Labaton
Keller Sucharow

THE ADVOCATE

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

2025 YEAR-END REPORT

CONTENTS
IN THIS ISSUE

EXECUTIVE SUMMARY

Labaton Keller Sucharow is pleased to present *The Advocate: 2025 Year-End 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 mass arbitrations. The Alternative Dispute Resolution Practice brings Labaton Keller Sucharow's longstanding commitment to providing exceptional service to clients in high-stakes, complex litigation to the vigorous representation of individual consumers in claims ranging from predatory lending to unfair and deceptive practices to data privacy violations.

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.

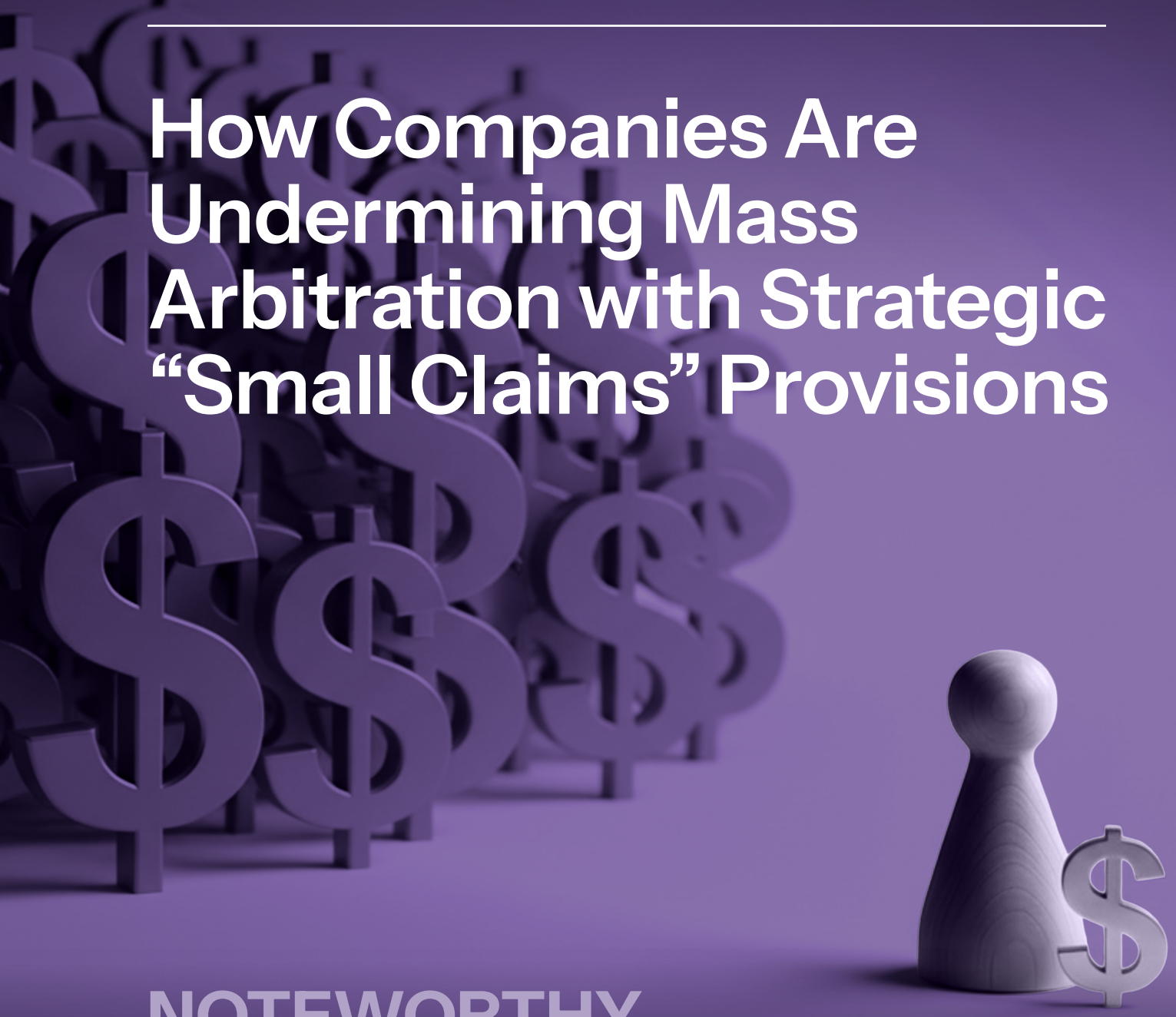
Featured in this edition:

- An in-depth analysis of how companies are attempting to undermine arbitration agreements and shift disputes into small claims courts with limited jurisdiction;
- What a recent California District Court ruling means for consumers facing procedural hurdles intended to thwart arbitration claims;
- How state and federal regulators are fighting to keep pace with the rise of algorithmic pricing and a rapidly evolving e-commerce landscape; and
- A look at the state of arbitration 100 years after the implementation of the Federal Arbitration Act of 1925 and whether its contemporary reach reflects Congress's intent to expand access to fairness, transparency, and justice for consumers.

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

By: Jonathan D. Waisnor, Eric R. Freiman

How Companies Are Undermining Mass Arbitration with Strategic "Small Claims" Provisions



NOTEWORTHY DEVELOPMENTS

In the evolving world of alternative dispute resolution, businesses have wielded arbitration clauses and class action waivers to prevent consumers from collectively vindicating their rights in court. In response, mass arbitration (the coordinated filing of hundreds or thousands of individual arbitration demands) emerged as a powerful tool for consumers to vindicate their rights outside of class action litigation.

Despite mandating individual arbitration, many businesses have simultaneously adopted contractual provisions designed to frustrate consumers' ability to pursue claims in arbitration, such as mandatory pre-arbitration informal dispute resolution conferences and serial batching provisions that limit arbitrations to a small number of claimants at a time, introducing years or decades of delay.

More recently, however, companies have adopted a new strategy of including strategic small claims carve-outs in arbitration agreements that force disputes into small claims court rather than arbitration. Although these provisions are usually framed as consumer friendly and cost efficient, they raise serious concerns and can prejudice consumers, especially in the mass arbitration context.

THE RISE OF SMALL CLAIMS CARVE-OUTS

Small claims provisions are usually drafted to allow either party to elect to utilize small claims court for disputes that fall within the court's jurisdictional limits, despite having a mandatory arbitration agreement. In practice, this allows companies, when faced with a mass arbitration, to divert claims out of arbitration and into small claims courts.

While this may appear innocuous, it fundamentally alters the mass arbitration landscape. Below are key considerations for consumers and counsel confronting businesses' attempts to weaponize small claims provisions to undermine mass arbitration.

KEY CONSIDERATIONS

SMALL CLAIMS COURTS HAVE STRICT JURISDICTIONAL LIMITS

Small claims courts vary vastly across each state, with local municipalities and counties containing their own small claims courts and their own rules and procedures. The monetary limits for states' small claims courts range from $2,500 to $25,000.[1]

New York illustrates this complexity. In New York City, jurisdiction is limited to $10,000 for natural persons and excludes attorneys' fees from that limit unless specifically provided by law.[2] In city and district courts, jurisdiction is limited to $5,000, exclusive of interest and costs, and does not extend to attorneys' fees.[3] In justice courts, jurisdiction is limited to $3,000 in damages, exclusive of interest and costs, and does not extend to attorneys' fees.[4]

Importantly, courts often hold that potential contractual or statutory attorneys' fees or costs must be included in determining the amount in controversy for jurisdictional purposes.[5] Where alleged damages exceed the small claims monetary threshold, the forum lacks jurisdiction, rendering the small claims carve-out inapplicable.

SMALL CLAIMS COURTS TYPICALLY CANNOT GRANT INJUNCTIVE RELIEF

Small claims courts are designed primarily for straightforward small-dollar monetary disputes. In most jurisdictions, small claims courts are expressly prohibited from ordering injunctive relief, or other equitable remedies designed to compel or prohibit certain conduct.[6]

Where a consumer seeks to enjoin unlawful practices, small claims courts typically do not have jurisdiction. Forcing such claims into small claims court rather than arbitration strips consumers of their right to pursue equitable remedies, and it conflicts with the underlying purpose of consumer protection statutes and the effective vindication of consumer rights under those statutes.

[1] *See e.g.* Cal.C.C.P. § 116.221 (Jurisdictional limit in California is $12,500); TX Rules of Civil Procedure, Rule 500.3 (a) (Jurisdictional limit in Texas is $20,000).

[2] CCA § 1801.

[3] UCCA § 1801, UDCA § 1801.

[4] UJCA § 1801.

[5] *See Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas De Espana, S.A.*, 896 F. Supp. 125, 128-29 (S.D.N.Y. 1995) (finding that, under New York consumer protection laws, "[a] potential award of attorney's fees may be considered by the court when determining whether a case involves the jurisdictional minimum . . . [t]here is certainly a reasonable probability that the plaintiff's legal fees will exceed $3,400 in pursuing its claim of $46,600, the increment necessary to bring the amount in controversy to the jurisdictional minimum.").

[6] *See e.g.*, Cal. Civ. Proc. Code § 116.220(a)(5) (authorizing California small claims courts to award injunctive relief "only when a statute expressly authorizes a small claims court to award that relief."); N.Y. City Ct Act § 1801 (defining a "small claim" as a "cause of action for money only") (emphasis added). This limitation has also been widely recognized by courts across the country. *Baker v. Match Grove, Inc.*, 2023 WL 3737808, at *3 (N.D. Ill. May 31, 2023) (Illinois small claims court cannot "issue . . . injunctive relief of the kind" Claimants seek); *Smale v. Wood Cnty.*, 2022 WL 1286562, at *2 (Tex. Ct. App. Apr. 29, 2022) ("Unless expressly authorized by the legislature," Texas small claims courts "do not have jurisdiction to issue writs of injunction").

ATTORNEY REPRESENTATION IS OFTEN RESTRICTED

A hallmark of small claims courts is informality and self-representation. Many states prohibit attorney participation altogether. For example, California law plainly states that "no attorney may take part in the conduct or defense of a small claims action."[7]

For consumers with complex disputes or those facing corporate defendants with counsel, being shoehorned into a forum where legal representation is restricted can tilt the scales toward companies. This is especially troublesome since the rules of most major arbitral bodies guarantee the right to counsel.

FEDERAL CLAIMS CANNOT BE HEARD IN SMALL CLAIMS COURTS

Small claims courts do not have jurisdiction over claims brought under federal consumer protection statutes. Unless brought in arbitration, such claims may only be "brought in any United States district court, or in any other court of competent jurisdiction" regardless of the amount in controversy.[8]

As a result, small claims carve-outs cannot lawfully be used to divert federal claims out of arbitration.

SMALL CLAIMS PROVISIONS ARE LIKELY UNENFORCEABLE UNDER ARBITRATION AGREEMENTS

Although case law remains developing, courts have begun to recognize that small claims provisions may be unconscionable and unenforceable when placed in arbitration agreements.

In *Rios v. HRB Digital LLC*, the Northern District of California recognized the prejudice plaintiffs would face if compelled to proceed in small claims court without counsel.[9] The H&R Block agreement permitted either party to elect small claims court for qualifying disputes.[10] The court explained that small claims proceedings are not a substitute for litigation in a court of general jurisdiction—particularly in complex

[7] Cal. Civ. Proc. Code. § 116.530(a).

[8] 15 U.S.C. § 1693m(g); see 28 U.S.C. § 1331 ("district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States") (emphasis added); *Intuit v. 9,933 Individuals*, 2021 WL 3204816, at *8 (Cal. App. 2d. 2021) (finding that federal statutory claims "may only be litigated in two fora—federal court or arbitration.").

[9] *See* Order Denying Motion to Compel Arbitration, *Rios v. HRB Digital LLC*, No. 3:25-cv-03530 (N.D. Cal. 2025), ECF No. 47.

[10] *Id.* at 18.

statutory cases—because they deprive consumers of the procedural tools and legal representation necessary to obtain meaningful relief.[11]

This reasoning aligns with broader unconscionability principles, that arbitration agreements may not promise a forum while reserving the right to force consumers into an inferior one.

ARBITRATION RULES: AAA VERSUS JAMS FOR SMALL CLAIMS

Arbitration administrators have begun responding to small claims carve-outs in mass arbitration with specific procedural rules in the mass arbitration context. For example, under the AAA Mass Arbitration Supplementary Rule MA-6 (c)(vii)(a), the Process Arbitrator is given the authority to decide "[w]hether the cases should be closed and the parties proceed in small claims court." JAMS does not have a comparable rule addressing who decides small claims jurisdiction. In practice, non-arbitrator JAMS administrators have sometimes made threshold determinations regarding small claims applicability.

The involvement of process arbitrators or administrators introduces additional layers of adjudication before a claim ever reaches the merits. This added complexity increases cost, delay, and procedural confusion, and often forces judicial intervention. Ironically, this is precisely the kind of inefficiency and gamesmanship that arbitration agreements purport to avoid.

CONCLUSION

While arbitration clauses containing small claims provisions are often marketed as efficient and consumer friendly, their strategic deployment in the mass arbitration context undermines the fundamental promise of arbitration as a fair and accessible forum. By forcing disputes into courts with limited jurisdiction, no injunctive relief, and restricted attorney participation, these provisions skew the process in favor of corporate defendants.

[11] *Id.*

Given their procedural and substantive defects, small claims carve-outs are increasingly vulnerable to challenge. As courts continue to scrutinize arbitration agreements for fairness, these provisions may well be deemed unconscionable and unenforceable, particularly where they operate as a backdoor mechanism to extinguish consumer claims rather than resolve them.

By: Jonathan Gardner, Brent Mitchell

N.D. Cal. Rules Arbitration Agreement Unconscionable and Unenforceable: Declines to Compel Tax Privacy Dispute to Arbitration

NOTEWORTHY DEVELOPMENTS

In a recent opinion, Judge Edward Chen of the Northern District of California denied a motion to compel arbitration in *Rios v. HRB Digital LLC*,[1] finding that the arbitration agreement—which contained numerous procedural hurdles to arbitration, including an informal dispute resolution process, a staged bellwether process, and a statute of limitations provision that was conditioned on claimants sending a "fully complete" notice of claims—was unconscionable and unenforceable. Specifically, Judge Chen found that the arbitration agreement was procedurally unconscionable and that the substantive unconscionability of the bellwether provision and statute of limitations tolling provisions rendered the entire arbitration agreement unenforceable. While the *Rios* decision is currently on appeal in the Ninth Circuit,[2] this case has important implications for both companies and consumers attempting to understand their duties, rights, and remedies available under consumer arbitration agreements, and the enforceability of procedural hurdles meant to discourage or delay mass arbitration filings.

BACKGROUND

Plaintiffs in *Rios* brought a class action lawsuit alleging that HRB Digital, LLC and HRB Tax Group Inc. (together, "H&R Block" or "HRB") had unlawfully intercepted and disclosed confidential taxpayer information through the use of tracking pixels embedded in H&R Block's online tax preparation services, which allegedly relayed confidential tax information to Meta Platforms, Inc. and Google LLC. As Judge Chen's opinion summarized, "Plaintiffs [] allege[d] that HRB intentionally deployed Meta's Pixel and Google's code with default settings that triggered the disclosure of page-title information reflecting the substance of taxpayers' filings, thereby monetizing tax-return data by using it for targeted advertising and marketing purposes."[3] Plaintiffs asserted claims under the Electronic Communications Act, California's Invasion of Privacy Act, California's Unfair Competition Law, and the California Consumer Legal Remedies Act.

HRB moved to compel arbitration under its Online Services Agreement ("OSA"), which contained an arbitration provision requiring the arbitration of all disputes

[1] *Rios v. HRB Digital LLC,* No. 25-CV-03530-EMC, 2025 WL 3003768 (N.D. Cal. Oct. 27, 2025).

[2] *Rios, et al. v. HRB Digital, LLC, et al.,* 25-7199 (9th Cir.).

[3] *Rios,* 2025 WL 3003768 at *1.

between HRB and a user of HRB's services. As Judge Chen's opinion explained, the arbitration agreement contained "multiple procedural prerequisites" including "an 'informal resolution' process" whereby a claimant must provide a written notice of dispute, and must then attempt to resolve the dispute informally with HRB for 60 days, during which time claimants may be represented by counsel provided they submit a signed statement authorizing HRB to disclose tax records to the user's counsel.[4] The OSA also requires that "all arbitrations must proceed on an individual basis."[5]

Additionally, the OSA included "a mass arbitration and bellwether protocol that applies any time 25 or more claimants submit Notices or seek to file arbitrations 'raising similar claims,' or where the users 'are represented by the same or coordinated counsel,'" a provision Judge Chen called "most critical[] to this case."[6] Under this bellwether provision, "each side selects 10 test cases (for a total of 20 cases) to proceed first in arbitration and to be resolved individually by different arbitrators," and "no other cases may be filed in arbitration and the AAA is prohibited from accepting, assessing, demanding fees for, or administering arbitrations" during the pendency of the first 20 cases.[7] After those 20 cases are resolved, "the next set of 20 cases proceed."[8] After the completion of the second round of 20 cases, "a total of 50 cases may be filed in subsequent rounds" but the terms are clear that "each round must be completed before proceeding to the next round." The terms note that users "agree to this process even though it may delay the arbitration of [their] claim."[9] Judge Chen noted that "the provision does not set an enforceable deadline for arbitrators," "[n]or does the mass arbitration provision provide claimants with any recourse or accountability mechanisms for arbitrator delays, and nothing in the OSA suggests that individual arbitrators can remedy delays caused by other arbitrators or HRB."[10]

JUDGE CHEN'S DECISION DENYING H&R BLOCK'S MOTION TO COMPEL ARBITRATION

Ultimately, Judge Chen found that the arbitration agreement contained in the OSA was both procedurally and substantively unconscionable.

[4] *Id.* at *2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

Regarding procedural unconscionability, Judge Chen explained that Plaintiffs showed "at least a minimal degree of procedural unconscionability" because the arbitration agreement was contained "in a standard-form OSA drafted by HRB and presented as a non-negotiable condition for using its online platform" that, "during the height of tax season, leaves consumers with little practical ability to reject arbitration."[11]

Judge Chen also found that the arbitration agreement contained unconscionable degrees of surprise and oppressiveness. Judge Chen explained that "the *content* of the clause is not something an ordinary consumer would expect" as "[t]hey would not reasonably anticipate HRB's complex bellwether and batching scheme, which prevents claimants from even *filing* their claims if '25 or more' similar claims are submitted by coordinated counsel."[12] Judge Chen explained that this surprise was "compounded by how the agreement described the timing of arbitrations," including that cases were encouraged to resolve within 120 days, in light of the fact that claims were "likely to languish for years under HRB's mass arbitration protocol."[13]

Regarding oppressiveness, Judge Chen explained that "the OSA was imposed by HRB with no opportunity for consumers to negotiate or modify its terms" and that consumers faced pressure to accept the agreement "in the midst of tax season with the looming threat of IRS penalties."[14] Judge Chen also explained that consumers "could not reasonably foresee that their ability to pursue claims would depend on the identity of their attorney or the number of other claimants represented by their attorney as a result of a complicated and unusual bellwether sequencing provision."[15] These factors together supported Judge Chen's finding that the prolix and complicated arbitration agreement, offered to consumers on a take-it-or-leave-it basis with few alternatives during tax season, was oppressive and procedurally unconscionable.

Regarding substantive unconscionability, which "pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or

[11] *Id.* at *6

[12] *Id.* at *7

[13] *Id.*

[14] *Id.*

[15] *Id.*

one-sided,"[16] Judge Chen explained that two provisions of the arbitration agreement in particular "weigh heavily in favor of finding substantive unconscionability: [1] the staged bellwether process, and [2] the statute of limitations tolling provision."[17]

Judge Chen found that the bellwether provision causes impermissible delay. Because the bellwether provision sets a cap on the number of arbitrations that may proceed at any given time, and because it requires that no other cases may be filed and AAA may not administer any other arbitrations during the pendency of each sequential round of batched cases, "the slowest case in a given round sets the pace for all others, and any delay in one arbitration halts progress for all remaining claimants and would-be claimants who are barred from filing until their turn arrives."[18] Judge Chen noted that even though H&R Block's OSA "encourages arbitrators to resolve the cases within 120 days, even that idealistic timeline could impose a 13-year timeline to resolve a batch of 2,000 Notices," and even "a single outlier or protracted case can hold up hundreds of other claims indefinitely."[19] Crucially, the OSA also "provides no recourse, oversight, or other accountability procedures in the event of delay by an arbitrator either by the AAA, HRB, or individual claimants" meaning that "even the most efficient arbitrators may be saddled by delays imposed by other arbitrators or parties in other proceedings."[20] Judge Chen explained that this prospect for delay "creates the risk of a de facto waiver of valid claims, weighing heavily in favor of finding substantive unconscionability."[21]

Additionally, Judge Chen explained that "the mass arbitration protocol and staged bellwether process may interfere with claimants' right to counsel of their choosing."[22] Because the bellwether provision triggers anytime 25 or more claimants are represented by the same counsel, the provision may, according to Judge Chen, "induce claimants to avoid the bellwether provision altogether by finding different counsel" and many "would-be claimants may struggle to find counsel willing to represent a single or small number of similarly situated clients seeking small claims against HRB."[23] As Judge Chen put it: "Forcing claimants to avoid experienced counsel in favor of less qualified or experienced representation—simply to

[16] *Id. (Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012)).

[17] *Id.* at *9.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at *10.

[22] *Id.*

[23] *Id.*

sidestep mass arbitration delays—imposes unjustifiable cost manufactured by HRB for its sole benefit." [24]

Furthermore, Judge Chen found that the unconscionable aspects of the bellwether provision are not cured by the OSA's provision permitting either party to elect to bring their case in small claims court. First, Judge Chen noted that "Claimants may be ineligible [for small claims court] because their damages exceed the jurisdictional cap."[25] Judge Chen then explained that the small claims carve-out is "an illusory alternative" because claimants electing to proceed in small claims court would "face sharply limited (potentially nonexistent) discovery and truncated procedures"[26] and "in many jurisdictions, litigants cannot be represented by counsel in small claims matters."[27] Small claims court thus "risks depriving consumers of the forum, tools, or procedures to prove their cases and obtain relief."[28]

In addition to the bellwether provision, Judge Chen explained that the "second critical deficiency" in H&R Block's OSA was the statute of limitations tolling provision, which provides that any applicable statute of limitations will be tolled starting on the date that a claimant sends "a fully complete Notice." As Judge Chen explained, "[w]hether a Notice is 'fully complete' is not defined by any objective criteria, and seems instead to be subject to HRB's exclusive interpretation." Thus, HRB could—and did—delay administration of Plaintiffs' claims by arguing that the notices they provided were improper or incomplete. This uncertainty in the applicability of tolling is crucial, according to Judge Chen, "[g]iven the potential for years-long delays" under H&R Block's OSA and arbitration agreement.[29] Judge Chen also noted that the tolling scheme was "asymmetrical," in that Defendants could assert a statute of limitations defense if it is successful in challenging a claimant's notice as incomplete, but the claimant has no comparable mechanism "to remedy delays caused by other arbitrators, claimants, or HRB in the bellwether process, nor does it provide claimants any recourse or judicial review if HRB challenges tolling."[30]

[24] *Id*.

[25] *Id*. (citing Cal. Civ. Proc. Code § 116.221).

[26] *Id*. (citing *Rosenberg v. Superior Ct.*, 67 Cal. App. 4th 860, 868, 79 Cal. Rptr.2d 365 (1998)).

[27] *Id*. (citing *Prudential Ins. Co. of Am. v. Small Claims Ct. of City & Cnty. of S.F.*, 76 Cal. App. 2d 379, 383–84, 173 P.2d 38 (1946)).

[28] *Id*.

[29] *Id*.

[30] *Id*. at *12.

Accordingly, Judge Chen denied the motion to compel arbitration, finding the entire arbitration agreement unenforceable.

CONCLUSION

The fate of H&R Block's arbitration agreement remains to be seen, as H&R Block has appealed Judge Chen's decision to deny its motion to compel arbitration, and that appeal remains pending in the Ninth Circuit.[31] However, Judge Chen's opinion provides meaningful insight into how District Court judges are approaching the rapidly evolving ways that companies draft their arbitration agreements to include procedural barriers to thwart mass arbitration filings. Practitioners in the arbitration space should be aware of these developments as they will help to determine the landscape for mass arbitration of consumer claims.

[31] *Rios, et al. v. HRB Digital, LLC, et al.*, 25-7199 (9th Cir.).

By: Jonathan Gardner, Stephen Kenny

U.S. Regulators Fight to Keep Pace with Algorithmic Pricing

NOTEWORTHY DEVELOPMENTS

On November 10, 2025, New York's Algorithmic Pricing Disclosure Act took effect, requiring companies that use algorithmic pricing to notify customers of the practice.

WHAT IS ALGORITHMIC PRICING?

Algorithmic pricing uses a customer's personal data to set individualized prices for a given product, often in real time. The practice had been somewhat common in certain segments of the market, like hotels and travel, but recent years have seen both an expansion into other industries and the implementation of a far more robust version. Indeed, "yield management" is a pricing strategy that has been used by businesses for decades to account for demand associated with finite inventory, such as seats on a flight or rooms in a hotel. Today, however, thanks to widespread opportunities for businesses to collect consumer data along with advances in artificial intelligence, such pricing models can now account for factors like a customer's location, device type, shopping history, or status in a company loyalty program.

While proponents would argue that today's algorithmic pricing is merely a more accurate and dynamic version of that which has long existed, critics highlight the potential for misuse. Certain data points, like a customer's location, are inherently socioeconomic and may unavoidably invoke race and income level. Indeed, early versions of the Algorithmic Pricing Disclosure Act explicitly outlawed the use of "protected class data" such as race, age, and religion in setting prices.[1] That provision did not appear in the final law but has instead been introduced in the New York Legislature as a separate bill titled the *Preventing Algorithmic Pricing Discrimination Act*.[2]

As enacted, the Algorithmic Pricing Disclosure Act requires that when a business lists a price for an item that was set using an algorithm which incorporated a customer's personal data, the following message must be displayed in a clear and conspicuous manner:[3]

"THIS PRICE WAS SET BY AN ALGORITHM USING YOUR PERSONAL DATA"

[1] Assemb. B. A3008, 2025–26 Legis. Sess. (N.Y. 2025) (original).

[2] Assemb. B. A6765A, 2025-26 Legis. Sess. (N.Y. 2025); *See also*, S. B. S7033, 2025–26 Legis. Sess. (N.Y. 2025).

[3] N.Y. Gen. Bus. Law § 349-a(2).

Notably, the statute features carve-outs for subscription agreements, certain insurance or financial institutions, and for-hire vehicles that might use location data to calculate trip costs.[4]

OPPOSITION TO THE ACT

Before it could take effect, the Algorithmic Pricing Disclosure Act had to survive a challenge in court. In October, the National Retail Federation ("NRF") filed for an injunction in New York's Southern District, claiming that the impending law violated the First Amendment in that it "compels a broad range of retailers—but not all of them—to express a misleading and controverted government-scripted opinion without justification."[5] The NRF further claimed that the Act regulated commercial speech and therefore was subject to intermediate scrutiny.[6] Judge Jed Saul Radkoff disagreed, finding that the disclosure at issue is "plainly factual" and "uncontroversial," thus warranting review under the more permissive rational basis standard.[7] From there, Judge Rakoff opined that the disclosure served a cognizable state interest in protecting consumers and was not unduly burdensome to businesses.[8]

A GROWING TREND AMONG STATES

New York's recent legislation is not the first time a state has sought to regulate algorithmic pricing. According to research published by *Consumer Reports*, more than 20 states introduced legislation related to algorithmic pricing in 2025—up markedly from 2024.[9]

Taking effect on January 1, 2026, amendments to the Cartwright Act, California's antitrust regime, make it unlawful to "use or distribute a common pricing algorithm," defined as "any methodology, including a computer, software, or other technology, used by two or more persons, that uses competitor data to recommend, align, stabilize, set, or otherwise influence a price or commercial term."[10] Unlike federal law under the Sherman Act, plaintiffs in California no longer need to plead facts that rule out independent conduct, making it easier to pursue antitrust claims based on coordinated or algorithm-driven pricing behavior.[11] Connecticut and New York

[4] *Id.* at 1(d).

[5] Compl. at ¶ 2, ECF No. 1. *Nat'l Retail Fed'n v. James*, No. 1:25-cv-05500 (S.D.N.Y. 2025).

[6] *Id.* ¶ 31.

[7] Op. & Order at 11, 18, ECF No. 13. *Nat'l Retail Fed'n* (S.D.N.Y. 2025).

[8] *Id.* at 24, 25.

[9] See *Cheyenne Tan, How U.S. States are Tackling Algorithmic Pricing: 2025 Bill Tracker and Analysis*, CONSUMER REPORTS (Aug. 1, 2025).

[10] Cal. Bus. & Prof. Code § 16729(d)(3) (2026).

also recently amended their respective antitrust laws to outlaw algorithmic price coordination, but the protections enacted apply only to the residential rental market.[12]

Despite the heightened appetite for regulation, not every state has opted to enact the measures introduced—even though many were confined to particular contexts or industries. Maine and Massachusetts considered bills prohibiting algorithmic pricing for food and groceries, while Hawaii examined similar legislation focused on goods eligible for purchase with SNAP and WIC benefits.[13] Each of these efforts stalled, however, in their respective state senates. Colorado, Georgia, and Illinois each proposed prohibiting the use of "surveillance data" to set prices and wages, defining the term in largely consistent ways to encompass data obtained through the observation, inference, or surveillance of consumers or workers that relates to individuals' personal characteristics, behaviors, or biometric information, whether pertaining to the individual directly or to a group, class, tier, or band with which the individual is associated.[14] These initiatives also largely stalled not long after their introduction. Finally, California legislators introduced a broadly applicable surveillance pricing bill, then narrowed it to grocery establishments in an effort to secure a compromise, yet it still failed to pass.[15]

FEDERAL OUTLOOK

On the federal level, the idea of regulating algorithmic pricing has been met with both support and resistance. In July 2024, the Federal Trade Commission ("FTC") began a market study on the practice and, on January 17, 2025, published initial findings.[16] The initial report appeared to express alarm at the often pervasive nature of algorithmic pricing, claiming that demographics, and even a person's mouse movements on a webpage, were used by some retailers to set prices. The report concluded with a request for information ("RFI") soliciting public comment on consumers' experiences.[18] However, just one week later, following the designation of Andrew Ferguson as FTC Chair, the RFI was withdrawn and the comment period closed.[19]

[11] *Compare* Cal. Bus. & Prof. Code § 16756.1 *with Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007).

[12] *See* H.B. 8002, Gen. Assem., Nov. Spec. Sess. (Conn. 2025) (to be codified within Conn. Gen. Stat. Ann. tit. 35, ch. 624); *see also* N.Y. Gen. Bus. Law § 340-b.

[13] H.R. 1597, 132nd Leg., 1st Spec. Sess. (Me. 2025); H. 99, 194th Gen. Court (Mass. 2025); S.B. 785, 33rd Leg., Reg. Sess. (Haw. 2025).

[14] *See* H.B. 25-1264, 75th Gen. Assemb., Reg. Sess. (Colo. 2025); *see also* S.B. 164, Gen. Assemb., Reg. Sess. (Ga. 2025); S.B. 2255, 104th Gen. Assem. (Ill. 2025).

[15] *Compare* Assem. B. 446, Leg., Reg. Sess. (Cal. 2025) (amended by S. on July 17, 2025) *with* Assem. B. 446, Leg., Reg. Sess. (Cal. 2025) (amended by S. on Aug. 29, 2025).

[16] Fed. Trade Comm'n, *FTC Surveillance Pricing Study Indicates Wide Range of Personal Data Used to Set Individualized Consumer Prices* (Jan. 2025); *See also*, Fed. Trade Comm'n, *FTC Surveillance Pricing 6(b) Study: Research Summaries A Staff Perspective* (Jan. 2025).

[17] *Id*.

[18] *Id*.

[19] Lina M. Khan, Comm'r, Fed. Trade Comm'n, *Statement Regarding Request for Public Comment Re: Fed. Trade Comm'n* (Jan. 31, 2025).

Still, in December 2025, Senator Ruben Gallego (D-AZ)—citing the FTC initial report—introduced the One Fair Price Act, which would ban companies from charging different prices to different customers for the same product at the same time.[20] The introduction of the bill coincided with the publication of a Consumer Reports investigation into Instacart's algorithmic pricing experiments, which produced precisely those kinds of discrepancies.[21] Instacart claimed the discrepancies were owed to randomized price testing and not based on customer data;[22] nevertheless, the findings prompted multiple U.S. Congresspersons to publicly question Instacart about their practices and petition the FTC for further investigation.[23] The bill has since gained two co-sponsors and been referred to the Senate Committee on Commerce, Science and Transportation.[24]

CONCLUSION

Algorithmic pricing is but the latest example of a rapidly evolving e-commerce landscape. As legislatures struggle to keep up, a fear exists that individual privacy rights will erode. Legal practitioners in states with more robust consumer protection frameworks have a responsibility to ensure businesses follow the law, while lawmakers in other states and at the national level should continue pushing for stronger regulation.

[20] One Fair Price Act of 2025, S. 3387, 119th Cong. (2025).

[21] Derek Kravitz, *Instacart's AI-Enabled Pricing Experiments May Be Inflating Your Grocery Bill, CR & Groundwork Collaborative Investigation Finds*, CONSUMER REPORTS (Dec. 9, 2025, updated Dec. 22, 2025).

[22] Instacart, *The Truth About Pricing Tests on Instacart* (Dec. 18, 2025).

[23] *See e.g.*, Angie Craig, U.S. Representative, *Letter to Chris Rogers*, CEO, Instacart (Dec. 11, 2025). *See also* Charles E. Schumer, U.S. Senator, *Letter to Andrew N. Ferguson*, Chairman, Federal Trade Commission (Dec. 14, 2025); News Release, *Klobuchar, Capito Introduce Bipartisan Artificial Intelligence Scam Prevention Act* (Dec. 17, 2025).

[24] *See* S. 3387, supra (Actions and Cosponsors).

By: Jonathan D. Waisnor, Nylah Mustafa

Ensuring Access to Justice Through Arbitration

NOTEWORTHY DEVELOPMENTS

Arbitration was created as a tool for fairness. Its purpose was straightforward: to provide a faster, more accessible, and less burdensome alternative to litigation. That purpose was formally codified with the enactment of the Federal Arbitration Act of 1925 ("FAA"), which Congress adopted to overcome judicial hostility toward arbitration and to place arbitration agreements on an "equal footing with other contracts."[1] The FAA was not designed to insulate wrongdoing from accountability, but to ensure that consensual arbitration agreements would be enforced in service of efficient and fair dispute resolution.

In its ideal form, arbitration offers consumers a forum that avoids the delays and procedural complexity of court, reduces costs, and delivers timely resolutions on the merits. Early proponents envisioned arbitration as a mechanism that would expand access to justice, particularly for individuals and small entities that lacked the resources to endure litigation. The FAA reflects this vision. Arbitration is meant to be an alternative forum, not a substantive waiver of rights, and its enforcement rests on principles of contractual fairness and mutuality.

Over time, however, the modern consumer marketplace has reshaped arbitration in ways that diverge from the framework Congress envisioned. Rather than operating as a mutually beneficial alternative to litigation, mandatory arbitration clauses are now routinely embedded in contracts and digital terms of service, leaving individuals with little meaningful opportunity to understand or contest the process governing their claims. This evolution does not reflect a failure of arbitration itself, but a departure from its intended function. When layered with restrictive procedural requirements, arbitration can shift from an efficient forum into a mechanism that suppresses accountability.

From a consumer protection perspective, this distinction matters. Properly structured arbitration remains a valuable and often preferable dispute resolution tool. It can reduce delays, lower costs, and allow claims to be adjudicated that would otherwise never reach a courtroom. Case processing delays in the U.S. federal courts have

[1] *See* 9 U.S.C. §§ 1 *et seq.*; H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) stating that "[t]he FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements" accordingly, "courts must place arbitration agreements on equal footing with other contracts."

become increasingly acute across both civil and criminal dockets. The Administrative Office of the U.S. Courts reports that the number of civil cases pending for more than 3 years has risen by 346%—from approximately 18,000 to 82,000—over the past two decades.[2] Because many observers maintain that "justice delayed is justice denied," these mounting delays, along with other shortcomings of traditional litigation such as escalating costs, have intensified interest in alternative dispute resolution as a means of achieving faster dispute resolution. Arbitration, in particular, avoids the "time-consuming procedures that must be adhered to in court proceedings," and offers a more streamlined and efficient mechanism for resolving disputes.[3]

Accordingly, the concern is not arbitration as a forum, but contractual practices that undermine its fairness and accessibility. Those practices distort outcomes and erode confidence in the system by creating procedural barriers that deter claims before they are ever heard.

For instance, modern arbitration agreements frequently include class waivers, shortened limitations periods, onerous notice of claim requirements, and mandatory informal exhaustion provisions.[4] Collectively, these terms operate less as neutral housekeeping rules and more as gatekeeping devices, filtering out claims before they can be meaningfully adjudicated. Even when such provisions are later deemed unenforceable, their inclusion can have a chilling effect on consumers' willingness to pursue relief. Moreover, many statutory rights are enforced through claims that involve relatively modest individual damages. When arbitration requires claimants to bear significant filing fees, administrative costs, or the risk of fee shifting, those costs can exceed the value of the claim itself, making arbitration an impractical forum for enforcement. In practice, this dynamic discourages individual claims and weakens statutory enforcement schemes that depend on private participation.[5]

These distortions also do not fall evenly across the population. Industries that rely most heavily on arbitration such as payday lending, high-cost installment loans, and auto-finance products also disproportionately operate in and target

[2] U.S. Courts, *The Need for Additional Judgeships: Litigants Suffer When Cases Linger*, (Nov. 18, 2024).

[3] *See* Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 774 (2001) ("Because parties can customize the proceedings to suit their interests, arbitration also has the potential for providing an acceptable result at a low cost.").

[4] *See e.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013), the U.S. Supreme Court held that a class action waiver in an arbitration agreement is enforceable under the FAA even "when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."; *See also* K&L Gates LLP, *Protect Your Company Against Mass Arbitrations*, (Sept. 29, 2022), (advising corporate clients to adopt one-sided, complicated arbitration provisions requiring individualized pre-arbitration dispute notices, mandatory informal resolution or negotiation periods, and additional contractual mechanisms such as fee shifting or nondelegation clauses to deter or complicate mass arbitration filings).

[5] *See*, *e.g.*, Compl. for Declaratory and Injunctive Relief, *Epson Am., Inc. v. Adams et al.*, No. 30-2023-01313431-CU-MC-CXC (Cal. Super. Ct. Orange Cnty. Mar. 10, 2023); Alison Frankel, *Epson's Unusual Mass Arbitration Defense: Sue Your (Alleged) Customers*, Reuters, (Apr. 11, 2023) (describing Epson's response to mass arbitration demands filed by Labaton Keller Sucharow on behalf of individual consumers seeking to enforce statutory rights, in which Epson initiated state court litigation against those claimants to halt or restructure the arbitrations, a strategy that adds cost and complexity for individual consumers and illustrates how such responses can discourage the enforcement of statutory rights against corporate actors).

communities of color and economically marginalized neighborhoods. These markets typically emerge in areas where access to mainstream financial institutions has long been limited and where institutional policies such as restrictive identity verification requirements and narrow account opening practices have failed to accommodate the needs of diverse consumers, leaving them with fewer alternatives.[6] At the same time, the arbitration provisions used in these contexts often push furthest away from the FAA's core purpose, embedding procedural hurdles that restrict meaningful access to justice.

Informal conference provisions are of particular concern. These provisions typically require consumers to personally appear, either in person or through teleconference, at an "informal" conference with a company employee or representative before the consumer is permitted to arbitrate their claim. These provisions superficially resemble administrative exhaustion requirements typically seen in high-stakes disputes such as union grievance processes or employment discrimination matters. However, initial reports reveal that companies are abusing the informal conference process not only to impose unnecessary delay in deciding the merits of small-dollar claims, but to attempt to intimidate customers into dropping claims. Specifically, in one matter, a Chinese e-commerce giant has been accused of using surreptitious, illegal tracking software that allows the Chinese government to potentially access sensitive customer information.[7] When the e-commerce company faced claimants seeking redress for these alleged acts, it reportedly used the individual conference process to "gather information about consumers and their claims" and "as an opportunity to threaten consumers with sanctions if they continued to pursue . . . arbitration,"[8] rather than to attempt to resolve its customers' disputes.

Ultimately, informal conference provisions may be of limited utility in the litigation or arbitration of complex consumer protection claims and may simply create another procedural hurdle for parties to litigate before reaching the merits of a claim. For example, in an action involving a major U.S.-based tax preparation company, Plaintiffs alleged that the company unlawfully transmitted consumers' online tax

[6] U.S. Dep't of the Treasury, *National Strategy for Financial Inclusion in the United States*, pg. 10, (October 2024), (explaining that restrictive account-opening and identity-verification policies can limit access to financial services for certain consumers and diverse communities, including victims of crime, domestic violence survivors, individuals experiencing homelessness, immigrants and refugees, and transgender and nonbinary consumers).

[7] *See generally McMahan et al v. Whaleco, Inc. dba Temu*, No. 25-cv-01590 (E.D.N.Y.).

[8] Pet., ECF No. 1 at ¶¶ 11, 12, *McMahon et al v. Waleco*.

filing data to Meta through embedded tracking technologies.[9] In assessing the enforceability of the arbitration agreement, the court found more than a minimal degree of procedural unconscionability, emphasizing that the Defendant imposed implied procedural hurdles that obstructed claimants' ability to pursue their claims.[10] For instance, although Plaintiffs' counsel submitted thousands of individually signed dispute notices via certified mail, the Defendant insisted that each claimant send their notice in separate individual envelopes, creating unnecessary administrative barriers to arbitration.[11]

The court also held that aspects of the arbitration provision were substantively unconscionable.[12] In particular, the staged bellwether process and related statute of limitations tolling provisions operated in a one-sided manner by delaying resolution for most claimants while allowing the Defendant to test defenses against a limited subset of claims, thereby imposing disproportionate delay and risk on consumers.[13] Taken together, these provisions undermined the fairness and mutuality required for enforcement under generally applicable contract principles.[14]

The resulting asymmetry is not accidental. Arbitration between large corporate entities and individual consumers is inherently uneven, and in a society where economic power is distributed along racial and socioeconomic lines, procedural barriers predictably fall hardest on diverse communities. When arbitration procedures favor corporate repeat players through cost barriers, complexity, or limited transparency, they risk reinforcing—rather than alleviating—broader patterns of inequality.

Importantly, these failures should not be conflated with arbitration itself. Properly administered arbitration can serve consumers well by resolving disputes more quickly, reducing intimidation for individuals unfamiliar with formal litigation, and lowering costs. For many consumers, these benefits remain essential. Arbitration's promise, particularly in consumer protection contexts, is real—but only when procedural integrity is preserved.

[9] *Rios v. HRB Digital LLC*, 2025 WL 3003768, (N.D. Cal. Oct. 27, 2025).

[10] *Id*. at 7.

[11] *Id*.

[12] *Id*. at 9-10.

[13] *Id*.

[14] *Id*.

Reclaiming that promise requires confronting the ways arbitration has been weaponized through contract design. Courts play a critical role in scrutinizing contractual assent and enforcing consumer-friendly fee and access rules consistent with the FAA's purpose. Arbitration administrators must ensure that efficiency does not come at the expense of fairness, and that procedural balance remains central to legitimacy. Corporate drafters also bear responsibility for resisting the temptation to convert arbitration into a system of deterrence rather than dispute resolution.

Ultimately, arbitration was designed to expand access to justice, not to deepen inequity. When fairness, transparency, and balance are enforced, arbitration can serve its intended role as a meaningful path to accountability—particularly for consumers who have long been excluded from traditional legal avenues.

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.

Jonathan Gardner
Managing Partner
Email: JGardner@Labaton.com
Tel: +1 212.907.0839

Jonathan D. Waisnor
Partner
Email: JWaisnor@Labaton.com
Tel: +1 212.907.0623

Morris Dweck
Of Counsel
Email: MDweck@labaton.com
Tel: +1 212.907.0831

James M. Fee
Of Counsel
Email: JFee@labaton.com
Tel: +1 212.907.0728

Brandon E. Heitmann
Of Counsel
Email: BHeitmann@Labaton.com
Tel: +1 212.907.0673

Alexander F. Schlow
Of Counsel
Email: ASchlow@labaton.com
Tel: +1 212.907.0892

NEW YORK
140 BROADWAY
NEW YORK, NY 10005
TEL: +1 212.907.0700

DELAWARE
222 DELAWARE AVENUE, SUITE 1510
WILMINGTON, DE 19801
TEL: +1 302.573.2540

LONDON
1 KING WILLIAM STREET
LONDON, EC4N 7AF UNITED KINGDOM
TEL: +44 20 3582 0981

WASHINGTON, D.C.
1050 CONNECTICUT AVENUE NW, SUITE 500
WASHINGTON, D.C. 20036
TEL: +1 202.772.1881