Pre-Dispute Mandatory ARBITRATION IN CONSUMER CONTRACTS

A Call for Reform

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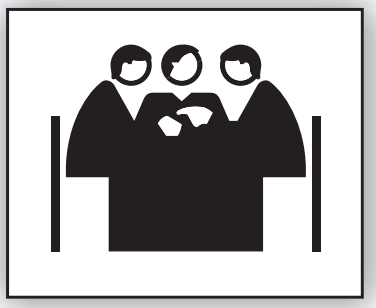

I. Introduction

Approximately twenty-five years ago, one legal phrase began to dominate most discussions of the American legal system—Alternative Dispute Resolution, commonly referred to as ADR.[1] Law schools initiated courses in ADR,[2] the judicial system and the bar began implementing methods of ADR, and scholars pontificated about this "movement" in the way we vindicated wrongs and distributed justice.[3]

The underlying premise of the ADR rhetoric was simple: the legal system had become too expensive, too slow, and too inefficient to deal with the myriad of problems it was being asked to resolve.[4] Supporters of ADR pointed out that our system of litigation could not efficiently resolve controversies ranging from multi-billion-dollar commercial disputes to few-hundred-dollar consumer problems, and promoted advocacy at the expense of harmony.[5] A voluntary, more efficient, less expensive, and more flexible alternative was needed. ADR, consisting of negotiation, mediation, and arbitration, was the panacea for the ills of the legal system, and became the catch phrase of the 80s and 90s.[6]

From a philosophical perspective, it is difficult to find fault with the concept of ADR, specifically the use of arbitration as an alternative to litigation in *consumer cases*.[7] No one can oppose a system of dispute resolution that is less expensive, more efficient, and more flexible. At first glance, arbitration of consumer disputes would appear to offer substantial benefits over formal litigation.[8] Because the rules of arbitration are less formal, and arbitrators have more freedom to "do the right thing,"[9] it should be more likely consumers would fare better in arbitration than before a judge, where they are bound by more formal rules and are subject to appellate review. Additionally, the speed and reduced cost of arbitration should provide prompt resolution. Consumers, if given the choice, would surely favor arbitration over litigation.[10]

Upon further review, however, the realities of pre-dispute mandatory arbitration,[11] as currently employed in American consumer transactions, differ sharply from the idealized process described above.[12] First, the consumer rarely, if ever, chooses arbitration; pre-dispute arbitration is imposed upon the consumer by a contract of adhesion in which the consumer has no real choice.[13] Second, arbitration often is not as prompt or as inexpensive as alternative courts, especially small claims courts.[14] Third, the informal rules, lack of guidelines, and finality of the decision[15] often favor the business organization, due in large part to its significant role as a "repeat-player."[16] Finally, and perhaps most importantly, imposition of mandatory arbitration generally precludes the consumer's freedom to choose to litigate in a class action and eliminates any favorable precedent or law reform that could arise through litigation.[17]

This Article will briefly review the current judicial attitude toward pre-dispute mandatory arbitration in consumer transactions. It will then focus on the perceived shortcomings of the practice, demonstrating that, as employed in the United States, pre-dispute mandatory arbitration is designed to preclude effective redress by consumers and to substantially reduce or eliminate the beneficial effects of favorable judicial precedent and legislation. Finally, it will suggest that the only viable means of reform is to do what many other countries have done[18]—preclude pre-dispute mandatory arbitration in consumer transactions.

II. A National Policy Favoring Arbitration

Until the enactment of the Federal Arbitration Act (FAA)[19] in 1925, mandatory arbitration was generally viewed with hostility by the courts.[20] Most courts refused to enforce pre-dispute mandatory arbitration clauses, choosing instead to find them revocable at will by the parties.[21] Under the FAA, however, arbitration agreements were placed on an equal footing with other types of contracts.[22] Section 2 of the Act provides that a written agreement containing an arbitration provision is valid, irrevocable, and enforceable, unless the agreement is revocable based on traditional contract theory.[23] As the Supreme Court noted in *Gilmer v. Interstate/Johnson Lane Corp.*:[24]

> The FAA was originally enacted in 1925, . . . and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.[25]

Under current law, when a binding arbitration clause exists, courts must stay any litigation and compel arbitration.[26]

The provisions of the FAA manifest a "liberal federal policy favoring arbitration agreements."[27] Although the Supreme Court initially did not favor enforcement of mandatory arbitration clauses,[28] the current trend clearly indicates that the Court is a strong supporter of such clauses. This trend began in earnest in 1983 with the Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[29] In *Cone*, the Court noted:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like to arbitrability.[30]

Arbitration agreements must be enforced, even if the result would be inefficiency.[31] "[T]he Act leaves no place for the exercise of discretion by a district court . . . ."[32] As the Supreme Court recently emphasized, section 2 of the FAA mandates that arbitration agreements are enforceable, absent a ground for revocation of the contractual agreement.[33] Even if the dispute involves rights protected by a federal statute, the dispute is subject to a pre-dispute mandatory arbitration provision unless there is an inherent conflict between the arbitration and the statute's underlying purposes.[34]

> The only viable means of reform is to do what many other countries have done—preclude pre-dispute mandatory arbitration in consumer transactions.

Thus, to establish a binding pre-dispute mandatory arbitration provision in a consumer transaction, it is only necessary to show that the agreement exists, that it is written, and that the consumer apparently has consented to the agreement. The agreement will be presumed valid and enforceable unless the consumer establishes that it is invalid because of a traditional contract defense. Given the current trend favoring enforcement of arbitration provisions, only those agreements that are truly induced by fraud, duress, or incapacity are likely to be found unenforceable.[35]

III. The Problems Inherent in Pre-Dispute Mandatory Arbitration of Consumer Disputes

A. The Non-Consensual Nature of Consensual Mandatory Arbitration Agreements

The test for the validity of a pre-dispute mandatory arbitration agreement begins with consent.[36] The pre-dispute arbitration term must appear in a "written provision" that is part of the contract evidencing the transaction. As with any valid contract, consent must be voluntary.[37] Apparent consent based on fraud, duress, mistake, or unconscionability is not sufficient to support a pre-dispute arbitration provision.[38]

Most consumer contracts containing a pre-dispute arbitration provision arise in the context of a transaction between an individual and an organization.[39] Such clauses are now a routine part of the contracts of most businesses, ranging from banks, car dealers, credit card companies, manufactured home dealers, builders, and hospitals to exterminating companies.[40] The terms of the agreement are set forth in a standard form contract, proposed

by the business, and provided to the consumer on a take-it-or-leave-it basis. These contracts of adhesion[41] bear little resemblance to the voluntary agreement envisioned when one thinks of "consent."[42] As noted over forty years ago in *Henningsen v. Bloomfield Motors, Inc.*:[43]

> The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. "The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all." Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds.[44]

Notwithstanding language such as that found in *Henningsen*, only a handful of cases have found pre-dispute mandatory arbitration clauses, presented on a take-it-or-leave-it basis, to be unenforceable.[45] The majority of courts reviewing such agreements look no further than to the language of the contract, and to the strong policy favoring arbitration,[46] to conclude that the consumer voluntarily consented to the arbitration provision.[47] Unless there is some other basis for invalidating consent, the mere fact that the consumer had no real choice appears irrelevant.[48] Thus, as a general rule, it is safe to assume that pre-dispute mandatory arbitration has been imposed on the consumer with an absence of any meaningful choice.[49]

B. Cost of Arbitration

One of the arguments supporting the policy favoring mandatory arbitration is the assertion that arbitration is less costly than traditional litigation. This is clearly the case with some arbitrations.[50] The simplified nature of arbitration and the fact that discovery is more limited often reduce the time and expense of resolving the dispute. Additionally, the lack of an appellate review process eliminates the expense associated with finalizing the judgment.

In many consumer cases, however, the costs of arbitration may greatly exceed the costs of litigation.[51] This is particularly true in the case of small disputes that may be eligible for small claims court treatment. In most states, the small claims court is available to the consumer at a cost of less than $100. This is the total cost the consumer must bear to maintain the suit, regardless of how long resolution may take. Arbitration, on the other hand, often involves substantial fees. Participants in the arbitration must pay a fee for the process itself, as well as a daily fee to the arbitrator.[52] The longer the process takes, the greater the expense. Costs in excess of $1,000 a day are not unusual.[53] Consumers who sign a pre-dispute mandatory arbitration provision, however, may not opt into the relatively inexpensive forum of small claims court and instead may be forced, at the discretion of the business, to arbitrate.[54]

Whether a pre-dispute mandatory arbitration agreement that imposes excessive costs on a consumer is enforceable is presently unclear. Some courts have recognized the realities of such a clause, indicating that it would be unenforceable in the context of an individual asserting rights protected by statute. For example, in *Cole v. Burns International Security Services*,[55] the court phrased the issue as follows:

> [C]an an employer condition employment on acceptance of an arbitration agreement that requires the employee to submit his or her statutory claims to arbitration and then requires the employee to pay all or part of the arbitrators' fees?[56]

Recognizing the excessive costs of arbitration, and the fact that Cole would be free to go to court were it not for the arbitration agreement, the court concluded:

> Arbitration will occur in this case only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue his claims in court without having to pay for the services of a judge. In such a circumstance—where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer.[57]

The United States Supreme Court recently had an opportunity to rule on this point in *Green Tree Financial Corp. v. Randolph*.[58] At issue in *Green Tree* was whether an arbitration agreement that was silent about fees was unenforceable because it did not protect the individual from potentially excessive costs.[59] Randolph argued that the agreement's silence "create[d] a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have."[60] The court of appeals held that the arbitration agreement was unenforceable because it imposed a risk that Randolph's ability to vindicate her statutory rights as an employee would be undone by "steep" arbitration costs.[61] The Supreme Court, on the other hand, found that although "[i]t may well be that . . . large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights, ... [t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."[62]

It appears that excessive costs may be sufficient to invalidate a pre-dispute mandatory arbitration agreement, if such costs preclude the litigant from "effectively vindicating" federal statutory rights.

Following the decision in *Green Tree*, it appears that excessive costs may be sufficient to invalidate a pre-dispute mandatory arbitration agreement, if such costs preclude the litigant from "effectively vindicating" federal statutory rights.[63] It is clear, however, that the party seeking to avoid arbitration "bears the burden of showing the likelihood of incurring such costs."[64] What is unclear is exactly how high costs must be to invalidate an arbitration agreement, whether the decision of cost is objective or subjective, and whether

the rationale of *Green Tree* applies to situations other than the assertion of federal statutory rights.[65]

For consumers, the bottom line is that, until the Supreme Court clarifies precisely what constitutes excessive costs and how an arbitration agreement imposing them should be handled, the potential high cost of arbitration will often preclude effective resolution of disputes.[66]

C. Benefits of the Repeat-Player

In 1974, Marc Galanter published an article entitled *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*.[67] A seminal work that has spawned decades of discussion and commentary,[68] his thesis was rather simple: repeat-players with substantial assets can use the legal system to their advantage.[69] This conclusion was based on his observations concerning the ability of the "Haves" as repeat-players to manipulate the legal system to optimize long-term results.[70] Those with a greater stake in the outcome of future litigation will attempt to optimize long-term results.[71]

For example, in the case of a consumer suing a large corporation over a relatively minor dispute, the amount at risk to the individual is relatively small. The resources he or she devotes to pursing this claim will be commensurate with the amount in dispute. The corporation, on the other hand, has much more at risk. It may possibly face multiple claims based on the same underlying dispute and, consequently, the resources it allocates to defending the dispute will be significantly greater. The repeat-player will play harder because there is substantially more at risk. While the consumer will hire a recent law school graduate with a few years experience, the corporation will retain a major law firm that specializes in defending such suits. The corporation also has the benefit of being able to choose which suits it will defend or settle, thereby choosing the appropriate forum in which to do battle, and when (or if) it will appeal. In the parlance of the old west, the repeat-player "Haves" will simply "out-gun" the "single-shot" consumer.

This is not to suggest that the legal system is of no value in resolving consumer disputes or that the advantage of the "Haves" is so great that it cannot be overcome. In fact, there are many ways consumers have been able to avoid, or substantially mitigate, the benefits of the repeat-player. For example, the class action device enables an individual consumer to increase the financial incentives of a lawsuit by representing a substantially larger group.[72] Specialized legal organizations, such as the National Association of Consumer Advocates, Trial Lawyers for Public Justice, and the National Consumer Law Center, follow litigation on a national front, offer their expertise and resources to individual players, and help determine which claims should be appealed to establish the best precedent.[73] Consumers also have begun to develop their own "repeat-player" attorneys through the increased use of fee-generating statutes and substantial damage awards.[74] Finally, the establishment of small claims courts, with simplified procedures and rules designed to minimize the impact of attorneys, provides the consumer with inexpensive access to justice.[75] Although the "Haves" will always enjoy an advantage in the judicial system, consumers have been able to win their share of battles by rallying resources and developing their own strategies to offset the power advantage of the repeat-player.

But there is one advantage held by the repeat-player that consumers might not be able to offset—the choice of mandatory arbitration. In his article, Galanter suggests that the "Haves" will choose a favorable dispute resolution forum based on the nature of the party with whom the dispute exists. Repeat-players, he opines, will choose to avoid the formal civil justice system when interacting with other repeat-players.[76] It is logical to assume that if one party is given the absolute right to choose the field of battle, it will select the one most favorable to its position. Accordingly, as consumers have marshaled the resources and expertise to compete with the repeat-player in the courts, the repeat-player has taken steps to change the forum through the imposition of mandatory arbitration.[77]

As noted above, consumers have been able to interact successfully with the repeat-player in the judicial system, due at least in part to their ability to maintain class actions, to establish legal precedent through appellate decisions, and to use liberal discovery rules and shared expertise to establish their own repeat-player strengths.[78] Mandatory arbitration, however, usually imposed through a non-negotiated contract of adhesion, thwarts these advantages by eliminating the ability to use a class action, precluding the establishment of any precedent or an appeal, and reducing the ability to use discovery. The repeat-player's ability to designate the forum clearly has substantive ramifications.

But perhaps more importantly, mandatory arbitration adds an entirely new dimension to the repeat-player problem. Unlike the judicial system, which is publicly funded and presided over by judges who are answerable to the legislature and the public, arbitration is privately funded and answerable to no one.[79] Judges receive their salaries regardless of how many or what type of disputes they resolve. The provision of arbitration services, on the other hand, is a competitive business involving large profits. The American Arbitration Association (AAA) states that in 2000, it handled 198,491 cases and generated $80,357,000 in operating revenues.[80] To continue to generate this kind of revenue, AAA needs parties to utilize its services. How much profit it and the individual arbitrators make depends on how often they work. Thus, an almost symbiotic relationship exists between the arbitrator and the repeat-player.[81]

Whether the repeat-player enjoys significant bias in the arbitration of consumer disputes is difficult to prove or disprove.[82] Those favoring arbitration assert that arbitrators tend to be more favorable to consumers than the judiciary, and that arbitration is less costly and time consuming.[83] The limited empirical data, however, suggests that arbitration favors the repeat-player.[84] However, because many arbitration agreements contain a provision requiring secrecy,[85] and courts often deny discovery to reveal such information,[86] it is difficult to obtain data sufficient to conclusively affirm or deny repeat-player bias. It must be assumed, however, that if businesses are increasingly using mandatory arbitration provisions, they see some benefit in precluding resort to the courts.[87] It may be that the benefit is in the reduced costs and increased efficiency of arbitration. However, as noted above, the reduced cost argument may be specious, and much of the efficiency comes at the expense of procedural safeguards and appellate rights which are often of great value to a consumer. In addition, the limited data available suggests the repeat-player does fare better. In one of the few instances in which data is available, First USA reported that out of nearly 20,000 arbitrations between the bank and consumers in 1999, First USA prevailed in all but 87, a success rate of 99.6%.[88]

Although little hard data is available to support or refute the allegation of repeat-player bias in pre-dispute mandatory arbitration, the repeat-player clearly comes out ahead by controlling the decision to arbitrate and benefiting from the processes surrounding arbitration. Additionally, even though anecdotal, the evidence seems to support the conclusion that, consciously or not, arbitrators tend to favor the repeat-player

whose continued business is essential for their financial success.

D. Prohibition Against Class Actions

Under American law, a class action is permitted in every state and federal court.[89] The class action device is designed to permit an individual to file a claim on behalf of a class of individuals who have been similarly injured by wrongful conduct. In consumer cases, the class action often provides the most viable means of litigating disputes. Its major benefit is that it permits the litigation of disputes in which the claim of any one individual would not justify the time and expense of a lawsuit.

For example, Chase Manhattan and other banks were recently accused of charging customers a late fee and interest, even though the customers' payments had arrived on time.[90] The amount of each customer's individual loss was quite small, generally less than $50. Class action law suits were filed against the banks on behalf of all customers charged the extra penalties and interest. As a result, Chase Manhattan agreed to pay at least $22.2 million to the class to settle its lawsuit.[91] Other similar lawsuits resulted in settlements of $45 million by Citibank and more than $300 million by Providian Financial Corporation.[92]

Opponents of the class action device argue that it is merely legal extortion,[93] often serving simply to line the pockets of attorneys at the expense of clients.[94] In fact, it may be true that in some cases larger settlements are negotiated simply because a class has been certified, and a few class action suits have resulted in substantial recovery for attorneys, possibly at the expense of the class members.[95] No one disputes, however, that in some cases the class action is the most efficient and effective way to resolve a dispute. When the stake of an individual plaintiff is small, but the wrong significant, the class action device provides both the incentive for an attorney to pursue the case and a deterrent against wrongful conduct.[96] Additionally, as discussed above, the class action device often neutralizes the power advantage enjoyed by the "Haves."[97]

A complete discussion of the pros and cons of the class action device is beyond the scope of this Article.[98] Suffice it to say, most consumer advocates support the class action device, while many industry representatives oppose it. The critics of the class action have pursued their opposition through the courts and the legislature. More effectively, however, they have asserted that the consumer's consent to a mandatory arbitration provision precludes the initiation of a class action suit.[99] To date, the courts considering this issue have been divided; however, the judicial trend appears to support the critics' position.[100]

For example, in *Johnson v. West Suburban Bank*,[101] the Third Circuit considered whether claims under the Truth in Lending Act (TILA) and the Electronic Fund Transfer Act (EFTA) can be referred to arbitration on an individual basis when the plaintiff seeks to bring a class action.[102] The district court, relying on congressional intent, had originally refused to enforce the arbitration provision.[103] The court of appeals found nothing within the statutes to preclude the imposition of mandatory arbitration. With respect to whether the preclusion of a class action suit imposed an onerous penalty on the plaintiff, the Third Circuit observed that:

> [E]ven if plaintiffs who sign valid arbitration agreements lack the procedural right to proceed as part of a class, they retain the full range of rights created by the TILA. These rights remain available in individual arbitration proceedings. The Supreme Court has made clear that when arbitration will preserve a plaintiff's substantive rights, compelling arbitration in accordance with an arbitration clause will not impede a statute's deterrent function.[104]

What the court ignores, however, is that while the individual's rights may be preserved, the beneficial and deterrent effects of the class action have been precluded. At issue in *West Suburban Bank* was the practice of making short term loans of small amounts at interest rates of nearly 1000%.[105] The suit alleged that the lender violated the TILA and EFTA by "failing to properly disclose the high rate of interest, and by requiring loan applicants to open accounts" and irrevocably preauthorize electronic payments.[106] Effective redress could be obtained only through a class action, maintained on behalf of all the individuals who had been adversely affected by this predatory lending practice.

Although the Supreme Court must have the final word on whether consent to mandatory arbitration precludes a class action,[107] it appears that the rationale of *West Suburban Bank* will prevail: class actions will be denied whenever a pre-dispute mandatory arbitration provision is present, particularly if the provision expressly precludes class action treatment.[108] In an excellent article discussing the relationship between binding arbitration and the class action, Professor Jean R. Sternlight concludes, "[i]f companies believe the class action device is being abused and ought to be eliminated, they are free to seek such legislative reform. They should not, however, be permitted to use contracts of adhesion to eliminate class actions on a wholesale basis."[109] Unfortunately, it is doubtful the courts will take the steps necessary to effectuate the approach suggested by Professor Sternlight.

E. Elimination of the Right to Use the Courts

Inherent in the concept of pre-dispute mandatory arbitration is the recognition that consumers are precluded from asserting their common law and statutory rights in a court of law. As noted above, consumers have had a degree of success in modifying oppressive conduct in the marketplace by strategic litigation designed to establish "good case law."[110] National centers for consumer law, such as the National Consumer Law Center, Trial Lawyers for Public Justice, and the National Association of Consumer Advocates, provide the resources necessary to enable individual consumers, and their attorneys, to "take on" the business establishment.[111] Although consumers often lack the political power to effectively lobby for legislative change, they have effectively utilized the judicial branch to protect their rights.

For example, although the Uniform Commercial Code imposes an implied warranty of merchantability in contracts for the sale of goods,[112] no statute creates a similar warranty in service transactions. In the absence of legislation, it is only through innovative judicial action that such a warranty can be created. In *Melody Home Manufacturing Co. v. Barnes*,[113] the Texas Supreme Court recognized that public policy mandates the creation of an implied warranty when the legislature has not otherwise provided adequate protections.[114] The court, therefore, created and defined an implied warranty of "good and workmanlike" performance in service contracts.[115] The court then stated that, "[c]onsistent with the trend in recent consumer protection legislation and sound public policy, we further hold that the implied warranty that repair or modification services of existing tangible goods or property will be performed in a good and workmanlike manner may not be waived or disclaimed."[116] Thus, the court created an implied warranty, defined its scope and application, and limited the right to waive or disclaim it.

The strategic use of pre-dispute mandatory arbitration agreements, however, seriously impedes the assertion of legal

rights and eliminates even the potential for precedent-setting case law. As Professor Speidel noted over a decade ago:

> These developments [regarding mandatory arbitration] create an incentive for organizations subject to federal or state regulation to use arbitration as a device to blunt or break social legislation, especially where the agreement to arbitrate is contained in a standard form prepared by the regulated party. Even if the arbitral practices and procedures are neutral, the limited capacity of arbitration in disputes over statutory rights coupled with the finality of the award could water down the protection provided for the other party, if not undermine the public policies underlying the regulatory legislation.[117]

Pre-dispute mandatory arbitration provisions do more, however, than merely blunt the assertion of existing rights. They preclude the creation of new ones. Had the contract between the Barneses and Melody Home contained an arbitration provision, the Texas Supreme Court never would have considered the issue of an implied warranty of good and workmanlike performance, and judicial innovation in this area would be stifled.[118]

The American justice system substantially relies upon private enforcement to help define and explain regulatory legislation and to insure that it is enforced. Consumers generally lack the resources or political power to effectively lobby the legislature for meaningful reform. The civil justice system, however, has long been fertile ground for the establishment of consumer rights. Pre-dispute mandatory arbitration, by precluding access to the courts, frustrates the implementation of existing consumer rights and effectively precludes the development of new ones.

IV. Suggested Reform

The notion that arbitration is "merely" a different forum is a myth, just like the belief that the world was flat or that the sun revolved around the earth. The choice of forum in and of itself has substantive ramifications[119] and, as demonstrated above, the choice of mandatory arbitration has substantial ramifications.

It appears unlikely that the courts are willing, or even able, to eliminate the problems inherent in pre-dispute mandatory arbitration in consumer transactions. The strong pro-arbitration position of the FAA, and the reluctance of courts to disturb contracts—even contracts of adhesion—make it extremely difficult to create judicial remedies. If there is to be reform, it must come from Congress.[120] The simplest and most direct method of effectuating such reform is for Congress to amend the FAA to prohibit such agreements.[121] But the Act should be amended only in those instances in which it is most likely an individual will be unknowingly coerced into waiving the right to litigate and in which arbitration offers the greatest possibility of adversely affecting statutory and common law rights.

If there is to be reform, it must come from Congress.

It does not appear necessary to enact a blanket prohibition of arbitration in all consumer transactions to accomplish this objective. In those cases in which the consumer wants to arbitrate, arbitration should be encouraged. For example, it may be that some consumers will favor the informality and speed of arbitration, even over small claims court. The problem is finding a way to accomplish this goal without authorizing the continued abuse of pre-dispute mandatory arbitration.

What I suggest is a prohibition of pre-dispute mandatory arbitration provisions in all consumer transactions. Parties who wish to arbitrate, however, should be permitted to do so. Therefore, I recommend that post-dispute agreements to arbitrate should be recognized as valid and enforceable, if agreed to in writing and absent a traditional contract defense. Below is a comparison of the current provisions of the FAA and the provisions as I recommend they be amended.[122]

Federal Arbitration Act

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Proposed Amendments to the Federal Arbitration Act[123]

§ 1. "Maritime transactions," "commerce," and "consumer transaction" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce; "consumer transaction", as herein defined, means any transaction by an individual the objective of which is primarily for personal, family, or household purposes.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

(a) In General. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(b) Consumer Transactions. Notwithstanding subsection (a), a written provision in an agreement evidencing a consumer transaction to settle by arbitration a controversy thereafter arising out of the transaction, or the refusal to perform the whole or any part thereof, shall not be valid or enforceable.

(c) Post-dispute Agreements. Nothing in this section shall prohibit the enforcement of any signed written agreement to settle by arbitration a controversy arising out of a consumer transaction, if the parties have entered into such agreement after the controversy has arisen.

a. Any agreement to arbitrate under subsection (c) shall conspicuously disclose the nature and effect of the arbitration provision and clearly indicate that agreement by the consumer is voluntary.

V. Conclusion

Attempting to find an efficient, inexpensive way to resolve consumer disputes is an admirable goal. In theory, arbitration provides the ideal forum for achieving this goal. The problem with the current use of pre-dispute mandatory arbitration, however, is that instead of being used as a means to resolve disputes, it is often employed as a means to an alternative end—the destruction of consumer rights.

Coerced pre-dispute mandatory arbitration—of any and all consumer claims—serves simply to thwart legitimate use of the legal system. As recognized by the American Arbitration Association, pre-dispute mandatory arbitration should never be employed to pre-empt the use of small claims courts. Further, arbitration should not be imposed upon consumers in a manner that denies them the benefits of federal and state statutory rights, or precludes the use of a class action.

The ADR movement grew out of the notion that our traditional system of resolving disputes was broken. A single system could not handle all the diverse types of claims it was expected to handle with the degree of efficiency that was required. Substituting a single arbitration forum is subject to all the same types of criticism, and is anything but an "alternative" resolution mechanism. This Article proposes legislative reform designed to make arbitration a true "alternative" method of dispute resolution: one voluntarily chosen by the parties after the dispute has arisen and after alternatives, such as litigation, have been considered. If, as is often asserted,[124] consumers prefer arbitration, they will have the right to elect to do so.

FOOTNOTES

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1. The term "ADR" generally refers to negotiation, mediation, and arbitration. E. Wendy Trachte-Huber & Stephen K. Huber, Alternative Dispute Resolution: Strategies for Law and Business 805 (1996) (referring to negotiation, mediation, and arbitration as "the big three ADR processes"). These concepts have a long history that extends far beyond the 1970s. *See generally* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443 (1984) (detailing the history of arbitration in Connecticut during the seventeenth and eighteenth centuries). The modern ADR "movement," however, is generally measured from a 1976 speech by Professor Frank Sander at the Roscoe Pound Conference, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held to honor the bicentennial of the Declaration of Independence. Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. on Disp. Resol. 1, 5–6 (1993) (tracing the modern acceptance of ADR to the Pound Conference where commentators upheld ADR methods as desirable alternatives to cumbersome litigation); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 Ohio St. J. on Disp. Resol. 297, 309–12 (1996) (describing the Pound Conference as a "watershed" event in which ADR came to be accepted by the judicial establishment).

2. For example, in 1976, the Directory of Law Teachers, published by the Association of American Law Schools, had no listing for alternative dispute resolution and included sixty-four professors who taught or were teaching "Arbitration." Association of American Law Schools, Directory of Law Teachers 1045 (1976). In the 2000-01 edition of the directory, arbitration no longer appears as a category. The category "Alternative Dispute Resolution" lists approximately 500 law professors who taught or are teaching in that area. Association of American Law Schools, The AALS Directory of Law Teachers 1144–48 (2000-01).

3. "When a 'movement' relating to law develops in the United States, one outcome is almost invariably a massive, confusing and largely unsystematic body of literature of variable quality. The ADR movement is no exception." William Twining, *Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 Mod. L. Rev. 380, 380 (1993) (citation omitted).

4. *See id.* (citing stimuli of the ADR movement such as court overload, delay, and the rising cost of litigation).

5. *See, e.g.*, Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. Fla. L. Rev. 1, 13–15 (1985) [hereinafter Sander, *Alternative Methods*] (promoting ADR as an appropriate alternative to adjudication in smaller, less complex matters and in those in which relationships are ongoing).

6. For example, between 1996 and 2000, the number of ADR cases filed with the American Arbitration Association almost tripled. David Hechler, *ADR Finds True Believers*, Nat'l L.J., July 2, 2001, at A1. This Article will not address whether the assumptions underlying the ADR movement are valid, or the degree of its success. Suffice it to say that the movement has been successful in introducing widespread private alternatives to our traditional legal system. For a general discussion of the ADR movement, see Sander, *Alternative Methods*, *supra* note 5. *See also generally* Trachte-Huber & Huber, *supra* note 1. For an interesting article "debunking" the myth of arbitration, see Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399 (2000).

7. The focus of this Article is the use of pre-dispute arbitration in consumer cases. Many of the discussions of mandatory arbitration consider consumer cases in connection with other types of cases, such as employment. *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 53–54 (1997) (listing a number of fields outside the consumer arena in which "[p]re-dispute arbitration clauses have become increasingly commonplace"). It is the author's belief that mandatory arbitration of consumer disputes presents unique problems that should not be confused by including consideration of other transactions—such as employment or securities. For example, a recent article suggests that in the employment context,

employers have no advantage in using arbitration and should instead consider avoiding the use of mandatory arbitration clauses. Green, *supra* note 6, at 400–07. Most of the arguments set forth in Green's article are inapplicable in the consumer context.

8. A recent study conducted on behalf of the Institute for Advanced Dispute Resolution found that when informed of how the arbitration process works, the majority of adults (82%) said that, in resolving a dispute, they would opt for arbitration over filing a lawsuit. The State Bar of Texas Alternative Dispute Resolution Section, *Roper Poll Reveals Americans' Preferences for Resolving Legal Issues: Majority Believe Arbitration Is Their Best Option* (Jan. 27, 2000), *at* http://www.texasadr.org/news_items1.html. It is unclear, however, exactly how arbitration was explained or what was presented with respect to alternatives.

9. *See* Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751, 1755 (1994) (citing arbitration commentator W. Willard Wirtz who indicated that, in general, arbitrators act by "striking the fat but saving the heart" of common procedural rules, and in so doing establish a "pattern of ordered informality").

10. Refer to note 8 *supra* and accompanying text. *Proponents* of arbitration, who are surprised by my opposition to it, often confront me with this argument. Their position is that because arbitration is not subject to the strict rules of a court, and is much faster and less expensive, consumers will come out better because of sympathetic arbitrators. They assert that arbitrators often "split the difference," meaning that many consumers who would collect nothing in court may still recover something in arbitration. As discussed in this Article, I disagree with that position on both legal and factual grounds. Although some individual consumers may occasionally fare better in arbitration, pre-dispute mandatory arbitration generally impairs consumers' rights. Additionally, as I suggest in my recommendation for change, retaining post-dispute arbitration permits the parties to choose arbitration, if they so desire. Refer to Part IV *infra* (proposing that those engaged in commerce be allowed to choose to enter into binding post-dispute arbitration agreements).

11. I have chosen to use the term "pre-dispute mandatory arbitration" to emphasize that the practice under consideration is the use of arbitration agreements contained in a contract entered into prior to the existence of a dispute. As others have recognized, pre-dispute arbitration itself is often referred to as "mandatory arbitration." *E.g.*, Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1069 (1998). The present Article uses the phrases "pre-dispute mandatory arbitration" and "mandatory arbitration" synonymously.

12. "Mandatory arbitration allows corporations to undermine the whole system by which we hold them accountable." Reynolds Holding, *Private Justice: Millions are Losing Their Legal Rights*, S.F. CHRON., Oct. 7, 2001, at A1 (quoting Justice Terry Trieweiler of the Montana Supreme Court). The analysis in this Article is limited to pre-dispute clauses, not submission agreements, which are entered into after a dispute has arisen. Submission agreements are very uncommon in consumer contracts and present few of the problems discussed in this article.

13. Such clauses are now routinely part of the contracts of most businesses, ranging from banks, car dealers, credit card companies, manufactured home dealers, builders, and hospitals to exterminating companies. As discussed in notes 39–49 *infra* and accompanying text, these contracts of adhesion are presented to consumers on a take-it-or-leave-it basis, often with little understanding of their terms and no right to bargain.

Typical of the language of such clauses is that used by First USA to amend its credit card agreement. The following clause, in very small print, was included among the paperwork in a monthly billing statement:

> ARBITRATION: Any claim, dispute or controversy ("Claim") by either you or against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Agreement or your Account, including Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time of the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, www.arb-forum.com or PO Box 50191, Minneapolis, Minnesota 55405, telephone 1-800-474-2371. Any arbitration hearing at which you appear will take place at a location within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16. Judgment upon any arbitration award may be entered in any court having jurisdiction.
>
> This arbitration agreement applies to all Claims now in existence or that may arise in the future except for Claims by or against any unaffiliated third party to whom ownership of your Account may be assigned after default (unless that party elects to arbitrate). Nothing in this Agreement shall be construed to prevent any party's use of (or advancement of any Claims, defenses, or offset in) bankruptcy or repossession, replevin, judicial foreclosure or any other prejudgment or provisional remedy relating to any collateral, security or property interests for contractual debts now or hereafter owned by either party to the other under this Agreement.
>
> IN THE ABSENCE OF THIS ARBITRATION AGREEMENT, YOU AND WE MAY OTHERWISE HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE CLAIMS THROUGH A COURT BEFORE A JUDGE OR A JURY, AND/OR TO PARTICIPATE OR BE REPRESENTED IN LITIGATION FILED IN COURT BY OTHERS (INCLUDING CLASS ACTIONS), BUT EXCEPT AS OTHERWISE PROVIDED ABOVE, ALL CLAIMS MUST NOW BE RESOLVED THROUGH ARBITRATION.

14. For a discussion of the costs of arbitration, refer to notes 50–66 *infra* and accompanying text.

15. As a general rule, decisions of arbitrators are not appealable. Under the Federal Arbitration Act (FAA), a court has very limited authority to vacate an arbitrator's award. Federal Arbitration Act, 9 U.S.C. § 10 (1994) (indicating that an arbitral award can be vacated only on narrow grounds including corruption, fraud, partiality, and misconduct). In most cases, the award may not be appealed based on the incorrect application of law or an improper factual finding. *See, e.g.*, Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724, 1728 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement.").

Some courts, however, have recognized limited non-statutory grounds for vacating an award. *E.g.*, United Steelworkers of Am. v. Enter. Wheel and Car Corp., 363 U.S. 593, 597 (1960) (holding that it is only when the arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of justice that the decision may be unenforceable). The standard for reviewing an arbitration award based on an incorrect application of law or fact has been described as "one of the most limited known to the law." Smith v. PSI Servs. II Inc., No. 97-6749, 2001 U.S. Dist. LEXIS 278, at *4 (E.D. Pa. Jan. 12, 2001). *See also IDS Life v. Royal Alliance, No. 00-2009, 2001 U.S. App. LEXIS 20625 (7th Cir. Sept. 12, 2001) (concluding that inarticulateness and unresponsiveness of award are insufficient grounds for reversal); Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178–79 (D.C. Cir. 1991) (explaining that an arbitral award can be overturned if it is made in "manifest disregard of the law," which requires "more than error or misunderstanding with respect to the law"); Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989) (outlining the narrow grounds for vacating an arbitration award given in "manifest disregard" of the law); Sheet Metal Workers Int'l Ass'n Local Union #420 v. Kinney Air Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985) (identifying "manifest disregard of the law" as a ground for vacating an arbitral award). Most courts have recognized that their authority in this area is very limited.*

E.g., United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 379–80 (3d Cir. 1995) ("District courts have very little authority to upset arbitrators' awards.").

What generally is required to upset a decision is manifest disregard of the law or other conduct that is arbitrary and capricious. Courts are not free to overturn an award simply because they think it is wrong or that they would have reached a different result. *E.g.*, *Garvey*, 121 S. Ct. at 1728 (*indicating that even if "the court is convinced [the arbitrator] committed serious error," the arbitral award will not be overturned if the arbitrator can, in any way, be seen to be "acting within the scope of his authority")*; Remmey v. Painewebber, Inc., 32 F.3d 143, 149–50 (4th Cir. 1994) (explaining the heavy burden the appellant bears under the "manifest disregard" rule). Manifest disregard of the law contemplates more than an error of fact or law. It is reserved for situations in which an arbitrator recognizes a clearly governing legal principle and then proceeds to ignore or pay no attention to it. *Id*. at 149 (asserting that in order for a court to vacate an arbitral award, the aggrieved party must show that "the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision"). Misapplication of the law to the facts is insufficient to constitute a manifest disregard of the law. *E.g.*, ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995) ("Even erroneous interpretations or applications of law will not be disturbed.").

For a general discussion of the grounds for vacating an arbitrator's award, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

16. Refer to notes 67–88 *infra* and accompanying text (discussing the "repeat-player").

17. Refer to notes 89–109 *infra* and accompanying text (discussing class actions). The relationship between arbitration and the consumer's ability to establish effective judicial precedent is discussed in notes 110–18 *infra* and accompanying text.

18. The author presented the paper on which this Article is based at the Eighth International Consumer Law Conference, sponsored by the International Association for Consumer Law, Auckland, New Zealand, April 9-11, 2001. Following the presentation, nearly every representative present reported that such mandatory arbitration provisions were prohibited in consumer transactions in his or her country. *See*, *e.g.*, Brazilian Consumer Protection Code, LAW No. 8078 of September 11, 1990, Title 1, Chapter VI, Section II, article 51(VII) (declaring that a contract provision that requires the compulsory use of arbitration is null and void); Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, Annex 1 (q), 1993 O.J. (L 095) 29, 34 (declaring that mandatory arbitration provisions are presumed unfair and unenforceable); C. CIV. art. 2061 (Fr.), *translated in* THE FRENCH CIVIL CODE 379 (John H. Crabb trans., Rothman & Co. Rev. ed. 1995) (asserting that mandatory arbitration provisions are invalid in consumer contracts).

19. 9 U.S.C. §§ 1–208 (1994 & Supp. 2000). The "modern movement" favoring arbitration began in the early twentieth century, culminating with the enactment of the FAA. IAN R. MCNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT §§ 8.1–8.2 (Supp. 1999) (detailing the history of the passage of the FAA).

20. *See*, *e.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983–85 (2d Cir. 1942) (describing the roots of the disdain for arbitration agreements by nineteenth-century courts and the change in judicial policy that came about in the following century).

21. "Generally speaking, then, the courts of this country were unfriendly to executory arbitration agreements." *Id*. at 984. *See generally* JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW (1918) (analyzing the history of the revocability of arbitration agreements and concluding that such agreements should be enforceable); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928) (tracing judicial attitudes regarding arbitration agreements through British and American history).

22. *See* Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1307 (2001) (citing statutory language from 9 U.S.C. § 2 indicating that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). In addition to the FAA, every state has adopted a general arbitration act. TRACHTE-HUBER & HUBER, *supra* note 1, at 619 (noting that Vermont was the last state to adopt the Uniform Arbitration Act). Most state acts are based on the Uniform Arbitration Act (UAA) promulgated by the Conference of Commissioners on Uniform State Laws in 1955. *Id*. A revised version of the UAA has been approved and recommended for enactment in all states. UNIF. ARBITRATION ACT §§ 1–33 (amended 2000), 7 U.L.A. 6 (Supp. 2001).

In many cases, state arbitration statutes provide additional protections for consumers. For example, Texas law exempts transactions under $50,000 from its statute. TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(a)(2) (Vernon Supp. 2001). As a practical matter, however, these state statutes are of little consequence in most consumer transactions because the language of the FAA has been broadly interpreted to pre-empt state law whenever the transaction is within the scope of Congress's Commerce Clause power. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 269–70 (1995) (finding that the state statute was pre-empted by the FAA).

23. 9 U.S.C. § 2.

24. 500 U.S. 20, 24 (1991). For an excellent discussion of the issues raised in *Gilmer*, see Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999).

25. *Gilmer*, 500 U.S. at 24 (citation omitted). *Accord* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218–19 (1985) (asserting that "agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974) (supporting the proposition that agreements to arbitrate are revocable only on grounds for revocation of contracts in general).

26. *See* 9 U.S.C. §§ 3–4 (providing that once a valid agreement to arbitrate is established, the pending litigation may be stayed to compel arbitration).

27. *Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983)).

28. Earlier decisions of the Supreme Court indicate much more of a concern with the fairness of imposing arbitration and the effect its decision could have on the public interest involved. *See*, *e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974) (holding that an employee could bring a discrimination claim in state court after having lost in arbitration); Wilko v. Swan, 346 U.S. 427, 433–35, 438 (1953) (holding that the Securities Act of 1993 prohibited brokerage firms from requiring customers to arbitrate unless there was actual consent and it served the public interest). As noted in the text, the Court's attitude has changed substantially. For a good general discussion of the Court's approach toward pre-dispute mandatory arbitration clauses, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

29. 460 U.S. 1 (1983).

30. *Id*. at 24–25. *See also* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (stressing that courts should "rigorously enforce agreements to arbitrate"); Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 643 (7th Cir. 1981) (describing the "established federal policy that, when constructing arbitration agreements, every doubt is to be resolved in favor of arbitration"); Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979) (asserting that courts should stay proceedings pending arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue"); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 44 (3d Cir. 1978) (recognizing that even in international agreements, the federal courts continue to favor arbitration of disputes); Germany v. River Terminal Ry. Co., 477 F.2d 546, 547 (6th Cir. 1973) (acknowledging that using arbitration to resolve disputes, with consent of the parties, reduces "court congestion").

31. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985).

32. *Id*. at 218.

33. Green Tree Fin. Corp. –Ala. v. Randolph, 531 U.S. 79, 89 (2000).

34. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (stating that parties will be held to an agreement to arbitrate statutory claims under the Age Discrimination Employment Act unless Congress's intent, as evidenced by an inherent conflict between arbitration and the statute's underlying purposes, was to preclude such agreements). There are many additional Supreme Court decisions upholding arbitration provisions based on this strong presumption of validity. *E.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (pre-empting a state statute voiding arbitration agreements unless written in a specific format as inconsistent with the FAA's provisions for revocability); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273–74, 277 (1995) (declaring that the FAA applies to the full extent of regulation permitted under the Commerce Clause); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953), and holding that pre-dispute arbitration agreements are valid in federal securities claims); *McMahon*, 482 U.S. at 226, 238, 242 (stressing that courts should "rigorously enforce agreements to arbitrate" and enforcing such an agreement as to claims arising under RICO and the Securities Exchange Act of 1934); Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984) (noting that the FAA applies in state as well as in federal courts and pre-empts any conflicting state law). *See also* Williams v. Healthalliance Hosp., Inc., 158 F. Supp. 2d 156 (D. Mass. 2001) (finding a claim under ERISA subject to an arbitration provision); Ellefson Plumbing Co. v. Holmes & Narver Constructors, Inc., 143 F. Supp. 2d 652, 653 (N.D. Miss. 2000) (finding that statutory claims, such as those arising under the Miller Act, are subject to arbitration); *In re* American Homestar of Lancaster, Inc., 50 S.W.3d 480, 490 (Tex. 2001) (determining that there is no inherent conflict between the Magnuson-Moss Warranty Act and the Federal Arbitration Act, thereby enforcing a pre-dispute arbitration clause in a consumer-product warranty dispute); S. Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000) (deciding that claims under the Magnuson-Moss Warranty Act are subject to a binding arbitration provision).

35. The recent trend favoring arbitration provisions has resulted in what has been described as an "'arbitration heaven' for businesses trying to stay out of court." *See* Marcia Coyle, *Arbitration Heaven Ahead*, 23 NAT'L L.J., Apr. 2, 2001, at B1.

36. "In determining whether statutory claims may be arbitrated, we first ask whether the parties *agreed* to submit their claims to arbitration." *Green Tree*, 531 U.S. at 90 (emphasis added). *See also* Myers v. MBNA, No. CV 00-163-M-DWM, 2001 U.S. Dist. LEXIS 11900, *15 (D. Mont. March 20, 2001) ("Absent circumstantial evidence that Myers accepted MBNA's offer to arbitrate their disputes, the Arbitration Section cannot be enforced against Myers.").

37. Section 2 of the Federal Arbitration Act provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000). The term contract implies consent. *See*, *e.g.*, Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 670 (Cal. 2000) ("Arbitration is favored in this state as a voluntary means of resolving disputes, and this voluntariness has been its bedrock justification."). For a discussion of consent in the context of an arbitration clause, see generally Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335 (1996).

38. For example, in *Klocek v. Gateway, Inc.*, the court engaged in traditional contract analysis to conclude that the buyer never accepted the seller's terms and, therefore, no contract was formed. 104 F. Supp. 2d 1332, 1336, 1341 (D. Kan. 2000). *See also* Rugumbwa v. Betten Motor Sales, 136 F. Supp. 2d 729, 733 (W.D. Mich. 2001) (holding that an arbitration provision not included in a retail installment contract is not enforceable).

39. Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, 53 DISP. RESOL. J. 8, 9 (1998) ("Binding arbitration provisions are now a common feature of banking, insurance, healthcare, and communication service contracts, as well as arrangements for the sale or lease of consumer goods."). Many employers, including Red Lobster, Olive Garden, Circuit City, and Travelers Group, use mandatory arbitration provisions in their employment contracts, while Bank of America, Kaiser Permanente, and Gateway all require arbitration in some of their consumer contracts. Stephanie Armour, *Mandatory Arbitration: A Pill Many are Forced to Swallow*, USA TODAY, July 9, 1998, at 1A.

40. For an example of a typical arbitration clause imposed on a consumer, refer to note 13 *supra*.

41. Standardized form contracts provided on a take-it-or-leave-it basis are generally referred to as contracts of adhesion. The term "contract of adhesion" was imported into the United States by Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). In an excellent discussion of adhesion contracts, Professor Rakoff spells out the seven characteristics that define a contract of adhesion. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983). *See also* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (discussing the impact that standardized contracts have had on the doctrine surrounding freedom of contract).

42. The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, [the contract of adhesion] part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer.

Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 94 (N.J. 1960). *See generally* Paul D. Carrington, *The Dark Side of Contract Law*, TRIAL, May 2000, at 73:

> Standard form contracts are useful instruments when employed to express the reasonable expectations of parties who lack the time, the wisdom, or the occasion to negotiate a reasonable bargain. However, when they are used as a weapon to force a party to waive rights, they can be the instruments of grave injustice.

Id.; Schwartz, *supra* note 7, at 36 ("The Supreme Court has created a monster. With the Court's enthusiastic approval, pre-dispute arbitration clauses—agreements to submit future disputes to binding arbitration—have increasingly found their way into standard form contracts of adhesion.").

43. 161 A.2d 69 (N.J. 1960).

44. *Id*. at 86 (citations omitted).

45. *See*, *e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (employer's "Dispute Resolution Agreement" is unconscionable and unenforceable); Ting v. A.T.& T., 182 F. Supp.2d 902 (N.D. Cal. 2002) (agreement unconscionable wher consumer had no meaningful choice); Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000) (refusing to enforce an agreement to arbitrate employment disputes and finding the agreement unconscionable because it only required arbitration for claims brought by employees but did not require arbitration of claims brought by the employer); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997) (declining to enforce an employment arbitration agreement in the absence of consideration); Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985) (holding that "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims" and, absent such an exchange, an arbitration provision in an employment agreement is invalid and unenforceable); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 158–59 (Cal. Ct. App. 1997) (declaring an arbitration clause in an employment agreement unenforceable, unconscionable, and against public policy because the contract was adhesive, the duty to arbitrate was unilateral, and the terms unfairly benefited the employer).

46. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court observed that:

> [T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this

> determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." And that body of law counsels "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

Id. at 626 (citations omitted) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

47. For examples of cases in which the court has refused to find a lack of consent based on a contract of adhesion, see the following: Hughes Training, Inc. v. Cook, 254 F.3d 588, 593 (5th Cir. 2001) (finding nothing per se unconscionable about an arbitration agreement); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 229–30 (3d Cir. 1997) (refusing to find a lack of consent in an arbitration agreement even where the plaintiff-employee would have been fired had she not signed the agreement); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (enforcing an arbitration agreement when the plaintiff failed to read the contract closely enough to discover the arbitration clause); Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 980 (2d Cir. 1996) (refusing to find that the arbitration agreement was fraudulently induced when the defendants failed to read or inquire into the meaning of the arbitration clause); Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 924–25 (Cal. 1997) (rejecting the claim that the arbitration agreement was unconscionable because it resembled an adhesion contract). *See generally* IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 19.3 (1999 & Supp.) (discussing the relationship between unconscionability and adhesion contracts).

48. In many cases, the arbitration agreement may even be included in the "fine print" of a brochure of terms and conditions inside a box. *E.g.*, *Hill*, 105 F.3d at 1150 (finding that customers agreed to computer company's contract terms, including an arbitration agreement, by failing to return merchandise within thirty days); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (deciding that although the excessive costs of arbitration made the agreement unenforceable, the lack of consent in the "take it or leave it" arbitration agreement was not a sufficient reason to reject the agreement). *See generally* Schwartz, *supra* note 7, at 40–53 (discussing the effects of a "fine print" arbitration clause on an employee's harassment case).

49. In *Hill*, Judge Easterbrook held that contract terms in a box were binding on a consumer because the consumer did not return the product, a computer, within thirty days as required by the contract. 105 F.3d at 1150. Judge Easterbrook justified his decision on law, common sense, and practical considerations. *Id*. at 1148–49. For a critical analysis of Judge Easterbrook's reasoning, see Lenora Ledwon, *Common Sense, Contracts, and Law and Literature: Why Lawyers Should Read Henry James*, 16 TOURO L. REV. 1065 (2000).

50. Even the supporters of arbitration, however, acknowledge that it is not always more efficient or less costly than traditional litigation. As arbitration becomes more formal, and arbitrators agree to follow traditional rules of procedure and evidence, arbitration begins to look, and cost, much the same as litigation. *See generally* Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (2000).

51. In one of the few cases to invalidate an arbitration provision based on excessive costs, the fees for the arbitration ($4,000) were higher than the costs of most of the products ($2,500). *Brower*, 676 N.Y.S.2d at 571 (1998).

52. AMERICAN ARBITRATION ASS'N, COMMERCIAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES), R-51, R-53 (2000) (describing the various filing and administrative fees, as well as defining the conditions for compensating the arbitrator), http://www.adr.org/rules/commercial/AAA235-0900.htm (last visited Nov. 7, 2001).

53. AAA cites $700 per day as the average arbitrator's fee in 1996. Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, 31 DAILY LAB. REP. (BNA) A-12 (Feb. 15, 1996). Judicial Arbitration and Mediation Services arbitrators charge an average of $400 *per hour*. *Reginald* Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381, 410 n.189 (1996). Fees up to $600 per hour are not uncommon. *See* Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1; David Segal, *Have Name Recognition, Will Mediate Disputes*, WASH. POST, Dec. 16, 1996, WASH. BUS., at 5. The CPR Institute for Dispute Resolution estimates arbitrators' fees of $250-$350 per hour and 15-40 hours of arbitrator time in a typical employment case, for total arbitrators' fees of $3,750 to $14,000 in an "average" case. CPR INST. FOR DISPUTE RESOLUTION, EMPLOYMENT ADR: A DISPUTE RESOLUTION PROGRAM FOR CORPORATE EMPLOYERS I-13 (1995).

54. Even the American Arbitration Association recognizes that consumers should not be forced to waive the right to go to small claims court.

> Within the judicial system, the least expensive and most efficient alternative for resolution of claims for minor amounts of money often lies in small claims courts. These courts typically provide a convenient, less formal and relatively expeditious judicial forum for handling such disputes, and afford the benefit, where necessary, of the coercive powers of the judicial system. The Advisory Committee concluded that access to small claims tribunals is an important right of Consumers that should not be waived by a pre-dispute ADR agreement.

AMERICAN ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL, STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE, at Principle 5 (Reporter's Comments) [hereinafter PROTOCOL], http://www.adr.org/education/education/consumer_protocol.html (last visited Nov. 7, 2001).

55. 105 F.3d 1465 (D.C. Cir. 1997).

56. *Id*. at 1483. Note that the decision in *Cole* may be limited to statutory claims. *See, e.g.*, Brown v. Wheat First Sec., Inc. 257 F.3d 821 (D.C. Cir. 2001).

57. *Cole*, 105 F.3d at 1484–85.

58. 531 U.S. 79 (2000).

59. *Id*. at 89.

60. *Id*. at 90.

61. Randolph v. Green Tree Fin. Corp., 178 F.3d 1149, 1158 (11th Cir. 1999) (relying on *Paladino v. Avnet Computer Technology Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998), for the proposition that an arbitration clause is unenforceable when the provisions of the clause subvert a plaintiff's statutory rights).

62. *Green Tree*, 531 U.S. at 90–91. In a footnote, the Court noted:

> In Randolph's motion for reconsideration in the District Court, she asserted that "[a]rbitration costs are high" and that she did not have the resources to arbitrate. But she failed to support this assertion. She first acknowledged that petitioners had not designated a particular arbitration association or arbitrator to resolve their dispute. Her subsequent discussion of costs relied entirely on unfounded assumptions. She stated that "[f]or the purposes of this discussion, we will assume filing with the [American Arbitration Association], the filing fee is $500 for claims under $10,000 and this does not include the cost of the arbitrator or administrative fees." Randolph relied on, and attached as an exhibit, what appears to be informational material from the American Arbitration Association that does not discuss the amount of filing fees. She then noted: "[The American Arbitration Association] further cites $700 per day as the average arbitrator's fee." For this proposition she cited an article in the Daily Labor Report, February 15, 1996, published by the Bureau of National Affairs, entitled Labor Lawyers at ABA Session Debate Role of American Arbitration Association. Plaintiff's Motion for

Reconsideration, Record Doc. No. 53, pp. 8–9. The article contains a stray statement by an association executive that the average arbitral fee is $700 per day. Randolph plainly failed to make any factual showing that the American Arbitration Association would conduct the arbitration, or that, if it did, she would be charged the filing fee or arbitrator's fee that she identified. These unsupported statements provide no basis on which to ascertain the actual costs and fees to which she would be subject in arbitration.

Id. at 90 n.6 (alterations in original).

63. *Id*. at 90. *See, e.g.*, McCaskill v. SCI Management Corp., ___ F.3d ___, 2002 U.S. App. Lexis 6068 (7th Cir. 2002) (arbitration agreement that requires employee to pay his own legal fees invalid); Ball v. SFX Broadcasting, No. 00-CV-1090, U.S. Dist. LEXIS 12510, *24 (N.D.N.Y. Aug. 21, 2001) (finding that the imposition of arbitration costs precluded vindication of rights).

64. *Id*. at 92. *See, e.g.*, Blair v. Scott Speciality Gases, ___ F.3d ___, 2002 U. S. App. Lexis 4115 (3rd Cir. 2002) (case remanded to determine plaintiff's ability to pay costs of arbitration).

65. In *Brown v. Wheat First Securities, Inc*., the court refused to extend the holding of *Cole* to non-statutory claims. 257 F.3d 821, 825 (D.C. Cir. 2001). A question also arises regarding whether an arbitration with reduced costs, but substantially reduced procedural rights, permits a consumer to "effectively vindicate" his or her rights. For example, many arbitration organizations are providing lower cost consumer arbitration. The fees for such procedures, although higher than small claims court, are substantially lower than those imposed for other arbitrations. Focusing solely on the lower fee, however, ignores the reality of the procedure. In most cases, the low fee consumer arbitration provides only limited procedural rights. For example, the parties may be allowed to present their case only through documents, the hearing may be by telephone with no discovery, or the parties may not have any right to question the other side. *Green Tree* gives no indication whether such limited types of arbitrations will be sufficient to protect consumers' rights.

66. It is worth noting that even the AAA recognizes that costs should not be a factor in a consumer's decision to arbitrate, stating that "[p]roviders of goods and services should develop ADR programs which entail reasonable cost to Consumers . . . ." Protocol, *supra* note 54, at Principle 6. "The consensus of the Committee was that if participation in mediation is mandated by the ADR agreement, the Provider should pay the costs of the procedure, including mediator's fees and expenses." *Id*.

67. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974) [hereinafter Galanter, *Speculations*].

68. Susan S. Silbey, *Do The "Haves" Still Come Out Ahead?*, 33 Law & Soc'y Rev. 799, 799 (1999) ("Since its publication in 1974, Galanter's paper has been cited more often than any other piece of sociolegal scholarship, and it stands among the most well cited law review articles of all time." (citing Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751, 766 (1996), which ranks Galanter's article as thirteenth on the list of most cited law review articles)). Galanter recently published an interesting review of contract litigation. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. Rev. 577 (2001).

69. Galanter, *Speculations*, *supra* note 67, at 98–100 (discussing the "ideal type" of repeat-player unit which anticipates repeated litigation, develops economies of scale, and expends substantial resources in lobbying to influence the development of legislation, thereby maintaining a competitive advantage).

70. *Id*.

71. *Id*. at 100 (stating that the repeat-player, interested in future litigation, "can adopt strategies calculated to maximize gain over a long series of cases"). As others have recognized, the "Haves" come out ahead in court for reasons other than litigation advantages.

> My guess is that "haves" do fare better than "have nots" in court, but I doubt if repeat playing is the main reason. Granted, legal rules are important, but here I expect that the "haves" have advanced their interests more through influencing legislation than through playing the litigation game for precedent.

Richard Lempert, Comment, *A Classic at 25: Reflections on Galanter's "Haves" Article and Work It Has Inspired*, 33 Law & Soc'y Rev. 1099, 1111 (1999). The "Haves" ability to effectively lobby the legislature is another reason that consumers must not be precluded from using the courts through pre-dispute mandatory arbitration provisions.

72. Refer to Part III.D *infra* (discussing the conflict between the class action device and the mandatory arbitration clause).

73. For information on the National Association of Consumer Advocates, Trial Lawyers for Public Justice, and the National Consumer Law Center, you may visit their Web sites at http://www.naca.net, http://www.tlpj.org, and http://www.consumerlaw.org, respectively (last visited Nov. 7, 2001).

74. *See generally* Galanter, *Speculations*, *supra* note 67, at 150–51.

75. *See generally* Protocol, *supra* note 54, at Principle 5 (acknowledging that the small claims court remains the least cost prohibitive and most efficient method of resolving disputes involving relatively small amounts of money).

76. *See* Galanter, *Speculations*, *supra* note 67, at 110, 130.

77. Note also that the repeat-player, in the superior bargaining position, also drafts the clause compelling arbitration. This means that the repeat-player makes all of the important decisions regarding the arbitration, such as the choice of arbitrators, the rules to be followed, the type of arbitration, and even the location of the arbitration. *See* Schwartz, *supra* note 7, at 57 ("Commentators have long observed the tendency of standard-form contracting to lead to the 'accumulation of seller-protective instead of consumer-protective clauses.'").

78. Refer to notes 72–75 *supra* and accompanying text.

79. *See generally* American Arbitration Association, 2000 Annual Report (2000) (discussing the various private groups that provide membership support to the AAA), http://www.adr.org/about/annual/report_99.html (last visited Nov. 4, 2001).

80. *Id*. (indicating an increase in caseload and operating income of approximately 50% and 14%, respectively, over the previous year's figures).

81. Although AAA is a not-for-profit organization, not all arbitration associations are. However, even a not-for-profit needs revenue to exist. There also is substantial competition within the arbitration provider industry. For example, I often receive advertising flyers from organizations and individuals soliciting my business for their services as an arbitrator.

82. In the consumer context, there is almost no data available. Even in the employment area, where there is the most data available, it is hard to come to any meaningful conclusions. This is due, in part, to the fact that the most meaningful statistic would be one that compared not only arbitration numbers, but also similar cases in the courts. *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 n.17 (D.C. Cir. 1997) ("It is hard to know what to make of these studies without assessing the relative *merits* of the cases in the surveys.").

83. *See, e.g.*, Protocol, *supra* note 54, at Introduction (stating that out-of-court dispute resolution clauses found in standardized agreements provide an expeditious and cost efficient method of resolving disputes).

84. Although there is no data regarding consumer disputes, there have been several studies examining employment cases. For example, in *Armendariz v. Foundation Health Psychcare Services, Inc*., 6 P.3d 669, 690 (Cal. 2000), the court noted: "Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system." In one of the few articles reviewing statistical data regarding repeat-players in arbitration, the author concludes "that repeat player employers do better in arbitration than one-shotters . . . ." Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L. Rev. 223, 224 (1998). *See also* William M. Howard, *Arbitrating Claims of Employment Discrimination: What* Really *Does Happen? What* Really *Should Happen?*, Disp. Resol.

J. Oct.-Dec. 1995, 40, 42 (revealing that employees not only have a higher success rate, by 38% in jury trials, but also have higher awards, ranging from $1,000 to $8 million, as compared to a success rate of only 19% in a bench trial coupled with lower awards, ranging from $1,000 to $5 million).

85. *See* PROTOCOL, *supra* note 54, at Principle 15 (Reporter's Comments) (recognizing "the tension between . . . [business's] desire for confidentiality in arbitration (including information regarding arbitration awards) and the need to provide Consumers access to information").

86. *See id*.

87. A recent article suggests that in some cases there is, in fact, no advantage. *See* Green, *supra* note 6, at 401 (arguing that, in the context of employment discrimination claims, the employer's use of mandatory arbitration clauses and status as a repeat-player actually result in substantial advantages).

88. Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1. Of course, most of the cases that went to arbitration involved default in payment, to which there is no defense, and a high success rate should be expected. *Id*.

89. The federal class action provision states:

> (a) *Prerequisites to a Class Action*. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable (2) there are questions of law or fact common to the class (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interest of the class.

FED. R. CIV. P. 23(a). These requirements are generally referred to as numerosity, commonality, typicality, and adequacy of representation. For a complete discussion of class action law, see HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS (3d ed. 1992 & Supp.). For a shorter discussion, see ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL (West 1999).

90. *Chase in $22 Million Credit Card Settlement*, N.Y. TIMES, Sept. 21, 2000, at C6.

91. *Id*.

92. *Id*.

93. *See, e.g.*, Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May-June 1998, at 24 (noting the tendency of companies to settle lawsuits for large amounts—without regard to the relative merits of the claim—upon certification of a class of consumers, rather than risk the expenses of litigation and the possibility of an adverse verdict).

94. *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 245 n.72 (1983) (providing an example of a "nonpecuniary" antitrust settlement in which the defendant real estate brokers agreed to issue certificates for "discounted" brokerage fees to plaintiffs while paying $350,000 for costs and attorneys fees).

95. For example, a recent article reported a proposed class action settlement that would have paid the attorney millions of dollars in fees and provided no recovery for class members. The attorney withdrew the proposed settlement days before a hearing. Bob Van Voris, *Settlement Draws Fire, Is Dropped; It Would Have Paid Only the N.M. Class Action Lawyer*, NAT'L L.J., Mar. 12, 2001, at A5.

96. See, for example, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), wherein the court stated:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Id. at 161.

97. Refer to part III.C *supra* (discussing the repeat-player's benefits in litigation).

98. For an excellent discussion of class action and arbitration, see Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) [hereinafter *Will the Class Action Survive?*].

99. In fact, some arbitration providers encourage pre-dispute arbitration provisions as a way of avoiding class action. A letter to an attorney from a National Arbitration Forum official stated, "[T]he only thing which will prevent 'Year 2000' class actions is an arbitration clause in every contract . . . ." Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us': Arbitration Clauses Block Consumers From Taking Companies to Court*, WASH. POST, May 22, 1999, at A1.

100. As the court noted in *Champ v. Siegel Trading Co*., 55 F.3d 269 (7th Cir. 1995):

> [A]n arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23. Therefore, absent an express provision in the parties' arbitration agreement providing for class arbitration, Rule 81(a)(3) does not provide a district court with the authority to reform the parties' agreement and order the arbitration panel to hear these claims on a class basis pursuant to Rule 23.

Id. at 276–77 (citations omitted).

Only a few courts have invalidated a pre-dispute mandatory arbitration provision, either in whole or in part due to the fact that it precluded class action recovery. *E.g.*, Powertel, Inc. v. Bexley, 743 So. 2d 570, 576–77 (Fla. Dist. Ct. App. 1999) (concluding that an arbitration provision that precludes class action relief is unconscionable and unenforceable); Ramirez III v. Circuit City Stores, Inc., 90 Cal. Rptr. 2d 916, 920–21 (Ct. App. 1999) (declaring that an arbitration clause expressly precluding class action relief is unconscionable). A few courts have also permitted class-wide arbitration. *E.g.*, Keating v. Superior Court, Alameda County, 167 Cal. Rptr. 481, 492 (Ct. App. 1980), *vacated by* 645 P.2d 1192 (Cal. 1982), *rev'd in part, appeal dismissed in part by* 465 U.S. 1 (1984) (allowing class-wide arbitration in some cases as "the fairest and most efficient way of resolving the parties' dispute"); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991).

101. 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 1081 (2001). For a very critical review of the decision in *Johnson*, see Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand*, 10 Pub. Int. L. J. 366 (2001) (*Johnson* represents "slipshod judicial performance, misreading of precedents, inadequate research, in credibly naïve views of 'reality,' and a sinister hidden agenda.")

102. *Id*. at 368. *See generally* Christina Lewis, Note, *Class Action vs. Arbitration: Does TILA Support Class Actions in Arbitration Where Statutory Rights are Concerned?*, 2001 J. DISP. RESOL. 133 (2001).

103. Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264, 279 (D. Del. 1999), *rev'd sub nom*., Johnson v. West Suburban Bank, 225 F.3d 366 (3rd Cir. 2000) (concluding that compelling arbitration would frustrate the disclosure requirements of TILA and EFTA).

104. *West Suburban Bank*, 225 F.3d at 373. The court continued:

> In sum, though pursuing individual claims in arbitration may well be less attractive than pursuing a class action in the courts, we do not agree that compelling arbitration of the claim of a prospective class action plaintiff irreconcilably conflicts with TILA's goal of encouraging private actions to deter violations of the Act. Whatever the benefits of class actions, the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement."

Id. at 374–75 (citation omitted).

105. *Id*. at 369.

106. *Id*. at 370.

1707. In *Green Tree Financial Corp.—Alabama v. Randolph*, the Court declined to address this issue because the court of appeals did not pass on it. 531 U.S. 79, 92 n.7 (2000). On remand, the court of appeals appeared ready to find that class-wide arbitration was precluded by the arbitration even though the agreement itself was silent as to class-wide relief. Randolph v. Green Tree Fin. Corp.—Ala., 244 F.3d

814, 816 (11th Cir. 2001). The court of appeals found it unnecessary to rule, however, because Randolph had waived the issue in earlier proceedings. *Id*.

108. *See, e.g.*, Hale v. First USA Bank, No. 00 Civ. 5406(JGK), 2001 U.S. Dist. LEXIS 8045, at *23 (S.D.N.Y. June 12, 2001) (finding arbitration precludes TILA class action); Lopez v. Plaza Fin. Co., No. 95-C-7567, 1996 WL 210073, at *3 (N.D. Ill. Apr. 26, 1996) (denying class certification based on pre-dispute arbitration provision); Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998) (denying class action arbitration and refusing to accept as persuasive the option of class-wide arbitration). It appears certain that class action relief will be denied if the arbitration agreement expressly prohibits class treatment. Fleet Boston Financial Corp., Citigroup, Inc., and MBNA Corp. have all barred credit card customers from joining any class action. Reynolds Holding, *Private Justice: Millions Are Losing Their Legal Rights*, S.F. Chron., Oct. 7, 2001, at A1.

109. *Will the Class Action Survive?*, *supra* note 98, at 125–26.

110. Refer to Part III.C *supra* (discussing varied means by which consumers may successfully counter the advantages of "repeat-players").

111. Refer to note 73 *supra* and accompanying text (discussing organizations which assist consumers in the legal arena).

112. U.C.C. § 2–314 (2001).

113. 741 S.W.2d 349 (Tex. 1987).

114. *Id*. at 353.

115. *Id*. at 354 ("We define good and workmanlike as that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.").

116. *Id*. at 355.

117. Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 Ohio St. J. on Disp. Resol. 157, 206 (1989) (citation omitted). *See also* Schwartz, *supra* note 7, at 37 ("The enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to deregulate themselves.").

118. It should be noted that use of an arbitration provision to preclude judicial "activitism" works both ways. As discussed in the text, an arbitration provision may limit the ability of courts to create or expand consumer rights. Arbitration provisions also preclude, however, the right of a more conservative court to limit existing rights. For example, in Texas the scope of *Melody Home* has been sharply limited. *See* Rocky Mountain Helicopter, Inc. v. Lubbock County Hosp. Dist., 987 S.W.2d 50, 52–54 (Tex. 1999) (refusing to extend the implied warranty of good and workmanlike performance to helicopter maintenance contracts because of the availability of other remedies and the absence of a compelling need for such provisions). Extensive use of arbitration denies the courts the ability to revise or reform the law and to serve their role in our tripartite system of government.

119. "This Court has always recognized that the choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum." U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359–60 (1971) (Harlan, J., concurring). *But cf*. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

120. I take no credit for being the first to recognize that federal legislation is the only way to enact meaningful reform in this area. There have been several proposals in Congress to limit arbitration in certain consumer transactions. For example, the Consumer Credit Fair Dispute Resolution Act of 2001 proposes that such agreements be prohibited in consumer credit transactions. S. 192, 107th Cong. § 2(b) (2000). There have also been legislative efforts to limit pre-dispute mandatory arbitration with respect to franchisees and distributors, H.R. 534, 106th Cong. 2(a) (1999), and car dealers, S. 1020, 106th Cong. § 2(b) (1999). Interestingly, the bills protecting franchisees and car dealers appear to have substantially more support than the one protecting consumers. *See also* H.R. 2282, 107th Cong. § 3 (2000) (prohibiting pre-dispute arbitration clauses in employment contracts). *See generally* Speidel, *supra* note 11, at 1093–94 (proposing legislative reform offering consumers and employees a choice to accept or reject an arbitration term).

121. Some states have attempted to enact their own reform proposals. For example, in Texas, most consumer transactions are exempt from the scope of the state arbitration statute. Tex. Civ. Prac. & Rem. Code Ann. § 171.002 (Vernon Supp. 2001) (limiting the scope of arbitration statutes by excluding most consumer transactions under $50,000). As a practical matter, however, such state statutes are of little effect due to the broad pre-emptive scope of the FAA. *See, e.g.*, Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273–77 (1995) (concluding that the pre-emptive power of the FAA extends to the limits of Congress's Commerce Clause power). *See generally* Mark R. Kravitz & Edward Wood Dunham, *Compelling Arbitration*, 23 Litig. 34 (1996) (comparing by jurisdiction the choices a company has under the FAA to ensure the enforcement of an arbitration clause).

122. Federal Arbitration Act, 9 U.S.C. §§ 1–2 (1994).

123. New material is underlined.

124. Refer to note 8 *supra* and accompanying text.