Labaton
Keller Sucharow

THE ADVOCATE

NEW YORK · DELAWARE · LONDON · WASHINGTON, D.C.

2025 MID-YEAR REPORT

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EXECUTIVE SUMMARY

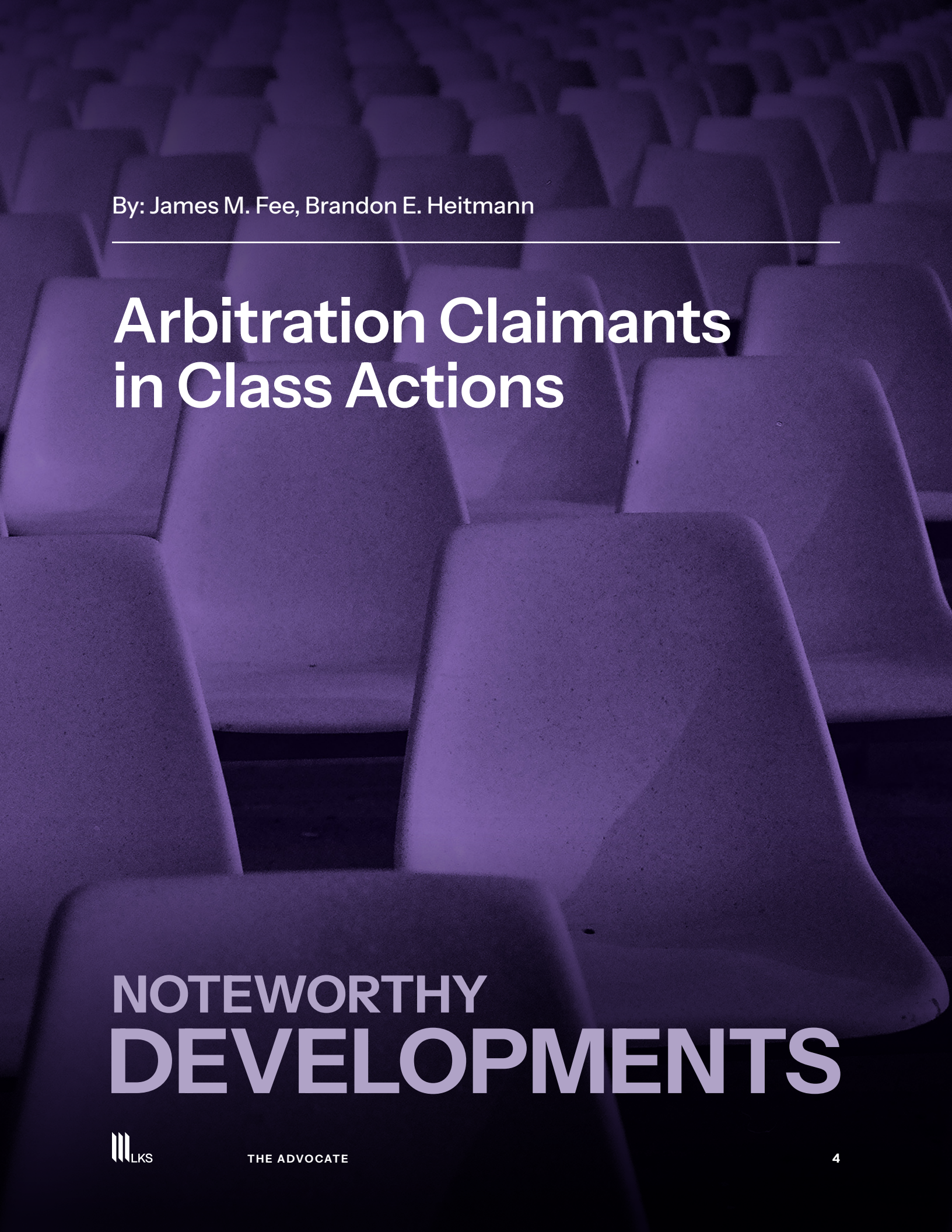
Labaton Keller Sucharow is pleased to present *The Advocate: 2025 Mid-Year Report*. Standing on the horizon of law and technology, Labaton Keller Sucharow's Alternative Dispute Resolution Practice is one of the nation's premier practices focused on representing consumers and investors in large volume arbitrations, or so-called mass arbitrations. The Alternative Dispute Resolution Practice represents clients in cases as diverse as data privacy, including wrongful data collection, data sharing, and data breaches, consumer banking, predatory lending, unfair and deceptive practices, and securities.

Labaton Keller Sucharow continually monitors for opportunities to help consumers and investors assert their legal rights in individual arbitration where they have previously been barred from doing so by a class action waiver and mandatory arbitration clause.

Featured in this edition:

- How companies are attempting to sweep arbitration claimants into class action settlements and what claimants can do to protect their interests;
- An emerging legal debate over how 1980's privacy regulations can be applied to protect consumers in the digital era;
- What recent updates to AAA rules mean for consumers and workers seeking to vindicate their rights through arbitration proceedings; and
- An overview of arbitration filings and results in 2024.

We would be happy to provide comprehensive assessments and recommendations regarding any of the topics discussed or highlighted in *The Advocate*.



By: James M. Fee, Brandon E. Heitmann

Arbitration Claimants in Class Actions

NOTEWORTHY DEVELOPMENTS

When mass arbitrations first proliferated, defendants frequently struck class action settlement agreements with burdensome opt-out procedures such that any individual seeking to pursue their claims in arbitration would be subsumed in the class settlement. This tactic was met with vehement resistance by the plaintiffs' bar as well as with skepticism by the courts, which often found that burdensome opt-out procedures in the face of thousands of known arbitration claimants were not enforceable. Accordingly, defendants scaled back their attempts to subsume arbitration claimants into class action settlements. Recently, however, defendants have renewed their efforts to include arbitration claimants in class actions. This has led to heightened scrutiny by courts and raised questions about whether individuals who have retained counsel and demanded arbitration should be included in settlement class definitions at all. This article provides background on the issue and examines two recent decisions in the Northern District of California regarding the inclusion of arbitration claimants in class definitions.

Arena v. Intuit Inc. was one of the first cases to question the motive of a class action settlement when a company was facing thousands of arbitration claims. In *Arena*, "tens of thousands of Intuit customers [had] already begun individually arbitrating analogous claims against Intuit[]" when the defendants reached a settlement in a concurrent class action regarding similar claims.[1] The proposed *Intuit* settlement sought to prevent any arbitration claimants from continuing to pursue their claims through burdensome opt-out procedures—seemingly designed to stymie any arbitration claimant's attempt to opt out from being successful.[2] Accordingly, the arbitration claimants moved to intervene in the class action to oppose preliminary approval.

In denying preliminary approval of the settlement, the *Arena* court took particular issue with the opt-out procedures that had prompted the arbitration claimants to intervene.[3] The court noted "several troubling features" of the proposed opt-out process, including "a 'wet ink' (not electronic) signature," "opt outs to be mailed in hard copy," and "not permit[ing] opting out through counsel." Such "opt out

[1] *Arena v. Intuit Inc.*, No. 19-CV-02546-CRB (N.D. Cal. Mar. 5, 2021). 2021 WL 834253 at *4.

[2] *Id*. at *6.

[3] *Id*. at *8.

requirements . . . are unduly burdensome given the unique circumstances of this litigation," *i.e.*, a situation where thousands of absent class members are actively seeking resolution of their claims through arbitration.[5]

After *Arena*, defendants appeared to have little interest in subsuming arbitration claimants' claims in class action settlements, at least until recently. In *In re 23andMe Customer Data Security Breach Litigation*, despite being on notice of thousands of arbitration claimants represented by several different firms, 23andMe nonetheless sought preliminarily approval of a class action settlement that would not only enjoin the continued prosecution of arbitrations but also enforce burdensome opt-out requirements that would prevent arbitration claimants from opting out electronically or through counsel.[6] Five firms representing arbitration claimants, including Labaton Keller Sucharow LLP, moved to intervene and opposed preliminary approval of the 23andMe data breach class action settlement.[7] The arbitration claimants argued that "the settlement class definition is improper because it does not exclude the Arbitrating Objectors, the Arbitrating Individuals, and others who have sought arbitration from the settlement class. In the alternative, the Arbitrating Objectors contend that, if these groups are part of the settlement class, then they have already opted out by seeking arbitration, or all groups should be allowed to opt out immediately through their counsel (*i.e.*, instead of individualized opt-outs, their counsel will opt them out 'en masse')."

The *23andMe* court agreed with the arbitration claimants' objections and ordered that the settlement class definition be modified to "exclude those 23andMe customers who have chosen to exercise their right to arbitrate, whether by making a mere demand for arbitration or by filing a formal complaint with the arbitral forum."[8] The *23andMe* court first noted that "[t]here is a question whether those who are bound by an enforceable arbitration clause can be included in a certified class given potential concerns about typicality/adequacy."[9] "Regardless, there is a basic problem with including those who have opted to arbitrate in the class. If an individual has chosen to arbitrate, they have chosen not to litigate; including the

[4] *Id*. at *10.

[5] *Id*. at *11.

[6] *In re 23andMe, Inc. Customer Data Sec. Breach Litig.*, No. 24-MD-03098-EMC (N.D. Cal. Dec. 4, 2024). 2024 WL 4982986 at *1.

[7] *Id*.

[8] *Id*. at *12.

[9] *Id*. at *11.

individual in the class amounts would force them into litigation in derogation of their right to arbitrate."[10]

In 2025, arbitration claimants have had continued success opposing defendants' renewed attempts to subsume their claims into class action settlements. In *In re Google Assistant Privacy Litigation*, the court added to the *23andMe* court's consideration of whether arbitration claimants who are represented by counsel should be included in a class action at all. In *Google*, 69,507 arbitration claimants submitted a unitary request, through their counsel, for exclusion from the class action settlement. Arbitration claimants' counsel represented that the 69,507 individuals retained them to pursue their privacy claims against Google in arbitration, had notified Google of that intention prior to the class action settlement being reached, and authorized counsel to opt them out of any class action. In response, despite *23andMe*, Google filed a motion to reject the 69,507 arbitration claimants' requirement for exclusion through counsel on the basis that it did not comply with the technical requirements of the class notice. However, the court had "little hesitation in denying Google's motion." Further, "Arbitration Claimants *did* make an individualized decision to retain Labaton's legal services and to opt out from the Class in order to pursue claims in arbitration. The Court sees no reason why the Arbitration Claimants may not act through their attorneys in executing those requests to opt out of the Class."

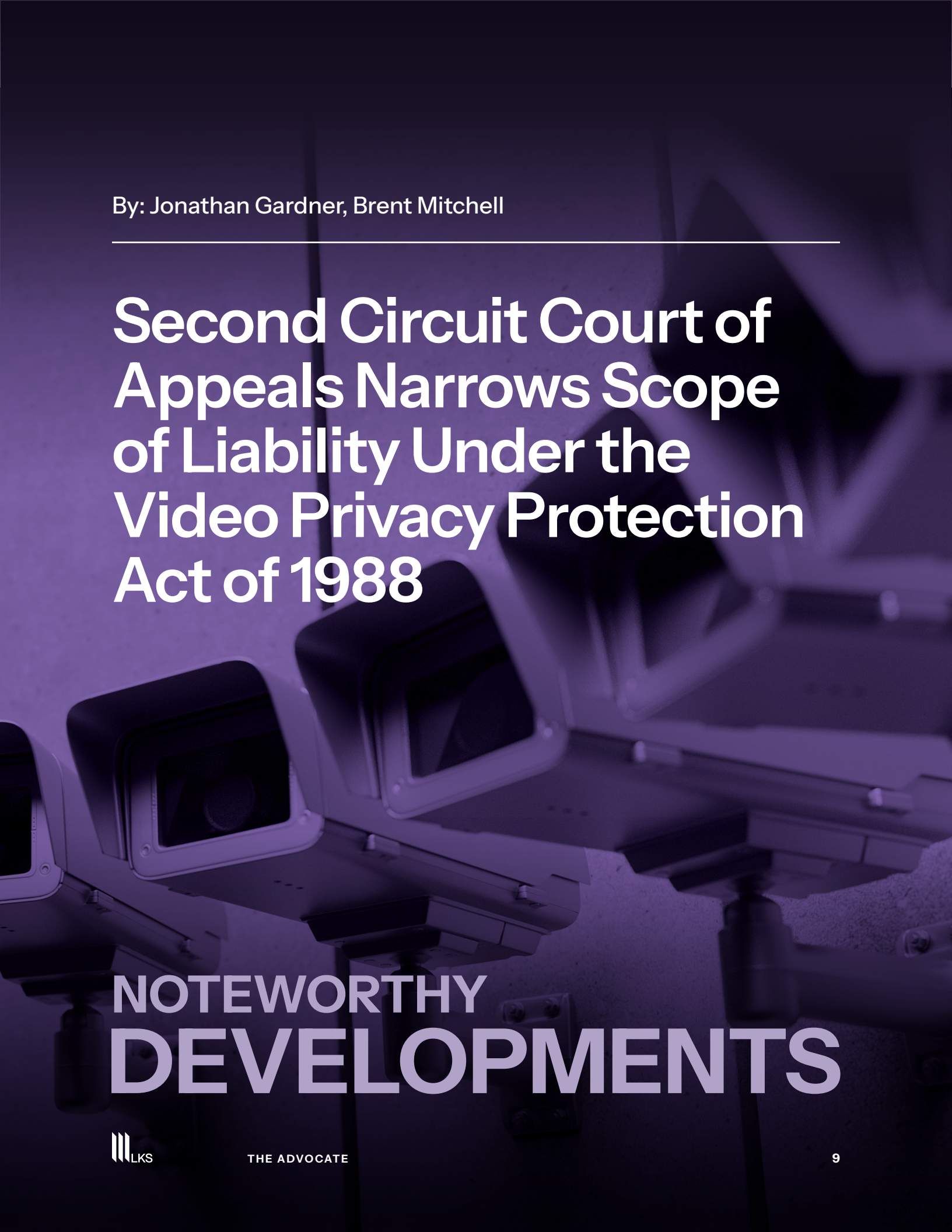
The recent decisions in *23andMe* and Google highlight questions courts are beginning to ask about arbitration claimants' inclusion in class actions, despite already notifying the defendants of their intention to arbitrate pursuant to the terms of use defendants themselves drafted. Thus far, courts appear willing to effectuate an individual's informed choice to proceed with their claims in arbitration rather than litigation. After all, an individual who has retained a law firm to pursue their claims in arbitration, given notice to a company of his or her claims, and acted upon that intention should not be forced to jump through numerous hoops to opt out of a class action settlement for the privilege of continuing to pursue his or

[10] *Id.*

her claim in arbitration. As long as there is a discrete group of claimants represented by law firms that come forward to oppose a class action settlement to pursue arbitration claims, courts appear willing to effectuate their intent by either specifically excluding them from class definitions or permitting opt outs via single communication made through counsel.

By: Jonathan Gardner, Brent Mitchell

Second Circuit Court of Appeals Narrows Scope of Liability Under the Video Privacy Protection Act of 1988



NOTEWORTHY DEVELOPMENTS

In its recent decision in *Solomon v. Flipps Media, Inc.*, the Second Circuit rejected a consumer's attempt to recover from an online video streaming service provider who knowingly provided certain user information, including the titles of videos and URLs accessed by the user as well as the user's Facebook ID ("FID"), to third-party Facebook Inc. ("Facebook").[1] Solomon brought suit under the Video Privacy Protection Act of 1988, 18 U.S.C. §2710 (the "VPPA"), which the Second Circuit concluded had not been violated as the information that was disclosed was not "the kind of information that would readily permit *an ordinary person* to identify a specific individual's video-watching behavior."[2] Although a petition for *en banc* review of the decision remains pending, if the opinion stands, it has important implications for both companies and claimants attempting to understand their duties, rights, and remedies available under the VPPA.

BACKGROUND

Plaintiff-appellant Detrina Solomon was a subscriber to a video streaming service operated by Flipps Media, Inc. d/b/a FITE, d/b/a FITE TV ("FITE"). FITE is a digital streaming company that offers a range of video content, including sports and entertainment, through its website and associated applications. FITE embedded the Facebook Pixel, a string of JavaScript of code that provides insights into how users interact with Facebook ads, into its website. Companies like FITE often use the Facebook Pixel to collect information on user interactions with their websites, including the items they purchase and the content they consume. The Facebook Pixel offers the optional "PageView" feature, which permits the Pixel to capture the URL and video title of each video that a user accesses, as well as a user's FID a unique sequence of numbers linked specifically to her profile on Facebook.[3]

Solomon sued FITE on behalf of subscribers and purchasers of FITE's streaming services alleging that FITE, using the Facebook Pixel, shared sensitive user information to Facebook whenever subscribers streamed a video in violation of the VPPA. Solomon alleged that the user information that FITE shared to Facebook through the pixel included her FID and the titles of videos and URLs

[1] *Solomon v. Flipps Media, Inc.*, 136 F.4th 41 (2d Cir. 2025).

[2] 136 F.4th at *49 (emphasis added).

[3] *Id.* at *45, *46.

that she visited on FITE's website.[4] Solomon alleged that FITE violated the VPPA because it was a video service provider that "knowingly disclose[d]" personally identifiable information ("PII") about her to Facebook.[5] Because it was "undisputed that FITE is a video service provider that knowingly disclosed certain information about Solomon to Facebook—namely, computer code that denoted the titles and URLs of the video Solomon accessed and her FID," the "principal question" at issue for the Second Circuit was what constitutes PII.[6]

THE SECOND CIRCUIT'S DECISION

The Second Circuit in *Solomon* affirmed the district court's dismissal of Solomon's claims, which the district court dismissed for failure to plausibly allege that FITE disclosed PII under the VPPA. In interpreting the VPPA, the Second Circuit identified a divergence amongst other federal circuit courts, explaining "[t]wo approaches have emerged: (1) the reasonable foreseeability standard and (2) the ordinary person standard." The former, upheld in the First Circuit, holds that PII includes not only information that explicitly names a person, "but also includes information disclosed to a third party that is 'reasonably and foreseeably likely to reveal which . . . videos [the plaintiff] has obtained.'"[7] The latter, which is the standard applied in the Third and Ninth Circuits, holds that "the [VPPA's] prohibition on the disclosure of [PII] applies only to the kind of information that would readily permit an ordinary person to identify a specific individual's video—watching behavior."[8]

In affirming the decision of the district court, the Second Circuit explicitly "adopt[ed] the Third and Ninth Circuits' ordinary person standard," and "applying that standard," concluded that "the Complaint fails to state a claim for violation of the VPPA."[9]

The Second Circuit began by interpreting the language of the VPPA, which states that PII "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[10]

[4] *Id*. at *43.

[5] *Id*. at *44.

[6] *Id*. at *47.

[7] *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016).

[8] *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 267 (3d Cir. 2016); *see also Eichenberger v. ESPN, Inc.*, 876 F.3d 979 (9th Cir. 2017).

[9] *Solomon*, 136 F.4th at *51.

[10] 18 U.S.C. § 2710(ad)(3).

The Second Circuit explained that the use of the words "includes" and "identifiable" "suggest that [PII] includes information that *can be used* to identify a person, as well as information that, standing alone, identifies a person."[11] While the Second Circuit "acknowledge[d] that these words could also be read to encompass computer code and digital identifiers decipherable only by a technologically sophisticated third party[,]" the court nonetheless said that "they are more naturally read as referring to information that would permit an ordinary person to learn another individual's video-watching history."[12]

The Second Circuit then explains that the context—both in which the words are used and in the broader statute as a whole—support the ordinary person standard for liability under the VPPA. First, the VPPA imposes liability on service providers that "knowingly" provide PII. Citing the Ninth Circuit in *Eichenberger*, the Second Circuit explains that this "looks to what information a video service provider discloses, not to what the recipient of that information decides to do with it," and agrees that the ordinary person standard "better informs video service providers of their obligations under the VPPA."[13] The Second Circuit also notes that the VPPA was passed in 1988, where "the Internet had not yet transformed the way that individuals and companies use consumer data," and that in 2013, Congress declined to amend the definition of PII even following testimony asking to expand the definition to include IP addresses.[14] The Second Circuit also contrasted the VPPA with other privacy statutes like the Children's Online Privacy Protection Act ("COPPA"), which it said had a "more expansive definition of [PII] or related terms."[15]

Ultimately, the Second Circuit concluded that "the VPPA was not intended to create liability where a third party is able to 'assemble otherwise anonymous pieces of data to unmask the identity of individual [users]'" and that "[h]olding otherwise would make 'the lawfulness of a disclosure depend on circumstances outside of a video service provider's control."[16]

[11] 136 F.4th at *52 (*emphasis in original*).

[12] *Id*.

[13] *Id*. at *51-52 (citing *Eichenberger*, 876 F. 3rd at 985).

[14] *Id*. at *53.

[15] *Id*.

[16] *Id*. at *54.

In assessing whether the FITE's use of the Facebook Pixel violated the ordinary person standard, the court looked at an "exemplar screenshot" of the computer code found on the Pixel's PageView.[17] While "the video title" accessed by Solomon was "indeed contained" in the code, the court found it "implausible" that an ordinary person would identify the specific phrase of code containing the video title among all of the lines of code that are visible on the Pixel's PageView.[18] Similarly, the court explained that the FID "would be just one phrase embedded in many other lines of code" such that "it is not plausible that an ordinary person . . . would see the 'c_user' phrase on FITE's servers and conclude that the phrase was a person's FID."[19]

Accordingly, the Second Circuit held that "Solomon failed to plausibly allege that FITE disclosed [PII] in violation of the VPPA."[20] While the Second Circuit claims to have adopted the Third and Ninth Circuits' "ordinary person" standard in reaching its decision, the scope of liability articulated by the court in Solomon is arguably narrower in practice than those other Circuits, as neither has gone so far as to exclude a user's FID from the definition of PII.[21]

The Second Circuit's decision constitutes the latest installment in an emerging circuit split concerning the statutory interpretation of PII as it is used in the VPPA. In siding with the Third and Ninth Circuits' "ordinary person" standard, the Second Circuit has opted for a narrower view of liability under the VPPA than its First Circuit counterpart. Consumers interested in safeguarding their online privacy and companies that provide online video streaming services should each be aware of these developments as they define a consumer's rights and a video streaming service company's duties under the VPPA. Notably, consumers should be aware that information which can be used by sophisticated third parties to identify an individual and the video content they access online will not necessarily give rise to a claim under the VPPA, unless that consumer can plead in detail "*how* an ordinary person" would use the disclosed information to identify that consumer.[22]

[17] *Id*. at *54.

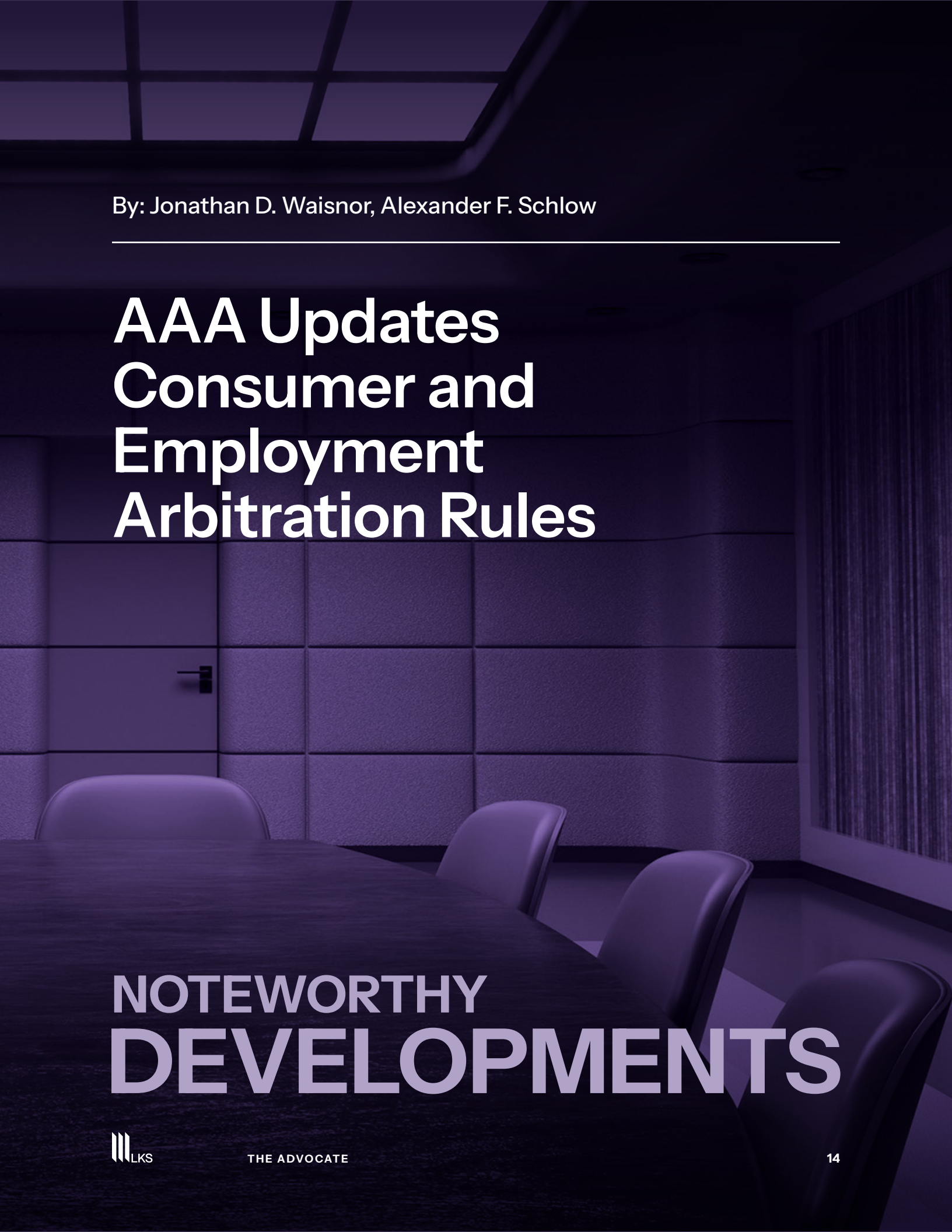
[18] *Id*.

[19] *Id*.

[20] *Id*. at *55.

[21] *See, e.g., In re Hulu Priv. Litig.*, No. C 11–03764 LB, 2014 WL 1724344 (N.D. Cal. Apr. 28, 2014) (The FID "is more than a unique, anonymous identifier. It personally identifies a Facebook user."); *see also Lee v. Springer Nature Am., Inc.*, 2025 WL 692152, at *13 (S.D.N.Y. Mar. 4, 2025) (noting that the Third and Ninth "Circuits have held that most digital identifiers are too technical to qualify as PII, while holding open the possibility that a[n] [FID] may be useful enough to a lay person to qualify.").

[22] 136 F.4th at *54 (*emphasis on the original*).



By: Jonathan D. Waisnor, Alexander F. Schlow

AAA Updates Consumer and Employment Arbitration Rules

NOTEWORTHY DEVELOPMENTS

Earlier this year, the American Arbitration Association ("AAA") released updated versions of its widely-used Consumer Arbitration Rules and Mediation Procedures ("Consumer Due Process Protocol") and Employment/Workplace Arbitration Rules and Mediation Procedures ("Employment Arbitration Rules"), which will govern all AAA arbitrations filed on or after May 1, 2025. While these new rules do not fundamentally alter AAA's approach to dispute resolution, there are a number of key differences that may be relevant to individual consumers or workers seeking to vindicate their rights through arbitration proceedings, as summarized in this article.

EXPANDED APPLICABILITY OF EMPLOYMENT RULES

AAA's Employment Arbitration Rules have been updated to specify that they apply to all workplace disputes, whether brought by an employee or an independent contractor. Previous versions of the rules allowed independent contractor agreements to specify different rule sets, which could mean differing requirements and fewer procedural protections for independent contractor claimants.

This revision should ensure uniform treatment of all workers under AAA rules, regardless of how their employer classifies them. The change is especially relevant given that in recent years numerous individuals working for gig economy services, like Uber and DoorDash, have sought to arbitrate their claims that their employer has "misclassified" them as independent contractors rather than employees under relevant law.

CLARIFIED REVIEW PROCESS FOR CONSUMER ARBITRATION CLAUSES

The updated rules more directly require companies to register their arbitration clauses with AAA, including "[a]ny subsequent changes, additions, deletions or amendments" to those clauses.[1] This registration process includes a preliminary administrative review of a company's arbitration clause to ensure "compliance with [the] due process standards contained in the [AAA's] Consumer Due Process

[1] American Arbitration Association, Consumer Arbitration Rules and Mediation Procedures. Business Notification and Publicly Accessible Consumer Clause Registry, R-12.

Protocol." The updated rules further clarify that AAA "will decline to administer consumer arbitrations" if the clause is not registered or the business refuses to waive any provisions that violate the Consumer Due Process Protocol. [2] Like the old rules, the updated rules provide that AAA's decision to allow registration of an arbitration clause is "only an administrative determination," subject to substantive review by an arbitrator on a case-by-case basis.[3]

This clarification is an important step in ensuring that companies cannot simply amend their arbitration clauses in ways that are unfair to consumers in response to new claims, and if a company does attempt such unfair amendment tactics, AAA will decline to administer claims under the amended contract, allowing consumers to instead proceed in court.

DISPUTES REGARDING MULTIPLE VERSIONS OF ARBITRATION AGREEMENTS

The updated AAA rules have been clarified to address the increasingly common situation in which a business and an individual claimant disagree as to which version of an arbitration clause, or which of multiple contracts containing an arbitration clause, governs their dispute. This situation can be tricky because often the different arbitration agreements in question will specify different procedures or different forums, leading to a situation where an arbitrator does not have undisputed authority to rule on the question.

The updated rules address this issue through a two-step process. Where the parties disagree as to the applicable arbitration clause, AAA's administrative staff will "make an initial determination regarding the controlling arbitration provision subject to a final determination by the arbitrator."[4] This clarification provides a straightforward, fair process under which the parties' dispute regarding which arbitration clause applies can be addressed expeditiously by a merits arbitrator, and it will hopefully minimize procedural delay in situations where the parties disagree as to which of two agreements controls their disputes.

[2] *Id.*

[3] *Id.* at 7. Applicable Rules of Arbitration, R-1(c).

[4] *Id.* at 10. Answers and Counterclaims, R-5(d).

REMOTE PROCEEDINGS

Unlike previous versions of the AAA rules, the new Consumer Due Process Protocol and Employment Arbitration Rules provide that all hearings "shall be held virtually . . . unless otherwise agreed to by the parties, or the arbitrator decides, upon application of a party, that the hearing shall be in person."[5] This is a reversal of the previous rules, which defaulted to an in-person hearing, to be held in the consumer or employee's home state, unless the parties otherwise agreed.

Generally speaking, this change should increase the convenience and accessibility of the arbitral process for most consumers and employees, as well as their access to representation, as individuals and lawyers will no longer need to travel to attend hearings. It should be noted, however, that if the arbitration clause in a consumer or employment contract expressly requires in-person hearings, such a requirement would be enforced despite this rule change. In addition, consumers who might prefer, or require, in-person proceedings should be aware that they may need to apply to the arbitrator assigned to their case for permission to proceed in person.

UPDATED DISCOVERY AND DISCLOSURE RULES

The updated AAA rules also clarify several aspects of the arbitration information exchange process that were less well defined in previous versions. Previously, information exchange was left entirely to the discretion of the arbitrator, without any express requirement that any information be exchanged except for hearing exhibits five days before the final merits hearing.[6]

The updated discovery rules now provide for a baseline exchange of all "documents in [the parties'] possession or custody on which they intend to rely" and require the parties to "identify the witnesses, if any, they plan to have testify at the hearing." They also specify that AAA arbitrators should "manage any necessary exchange of information among the parties, which can "include[e] depositions, interrogatories, document production, or . . . other means," bringing AAA rules

[5] *Id*. at 17. Date, Time, Place, and Method of Hearing, R-22.

[6] *Id*. at 16. Exchange of Information, R-20.

more closely in line with standard litigation discovery practice. These changes appear to preserve the informal, speedy nature of arbitration as an alternative to the courts while ensuring that parties have similar access to necessary information as they would in court, a necessary requirement for a fair and equitable alternative dispute resolution process.

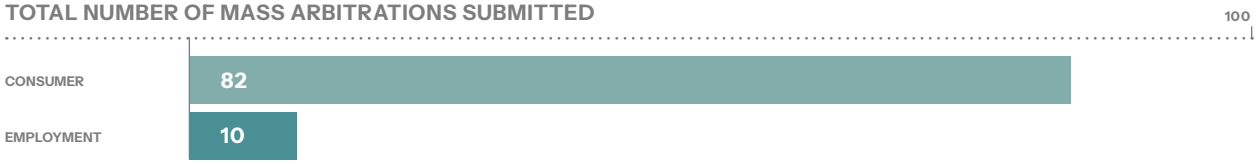
CONCLUSION

AAA's updated rules provide clarity in several important areas and appear well suited to ensuring fairness for both businesses and individual consumers and workers in a dynamic legal environment. Attorneys, consumers, companies, and workers should carefully review the updated rules before initiating (or defending) a dispute under an arbitration clause naming AAA as the arbitral body.

MASS ARBITRATION BY THE NUMBERS

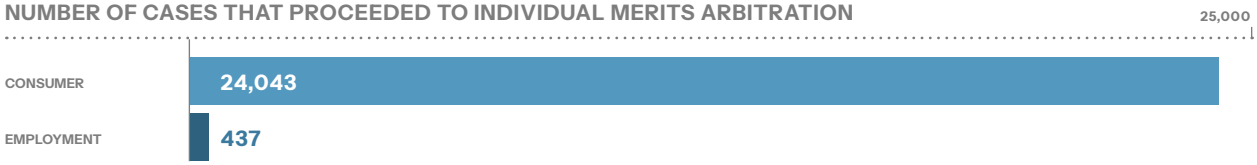
PROCEEDINGS IN 2024: CONSUMER & EMPLOYMENT

TOTAL NUMBER OF MASS ARBITRATIONS SUBMITTED



TOTAL NUMBER OF INDIVIDUAL FILINGS

NUMBER OF CASES THAT PROCEEDED TO INDIVIDUAL MERITS ARBITRATION



CONSUMER TOP INDUSTRIES

GAMING AND ENTERTAINMENT	101,549
TELECOMMUNICATIONS	37,975
HEALTHCARE	32,318
FINANCIAL SERVICES	21,842
TECHNOLOGY	18,817

EMPLOYMENT TOP INDUSTRIES

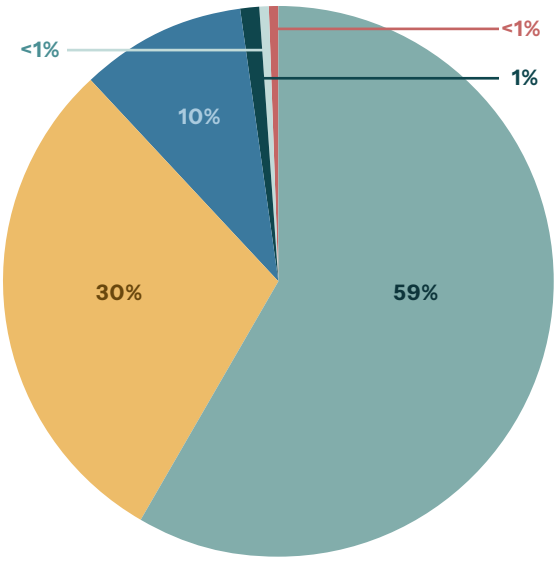
TECHNOLOGY	31,932
RESTAURANT AND FOOD SERVICE	568
TRANSPORTATION	204
HEALTHCARE	173
FINANCIAL SERVICES	54

*The information contained in this section is drawn from statistics provided by the American Arbitration Association.

MASS ARBITRATION BY THE NUMBERS

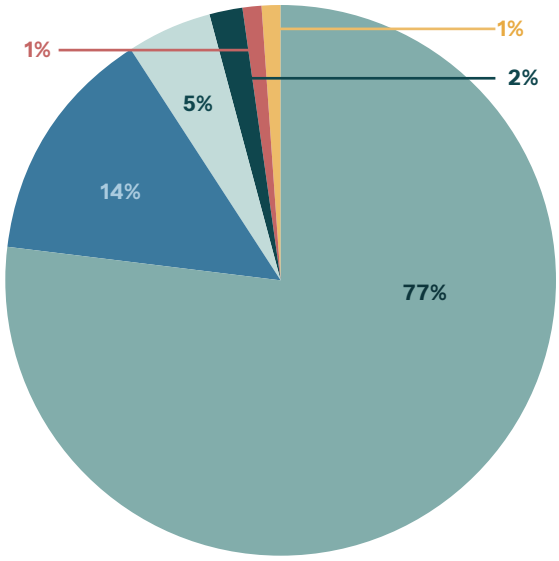
OUTCOMES IN 2024: CONSUMER & EMPLOYMENT

CONSUMER



SETTLED	4,182
DISMISSED	2,105
WITHDRAWN	699
AWARDED	73
ADMINISTRATIVE	63
CONSOLIDATED	1

EMPLOYMENT



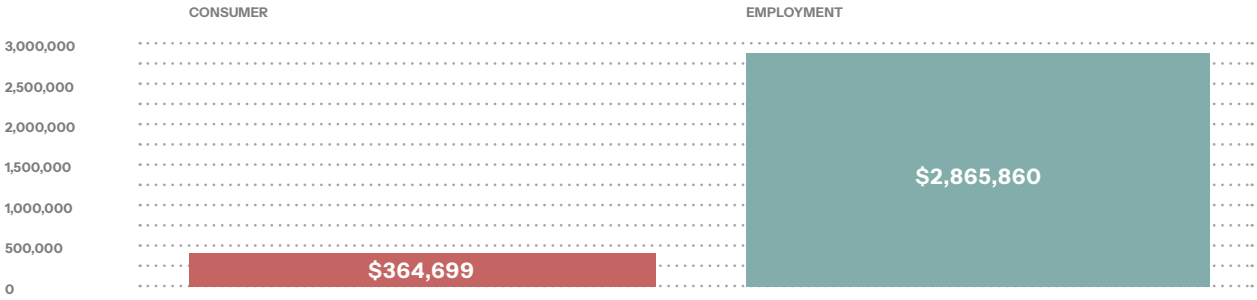
SETTLED	1,970
WITHDRAWN	354
ADMINISTRATIVE	139
AWARDED	51
CONSOLIDATED	31
DISMISSED	13

*The information contained in this section is drawn from statistics provided by the American Arbitration Association.

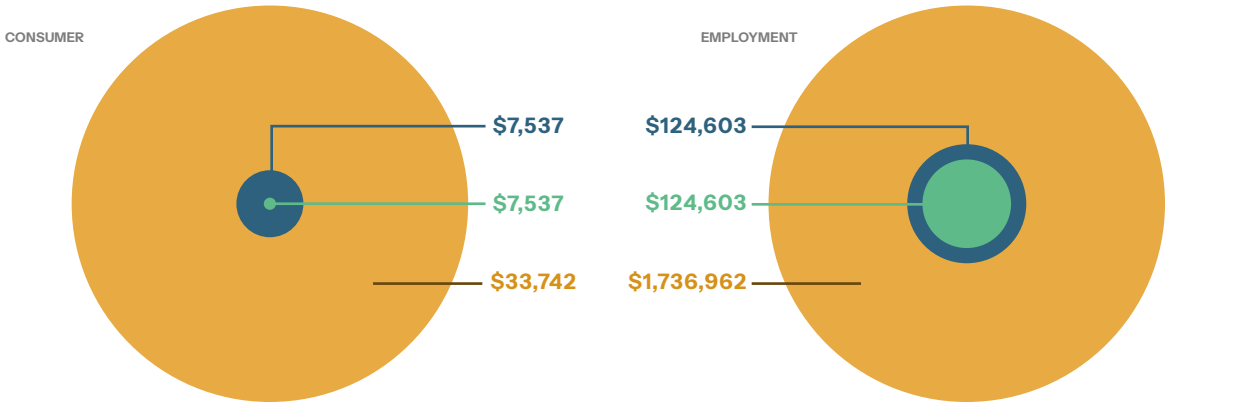
MASS ARBITRATION BY THE NUMBERS

MONETARY AWARDS IN 2024: CONSUMER & EMPLOYMENT

TOTAL AMOUNT AWARDED



AWARD STATISTICS



AVERAGE AWARD	$10,131
MEDIAN AWARD	$7,537
LARGEST AWARD	$33,742

AVERAGE AWARD	$124,603
MEDIAN AWARD	$22,667
LARGEST AWARD	$1,736,962

*The information contained in this section is drawn from statistics provided by the American Arbitration Association.

CONTACT US

Built on our world-class litigation skills, extensive technical proficiency across various industries, and an unyielding dedication to fairness, our Alternative Dispute Resolution Practice is dedicated to standing up for the rights of consumers. Our attorneys are available to address any questions you may have regarding litigation or arbitration. Please contact the Labaton attorney with whom you usually work or a member of the Firm's Alternative Dispute Resolution Practice.

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