

AN *EPIC* IMPACT ON ACCESS TO  
JUSTICE? SAVING CLAUSE  
CHALLENGES TO ARBITRATION  
AGREEMENTS IN NINTH CIRCUIT  
DISTRICT COURTS BEFORE AND  
AFTER *EPIC SYSTEMS*

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## I. INTRODUCTION

In *Epic Systems v. Lewis* (“*Epic*”), the Supreme Court again instructed lower courts to “rigorously . . . enforce arbitration agreements according to their terms.”<sup>1</sup> The Court unequivocally held that the substantive right to concerted action afforded to employees under the National Labor Relations Act (“NLRA”)<sup>2</sup> did not conflict with enforcing class action waivers in mandatory employment arbitration agreements under the Federal Arbitration Act (“FAA”).<sup>3</sup> The Court’s ruling underscores the importance of the FAA’s Saving Clause<sup>4</sup> in defeating motions to compel arbitration.

This Note examines how Ninth Circuit district courts enforced arbitration agreements, despite challenges to their validity, before and after *Epic*. I surveyed 183 Ninth Circuit district court opinions resolving Saving Clause or statutory challenges to arbitration agreements under the FAA—81 from the year preceding the Court’s grant of certiorari in *Epic*<sup>5</sup> and 102 from the year following.<sup>6</sup> The data shows that before and after *Epic*, Ninth Circuit district courts overwhelmingly enforced arbitration agreements according to their terms.

One-hundred and fifty-two of the 183 cases involved unconscionability challenges. Only eight of those cases were *not* compelled to arbitration: two before *Epic* and six afterwards. This was despite 68 findings of procedural unconscionability and 66 findings of substantive unconscionability across the 152 unconscionability cases. While there is no statistically significant difference in the outcome of Saving Clause challenges to arbitration agreements before or after *Epic*, it is notable how unsuccessful challenges to arbitration agreements already were prior to *Epic*. Given how unsuccessful these challenges are, arbitration agreements have been, and will likely continue to be, “rigorously . . . enforce[d] . . . according to their terms” in the Ninth Circuit.<sup>7</sup>

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<sup>1</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citations and internal quotation marks omitted).

<sup>2</sup> 29 U.S.C. § 157 (2018).

<sup>3</sup> 9 U.S.C. § 2 (2018).

<sup>4</sup> “Saving Clause” refers to this italicized portion the FAA: “A written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” *Id.* (emphasis added).

<sup>5</sup> These are referred to collectively as the “pre-*Epic* sample” and can be found *supra* in Table 2 of the Appendix.

<sup>6</sup> These are referred to collectively as the “post-*Epic* sample” and can be found *supra* in Table 3 of the Appendix.

<sup>7</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

## II. THE STEADY RISE OF ARBITRATION

The FAA was enacted in the 1920s to facilitate businesses' use of arbitration to resolve commercial disputes quickly, privately, and at lower cost.<sup>8</sup> For these reasons, companies favor requiring employees, consumers, and business partners to submit to arbitration.<sup>9</sup> Plaintiffs in arbitration are not vulnerable to motions to dismiss or summary judgments, allowing them to receive a judgment from the arbitrator on the merits of their claim.<sup>10</sup>

On the other hand, arbitration's secrecy, lack of precedential value, and companies' ability to repeatedly appear in front of the same arbitrator can allow sexual harassment, discrimination, and wage theft to continue unchecked in workplaces.<sup>11</sup> Judicial review or arbitration awards is limited.<sup>12</sup> It can be difficult for individual plaintiffs to retain an attorney for arbitration proceedings, as opposed to judicial proceedings, because the prospect of recovery for both plaintiffs and attorneys is low, particularly for small-value claims like those brought under the Fair Labor Standards Act.<sup>13</sup> This translates into a "large share of all legal disputes between individuals (consumers and employees) and corporations—simply evaporate[ing] before they are even filed" into what one scholar called the "blackhole of mandatory arbitration."<sup>14</sup>

Just before *Epic* was issued, in terms of the overall U.S. workforce, around 60.1 million workers had signed arbitration agreements.<sup>15</sup> Around 53.9 percent non-union private-sector employers have mandatory arbitration procedures.<sup>16</sup> Around 65 percent of companies with over 1,000 employees require employees to submit to arbitration.<sup>17</sup> For employees, this means that 56.2 percent of non-union private-sector employees are subject

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<sup>8</sup> JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 2–3 (2017).

<sup>9</sup> Stephanie Greene & Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—#TimesUp on Workers' Rights*, 15 STAN. J.C.R. C.L. 43, 45 (2019).

<sup>10</sup> Martin Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 31 (2016).

<sup>11</sup> *Id.*

<sup>12</sup> See 9 U.S.C. § 10(a)(1)–(4). See generally 9 U.S.C. §§ 9–11 (2018) (limiting court jurisdiction to review delineated in Section 10 of the FAA).

<sup>13</sup> Malin, *supra* note 10, at 49.

<sup>14</sup> Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018).

<sup>15</sup> Alexander J.S. Colvin, ECON. POLICY INS., THE GROWING USE OF MANDATORY: ARBITRATION ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 2 (2018).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 6.

to mandatory arbitration.<sup>18</sup> Arbitration agreements are disproportionately used in low-wage industries, as well as those primarily comprised of female and Black workers.<sup>19</sup> In the twelve largest states by population, over 40 percent of employers require arbitration.<sup>20</sup> California, Texas, and North Carolina have the highest percentages of arbitration use in workplaces.<sup>21</sup>

Around 30 percent of employers who require arbitration include class action waivers.<sup>22</sup> Large-scale employers are more likely than small-scale employers to include class action waivers in their arbitration procedures.<sup>23</sup> As a result, approximately 40 percent of employees subject to mandatory arbitration have waived their right to participate in a class action claim.<sup>24</sup> Overall, 23.1 percent of private-sector non-union employees, or 24.7 million workers, have waived their right to bring a class action claim against their employer.<sup>25</sup> Class action waivers are particularly beneficial for employers because they lessen the employer's exposure to liability, but are detrimental for employees who can no longer use the resource-pooling benefits of class actions. For many employees, the small value of their claims will no longer provide an incentive to hold employers accountable for labor violations.<sup>26</sup>

This shift to arbitration will have ramifications as disputes arising out of the COVID-19 pandemic come to fruition. For example, Dragan Janicijevic, a former cruise ship employee, is seeking to represent himself and 276 of his former colleagues in a suit against his employer for two months of severance pay they allege went unpaid after they were quarantined at sea when the COVID-19 pandemic struck.<sup>27</sup> The cruise operator has demanded arbitration of Janicijevic's individual claims and dismissal of his class claims pursuant to his employment agreement's mandatory arbitration clause.<sup>28</sup>

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<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 8-9.

<sup>20</sup> *Id.* at 7 tbl.2.

<sup>21</sup> Estlund, *supra* note 14, at 7.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Greene & O'Brien, *supra* note 9, at 45; Estlund, *supra* note 14, at 682.

<sup>27</sup> See Third Amended Complaint at 4-6, Dragan Janicijevic v. Classica Cruise Operator, Ltd., No. 1:20-cv-23223-BB (S.D. Fla. Nov. 30, 2020); see also Caroline Simson, *Ex-Cruise Ship Workers Eye Deal Over COVID-19 Claims*, LAW360 (Dec. 14, 2020).

<sup>28</sup> See Answer at 25-26, Dragan Janicijevic v. Classica Cruise Operator, Ltd., No. 1:20-cv-23223-BB (S.D. Fla. Dec. 11, 2020).

Arbitration, procedurally, has not been immune to the challenges brought by COVID-19. Traditionally, arbitrations are conducted through informal in-person hearings—a feature now impossible in the midst of the pandemic.<sup>29</sup> Employees subject to mandatory arbitration may face unique obstacles objecting to virtual hearings. The American Arbitration Association (“AAA”)—the world’s largest private global provider of arbitration<sup>30</sup>—for example, ultimately allows arbitrators to order virtual hearings over a party’s objection under its labor arbitration rules.<sup>31</sup> Such a ruling, furthermore, is subject to a more limited form of judicial review than that of a trial judge in a judicial proceeding.<sup>32</sup> With informality already one of the claimed benefits of arbitration, it is unclear whether virtual arbitrations—for better or worse—will continue after the COVID-19 pandemic subsides.<sup>33</sup>

### III. THE FEDERAL ARBITRATION ACT

District courts have jurisdiction to enforce arbitration agreements under the FAA, which provides:

A written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>34</sup>

The Supreme Court has interpreted the FAA as establishing a “liberal federal policy favoring arbitration.”<sup>35</sup> This means that “[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration.”<sup>36</sup> A district court’s role, under the FAA, thus, is limited to determining “(1) whether a valid agreement to arbitrate exists and, if it does,

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<sup>29</sup> See Ann Gosline, Marc D. Greenbaum, & Sheila Mayberry, *Labor Arbitration: Key COVID-19 Issues*, LEXISNEXIS (June 3, 2020).

<sup>30</sup> *Our Mission*, AM. ARB. ASS’N, <https://adr.org/mission> [<https://perma.cc/2PVE-6HW8>].

<sup>31</sup> See Gosline, Greenbaum, & Mayberry, *supra* note 29 (examining AAA Labor Arbitration Rule 17).

<sup>32</sup> See 9 U.S.C. § 10(a)(1)–(4) (2018) (specifying the limited grounds upon which courts may vacate an arbitral award).

<sup>33</sup> See, e.g., ‘*Awful Impact*’: *The Long-Lasting Effects of COVID-19 on the Practice of Law*, FLA. BUS. REV. (Dec. 7, 2020) (surveying practitioners on their impressions of anticipated effects of COVID-19 on the practice of law and arbitration).

<sup>34</sup> 9 U.S.C. § 2 (2018).

<sup>35</sup> *AT&T Mobility LLC v. Concepcion* (“*Concepcion*”), 563 U.S. 333, 339 (2011).

<sup>36</sup> *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1984) (emphasis added).

(2) whether the agreement encompasses the dispute at issue.”<sup>37</sup> “If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms.”<sup>38</sup> The Supreme Court has instructed that “any doubts about the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>39</sup>

#### A. THE FAA’S SAVING CLAUSE

Under the FAA’s Saving Clause, in determining if a valid agreement to arbitrate exists, district courts may only consider defenses that “exist at law or in equity for the revocation of any contract.”<sup>40</sup> The Supreme Court admonished courts in *AT&T Mobility v. Concepcion* (“*Concepcion*”) that applications of state contract law in Saving Clause challenges must not “interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA.”<sup>41</sup> There, the Court struck down California’s judicially created rule that class waivers in consumer arbitration agreements as preempted by the FAA and therefore unenforceable.<sup>42</sup> Arbitration agreements can be invalidated only by “generally applicable contract defenses, such as fraud, duress, or unconscionability[.]” not by defenses that apply only to arbitration or “derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>43</sup>

The Court has cautioned since *Concepcion* that arbitration agreements must be placed “on equal footing with all other contracts” with regards to applying state contract law.<sup>44</sup> To the extent state contract law treats arbitration agreements differently, or has a “disproportionate impact on arbitration agreements[.]” the “FAA displaces the conflicting rule.”<sup>45</sup> In 2015, for example, in *DIRECTV v. Imburgia* a California court of appeal held that the language “laws of your state” in a consumer arbitration agreement class waiver meant that the term must be interpreted by the state’s laws at the time the contract was signed in an effort to revive the

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<sup>37</sup> *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

<sup>38</sup> *Id.*

<sup>39</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

<sup>40</sup> *Id.*

<sup>41</sup> *Concepcion*, 563 U.S. at 366.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 339.

<sup>44</sup> *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *Concepcion*, 563 U.S. at 337.

<sup>45</sup> *Concepcion*, 563 U.S. at 342, 343; *see Malin, supra* note 10, at 43 (discussing how the Supreme Court has frequently held state contract law preempted by the FAA).

judicially created consumer class waiver rule the Court previously rejected in *Concepcion*. The Supreme Court reversed,<sup>46</sup> holding that the court of appeal did not place the arbitration agreement on “equal footing with all other contracts,” that its interpretation of state law was preempted, and that the arbitration agreement must be enforced under the FAA.<sup>47</sup> The Supreme Court, again, instructed lower courts to follow *Concepcion*.

Saving Clause challenges, moreover, must be directed at the arbitration agreement specifically, not at the contract generally. “Unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”<sup>48</sup> When a plaintiff alleges fraud in the inducement of the underlying contract, the arbitration provision is severable from the remainder of the contract.<sup>49</sup> Even though it is an available defense under the Saving Clause, successful challenges must allege “fraud in the inducement of the arbitration clause itself . . . not . . . in the inducement of the contract generally.”<sup>50</sup> Arbitration similarly can be compelled where illegality is alleged in the underlying contract, but not in the agreement to arbitrate.<sup>51</sup>

A district court’s role under the FAA can be limited by the parties’ agreement. If the parties include a delegation provision,<sup>52</sup> questions of the agreement’s enforceability are delegated to the arbitrator—not the court.

If a delegation provision is included, a court can only determine the validity of the delegation provision—not the general agreement to arbitrate. This is because “an agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.”<sup>53</sup> Accordingly, Saving Clause

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<sup>46</sup> The Supreme Court reviewed the decision by the Court of Appeals because the California Supreme Court declined review of the appellate court’s ruling. *See Imburgia v. DIRECTV, Inc.* No. S218686, 2014 Cal. LEXIS 5116, at \*1 (July 23, 2014).

<sup>47</sup> *DIRECTV, Inc.*, 136 S. Ct. at 467–70.

<sup>48</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006).

<sup>49</sup> This concept is known as the “*Prima Paint* rule of severability.” *Id.* at 445–46.

<sup>50</sup> *Prima Paint Corp.*, 388 U.S. 395, 403–04 (1967).

<sup>51</sup> *See, e.g., Buckeye Check Cashing, Inc.*, 546 U.S. at 446; *Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984).

<sup>52</sup> An example of a delegation provision previously examined by the Supreme Court is:

The Arbitrator, *and not any federal, state, or local court or agency*, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.

*Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (emphasis added).

<sup>53</sup> *Id.* at 70.



challenges to delegation provisions must be directed at the delegation provision as it constitutes a separate agreement, distinct from the general agreement to arbitrate.<sup>54</sup> Arguments such as “the *entire* arbitration agreement, including the delegation clause, was unconscionable” necessarily fail.<sup>55</sup> This rule can be fatal for some defenses like unconscionability because courts can *only* consider the delegation provision in applying the alleged Saving Clause defense.

Thus, to successfully oppose arbitration under the FAA’s Saving Clause, a plaintiff’s challenge (1) must be a generally applicable contract defense that does not disproportionately affect arbitration agreements, and (2) be specifically directed at the arbitration agreement (or delegation provision, if applicable).

The FAA, by its statutory language, requires application of state contract law principles in determining the validity of an arbitration agreement. Table 1 in the Appendix includes key terms, standards, and examples to define the general contract principles applied in this Note’s sample of cases.<sup>56</sup>

## B. THE FAA AND STATUTORY CLAIMS

The Supreme Court has frequently ruled on whether federal statutory claims, such as those brought under the Fair Labor Standards Act, Age Discrimination in Employment Act, and others, may be compelled to arbitration under the FAA.<sup>57</sup> A litigant must be able to effectively vindicate federal statutory rights even in arbitration. When an arbitration agreement’s terms infringe on a litigant’s federal statutory rights, that litigant can challenge the arbitration clause under a judge-made exception to the FAA known as the ineffective statutory vindication doctrine.<sup>58</sup> It is presumed that arbitration allows for effective vindication of those rights.<sup>59</sup> The party resisting arbitration, thus, “bears the burden of proving that the claims at

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 73 (emphasis in original).

<sup>56</sup> Table 1 in the Appendix was compiled using California law, as that was the most frequently applied state law in this Note’s sample.

<sup>57</sup> *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding FLSA claims arbitrable); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (holding ADEA claims arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (holding Sherman Act claims arbitrable).

<sup>58</sup> Malin, *supra* note 10, at 33. *See generally* *Mitsubishi Motors Corp.*, 473 U.S. 614 (1985) (discussing statutory vindication).

<sup>59</sup> *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000); *Am. Express Co. v. Italian Colors Rest.* (“*Italian Colors*”), 570 U.S. 228, 236 (2013).

issue are unsuitable for arbitration” or that “Congress intended to preclude arbitration of the statutory claims at issue.”<sup>60</sup>

Without a contrary congressional command, courts determine “the effects . . . of the arbitral forum on a plaintiff’s ability to vindicate statutory rights” on a case-by-case basis.<sup>61</sup> And the presumption is strong.<sup>62</sup> In *Green Tree Financial Corporation—Alabama v. Randolph*, for example, the fact that the arbitration agreement was silent on costs was alone “insufficient” to rebut the presumption because “the ‘risk’ that [Plaintiff] will be saddled with prohibitive costs [was] too speculative.”<sup>63</sup> And, the Court concluded in *American Express Co. v. Italian Colors Restaurant* (almost fifteen years later) that “the fact that it is not worth the expense involved in proving a statutory remedy” [in arbitration] does not constitute the elimination of [that] right.”<sup>64</sup>

### C. *EPIC SYSTEMS*<sup>65</sup>

In *Epic*, the Supreme Court resolved a split among the Fifth, Seventh, and Ninth Circuits over an alleged conflict between the FAA and NLRA.<sup>66</sup> Three cases on workplace arbitration were consolidated: *Epic Systems Corporation v. Lewis*, *Ernst & Young LLP v. Morris*, and *National Labor and Review Board v. Murphy Oil*. In all three cases, the employer required employees to sign arbitration agreements as a condition of employment, and the signed arbitration agreements precluded class or collective proceedings. The Court considered if arbitration agreements that include class waivers are enforceable under the FAA, notwithstanding the NLRA’s provisions affording employees’ substantive right to concerted action.<sup>67</sup>

The Seventh and Ninth Circuits found that class waivers in mandatory employment arbitration clauses infringed on employees’ rights under the NLRA.<sup>68</sup> The Ninth Circuit additionally found the Saving Clause defense

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<sup>60</sup> *Green Tree Fin. Corp.—Ala.*, 531 U.S. at 92.

<sup>61</sup> Malin, *supra* note 10, at 33.

<sup>62</sup> See *Gilmer*, 500 U.S. at 26–35; *Italian Colors*, 570 U.S. at 235–38.

<sup>63</sup> *Green Tree Fin. Corp.—Ala.*, 531 U.S. at 91.

<sup>64</sup> *Italian Colors*, 570 U.S. at 236.

<sup>65</sup> This Note does not provide an in-depth analysis of the *Epic Systems* case. Rather, it focuses on whether the *Epic Systems* Saving Clause dicta affected how Ninth Circuit district courts applied the Saving Clause. Background on *Epic* is provided with that goal in mind.

<sup>66</sup> *Epic Sys.*, 138 S. Ct. 1612 (2018).

<sup>67</sup> 31 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 907.04 (Matthew Bender 3d ed. 2020).

<sup>68</sup> *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 987 (9th Cir. 2016).

of illegality prevented the enforcement of a provision contravening a substantive federal right.<sup>69</sup> The Fifth Circuit, on the other hand, held that “the NLRA does not contain a congressional command exempting the statute from application of the FAA.”<sup>70</sup> The Supreme Court agreed with the Fifth Circuit that the NLRA does not conflict with the FAA and held that the employees’ class waivers were valid.<sup>71</sup> The Court noted it “has rejected many efforts to manufacture conflicts between the [FAA] and other federal statutes.”<sup>72</sup>

The Court criticized lower courts’ enforcement of the FAA, noting that “[u]ntil a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms . . . [b]ut recently things have shifted.”<sup>73</sup> Because the employees attacked the individualized nature of arbitration, the Court invoked *Concepcion*:

Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. . . the Arbitration Act’s saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*.<sup>74</sup>

It then cautioned courts to “be alert to new devices and formulas that [declare arbitration against public policy].”<sup>75</sup> This dictum particularly targets the Ninth Circuit, as the only circuit to deny arbitration enforcement on grounds of illegality under the Saving Clause.

#### IV. RESEARCH QUESTION AND METHODOLOGY

In *Epic*, the Supreme Court insinuated that the Ninth Circuit had not been rigorously enforcing arbitration agreements. These comments raise the questions: (1) were arbitration agreements likely to be enforced

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<sup>69</sup> Morris, 834 F.3d at 987. *But see* Epic Sys., 823 F.3d at 1158 (“If Epic’s provision had permitted collective arbitration, it would not have run afoul of Section 7 either. But it did not, and so it ran up against the substantive right to act collectively that the NLRA gives to employees.”).

<sup>70</sup> D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013).

<sup>71</sup> Epic Sys., 138 S. Ct. at 1621.

<sup>72</sup> *Id.* at 1618.

<sup>73</sup> *Id.* at 1620.

<sup>74</sup> *Id.* at 1623.

<sup>75</sup> *Id.*

according to their terms in Ninth Circuit before *Epic*? and (2) were arbitration agreements more likely to be enforced according to their terms in the Ninth Circuit after *Epic*?

In answering these questions, I surveyed 183 Ninth Circuit district court opinions resolving either Saving Clause or statutory challenges under the FAA—81 in the year before the Court granted certiorari in *Epic* and 102 in the following year. In both years, Ninth Circuit district courts overwhelmingly enforced arbitration agreements according to their terms. Because district courts were already rejecting Saving Clause challenges, there was no statistically significant difference in the outcome of these challenges before or after *Epic*.

#### A. THE SAMPLE: 81 PRE-*EPIC* CASES AND 102 POST-*EPIC* CASES

The pre-*Epic* sample includes eighty-one Ninth Circuit district court opinions applying Saving Clause or ineffective statutory vindication and waiver challenges from January 1, 2016 to January 1, 2017—one year prior to the Court’s grant of certiorari in *Epic*. The post-*Epic* sample examines 102 Ninth Circuit district court opinions applying Saving Clause or statutory vindication challenges from May 19, 2018 to May 19, 2019—one year after *Epic*. In collecting these cases, I searched multiple legal databases for cases disputing arbitration. I eliminated cases that did not involve Saving Clause or statutory challenges, such as cases deciding whether a party waived its right to arbitration or whether an agreement was binding on non-signatories. While I hope this represents Saving Clause and statutory challenges to compelling arbitration before Ninth Circuit district courts in the selected periods, given the limited timeframe and resources to complete this project, it is likely that this sample is not exhaustive. With almost 200 cases overall, however, it is arguably *representative* of Saving Clause and statutory challenges within the relevant time periods.

The sample’s time periods are narrowly drawn primarily because *Epic* was recently decided in mid-2018. I decided to limit the pre-*Epic* sample to the year before the Court granted certiorari to ensure a pre-*Epic* sample similar to the post-*Epic* sample.<sup>76</sup> These short time frames make it difficult to assess longstanding pre-existing trends. But this is mitigated by the data compiled from almost 200 cases (81 before and 102 after) yielding uniform results. Overall, only nineteen cases were not compelled to arbitration, eleven before and eight after *Epic*.

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<sup>76</sup> The time periods were also narrow given this project’s limited timeframe and resources.

## B. SAMPLES' TYPES OF CONTRACTS

In both samples, I divided the cases based on the underlying relationship through which the arbitration agreement at issue was reached. Cases generally landed in three categories: employment, consumer, and commercial. A case was defined as “employment” if the arbitration agreement and underlying dispute arose out of an employment relationship between the parties. Cases were classified as “consumer” if the arbitration agreement and underlying dispute was between a person contracting for goods or services with a business entity offered on a “take it or leave it” basis. “Commercial” cases were defined as those in which the arbitration agreement and underlying dispute arose from a contractual relationship between two or more businesses entities involving some form of negotiations. Before *Epic*, there were forty-seven employment cases, twenty-five consumer cases, and nine commercial cases. After *Epic*, there were seventy-seven employment cases, twenty-three consumer cases, and two commercial cases.

V. FINDINGS<sup>77</sup>

Were Ninth Circuit district courts enforcing arbitration agreements before *Epic*? Yes, overwhelmingly, district courts enforced arbitration agreements according to their terms, despite the Supreme Court’s dictum insinuating otherwise. Including cases that inevitably would be reversed by *Epic*, only eleven cases were not compelled to arbitration pre-*Epic*. Three of these cases did not rely on the reasoning rejected in *Epic*.

Did district courts’ enforcement of arbitration agreements change after *Epic*? No, primarily because these courts were *already* enforcing arbitration agreements. Eight of 102 cases were not compelled to arbitration post-*Epic*. Although there were slight increases in the success of some Saving Clause challenges after *Epic*, these deviations were not statistically significant.

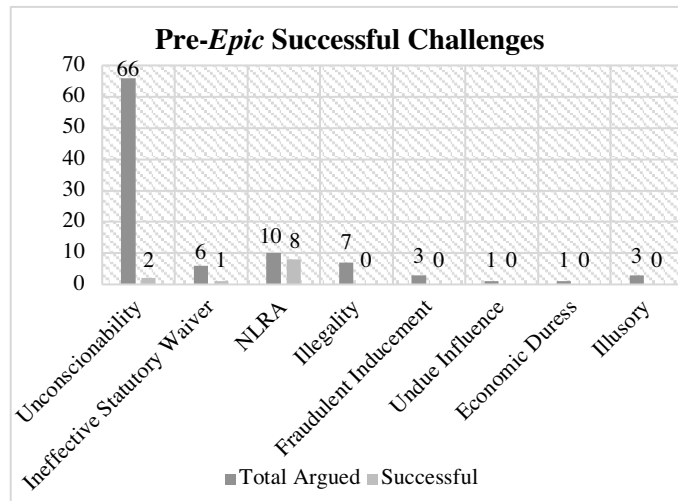
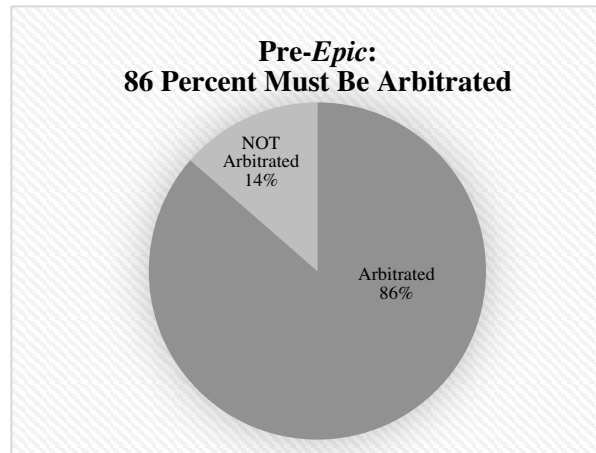
## A. PRE-EPIC RESULTS

Before *Epic*, out of eighty-one cases, seventy were compelled to arbitration and eleven were *not* compelled to arbitration. In the eleven cases not compelled to arbitration, eight relied on the reasoning overturned by the

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<sup>77</sup> For reading clarity, citations to individual cases within the pre- and post-*Epic* samples are omitted. Citations for all cases included in the pre- and post-*Epic* samples are listed *supra* in the Appendix in Tables 2 and 3, respectively.

Supreme Court in *Epic* to avoid arbitration. Only three of the cases not compelled to arbitration relied on Saving Clause or statutory vindication challenges to prevent arbitration: In two, consumer arbitration agreements were held unconscionable and unenforceable; in one, a vague employment arbitration agreement was unenforceable because the employee did not knowingly waive her federal statutory rights in agreeing to arbitrate. Even with the cases relying on a purported conflict with the NLRA to invalidate arbitration agreements, 86.42 percent of cases were compelled to arbitration. Removing those cases relying on now-defunct *Epic* arguments, arbitration was compelled in seventy of seventy-three cases, or at a rate of 95.89 percent. Overwhelmingly, Ninth Circuit district courts compelled arbitration before *Epic*.



Pre-Epic Cases Not Compelled to Arbitration		
Case		Grounds to Not Compel Arbitration
1.	<i>Whitworth v. SolarCity Corp.</i> (N.D. Cal. Nov. 2016). <sup>78</sup>	<b>Epic reasoning:</b> The NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.
2.	<i>Lee v. Asurion Ins. Servs.</i> (D. Ariz. Sept. 2016). <sup>79</sup>	<b>Epic reasoning:</b> The NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.
3.	<i>Gessele v. Jack in the Box, Inc.</i> (D. Or. Dec. 2016). <sup>80</sup>	<b>Epic reasoning:</b> Severed class waiver from arbitration agreement because the NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.
4.	<i>Bui v. Northrop Grumman Sys. Corp.</i> (S.D. Cal. Dec. 2016). <sup>81</sup>	<b>Epic reasoning:</b> The NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.
5.	<i>Attia v. Neiman Marcus Grp, Inc.</i> (C.D. Cal. Oct. 2016). <sup>82</sup>	<b>Epic reasoning:</b> The NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.
6.	<i>Totten v. Kellog Brown &amp; Root, LLC</i> (C.D. Cal. Jan. 2016). <sup>83</sup>	<b>Epic reasoning:</b> The NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.
7.	<i>Mackall v. Healthsource Global Staffing, Inc.</i> (N.D. Cal. Nov. 2016). <sup>84</sup>	<b>Epic reasoning:</b> The NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.
8.	<i>Gonzalez v. CEVA Logistics U.S., Inc.</i> (N.D. Cal. Oct. 2016). <sup>85</sup>	<b>Epic reasoning:</b> The NLRA conflicts with the FAA and guarantees workers' right to pursue class and representative actions.

<sup>78</sup> *Whitworth v. SolarCity Corp.*, No. 16-cv-01540-JSC, 2016 U.S. Dist. LEXIS 158903 (N.D. Cal. Nov. 16, 2016).

<sup>79</sup> *Lee v. Asurion Ins. Servs.*, No. CV-15-02606-PHX-ROS, 2016 U.S. Dist. LEXIS 192853 (D. Ariz. Sept. 13, 2016).

<sup>80</sup> *Gessele v. Jack in the Box, Inc.*, No. 3:14-CV-1092-BR, 2016 U.S. Dist. LEXIS 172061 (D. Or. Dec. 13, 2016).

<sup>81</sup> *Bui v. Northrop Grumman Sys. Corp.*, No. 15-cv-1397-WQH-WVG, 2016 U.S. Dist. LEXIS 171513 (S.D. Cal. Dec. 9, 2016).

<sup>82</sup> *Attia v. Neiman Marcus Grp, Inc.*, *on reconsideration*, No. CV 16-0504-DOC (FFMx), 2016 U.S. Dist. LEXIS 173166 (C.D. Cal. October 18, 2016).

<sup>83</sup> *Totten v. Kellog Brown & Root, LLC.*, 152 F. Supp. 3d 1243 (C.D. Cal. 2016).

<sup>84</sup> *Mackall v. Healthsource Global Staffing, Inc.*, No. 16-cv-03810-WHO, 2016 U.S. Dist. LEXIS 151418 (N.D. Cal. Nov. 1, 2016).

<sup>85</sup> *Gonzalez v. CEVA Logistics U.S., Inc.*, Case No. 16-cv-04282-WHO, 2016 U.S. Dist. LEXIS 150766 (N.D. Cal. Oct. 31, 2016).

9.	<i>Berdechowski v. Reach Grp., LLC</i> (E.D. Cal. June 2016). <sup>86</sup>	<b>Ineffective Statutory Waiver:</b> Employment arbitration agreement did not constitute a valid waiver of plaintiff's statutory rights because the agreement did not specifically address the employee's civil rights under Title VII or FEHA.
10.	<i>Solo v. Am. Ass'n of Univ. Women</i> (S.D. Cal. May 2016). <sup>87</sup>	<b>Saving Clause: Unconscionability:</b> Consumer arbitration agreement was unconscionable because it required only the consumer to arbitrate claims and failed to specify who would arbitrate or under what rules would apply in an arbitral proceeding.
11.	<i>Ingalls v. Spotify USA, Inc.</i> (N.D. Cal. Nov. 2016). <sup>88</sup>	<b>Saving Clause: Unconscionability:</b> Consumer arbitration agreement was unconscionable, and the court declined to sever overly one-sided unilateral modification, confidentiality, and statute of limitations clauses.
<b><i>The remaining 70 cases were compelled to arbitration.</i></b>		

### 1. *Epic*-Impacted Cases

There were ten cases in the year preceding *Epic* where a party argued that the NLRA guaranteed workers a substantive right to pursue class and representative actions in a judicial forum. Two district courts rejected this argument,<sup>89</sup> while eight accepted it and invalidated the employees' arbitration agreements containing class action waivers.<sup>90</sup> The Ninth Circuit accepted these employees' argument in *Morris* in August 2016,<sup>91</sup> which was later consolidated in *Epic* before the Supreme Court.<sup>92</sup> Because these events transpired during the pre-*Epic* sample period, this sample does not truly capture the ramifications *Morris* would have had if it had not been subsequently overruled. It is important to note, however, that out of the

<sup>86</sup> *Berdechowski v. Reach Grp., LLC*, No. 1:16-cv-00177-LJO-JLTx, 2016 U.S. Dist. LEXIS 74287 (E.D. Cal. June 7, 2016).

<sup>87</sup> *Solo v. Am. Ass'n of Univ. Women*, 187 F. Supp. 3d 1151 (S.D. Cal. 2016).

<sup>88</sup> *Ingalls v. Spotify USA, Inc.*, No. C-16-03533-WHA, 2016 U.S. Dist. LEXIS 157384 (N.D. Cal. Nov. 14, 2016).

<sup>89</sup> *See, e.g.*, *Gerton v. Fortiss, LLC*, No. 15-cv-04805-TEH, 2016 U.S. Dist. LEXIS 19297, at \*10 (N.D. Cal. Feb. 16, 2016) (rejecting such argument prior to the Ninth Circuit's decision in *Morris*) ("Indeed, even the California Supreme Court rejected *Horton I* in *Iskanian* ("We thus conclude . . . that sections 7 and 8 of the NLRA do not represent a 'contrary congressional command' overriding the FAA's mandate.")" (internal citation omitted)).

<sup>90</sup> *See, e.g.*, *Bui v. Northrop Grumman Sys. Corp.*, No. 15-cv-1397-WQH-WVG, 2016 U.S. Dist. LEXIS 171513, at \*11 (S.D. Cal. Dec. 9, 2016) ("The 'Class Action Claims' section of the Arbitration Agreement in this case is similarly restrictive of Plaintiff's ability to bring a concerted action against Defendant.").

<sup>91</sup> *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980 (9th Cir. 2016).

<sup>92</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).



eleven cases not compelled to arbitration in the pre-*Epic* sample, eight of these relied on the supposed conflict between the NLRA and FAA to not compel arbitration in those cases.

## 2. Saving Clause

Out of eighty-one Saving Clause challenges to arbitration agreements, only two succeeded in the pre-*Epic* sample. Illegality, fraudulent inducement, undue influence, economic duress, and illusoriness never succeeded. Unconscionability was the most common challenge, argued in sixty-six cases. While unconscionability was the only Saving Clause defense to successfully preclude arbitration pre-*Epic*, it only did so in two of these sixty-six cases.

### a. Illegality, Fraudulent Inducement, Economic Duress, Undue Influence, Illusoriness

Challenges of illegality, fraudulent inducement, economic duress, undue influence, and illusoriness accounted for fifteen of the eighty-one cases in the pre-*Epic* sample. This accounts for a small share primarily because of the Supreme Court's holdings in *Buckeye Check Cashing* that Saving Clause defenses directed at the contract as a whole must be decided by the arbitrator and not the district court. When proponents alleged state law voided the underlying contract in which the arbitration provision was contained, district courts unanimously cited *Buckeye Check Cashing* to compel the disputes to arbitration.<sup>93</sup> In an action regarding unfair debt and collection practices, for example, a consumer alleged the loan contract with defendant violated California Business and Professional Code Section 654.3(c), rendering the entire contract—including the arbitration clause—void.<sup>94</sup> The district court rejected the argument, citing the “well-settled authority” that “an arbitrator may resolve the merits of a dispute even if the arbitrator finds the contract as a whole to be void for illegality or otherwise unenforceable.”<sup>95</sup> When an employee argued an arbitration clause specifically violated state notice requirements, conversely, the district court

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<sup>93</sup> See, e.g., *Goggans v. Loanme, Inc.*, No. SACV-16-01223-AG-JCGx, 2016 U.S. Dist. LEXIS 195982, at \*2–4 (C.D. Cal. Nov. 14, 2016).

<sup>94</sup> *Quiroz v. Cavalry SPV I, LLC*, 217 F. Supp. 3d 1130, 1136 (C.D. Cal. 2016).

<sup>95</sup> *Id.*

held that the state law was preempted by the FAA under *Concepcion*.<sup>96</sup> In the end, all seven illegality challenges failed.

Fraudulent inducement, economic duress, and undue influence arguments fared no better. These challenges inherently take issue with the way in which the contract as a whole was formed.<sup>97</sup> Proponents in these cases attempted to argue that by not voluntarily assenting to the contract as a whole, they did not assent to the arbitration clause contained within the contract.<sup>98</sup> Some courts rejected these arguments because the proponents failed to prove the requisite level of coerciveness these defenses require.<sup>99</sup>

In *Burgoon v. Narconon of Northern California*, for example, the court found no undue influence because there was “no overpersuasion by the facility,” and “even if Plaintiffs were high from drugs and/or had high-level withdrawal symptoms, that [did] not negate the fact that they knew they were seeking drug treatment from the Narconon facilities for which the facilities would have to be compensated, and thus understood the nature and effect of the admission agreement.”<sup>100</sup> Other district courts relied on *Buckeye Check Cashing* to reject defenses, such as fraudulent inducement in *Azoulai v. La Porta*, as directed at the contract as a whole.<sup>101</sup> Regardless of the approach, however, the result was the same: all three fraudulent inducement, one undue influence, and one economic duress challenges failed.

There were three cases in which plaintiffs argued unilateral modification clauses rendered their arbitration agreements illusory as an

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<sup>96</sup> *Olson v. MBO Partners, Inc.*, No. 3:15-cv-2216-HZ, 2016 U.S. Dist. LEXIS 145970, at \*9–10 (D. Or. Oct. 20, 2016).

<sup>97</sup> *See, e.g.*, Restatement (Second) of Contracts §§ 162, 175–77 (Am. L. Inst. 1981).

<sup>98</sup> *See, e.g.*, *Mims v. Davison Design & Dev., Inc.*, No. EDCV-16-92-JGB-KKx, 2016 U.S. Dist. LEXIS 194325, at \*6–7 (C.D. Cal. Apr. 14, 2016) (“Because Plaintiff’s claim of fraud in the inducement relates to the formation of the contract as a whole and is in no way specific to the arbitration clause, it must be decided by the arbitrator, not the federal court.”); *Azod v. Robinson*, No. 2:16-cv-00440-JFW-Ex, 2016 U.S. Dist. LEXIS 184770, at \*10 (C.D. Cal. May 10, 2016).

<sup>99</sup> *See, e.g.*, *Olson v. MBO Partners, Inc.*, No. 3:15-cv-2216-HZ, 2016 U.S. Dist. LEXIS 145970, at \*12–15 (D. Or. Oct. 20, 2016).

<sup>100</sup> *Burgoon v. Narconon of N. Cal.*, Case No. 15-cv-01381-EMC, 2016 U.S. Dist. LEXIS 5489, \*15–16 (N.D. Cal. Jan. 15, 2016); *see Olson*, 2016 U.S. Dist. LEXIS at \*14–15 (rejecting plaintiff’s fraudulent inducement claim because arbitration clause was clearly stated).

<sup>101</sup> *Azoulai v. La Porta*, No. CV-15-06083-MWF-PLAx, 2016 U.S. Dist. LEXIS 190593, at \*14 (C.D. Cal. January 25, 2016); *see Mims v. Davison Design & Dev., Inc.*, EDCV-16-92-JGB-KKx, 2016 U.S. Dist. LEXIS 194325, at \*6–7 (C.D. Cal. April 14, 2016) (rejecting plaintiff’s fraudulent inducement claim based on *Buckeye Check Cashing*).

independent basis to invalidate their agreements.<sup>102</sup> Two district courts rejected this argument, finding that under California law, unilateral modification agreements are not illusory because they are limited by the covenant of good faith and fair dealing.<sup>103</sup> One district court, on the other hand, found a unilateral modification clause illusory because it enabled the employer to modify the arbitration agreement after employees' claims accrued, but before filing, meaning it could "not be saved by the covenant of good faith and fair dealing."<sup>104</sup> The court, however, severed the unilateral modification clause to compel arbitration. Illusoriness, thus, failed overall as a basis to prevent arbitration in the pre-*Epic* sample.

#### b. Unconscionability

While unconscionability prevented arbitration in two cases,<sup>105</sup> unconscionable elements were present in more than two cases. Because unconscionability consists of two elements, procedural and substantive, it is possible for a litigant to prove one element but fail overall in proving unconscionability.<sup>106</sup> Procedural unconscionability is defined generally as the presence of unequal bargaining power between the parties and unfair surprise in presenting the terms of a contract.<sup>107</sup> Substantive unconscionability requires a contract's terms to be so one-sided that they "shock the conscience."<sup>108</sup> Both typically need to be present for a finding of unconscionability.<sup>109</sup> Once unconscionability is found, the court has

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<sup>102</sup> The vast majority of cases argued unconscionability to challenge unilateral modification clauses. To the extent proponents argued unilateral modification clauses rendered their arbitration agreements illusory as a separate ground to invalidate the agreement, it was coded in the "illusory" category and not in the "unconscionability" category.

<sup>103</sup> *DDC Logistics, Inc. v. Airways Freight Corp.*, No. 8:16-cv-00903-JLS-SESx, 2016 U.S. Dist. LEXIS 194309, at \*7–10 (C.D. Cal. Sept. 7, 2016); *Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-cv-1938-BAM, 2016 U.S. Dist. LEXIS 63693, at \*13–17 (E.D. Cal. May 12, 2016).

<sup>104</sup> *Cummings-Reed v. United Health Grp.*, No. 2:15-cv-02359-JAM-AC, 2016 U.S. Dist. LEXIS 58325, at \*10 (E.D. Cal. May 2, 2016).

<sup>105</sup> *Solo v. Am. Ass'n of Univ. Women*, 187 F. Supp. 3d 1151, 1162 (S.D. Cal. 2016); *Ingalls v. Spotify USA, Inc.*, No. C-16-03533-WHA, 2016 U.S. Dist. LEXIS 157384, at \*14–15 (N.D. Cal. Nov. 14, 2016).

<sup>106</sup> *See De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1013–16 (Cal. 2018).

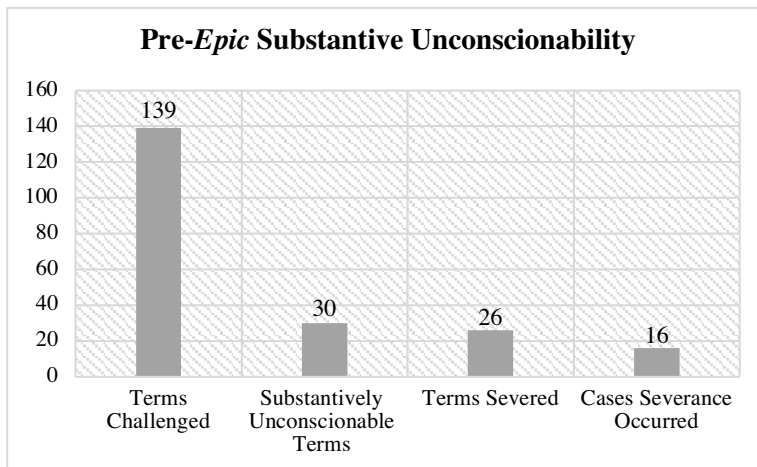
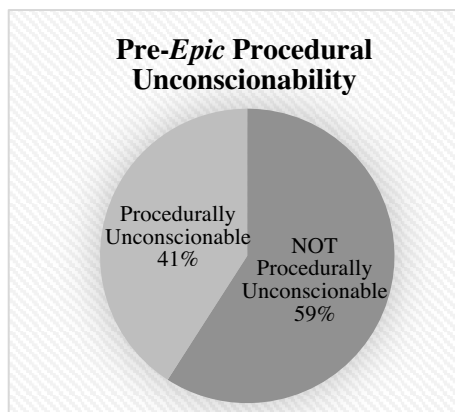
<sup>107</sup> *Baltazar v. Forever21, Inc.*, 367 P.3d 6, 11–12 (Cal. 2016).

<sup>108</sup> *Id.*

<sup>109</sup> Some states, such as Illinois, do not require both procedural and substantive unconscionability, *see, e.g., Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 263 (Ill. 2006); however, the majority of state law applied in the sample, including California, does require both for a finding of unconscionability, *see Baltazar v. Forever21, Inc.*, 367 P.3d 6, 11 (Cal. 2016). California uses a sliding scale approach, meaning while it requires both be present to limit or deny enforcement, it does not require both be present to the same degree. *Baltazar*, 367 P.3d at 11.

discretion to either limit or deny enforcement of the agreement, meaning it can sever one-sided terms from the contract or not enforce the agreement.<sup>110</sup>

To avoid arbitration, unconscionability proponents must therefore demonstrate: (1) unequal bargaining power and/or unfair surprise, (2) shockingly one-sided terms, and that (3) one-sided terms cannot not be severed from the agreement, rendering it void. Only two of sixty-six litigants in the pre-*Epic* sample were able to meet this burden. The majority of proponents could not.



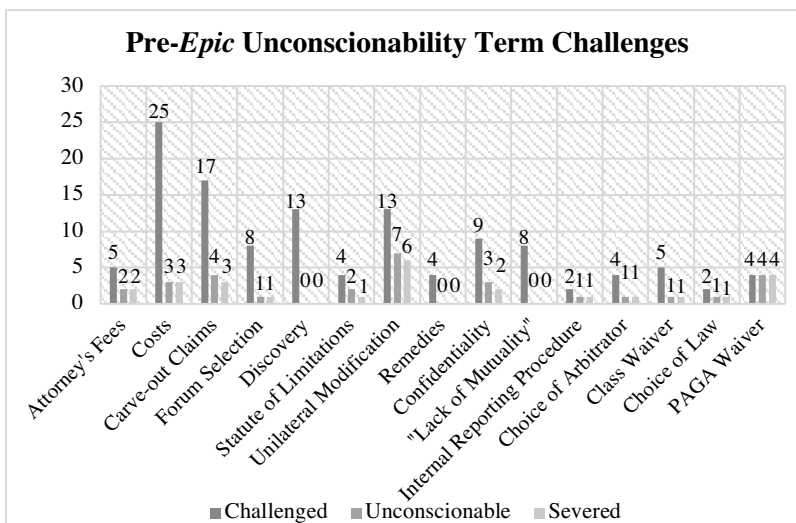
<sup>110</sup> See CAL. CIV. CODE §1670.5 (2020); see also *Samaniego v. Empire Today, LLC*, 205 Cal. App. 4th 1138, 1148 (2012) (“When an arbitration agreement is ‘permeated’ by unconscionability the decision whether to sever the objectionable clauses or refuse to compel arbitration is within the trial court’s exercise of discretion.”) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 695 (Cal. 2000)).

i. Procedural and Substantive Unconscionability

The fact that only two litigants met the unconscionability burden does not mean unconscionable elements were present in only two cases. District courts found procedural unconscionability in 27 of the 66 unconscionability cases, meaning 41 percent demonstrated unequal bargaining power or unfair surprise. For substantive unconscionability, 139 terms were challenged across the 66 unconscionability cases, and 30 terms were found to be one-sided. Of the thirty one-sided terms, however, twenty-six were severed to compel arbitration. When presented with the decision to either sever one-sided terms or not compel arbitration, 16 district courts (almost 25 percent) chose severance in order to compel arbitration. Two district courts, conversely, chose to deny arbitration, representing the two successful Saving Clause challenges pre-*Epic*. Four of the thirty unconscionable terms were present in the two unconscionability cases not compelled to arbitration. The remaining twenty-six unconscionable terms were spread among the sixteen cases.

ii. Common Substantive Unconscionability Challenges

The terms most frequently challenged by litigants, however, were not the terms courts tended to find unconscionable. But even if terms were found to be unconscionable, severance overwhelmingly occurred. Only four unconscionable terms were not severed.



Cost-Splitting Provisions

The most common challenge, found in twenty-five cases, was to cost-splitting provisions. This is primarily because the Supreme Court explicitly recognized that high fees and costs associated with arbitration could be a legitimate basis for courts to refuse arbitration in *Green Tree Financial*.<sup>111</sup> To invalidate an agreement to arbitrate for unreasonable costs and fees, a party must (1) present “specific facts showing with reasonable certainty the likely costs of arbitration” and (2) a “specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration.”<sup>112</sup> The court then considers “whether the arbitration agreement or the applicable arbitration rules . . . permit a party to waive or reduce the costs of arbitration based on financial hardship.”<sup>113</sup>

Only three litigants successfully showed that they would incur prohibitive costs in arbitration, but none could show that those costs provisions could not be severed.<sup>114</sup> Thus, all three unconscionable costs provisions were severed to compel arbitration.

The vast majority of challenges to fee provisions, on the other hand, failed because litigants could not make the specific showing required to invalidate cost provisions.<sup>115</sup> In *Trinchitella v. American Realty Partners*, for example, the court rejected plaintiff’s evidence that:

[A]rbitrators in Arizona charge between \$300 and \$475 per hour, . . . [Plaintiff] is seventy-four years old and retired, lives off a ‘fixed income[,] and do[es] not have any liquid financial resources such as savings or stock[,]’ . . . [and] if he incurred the arbitration costs required by the Subscription Agreement, he would have to sell his house within months to avoid bankruptcy.<sup>116</sup>

The court reasoned that these “conclusory statements” did not establish the required “specific [] individualized showing” for the costs provision to

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<sup>111</sup> *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 89 (2000).

<sup>112</sup> *Trinchitella v. Am. Realty Partners, LLC*, No. 2:15-cv-02365-KJM-EFB, 2016 U.S. Dist. LEXIS 98265, at \*35 (E.D. Cal. July 27, 2016).

<sup>113</sup> *Id.*

<sup>114</sup> *See, e.g., McLaurin v. Russell Sigler, Inc.*, 155 F. Supp. 3d 1042, 1047–48 (C.D. Cal. 2016) (“The Arbitration Policy’s unconscionable cost-splitting provision doesn’t make the entire agreement unenforceable.”).

<sup>115</sup> *See, e.g., Wishner v. Wells Fargo Bank, N.A.*, No. CV-16-2832-MWF-SKX, 2016 WL 10988765, at \*4 (C.D. Cal. Sept. 28, 2016) (“Plaintiff has failed to show that this cost is unconscionable.”).

<sup>116</sup> *Trinchitella*, 2016 U.S. Dist. LEXIS at \*36–37.

be substantively unconscionable.<sup>117</sup> The same outcome occurred for twenty-two of the twenty-five cases challenging costs.<sup>118</sup>

Conversely, in one of the successful cost-splitting provision challenges, the employee produced evidence that his share of arbitration fees could amount to \$40,000 whereas he would be responsible for only the \$400 filing fee in district court.<sup>119</sup> There, the court determined the evidence sufficiently showed a disparity in the costs the employee would incur in arbitration compared to a judicial forum.<sup>120</sup> The court severed the cost-sharing provision and compelled arbitration.<sup>121</sup>

### Unilateral Modification Clauses

The most successful challenge was to unilateral modification clauses, which were found substantively unconscionable in half of the cases in which they were challenged. Only one of these successful challenges prevented arbitration,<sup>122</sup> the remaining six unconscionable unilateral modification clauses were severed.<sup>123</sup> Some courts focused on the inherent lack of mutuality in unilateral modification clauses, while others focused on whether superior parties could modify the arbitration agreement to apply retroactively to accrued claims. The district court, in *Harris v. Halliburton*, focused on the former, severing the unilateral modification clause from the parties' arbitration agreement because "the [c]ompany maintains the right to amend or terminate the [arbitration] [p]rogram while affording no such power to employees."<sup>124</sup> Thirty-day notice of modifications and the fact modifications could not apply retroactively did not save the unilateral modification clause for the court in *Harris*.<sup>125</sup> In its unconscionability

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<sup>117</sup> *Id.* at \*35.

<sup>118</sup> *See, e.g.*, *Sena v. Uber Techs. Inc.*, No. CV-15-02418-PHX-DLR, 2016 U.S. Dist. LEXIS 47141, at \*21 (D. Ariz. Apr. 7, 2016) ("Sena has not produced evidence that his cost to individually arbitrate questions of arbitrability would be prohibitively expensive.").

<sup>119</sup> *Castaldi v. Signature Retail Servs., Inc.*, No. 15-cv-00737-JSC, 2016 U.S. Dist. LEXIS 1911, at \*39 (N.D. Cal. Jan. 7, 2016).

<sup>120</sup> *Id.* at \*38–41.

<sup>121</sup> *Id.* at \*45–48.

<sup>122</sup> *Ingalls v. Spotify USA, Inc.*, No. C-16-03533-WHA, 2016 U.S. Dist. LEXIS 157384, at \*21 (N.D. Cal. Nov. 14, 2016).

<sup>123</sup> *See, e.g.*, *Mikhak v. Univ. of Phx.*, No. C-16-00901-CRB, 2016 U.S. Dist. LEXIS 80705, at \*40 (N.D. Cal. June 21, 2016).

<sup>124</sup> *Harris v. Halliburton Co.*, No. 1:16-cv-00281-LJO-JLT, 2016 U.S. Dist. LEXIS 74916, \*36–37 (E.D. Cal. June 8, 2016) (recommending compelling arbitration by magistrate judge); *see Harris v. Halliburton Co.*, No. 1:16-cv-00281-LJO-JLT, 2016 U.S. Dist. LEXIS 105135, at \*6–7 (E.D. Cal. Aug. 9, 2016) (adopting Magistrate's recommendation).

<sup>125</sup> *Harris v. Halliburton Co.*, No. 1:16-cv-00281-LJO-JLT, 2016 U.S. Dist. LEXIS 74916, \*36–37 (E.D. Cal. June 8, 2016).

analysis, the court in *Totten v. Kellogg Brown & Root* focused on the latter, severing the unilateral modification clause because it allowed modifications to arbitration procedures for claims already accrued.<sup>126</sup> United States District Judge Dolly Gee interpreted the clause's language that, "no amendment shall apply to a Dispute which is initiated prior to the effective date of the amendment," to mean that "modifications may apply to claims already accrued or known to [defendant], provided that the claim was not filed until after the 30-day notice period." Interpreted this way, because modifications could apply retroactively, Judge Gee concluded that the implied covenant of good faith and fair dealing "cannot save the . . . unilateral modification provision" and severed it.<sup>127</sup>

Six others reached the opposite conclusion. The court in *O'Bannon v. United Services Automobile Association*, for example, disagreed with the court in *Harris*, holding that the arbitration agreement's unilateral modification clause's notice requirements precluded a finding of substantive unconscionability.<sup>128</sup> Examining the same unilateral modification clause as Judge Gee,<sup>129</sup> United States District Judge Otis Wright II, in the same judicial district concluded that the implied covenant of good faith and fair dealing *did* save defendant's unilateral modification clause.<sup>130</sup> Judge Wright II, moreover, disagreed with Judge Gee's interpretation of the clause, finding the thirty-day notice requirement prevented modifications from applying retroactively,<sup>131</sup> illustrating the split in courts' interpretations of unilateral modifications pre-*Epic*.<sup>132</sup> Half of the challenges succeeded; half failed.

#### Attorney's Fees Provisions

Challenges to attorney's fee provisions in arbitration agreements arose primarily in employment cases wherein statutes serving as the bases for plaintiffs' claims afford successful aggrieved employees the right to collect attorney's fees from losing employers but prohibit employers from

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<sup>126</sup> *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1253 (C.D. Cal. 2016).

<sup>127</sup> *Id.*

<sup>128</sup> *O'Bannon v. United Servs. Auto. Ass'n*, No. CV-15-02231-PHX-SRB, 2016 U.S. Dist. LEXIS 186581, at \*9–10 (D. Ariz. June 17, 2016) (emphasizing at-will nature of employment contract).

<sup>129</sup> It also appears to be the same plaintiff in both cases.

<sup>130</sup> *Totten v. Kellogg Brown & Root, LLC ("Totten II")*, No. 5:15-cv-01876-ODW-KKx, 2016 U.S. Dist. LEXIS 18558, at \*13 (C.D. Cal. Feb. 10, 2016).

<sup>131</sup> *Id.*

<sup>132</sup> *See, e.g., Robinson v. OnStar, LLC*, No. 15-cv-1731-WQH-BGS, 2016 U.S. Dist. LEXIS 114937, at \*18 (S.D. Cal. Aug. 25, 2016) (finding the implied covenant of good faith and fair dealing rendered unilateral modification clause not unconscionable).



collecting attorney's fees from losing employees.<sup>133</sup> If an arbitration agreement provides for the parties to pay their own attorney's fees, with no ability for the arbitrator to modify as provided by law, the attorney's fees provision can infringe on employee rights under statutes, such as the FLSA, as was found in *Smith v. VMware*.<sup>134</sup> Where these provisions were found unconscionable, however, they were deemed to be "easily severable[.]" and thus, did not prevent arbitration.<sup>135</sup>

### Discovery Provisions

Arbitration agreements' limits on discovery were challenged in thirteen cases but were never held to be unconscionable.<sup>136</sup> This is partly because the Supreme Court in *Concepcion* noted that faster, streamlined discovery is a central feature of arbitration, and has cautioned parties not to interfere with those features fundamental to arbitration.<sup>137</sup> District courts appear to have heeded this warning.<sup>138</sup>

### Carve-Out Claims

Substantive unconscionability is present when terms are unreasonably one-sided, with no commercial justification other than the parties' unequal bargaining power.<sup>139</sup> Seventeen unconscionability proponents argued that their arbitration agreements were one-sided because claims likely to be brought by the parties with inferior bargaining power had to be arbitrated, while claims likely to be brought by the drafting party did not.<sup>140</sup> Four litigants proved substantive unconscionability on these

<sup>133</sup> See, e.g., *Totten v. Kellogg Brown & Root, LLC*, No. 5:15-cv-01876-ODW-KKx, 2016 U.S. Dist. LEXIS 18558, at \*14 (C.D. Cal. Feb. 10, 2016); *Manning v. Parsons Transp. Grp., Inc.*, No. 1:16-cv-00390-JLT, 2016 U.S. Dist. LEXIS 76733, at \*27 (E.D. Cal. June 13, 2016).

<sup>134</sup> *Smith v. VMware, Inc.*, No. 15-cv-03750-TEH, 2016 U.S. Dist. LEXIS 1245, at \*9-10 (N.D. Cal. January 5, 2016).

<sup>135</sup> *Id.* at \*15-17.

<sup>136</sup> See, e.g., *McCarthy v. Stifel, Nicolaus & Co.*, No. 2:16-cv-0581-HRH, 2016 U.S. Dist. LEXIS 115647, at \*12-19 (D. Ariz. Aug. 29, 2016).

<sup>137</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 366 (2011).

<sup>138</sup> See, e.g., *Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-cv-1938-BAM, 2016 U.S. Dist. LEXIS 63693, at \*24 (E.D. Cal. May 12, 2016) ("*Concepcion*, however, suggests that limitations on arbitral discovery no longer support a finding of substantive unconscionability.>").

<sup>139</sup> See, e.g., *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1173 (9th Cir. 2003) ("... unjustified one-sidedness deprives the [arbitration agreement] of the 'modicum of bilaterality' that the California Supreme Court requires for contracts to be enforceable under California law.>").

<sup>140</sup> See, e.g., *Canlas v. Olomana Golf Links, Inc.*, No. 15-00243 HG-KSC, 2016 U.S. Dist. LEXIS 146754, at \*10 (D. Haw. Oct. 24, 2016).

grounds.<sup>141</sup> In three, courts chose to sever the exempted claims provisions,<sup>142</sup> while one declined to sever and did not compel arbitration. *Solo v. American Association of University Women*, which was not compelled to arbitration, involved an arbitration clause in a contract for a free children’s camp.<sup>143</sup> It was found unconscionable because all of the camp attendees’ claims—but none of the association’s—had to be arbitrated. The court reasoned that the lack of mutuality was too pervasive and central to the agreement’s purpose and was “unable to sever . . . without simply rewriting the agreement.”<sup>144</sup>

Litigants tended to be unsuccessful, on the other hand, “[w]hen an injunctive relief carve-out provision merely confirms, rather than expands, rights available to the parties[.]”<sup>145</sup> In *Varela v. Lamps Plus*, for example, the parties’ arbitration agreement exempted claims for injunctive relief for both parties, but all other claims had to be arbitrated.<sup>146</sup> Plaintiff argued that since the company would be more likely to bring injunctive relief claims than an employee, the practical effect of the provision was one-sided.<sup>147</sup> The court disagreed, finding no one-sidedness since “both parties are entitled to any and all appropriate relief, and the availability of injunctive relief does not render the Agreement substantively unconscionable.”<sup>148</sup> Thirteen similar challenges to carve-out provisions also failed.

### Confidentiality

Confidentiality provisions are overly broad, and therefore unconscionable, when parties are prevented from “disclosing the existence or substance of the claim, arbitration, or award,” or from contacting other similarly situated parties, such as other employees, to assist in the

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<sup>141</sup> See, e.g., *Moule v. UPS Co.*, No. 1:16-cv-00102-JLT, 2016 U.S. Dist. LEXIS 88270, at \*20 (E.D. Cal. July 7, 2016) (“An arbitration agreement that compels arbitration for claims of the individual but exempts from arbitration those claims of the corporation is substantively unconscionable.”).

<sup>142</sup> See, e.g., *Manning v. Parsons Transp. Grp., Inc.*, No. 1:16-cv-00390-JLT, 2016 U.S. Dist. LEXIS 76733, at \*23–25 (E.D. Cal. June 13, 2016).

<sup>143</sup> *Solo v. Am. Ass’n of Univ. Women*, 187 F. Supp. 3d 1151, 1155–56 (S.D. Cal. 2016).

<sup>144</sup> *Id.* at 1158–60.

<sup>145</sup> *Borgarding v. JPMorgan Chase Bank*, No. CV-16-2485 FMO-RAOx, 2016 U.S. Dist. LEXIS 191612, at \*20 (C.D. Cal. Oct. 31, 2016); see also *Quiroz v. Cavalry SPV I, LLC*, 217 F. Supp. 3d 1130, 1137–38 (C.D. Cal. 2016).

<sup>146</sup> *Varela v. Lamps Plus, Inc.*, No. CV-16-577-DMG-KSx, 2016 Lexis U.S. Dist. LEXIS 189521, at \*16 (July 7, 2016).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

arbitration.<sup>149</sup> Four confidentiality clauses were found unconscionable pre-*Epic*, three of which were severed.<sup>150</sup> Requiring arbitration proceedings to be conducted privately was alone insufficient to render an arbitration agreement unconscionable.<sup>151</sup> Some courts found that an otherwise overly broad confidentiality clause is not unconscionable if the arbitrator had the “authority to determine [if] disclosure is permitted or required by law.”<sup>152</sup> Some courts, nevertheless, found unconscionability if there was no commercial justification for the level of confidentiality required in the arbitration agreement.<sup>153</sup> The majority of those courts, however, chose to sever offending confidentiality clauses.

#### PAGA Waivers

In *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court held that claims under the Labor Code Private Attorneys General Act of 2004 (“PAGA”)<sup>154</sup> cannot be compelled to arbitration.<sup>155</sup> The Ninth Circuit, in 2015, considered if the *Iskanian Rule* was a generally applicable contract defense under the Saving Clause, and concluded it was.<sup>156</sup> Thus, the *Iskanian Rule* is not preempted by the FAA in the Ninth Circuit.<sup>157</sup>

PAGA “authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with [seventy-five percent] of the proceeds of that litigation going to the state’ . . . [and] is a type of qui tam action.”<sup>158</sup> The remaining twenty-five percent of litigation proceeds are distributed among aggrieved employees.<sup>159</sup> The *Iskanian Rule*

<sup>149</sup> *Jacovides v. Future Foam, Inc.*, No. 2:16-cv-01842-CAS-AJWx, 2016 U.S. Dist. LEXIS 57530, at \*33–34 (C.D. Cal. Apr. 25, 2016).

<sup>150</sup> See *Ingalls v. Spotify USA, Inc.*, No. C-16-03533 WHA, 2016 U.S. Dist. LEXIS 157384, at \*18–21 (N.D. Cal. Nov. 14, 2016) (declining to sever unconscionable confidentiality provision); see, e.g., *Burgoon v. Narconon of N. Cal.*, No. 15-cv-01381-EMC, 2016 U.S. Dist. LEXIS 5489, at \*17–18, 23–24 (N.D. Cal. Jan. 15, 2016) (severing unconscionable confidentiality provision).

<sup>151</sup> See, e.g., *Jacovides*, 2016 U.S. Dist. LEXIS at \*33–34.

<sup>152</sup> See, e.g., *Mikhak v. Univ. of Phx.*, No. C16-00901-CRB, 2016 U.S. Dist. LEXIS 80705, at \*40 (N.D. Cal. June 21, 2016).

<sup>153</sup> See, e.g., *Moule v. UPS Co.*, No. 1:16-cv-00102-JLT, 2016 U.S. Dist. LEXIS 88270, at \*29 (E.D. Cal. July 7, 2016).

<sup>154</sup> Labor Code Private Attorneys General Act of 2004, CAL. LAB. CODE § 2699 (2020).

<sup>155</sup> *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 151 (Cal. 2014) (“*Iskanian Rule*”).

<sup>156</sup> *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439 (9th Cir. 2015).

<sup>157</sup> *Id.* at 433 (“After considering the objectives of the FAA, we conclude that the *Iskanian* rule does not conflict with those objectives, and is not impliedly preempted.”)

<sup>158</sup> *Id.* at 429.

<sup>159</sup> *Id.*

under California law prohibits agreements “waiving the right to bring ‘representative’ PAGA claims—that is, claims seeking penalties for Labor Code violations affecting other employees.”<sup>160</sup>

The Ninth Circuit agreed with the California Supreme Court that the Saving Clause applies because it contravenes California’s public policy to allow PAGA waivers in any agreement—arbitration or otherwise.<sup>161</sup> As a type of *qui tam* claim, it reasoned PAGA actions are inherently different from *Conception*’s class action.<sup>162</sup>

The Circuit Court agreed with the California Supreme Court that this interpretation of state law was not preempted by the FAA because “a PAGA action is a statutory action for penalties brought as a proxy for the state.”<sup>163</sup> The FAA “does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself.”<sup>164</sup> Arbitration agreements between employees and employers do not bind the state, on whose behalf the employee is acting when a PAGA claim is brought; more directly, the real party in interest in PAGA claims is the state.<sup>165</sup> *Iskanian* and *Sakkab*, however, do not reject the arbitrability of PAGA claims.<sup>166</sup> In *Sakkab*, moreover, the Ninth Circuit itself concluded that plaintiff’s individual claims could be compelled to arbitration.<sup>167</sup>

Four courts found PAGA waivers to be unenforceable in light of *Sakkab*, severing them from arbitration agreements.<sup>168</sup> This limited number of cases where the waivers were found unenforceable does not capture the total number of disputes over a plaintiff’s ability to bring a PAGA claim in the pre-*Epic* sample. PAGA waivers were difficult to code in the sample because some courts used *Iskanian*’s reasoning to find that representative

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<sup>160</sup> *Id.* at 431.

<sup>161</sup> *Id.* at 433.

<sup>162</sup> *Sakkab*, 803 F.3d at 433.

<sup>163</sup> *Id.*

<sup>164</sup> *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 153 (Cal. 2014)

<sup>165</sup> *Sakkab*, 803 F.3d at 435.

<sup>166</sup> *Id.* at 44; *Iskanian*, 327 P.3d 155–55. See generally Mary-Christine Sungaila & Marco Pulido, *The Arbitrability Of Claims Arising Under PAGA*, LAW360 (Mar. 16, 2018, 10:22 AM) (discussing the arbitrability questions remaining after *Iskanian* and *Sakkab*); Mary-Christine Sungaila, *Arbitration After ‘Epic Systems v. Lewis’: Implications for California Employers*, THE RECORDER (CAL.) (May 30, 2018), <https://www.law.com/therecorder/2018/05/30/arbitration-after-epic-systems-v-lewis-implications-for-california-employers> [https://perma.cc/86XA-79M5].

<sup>167</sup> *Sakkab*, 803 F.3d at 440.

<sup>168</sup> See, e.g., *Harris v. Halliburton Co.*, No. 1:16-cv-00281-LJO-JLT, 2016 U.S. Dist. LEXIS 74916, at \*29–30 (E.D. Cal. June 8, 2016) (severing PAGA waiver from arbitration agreement).

actions, like PAGA, are not inherently covered by arbitration agreements.<sup>169</sup> The courts that used this reasoning did not find PAGA waivers unconscionable and severable, however, which is why those cases are not included in these severance figures.<sup>170</sup>

### 3. Ineffective Statutory Waiver

The majority of litigants that argued arbitration would infringe on federal statutory or constitutional rights failed to prevent arbitration.<sup>171</sup> Only one of six of these challenges succeeded. In the successful challenge, plaintiff employee argued that the language in her arbitration agreement did not constitute a valid waiver of her Title VII statutory rights.<sup>172</sup> The court agreed that the language, “[a]ny dispute arising in connection with the Agreement shall be finally settled by arbitration[,]” was too general to put plaintiff on notice that she was waiving her Title VII rights.<sup>173</sup> The employee successfully prevented arbitration; the litigants in the other statutory vindication challenges did not. The majority of those unsuccessful challenges involved allegations that the litigants’ First and Seventh Amendment rights would be violated if courts compelled arbitration.<sup>174</sup> These arguments failed because there is no state action on which a constitutional violation can be based in compelling arbitration. As the Supreme Court has explained, the district court merely enforces a private agreement between non-state actors if a valid arbitration agreement exists.<sup>175</sup>

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<sup>169</sup> See, e.g., *Jacovides v. Future Foam, Inc.*, No. 2:16-cv-01842-CAS-AJWx, 2016 U.S. Dist. LEXIS 57530, at \*35 (C.D. Cal. Apr. 25, 2016) (holding arbitration agreements did not include unwaivable PAGA claims).

<sup>170</sup> *Id.*

<sup>171</sup> See, e.g., *Scudieri v. Chapman Chevrolet Chandler, LLC*, 2:16-cv-01988 JWS, 2016 U.S. Dist. LEXIS 148509, at \*5–8 (D. Ariz. Oct. 25, 2016), *dismissed* 2017 U.S. Dist. LEXIS 79208 (D. Ariz., May 22, 2017)

<sup>172</sup> *Berdechowski v. Reach Grp., LLC*, No. 1:16-CV-00177-LJO-JLT, 2016 U.S. Dist. LEXIS 74287, at \*8–9 (E.D. Cal. June 7, 2016).

<sup>173</sup> *Id.* at \*4, 8–9.

<sup>174</sup> See, e.g., *Youssofi v. Wells Fargo Bank*, No. 16-cv-1330-MMA-JMA, 2016 U.S. Dist. LEXIS 177668, at \*2–6 (S.D. Cal. Dec. 21, 2016) (alleging infringement of First Amendment rights); *Roberts v. AT&T Mobility LLC*, No. 15-cv-03418-EMC, 2016 U.S. Dist. LEXIS 25446, at \*4–12 (N.D. Cal. Feb. 29, 2016) (same); *Robinson v. Universal Prot. Serv., L.P.*, No. CV-16-01408-PHX-DGC, 2016 U.S. Dist. LEXIS 104888, at \*2–4 (D. Ariz. Aug. 9, 2016) (alleging infringement of 7th Amendment and FMLA rights).

<sup>175</sup> *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

4. Pre-*Epic* Case Studiesa. An *Epic* Impact

This Note focuses primarily on district courts analyzing arbitration challenges unrelated to *Epic*'s holding. But the sample did capture cases directly impacted by *Epic*.<sup>176</sup> In one such case, *Attia v. Neiman Marcus Group*, employees filed class and PAGA claims against employer Neiman Marcus for various California labor code violations.<sup>177</sup> The district court first decided Neiman Marcus's motion to compel arbitration in June 2016. After finding the parties did not delegate arbitrability,<sup>178</sup> the district court considered the employees' claim that the arbitration agreement was unconscionable. The court reasoned that while the agreement was an adhesive contract, there was minimal procedural unconscionability.<sup>179</sup> For substantive unconscionability, the court rejected the employees' assertion that the Texas choice of law provision was unconscionable because it only applied to interpreting the validity of the arbitration agreement—not to the substance of the employees' claims—and both parties agreed California law should substantively apply to plaintiffs' claims.<sup>180</sup> The court rejected the employees' argument regarding the unilateral modification clause, finding it was not unconscionable because it was limited by a thirty-day notice requirement and did not apply retroactively to already-accrued claims.<sup>181</sup> The employees' last challenge, to the provision on arbitral costs failed because they failed to prove they would incur any additional costs compared to a judicial forum.<sup>182</sup> The court severed the agreement's waiver of representative actions and stayed the employees' PAGA claim pending arbitration of plaintiffs' individual claims.<sup>183</sup>

After the Ninth Circuit decided *Morris* in August 2016, the employees filed a motion for reconsideration.<sup>184</sup> In light of *Morris*, the district court

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<sup>176</sup> See, e.g., *Gutierrez v. Jolt Delivery, LLC*, No. LACV-17-8380-VAP-SSx, 2018 U.S. Dist. LEXIS 226888, at \*8 (C.D. Cal. Aug. 7, 2018) ("Plaintiff's argument regarding the class action waiver has been foreclosed by the Supreme Court's decision in *Epic*.").

<sup>177</sup> *Attia v. Neiman Marcus Grp., Inc.*, No. SA-CV-16-0504-DOC-FFMx, 2016 WL 8902584, at \*9 (C.D. Cal. June 27, 2016), *on reconsideration*, No. SA-CV-16-0504-DOC-FFMx, 2016 WL 9150570 (C.D. Cal. Oct. 18, 2016).

<sup>178</sup> *Id.* at \*7.

<sup>179</sup> *Id.* at \*8.

<sup>180</sup> *Id.* at \*9.

<sup>181</sup> *Id.* at \*10–11.

<sup>182</sup> *Id.* at \*12.

<sup>183</sup> *Id.*

<sup>184</sup> See generally *Attia*, 2016 WL 9150570 (C.D. Cal. Oct. 18, 2016).

granted the motion for reconsideration on the grounds that the NLRA prohibits mandatory arbitration agreements requiring employees to pursue claims individually.<sup>185</sup> The court noted to Neiman Marcus, “[s]hould the Supreme Court overrule the Ninth Circuit on this issue, Defendant may file for reconsideration of this Order.”<sup>186</sup> Under *Morris*, the employees still would be able to pursue class claims. Without *Morris*’s bright-line rule, these employees would have had to arbitrate claims individually because their unconscionability challenge failed to prevent arbitration. Their only remaining claim in the district court would have been under PAGA, in which 75 percent of any recovery goes to the state—not the employees.<sup>187</sup>

#### b. Saving Clause Outlier and Effects of Severance

Only two district courts declined to sever unconscionable terms pre-*Epic*. The court in *Solo v. American Association of University Women* declined to sever the unconscionable provision governing what claims would be subject to arbitration.<sup>188</sup> Because none of the association’s claims were subject to arbitration, but all of the consumer’s claims were, it would have been impossible for the court to use severance to remove unconscionability without rewriting the parties’ agreement, partly because the term was fundamentally *not* collateral to the arbitration agreement.<sup>189</sup>

The court in *Ingalls v. Spotify USA*, however, declined to sever three unconscionable terms most other district courts chose to sever when faced with the same decision.<sup>190</sup>

In *Ingalls*, consumers filed a class action suit against music streaming provider Spotify for auto-renewal fees assessed to their accounts.<sup>191</sup> After finding that the parties did not delegate arbitrability, the court held that there was a low level of procedural unconscionability.<sup>192</sup>

Turning to substantive unconscionability, the *Ingalls* court found the unilateral modification clause unconscionable.<sup>193</sup> It based its decision on the fact that Spotify established one set of procedures for consumers to

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<sup>185</sup> *Id.* at \*3–4.

<sup>186</sup> *Id.* at \*4.

<sup>187</sup> The parties in this case reached a settlement while the case was stayed pending the Supreme Court’s ruling in *Epic*.

<sup>188</sup> *Solo v. Am. Ass’n of Univ. Women*, 187 F. Supp. 3d 1151, 1159–60 (S.D. Cal. 2016).

<sup>189</sup> *Id.*

<sup>190</sup> *Ingalls v. Spotify USA, Inc.*, No. C-16-03533-WHA, 2016 U.S. Dist. LEXIS 157384, at \*21 (N.D. Cal. Nov. 14, 2016).

<sup>191</sup> *Id.* at \*1–8.

<sup>192</sup> *Id.* at \*13–15.

<sup>193</sup> *Id.* at \*16–18.

reject unilateral modifications to their contract as a whole and a different, more burdensome procedure to reject unilateral modifications to the arbitration agreement.<sup>194</sup> Next, the court held that the agreement's confidentiality clause unconscionable as overly broad, "prohibiting both sides from making 'any public pronouncement or public comment or originat[ing] any publicity concerning the arbitration.'"<sup>195</sup> Lastly, the court concluded that the one-year statute of limitations that applied only to arbitrated claims was unconscionable because the applicable statute of limitations for plaintiffs' claim was four years under California's Unfair Competition Law.<sup>196</sup> In deciding whether to sever the three unconscionable terms or preclude arbitration, the *Ingalls* court chose to avoid arbitration. It concluded that while "many of the substantively unconscionable provisions that form part of the arbitration provision could be severed, unconscionability so permeates the arbitration clause that it cannot be cured by severance."<sup>197</sup>

Another court in the same judicial district, in *Burgoon v. Narconon of Northern California*, however, reached the opposite conclusion, instead severing three unconscionable terms to compel arbitration.<sup>198</sup> Plaintiffs sued the defendant, a drug rehabilitation facility, and tried to prevent arbitration.<sup>199</sup> After the court rejected the undue influence defense,<sup>200</sup> the court considered unconscionability. Although the plaintiffs were on narcotics when they signed their arbitration agreements, the court concluded that there was only "some" procedural unconscionability.<sup>201</sup> It found the confidentiality, statute of limitations, and cost-splitting provisions substantively unconscionable.<sup>202</sup> Plaintiffs successfully showed that the confidentiality provision was overly broad, and the statute of limitations clause unreasonably shortened the statute of limitations for their consumer statutory claims.<sup>203</sup> Plaintiffs also proved the cost-splitting provision was unconscionable after offering evidence that arbitration costs could exceed \$12,000 per day, a cost that both plaintiffs, who were seeking treatment for drug addiction at the facility, could not bear.<sup>204</sup> The court nevertheless

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at \*18.

<sup>196</sup> *Ingalls*, 2016 U.S. Dist. LEXIS at \*20–21.

<sup>197</sup> *Id.* at \*21.

<sup>198</sup> *Burgoon v. Narconon of N. Cal.*, No. 15-cv-01381-EMC, 2016 U.S. Dist. LEXIS 5489, at \*23–24 (N.D. Cal. Jan. 15, 2016).

<sup>199</sup> *Id.* at \*11–15.

<sup>200</sup> *Id.* at \*16.

<sup>201</sup> *Id.* at \*17.

<sup>202</sup> *Id.* at \*17–18.

<sup>203</sup> *Id.*

<sup>204</sup> *Burgoon*, 2016 U.S. Dist. LEXIS at \*22–23.



reached the opposite conclusion from *Ingalls*, severing all three provisions to compel arbitration.<sup>205</sup>

Unlike *Solo* where the unconscionable term was fundamental to the agreement to arbitrate, the unconscionable terms in both *Ingalls* and *Burgoon* were collateral to the purpose of the arbitration agreements. Both found confidentiality and statute of limitations provisions unconscionable. *Ingalls* contained an unconscionable unilateral modification clause, and *Burgoon* had an unconscionable cost-splitting term. It was never asserted in *Ingalls* that Spotify exercised its right to unilaterally modify the arbitration agreement, but the *Burgoon* plaintiffs would have been required to share the costs of arbitration had they not challenged it as unconscionable.

Even if the *Ingalls* agreement was perhaps more substantively unconscionable, the procedural unconscionability present in *Burgoon* was unquestionably more significant. The *Burgoon* plaintiffs were on narcotics when they signed the arbitration agreements in their intake paperwork seeking drug rehabilitation at defendant's facility; whereas the *Ingalls* plaintiffs failed to cancel Spotify subscriptions before the free trial periods expired, triggering auto-payments. As one of only two successful unconscionability challenges pre-*Epic*, *Ingalls* appears to be an outlier with *Burgoon* more representative of the sample. For plaintiffs, such as those in *Burgoon*, this means that their claims likely will be compelled to arbitration.

### 5. Pre-*Epic* Conclusions

The majority of cases (eight) not arbitrated in the pre-*Epic* sample relied on reasoning overturned by *Epic* to not compel arbitration. Only two cases relied on the Saving Clause and one on ineffective statutory vindication to refuse to compel arbitration. Saving Clause challenges never succeeded in employment cases pre-*Epic* to prevent arbitration. In almost 25 percent of unconscionability cases—the only Saving Clause defense to successfully prevent arbitration pre-*Epic*—courts used severance to enable arbitration. Overall, Ninth Circuit district courts rigorously enforced arbitration agreements according to their terms prior to *Epic*, contrary to Supreme Court dictum.

### B. POST-*EPIC* RESULTS

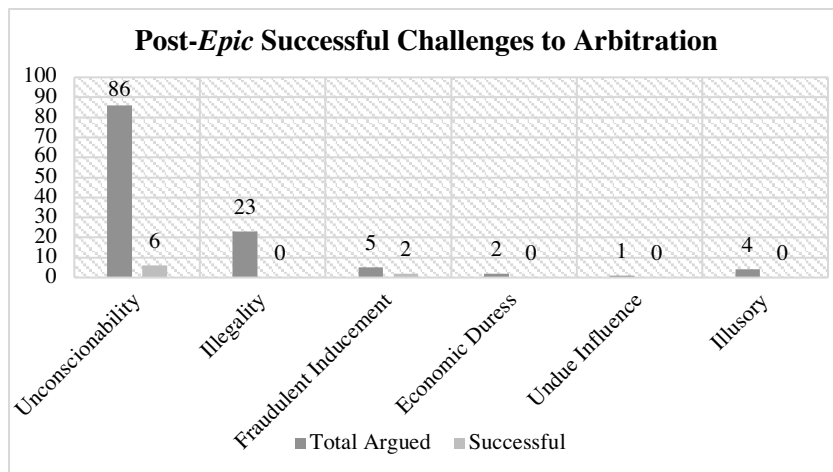
Ninth Circuit district courts continued to enforce arbitration agreements post-*Epic*. Out of 102 cases applying Saving Clause challenges in the year following *Epic*, only 8 succeeded and 94 failed. Ninety-two

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<sup>205</sup> *Id.*

percent of cases were compelled to arbitration in the post-*Epic* sample. Unconscionability successfully precluded arbitration in six cases, and fraudulent inducement prevented it in two. While more arbitration agreements were found unconscionable and denied enforcement, the number of terms found unconscionable and severed slightly decreased, despite findings of procedural unconscionability slightly increasing. These variances were not statistically significant, with one exception. Post-*Epic*, there was a statistically significant decrease in substantively unconscionable terms that were severed. On the other hand, the overall decrease in the number of cases in which severance occurred was not statistically significant. Only one *Epic*-impacted case was successfully challenged with the Saving Clause to preclude arbitration.<sup>206</sup>

Overall, *Epic*'s dictum implying that the Ninth Circuit was *not* following Supreme Court precedent and *not* compelling arbitration<sup>207</sup> was unsupported by this review of Ninth Circuit district court decisions—both before and after *Epic*.



<sup>206</sup> See generally *Ziglar v. Express Messenger Sys. Inc.*, No. CV-16-02726-PHX-SRB, 2019 U.S. Dist. LEXIS 34951 (D. Ariz. Mar. 4, 2019).

<sup>207</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018) (“Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms.”).

Post-Epic Cases Not Compelled to Arbitration		
Case		Reasoning to Not Compel Arbitration
1.	<i>Titus v. ZestFinance, Inc.</i> (W.D. Wash. Oct. 2018). <sup>208</sup>	<b>Saving Clause: Unconscionability:</b> Consumer loan agreement was unconscionable because its choice of law and forum provisions required consumer to arbitrate claims under Tribal law.
2.	<i>Brice v. Plain Green, LLC</i> (N.D. Cal. Mar. 2019). <sup>209</sup>	<b>Saving Clause: Unconscionability:</b> Consumer loan agreement was unconscionable because it required consumer to arbitrate claims under Tribal law and remedies to consumer were inadequate.
3.	<i>Siggelkow v. Nw. Grp.</i> (D. Or. Jan. 2019). <sup>210</sup>	<b>Saving Clause: Unconscionability:</b> Employment agreement was minimally procedurally unconscionable, and court declined to sever unconscionable cost-splitting, statute of limitations, and carve-out claim provisions.
4.	<i>Alonso v. AuPairCare, Inc.</i> (N.D. Cal. Aug. 2018). <sup>211</sup>	<b>Saving Clause: Unconscionability:</b> Employment agreement was procedurally unconscionable, and court declined to sever unconscionable choice of arbitrator and cost-splitting provisions.
5.	<i>Wood v. Team Enters.</i> (N.D. Cal. Apr. 2019). <sup>212</sup>	<b>Saving Clause: Unconscionability:</b> Employment agreement was minimally procedurally unconscionable, and court declined to sever unconscionable attorney's fees, statute of limitations, and choice of law provisions.

<sup>208</sup> *Titus v. ZestFinance, Inc.*, No. 18-5373-RJB, 2018 U.S. Dist. LEXIS 179380 (W.D. Wash. Oct. 18, 2018).

<sup>209</sup> *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955 (N.D. Cal. 2019).

<sup>210</sup> *Siggelkow v. Nw. Grp., Inc.*, No. 3:18-cv-01494-HZ, 2019 U.S. Dist. LEXIS 10818 (D. Or. Jan. 22, 2019).

<sup>211</sup> *Alonso v. AuPairCare, Inc.*, No. 3:18-cv-00970-JD, 2018 U.S. Dist. LEXIS 143872 (N.D. Cal. Aug. 23, 2018).

<sup>212</sup> *Wood v. Team Enters.*, No. C-18-06867-WHA, 2019 U.S. Dist. LEXIS 60160, at \*1 (N.D. Cal. Apr. 7, 2019), *rev'd on other grounds*, *Cipolla v. Team Enters., LLC*, 810 F. App'x 562 (9th Cir. 2020).

6.	<i>Ziglar v. Express Messenger Sys. Inc.</i> (D. Ariz. Mar. 2019). <sup>213</sup>	<b>Saving Clause: Unconscionability:</b> After reversal following <i>Epic</i> , court declined to sever unconscionable choice of arbitrator, attorney's fees, and remedies provisions from employment agreement.
7.	<i>Castillo v. CleanNet USA, Inc.</i> (N.D. Cal. Dec. 2018). <sup>214</sup>	<b>Saving Clause: Fraudulent Inducement:</b> Franchise agreement was fraudulently induced because franchisor did not allow the plaintiff to review the agreement or obtain Spanish translation. Franchisee was forced to rely on franchisor's translation, which omitted the arbitration agreement. The court did not need to address unconscionability but noted it would have declined to sever unconscionable statute of limitations, attorney's fees, cost-splitting, and remedies provisions.
8.	<i>Vasquez v. Libre by Nexus, Inc.</i> (N.D. Cal. Aug. 2018). <sup>215</sup>	<b>Saving Clause: Fraudulent Inducement:</b> Consumer agreement facilitating third-party bonds for immigration detainees was fraudulently induced because company did not fully translate arbitration clause in Spanish copies of the agreement it provided to detainees.
<b><i>The remaining 94 cases were compelled to arbitration.</i></b>		

### 1. Cases Directly Impacted by *Epic*

In the post-*Epic* sample, twenty-seven courts dismissed class action claims that were previously authorized under *Morris*. Litigants in fifteen cases challenged class action waivers in their arbitration agreements as unconscionable. All fifteen challenges failed after *Epic*. In only one of the twenty-seven cases reversed by *Epic* did the court grant a Saving Clause challenge to the disputed arbitration agreement. In that case, *Ziglar v. Express Messenger Sys. Inc.*, the court still found the employees' arbitration agreement unconscionable, and declined to sever unconscionable terms on attorney's fees, cost-splitting, and remedies.<sup>216</sup>

<sup>213</sup> *Ziglar v. Express Messenger Sys. Inc.*, No. CV-16-02726-PHX-SRB, 2019 U.S. Dist. LEXIS 34951 (D. Ariz. Mar. 4, 2019).

<sup>214</sup> *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912 (N.D. Cal. 2018).

<sup>215</sup> *Vasquez v. Libre by Nexus, Inc.*, No. 17-cv-00755-CW, 2018 U.S. Dist. LEXIS 214143 (N.D. Cal. Aug. 20, 2018).

<sup>216</sup> *Ziglar v. Express Messenger Sys. Inc.*, No. CV-16-02726-PHX-SRB, 2019 U.S. Dist. LEXIS 34951, at \*6 (D. Ariz. Mar. 4, 2019).

## 2. Saving Clause

The only Saving Clause challenges to succeed post-*Epic* were unconscionability (six) and fraudulent inducement (two). While illegality was challenged more frequently post-*Epic* (twenty-three challenges compared to seven pre-*Epic*) it never successfully precluded arbitration.

### a. Illegality

Litigants framed arguments about vindicating their statutory rights as illegality challenges under the Saving Clause Post-*Epic*.<sup>217</sup> Still, all twenty-three challenges failed to prevent arbitration.<sup>218</sup> Ten of those cases argued class waivers were illegal, either under the NLRA or as per se unenforceable.<sup>219</sup> Eight cases sought to avoid arbitration of all claims, including for public injunctive relief, by asserting that the injunctive relief waivers voided their agreements.<sup>220</sup> In April 2017, the California Supreme Court, in *McGill v. Citibank*, invalidated a public injunctive relief waiver in an arbitration agreement, remanding for determination of the validity of the remainder of the agreement.<sup>221</sup> Eight cases challenging public injunctive relief waivers in the post-*Epic* sample, however, did not prevent arbitration because the court either found the agreement did allow public injunctive relief claims, the plaintiff lacked standing to bring one, or the waiver could be severed.<sup>222</sup>

In *Vasquez v. Libre by Nexus*, on the other hand, had the court not already voided the parties' agreement for fraudulent inducement, the court would have allowed the plaintiffs—a proposed class of immigrant detainees who filed suit against Libre by Nexus (LBN) for fraudulent and deceptive business practices—to bring claims for public injunctive relief despite their arbitration agreements.<sup>223</sup> The court reasoned that the plaintiffs asserted a

<sup>217</sup> See, e.g., *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 900, 900–902 (N.D. Cal. 2018).

<sup>218</sup> See, e.g., *Hinojosa v. UPS Expedited Mail Servs.*, No. SACV-18-02298 JVS-DFMx, 2019 U.S. Dist. LEXIS 31354, at \*9–15 (C.D. Cal. Feb. 26, 2019).

<sup>219</sup> See, e.g., *Rowland v. CarMax Auto Superstores Cal., LLC*, No. 16-cv-02135-VC, 2019 U.S. Dist. LEXIS 62891, at \*1–2 (E.D. Cal. Apr. 9, 2019).

<sup>220</sup> See, e.g., *Croucier v. Credit One Bank, N.A.*, No. 18-cv-20-MMA-JMA, 2018 U.S. Dist. LEXIS 97756, at \*8 (S.D. Cal. June 11, 2018).

<sup>221</sup> *McGill v. Citibank, N.A.*, 393 P.3d 85, 97–98 (Cal. 2017) (voiding arbitration agreement's waiver to seek public injunctive relief for illegality because the remedy is intended to benefit the public, not the individual plaintiffs).

<sup>222</sup> See, e.g., *Revitch v. Uber Techs.*, No. 18-CV-2974-PSG-GJS, 2018 U.S. Dist. LEXIS 227333, at \*14–15 (C.D. Cal. Sept. 5, 2018).

<sup>223</sup> *Vasquez v. Libre by Nexus, Inc.*, No. 17-cv-00755-CW, 2018 U.S. Dist. LEXIS 214143, at \*13–16 (N.D. Cal. Aug. 20, 2018).

valid claim for public injunctive relief because they had already been injured by LBN's deceptive practices, so their proposed injunction would not benefit them directly.<sup>224</sup> Rather, an injunction was "intended to benefit members of the public who are exposed to LBN's false and deceptive business practices."<sup>225</sup> Because the court first voided the parties' arbitration agreement under the Saving Clause for being fraudulently induced, however, the case was coded as such in these results.

#### b. Fraudulent Inducement

Two out of five litigants successfully prevented arbitration by proving that their arbitration agreements were fraudulently induced.<sup>226</sup> Both fraudulent inducement cases presented similar facts.<sup>227</sup> *Vasquez* involved the class of immigrant detainees described above who also asserted claims for public injunctive relief,<sup>228</sup> and *Castillo v. CleanNet USA, Inc.* involved a janitorial franchise agreement.<sup>229</sup> The plaintiffs in both cases were Spanish speakers who relied on defendants' agents' oral translations of English contracts.<sup>230</sup> Both cases alleged the arbitration provisions were not disclosed in these oral translations.<sup>231</sup> In *Vasquez*, the plaintiffs further alleged that they were provided with a one-page Spanish-language summary of the agreements that did not disclose the arbitration clauses.<sup>232</sup> Defendant LBN in *Vasquez* also admitted it never instructed employees on how to even translate "arbitration" into Spanish or how it could be described.<sup>233</sup> In *Castillo*, the plaintiff franchisee alleged he was not provided with the agreement until his last meeting with defendant in which he was expected to make a down payment, and thereby not afforded time to seek help in translating the agreement.<sup>234</sup> In both *Castillo* and *Vasquez*, the district court found sufficient evidence that the plaintiffs' arbitration agreements were fraudulently induced, voiding the agreements.<sup>235</sup>

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<sup>224</sup> *Id.* at \*16.

<sup>225</sup> *Id.*

<sup>226</sup> See generally *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912 (N.D. Cal. 2018); *Vasquez v. Libre by Nexus, Inc.*, No. 17-cv-00755-CW, 2018 U.S. Dist. LEXIS 214143 (N.D. Cal. Aug. 20, 2018).

<sup>227</sup> Compare *Castillo*, 358 F. Supp. 3d at 918–27, with *Vasquez*, 2018 U.S. Dist. LEXIS at \*2–8.

<sup>228</sup> See *Vasquez*, 2018 U.S. Dist. LEXIS at \*8.

<sup>229</sup> See *Castillo*, 358 F. Supp. 3d at 918–19.

<sup>230</sup> See *id.* at 921–927.

<sup>231</sup> See *id.* at 925–926; *Vasquez*, 2018 U.S. Dist. LEXIS at \*9–11.

<sup>232</sup> *Vasquez*, 2018 U.S. Dist. LEXIS at \*12–13.

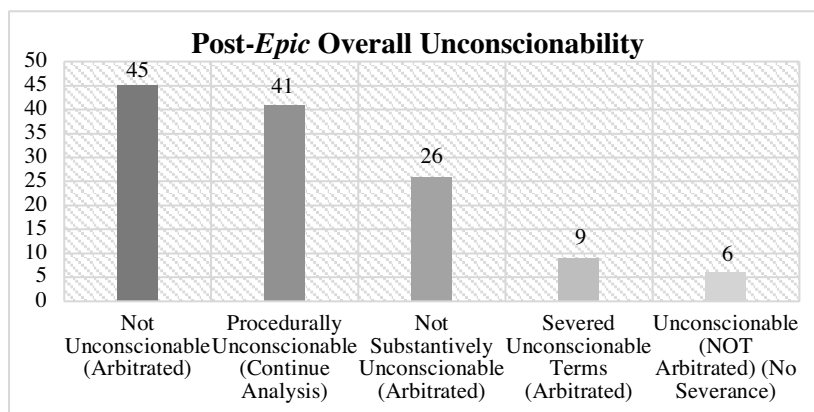
<sup>233</sup> See *id.* at \*12–13,

<sup>234</sup> See *Castillo*, 358 F. Supp. 3d at 924–25.

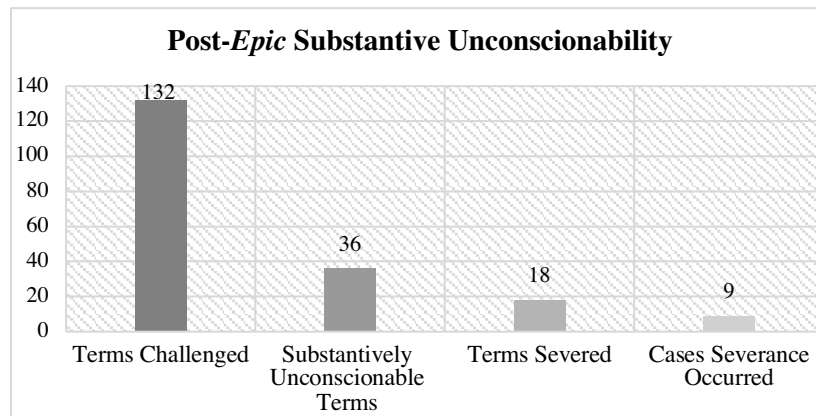
<sup>235</sup> See *id.* at 924–25; *Vasquez*, 2018 U.S. Dist. LEXIS at \*12–13.

c. Unconscionability

Eighty-six litigants challenged their arbitration agreements on unconscionability grounds post-*Epic*; six succeeded. Procedural unconscionability was found in forty-one of the eighty-six challenges. In thirty-two of those procedurally unconscionable cases, however, the district court qualified the procedural unconscionability as “minimal.”<sup>236</sup> Unconscionable terms were present in fifteen cases. One-hundred-thirty-two terms were challenged as substantively unconscionable, and thirty-six terms were found unconscionable. Eighteen of the thirty-six unconscionable terms were severed to allow arbitration. Severance occurred in nine cases. Seventeen percent of unconscionability litigants proved both procedural and substantive unconscionability, but severance permitted enforcement in 10 percent of those cases.



<sup>236</sup> See, e.g., *Ortega v. Spearmint Rhino Cos. Worldwide, Inc.*, No. EDCV-17-206-JGB-KKx, 2019 U.S. Dist. LEXIS 138258, at \*9–10 (C.D. Cal. May 15, 2019).



### 3. Was There a Change in Unconscionability Post-*Epic*?

I expected more district courts to reject Saving Clause challenges post-*Epic*. As the most common challenge, unconscionability bore enough data to perform chi-square tests of independence on changes in: (1) unconscionability generally, (2) procedural unconscionability (3) substantive unconscionability, (4) severed unconscionable terms, and (5) cases in which severance occurred. The total unconscionability sample was 152 cases. Tests were performed first for statistical significance at  $p < .05$ . If results were statistically significant at  $p < .05$ , additional tests for significance at  $p < .01$  were performed.

Before *Epic*, two of sixty-six unconscionability defenses succeeded; post-*Epic*, six of eighty-six unconscionability defenses succeeded. A chi-square test of independence showed that there was no significant difference in district courts' overall findings of unconscionability post-*Epic* ( $\chi^2 (1, N = 152) = 1.16, p = .28$ ).

Before *Epic*, twenty-seven of sixty-six cases were procedurally unconscionable, and forty-one of eighty-six post-*Epic*. There was no statistically significant difference in procedural unconscionability ( $\chi^2 (1, N = 152) = .69, p = .41$ ).

Before *Epic*, 30 of 135 terms challenged were substantively unconscionable, and 36 of 132 post-*Epic*. There was no statistically significant difference in the overall number of terms found unconscionable ( $\chi^2 (1, N = 267) = .91, p = .34$ ).

Of the thirty terms found substantively unconscionable pre-*Epic*, twenty-six were severed to allow arbitration. Eighteen of thirty-six were severed post-*Epic*. The number of unconscionable terms severed out of total number of terms found unconscionable was statistically significant at  $p < .01$  post-*Epic* ( $\chi^2 (1, N = 66) = 9.9, p = .0017$ ). The decrease in number



of cases in which severance occurred pre-*Epic* (sixteen) compared to post-*Epic* (nine), however, was not statistically significant ( $\chi^2(1, N = 33) = 3.72, p = .054$ ).

Fewer substantively unconscionable terms were severed post-*Epic*, but this did not result in a statistically significant difference in the overall number of cases in which severance occurred compared to denial of arbitration. This paradox may explain why there remained few cases where arbitration was prevented in the twenty-seven cases *Epic* directly impacted. Only one was not compelled to arbitration due to unconscionability: the remaining had class claims dismissed.

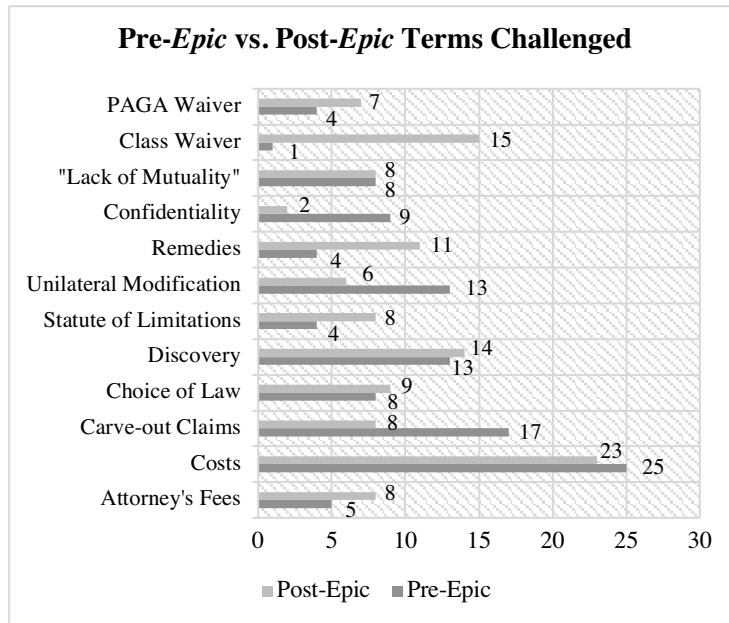
It is possible that this paradox shows that courts placed a higher significance on the presence of multiple unconscionable terms in arbitration agreements post-*Epic*. Whereas pre-*Epic* cases militated toward *Burgoon*, in which three unconscionable terms were severed,<sup>237</sup> post-*Epic* cases militated toward *Ingalls*—the pre-*Epic* outlier in which the court declined to sever three unconscionable terms.<sup>238</sup> More specifically, *Ingalls* appears to be in line with how courts treated the severability of substantively unconscionable terms post-*Epic*. That being said, across the eighty-six unconscionability cases post-*Epic*, the *types* of terms challenged and those found substantively unconscionable were similar, with cost-splitting as the most frequent term to be challenged, but again with little success.<sup>239</sup>

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<sup>237</sup> *Burgoon v. Narconon of N. Cal.*, 2016 U.S. Dist. LEXIS 5489, at \*23–24 (N.D. Cal. Jan. 15, 2016).

<sup>238</sup> *Ingalls v. Spotify USA, Inc.*, No. C-16-03533-WHA, 2016 U.S. Dist. LEXIS 157384, at \*21 (N.D. Cal. Nov. 14, 2016).

<sup>239</sup> *See, e.g., United States v. Singulex, Inc.*, No. 4:16-cv-05241-KAW, 2019 U.S. Dist. LEXIS 75232, at \*10 (N.D. Cal. May 3, 2019) (severing unconscionable cost-splitting provision to compel arbitration).



#### 4. Post-*Epic* Case Study

*Wood v. Team Enterprise* may illustrate this renewed emphasis on the presence of multiple unconscionable terms in determining severability post-*Epic*. A proposed class of employees filed suit against defendant, their former employer, for various California labor code violations.<sup>240</sup> Prior to *Epic*, under *Morris* the employees' suit would have been allowed to proceed because of the employees' rights under the NLRA. Post-*Epic*, however, the employees had to demonstrate their arbitration agreements were unconscionable to prevent enforcement. The district court indeed refused to compel arbitration, finding their agreements unconscionable.<sup>241</sup>

Examining the agreement for substantive unconscionability, the court focused on the agreement's attorney's fees, statute of limitations, and choice of law provisions. For attorney's fees, the agreement provided that the prevailing party in arbitration could collect attorney's fees from the losing party.<sup>242</sup> But for the plaintiff's wage and hour violations, however, losing employees cannot be forced to pay their employer's attorney's fees, even if

<sup>240</sup> *Wood v. Team Enters.*, No. C-18-06867-WHA, 2019 U.S. Dist. LEXIS 60160, at \*1 (N.D. Cal. Apr. 7, 2019), *rev'd on other grounds*, *Cipolla v. Team Enters., LLC*, 810 F. App'x 562 (9th Cir. 2020).

<sup>241</sup> *Id.* at \*4-7.

<sup>242</sup> *Id.* at \*4-5.

the employer is successful.<sup>243</sup> The arbitration clause impermissibly curtailed the statute of limitations of arbitral claims to one year when the statute under which the employees' claims were brought set the statute of limitations at four years.<sup>244</sup> Finally, the court concluded the agreement's Florida choice-of-law provision deprived the employees of their statutory rights under California labor laws.<sup>245</sup> Significantly, the fact that neither party identified any substantive difference between applicable Florida and California law was irrelevant.<sup>246</sup>

In considering whether to sever the three unconscionable terms from the arbitration agreement, the court reasoned that, it was "permeated by unconscionability if it contains more than one unlawful provision."<sup>247</sup> Even though the unconscionable provisions were collateral to the arbitration agreement and could in theory be severed, like the *Ingalls* court pre-*Epic*,<sup>248</sup> the court declined to sever and refused arbitration.<sup>249</sup>

### 5. Severance Pre- and Post-*Epic*

Twenty-five district courts in the pre- and post-*Epic* samples severed unconscionable terms compared to the eight that rejected arbitration.<sup>250</sup> This result is surprising given that the Ninth Circuit had affirmed district court orders that declined to sever unconscionable terms. In 2014, for example, the Circuit Court had upheld the denial of a motion to compel arbitration because the choice of arbitrator, statute of limitations, and cost-and-fee-shifting clauses were unconscionable.<sup>251</sup> Analyzing the district court's decision for abuse of discretion, the Court reasoned:

Although the Federal Arbitration Act expresses a strong preference for the enforcement of arbitration agreements, the Act does not license a party with superior bargaining power "to stack the deck unconscionably in [its] favor" when drafting the terms

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<sup>243</sup> *Id.* at \*4–5.

<sup>244</sup> *Id.* at \*5–6.

<sup>245</sup> *Id.* at \*6.

<sup>246</sup> Wood, 2019 U.S. Dist. LEXIS at \*6.

<sup>247</sup> *Id.* at \*7.

<sup>248</sup> *Ingalls v. Spotify USA, Inc.*, No. C-16-03533-WHA, 2016 U.S. Dist. LEXIS 157384, at \*21 (N.D. Cal. Nov. 14, 2016).

<sup>249</sup> Wood, 2019 U.S. Dist. LEXIS at \*7.

<sup>250</sup> See e.g., *Burgoon v. Narconon of N. Cal.*, 2016 U.S. Dist. LEXIS 5489, at \*23–24 (N.D. Cal. Jan. 15, 2016) (severing three terms pre-*Epic*); *Prasad v. Pinnacle Prop. Mgmt Servs.*, No. 5:17-cv-02794-VKD, 2018 US Dist LEXIS 164623, at \*33–34 (N.D. Cal. Sept. 25, 2018) (severing three terms from employment agreement and dismissing class claims post-*Epic*).

<sup>251</sup> *Zaborowski v. MHN Gov't Servs.*, 601 F. App'x 461, 464 (9th Cir. 2014).

of an arbitration agreement. *Ingle* [*v. Circuit City Stores, Inc.*], 328 F.3d [1165,] 1180 [(9th Cir. 2003)]. Under generally applicable severance principles, California courts refuse to sever when multiple provisions of the contract permeate the entire agreement with unconscionability. See *Samaniego* [*v. Empire Today, LLC*], 205 Cal. App. 4th [1138,] 1149 [(2012)]. The district court found that to be the case here.<sup>252</sup>

This decision to affirm was not unanimous. Circuit Judge Gould dissented in relevant part, reasoning that “*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions [here, three] that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced.”<sup>253</sup> In his view, the decision relying on *Armendariz* was “based on an erroneous interpretation and an inaccurate view of *Concepcion* and the FAA.”<sup>254</sup>

The Ninth Circuit previously had expressed the majority view in 2012, however, when it found a “district court did not implausibly or illogically decline to sever the [four] unconscionable parts of this arbitration agreement, despite Congress’s preference for arbitration.”<sup>255</sup> Even there, the Circuit Court acknowledged that “[i]n California, severance is preferred over “voiding the entire agreement” . . . [and] [t]he United States Supreme Court has an even stronger preference for severance in the context of arbitration agreements.”<sup>256</sup> The Circuit nevertheless emphasized in 2013 that “federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power.”<sup>257</sup>

Such pre-*Epic* district courts as *Burgoon*<sup>258</sup> and post-*Epic* courts as *Prasad v. Pinnacle Property Management*<sup>259</sup> appeared to be more persuaded by Judge Gould’s reasoning. Unfortunately for the consumer plaintiffs in *Burgoon* and employee plaintiffs in *Prasad*, this meant their claims were

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<sup>252</sup> *Id.* (citations in original) (majority opinion).

<sup>253</sup> Zaborowski, 601 F. App’x at 466 (Gould, J., concurring in part and dissenting in part).

<sup>254</sup> *Id.* (Gould, J., concurring in part and dissenting in part).

<sup>255</sup> *Newton v. Am. Debt Servs.*, 549 F. App’x 692, 695 (9th Cir. 2013).

<sup>256</sup> *Id.*

<sup>257</sup> *Chavarria v. Ralphps Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013).

<sup>258</sup> *Burgoon v. Narconon of N. Cal.*, No. 15-cv-01381-EMC, 2016 U.S. Dist. LEXIS 5489, at \*23–24 (N.D. Cal. January 15, 2016) (severing unconscionable unilateral modification, statute of limitations, and cost-splitting clauses from arbitration agreement pre-*Epic*).

<sup>259</sup> *Prasad v. Pinnacle Prop. Mgmt Servs.*, No. 5:17-cv-02794-VKD, 2018 US Dist LEXIS 164623, at \*33–34 (N.D. Cal. Sept. 25, 2018) (severing unconscionable unilateral modification, statute of limitations, and cost-splitting clauses post-*Epic*).

compelled to arbitration. And in *Prasad*, had the Supreme Court reached the opposite conclusion in *Epic*, the Ninth Circuit's decision in *Morris* would have prevented arbitration.<sup>260</sup>

## VI. CONCLUSION

This Note examined two questions: First, were Ninth Circuit district courts enforcing arbitration when faced with Saving Clause challenges? Second, did enforcement change after *Epic*? The Supreme Court in *Epic* indicated that some circuits had *not* been enforcing arbitration agreements. Because the Ninth Circuit was the only circuit to apply the Saving Clause to find employees' class action waivers in arbitration clauses illegal, I expected district courts had *not* rigorously enforced arbitration agreements pre-*Epic* but increased their enforcement post-*Epic*.

Based on eighty-one Saving Clause challenges in Ninth Circuit district courts the year preceding *Epic*, district courts were *overwhelmingly* enforcing arbitration clauses despite challenges to the agreements' validity: seventy of the eighty-one cases were compelled to arbitration. Eight of the eleven cases that refused to compel arbitration chose not to compel based on the now-defunct reasoning at issue in *Epic*; one applied the ineffective statutory vindication doctrine; two were found unconscionable. Within the twenty-seven cases found procedurally unconscionable, severance occurred in sixteen. Twenty-six of thirty unconscionable terms were severed in order to compel arbitration. In total, sixty-four unconscionability challenges failed to prevent arbitration. Contrary to the dictum in *Epic*, district courts were complying with the Supreme Court's mandate to rigorously enforce arbitration agreements under the FAA.

Comparing this to 102 Saving Clause challenges in Ninth Circuit district courts in the year following *Epic*, I found courts continued to enforce arbitration agreements. District courts compelled arbitration in ninety-four cases. Eight cases, six based on unconscionability and two based on fraudulent inducement, were not compelled to arbitration. Unconscionability remained the most common Saving Clause challenge, argued in eighty-six cases. While there was a slight increase in the number of cases presenting procedural unconscionability (twenty-seven before, forty-one after) and the number of substantively unconscionable terms (thirty before, thirty-six after), these increases were not statistically significant. While the change in number of cases in which severance

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<sup>260</sup> *Id.* at \*5 (“Ms. Prasad acknowledges that *Epic* is dispositive with respect to her argument that the IRA’s class action waiver renders that agreement unenforceable. She therefore cannot maintain the class, collective and representative claims asserted in her original complaint.”).

occurred (sixteen before, nine after) was not statistically significant, the number of severed unconscionable terms compared to the number of total unconscionable terms (twenty-six out of thirty before, eighteen out of thirty after) *was* statistically significant. This small effect allowed one case that had *not* been compelled under *Morris* to be found unconscionable and remain in the district after *Epic*. But since the number of severance cases did not significantly decrease, twenty-six other cases *Epic* affected were compelled to arbitration with their class claims dismissed.

While the effects of *Epic* are difficult to isolate given the sample's size and time period, the sample conclusively shows Saving Clause challenges unaffected by *Epic* will likely remain as unsuccessful in Ninth Circuit district courts as they appeared to be prior to *Epic*.

## VII. APPENDIX

A. TABLE 1: CONTRACT DEFENSES, DEFINITIONS, AND STANDARDS

Term/Concept	Definition	Standard to Apply	Example
<b>Illegality</b>	Contract is void if it contravenes law established for a public reason. <sup>261</sup>	Parties are free to waive laws intended solely for their own benefit but may not waive legal protections if the purpose of the legislation in enacting those protections is to benefit society at large. <sup>262</sup> Under the FAA, illegality cannot be used to interfere with the fundamental attributes of arbitration.	Waivers of public injunctive relief under consumer rights laws are unenforceable because the statutory remedy is intended to benefit the public; parties seeking public injunctive relief have already suffered an injury from the practices they are seeking to enjoin for the benefit of future consumers. <sup>263</sup>
<b>Fraudulent Inducement</b>	Contract is void if the offeror fraudulently, materially misrepresents terms such that a reasonable person would have manifested his assent. <sup>264</sup>	Proponents must show: (1) misrepresentation (including by omission) and (2) reasonable reliance on that omission. <sup>265</sup>	For an example of how fraudulent inducement may be used to prevent contract enforcement, see <i>Vasquez v. Libre by Nexus, Inc.</i> , <sup>266</sup> discussed <i>supra</i> pages 179-80.
<b>Undue Influence</b>	Contract is void if one takes “an unfair advantage of	Proponents must show: (1) A person with whom he has entrusted in	Factors considered: (1) discussion or consummation of transaction at an unusual or inappropriate

<sup>261</sup> CAL. CIV. CODE § 3513 (2020).

<sup>262</sup> *Id.*

<sup>263</sup> *McGill v. Citibank, N.A.*, 393 P.3d 85, 90–91 (Cal. 2017); see also *McGill* discussion *supra* pages 157–158.

<sup>264</sup> Restatement (Second) of Contracts § 162 (Am. L. Inst. 1981).

<sup>265</sup> *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 930 (N.D. Cal. 2018).

<sup>266</sup> *Vasquez v. Libre by Nexus, Inc.*, No. 17-cv-00755-CW, 2018 U.S. Dist. LEXIS 214143 (N.D. Cal. Aug. 20, 2018).

	another's weakness of mind" or "a grossly oppressive and unfair advantage of another's necessities or distress."	confidence or holds a real or apparent authority over him and (2) uses such confidence or authority for the purpose of obtaining an unfair advantage against him; or (3) Took unfair advantage of his weakness of mind; or (4) Took grossly oppressive and unfair advantage of another's necessities or distress. <sup>267</sup>	time or place; (2) insistent demand that the business be finished at once; (3) extreme emphasis on negative consequences of delay; (4) the use of multiple persuaders by the dominant side against a single servient party; (5) absence of third-party advisers to the servient party; (6) statements that there is no time to consult financial advisers or attorneys. <sup>268</sup>
<b>Economic Duress</b>	Contract is void if induced by an improper threat that left victim with no reasonable alternative but to assent to the agreement. <sup>269</sup>	Proponents must show: (1) wrongful acts or threats; (2) financial distress caused by the wrongful acts or threats; and (3) the absence of any reasonable alternative to the terms presented by the wrongdoer. <sup>270</sup>	Presenting an agreement on a "take it-or-leave it" basis as a condition of employment does <i>not</i> constitute an improper threat for the purposes of economic duress. <sup>271</sup>
<b>Illusory</b>	Contract is void if not supported by consideration in which offeror reserves choice of alternative performance and for which	"Generally, under California law an agreement to arbitrate is illusory if . . . the employer can unilaterally modify it." But "the implied covenant of good faith and fair dealing may	When a unilateral modification clause "is silent as to whether contract changes apply to claims, accrued or known, [it is saved] by the covenant so that changes do not apply to such claims . . . [but] if a modification provision <i>expressly</i>

<sup>267</sup> CAL. CIV. CODE § 1575 (2020).

<sup>268</sup> See *Burgoon v. Narconon of N. Cal.*, Case No. 15-cv-01381-EMC, 2016 U.S. Dist. LEXIS 5489, at \*15-16 (N.D. Cal. Jan. 15, 2016).

<sup>269</sup> *Olson v. MBO Partners, Inc.*, No. 3:15-cv-2216-HZ, 2016 U.S. Dist. LEXIS 145970, at \*13 (D. Or. Oct. 20, 2016).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*



	none of the performance alternatives have been bargained. <sup>272</sup> In arbitration, this can potentially arise in unilateral modification clauses (defined further below).	save an arbitration agreement from being illusory.” <sup>273</sup>	addresses whether contract changes apply to claims that have accrued or are known to the employer, the agreement <i>is</i> illusory because the covenant of good faith and fair dealing cannot create implied terms that contradict the express language.” <sup>274</sup>
Unconscionability and Related Concepts <sup>275</sup>			
	Definition	Elements	Standard
<b>Unconscionability</b>	Contract is void when it is the result of “circumstances indicating an absence of meaningful choice, contracts do not specify terms that are ‘overly harsh,’ ‘unduly oppressive,’ or ‘so one-sided as to shock the conscience.’”	Consists of two elements: (1) <b>procedural</b> unconscionability (the bargaining process) and (2) <b>substantive</b> unconscionability (the bargain)	Both must be shown, but “more of one kind mitigates how much of the other kind is needed.” Assessed at the time of contract formation.
<b>Procedural Unconscionability</b>	Refers to the bargaining process and is measured by the presence of either (1) oppression or	<b>Oppression</b> is shown by: (1) unequal bargaining power or sophistication and/or	Party need not prove the presence of <i>both</i> oppression and unfair surprise; however, the absence of one means higher level of substantive unconscionability

<sup>272</sup> Restatement (Second) of Contracts § 77 (Am. L. Inst. 1981).

<sup>273</sup> *Reyes v. United Healthcare Servs.*, No. CV 14-1741-DOC-JEMx, 2014 U.S. Dist. LEXIS 111645, at \*4 (C.D. Cal. Aug. 11, 2014) (citation and internal quotation marks omitted).

<sup>274</sup> *Id.* at \*5 (citation and internal quotation marks omitted) (emphasis added).

<sup>275</sup> Unless otherwise indicated, the following information is based on *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1013–16 (Cal. 2018).

	(2) unfair surprise	(2) “absence of meaningful choice” <sup>276</sup> <b>Unfair surprise:</b> (1) the terms are hidden (“in a prolix printed form”) and/or (2) pressure to hurry and sign.	required to void contract. Procedural unconscionability matter of degree: “At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability . . . Contracts of adhesion <sup>277</sup> that involve surprise or other sharp practices lie on the other end of the spectrum.” <sup>278</sup>
<b>Substantive Unconscionability</b>	Refers to the fairness of the contract’s terms.	Shown through terms that are: (1) ‘overly harsh’ (2) ‘unduly oppressive,’ or (3) ‘so one-sided as to shock the conscience’ (4) without a commercial or market justification.	Some level of substantive unconscionability is required to void contract.
<b>Severability</b>	After a finding of unconscionability, <sup>279</sup> court may (1) refuse to enforce the contract, or (2) enforce the remainder of the contract	Severance is <i>not</i> permissible if: “the central purpose of the contract is tainted with illegality.” Severance is permissible, and preferred, if: “the illegality is <i>collateral</i> to the main purpose of the contract, and	“Tainted with illegality” is indicated by: (1) “multiple defects indicate a systematic effort to impose unfair terms; (2) Lack of mutuality; (3) If removing unconscionable elements requires court to “augment,” “reform,” or create additional terms to enforce

<sup>276</sup> The ability to opt-out of an arbitration clause defeats procedural unconscionability. *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1111 (9th Cir. 2016).

<sup>277</sup> While there is debate over what constitutes an adhesive contract, this Note uses the California Supreme Court’s definition, which is a “standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

<sup>278</sup> *Baltazar v. Forever21, Inc.*, 367 P.3d 6, 11–12 (Cal. 2016) (footnote added).

<sup>279</sup> Severability can also be applied to terms that are found to be illegal. *See Armendariz*, 6 P.3d at 696. Severability decisions are reviewed for abuse of discretion. *Id.*

	<i>without</i> the unconscionable clause, or (3) limit application of any unconscionable clause as to avoid any unconscionable result. <sup>280</sup>	the illegal provision can be extirpated from the contract by means of severance or restriction <sup>281</sup>	remainder of agreement. <sup>282</sup> The presence of a severability clause <sup>283</sup> within an agreement weighs in favor of severance.
<b>Summary:</b>	To avoid arbitration, unconscionability proponents, therefore, must demonstrate (1) <b>procedural unconscionability</b> : unequal bargaining power and/or unfair surprise, (2) <b>substantive unconscionability</b> : shockingly one-sided terms, and (3) <b>severance impermissible</b> : one-sided terms cannot not be severed from the agreement or agreement tainted with illegality, rendering it void.		
<b>Common Contract Terms in Arbitration Agreements</b>			
	Definition	Unconscionability Standard	Common Application
<b>Attorney's Fees</b>	Defines if the prevailing party can collect attorney's fees from losing party, or if no party is entitled to attorney's fees.	Attorney's fees provisions are unconscionable when they could allow a prevailing party to collect attorney's fees contravening the statute under which disputed claims arise. <sup>284</sup>	Some statutes, such as the FLSA, only provide prevailing plaintiffs with the option of collecting attorney's fees. If an arbitration agreement, particularly in employment, allows <i>any</i> prevailing party to collect attorney's fees, not just plaintiff employee, it is unconscionable. <sup>285</sup>
<b>Cost-Splitting</b>	Defines how the parties will share the costs of arbitration and	Cost-splitting provisions cannot impose costs of arbitration on weaker party that are in excess of	Particularly in employment cases in which employees have to arbitrate civil rights claims, cost-splitting provisions are

<sup>280</sup> CAL. CIV. CODE § 1670.5 (2020); *Samaniego v. Empire Today, LLC*, 205 Cal. App. 4th 1138, 1148 (2012) (“When an arbitration agreement is “permeated” by unconscionability the decision whether to sever the objectionable clauses or refuse to compel arbitration is within the trial court's exercise of discretion.”).

<sup>281</sup> *Armendariz*, 6 P.3d at 696.

<sup>282</sup> *Id.*

<sup>283</sup> Clause indicating if a term is found to be unenforceable, the remaining clauses should be enforceable.

<sup>284</sup> *Smith v. VMware, Inc.*, No. 15-cv-03750-TEH, 2016 U.S. Dist. LEXIS 1245, at \*10–12 (N.D. Cal. Jan. 5, 2016).

<sup>285</sup> *See id.*

	associated filing fees.	costs associated with judicial forum. <sup>286</sup>	unconscionable when they saddle employees with costs that greatly exceed judicial litigation costs. <sup>287</sup>
<b>Claims Covered (Carve-Out Claims)</b>	Defines what types of claims must be submitted to arbitration.	Clauses defining what claims must be arbitrated are unconscionable when the weaker party must submit to arbitration, but the superior party does not. This is also true if the clause is facially neutral, but one-sided in practice. To be unconscionable, there must be no commercial justification for the one-sidedness. <sup>288</sup>	This can be seen in employment agreement when employers “carve out” claims, like injunctive relief, for only themselves or in consumer cases, when collection suits are exempted. <sup>289</sup>
<b>Forum Selection</b>	Defines geographic location where arbitration will be held.	Unconscionable when enforcement is unreasonable, which is when: (1) if its inclusion was the product of fraud or overreaching; (2) if the challenging party would effectively be deprived of his day in court were the clause enforced; and (3) if enforcement would contravene a strong public policy of the forum	Typically challenged when employer or company is headquartered in another state, selects that state as arbitral forum, but employee or consumer is located in and sues under the laws of another state. <sup>291</sup>

<sup>286</sup> *McLaurin v. Russell Sigler, Inc.*, 155 F. Supp. 3d 1042, 1047–48 (C.D. Cal. 2016).

<sup>287</sup> *Id.*

<sup>288</sup> *Varela v. Lamps Plus, Inc.*, No. CV 16-577-DMG-KSx, 2016 Lexis U.S. Dist. LEXIS 189521, at \*14–16 (July 7, 2016).

<sup>289</sup> *See id.*

<sup>291</sup> *See id.*

		in which suit is brought. <sup>290</sup>	
<b>Discovery</b>	Defines discovery procedures, limits on discovery, and authority of arbitrator to allow more discovery. Parties can also incorporate discovery rules into agreement by reference.	Streamlined discovery is a fundamental feature of arbitration. While parties are “not entitled to the full range of discovery . . . they are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review.” <sup>292</sup>	For claims, like those arising under FEHA, plaintiffs are entitled to sufficient discovery to prove their claims. The level of discovery that is sufficient, therefore, depends partly on how complex the disputed claims are. <sup>293</sup>
<b>Statute of Limitations</b>	Defines the period of time after which a claim has been accrued in which a party may file a claim in arbitration.	Statute of limitations for arbitrable claims may not unreasonably be shortened compared to claims’ statute of limitations provided by law. <sup>294</sup>	One-year statute of limitations for arbitrable claims was unreasonable for claims arising under California’s Unfair Competition Law, which is four years under the statute. <sup>295</sup>
<b>Unilateral Modification</b>	Clause enabling one party to unilaterally modify or amend arbitration agreement (or contract as a	Courts are split as to whether providing notice, preventing retroactive application of modifications and/or the implied covenant of good	For discussion of unilateral modification clauses, see <i>supra</i> page 165.

<sup>290</sup> Britvan v. Cantor Fitzgerald, L.P., No. 2:16-cv-04075-ODW-JPRx, 2016 U.S. Dist. LEXIS 93184, at \*7–8 (C.D. Cal. July 18, 2016).

<sup>292</sup> Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 684 (Cal. 2000).

<sup>293</sup> *See id.*

<sup>294</sup> Ingalls v. Spotify USA, Inc., No. C-16-03533-WHA, 2016 U.S. Dist. LEXIS 157384, at \*20–21 (N.D. Cal. Nov. 14, 2016).

<sup>295</sup> *Id.*

	whole, including arbitration clause).	faith and fair dealing save unilateral modification clauses from being unconscionable.	
<b>Remedies</b>	Defines remedies arbitrator may award to prevailing party.	Similar to attorney's fees standards, remedy provisions cannot unfairly limit statutory remedies available to plaintiff in judicial forum. <sup>296</sup>	If provision allows arbitrator to act in accordance with applicable law, it is generally <i>not</i> unconscionable. <sup>297</sup>
<b>Confidentiality</b>	Defines the level of confidentiality required for arbitration, discussion of claims, and disclosure of awards.	If the drafting party can "not identif[y] any commercial need for the proceedings to remain confidential, and it appears the confidentiality requirement places [them] in a superior legal posture[.]" the confidentiality clause is generally unconscionable. <sup>298</sup>	Confidentiality clauses are unfair when they contribute to the "repeat player" problem in arbitration, in which the "repeat player" has access to information the "new player" cannot obtain because "former players" are prohibited from discussing their arbitration proceedings. <sup>299</sup>
<b>Pre-Claim Procedures (Internal Reporting Requirements)</b>	Defines notice a party must provide the other either when filing a claim in arbitration or when they are <i>reasonably aware</i> of a potential claim.	If pre-claim notification procedures are mandatory for only one party, give one party a "preview" of the other's claim, or work to truncate the applicable statute of limitations, they	Similar to confidentiality clauses, the test is one-sidedness that gives one party an unfair advantage in arbitration without a commercial justification.

<sup>296</sup> *Moule v. UPS Co.*, No. 1:16-cv-00102-JLT, 2016 U.S. Dist. LEXIS 88270, at \*26 (E.D. Cal. July 7, 2016).

<sup>297</sup> *See id.*

<sup>298</sup> *Id.* at \*29.

<sup>299</sup> *See id.*

		are generally unconscionable. <sup>300</sup>	
<b>Choice of Arbitrator</b>	Designates who will act as the arbitrator for parties' future disputes.	If choice of arbitrator is undisclosed and left to the discretion of one party, it is generally unconscionable. <sup>301</sup> Mandatory employment arbitration agreements must provide for neutral arbitrators in California. <sup>302</sup>	Choice of arbitrator clauses are challenged usually on one of two grounds: either it is unfair surprise to not know under <i>whom</i> party will have to arbitrate or it is one-sided for drafting party to have an unfair advantage in choosing the arbitrator. <sup>303</sup>
<b>Choice of Law</b>	Designates which state's laws will apply to arbitrable disputes.	Choice of law provisions are examined for one-sidedness <i>without</i> business justification. If not justified by business reasons, courts will assess provisions by looking to the substantive differences between the opposing states' laws to determine if the provision deprives one party of significant statutory rights. <sup>304</sup>	The substantive unconscionability of choice of law provisions are frequently determined in light of parties' sophistication. <sup>305</sup>

<sup>300</sup> *Castaldi v. Signature Retail Servs.*, No. 15-cv-00737-JSC, 2016 U.S. Dist. LEXIS 1911, at \*33–36 (N.D. Cal. Jan. 7, 2016), *motion granted by, dismissed without prejudice* 2016 U.S. Dist. LEXIS 6734 (N.D. Cal. Jan. 20, 2016).

<sup>301</sup> *Doe v. George St. Photo & Video, LLC*, No. 16-cv-02698-MEJ, 2016 U.S. Dist. LEXIS 175329, at \*19–22 (N.D. Cal. Dec. 19, 2016).

<sup>302</sup> *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 681 (Cal. 2000).

<sup>303</sup> *See Doe*, 2016 U.S. Dist. LEXIS 175329, at \*7–13.

<sup>304</sup> *Smith v. VMware, Inc.*, No. 15-cv-03750-TEH, 2016 U.S. Dist. LEXIS 1245, at \*12–13 (N.D. Cal. Jan. 5, 2016).

<sup>305</sup> *Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-03408-JST, 2016 U.S. Dist. LEXIS 32634, at \*31–32 (N.D. Cal. Mar. 14, 2016) (holding Florida choice of law clause unconscionable for airport luggage handler in Oakland, California). *But see* *Britvan v. Cantor Fitzgerald, L.P.*, No. 2:16-cv-04075-ODW-JPRx, 2016 U.S. Dist. LEXIS 93184, at \*8–9 (C.D. Cal. July 18, 2016) (holding California corporate professional's New York choice of law clause *not* unconscionable).

B. TABLE 2: PRE-EPIC SAMPLE (JANUARY 1, 2016–JANUARY 1, 2017)

Case Citation	
1.	Harris v. Halliburton Co., No. 1:16-cv-00281-LJO-JLT, 2016 U.S. Dist. LEXIS 74916 (E.D. Cal. June 8, 2016), <i>motion granted by</i> 2016 U.S. Dist. LEXIS 105135 (E.D. Cal. Aug. 9, 2016).
2.	Whitworth v. SolarCity Corp., No. 16-cv-01540-JSC, 2016 U.S. Dist. LEXIS 158903 (N.D. Cal. Nov. 16, 2016).
3.	Lee v. Asurion Ins. Servs., No. CV-15-02606-PHX-ROS, 2016 U.S. Dist. LEXIS 192853 (D. Ariz. Sept. 13, 2016).
4.	DDC Logistics, Inc. v. Airways Freight Corp., No. 8:16-CV-00903-JLS-KES, 2016 U.S. Dist. LEXIS 194309 (C.D. Cal. Sept. 7, 2016).
5.	Quiroz v. Cavalry SPV I, LLC, 217 F. Supp. 3d 1130 (C.D. Cal. 2016).
6.	Roberts v. AT&T Mobility LLC, No. 15-cv-03418-EMC, 2016 U.S. Dist. LEXIS 25446 (N.D. Cal. Feb. 29, 2016).
7.	LaCross v. Knight Transp. Inc., No. CV-15-00990-PHX-JJT, 2016 U.S. Dist. LEXIS 129676 (D. Ariz. Sept 22, 2016).
8.	Sauer v. Lateef Inv. Mgmt. LP, No. 16-cv-02802-VC, 2016 U.S. Dist. LEXIS 98976 (N.D. Cal. July 28, 2016).
9.	Youssofi v. Wells Fargo Bank, No. 16-cv-1330-MMA-JMA, 2016 U.S. Dist. LEXIS 177668 (S.D. Cal. Dec. 21, 2016).
10.	Britvan v. Cantor Fitzgerald, L.P., No. 2:16-cv-04075-ODW-JPRx, 2016 U.S. Dist. LEXIS 93184 (C.D. Cal. July 18, 2016).
11.	Goggans v. Loanme, Inc., No. SACV-16-01223-AG-JCGx, 2016 U.S. Dist. LEXIS 195982 (C.D. Cal. Nov. 14, 2016).
12.	Castaldi v. Signature Retail Servs., No. 15-cv-00737-JSC, 2016 U.S. Dist. LEXIS 6734 (N.D. Cal. Jan. 20, 2016).
13.	Azoulai v. La Porta, No. CV-15-06083-MWF-PLA, 2016 U.S. Dist. LEXIS 190593 (C.D. Cal. Jan. 25, 2016).
14.	Varela v. Lamps Plus, Inc., No. ED-CV-16-577-DMG-KSx, 2016 U.S. Dist. LEXIS 188771 (C.D. Cal. Dec. 27, 2016), <i>rev'd on other grounds</i> , 139 S. Ct. 1407 (2019).
15.	Berdechowski v. Reach Grp., LLC, No. 1:16-CV-00177-LJO-JLT, 2016 U.S. Dist. LEXIS 74287 (E.D. Cal. June 7, 2016).
16.	Ribeiro v. Sedgwick LLP, No. C-16-04507-WHA, 2016 U.S. Dist. LEXIS 152896 (N.D. Cal. Nov. 2, 2016).



17.	Grigsby v. DC 4400, LLC, No. 5:16-cv-01809-CAS-SPx, 2016 U.S. Dist. LEXIS 168631 (C.D. Cal. Dec. 5, 2016).
18.	Olson v. MBO Partners, Inc., No. 3:15-cv-2216-HZ, 2016 U.S. Dist. LEXIS 145970 (D. Or. Oct. 20, 2016).
19.	Robinson v. Universal Prot. Serv., L.P., No. CV-16-01408-PHX-DGC, 2016 U.S. Dist. LEXIS 104888 (D. Ariz. Aug. 9, 2016).
20.	Sena v. Uber Techs. Inc., No. CV-15-02418-PHX-DLR, 2016 U.S. Dist. LEXIS 47141 (D. Ariz. Apr. 7, 2016).
21.	O'Bannon v. United Servs. Auto. Ass'n, No. CV-15-02231-PHX-SRB, 2016 U.S. Dist. LEXIS 186581 (D. Ariz. June 17, 2016).
22.	Fruth v. AGCS Marine Ins. Co., No. 15-cv-03311-JD, 2016 U.S. Dist. LEXIS 163047 (N.D. Cal. Mar. 31, 2016).
23.	Totten v. Kellogg Brown & Root, LLC, No. 5:15-cv-01876-ODW-KKx, 2016 U.S. Dist. LEXIS 18558 (C.D. Cal. Feb. 10, 2016).
24.	McLaurin v. Russell Sigler, Inc., 155 F. Supp. 3d 1042 (C.D. Cal. 2016).
25.	Smith v. VMware, Inc., No. 15-cv-03750-TEH, 2016 U.S. Dist. LEXIS 1245 (N.D. Cal. Jan. 5, 2016).
26.	Hidalgo v. Tesla Motors, Inc., No. 5:15-cv-05185-BLF, 2016 U.S. Dist. LEXIS 85208 (N.D. Cal. June 29, 2016).
27.	Langere v. Verizon Wireless Servs., LLC, No. CV-15-00191-DDP-AJWx, 2016 U.S. Dist. LEXIS 130678 (C.D. Cal. Sept. 23, 2016).
28.	Hale v. Heath, No. 15-cv-1676-LAB-JMA, 2016 U.S. Dist. LEXIS 92382 (S.D. Cal. July 14, 2016).
29.	Dalton v. J. Mann, Inc., No. 16-cv-03409-EMC, 2016 U.S. Dist. LEXIS 140772 (N.D. Cal. Oct. 11, 2016).
30.	Miceli v. Citigroup, Inc., No. 2:15-cv-1962-GMN-VCF, 2016 U.S. Dist. LEXIS 90843 (D. Nev. July 13, 2016).
31.	Archer v. TIC-The Indus. Co., No. CV 16-6649-GHK-SSx, 2016 U.S. Dist. LEXIS 167981 (C.D. Cal. Nov. 7, 2016).
32.	James v. Comcast Corp., No. 16-cv-02218-EMC, 2016 U.S. Dist. LEXIS 107905 (N.D. Cal. Aug. 15, 2016).
33.	Gessele v. Jack in the Box, Inc., No. 3:14-CV-1092-BR, 2016 U.S. Dist. LEXIS 172061 (D. Or. Dec. 13, 2016).
34.	Solo v. Am. Ass'n of Univ. Women, 187 F. Supp. 3d 1151 (S.D. Cal. 2016).
35.	Burgess v. Buddy's Nw. LLC, No. C15-5785-BHS, 2016 U.S. Dist. LEXIS 176869 (W.D. Wash. Dec. 21, 2016).

36.	Ashraf v. Nev. Title & Payday Loans, No. 2:15-cv-1353-GMN-VCF, 2016 U.S. Dist. LEXIS 25053 (D. Nev. Mar. 1, 2016).
37.	Echavarria v. Adir Int'l, LLC, No. 2:15-cv-09172-CAS-KSx, 2016 U.S. Dist. LEXIS 77395 (C.D. Cal. June 13, 2016).
38.	Scudieri v. Chapman Chevrolet Chandler, LLC, No. 2:16-cv-01988-JWS, 2016 U.S. Dist. LEXIS 148509 (D. Ariz. Oct. 25, 2016).
39.	Abaya v. Total Account Recovery, LLC, No. 2:15-cv-01269-MCE-CKD, 2016 U.S. Dist. LEXIS 80102 (E.D. Cal. June 17, 2016).
40.	Knatt v. J. C. Penney Corp., Inc., No. 15cv2516 JM-KSC, 2016 U.S. Dist. LEXIS 44159 (S.D. Cal. Mar. 30, 2016).
41.	Mercado v. Sally Beauty Supply LLC, No. 2:15-cv-02316-KJM-CKD, 2016 U.S. Dist. LEXIS 78888 (E.D. Cal. June 16, 2016).
42.	Trinchitella v. Am. Realty Partners, LLC, No. 2:15-cv-02365-KJM-EFB, 2016 U.S. Dist. LEXIS 98265 (E.D. Cal. July 27, 2016).
43.	Bui v. Northrop Grumman Sys. Corp., No. 15-cv-1397-WQH-WVG, 2016 U.S. Dist. LEXIS 171513 (S.D. Cal. Dec. 9, 2016).
44.	Attia v. Neiman Marcus Grp, Inc., No. SA-CV-16-0504-DOC-FFMx, 2016 U.S. Dist. LEXIS 173166 (C.D. Cal. Oct. 18, 2016).
45.	Cummings-Reed v. United Health Grp., No. 2:15-cv-02359-JAM-AC, 2016 U.S. Dist. LEXIS 58325 (E.D. Cal. Apr. 29, 2016).
46.	Shepardson v. Adecco USA, Inc., No. 15-cv-05102-EMC, 2016 U.S. Dist. LEXIS 46754 (N.D. Cal. Apr. 5, 2016).
47.	Robinson v. OnStar, LLC, No. 15cv1731-WQH-BGS, 2016 U.S. Dist. LEXIS 114937 (S.D. Cal. Aug. 25, 2016).
48.	Mike Rose's Auto Body, Inc. v. Applied Underwriters Captive Risk Assurance Co., No. 16-cv-01864-EMC, 2016 U.S. Dist. LEXIS 133747 (N.D. Cal. Sept. 28, 2016).
49.	Tuck v. DirecTV, No. 16-CV-160-JLS-KSC, 2016 U.S. Dist. LEXIS 158034 (S.D. Cal. Nov. 15, 2016).
50.	Mims v. Davison Design & Dev., Inc., No. EDCV-16-92-JGB-KKx, 2016 U.S. Dist. LEXIS 194325 (C.D. Cal. Apr. 14, 2016).
51.	Ingalls v. Spotify USA, Inc., No. C 16-03533-WHA, 2016 U.S. Dist. LEXIS 157384 (N.D. Cal. Nov. 14, 2016).
52.	Burgoon v. Narconon of N. Cal., No. 15-cv-01381-EMC, 2016 U.S. Dist. LEXIS 5489 (N.D. Cal. Jan. 15, 2016).
53.	Taft v. Henley Enters., No. SACV-15-1658-JLS-JCGx, 2016 U.S. Dist. LEXIS 193641 (C.D. Cal. Mar. 2, 2016).

54.	Elmore v. CVS Pharmacy, Inc., No. 2:16-cv-05603-ODW-ASx, 2016 U.S. Dist. LEXIS 156481 (C.D. Cal. Nov. 9, 2016).
55.	Vargas v. Delivery Outsourcing, LLC, No. 15-cv-03408-JST, 2016 U.S. Dist. LEXIS 32634 (N.D. Cal. Mar. 14, 2016).
56.	Azod v. Robinson, No. 2:16-cv-00440-JFW-Ex, 2016 U.S. Dist. LEXIS 184770 (C.D. Cal. May 10, 2016).
57.	Stover-Davis v. Aetna Life Ins. Co., No. 1:15-cv-1938-BAM, 2016 U.S. Dist. LEXIS 63693 (E.D. Cal. May 12, 2016).
58.	Mikhak v. Univ. of Phx., No. C16-00901-CRB, 2016 U.S. Dist. LEXIS 80705 (N.D. Cal. June 21, 2016).
59.	Larson v. D. Westwood, Inc., No. 2:15-cv-01372-RFB-GWF, 2016 U.S. Dist. LEXIS 133341 (D. Nev. Sept. 27, 2016).
60.	Jacovides v. Future Foam, Inc., No. 2:16-cv-01842-CAS-AJWx, 2016 U.S. Dist. LEXIS 57530 (C.D. Cal. Apr. 25, 2016).
61.	Cicogna v. 33Across Inc., No. 16-CV-2012 JLS-WVG, 2016 U.S. Dist. LEXIS 170942 (S.D. Cal. Dec. 8, 2016).
62.	McCarthy v. Stifel, Nicolaus & Co., No. 2:16-cv-0581-HRH, 2016 U.S. Dist. LEXIS 115647 (D. Ariz. Aug. 29, 2016).
63.	Moule v. UPS Co., No. 1:16-cv-00102-JLT, 2016 U.S. Dist. LEXIS 88270 (E.D. Cal. July 7, 2016).
64.	Doe v. George St. Photo & Video, LLC, No. 16-cv-02698-MEJ, 2016 U.S. Dist. LEXIS 175329 (N.D. Cal. Dec. 19, 2016).
65.	Manning v. Parsons Transp. Grp., Inc., No. 1:16-cv-00390-JLT, 2016 U.S. Dist. LEXIS 76733 (E.D. Cal. June 13, 2016).
66.	Montoya v. Comcast Corp., No. 2:15-cv-02573-TLN-DB, 2016 U.S. Dist. LEXIS 130806 (E.D. Cal. Sept. 22, 2016).
67.	Galilea, LLC v. AGCS Marine Ins. Co., No. CV-15-84-BLG-SPW, 2016 U.S. Dist. LEXIS 22634 (D. Mont. Feb. 24, 2016).
68.	Canlas v. Olomana Golf Links, Inc., No. 15-00243-HG-KSC, 2016 U.S. Dist. LEXIS 146754 (D. Haw. Oct. 24, 2016).
69.	Gerton v. Fortiss, LLC, No. 15-cv-04805-TEH, 2016 U.S. Dist. LEXIS 19297 (N.D. Cal. Feb. 16, 2016).
70.	Larsen v. Reverse Mortg. Sols., Inc., No. 3:15-cv-01512-L-MDD, 2016 U.S. Dist. LEXIS 41630 (S.D. Cal. Mar. 29, 2016).
71.	Borgarding v. JPMorgan Chase Bank, No. CV-16-2485 FMO-RAOx, 2016 U.S. Dist. LEXIS 191612 (C.D. Cal. Oct. 31, 2016).

72.	Totten v. Kellogg Brown & Root, LLC, 152 F. Supp. 3d 1243 (C.D. Cal. 2016).
73.	Khraibut v. Chahal, No. C15-04463-CRB, 2016 U.S. Dist. LEXIS 35514 (N.D. Cal. Mar. 18, 2016).
74.	Mackall v. Healthsource Glob. Staffing, Inc., No. 16-cv-03810-WHO, 2016 U.S. Dist. LEXIS 151418 (N.D. Cal. Nov. 1, 2016).
75.	Gonzalez v. CEVA Logistics U.S., Inc, No. 16-cv-04282-WHO, 2016 U.S. Dist. LEXIS 150766 (N.D. Cal. Oct. 31, 2016).
76.	Winfrey v. Kmart Corp., No. EDCV-1501873-VAP-SPX, 2016 WL 6666810 (C.D. Cal. Jan. 6, 2016), <i>aff'd</i> , 692 F. App'x 356 (9th Cir. 2017).
77.	Atencio v. TuneCore, Inc., No. CV-161925-DMG-MRWx, 2016 WL 11518598 (C.D. Cal. Sept. 29, 2016).
78.	Wishner v. Wells Fargo Bank, N.A., No. CV-16-2832-MWF-SKX, 2016 WL 10988765 (C.D. Cal. Sept. 28, 2016).
79.	Murphy v. HRB Green Res., LLC, No. 16-CV-04151-EDL, 2016 WL 11527027 (N.D. Cal. Oct. 14, 2016).
80.	Sophinos v. Quadriga Worldwide LTD, No. CV-16-01273-MWF-MRW, 2016 WL 10830359 (C.D. Cal. Apr. 27, 2016).
81.	Tribendis v. Life Care Centers of Am., Inc., No. CV-142765-DMG-PJWx, 2016 WL 7655743 (C.D. Cal. May 25, 2016).

C. TABLE 3: POST-EPIC SAMPLE (MAY 19, 2018–MAY 19, 2019)

Case Citation	
1.	Winship v. Prudential Ins. Co. of Am., No. 8:18-cv-00355-AG-KES, 2018 U.S. Dist. LEXIS 225318 (C.D. Cal. June 4, 2018).
2.	Sanfilippo v. Tinder, Inc., No. 2:18-cv-08372-AB-JEMx, 2018 U.S. Dist. LEXIS 213840 (C.D. Cal. Dec. 18, 2018).
3.	Gabriel v. Securitas Sec. Servs. USA, No. 17-00548 JAO-RLP, 2019 U.S. Dist. LEXIS 67235 (D. Haw. Mar. 25, 2019), <i>motion granted by</i> 2019 U.S. Dist. LEXIS 64911 (D. Haw. Apr. 16, 2019).
4.	Campanelli v. Image First Healthcare Laundry Specialists, Inc., No. 15-cv-04456-PJH, 2018 U.S. Dist. LEXIS 215287 (N.D. Cal. Dec. 21, 2018).
5.	Charles v. Portfolio Recovery Assocs., LLC, No. 3:17-CV-0955-YY, 2018 U.S. Dist. LEXIS 221665 (D. Or. Aug. 1, 2018).
6.	Rowland v. CarMax Auto Superstores Cal., LLC, No. 16-cv-02135-VC, 2019 U.S. Dist. LEXIS 62891 (E.D. Cal. Apr. 9, 2019).
7.	Rockefeller v. Perkins Coie LLP, No. 2:09-cv-04675-SVW-FFM, 2019 U.S. Dist. LEXIS 42275 (C.D. Cal. Jan. 31, 2019).

8.	Walker v. Showcase Auto. LLC, No. CV-18-0949-PHX-DMF, 2018 U.S. Dist. LEXIS 146241 (D. Ariz. Aug. 28, 2018).
9.	Albert v. Postmates Inc., No. 18-cv-07592-JCS, 2019 U.S. Dist. LEXIS 35239 (N.D. Cal. Mar. 5, 2019).
10.	Prasad v. Pinnacle Prop. Mgmt. Servs., LLC, No. 17-cv-02794-VKD, 2018 U.S. Dist. LEXIS 164623 (N.D. Cal. Sept. 25, 2018).
11.	Greer v. Sterling Jewelers, Inc., No. 1:18-cv-480-LJO-SKO, 2018 U.S. Dist. LEXIS 114640 (E.D. Cal. July 10, 2018).
12.	Wood v. Team Enters., No. C 18-06867 WHA, 2019 U.S. Dist. LEXIS 60160 (N.D. Cal. Apr. 7, 2019).
13.	Hartley v. On My Own Cmty. Servs., No. 2:17-cv-00353-KJM-EFB, 2018 U.S. Dist. LEXIS 129264 (E.D. Cal. Aug. 1, 2018).
14.	Orihuela-Knott v. Salvation Army, No. 2:18-cv-01060-KJM-DB, 2018 U.S. Dist. LEXIS 142086 (E.D. Cal. Aug. 20, 2018).
15.	Razzaghi v. Unitedhealth Grp., No. SACV-18-01223 AG-JDEx, 2018 U.S. Dist. LEXIS 224479 (C.D. Cal. Sept. 17, 2018).
16.	Ziglar v. Express Messenger Sys. Inc., No. CV-16-02726-PHX-SRB, 2019 U.S. Dist. LEXIS 34951 (D. Ariz. Mar. 4, 2019).
17.	Liggins v. GMRI, Inc., No. CV-18-09000-DSF-AFMx, 2018 U.S. Dist. LEXIS 223333 (C.D. Cal. Dec. 11, 2018).
18.	Ralph v. HAJ, Inc., No. 17-cv-1332 JM-JMA, 2018 U.S. Dist. LEXIS 91302 (S.D. Cal. May 30, 2018).
19.	Pinto v. Squaw Valley Resort, LLC, No. 2:17-cv-02281-MCE-CKD, 2018 U.S. Dist. LEXIS 186687 (E.D. Cal. Oct. 30, 2018).
20.	Benson v. Maxim Healthcare Servs., No. 2:17-cv-00771-MCE-EFB, 2018 U.S. Dist. LEXIS 190874 (E.D. Cal. Nov. 6, 2018).
21.	Steele v. Lending Club Corp., No. 18-cv-02023-RS, 2018 U.S. Dist. LEXIS 171270 (N.D. Cal. Oct. 3, 2018).
22.	United States v. Singulex, Inc., No. 4:16-cv-05241-KAW, 2019 U.S. Dist. LEXIS 75232 (N.D. Cal. May 3, 2019).
23.	Brown v. Dow Chem. Co., No. 18-cv-07098-MMC, 2019 U.S. Dist. LEXIS 20294 (N.D. Cal. Feb. 7, 2019).
24.	Shams v. CVS Health Corp., No. CV-18-8158-DMG-SKx, 2019 U.S. Dist. LEXIS 74535 (C.D. Cal. May 2, 2019).
25.	Lewis v. Sterling Jewelers Inc., No. CV-18-0277-FMO-MRWx, 2019 U.S. Dist. LEXIS 42873 (C.D. Cal. Feb. 11, 2019).
26.	Sheehan v. Sparks Black Bear, LLC, No. 3:18-cv-00510-HDM-CBC, 2019 U.S. Dist. LEXIS 23346 (D. Nev. Feb. 13, 2019).

27.	Jaffey v. Del Taco Rests., Inc., No. 2:17-CV-2600 JCM-PAL, 2018 U.S. Dist. LEXIS 141584 (D. Nev. Aug. 21, 2018).
28.	Flores v. Uber Techs., No. 17-CV-8503-PSG-GJS, 2018 U.S. Dist. LEXIS 219400 (C.D. Cal. Sept 5, 2018).
29.	Howard v. Navient Sols., LLC, No. C18-5333-BHS, 2018 U.S. Dist. LEXIS 180022 (W.D. Wash. Oct. 18, 2018).
30.	Ware v. Golden 1 Credit Union, Inc., 375 F. Supp. 3d 1145 (E.D. Cal. 2019).
31.	Patni v. Uber Techs., No. 18-CV-3002-PSG-GJS, 2018 U.S. Dist. LEXIS 227545 (C.D. Cal. Sept. 5, 2018).
32.	Brumley v. Austin Ctrs. for Exceptional Students Inc., No. CV-18-00662-PHX-DLR, 2019 U.S. Dist. LEXIS 36526 (D. Ariz. Mar. 6, 2019).
33.	Revitch v. Uber Techs., No. 18-CV-2974-PSG-GJS, 2018 U.S. Dist. LEXIS 227333 (C.D. Cal. Sept. 5, 2018).
34.	Da Silva v. Darden Rests., Inc., No. 2:17-CV-05663-ODW-E, 2018 U.S. Dist. LEXIS 121857 (C.D. Cal. July 20, 2018).
35.	Trudeau v. Google LLC, 349 F. Supp. 3d 869 (N.D. Cal. 2018).
36.	Farfan v. SSC Carmichael Operating Co. LP, No. 18-cv-01472-HSG, 2019 U.S. Dist. LEXIS 16696 (N.D. Cal. Feb. 1, 2019).
37.	Vigueras v. Red Robin Int'l, No. SACV-17-01422-JVS-DFMx, 2019 U.S. Dist. LEXIS 54432 (C.D. Cal. Feb. 21, 2019)
38.	Mitchell v. Health Net, No. CV-18-5499-R-SKx, 2018 U.S. Dist. LEXIS 225132 (C.D. Cal. Oct. 2, 2018).
39.	Gutierrez v. FriendFinder Networks, Inc., No. 18-cv-05918-BLF, 2019 U.S. Dist. LEXIS 75310 (N.D. Cal. May 3, 2019).
40.	Stone v. Mid Am. Bank & Tr. Co., No. 2:18-CV-87-RMP, 2018 U.S. Dist. LEXIS 220947 (E.D. Wash. Aug. 31, 2018).
41.	McGovern v. United States Bank N.A., 362 F. Supp. 3d 850 (S.D. Cal. 2019).
42.	Davis v. Red Eye Jack's Sports Bar, Inc., No. 3:17-cv-01111-BEN-JMA, 2018 U.S. Dist. LEXIS 96177 (S.D. Cal. June 7, 2018).
43.	Spikener v. Noble Food Grp., Inc., No. 18-cv-02855-LB, 2018 U.S. Dist. LEXIS 166851 (N.D. Cal. Sept. 27, 2018).
44.	Carbajal v. Rentokil N. Am., Inc., No. 17-CV-06651-YGR, 2018 U.S. Dist. LEXIS 112169 (N.D. Cal. July 5, 2018).
45.	Gutierrez v. Jolt Delivery, LLC, No. LACV-17-8380-VAP-SSx, 2018 U.S. Dist. LEXIS 226888 (C.D. Cal. Aug. 7, 2018).

46.	JP Morgan Chase Bank v. Swanson, No. SACV 18-01405-JVS-ADSx, 2018 U.S. Dist. LEXIS 223169 (C.D. Cal. Dec. 17, 2018).
47.	Guest v. Air Liquide Am. Specialty Gasses, LLC, No. 3:17-cv-1969-AC, 2018 U.S. Dist. LEXIS 136029 (D. Or. Aug. 13, 2018).
48.	Magana v. DoorDash, Inc., 343 F. Supp. 3d 891 (N.D. Cal. 2018).
49.	Bell-Sparrow v. SFG*Proschoicebeauty, No. 18-cv-06707-YGR, 2019 U.S. Dist. LEXIS 41941 (N.D. Cal. Mar. 14, 2019).
50.	Buchanan v. Tata Consultancy Servs., No. 15-cv-01696-YGR, 2018 U.S. Dist. LEXIS 122948 (N.D. Cal. July 23, 2018).
51.	Anderson v. Monterey Fin. Servs., LLC, No. 18-cv-02040-DMR, 2018 U.S. Dist. LEXIS 176109 (N.D. Cal. Oct. 12, 2018).
52.	Lakhan v. U.S. Sec. Assocs., No. CV 18-9659-MWF-GJSx, 2019 U.S. Dist. LEXIS 5673 (C.D. Cal. Jan. 11, 2019).
53.	Heidrich v. Pennymac Fin. Servs., No. 2:16-cv-02821-TLN-EFB, 2018 U.S. Dist. LEXIS 115644 (E.D. Cal. July 9, 2018).
54.	Garcia v. Trademark Constr. Co., No. 18-CV-1214 JLS-WVG, 2019 U.S. Dist. LEXIS 48322 (S.D. Cal. Mar. 22, 2019).
55.	Vasquez v. Libre by Nexus, Inc., No. 17-cv-00755-CW, 2018 U.S. Dist. LEXIS 214143 (N.D. Cal. Aug. 20, 2018).
56.	Croucier v. Credit One Bank, N.A., No. 18-cv-20-MMA-JMA, 2018 U.S. Dist. LEXIS 97756 (S.D. Cal. June 11, 2018).
57.	Brock v. Copart of Wash., Inc., No. 3:18-CV-02012-BR, 2019 U.S. Dist. LEXIS 30981 (D. Or. Feb. 27, 2019).
58.	Hinojosa v. UPS Expedited Mail Servs., No. SACV-18-02298-JVS-DFMx, 2019 U.S. Dist. LEXIS 31354 (C.D. Cal. Feb. 26, 2019).
59.	Espino v. Dollar Tree, Inc., No. 18-CV-0406-W-MDD, 2018 U.S. Dist. LEXIS 120971 (S.D. Cal. July 18, 2018).
60.	Borgonia v. G2 Secure Staff, LLC, No. 19-cv-00914-LB, 2019 U.S. Dist. LEXIS 70224 (N.D. Cal. Apr. 25, 2019).
61.	McComack v. Marriott Ownership Resorts, Inc., No. 3:17-cv-01663-BEN-WVG, 2018 U.S. Dist. LEXIS 151331 (S.D. Cal. Aug. 31, 2018).
62.	Alonso v. AuPairCare, Inc., No. 3:18-cv-00970-JD, 2018 U.S. Dist. LEXIS 143872 (N.D. Cal. Aug. 23, 2018).
63.	Peterson v. Lyft, Inc., No. 16-cv-07343-LB, 2018 U.S. Dist. LEXIS 197164 (N.D. Cal. Nov. 19, 2018).
64.	Roberts v. Obelisk, Inc., No. 18-cv-2898-LAB-BGS, 2019 U.S. Dist. LEXIS 72065 (S.D. Cal. Apr. 29, 2019).

65.	Dornaus v. Best Buy Co., Inc., No. 18-cv-04085-PJH, 2019 U.S. Dist. LEXIS 24522 (N.D. Cal. Feb. 14, 2019).
66.	Limon v. ABM Indus. Grps., Ltd. Liab. Co., No. 3:18-cv-00701, 2018 U.S. Dist. LEXIS 128427 (S.D. Cal. July 31, 2018).
67.	Johnson v. JP Morgan Chase Bank, N.A., No. EDCV 17-2477-JGB-SPx, 2018 U.S. Dist. LEXIS 167272 (C.D. Cal. Sept. 18, 2018).
68.	Broom v. Mydatt Servs., No. 18-00358 JMS-RT, 2019 U.S. Dist. LEXIS 60394 (D. Haw. Apr. 8, 2019).
69.	Burrola v. U.S. Sec. Assocs., No. 3:18-cv-00595-BEN-JLB, 2019 U.S. Dist. LEXIS 20273 (S.D. Cal. Feb. 7, 2019).
70.	Itkoff v. ABC Phones of N.C., Inc., No. 8:17-cv-02043-JLS-JDE, 2018 U.S. Dist. LEXIS 224509 (C.D. Cal. Oct. 11, 2018).
71.	Lovig v. Best Buy Stores LP, No. 18-cv-02807-PJH, 2018 U.S. Dist. LEXIS 146473 (N.D. Cal. Aug. 28, 2018).
72.	Anderson v. Safe Sts. USA LLC, No. 2:18-cv-00323-KJM, 2018 U.S. Dist. LEXIS 147473 (E.D. Cal. Aug. 28, 2018).
73.	Sanchez v. Gruma Corp., No. 19-cv-00794-WHO, 2019 U.S. Dist. LEXIS 60885 (N.D. Cal. Apr. 9, 2019).
74.	Brice v. Plain Green, LLC, 372 F. Supp. 3d 955 (N.D. Cal. 2019).
75.	Ngo v. PMGI Fin., LLC, No. 18-cv-05401-JCS, 2018 U.S. Dist. LEXIS 213044 (N.D. Cal. Dec. 18, 2018).
76.	Campos v. JPMorgan Chase Bank, NA, No. 18-cv-06169-JSC, 2019 U.S. Dist. LEXIS 27862 (N.D. Cal. Feb. 21, 2019).
77.	Angheloiu v. PeaceHealth, No. C17-5891 BHS, 2018 U.S. Dist. LEXIS 92158 (W.D. Wash. May 31, 2018).
78.	Romo v. Cbre Grp., Inc., No. 8:18-cv-00237-JLS-KES, 2018 U.S. Dist. LEXIS 173692 (C.D. Cal. Oct. 3, 2018).
79.	Mohammad v. T-Mobile USA, Inc., No. 2:18-cv-00405-KJM-DB, 2018 U.S. Dist. LEXIS 202678 (E.D. Cal. Nov. 28, 2018).
80.	Lang v. Skytap, Inc., 347 F. Supp. 3d 420 (N.D. Cal. 2018).
81.	Hughes v. S.A.W. Entm't, Ltd., No. 16-cv-03371-LB, 2018 U.S. Dist. LEXIS 147602 (N.D. Cal. Aug. 29, 2018).
82.	Trevino v. Acosta, Inc., No. 17-cv-06529 NC, 2018 U.S. Dist. LEXIS 122936 (N.D. Cal. July 23, 2018).
83.	Amin v. Advanced Sterilization Prods. Servs., No. SACV-18-1528-JVS-JDEx, 2019 U.S. Dist. LEXIS 13254 (C.D. Cal. Jan. 7, 2019).



84.	Whitworth v. SolarCity Corp., 336 F. Supp. 3d 1119 (N.D. Cal. 2018).
85.	Turng v. Guaranteed Rate, Inc., 371 F. Supp. 3d 610 (N.D. Cal. Jan. 17, 2019).
86.	Augustine v. TLC Resorts Vacation Club, LLC, No. 3:18-cv-01120-H-JMA, 2018 U.S. Dist. LEXIS 139183 (S.D. Cal. Aug. 16, 2018).
87.	Lopez v. Randstad U.S., L.P., No. 17-cv-01003-BLF, 2018 U.S. Dist. LEXIS 198122 (N.D. Cal. Nov. 20, 2018).
88.	Knepper v. Ogletree, No. 18-cv-00303-WHO, 2019 U.S. Dist. LEXIS 4980 (N.D. Cal. Jan. 9, 2019).
89.	Guerrero v. Haliburton Energy Servs., No. 1:16-cv-01300-LJO-JLT, 2018 U.S. Dist. LEXIS 125472 (E.D. Cal. July 26, 2018).
90.	Hazen v. Citibank, N.A., No. 1:18-cv-00103-BLW, 2018 U.S. Dist. LEXIS 137713 (D. Idaho Aug. 13, 2018).
91.	Siggelkow v. Nw. Grp., Inc., No. 3:18-cv-01494-HZ, 2019 U.S. Dist. LEXIS 10818 (D. Or. Jan. 22, 2019).
92.	Nguyen v. Mortgage, No. SA-CV-17-0723-DOC-KESx, 2018 U.S. Dist. LEXIS 227091 (C.D. Cal. Aug. 23, 2018).
93.	Dropp v. Diamond Resorts Int'l, Inc., No. 2:18-cv-00247-APG-GWF, 2019 U.S. Dist. LEXIS 12101 (D. Nev. Jan. 25, 2019).
94.	Paxton v. Macy's W. Stores, Inc., No. 1:18-cv-00132-LJO-SKO, 2018 U.S. Dist. LEXIS 153164 (E.D. Cal. Sept. 7, 2018).
95.	Shoals v. Owens & Minor Distrib., Inc., No. 2:18-cv-2355 WBS EFB, 2018 U.S. Dist. LEXIS 186729 (E.D. Cal. Oct. 30, 2018).
96.	Castillo v. CleanNet USA, Inc., 358 F. Supp. 3d 912 (N.D. Cal. 2018).
97.	Loyola v. Am. Credit Acceptance LLC, No. 2:19-cv-00002-SMJ, 2019 U.S. Dist. LEXIS 64285 (E.D. Wash. Apr. 15, 2019).
98.	Lucas v. Michael Kors U.S., Inc., No. CV-18-1608-MWF-MRWx, 2018 U.S. Dist. LEXIS 226345 (C.D. Cal. Aug. 20, 2018).
99.	Ortega v. Spearmint Rhino Cos. Worldwide, Inc., No. EDCV-17-206 JGB-KKx, 2019 U.S. Dist. LEXIS 138258 (C.D. Cal. May 15, 2019).
100.	Gountoumas v. Giaran, Inc., No. CV 18-7720-JFW-PJWx, 2018 U.S. Dist. LEXIS 223702 (C.D. Cal. Nov. 21, 2018).
101.	Titus v. ZestFinance, Inc., No. 18-5373-RJB, 2018 U.S. Dist. LEXIS 179380 (W.D. Wash. Oct. 18, 2018).
102.	Hermosillo v. Davey Tree Surgery Co., No. 18-CV-00393-LHK, 2018 U.S. Dist. LEXIS 117426 (N.D. Cal. July 13, 2018).