *DoorDash Got Its Arbitration Wish, Costing Millions Upfront*, BLOOMBERG L. (Feb. 12, 2020, 3:47 PM) [hereinafter Mulvaney, *DoorDash Got Its Arbitration Wish*], <https://news.bloomberglaw.com/daily-labor-report/doordash-got-its-arbitration-wish-costing-millions-upfront> [<https://perma.cc/5TLA-UQRT>] (explaining how DoorDash was required to pay \$10 million in fees to initiate arbitration); *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1250 (N.D. Cal. 2019), *aff’d*, 823 F. App’x 535 (9th Cir. 2020) (stating that Postmates was ordered by the AAA to pay roughly \$9 million in filing fees).

³⁷ See, e.g., Allison Frankel, *3,420 Lyft Drivers Claim the Company Won’t Pay Arbitration Fees to Launch Their Cases*, REUTERS (Dec. 14, 2018, 9:24 PM) [hereinafter Frankel, *Lyft Drivers Claim Company Won’t Pay Arbitration Fees*], <https://reuters.com/article/legal-us-otc-lyft/3420-lyft-drivers-claim-the-company-wont-pay-arbitration-fees-to-launch-their-cases-idUSKBN1OD2KC> [<https://perma.cc/2HKD-AE6V>] (describing Lyft’s refusal to pay arbitration fees owed in response to 3,420 mass-arbitration claims); *Postmates Inc. v. 10,356 Individuals*, No. CV-20-2783, 2021 WL 540155, at *3 (C.D. Cal. Jan. 19, 2021) (detailing Postmates’s failure to pay initial arbitration fees in response to 1,250 arbitration demands against it, despite receiving an extension from the AAA to do so).

³⁸ See, e.g., *Postmates*, 2021 WL 540155, at *3 (“The AAA determined that under the applicable fee schedule, Postmates was obligated to pay the applicable fees by October 21, 2019 for the commencement of arbitration. The AAA eventually set November 6, 2019 as the final deadline for Postmates to pay the fees to commence arbitration. On November 8, 2019, AAA confirmed that Postmates had not paid the fees and administratively closed the cases.” (citations omitted)); Horton, *supra* note 22, at 622-23 (detailing DoorDash’s initial refusal to pay fees and subsequent dismissal of claims by the AAA).

the companies' contractually required arbitration fees.³⁹ Numerous courts have already sided with the mass-arbitration plaintiffs and refused to bless, as one court put it, the "hypocrisy" of companies seeking to escape the very contractual clauses that they themselves drafted and for decades lobbied courts to uphold.⁴⁰ The "mass arbitration" tactic has picked up steam and resulted in some significant early successes,⁴¹ some even better than comparable class-action efforts.⁴²

Mass arbitration thus demonstrates not only how defendants can manipulate the Reverse Default Judgment Rule but also the double-edged nature of arbitration's fee structures. For both individual plaintiffs subjected to thousands in upfront fees to initiate arbitration and defendants subjected to millions in fees to participate in mass arbitration, the Reverse Default Judgment Rule means that many arbitration outcomes may turn on procedural gamesmanship rather than the merits of the claims.

And unlike the traditional default judgment rule, which by pressuring defendants to timely respond to claims is "one of the district judges' most important tools for obtaining compliance with litigation schedules,"⁴³ the Reverse Default Judgment Rule threatens to significantly slow down the dispute resolution process. It encourages defendants to ignore and wait out their required deadlines for response rather than quickly paying fees and initiating the arbitration process. And only a judge—not arbitration providers—can compel the unresponsive defendant to pay its fees and proceed to arbitration.⁴⁴ Thus, a determined plaintiff who is unable or

³⁹ See discussion *infra* Section II.B (detailing legal representation by plaintiff-side law firms in mass arbitrations).

⁴⁰ *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020); see also discussion *infra* Section II.B (documenting the victories achieved in court by mass-arbitration plaintiffs).

⁴¹ See Medintz, *supra* note 35 ("[Mass arbitration] has pressured several corporate defendants—including Uber, Chipotle, and DraftKings—to grapple with accusations they otherwise could have swatted away.").

⁴² See Alison Frankel, *Uber Sues AAA to Block \$100 Million Fees in 'Politically-motivated' Arbitration*, REUTERS (Sept. 20, 2021, 4:49 PM) [hereinafter Frankel, *Uber Sues AAA to Block \$100 Million Fees*], <https://reuters.com/legal/government/uber-sues-aaa-block-100-million-fees-politically-motivated-arbitration-2021-09-20/> [<https://perma.cc/3J3Q-XV7X>] (detailing Uber's \$146 million settlement with drivers); see also discussion *infra* Section II.B (comparing settlement outcomes in Uber cases).

⁴³ *Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc.*, 856 F.2d 873, 882 (7th Cir. 1988) (Posner, J., dissenting).

⁴⁴ See *Abernathy*, 438 F. Supp. 3d at 1064-66 (compelling arbitration after plaintiffs were forced to go to court following an arbitrator's dismissal of claims for nonpayment by the defendant-company). These inefficiencies can be further compounded at the conclusion of arbitration when successful plaintiffs routinely must go *back* to court to enforce arbitration awards with which defendants have not voluntarily complied. See Joseph Colagiovanni & Thomas W. Hartmann, *Enforcing Arbitration Awards*, DISP. RESOL. J., Jan. 1995, at 17 ("[W]inning an arbitration

unwilling to front the company's fees is forced to do precisely what arbitration is designed to avoid: go to court. The Reverse Default Judgment Rule, by forcing parties to navigate multiple forums and sets of procedures, can therefore lead to outcomes that are not only less fair but also less efficient than proceeding in court.

This Article's discussion of the Reverse Default Judgment Rule proceeds in three Parts. Part I delves into the history and development of default judgment procedures in both civil court and arbitration forums, revealing how and why arbitration's modern default rules diverged from established civil procedure rules. Part II presents the practical effects of the Reverse Default Judgment Rule. It begins by addressing the way that the Reverse Default Judgment Rule creates gaps in publicly reported arbitration data that lead to incomplete and potentially flawed conclusions about arbitration. It then analyzes how the Reverse Default Judgment Rule hinders individual plaintiffs seeking access to justice and how mass-arbitration plaintiffs have recently used arbitration's fee structures as a collective means of pressuring defendant-companies into settling claims.

Part III details how courts, policymakers, and private actors should account for and remedy the effects of the Reverse Default Judgment Rule. Courts should re-evaluate various bases upon which arbitration clauses have been upheld, particularly the oft-referenced notion that arbitration is preferable to the courts as a faster and cheaper means of resolving claims on the merits while avoiding the "procedural morass" of court.⁴⁵ Policymakers, meanwhile, should consider requiring more complete data reporting from arbitration providers, establishing mandatory contractual language that is more transparent about fee payments, and creating alternative funding mechanisms that will eliminate the current fee-shifting structure. Consumers and employees, acting both independently and with coordination from advocacy groups and the plaintiffs' bar, can also exert significant leverage over arbitration's fee structures.

award may not immediately end the dispute, particularly where the unsuccessful party refuses to voluntarily comply with the award or seeks to vacate, modify, or correct the award . . .").

⁴⁵ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (disfavoring class-wide arbitration because it "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"); see also *Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp.*, 559 U.S. 662, 685 (2010) (favoring bilateral arbitration for its "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration . . . because of the economics of dispute resolution."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648 n.14 (1985) (Stevens, J., dissenting) ("[I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.").

The Article concludes by identifying the present moment as a unique political window in which, for the first time in decades, the primary arbitration stakeholders have reason to support reforming arbitration's existing fee structures. These stakeholders include employee and consumer plaintiffs, who have consistently challenged arbitration clauses in the hopes of accessing class-action procedures in court; corporate defendants, who are threatened by new mass-arbitration efforts; and arbitration providers, who have faced mounting pressure from defendant-companies to reduce or waive fees, resulting in a race to the bottom to retain corporate business. With these interests aligning, or at least overlapping, time is of the essence to confront and remedy the unfair effects of the Reverse Default Judgment Rule.

I. DEFAULT JUDGMENT IN CIVIL LITIGATION AND ARBITRATION

This Article's focus is on one of the earliest steps in the arbitration process: the required upfront payments in consumer and employment arbitration and what happens if a defendant-company fails to pay its share of the fees. Civil courts have long provided a clear remedy when a defendant fails to respond to claims against it: entering default judgment against the defendant. But arbitration diverges from traditional default judgment because a defendant's first required response is not a substantive reply on the merits but rather the payment of case initiation fees. And unlike in civil court where nonresponse leads to entry of default against the defendant, a defendant that fails to make the required first response in arbitration is actually rewarded: the financial burden shifts back to the plaintiff, and the arbitration provider will dismiss the claim if the plaintiff is unable or unwilling to pay.

This Part begins by providing a history of default rules in civil court. It then explains how and why arbitration providers developed a very different set of rules governing default, culminating in the modern *de facto* Reverse Default Judgment Rule. The Part concludes by comparing default procedures in civil court with those in arbitration. Although not the mirror opposite of civil default judgment, the Reverse Default Judgment Rule is the practical "reverse" because it incentivizes the very practices—gamesmanship, delay, and unresponsiveness—that civil default is designed to discourage.

A. Default Judgment and Fees in Court

The civil default judgment rule spans millennia and crosses continents. Its origins can be traced to Ancient Rome,⁴⁶ where courts could enter a decree *pro confesso* awarding judgment against a party that “had appeared before the court but failed to file an answer after a demurrer was overruled.”⁴⁷ These default rules were adopted by early common law courts in England.⁴⁸ In 1732, King George II enacted The Process Act, bringing the decree *pro confesso* law closer to what we now know as the default judgment rule.⁴⁹ The Process Act allowed courts to enter a default against a defendant who never appeared in court, provided that certain procedural safeguards for adequate notice had been met.⁵⁰ Upon entry of this decree *pro confesso*, courts would consider “the naked allegations of the complainants bill,” and for those allegations that were “distinct and positive,” the court would “give the relief proper to the case.”⁵¹

Early U.S. courts adopted the decree *pro confesso* rule, considering a defendant’s failure to respond tantamount to a confession as to all claims that had been “alleged with sufficient certainty.”⁵² The required response would not include payment for the judge’s services, however, for the simple reason that taxpayers—not litigants—fund judicial salaries.⁵³ This funding arrangement, like the default judgment rule, is well established in American law. In 1789, Congress passed a series of statutes that provided fixed salaries for federal judges, paid through the Treasury, and prohibited judges from

⁴⁶ See Arthur J. Park, *Fixing Faults in the Current Default Judgment Framework*, 34 CAMPBELL L. REV. 155, 156 (2011).

⁴⁷ John R. Hardin, *Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure*, 30 U. MEM. L. REV. 131, 134 (1999).

⁴⁸ *Id.* Initially, the rule only applied to defendants who had previously appeared, rather than ones who had been entirely absent. *Id.*

⁴⁹ *Id.* at 135.

⁵⁰ See *id.* (describing the statute’s procedural safeguards for ensuring that legal notice had been published before the entry of default).

⁵¹ *Id.* at 136 (quoting *Williams v. Corwin*, 1 Hopk. Ch. 471, 476 (N.Y. Ch. 1824)).

⁵² *Williams*, 1 Hopk. Ch. at 477. As the Supreme Court explained in 1885,

[A] decree *pro confesso* may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur, or answer to the bill within the time limited for that purpose; or if he fails to answer after a former plea, demurrer, or answer is overruled or declared insufficient.

Thomson v. Wooster, 114 U.S. 104, 112 (1885).

⁵³ See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 19 (2008) (“[Founding-era] statutes that reflect[ed] a decision by Congress to specify fixed . . . salaries for federal judges and to deny the judges any kind of fee-based compensation for their services.”).

charging fees to the litigants for the judges' services.⁵⁴ States also included in their constitutions "restrictions designed to moderate the corrupting influence of fee-based judicial compensation," an unwelcome influence that Congress and the states had observed in the English courts of that era.⁵⁵

Default judgment today is codified in modern American civil law.⁵⁶ This Article focuses on the Federal Rules of Civil Procedure as the leading source of default procedures because of their broad influence on state court rules.⁵⁷ Specifically, Rule 55 states that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."⁵⁸ Once default is entered, the clerk "must enter judgment" upon a showing by the plaintiff as to any "sum certain or a sum that can be made certain by computation."⁵⁹ A plaintiff is thus entitled to an entry of default when "the adversary process has been halted because of an essentially unresponsive party."⁶⁰ This rule exists to protect plaintiffs from undue delay

⁵⁴ *Id.* Congress additionally "specified the fees that clerks, marshals, and officers of the court were to receive." *Id.*

⁵⁵ *Id.* at 4; *see also id.* at 11-14 (describing the shift from fee-based payments to salaries for judges in the United States). Late eighteenth-century English judges, by contrast, "earned nearly as much in fees as they did in salary." *Id.* at 8. These "fees were a regular part of the judicial process. At every stage of a case, litigants paid a fee. Some of these fees were paid to court staff, who thereby also acquired an incentive to augment the court's caseload, while other fees were paid directly to the judges." Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1187 (2007).

⁵⁶ *See* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2681 (4th ed. 2022) ("The Advisory Committee Note accompanying original Rule 55 states that the rule 'represents the joining of the equity decree pro confesso . . . and the judgment by default now governed by U.S.C., Title 28, § 724 (Conformity Act).'"

⁵⁷ *See* Horton, *supra* note 22, at 623-24 ("About half of the states passed procedural codes modeled on the [Federal] Rules, and even jurisdictions that did not copy the Committee's handiwork adopted schemes that line up with federal court practice." (internal quotation marks and alterations omitted)).

⁵⁸ FED. R. CIV. P. 55(a).

⁵⁹ FED. R. CIV. P. 55(b).

⁶⁰ *Boland v. Elite Terrazzo Flooring, Inc.*, 763 F. Supp. 2d 64, 67 (D.D.C. 2011).

and prejudice from nonresponsive defendants,⁶¹ and to keep cases moving efficiently from the complaint stage to resolution on the merits.⁶²

Courts may, however, “set aside an entry of default for good cause, and . . . may set aside a final default judgment under Rule 60(b)”⁶³ which allows relief for defendants in specific circumstances or for “any other reason that justifies relief.”⁶⁴ This judicial latitude reflects a preference for trials on the merits rather than defaults,⁶⁵ and “any doubts usually will be resolved in favor of the defaulting party.”⁶⁶ However, the burden nevertheless remains on the defendant in default to demonstrate adequate grounds for relief from default judgment.⁶⁷ Courts thus routinely enforce default judgments where the defendant has failed to meet its burden.⁶⁸

Importantly, courts will consider a defendant’s willfulness in failing to respond when assessing whether good cause exists to set aside a default judgment.⁶⁹ Thus, where failure to respond appears to be one of the party’s

⁶¹ See Adam Owen Glist, Note, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 *FORDHAM L. REV.* 757, 765 (2000) (“The mechanism of default fosters efficiency and discourages delay by severely penalizing dilatory or procrastinating conduct. Defaults protect diligent parties. The law also favors the finality of judgments.”); Gregory A. Kendall, Comment, *Defendants’ Burdens Under Fed. R. Civ. P. 55: Post-Answer Defaults and Jurisdictional Waivers in City of New York v. Mickalis Pawn Shop*, 81 *U. CIN. L. REV.* 1079, 1079 (2013) (“[The default judgment rule’s] purposes are to keep dockets current and to prevent dilatory defendants from impeding the speedy disposition of plaintiffs’ claims.”).

⁶² See *Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc.*, 856 F.2d 873, 882 (7th Cir. 1988) (Posner, J., dissenting) (“The threat of default is one of the district judges’ most important tools for obtaining compliance with litigation schedules.”).

⁶³ *FED. R. CIV. P.* 55(c)

⁶⁴ *FED. R. CIV. P.* 60(b).

⁶⁵ See generally *WRIGHT ET AL.*, *supra* note 56, at § 2681 (summarizing how contemporary procedural philosophy promotes a trial on the merits).

⁶⁶ *Id.*

⁶⁷ See *Marmolejos v. United States*, 283 F.R.D. 63, 66 (D.P.R. 2012) (“A party seeking to set aside an entry of default bears the burden of proving ‘good cause’ pursuant to Rule 55(c), and the Court has discretion in deciding whether to grant the motion.”).

⁶⁸ See *NAT’L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 20-21 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/JW9K-ZZ4Q>] (finding that default judgments comprised twenty percent of dispositions in a sample of civil cases between 2012 and 2013); see also *Fanning v. Seneca One Realty LLC*, 265 F. Supp. 3d 31, 32 (D.D.C. 2017) (entering default judgment against a nonresponsive defendant); *Serv. Emps. Int’l Union Nat’l Indus. Pension Fund v. Liberty House Nursing Home of Jersey City, Inc.*, 232 F. Supp. 3d 69, 76 (D.D.C. 2017) (same); *Penpower Tech. Ltd. v. S.P.C. Tech.*, 627 F. Supp. 2d 1083, 1093 (N.D. Cal. 2008) (same).

⁶⁹ See, e.g., *Hal Commodity Cycles Mgmt. Co. v. Kirsh*, 825 F.2d 1136, 1137-39 (7th Cir. 1987) (affirming denial of motion to vacate default judgment where district court found defendant’s “default was willful, that she had no meritorious defense, and that granting the motion would result in prejudice to the plaintiff”); cf. *SEC v. Vogel*, 49 F.R.D. 297, 299 (S.D.N.Y. 1969) (“Where no substantial prejudice will result to the plaintiff, where defendants have not been guilty of gross

“litigation tactics,” courts are likely to enter default judgment and deny any attempts to vacate that judgment.⁷⁰ In sum, traditional default judgment rules strike a balance between deterring gamesmanship by defendants while allowing courts leeway to ensure that the technical rules do not result in unjust awards.

B. *The Development of Arbitration’s Default Judgment Rules and Fees*

Despite arbitration’s reputation for informality, arbitration providers have established formalized procedures and rules for nearly every step of the claims process.⁷¹ These rules are intended to create adequate procedural protections and, in doing so, protect arbitration awards from being challenged and overturned in court.⁷² Many of these rules mirror the Federal Rules of Civil Procedure, and some even foreshadowed the federal rules.⁷³ This Section details the development of arbitration rules since the passage of the Federal Arbitration Act and how, over time, default judgment procedures in arbitration began to diverge from default rules in federal court.

Historically, arbitration contracts represented an informal means of contract dispute resolution, one that courts were loath to enforce absent a clear showing of mutual intent from the agreeing parties.⁷⁴ English common law “traditionally considered irrevocable arbitration agreements as ‘ousting’ the courts of jurisdiction, and refused to enforce such agreements for this reason.”⁷⁵ The English common law view of arbitration carried over to early

neglect, and where defendants claim the existence and present a factual basis for a meritorious defense, this Court will set aside the default.” (citing *Hensley Equip. Co. v. Esco Corp.*, 383 F.2d 252 (5th Cir. 1967)); *Kulakowich v. A/S Borgestad*, 36 F.R.D. 185, 186 (E.D. Pa. 1964) (“A default, as distinguished from a default judgment, may be set aside ‘for good cause shown’ It is usually granted when no substantial prejudice will result to the plaintiff and the defendant, not being guilty of any gross neglect, claims the existence of a meritorious defense.”).

⁷⁰ See, e.g., *Hal Commodity Cycles*, 825 F.2d at 1137-39 (crediting district court’s finding “of particular relevance” that defendant did not attend pretrial conferences as part of defendant’s “litigation tactics” and therefore affirming denial of defendant’s motion to vacate the default judgment).

⁷¹ See discussion *infra* Section I.C (detailing formal arbitration rules governing fee payments).

⁷² See *Horton*, *supra* note 22, at 634 (noting that the American Arbitration Association adopted Arbitration Rules to increase the likelihood that arbitration awards would be legally enforceable).

⁷³ See *id.* at 635 (describing the similarities between the Arbitration Rules and Federal Rules of Civil Procedure).

⁷⁴ See *infra* notes 76–77 (collecting early cases illustrating courts’ reluctance to compel non-mutual arbitration).

⁷⁵ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974); see also *Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp.*, 126 F.2d 978, 982 (2d Cir. 1942) (recounting that in *Vynoir’s Case*, 77 Eng. Rep. 595, 599-600 (1609), Lord Coke “in a dictum, citing precedents, dilated on the inherent revocability of the authority given to an arbitrator”).

American courts, which likewise would not compel arbitration over a party's objection.⁷⁶

This judicial view continued into the twentieth century,⁷⁷ until merchants began clamoring for a law to protect their contractual arrangements with one another and resolve disputes without court involvement.⁷⁸ In 1925, Congress answered this call by passing what is now the Federal Arbitration Act (FAA).⁷⁹

The centerpiece of the FAA is Section 2, which provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁸⁰

Congress' intent behind the FAA has been characterized by courts, at least in retrospect, as reversing a longstanding "judicial hostility toward arbitration."⁸¹

⁷⁶ See, e.g., *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1321 (Story, Circuit Justice, C.C.D. Mass. 1845) ("It is . . . the policy of the common law, not to compel men to submit their rights and interests to arbitration . . ."); *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. 445, 451 (1874) (holding that an agreement made in advance to remove a suit to arbitration is not valid).

⁷⁷ See, e.g., *Memphis Tr. Co. v. Brown-Ketchum Iron Works*, 166 F. 398, 403 (6th Cir. 1909) ("[W]hen the agreement for arbitration is merely collateral to and independent of the other provisions of the contract, such arbitration is not a condition precedent to the right to sue for a breach of such provision, and that in such cases the remedy for refusal to arbitrate is by action for breach of that agreement.").

⁷⁸ See Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249, 250 (2018) (noting that the Federal Arbitration Act was "intended to allow merchants to arbitrate disputes").

⁷⁹ *Id.*

⁸⁰ 9 U.S.C. § 2.

⁸¹ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (noting passage of the FAA in response to "judicial hostility towards arbitration"); *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125, 129 (7th Cir. 1994) ("The purpose of the Act was to end a tradition of judicial hostility toward arbitration agreements . . ."). At the time of the FAA's passage, though, the purported hostility of courts to arbitration agreements concerned mostly commercial breach of contract disputes. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 78 ("Shortly after the FAA's passage . . . its principal drafter[] commented that '[a]rbitration under the Federal and similar statutes is simply a new procedural remedy, particularly adapted to the settlement of commercial disputes.'" (quoting Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 279 (1926))).

The FAA also provides the means for a party to enforce an arbitration agreement against a counterparty who does not voluntarily participate.⁸² The party seeking to arbitrate may move the court to stay a judicial proceeding of a dispute involving an issue and to compel the opposing party to arbitrate “in the manner provided for in [the parties’ arbitration] agreement.”⁸³ Sections 3 and 4 thus form the basis for defendant-companies to successfully compel employees and consumers to arbitrate individually instead of in court as members of a class.⁸⁴

Section 4 of the FAA further provides that, after arbitration is initiated, if “there is a default” by one party to the arbitration agreement, “the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.”⁸⁵ Courts have held, though, that this language should not be read to punish the non-defaulting party by compelling it to go back to arbitration; instead, the non-defaulting party may proceed in court because the defaulting party has waived its right to subsequently compel arbitration.⁸⁶ But the FAA does not define what constitutes default; nor does it provide specific relief for the non-defaulting party.⁸⁷

Formal arbitration rules appeared soon after the FAA’s passage, with the American Arbitration Association in 1931 promulgating a set of practices and procedures to govern future arbitrations.⁸⁸ These 1931 AAA Rules addressed

⁸² See 9 U.S.C. § 4 (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate . . . may petition any United States district court . . . for an order directing that such arbitration proceed . . .”).

⁸³ 9 U.S.C. §§ 3, 4.

⁸⁴ *Id.*

⁸⁵ 9 U.S.C. § 4.

⁸⁶ See, e.g., *Hernandez v. Acosta Tractors Inc.*, 898 F.3d 1301, 1305 (11th Cir. 2018) (“Once [defendant-employer] defaulted in the arbitration [by failing to pay required fees], the District Court would have been within its power to find that [the employer] could no longer require [the employee] to proceed in arbitration.”); *Sink v. Aden Enters., Inc.*, 352 F.3d 1197, 1202 (9th Cir. 2003) (holding that when a party defaults on arbitration payments, “the FAA no longer permits a stay of the court proceedings in favor of arbitration, [and] the FAA commensurately does not require the district court to order the parties to return to arbitration”); *Garcia v. Mason Contract Prods., LLC*, No. 08-23103-CIV, 2010 WL 3259922, at *3 (S.D. Fla. Aug. 18, 2010) (“By failing to timely pay its share of the arbitration fee, Defendant materially breached its obligations, thereby ‘scuttling’ that opportunity.”).

⁸⁷ See 9 U.S.C. § 3.

⁸⁸ See AM. ARB. ASS’N, CODE OF ARBITRATION: PRACTICE AND PROCEDURE OF THE AMERICAN ARBITRATION TRIBUNAL 67-68 (1931) [hereinafter AAA 1931 RULES]; see also Horton, *supra* note 22, at 627 (explaining that the 1931 Rules were meant to “function[] like a private code of civil procedure”).

both default procedures and arbitration fees, but not the interaction between the two.⁸⁹

In terms of default procedures, the 1931 Rules noted that “there occasionally may be a delay in instituting the proceedings,” and provided that “when for any reason a party is opposed to the proceeding and it is evidenced by his failure, neglect or refusal to perform the duties of which he has received notice under the Arbitration Rules,” the Arbitration Committee would then “consult the wishes of the moving party and he may avail himself of any remedy under the prevailing law of the jurisdiction in which arbitration is being held before continuing the arbitration proceedings.”⁹⁰ In a supplement to the 1931 Rules, the Arbitration Committee explained that

when a party is in default by refusing or failing to proceed with the arbitration, it is not necessary, under the New York Statute under which most of the arbitrations have been held, to obtain a court order directing the arbitration to proceed as the Rules specify that the arbitration may proceed in the absence of a party.⁹¹

The Supplement explained the need for intra-arbitration default rules because otherwise “the parties would have no alternative but to resort to litigation whenever a party refused to proceed or failed to designate an arbitrator.”⁹² Given that arbitration was expressly designed to avoid the “costs and delays” of litigation, such an outcome would be unacceptable.⁹³ In other words, the default rules at arbitration would operate much like those in court, while preventing the inefficiency of actually needing to go to court.

The 1931 Rules also established fee schedules for initiating arbitration proceedings.⁹⁴ Critically, these early AAA rules recognized the high potential for prejudice that could be caused by forcing the parties to pay the arbitration fees. With the intention of “keeping with the dignity and prestige of [the arbitrators’] office,” the 1931 Rules drafters contemplated two alternatives for compensation: “that it should be either an honorary office carrying no

⁸⁹ See generally AAA 1931 RULES, *supra* note 88.

⁹⁰ *Id.* at 67.

⁹¹ AM. ARB. ASS’N, ADMINISTRATION OF COMMERCIAL ARBITRATION UNDER THE CODE OF ARBITRATION: PRACTICE AND PROCEDURE OF THE AMERICAN ARBITRATION TRIBUNAL 16 (Supp. No. 1 1931) [hereinafter AAA 1931 SUPPLEMENT], available at <https://babel.hathitrust.org/cgi/pt?id=nncl.cu03143201&view=1up&seq=46&skin=2021> [<https://perma.cc/Y759-BTES>].

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See AAA 1931 RULES, *supra* note 88, at 180 (listing the fee schedule for arbitration based on the amount of the claim).

emoluments” or, alternatively, “that arbitrators should receive compensation fully commensurate with the services which they render”⁹⁵

Drawing on the “experience of more than five years in filling the office of arbitrator as an honorary one,”⁹⁶ the Arbitration Committee made five findings:

- (1) There is no difficulty in securing highly qualified men on [an honorary] basis. (2) Men of the highest standing are available on the basis of public duty whose services would be prohibitive if charged for at their current rate. (3) No possible relationship of employment between a party and an arbitrator is sustainable on an honorary basis. (4) No question arises as to the inequality of compensation which does occur when each party fixes the compensation of an individual arbitrator. (5) No bickering arises over the fixing of fees, and no conjectures arise concerning the amount of the fees paid.⁹⁷

Based on these findings, the Committee concluded that “in the absence of any public fund” for arbitrator fees, “the only certain way to attain [a] standard” “approximating [the] integrity [of] a judicial proceeding” is to “maintain the office of the arbitrator on an honorary [i.e., unpaid] basis.”⁹⁸ In the 1931 Supplement to the Rules, the Arbitration Committee explained its expectation that arbitration come “at practically *no cost* to the parties as the Association charges only a nominal service fee when a hearing has not been held. In matters which went on to an award the average cost has been *approximately one per cent[] of the claim.*”⁹⁹ For claims under \$1,000, both sides were required to pay \$10,¹⁰⁰ approximately \$186 per party in today’s dollars, adjusting for inflation.¹⁰¹

The supplement further suggested that, rather than passing along arbitration costs to the parties, the costs of maintaining the arbitral system should be “borne by industry generally,” and therefore “industry and

⁹⁵ *Id.* at 184.

⁹⁶ *Id.* at 184-85.

⁹⁷ *Id.* at 184-85.

⁹⁸ *Id.* at 185; see also AAA 1931 SUPPLEMENT, *supra* note 91, at 17-18 (“Under [the fixed payment] schedule, each party pays at the same rate and arbitrators generally receive no compensation, thus avoiding the employment of private judges by parties.”).

⁹⁹ AAA 1931 SUPPLEMENT, *supra* note 91, at 17-18 (emphasis added).

¹⁰⁰ AAA 1931 RULES, *supra* note 88, at 180 (establishing a \$10 fee for claims under \$1,000). Aside from this nominal fee, the AAA noted an “outstanding feature[]” of its services was that arbitrators could be chosen “without cost to the parties.” *Id.* at 1.

¹⁰¹ See *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm (last visited Sept. 16, 2022) [<https://perma.cc/QAY7-DLCF>] (calculating the present-day value of the AAA 1931 small claims fee).

commerce should voluntarily tax themselves to maintain [the benefits of arbitration] to industry.”¹⁰²

Critically, though, the early arbitration rules failed to anticipate a day when arbitration would become a widespread term unilaterally drafted and inserted by businesses into countless employment and consumer contracts, and arbitration services would in turn become a profit-generating industry unto itself.

Suffice to say, a lot has changed since the 1931 AAA Rules and 1931 Supplement, and the AAA no longer subscribes to the view that the integrity of arbitration can only be maintained if arbitrators serve on an unpaid, “honorary” basis.¹⁰³ Meanwhile, as discussed below, the fees for plaintiff-employees and consumers in the event that the defendant-business refuses to pay its share—which can easily exceed twenty times the inflation-adjusted fees proposed in 1931—are today much greater than the “nominal” fees originally envisioned.¹⁰⁴

Once arbitration clauses became a routine fixture of employment and consumer contracts in the 1990s,¹⁰⁵ arbitration providers revisited their existing employment rules, releasing new employment rules in 1995 and new consumer rules in 1998.¹⁰⁶ Unlike the AAA’s 1931 Rules, the updated protocols no longer reflected a view that arbitrators should work on an “honorary” basis without compensation to avoid conflicts of interest. Instead, the new employment and consumer protocols stated that the impartiality of arbitrators “is best assured by the parties sharing the fees and expenses of the mediator and arbitrator.”¹⁰⁷ Both protocols, though, were vague as to how fee-sharing should work in practice, with the employment protocols

¹⁰² AAA 1931 SUPPLEMENT, *supra* note 91, at 44.

¹⁰³ See discussion *infra* Section I.C (detailing the AAA’s arbitrator costs).

¹⁰⁴ See discussion *infra* Section I.C (summarizing modern arbitration fees).

¹⁰⁵ F. Paul Bland, Myriam Gilles & Tanuja Gupta, *From the Frontlines of the Modern Movement to End Forced Arbitration and Restore Jury Rights: An Essay in Three Parts*, 95 CHI.-KENT L. REV. 585, 593 (2020) (“Arbitration clauses first began appearing in consumer and employment agreements in the mid-1990s, and then, their use very rapidly expanded in the late 1990s and on.”).

¹⁰⁶ See AM. ARB. ASS’N, EMPLOYMENT DUE PROCESS PROTOCOL 1 (May 9, 1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [<https://perma.cc/RRJ2-XZ7X>] [hereinafter AAA 1995 EMPLOYMENT PROTOCOL] (establishing “proper due process safeguards” for employment disputes); AM. ARB. ASS’N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 4 (Apr. 17, 1998), [https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf) [[https://perma.cc/N5B\]-ZH6B](https://perma.cc/N5B]-ZH6B)] [hereinafter AAA 1998 CONSUMER PROTOCOL] (addressing the trend in “[r]ecent years” “toward incorporation of out-of-court conflict resolution processes in standardized agreements presented to consumers of goods and services”).

¹⁰⁷ AAA 1995 EMPLOYMENT PROTOCOL, *supra* note 106, at 4; AAA 1998 CONSUMER PROTOCOL, *supra* note 106, at 18.

recommending that the arbitrator should determine reasonable fees absent an equitable agreement among the parties,¹⁰⁸ and the consumer protocols recommending that “[p]roviders of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay.”¹⁰⁹

In the modern era of arbitration services, the providers had thus abandoned their stance that arbitrators should serve on a volunteer basis and the costs of funding arbitration should come from taxation of industry. Nowhere in either the Employment or Consumer Due Process protocols does the Advisory Committee even so much as acknowledge these ideas. Instead, it was seemingly taken for granted in the 1990s AAA rules that arbitrators will receive fees for their services.¹¹⁰

As for default, the 1995 Employment Protocol was silent as to what would happen if a defendant-business failed or refused to pay its fees, but the later-drafted 1998 Consumer Protocol provides a glimpse into arbitration providers’ thought process on the matter. Principle 8 of the Consumer Protocol states that “ADR proceedings should occur within a reasonable time, without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR process and, where necessary, set forth default procedures in the event a party fails to participate in the process after reasonable notice.”¹¹¹ The AAA left it a mystery, though, what the substance of such “default procedures” might be and when such procedures would be “necessary.” The Reporters’ Comments on Principle 8 note that “[a] basic requirement is that the rules governing ADR establish and further the basic principle of conflict resolution within a reasonable time,” but the comment provides little in the way of concrete procedures for accomplishing this requirement.¹¹² Instead, the reporter opaquely provides that “default rules come into play if a party fails to participate in the manner required by the rules after due notice.”¹¹³ No guidance is given as to what those default rules might be, however, or whether a plaintiff would need to go to court to obtain default judgment.

¹⁰⁸ AAA 1995 EMPLOYMENT PROTOCOL, *supra* note 106, at 4.

¹⁰⁹ AAA 1998 CONSUMER PROTOCOL, *supra* note 106, at 2.

¹¹⁰ The 1998 AAA Consumer Protocol briefly mentions that “[s]ome ADR Programs serving Consumers are staffed wholly or partly by unpaid volunteers[,]” but notes “concerns have been expressed by some authorities regarding overdependence on volunteer Neutrals.” *Id.* at 19.

¹¹¹ *Id.* at 22.

¹¹² *Id.*

¹¹³ *Id.*

Courts quickly picked up on the potential prohibitive costs that the AAA's new rules could impose on individual plaintiffs.¹¹⁴ The D.C. Circuit, for example, observed that there was “no indication in AAA's rules that an arbitrator's fees may be reduced or waived in cases of financial hardship,” and thus it was “unacceptable” to force an employee to shoulder fees “unlike anything that he would have to pay to pursue his statutory claims in court” to pursue a claim at arbitration.¹¹⁵ Instead, “where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer.”¹¹⁶

Recognizing that courts would not stand for fee-sharing arrangements that imposed large upfront and potentially unlimited costs on consumers and employees, arbitration providers began releasing new rules in the early 2000s that were purportedly designed to limit plaintiffs' financial exposure. Rather than establishing a “public fund” or a volunteer corps of arbitrators, which the 1931 AAA Rules Committee had said were the only two ways to ensure arbitrator impartiality,¹¹⁷ the AAA now proposed capping fees due from individual plaintiffs.¹¹⁸ Fee caps remain a key component of present-day arbitration rules and served as the catalyst for the Reverse Default Judgment Rule.

C. *The Modern Reverse Default Judgment Rule*

Examining the actual fees and processes involved in arbitrating a claim today reveals the focus of this Article: defendant businesses have little incentive to actually respond to claims brought by consumers and employees, because arbitration providers do not have adequate safeguards in place to

¹¹⁴ See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (holding that an employer could not force a former employee to shoulder arbitration fees that could be much higher than court fees); see also *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 874 (D. Or. 2002) (holding, in the consumer arbitration context, that even the “best case scenario” under the existing AAA rules where plaintiffs would be obligated to pay up to \$375 for the arbitrator's fee was “sufficient to render the obligation unconscionable” as denying the consumer a “meaningful opportunity to vindicate his or her substantive rights due to prohibitive arbitration costs”).

¹¹⁵ *Cole*, 105 F.3d at 1484.

¹¹⁶ *Id.* at 1485.

¹¹⁷ AAA 1931 RULES, *supra* note 88, at 184–85.

¹¹⁸ See AM. ARB. ASS'N, CONSUMER ARBITRATION COSTS (July 1, 2003), <https://www.adr.org/sites/default/files/Consumer%20Arbitration%20Costs%20Jul%2001%2C%202003.pdf> [<https://perma.cc/D8LV-GEPG>] (capping consumer fees at \$125 for claims up to \$10,000 and \$375 for claims up to \$75,000); AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (July 1, 2006), <https://www.adr.org/sites/default/files/Employment%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Jul%2001%2C%202006.pdf> [<https://perma.cc/P7MB-Q44A>] (capping filing fees at \$150 for employees).

compel or even incentivize such a response. The absence of meaningful default rules operates as a de facto “Reverse Default Judgment Rule,” which can dictate and warp the outcome of claims regardless of the merits. This Section lays out the formal, express rules that create the implicit Reverse Default Judgment Rule.

This Article looks to the two largest arbitration providers, AAA and JAMS, to better understand the contours of the Reverse Default Judgment Rule, because these “generalist providers . . . serve as true substitutes for the court system because their procedures cover ‘all kinds of disputes’ and ‘transcend[] . . . any given professional or trade association.’”¹¹⁹

1. Initial Fees

Both AAA and JAMS have adopted fee systems where, at least superficially, defendant-companies pay a far greater share of the initial filing fees than plaintiff consumers and employees. Below is a comparison of fee structures for initiating single-arbitrator, two-party disputes in both employment and consumer claims:¹²⁰

Table 1: Employment Claims

| | AAA ¹²¹ | JAMS ¹²² |
|-----------------------------|--------------------|---------------------|
| Employee filing fee | \$300 | \$400 |
| Company filing fee | \$1,900 | \$1,350 |
| Company case management fee | \$750 | N/A |
| Total employee fee | \$300 | \$400 |
| Total company fee | \$2,650 | \$1,350 |
| TOTAL FEES | \$2,950 | \$1,750 |

¹¹⁹ Horton, *supra* note 22, at 630 (quoting FRANCIS KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 63 (1948) and Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2984 (2015)).

¹²⁰ This analysis assumes full payment of initial fees by the consumer or employee, and no extenuating circumstances justifying fee reduction or forgiveness.

¹²¹ AM. ARB. ASS'N, EMPLOYMENT/WORKPLACE FEE SCHEDULE, COSTS OF ARBITRATION (Nov. 1, 2020) [hereinafter AAA EMPLOYMENT FEES], <https://go.adr.org/employmentfeeschedule> [<https://perma.cc/3Z53-SKHR>].

¹²² JAMS, ARBITRATION SCHEDULE OF FEES AND COSTS [hereinafter JAMS FEES AND COSTS], <https://www.jamsadr.com/arbitration-fees> (last visited Nov. 16, 2022) [<https://perma.cc/7VWV-KTE2>].

Table 2: Consumer Claims

| | AAA ¹²³ | JAMS ¹²⁴ |
|-----------------------------|--------------------|---------------------|
| Consumer filing fee | \$200 | \$250 |
| Company filing fee | \$300 | \$1,500 |
| Company case management fee | \$1,400 | N/A |
| Arbitrator compensation fee | \$1,500 | N/A |
| Total consumer fee | \$200 | \$250 |
| Total company fee | \$3,200 | \$1,500 |
| TOTAL FEES | \$3,400 | \$1,750 |

JAMS may look like a far better upfront deal for businesses, at least any business that actually intends to pay the initial fees. But the picture becomes more complicated once we look at arbitration's other rules for fee payments, discussed below. These additional arbitration rules incentivize defendants to not pay their upfront fees and to shift the largest financial burden possible back to plaintiffs. Based on these incentives, the AAA's large fees could actually be more attractive to a defendant-company intent on procedural gamesmanship.

2. Company's Failure to Pay Initial Fees

In all instances, a company's failure to pay fees shifts the burden back to the plaintiff to front those fees. In employment arbitration, the AAA Rules state that "[i]f arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment."¹²⁵ This neutral phrasing is notable. Although framed vaguely as allowing "one of" the parties to pay in full, the only possible party this could be is the plaintiff-employee, who will have already paid the entirety of his or her \$300 burden before payment could be

¹²³ AM. ARB. ASS'N, CONSUMER ARBITRATION RULES, COSTS OF ARBITRATION (Nov. 1, 2020), https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf [<https://perma.cc/3Z53-SKHR>] [hereinafter AAA CONSUMER COSTS].

¹²⁴ JAMS FEES AND COSTS, *supra* note 122.

¹²⁵ AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES r. 47 (Oct. 1, 2017) [hereinafter AAA EMPLOYMENT RULES], https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [<https://perma.cc/MAS3-PZW5>].

sought from the employer. If “such payments are not made,” (i.e., if the employee does not pay the employer’s share), then “the AAA may suspend or terminate the proceedings.”¹²⁶ The AAA Consumer Rules lay out a similar rule that unless “one of” the parties pays the missing fees, the AAA may suspend and terminate the proceedings.¹²⁷

JAMS likewise advises that, in both consumer and employment arbitrations, “[i]f, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment.”¹²⁸

Thus, in both JAMS- and AAA-administered arbitrations, if a company fails to pay its required fees, the burden shifts back to the employee or consumer to pay those fees or have their claims dismissed.

3. No Default for Failure to Pay

Both the AAA and JAMS explicitly state that arbitrators are prohibited from entering an award solely based on the default of a party.¹²⁹

Arbitration providers may, however, dismiss the claims and, in doing so, release plaintiff consumers and employees from the obligation to arbitrate.¹³⁰ But courts, like the arbitration providers, have also refused to enter default judgment awards based on a party’s previous default in arbitration proceedings.¹³¹ In the event of a defendant’s default on payment obligations, then, the plaintiff is merely released from the obligation to arbitrate and must begin the process from square one in court rather than obtaining a default judgment against the defendant.

¹²⁶ *Id.*

¹²⁷ AAA CONSUMER RULES, *supra* note 21, at r. 54.

¹²⁸ JAMS RULES, *supra* note 29, at r. 6(C). JAMS’s fee schedule is more direct than either its own rules or the AAA’s, advising that if “the company fails to pay its filing or other fees, JAMS may place the matter on administrative suspension and, in such case, will advise the parties in writing of that action so that the employee or consumer may seek appropriate redress in a court of competent jurisdiction.” JAMS FEES AND COSTS, *supra* note 122.

¹²⁹ See AAA EMPLOYMENT RULES, *supra* note 125, at r. 29 (“An award shall not be based solely on the default of a party.”); AAA CONSUMER RULES, *supra* note 21, at r. 39 (“An award cannot be made only because of the default of a party.”); *id.* at r. 54 (“[M]easures might be taken in light of a party’s nonpayment However, a party shall never be precluded from defending a claim or counterclaim.”); JAMS RULES, *supra* note 29, at r. 22(j) (“The Arbitrator may not render an Award solely on the basis of the default or absence of the Party”).

¹³⁰ See *supra* notes 17–20 and accompanying text (detailing dismissal of arbitration claims for nonpayment and ensuing judgment that the defaulting party lost the right to compel arbitration).

¹³¹ See, e.g., *Hernandez v. Acosta Tractors Inc.*, 898 F.3d 1301, 1305 (11th Cir. 2018) (“We find no basis in the FAA, the caselaw, or anywhere else to support a court’s decision to enter a default judgment solely because a party defaulted in the underlying arbitration.”).

4. Extensions on Payment Deadlines

Though there are not express rules for extensions on upfront fee payments, evidence from court records suggests that arbitration providers frequently give defendant-companies significant and often unsolicited extensions to satisfy their financial obligations.¹³² This structure further incentivizes delay, as defendant-companies can decline to pay by the required initial deadline knowing that there will be no repercussions for doing so. Even if the company would prefer to remain in arbitration and believes the plaintiff might pay the additional fees or take the claims to court, the company can buy itself time knowing that even if it does not pay by the deadline, it will likely receive additional weeks or months to delay, allowing evidence to get stale and testing the plaintiff's ongoing commitment.

5. Recoupment of Fronted Fees

Neither the AAA nor JAMS provide any guarantee that an arbitrator will award reimbursement of a defendant-company's fees that the plaintiff fronted. The AAA Consumer and Employee Rules merely state that the arbitrator "shall, in the award, assess arbitration fees, expenses, and compensation as provided in [the rules] in favor of any party."¹³³

JAMS specifically provides the possibility of reimbursement but does not require arbitrators to make such an award: "In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator *may* award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration."¹³⁴ Without a guarantee of fee reimbursement, plaintiffs are even less likely to front the fees even if they have the money on hand to do so.

¹³² See, e.g., *Strong v. Davidson*, 734 F. App'x 578, 580 (10th Cir. 2018) (noting, in an investor-initiated arbitration claim against a real-estate company, that the AAA "announced the suspension of the arbitration" for nonpayment in a letter dated November 21 but "gave the parties one last chance—setting December 7 as the final payment deadline and reminding them of the arbitrators' ability to terminate the matter for nonpayment," but then extended the deadline again on December 9); *Mason v. Coastal Credit, LLC*, No. 18-CV-835, 2018 WL 6620684, at *2-3 (M.D. Fla. Nov. 16, 2018) (detailing the AAA's grant of a 15-day extension for defendant-company to pay fees, followed by another, unsolicited multiweek extension, with the company failing to pay each time); *Bruzda v. Sonic Auto.*, No. 16-CV-02413, 2017 WL 5178967, at *1 (D. Colo. Jan. 23, 2017) (describing the defendant's failure to pay its arbitration fees by the deadline and the AAA's decision to provide two unsolicited deadline extensions); *Spano v. V&J Nat'l Enters., LLC*, 264 F. Supp. 3d 440, 446 (W.D.N.Y. 2017) (detailing correspondence sent by the AAA, over a three-month period, to the defendant regarding its unpaid fee).

¹³³ AAA EMPLOYMENT RULES, *supra* note 125, at r. 39; accord AAA CONSUMER RULES, *supra* note 21, at r. 44(d).

¹³⁴ JAMS RULES, *supra* note 29, at r. 31(c) (emphasis added).

6. Refund of Initial Filing Fee

The AAA and JAMS differ on whether plaintiffs are expressly entitled to a refund when a case is dismissed for nonpayment by the responding company. Both the AAA consumer and employment fee schedules state that in the event a case is “closed due to non-payment of filing fees by the company, the AAA will return any filing fee received from the individual.”¹³⁵ JAMS, by contrast, makes no mention of any return policy for such fees.¹³⁶

7. Punishment for Failure to Pay

Neither the AAA nor JAMS has any clear or binding procedure for punishing companies that fail to pay their required initial fees. For both employment and consumer claims, when the AAA “determines that a business’s failure to pay their portion of arbitration costs is a violation of the . . . Arbitration Rules, the AAA *may* decline to administer future . . . arbitrations with that business.”¹³⁷ JAMS, meanwhile, does not list any potential punishment for nonpayment.¹³⁸

* * *

In sum, upfront fees for even the most straightforward and basic arbitrations range from \$1,750 to \$3,400. A company that chooses to ignore its fee obligations bears little risk, and instead benefits from stalling the claims and imposing on the plaintiff a much greater financial burden. This type of gamesmanship could have especially pronounced effects in regard to claims filed by small-dollar and pro se plaintiffs, who, by the nature of their claims and status, have less incentive to expend the time and resources necessary to further pursue a dismissed arbitration claim in court. The plaintiff, on the other hand, may be financially unable to pay the additional costs and therefore

¹³⁵ AAA EMPLOYMENT FEES, *supra* note 121; AAA CONSUMER COSTS, *supra* note 123.

¹³⁶ See generally JAMS RULES, *supra* note 29.

¹³⁷ AAA CONSUMER COSTS, *supra* note 123 (emphasis added); accord AAA EMPLOYMENT FEES, *supra* note 121.

¹³⁸ JAMS provides a general sanctions provision under which the *arbitrator* “may order appropriate sanctions” for general “failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator.” JAMS RULES, *supra* note 29, at r. 29. It is unclear if nonpayment of initial fees would qualify as a violation of the rules. And, more importantly, the JAMS rules only apply to arbitrators and not to JAMS itself. A case dismissed for nonpayment of initial fees will not have reached an arbitrator, and so an arbitrator’s powers would be irrelevant in such circumstances. See *infra* note 212 and accompanying text (analyzing JAMS’s arbitration rules). The JAMS rules also say nothing about additional or heightened punishments for companies that repeatedly fail to pay their required fees.

abandon the claim. At minimum, plaintiffs bear significant risk in picking up the tab for defendants' fees, considering there is no guarantee they will see these costs reimbursed.

D. Reverse Default Compared to Civil Default

Before continuing, it is worth noting that the "Reverse Default Judgment Rule" is not the exact inverse of traditional default judgment in civil litigation. At a technical level, default and default judgment are express rules formally codified within the judicial system,¹³⁹ whereas the "Reverse Default Judgment Rule" captures a synthesis of affirmative arbitration rules and areas where the rules are silent. There is not, as yet, an express "Reverse Default Arbitration Rule" recognized by either arbitration providers or courts.

Substantively, the manner of responding and paying fees is different between courts and arbitration forums: in civil litigation, a defendant pays a nominal fee at the time that it files a response, but it is the defendant's failure "to plead or otherwise defend" itself that triggers court default procedures.¹⁴⁰ Payment of fees is simply incidental to that failure. In arbitration, by contrast, the defendant pays an upfront fee and responds, but not necessarily at the same time. It is the defendant's failure to pay fees that triggers the problematic aspects of the Reverse Default Judgment Rule. Civil default judgment thus turns on a defendant's *nonresponse*, while technically the Reverse Default Judgment rule turns on the defendant's *nonpayment*.

Theoretically, this distinction means it is possible that the Reverse Default Judgment Rule could operate similarly to normal court default rules, rather than being the inverse. For example, if a defendant paid thousands in upfront fees but then, inexplicably, declined to respond to the actual claims, an arbitrator would be appointed who, like a court, could enter default and award judgment against the defendant.¹⁴¹ In real life, the distinction is irrelevant, because no company would willingly pay thousands in arbitration fees only to then not bother responding. Doing so would needlessly open the defendant up to liability that the arbitration provider could not impose absent the fee payment.

¹³⁹ See, e.g., FED. R. CIV. P. 55 (providing grounds for entering and setting aside default judgments); FED. R. CIV. P. 60 (establishing various grounds for relief from a judgment).

¹⁴⁰ FED. R. CIV. P. 55(a).

¹⁴¹ See, e.g., AAA CONSUMER RULES, *supra* note 21, at r. 39 ("The arbitration may proceed even if any party or representative is absent, so long as proper notice was given and that party or representative fails to appear or obtain a postponement from the arbitrator."); AAA EMPLOYMENT RULES, *supra* note 125, at r. 29.

Relatedly, a defendant-company at arbitration could technically refuse to pay its fees but nonetheless respond, something it could not do in court. But the response in arbitration would be meaningless because, absent the payment of upfront fees, no arbitrator would ever be appointed to read it or decide the claim on the merits. The important distinction between default in court and arbitration is that if a response in civil litigation never reaches the court (for example, if a defendant emailed its response to the judge's chambers but never properly filed it or paid the attendant fees), the defendant's oversight works in favor of the plaintiff because the defendant would be found in default under FRCP 55. By contrast, a defendant-company's failure to follow mandatory arbitration procedures, including payment of initial fees, works in favor of the defendant by saddling the plaintiff with a large additional financial burden.

There is no practical difference, then, between a litigation *response* and an arbitration *fee payment*. The Reverse Default Judgment Rule is the practical opposite of civil default rules because a defendant's failure to comply with its initial obligations after a claim is filed strategically and financially benefits the defendant in arbitration, whereas failure to comply with court-mandated rules would be a detriment in civil litigation.

One other technical, but practically insignificant difference is preclusion. Whereas default judgment in court prevents the parties from subsequently relitigating the claims at issue,¹⁴² dismissal under the Reverse Default Judgment Rule does not necessarily have the same preclusive effect. Thus, a consumer or employee subject to the Reverse Default Judgment Rule could potentially file the same arbitration claim again after an arbitration provider's previous dismissal of the claim.¹⁴³ But there would be little incentive to do so: without any way to compel the company to respond the next time around, refile a previously-ignored arbitration claim would amount to nothing more than lighting a few hundred dollars on fire because the company would again have no new reason to respond. In the end, a defendant-company's failure to respond pursuant to civil litigation rules operates against the company, while the failure to respond pursuant to arbitration rules operates in favor of the company.

¹⁴² See *Riehle v. Margolies*, 279 U.S. 218, 225 (1929) ("A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default.")

¹⁴³ The rules are not clear on this point. And the absence of a rule prohibiting plaintiffs from bringing a renewed claim does not necessarily mean that arbitrators will unanimously allow it. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2912 (2015) ("In short, the various procedures and specific arbitration clauses offer more of a maze than a roadmap to which rules apply and how much discretion individual arbitrators have in a system that is unbounded by precedent.")

Lastly, it is worth noting that a plaintiff could theoretically benefit from a defendant's failure to pay its fees and the subsequent dismissal of the arbitration claim. If the plaintiff had been subject to mandatory individual arbitration, as is the case in most employment and consumer contracts,¹⁴⁴ dismissal by an arbitration provider could free the plaintiff not only from mandatory arbitration but also from the class-action waiver (at least in states that prohibit standalone class-action waivers).¹⁴⁵ The plaintiff would then be free to join and benefit from the efficiencies, legal representation, and lower individual costs of class-action litigation.¹⁴⁶

However, absent any coordination by plaintiff-side law firms of the kind seen in mass-arbitration efforts to free large numbers of consumers and employees from their arbitration contracts, the "class" of plaintiffs would only include those who had personally gone through the trouble of filing an individual arbitration claim and spending the hundreds of dollars in upfront fees to start the process.¹⁴⁷ Such a "class" would hardly be a class at all but, in

¹⁴⁴ See ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 4-5 (Sept. 27, 2017), <https://files.epi.org/pdf/135056.pdf> [<https://perma.cc/WWD2-KXVE>] (noting that the percentage of workers whose terms of employment subject them to mandatory arbitration grew from an estimated two percent in 1992 to fifty-four percent by 2017); *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROT. BUREAU 44-45 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/8EH5-BQ9A>] ("93.9% of the credit card arbitration clauses, 88.5% of the checking account arbitration clauses, 97.9% of the prepaid card arbitration clauses, 88.7% of the storefront payday loan arbitration clauses, 100.0% of the private student loan arbitration clauses, and 85.7% of the mobile wireless arbitration clauses in our sample contained terms that expressly did not allow arbitration to proceed on a class basis.").

¹⁴⁵ See, e.g., *Meyer v. Kalanick*, 185 F. Supp. 3d 448, 458 (S.D.N.Y. 2016) ("*Concepcion* thus provides no basis on which to conclude that California law on the unconscionability of class-action waivers would be invalid outside the arbitration setting.").

¹⁴⁶ See Andrew Faisman, *The Goals of Class Actions*, 121 COLUM. L. REV. 2157, 2169 (identifying "efficiency and representation" as the primary justifications for class consolidation).

¹⁴⁷ See Emily Villano, *Arbitration Asymmetries in Class Actions*, 131 YALE L.J.F. 742, 745 (2022) ("By and large, courts have determined that a putative class representative who is not bound to arbitrate her claims may not certify a class where a defendant has asserted that putative class members are bound by arbitration agreements."). Numerous courts have specifically held that individual plaintiffs released from arbitration clauses cannot represent a class of plaintiffs against whom the defendant-company had not waived its right to compel arbitration. See, e.g., *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1234-39 (11th Cir. 2018) (finding class certification inappropriate where defendant-bank had waived right to compel arbitration as to named plaintiffs but not as to putative class of unnamed plaintiffs, because of the impossibility of compelling arbitration against speculative plaintiffs and the difficulty inherent in the district court's exercise of jurisdiction prior to class certification); *In re Checking Account Overdraft Litig.*, No. 09-MD-02036, 2019 WL 6838631, at *8 (S.D. Fla. Sept. 26, 2019), *aff'd*, 856 Fed. App'x 238 (11th Cir. 2021) (granting, on remand from the Eleventh Circuit, Wells Fargo's motion to dismiss all claims of putative class members in favor of arbitration); *Forby v. One Techs., LP*, No. 16-CV-856, 2020 WL 4201604, at *10 (N.D. Tex. July 22, 2020) (explaining that defendant-company's waiver of arbitration rights did not

all likelihood, at most a handful of individuals. Identifying and coordinating other members of this class would be difficult, and the costs to create such a class—at \$200 or more per person in arbitration filing fees just to extricate each individual from his or her contract,¹⁴⁸ plus court filing fees and any additional litigation costs expended in obtaining court-ordered relief from the mandatory arbitration clause—would be a major deterrent and likely prohibitive in small-dollar claims. Thus, we again see that the practical effect of the Reverse Default Judgment Rule is to deter efficient resolution of claims on the merits, even if one can imagine hypothetical scenarios in which this would not be the case.

II. THE REVERSE DEFAULT JUDGMENT RULE IN PRACTICE

The Reverse Default Judgment Rule is not just an abstract novelty; it tangibly affects outcomes of claims and distorts the reported data on those outcomes. As discussed below, defendants can use the Reverse Default Judgment Rule to deter individual plaintiffs from pursuing otherwise meritorious claims. However, the rise of mass arbitration has flipped the narrative on its head. Now, companies defending themselves are finding that individual arbitration is not always so favorable after all, at least when they are required to pay the upfront fees. These companies have responded by pressuring arbitration providers to alter and reduce upfront fee structures to

permit plaintiff to lead a class of plaintiffs where waiver had not occurred, because “the putative class members are likely bound by the arbitration clause at issue, unlike [the named plaintiff], which precludes her ability to certify a class under Federal Rule of Civil Procedure Rule 23”). Similarly, a number of courts have also refused to allow plaintiffs who had never been bound to an arbitration clause to represent similarly situated plaintiffs who had agreed to such a clause. *See, e.g., Tan v. Grubhub, Inc.*, No. CV-05128-JSC, 2016 WL 4721439, at *1-3 (N.D. Cal. July 19, 2016), *aff’d sub nom. Lawson v. Grubhub, Inc.*, 13 F.4th 908 (9th Cir. 2021) (finding a named plaintiff who had opted out of an arbitration agreement could not represent a class of those who had not and citing other courts that “found typicality and adequacy of representation to be lacking where the lead plaintiff was not subject to the same arbitration provisions as unnamed plaintiffs”); *Avilez v. Pinkerton Gov’t Servs.*, 596 Fed. App’x 579, 579 (9th Cir. 2015) (finding that the district court abused its discretion by certifying classes and subclasses that included employees who signed class-action waivers, where the named plaintiff’s arbitration agreement did not contain a class-action waiver, because “those who signed such waivers have potential defenses that [the named plaintiff] would be unable to argue on their behalf” and, thus, named plaintiff was not an adequate representative under Federal Rule of Civil Procedure 23(a)(4)). *But see Krukever v. TD Ameritrade, Futures & Forex LLC*, 328 F.R.D. 649, 656 (S.D. Fla. 2018) (finding the Rule 23(a)(1) numerosity requirement for class certification satisfied where the named plaintiffs were not subject to arbitration agreements but, according to the defendants, “the vast majority of putative class members” were subject to such agreements, because “the presence of arbitration clauses signed by certain class members cannot defeat Plaintiffs’ prima facie showing of numerosity”).

¹⁴⁸ *See supra* notes 121–25 and accompanying text (discussing filing fees for the two largest arbitration service providers).

lessen the financial burden of responding to individual arbitration claims. In addition to distorting outcomes of claims, the Reverse Default Judgment Rule also undermines the integrity of publicly reported data on arbitration and, in turn, the ability of scholars to draw conclusions from this data.

A. Reverse Default Judgment in Individual Arbitration

The Reverse Default Judgment Rule has the potential to prevent individual plaintiffs from ever having their claims heard on the merits. Scholars have already acknowledged the potentially large deterrent effect that even the supposedly capped filing fee of a few hundred dollars can have on small-dollar plaintiffs.¹⁴⁹ But as discussed above, the Reverse Default Judgment Rule can put consumers and employees on the hook for far more than just the initial capped fee. A defendant's nonresponse makes the plaintiff responsible for the entirety of the case initiation fees, which can range from \$1,750 to \$3,400 and beyond.¹⁵⁰ Plaintiffs may invest \$200 to \$400 into vindicating their rights but be unwilling or unable to pay thousands more, particularly if there is no guarantee of getting that money back.¹⁵¹ Nor will these plaintiffs necessarily be willing or able to go to court—which entails paying additional filing fees as well as engaging in extensive motion practice—to continue pursuing their claims individually.

Indeed, the majority of Americans do not have enough money on hand to afford even a \$1,000 unexpected emergency bill.¹⁵² High upfront costs resulting from the Reverse Default Judgment Rule may particularly deter Black and Latino plaintiffs. As of 2019, white households had average liquid assets of \$8,100, compared to just \$2,000 for Latino households and \$1,500 for

¹⁴⁹ See, e.g., Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 215 (2016) (“[A] consumer generally will not pursue a claim regarding a \$500 cell phone if that means she must pay the nonrefundable \$200 filing fee required to initiate arbitration with the American Arbitration Association . . .”); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RESRV. L. REV. 341, 389 (2014) (“If a social media user is prohibited from initiating or joining a class action, it is likely that no arbitrations will be filed because individual claims will seldom be greater than the expenses in pursuing arbitration, which may include filing fees, airfares, a hotel stay, and legal representation.”).

¹⁵⁰ See *supra* Section I.C (outlining costs associated with the modern Reverse Default Judgment Rule).

¹⁵¹ See *supra* Section I.C (discussing upfront fees).

¹⁵² See Jeff Ostrowski, *Survey: Fewer Than 4 in 10 Americans Could Pay a Surprise \$1,000 Bill From Savings*, BANKRATE (Jan. 11, 2021), <https://bankrate.com/banking/savings/financial-security-january-2021> [<https://perma.cc/8WJ3-9V6G>] (“[J]ust 39 percent of Americans surveyed say they could comfortably cover an unexpected expense of \$1,000.”).

Black households.¹⁵³ Meanwhile, seventy-two percent of white households say they could get \$3,000 from family or friends—around the total cost of the AAA's arbitration filing fees under the Reverse Default Judgment Rule—while only forty-one percent of Black households believed they could do the same.¹⁵⁴ Thus, accessing a contractually required arbitration forum may actually be impossible for many Black and Latino plaintiffs subjected to the Reverse Default Judgment Rule.¹⁵⁵ Even individuals who do have thousands of expendable dollars available may justifiably still feel uncomfortable sinking so much money into an expensive and laborious arbitration claim just to gamble on the possibility of recovering some greater monetary relief.

Despite the Reverse Default Judgment Rule's deterrent effects, a number of plaintiffs have persevered against delinquent arbitration defendants by going to court,¹⁵⁶ or, in some instances, back to court.¹⁵⁷ These cases are telling

¹⁵³ Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, BROOKINGS INST. (Dec. 9, 2020), <https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap> [<https://perma.cc/L45J-T87P>].

¹⁵⁴ See Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristen Broady, *The Black-White Wealth Gap Left Black Households More Vulnerable*, BROOKINGS INST. (Dec. 8, 2020), [brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable](https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable) [<https://perma.cc/3ADG-S5GD>] (studying disparities in wealth by race and ethnicity using data from the 2019 Survey of Consumer Finances).

¹⁵⁵ More data is needed, however, to support and prove this assumption, given that the current data on arbitration do not provide transparency into claims dismissed for nonpayment, much less demographic information about who is bringing and abandoning those claims. See discussion *infra* Section II.D (describing the lack of published data on claims dismissed for nonpayment of fees).

¹⁵⁶ See *Page v. GPB Cars 12, LLC*, Civ. No. 19-11513, 2019 WL 5258164, at *4 (D.N.J. Oct. 17, 2019) (rejecting defendant-company's argument that consumer was required to arbitrate claims and instead finding that defendant had breached arbitration agreement by failing to pay initial filing fees); *Bruzda v. Sonic Auto.*, No. 16-CV-02413, 2017 WL 5178967, at *5 (D. Colo. Jan. 23, 2017) ("Defendant forfeited its ability to enforce the arbitration agreement when AAA administratively closed the parties' case because of Defendant's failure to pay fees despite multiple payment notices.").

¹⁵⁷ See *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1006 (9th Cir. 2005) ("[W]hen an employer enters into an arbitration agreement with its employees, it must itself participate in properly initiated arbitration proceedings or forego its right to compel arbitration."); see also *Murphy v. Ind. Fin. Co.*, No. 19-CV-270, 2020 WL 1452095, at *3 (N.D. Ind. Mar. 25, 2020) (holding that defendant-company could not enforce arbitration agreement after refusing to pay fees required by JAMS, the arbitration organization chosen by the plaintiff in accord with the arbitration agreement, because the company "cannot both breach and enforce the arbitration agreement"); *Mason v. Coastal Credit, LLC*, No. 18-CV-835, 2018 WL 6620684, at *1-4 (M.D. Fla. Nov. 16, 2018) (rejecting defendant-company's attempt to compel arbitration against employee who had previously dropped lawsuit in federal court and attempted to pursue arbitration); *Spano v. V & J Nat'l Enters.*, 264 F. Supp. 3d 440, 459 (W.D.N.Y. 2017) ("Defendants' refusal to participate in arbitration has prejudiced Plaintiff[-employee] and has resulted in a material breach of the Agreement [and as] a result of Defendants' inaction, they have lost their right to compel Plaintiff to arbitrate his claims."); *Strong v. Davidson*, 734 F. App'x 578, 580, 582-83 (10th Cir. 2018) (affirming district court's denial of

for what they reveal about defendant-companies' gamesmanship using the Reverse Default Judgment Rule. For example, several defendant-companies moved to compel arbitration *after* plaintiffs had already attempted to arbitrate their claims and the companies had derailed the process by refusing to pay their share of the fees.¹⁵⁸

These cases show that the Reverse Default Judgment Rule is not just theoretical: defendants routinely fail or even actively refuse to pay arbitration fees required by the very contracts that they themselves drafted and imposed on employees and consumers. They also demonstrate that arbitration providers routinely provide—and defendant-companies routinely ignore—extensions on required payment deadlines.¹⁵⁹ As these deadlines come and pass, plaintiffs have little choice but to continue waiting, with no insight into when the arbitration provider will finally close the case and allow the plaintiff to proceed to court.¹⁶⁰

The limited number of suits arising out of a defendant's failure to pay fees is not necessarily indicative of how frequently or infrequently defendants use the Reverse Default Judgment Rule in their favor. Because arbitration

corporate executive's motion to compel arbitration of securities fraud claims where defendant failed to pay arbitration fees and then "did not oppose the litigation or express any desire to return the case to arbitration until he moved for a stay and to compel arbitration of the claims against him").

¹⁵⁸ See, e.g., *Brown*, 430 F.3d at 1006 ("[W]e hold that [defendant-employer] cannot compel [plaintiff-employee] to honor an arbitration agreement of which it is itself in material breach."); *Mason*, 2018 WL 6620684, at *1-4 (declining defendant-company's request to compel arbitration and citing failure to pay required fees); *Nadeau v. Equity Residential Props. Mgmt. Corp.*, 251 F. Supp. 3d 637, 639 (S.D.N.Y. 2017) (agreeing with plaintiff-employee that "defendant cannot compel arbitration because defendant breached the Agreement by refusing to arbitrate before the AAA").

¹⁵⁹ See, e.g., *Strong*, 734 F. App'x at 580 (noting that the AAA "announced the suspension of the arbitration" for nonpayment in a letter dated November 21 but "gave the parties one last chance—setting December 7 as the final payment deadline and reminding them of the arbitrators' ability to terminate the matter for nonpayment," followed by the AAA on December 9 extending the deadline to December 13); *Mason*, 2018 WL 6620684, at *1-4 (detailing an arbitration provider's grant of a fifteen-day extension for defendant-company to pay fees, followed by another, unsolicited multiweek extension, with the company failing to pay each time); *Bruzda*, 2017 WL 5178967, at *1 (describing a defendant's failure to pay by the August 19, 2016 deadline, followed by the AAA providing unsolicited deadline extensions of September 2 and September 23, 2016); *Spano*, 264 F. Supp. 3d at 446 (detailing six unsolicited extensions provided by the AAA to a defendant-company before the FAA ultimately "administratively terminated the proceeding" based on the company's nonpayment).

¹⁶⁰ If plaintiffs prematurely go to court before the AAA closes the case, they are likely to be rebuffed and told to continue waiting on the arbitrator's decision. See *Sophinos v. Quadriga Worldwide Ltd.*, No. CV-16-01273, 2016 WL 10966561, at *2 (C.D. Cal. Aug. 4, 2016) (refusing to lift a stay on court proceedings following a defendant's nonpayment of arbitration fees and holding instead that the question of payment "should be decided by the arbitrator"); *Burns v. Covenant Health & Rehab. of Picayune, LLC*, No. 15-CV-378, 2016 WL 660938, at *5 (S.D. Miss. Feb. 18, 2016) ("When an arbitrator has not held a hearing to address non-payment or has not otherwise suspended or terminated the proceedings, it is premature for a court to find default.").

proceedings and awards are generally confidential,¹⁶¹ it is difficult to gauge the number of arbitration claims in which the consumer or employee willingly paid the upfront fees on a delinquent defendant's behalf and, in doing so, allowed the claim to proceed to an arbitration hearing to be decided on the merits. And a plaintiff unwilling or unable to pay the defendant's fees is unlikely to go to court for a number of practical reasons. First, the average layperson plaintiff may have no idea where and how to file a claim in court (if they are even aware of the option to go to court).¹⁶² Compounding the problem, small-dollar plaintiffs, unable to proceed as a class, would be unlikely to retain legal assistance to navigate this complicated process.¹⁶³ Lastly, plaintiffs will weigh the potential benefits of pursuing their claim in court—the possibility of recovering damages—against the concrete reality of spending months or years of time and substantial sums of money. Particularly for small-dollar claims, a rational plaintiff will likely walk away, leaving no public trace that the claim ever existed or that it was abandoned because of the Reverse Default Judgment Rule.

B. *The Reverse Default Judgment Rule and Mass Arbitration*

Given the struggles of pursuing individual arbitration, plaintiffs and plaintiff-side law firms have begun a strategy of “mass arbitration.”¹⁶⁴ In mass arbitration, plaintiffs file individual arbitration claims simultaneously, with plaintiff-side law firms providing resources and coordination.¹⁶⁵ The strategy has proven highly successful in leveraging the large upfront fees of arbitration against companies. That plaintiffs have recently begun leveraging arbitration's

¹⁶¹ Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 636-39 (2020) (noting that leading arbitration providers “insist on the privacy of proceedings” and citing real arbitration agreements that require that awards remain confidential).

¹⁶² Justice Breyer, for example, recently expressed concern that related questions surrounding enforcement and waiver of mandatory arbitration clauses are leading to a “matrix of rules . . . that is so complicated that . . . it's at least hard for a layperson like me in this area to understand . . .” Transcript of Oral Argument at 30, *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022) (No. 21-328).

¹⁶³ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. 22 (Dec. 7, 2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/ZAY7-8UB6>] (noting the reduced ability of arbitration plaintiffs to retain legal counsel).

¹⁶⁴ For a detailed and comprehensive description of the mass arbitration phenomenon, see generally J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022).

¹⁶⁵ See Alison Frankel, *Mass Arbitration Ethics: Can One Firm Protect the Interests of Tens of Thousands of Clients?*, REUTERS (Dec. 3, 2019, 7:59 PM), <https://reuters.com/article/legal-us-otc-massarb/mass-arbitration-ethics-can-one-firm-protect-the-interests-of-tens-of-thousands-of-clients-idUSKBN1Y803N> [<https://perma.cc/EA7L-PZ4P>] (describing how firms support plaintiffs bringing actions against corporations).

fee payment rules in their favor is less surprising than how long it took for the mass-arbitration efforts to begin in earnest.¹⁶⁶ In achieving these successes, the mass-arbitration plaintiffs have also demonstrated the importance of the Reverse Default Judgment Rule.

In traditional litigation, companies may fight tooth-and-nail to dismiss claims on the merits and decertify classes of plaintiffs, but they do not merely refuse to participate at all. Such refusal would be suicidal, as the plaintiffs could then seek and obtain default judgment awards.¹⁶⁷ In arbitration—at least individual arbitration—ignoring claims can be an excellent strategy for avoiding liability. But it turns out that when employees and consumers band together to bring mass-arbitration claims, arbitration’s fee structures act against defendant-companies by pressuring them to pay enormous upfront required arbitration fees.

The key initial step in mass arbitration is coordination by and representation from well-resourced legal counsel. Although each individual mass-arbitration plaintiff likely would have struggled to find a lawyer willing to represent their claims, the mass-arbitration strategy gives law firms far more financial incentive to take cases. Some firms have clients sign contracts to pay contingency fees of about forty percent of the recovery (meaning clients pay nothing upfront), while others sue under laws that require defendants to pay a plaintiff’s legal fees if defendants lose.¹⁶⁸

The effects of the mass-arbitration strategy demonstrate the importance of arbitration’s initial fee structures and the Reverse Default Judgment Rule. Mass-arbitration claims brought by thousands of individual but coordinated plaintiffs have put companies on the hook for enormous upfront fees to

¹⁶⁶ Scholars have previously noted that, despite their vigorous efforts to deny prospective plaintiffs access to class-action procedures, individual arbitration is not always clearly favorable to businesses. *See, e.g.*, Resnik et al., *supra* note 161, at 616 (“At points during the twentieth century, potential defendants saw the utility of bringing claimants together as a means of preempting future litigation.”). Meanwhile, the court system—and federal court in particular—can be highly favorable to businesses in both consumer and employment disputes. *See* Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 291 (2012) (“[W]hen one considers the employer advantage in employment litigation in federal court, one is left wondering why an employer would ever want to leave the federal court system.”); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 131 (2009) (comparing employment discrimination claims against other civil claims and finding “lower success rates for plaintiffs by settlement and lower plaintiff win rates at pretrial adjudication and trial, especially judge trial; and more appeals”).

¹⁶⁷ *See* FED. R. CIV. P. 55 (providing for entry of default and default judgment in the event of nonresponse).

¹⁶⁸ Jack Newsham, *Lawyers Are Waging Secret Battles Against Uber, DoorDash, and Lyft on Behalf of Thousands of Workers. And They’re Winning Big – Here’s How.*, BUS. INSIDER (Nov. 10, 2021, 9:49 AM), <https://www.businessinsider.com/how-plaintiffs-law-firms-bring-mass-arbitration-cases-class-actions-2021-11> [<https://perma.cc/EM76-EQF5>].

arbitration providers, including bills of \$9 million for Lyft,¹⁶⁹ nearly \$10 million for Postmates,¹⁷⁰ \$11 million for DoorDash,¹⁷¹ and \$18 million for Uber.¹⁷²

Despite drafting contracts stipulating that each party to an arbitration pay its own required initial filing fees, companies have balked when confronted with the costs of actually doing so in mass arbitration. Tellingly, every one of the above companies initially simply refused to pay their required arbitration filing fees.¹⁷³ This refusal to participate is the logical outcome of the Reverse Default Judgment Rule, as declining to pay upfront fees has significant strategic advantages.¹⁷⁴ Indeed, the strategy initially worked as expected: arbitration providers dismissed the claims against the companies.¹⁷⁵ The arbitration plaintiffs thus “found themselves in limbo: contractually bound to arbitrate, but blocked from pursuing their cases in that forum.”¹⁷⁶ This “limbo” is why the Reverse Default Judgment Rule is so important: it has the potential to immunize companies from liability against small-dollar and under-resourced plaintiffs—or at least it did, before mass arbitration.

A good example of how plaintiffs can leverage arbitration fees in their favor—and how companies’ respond to this shift in power—comes from one of the earliest mass-arbitration efforts. In September 2019, roughly 4,000 DoorDash couriers filed simultaneous, individual arbitration claims against the company, with assistance and coordination from a plaintiff-side law firm.¹⁷⁷ The couriers filed the claims with the AAA, per the terms of the

169 Frankel, *Lyft Drivers Claim Company Won't Pay Arbitration Fees*, *supra* note 37 (citing driver-filed petition detailing Lyft’s required fees of \$2,650 times the 3,420 individual mass-arbitration claimants).

170 *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1250 (N.D. Cal. 2019) (detailing Postmates’s required fees), *aff’d*, 823 F. App’x 535 (9th Cir. 2020).

171 Horton, *supra* note 22, at 622-23. That total cost represented fees of \$1,900 per claim. *See* Mulvaney, *DoorDash Got Its Arbitration Wish*, *supra* note 36.

172 Frankel, *Uber Tells its Side of the Story*, *supra* note 36. These upfront fees represented \$1,500 per claim for Uber.

173 *See* Frankel, *Lyft Drivers Claim Company Won't Pay Arbitration Fees*, *supra* note 37 (Lyft refusal); Horton, *supra* note 22, at 622-23 (DoorDash refusal); Frankel, *Uber Tells its Side of the Story*, *supra* note 36 (Uber refusal); *Adams*, 414 F. Supp. 3d at 1248 (Postmates refusal); *see also* Glover, *supra* note 164, at 1341 (“Across the universe of mass-arbitration demands, defendants have consistently refused, in whole or in part, to pay fees or to participate in arbitration in any way.”).

174 *See* discussion *supra* Section I.C.

175 *See, e.g.*, Horton, *supra* note 22, at 622-23 (“DoorDash refused to pay, prompting the AAA to terminate the arbitrations.”).

176 *Id.*

177 Motion for a Temporary Restraining Order and Order to Show Cause at 3, *Boyd v. DoorDash*, No. CPF-19-516930 (Cal. Super. Ct. Nov. 19, 2019); Horton, *supra* note 22, at 622-23.

contract that DoorDash itself had drafted and had its couriers sign.¹⁷⁸ DoorDash, though, refused to pay the \$9.5 million in upfront fees that the employees' arbitration agreements and the AAA rules required.¹⁷⁹ The AAA thus dismissed the couriers' mass-arbitration claims based on DoorDash's failure to pay.¹⁸⁰ Lacking coordination and skilled, well-resourced legal counsel, this might have been the end of the matter for the DoorDash couriers. Instead, the couriers quickly filed a motion to compel arbitration in court just a week after the AAA's dismissal of their claims.¹⁸¹

Meanwhile, DoorDash updated its courier contracts to provide that all disputes would now be resolved through a different arbitration provider, the International Institute for Conflict Prevention & Resolution (CPR).¹⁸² This contractual change reflected an effort by DoorDash to retroactively bind the courier plaintiffs to CPR's newly created rules governing mass arbitrations. While the couriers' claims were pending with the AAA, DoorDash's lawyers at Gibson Dunn had reached out to CPR for a lifeline, with CPR quickly agreeing to vet an initial ten random "test case" individual claims before any of the remaining mass-arbitration claims could proceed.¹⁸³ The arbitrators' decisions in these test cases would then be sent to a mediator who would "try to resolve the remaining cases" in the ensuing ninety days, after which time the parties could "choose to opt out of the arbitration process and proceed in court with the remaining claims."¹⁸⁴ Under these new CPR rules, then, DoorDash could avoid the vast majority of upfront individual arbitration fees.

DoorDash's effort to circumvent its original contracts ultimately failed, though. In the Northern District of California, DoorDash conceded during a hearing that it could not use its newly drafted contracts to compel the couriers

¹⁷⁸ Alison Frankel, *DoorDash Accused of Changing Driver Rules to Block Mass Arbitration Campaign*, REUTERS (Nov. 20, 2019, 6:34 PM), <https://www.reuters.com/article/legal-us-ot-massarb/door-dash-accused-of-changing-driver-rules-to-block-mass-arbitration-campaign-idUSKBN1XU2U2> [<https://perma.cc/DL9F-NZJW>].

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

¹⁸² Frankel, *supra* note 178 ("The new contract required Dashers to file their individual arbitration demands not at AAA but at the much smaller International Institute for Conflict Prevention & Resolution.")

¹⁸³ Alaina Lancaster, *What's Next: Will Mass Arbitration Blow Up ADR? + Invasion of the Privacy Bills + Qualcomm's Class*, LAW.COM (Dec. 4, 2019, 7:30 AM), <https://law.com/2019/12/04/whats-next-will-mass-arbitration-blow-up-adr-invasion-of-the-privacy-bills-qualcomms-class/?sreturn=20220004105035> [<https://perma.cc/SPV6-GYC4>].

¹⁸⁴ *McGrath v. DoorDash, Inc.*, No. 19-CV-05279, 2020 WL 6526129, at *4 (N.D. Cal. Nov. 5, 2020).

to refile their existing claims with CPR, but the company nonetheless argued that the couriers' arbitration claims were deficient and therefore DoorDash could not be compelled to arbitration with the AAA.¹⁸⁵ Judge Alsup rejected this argument and granted the couriers' motion to compel arbitration.¹⁸⁶ He called out the "irony upon irony" of DoorDash seeking "to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate," and concluded that "[t]his hypocrisy will not be blessed."¹⁸⁷ DoorDash, having tried and failed to use the Reverse Default Judgment rule in its favor (by refusing to pay its required fees) and tried and failed to retroactively bind the mass-arbitration plaintiffs to new arbitration rules (by swapping the AAA out for CPR in the couriers' new contracts), settled the mass-arbitration claims for \$100 million.¹⁸⁸

The tax-preparation company Intuit faced a similar dilemma when more than 100,000 consumers filed mass-arbitration claims against it.¹⁸⁹ Faced with the prospect of paying the AAA \$33 million in administrative fees alone and an estimated \$175 million more to actually arbitrate every claim, Intuit attempted to settle the case for \$40 million.¹⁹⁰ Judge Charles Breyer, also in the Northern District of California, rejected the proposed settlement and reflected that "Intuit was, in Hamlet's words, hoisted by their own petard . . . I think arbitration is the petard that Intuit now faces."¹⁹¹

Thus, DoorDash and Intuit—like so many individual consumer and employee plaintiffs—were required to deal with the substantial inconveniences of actually complying with arbitration agreements and the

¹⁸⁵ *Abernathy*, 438 F. Supp. 3d at 1064-65.

¹⁸⁶ *Id.* at 1065-66.

¹⁸⁷ *Id.* at 1068.

¹⁸⁸ Maeve Allsup & Erin Mulvaney, *DoorDash \$100 Million Driver Settlement Tentatively Approved*, BLOOMBERG L. (Dec. 22, 2021, 3:37 PM), <https://news.bloomberglaw.com/daily-labor-report/door-dash-100-million-driver-settlement-tentatively-approved> [<https://perma.cc/QVC7-NQF3>].

¹⁸⁹ Megan Leonhardt, *Corporate America Has the Upper Hand in Lawsuits. Consumers Could Be Poised to Take Back Power*, FORTUNE (Apr. 18, 2022, 7:00 AM),

<https://fortune.com/2022/04/18/corporate-america-mass-arbitration-consumer-power-intuit-keller-lenkner> [<https://perma.cc/49F3-FPGY>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.* More recently, a New York state appellate court affirmed denial of a request by Uber to preliminarily enjoin the AAA from collecting \$91 million in fees arising out of 31,000 mass-arbitration claims. *Uber Techs., Inc. v. Am. Arb. Ass'n*, 167 N.Y.S.3d 66, 70 (N.Y. App. Div. 1st Dept. 2022). The court reasoned that "[t]he balance of the equities weighs in favor of AAA" enforcing the arbitration agreement's fee schedule because, "[w]hile Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision." *Id.*

attendant fees. A number of other mass-arbitration claims have also settled for striking amounts, with companies deciding that the costs and technical difficulties of resolving individual arbitrations were simply not worth it.¹⁹² Notably, Uber settled driver-initiated mass-arbitration claims against it for at least \$146 million, which ironically represented a higher cost on a per-plaintiff basis than a similar Uber settlement of in-court claims involving drivers upon whom Uber had not imposed mandatory individual arbitration.¹⁹³

Perhaps even more notable than the large mass-arbitration settlement figures are companies walking away from arbitration entirely. Amazon, faced with the threat of a 75,000-member mass arbitration in 2021, quietly removed arbitration from the company's terms of service.¹⁹⁴ As a result of this decision, the mass-arbitration plaintiffs are now proceeding as a class action in court against the company.¹⁹⁵ That both the mass-arbitration plaintiffs and a major company like Amazon seem to prefer class actions to arbitration indicates both the enormous impact of the Reverse Default Judgment Rule, as well as a seismic shift in the way employment and consumer claims may be resolved in the future even after decades of business efforts to expand arbitration.¹⁹⁶ Mass arbitration's early successes may be

¹⁹² Intuit, for example, attempted to settle mass-arbitration claims against it for \$40 million, only to see the settlement struck down as inadequate. Aysha Bagchi, *Intuit \$40 Million Proposed Settlement Rejected as Unfair (2)*, BLOOMBERG TAX (Mar. 6, 2021, 7:46 PM), <https://news.bloombergtax.com/daily-tax-report/40-million-intuit-proposed-settlement-rejected-as-insufficient> [<https://perma.cc/MC8C-RAH6>]. In his ruling, Judge Chen rejected Intuit's argument based on the company's purported concern that, absent settlement, "950,000 or more" potential plaintiffs beyond the 125,000 represented by Keller Lenkner would "get nothing." *Arena v. Intuit Inc.*, No. 19-CV-02546, 2021 WL 834253, at *9 (N.D. Cal. Mar. 5, 2021).

¹⁹³ See Dave Simpson, *UBER PEGS DRIVER EMPLOYMENT DEAL COSTS AT \$146M TO \$170M*, LAW360 (May 9, 2019, 11:22 PM), <https://www.law360.com/articles/1158448/uber-pegs-driver-employment-deal-costs-at-146m-to-170m> [<https://perma.cc/US7F-FPJ6>] (describing Uber's settlement of only \$20 million with plaintiff-drivers who were not bound by an arbitration agreement, compared to the company's \$146 million settlement with drivers bound by Uber's arbitration agreement).

¹⁹⁴ See Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), <https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000> [<https://perma.cc/2WXQ-XUEG>] ("With no announcement, the company recently changed its terms of service to allow customers to file lawsuits. Already, it faces at least three proposed class actions, including one brought May 18 alleging the company's Alexa-powered Echo devices recorded people without permission.").

¹⁹⁵ *Id.*

¹⁹⁶ See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 122 DICK. L. REV. 349, 369 (2017) ("[B]usinesses have enthusiastically embraced arbitration for disputes between them and individual consumers and between management and its employees—a move that was also authorized by the court decisions of the 1980s and 1990s.").

fleeting, however, as defendant-businesses have begun pressing arbitration providers for change.

C. Business Pressure and Arbitration Provider Adaptation

The Reverse Default Judgment Rule has also affected arbitration providers' modern business model. The arbitration industry has long relied on and catered to the business of repeat players, which in individual consumer and employment disputes are the defendant-companies.¹⁹⁷ Unsurprisingly, then, these companies are already having success in getting providers to change their rules to combat the rush of mass arbitrations. This was evident in CPR's willingness to immediately create new arbitration procedures simply at the request of DoorDash.¹⁹⁸

Both the AAA and JAMS, perhaps fearing an exodus to CPR by major repeat-player businesses like DoorDash, also quickly adopted new rules and modified existing ones to make their services more accommodating of defendants.¹⁹⁹ In November 2020, the AAA established employment and consumer rules for "multiple case filings" (i.e., claims of twenty-five or more consumers or employees against "the same party and with counsel for the same party or parties that is consistent or coordinated across all cases").²⁰⁰ AAA's "multiple case" rules provide that both the plaintiff and business initial filing fees will be reduced by as much as seventy-five percent for the largest claims, from \$200 for employees/consumers to \$50, and from \$300 for businesses to \$75.²⁰¹ The AAA rules also create additional leeway to forgive business fees, providing that "AAA, in its sole discretion, may consider an alternative payment process for multiple case filings."²⁰²

¹⁹⁷ Stone & Colvin, *supra* note 163, at 22-23 ("What could explain the repeat-player advantage of employers appearing before the same arbitrator multiple times? One possibility is that arbitrators may feel pressure to rule in favor of the employer to be selected in future cases.")

¹⁹⁸ See Alison Frankel, *The Problem with Outsourcing Justice to Mass Arbitration Services*, REUTERS (Feb. 27, 2020, 8:21 PM), <https://www.reuters.com/article/legal-us-otc-mass-arbit-lawsuits/the-problem-with-outsourcing-justice-to-mass-arbitration-services-idUSKCN20MooZ> [<https://perma.cc/66GV-6HDQ>] ("[T]he idea for a mass arbitration protocol was hatched at CPR after Gibson Dunn reached out to the arbitration service in May 2019, after Keller Lenkner informed DoorDash that it was on the cusp of filing thousands of demands at AAA and exposing the company to millions of dollars in AAA fees. And as CPR drafted and reworked mass arbitration rules . . . it consulted with Gibson Dunn and with an in-house DoorDash lawyer on a half-dozen occasions.").

¹⁹⁹ See David Rochelson, *Is This the End of Mandatory Arbitration?*, ANTITRUST, Fall 2021, at 63, 64, 66 (describing AAA and JAMS rule changes following mass-arbitration claims).

²⁰⁰ AAA EMPLOYMENT FEES, *supra* note 121; AAA CONSUMER COSTS, *supra* note 123.

²⁰¹ AAA EMPLOYMENT FEES, *supra* note 121; AAA CONSUMER COSTS, *supra* note 123.

²⁰² AAA EMPLOYMENT FEES, *supra* note 121; AAA CONSUMER COSTS, *supra* note 123.

The fee changes and additional leeway have already had significant effect. For example, in Uber's mass-arbitration defense against 60,000 drivers, the AAA reduced Uber's costs to just \$140 per plaintiff for 31,000 of the claims, as opposed to the full sum of \$500 Uber would have had to pay under the existing AAA rules at the time Uber drafted its driver employment contracts.²⁰³ This discount represented savings of tens or even hundreds of millions for Uber.²⁰⁴ Despite all this, Uber challenged the AAA's fees (in court, of course), arguing that the reduced fees are an "astronomical sum" that constitute "a ransom orchestrated by politically-motivated lawyers."²⁰⁵ In April 2022, a New York appeals court held that Uber was not entitled to a preliminary injunction as to the fees because Uber had "made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision."²⁰⁶

Uber also simultaneously complained about and influenced JAMS's fees. After refusing to pay the \$1,500 case initiation fees for claims filed by 12,500 other mass-arbitration plaintiff drivers—a sum of about \$18 million—the company "persuaded JAMS to stay all of the more than 8,500 driver arbitrations in California," and presumably the fees associated with those claims, until JAMS determined whether to allow the drivers' lawyers to "arbitrate pro hac vice" in California.²⁰⁷ Rather than immediately having to pay fees on every single claim, Uber's gambit would mean only paying a single neutral with a single set of fees.²⁰⁸ JAMS's latest arbitration rules, updated in June 2021, reflect a continued willingness to let companies off the hook for mass-arbitration fees. The rules provide that JAMS itself—not an arbitrator—may consolidate arbitration claims where a claim or claims are submitted "naming Parties already involved in another Arbitration or Arbitrations."²⁰⁹ Mass arbitration has forced companies to reckon with arbitration's default procedures in a way they previously had not. It also shows that the Reverse Default Judgment Rule does not necessarily favor solely businesses or plaintiffs, as evidenced by the large mass-arbitration settlements and efforts by businesses to escape their own arbitration clauses.

²⁰³ Frankel, *Uber Sues AAA to Block \$100 Million Fees*, *supra* note 42.

²⁰⁴ *Id.*; see also discussion *supra* Section I.C (detailing total business fees for employment arbitration).

²⁰⁵ Frankel, *Uber Sues AAA to Block \$100 Million Fees*, *supra* note 42.

²⁰⁶ *Uber Techs., Inc. v. Am. Arb. Ass'n*, 167 N.Y.S.3d 66, 70 (N.Y. App. Div. 1st Dept. 2022) (internal citation omitted).

²⁰⁷ Frankel, *Uber Tells its Side of the Story*, *supra* note 36.

²⁰⁸ *Id.*

²⁰⁹ JAMS RULES, *supra* note 29, at r. 6(e)(ii).

In practice, then, we see that the Reverse Default Judgment Rule can be manipulated by either side. Individual plaintiffs, generally, will suffer as a result of the Rule because it carries the possibility of massively increasing their upfront costs. But when these plaintiffs take collective action in the form of mass arbitration, the tables turn. When utilized by zealous plaintiff-side lawyers, the Reverse Default Judgment Rule sticks defendant-companies with enormous upfront costs to defend themselves and, as seen in the above examples, leaves them begging arbitration providers to retroactively change the rules or, ironically, seeking protection from the very court system they sought to avoid.

D. Gaps in Arbitration Data

The Reverse Default Judgment Rule's effects are apparent not only in case law and current events, but also in quantitative data on arbitration and, as a result, studies focused on this data. Pursuant to various state laws, arbitration providers publicly report data on arbitration claims and outcomes.²¹⁰ But data from some or all providers is incomplete, and perhaps egregiously incomplete.²¹¹ The data only reflects claims actually "filed," meaning claims in which both the plaintiff's and defendant's required initial fees were satisfied.²¹² And the arbitration providers do not report data on which party

²¹⁰ Both AAA and JAMS maintain these databases online. See JAMS, CONSUMER CASE INFORMATION, <https://www.jamsadr.com/consumercases/> (last visited May 10, 2022) [<https://perma.cc/RS2D-4S2D>] (explaining that California and other states require JAMS to maintain a database on consumer arbitrations that includes information such as the name of the company and the history of a company's usage of JAMS); AM. ARB. ASS'N, CONSUMER AND EMPLOYMENT ARBITRATION STATISTICS, <https://www.adr.org/ConsumerArbitrationStatistics> (last visited May 10, 2022) [<https://perma.cc/8FTQ-ZXJH>] (identifying states, such as California and New Jersey, that have statutes requiring publication of arbitration statistics). This Section focuses largely on the AAA statistics, because that has been the principal focus of scholars in the past. See Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 39 (2019) ("[D]espite [JAMS's] role as a leading arbitration administrator, it has never been subject to empirical research.").

²¹¹ See Resnik et al., *supra* note 161, at 672 ("California requires information on arbitrators' fees and attorney's fees, but does not seek data on administrative fees charged by the arbitration administrator or who paid them."); *id.* at 675 ("Without underlying documents, we were not able to learn whether parties paid as required.").

²¹² Although the AAA's data includes "withdrawn" and "administrative" claim outcomes, AM. ARB. ASS'N, CONSUMER AND EMPLOYMENT ARBITRATION STATISTICS Q2 2022, https://www.adr.org/sites/default/files/document_repository/ConsumerReport_Q2_2022.xlsx (last visited Nov. 18, 2022) [<https://perma.cc/XE67-YBN4>], which could be read to cover claims dismissed pursuant to the Reverse Default Judgment Rule, AAA staff confirmed that this publicly reported database "does not include cases in which the filing requirements, including payment of fees, are not met by one or both parties." E-mail from Jean (ADRScholars), Am. Arb. Ass'n to author (May 21, 2021, 8:49 AM) (on file with author). The JAMS data describes case outcomes, but no category appears to cover claims filed by plaintiffs that were dismissed following nonpayment. See JAMS,

paid the administrative fees, in those claims where the upfront fees were actually satisfied.²¹³ As a result, the data—and conclusions relying on that data—exclude cases dismissed or abandoned because of the Reverse Default Judgment Rule and fail to capture instances where the individual plaintiff paid all initial fees beyond the “capped” maximum amount. These gaps in the data manifest themselves in a number of important ways, discussed below.

1. Total Claims

First, and most obviously, without data on claims dismissed pursuant to the Reverse Default Judgment Rule, it is not possible to gauge how many arbitration claims are actually filed or how common the tactic of ignoring claims is among companies. It is possible that companies usually pay the required arbitration fees to initiate employee and consumer claims against them, despite having financial and strategic incentives not to do so. But it is also possible that companies frequently manipulate the Reverse Default Judgment Rule to their advantage by getting claims dismissed through their refusal to pay the fees and thus shifting the financial burden back to plaintiffs. The limited datapoints discussed in this Article from plaintiffs who have actually gone to court after a defendant’s failure to pay fees²¹⁴ and companies’ repeated and widely publicized refusals to pay fees in response to mass-

CONSUMER CASE INFORMATION SPREADSHEET,
<https://www.jamsadr.com/files/uploads/documents/jams-consumer-case-information.xlsx> (last visited Nov. 18, 2022) [<https://perma.cc/RS2D-4S2D>] (describing collecting data and detailing categories of consumer arbitration information that JAMS records). For example, the JAMS data accounts for “claims dismissed without a hearing,” but the category only covers “stipulated dismissals *by the parties*,” which would presumably not cover claims dismissed against a plaintiff’s will for the defendant’s nonpayment, and “dismissals *by the arbitrator*,” which would necessarily encompass only claims where an arbitrator had been appointed. *Id.* (emphasis added). Per JAMS’s own rules, an arbitrator is appointed only *after* payment of the required fees. See JAMS RULES, *supra* note 29, at r. 5 (stating that arbitration is deemed “commenced” upon issuance of a “commencement letter,” which, as defined by JAMS, “confirms that requirements for commencement have been met, [and] that JAMS has received all payments required under the applicable fee schedule”); *id.* at r. 6(c) (“If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings.”). Notably, California’s arbitration data reporting law requires arbitration providers to report “default” as one category of dispute outcomes, CAL. CIV. PROC. CODE § 1281.96(a)(9), but neither AAA nor JAMS appear to report claims dismissed under the Reverse Default Judgment Rule as a default. See E-mail from Jean (ADRScholars), Am. Arb. Ass’n to author (May 21, 2021, 8:49 AM) (on file with author) (confirming that the AAA does not report claims dismissed for nonpayment); JAMS, CONSUMER CASE INFORMATION SPREADSHEET, *supra* note 212 (defining categories of claim resolution, without mention of pre-arbitrator dismissal for nonpayment).

²¹³ See *supra* note 211 and accompanying text (outlining gaps in California’s reporting requirements relating to arbitration filing fees).

²¹⁴ See discussion *supra* Introduction; discussion *supra* Section II.A.

arbitration claims²¹⁵ suggest that manipulation of the Reverse Default Judgment Rule may be common.

As one leading scholar of arbitration has put it, though, the available arbitration data is “partial at best.”²¹⁶ So too, then, are existing conclusions about the rate at which individuals file arbitration claims against companies and the extent to which arbitration clauses inherently deter plaintiffs from pursuing claims at all.²¹⁷ For example, Professor Ramona Lampley relied on arbitration data to criticize the Consumer Financial Protection Bureau (CFPB) for prematurely seeking to “kill” consumer arbitration for financial products.²¹⁸ According to Lampley, the CFPB should not have acted so quickly because although “data gleaned from [arbitration] studies will continue to be useful in making some conclusions regarding the fairness of consumer arbitration[,] . . . that assessment is premature because consumers are not filing many cases (yet).”²¹⁹ Lampley’s conclusion rests on the assumption that existing data accurately reflects the frequency with which consumers (or employees) are filing arbitration claims. But because of the Reverse Default Judgment rule causing an indeterminate and potentially large number of claims to disappear before ever reaching an arbitrator, this public data may significantly undercount such filings. Measures to combat arbitration, then, would not be “premature,” as Lampley concludes,²²⁰ and might in fact be overdue.

The existing, publicly available data about claims paid for and filed is surely useful, and scholars have done important work analyzing this data to find out more about claims that have actually proceeded to arbitration.²²¹

²¹⁵ See discussion *supra* Section II.B.

²¹⁶ Resnik, *supra* note 143, at 2900.

²¹⁷ See *e.g.*, Resnik et al., *supra* note 161, at 661 (analyzing total reported consumer claims from 2009–2019); Chandrasekher & Horton, *supra* note 210, at 53–54 (analyzing reported arbitration data from four providers, and noting that, since 2011, “the volume of pro se filings decreased”); Resnik, *supra* note 143, at 2900, 2902 (noting that only twenty-seven consumers in an average year filed claims against AT&T and concluding that individual consumers rarely use arbitration, while also acknowledging that the data is “partial at best”).

²¹⁸ Ramona L. Lampley, *The CFPB Anti-Arbitration Proposal: Let’s Just Give Arbitration A Chance*, 48 ST. MARY’S L.J. 313, 324–28 (2016).

²¹⁹ *Id.* at 324–25.

²²⁰ *Id.*

²²¹ See, *e.g.*, Resnik et al., *supra* note 161, at 612, 661 (noting “remarkably low level[s] of [arbitration] claims” in arbitration providers’ publicly available data as evidence that arbitration’s confidentiality provisions deter claims); Chandrasekher & Horton, *supra* note 210, at 31–43 (analyzing published AAA and JAMS data on arbitration results); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 699–700 (2018) (comparing the number of arbitration claims filed through the AAA to cases filed in federal courts and concluding that “[f]or all the sound and fury about skewed outcomes, repeat player effects, biased arbitrators, limited discovery, and lack

However, accounting for claims dismissed on purely procedural grounds for nonpayment before being technically “filed” would paint a clearer and more complete picture of the arbitration landscape. It is wholly possible, for example, that consumers file many more claims than represented in the AAA data, but that these claims simply disappear because of the Reverse Default Judgment Rule. Data on claims abandoned as a result of the defendant’s nonpayment would therefore paint a more complete picture of total claims (not just claims where all fees were paid). This additional data would, in turn, shed more light on the extent to which arbitration clauses actually deter employee and consumer plaintiffs from attempting to vindicate their rights.

2. Fees

The publicly reported data on arbitration also potentially distorts arbitration’s true costs for plaintiffs by failing to capture when plaintiffs are unable to proceed based on upfront costs or when plaintiffs proceeded only by paying the defendant’s costs on their behalf.

In some instances, scholars and policymakers have assumed that the “capped fees” on arbitration claims are the end of the matter without considering the Reverse Default Judgment Rule. Martin Malin, for example, commended the AAA in 2007 for taking a “major step in self-regulation by providing in its rules that the rules control over conflicting provisions in the arbitration agreement,” meaning that “regardless of whether contrary provisions exist in the agreement imposed by the employer, an employee may not be compelled to pay more than a \$150.00 filing fee and the employer is compelled to pay the entire arbitrator fee.”²²² David Horton similarly describes forced arbitration as becoming “plaintiff-friendly,” in part because the AAA and JAMS instituted “progressive procedural codes [that] open the courthouse door—or, more accurately, the conference room door—by requiring businesses to subsidize plaintiffs’ claims.”²²³ And Alexander Colvin writes that concerns about “the possibility of individual employees having to

of adherence to or production of precedent in arbitration, it turns out that, except for a relative handful of cases, arbitration does not take place at all”); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 77-101 (2015) (conducting an empirical analysis of AAA arbitration data and cautioning that statistics on arbitration awards may be unreliable based on incomplete data, reflecting the “oft-voiced critique” that mandatory arbitration “deters plaintiffs from even filing claims” (emphasis added)).

²²² Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL’Y J. 363, 398-99 (2007).

²²³ Horton, *supra* note 22, at 640, 650. Horton posits that businesses choose the “plaintiff-friendly” AAA not because of any desire to suppress claims but because the AAA has such strong independent rules that protect their arbitrators’ decisions from being overturned, and what businesses “really value is the knowledge that their clauses and awards will be upheld.” *Id.* at 650.

bear substantial arbitration fees in order to protect their statutory rights . . . are mitigated by [the AAA's] adoption of an organizational policy of requiring employers that utilize its services to bear the costs of arbitration fees."²²⁴

Meanwhile, in a seminal report on arbitration, the CFPB cited testimony from a group of "Congressional, industry, and research center commenters, as well as a group of State attorneys general" who had suggested that arbitration was a "superior forum for resolving individual disputes because filing fees are less expensive for consumers than comparable fees in court."²²⁵ The CFPB noted, as an example, "that the AAA's consumer arbitration rules require consumers to pay *no more* than \$200 in costs for arbitration," while "commenters noted that filing fees for individual suits in Federal court are \$400, and that State court filing fees vary but are often more than \$200."²²⁶

These analyses of total costs, however, would benefit from appreciating the potential effect of the Reverse Default Judgment Rule. We know from the AAA and JAMS rules, discussed above, that plaintiff employees and consumers could be required to pay thousands of dollars more than just their purportedly "capped" filing fee just for an arbitrator to hear a claim on the merits.²²⁷ Based on the Reverse Default Judgment Rule, then, it may actually be plaintiffs rather than defendant-companies who are shouldering these substantial fees, at least at the outset.

The assumptions about arbitration's manageable costs for plaintiffs are seemingly bolstered by arbitration data. Colvin, for example, acknowledges that "[a]lthough organizational policies are not always universally reflected in actual practices" in regard to fee protections, the AAA's public data can be a "check on this question."²²⁸ This data, according to Colvin, suggests minimal cause for concern about costs to plaintiffs because "the employer paid all arbitration fees 97 percent of the time, indicating that the employer-pays rule is generally being enforced in AAA employment arbitration cases."²²⁹ More recently, Resnik, Garlock, and Wang focused on the allocation of fees rather than the absolute dollar amounts.²³⁰ Their research, based on AAA data, showed that 70.7% of all claims to the AAA, excluding those claims that were

²²⁴ Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 9 (2011).

²²⁵ Arbitration Agreements, 82 Fed. Reg. 33210, 33288 (July 19, 2017).

²²⁶ *Id.* (emphasis added).

²²⁷ See discussion *supra* Section I.C (discussing how both AAA and JAMS shift the burden of paying filing fees to the plaintiff when a defendant-company fails to pay such fees in order to avoid claim dismissal).

²²⁸ Colvin, *supra* note 224, at 9.

²²⁹ *Id.*

²³⁰ Resnik et al., *supra* note 161, at 673.

part of a “collective action,” resulted in reported fees.²³¹ In 73.4% of the consumer cases with data, fees were “allocated to the business.”²³² The inference, then, is that in most arbitration claims, businesses pay the entirety of the fees. But this inference arises out of data that is limited to those instances in which *any* party paid the full fees. It does not account for the potentially large number of instances in which the defendant declined to pay and the plaintiff subsequently abandoned the claims. Thus, more complete data is needed to understand whether defendant-companies consistently pay their required fees or do so only when forced by a well-resourced and determined plaintiff who fronts the fees on the company’s behalf.

The arbitration providers’ data may misrepresent not only who pays, but also how much each party pays. Chandrasekher and Horton, for example, looked at data from both AAA and JAMS and found that in AAA-administered arbitrations, consumers pay average fees of \$1,438 out of \$3,797 total arbitration fees, while employees pay average fees of \$314 out of \$22,476 total.²³³ On the other hand, in JAMS arbitrations, consumers pay average fees of \$135 out \$14,419 in total fees, while employees pay \$62 out of \$37,297 total fees.²³⁴ From this, the authors conclude that in both AAA- and JAMS-administered arbitrations, “plaintiffs pay a mere sliver of [the total] costs” of arbitrations.²³⁵ Ultimately, “[c]ombining all case types and all providers, the average plaintiff’s share of arbitrators’ fees was a manageable \$1,114.”²³⁶ Again, though, the data may exclude many claims dismissed because of arbitration’s Reverse Default Judgment Rule, particularly small-dollar claims from which plaintiffs are more likely to walk away if asked to pay thousands in fees to have their claims heard.

Looking only at publicly reported fee policies and data supplied by arbitration providers thus risks missing the potentially substantial impact of the Reverse Default Judgment Rule. Moreover, the reported data also does not state *when* the costs were paid by the respective parties. Given the fee-shifting nature of the Reverse Default Judgment Rule, it is possible that many plaintiffs paid much higher fees at the outset to keep their claims alive, but that these fees were ultimately reimbursed after an arbitration judgment or settlement was reached. Were this the case, such upfront plaintiff fees would be less “manageable” than previously believed.

²³¹ *Id.*

²³² *Id.* at 675.

²³³ Chandrasekher & Horton, *supra* note 210, at 32.

²³⁴ *Id.* at 40.

²³⁵ *Id.*

²³⁶ *Id.* at 52.

3. Success Rates

The lack of full data accounting for the Reverse Default Judgment Rule also undermines efforts to analyze success rates of arbitration plaintiffs. This is because claims dismissed under the Reverse Default Judgment Rule never appear in the data and thus represent neutral outcomes, as they would not register as a success for either the plaintiff or the defendant. Practically speaking, though, it is hardly a neutral outcome if a claim is dismissed in a defendant-company's favor based on the company's refusal to pay fees and the plaintiff's inability or unwillingness to pick up the bill. In this scenario, the defendant-company incurs essentially no costs or time to achieve this outcome.

Scholars have some visibility into success rates from the existing, but incomplete, public arbitration data. For example, Resnik, Garlock, and Wang examined 849 AT&T consumer arbitrations from 2009 to 2019 and found that roughly 69.8% of claims settled and 11.3% ended in an award.²³⁷ This data suggests that consumers achieve at least a somewhat favorable outcome—settlement or an actual award—in the majority of claims filed.

Scholars have reached similar conclusions regarding employment claims. Colvin, for example, analyzed 3,945 employment claims in the AAA's database and found that 59.1% of cases were resolved by settlement.²³⁸ Colvin noted that these results were somewhat troubling because “upward of 70 percent of all employment cases settl[e],” suggesting “that there exists an arbitration-litigation gap,” with arbitration claims being less likely to settle than court cases.²³⁹ But what if far more employees and consumers filed claims only to abandon those claims when the business defendants ignored them or refused to pay? The arbitration-litigation gap would be much larger than it appears from the data.

4. Importance of Lawyers

More complete data may also show that the effects of legal representation are even greater than previously believed once accounting for the Reverse Default Judgment Rule. As discussed above, it is reasonable to assume that those plaintiffs punished by the Reverse Default Judgment Rule are more likely to be small-dollar claimants and, thus, less likely to have legal representation. But if these claims never appear in the arbitration data, they essentially disappear, meaning the data would significantly undercount the

²³⁷ Resnik et al., *supra* note 161, at 675.

²³⁸ Colvin, *supra* note 224, at 4, 6.

²³⁹ *Id.* at 6.

number of arbitration claims filed by pro se plaintiffs that result in negative outcomes (dismissal) for those plaintiffs.

Existing scholarship relying on public data may therefore understate the importance of lawyers in arbitration claims. Resnik, Garlock, and Wang, for example, reported that from 2009 to 2019, between 66.7% and 76.3% of consumers bringing arbitration claims against AT&T did so without lawyers, with a trend over the years toward more lawyer-less claims.²⁴⁰ Breaking down the results of these claims, the authors found that pro se claims were “slightly less successful” than claims brought with attorney representation.²⁴¹ In another article, Chandrasekher and Horton found a much starker difference in success rates between pro se consumer plaintiffs and those represented with law firm assistance, with lawyers improving chances of victory by 27.5-79.9%.²⁴²

Although there is no way to be certain without the data, it is reasonable to assume that those plaintiffs who lack counsel are significantly more likely to be punished by the Reverse Default Judgment Rule than those who have counsel. Plaintiff-side lawyers have a vested interest in obtaining a recovery, given that most will work either on a contingency basis or for attorneys’ fees, both of which can only be recovered at the conclusion of a claim.²⁴³ Given this incentive to pursue claims to judgment or settlement, plaintiff-side lawyers whose clients’ claims were dismissed at arbitration will likely be willing to invest the time and resources necessary to go to court seeking an order either a) compelling the defendant-company to participate in the arbitration; or b) finding that the defendant’s nonpayment constituted waiver of the mandatory arbitration clause. Without a lawyer, the prospect for pro se plaintiffs of taking arbitration claims to court may, justifiably, be daunting. These plaintiffs, then, would be more likely to simply walk away from claims if the business refuses to pay.

Similarly, and again because of attorneys’ fees, small-dollar plaintiffs would be less able to find a lawyer willing to take their case given the size of recovery. Small-dollar plaintiffs would also likely be more inclined to abandon their claims if asked to pay the opposing business’ fees in order to proceed: the \$1,500 to \$3,200 cost of entry would be much more of a deterrent to an individual pursuing a \$700 claim than an individual pursuing a \$50,000 claim,

²⁴⁰ Resnik et al., *supra* note 161, at 676.

²⁴¹ *Id.* at 677.

²⁴² Chandrasekher & Horton, *supra* note 210, at 41-42.

²⁴³ See Stone & Colvin, *supra* note 163, at 21 (“[T]he key mechanism for financing representation is the contingency fee, where the plaintiff’s attorney receives 30-40 percent of the damages as a fee if successful 75 percent [of attorneys] typically represented employees under a contingency-fee arrangement, and a further 17 percent used a hybrid arrangement . . .”).

for example. Thus, there would likely be a correlation between claims abandoned (meaning lost) because of the Reverse Default Judgment Rule and lack of legal counsel. But these outcomes will never appear in the current data, meaning that the importance of legal representation in arbitration claims may be even greater than currently understood.

* * *

Scholars are certainly aware of the limits of their conclusions and the need for better reporting from arbitration providers. Resnik, Garlock, and Wang, for example, acknowledge that “[w]ithout underlying documents, we [are] not able to learn whether parties paid [arbitration fees] as required.”²⁴⁴ The authors then call for more complete data reporting, including “the substantive bases for the claims filed, whether arbitration mandates include rules that require service providers to pay fees and costs, and whether non-lawyers assisted in filing claims.”²⁴⁵ To this list, we should also add data about claims dismissed pursuant to the Reverse Default Judgment Rule.

It is difficult to estimate the effect of the Reverse Default Judgment Rule without more data. If many cases are dismissed for nonpayment, this phenomenon would demonstrate that arbitration is even more financially burdensome for plaintiffs and inefficient than previously understood. And it would also show that the Reverse Default Judgment Rule leads to significant gamesmanship by defendant-companies who would happily see claims dismissed on a technicality. Such gamesmanship would deeply undermine arbitration’s existence, adding further evidence that defendants’ usage of arbitration clauses is designed not to provide a more efficient and informal forum in which to resolve plaintiffs’ claims, but rather to prevent plaintiffs from ever resolving their claims, in any forum.

If, on the other hand, additional data shows little effect in practice from the Reverse Default Judgment Rule, with companies usually paying their initial fees voluntarily, this would beg the question why companies are so eager to go to arbitration, incur substantial upfront costs, and subject themselves to potential liability that could have been avoided by simply ignoring the claims.²⁴⁶ Either way, appreciating the effect of the Reverse Default Judgment Rule will lead to more accurate analyses and conclusions in the study of arbitration.

²⁴⁴ Resnik et al., *supra* note 161, at 675.

²⁴⁵ *Id.* at 679.

²⁴⁶ It is possible that such eagerness to arbitrate would demonstrate just how lopsided arbitration is in favor of companies.

III. LEGAL AND POLICY RESPONSES TO THE REVERSE DEFAULT JUDGMENT RULE

The Reverse Default Judgment Rule has varied and far-reaching implications that should be addressed by courts and policymakers. First, courts must reexamine the idea that arbitration in its current state is compatible with the FAA's goals of guaranteeing speedy and economical alternative dispute resolution. And second, policymakers should be aware of and act on the unique political window for arbitration reform that has been opened as a result of mass arbitration, which seems to have businesses reconsidering their longstanding devotion to the current provision of arbitration services.

A. Implications for the Courts

Courts should reconsider existing arbitration jurisprudence in light of the Reverse Default Judgment Rule's hidden effects. The Rule calls into doubt a number of judicial justifications for enforcing arbitration clauses, including that arbitration is more efficient than going to court, relatively affordable for individual consumers and employees, and less risky for businesses than class actions. The Rule also undermines the idea that consumers and employees have knowingly consented to arbitration clauses and should therefore be bound by those terms. Lastly, and most importantly, the Reverse Default Judgment Rule undermines the idea that consumers and employees can effectively and adequately vindicate their rights in arbitration. Each of these points is discussed in more detail below.

1. Efficiency

The Supreme Court has repeatedly emphasized arbitration's efficiency as a reason for the Court's policy of "favoring" arbitration under the FAA.²⁴⁷ But the Reverse Default Judgment Rule reveals a number of ways that arbitration may not be as expeditious as previously thought.

First, prevailing views of arbitration's "efficiency" fail to account for the potentially laborious and convoluted process of just getting a claim heard by an arbitrator. The Reverse Default Judgment Rule can significantly bog down this prehearing process by encouraging defendant-companies to drag their

²⁴⁷ See cases cited *supra* note 45. As Chief Justice Roberts recently explained during an oral argument, "the whole point of the Federal Arbitration Act or at least a significant point was to expedite disputes." Transcript of Oral Argument at 27, *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022) (No. 21-328).

feet on responding and paying their fees, forcing the plaintiff and arbitrator to expend time and resources to get the needed response.²⁴⁸

Moreover, if and when these efforts prove unsuccessful, an individual plaintiff who is determined to proceed but unwilling to pay the business' required fees on its behalf will be forced to go to court to compel the business to participate.²⁴⁹ Considering that a main reason for favoring arbitration is that it allows parties to avoid the formality and "procedural morass" of going to court,²⁵⁰ the Reverse Default Judgment Rule significantly undercuts this rationale by forcing the parties to do just that, and to do so before even having the claim heard on the merits. This pre-merits process is in fact significantly *less* efficient than simply going to court in the first place. Rather than going to court and staying there, the parties would need to bounce back and forth between two forums—court and arbitration—with two sets of potentially conflicting rules to follow and potentially duplicative briefing and arguments.²⁵¹

Of course, the Reverse Default Judgment Rule in a sense makes dispute resolution more "efficient" in that it efficiently makes disputes disappear entirely, regardless of the merits, by incentivizing plaintiffs to abandon their claims. However, this lopsided efficiency, which incentivizes and rewards delay tactics by defendants, runs directly counter to the interests of achieving anything resembling justice.

Indeed, courts have recognized that arbitration is "not meant to be another weapon in the arsenal for imposing delay and costs in the dispute resolution process,"²⁵² and, specifically, allowing a defendant-company "to compel arbitration notwithstanding its breach of the arbitration agreement . . . would set up a perverse incentive scheme" in which the defendant "would have an incentive to refuse to arbitrate claims brought by employees in the hope that

²⁴⁸ See discussion *supra* Section II.A (describing the Reverse Default Judgment Rule's effects).

²⁴⁹ See discussion *supra* Section II.A (detailing solo-plaintiff Reverse Default Judgment Rule cases).

²⁵⁰ See *AT&T Mobility v. Concepcion*, 563 U.S. 333, 348 (2011) (describing "informality" as "the principal advantage of arbitration" and rejecting procedures that "make[] the process slower, more costly, and more likely to generate procedural morass than final judgment"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (identifying "greater efficiency and speed" as a principal advantage of arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648 n.14 (1985) (Stevens, J., dissenting) ("[I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.").

²⁵¹ See *supra* notes 1-20 and accompanying text (detailing the yearlong, pre-merits process of one plaintiff forced to move from court to arbitration and then back to court).

²⁵² *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 47 (1st Cir. 2005) (quoting *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir. 1995)).

the frustrated employees would simply abandon them.”²⁵³ This “tactic,” as the Ninth Circuit explained, “would be costless to employers if they were allowed to compel arbitration whenever a frustrated but persistent employee eventually initiated litigation.”²⁵⁴ Plaintiff consumers and employees have thus succeeded in overcoming arbitration clauses and pursuing their claims in court after the defendant failed to pay its required initial fees.²⁵⁵

But simply denying motions to compel arbitration if and when a plaintiff goes to court is insufficient, because this relief is only available to those plaintiffs who have sufficient knowledge, resources, and tenacity to continue pursuing their claim in court once it has been dismissed by an arbitration provider.²⁵⁶ This limitation also undermines the effectiveness of another potential check on defendants’ gamesmanship: the threat of sanctions against defense-side attorneys who manipulate the Reverse Default Judgment Rule. Although plaintiffs may have a credible case for the imposition of sanctions, to actually obtain such relief requires extensive time, money, and understanding of the law. The threat of sanctions, therefore, is unlikely to serve as a sufficient deterrent.

Furthermore, arbitration’s primary justification of efficiently resolving claims on the merits is significantly undermined by the prospect of plaintiffs waiting months for arbitration providers to grant repeated and unjustified payment extension deadlines without any clear end-point—as has happened in multiple cases²⁵⁷—only for the claims to ultimately be dismissed and later return to court, where the defendant files a renewed motion to go back to arbitration—as has also happened in multiple cases.²⁵⁸

²⁵³ *Brown v. Dillard’s, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005).

²⁵⁴ *Id.*

²⁵⁵ See *supra* notes 156–158 and accompanying text (recounting cases in which courts rejected a defendant-company’s motion to compel arbitration because the defendant-company failed to pay arbitration fees).

²⁵⁶ See *supra* note 162 (discussing Justice Breyer’s concern that arbitration could create a “matrix of rules . . . so complicated” as to prevent understanding by a layperson).

²⁵⁷ See *supra* note 159 and accompanying text (collecting cases in which arbitration providers granted unsolicited extensions to defendant-companies).

²⁵⁸ See, e.g., *Strong v. Davidson*, 734 F. App’x 578, 580 (10th Cir. 2018) (detailing individual defendant’s motion to compel arbitration following nonpayment of fees by co-defendants in court-ordered arbitration); *Mason v. Coastal Credit, LLC*, No. 18-CV-835, 2018 WL 6620684, at *1-4 (M.D. Fla. Nov. 16, 2018) (describing defendant-company’s second motion to compel arbitration after succeeding on its first motion but refusing to pay the required arbitration fees); *Spano v. V&J Nat’l Enters., LLC*, 264 F. Supp. 3d 440, 446 (W.D.N.Y. 2017) (considering defendant-companies’ second motion to compel arbitration after plaintiff voluntarily initiated arbitration in response to the companies’ previous motion to compel arbitration but returned to court after the defendant-companies failed to pay required arbitration fees).

The Reverse Default Judgment Rule in the hands of mass-arbitration plaintiffs also makes arbitration less efficient. As recognized by Justice Breyer in his *Concepcion* dissent, “a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims.”²⁵⁹ These words have proven prescient in light of the mass-arbitration movement. When plaintiffs began filing thousands of claims for arbitration simultaneously, defendant-companies rushed to courts and arbitration providers in the hopes of *avoiding* the arbitration clauses they themselves drafted and instead resolving the cases through class actions or class-action-like “test case” procedures.²⁶⁰ In instances where these efforts failed, the businesses quickly settled to avoid the incredibly high upfront costs and inefficiencies of individual arbitration.²⁶¹ Again, arbitration failed to provide a more efficient alternative to the courts.

Regardless of whether arbitration’s fee structures operate in favor of businesses—as in the case of individual claims—or in favor of plaintiffs—as in the case of mass-arbitration claims—the Reverse Default Judgment Rule can make arbitration far less efficient than previously believed.

2. Risks to Business

The Reverse Default Judgment Rule also calls into question the notion, endorsed by the Supreme Court, that arbitration deserves judicial favoritism because it is lower risk for businesses than defending class actions. The Court in *Concepcion* revealed a lot about its priorities when it held that class consolidation was “inconsistent with the FAA” because it “greatly increases risks to defendants.”²⁶² Apparently ignoring the ability to appeal judgments, the Court said that the risk of being ordered to pay large damages based on a trial court’s “error will often become unacceptable” and will pressure defendants “into settling questionable claims.”²⁶³ Even assuming risk of settlement for businesses was a legitimate concern that could justify the

²⁵⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 363 (2011) (Breyer, J., dissenting).

²⁶⁰ See discussion *supra* Section II.B (describing DoorDash’s efforts to use “test case” procedures in the International Institute for Conflict Prevention & Resolution as a way of resolving a mass-arbitration claims brought by plaintiff-employees).

²⁶¹ See discussion *supra* Section II.B (discussing how companies such as DoorDash and Uber settled mass-arbitration claims to avoid lengthy and expensive individual arbitration proceedings).

²⁶² *Concepcion*, 563 U.S. at 348, 350. One might argue that these risks should properly be borne by the businesses that cut corners with product standards, engaged in predatory financial lending, shortchanged employees, or committed any other legal violations in pursuit of maximizing profits, and that perhaps societal goals are not best served by minimizing these “risks,” but such an argument is outside the scope of this Article.

²⁶³ *Id.* at 350.

establishment of and favoritism toward a private, extrajudicial system where claims could only proceed on an individual basis, the Reverse Default Judgment Rule casts significant doubt on whether it is even true that class actions are riskier to businesses than individual arbitrations.

In one sense, the Reverse Default Judgment Rule does decrease risks to businesses. Plaintiffs to mandatory individual arbitration may abandon their claims after being asked to pay thousands in upfront fees as a result of the Reverse Default Judgment Rule.²⁶⁴ When this happens, a business's risk of liability goes to zero. This risk equation stands in stark contrast to civil litigation, where businesses bear significant risks of liability for class-wide damages and millions in legal fees while most class-member plaintiffs bear no upfront costs or responsibility for strategizing and, in fact, may not even be aware of the litigation at all until a settlement check arrives in their mailbox.

But if the goal is to achieve a *fair* outcome in which neither party bears *undue* risk, the Reverse Default Judgment Rule's shifting to plaintiffs all upfront costs—and therefore all initial financial risk—can hardly be seen as a desirable outcome. Indeed, at the time the Supreme Court decided *Concepcion*, several judges already understood that “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”²⁶⁵

The weighing of risks and benefits around class consolidation changes significantly, however, given the increasingly realistic possibility of mass arbitration.²⁶⁶ Although only “lunatics” might file small-dollar claims against large companies, it appears quite sane for individual plaintiffs to file claims as part of a mass-arbitration effort. For example, Uber was confronted with 60,000 simultaneous individual claims (a huge number, albeit still short of the 17 million hypothesized by Justice Breyer).²⁶⁷ Faced with the prospect of spending \$600 million just to resolve these claims through arbitration,²⁶⁸ Uber instead settled and did so for about 65% more on a per-plaintiff basis

²⁶⁴ See discussion *supra* Section I.C (describing the incentives defendants have to avoid paying initial fees and to instead shift the financial burden to plaintiffs).

²⁶⁵ *Concepcion*, 563 U.S. at 365 (Breyer, J., dissenting) (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

²⁶⁶ See discussion *supra* Section II.B (documenting mass-arbitration claims in court); see also Glover, *supra* note 164, at 1360 (“[M]ass arbitration will likely require scaled-up arbitral fora to handle growing claim volume.”).

²⁶⁷ See Joel Rosenblatt, *Uber's Arbitration Addiction Could Be Death by 60,000 Cuts*, BLOOMBERG (May 8, 2019, 5:00 AM), bloomberg.com/news/articles/2019-05-08/uber-s-arbitration-addiction-could-be-death-by-60-000-cuts?leadSource=verify% [https://perma.cc/J3HX-EQDX] (citing legal experts' speculation that it “would take decades and cost Uber at least \$600 million” to resolve the mass-arbitration claims).

²⁶⁸ *Id.*

than its settlement in a class action based on similar allegations but not removed to arbitration.²⁶⁹

In mass-arbitration cases, then, the “risks” and “pressure[.]” to settle may actually be far greater for businesses than simply defending a class action in court.²⁷⁰ Courts should factor these risks into their analysis of whether mandatory individual arbitration actually presents a fair balancing of risks to the parties.

3. Mutual Assent

In enforcing arbitration clauses, courts also often cite the contractual principle that contracts to which the parties mutually agreed should be enforced according to their terms. As the Supreme Court has repeatedly stated, “arbitration is a matter of consent.”²⁷¹ On this basis of perceived mutuality, the Court has frequently given short shrift to plaintiffs’ concerns about forced arbitration: having agreed to the rules of arbitration at the outset, why should plaintiffs be allowed to escape arbitration later on?²⁷²

Even assuming that individual employees and consumers can be expected to read and understand that they are waiving access to court in the hundreds or thousands of arbitration clauses they sign as part of daily life, it is much harder to make the case that they should understand the hidden implications of the Reverse Default Judgment Rule at the time of contract formation.

²⁶⁹ See Simpson, *supra* note 193 (comparing two Uber settlements, one with plaintiff-drivers bound by arbitration agreements and another with plaintiff-drivers not so bound).

²⁷⁰ See *Concepcion*, 563 U.S. at 350 (“[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”).

²⁷¹ *Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp.*, 559 U.S. 662, 684 (2010); *accord* *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1923-25 (2022) (holding that California’s Private Attorneys General Act’s claim joinder mechanism violates the consensual notion of arbitration); *Lamps Plus v. Varela*, 139 S. Ct. 1407, 1412 (2019) (“[A] court may not compel classwide arbitration when an agreement is ‘silent’ on the availability of such arbitration.”).

²⁷² See, e.g., *Lamps Plus*, 139 S. Ct. at 1419 (Thomas, J., concurring) (reasoning that an arbitration clause “suggests that the parties contemplated only bilateral arbitration” because the terms of the agreement stated that “*The Company and I* mutually consent to the resolution by arbitration of all claims . . . that I may have against the Company” and “*the Company and I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment”); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (“We have recognized that *parties can agree* to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” (emphasis added)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (“[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that *causes parties to agree* to arbitrate their disputes” (emphasis added)).

Part of the problem is that arbitration clauses generally state affirmative requirements and not contingencies like what happens if the business fails to pay its required fees. The AAA, for example, recommends the following language for fee-sharing in employment contracts: “[T]he employer shall pay the bulk of the AAA’s administrative fee and the employee’s portion of the AAA’s administrative fee is capped at a certain amount.”²⁷³ An employee reading this language would reasonably understand this to mean that under no circumstances would they need to pay more than the capped amount. Nowhere on the face of this language is it apparent that if the company does not comply with its contractual fee obligations, the employee will be forced to front the remaining costs in order to maintain the arbitration. Instead, a plaintiff can only appreciate the Reverse Default Judgment Rule through negative inference, recognizing that there is no rule compelling businesses to pay their share and arbitration providers will not enter default based on a business’ failure to pay. Everyday employees and consumers can hardly be expected to undertake the kind of parsing of contractual language and synthesis of arbitration rules necessary to make this inference.

As a result, an arbitration clause that obscures the true costs for plaintiffs lacks the key contractual component of “not only a deal but dealing.”²⁷⁴ As one scholar has explained, “individuals who ‘agree’ to arbitrate in consumer and employment contracts are unlikely to appreciate that they have done so, either because they are rationally indifferent to boilerplate terms and conditions or because they misapprehend the importance of those terms, *perhaps as a result of the drafter’s intentional obfuscation.*”²⁷⁵

This lack of agreement is even more apparent as a result of the hidden Reverse Default Judgment Rule. In the case of fee payments, we see a “deal” for the business to pay the bulk of the fees, but there is no additional “dealing” for the employee or consumer to front these fees if the business refuses to participate.²⁷⁶ Nowhere in boilerplate terms about capped fees and sharing of costs is such an arrangement stated or even implied. Such express contractual language setting relatively low fee “caps” on arbitration plaintiffs would more

²⁷³ *Clausebuilder Tool*, AM. ARB. ASS’N, <https://www.clausebuilder.org/cb/faces/welcome> (last visited Oct. 26, 2022) [<https://perma.cc/9LWH-ZAWE>] (to access, accept terms and conditions and press next; select “Employment Plan Contract” for nature of the contract and “Arbitration” as the clause you would like to create; then press next).

²⁷⁴ Resnik, *supra* note 143, at 2870 (quoting Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132, 138 (1970)).

²⁷⁵ David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1003 (2017) (emphasis added); see also Resnik, *supra* note 143, at 2839 (“The bases for [] obligations to arbitrate are not bargained-for, and, in many contexts, consumers and employees cannot shop to avoid arbitration mandates.”).

²⁷⁶ Resnik, *supra* note 143, at 2870.

likely give individual consumers and employees a false sense of security about their upfront costs.²⁷⁷ In sum, nothing in language purporting to guarantee that businesses “shall pay the bulk of” the arbitration fees could clue reasonable plaintiffs into the realistic possibility that they would be forced to pay the entirety of these fees.

Mutual assent is lacking where the contract does not sufficiently inform a party of what rights they are waiving. For example, as Justice Sotomayor explained in her *Lamps Plus* dissent:

Where . . . an employment agreement provides for arbitration as a forum for all disputes relating to a person’s employment and the rules of that forum allow for class actions, an employee who signs an arbitration agreement should not be expected to realize that she is giving up access to that procedural device.²⁷⁸

The same principle is even more true for the Reverse Default Judgment Rule. To the extent employees or consumers ever read the many arbitration agreements to which they agree as part of daily life, they can hardly be blamed for assuming that a clause promising a business will pay its share of initial arbitration fees means that the business actually will pay its share of the initial arbitration fees. Because only the business drafter is likely to be aware of the Reverse Default Judgment Rule escape hatch from its contractual obligations, through which the business can force plaintiffs to pay the entirety of upfront costs, the idea that both parties have mutually consented to the arbitration clause becomes even more far-fetched.²⁷⁹ Courts, then, must reconsider whether a plaintiff’s signature truly represents consent to a boilerplate arbitration clause.

4. Effective Vindication of Claims

All of the proceeding rationales in support of arbitration have been used by courts to support the ultimate, and key, assumption that arbitration is an adequate substitute for civil litigation as a forum for employees and consumers to vindicate their rights. The existence of the Reverse Default Judgment Rule undercuts this assumption because the hidden incentives for businesses to refuse to pay their fees mean that it can be much more costly

²⁷⁷ See *Clausebuilder Tool*, AM. ARB. ASS’N, *supra* note 273 (providing boilerplate language for disputes relating to employment contracts).

²⁷⁸ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1427 (2019) (Sotomayor, J., dissenting).

²⁷⁹ See Horton, *supra* note 22, at 629 (“[T]he cacophony of competing Arbitration Rules—which vary by organization and claim type—exacerbate the information asymmetry between one-shot plaintiffs and repeat-playing corporations.”).

and difficult for individuals to access justice through arbitration than previously understood.

Courts have largely taken arbitration providers at their word in assuming that providers' caps of between \$200 and \$400 are indeed the maximum out-of-pocket expenses consumer and employee plaintiffs can incur. One district court, for example, held that "arbitration will not impose such a financial burden on Plaintiff as to render the [agreement] substantively unconscionable," because "[u]nder the AAA Consumer Rules, Plaintiff will be obligated to pay only a \$200 initial filing fee and Defendants must pay all other costs and fees associated with the arbitration process."²⁸⁰

However, the Supreme Court has suggested that an arbitration clause could be invalid if "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,"²⁸¹ including when "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."²⁸² Nonetheless, "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."²⁸³

The Reverse Default Judgment Rule goes beyond just the cost of "proving" a remedy. It imposes thousands of dollars in upfront fees which undermines plaintiffs' ability to "pursue" a claim at all.²⁸⁴ These fees, unlike the few-hundred-dollar "capped" fees in arbitration rules or the costs of "proving" entitlement to relief through complex expert analysis, as in *Italian Colors*, are just the kind of "filing and administrative fees attached to arbitration" that the Supreme Court has said could be "so high as to make

280 *Sanders v. Concorde Career Colls, Inc.*, No. 16-CV-01974, 2017 WL 1025670, at *4 (D. Or. Mar. 16, 2017). Many other courts have followed this same logic. *See, e.g.*, *Perkins v. M&N Dealership XII, LLC*, No. CIV-16-796, 2017 WL 573565, at *5 (W.D. Okla. Feb. 13, 2017) (finding that a consumer arbitration clause posed no risk of prohibitive expenses, and therefore was not unconscionable, where defendant-company had "agreed to using an arbitration service such as American Arbitration Association, which would cap plaintiff's arbitration costs at the \$200 filing fee"); *McKay v. JPMorgan Chase Bank, N.A.*, No. 15-CV-06256, 2016 WL 11755601, at *8 (C.D. Cal. Mar. 8, 2016) (holding that a consumer arbitration agreement was "not substantively unconscionable as to any initial arbitration costs" because the agreement stipulated that consumers "would not be required to pay any arbitration fees for the initial arbitration under the AAA's rules").

281 *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000). In that case, the court held that the mere "risk" of such costs "is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

282 *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013); *see also* *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 277 (Cal. Ct. App. 1st Dist. 2003) (holding, under California law, that "it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high").

283 *Italian Colors*, 570 U.S. at 236.

284 For an overview of these upfront costs, see discussion *supra* Section I.C.

access to the forum impracticable.”²⁸⁵ The large upfront fees thus raise major questions about whether arbitration clauses can be conscionably enforced, absent reform to the Reverse Default Judgment Rule.²⁸⁶

That plaintiffs could potentially recover these fees at the end of arbitration is of little help at the outset for ensuring that employees and consumers are able to vindicate their claims. As discussed above, many plaintiffs will not even have enough savings to their name to front these fees, even if they wanted to.²⁸⁷ Nor will most individual plaintiffs have the resources or ability to pursue their claims in court following a defendant’s nonpayment, given that such plaintiffs will have to proceed individually or with a very small class of individuals who also filed individual arbitration claims. The Reverse Default Judgment Rule thus does precisely what the Supreme Court has said would invalidate an arbitration clause: it “eliminat[es] . . . the right to pursue” a remedy.²⁸⁸

By undercutting arbitration’s supposed efficiency and affordability, the Reverse Default Judgment Rule casts doubt on the very bases for the judiciary’s expansive favoritism of arbitration. Courts must therefore reassess existing rationales for enforcing arbitration clauses in light of the Reverse Default Judgment Rule’s effects.

B. Policy Implications and (Tentative) Proposals

The Reverse Default Judgment Rule reveals a systemic issue in the way private arbitration is funded, an issue that courts may be ill-equipped to resolve through resolution of discrete claims that come before them. Policymakers, tasked as they are with balancing competing interests and societal goals, may be better positioned to effect systemic change. Individual consumers and employees, as well as advocacy organizations and the plaintiffs’ bar, may also be able to organize around and exert influence over existing unfairness within the arbitration system. This final Section seeks to

²⁸⁵ *Italian Colors*, 570 U.S. at 236; see also *Green Tree Fin. Corp.*, 531 U.S. at 90 (“It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”).

²⁸⁶ See, e.g., *Zaborowski v. MHN Gov’t Servs., Inc.*, 601 F. App’x 461, 463 (9th Cir. 2014) (holding that an arbitration agreement was unconscionable, in part, because “[t]he \$2600 filing fee imposed by the commercial arbitration rules hampers one party—the employee—much more than the other.”); *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 925 (9th Cir. 2013) (finding unconscionable an arbitration agreement that would impose fees of \$3,500–\$7,000 per day, because such fees “likely dwarf[] the amount of [plaintiff’s] claims”).

²⁸⁷ See discussion *supra* Section II.A (detailing the extensive fees plaintiffs incur during the arbitration process).

²⁸⁸ See *Italian Colors*, 570 U.S. at 236.

initiate a discussion on the best policy approaches to the Reverse Default Judgment Rule. It first provides broad guiding principles and then, based on these principles, offers tentative policy proposals.

1. Two Guiding Principles

Before discussing specific policy proposals, it is worth first discussing the best sources and means for policy changes. First, change should come from external sources rather than from the private providers of arbitration services. The AAA, JAMS, and other providers have neither the incentives nor the capacity to reform the Reverse Default Judgment rule. Arbitration providers rely heavily on repeat-player business and therefore are incentivized to create business-friendly rather than truly neutral procedures.²⁸⁹ Adding punitive default rules will make any providers' services less appealing to their most important customers, companies who serve as frequent defendants in individual arbitration claims.

It is also important for parties, as well as courts, to have input and clarity in the process of reform. Arbitration providers, though, craft rules largely behind closed doors and without any public oversight.²⁹⁰

More importantly, arbitrators compete against one another, creating a prisoner's dilemma: any provider who moves first on reforming the Reverse Default Judgment Rule in a way detrimental to repeat-player business will likely suffer by losing those business customers to providers who do not follow suit. This is probably why arbitration providers have all quickly fallen in line to relieve businesses of their financial obligations at mass arbitration.²⁹¹ Surely these providers would love the additional hundreds of millions in fee payments, but the risk of actually demanding full payment is too great when the businesses can simply switch to another provider, just as DoorDash sought to do by re-writing its employment contracts to include CPR instead of the AAA.²⁹² That there has been no similar effort from providers on behalf of individual plaintiffs who have experienced unfair outcomes under the Reverse Default Judgment Rule is likely a consequence

²⁸⁹ See Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 *INDUS. LAB. RELS. REV.* 1019, 1033-35 (2015) (noting the benefits to employers of repeatedly bringing cases before the same arbitrators).

²⁹⁰ See Horton, *supra* note 22, at 628 (noting that many arbitration rules are "simply imposed by for-profit entities" without outside experts, input from the public, or any possibility of legislative veto).

²⁹¹ See discussion *supra* Section II.B (describing recent rule changes from arbitration providers).

²⁹² See *supra* note 182 and accompanying text (recounting DoorDash's efforts).

of individual-plaintiff business being far less important to providers than business from defendant-companies.

Providers also lack adequate means to punish companies that refuse to pay their fees. “The most [providers] can do is refuse to service [businesses] whose procedures impair due process.”²⁹³ Providers could perhaps publish a list of companies that have failed to pay their fees, in the hopes that doing so would create public pressure to participate in arbitration. But even if an individual arbitration provider does punish a business for nonpayment, this will have minimal deterrent effect given the free-market nature of arbitration services. The business will likely just change its contracts to a different, more lenient provider. In this sense, the original arbitration provider suffers a greater detriment, loss of business, than the noncompliant business. This market structure is why arbitration providers have been so willing to concede to the requests of businesses, forgiving and modifying their mass-arbitration fee structures rather than punishing businesses that did not comply with unambiguous contractual fee-payment obligations.²⁹⁴ Arbitration providers are thus in a bind, albeit a self-created one given their business model. They have every reason to prioritize satisfying business customers, potentially at the cost of individual plaintiffs and societal goals. Reform, then, must come from outside of the arbitration system rather than from within.

The second principle is that any law or rule requiring court enforcement of mandatory fees will undercut the purpose of arbitration and likely be insufficient. As is apparent through the individual and mass-arbitration efforts that have ended up in court,²⁹⁵ post-hoc enforcement, including by courts themselves, complicates and slows down what is intended to be an efficient and informal process. Moreover, courts should not and likely cannot police the Reverse Default Judgment Rule. As Martin Malin has explained, allowing defendants to incorporate “excessive fees to plaintiffs in the agreements that the defendants themselves drafted,” with the only check coming from court review after the fact, “allow[s] defendants to game the system” and “invites them to, in effect, negotiate with the court,” for example by voluntarily agreeing to pay fees only for the specific plaintiff who has gone

²⁹³ Malin, *supra* note 222, at 396.

²⁹⁴ See discussion *supra* Section II.B (noting the arbitration industry’s heavy reliance on repeat business); see also Horton, *supra* note 22, at 649-50 (describing JAMS’s abandonment of existing rules after corporate customers “made clear that there were other alternative forums” (quoting Philip Allen Lacovara, *Class Action Arbitrations: The Challenge for the Business Community*, 24 ARB. INT’L 541, 546 (2008))).

²⁹⁵ See discussion *supra* Section II.A (describing individual arbitration cases); discussion *supra* Section II.B (describing mass-arbitration cases).

to court, mooting the issue in that case but leaving the same fee arrangements in place for its thousands or millions of other contracts.²⁹⁶

The shortcomings of a piecemeal, court-review approach can be seen in California's recent push to make arbitration fee payments more equitable. The state in 2021 amended its Civil Code to include a requirement that, in consumer arbitration claims, "if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration"²⁹⁷ On its face, this rule would seem to solve the Reverse Default Judgment issue by mandating that failure to pay results in traditional default judgment.

The key flaw, though, is that the only way plaintiffs can obtain relief under California's law is to go to court, and such relief is on an individual, case-by-case basis.²⁹⁸ Although a few plaintiffs have indeed gone to court to enforce the California law,²⁹⁹ it is unlikely that the average individual, small-dollar plaintiff without legal counsel would even be aware of the law, much less be willing and able to bring a claim under the law in court.³⁰⁰ Courts' interpretation of the law has also lead to perverse and absurd results, such as holding that the question whether a defendant failed to pay its required fees must go to the very arbitration process that had already refused to hear the case as a result of the defendant's failure to pay fees,³⁰¹ and that an arbitration

²⁹⁶ Malin, *supra* note 222, at 391-92.

²⁹⁷ CAL. CIV. PROC. CODE § 1281.97(a)(1).

²⁹⁸ *See* CAL. CIV. PROC. CODE § 1281.97(b) ("If the drafting party materially breaches the arbitration agreement . . . the employee or consumer may . . . [w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction.").

²⁹⁹ *See, e.g., Daniels v. Securitas Sec. Servs. USA, Inc.*, No. SACV 18-00265C, 2021 WL 2322938, at *2 (C.D. Cal. May 27, 2021) (allowing a plaintiff to withdraw claims from arbitration and instead litigate them in court); *Tapia v. Braiform Enters., Inc.*, No. SACV 19-2434, 2020 WL 5167740, at *3 (C.D. Cal. July 17, 2020) (granting a plaintiff's motion to lift the stay of proceedings because the defendant-company was in default of arbitration).

³⁰⁰ The burden of going to court is particularly onerous on individual plaintiffs, given the opportunity for defendant-companies to appeal and further complicate and delay the process. *See, e.g., Le v. United Med. Imaging, Inc.*, No. G059522, 2021 WL 5999194, at *1 (Cal. Ct. App. 4th Dist. Dec. 20, 2021) (reversing in part the trial court's finding that defendants violated California law by refusing to pay required fees).

³⁰¹ *See, e.g., Mesachi v. Postmates, Inc.*, No. 20-CV-07028, 2021 WL 736270, at *4-5 (N.D. Cal. Jan. 8, 2021) (holding that the issue of a defendant's failure to pay initiation fees required under Section 1281.97 is to be decided by the arbitrator in the first instance); *Farmer v. Airbnb, Inc.*, No. 20-CV-07842, 2021 WL 4942675, at *1 (N.D. Cal. June 1, 2021) (same, in regard to nonpayment of continuing arbitration fees, under Section 1281.98).

provider closing a claim for nonpayment relieves the defendant company of its burden to pay any fees.³⁰²

Even before the new California law, a willing individual could go to court for relief after a business failed to pay its share of fees.³⁰³ The law may help those individuals by codifying the relief available, but it does not do much to protect against businesses using the Reverse Default Judgment Rule to pick off plaintiffs who would not go to court on their own. The ability to proceed as part of a class would solve this problem, but the only possible class members would be those few who had also brought individual arbitration claims—likely a vanishingly small number of plaintiffs.³⁰⁴

Reactive laws, like California's, thus slow down arbitration's supposed efficiency and are unlikely to create beneficial change at a systemic level. Preemptive laws and regulations, governing the structure of the arbitration system itself, therefore offer a better path forward.

2. Tentative Proposals

Based on the above principles, there are a number of potential policies that could prevent or at least minimize the Reversed Default Judgment Rule's unfairness. This subsection addresses both statutory and administrative responses to the Reverse Default Judgment Rule, as well as the potential role of private actors.

a. *Statutory Responses*

Legislators can confront arbitration's Reverse Default Judgment problem using an array of tools, some more blunt and aggressive than others. As an initial matter, it bears noting that Congress has already introduced a sweeping arbitration bill, the Forced Arbitration Injustice Repeal ("FAIR") Act of 2022, which would prohibit mandatory arbitration agreements in consumer and employment contracts.³⁰⁵ Although such a bill would potentially moot the Reverse Default Judgment problem for consumers and employees, along with

³⁰² See *Le*, 2021 WL 5999194, at *6 (stating that because the arbitration provider emailed parties stating it would put the claim on hold "unless there [was] a consensus among the parties" as to fee payments, the arbitration "was put on hold *before* the 30-day grace period expired" and the court "accordingly [could not] find defendants breached section 1281.97 by failing to pay fees 'within 30 days'").

³⁰³ See discussion *supra* Section II.A (discussing arbitration plaintiffs who brought their claims to court following defendants' nonpayment).

³⁰⁴ See *supra* note 147 and accompanying text (collecting cases and scholarship suggesting that plaintiffs who have individually escaped an arbitration clause generally may not represent a class of individuals who are still bound by the same arbitration clause).

³⁰⁵ Forced Arbitration Injustice Repeal Act, S.505, 117th Cong. (2022).

other procedural and substantive concerns about forced employment and consumer arbitration, the FAIR Act has seemingly stalled in the Senate Committee on the Judiciary and appears unlikely to pass in the foreseeable future.³⁰⁶

In light of the political headwinds acting against sweeping arbitration reform, the policy recommendations described in this subsection present a more targeted and thus potentially more feasible approach to countering the Reverse Default Judgment Problem.

The first and most achievable step is to require arbitration providers to disclose information about not only claims that proceed to arbitration (i.e., claims where the required initial fees were paid), but also data on claims abandoned or settled prior to complete fee payment. This measure will provide needed clarity on the effects of the Reverse Default Judgment Rule and can help inform additional policy.

Next, lawmakers need to raise the standards for arbitration clause disclosures to include meaningful notice about the Reverse Default Judgment Rule.³⁰⁷ As it stands, a clause stating that the business will pay its required fees to initiate arbitration is highly misleading, given that businesses have little incentive to actually pay. Arbitration clauses should be required to include language expressly explaining the Reverse Default Judgment Rule, such as “If the business refuses or otherwise fails to pay its required fees, you will be asked to pay these fees, or else the provider may terminate your claim for nonpayment and you may proceed to court.” Such language would be more consistent with the goals of clear notice and transparency to which arbitration providers purport to adhere. The AAA, for example, states that individual plaintiffs “should have clear and adequate notice of the arbitration provision and basic information regarding the process at the time of assent.”³⁰⁸ Such disclosure would at least allow consumers and employees to make more informed choices about arbitration.

³⁰⁶ See *S.505, Forced Arbitration Injustice Repeal Act (All Actions)*, U.S. CONG., <https://www.congress.gov/bill/117th-congress/senate-bill/505/all-actions?overview=closed#tabs> (last visited Nov. 1, 2022) [<https://perma.cc/XA6T-SR7E>] (summarizing the latest action on the bill as “03/01/2021 Read twice and referred to the Committee on the Judiciary”); Glover, *supra* note 164 at 1312–13 (describing fierce opposition from the defense coalition to the passage of the FAIR Act and concluding that “the passage of broad arbitration reform remains unlikely”).

³⁰⁷ See Noll, *supra* note 275, at 1034 (recommending regulation of “specific contract terms such as those governing filing fees and the forum in which claims are litigated or arbitrated” because doing so can “control terms that disrupt” congressional intent behind private enforcement statutes, “while leaving space for parties to capture the benefits of designing dispute resolution procedure by contract”).

³⁰⁸ AAA 1998 CONSUMER PROTOCOLS, *supra* note 106, at 26.

Disclosure alone, however, will not solve the underlying problem that arbitration's "capped" fee payments are largely illusory and defendant-companies are incentivized to ignore claims. As a preliminary step toward addressing this larger problem, new rules are needed to differentiate between a business that has strategically chosen not to pay its required fees and a business that has simply not received or overlooked notice of the claims against it.³⁰⁹ An innocent failure to respond might occur, for example, if the plaintiff did not adequately serve notice of the claim. Lawmakers can remedy this problem by requiring businesses to include in every arbitration clause contact information through which they will accept service of process. Such a requirement would remove any ambiguity or defense around whether the business had been adequately notified of the claim.

Lawmakers should also require arbitration providers to keep business contact information on file, at least after the first time that the provider has arbitrated a case involving the business. Such a requirement could be as minimal as simply listing an email or fax address for service of process, which would align with keeping arbitration as an efficient and informal procedure compared to the courts, where there are generally heightened requirements for service of process.³¹⁰

Lawmakers should also consider laws specific to the Reverse Default Judgment Rule itself. If data on total claims filed shows that the Reverse Default Judgment Rule does not have a major effect—i.e., that the total number of claims filed is not significantly higher than the total number of claims that go to arbitrators—a straightforward solution would be to simply prohibit arbitration providers themselves, rather than pre-paid arbitrators, from dismissing claims for nonpayment. With this measure in place, arbitration providers would "grant any remedy, relief, or outcome that the parties could have received in court," including default in the event of the defendant-companies' nonpayment.³¹¹ Similarly, a law like California's that specifically requires courts to enter default against a defendant that fails to pay its required arbitration fees in a specific individual claim could be

³⁰⁹ Courts can already protect defendant-companies that are genuinely unable to afford arbitration costs. *See, e.g.,* *CellInfo, LLC v. Am. Tower Corp.*, 506 F. Supp. 3d 61, 67 (D. Mass. 2020) ("[O]nly upon a satisfactory showing that the non-paying party acted in good faith and under a genuine indigency—inadvertently causing the premature termination of the arbitration proceedings—would lifting a stay and adjudicating in court be appropriate.").

³¹⁰ *See* FED. R. CIV. P. 5(b) (detailing service of process requirements).

³¹¹ AAA CONSUMER RULES, *supra* note 21, at r. 44(a); *accord* AAA EMPLOYMENT RULES, *supra* note 125, at r. 39(d) ("The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court . . ."); *see also* JAMS RULES, *supra* note 29, at r. 24(c) ("The [a]rbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement . . .").

tweaked to entitle or require courts to enjoin the company from compelling arbitration against any plaintiff bound by the same contractual language.

The issue is trickier if data reveals that the Reverse Default Judgment Rule has a significant effect—i.e., that many claims are dismissed pursuant to the Rule before they ever reach an arbitrator. If this is the case, arbitration providers may not have the resources to handle what would be a huge increase in the number of claims demanding arbitrator review if the Reverse Default Judgment Rule were simply eliminated.³¹² Short of requiring that arbitration providers send all unpaid claims to arbitrators to review and enter default judgment, lawmakers could also disincentivize business reliance on the Reverse Default Judgment Rule by, for example, setting up a public fund for loaning arbitration providers any fees beyond the few hundred dollars received from plaintiff consumers and employees. Such a public fund would conform to the original intentions of early arbitration stakeholders, who in the 1931 AAA Rules found that the only two ways for arbitration to “approximat[e] the integrity [of] a judicial proceeding” would be to have arbitrators serve on an honorary basis or to draw arbitrator fees from a “public fund.”³¹³ Given that arbitrators no longer serve on an honorary basis and instead have made it a profession, establishing a public fund provides the best possibility for ensuring procedural fairness in private arbitration.

Under the public fund policy, arbitrators would receive upfront payment rather than having to seek payment from some combination of individual plaintiffs, who might not have enough money to pay the full fees, and businesses, who have little incentive to pay thousands of dollars for the privilege of being sued. Such a fund would not only take the financial pressure off of the individual consumers and employees who would otherwise abandon their claims as a result of the Reverse Default Judgment Rule, but it also would incentivize companies to pay the required fees, knowing that if they did not, the debt collector would be a well-resourced government agency rather than an individual plaintiff. Such a scheme would be consistent with the views of arbitration stakeholders at the time of the FAA’s passage, who posited in the 1931 AAA Rules that “industry and commerce should voluntarily tax themselves to maintain [the benefits of arbitration] to

³¹² See Resnik, *supra* note 143, at 2813 (“[W]ere arbitration providers to be in high demand, their capacity to respond would be limited.”); cf. Glover, *supra* note 164, at 1363 (“The AAA or JAMs, however, could easily handle \$50 million worth of claims across a large set of individual proceedings. Scaling up these fora . . . is largely a matter of logistics.”).

³¹³ AAA 1931 RULES, *supra* note 88, at 185; see also AAA 1931 SUPPLEMENT, *supra* note 91, at 17-18 (“Under [the fixed payment] schedule, each party pays at the same rate and arbitrators generally receive no compensation, thus avoiding the employment of private judges by parties.”).

industry.”³¹⁴ An additional benefit of such public funding for arbitration would be the opportunity for the government to use its enormous leverage to negotiate reduced claim-initiation fee rates with arbitration providers on behalf of all parties, much like businesses have already done on their own behalf following mass-arbitration claims.³¹⁵

Even better than the government just fronting the costs of private arbitration services would be the creation of a parallel public arbitration service providing an alternative forum for the kinds of employment and consumer claims that now go to private arbitration services. This proposal would not require completely replacing private arbitration providers with a government program or making providers quasi-public entities reliant on payment from the government rather than private parties, but could instead be created as a “public option” that would compete against private providers and hopefully keep their fees and practices in check. Unlike the court system, which plaintiffs bound by arbitration clauses can access only once the defendant breaches the agreement by failing to pay its fees, a public-option arbitration service would be immediately available as an alternative to the private arbitration providers.³¹⁶ Of course, as with the public option for health insurance, such a plan would almost certainly meet resistance from private interests—the providers themselves—and might lack the political will for passage.³¹⁷ But with mass-arbitration efforts putting the pressure on

³¹⁴ AAA 1931 SUPPLEMENT, *supra* note 91, at 44.

³¹⁵ See discussion *supra* Section II.B.

³¹⁶ Courts actually have some experience administering arbitration services. As Resnik, Garlock, and Wang note:

[In] ‘court-annexed arbitration’ courts send parties who have filed lawsuits to lawyers who serve as arbitrators and are authorized to render decisions that could end the dispute. These arbitrations are governed by court-produced public rules, and some of them take place in courthouses or other venues to which the public may have access.

Resnik et al., *supra* note 161, at 633. Scholars have noted that such programs “vary widely.” Robyn Weinstein & Lance Bond, *Visions for the Future: Diversity and Inclusion Initiatives in Court-Annexed ADR Programs*, 22 CARDOZO J. CONFLICT RESOL. 499, 501 (2021). Importantly, for the purposes of this Article, “[t]hese court-connected programs apply where parties have not contractually agreed to submit their disputes to private, binding arbitration under the FAA.” Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 592 (2009). In other words, employee and consumer plaintiffs bound by mandatory arbitration clauses do not currently have the option to pursue arbitration through court-annexed programs instead of going to private arbitration providers.

³¹⁷ See, e.g., Julia Rock, *Health Care Lobbyists Are Trying to Block the Public Option at the State Level*, JACOBIN (May 19, 2021), <https://www.jacobinmag.com/2021/05/health-care-insurance-lobbying-ad-campaign-state-public-option-biden> [<https://perma.cc/BQH4-VVB2>] (detailing successful efforts by lobbyists for health insurance companies, hospitals, and pharmaceutical companies to block passage of legislation creating public health insurance options).

businesses and arbitration providers, the current moment may present a singular opportunity to push for such a program.

b. *Administrative Responses*

Government agencies should also play a role in confronting the Reverse Default Judgment problem. As one scholar has suggested, agencies may regulate arbitration in a number of ways, including “data gathering,” “mandating that certain information be shared with the agency or the public,” and “directly regulating how arbitration agreements may be written, up to and including banning such agreements altogether.”³¹⁸ The CFPB has express authority to “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties,”³¹⁹ and other federal agencies, like the Federal Trade Commission (FTC), arguably have implied authority to further regulate arbitration agreements and reporting.³²⁰ Thus, both the CFPB and FTC have the ability to counter the Reverse Default Judgment Rule’s unfair effects.

The CFPB has already engaged in extensive data collection on arbitration³²¹ and has mandated reporting of various data.³²² To its data collection and reporting requirements, the CFPB could also request data on claims dismissed pursuant to the Reverse Default Judgment Rule. If the data shows that the Reverse Default Judgment Rule has a significant effect on arbitration outcomes, the CFPB could then counter the Reverse Default Judgment Rule under its authority to “impose conditions” on consumer arbitration.³²³ Such conditions could include requiring more complete contractual disclosures of arbitration’s fee structures or even requiring that arbitration providers enter default in the event of a company’s nonpayment. The CFPB’s authority is, however, expressly limited to consumer arbitration and therefore would not cover mandatory employment arbitration.³²⁴

The Federal Trade Commission, meanwhile, could act on behalf of both consumers and employees under the Commission’s authority to prevent the use of “[u]nfair methods of competition in or affecting commerce and unfair

³¹⁸ Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 1014 (2017).

³¹⁹ 12 U.S.C. § 5518(b).

³²⁰ See Deacon, *supra* note 318, at 1020 (describing the FTC’s regulation of arbitration).

³²¹ *Id.* at 1015-16.

³²² Arbitration Agreements, 82 Fed. Reg. 55500 (Nov. 22, 2017).

³²³ 12 U.S.C. § 5518(b).

³²⁴ *Id.*

or deceptive acts or practices in or affecting commerce”³²⁵ and its recent partnership with the National Labor Relations Board to “protect workers against unfair methods of competition, unfair or deceptive acts or practices, and unfair labor practices.”³²⁶

Under its authority to prevent deceptive practices, the FTC could require changes to standard arbitration clause language that businesses in employment and consumer disputes “shall pay the bulk of the AAA’s administrative fee and the employee’s portion of the AAA’s administrative fee is capped” at the amount listed in providers’ fee schedules,³²⁷ given that such language is potentially deceptive in obscuring the possibility that the consumer or employee will have to foot the business’ cost under the Reverse Default Judgment Rule.

The FTC could also effect change through its express authority in the area of consumer warranties to “prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty.”³²⁸ Such minimum requirements, in the context of consumer warranties, could include more transparent contractual disclosures and a requirement that arbitration providers enter default as to well-pleaded claims against a defendant-company that has failed to pay its fees. Although these changes would be specifically confined to consumer warranties, they could have a ripple effect and pressure arbitration providers to enact broader rule changes in both consumer and employment arbitration agreements.

The main impediment to the CFPB, the FTC, or any other government agency seeking to curb arbitration’s unfair fee structures is the Supreme Court. The Court has in recent years consistently rejected the authority of agencies to protect consumer and employee rights,³²⁹ including with regard

³²⁵ 15 U.S.C. § 45(a)(1).

³²⁶ FED. TRADE COMM’N, MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL TRADE COMMISSION (FTC) AND THE NATIONAL LABOR RELATIONS BOARD (NLRB) REGARDING INFORMATION SHARING, CROSS-AGENCY TRAINING, AND OUTREACH IN AREAS OF COMMON REGULATORY INTEREST 1 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf [<https://perma.cc/4X59-9RAY>].

³²⁷ *Clausebuilder Tool*, AM. ARB. ASS’N, *supra* note 273.

³²⁸ 15 U.S.C. § 2310(a)(2).

³²⁹ *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022) (per curiam) (holding that “[a]lthough Congress has indisputably given OSHA the power to regulate occupational dangers,” OSHA did not have the authority to regulate the danger of workers contracting COVID-19 in their workplaces); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 161 (2000) (holding that the FDA lacks congressional authorization to “promulgate[] regulations intended to reduce tobacco consumption among children and adolescents”).

to forced arbitration.³³⁰ Lower courts have followed suit, holding, for example, that the FTC’s authority to regulate “informal” dispute settlement procedures does not cover arbitration agreements because arbitration is “formal.”³³¹ That such a reading is inconsistent with the Supreme Court’s definition of arbitration as “informal”³³² shows the lengths to which courts will go in reading agencies out of arbitration enforcement. It is thus quite possible that lower courts and the current Supreme Court would find that agencies lack authority to regulate arbitration’s Reverse Default Judgment Rule. At minimum, though, agency action can bring attention to the unfair nature of the Rule and potentially create public pressure on providers to change their fee structures.

c. *Private Actors*

Arbitration reform need not necessarily come from the government. Arbitration is a private dispute resolution system, and it thus makes intuitive sense that private parties can exert significant control over this system. Indeed, defendant-companies and the defense bar have for decades shaped arbitration rules and procedures³³³ and, as discussed in the above analysis of mass arbitration, continue to do so by pressuring arbitration providers to

³³⁰ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630–32 (2018) (refusing to accord deference to National Labor Relations Board and rejecting its determination that the National Labor Relations Act bars forced individual arbitration of employee disputes); cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–29 (1991) (“[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.”).

³³¹ See, e.g., *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002) (“[G]iven the absence of any meaningful legislative history barring binding arbitration, coupled with the unquestionable federal policy favoring arbitration, we conclude that Congress did not express a clear intent in the MMWA’s legislative history to bar binding arbitration agreements in written warranties.”); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 476 (5th Cir. 2002) (“[B]inding arbitration is not normally considered to be an ‘informal dispute settlement procedure,’ and it therefore seems to fall outside the bounds of the MMWA and of the FTC’s power to prescribe regulations.”); *Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1140 (D. Ariz. 2009) (“[B]inding arbitration is not an ‘informal settlement.’”); *Krol v. FCA US, LLC*, 273 So. 3d 198, 203 (Fla. 5th Dist. Ct. App. 2019) (“[B]inding arbitration is not comparable to the informal dispute settlement procedures described in the MMWA . . .”).

³³² See, e.g., *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1912 (2022) (“This Court’s FAA precedents treat bilateral arbitration as the *prototype* of the individualized and *informal* form of arbitration protected from undue state interference by the FAA.” (emphasis added)); *AT&T Mobility v. Concepcion*, 563 U.S. 333, 348 (2011) (“[T]he switch from bilateral to class arbitration sacrifices the *principal advantage of arbitration—its informality* . . .” (emphasis added)).

³³³ See Horton, *supra* note 22, at 649–50 (describing successful corporate efforts to change arbitration rules).

modify their fee structures.³³⁴ These efforts have led providers to adopt new “test-case” procedures that allow defendant-companies to largely sidestep the enormous fees that mass arbitration would otherwise require.³³⁵

At the same time, mass arbitration demonstrates how private plaintiffs and the plaintiffs’ bar can also effect change in private dispute resolution systems. Although the new test-case rules arguably favor defendant-companies in mass arbitration compared to the prior rules that required upfront payment for all individual claims, these test-case rules can also be viewed as a significant improvement for individual plaintiffs in the sense that they more closely approximate class-action litigation.³³⁶ Mass-arbitration claims, and the growing bar of plaintiff-side lawyers representing such claims, now represent a potentially major source of business for arbitration providers³³⁷ and, in turn, a significant source of leverage to influence the substance of arbitration rules in favor of consumers and employees.

Another largely unexplored source of private-actor employee and consumer influence is the potential for uncoordinated but prolific arbitration filings. Given arbitration’s substantial upfront fees in individual claims,³³⁸ there is a major opportunity for individual consumers and employees to bring scattershot claims against companies and negotiate settlements for amounts less than the upfront fees and staffing costs the companies would incur by defending themselves. Unscrupulous plaintiffs could take this kind of action regardless of the merits of their underlying claims—think of such plaintiffs as “arbitration trolls” bringing what amounts to nuisance suits purely for financial gain. Although we could question the ethics of bringing such claims, they might nonetheless lead to positive change by further revealing the flaws in arbitration’s fee structures and forcing defendant-companies and arbitration providers to adapt.

A less cynical approach would entail unions and consumer and employee advocacy groups fostering more legitimate consumer and employee claims, albeit with less coordination than in mass-arbitration claims. This strategy

³³⁴ See discussion *supra* Section II.B (detailing successful corporate efforts, with the assistance of corporate defense firms, to alter providers’ mass-arbitration rules).

³³⁵ See discussion *supra* Section II.B (noting the adoption of test-case procedures by the AAA, JAMS, and CPR).

³³⁶ See Glover, *supra* note 164, at 1369 (noting that the new batch-case rules mean defendants may be “stuck with an arbitration that looks like a class action or an MDL consolidation”); see also *id.* at 1326-28 (documenting the growing number of mass-arbitration-focused law practices, with support from litigation-funding investment firms).

³³⁷ See discussion *supra* Section II.B (detailing the millions of dollars in upfront fees and hearing costs that arbitration providers stand to make from mass-arbitration claims).

³³⁸ See discussion *supra* Section II.A (calculating individual arbitration fees for defendant-companies).

could involve providing educational and financial resources for individual arbitration plaintiffs and offering informal, unpaid assistance once the arbitration process begins.

Loose assistance of this nature would mirror organized labor's involvement in "improvisational" employee efforts, like spontaneous walk-outs, that have helped lead the charge for initiatives like raising the minimum wage.³³⁹ Such improvisational organizing involved less oversight—and lower costs—for unions compared to typical labor union organizing campaigns, but unions nonetheless played an important role by sending organizers to seed the worker-led movements; spreading awareness of the campaigns online; and creating guides, or "kits," for employees to use as a template for initiating their own actions without the need for direct union assistance.³⁴⁰ These efforts successfully led to higher wages for employees in numerous cities around the country.³⁴¹

If unions and consumer groups applied a similar strategy to arbitration—seeding the idea that consumers and employees can and should arbitrate disputes against companies and providing educational resources to do so—such a tactic could put companies on the defensive in much the same way that the mass-arbitration movement has. Companies faced with increasing numbers of individual arbitration claims, even if those claims are only loosely coordinated, might embrace changes to arbitration fee structures or even follow Amazon in abandoning mandatory arbitration clauses altogether.³⁴²

* * *

Lawmakers, agencies, and private actors all have significant opportunity to confront the Reverse Default Judgment Rule. The first step in the process, though, is to require adequate data reporting on claims dismissed pursuant to the Reverse Default Judgment Rule. If and when this happens, policymakers and private actors will be better equipped to craft the appropriate responses.

³³⁹ See generally Michael M. Oswald, *Improvisational Unionism*, 104 CALIF. L. REV. 597 (2016) (recounting the rise and successes of "improvisational unionism").

³⁴⁰ *Id.* at 606, 620, 625.

³⁴¹ See *id.* at 630-31 (noting that cities like Seattle, San Francisco, and New York have all adopted some form of a \$15 minimum wage law following improvisational worker collective actions).

³⁴² See Randazzo, *supra* note 194 (detailing Amazon's abandonment of binding arbitration after 75,000 consumers filed mass-arbitration claims).

CONCLUSION

The Reverse Default Judgment Rule has created a system in which individual plaintiffs can be forced to front thousands of dollars just to have even small-dollar claims heard by an arbitrator. Plaintiffs have for decades sought to overturn arbitration based on excessive upfront costs, but now defendants too are feeling a similar uneasiness about these costs as a result of the mass-arbitration movement. As a new era of arbitration dawns, there is a unique opportunity to confront the Reverse Default Judgment Rule's effects and propel changes that will make arbitration a more accessible and fairer forum for consumers and employees.