

COMMENT

ENFORCEABLE OR NOT?: CLASS ACTION WAIVERS IN MANDATORY ARBITRATION CLAUSES AND THE NEED FOR A JUDICIAL STANDARD*

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I. INTRODUCTION

The class action has long been a point of debate for professors, politicians, and attorneys.¹ Trial lawyers praise these “complex social dramas”² while corporate defense lawyers curse them.³ Some blame this procedural tool for overwhelming judgments that benefit only the plaintiffs’ attorneys⁴ while others credit it for vindicating consumer rights and keeping predatory corporations in check.⁵

Lately, a new battle has begun in the war over class action: the use of the class action procedure in arbitration.⁶ Specifically,

1. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 3–5 (2000) (summarizing issues surrounding the class action debate); see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (noting in recent years there has been scholarship on “virtually every imaginable issue related to class action litigation,” but predicting “class actions will soon be virtually extinct”).

2. HENSLER ET AL., *supra* note 1, at 402.

3. See Jean R. Sternlight, *Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, DISP. RESOL. MAG., Spring 2002, at 13, 19 (“[The class action] is reviled by potential defendants and beloved by potential plaintiffs and those who seek to ensure that our laws are properly enforced.”); see also Daniel C. Girard, *Legitimate Businesses Can Behave Badly*, BUS. L. TODAY, May/June 1998, at 25, 25 (“Class action lawyers thrive in the business lawyer’s hell . . . [and] are the chickens come home to roost, the litigation risk that cautious business lawyers counsel their clients to avoid.”); Alan S. Kaplinsky & Mark J. Levin, *Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May/June 1998, at 24, 24 (bemoaning the class action as a tool being used by consumers who “have been ganging up on banks” and “attacking virtually every aspect of their credit practices”).

4. See *Liability Issues Regarding the Global Settlement of Tobacco Litigation: Hearing Before the Comm. on Commerce, Sci. & Transp.*, 105th Cong. 50 (1998) (statement of Richard F. Scruggs, panelist) (testifying that restricting class actions against the tobacco industry protects individual plaintiffs by preventing tobacco companies from collusively settling a putative class action for minimal individual damages and thereby avoiding liability to millions of individuals harmed by tobacco); see also Sarah S. Vance, *Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1632 (2006) (noting many class action cases in which class members received coupons of nominal value while the class attorneys collected millions of dollars in fees).

5. See Gilles, *supra* note 1, at 378 (“I take it as beyond dispute that the threat of class action liability plays a vital role in deterring corporate wrongdoing.”).

6. See, e.g., Jeffrey I. Carton & Lindsay M. Held, *A New Battleground for the Class Action War*, N.Y.L.J., Oct. 10, 2006, at S10 (questioning the enforceability of waiver

the battle is raging over “collective action waivers”⁷ placed in mandatory arbitration clauses.⁸ To be precise, the stirring debate is now focused on the enforceability of class-action arbitration prohibitions included in mandatory arbitration clauses.⁹

One can find mandatory arbitration clauses in a myriad of contracts into which consumers enter on a daily basis.¹⁰ These contract clauses restrict consumers’ rights to pursue any complaints against defendant companies via the court system by compelling plaintiffs to seek vindication through an arbitration process.¹¹ Consequently, would-be defendants are insulated from

provisions).

7. Gilles, *supra* note 1, at 375–76 (explaining that these clauses amount to “collective action waivers” instead of mere “class action waivers” because they typically forbid the consumer from participating not only in class action litigation but also from joining in class-wide arbitration).

8. *Id.* at 375 (arguing the use of collective action waivers in mandatory clauses will essentially eliminate the class action as a viable option); *see also* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 76 (2004) (proposing that Congress should enact federal legislation “prohibiting companies from precluding consumer class actions”); Allison Torres Burtka, *Courts Weigh in on Class Action Bans in Arbitration*, TRIAL, Sept. 2006, at 16, 16 (noting the recent court decisions and debate centered on the use of class action bans in mandatory arbitration clauses).

9. *See* Gilles, *supra* note 1, at 376 (discussing the debate on collective action waivers in mandatory arbitration clauses); Sternlight & Jensen, *supra* note 8, at 76 (same). In *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the Supreme Court held when an arbitration agreement is silent on the issue of whether the arbitration can be taken up as a class action, it is for the arbitrator, not a court, to determine the permissibility of class arbitration. *Bazzle*, 539 U.S. at 451.

10. In fact, just over 55% “of businesses that offer an ongoing product or service” included an arbitration clause in the written contract. Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 L. & CONTEMP. PROBS. 55, 62 n.30 (2004). The next time you open your credit card statement or cell phone bill, take a careful look at the extra stuffer that comes along with the bill. This “contract” most likely contains a mandatory arbitration clause and also serves as your notice that you have waived your right to litigate in court any claim that may arise from your transaction with the company. *See* Press Release, Nat’l Consumer Law Ctr., Consumer and Media Alert: The Small Print That’s Devastating Major Consumer Rights (July 8, 2003), available at <http://www.consumerlaw.org/issues/model/arbitration.shtml> (claiming that mandatory arbitration clauses often found in bills are a “giant trap door for consumers”). While arbitration and mandatory arbitration clauses are found in all segments of society and areas of the law, this Comment will focus primarily on the consumer context and commercial contractual arrangements. The consumer context garners the most attention because consumers are considered to be the most vulnerable and are typically confronted with arbitration clauses in adhesion contracts of which the consumer has virtually no chance to negotiate the terms. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637–38 (1996) (explaining that large companies often include mandatory binding arbitration clauses in documents consumers sign, and specifying some of the terms a consumer often has no opportunity to negotiate).

11. For example, the mandatory arbitration clause in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) provided:

litigation in the courts by compelling the contracting party, the consumer, to arbitrate any dispute that may arise.¹² The courts have been more than accepting of the move to compel arbitration,¹³ even in the face of outrage by consumer advocate groups.¹⁴

Recently, would-be defendants have taken to even further insulating themselves from liability by contractually restricting potential plaintiffs' use of a powerful and legitimate procedural tool in arbitration—the class action.¹⁵ While American courts have overwhelmingly embraced the mandatory arbitration clause¹⁶—upholding it even in unenforceable contracts¹⁷ or in contracts induced by fraud¹⁸—the use of this clause to eliminate a party's ability to bring or join a class action has left an unanswered question: Is this total ban on class actions in

You and we agree that any claim, dispute, or controversy between us . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . . including the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration . . . **NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.**

W. Suburban Bank, 225 F.3d at 369–70.

12. See *id.* (demonstrating the compulsory nature of binding arbitration agreements).

13. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448–49 (2006) (ruling that a mandatory arbitration clause may be enforceable even when the contract in which it was found may be unenforceable); *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that the Federal Arbitration Act was intended to establish substantive law in favor of arbitration in state and federal courts); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967) (upholding mandatory arbitration in a contract dispute in which the defendant may have wrongfully induced the complaining party into entering the contract).

14. See, e.g., Give Me Back My Rights!, *The Dangers of Binding Mandatory Arbitration (BMA) Clauses*, <http://www.givemebackmyrights.com> (last visited Feb. 29, 2008) (warning against the dangers of binding mandatory arbitration and advocating the elimination of these clauses); Citizen Advocacy Center, *Consumer Guide to Mandatory Arbitration Clauses*, <http://www.citizenadvocacycenter.org/Ed.%20Brochures/arbitration.htm> (last visited Feb. 29, 2008) (advising consumers of mandatory arbitration and how to avoid the dangers of such clauses).

15. Gilles, *supra* note 1 at 375; Sternlight, *supra* note 3 at 13.

16. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 22–23 (2000) (describing the Supreme Court as “an extremely strong advocate of binding arbitration”).

17. *Buckeye Check Cashing*, 546 U.S. at 448–49 (holding that the enforceability of arbitration provisions is separate from that of the contract as a whole and that a challenge to the validity of a contract as a whole must be decided by the arbitrator).

18. *Prima Paint Corp.*, 388 U.S. at 404 (“[T]he statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. . . . We hold, therefore, that . . . a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.”).

mandatory arbitration clauses enforceable?¹⁹ Many federal and state courts have confronted this question, but there is, as of yet, no clear consensus.²⁰

The time has come for the Supreme Court to settle the question once and for all; congressional action is not required. Recent circuit and state court decisions invalidating class-wide arbitration bans have created a usable framework upon which the Supreme Court could construct a viable judicial standard for judging the validity of collective action waivers, particularly in consumer contracts. The Court should address this issue soon, and it should adopt the two-prong analysis this Comment proposes.

This Comment begins in Part II by reviewing American courts' affection for mandatory arbitration, beginning with a brief history of the rise of arbitration in the United States. Next, this Comment presents a brief history of the class action in the United States and then discusses the problems posed when these two legal procedures come together.

In Part III, this Comment describes the division among both federal and state courts considering the issue of whether to uphold class action waivers in mandatory arbitration clauses. The discussion centers on the leading cases from the different federal circuits and the distinct views taken by those courts, as well as the different stances taken by state courts and legislatures.

Part IV discusses the various arguments made in favor of, and in opposition to, collective-action arbitration waivers. This Comment points out the strengths and flaws of the arguments

19. Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. L. 775, 775 (2005). In *Bazze*, the Supreme Court made clear that it was an arbitrator's determination, rather than a court's, as to whether arbitration could be made a class action when the arbitration clause was silent on the matter. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 453–54 (2003). The Court, however, did not answer the question of the validity of arbitration clauses which specifically prohibit class treatment. *Id.* Still, the Court's ruling in *Bazze* intimates that arbitration could be conducted as a class action. *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 262 (Ill. 2006); *see also* AM. ARBITRATION ASS'N, 2005 PRESIDENT'S LETTER & FINANCIAL STATEMENTS 3 (2005), available at http://www.adr.org/annual_reports (follow "2005 ANNUAL REPORT" hyperlink) ("Implicit in the [*Bazze*] decision is that class action proceedings could take place in an arbitration setting.").

20. *Compare, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006), and *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (invalidating explicit collective action waivers in arbitration clauses), *with* *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002), and *Johnson v. W. Suburban Bank*, 225 F.3d 366, 377–78 (3d Cir. 2000) (upholding explicit collective action waivers in arbitration clauses).

and identifies certain policy reasons supporting the need for a judicial standard urged by this Comment.

Finally, in Part V, this Comment proposes the adoption of a new judicial standard for analyzing the validity of class action waivers. This Comment rejects the idea that federal legislation prohibiting the inclusion of class action waivers in mandatory arbitration clauses is required. This Comment urges the Supreme Court to settle the matter of whether class-action arbitration bans are enforceable in mandatory arbitration clauses and proposes a viable standard for the Court to adopt.

II. THE COURTS' AFFECTION FOR ARBITRATION

The increase in class action litigation along with the strong federal policy preference for arbitration has created an interesting coupling. This Part seeks to chronicle the rise of these popular procedural tools and the history behind what has become one of the most hotly debated topics in consumer law: the prohibition of class arbitration in mandatory, binding predispute arbitration clauses.

A. *A Brief History of the Rise of Arbitration*

Arbitration is by no means a recent phenomenon.²¹ It is “one of the oldest forms of dispute resolution in the history of the world.”²² In fact, some report the father of Alexander the Great used arbitration as early as 337 B.C.²³ Native American tribes were said to use a method of arbitration to settle disputes within the tribe, as well as between tribes, long before white settlers brought their common law system to the new world.²⁴

21. Robert V. Massey, Jr., History of Arbitration and Grievance Arbitration in the United States, http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf (last visited Feb. 29, 2008).

22. *Id.*; see also *McAmis v. Panhandle E. Pipe Line Co.*, 273 S.W.2d 789, 794 (Mo. Ct. App. 1954) (calling arbitration “the oldest known method of settlement of disputes”).

23. RICHARD A. BALES, COMPULSORY ARBITRATION 5 (1997); see also Massey, *supra* note 21 (explaining that Phillip the Second, Alexander the Great’s father, used arbitration to settle disputes “as far back as 337 B.C.”).

24. See Massey, *supra* note 21 (chronicling the history of arbitration in the United States). George Washington included in his will a mandatory arbitration clause that required all disputes concerning his will be resolved by a panel of three arbitrators. BALES, *supra* note 23, at 5. He required that any decision of those arbitrations be “as binding on the Parties as if it had been given in the Supreme Court of the United States.” *Id.* (citing *The Will of George Washington*, in *WILLS OF GEORGE WASHINGTON AND HIS IMMEDIATE ANCESTORS* 81, 120 (Worthington Chauncey Ford ed., Brooklyn, N.Y., Historical Printing Club 1891)).

Modern American usage of these “private arbitration tribunals”²⁵ began due to both the flood of litigation following World War I and a general effort to increase judicial efficiency.²⁶ New York was the first state to enact an arbitration statute,²⁷ followed in 1925 by a federal version with the passage of the Federal Arbitration Act (FAA).²⁸ The FAA “shaped modern arbitration” and forever changed the way business is conducted.²⁹ It provided that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁰ Moreover, it was intended to “place arbitration agreements upon the same footing as other contracts”³¹ and “to abrogate the then-existing common law rule disfavoring arbitration agreements.”³² Arbitration is employed in all areas of the law and has grown rapidly in the consumer context.³³ The American Arbitration Association reports that 1,170,000 cases were filed with it between 1990 and 2001, more than were filed in the sixty-five years since the organization’s formation.³⁴

It is now more than clear that federal policy favors arbitration, and any “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”³⁵ The Supreme Court has favored arbitration even when major public policy concerns are at issue.³⁶ This strong federal policy preference for

25. AM. ARBITRATION ASS’N, PUBLIC SERVICE AT THE AAA 2 (2004), http://www.adr.org/aaa_mission (follow “AAA Public Service History” hyperlink).

26. *Id.*

27. *Id.* (“The statute was particularly notable for providing for enforcement of agreements to arbitrate future disputes as well as to settle existing disputes.”).

28. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000 & Supp. 2006).

29. AM. ARBITRATION ASS’N, *supra* note 19, at 1.

30. 9 U.S.C. § 2 (2000).

31. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

32. *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 876 (N.J. 2002).

33. *See infra* note 36 (listing various disputes where arbitration is commonly used); text accompanying note 34 (noting the increase in arbitration cases filed with one arbitration service provider); *see also* Leslie Gordon, *Clause for Alarm*, A.B.A. J., Nov. 2006, at 19, 19 (“[A]rbitration took off alongside tort reform in the late 1980s and early 1990s. The practice became particularly popular among defendants facing a huge amount of litigation and seeking to limit risks inherent in the court system.”).

34. AM. ARBITRATION ASS’N, FAIR PLAY: PERSPECTIVES FROM AAA ON CONSUMER AND EMPLOYMENT ARBITRATION 7 n.2 (2003), <http://www.adr.org> (on file with the Houston Law Review).

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

36. Steven C. Bennett, *The Developing American Approach to Arbitrability*, DISP. RESOL. J., Feb.–Apr. 2003, at 8, 10 (“[T]he Supreme Court has repeatedly indicated that various disputes of potential public concern (securities, antitrust, and RICO claims, to name a few) are all subject to arbitration, if the parties have so agreed.” (citation omitted)).

arbitration is disconcerting to many because of the stark differences between arbitration and our judicial system.³⁷ For instance, arbitration has been called a “pay-for-justice phenomenon”³⁸ because of fees charged by arbitrators and the inherent conflicts created when a purportedly neutral decisionmaker is dependent upon those who pay for that service for future business.³⁹ Arbitration is also criticized as being a highly unregulated system in which cases are decided “out of public view, leaving no record or legal precedent.”⁴⁰ Unlike trials, arbitrations are generally not bound by discovery rules or evidentiary standards.⁴¹ Nor are the results, for the most part, appealable.⁴² And, because arbitration proceedings are not public, those results often are never disclosed beyond the parties involved and consequently do not face public scrutiny.⁴³ These characteristics of arbitration can have dire consequences for consumers, particularly when such procedures are imposed upon consumers through mandatory arbitration clauses.⁴⁴

37. See Public Citizen, *Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees and Small Businesses*, <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7332> (last visited Feb. 29, 2008) (listing some disadvantages of arbitration compared to court, including limited judicial review and discovery); see also Cliff Palefsky, *The Civil Rights Struggle Against Mandatory Arbitration—From ‘Separate But Equal’ to ‘Just Another Forum’*, <http://www.workplacefairness.org/sc/arbitration.php> (last visited Feb. 29, 2008) (describing the differences between arbitration and court in the employment context).

38. Eric Berkowitz, *Is Justice Served?*, L.A. TIMES, Oct. 22, 2006, at 20.

39. Many people fear that because “neutral” arbitrators depend on the repeat business of large corporations that are frequently involved in disputes with consumers, the arbitrators will naturally tend to rule in favor of the corporations to secure further arbitration business. See *id.* at 22. (quoting an arbitrator as saying “I have had an insurance company that very noticeably did not hire me further after I ruled against them in arbitration. . . . You would have to be unconscious not to be aware that if you rule a certain way, you can compromise your future business.”).

40. *Id.*

41. See John D. Kimball, *Evidentiary and Discovery Issues in Arbitration*, <http://www.blankrome.com/index.cfm?contentID=37&itemID=1079> (last visited Feb. 29, 2008) (detailing evidence and discovery rules in arbitration); see also Rachel Rivers et al., *Evidence and Discovery Issues in ADR*, <http://www.brownmccarroll.com/pdfs/EvidenceDiscovery.pdf> (last visited Feb. 29, 2008) (noting discovery tends to be limited and evidence rules generally do not apply in arbitration).

42. *ABCs of ADR: A Dispute Resolution Glossary*, 10 ALTERNATIVES TO THE HIGH COST OF LITIG. 115, 115 (Aug. 1992) (explaining that arbitration awards, absent fraud, are not subject to appellate review).

43. Richard M. Alderman, *Consumer Arbitration, Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003) (noting the disadvantages of arbitration in the consumer context and calling for change in federal law to preclude the use of predispute mandatory arbitration clauses).

44. While most arbitration clauses designate which organization will administer the arbitration proceedings (for example, the American Arbitration Association, Judicial Arbitration and Mediation Services, Inc., or National Arbitration Forum), rarely do they spell out the ground rules for the proceeding. Demaine & Hensler, *supra* note 10, at 67–68

B. A Brief History of the Class Action

The class action is perhaps not as old as arbitration—tracing only to the twelfth century and medieval group litigation.⁴⁵ The modern rule⁴⁶ came into being, after several previous versions of a class action rule,⁴⁷ with the 1966 amendments to the Federal Rules of Civil Procedure. The modern rule was intended to “resolve the doubts about the binding effect of the resulting judgments, to broaden the usefulness of the class action device, and to improve the procedural management of these complex actions.”⁴⁸ Whatever its roots, class action has flourished. In the ten years from 1988 to 1998, class action filings in state courts jumped 1,315%.⁴⁹ Putative class actions in federal courts increased 340% during the same time period.⁵⁰ The class action has clearly been instrumental in righting wrongs, compensating plaintiffs for otherwise unrecompensable injuries, and in helping to instigate corporate change and implement public policy.⁵¹ Still, class action lawsuits are lambasted as nothing more than conglomerations of weak or nonexistent claims in an attempt to “win a potentially big payday” from a deep-pocket defendant, usually a large corporation.⁵²

(noting only about a quarter of arbitration clauses specify both an arbitration provider and rules that will govern the arbitration proceeding). For those that do, only about 33% discuss discovery rules and about 21% discuss evidentiary standards. *Id.* at 68. Interestingly, many defendants are becoming concerned about mandatory arbitration and the lack of the possibility for summary judgment. Gordon, *supra* note 33, at 19; see also Jim McCown, *Is Arbitration Appropriate for Your Case?*, AVIATION FLYER, Winter 2004, at 2, available at <http://images.jw.com/com/publications/329.pdf> (warning would-be defendants of the dangers of mandatory arbitration and its potential escalation of time and expense due to the unavailability of summary judgment procedures).

45. RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, CIVIL PROCEDURE, MATERIALS FOR A BASIC COURSE 842 (8th ed. 2003).

46. See FED. R. CIV. P. 23 (listing the prerequisites necessary to bring and maintain a class action suit).

47. FED. EQUITY R. 38 (1912), reprinted in JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 168–69 (8th ed. 1933); Rules of Practice for the Courts of Equity of the United States, 226 U.S. 649, 659 (1912) (Rule 38); *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) (stating the common law rule); see also FED. R. CIV. P. 23 (1958).

48. FIELD ET AL., *supra* note 45, at 851.

49. The Federalist Soc’y, *Class Action Litigation—A Federalist Society Survey, Part III*, CLASS ACTION WATCH, Fall 1999, at 3, available at http://www.fed-soc.org/doclib/20070321_classv1i3.pdf.

50. *Id.*

51. See generally, e.g., CLARA BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW (2003) (chronicling the first sexual harassment class action lawsuit in the United States and its impact on labor and employment law).

52. Steven Malanga, *Class Action? Third Aisle to the Left*, WALL ST. J., June 29, 2004, at A14 (describing the class action suit against Wal-Mart on behalf of 1.6 million female workers as “based on individual cases that reveal little more than the frustrated

C. Class Action in Arbitration

This Comment focuses on the intersection of these two legal maneuvers and the controversy created by the use of the class action in arbitration.⁵³ The outright banning of class action in mandatory arbitration clauses has become a standard policy for many corporations that transact with consumers.⁵⁴ Slipping these class action prohibitions into the mandatory arbitration clause in standard forms and adhesion contracts provides for an effective defense against “the threat of a class action”⁵⁵ and too often ensures the defendant will escape liability.⁵⁶

Consumer advocates complain that these bans on consumers’ procedural rights are unfairly forced upon consumers and deprive the consumers of their ability to vindicate their statutory or other legal rights.⁵⁷ Corporate defense attorneys tout the use of the class-action arbitration bans as a legitimate contract tool used to defend benevolent companies from the ever-increasing onslaught of frivolous “multimillion-dollar class action lawsuits.”⁵⁸ Both are correct to some degree.

Many have entered the debate and have taken strong positions on whether the mandatory arbitration clause and the class action waiver should coexist, particularly in the consumer context.⁵⁹ Some see the collective action waiver as “inherently unfair” and call on Congress to intervene.⁶⁰ Others believe these clauses may be the only way for big business to protect itself from

ambitions of underperforming or unpopular workers, backed up by dubious statistical analysis and tortured logic that binds together contradictory arguments by the thinnest of threads”).

53. See *supra* notes 6–9 and accompanying text (describing the debate surrounding class action arbitration and collective action waivers).

54. See *supra* notes 1, 36–38 (discussing the battle raging over these mandatory clauses).

55. Kaplinsky & Levin, *supra* note 3, at 26 (noting that denying the availability of a class action reduces plaintiffs’ lawyers’ incentive to sue).

56. See *infra* Part IV (explaining that many times when consumers are unable to bring class claims, their claims will simply not be pursued due to the overwhelming costs, thereby allowing the defendant to escape liability).

57. Press Release, *supra* note 10 (“Class-action suits are the **only** reasonable way to pursue many consumer [claims]. When arbitration fees can quickly exceed the amount of individual consumer claims . . . those claims [are] impossible to prosecute individually.”).

58. See, e.g., Kaplinsky & Levin, *supra* note 3, at 28 (advising lenders to act promptly in instituting arbitration programs to avoid the risk of class action lawsuits).

59. See, e.g., Gilles, *supra* note 1, at 375; Girard *supra* note 3, at 29; Kaplinsky & Levin, *supra* note 3, at 24; Sternlight, *supra* note 3, at 13; see also Carton & Held, *supra* note 6, at S13 (“[B]road-based class action waivers should not be enforced as a matter of public policy”).

60. Sternlight, *supra* note 3, at 21.

unjust and overwhelming judgments.⁶¹ At least one commentator has predicted this convergence will lead to the virtual extinction of the modern class action.⁶² As is usually the case, the truth is probably somewhere in between.

Early on it appeared as though the ban on class arbitration would be welcomed with open arms by a judiciary that has long been enamored with arbitration.⁶³ Prior to the most recent trend of court decisions invalidating these class prohibitions, commentators predicted courts would overwhelmingly accept the collective action waiver as wholly enforceable and urged Congress to intervene.⁶⁴ However, recent decisions in state and federal courts suggest courts understand what is at stake for both consumers and defendants and are well on their way to fashioning a workable solution.⁶⁵

III. THE GREAT DIVIDE

With federal courts—and most state courts—giving wide berth to arbitration and generally enforcing mandatory predispute arbitration clauses, the question of what to do about class action waivers in the arbitration clause has been difficult. Most courts have wrestled with this question in some form, and many have struggled to come to a consistent answer.⁶⁶ This Part reviews the recent federal and state court cases discussing class action waivers and examines the arguments for upholding or invalidating the class arbitration waiver. In these cases the Supreme Court can find a workable solution to finally answer the question of what to do about class action waivers.

61. See *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 101, 102 n.6 (N.J. 2006) (noting courts and commentators have pointed out the pressure that potential class action places on defendants to settle “arguably frivolous claims”).

62. Gilles, *supra* note 1, at 375 (predicting that, with a warm reception by the judiciary, collective action waivers in mandatory arbitration clauses will lead to the demise of the class action).

63. *Id.* at 376.

64. *Id.* at 428 (predicting the collective action waiver would be warmly received by American courts); see also Sternlight, *supra* note 16 at 126 (urging Congress to enact legislation to “prevent companies from eliminating the class action”).

65. See *infra* Part III (discussing recent state and federal court decisions on the enforceability of class action waivers in arbitration clauses and how these decisions form the basis for the judicial standard the Supreme Court should adopt).

66. See *infra* note 159 (comparing conflicting decisions within the same states’ courts).

A. *Circuit Split*

Today, the U.S. circuit courts of appeals are split, although not evenly, on whether to uphold contract clauses that prohibit parties from asserting or joining class status in arbitration. Both the First and the Ninth Circuits have invalidated these class bar mechanisms⁶⁷ while the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have all upheld compulsory class arbitration waivers.⁶⁸

1. *Circuits Invalidating Class Action Waivers.* In April 2006, the First Circuit invalidated a class-action arbitration ban within a mandatory arbitration clause while upholding the arbitration clause itself, even though the class prohibition did not directly conflict with the relevant state and federal antitrust statutes at issue.⁶⁹ In *Kristian v. Comcast Corp.*, a group of Boston-area cable-service customers brought suit against the cable-service provider for allegedly charging “inflated prices as a result of anticompetitive practices” in violation of state and federal antitrust laws.⁷⁰ The arbitration provision that governed the relationship was included as a “billing stuffer”⁷¹ and contained language prohibiting customers from arbitrating any

67. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 61–62 (1st Cir. 2006); *Circuit City Stores v. Mantor*, 335 F.3d 1101, 1107 (9th Cir. 2003); *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1175–76 (9th Cir. 2003); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003).

68. See *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 558–59 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638–39 (4th Cir. 2002); *Burden v. Check into Cash of Ky., LLC*, 267 F.3d 483, 492 (6th Cir. 2001); *Dominion Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001); *Randolph v. Green Tree Fin. Corp.—Ala.*, 244 F.3d 814, 817–18 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). The Second Circuit, in dicta, indicated it would most likely refuse to invalidate such a bar. *JLM Indus., Inc. v. Stolt-Nielson SA*, 387 F.3d 163, 180 n.9 (2d Cir. 2004) (“We also note that we do not understand JLM to be making any argument to the effect that its assertion of class claims should serve as a bar or deterrent to sending the instant case to an arbitral panel. We would likely view such an argument skeptically because “[f]ederal courts have . . . consistently enforced arbitration provisions in the context of class action lawsuits when federal statutory claims have been at issue.” (quoting *Lewis Tree Serv., Inc. v. Lucent Techs. Inc.*, 239 F. Supp. 2d 332, 338 (S.D.N.Y. 2002))).

69. *Kristian*, 446 F.3d at 61–65. It is clear that when an arbitration clause directly conflicts with a federal statute, the clause will be invalidated. Generally, arbitration clauses which do not conflict with underlying state or federal statutes will be enforceable. However, the court explains that the class prohibition in the arbitration clause here “ostensibly conflicts with the Federal Rules of Civil Procedure.” *Id.* at 54.

70. *Id.* at 30.

71. Billing stuffers are leaflets slipped into the envelope along with monthly bills that contain important notices or clauses affecting the particular product or service. See Press Release, *supra* note 10 (describing examples of billing stuffers).

claims as a class.⁷² The court ultimately relied upon the savings clause in the arbitration agreement which provided that the clause is valid “unless your state’s laws provide otherwise.”⁷³

However, the court found no conflict with state law.⁷⁴ Rather, the court “found an impermissible conflict between the class arbitration bar and federal law.”⁷⁵ The conflict with federal law that the court forced into the “state law” savings clause was the threat that the bar on class arbitration posed to the “premise that arbitration can be ‘a fair and adequate mechanism for enforcing statutory rights.’”⁷⁶ The *Kristian* court seemingly relied upon the Supreme Court’s language in *Amchem Products*⁷⁷ to find a “substantive implication” to this “procedural mechanism.”⁷⁸ In both *Amchem* and *Kristian*, the courts recognized the substantive restriction that compulsory arbitration clauses barring class participation placed upon potential plaintiffs and acted to relieve that substantive restriction.⁷⁹

The *Kristian* court concluded that “[i]f the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law.”⁸⁰ And, of course, those

72. *Kristian*, 446 F.3d at 30–31. The arbitration agreement in *Kristian* provided: THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS SIMILARLY SITUATED UNLESS YOUR STATE’S LAWS PROVIDE OTHERWISE.

Id. at 31–32.

73. *Id.* at 61–62.

74. *Id.* at 61.

75. *Id.* The court stated “the basis for the conflict is irrelevant to the severance analysis.” *Id.*

76. *Id.* at 54 (quoting *Rosenberg v. Merrill Lynch, Inc.*, 170 F.3d 1, 14 (1st Cir. 1999)). The Court also noted the arbitration agreement “ostensibly conflicts with the Federal Rules of Civil Procedure, which provide for class actions.” *Id.*

77. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”).

78. *Kristian*, 446 F.3d at 54.

79. *Amchem Prods.*, 521 U.S. at 617; *Kristian*, 446 F.3d at 64. The *Kristian* court explains this substantive restriction quite well: when a procedural mechanism effectively forecloses an individual’s substantive right to vindicate her claim, the procedural mechanism becomes a substantive restriction. *Kristian*, 446 F.3d at 54–55. As the court explains, particularly in consumer transactions, the prohibitively high costs of pursuing a claim individually, as opposed to as a class, works to essentially eliminate the consumer’s opportunity to bring and recover on her claims. *Id.*

80. *Kristian*, 446 F.3d at 61.

“private consumer[s]” who suffered damages as a result of such purported violations would have been without an effective means of recovering those damages.⁸¹ This is because without access to class status the plaintiffs would not be able to afford to bring suit on their claim. But in *Kristian*, the arbitration agreement at issue contained a savings clause on which the court relied when severing the class bar provision, albeit somewhat forcibly.⁸² Nevertheless, even when no savings clause exists in the arbitration clause, courts may still sever parts of the clause as they would sever certain clauses from the contract in general to reach an equitable solution.⁸³

Another circuit court had struck down a similar provision earlier. In *Ting v. AT&T*,⁸⁴ the Ninth Circuit relied upon California contract law to find a class action waiver unconscionable.⁸⁵ There, in order to comply with a Federal Communication Commission requirement to “establish contracts with consumers governing . . . rates, terms, and conditions,” AT&T mailed to 18 million of its residential customers a customer service agreement (CSA) that contained, inter alia, a mandatory arbitration clause barring class-wide action.⁸⁶ Plaintiff Ting brought a class action lawsuit against AT&T

81. *Id.* at 54–55.

82. *Id.* at 61–62; *see supra* notes 74–76 and accompanying text (discussing how the court forcibly applied the savings clause in context of the conflict that it found between the class arbitration bar and federal law).

83. *See, e.g.*, *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 103 (N.J. 2006) (severing offending language from a mandatory arbitration clause while enforcing the remainder of the arbitration agreement).

84. *Ting v. AT&T*, 319 F.3d 1126, 1147–50 (9th Cir. 2003) (finding the FAA preempted state law which created a nonwaivable right to class action, but still invalidating a class action arbitration waiver as unconscionable under state law).

85. *Id.* at 1148–50 (holding the clause both procedurally and substantively unconscionable).

86. *Id.* at 1132–34. The relevant section of the mandatory arbitration clause provided:

THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY JUDGE OR JURY OR THROUGH A CLASS ACTION. YOU CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF FROM A FEDERAL OR STATE REGULATORY AGENCY. NO DISPUTE MAY BE JOINED WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OTHER PERSON, OR RESOLVED ON A CLASS WIDE BASIS. THE ARBITRATOR MAY NOT AWARD DAMAGES THAT ARE NOT EXPRESSLY AUTHORIZED BY THIS AGREEMENT AND MAY NOT AWARD PUNITIVE DAMAGES OR ATTORNEYS' FEES UNLESS SUCH DAMAGES ARE EXPRESSLY AUTHORIZED BY A STATUTE. YOU AND AT&T BOTH WAIVE ANY CLAIMS FOR AN AWARD OF DAMAGES THAT ARE EXCLUDED UNDER THIS AGREEMENT.

Id. at 1133 & n.4.

charging that sections of the contract known as the “Legal Remedies Provisions” violated California consumer protection and contract laws.⁸⁷

First, Ting argued that the CSA’s ban on class action lawsuits violated the California Consumer Legal Remedies Act⁸⁸ (CLRA), which expressly permits class actions.⁸⁹ The court dispensed with this argument by agreeing that the FAA preempts state laws that “single[] out arbitration clauses for suspect status.”⁹⁰ However, the court noted that “state law is not entirely displaced from federal arbitration analysis.”⁹¹ When a state law is “*generally applied* to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA.”⁹² While the CLRA was too narrowly drafted to be enforced under the FAA, the court clearly left open the possibility of defeating federal preemption with well-drafted state statutes.⁹³ The court did, however, find state common law on unconscionability broad enough to strike down the compulsory class waiver.⁹⁴ The court agreed with the district court’s finding that the AT&T CSA was procedurally unconscionable because the company had forced the clause upon its customers “without opportunity for negotiation, modification, or waiver.”⁹⁵ Furthermore, the court found the CSA substantively unconscionable under California law “because it imposes on some consumers costs greater than those a complainant would bear if he or she would file the same complaint in court.”⁹⁶

87. *Id.* at 1134.

88. CAL. CIV. CODE §§ 1750–1785 (West 1998 & Supp. 2008).

89. *Ting*, 319 F.3d at 1147; *see also* CAL. CIV. CODE § 1752 (West 1998 & Supp. 2008).

90. *Ting*, 319 F.3d at 1147 (quoting *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996)).

91. *Id.* at 1147–48 (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) and *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001)).

92. *Id.* at 1148 (quoting *Ticknor*, 265 F.3d at 937).

93. *Id.* at 1147–48. It is not clear whether state statutes that specifically apply to arbitration clauses whose language is intended not to place such clauses into “suspect status,” but rather is intended to generally legitimize their enforceability, will be valid in the face of FAA preemption. *See Doctor’s Assocs.*, 517 U.S. at 687 (holding the FAA preempts a state statute that “conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally”); *see also infra* notes 208–11 and accompanying text (discussing the enforceability of state statutes aimed at the use of waivers in arbitration clauses).

94. *Ting*, 319 F.3d at 1148–50 & n.15 (“Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA.”).

95. *Id.* at 1149.

96. *Id.* at 1151.

Once again, a federal court recognized the substantive pinch a procedural waiver clause has upon a plaintiff.⁹⁷ The court made it clear that its finding was consistent with the FAA not only because of the unconscionability doctrine's general application to all contracts, but also because even when parties agree to arbitrate their statutory claims they "still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights."⁹⁸ Central to those protections is the assurance that a party will not be forced to bear prohibitively high or unreasonable costs in vindicating his claim.⁹⁹ Moreover, while the courts have focused on protecting the plaintiffs' statutory rights, this Comment suggests the same analysis should be employed to protect from preclusion any common law claims the plaintiff may be able to assert.

The courts' analyses in *Kristian* and *Ting* form the necessary framework for a workable standard the Supreme Court should adopt and apply to the enforceability question.¹⁰⁰ The first question courts should ask is whether the clause was forced upon the consumer via a standard-form, take-it-or-leave-it adhesion contract, or whether the consumer enjoyed a reasonable level of negotiation or had some reasonable alternative to the transaction.¹⁰¹ Secondly, the courts should determine whether the waiver restricts the consumer's substantive rights by effectively foreclosing the consumer's ability to bring an action any other way.¹⁰²

2. *Circuits Upholding Class Action Waivers.* Other circuit courts, however, have enforced class arbitration prohibitions.¹⁰³

97. See *supra* note 79 and accompanying text.

98. *Ting*, 319 F.3d at 1151.

99. *Id.*

100. *Kristian v. Comcast Corp.*, 446 F.3d 25, 60–62 (1st Cir. 2006); *Ting*, 319 F.3d at 1148–50; see also *Carton & Held* *supra* note 6 at S12–13 (recognizing the framework for a "middle ground" set forth in these and other recent cases).

101. A court may determine, for instance, that although there was no opportunity for the consumer to negotiate or bargain for the terms of the contract, the consumer nonetheless did have reasonable alternatives such that they could have reasonably refused the offer and sought an interchangeable product or service elsewhere with more comfortable terms. The court could then find that the waiver was not "forced" upon the consumer, and consequently, uphold the waiver.

102. See *supra* note 79 and accompanying text (explaining the substantive restriction these waivers generally create). The primary concern should be the economic restriction such a clause would place on plaintiffs, particularly where the claims are very small amounts. If the costs to the plaintiff of arbitrating or litigating the claim individually is an amount that would effectively prohibit an individual plaintiff from pursuing the claim, the waiver should be invalidated.

103. See *supra* note 68 (listing examples of cases in which courts have upheld compulsory class arbitration waivers).

In 2002, the Fourth Circuit upheld a class action bar in a mandatory arbitration clause in *Snowden v. CheckPoint Check Cashing*, rejecting plaintiffs' claim "that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages."¹⁰⁴ In *Snowden*, several plaintiffs filed a class action against CheckPoint Check Cashing for charging excessive interest and service fees in violation of the Truth in Lending Act¹⁰⁵ (TILA) and the Racketeer Influenced and Corrupt Organization Act¹⁰⁶ (RICO) as well as violation of state consumer protection statutes.¹⁰⁷ Unlike in *Kristian*, the language of the mandatory arbitration agreement in *Snowden* strictly prohibited class arbitration and contained no savings clause.¹⁰⁸ The court simply rejected the unconscionability argument by noting that both TILA and RICO provide for recovery of attorney's fees "by a prevailing plaintiff."¹⁰⁹ Furthermore, the court flatly rejected "as meritless" Snowden's public-policy argument that "forcing consumers like her to arbitrate consumer protection claims against companies like [CheckPoint] is against public policy relating to consumer protection."¹¹⁰ The court concluded that nothing in the arbitration agreement was "inconsistent with public policy relating to consumer protection."¹¹¹

However, nowhere in the court's analysis does the court discuss the realistic impact of the forced class waiver on plaintiffs such as Snowden.¹¹² The court discussed the potential lack of assent but only as it related to Snowden's claim of "usurious rates of interest and non-licensure."¹¹³ Snowden's arguable lack of

104. *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002). The argument here of course is precisely the argument pointed out in *Amchem* and *Kristian* and recognized by those courts. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Kristian*, 446 F.3d at 31.

105. 15 U.S.C. §§ 1601 et seq. (1994 & Supp. 2000).

106. 18 U.S.C. §§ 1961–1968 (1988).

107. *Snowden*, 290 F.3d at 635.

108. *Id.* at 634. The relevant portion of the *Snowden* arbitration agreement states: "(2) There shall be no authority for any claims to be arbitrated on a class action basis; (3) An arbitration can only decide CheckPoint[']s or your claim and may not consolidate or join the claims of other persons who may have similar claims. . . ." *Id.*

109. *Id.* at 638 ("[A]lthough the Arbitration Agreement provides that each party shall bear the expense of their respective attorneys' fees regardless of which party prevails in the arbitration, such provision expressly does not apply if it is 'inconsistent with the applicable law . . .'").

110. *Id.* at 639.

111. *Id.*

112. *Id.* at 636–39.

113. *Id.* at 637.

assent to the arbitration agreement itself, or its ban on class arbitration, did not suffice to invalidate the waiver by the court's reasoning.¹¹⁴ The court supported its decision with that of the Sixth Circuit in *Burden v. Check Into Cash of Kentucky, LLC*,¹¹⁵ in which the Sixth Circuit, with facts similar to *Snowden*, held that the plaintiffs "could not avoid arbitration by reason of their allegations that the customer agreements containing the arbitration provisions were void *ab initio* under Kentucky law."¹¹⁶ This, of course, is the square holding of *Buckeye Check Cashing*.¹¹⁷ Parties may still be compelled to arbitrate a dispute over a contract containing an arbitration agreement even when the contract itself is otherwise unenforceable.¹¹⁸ Nevertheless, the *Snowden* court refused to consider whether Snowden "never assented in the first place" to the arbitration agreement itself.¹¹⁹

Nor does the *Snowden* court recognize the substantive restriction the arbitration agreement placed upon Snowden and similarly situated plaintiffs.¹²⁰ Unlike the court in *Kristian*, the court here simply relies upon the fact that attorney's fees are potentially recoverable¹²¹ without mention of how "illusory"¹²² this recovery actually may be for a plaintiff with a very small claim.¹²³

114. *Id.* ("Here, Snowden's allegations of usurious rates of interest and non-licensure do not relate specifically to the Arbitration Agreement. Neither do they underlie a claim that Snowden failed to assent to the terms of the . . . Agreement. Therefore, they cannot serve as a basis to uphold the district court's denial of [CheckPoint's] Motion to Compel Arbitration/Stay Proceedings.")

115. *Burden v. Check into Cash of Ky., LLC*, 267 F.3d 483, 489–93 (6th Cir. 2001).

116. *Snowden*, 290 F.3d at 637–38.

117. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447–48 (2006) (holding an arbitration agreement enforceable even when it is contained in a voidable contract).

118. *Id.* at 448–49.

119. *Snowden*, 290 F.3d at 637. Thus, the court did not discuss the first prong of the analysis proposed by this Comment and engaged in by the *Kristian* and *Ting* courts: whether the agreement was the product of a reasonable level of negotiation or the consumer had reasonable alternatives to the transaction. *See infra* Part V.B (discussing the test proposed by this Comment, which incorporates the analysis from *Kristian* and *Ting*).

120. *Snowden*, 290 F.3d at 636–38.

121. *Id.* at 638. Although the arbitration agreement in *Snowden*, as in *Kristian*, prohibited recovery of attorney's fees by the plaintiff "regardless of which party prevails in arbitration," the court refused to invalidate it on those grounds, as had the court in *Kristian*. *Id.* at 638; *Kristian v. Comcast Corp.*, 446 F.3d 25, 50–51 (1st Cir. 2006). However, the *Snowden* court did correctly point out that "such provision expressly does not apply if it is 'inconsistent with the applicable law . . .'" *Snowden*, 290 F.3d at 638 (citation omitted). Consequently, the court determined that Snowden's attorney's fees were recoverable. *Id.*

122. *See Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006) ("The availability of attorney's fees is illusory if it is unlikely that counsel would be willing to undertake the representation.")

123. *Snowden*, 290 F.3d at 638–39.

In fact, the court noted that “the Arbitration Agreement places no limitations upon the substantive remedies available to Snowden in arbitration.”¹²⁴ Clearly, the court refused to recognize the severe “substantive implication” of this “procedural mechanism” as did the court in *Kristian*.¹²⁵ Without access to the class procedure, Snowden will be unable to adequately and affordably vindicate her rights because the costs of doing so would be significantly higher than the potential recovery.

In *Livingston v. Associates Finance*, the Seventh Circuit also refused to invalidate a mandatory arbitration clause which prohibited class arbitration.¹²⁶ There, the Livingstons brought suit against Associates on behalf of a putative class for violation of TILA because they “believe[d] the disclosures [made by Associates in a rate reduction rider] do not reflect the terms . . . and do not disclose the true annual percentage rate, finance charges, and total payments of the loan.”¹²⁷ The Livingstons’ argument, like Snowden’s, *Kristian*’s, and most other plaintiffs’ in these types of cases, was that the costs of arbitrating a single cause of action are “prohibitively high” and that only by allowing class arbitration will they be able to pursue vindication of their claims.¹²⁸ As the court noted, however, the Livingstons’ argument is flawed because the arbitration agreement provided for Associates to pay the Livingstons’ filing fee if the Livingstons were unable to pay it themselves.¹²⁹ Further, the court noted that while the agreement specified that each party shall bear an equal portion of the costs, the agreement also provided that an arbitrator may award attorney’s fees.¹³⁰ Consequently, the court figured that attorney’s fees were, in fact, available in arbitration pursuant to the agreement.¹³¹

124. *Id.* at 639.

125. *Kristian*, 446 F.3d at 54 (1st Cir. 2006).

126. *Livingston v. Assocs. Fin.*, 339 F.3d 553, 559 (7th Cir. 2003).

127. *Id.* at 555.

128. *Id.* This is because, generally, a rational person will not spend more in legal fees in pursuing a claim than they stand to recover on that claim. The Seventh Circuit explained it best when it said, “only a lunatic or a fanatic sues for \$30.” *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

129. *Livingston*, 339 F.3d at 554–55 & n.1 (noting the agreement required Associates to pay the filing fees if the Livingstons believed they were financially incapable of paying it themselves).

130. *Id.* at 555 n.1. Technically, the agreement established that the Commercial Arbitration Rules would determine which party paid the arbitration fees. *Id.* Those rules stated each party shall bear an equal portion of the costs. *Id.* Furthermore, Associates had later agreed to “pay [the Livingstons’] arbitration costs to the extent those costs exceeded what [the Livingstons] would incur in litigation in federal court.” *Id.* at 555–56.

131. *Id.* at 557.

The court reasoned that although prohibitive arbitration costs can be “a legitimate reason to deny arbitration,”¹³² the Livingstons bear the burden of showing “the likelihood of incurring” such costs.¹³³ The court found the plaintiffs had failed to offer specific evidence of prohibitive costs which would preclude them from vindicating their rights through individual arbitration.¹³⁴ This was because the agreement provided for the possibility of Associates paying the Livingstons’ arbitration filing fee, the possibility of being awarded attorney’s fees, and because Associates offered to pay all of the Livingstons’ arbitration costs.¹³⁵ Ultimately, the court concluded the agreement “explicitly [precluded] the Livingstons from bringing class claims or pursuing ‘class action arbitration,’ so [the court was] therefore ‘obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.’”¹³⁶

Of course, this necessarily assumes the parties in fact manifested assent to waive their rights to the class procedure.¹³⁷ In many, if not most, consumer transactions, the consumer is unaware that she is giving up this important right because the language is buried in tiny print or attached as an addendum to the contract shortly after the transaction. While a presumption of awareness and mutual assent may very well comport with the idea of personal autonomy and freedom-of-contract, it does so only when there is a reasonable degree of negotiation or a reasonable alternative to the transaction at issue. Quite clearly, neither exists when consumers are forced to accept standard-form, take-it-or-leave-it contracts.¹³⁸ The *Livingston* court should have first engaged in a determination of whether the agreement was one in which the Livingstons had a reasonable opportunity to either negotiate or reject prior to determining whether it restricted their substantive rights through, for example,

132. *Id.*

133. *Id.* (quoting *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 92 (2000)).

134. *Id.*

135. *Id.* at 555–56 & n.1.

136. *Id.* at 559 (quoting *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995)).

137. *See supra* note 119 and accompanying text (discussing the need for a court to determine whether the plaintiff had even assented to the arbitration agreement in the first place).

138. *But see* Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006) (arguing standard form contracts do not eliminate consumers’ bargaining power and that such contracts actually facilitate bargaining in negotiations).

prohibitively high individual arbitration costs.¹³⁹ Even so, in determining that the plaintiff did not face prohibitively high costs, the court essentially reached the ultimate question in the test proposed by this Comment.

In *Randolph v. Green Tree Financial Corp.—Alabama*,¹⁴⁰ the Eleventh Circuit also refused to invalidate a provision within a mandatory arbitration clause which prevented¹⁴¹ the plaintiff from utilizing class action procedures in arbitration.¹⁴² Randolph purchased a mobile home and financed the purchase with Green Tree Financial Corporation.¹⁴³ Randolph sued Green Tree for violation of the Truth in Lending Act¹⁴⁴ (TILA) “by failing to include the requirement of a vendor’s single interest insurance in its TILA disclosure,” for violation of the Equal Opportunity

139. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (recognizing the prohibitive costs of individual arbitration for plaintiffs with very small claims); *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) (noting the class prohibition forced higher costs upon some claimants than they would have faced pursuing the claim in court, or as a class action).

140. *Randolph v. Green Tree Fin. Corp.—Ala.*, 244 F.3d 814 (11th Cir. 2001).

141. In *Randolph*, unlike in *Kristian*, *Ting*, and *Snowden*, the arbitration clause did not explicitly preclude class action because it was silent as to whether Randolph was allowed to pursue class status. *Kristian*, 446 F.3d at 31–32; *Ting*, 319 F.3d at 1133; *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 634 (4th Cir. 2002); *Randolph*, 244 F.3d at 815. Randolph argued that “silence equates with permission instead of preclusion,” and asked the court to read authorization of class-wide relief into the agreement. *Randolph*, 244 F.3d at 815. The court refused to address the question of whether arbitration could be conducted as a class action when the agreement was “silent on the subject of that type of remedy” because the plaintiff had not preserved the issue for appeal. *Id.* at 816. However, the court noted it had previously held, in *Protective Life Ins. Corp. v. Lincoln Nat’l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989), that arbitrations may only be consolidated when the parties have agreed to it in the arbitration agreement. *Randolph*, 244 F.3d at 816. Consequently, the court’s decision in *Randolph* amounts to a ruling on the enforceability of arbitration clauses that prohibit class action arbitration. See *id.* at 816.

142. *Randolph*, 244 F.3d at 819. The Eleventh Circuit initially held the arbitration agreement “defeats the remedial purposes of the TILA and is unenforceable” because it burdened the plaintiff with arbitration costs that would prohibit her ability to vindicate her statutory claims under TILA. *Randolph v. Green Tree Fin. Corp.—Ala.*, 178 F.3d 1149, 1151 (11th Cir. 1999). The Supreme Court reversed that holding and remanded the cause back to the Eleventh Circuit. *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 92 (2000). The Supreme Court explicitly “decline[d] to reach [Randolph’s] argument that . . . the arbitration agreement is unenforceable on the alternative ground that the agreement precludes [Randolph] from bringing her claims under the TILA as a class action” because the appeals court “did not pass on [that] question.” *Id.* at 92 n.7. Thus, on remand the Eleventh Circuit addressed the question of “whether an arbitration agreement that bars pursuit of classwide relief for TILA violations is unenforceable for that reason.” *Randolph*, 244 F.3d at 816.

143. *Randolph*, 178 F.3d at 1151. The Eleventh Circuit’s initial opinion contains a more elaborate recitation of the facts.

144. 15 U.S.C. §§ 1601 et seq. (2000 & Supp. 2005).

Credit Act¹⁴⁵ (ECA) by “requiring arbitration of all claims,” and sought class certification on behalf of all those “who had entered into similar agreements with Green Tree.”¹⁴⁶ In holding “that a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA,”¹⁴⁷ the court relied upon the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁴⁸ and its own decision in *Bowen v. First Family Financial Services, Inc.*¹⁴⁹ The circuit court noted that in *Gilmer* the Supreme Court stated, “Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”¹⁵⁰

Again, a federal court assumed a plaintiff challenging an arbitration agreement actually manifested an assent to relinquish procedural rights to pursue vindication of a potential wrong and consequently “got what they bargained for” in the end. The fact that often plaintiffs challenging an arbitration clause have not actually “bargained” for the arbitration arrangement or the loss of their procedural rights did not enter the court’s discourse.¹⁵¹ Much like the *Snowden* court, the court here simply assumes consumers who enter a consumer transaction necessarily manifest an assent to the terms of the agreement.¹⁵² This simply isn’t the case in adhesion contracts or other transactions in which mandatory clauses are forced upon the consumer with no opportunity to negotiate the terms or conditions of the deal. Furthermore, it should not be the case that Congress must evince “an intention to preclude a waiver of judicial remedies”¹⁵³ in order for those remedies to be protected from preclusion by would-be

145. 15 U.S.C. §§ 1691–1691(f) (2000).

146. *Randolph*, 178 F.3d at 1152.

147. *Randolph*, 244 F.3d at 819.

148. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (upholding a compulsory arbitration clause in an age-discrimination claim brought under the Age Discrimination in Employment Act and stating the plaintiff had not met his burden of showing that in enacting the ADEA Congress had intended to preclude these claims from arbitration).

149. *Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1341 (11th Cir. 2000) (holding the ECA did not create nonwaivable litigation rights for claims brought under TILA so as to preclude compulsory arbitration clause).

150. *Randolph*, 244 F.3d at 816–17 (quoting *Gilmer*, 500 U.S. at 26).

151. *Id.*

152. *Id.*; see also *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002).

153. *Randolph*, 244 F.3d at 816–17.

wrongdoers, particularly when those preclusions are unfairly foisted upon the unwary.¹⁵⁴

Nevertheless, the court further relied on its own decision in *Bowen* when it recognized

that a class action is an available, important means of remedying violations of the TILA . . . [but that] neither the text nor the legislative history of the TILA establishes that the plaintiffs have a non-waivable right to pursue a class action, or even to pursue an individual lawsuit, . . . in order to obtain remedies for violations of the statute.¹⁵⁵

The court here allows a defendant to force upon a plaintiff an “agreement” in which the plaintiff “waives” his “available, important means of” vindicating his rights, thereby making the admittedly “available important means” unavailable.¹⁵⁶

Clearly, as discussed above, the federal courts are at odds as to how to appropriately answer our question.¹⁵⁷ Uncertainty about how the courts will handle these waiver clauses is causing the opposite of the clauses’ intended effect; it is increasing litigation to determine their enforceability.¹⁵⁸ Still, these courts are not totally off base in their analyses of the problem. Nevertheless, the Supreme Court should bridge the divide soon, and promulgate a judicial standard by which to judge the enforceability of the class action waiver in arbitration clauses.

B. Split Among the States

State courts have also struggled with whether to invalidate compulsory class-action waiver clauses.¹⁵⁹ While it is still unclear

154. In the consumer context, the class action waiver is often slipped into the agreement unbeknownst to the consumer or forced upon the consumer in a take-it-or-leave-it manner. Congress should not have to “evinced an intention” to recognize these secretive and strong-arm business tactics are inherently unfair to the consumer.

155. *Randolph*, 244 F.3d at 817 (quoting *Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1337–38 (11th Cir. 2000)).

156. *Id.* at 816–17. In *Bowen*, the defendant–lender required customers to sign these mandatory binding arbitration agreements before the consumer could obtain a loan. *Bowen*, 233 F.3d. at 1333.

157. See *supra* notes 19–20 and accompanying text (discussing attempts by various courts to answer the question: “Are these total bans on class actions in mandatory arbitration clauses enforceable?”).

158. See Gordon, *supra* note 33, at 19 (noting that in-house counsel at large corporations have been moving away from mandatory arbitration clauses in recent years because of the litigation involved in enforcing them against customers).

159. Compare, e.g., *Fonte v. AT&T Wireless Servs.*, 903 So. 2d 1019, 1025 (Fla. Dist. Ct. App. 2005) (“We find that neither the text nor our review of the legislative history of [the Florida Deceptive and Unfair Trade Practices Act] suggest that the legislature

in many states whether these waivers will preclude plaintiffs from using class arbitration, other states have taken a clear position as to the enforceability of class action waivers.¹⁶⁰

1. States Invalidating Class Action Waivers

a. State Court Action. California has led the states in case law invalidating class action waivers in mandatory arbitration clauses.¹⁶¹ The California Courts have relied mostly on the unconscionability doctrine in striking down these waivers.¹⁶² Recently, other state high courts have reached the same conclusion reached by the California courts; class arbitration waivers in consumer contracts of adhesion are unconscionable and unenforceable.¹⁶³

New Jersey, Illinois, and Washington are the most recent states to join those invalidating such clauses.¹⁶⁴ In August 2006, the New Jersey Supreme Court refused to uphold a trial court and appellate division ruling enforcing a class arbitration bar.¹⁶⁵ Rather, the court held in *Muhammad v. County Bank of*

intended to confer a non-waivable right to class representation.”), and *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003) (holding class action waivers not unconscionable under Illinois law), with *Bellsouth Mobility LLC v. Christopher*, 819 So. 2d 171, 173 (Fla. Dist. Ct. App. 2002) (holding class action waiver substantively unconscionable), and *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 823 (Ill. App. Ct. 2005) (holding class action waiver unconscionable).

160. See, e.g., *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100–01 (N.J. 2006).

161. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1116–17 (Cal. 2005) (holding that class arbitration waivers are unconscionable and unenforceable in certain situations and that the FAA does not preempt the invalidation of such clauses); see also *Cohen v. DirectTV, Inc.*, 48 Cal. Rptr. 3d 813, 814 (Cal. Ct. App. 2006) (striking down a class arbitration waiver in an adhesion contract as unconscionable).

162. See *supra* note 161. While the California courts have invalidated these class arbitration waivers, they have done so only in “certain circumstances.” *Discover Bank*, 113 P.3d at 1112. Notably, such circumstances exist when the waivers tend to be “unlawfully exculpatory,” a legal principle applied generally to contracts in California. *Id.* This, of course, requires a case-by-case analysis like that proposed by this Comment. See *infra* Part V (discussing alternative standard and its case-by-case analysis requirement).

163. See *Kinkel v. Cingular Wireless*, 857 N.E.2d 250, 262, 278 (Ill. 2006) (holding a class arbitration waiver unconscionable and noting that the FAA does not preempt application of state law to the enforceability of a contract provision); *Scott v. Cingular*, 161 P.3d 1000, 1003 (Wash. 2007) (en banc) (holding class action waiver “unconscionable because it effectively denies large numbers of consumers the protection” of the state’s consumer protection statute and “because it effectively exculpates Cingular from liability for a whole class of wrongful conduct”); see also *Muhammad*, 912 A.2d at 100–01 (holding class waiver in arbitration clause unconscionable “[a]s a matter of generally applicable state contract law”).

164. *Supra* note 163.

165. *Muhammad*, 912 A.2d at 103. The contract clause at issue in *Muhammad* prohibited both class arbitrations and participation in class action litigation in court. *Id.* at 92.

Rehoboth Beach, Delaware that the “presence of the class-arbitration waiver in [plaintiff’s] consumer arbitration agreement renders that agreement unconscionable” and unenforceable.¹⁶⁶ Muhammad had taken out a \$200 short-term loan from County Bank for which she paid two \$60 extension finance charges when she was unable to repay the loan on time.¹⁶⁷ The annual percentage rate for the loan was 608.33%.¹⁶⁸ Muhammad filed suit claiming violation of the New Jersey Consumer Fraud Act,¹⁶⁹ civil usury statute, and the state RICO statute by charging illegal interest rates.¹⁷⁰

The court, of course, relied upon the unconscionability doctrine under state law and its own standard governing adhesion contracts.¹⁷¹ In its analysis, the court clearly recognized the value of the class action in “fulfill[ing] the policies of th[e] State,” particularly in the consumer context.¹⁷² In New Jersey, “exculpatory waivers that seek a release from a statutorily imposed duty are void as against public policy.”¹⁷³ The court noted that although class action waivers “are not, in the strictest sense of the term, exculpatory clauses,” because the one here did not “preclude Muhammad from filing an individual claim[,]” it was in effect an exculpatory clause because Muhammad’s claims were so small as to render “individual enforcement of her [statutory] rights . . . difficult if not impossible.”¹⁷⁴ This concern regarding the ability of consumers to recover on claims that would otherwise be too small to pursue singularly drove the decisions in

166. *Id.* at 100–01. The court, however, severed the offending class action bar and enforced the remaining compulsory arbitration agreement. *Id.* at 103.

167. *Id.* at 91.

168. *Id.*

169. N.J. STAT. ANN. § 56:8-2 (West 2001).

170. *Muhammad*, 912 A.2d at 93.

171. *Id.* at 98–101. The court noted, rightfully, that while the FAA “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,” it “does not preclude an examination into whether the arbitration agreement at issue is unconscionable under state law.” *Id.* at 94. The court relied on the four-prong unconscionability standard for adhesion contracts proffered by the court in *Rudbart v. North Jersey District Water Supply Commission*, 605 A.2d 681, 687 (N.J. 1992). *Muhammad*, 912 A.2d at 98. *Rudbart* directed courts to take into account the (1) subject matter of the contract; (2) parties’ relative bargaining position; (3) “degree of economic compulsion motivating the ‘adhering’ party”; and (4) public interests affected, when determining whether to enforce the terms of adhesion contracts. *Rudbart*, 605 A.2d at 687.

172. *Muhammad*, 912 A.2d at 98. The court stated, “The public interest at stake in her ability and the ability of her fellow consumers effectively to pursue their statutory rights under this State’s consumer protection laws overrides the defendants’ right to seek enforcement of the class-arbitration bar in their agreement.” *Id.* at 101.

173. *Id.* at 99.

174. *Id.*

Kristian and *Ting* and is the central argument put forth by those opposed to collective-action arbitration waivers.¹⁷⁵ Although technically attorney's fees were available to Muhammad in the consumer fraud statute under which she brought her claim, the court noted this availability "is illusory if it is unlikely that counsel would be willing to undertake the representation."¹⁷⁶

It is interesting to note that the court made clear its decision in *Muhammad* was not in conflict with an earlier appellate division decision considering "whether class-action waivers were per se unenforceable."¹⁷⁷ The question was not whether there was "inherent conflict . . . between arbitration and the underlying purpose of [the consumer fraud statute]," but whether the "small amount of damages being pursued . . . effectively prevents plaintiff from being able to vindicate the public interests protected by the [consumer fraud statute]."¹⁷⁸ This conclusion, consequently, requires a case-by-case evaluation—something many complain adds unneeded burden to the courts.¹⁷⁹ Nevertheless, it is precisely this type of case-by-case analysis the courts should engage in order to evaluate the enforceability of class action waivers.¹⁸⁰

The Illinois Supreme Court, in October of 2006, used similar reasoning when it struck down as unconscionable a clause prohibiting class arbitration in *Kinkel v. Cingular Wireless, LLC*.¹⁸¹ There, plaintiff filed a class action suit against Cingular claiming violation of the Illinois Consumer Fraud and Deceptive

175. *Kristian v. Comcast Corp.*, 446 F.3d 25, 54–55 (1st Cir. 2006); *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003). As the *Muhammad* court noted, "[C]lass-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action waivers prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys. Although defendants have no obligation to provide counsel to plaintiff, they cannot take action that impedes ordinary citizens' access to representation to vindicate their rights." *Muhammad*, 912 A.2d at 100.

176. *Id.* Muhammad would have been hard pressed to find an attorney willing to take on her case to pursue a claim of roughly \$600. *Id.*

177. *Id.* at 101. The appellate division decision came in *Gras v. Associates First Capital Co.*, 786 A.2d 886, 893 (N.J. Super. Ct. App. Div. 2001), *certif. denied*, 794 A.2d 184 (N.J. 2002), in which the court upheld the class action waiver because there is no "overriding public policy in favor of class actions."

178. *Muhammad*, 912 A.2d at 101.

179. *See Sternlight & Jensen, supra* note 8, at 101; *Gordon, supra* note 33, at 19.

180. *See infra* Part V (discussing a proposed standard to apply to the enforceability of class arbitration waivers, which includes a case-by-case analysis).

181. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006). The court relied on substantive unconscionability to invalidate the class waiver and pointed out that such an analysis was necessarily a case-by-case determination, considering the totality of the circumstances. *Id.* at 265–67.

Business Practices Act¹⁸² (DBPA) for charging an “illegal penalty” in the form of an early termination fee.¹⁸³ The court rejected the argument that the FAA preempted plaintiff’s claim and relied upon the unconscionability doctrine under state contract law.¹⁸⁴ In rejecting the preemption argument, the court noted that “class arbitration cannot be in conflict with the FAA when the Supreme Court has recognized the arbitrability of class claims.”¹⁸⁵ The *Kinkel* court further noted, “[T]he FAA neither expressly nor impliedly preempts a state court from holding that an arbitration clause or a specific provision within an arbitration clause is unenforceable; it merely . . . require[s] that a state court examine the disputed provision in the same manner that it would examine any contract.”¹⁸⁶

In determining that the class action waiver in the *Kinkel* agreement was unconscionable, the court concluded it was “not useful to do a simple head count of the number of state courts to have ruled a certain way on class action waivers.”¹⁸⁷ This is so because each case was an application of a different state’s substantive contract law.¹⁸⁸ The court found that the class action waiver was unconscionable—not because it was included in a mandatory arbitration clause, but “because it is contained in a contract of adhesion that . . . does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged in either a judicial or an arbitral forum.”¹⁸⁹ The court made clear that it was not finding class action waivers per se unconscionable, saying that “[t]he unconscionability of class action waivers must be determined on a case-by-case basis, considering the totality of the circumstances.”¹⁹⁰

The Supreme Court of Washington recently used similar logic to invalidate a class-action arbitration waiver in July of 2007.¹⁹¹ In

182. 815 ILL. COMP. STAT. 505/1 et seq. (2007).

183. *Kinkel*, 857 N.E.2d at 254.

184. *Id.* at 263, 278.

185. *Id.* at 262.

186. *Id.* at 263.

187. *Id.* at 271.

188. *Id.*

189. *Id.* at 278. Essentially, it restricts the plaintiff’s substantive right by imposing prohibitively high costs. When combined with the fact that it was forced upon the consumer in an adhesion contract, which the consumer had no reasonable opportunity to negotiate or reject, the waiver becomes invalid under the analysis proposed by this Comment.

190. *Id.*

191. *Scott v. Cingular*, 161 P.3d 1000, 1009 (Wash. 2007). The facts in *Scott* were very similar to those in *Kinkel*, and the court’s reasoning is nearly identical to that in *Muhammad*. Compare *id.*, with *Kinkel*, 857 N.E.2d at 254, 278, and *Muhammad v.*

Scott v. Cingular, the court explained that “[c]lass actions are vital where damage to any individual consumer is nominal” and that “without class actions, consumers would have far less ability to vindicate the [Washington Consumer Protection Act].”¹⁹² Washington’s strong policy favors “aggregation of small claims for purposes of efficiency, deterrence, and access to justice.”¹⁹³ Because “[p]rivate citizens act as private attorneys general in protecting the public’s interest against unfair and deceptive acts and practices in trade and commerce,” it is essential that consumers be able to bring class actions.¹⁹⁴ Without the ability to arbitrate as a class these consumers would not be able to “represent the public interest” as a private attorney general in vindicating the state consumer protection laws, much less vindicate their own statutory or common law rights.¹⁹⁵

Furthermore, the *Scott* court observed that these mandatory predispute arbitration clauses effectively exculpate the defendant from any legal liability because the “cost of pursui[ng a claim] outweighs the potential amount of recovery.”¹⁹⁶ And, the court recognized, even though the agreement called for Cingular to pay the arbitration filing fee and attorney’s fees, these fees would be “awarded only if the plaintiffs recover at least the full amount of their demand.”¹⁹⁷ Even then, the arbitrator could “consider the amount in controversy in awarding fees.”¹⁹⁸ As the court noted, it is conceivable that an individual plaintiff “could recover 99 percent of a claim and still not be awarded any attorney fees.”¹⁹⁹ Because of these contingencies, and because the claims “‘are too small and too complex factually and legally’ to be adjudicated separately,”²⁰⁰ the ability of an individual consumer to vindicate his rights under the Washington CPA is “illusory”²⁰¹ but the “ability to proceed as a class transforms a merely theoretically possible remedy into a real one.”²⁰²

County Bank of Rehoboth Beach, Del., 912 A.2d 88, 99 (N.J. 2006).

192. *Scott*, 161 P.3d at 1006.

193. *Id.* at 1005.

194. *Id.* at 1006.

195. *Id.*

196. *Id.* at 1007.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 1004 (quoting plaintiff’s declaration of Peter Maier, an attorney specializing in consumer law).

201. *See* *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 97 (N.J. 2006) (noting if victims were only allowed to file individual suits their remedy would be illusory).

202. *Scott*, 161 P.3d at 1007.

Finally, like the *Kinkel* court, the *Scott* court dispensed with Cingular's argument that the FAA governed the contract at issue and required enforcement of the mandatory class action waiver.²⁰³ It noted the FAA only "requires [state courts] to put arbitration clauses on the *same* footing as other contracts, not make them the special favorites of the law."²⁰⁴ Further, as the court so succinctly put it, "[t]he FAA favors arbitration, not exculpation."²⁰⁵

These state court decisions, much like *Kristian* and *Ting*, also incorporate into their analyses the appropriate questions:²⁰⁶ Was the agreement to forego class arbitration fairly negotiated or "bargained for," or was there a reasonable alternative to the transaction? And, if there was no reasonable alternative, did the class prohibition effectively restrict the plaintiffs' substantive rights by, for example, imposing "prohibitively high" litigation costs upon potential plaintiffs?

b. State Legislative Action. Other states have taken legislative action in an attempt to invalidate the collective-action arbitration waiver. Both Oklahoma and New Mexico have enacted legislation intended to prevent the use of class action bans in arbitration agreements.²⁰⁷ While it appears as though these particular statutes have been untested, it is unlikely they would withstand judicial scrutiny. The Supreme Court has made clear that the FAA applies in state courts as well as in federal courts.²⁰⁸ Consequently, courts must apply the FAA even when it

203. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263 (Ill. 2006); *Scott*, 161 P.3d at 1008–09.

204. *Scott*, 161 P.3d at 1008.

205. *Id.*

206. *See supra* notes 100–02 and accompanying text (discussing the analysis in *Kristian* and *Ting* that could be the basis of a two-prong test in deciding if a waiver would be enforceable).

207. OKLA. STAT. ANN. tit. 12, § 1880 (West Supp. 2007) ("[C]lauses . . . denying the ability to consolidate arbitrations or to have arbitration for a class of persons involving substantially similar issues . . . shall be closely reviewed for unconscionability"); N.M. STAT. ANN. § 44-7A-5 (West 2007) ("In the arbitration of a dispute . . . a disabling civil dispute clause contained in [the contract] is unenforceable against and voidable by the consumer. . . . [T]he consumer . . . may seek judicial relief to have the clause declared unenforceable in a court . . .").

208. *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984) (noting that the FAA applies to any contract involving commerce and is not "subject to any additional limitations under state law"); *see also* *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing.'").

conflicts with state arbitration law.²⁰⁹ The Oklahoma and New Mexico state statutes conflict with the FAA because they are specifically directed at arbitration clauses and not generally applied to all contracts.²¹⁰ Therefore, such state statutes would most likely be impotent in a direct challenge of an arbitration clause. This is unless states enact statutes which generally apply to all contracts and are not limited in scope to arbitration clauses or any other “limited set of transactions.”²¹¹

2. *States Upholding Class Action Waivers.* Many state courts have upheld the validity of class action waivers for various reasons.²¹² These courts often have interpreted the FAA as

209. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”). In *Doctor's Associates*, a Montana statute provided that notice of an arbitration requirement must be “typed in underlined capital letters on the first page of the contract.” *Id.* at 684 (quoting MONT. CODE ANN. § 27-5-114(4) (1995) (amended 1997)). The Court determined that this was an attempt to “singl[e] out [the] arbitration provisions for suspect status.” *Id.* at 687. Instead, the Court stated that “such provisions be placed ‘upon the same footing as other contracts.’” *Id.* (quoting *Scherk v. Alberto-Culver Co.* 417 U.S. 506, 511 (1974)). The Court noted that § 2 of the FAA preempted the Montana statute because “the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.” *Id.*

210. *See Doctor's Assocs.*, 517 U.S. at 687 (striking down a Montana statute that was applicable *only* to arbitration agreements). Arguably, these statutes merely codify, as to arbitration agreements, generally applicable contract defenses that would apply to any and all contracts under state law, thereby not conflicting with the federal policy. However, that argument is relatively weak in light of the Supreme Court’s decision in *Doctor's Associates*. *Id.* However, in *Doctor's Associates*, the Montana statute at issue dealt specifically with the form of notice required by “specifically and solely contracts ‘subject to arbitration,’” and “not ‘any contract.’” *Id.* at 683 (quoting MONT. CODE ANN. § 27-5-114(4) (1995) (amended 1997)).

211. *See Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (finding California’s Consumer Legal Remedies Act was not a law of “general applicability” because it applied only to noncommercial and consumer contracts); *see also Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (“[S]tate law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001) (“[A]s long as state law defenses concerning the validity, revocability, and enforceability of contracts are generally applied to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA.”). Of course, unconscionability is a generally applicable contract defense, and it can and should be used by the courts to invalidate these clauses. *See Doctor's Assocs.*, 517 U.S. at 687 (“Thus, generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA].”). Perhaps state legislatures could begin to fashion these statutes so as to apply to any contract that prohibitively restricts a plaintiff’s substantive rights. *See infra* Part IV.D (discussing the substantive right restriction argument for striking down class action arbitration waivers).

212. *See Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (upholding a class arbitration waiver while stating, “arbitration clauses are not unenforceable simply because they might render a class action unavailable”); *Fonte v. AT&T Wireless, Inc.*, 903 So. 2d 1019, 1025 (Fla. Ct. App. 2005) (allowing waiver of the

preempting a particular challenge.²¹³ Others have conducted an unconscionability analysis and found the particular collective action waivers in question were not unconscionable under the state law at issue.²¹⁴

Just as two states have enacted legislation in an attempt to prevent the use of these class action waivers in arbitration agreements,²¹⁵ Utah has enacted state legislation that generally legitimizes class action waivers as long as they meet certain form requirements meant to ensure that consumers know and understand they are waiving the right to bring their claims as a class action.²¹⁶ It is questionable, also, whether this type of statute would be upheld given the Court's position as stated in *Doctor's Associates*.²¹⁷

Many federal and state courts, as well as some state legislatures, have weighed in on whether arbitration clauses that expressly prohibit class action arbitration are enforceable in consumer contracts. While these courts have often reached different conclusions, their fundamental analyses contain, for the most part, the essential elements comprising the test synthesized and proposed by this Comment. Nevertheless, there remains an uncertainty in the enforceability of these express class waivers with the various analyses employed by the courts. Therefore, the Supreme Court should address this question soon and adopt the analysis proposed in Part V of this Comment.

right to class action); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166–67 (Haw. 1996) (noting that elimination of class action did not make agreement inherently unfair); *Wilson v. Mike Stevens Motors, Inc.*, No. 92468, 2005 WL 1277948, at *9 (Kan. Ct. App. May 27, 2005) (finding class action waiver not unenforceable under state law); *Walther v. Sovereign Bank*, 872 A.2d 735, 751 (Md. 2005) (finding that state law policy strongly favors enforcement of arbitration agreements); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926 (N.D. 2005) (“Merely restricting the availability of a class action is not, by itself, a restriction on substantive remedies. The right to bring a class action is purely a procedural right.”); *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (N.Y. App. Div. 2003) (holding class action waiver enforceable as not contrary to state law or public policy); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001) (enforcing class action waiver in arbitration agreement).

213. See *supra* note 212.

214. See *supra* note 212.

215. See *supra* note 207 and accompanying text (discussing legislation enacted by Oklahoma and New Mexico to prohibit class action bans in arbitration agreements).

216. UTAH CODE ANN. § 70C-3-104 (Supp. 2006) (allowing class waivers in “closed-end consumer contract[s]” as long as they are in bold type or all capital letters); UTAH CODE ANN. § 70C-4-105 (Supp. 2006) (allowing class waivers in “open-end consumer credit contract[s]” as long as they are in bold type or all capital letters).

217. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). See *supra* note 209 and accompanying text (discussing the *Doctors Associates* ruling upholding state law only when it places arbitration agreements on the same footing as other contracts); see also *supra* note 93 and accompanying text (discussing an example of a narrowly defined state statute that was struck down by the Court).

IV. THE ARGUMENTS

There are multiple arguments offered by both sides of the collective-action waiver debate in support of their own particular view of the issue. This Part discusses four common arguments and points out the relative strengths and weaknesses of each.

A. *Economic and Judicial Efficiency*

Proponents of arbitration, and particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute.²¹⁸ Yet, while increased judicial efficiency is certainly an admirable goal, at what and whose expense should it be incurred?²¹⁹ It may be true that in some cases arbitration will be less expensive to the parties, less taxing to the system,²²⁰ and able to generate an equitable outcome not decidedly disparate from that which could have been achieved in a court at law.²²¹ But clearly in others, as we have seen, it is not.²²² Some attorneys now are even reporting that due to the unsettled questions of enforceability, these

218. See *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1202 (C.D. Cal. 2006) (“Finally, and most significantly, the NAF is an inexpensive, convenient, and efficient forum for [the plaintiff] to resolve his disputes with [the defendant].”); *Walther v. Sovereign Bank*, 872 A.2d 735, 753 (Md. 2005) (“The Court of Special Appeals noted that the [NAF] arbitration would likely be more expedient and less procedurally cumbersome for petitioners than would a circuit court trial.”).

219. “One could speculate that class-arbitration waivers are viewed as more efficient because of the likelihood that fewer individual consumers would seek redress than those who would be included as part of a class.” *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 101 (N.J. 2006). “The purpose of arbitration, however, is not to discourage consumers from seeking vindication of their rights.” *Id.* Potential plaintiffs should not bear the cost of this increase in efficiency alone. Eliminating plaintiffs’ ability to seek redress as a class forces them to pay a “prohibitively high” cost for such increased efficiency because it imposes upon them greater costs than they would face if they were able to file in court or as a class. *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003). Wronged consumers should not bear the costs of an increase in judicial efficiency while corporate defendants escape liability for those wrongs.

220. Massey, *supra* note 21, at 3 (“[D]ue to the final and binding nature of arbitration less than 1.5% of all arbitration cases heard in America ever end up in court.”).

221. See Berkowitz, *supra* note 38, at 20 (“ADR often provided a more streamlined process, which I welcomed. Because the proceedings were held outside the courts, I didn’t have to follow a bunch of complicated—and often needless—rules. What’s more, private judges could be counted on to give me and my opposing counsel something all too rare in the harried courts of California: their full attention.”).

222. See Kevin A.S. Fanning, *The Arbitration “Alternative”*, BUS. CREDIT, Nov./Dec. 2003, at 1 (examining the drawbacks of arbitration); see also *supra* Part III.A.1 (describing court decisions that have recognized the increased costs associated with arbitration for some plaintiffs).

arbitration clauses are actually becoming too costly and unpredictable.²²³

Moreover, many commentators, as well as some courts, have questioned the efficiency gained by arbitration, particularly where class arbitration is forbidden.²²⁴ For example, in *Ting v. AT&T*, it would be hard to argue that conducting 18 million individual arbitration proceedings is more efficient than arbitrating all similar claims as a class.²²⁵ Of course, as many critics point out—as did the courts in *Kristian* and *Ting*—would-be defendants essentially eliminate the vast majority of those claims by prohibiting class arbitration because the costs of pursuing them individually are prohibitively high.²²⁶ In that sense, certainly the defendant reaps a significant economic efficiency gain. But the balance of any efficiency gain should not tip disproportionately in favor of corporate defendants at consumers' expense.

Finally, some suggest allowing companies to protect themselves from the high costs of litigation and the potential of paying damages on “frivolous” class claims ultimately benefits consumers.²²⁷ Because companies are able to keep their costs down by mitigating risk, they will pass cost savings on to the consumer in the form of lowered prices. However, this argument fails to account for the costs to the would-be class members whose particular losses will not be overcome by lower prices to the general public.²²⁸ As we have seen, without access to the class

223. See Gordon, *supra* note 33, at 19 (discussing the rise in arbitration cost due to increased litigation on enforceability of arbitration clauses).

224. *Muhammad*, 912 A.2d at 101; Sternlight, *supra* note 16, at 49–53; Sternlight & Jensen, *supra* note 8, at 92.

225. *Ting v. AT&T*, 319 F.3d 1126, 1134 (9th Cir. 2003) (“AT&T mailed the CSA . . . [t]o approximately 18 million of its . . . customers . . .”). Plaintiff Ting brought the class action on behalf of those 18 million customers. *Id.* Clearly, a single proceeding would be more judicially efficient than forcing each of the 18 million customers to bring their complaints individually.

226. See *supra* note 79 and accompanying text (discussing the Court's reasoning in *Kristian*); see also *Ting*, 319 F.3d at 1151 (noting prohibitive arbitration costs effectively deter complainants from vindicating their statutory rights).

227. See Sternlight & Jensen, *supra* note 8, at 92–93 & n.107 (discussing the economic benefit to consumers of allowing corporations to utilize these types of exculpatory clauses); see also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 94 (arguing that by allowing class-wide litigation to proceed in face of previously contracted mandatory arbitration clauses, some courts have raised costs to businesses and, therefore, raised prices to consumers).

228. First, it is likely that consumers who have been “wronged” by the defendant would cease purchasing the particular product or service. Therefore, they would not long gain the advantage of the lowered prices. Secondly, why should lower prices for the masses be absorbed by the few, or many, potential class members who have suffered

procedure, many individuals would not pursue vindication of their claims due to the “prohibitively high” costs of doing so.²²⁹ These claimants would likely not be able to secure legal counsel to represent them individually because the damages sought are so often relatively small.²³⁰ Collectively, these claims could amount to millions of dollars, creating a windfall for would-be defendants who may have broken the law.²³¹

B. Freedom of Contract

Proponents of the class action waiver also seek refuge behind the freedom-of-contract theory. They argue that parties to an agreement should be allowed to assent to any terms of agreement they desire, and companies should be allowed to use contracts to limit their risk of exposure to litigation.²³² They support their argument with court decisions resting on the importance of contract freedom to public policy.²³³ They may even claim that “because arbitration is a creature of contract, it may be impossible to conduct a class action in arbitration.”²³⁴ These arguments all rest upon the manifestation of assent to the terms of the agreement, which is inherently underpinned by the parties’ intent.

damages as a result of the defendant’s actions?

229. *Kristian v. Comcast Corp.*, 446 F.3d 25, 55 (1st Cir. 2006); *Ting*, 319 F.3d at 1151; *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006); *Muhammad*, 912 A.2d 100–01.

230. *See, e.g., Kinkel*, 857 N.E.2d at 268, 275; *Muhammad*, 912 A.2d at 91; *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007).

231. For instance, in a case like *Ting*, with 18 million potential claimants, if the dispute was over as little as an extra \$10 fee that was wrongly charged, these claims in likely would not be pursued without the ability to consolidate to a class. Consequently, the defendant would stand to theoretically gain a \$180,000,000 windfall.

232. *See* Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT’L L. 1189, 1189–93, 1195–96 (2003); *see also* Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL’Y ANALYSIS, No. 433, Apr. 18, 2002, at 2, 4, available at <http://www.cato.org/pubs/pas/pa433.pdf> (touting the FAA as pro-contract and insisting that arbitration gives consumers a benefit of choice of “many alternatives”).

233. *Banfield v. Louis*, 589 So. 2d 441, 446 (Fla. Dist. Ct. App. 1991) (“[I]t is a matter of great public concern that freedom of contract be not lightly interfered with.” (quoting *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101 (Fla. 1944)); *Chazen v. Trailmobile, Inc.*, 384 S.W.2d 1, 3 (Tenn. 1964) (“[P]ublic policy is best served by the freedom of contract and this freedom is prompted by allowing the parties to limit their liability . . .”).

234. *Bennett*, *supra* note 36, at 10 (“The thinking is that all the absent members of the class may not have consented to arbitration (and the counter-party to the class may not have consented to arbitration with the class as a whole, rather than in individual, separate arbitration proceedings).” (footnote omitted)). Of course, in the consumer context the class members are likely to have all agreed—either knowingly or not—to the same arbitration agreement because of the standard form nature of the contracts in the transaction.

Even the *Kristian* court noted in its analysis of the arbitrability of the class action waiver that the “cornerstone here is an assumption about the intent of the contracting parties to an arbitration agreement.”²³⁵ In adhesion contracts, however, the intent of the consumer is displaced by the imposition by one party of its own preferred terms upon the inferior party. Moreover, the Supreme Court intimated in *Bazzle* that class action was available in arbitration when the agreement was silent on the matter; the clause’s silence indicated the absence of the parties’ intent to waive the class procedure.²³⁶ If it can be said that forcing an arbitration clause containing a class prohibition upon a consumer effectively overrides and mutes the consumer’s intent—or displaces it with the defendant’s intent—then class action waivers in such agreements should not be enforceable because the consumer did not assent to such a waiver. Courts should not allow defendants to impose such prohibitions upon consumers because the consumers’ intent is effectively absent.²³⁷

The freedom-of-contract proponents label judicial intervention of these clauses as unneeded paternalism.²³⁸ Certainly, the voiding of exculpatory clauses is essentially a paternalistic act.²³⁹ But, “[t]here is no avoiding the need for some measure of paternalism.”²⁴⁰ Exculpatory clauses may be enforceable if the “term is fairly bargained,”²⁴¹ but when large corporations force upon their customers an agreement that essentially exculpates the corporation from any liability²⁴² and

235. *Kristian v. Comcast Corp.*, 446 F.3d 25, 38 (1st Cir. 2006).

236. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–52 (2003).

237. This, of course, assumes there in fact was no reasonable degree of negotiation and no reasonable alternative to the transaction at issue. If, however, the consumer had a reasonable alternative to the transaction by which he could secure the same or similar products or services without being subjected to the class waiver, and the consumer elected to enter the transaction anyway, then his acceptance of the contract would equate to his intent to manifest assent to the class waiver.

238. Cf. Horacio Spector, *A Contractarian Approach to Unconscionability*, 81 CHI-KENT L. REV. 95, 97–99 (2006) (discussing the role of paternalism supporting the unconscionability doctrine and proffering nonpaternalistic defenses of the doctrine); see also Julia B. Strickland & Stephen J. Newman, *Shock Waives*, L.A. LAW., Mar. 2006, at 22, 22, available at <http://www.lacba.org/files/lal/Vol29No1/2240.pdf> (discussing the “tension” between freedom of contract and paternalism).

239. Hugh Beale, *Inequality of Bargaining Power*, 6 OXFORD J. OF LEG. STUDIES 123, 134–35 (1986).

240. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 34 (1962).

241. RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981) (restating the law of exculpatory contract clauses tending to exempt a seller of a product from liability for physical harm to the consumer).

242. Of course, as the court in *Muhammad* noted, many of these clauses are not technically exculpatory because they do not actually prohibit plaintiffs from bringing an individual suit. *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 99

virtually eliminates the consumers ability to bring suit on her claims, some degree of paternalism is required. These types of contracts are “inconsistent with basic notions of individual self-fulfilment [sic]—an individual should not be free to agree not to be free.”²⁴³

Of course, consumers have the right to not agree to such terms by not entering into the transaction. Technically, this is correct. Consumers are theoretically free to choose not to enter a particular transaction for a service or product, or choose to enter the transaction and contract away their right to bring a class action. However, as most consumer advocates point out,²⁴⁴ and the courts are beginning to recognize,²⁴⁵ these class action waivers show up in transactions in which the consumer has no realistic option of turning away.²⁴⁶ In these situations the consumer’s choice is to accept the terms of the agreement, however onerous they may be, or go without the product or service. This argument may well be defended when the product or service is a flat screen television or a Caribbean cruise. But, it is hard to argue that such a choice, or lack of choice, is inherently fair under the freedom-of-contract theory when the product or service is health care or a home mortgage.²⁴⁷ That is why part of the initial question courts should be asking is whether there was a reasonable alternative to entering into the contract or

(N.J. 2006). But, they are effectively exculpation clauses because the barriers to bringing those individual suits are such that they will not be brought. *Id.*

243. Michael J. Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism*, in *THE THEORY OF CONTRACT LAW* 45, 48 (Peter Benson ed., 2001) (discussing voluntary enslavement contracts).

244. See Sternlight, *supra* note 3, at 19. For those who argue for striking down class action waivers, the cause has seemingly ceased to be about vindicating an individual plaintiff’s rights and become more about changing a standard corporate practice. See generally Gilles, *supra* note 1, at 375; Sternlight, *supra* note 3, at 19–21.

245. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 266 (Ill. 2006); *Muhammad*, 912 A.2d at 99.

246. Certainly, the consumer could always, at least theoretically, refuse to enter the transaction. But that is not always reasonable. There are certain essential products and services needed by every consumer. Also, many times companies offering the same or very similar products—such as cell phones or computers or vacation cruises—all have similar limiting clauses, so there really is no choice. See Beale, *supra* note 239, at 133 (discussing unfairness in exculpation clauses even when the buyer is not being exploited and there is no intent by the seller to exploit the buyer’s limited bargaining power).

247. See *id.* at 134 (“It can certainly be argued that even if the seller is not acting in any way improperly by refusing to make a concession, the customer is justified in complaining of unfairness when the effect of the clause will be to leave him ‘in need,’ with some basic interest—his interest in income maintenance, for example—unprotected. Thus a clause that would leave the customer with no remedy if his crop fails because he has been supplied with defective seed, will be unfair if the customer cannot insure against the loss; a clause excluding liability for death or personal injury will be unfair if the customer is unlikely to be fully insured against these risks.”).

transaction. If so, the consumer's intent to assent to the agreement may fairly be assumed. If not, the court would then engage in the second prong of the proposed test: Whether the waiver restricted the plaintiff's substantive rights.

C. Unconscionability

These arguments and questions essentially derive from the unconscionability framework, which has been the primary doctrine used by courts to invalidate class action waivers.²⁴⁸ Although this vague²⁴⁹ contract doctrine was "intended to apply only to standard form contracts,"²⁵⁰ it is not limited in use to any certain type of contract or agreement.²⁵¹ Unconscionability, as we have seen, presents the best option for both state and federal courts looking to invalidate collective action waivers in the face of the strong public policy favoring arbitration.²⁵²

Clearly, an unconscionability argument is never a plaintiff attorney's primary choice of legal theory on which to pursue a claim. Nevertheless, this last resort theory has recently found favor with courts trying to strike down the collective action waivers in arbitration clauses. Until the Supreme Court weighs in on the enforceability of these waivers, unconscionability under state law—as a generally applicable contract defense—may continue to be the best tool available to courts wishing to limit the scope and use of onerously restrictive arbitration clauses.

D. Substantive Right Restriction

The courts of appeals and state courts that have struck down class action arbitration waivers have focused on the restriction such provisions place upon the plaintiff's ability to use a procedural tool to vindicate a substantive right.²⁵³ This perhaps is the strongest

248. *Kristian v. Comcast Corp.*, 446 F.3d 25, 63–64 (1st Cir. 2006); *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003); *Muhammad*, 912 A.2d at 101.

249. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW, CASES AND MATERIALS*, 566 (5th ed. 2003).

250. *Id.*; see generally Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing the history of the drafting of unconscionability clause in the Uniform Commercial Code).

251. See, e.g., *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 265 (Ill. 2006) ("[T]he doctrine of unconscionability should be at least as protective of individual consumers who enter into contracts with commercial entities as it is of one business that enters into a contract with another business.").

252. *Cf. Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA].").

253. See *supra* Part III.A.1 (discussing court decisions that have recognized the

argument for invalidating compulsory collective action waivers. This issue obviously also arises in an unconscionability analysis and has been the key reason some state courts have found bans on class action arbitration unconscionable.²⁵⁴ However, it is particularly important in determining the enforceability of a class arbitration waiver in the standard proposed by this Comment. Even when an agreement can be found by the courts to be an adhesion-type contract that imposes upon the consumer the class action prohibition with no negotiation, the court could nevertheless uphold the enforceability of the waiver if it did not foreclose the plaintiff's ability to vindicate her rights, such as by imposing prohibitively high arbitration costs. Furthermore, if there had been, prior to the agreement, a reasonable alternative to the transaction such that the consumer could have reasonably chosen not to enter the transaction in question, the waiver should be upheld. But, the courts must recognize—as have the First and Ninth Circuits, and the New Jersey, Illinois, and Washington Supreme Courts—very often when consumers are prohibited from joining their claims in class status, the low value of their individual claims will effectively prevent them from bringing those claims altogether.

V. THE NEED FOR A JUDICIAL STANDARD

Collective action waivers in mandatory arbitration clauses are not inherently evil.²⁵⁵ As Professor Sternlight pointed out over seven years ago, the collective action waiver and mandatory arbitration agreement can peacefully coexist in contracts between sophisticated parties that have relatively equal bargaining power and incentive, and have engaged in some degree of give-and-take negotiation.²⁵⁶ Under those circumstances, negotiated agreements to arbitrate and waive collective action proceedings add significant value to parties seeking to mitigate risk through contract.²⁵⁷ Such negotiated contracts are valid and enforceable, and courts will hold parties to that for which they have “bargained.”²⁵⁸

substantive restriction that mandatory arbitration clauses realistically place upon potential plaintiffs).

254. See *Kinkel*, 857 N.E.2d at 270–74 (finding waiver unconscionable solely on grounds of substantive unconscionability).

255. See Beale, *supra* note 239, at 133 (explaining why compulsory, and seemingly exculpatory, clauses used by businesses that are forced upon customers in a “take it or leave it” matter are not always “sinister exploitation”).

256. See Sternlight, *supra* note 16, at 123 (noting parties should be able to choose how to resolve disputes).

257. For instance, it allows business organizations to reduce their exposure to risk, enabling them to more precisely plan their operations and reduce their costs.

258. See *infra* notes 278–79 and accompanying text (suggesting a two-prong test for

However, the balance between efficiency and economy and the need to protect vulnerable consumers is delicate as is the need to preserve important legal doctrines like freedom-of-contract.²⁵⁹ It is specifically in the consumer context where the coexistence of mandatory arbitration clauses and collective action waivers cause problems.²⁶⁰ In this context, these clauses tend to be used as “effectively an exculpatory”²⁶¹ measure, and thus the courts have begun to invalidate them.²⁶²

A. *Why Congress Need Not Intervene: S. 1782, H.R. 3010, & H.R. 1433.*

While some advocate congressional action,²⁶³ more legislation and congressional meddling is not the answer. The massive lobby most consumer corporations enjoy with Congress would most likely prevent Congress from taking any meaningful action.²⁶⁴

Nonetheless, there are at least two bills currently pending in Congress that purport to solve this arbitration problem.²⁶⁵ However,

enforceability of any agreement, wherein the preliminary analysis should determine if the contract was a product of a negotiation between sophisticated parties with similar bargaining positions).

259. See Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW*, *supra* note 243 at, 118, 184 (discussing the unconscionability doctrine and the “relation between contractual liberty . . . and contractual fairness”); see also *supra* note 233 (discussing court decisions that emphasize the importance of freedom of contract to public policy).

260. *Supra* notes 7–9 and accompanying text (discussing the present debate on the problems of mandatory arbitration clauses and the enforceability of class action waivers).

261. *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 99 (N.J. 2006) (“In such circumstances a class-action waiver can act effectively as an exculpatory clause.”).

262. *E.g., id.* at 99–100.

263. See Gilles *supra* note 1, at 378–79 (advocating a change to Rule 23 of the Rules of Civil Procedure, which would make the procedures of Rule 23 nonwaivable by standard-form adhesion contracts); see also Sternlight & Jensen, *supra* note 8, at 103 (claiming public policy and efficiency would be better served by enactment of federal legislation prohibiting the use of class action bans in arbitration agreements). Some would even argue that congressional action as of late actually has done more to “close the courthouse door” to citizens than to increase their ability to have their day in court. See Arthur H. Bryant, *Fighting to End the ‘Ban Litigation’ Crisis*, *TRIAL*, July 2006, at 50, 50, available at <http://www.atla.org/Publications/trial/0607/bryant1.aspx> (noting that “Congress and state legislatures are increasingly considering—and passing—legislation that cuts off Americans’ access to courts” including the Marriage Protection Act of 2005 and the Pledge Protection Act of 2005).

264. In 2006, total lobbying dollars spent topped \$2.5 billion, led by pharmaceutical and health products, insurance, electric utilities, and computer and internet industries. See Lobbying Spending Database, <http://www.opensecrets.org/lobbyists/overview.asp?showyear=2006> (last visited Feb. 29, 2008).

265. See Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); Consumer Fairness Act of 2007, H.R. 1443, 110th Cong. (2007).

these bills are overly broad. The proposed Arbitration Fairness Act of 2007 (AFA) would make mandatory arbitration clauses invalid and unenforceable in consumer transactions, employment contracts, and franchise disputes.²⁶⁶ The Consumer Fairness Act of 2007 would prohibit “arbitration clauses imposed on consumers without their consent.”²⁶⁷ The AFA, at the time of this writing, enjoys the support of fifty-three cosponsors in the House, six in the Senate, and numerous consumer-rights activist groups.²⁶⁸ Nevertheless, as some have pointed out, the incredible corporate lobby may prevent its passage.²⁶⁹ The U.S. Chamber of Commerce opposes the bill, saying “it would severely damage an alternative dispute resolution system that consumers and businesses have relied on for decades, disrupt current commercial arbitration practices, and increase litigation.”²⁷⁰ Others claim it “may have significant negative economic effects and . . . make worse off the very parties whom defenders of H.R. 3010 are trying to protect.”²⁷¹

266. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4 (2007). The bill broadly defines “consumer dispute” as “a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit.” Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 3 (2007).

267. Consumer Fairness Act of 2007, H.R. 1443, 110th Cong. § 1003 (2007). The bill defines a “consumer transaction” as “the sale or rental of goods, services, or real property, including an extension of credit or the provision of any other financial product or service, to an individual in a transaction entered into primarily for personal, family, or household purposes.” Consumer Fairness Act of 2007, H.R. 1443, 110th Cong. § 1002 (2007). The bill broadly defines a consumer as “any individual.” *Id.*

268. See H.R. 3010: Arbitration Fairness Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-3010> (last visited Feb. 29, 2008) (showing a list of representatives supporting the version of the bill in the House); S. 1782: Arbitration Fairness Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1782> (last visited Feb. 29, 2008) (listing senators supporting the bill).

269. Elizabeth Warren, *Cleaning Up the Fine Print*, WARREN REPORTS ON THE MIDDLE CLASS, Sept. 27, 2007, http://tpmcafe.talkingpointsmemo.com/2007/09/27/cleaning_up_the_fine_print (“And most important for the legislative process, the industries that use mandatory arbitration have a lot more money for lobbying campaigns and make a lot more political contributions than the consumer groups.”); see also *supra* note 264.

270. U.S. Chamber of Commerce, *Capital Roundup: Transportation Bill Moves*, USCHAMBER.COM MAGAZINE, Nov. 2007, http://www.uschambermagazine.com/content/0711_2.htm (listing the Chamber’s position on the various bills introduced in the Congress); U.S. Chamber of Commerce, U.S. Chamber on Equal Employment Opportunity Issues, <http://www.uschamber.com/issues/index/labor/eoo.htm> (last visited Feb. 29, 2008) (“The Chamber supports the right of employers and employees to enter into pre-dispute agreements that obligate either party to resolve employment issues through arbitration as opposed to litigation. . . . Prohibiting binding arbitration would only continue to move more disputes into courts, increase costs, and decrease the chances of amicable settlement.”).

271. *Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 3 (Oct. 25,

Regardless of who proves correct, the outright elimination of arbitration as a contract tool—even in consumer contracts—is not the most appropriate response to the crisis at hand.²⁷² As many point out, the AFA would eliminate predispute arbitration clauses in areas such as employment and securities law where parties often are sophisticated entities with the bargaining power to strike a reasonable deal, which may include a predispute arbitration clause prohibiting class action.²⁷³ As it stands, the AFA would eliminate the use of predispute arbitration waivers altogether from these areas. In that way, the AFA is all too paternalistic. Furthermore, the AFA would nullify arbitration agreements in existing contracts, many of which may have been willingly negotiated and would pass the rigorous analysis proposed here.²⁷⁴ Arguably, this alone would increase litigation and dispute resolution costs.²⁷⁵ Finally, while arbitration—and particularly the mandatory arbitration clause—has its ills, the real problem lies with the clauses that ban a party's right to pursue the arbitration via a class action. There, the AFA's cure is worse than the disease.²⁷⁶

Because Congressional action would tend to be overly broad and restrictive, this Comment rejects the notion that federal

2007) [hereinafter *AFA Hearings*] (statement of Peter B. Rutledge, Assoc. Professor of Law, Columbus School of Law, Catholic Univ. of Am.).

272. In fact, problems inherent to arbitration and potential solutions are well beyond the scope of this Comment. This Comment focuses on the problems associated with the exclusion of class action as a procedural tool in arbitration. The courts have and should remedy this particular issue by judicial doctrine. An all-out ban on predispute arbitration clauses in any area of the law is an overreaction and is counter to notions of freedom-of-contract.

273. Robert Arrington, *Arbitration Fairness Act of 2007 Could Hinder Future Arbitration*, BUS. INSIDER, Oct. 2007, at 1, 1, available at <http://www.tnchamber.org/insider/Oct2007.pdf> (“Moreover, as drafted, the legislation is so paternalistic that it would prevent a corporation from agreeing, even with a highly compensated executive officer, for the arbitration of statutory employment disputes, in advance of such a dispute arising.”).

274. See *AFA Hearings*, *supra* note 271, at 1, 5 (testimony of Securities Industry and Financial Markets Association) (advancing multiple ways in which the AFA would “undermine arbitration generally as a dispute resolution forum,” and noting how the elimination of predispute arbitration clauses would hurt most plaintiffs, particularly those not “wealthy” enough to “roll the dice with litigation”).

275. See *AFA Hearings*, *supra* note 271, at 16 (statement of Peter B. Rutledge, Assoc. Professor of Law, Columbus School of Law, Catholic Univ. of Am.) (proposing that eliminating arbitration from employment context “would increase aggregate dispute resolution costs approximately fourfold or approximately \$88 million”).

276. *Id.* at 3 (“[E]liminating predispute arbitration agreements would have a net negative effect on the economy, making worse off the very people whom Congress is seeking to protect.”); see also Perlmutter & Schuelke, LLP, *How Arbitration Steals Your Day in Court*, <http://www.civtrial.com/blog/litigation/how-arbitration-steals-your-day-in-court.html> (last visited Feb. 29, 2008) (“As for us, we continue to think that arbitration is appropriate in many cases. . . . [W]e’re opposed to mandatory arbitration agreements, but do support arbitrating some cases as the disputes warrant.”).

legislation is required to strike the proper balance and create the needed protection against prohibitions on class arbitration. Rather, at its first opportunity, the Supreme Court should take up the question of the enforceability of collective action prohibitions in mandatory arbitration clauses, specifically in consumer contracts.²⁷⁷

B. Proposed Test

The Court should adopt the essential reasoning of those courts that have addressed this issue to date.²⁷⁸ In doing so, the Court should establish a two-prong analysis by which the Court would determine if the agreement in question was enforceable. This analysis would begin with determining if the contract was a product of a negotiation between sophisticated parties with similar bargaining positions. If the Court so determined, the agreement would be valid and enforceable.²⁷⁹ If, however, the Court determined the contract is one in which there was little or no negotiation or it was a standard-form or adhesion contract and the plaintiff had no reasonable alternative to the transaction,²⁸⁰ the Court would then step through an analysis of the agreement and determine whether it restricts the plaintiff's substantive rights.

As in *Kristian*, *Ting*, *Muhammad*, *Kinkel*, and *Scott*, the Court must determine if class prohibition restricted the plaintiff's ability to bring her claims individually or otherwise vindicate her rights.²⁸¹ First, the Court must ask whether the collective action

277. The Court missed perhaps its best opportunity to settle this issue when it recently denied certiorari in the *Muhammad* case. County Bank of Rehoboth Beach, Del. v. Muhammad, 127 S. Ct. 2032 (2007) (mem.).

278. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006); *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, (N.J. 2006); *Scott v. Cingular*, 161 P.3d 1000, (Wash. 2007).

279. See *Sternlight*, *supra* note 16, at 123 (“[I]f two sophisticated companies, represented by counsel, knowingly contract that they will never sue each other in a class action absent other special circumstances, it should not be voided on statutory or contractual grounds.” (citations omitted)).

280. If there were reasonable alternatives to accepting the take-it-or-leave contract such that the consumer could have rejected the transaction altogether and secured the product or service elsewhere without such onerous terms, then the consumer could be said to have agreed to the terms of the clause and it would be upheld. Alternatively, opt-out provisions in the transaction or contract could be used to allow consumers to opt-out of the mandatory arbitration or class action waiver at the time of the transaction. If the contract included such an option the court could uphold the validity of the collective action waiver against those who elected not to opt-out.

281. *Kristian*, 446 F.3d at 37; *Ting*, 319 F.3d at 1151; *Kinkel*, 857 N.E.2d at 268; *Muhammad*, 912 A.2d at 99–101; *Scott*, 161 P.3d at 1007.

waiver imposed prohibitively high costs upon the consumer or otherwise imposed such a restriction to the plaintiff's substantive rights that it effectively foreclosed any realistic opportunity for the plaintiff to vindicate her legal rights and recover on her claim.²⁸² If such a substantive restriction existed, the collective action waiver would be invalid and unenforceable and would be severed from the arbitration agreement.²⁸³

If, however, the Court determined that, although the collective action waiver was in a consumer contract in which there was little or no negotiation, it did not impose such a substantive restriction, the waiver would be enforceable. Likewise, if the Court determined that, though the waiver restricted the plaintiff's ability to vindicate the claim, if the plaintiff chose to enter the agreement and refused reasonable alternative transactions in which the plaintiff could have avoided the compulsory waiver, the Court could uphold the waiver as enforceable.²⁸⁴

This would allow companies to continue to use the collective action waiver and arbitration clauses to ensure against potential "frivolous" class claims and "mega-judgments," while still protecting consumers from onerous exculpation clauses. Further, a relatively certain judicial standard set forth by the Supreme Court would eliminate the confusion surrounding enforceability of these types of clauses and help to lessen the amount of litigation on the enforceability of arbitration agreements.²⁸⁵ Also, a Supreme Court ruling would send a clear message to those companies that transact with consumers. The message would be: If you wish to use collective action waivers to mitigate your own risk, you must do so fairly and the consumer must not be otherwise forcibly unprotected.²⁸⁶

This type of solution, of course, requires a case-by-case analysis and should be conducted based upon the totality of the circumstances.²⁸⁷ Arguably, this may initially decrease judicial

282. See *Kristian*, 446 F.3d at 29; *Ting*, 319 F.3d at 1152.

283. See *Kristian*, 446 F.3d at 29; *Ting*, 319 F.3d at 1152.

284. In this case, it would be difficult to argue that the consumer's intent was muted or displaced. By foregoing other reasonable alternatives that would have provided the consumer with the same or similar product or service and would not have imposed upon the consumer the class action waiver, it can be fairly assumed that the consumer's intent was to waive such procedural right and assent to the waiver.

285. See *Gordon*, *supra* note 33, at 19 (noting the recent drastic increase in litigation surrounding the enforceability of class waivers).

286. See *Beale*, *supra* note 239, at 134 (comparing the consumers lack of reasonable alternatives to the lack of insurance).

287. See *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006) ("The unconscionability of class action waivers must be determined on a case-by-case basis,

efficiency and clutter the courts with suits to determine the enforceability of specific waivers. However, once the standard is clear and there is significant case law applying the new standard, there would likely be little confusion over whether a specific waiver would be valid.

VI. CONCLUSION

Contrary to the cries of some commentators,²⁸⁸ and the actions of some legislators,²⁸⁹ congressional intervention is not required to protect consumers from the pernicious collective action waiver slipped into mandatory arbitration clauses. Clearly, the tide is turning and courts are tending to invalidate these waivers to prevent “companies’ efforts to eliminate class actions,”²⁹⁰ and protect consumers’ substantive rights. The framework for a workable standard exists in recent state court and federal court decisions.²⁹¹ The Supreme Court should act soon to answer the question of the enforceability of these class waivers and adopt the test proposed by this Comment.

The mandatory arbitration clause and the collective action waiver may both have value to contracting parties and peacefully coexist in certain contractual circumstances. In the consumer context, however, it is clear that close judicial scrutiny is required. Fortunately, the courts are now beginning to provide that scrutiny. The Supreme Court should validate that scrutiny soon and put an end to this debate over the mandatory arbitration clause. Unfortunately, however, these types of debates involving mandatory arbitration will likely not subside until the Supreme Court retreats from its infatuation with

considering the totality of the circumstances.”).

288. See Sternlight & Jensen, *supra* note 8 at 76 (proposing Congress enact legislation banning predispute arbitration clauses in the interests of public policy and efficiency); Alderman, *supra* note 43, at 16–17 (suggesting the only way to stop “the further degeneration of consumers’ rights” is for Congress to amend the FAA to “preclude predispute arbitration clauses in consumer contracts”).

289. Consumer Fairness Act of 2007, H.R. 1433, 110th Cong. (2007).

290. Sternlight, *supra* note 3, at 21 (explaining the willingness of some courts to stop corporations from eliminating class actions).

291. Other commentators have recognized the potential “middle ground” offered by the construct of the *Muhammad* decision. Carton & Held, *supra* note 6, at S13. Carton and Held, however, argue that “broad-based class action waivers [in arbitration clauses] should not be enforced as a matter of public policy,” without regard to any balancing analysis like that suggested by this Comment. *Id.* Such a broad preclusion hardly seems like a middle ground. Rather, as this Comment suggests, a more appropriate middle ground would be to enforce class action waivers in arbitration only where the consumer reasonably negotiated for the waiver or had a reasonable alternative to the transaction. See *supra* Part V.

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arbitration and allows disputes to be settled where they should be settled—in American courts of law.

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