Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed after *Concepcion* and *American Express*

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INTRODUCTION

For decades, consumers' rights advocates have anxiously watched the development of binding arbitration clauses.[1] Though proponents of these agreements laud arbitration's ability to handle claims cheaper, faster, and less formally than traditional lawsuits,[2] their opponents argue that arbitration favors businesses at the expense of their customers and may prevent consumers from having access to justice at all.[3] By binding a consumer to arbitrate their disputes, businesses can prevent customers from pooling their resources in order to make their claims financially feasible, force them to travel great distances to arbitrate their claims, and put numerous other limits on how and when customers may bring their claims.[4] These restrictions can completely bar even meritorious claims, not only keeping consumers out of the court house but away from the arbitration table as well.[5] What's more, these agreements are typically included in take-it-or-leave-it form contracts, meaning that customers cannot negotiate them. In fact, few customers even realize that they have agreed to these terms, allowing businesses to quietly contract away their customers' rights without them even knowing.[6] These discrete problems of forced arbitration exist alongside numerous other practical and ethical issues that plague arbitration more broadly.[7]

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1. *See, e.g.*, Arbitration, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, https://www.consumeradvocates.org/for-consumers/arbitration [https://perma.cc/2GP7-PBM8]; Forced Arbitration, NATIONAL CONSUMER LAW CENTER, https://www.nclc.org/issues/forced-arbitration.html [https://perma.cc/PX67-C6NL].

2. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011).

3. Peter B. Rutledge, *Wither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 550 (2008).

4. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 282 (2015).

5. *See* American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228, 253 (2013) (Kagan, J., dissenting).

6. *See* Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 691–700 (2009); Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 953 (2002).

7. *See* Menkel-Meadow, *supra* note 6, at 953–74 (identifying ten different ethical issues posed by the growing use of arbitration).

Given these concerns, courts have struggled to police binding arbitration agreements to weed out those that jeopardize consumers' access to justice. For years, the businesses and the courts have squared off; businesses would draft agreements, the courts would refuse to enforce them, and businesses would return to the drawing board, resulting in three distinct "generations" of arbitration agreements, each crafted to try to pass judicial scrutiny while still achieving the goals of businesses.[8] In the years leading up to *Concepcion*, courts invalidated two generation of agreements that contained pro-business terms such as forum selection clauses, class action waivers, and exorbitant arbitration fees.[9] But when the Supreme Court was asked to judge the third generation of contracts in *Concepcion* and *American Express*, it not only gave this generation its seal of approval, but also restricted the ability of lower courts to strike down the very types of exculpatory agreements that they previously condemned. With lower courts restrained in their ability to police these agreements, some believed that businesses could go back to the "old days" of first and second generation, once again binding consumers to a host of pro-business terms.[10]

But did they? While a number of commentators in the wake of these decisions hypothesized that they would lead to increasingly aggressive use of exculpatory arbitration agreements, few have explored how this generation of agreements is the same as, or different from, the generations before it.[11] This paper takes a first look at this "next generation" of arbitration agreements by analyzing 100 arbitration agreements from prominent consumer-facing businesses as they existed before *Concepcion* and before and after *American Express*. While *Concepcion* and *American Express* opened the landscape for businesses to make the next generation of arbitration agreements even more pro-business than previous ones,[12] the results of this study suggest that arbitration agreements have not actually changed very much in terms of what kinds of pro-business and pro-consumer clauses they feature; in fact, most modern arbitration agreements resemble the

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8. *See* Ramona L. Lampley, *Is Arbitration Under Attack? Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Landscape*, 18 CORNELL J. L. & PUB. POL. 477, 503–10 (2009).

9. *Id*. at 504.

10. *See* Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion: *The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 484 (2013).

11. Some studies have been conducted analyzing the prevalence and composition of arbitration agreements in some other industries. *See* Elizabeth C. Tipett & Bridget Schaaff, *How Conception and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U.L. REV. 459 (2018); CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 24–102 (2015) [hereinafter CFPB Arbitration Study]. However, few of these specifically focus on how these agreements have changed after *Concepcion* and *American Express*, *but see* Elizabeth C. Tipett & Bridget Schaaff, *How Conception and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U.L. REV. 459 (2018), and none of these studies focus specifically on contracts for the companies providing basic consumer-facing goods and services that are the focus of this study, or on the various terms examined herein.

12. *See* Sura & DeRise, *supra* note 10, at 484.

one at hand in *Concepcion*. However, this does not mean that customers have nothing to fear. The number of businesses in this survey that use binding arbitration agreements with class action waivers has tripled in less than a decade.[13] In addition, an analysis of these agreements suggests that they have been reduced to their most necessary and dangerous terms, including only a "sword" in the form of a class action waiver to strike down even meritorious consumer claims and a "shield" of seemingly pro-consumer provisions to insulate the agreement from any lingering judicial scrutiny. As such, it's not that these agreements have become any friendlier after *Concepcion* and *American Express*, it's that they have become common, and more optimized for defeating customers' claims.

The rest of this paper will proceed as follows. Part I traces the evolution of arbitration agreements as they appear in consumer form contracts. Parts II and III then detail the empirical study of arbitration agreements in consumer form contracts, with Part II describing the methodology and Part III summarizing the results. Part IV then explores what these results reveal about the next generation of arbitration agreements and what these developments mean for consumers.

I. THE PRE-*CONCEPCION* EVOLUTION OF BINDING ARBITRATION AGREEMENTS

Over the past century, both Congress and the Courts have greatly relaxed their policing of the contracts that businesses use to bind their customers and have become more amenable to forced arbitration.[14] In so doing, they have thrown the door wide open for businesses to bind consumers to numerous pro-business and anti-consumer terms.[15] As a result, businesses are now in a position to close the doors of the courthouse to consumers and perhaps foreclose any practical possibility for them to redress injuries altogether. This section briefly traces the development of arbitration agreements in consumer form contracts, beginning with the development of form contracts as a whole and then focusing more specifically on how arbitration agreements were added to these contracts and how they evolved over time in response to legislation and judicial decisions.[16]

A. THE GROWTH OF CONSUMER FORM CONTRACTS

Before businesses could even consider forcing consumers to arbitrate, they needed a way to bind their consumers to contracts *en masse*. Given the obvious difficulty of contracting individually with each of a business' thousands of

13. *See infra* Part IV.A.

14. *See* Leslie, *supra* note 4, at 268.

15. *See id*. at 266.

16. As the evolution of binding arbitration agreements in contracts has been well-documented by a number of scholars, this section does not undertake an exhaustive exploration of that history, and instead provides only a brief overview. For a fuller discussion of the development of binding arbitration, see generally IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992); Lampley, *supra* note 8; Leslie, *supra* note 4.

customers, businesses began to adopt standard "form contracts" that apply to all of their customers. These form contracts are a type of contract of adhesion; that is, they are offered by a more powerful party (the business) to a less powerful party (the customer) purely on a "take it or leave it" basis.[17] Consumers who are unsatisfied with the terms of a given agreement have only two options: forgo purchasing the product or service entirely, or suck it up and accept the terms, regardless of how odious they may be. However, most consumers do not even know enough about these contracts to be upset about their terms; studies of consumer behavior have consistently found that the average consumer does not read the form contracts she is provided with,[18] does not understand the terms contained in these contracts,[19] and often times does not realize that she will be bound by the terms of the contract.[20] Despite criticism from scholars calling for these contracts to be consistently held unenforceable,[21] courts will enforce form contracts as long as they meet a general "reasonableness" test.[22] Though customers are generally ignorant of the terms in these agreements, they are upheld as long as they are not "so unfair that enforcement should be withheld."[23]

Contracts of adhesion first attracted the attention of American scholars in 1919,[24] and they grew in use through the twentieth century and into the twenty-first.[25] With the birth of the internet these contracts grew yet more prominent as new ways to deliver them to customers became available.[26] More recently,

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17. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 600 (1991); *see also Adhesion Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining adhesion contract as "A standard-form contract prepared by one party, to be signed by another party in a weaker position, usu. a consumer, who adheres to the contract with little choice about the terms").

18. *See, e.g.*, Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 886–87 (2010); Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 32 (2014); Stark & Choplin, *supra* note 6, at 694–700.

19. *See* Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *Whimsy Little Contracts with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 47 (2015) (finding that only seven percent of survey respondents understood the meaning of certain terms in a sample contract).

20. *Id.* at 53 (finding that fifty-seven percent of consumers surveyed did not understand that an arbitration agreement was binding).

21. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1180 (1983).

22. *See, e.g., Carnival Cruise Lines*, 499 U.S. at 600 (Stevens, J., dissenting); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (1965).

23. *Williams*, 350 F.2d at 450.

24. *See* Edwin W. Patterson, *Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 & n.106 (1919); *see also* Steven v. Fidelity & Cas. Co. of N.Y., 58 Cal. 2d 862, 882 n.10 (1962).

25. *See* H. B. Sales, *Standard Form Contracts*, 16 MOD. L. REV. 318, 318 (1953) (noting the increased use of form contracts in the 1950s).

26. Specifically, the rise of the internet saw the advent of "click-wrap" and "browse-wrap" agreements. "Click-wrap" agreements are form contracts that appear when a user attempts to install software from the internet or carry out some other online transaction. Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 577 n.3 (2007). Consumers consent to the conditions contained therein by clicking a dialog box, often labelled "I agree," which then enables the program to finish downloading

companies have begun exploiting even more creative ways of binding consumers to their terms. For example, General Mills recently updated its terms of service purporting to bind anyone who subscribed to its mailing list, downloaded a coupon, entered a sweepstakes, redeemed a promotional offer, or "otherwise participat[ed] in any other General Mills offering."[27] While public backlash was sufficient in this case for General Mills to revise its agreement to apply only to users of its website,[28] commentators noted that there were few legal barriers to such expansive methods of binding customers, opining that even agreements printed on cereal boxes and coffee cups could potentially be binding.[29] Thus, consumer form contracts are poised to become even more ubiquitous in the coming years, giving businesses even more ways to bind consumers to arbitration and other pro-business terms.

B. JUDICIAL HOSTILITY TO ARBITRATION, THE FAA, AND FIRST-GENERATION ARBITRATION AGREEMENTS

With form contracts providing a viable way to contract with a large number of consumers at once, businesses had a viable way to deliver binding arbitration agreements to their customers. However, even as form contracts were becoming more prominent, binding arbitration agreements were heavily disfavored by courts, which generally refused to enforce them.[30] Congress responded to this judicial hostility toward arbitration agreements with the Federal Arbitration Act ("FAA"), which mandates that agreements to arbitrate in any contract involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[31]

Though the FAA sought to eliminate judicial hostility to arbitration agreements, its initial impact was quite narrow. This limited effect was due in part to

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or the transaction to finish processing. *Id.* "Browse-wrap" agreements are form contracts that are posted to a website that do not require the user to explicitly accept them; instead, users are deemed to consent to these agreements by taking some action, such as continuing to browse the website or installing specified software. Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 280 (2003).

27. Legal Terms, GENERAL MILLS (2014), https://prawfsblawg.blogs.com/files/general-mills-arbitration-agreement.pdf [https://perma.cc/4PHA-F5ZY].

28. Legal Terms, GENERAL MILLS (2018), http://www.generalmills.com/en/Company/legal-terms [https://perma.cc/C3F9-CT42].

29. *See* Mark Guarino, *General Mills drops arbitration clause, but such contracts are 'pervasive,'* THE CHRISTIAN SCIENCE MONITOR (Apr. 21, 2014), https://www.csmonitor.com/Business/2014/0421/General-Mills-drops-arbitration-clause-but-such-contracts-are-pervasive [https://perma.cc/25KZ-64FR] (according to David Seligman of the National Consumer Law Center, "Theoretically, there's nothing to stop General Mills from putting arbitration clauses on its Cheerios boxes, or Starbucks on its cups . . . . We're not seeing it on consumer products yet, but there is nothing in the law that would stop the company from doing it."); *see also* Emily Canis, *One Like Away: Mandatory Arbitration for Consumers*, 26 GEO. MASON U.C.R.L.J. 127, 135–36 (2015) (describing new methods by which consumers may unknowingly consent to form contracts).

30. David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C.L. REV. 1027, 1039 (2012).

31. 9 U.S.C.A. § 2 (1925).

the view that the FAA was a mere procedural statute that could not supersede state law.[32] In addition, judges established their own doctrines to limit the reach of the act; most notably, courts adopted the "non-arbitrability doctrine," which dictated that for certain types of cases such as civil rights, antitrust, and patent cases, arbitration was not an adequate substitute for a full judicial proceeding.[33] As a result, litigants in these types of cases could still bring their claims in court even if they had previously agreed to do submit to arbitration.[34] Both of these doctrines served as powerful checks on the ability of businesses to block consumer claims via arbitration agreements.[35]

Given these limitations, the FAA remained largely toothless until the late 1980s, when the Supreme Court began expanding the FAA's applicability in response to the supposed "litigation explosion" of the 1980s.[36] In the face of what it perceived to be increasingly unmanageable dockets, the Supreme Court changed course on its arbitration precedent and suddenly declared that the FAA's purpose was to establish a broad policy that favored arbitration agreements.[37]

From this point on, the Court's jurisprudence shifted from narrowing the scope of the FAA to expanding it, largely by dismantling the many obstacles to enforcement that it had previously put in place. In *Southland Corp. v. Keating*, the Court declared that the FAA actually was substantive federal law, meaning that it applied in state court proceedings and preempted contrary state laws that would have allowed consumers to avoid arbitration.[38] Similarly, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court seemingly reversed course on prior precedent by declaring that litigation and arbitration were substantively equal, with the only differences between them being procedural.[39] This holding greatly weakened the non-arbitrability doctrine; instead of recognizing broad category of cases that were non-arbitrable by default, the Court began to enforce arbitration agreements "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[40]

With many prominent barriers to enforcing arbitration agreements in tatters, businesses in the 1990s introduced the "first-generation" of consumer arbitration

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32. David Horton, *supra* note 30, at 1039.

33. *See* McDonald v. City of W. Branch, Mich., 466 U.S. 284, 290 (1984) ("And, although arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard.").

34. *See id.*

35. *See id.*

36. Horton, *supra* note 30, at 1041–42.

37. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (calling the FAA "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

38. *See* 465 U.S. 1, 11 (1984); *see also* Perry v. Thomas, 482 U.S. 483, 492 (1987) (striking down state law prohibiting arbitration of wage disputes).

39. 473 U.S. 614, 637–38 (1985).

40. *Id.*

agreements containing class action waivers.[41] These agreements suggested that businesses believed they were free to use arbitration agreements to substantially block consumers' claims; first-generation arbitration agreements featured a number of strongly pro-business terms designed to not only keep customers out of the courtroom, but also to prevent them from having any practical chance of winning a claim in arbitration.[42] First-generation arbitration agreements often prevented customers from participating in a class action, barred customers from recovering punitive damages, required customers to pay some or all of the arbitration fees, and forced customers to arbitrate in faraway, inconvenient locations.[43] These terms all greatly increased costs for consumers, most of whom had relatively low-value claims to begin with, making it a practical impossibility for them to actually bring their claims before an arbitrator, as any potential payoff they could receive would not cover the costs of the arbitration.[44]

When consumers challenged these clearly pro-business contracts in court, many of the agreements were struck down.[45] Relying on the FAA's provision that arbitration agreements could be invalidated by "such grounds as exist at law or in equity for the revocation of any contract,"[46] a number of courts invalidated these agreements under state unconscionability doctrines.[47] This rejection by the courts signaled to businesses that, despite recent pro-arbitration jurisprudence by the Supreme Court, there still were limits on how far arbitration agreements could go in trying to extinguish consumer claims.[48]

C. SECOND AND THIRD GENERATION ARBITRATION AGREEMENTS

After the first generation of heavily pro-business agreements was struck down as unconscionable, businesses revised their contracts in an attempt to appease the courts while still giving them an edge over consumers.[49] Businesses were unwilling to part with the class action waiver provision, but they made their agreements "friendlier" by omitting many of the more punitive provisions that were included in the previous generation of contracts.[50] In addition, second generation contracts sometimes included consumer-friendly provisions such as offers to pay some or all of a customer's litigation costs.[51] However, several courts invalidated even these friendlier agreements, finding that taking the class action vehicle away

41. *See* Lampley, *supra* note 8, at 503–04 & n.130.
42. *See id*.
43. *See id*.
44. *See* J. Maria Glover, Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements, 59 VAND. L. REV. 1735, 1737, 1747 (2006).
45. *See* Lampley, *supra* note 8, at 503–04 & n.131.
46. 9 U.S.C.A. § 2 (1925).
47. Lampley, *supra* note 8, at 503–04 & n.131.
48. *See id*. at 504.
49. *See* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 11 (2011).
50. *See id*.
51. *See* Lampley, *supra* note 8, at 508.

from consumers through contracts of adhesion still effectively prevented consumers with low value claims from receiving any form of relief.[52] As a result, these contracts were struck down as unconscionable.[53]

When even second-generation contracts failed to pass muster in the courts, businesses introduced a third generation of arbitration clauses which, while still forbidding class actions, aimed to avoid unconscionability by including terms that seemed to offer the financial incentive to bring suit that class actions usually provide.[54] Third-generation agreements typically offered a wide variety of goodies to customers; businesses frequently promised to pay all costs of arbitration, to allow arbitration to take place telephonically or at customer-convenient locations, and sometimes even to pay premiums to customers who prevailed in arbitration.[55] This generation of contracts was essentially tailor-made to address the problems that resulted in the previous generation of contracts being struck as unconscionable; while they barred class actions, they provided incentives for even customers with low-value claims to proceed to arbitration.[56]

D. *CONCEPCION* AND *AMERICAN EXPRESS* REOPEN THE LANDSCAPE FOR ARBITRATION AGREEMENTS

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court was confronted with one of these third-generation contracts. [57] In this case, AT&T's third-generation agreement had been struck down by lower courts, which had held that under California state law, an arbitration agreement featuring a class action waiver was unconscionable.[58] The Supreme Court reversed, holding the arbitration clause enforceable; however, rather than merely giving the AT&T contract a stamp of approval for adequately incentivizing customer claims, the Supreme Court went a step further.[59] In an opinion penned by Justice Scalia, the Court declared that the FAA invalidated even generally applicable doctrines, such as unconscionability, if they are "applied in a fashion that disfavors arbitration."[60] In other words, the Court held that FAA supersedes even settled state laws such as fraud and unconscionability that would otherwise invalidate pro-business arbitration agreements if those laws "interfere[] with arbitration."[61]

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52. *See* Discover Bank v. Superior Court, 113 P.3d 1100, 1107–08 (Cal. 2005); *see also* Sherry, *supra* note 49, at 11–12.

53. *See Discover Bank*, 113 P.3d at 160–61.

54. Sherry, *supra* note 49, at 12–13.

55. *Id.*

56. *Id.* at 14–15.

57. *See* 563 U.S. at 337 (describing various consumer-friendly features of the AT&T contract typical of third generation contracts).

58. *Id.* at 338.

59. *See id.* at 352.

60. *Id.* at 341.

61. *Id.* at 346.

This decision thus weakened the ability of lower courts to use unconscionability to police arbitration agreements, potentially allowing businesses to re-insert the types of pro-business terms that they had tried to use in the first generation of arbitration agreements.[62] *Concepcion* narrowed the "grounds for the revocation of any contract" that actually applied to the FAA; even doctrines such as unconscionability and duress may no longer be sufficient to invalidate an arbitration agreement in some situations. What's more, the plaintiffs in *Concepcion* were not attacking the arbitration agreement for its own sake; rather, they were objecting to the class arbitration waiver that was a part of the agreement.[63] Thus, rather than just protecting the actual arbitration agreement, the Court expanded the FAA's protective shield to potentially cover any terms related to that agreement.[64] As a result, the Court robbed the lower courts of ways to effectively police arbitration agreements. In addition to ensuring companies that third-generation contracts were undoubtedly safe under *Concepcion*, the Court weakened state unconscionability doctrines such that now even less consumer-friendly agreements, like second or even first generation contracts, could now pass muster in the courts.[65]

While *Concepcion* told businesses that they could put the pro-business terms back into their contracts, *American Express* told businesses that they could throw out the pro-consumer ones. In *American Express Co. v. Italian Colors Family Restaurant*, Italian Colors Restaurant and numerous other businesses that accepted American Express cards brought a class action against American Express alleging antitrust violations.[66] However, as part of its standard agreement, American Express required all vendors to arbitrate all disputes on an individual basis.[67] When American Express moved to compel arbitration, the plaintiffs objected that the agreement was unenforceable because no plaintiff could individually afford the cost of an expert who would be necessary to proving their claim.[68] Without access to some form of consolidated proceeding, plaintiffs had no financial incentive to bring the case, meaning that American Express had practically prevented them from vindicating their rights.[69] Indeed, it was this type of scenario where a class action waiver removed all incentive to bring suit that the lower courts were concerned about when they struck down second generation contracts.[70]

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62. *See* Sura & DeRise, *supra* note 10, at 484.

63. 563 U.S. at 337–38; *see also* Leslie, *supra* note 4, at 292; Imre Stephen Szalai, *More Than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 45 (2014).

64. *See* Leslie, *supra* note 4, at 292.

65. *See* Sura & DeRise, *supra* note 10, at 484.

66. *See* 570 U.S. at 231.

67. *Id.*

68. *See id.*

69. *See id.*

70. *See* Lampley *supra* note 8, at 508.

Though the Court's past decisions suggested that such cost-based bars to arbitration may indeed invalidate arbitration agreements under the effective vindication doctrine,[71] the *American Express* Court cabined these past decisions and signaled to businesses that their contracts need not ensure that plaintiffs have any practical way of prevailing on their claims.[72] Instead, the Court declared that an arbitration clause was enforceable as long as a party could *pursue* a statutory remedy; the Court did not care whether *actually proving* the statutory remedy was feasible.[73] While companies could not craft arbitration agreements that expressly forbade a potential plaintiff from ever bringing claims, they were free to use class action waivers and other provisions to make it practically impossible for a plaintiff to prevail.[74]

After the Supreme Court's most recent decisions, there are few meaningful checks on the enforceability of arbitration agreements.[75] *Concepcion* decimated the grounds for striking down arbitration agreements as unconscionable,[76] and while scholars debate whether the effective vindication doctrine still remains a viable safeguard against automatic enforcement of arbitration agreements after *American Express*,[77] whatever might remain of it only protects the plaintiff's

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71. Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights."); *see also American Express*, 570 U.S. at 240 (Kagan, J., dissenting) ("Our decision in Green Tree Financial Corp . . . confirmed that this principle applies when an agreement thwarts federal law by making arbitration prohibitively expensive.").

72. *See* 570 U.S. at 236.

73. *Id.*

74. *Id.* at 241–42 (Kagan, J., dissenting) (describing ways that companies can draft arbitration agreements to escape liability without resorting to "baldly exculpatory provisions").

75. Arbitration agreements cannot be enforced if they are in direct conflict with another federal law, few federal statutes have been found to inherently conflict with the FAA. Of these, even fewer affect arbitration for disputes related to basic consumer goods and services. The most notable conflicting statute for the types of agreements examined in this paper is the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (1975), which the Federal Trade Commission (FTC) has interpreted to forbid the inclusion of binding arbitration agreements in warranties. *See* 16 C.F.R. § 703.5(j) (2015); *see also* Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act § C(2), 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999). However, the Fifth and Eleventh Circuits have refused to recognize the FTC's rules and interpretations, and they allow binding arbitration agreements in warranties. Walton v. Rose Mobile Homes, L.L.C., 298 F.3d 470, 478 (5th Cir. 2002); Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1271–72 (11th Cir. 2002).

The Court has very recently signaled that there are *some* limits on the types of provisions that businesses can include in their arbitration agreements. In *New Prime Inc. v. Oliviera*, 139 S. Ct. 532, 544 (2019), the Court unanimously held that the FAA cannot be applied to enforce arbitration agreements in employment contracts for truck drivers, regardless of whether they are regular employees or independent contractors. While this is a notable departure from the Court's recent pro-arbitration provisions, it may be fairly limited in that it was premised on § 1 of the FAA, which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1947). As such, this limit on the enforcement of arbitration agreements is unlikely to apply to arbitration agreements that would be found in consumer form contracts.

76. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. at 341.

77. *Compare* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 463–64 (2014) (advocating legislative reform to the FAA due in part to the Court's "unwillingness to provide necessary safeguards" as evinced by its decision limiting of

ability to assert a claim, even if other terms of the agreement make actually prevailing on that claim impossible.[78] As a result, businesses may not be under pressure from the courts to be so nice to their customers and continue to offer goodie-laden third-generation contracts.[79]

Without the courts there to stop them, businesses seem to have every incentive to return to second-generation or even first-generation contracts that will more thoroughly bind consumers and prevent them from bringing claims both in court or in arbitration. Thus the question becomes: what is the next step in the evolution of arbitration agreements? Will the fourth generation of agreements resemble those of the third generation, which were tailor made to withstand tough judicial scrutiny? Or will businesses revert to the more neutral second generation-style contracts that lacked pro-consumer provisions on the assumption that courts no longer require these giveaways for consumers? Might they be so emboldened by the Supreme Court's recent decisions that they return to the heavily pro-business first generation contracts? And, ultimately, how might these changes affect consumers' access to justice in the near future?

II. EMPIRICAL STUDY OF ARBITRATION CONTRACTS—METHODS

At the time of writing, American Express took place over six years ago, meaning that the fourth generation of arbitration agreements, the post-*Concepcion* and *American Express* generation, is already upon us. In order to explore this new generation of contracts and assess how they may affect consumers' access to justice, this study compared consumer form contracts as they existed before *Concepcion*, after *Concepcion*, and after *American Express*.

A. SAMPLE

This study examined form contracts from a total of 100 businesses representing six industries that consumers interact with on an almost daily basis: Telecom, E-Commerce, Entertainment, Apps and Internet Services, Consumer Electronics, and Credit Cards. These categories were chosen in part due to the availability of the agreements online, which facilitated analysis of both past and present arguments. In addition, they are underrepresented in current literature on arbitration despite consumers' frequent use of products and services in these industries. The specific businesses chosen were those with substantial market share and

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the effective vindication doctrine in *American Express*) *and* Stephen A. Fogdall and Christopher A. Reese, *The "Effective Vindication Doctrine" is a Virtual Dead Letter After* American Express Co. v. Italian Colors Restaurant, Schnader Harrison Segal & Lewis LLP (July 5, 2013), https://www.jdsupra.com/legalnews/the-effective-vindication-doctrine-is-48480/ [https://perma.cc/3N9U-RWP5] *with* Ivey Blair, *Battles between Arbitration and Equity: Effective Vindication Redefined by U.S. Supreme Court*, 4 RESOLVED: J. ALTERNATIVE DISP. RESOL. 3, 13–15 (2014) (arguing that effective vindication doctrine is still being employed in the lower courts after *American Express*).

78. *See American Express*, 570 U.S. at 236–37.

79. *See* Sura & DeRise, *supra* note 10, at 484.

widespread name-recognition, as consumers are especially likely to interact with these well-recognized businesses frequently, and thus will more acutely feel the effects of arbitration agreements from them. However, within each category, businesses of various sizes and revenues were selected in order to ensure that any changes observed were not limited only to companies of a certain size. A full list of business contracts included in this study is available in Appendix A.

B. ARBITRATION AGREEMENT COLLECTION

After choosing prominent companies in each of the six categories, current versions of their relevant consumer form contracts were collected directly from their websites. Past versions of the agreements were then collected using the Internet Archive's Wayback Machine.[80] Agreements were collected in this manner from roughly 2008, three years before *Concepcion*, to 2018. Note that additional versions of each contract were only collected when the arbitration provisions or relevant terms were updated; at times provisions of the contract unrelated to the arbitration clause were updated while the arbitration agreement remained untouched. While these instances were noted, only agreements with changes to the arbitration agreement itself were collected, meaning that while the study accounts for 100 businesses over three time periods, there were not 300 unique agreements collected.

C. ARBITRATION AGREEMENT CODING AND ANALYSIS

The contracts collected were then sorted into three time periods based on whether they were last updated before *Concepcion*, after *Concepcion*, or after *American Express*. If a business introduced multiple contracts within that time frame, only the latest one was used for that time period. Once the contracts were sorted, each one was manually reviewed to determine first whether it contained an arbitration agreement at all, and, if so, what terms accompanied the agreement. Specifically, each contract was analyzed to determine if it contained any of the following provisions: arbitration fee shifting provisions, attorney fee shifting, forum selection clauses, provisions mandating a certain set of arbitration rules, minimum award guarantees, opportunities to opt-out, class action waivers, and sunset provisions. Certain details about each of these provisions were also collected; for example, in addition to noting whether an agreement allowed for fee shifting, the specific conditions and amounts of these contracts were also recorded. After coding was completed, the terms were compared across each of the three time periods and the six industries to track the changes in the use of each term.

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80. The Wayback Machine is a digital archive that hosts past versions of websites, essentially taking snapshots of webpages as they existed at a specific time and making it available for viewing at a later date even if the website is updated. *See* Wayback Machine, INTERNET ARCHIVE (last visited Dec. 12, 2018), https://archive.org/web/.

D. LIMITATIONS

Though this study had the benefit of a wide range of data collected both over time and from a number of prominent companies, there were some challenges to collection and analysis of these contracts. Companies rarely provide archives of past contracts on their websites, and as a result the terms available were limited to those that had been voluntarily archived through the Internet Archive's Wayback Machine. This archive, while a useful resource, is incomplete in that it does not provide cached versions of every website for every day, meaning that contracts from certain days or months in a given year were unavailable for review. Fortunately, because none of the arbitration agreements in the sample were updated on a monthly basis, and because some gaps could be logically filled by reviewing contracts from right before and right after the missing timeframe, the unavailability of terms had only a minor impact on the companies included in the study.[81] Some companies did not have any contracts available for certain years, and thus had to be excluded from those time periods. While this only affected six companies and only for the "pre-*Concepcion*" results, it nevertheless may skew the data slightly during these timeframes.

In addition, as a correlational study, this survey is unable to isolate specific variables beyond the Court's decisions that may have influenced companies to update their contracts. While the results suggest that the pronounced change in agreements before and after *Concepcion* and *American Express* is likely due to these decisions, there may be other variables that businesses took into account when deciding whether to change the terms of their agreements.

III. EMPIRICAL STUDY OF ARBITRATION CONTRACTS – RESULTS

Once the contracts were collected and coded, the data was analyzed to explore how consumer form contracts changed from before the Court's decision in *Concepcion* until 2018, five years after *American Express* was decided. This section explores these results, looking first at the changes in the overall incidence of arbitration clauses in consumer form contracts. It then looks more specifically at the prevalence of pro-business terms, the hallmark of first generation contracts, to see if there has been a resurgence of these terms in the aftermath of *Concepcion* and *American Express*. Finally, it turns to more consumer-friendly terms, many of which were introduced in third generation contracts to placate courts[82] and

81. For example, the Wayback Machine may have archived websites for the months of January and March for a certain month, but may lack an archived version of February. However, the websites in January and March from that year were identical, leading to the conclusion that website had most likely not been updated in February only to be reverted in March. In addition, a majority of contracts did note a "last updated" date for their terms, which further helped to pinpoint when a contract was last updated in the event that an archived website was missing for a certain time period.

82. *See* Lampley, *supra* note 8, at 510.

may no longer be necessary to insulate the contracts under the Court's recent jurisprudence.[83]

A. OVERALL INCIDENCE OF ARBITRATION CLAUSES

As Figure 1 illustrates, arbitration clauses were relatively rare in the years before *Concepcion* was decided; of the 94 businesses with contracts available for these dates, only 21 of them, or 22.3%, used arbitration clauses.[84] After *Concepcion*, this rate nearly doubled, with 41 out of 100 companies, or 41.0%, including a binding arbitration agreement in their contracts.[85] The number increased further in the years following *American Express* to 66.0%. While this increase after *American Express* at first appears roughly as dramatic as that observed after *Concepcion*, a further breakdown of the data illustrates that it actually was a more gradual shift than the post-*Concepcion* one.

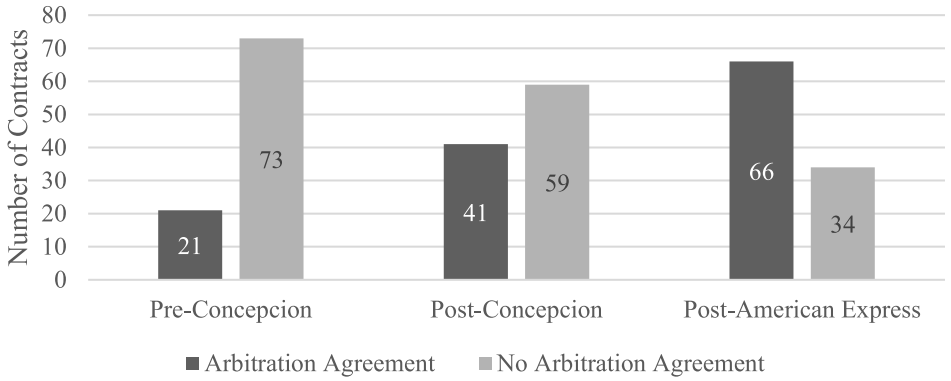

FIGURE 1: Contracts With and Without Arbitration Clauses over Time

As Figure 2 shows, the increase in arbitration agreements was actually less rapid after *American Express* than it was after *Concepcion*; in the two year period between the decisions in *Concepcion* and *American Express*, the number of arbitration agreements among the companies surveyed increased by 105%, while in the two years following *American Express* they only increased by 22%, suggesting that *Concepcion* had a more immediate impact on the use of arbitration agreements in standard form contracts overall than did *American Express*.

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83. *See* Sura &DeRise, *supra* note 8, at 484.

84. "Pre-*Concepcion*" was defined as any contract that was current as of April 7, 2011, the day before *Concepcion* decided. There were no available contracts in this time range for three of the credit card-offering companies surveyed (USAA, Credit One, and First Premier Bank) and three of the apps in the survey had not been created until after *Concepcion* was decided (CandyCrush Saga, Snapchat, and Tinder). As a result, this time period has six less contracts in its sample set than the other two timeframes.

85. "Post-*Concepcion*" was defined as any contract that was introduced between April 8, 2011, the day *Concepcion* was decided, and June 19, 2013, the day before *American Express* was decided.

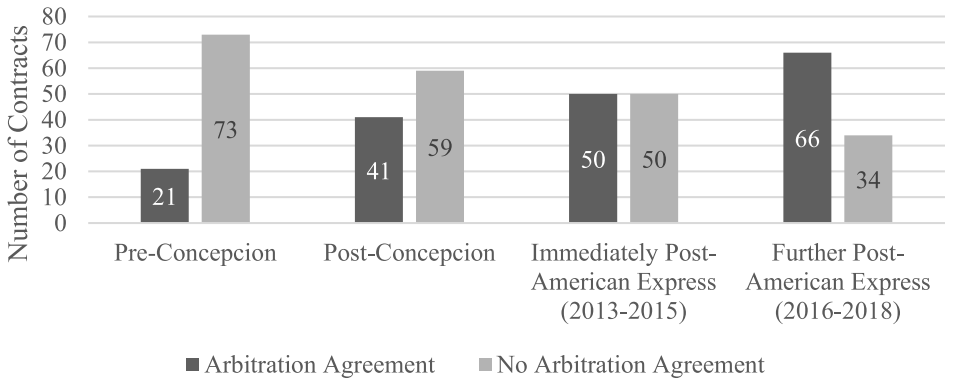

FIGURE 2: Contracts With and Without Arbitration Contracts, Post-*American Express* Breakdown

The increases in use of arbitration agreements also varied significantly by industry. Figure 3 displays percentage of contracts in each industry that included an arbitration provision over each of the three time periods in question.

While contracts in all industries surveyed increasingly contained arbitration agreements as time went on, this change was more dramatic for some industries than it was for others. Notably, credit card companies remained stable in their use of these agreements,[86] while online shopping sites, streaming and entertainment services, and apps and internet services all saw a much more marked increase. While there was some movement in consumer electronics, the increase in this category was relatively small compared to those of other industries.[87]

86. All of the changes in the use of arbitration agreements in this industry can be attributed to the three credit card agreements that were not available for the Pre-*Concepcion* period. *See supra* note 84 and accompanying text. This may be due in part to the unstable regulatory regime surrounding the credit card industry. In 2009, the National Arbitration Forum, formerly the biggest arbitration association for credit card disputes, entered into a consent decree whereby it would no longer arbitrate consumer claims related to credit cards or debt after allegations that it deceived customers who had engaged in its proceedings. *See* Martin Menzer, *Leading arbitration firm quits the business after lawsuit*, CREDITCARDS.COM (July 20, 2009), https://www.creditcards.com/credit-card-news/arbitration-lawsuit-naf-settle-1282.php [https://perma.cc/E7V3-NX8Z]. The Obama administration then sought to eliminate forced arbitration in cases involving consumer credit cards entirely, with the CFPB finally passing a rule to that effect in 2017. *See* Arbitration Agreements 12 C.F.R. 1040 (2017). The after Donald Trump took office, he signed a joint resolution of disapproval pursuant to the Congressional Review Act, effectively removing this rule from the Code of Federal Regulations and reopening the credit card industry to binding arbitration. *See* Arbitration Agreements 82 Fed. Reg. 55,500 (Nov. 22, 2017).

87. The relatively small shift in the use of arbitration agreements in this industry may in part be due to uncertainty as to whether the Magnuson-Moss Warranty Act bars binding arbitration agreements in consumer warranties, which are widely used for such electronic goods. *See supra* note 75 and accompanying text. While some of the warranties for consumer electronics nevertheless contained arbitration agreements, *see e.g.*, One (1) Year Standard Limited Warranty, Toshiba (2018), http://cdgenp01.csd.toshiba.com/content/support/pdf_files/stdwar/gma501515010_laptop_1_yr_warranty_locked_18oct03.pdf [https://perma.cc/Y7RT-QXUR]; Terms & Conditions/Health & Safety Information for Samsung Galaxy S9, SAMSUNG (2018) http://downloadcenter.samsung.com/content/UM/201803/20180323061326519/ATT_SM-G960U_SamsungTC_EN_032118_Final_Rev_1.1.pdf [https://perma.cc/6Y8W-B56E], most of the product warranties examined did not contain an arbitration agreement, *see, e.g.*, Warranty

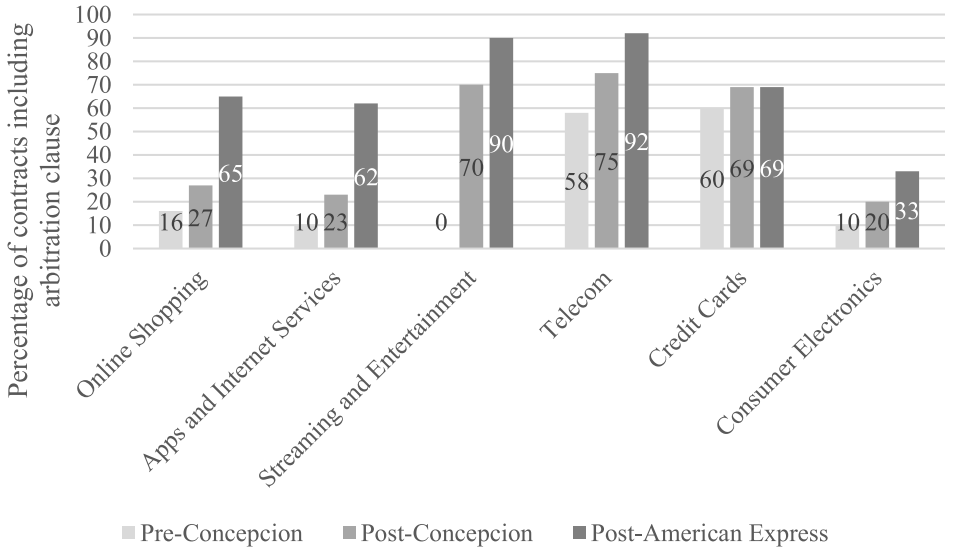

FIGURE 3: Arbitration Agreement Inclusion by Industry

B. INCIDENCE OF PRO-BUSINESS CLAUSES

While pro-business terms featured most prominently in first generation arbitration agreements before being struck down by the courts, commentators expressed some concern that these terms were poised to make a comeback after the decisions in *Concepcion* and *American Express*.[88] However, with the exception of the class action waiver, pro-business clauses such as forum selection clauses, choice of arbitrator clauses, and sunset clauses generally either remained rarely used or became even rarer over the course of the study.

1. CLASS ACTION WAIVERS

Perhaps the most powerful tool that a business can use to insulate itself from liability is the class action waiver. Class actions exist in part in order to make the small value claims of individual plaintiffs worth pursuing; they help ensure that claimants have access to the courts in cases where the aggregate harm is large but any one claim is too small to justify the expenses of litigation.[89] This type of situation was exemplified in *American Express v. Italian Colors Restaurant*, where the fee for a necessary expert witness was too large for any one party to

and Service Information, NINTENDO (2018), https://www.nintendo.com/consumer/manuals/warrantytext_eng.jsp [https://perma.cc/BG6E-4936]; Apple One (1) Year Limited Warranty, APPLE (August 26, 2016), https://www.apple.com/legal/warranty/products/ios-warranty-document-us.html [https://perma.cc/4VAA-64PT].

88. *See* Sura &DeRise, *supra* note 10, at 484.

89. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)).

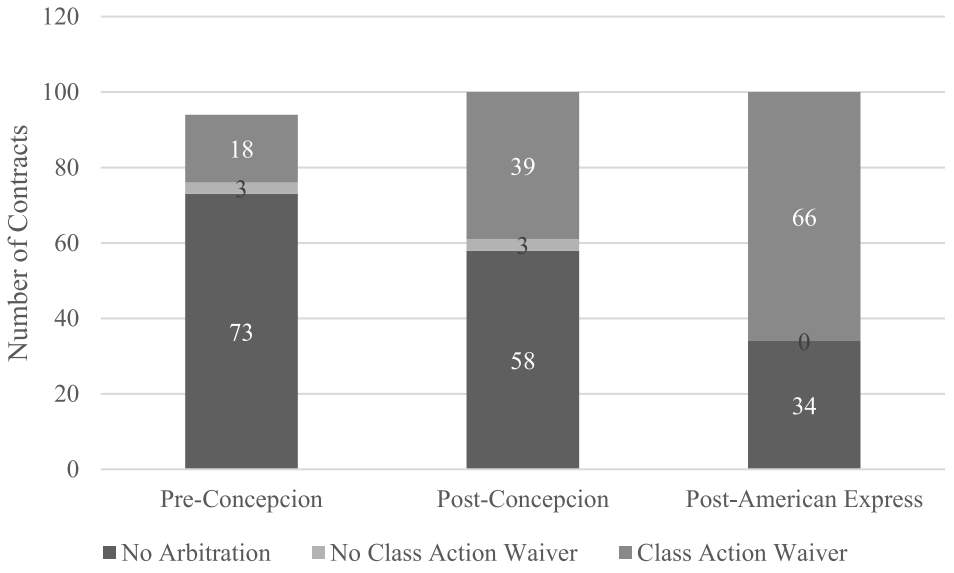

FIGURE 4: Incidence of Class Action Waivers in Contracts

shoulder.[90] Furthermore, because consumer suits often involve precisely these types of low-value or "negative-value" claims, a class action waiver can be completely fatal to customers' ability to vindicate their rights.[91] As a result, class action waivers do more than just block class actions; they prevent customers from sharing the costs of resolving disputes, which in turn extinguishes a number of claims by making them financially impossible for customers to bring.[92] Between the sheer power of class action waivers and the Supreme Court's official seal of approval for them in *American Express*, it would seem only logical that businesses would adopt these policies en masse.

The importance of these agreements for businesses was reflected in the results of the study, with class action waivers growing rapidly alongside arbitration agreements. Over the entire course of the study, only 6 contracts that included an arbitration agreement lacked a class action waiver, and these 6 contracts came from the same three online shopping businesses during different time periods. Figure 4 illustrates the proportion of contracts including arbitration clauses with and without class action waivers over time.

Until *American Express*, Lowes, Home Depot, and Etsy included arbitration agreements in their contracts but did not include class action waivers. All three of these companies have since revised their agreements to include such waivers, and every company that has added an arbitration agreement has also included a class

90. *American Express*, 570 U.S. at 231.
91. *See* Glover, *supra* note 44, at 1737, 1747.
92. *See id.*

action waiver. As of 2018, every contract containing an arbitration provision also contained some form of class action waiver.

2. FORUM SELECTION CLAUSES

Forum selection clauses may be incorporated into arbitration agreements in order to make the process easier for businesses and more difficult for customers. Like traditional arbitration clauses that choose the court or courts in which a party may bring suit, arbitration forum selection clauses set the location that any future arbitration hearings will take place.[93] These clauses may force customers to travel hundreds of miles to resolve their claims, thus greatly increasing the time and expense demanded of the customer should she wish to follow through with arbitration.[94] Traditional forum-selection clauses have been upheld by the Supreme Court even when the choice of forum interfered with the plaintiffs' ability to vindicate their rights,[95] and any prohibitions on arbitration forum selection may be preempted by the FAA.[96]

However, forum selection clauses for arbitration were relatively rare in all of the time periods analyzed.[97] While they were included in over a quarter of all arbitration agreements before *Concepcion*, they are now found in only 12% of them. Figure 5 shows the number of contracts that did and did not contain pro-business forum selection clauses in each of the three relevant time periods.

Some of the businesses that used forum selection clauses opted to remove them from later revisions of their arbitration agreements. Dick's Sporting Goods, Etsy, J.Crew,[98] and WeChat all removed their more restrictive forum selection clauses from their agreements after *American Express* was decided. This shift indicates an affirmative step by these businesses to make arbitration more viable for their customers by removing possible geographic barriers that would have

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93. *See, e.g.*, Terms of Service, TWITCH (2018), https://www.twitch.tv/p/legal/terms-of-service [https://perma.cc/F3CB-JAXA] [hereinafter Twitch Terms of Service] ("You and Twitch further agree . . . that any arbitration will occur in Santa Clara County. . . .").

94. *See id.* (requiring arbitration in Santa Clara County regardless of where the customer resides).

95. *See Carnival Cruise Lines*, 499 U.S. at 603 (Stevens, J., dissenting).

96. Leslie, *supra* note 4, at 290.

97. "Forum selection clause," as used here, refers to provisions that set a definite location for arbitration that did not change based on the customer's residence. Terms that set a forum for litigation if the arbitration agreement was not upheld or that called for arbitration to take place in a location intended to be convenient to customers, such as their county of residence, are not included in this definition.

98. J.Crew's current forum selection terms are somewhat contradictory; its current Terms of Use mandate both that "Any dispute . . . shall be submitted to confidential arbitration in New York, New York" and that "you may choose to have the arbitration conducted . . . in person in the county where you live, or at another mutually agreed location" Terms of Use, J.Crew (Nov. 1, 2017), https://www.jcrew.com/footer/termsofuse.jsp?sidecar=true [https://perma.cc/2ES2-NU8U] [hereinafter J.Crew Terms of Use]. As the latter provision allowing for arbitration in a customer's county of residence or another mutually agreed upon location was not present in J. Crew's pre-*American Express* Terms of Use, *see* Terms of Use, J.CREW (May 29, 2012), https://web.archive.org/web/20120621182325/http://www.jcrew.com:80/footer/termsofuse.jsp [https://perma.cc/8BJM-N574], it appears that J.Crew intended to allow for arbitration in more customer-friendly locations in the newer version.

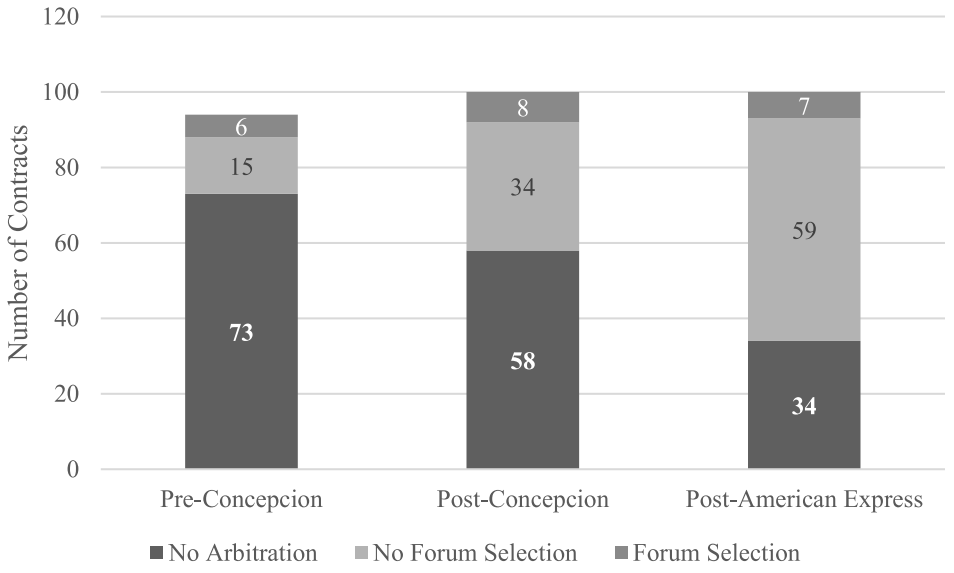

FIGURE 5: Incidence of Forum Selection Clauses in Contracts

required customers to travel to locations that were more convenient for the business. In addition, businesses adopting arbitration agreements for the first time also typically did not include restrictive forum selection clauses in their agreements. Only 3 of the 45 businesses that added arbitration clauses to their agreements between 2011 and 2018 included a forum selection clause in the first version of their contracts.

As with attorney fee shifting provisions, forum selection clauses were much more prevalent in one industry than the other five surveyed. During all three time periods, online shopping sites represented a substantial majority of the businesses utilizing these clauses. Businesses in this industry provided 5 of the 6 (83%) forum selection clauses found in pre-*Concepcion* agreements, 7 of 9 (78%) after *Concepcion*, and 6 of 8 (75%) after *American Express*.[99]

3. SUNSET CLAUSES

A "sunset clause" essentially functions as a custom-made statute of limitations that mandates that a customer must bring their claim to arbitration within a

99. While these raw numbers may be due in part to the larger sample size of shopping sites compared to some of the other categories, controlling for this variable still shows that there are typically at least twice as many forum selection clauses found in contracts in this industry than in others. After *Concepcion*, 19% of all online shopping agreements included a forum selection clause, compared to 8% of all app contracts and 0% of all streaming service, telecom, credit card, and consumer electronics contracts. Similarly, after *American Express* 16% of all online shopping agreements surveyed included a forum selection clause, compared to 10% of streaming service contracts and 0% of all app, telecom, credit card, and consumer electronics contracts.

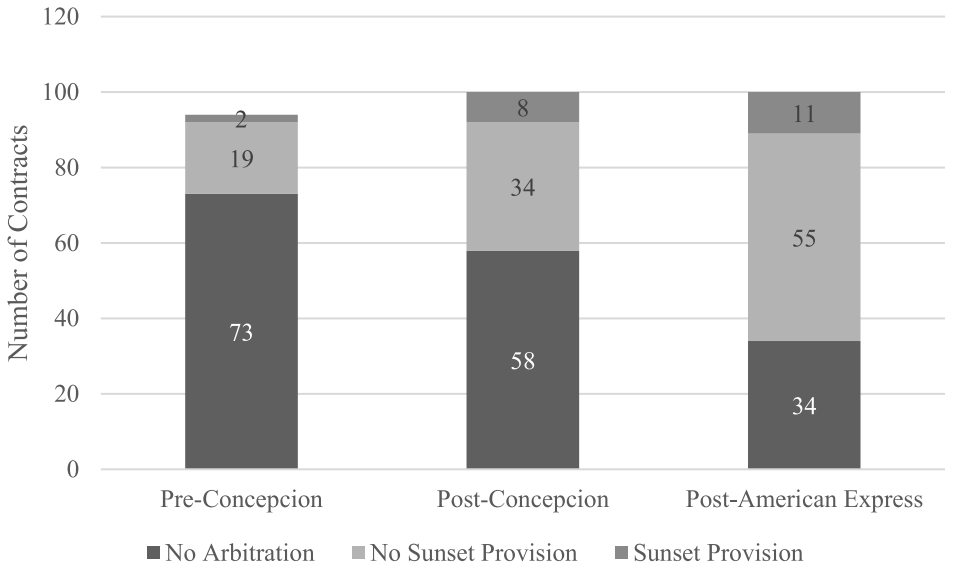

FIGURE 6: Incidence of Sunset Clauses in Contracts

certain time period or have it permanently waived.[100] These clauses allow businesses to overwrite the otherwise quite generous statutes of limitations that typically exist for consumer claims.[101] While these types of clauses are held to certain standards of reasonableness in courts, arbitrators do not adhere to these standards, meaning that sunset clauses are more likely to be upheld if they are included arbitration agreement, and may be even more likely to be enforced after *Concepcion* and *American Express*.[102] As a result, sunset provisions offer another potentially viable method of limiting liability.

Despite their potential viability, sunset clauses were also relatively rare at all points in this study, though their growth kept pace with and at times exceeded the overall increase in the use of arbitration clauses. Figure 6 illustrates the use of sunset provisions over the three time periods examined in the study.

While only 9.5% of arbitration agreements included sunset provisions before *Concepcion*, this number increased to 19.5% after *Concepcion*, then decreased slightly to 16.7% after *American Express*. This means that these agreements are more prevalent now than they were before *Concepcion*, but it appears that fewer are being adopted after *American Express* than after *Concepcion*. In addition, while until *American Express* all sunset provisions mandated that claims must be

100. *See, e.g.*, J.Crew Terms of Use, *supra* note 98 ("Any claim or cause of action you may have with respect to J.Crew or the Site must be commenced within one (1) year after the claim or cause of action arose. . . .").

101. *See* Leslie, *supra* note 4, at 282–83.

102. *Id.* at 284.

brought within one year, one of the new sunset provisions introduced after this decision allowed for a longer time period, giving customers two years to bring their disputes to arbitration.[103] Whether this contract is simply an outlier or evinces a movement toward more lenient sunset provisions remains to be seen.

4. CHOICE OF ARBITRATION ASSOCIATION CLAUSES

While less decisively pro-business than some of the aforementioned terms, businesses can more subtly tip the scales in their favor by inserting a clause into an arbitration agreement that dictates which arbitration association's rules will govern disputes.[104] These clauses are less likely to deter customers from initiating arbitration, but may give the company some procedural advantages over the customer. In addition to choosing rules that may be procedurally advantageous, businesses can use these clauses to better cultivate and capitalize on a "repeat player" advantage.[105] While this effect is subtle and has only limited empirical support,[106] provisions that specify certain arbitration rules are fairly innocuous on their face, making them more likely to be reasonable and thus enforceable. As such, these terms present a low-risk way for businesses to tilt the scales slightly in their favor.

Nearly all of the arbitration agreements in the sample specified which arbitration association would govern any disputes that arose. In fact, in each of the three time periods examined, only one arbitration agreement failed to select a set of arbitration rules. Of the vast majority of businesses that did specify which rules would govern arbitration, most chose either the American Arbitration Association (AAA)[107] or the Judicial Arbitration and Mediation Services (JAMS).[108] This is significant because using the same few arbitration services

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103. *See* Terms of Use, BELK (June 18, 2018), https://www.belk.com/customer-service/terms-of-use/ [https://perma.cc/SJ4V-X9AV] ("To the extent allowed by applicable law, you agree that you will bring any claim within two (2) years from the date on which such claim or action arose or accrued or it will be irrevocably waived.").

104. *See, e.g.*, Residential Customer Agreement, DISH NETWORK (Apr. 2018), https://www.dish.com/downloads/legal/residential-agreement.pdf [https://perma.cc/P92Q-SW26] ("Unless you and DISH agree otherwise in writing, the arbitration will be governed by the then-current Consumer Arbitration Rules (collectively, the "AAA Rules") of the American Arbitration Association . . . .").

105. A repeat player advantage is a phenomenon where arbitration becomes biased toward businesses over time because the business repeatedly engages in arbitration and becomes familiar with both the arbitrator and arbitration process, whereas most customers only engage in arbitration once and thus lack such familiarity. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650–51 (2005).

106. *See id.* at 1651.

107. The American Arbitration Association is a not-for-profit organization that provides arbitration and mediation services to individuals and organizations. *See* About the American Arbitration Association® (AAA®) and the International Centre for Dispute Resolution® (ICDR®), AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/about [https://perma.cc/BHT8-MUPX]. It administers arbitration using its own appointed arbitrators and subject to its own sets of arbitration rules, depending on the type of dispute at hand. *See id.*

108. JAMS, like AAA, is an independent arbitration association offering a variety of dispute resolution services, including arbitration and mediation. *See* About Us, JAMS, https://www.jamsadr.com/about/ [https://perma.cc/U2L6-XNES]. JAMS differs from AAA in its fee structure, rules, pool of arbitrators, and numerous

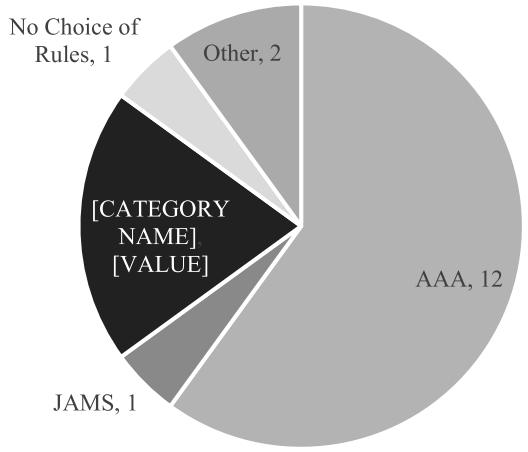

FIGURE 7: Contracts by Choice of Arbitration Rules, Pre-*Concepcion*

increases the chances that businesses will maximize the repeat player effect as businesses and even entire industries become increasingly familiar with a single set of arbitration rules and a single set of arbitrators.[109] Figures 7, 8, and 9 sort the contracts by their choice of arbitration rules for each of the three time periods in the study.[110]

The American Arbitration Association was used by a majority of the businesses surveyed in the study, and it only became more popular over time. Before *Concepcion*, 60% of businesses with arbitration agreements mandated that all arbitration would be subject to the AAA rules, and since *American Express* this number has risen to 79%. The Judicial Arbitration and Mediation Services Rules were selected by a few businesses, with some even offering a choice between JAMS or AAA rules. The only other rules that appeared in any contracts were the International Institute for Conflict Prevention and Resolution (CPR) rules,[111] the Hong Kong

other administrative practices. *See* Liz Kramer, ArbitrationNation Roadmap: When Should You Choose JAMS, AAA or CPR Rules?, ARBITRATION NATION (June 27, 2013), https://www.arbitrationnation.com/arbitrationnation-roadmap-when-should-you-choose-jams-aaa-or-cpr-rules/ [https://perma.cc/3KYP-B4UQ].

109. *See* Rutledge, *supra* note 3, at 565. Furthermore, because part of the repeat player effect is premised on the idea that arbitration associations have an incentive to favor businesses because they are more likely to appoint them in the future, the selection of one or two arbitration associations by a majority of businesses in an industry may serve to compound these incentives. *See id.*

110. Note that these figures include only the contracts that included arbitration clauses; those that did not compel arbitration also did not specify what arbitration association would govern arbitration in the event that it did arise.

111. Sprint's contract mandated use of the CPR terms until after *Concepcion*. *Compare* Sprint PCS Terms and Conditions of Service, SPRINTPCS (2008), https://web.archive.org/web/20070217195636/http://www.sprintpcs.com:80/common/popups/popLegalTermsPrivacy.html [https://perma.cc/EV2P-7KCB] *with* Sprint Nextel Terms and Conditions of Service, SPRINTPCS (2012), https://web.archive.org/web/20120127145300/https://manage.sprintpcs.com/output/en_US/manage/MyPhoneandPlan/ChangePlans/popLegalTermsPrivacy.htm [https://perma.cc/HFE4-T7M8].

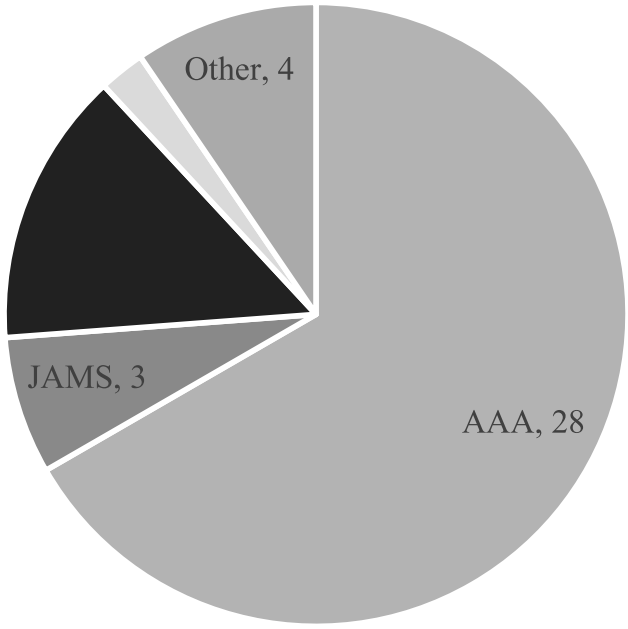

FIGURE 8: Contracts by Choice of Arbitration Rules, Post-*Concepcion*

International Arbitration Centre Administered Arbitration rules,[112] and the Better Business Bureau,[113] though as of 2018 none of these rules appeared in any of the contracts in the sample.

C. INCIDENCE OF PRO-CONSUMER CLAUSES

Especially before *Concepcion*, businesses would sometimes include pro-consumer clauses in their agreements in order to lessen the chances that the entire arbitration agreement would be struck down as unconscionable.[114] However, in

112. WeChat's contract mandated use of the Hong Kong International Arbitration Centre Administered Arbitration rules for all users, including American users, until March of 2018, when it adopted AAA rules for disputes with American customers. *Compare* WeChat Terms of Service, WECHAT (Jan. 6, 2014), https://web.archive.org/web/20180206170534/http://www.wechat.com:80/en/service_terms.html [https://perma.cc/8AVE-S2UE] *with* WeChat Terms of Service, WECHAT (Mar. 21, 2018) https://www.wechat.com/en/service_terms.html [https://perma.cc/PGD7-2FDJ].

113. Verizon's contract offered customers a choice between AAA or BBB rules until after *American Express*. *Compare* Verizon Online Terms of Service, Verizon (Apr. 19, 2011), https://web.archive.org/web/20120108163810/http://my.verizon.com:80/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_policies&id=TOS#Before_12_31_11 [https://perma.cc/ETX9-F8PG] [hereinafter Verizon 2011 Terms of Service] *with* Verizon Online Terms of Service, VERIZON (Apr. 26, 2018), https://www.verizon.com/about/sites/default/files/documents/terms/version_15-1_internet_tos.pdf [https://perma.cc/3SPG-59T7] [hereinafter Verizon 2018 Terms of Service].

114. *See* Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer* Contracts, 41 U. MICH. J.L. REFORM 871, 893 (2008).

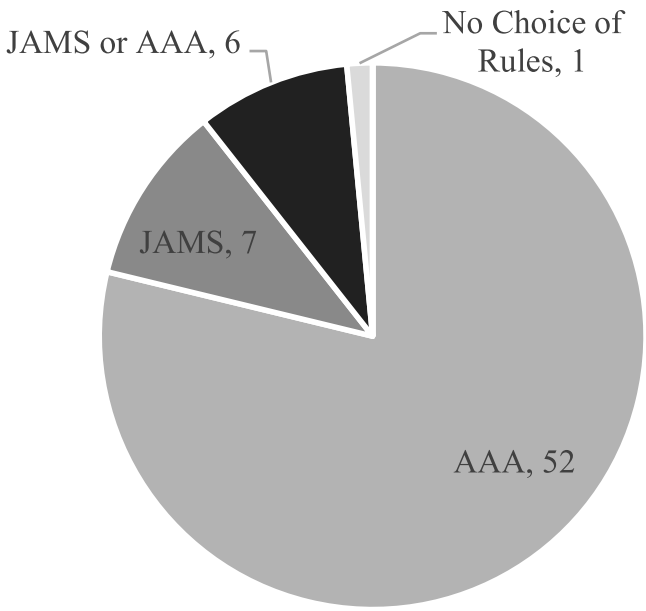

FIGURE 9: Contracts by Choice of Arbitration Rules, Post-*American Express*

the post-*Concepcion* era, there is considerable deference given to arbitration clauses, with even generally unconscionable terms being enforced as long as they are part of an arbitration agreement.[115] As such, there is now less legal incentive for companies to include these consumer-friendly terms in their agreements. To determine whether businesses have responded to *Concepcion* and *American Express* by removing many of these pro-consumer provisions, this study examined the prevalence of four different pro-consumer clauses in arbitration agreements: arbitration cost-shifting clauses, attorney cost-shifting clauses, minimum award guarantees, and opt-out clauses.

1. INCIDENCE OF ARBITRATION COST-SHIFTING CLAUSES

A number of the contracts surveyed shifted some of the costs associated with arbitration, such as the arbitrator's fee, the filing fee, or other associated costs, from the customer to the company. All of these clauses lessen or even remove some of the costs associated with arbitration, making it more financially feasible for consumers to initiate arbitration while also potentially making the agreement more palatable for judges if it is challenged in court.[116] While the exact terms of these provisions varied considerably, they all fell into two categories. Some

115. *See* Leslie, *supra* note 4, at 292–96 (describing how various terms are less likely to be held unconscionable after *Concepcion*).

116. *See* Lampley, *supra* note 8, at 508.

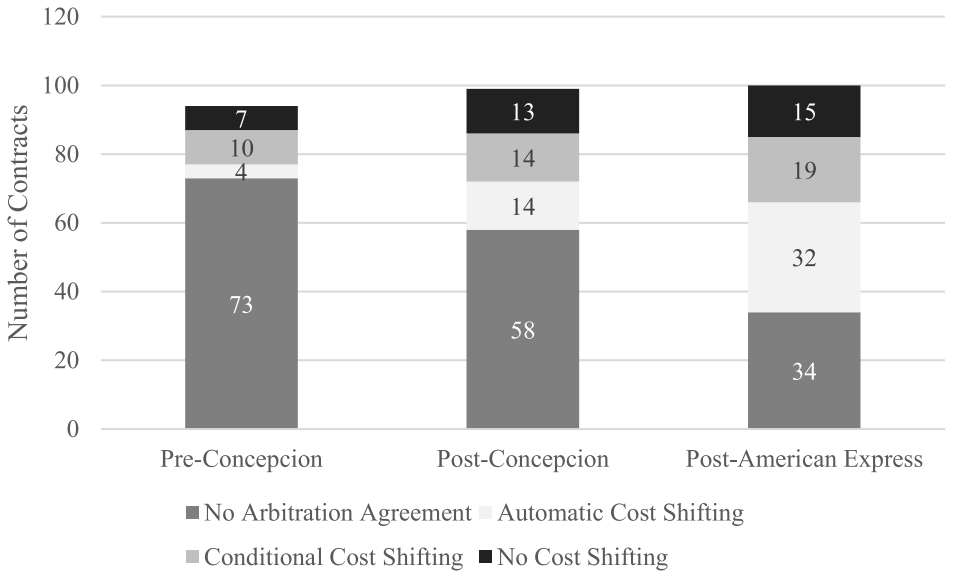

FIGURE 10: Arbitration Cost-Shifting Provisions in Form Contracts

contracts *automatically* shifted all fees and costs associated with arbitration to the company for all claims up to a certain dollar amount.[117] Other contracts provided for *conditional* sharing of arbitration costs; companies utilizing these contracts would only pay all or some of the arbitration costs under certain circumstances, such as the customer being unable to pay these costs[118] or the costs being above a certain threshold.[119] A number of contracts provided for no cost shifting at all, though in some cases this was because there was no arbitration agreement to begin with.

As Figure 10 shows, the proportion of contracts that contained some form of arbitration fee shifting provision grew after both *Concepcion* and *American Express*, with the number of contracts providing for automatic cost shifting rising most dramatically. This change in proportion is even clearer if the contracts without arbitration agreements are filtered out; Figure 11 maps the use of cost-shifting

117. *See, e.g.*, Comcast Agreement for Residential Services, XFINITY (2018), https://www.xfinity.com/corporate/customers/policies/subscriberagreement [https://perma.cc/5WBW-LH6Q] ("If your claims seek less than $75,000 in the aggregate, the payment of the AAA's fees and costs will be our responsibility.").

118. *See, e.g.*, Verizon 2018 Terms of Service, *supra* note 113 ("[I]f you provide us with signed written notice that you cannot pay the filing fee, Verizon will pay the fee directly to the AAA.").

119. Cardmember Agreement, AMERICAN EXPRESS (Nov. 8, 2018), https://www.americanexpress.com/content/dam/amex/us/staticassets/pdf/cardmember-agreements/green/American_Express_Green_Card_11-08-2018.pdf [https://perma.cc/2ZRZ-8HL2] ("You will be responsible for paying your share of any arbitration fees (including filing, administrative, hearing or other fees), but only up to the amount of the filing fees you would have incurred if you had brought a claim in court. We will be responsible for any additional arbitration fees.").

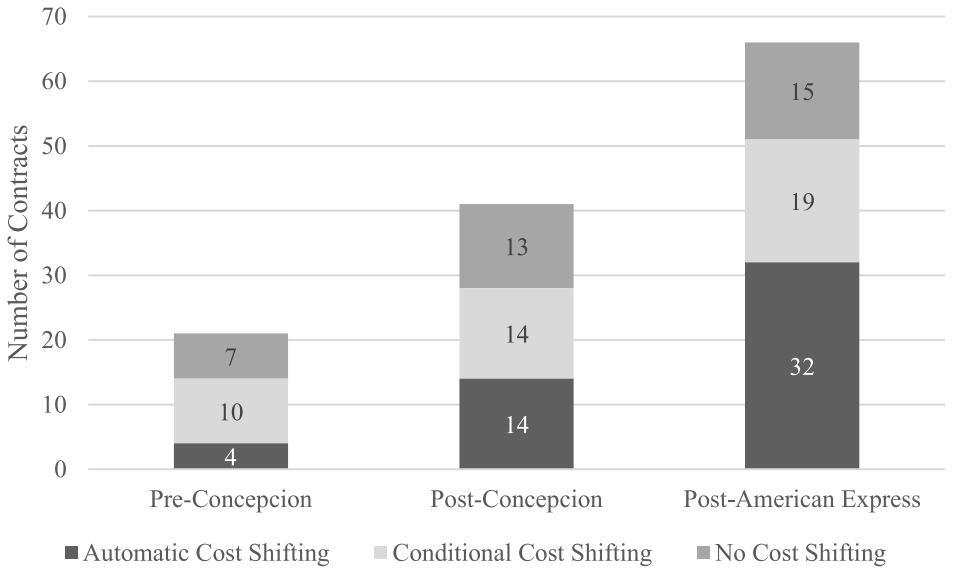

FIGURE 11: Incidence of Cost Shifting Provisions in Contracts with Arbitration Agreements

provisions only among contracts that utilized arbitration agreements over each of the three time periods.

While before *Concepcion* only 4 of the 20 contracts (20.0%) containing arbitration agreements provided that the company would automatically cover fees and costs associated with arbitration, this provision has become the new standard, with almost a majority of modern arbitration agreements (32 of 66 or 48.5%) now including it. While the proportion of contracts allowing for some form of cost-shifting has increased relatively little,[120] contracts that include fee shifting are now considerably more likely to automatically cover all costs rather than cover them only under certain conditions. Notably, none of the companies in the sample ever removed a cost sharing provision from their agreements, nor did any change an agreement from automatic cost shifting to conditional. As such, no arbitration cost shifting provision ever became *less* consumer friendly, and these agreements tended to become more favorable to consumers on this point over time.

2. INCIDENCE OF ATTORNEY FEE-SHIFTING CLAUSES

In addition to shifting the costs associated with arbitration, some businesses added clauses to their agreements that shifted the costs of an attorney to the business, further reducing the risk incurred by a customer who decides to go through

120. Compare the pre-*Concepcion* proportion of 13 out of 21 or 61.9% to the post-*American Express* value of 51 out of 66 or 77.3%.

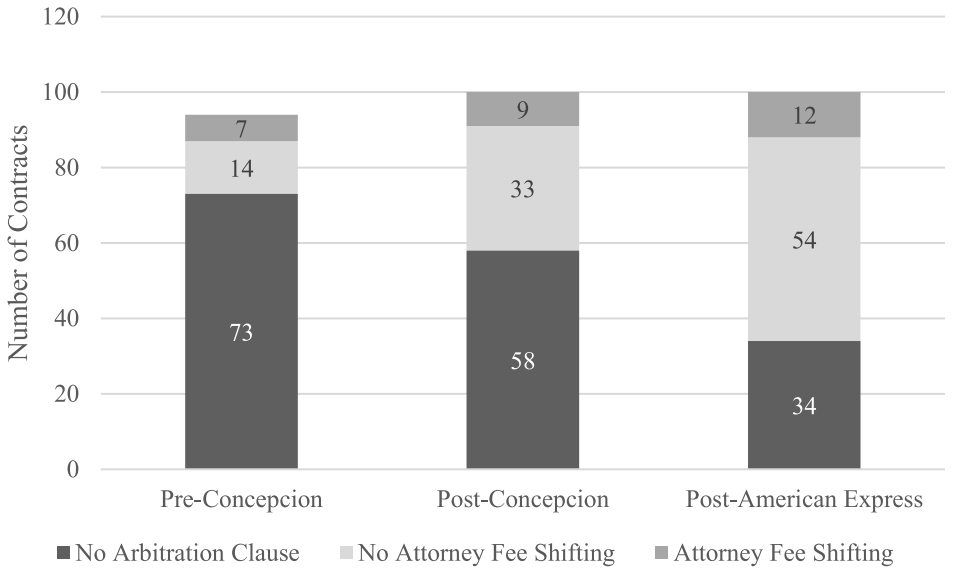

FIGURE 12: Incidence of Attorney Fee Shifting Clauses in Contracts

with arbitration.[121] Attorney fee-shifting clauses were notably rarer than arbitration cost shifting provisions, but these terms also became more common after the decisions in *Concepcion* and *American Express*. Each of these provisions shifted the burden of attorney's fees from the customer to the company, and all but one of them were conditional on the customer prevailing in arbitration.[122] Figure 12 illustrates the proportion of contracts with arbitration agreements that included these agreements before Concepcion, after *Concepcion*, and after *American Express*.

While the overall number of attorney fee shifting provisions rose from 7 to 12, this increase did not keep pace with the increase in arbitration agreements; arbitration agreements increased by 285% from before *Concepcion* to after *American Express*, while attorney fee shifting provisions increased by only 71.4%. As such, contracts with these provisions make up a smaller proportion of all arbitration agreements now than they did before *Concepcion*; while attorney fee shifting provisions could be found in 30.0% of arbitration agreements before *Concepcion*, now they are found in only 18.2%. No company removed an attorney fee shifting clause from its arbitration agreement over the course of the study.

121. *See* Lampley, *supra* note 8, at 515.

122. The sole exception to this rule was J.Crew's post-*American Express* online store terms of use, which provided that the company would reimburse the customer's attorney's fees up to $10,000 automatically as long as none of the claims were "frivolous, without merit, or otherwise non-reimbursable." J.Crew Terms of Use, *supra* note 98.

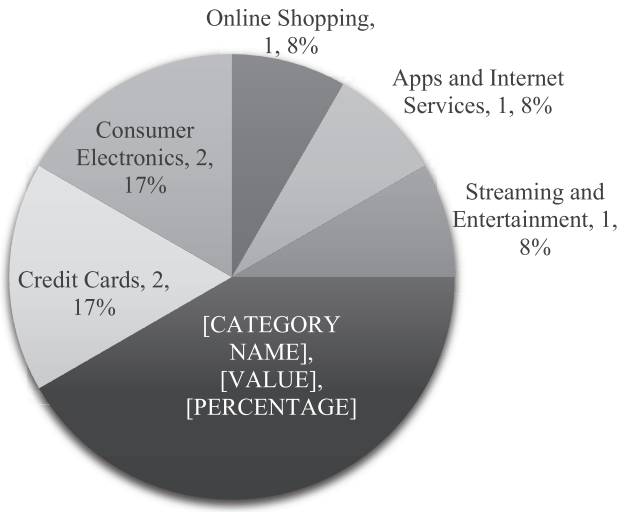

FIGURE 13: Contracts Containing Attorney Fee Shifting Provisions by Sector, Post-*American Express*

Unlike arbitration cost sharing provisions, which were not significantly more common in contracts in any one industry, attorney fee shifting provisions were found more frequently in contracts for telecom products and services. Figure 13 shows the current arbitration agreements containing attorney fee shifting provisions grouped by industry.

Telecom companies disproportionately included attorney fee shifting agreements compared to other industries for all time periods in the survey.[123] Contracts in this industry accounted for 66.7% of the agreements including these provisions before *Concepcion*, 55.6% after *Concepcion*, and 41.7% after *American Express*. While companies in different industries are beginning to include these provisions in their contracts, Telecom companies still use these provisions most frequently.

3. INCIDENCE OF MINIMUM AWARD GUARANTEES

A minimum award guarantee is an additional pro-consumer clause that may strongly incentive consumers to engage in arbitration even without being able to

123. A potential explanation for this trend may be that telecomm companies chose to simply copy AT&T's contract, which effectively received the Court's seal of approval in *Concepcion*. 563 U.S. at 351–52. This possibility is further supported by the similarity between the contracts of many of AT&T's competitors. *Compare* AT&T Consumer Services Agreement, AT&T (Jan. 1, 2008), http://serviceguide.att.com:80/ACS/ext/agreement.cfm [https://perma.cc/ZX9L-TBFY] *with* Verizon 2011 Terms, *supra* note 113 *and* T-Mobile Terms and Conditions, T-MOBILE (July 24, 2011), https://www.t-mobile.com/responsibility/legal/terms-and-conditions-jul-2011 [https://perma.cc/H4Q7-9JCS].

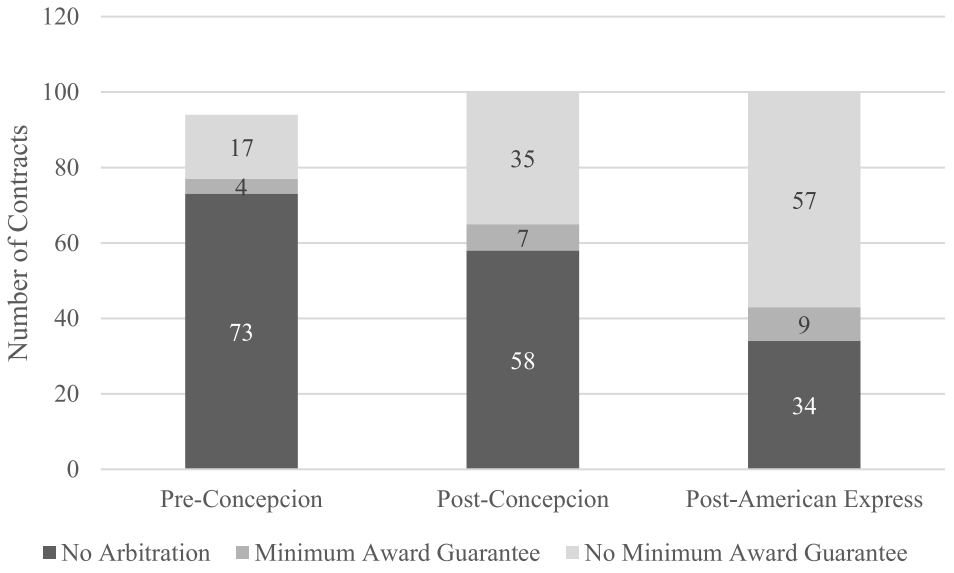

FIGURE 14: Incidence of Minimum Award Guarantees in Contracts

consolidate their claims.[124] These clauses may take a variety of forms, but typically they may promise that if the business offers them an amount that is lower than that ultimately awarded by an arbitrator, the customer will receive either a minimum amount or a premium above the arbitrator's award.[125]

As with attorney fee-shifting agreements, minimum award guarantees were relatively rare and were notably more prevalent in some industries than in others. Figure 14 depicts the proportion of form contracts containing minimum award guarantees for each of the three time periods examined in the study.

While again there was an increase in the absolute number of these guarantees in contracts over time, it was vastly outpaced by the overall increase in arbitration agreements. As such, while 19.0% of arbitration agreements contained a minimum award guarantee before *Concepcion*, only 13.6% of modern arbitration agreements do. In addition, none of the businesses surveyed that adopted one of these guarantees ever removed it from a later version of their agreement, meaning that only 5 of the additional 45 arbitration agreements that were added between 2011 and 2018 included a minimum award guarantee.

Minimum award guarantees were also found disproportionately in contracts of certain industries. Figure 15 maps the proportion of minimum award guarantees from each industry over time.

124. *See* Lampley, *supra* note 8, at 513–14.

125. *See, e.g.*, Verizon 2011 Terms of Service, *supra* note 113.

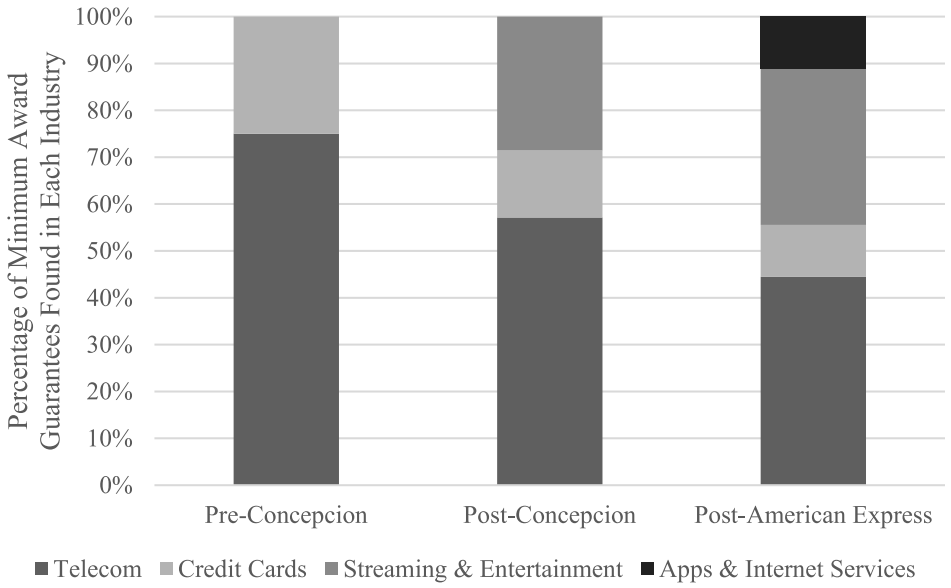

FIGURE 15: Proportion of Minimum Award Guarantees Found in Contracts by Industry

Though contracts including a minimum award guarantee are a substantial minority, a more diverse set of businesses is beginning to adopt them. While before *Concepcion* 3 of the 4 businesses to include a guarantee were all in the Telecom industry, Yahoo, Netflix, Electronic Arts, and Spotify updated their terms to include guarantees in the years following *Concepcion* and *American Express*. Meanwhile, despite online shopping having the largest sample size of the industries surveyed, there was not a single business in this industry to include a minimum award guarantee in its contract.

4. INCIDENCE OF OPT-OUT CLAUSES

Some businesses offer customers an opportunity to opt-out of arbitration altogether if they provide notice to the business within a specified period of time.[126] These agreements are strongly pro-consumer in that they allow customers to acquit themselves of all the benefits of collective actions, but only if they opt-out within the allotted time period.[127]

Arbitration agreements before *Concepcion* rarely afforded customers the opportunity to opt-out of arbitration, but after *Concepcion* and especially after *American Express* they are increasingly giving customers this choice. Figure 16 shows the number of contracts containing opt-out provisions compared to

126. *See, e.g.*, Comcast Agreement for Residential Services, *supra* note 117.
127. *See* Lampley, *supra* note 8, at 510–11.

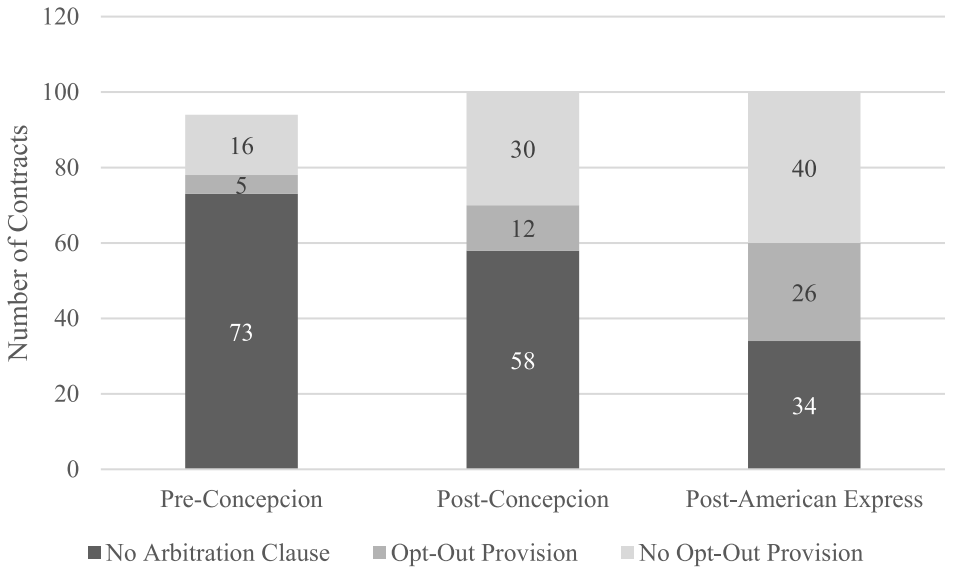

FIGURE 16: Incidence of Opt-Out Provisions in Contracts

contracts that either did not allow customers to opt-out or did not mandate arbitration in the first place.

Before *Concepcion*, only 23.8% of arbitration agreements allowed customers to opt out of arbitration. After *Concepcion* that proportion rose slightly to 28.6%. In the years following *American Express*, however, the adoption of opt-out provisions increased more relative to the overall adoption of arbitration agreements, such that by 2018, 39.4% of all arbitration agreements allowed the consumer to opt-out of arbitration.

The use of opt-out provisions was not strongly correlated with certain industries. Opt-out provisions are utilized by businesses in all industries surveyed, though telecom companies, app and internet services businesses, and credit card companies use them slightly more frequently than other industries.[128] Again online shopping contracts accounted for a disproportionately low number of these provisions, especially given the larger sample size of these contracts.[129]

128. 26.9% of the opt-out provisions found after *American Express* came from telecom contracts, 19.2% from credit card contracts, and another 19.2% from app or internet services contracts. The remaining 34.7% of these provisions came from a combination of online shopping, streaming and entertainment, and consumer electronics contracts.

129. As of 2018, only 16.7% of online shopping contracts with an arbitration agreement included an opt-out provision, while the average inclusion rate of the other five industries was 56.2%.

IV. NEXT-GEN ARBITRATION AGREEMENTS: CONSUMER ARBITRATION AGREEMENTS POST-*AMERICAN EXPRESS*

Arbitration agreements have seen a dramatic increase in use after *Concepcion*, as many scholars predicted, and all of these agreements include class action waivers. However, these agreements are in many ways similar to the third generation of arbitration agreements that existed before *Concepcion*. Despite a legal landscape that is considerably more amenable to pro-business contracts, the post-*American Express* generation of contracts tended to lack pro-business terms other than the class action waiver. In addition, none of the businesses surveyed removed any of their consumer-friendly terms, with many actually adopting these terms even after the Court's decision in *American Express*. While these results may seem to suggest that concerns about consumers' access to justice in the wake of *Concepcion* and *American Express* are overblown, I posit that these results actually suggest that businesses have simply settled on a more or less optimal form of blocking consumer disputes. Businesses' growing use of arbitration clauses that include class action waivers but lack other pro-business terms suggests that the class action waiver is an effective enough weapon against consumer claims that businesses need not press their vantage. On the other hand, businesses are retaining some, but not all, consumer-friendly terms to continue to shield their agreements from the scrutiny of courts and consumers alike.

A. INCREASED USE OF ARBITRATION CLAUSES AND THE PRIMACY OF CLASS ACTION WAIVERS

The increased use of arbitration clauses overall is very much in line with the predictions of what would likely happen to these contracts after *Concepcion* and *American Express*. Over the course of only seven years, the proportion of businesses surveyed that use of arbitration agreements almost tripled from 22.3% to 66.7%,[130] with businesses across all six industries surveyed adding binding arbitration agreements to their form contracts.[131] These results almost perfectly mirror the findings of Professor Tipett and Bridget Schaaf in their study of service contracts in the gig economy; they found that prior to *Concepcion*, class action waivers were utilized in 23% of the contracts they surveyed, while after *American Express* this number rose to 63%.[132] In addition, the increase observed here was notably more dramatic than that found in a study of arbitration clauses in franchise agreements conducted by Professor Rutledge and Professor Drahozal, which found only a minor increase from 50.4% of franchises surveyed to 53.7%.[133] And while the increase found in this case is notable on its own, the

130. *See supra* Figure 1.

131. *See supra* Figure 2.

132. *See* Tipett & Schaaf, *supra* note 11, at 487.

133. *See* Peter B. Rutledge, Christopher R. Drahozal, *Sticky Arbitration Clauses? The Use of Arbitration Clauses after* Concepcion *and* Amex, 67 VAND. L. REV. 955, 991 (2014).

delay between *American Express* and the adoption of a number of additional arbitration agreements suggests that there may still be additional companies that will also adopt arbitration agreements in the near future.[134]

Every single business in the study that adopted an arbitration provision also adopted a class action waiver, highlighting the importance of these waivers for businesses.[135] the sheer ubiquity of class action waivers, especially in comparison to other business-friendly terms, suggests that businesses value them considerably more than other pro-business provisions that may now pass judicial scrutiny in a post-*American Express* world. In fact, a number of agreements included a provision that nullified the entire arbitration agreement if the class action waiver was not upheld,[136] signaling clearly that, at least for some businesses, the class action waiver was the only reason to have an arbitration agreement in the first place.[137]

The importance attached to the class action waiver confirms what a number of scholars have posited about class action waivers: they function as a highly effective "sword" that can strike down *all types* of customer disputes, not just class actions.[138] In the absence of a provision that would cover any number of things related to litigation costs, these class action waivers allow companies to get rid of cost sharing. Without cost sharing, consumers with low or "negative value" claims have no incentive to pursue a resolution for their dispute, as any award would not cover the time and money sunk into obtaining it.[139] And without an incentive to pursue a claim, customers, effectively do not have a viable claim at all.[140]

With class action waivers serving as business' main weapon against consumer claims, other pro-business terms are generally superfluous. Compared to class action waivers, which by 2018 were included in some form in one-hundred percent of the arbitration agreements found in this study, forum selection clauses and sunset provisions were quite rare, being found in only 12% and 16.7% of modern arbitration agreements, respectively. And if customers cannot pool together multiple negative-value claims to make litigation or arbitration worthwhile in the first place, then a forum selection clause or business-imposed time limit certainly

134. *See supra* Figure 2.

135. *See, e.g.*, Sternlight, *supra* note 105, at 718; Glover, *supra* note 44, at 1746 ("Companies now frequently use arbitration clauses in their agreements with customers or other counterparties to manage class action risks.").

136. *See, e.g.*, Netflix Terms of Use, NETFLIX (May 11, 2018), https://help.netflix.com/en/legal/termsofuse [https://perma.cc/BYG2-CWSL]; Verizon 2018 Terms of Service, *supra* note 112 ("If for some reason the prohibition on class arbitrations set forth in subsection 18.3 cannot be enforced, then the agreement to arbitrate will not apply").

137. *See* Tipett & Schaaf, *supra* note 11, at 493 ("If companies instruct courts to sever the entire arbitration section in the event the class action waiver is deemed unenforceable, it suggests that the company is using the arbitration clause primarily or exclusively for the class action waiver.").

138. *See* Leslie, *supra* note 4, at 275.

139. *See* Glover, *supra* note 44, at 1737, 1747.

140. *See id.*

would not make things any *worse* for the aggrieved consumers. Furthermore, while *Concepcion* has insulated terms of arbitration agreements from judicial review, it has not necessarily set them entirely beyond judicial scrutiny.[141] As such, piling multiple anti-consumer terms into a single arbitration clause may raise the risk that it will be found unconscionable more than the terms would actually help the business.[142] Since the class action waiver is all that businesses really need to ensure shut down customers' access to justice, fourth generation contracts typically forego other pro-business terms that are unnecessary and could subject the arbitration agreement to scrutiny.

B. THE SURVIVAL OF PRO-CONSUMER CLAUSES IN NEXT-GEN ARBITRATION AGREEMENTS

In *American Express*, the Court signaled to businesses that they need not incentivize or subsidize arbitration to make it actually worthwhile for consumers, suggesting that the pro-consumer terms of third generation agreements were no longer necessary.[143] However, a number of these pro-consumer terms can still be found in modern arbitration agreements. While the inclusion of consumer-friendly terms in arbitration agreements after *Concepcion* and *American Express* may seem unnecessary and even illogical, a closer look at which terms are being included may help to explain why they have endured. These pro-consumer clauses effectively serve as cheap "shields" for the arbitration agreement; businesses use clauses that cost them little or nothing to ensure that their arbitration agreements, and more specifically their class action waivers, are not susceptible to attack.

Not all pro-consumer provisions are created equal; some are considerably costlier to businesses than others. Indeed, the consumer-friendly terms that are flourishing after *American Express* are the ones that are the least helpful to consumers, and thus the least harmful to businesses. For example, arbitration cost-shifting provisions and opt-out provisions, which appeared in 77.3% and 39.4% of arbitration agreements, respectively, cost businesses very little. Under the AAA consumer arbitration rules, which are the rules most commonly selected by businesses, customers will never pay more than a $200 filing fee to engage in arbitration.[144] Similarly, the JAMS consumer arbitration rules, the second most popular, require only a $250 filing fee from the customer.[145] Thus, companies

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141. *See* Szalai, *supra* note 63, at 52–53 (outlining several still-viable challenges to terms in arbitration agreements based on unconscionability).

142. *See* Leslie, *supra* note 4, at 291 ("Sometimes a combination of the above terms can make an arbitration agreement unconscionable.").

143. *See American Express*, 570 U.S. at 236 ("But 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").

144. *See* Consumer Arbitration Rules: Costs of Arbitration, AMERICAN ARBITRATION ASSOCIATION (Sept. 1, 2018), https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf.

145. JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, JUDICIAL ARBITRATION AND MEDIATION SERVICES (July 15, 2009), https://www.jamsadr.com/consumer-minimum-standards/ [https://perma.cc/Z7TG-RZE7].

offering to pay arbitration expenses will only ever be on the hook for a maximum of $250, while the customer still has to pick up the heavier tabs for travel, attorney's fees, and other indirect costs of arbitration. What's more, studies by the CFPB have revealed that customers hardly ever arbitrate anyway, making the issue of arbitration fees a moot point.[146] These provisions offer incentives to engage in a process that people never engage in anyway and, even if people *did* arbitrate, they still would cost businesses little to honor their end of the bargain.

Similarly, over a third of arbitration agreements offered customers a chance to opt-out entirely, which would allow them both to bring their claims in court and even participate in class actions. It seems entirely antithetical to business interests to include these opt-out provisions; that is, of course, if these provisions actually do anything in practice. However, studies in other industries have found that so few customers actually utilize these opt-out provisions that they have little practical effect.[147] As such, these provisions are nothing more than a shiny gloss on the agreements aimed at making them appear more consumer-friendly when they are challenged in courts.

This idea is further supported by the reticence of businesses to add any truly meaningful pro-consumer clauses into their contracts; for example, only 18.2% of modern arbitration agreements provide for a shifting of attorney's fees, and all but one of these were conditioned on the customer prevailing. Unlike arbitration fees, attorney's fees are not capped at a few hundred dollars, meaning that a business that promises to pay these fees may both be on the hook for a substantial sum. Furthermore, by paying attorney's fees, a business may inadvertently encourage customers to engage in arbitration by removing a significant cost barrier. As a result, it makes sense that businesses opt for the less impactful but still friendly-seeming arbitration fee shifting agreements instead of attorney fee shifting agreements.

But even if these provisions are low-risk to the businesses, why include them at all? And why do any businesses continue to include more powerful consumer-friendly terms such as attorney fee shifting provisions in their arbitration agreements? While *Concepcion* may have generally lessened judicial oversight of

146. *See* CFPB Arbitration Study, *supra* note 11, at § 5.5.1 (finding that fewer than 400 consumers elect to arbitrate credit card disputes in a given year).

147. *See id*. at § 1.4.2 ("Consumers are generally unaware of any arbitration clause opt-out opportunities they may have been offered by their card issuer"); Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 219–20 (2017) (Noting that only two of thousands of Grubhub drivers took advantage of the opt-out provision in their arbitration agreement, and that only 270 of over 160,000 Uber drivers did); *see also* Mandy Walker, *Did Your Bank Send You an Opt Out of Arbitration?*, CONSUMER REPORTS (Dec. 10, 2015), https://www.consumerreports.org/consumer-protection/did-your-bank-send-you-an-opt-out-of-arbitration-letter/ [https://perma.cc/Z9ZW-96Z8]. A parallel can also be drawn to the number of people who opt-out of class action provisions; only one percent of people opt-out of class proceedings, which further highlights that, on a practical level, individuals are unlikely to take the affirmative step of opting out of a legal arrangement when given the opportunity. *See* Kevin LaCroix, *Securities Class Action Settlement Opt-Outs: Statistics and Trends*, The D&O Diary (Oct. 6, 2016), https://www.dandodiary.com/2016/10/articles/opt-outs/securities-class-action-settlement-opt-outs-statistics-trends/ [https://perma.cc/4QVR-UTHH].

terms within arbitration contracts, businesses still need to be concerned about the possibility that courts will strike down their agreements as unconscionable.[148] Though most courts have fallen in line with the Supreme Court's pro-arbitration opinions, others, most notably a number of California Courts, continue to more actively police these agreements.[149] These friendly terms may serve as a shield the arbitration agreement and its all-important class action waiver in event that they come before one of these courts.[150] In addition, while customers remain largely ignorant of arbitration agreements and their effects, recent outcry over arbitration agreements[151] suggests that there may yet be some value in trying to save face with consumers by making the agreements seem more desirable from the customer's point of view.[152] Ultimately, the inclusion of any pro-consumer term is likely neither illogical nor truly friendly on the part of the business; instead, these terms are included to shield the overall arbitration agreement from the scrutiny of both courts and the public.

CONCLUSION

Though fourth generation arbitration agreements are in many ways not so different from their pre-*Concepcion* counterparts, the next stage in the evolution of arbitration agreements still has concerning ramifications for consumers' access to justice. As this study illustrates, businesses across industries are increasingly binding their customers to arbitrate their claims, and whenever they do they are also forcing their customers to forego class action proceedings. Businesses are not using these agreements to press every advantage that they can; instead they are crafting agreements that let them kill off customer claims with class action waivers while shielding their agreements with innocuous or even pro-consumer terms that look good on paper but ultimately do almost nothing for customers. With over two-thirds of the most recognizable consumer-facing businesses forcing arbitration on consumers and forbidding class action proceedings, there is

148. *See* Szalai, *supra* note 63, at 52–53; Leslie, *supra* note 4, at 291.

149. *See, e.g.*, McGill v. Citibank, N.A., 393 P.3d 85, 94–95 (Cal. 2017); Flores v. Nature's Best Distribution, LLC, 212 Cal. Rptr. 3d 284, 292 (Cal. Ct. App. 2016).

150. *See* Tipett & Schaaf, *supra* note 11, at 498 ("[An opt-out provision] helps companies buttress claims of unconscionability under state law.")

151. *See, e.g.*, Chris Morran, *General Mills Thinks You're Stupid, But Decides To Not Take Customers' Legal Rights Away After All*, CONSUMERIST (Apr. 20, 2014), https://consumerist.com/2014/04/20/general-mills-thinks-youre-stupid-but-decides-to-not-take-customers-legal-rights-away-after-all/ [https://perma.cc/D6TX-UHT4]; Cory Doctoro, *Uber forces its drivers to arbitrate, rather than sue, but Uber also won't arbitrate*, BOINGBOING (Dec. 9, 2018), https://boingboing.net/2018/12/09/justice-denied.html [https://perma.cc/N64G-29NS]; Karen Sloan, *#DumpVenable Campaign Launched by Harvard Law Student Group*, THE NATIONAL LAW JOURNAL (Feb. 4, 2019), https://www.law.com/nationallawjournal/2019/02/04/harvard-law-students-target-venable-over-mandatory-arbitration/?kw=%23DumpVenable%20Campaign%20Launched%20by%20Harvard%20Law%20Student%20Group&utm_source=email&utm_medium=enl&utm_campaign=afternoonupdate&utm_content=20190204&utm_term=nlj&slreturn=20190108113611 [https://perma.cc/manage/create?folder=51711].

152. *See* Eisenberg, Miller, & Sherwin *supra* note 114, at 893. ("The apparent purpose of these "kinder and gentler" arbitration clauses is to avoid the appearance of one-sidedness . . . .").

precious little access to justice remaining for the average American consumer. And as more and more businesses adopt these optimized, fourth generation contracts, consumers will be left with no choice but to give up their day in court if they want to buy just about anything from any company.

APPENDIX A. LIST OF CONTRACTS INCLUDED IN STUDY

Apps and Internet Services

King Games Terms of Service
Snapchat Terms of Service
Tinder Terms of Use
Instagram Terms of Use
Yahoo Terms of Use
WhatsApp Terms of Service
Open Table Terms of Use
WeChat Terms of Use
Facebook Terms of Use
Twitter Terms of Use
YouTube Terms of Service
Yelp Terms of Service
Google Terms of Service

Consumer Electronics

Samsung Galaxy Product Warranty
LG Electronics Phone Product Warranty
Motorola Product Policies
Dell Terms of Sale
Toshiba Computer Product Warranty
Apple iPhone Product Warranty
Panasonic Product Warranty
Lenovo Product Warranty
Whirlpool Product Warranty
Sony PlayStation Product Warranty
Yamaha Products Warranty
Schneider Electric Product Terms and Conditions of Sale
Nintendo Systems Product Warranty
Hewlett Packard Product Warranty
Microsoft Xbox Product Policies

Credit Cards

American Express Cardholder Agreement
Discover Cardholder Agreement
Citibank Cardholder Agreement
Wells Fargo Cardholder Agreement
U.S. Bank Cardholder Agreement
USAA Cardholder Agreement
Credit One Cardholder Agreement

Barclays U.S. Cardholder Agreement
First Premier Cardholder Agreement
Chase Visa Cardholder Agreement
Capital One Cardholder Agreement
Bank of America Cardholder Agreement
PNC Cardholder Agreement

Entertainment and Streaming Services

PlayStation Network Terms and Conditions
Microsoft Terms of Service
Netflix Terms of Use
Hulu Terms of Use
Electronic Arts User Agreement
Spotify User Agreement
Crunchyroll Terms of Use
Twitch Terms of Service
Pandora Terms of Use
Apple Music User Agreement

Online Shopping

Costco Website Terms of Use
Macy's Website Terms of Use
Kohl's Website Terms of Use
Bed Bath & Beyond Website Terms of Use
Nike Website Terms of Use
GameStop Website Terms of Use
Dillards Website Terms of Use
Ikea Website Terms of Use
Lord & Taylor Website Terms of Use
Albertsons Website Terms of Use
Saks Fifth Avenue Website Terms of Use
T.J. Maxx Website Terms of Use
Abercrombie Website Terms of Use
Bath and Body Works Website Terms of Use
Amazon Website Terms of Use
Walmart Website Terms of Use
Kroger Website Terms of Use
Home Depot Website Terms of Use
Walgreens Website Terms of Use
Target Website Terms of Use
Lowes Website Terms of Use
Best Buy Website Terms of Use

Nordstrom Website Terms of Use
Sears Website Terms of Use
Gap Website Terms of Use
J.C. Penney Website Terms of Use
Dick's Sporting Goods Website Terms of Use
Burlington Website Terms of Use
Sephora Website Terms of Use
Belk Website Terms of Use
JCrew Website Terms of Use
CVS Health Website Terms of Use
eBay Website Terms of Use
American Eagle Outfitters Website Terms of Use
Barnes & Noble Website Terms of Use
Bodybuilding.com Website Terms of Use

Telecommunications

Consolidated Communications Terms of Service for Internet Service
Comcast Xfinity Subscriber Agreement
Verizon Fios Online Service Terms of Use
AT&T Online Service Terms of Use
U.S. Cellular Terms & Conditions
Cox Cable Customer Service Agreement
DISH Network Customer Service Agreement
CenturyLink Internet Subscriber Agreement
Sprint Terms and Conditions
T-Mobile Terms and Conditions
Charter Communications Residential Terms and Conditions
Frontier Communications General Residential Service Terms & Conditions