

# BUYER BEWARE: WHY THE CLASS ARBITRATION WAIVER CLAUSE PRESENTS A GLOOMY FUTURE FOR CONSUMERS

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## ABSTRACT

*Consumer contracts typically include class arbitration waivers, or clauses that prevent consumers from asserting class claims within arbitration. By limiting consumers' ability to hold businesses liable, these waivers allow companies to continue illegal activity. Although class arbitration waivers have the potential to impose significant harm on consumers, commentators have yet to identify an adequate solution. This Note examines commentators' most commonly proposed solution—legislation prohibiting class arbitration waivers. It argues that prohibiting use of class arbitration waivers is an insufficient solution. Supporters of such a response assume that class arbitration would provide consumers with sufficient relief while adequately protecting the rights of the parties involved. The rules governing class arbitration, however, sacrifice important party rights, suggesting that increased use of class arbitration might provide consumers little relief. After demonstrating these shortcomings, this Note then proposes three alternative solutions: lowering consumers' arbitration costs, increasing administrative enforcement, and limiting choice-of-law provisions within arbitration agreements.*

## INTRODUCTION

“If [mandatory arbitration] catches on, it could wipe out years of progress in consumer protection.”<sup>1</sup> That was one commentator's warning in the early 1990s, when companies began including

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1. Michael Ferry, *Consumers: Forced Arbitration Is Bad*, ST. LOUIS POST-DISPATCH, Sept. 8, 1992, at 7D.

provisions in consumer contracts requiring all disputes to be resolved through arbitration. Unfortunately for consumers, such warnings fell on deaf ears. Since the early 1990s mandatory arbitration has gradually gained judicial acceptance.<sup>2</sup> American companies increasingly include certain remedy-stripping clauses within the arbitration provisions of consumer contracts.<sup>3</sup> One example is the class arbitration waiver clause (class arbitration waiver or class waiver), which precludes consumers from asserting a class claim during arbitration.<sup>4</sup> Class arbitration waivers prohibit consumers from aggregating their claims and, in many instances, leave low-value claimants without a remedy.

To understand the harsh and unfair implications of class waivers, consider the story of Gene Dale and other Atlanta-area Comcast Cable subscribers. In 2005, Dale alleged that Comcast had unlawfully imposed on its subscribers franchise fees in excess of the amount permitted by federal law.<sup>5</sup> As a result, every three months, Dale received a cable bill that was \$0.66 higher than it otherwise should have been.<sup>6</sup> Over the four-year period that Dale had subscribed, Comcast overcharged each subscriber by a total of \$10.56,<sup>7</sup> resulting in a windfall to Comcast of nearly \$640,000.<sup>8</sup> Unfortunately for Dale, recovering that fee would be difficult; in 2004, he unknowingly agreed to arbitrate any claims against Comcast when he *paid a bill* that contained a mandatory arbitration agreement.<sup>9</sup> That bill included a class arbitration waiver preventing subscribers from asserting any claims on a consolidated basis.<sup>10</sup> As a result, Dale could either spend

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2. For a discussion of the Supreme Court's gradual acceptance of mandatory arbitration agreements, see *infra* notes 37–47 and accompanying text.

3. For a discussion of the right of remedy-stripping clauses, see *infra* notes 49–51 and accompanying text.

4. For a more detailed explanation of the right of class arbitration waivers, see *infra* Part I.B.

5. Brief of Appellants at 2, *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007) (No. 06-15516-C), 2006 WL 4126913.

6. *Id.* at 14.

7. *Id.*

8. *Dale*, 498 F.3d at 1220.

9. *Id.* at 6. Comcast inserted the arbitration agreements in envelopes containing subscribers' monthly bills. *Id.* The agreements provided that by paying the enclosed bill, the subscriber agreed to arbitrate any future claims. *Id.*

10. *Id.*

hundreds of dollars in arbitration and attorneys' fees<sup>11</sup> in hopes of recovering \$10.56 or simply pay the extra \$0.66 every three months. Although the Eleventh Circuit eventually held Comcast's arbitration agreement unconscionable,<sup>12</sup> which allowed subscribers to assert a class claim, many courts consider class waivers entirely enforceable against consumers.<sup>13</sup>

Not surprisingly, commentators have criticized courts adopting the latter view. Several scholars have demonstrated that class waivers, by rendering many valid claims economically unfeasible, have a disastrous impact on consumers' abilities to prevent businesses from engaging in unfair and potentially illegal activities.<sup>14</sup> Yet these critiques fall short in one important respect—they fail to adequately examine and identify potential solutions. Commentators summarily conclude that legislation prohibiting class waivers is both necessary and sufficient to provide low-value claimants adequate relief from business misconduct.<sup>15</sup> Extensive analysis shows that it is neither. This Note examines the likely implications of such a legislative response and demonstrates that legislation prohibiting class waivers is not a viable solution. It then proposes three alternative solutions that scholars should examine further to give consumers meaningful protection in arbitral proceedings.

This Note begins with background information on class arbitration waivers. Part I explains what these clauses are, why they are detrimental to consumers, and why more and more companies include them in their arbitration agreements. This Part also examines how courts have treated class waivers. Part II discusses the response of consumer advocates to class waivers and explores the solution that commentators most often suggest—legislation prohibiting class waivers. Part III explains why such legislation would not redress the problems with arbitration. It examines the likelihood of legislative action and explains that preventing businesses from using class waivers would result in grossly unfair arbitral proceedings. Finally,

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11. For a detailed discussion of the high costs of arbitration, see *infra* Part III.B.

12. *Dale*, 498 F.3d at 1217.

13. For an examination of various courts' treatment of class waiver clauses, see *infra* Part I.C.

14. For a summary of scholarly critiques of class waiver clauses, see *infra* notes 58–68 and accompanying text.

15. For a summary of potential solutions identified by scholars thus far to class waiver clauses, see *infra* Part II.

Part IV identifies three alternative solutions to this problem: first, courts, legislatures, or arbitration bodies could shift attorneys' fees and arbitration costs from consumers to defending companies; second, legislatures could rely on administrative agencies to deter business misconduct; third, Congress should limit choice-of-law provisions in arbitration agreements.<sup>16</sup>

### I. CLASS ARBITRATION WAIVERS: HISTORY & USE

Predispute arbitration agreements are simply contracts between two parties.<sup>17</sup> Each party, by accepting the agreement, promises to arbitrate, rather than litigate, any disputes that arise between them. Like any contract, mandatory arbitration agreements contain specific provisions detailing terms such as where the arbitral hearing will be held, who will conduct the hearing, and how the parties will split fees associated with the proceeding.<sup>18</sup> By agreeing to the contract, the consumer not only forgoes the right to assert a claim in court but also agrees to be bound by any provision within the arbitration agreement.

Class arbitration waivers are an example of a remedy-stripping provision typically included within predispute arbitration contracts.<sup>19</sup> Class waivers preclude consumers from asserting claims on a class

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16. At the outset, it is necessary to note that arbitration and class arbitration waivers are prevalent in a number of areas. As Professor Gilles points out, class waivers have the potential to limit consumer, antitrust, securities, employment, and civil rights claims. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005). Each type of claim raises unique issues, the examination of which is beyond the scope of this Note. Therefore, this Note considers only the potential implications on consumers and consumer claims. Consumer claims "encompass[] actions against mortgage lenders, credit card companies, commercial banks, and others under truth in lending and fair credit statutes; unreasonable charges claims against telecommunication carriers . . . ; deceptive trade practices and false advertising claims against manufacturers and service providers; and numerous other actions." *Id.* at 414.

17. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (recognizing that the Federal Arbitration Act "is at bottom a policy guaranteeing the enforcement of private contractual agreements"); H.R. REP. NO. 68-96, at 1 (1924) ("Arbitration agreements are purely matters of contract . . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs.").

18. See Jean R. Sternlight, *Consumer Arbitration*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 127, 131 (2006) (identifying clauses typically included within arbitration agreements).

19. F. PAUL BLAND, JR., ET AL., NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS 5 (5th ed. 2007) ("The vast majority of arbitration clauses in use in consumer contracts throughout the United States explicitly prohibit consumers from bringing or participating in class actions.").

basis within arbitration. As this Part explains, class waivers have the potential to impact a significant number of consumers because more and more businesses are turning to these clauses to insulate themselves from class claims. To understand how and why class waivers developed, it is first necessary to understand the United States's dependence on arbitration as a dispute resolution mechanism.

*A. The Rise of Judicial Deference toward Arbitration Agreements*

The acceptance of arbitration as a dispute resolution mechanism in the United States dates back to the colonial period; merchants routinely used arbitration to settle disputes as early as the seventeenth century.<sup>20</sup> Even then, proponents regarded arbitration as not only faster and cheaper than litigation but also more private, less adversarial, and fairer.<sup>21</sup> With the advent of the railroad in the nineteenth century, distant merchants incorporated arbitration provisions into contracts to avoid what they considered to be biased local forums.<sup>22</sup> By the twentieth century, both businesses and consumers believed arbitration agreements to be an effective way to avoid the significant costs and delays associated with litigation.<sup>23</sup>

Support for arbitration as an efficient method of conflict resolution was not limited to the disputants themselves.<sup>24</sup> In 1925, Congress enacted the Federal Arbitration Act (FAA) in an effort to recognize and enforce private arbitration agreements.<sup>25</sup> The FAA requires courts to compel arbitration when the parties have formed a valid agreement to arbitrate.<sup>26</sup> Its passage reflected a congressional

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20. Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 481 (1995).

21. *Id.* at 482.

22. Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 215 (Winter/Spring 2004).

23. *See 500 Trade Cases Are Arbitrated*, N.Y. TIMES, May 11, 1924, at E3 (discussing the low costs and lack of delay that parties to arbitration proceedings reported).

24. *See Benson, supra* note 20, at 481 (noting that, along with the federal government, numerous states passed arbitration statutes in the 1920s).

25. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2006)).

26. *See* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”).

belief that arbitration agreements were worth enforcing in an increasingly transactional nation.<sup>27</sup>

Acceptance of arbitration was not universal, however. Nineteenth and early twentieth century judges remained skeptical of the process's supposed benefits.<sup>28</sup> Courts considered arbitration a lawless procedure in which arbitrators, unlike judges, were in no way obligated to enforce the law.<sup>29</sup> Disputants, the judiciary argued, could not expect adequate relief in such an informal process.<sup>30</sup> As a result, courts at the time adhered to the doctrine of revocability, under which courts considered agreements to arbitrate entirely rescindable and routinely held them unenforceable.<sup>31</sup> Even the enactment of the FAA, Congress's explicit attempt to force judges to accept arbitration as a valid dispute mechanism,<sup>32</sup> proved insufficient.<sup>33</sup> For instance, more than twenty-five years after the FAA's enactment, the Supreme Court in *Wilko v. Swan*<sup>34</sup> invalidated an arbitration agreement between a securities brokerage firm and its customer, openly

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27. See S. REP. NO. 68-536, at 3 (1924) (presenting the Senate Judiciary Committee's belief that arbitration agreements are valuable).

28. E.g., H.R. REP. NO. 68-96, at 1-2 (1924) ("Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate . . . This jealousy . . . became firmly embedded in the English common law and was adopted with it by the American courts."); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 619-20 (2005) ("[T]he law had been ambivalent about enforcing obligations to participate in private dispute resolution at the expense of access to public processes. Judges guarded their own monopoly power and regularly refused to enforce arbitration contracts.").

29. See Resnik, *supra* note 28, at 620 ("Jurists found arbitration too flexible, too lawless, and too informal when contrasted with adjudication, esteemed for its regulatory role in monitoring adherence to national norms.").

30. See, e.g., *Hurst v. Litchfield*, 39 N.Y. 377, 380 (1868) ("[A] covenant to refer disputes to arbitration is but an unprofitable covenant, affording only the shadow of relief at law, and neither substance nor shadow in equity.").

31. See *Carrington & Castle*, *supra* note 22, at 212 ("[T]he principle of revocability was widely accepted by nineteenth century U.S. courts . . ."); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) (describing legislative attempts to overcome "the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable"). The Supreme Court explicitly affirmed the doctrine of revocability on numerous occasions. See, e.g., *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) ("[A man] may submit his particular suit by his own consent to an arbitration . . . He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions . . .").

32. See *supra* note 25 and accompanying text.

33. Matthew Eisler, Note, *Difficult, Duplicative and Wasteful?: The NASD's Prohibition of Class Action Arbitration in the Post-Bazze Era*, 28 CARDOZO L. REV. 1891, 1900-01 (2007).

34. *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

questioning the ability of arbitrators and the arbitration process to effectively decide disputes.<sup>35</sup>

In the 1980s the judiciary finally accepted arbitration as a valid procedure. Courts, frustrated by the growing problems of litigation, turned to arbitration and other alternative dispute resolution mechanisms to efficiently and inexpensively resolve disputes.<sup>36</sup> In a host of decisions between 1983 and 1990, the Supreme Court readily acknowledged that the FAA mandates arbitration when the parties have a predispute agreement to arbitrate.<sup>37</sup> In 1983, the Court declared in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>38</sup> that the FAA signifies “a liberal federal policy favoring arbitration agreements.”<sup>39</sup> Whereas the Court viewed arbitration with skepticism just thirty years earlier,<sup>40</sup> it maintained in *Moses H. Cone* that “any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.”<sup>41</sup> Just two years later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>42</sup> the Court not only acknowledged several advantages of arbitration<sup>43</sup> but also concluded that concerns over “potential complexity should not suffice to ward off arbitration,”<sup>44</sup> a conclusion quite different from the one reached in *Wilko*. Finally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*<sup>45</sup> in 1989, the Court expressly overruled the *Wilko* decision, declaring that it was improperly based on the “outmoded presumption of disfavoring arbitration proceedings.”<sup>46</sup> Less than forty years after deeming predispute

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35. *Id.* at 436–38.

36. See Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 851–53 (1996) (noting that significant dissatisfaction with the court system throughout the 1970s led judges to pursue alternative dispute resolution).

37. *E.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (“By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration . . .”).

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

39. *Id.* at 24.

40. See *supra* note 35 and accompanying text.

41. *Moses H. Cone*, 460 U.S. at 24–25.

42. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

43. *Id.* at 628.

44. *Id.* at 633.

45. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

46. *Id.* at 481.

arbitration agreements a violation of public policy, the Court fully embraced arbitration as a valid mechanism for resolving disputes.<sup>47</sup>

*B. The Birth of Class Arbitration Waivers and the Criticism That Followed*

What, if any, impact the Supreme Court's decisions in the 1980s had on the prevalence of arbitration agreements in consumer transactions is unclear.<sup>48</sup> What is clearer, however, is that the decisions transformed the *type* of arbitration agreements used by businesses in consumer transactions in the 1990s and 2000s. Corporations hoped that the judiciary's newfound fervor for arbitration agreements would enable them to create agreements that reduced their overall liability to consumers.<sup>49</sup> As a result, drafters began incorporating into their standard arbitration agreements what one commentator has termed "remedy-stripping" clauses.<sup>50</sup> For instance, arbitration agreements have come to regularly include clauses limiting the type or amount of damages available, the recoverability of attorneys' fees, and the length of statute of limitations periods.<sup>51</sup> For consumers, such clauses make it either more difficult to assert claims in the first place or less likely that they will prevail on claims in arbitration. Either way, the drafters decrease the chances of their corporate client being held liable.

Companies seeking to evade class action litigation introduced the class arbitration waiver as one such provision. Corporate defendants

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47. See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 225 (1995) (describing the Supreme Court's recognition that "[p]ublic policy no longer prohibits arbitration").

48. Compare 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, 36 ("With the Court's enthusiastic approval, pre-dispute arbitration clauses . . . have increasingly found their way into standard form contracts of adhesion."), and Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 956 (1999) ("As a result of these expansive legal doctrines, arbitration clauses are ubiquitous in consumer transactions today."), with Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62 (Winter/Spring 2004) (finding that just over one-third of the average consumer transaction contracts contained an arbitration clause).

49. Gilles, *supra* note 16, at 396.

50. David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 53-59 (2003).

51. *Id.* at 57-58.



detest class action litigation.<sup>52</sup> The procedure aggregates plaintiffs' claims, many of which plaintiffs could not bring without the class action device.<sup>53</sup> Class action litigation increases the chance that a defendant will face substantial damage awards, so much so that defendants may feel pressure to settle the claims.<sup>54</sup> To combat these problems, corporate attorneys in the 1990s urged their clients to include within their arbitration agreements provisions preventing consumers from asserting class claims.<sup>55</sup> Their corporate clients listened. Many consumer arbitration agreements began to contain a clause providing that the consumer, by accepting the agreement, waives the right to arbitrate on a class basis.<sup>56</sup> These provisions leave consumers in an untenable position: the arbitration agreement forecloses use of the courtroom (and thus traditional class-action litigation), while the class waiver bars class arbitration.<sup>57</sup>

Consumer advocates have attacked this result as unfair. They insist that the class device is often necessary to provide individual consumers an adequate remedy.<sup>58</sup> A consumer claim is typically a negative value claim—that is, the consumer's potential award is small while the costs of asserting that claim are significant, resulting in an

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52. *E.g.*, Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429 (2003) ("By aggregating hundreds, thousands, or even millions of claims, the class action can make small claims viable and empower claimants in other ways. Defendants dislike class actions for this reason.").

53. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007) ("The class action process facilitates the aggregation of numerous small claims in order to solve the collective action problem.").

54. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (expressing concern that a class action may "forc[e] . . . defendants to stake their companies on the outcome of a single jury trial, or . . . to settle even if they have no legal liability"); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) ("[The class action device] utilizes the threat of unmanageable and expensive litigation to compel settlement . . ."); Silver, *supra* note 52, at 1357–58 (discussing Chief Judge Richard Posner and Judge Frank Easterbrook's adoption of arguments similar to Professor Handler's).

55. Gilles, *supra* note 16, at 396.

56. *See, e.g., Dale v. Comcast Corp.*, 498 F.3d 1216, 1218 (11th Cir. 2007) (reviewing Comcast's class arbitration waiver, which provided that "[a]ll parties to the arbitration must be individually named" and that there was "no right or authority for any claims to be arbitrated or litigated on a class-action or consolidated basis").

57. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) ("[B]ecause the [agreement] creates a mandatory arbitration regime, a ban on class arbitration effectively forecloses the use of any class-based mechanism.").

58. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 12 (2000).

economic loss to the consumer.<sup>59</sup> Few consumers have the resources or desire to seek relief when filing fees, administrative costs, and attorneys' fees exceed the potential award. As a result, consumers, no matter how strong their claims may be, are unable to assert those claims and must forgo any potential relief.<sup>60</sup> Because class arbitration waivers leave consumers with otherwise valid claims without relief, the presumption that arbitration provides an effective dispute resolution procedure is erroneous.<sup>61</sup> Opponents of class waivers argue that class proceedings avoid this inequitable result by aggregating the claims of many consumers, thereby lowering the costs faced by each.<sup>62</sup>

A related and perhaps more serious problem with class arbitration waivers is that they potentially allow the drafting corporation's misconduct to go unpunished.<sup>63</sup> When individual consumers are unable to assert claims, companies are not held accountable for their misconduct.<sup>64</sup> Recall, for instance, the story of Gene Dale and his fight to recover \$10.56 from Comcast Cable.<sup>65</sup> That amount, over a four-year period, may seem insignificant, but Comcast reaped nearly \$640,000 as a result of its overcharging in Atlanta.<sup>66</sup> If the class waiver precludes Dale and his fellow subscribers from recovering, Comcast has an incentive to continue overcharging, especially if it can recover such a large sum of money. But the class action device, by allowing individual consumers to aggregate their

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59. See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 85–88 (Winter/Spring 2004) (discussing numerous cases in which the consumers' potential award was significantly outweighed by the costs of asserting the claim). For example, one group of consumers was unable to assert a claim against a jewelry store that allegedly overcharged its customers by \$8.46 because the store used a class waiver clause. *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 267 (W. Va. 2002). Professor Sternlight uses this and other cases to suggest that, without the aid of the class action device, many consumers will be left without adequate relief. Sternlight & Jensen, *supra*, at 86.

60. Leslie, *supra* note 53, at 76.

61. *Keating v. Superior Court*, 645 P.2d 1192, 1207 (Cal. 1982) (“If . . . an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party.”), *rev'd in part sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

62. Leslie, *supra* note 53, at 76.

63. *Id.* at 76–77.

64. *Id.*

65. See *supra* notes 5–13 and accompanying text.

66. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1220 (11th Cir. 2007).

claims, increases the company's liability, making its misconduct unprofitable.<sup>67</sup> Because the class action procedure is in many instances necessary to deter business misconduct, consumer advocates argue that companies must be prevented from insulating themselves by using a class arbitration waiver.<sup>68</sup>

### C. *Judicial Deference to Class Arbitration Waivers?*

The growth of class arbitration waivers and other remedy-stripping provisions has meant more consumers challenging the viability of mandatory arbitration agreements. Although the Supreme Court has readily embraced arbitration and predispute arbitration agreements,<sup>69</sup> it has also recognized limits to this judicial deference.<sup>70</sup> The Court has held that, though agreements to arbitrate are generally enforceable, a court may invalidate an arbitration agreement based on any common law contract defense, such as fraud or unconscionability.<sup>71</sup> In consumer challenges to class waivers, many courts have used this authority to declare arbitration agreements (or at least the class waivers within those agreements) unenforceable.

Courts generally rely on two doctrines to reach this result.<sup>72</sup> Some courts apply state unconscionability analysis to invalidate class waivers. For instance, the Eleventh Circuit decided that Comcast's class waiver, if enforced, would effectively preclude subscribers of Comcast cable from asserting low-value claims,<sup>73</sup> "allow[ing] Comcast to engage in unchecked market behavior that may be unlawful."<sup>74</sup>

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67. Leslie, *supra* note 53, at 77.

68. *E.g.*, Pub. Citizen, Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees, and Small Businesses, <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7332> (last visited Sept. 14, 2008) ("Class actions are the only effective remedy for wide-scale scams that rip off individual consumers . . . in small amounts.").

69. *See supra* notes 37–47 and accompanying text.

70. *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) ("Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" (quoting 9 U.S.C. § 2)).

71. *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984).

72. *See Gilles, supra* note 16, at 399–400, 406–08 (describing two waves of challenges to class arbitration waivers).

73. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007); *see also supra* note 12 and accompanying text.

74. *Dale*, 498 F.3d at 1224.

Thus, the court held that the class waiver was unconscionable.<sup>75</sup> The Ninth Circuit, also relying on unconscionability analysis, reached a similar result in *Ting v. AT&T*.<sup>76</sup> Other courts have held that class arbitration waivers preclude consumers from vindicating their federal statutory rights.<sup>77</sup> The First Circuit, for example, noted that the presumption that arbitration is an adequate mechanism for resolving disputes fails when a consumer faces large arbitration costs.<sup>78</sup> The court held that because the class arbitration waiver at hand significantly increased the costs faced by consumers, many plaintiffs were left unable to vindicate their statutory rights.<sup>79</sup> As a result, the clause was unenforceable.<sup>80</sup>

The problem for consumers is that a majority of jurisdictions have reached a different conclusion. The First,<sup>81</sup> Third,<sup>82</sup> Fourth,<sup>83</sup> Fifth,<sup>84</sup> and Seventh<sup>85</sup> Circuits each enforce class waivers, at least in certain circumstances.<sup>86</sup> These courts generally point to both the federal policy favoring arbitration and the FAA's mandate that an arbitration agreement be enforced in accordance with its terms when

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75. *Id.*

76. *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (concluding that AT&T's class waiver was unconscionable because it was unfairly one-sided).

77. *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006) (holding that Comcast's class arbitration waiver would leave plaintiffs unable to vindicate their statutory rights); *Chun Wing Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 U.S. Dist. LEXIS 49444, at \*12-13 (E.D. Mich. July 20, 2006) ("Plaintiff's damages are a paltry \$19.74, hardly enough to make arbitration worthwhile. Class actions were designed for situations just like this. The . . . class action mechanism is essential to the effective vindication [of the plaintiff's] statutory cause of action.").

78. *Kristian*, 446 F.3d at 54-55.

79. *Id.* at 61.

80. *Id.* at 64.

81. *Anderson v. Comcast Corp.*, 500 F.3d 66, 72 (1st Cir. 2007) (upholding a class waiver clause).

82. *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374-75 (3d Cir. 2000) (same).

83. *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (same).

84. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (same).

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

86. No court has held that all class waiver clauses are enforceable. Rather, each circuit has engaged in a contract-by-contract analysis and made a determination based upon the facts of each case. The First Circuit, for instance, invalidated Comcast's arbitration agreement on one occasion, *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006), and enforced it on another, *Anderson*, 500 F.3d at 72.

upholding class waivers.<sup>87</sup> Moreover, with few exceptions, most state courts consider class waivers enforceable as well.<sup>88</sup> Finally, some state legislatures have taken it on themselves to declare class waivers enforceable. In Utah, for example, creditors may include class arbitration waivers within consumer credit contracts.<sup>89</sup> It appears, therefore, that in the majority of jurisdictions, courts will enforce class waivers against consumers.

Although the Supreme Court has yet to decide the issue, there is evidence that some members of the Roberts Court consider class arbitration waivers enforceable. In *Green Tree Financial Corp. v. Bazzle*,<sup>90</sup> the Court faced an arbitration agreement that was ambiguous as to whether or not class arbitration was precluded.<sup>91</sup> The plurality declared that when an arbitration agreement is ambiguous regarding the availability of class arbitration, an arbitrator, as opposed to a court, should interpret the agreement.<sup>92</sup> Though the plurality did not state that class waivers are enforceable, the decision suggests that a business may include such a waiver in its arbitration agreement. Otherwise, the plurality would have simply invalidated the class waiver—there would have been no reason to require the arbitrator to determine whether or not a contract contains a class waiver. Indeed, Justice Stevens, who concurred in the plurality's judgment,<sup>93</sup> opined during oral arguments in the case that, whatever decision the Court reached, "all the arbitration agreements in the future will prohibit class actions."<sup>94</sup> Coupled with the judicial and legislative traction they have already gained, *Bazzle* suggests a bright future for class arbitration waivers.

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87. See, e.g., *Johnson*, 225 F.3d at 369 (explaining that the FAA and the federal policy favoring arbitration agreements impose a heavy burden upon challenging consumers).

88. See Gilles, *supra* note 16, at 401 (describing California as the only state that regularly finds class arbitration waivers unenforceable). Though California is still in the minority position, it is no longer alone. See, e.g., *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006) (severing a class arbitration waiver from a consumer arbitration agreement).

89. UTAH CODE ANN. § 70C-4-105 (Supp. 2007).

90. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion).

91. *Id.* at 451.

92. *Id.* at 453.

93. *Id.* at 455 (Stevens, J., concurring in the judgment and dissenting in part).

94. Transcript of Oral Argument at 55, *Bazzle*, 539 U.S. 444 (No. 02-634), 2003 WL 1989562.

## II. HOW CONSUMER ADVOCATES HAVE RESPONDED TO THE PROLIFERATION OF CLASS ARBITRATION WAIVERS

Commentators have given class waivers significant attention since businesses first began limiting consumers' ability to assert consolidated claims within arbitration.<sup>95</sup> Nonetheless, courts mostly have rejected arguments that class waivers should be held unenforceable.<sup>96</sup> And though judicial attitudes may change, there are few indications that consumers will fare better in the near future.<sup>97</sup> As a result, attention should shift from criticism to reform.

Consumer advocates, however, have yet to put forth an adequate solution to the problems presented by class waivers. Whereas their critiques are extensive, weighing the costs of class waivers against any potential benefits and examining at length the likely implications on consumers, scholars' proposed resolutions have been far less complete. Of the commentators who have proposed solutions, most have concluded that legislation barring the use of class waivers is the best, and perhaps only, solution.<sup>98</sup>

For example, consider the critiques offered by Professors Jean Sternlight and Elizabeth Jensen. Professors Sternlight and Jensen examine class waivers from public policy and efficiency perspectives.<sup>99</sup> They first address the argument that class arbitration waivers, because they lower the costs faced by companies when resolving disputes, actually benefit consumers because companies are able to pass these savings to consumers by providing lower priced goods.<sup>100</sup> Sternlight and Jensen demonstrate that this argument is incomplete using economic analysis that shows that consumers are unlikely to

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95. See *supra* notes 58–68 and accompanying text.

96. See *supra* Part I.C.

97. See Gilles, *supra* note 16, at 375, 428 (concluding that class waiver clauses may ultimately lead to the demise of the class action in part because “courts are likely to prove hospitable to collective action waivers for as far as the eye can see”).

98. See, e.g., *id.* at 428 (explaining that, if courts continue to uphold arbitration agreements containing class waiver clauses, legislation preventing companies from barring the use of consolidated claims may be necessary).

99. Sternlight & Jensen, *supra* note 59, at 92–99.

100. *Id.* at 92–93. Proponents of this argument suggest that subjecting businesses to class arbitration will harm consumers because companies will raise prices to offset the higher dispute-resolution costs. See, e.g., Steven J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (contending that arbitration lowers a business's “dispute-resolution costs” in part because of the ability to avoid class actions).

benefit from mandatory arbitration agreements and remedy-stripping provisions such as class waivers.<sup>101</sup> They then argue that even if class waivers enabled companies to lower the price of consumer goods, these provisions should not be enforced for public policy reasons.<sup>102</sup> Consumers tend to be overly optimistic, meaning that many would gladly trade their ability to assert claims on a consolidated basis for lower priced goods even though that right is potentially worth significantly more than the difference in price.<sup>103</sup> Further, Sternlight and Jensen contend that class waivers should not be permitted because of the important role of private litigation in the United States.<sup>104</sup> Eliminating consumers' ability to consolidate claims would pose a significant problem in a legal system that does not rely on administrative enforcement to protect consumers.<sup>105</sup>

Having concluded that businesses should not be able to use class waivers to prevent consumers from asserting consolidated claims, Professors Sternlight and Jensen argue that regulation is necessary.<sup>106</sup> Consumers can protect themselves from class waivers only by litigating the matter in court.<sup>107</sup> Although this case-by-case approach has enabled some consumers to successfully challenge class waivers,<sup>108</sup> this approach unfairly places a heavy burden on the consumer, who has to spend a significant amount of money to challenge the arbitration agreement.<sup>109</sup> Courts' contract-by-contract analysis forces many consumers to forgo their challenges as economically unfeasible.<sup>110</sup>

Professors Sternlight and Jensen next examine how to best regulate the use of class waivers. This is where their argument—and many similar scholarly critiques of class waivers—falls short. They conclude:

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101. Sternlight & Jensen, *supra* note 59, at 94–95.

102. *Id.* at 96–99.

103. *Id.* at 97.

104. *Id.* at 98–99.

105. *Id.*

106. *Id.* at 99.

107. *Id.*

108. For a discussion of various circuit courts' treatment of class waiver clauses, see *supra* notes 72–80 and accompanying text.

109. Sternlight & Jensen, *supra* note 59, at 100–01.

110. *Id.*

An alternative to using a case-by-case approach would be for Congress to prohibit companies from using arbitration clauses to preclude class actions. If Congress thought such a general prohibition too broad, it could at least prohibit the practice with respect to arbitration agreements imposed on consumers or employees. Such a legislative approach would have both costs and benefits. Its primary advantage would be substantially reducing the cost of challenging class action prohibitions, but it would also serve other interests that are furthered by class actions, including the courts' interest in the efficient resolution of disputes and the public's interest in ensuring that the law is enforced.<sup>111</sup>

Other than noting that states could adopt similar legislation,<sup>112</sup> the above quote is the article's entire discussion of potential remedies.

Although the purpose of Professors Sternlight's and Jensen's article was to shed light on the problems associated with class waivers as opposed to identifying potential solutions, too many scholarly critiques have concluded in the same casual manner.<sup>113</sup> Commentators have yet to examine the likely implications of legislation barring use of class waivers. In short, their critiques have thus far failed to adequately focus on a sufficient response to the problems presented by class waivers.

### III. WHY LEGISLATION BARRING THE USE OF CLASS ARBITRATION WAIVERS IS AN INSUFFICIENT REMEDY

Legislation preventing businesses from including class waivers within their arbitration agreements seems both a sensible and effective solution. Thus it is no surprise that many commentators have reached this result.<sup>114</sup> Because consumers are unjustly prevented from asserting claims on a class basis, a reasonable solution should allow

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111. *Id.* at 101–02 (footnote omitted).

112. *Id.* at 102.

113. *See, e.g.,* Gilles, *supra* note 16, at 428 (“Congress . . . could pass legislation providing that the procedures of Rule 23 [of the Federal Rules of Civil Procedure] may not be waived . . .”); Sternlight, *supra* note 58, at 121 (“Legislation will be needed to prevent companies from using binding arbitration clauses to eliminate class actions entirely, to the extent we decide it would be undesirable to allow companies to insulate themselves from class actions . . .”); Thomas Burch, Note, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 FLA. ST. U. L. REV. 1005, 1040 (2004) (“[O]ne practical compromise would be to uphold the parties’ agreement to arbitrate, but allow state law to determine whether the arbitration may proceed on a classwide basis.”).

114. *See supra* notes 112–13 and accompanying text.



consolidated claims within arbitration. Legislation preventing companies from using class waivers, the argument goes, would allow consumers to consolidate their claims. As a result, low-value claimants are able to seek relief, regardless of the amount of their claims.

The problem with this argument is that it makes a number of questionable assumptions. First, commentators assume that allowing class claims in arbitration would provide consumers sufficient relief while adequately protecting the rights of the parties involved. Second, the argument assumes that businesses would continue to use arbitration if consumers could consolidate their claims. This Part concludes that class arbitration rules sacrifice important party rights and that businesses may no longer use arbitration if subject to class claims. Legislation prohibiting class waivers is therefore an inadequate solution.

*A. Will Legislators Answer Calls for Legislative Reform?*

Assuming Congress or various state legislatures agreed that they should eliminate class arbitration waivers, what steps could legislators take toward a remedy? The Federal Arbitration Act presents a significant hurdle to state legislation attempting to ban such clauses. Section 2 of the FAA provides that written agreements to arbitrate are valid, irrevocable, and enforceable.<sup>115</sup> The Supreme Court has held that the FAA preempts any state law, whether legislatively or judicially created, that suggests otherwise.<sup>116</sup> Therefore, courts would likely hold that federal law preempts any state legislation providing consumers with a right to class arbitration or prohibiting companies from including waiver clauses in arbitration agreements.<sup>117</sup> Although determining exactly when federal law would preempt state legislation is beyond the scope of this Note, courts would probably invalidate the type of state legislation that critics of class arbitration waivers recommend.

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115. 9 U.S.C. § 2 (2006).

116. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”); see also Robert S. Safi, Note, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1721–24 (2005) (discussing the Supreme Court’s interpretation of the FAA’s preemptive effect).

117. Safi, *supra* note 116, at 1736.

As for congressional action, Congress could amend the FAA to prohibit class waivers. Congress could add a provision preventing drafters from including class waivers within their arbitration agreements or one declaring any such clause unenforceable. Such a practical solution is unlikely; in the nearly two decades since mandatory arbitration agreements emerged, Congress has yet to offer consumers any form of protection.<sup>118</sup>

In short, legislative reform is a possibility. State legislatures may find a way to draft a statute so as to prohibit class arbitration waivers without running afoul of the FAA. Congress might finally decide to provide consumers relief from mandatory arbitration by prohibiting waiver clauses in consumer contracts, at least in some circumstances. But critics of these waivers have failed to recognize that the efficacy of such reforms is outweighed by the remote possibility of their enactment and enforcement.

#### *B. Class Arbitration: A Flawed Procedure*

Putting aside whether legislative reform is a possibility, it is not at all clear that Congress could prohibit class arbitration waivers without creating other, perhaps more serious, problems. Legislation declaring these clauses unenforceable would have its benefits. This bright-line approach would allow courts to avoid difficult, time-consuming contract-by-contract analysis. Nonetheless, legislative reform is an insufficient solution, primarily because it relies too much on class arbitration to resolve consumer claims.

Though commentators blame class waivers for unjustly stripping consumers of the ability to assert low-value claims, it is important to note that these clauses foreclose only class arbitration. The arbitration agreement itself, not the class waiver, prohibits class action litigation (or any other court litigation).<sup>119</sup> In other words, consumers' inability to bring low-value claims is the product of two steps: first, the arbitration agreement, by forcing the consumer into arbitration, prevents the consumer from participating in class action

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118. *See id.* at 1717 & n.11 (discussing several unsuccessful attempts in Congress to protect consumers from mandatory arbitration agreements).

119. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (“[T]he [agreement] explicitly forbids only class *arbitration*, and not class actions. However, because the [agreement] creates a mandatory arbitration regime, a ban on class arbitration effectively forecloses the use of any class-based mechanism.”).

litigation; second, the class waivers within the arbitration agreement prevent the consumer from participating in class arbitration. The distinction, though subtle, is important because legislative reform rendering class arbitration waivers unenforceable would allow consumers to take advantage only of class arbitration. So long as companies continued to use arbitration agreements despite legislative reform, class action litigation would remain unavailable to consumers subject to a valid arbitration agreement. Therefore, the success of legislative reform ultimately depends on the viability of class arbitration as a dispute mechanism.<sup>120</sup>

It is this reliance on class arbitration that dooms legislative reform as a viable option. Though courts first recognized class arbitration as a potential solution to the problem of mandatory arbitration over twenty-five years ago,<sup>121</sup> class arbitration is a relatively untested device.<sup>122</sup> Opponents of class waivers assume that making class arbitration available to consumers would effectively

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120. Professor Sternlight has suggested that legislation might instead preclude both class waiver clauses and class arbitration. Sternlight, *supra* note 58, at 125. Consumers would then be able to use traditional class action litigation for class claims but would be required to arbitrate any individual claims. *Id.* This approach, however, forces many claims that might otherwise be resolved through arbitration into courtrooms. The federal policy favoring arbitration requires courts to uphold parties' commitments to arbitration. *See Keating v. Superior Court*, 645 P.2d 1192, 1207 (Cal. 1982) ("One possible solution to this dilemma would be to hold that arbitration agreements contained in contracts of adhesion may not operate to stay properly maintainable class actions. The statutes and public policy supportive of arbitration require, however, that this result be avoided if means are available to give expression to the basic arbitration commitment of the parties." (citations omitted)), *rev'd in part sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

121. *See, e.g., Keating*, 645 P.2d at 1209 ("Where . . . gross unfairness would result from the denial of opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified.").

122. *See* Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1717 (2005) ("[T]here have been no special class arbitration procedures devised by Congress via the FAA or any other legislation."). Indeed, during oral arguments in *Bazzle*, Justice Ginsburg inquired whether there had ever been a class arbitration proceeding, and counsel for Green Tree could identify only a few. Transcript of Oral Argument, *supra* note 94, at 13. Since the *Bazzle* decision, however, the prevalence of class arbitration has increased. The American Arbitration Association, one of the leading arbitration providers in the United States, has administered over one hundred class arbitrations. *See* Am. Arbitration Ass'n, Class Action Cases, <http://www.adr.org/sp.asp?id=25562> (last visited Sept. 14, 2008) (listing all class arbitration proceedings AAA has administered or is currently administering).

solve the problems presented by the clauses.<sup>123</sup> Evaluation of class arbitration, however, shows that assumption is at least premature and likely misguided. Simply put, class arbitration is not capable of resolving hundreds (perhaps thousands) of claims, all the while adequately protecting the interests of absent class members and the defendants. Moreover, increased use of class arbitration might ultimately lead businesses to avoid using arbitration agreements altogether, a result at odds with the United States's "federal policy favoring arbitration."<sup>124</sup>

1. *Unlike the Federal Rules of Civil Procedure, Class Arbitration Rules Fail to Protect Consumers Asserting Class Claims.* Following the Supreme Court's decision in *Bazzle*,<sup>125</sup> several major private arbitration providers set forth rules governing use of class arbitration. For example, the American Arbitration Association (AAA), a private alternative dispute resolution provider, adopted its Supplementary Rules for Class Arbitrations just months after the *Bazzle* decision.<sup>126</sup> The AAA and other arbitration providers used Rule 23 of the Federal Rules of Civil Procedure as a model.<sup>127</sup> In many respects, the arbitration providers' rules are identical to Rule 23.<sup>128</sup>

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123. See Sternlight, *supra* note 58, at 121–22 (contending that legislation precluding use of class arbitration waivers would "allow[] suits to be brought by small claimants who otherwise could not afford to sue" and "facilitate[] enforcement of laws").

124. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

125. See *supra* notes 90–94 and accompanying text (discussing *Bazzle* and its implications).

126. See Am. Arbitration Ass'n, AAA Policy on Class Arbitrations (July 14, 2005), <http://www.adr.org/sp.asp?id=28779> (explaining that the AAA's rules were adopted in response to the Supreme Court's decision in *Bazzle*).

127. Compare FED. R. CIV. P. 23 (setting forth several prerequisites to a class action, describing the types of class actions maintainable, and presenting numerous procedural protections for the parties to a class action), with JUDICIAL ARBITRATION & MEDIATION SERVS. (JAMS), JAMS CLASS ACTION PROCEDURES 2 (2005), available at [http://www.jamsadr.com/images/PDF/JAMS\\_Class\\_Action\\_Procedures.pdf](http://www.jamsadr.com/images/PDF/JAMS_Class_Action_Procedures.pdf) (adopting similar prerequisites and procedural protections and describing similar types of classes maintainable in class arbitration), and SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 4(a) (Am. Arbitration Ass'n 2003), available at <http://www.adr.org/sp.asp?id=21936> (same).

128. For instance, JAMS, a large private arbitration and mediation provider, requires that a class meet four prerequisites before it may be certified: the class must be "so numerous that joinder of all members is impracticable"; there must be "questions of law or fact common to the class"; "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class"; and "the representative parties [must] fairly and adequately protect the interests of the class." JAMS, *supra* note 127, at 2. These requirements are identical to the prerequisites set forth in Rule 23(a). See FED. R. CIV. P. 23(a) (describing the prerequisites to a class action).

Regarding many important issues, however, the rules are either silent or diverge significantly from the Federal Rules of Civil Procedure, raising serious questions as to the ability of class arbitration to adequately resolve disputes. Though there are other examples,<sup>129</sup> this Section considers one—appellate review of certification decisions—at length.

In 1998, the Supreme Court adopted Rule 23(f), which provides the federal courts of appeals discretionary interlocutory review of a lower court's decision granting or denying class certification.<sup>130</sup> That rule was enacted in large part because of the significant impact a class certification decision can have on the losing party.<sup>131</sup> Before its adoption, litigants dissatisfied with a lower court's certification ruling were generally barred from interlocutory review.<sup>132</sup> In many instances, however, the certification decision was dispositive of the claim: a decision denying certification of a class action could serve as a death knell to the plaintiffs' claim,<sup>133</sup> whereas an order granting certification imposed significant pressure on the defendant to settle.<sup>134</sup> The Advisory Committee believed that, because of these concerns, interlocutory appeal should be available in limited situations.<sup>135</sup>

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129. The rules governing discovery provide one example. The Federal Rules of Civil Procedure generally do not limit defendants to deposing only the plaintiff. Instead, Rule 30 provides that the defendant may depose "any person." FED. R. CIV. P. 30(a)(1) (emphasis added). Though some courts have limited discovery in class actions, *see, e.g.*, *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1556–57 (1986) (precluding the defendant from pursuing discovery from absent class members), class action litigation defendants are able to discover substantially more than are class arbitration defendants. Class arbitration providers substantially limit the ability of parties to gather information. For instance, JAMS allows parties to depose only one person. JAMS, COMPREHENSIVE ARBITRATION RULES & PROCEDURES 8–9 (2007), available at [http://www.jamsadr.com/images/PDF/JAMS-comprehensive\\_arbitration\\_rules.pdf](http://www.jamsadr.com/images/PDF/JAMS-comprehensive_arbitration_rules.pdf). It is not at all clear how a company could defend a class arbitration suit while deposing only one person.

130. FED. R. CIV. P. 23(f).

131. *See id.* advisory committee's note (discussing the concerns which led to Rule 23(f)'s enactment); *see also* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1552 (2000) (discussing the "potential significance of an adverse class certification decision").

132. *See* Solimine & Hines, *supra* note 131, at 1562 (discussing support for allowing immediate appeal of class action certification decisions).

133. *Id.* at 1552.

134. FED. R. CIV. P. 23(f) advisory committee's note ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

135. *Id.* Courts generally consider appellate review appropriate in three situations: when "denial of class status sounds the death knell of the litigation," when "grant of class

To provide consumers and businesses similar protection in class arbitration proceedings, many arbitration providers incorporate the right to interlocutory appeal provided for in Rule 23(f).<sup>136</sup> The problem, however, is that the rules fail to acknowledge the FAA's severe limitation on a court's ability to modify an arbitral decision. The FAA provides that arbitral decisions may be vacated only in a limited number of circumstances, most importantly "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."<sup>137</sup> Courts have interpreted this limitation as equivalent to a "manifest disregard of the law" standard,<sup>138</sup> meaning that a court may vacate an arbitral decision only when the arbitrator was aware of the governing legal principle but failed to apply it, and the particular law ignored by the arbitrator was explicit and clearly applicable.<sup>139</sup> Lower court decisions granting or denying certification, on the other hand, are reviewed for an abuse of discretion, which permits reversal if the lower court's decision was based "upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact."<sup>140</sup> A dissatisfied party in an

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status . . . put[s] considerable pressure on the defendant to settle," and when "an appeal may facilitate the development of the law." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834–35 (7th Cir. 1999).

136. *See, e.g.*, JAMS, *supra* note 127, at 3 ("In the discretion of the Arbitrator, his or her determinations with respect to the matter of Class Certification may be set forth in a partial final award subject to immediate court review."). Others provide a right to appeal only after the class arbitration award has been issued, however. *See, e.g.*, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, *supra* note 127, § 5(d) ("The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award.").

137. 9 U.S.C. § 10 (2006).

138. *E.g.*, *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) ("[W]e have adopted a narrow 'manifest disregard of the law' exception under which a procedurally proper arbitration award may be vacated."); *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 280 (3d Cir. 2004) ("[A]n award may be vacated if the arbitrator demonstrates manifest disregard for the [law]."); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998) ("[A]n arbitration award may be vacated if it is in 'manifest disregard of the law.'").

139. *Halligan*, 148 F.3d at 202. For a detailed analysis and critique of the manifest disregard of the law standard as applied to arbitral decisions, see Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 565–87 (2005).

140. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 783 (1995)).

arbitration proceeding therefore faces a much higher burden than a dissatisfied court litigant, because a manifest disregard of the law “means more than error or misunderstanding with respect to the law.”<sup>141</sup>

The result seems inconsistent with the presumption that arbitration adequately and fairly enforces the parties’ rights. To illustrate, suppose two separate, yet identical, class actions are filed against two different cell phone providers. One class files a class action in a United States district court (because that cell phone provider does not use mandatory arbitration agreements), whereas the other class, because of a mandatory arbitration agreement, is forced to use class arbitration. Suppose both the lower court and the arbitrator misinterpret the applicable law and therefore inappropriately certify the proposed classes. Under the abuse of discretion standard, the appellate court can overturn the lower court’s “errant conclusion of law.”<sup>142</sup> But under the manifest disregard of the law standard, the arbitrator must have committed more than mere error or misunderstanding.<sup>143</sup> Under these circumstances, it appears that a court could not modify the arbitrator’s decision, despite the arbitration providers’ rules suggesting otherwise.

That identical classes achieve different results merely because one party files suit in court whereas the other is relegated to arbitration is manifestly unfair and should raise serious concerns regarding the ability of class arbitration to protect the parties to a dispute. Some might argue that this result is a problem of arbitration in general, because the manifest disregard of the law standard applies to all arbitration decisions, not just those granting or denying class certification.<sup>144</sup> Although that may be the case, the problem is both more apparent and more severe in the context of class arbitration, given the broader impact of certification decisions. Though arbitration providers appear to have recognized and addressed this concern by granting the right to interlocutory appeal, the Rule 23(f)–

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141. *Halligan*, 148 F.3d at 202 (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2nd Cir. 1986)).

142. *Newton*, 259 F.3d at 165 (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank*, 55 F.3d at 783).

143. *Halligan*, 148 F.3d at 202.

144. *See generally* Scodro, *supra* note 139 (examining the manifest disregard of the law standard at length and offering a more appropriate alternative).

like provisions fail to address the impact of the manifest disregard of the law standard.

2. *The Class Arbitration Rules Fail to Protect the Rights of the Parties Involved.* The previous Section identified procedural inadequacies of class arbitration proceedings and explained that, although the arbitration providers' rules appear to mimic those set forth in the Federal Rules of Civil Procedure, the rules governing class arbitration fail to take into consideration the unique characteristics of arbitration as set forth in the FAA. These and other deficiencies raise significant due process concerns. Though it is well settled that the Due Process Clause does not apply to private arbitration,<sup>145</sup> the rise of class arbitration has led several commentators to reexamine whether due process might actually play a role in a limited number of arbitration proceedings.<sup>146</sup> For instance, in class arbitrations provided by JAMS, an arbitrator is permitted to make a partial final award subject to immediate court review.<sup>147</sup> Such judicial involvement would apparently bring into play due process considerations. Some therefore suggest that private arbitration providers' class arbitration procedures are subject to due process requirements.<sup>148</sup> Others believe that, regardless of the Due Process Clause's applicability to arbitration, AAA, JAMS, and other arbitration providers must afford class members and defendants

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145. See, e.g., *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (“[T]he state action element of a due process claim is absent in private arbitration cases.”); *Fed. Deposit Ins. Corp. v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) (“[W]e do not find in private arbitration proceedings the state action requisite for a constitutional due process claim.”); *Elmore v. Chi. & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) (“[T]he fact that a private arbitrator denies the procedural safeguards that are encompassed by the term ‘due process of law’ cannot give rise to a constitutional complaint.”).

146. See, e.g., Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 239 (2006) (“Provider models of class arbitration also may involve state action . . . given that the role of the court in class arbitration is increased beyond that involved in non-class arbitration, and that judicial review of an arbitrator’s certification decisions potentially available under provider models occurs in connection with a potential area of deprivation of constitutional rights.”); *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 410, 418–19 (2003) (“Although private arbitration is not generally subject to due process constraints because it does not involve state action, binding absent class members to an arbitrator’s judgment would likely implicate due process requirements of adequate notice and representation.” (footnote omitted)).

147. JAMS, *supra* note 127, at 2.

148. See, e.g., Buckner, *supra* note 146, at 247 (suggesting that, because an arbitrator cannot be certain whether there will be judicial involvement during an arbitration proceeding, arbitration providers’ rules should satisfy due process requirements).



adequate due process protections.<sup>149</sup> Arbitration providers apparently agree, as many have self-imposed “due process protocols.”<sup>150</sup> Before legislators declare class arbitration waivers unenforceable, they should be satisfied that class members receive adequate notice and are adequately represented. Again, in many respects, the arbitration providers’ rules fail to provide general fairness to the parties involved.

Selecting the arbitrator presents one potential problem. The right to have a dispute resolved by a neutral decisionmaker is fundamental to due process.<sup>151</sup> Courts generally consider the neutrality of the arbitrator an important factor when determining whether arbitration agreements adequately protect the nondrafting party.<sup>152</sup> To guarantee their arbitrators’ neutrality, arbitration providers allow the parties to a dispute to participate in selecting the arbitrator.<sup>153</sup> In a proceeding between an individual consumer and a company, these provisions guarantee the arbitrator’s neutrality, or at least give consumers the opportunity to protect themselves against a biased arbitrator, because the consumer or the consumer’s attorney directly participates in the selection process. But in a class proceeding, the arbitrator must be selected before class certification, because it is the arbitrator’s job to certify the class.<sup>154</sup> As a result, class members are unable to participate in the selection process, and there is no way for these members to protect themselves against a biased arbitrator. Although the requirement that the class representative adequately represent the class members might provide some form of protection, that requirement is insufficient.<sup>155</sup> Because the class members have a right

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149. See, e.g., Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1766–67 (2006) (“Even if courts reject mandating constitutional due process in class arbitrations through the state action doctrine, the concerns for a fair process in class arbitrations are as significant, if not more, as they are in judicial class actions . . .”).

150. Sternlight, *supra* note 18, at 172.

151. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992).

152. See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (enforcing an arbitral decision in part because the agreement provided for neutral arbitrators).

153. See, e.g., JAMS, JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 1 (2007), available at [http://www.jamsadr.com/images/PDF/Consumer\\_Arbitration\\_Min\\_Std.pdf](http://www.jamsadr.com/images/PDF/Consumer_Arbitration_Min_Std.pdf) (“The arbitrator(s) must be neutral and the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s).”).

154. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003).

155. At that stage in the proceedings, there are no class members or even putative class members to protect. An individual consumer (who may eventually become the class

to an unbiased decisionmaker, and that right is protected in the arbitration context by allowing the parties to choose the arbitrator, class members who are bound by the ruling of an arbitrator they were prevented from selecting are not protected against unfair rulings.<sup>156</sup>

A similar problem concerns the class members' near inability to challenge the arbitrator's determination that the class representatives adequately represent the class. A class action judgment binds absent class members only when those members have been adequately represented.<sup>157</sup> In a typical class action proceeding, absent class members are given numerous opportunities to ensure the adequacy of the representatives. For instance, Rule 23(f) of the Federal Rules of Civil Procedure provides absent class members the ability to appeal immediately a district court's order granting or denying class certification.<sup>158</sup> Moreover, when it becomes apparent that the representative is inadequate after certification, some courts allow class members to collaterally attack the district court's adequacy finding.<sup>159</sup>

These same protections are not available in the class arbitration setting. First, the strict manifest disregard of the law standard

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representative) might select a particular arbitrator with the best of intentions, believing that the arbitrator is neutral. But if for some reason the arbitrator is biased against the class, the class members have few ways to replace the biased arbitrator. The only remedies available are to (1) complain to the very arbitrator they are accusing of bias or (2) seek an interlocutory appeal by demonstrating that there was a manifest disregard of the law, neither of which seems very promising.

156. Although the above text concentrates on the class members' right to a neutral arbitrator, defendant companies share that right as well. When an individual consumer and a company mutually select an arbitrator, both parties are able to adequately protect themselves. But what if the defendant would have chosen a different arbitrator with respect to other class members? In such a case, the defendant company will be bound by the decision of an arbitrator it played no role in selecting, which raises questions about class arbitration's ability to adequately protect the defendant. *See Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) (noting that, because parties to an arbitration agreement are entitled to select their own arbitrator, subjecting a defendant to the ruling of a single arbitrator with respect to every class member's claim is a violation of the defendant's rights).

157. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

158. FED. R. CIV. P. 23(f); *see also supra* notes 130–35 and accompanying text.

159. *See, e.g., Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 258–59 (2d Cir. 2001) (allowing absent class members to attack the adequacy of representation collaterally even after termination of the suit), *aff'd in part, vacated in part*, 539 U.S. 111, 112 (2003) (per curiam); *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973) (same). *But see, e.g., Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) (“Simply put, the absent class members’ due process right to adequate representation is protected not by collateral review, but by the certifying court initially . . .”).

prevents many class members from appealing the arbitrator's initial certification decision.<sup>160</sup> Moreover, when the class representative's inadequacy becomes apparent after the certification decision, the class members' only available remedy is to appeal the arbitrator's final award. The manifest disregard of the law standard also precludes many appeals challenging the class representative's adequacy. As a result, in class arbitration, class members can ensure adequate representation only by objecting during the certification phase. This result suggests that the adequacy of representation may present a greater concern in class arbitration than in class action litigation.

Finally, many arbitration providers have yet to set forth *any* provisions that safeguard the consumers' due process rights.<sup>161</sup> Despite some shortcomings, JAMS's class arbitration rules at least offer class members adequate notice<sup>162</sup> and opt-out rights.<sup>163</sup> Other arbitration providers, however, such as the National Arbitration Forum (NAF), have no rules governing class arbitration.<sup>164</sup> It is difficult to imagine how a legislative response prohibiting use of class arbitration waivers could succeed when some important arbitration providers have yet to develop procedures which facilitate class arbitration.

3. *The Availability of Class Arbitration May Lead Companies to Avoid Using Arbitration Altogether.* If Congress did amend the FAA to prohibit use of class arbitration waivers, companies would be left with a choice. They could continue to use arbitration agreements with their consumers, subjecting themselves to potential class arbitration. Or they could forgo use of arbitration agreements entirely, opting instead to resolve disputes through traditional litigation and therefore, when courts find certification appropriate, the traditional class action. Section B assumes that companies would continue using arbitration even in the absence of class arbitration waivers. This is a questionable, and possibly erroneous, assumption. Class arbitration is

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160. For a discussion of the manifest disregard of the law standard and its implications for class arbitration, see *supra* notes 136–43 and accompanying text.

161. See Buckner, *supra* note 146, at 249 (noting that only AAA and JAMS have chosen to provide due process-like protections to class members).

162. See JAMS, *supra* note 127, at 3 (mirroring Rule 23(c) of the Federal Rules of Civil Procedure and its notice provisions).

163. *Id.* (permitting class members to exclude themselves from the proceeding).

164. Sternlight, *supra* note 58, at 72. Professor Sternlight suggests that NAF actually uses this fact to market itself to companies typically involved in consumer arbitration proceedings. *Id.*

a relatively new procedure, which, coupled with the fact that a company rarely can appeal an arbitrator's decision, suggests a high degree of unpredictability.<sup>165</sup> Furthermore, some commentators suggest that exposing companies to class arbitration would increase the costs of resolving disputes when compared to the costs of individual arbitration.<sup>166</sup> At some point, companies may decide to avoid arbitration altogether if the cost increases are significant, given that a primary reason for arbitration is to avoid high litigation expenditures.<sup>167</sup> In light of these concerns, some companies have amended their agreements to avoid arbitration altogether if they are unable to compel arbitration on an individual basis.<sup>168</sup>

For opponents of class waivers, this might seem like a favorable result. Consumers would no longer be precluded from using traditional litigation to resolve disputes. But Congress has declared a national policy favoring arbitration.<sup>169</sup> This national policy arose from concerns that the legal system, characterized by high costs and lengthy delays, was incapable of efficiently and adequately resolving disputes.<sup>170</sup> Arbitration and other alternative dispute mechanisms have helped ease this burden.<sup>171</sup> Legislative action, by forcing companies to engage in class arbitration, may very well force countless consumer claims, many of which could have been successfully resolved without exhausting limited judicial resources, from arbitration to the courtroom. A successful solution to class

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165. *See id.* at 118 (noting that companies may prefer “the known quantity of class action litigation, rather than risk a bad experience with the relatively unknown” class arbitration process).

166. *See, e.g.,* Ware, *supra* note 100, at 90 (maintaining that arbitration and the clauses typically included within arbitration agreements result in lower-priced consumer goods).

167. For an explanation of the reasons for widespread use of arbitration, see *supra* note 23 and accompanying text.

168. Jack Wilson, ‘No-Class-Action Arbitration Clauses,’ *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 779–80 (2004).

169. For a description of the Supreme Court's interpretation of the FAA and the policy in favor of arbitration, see *supra* notes 37–47 and accompanying text.

170. For the suggestion that litigation's inefficiency gave rise to judicial acceptance of arbitration, see *supra* note 36 and accompanying text.

171. Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64, 65 (1983) (“Although there is no readily available statistic concerning the time expended by judges in handling pretrial conferences, and settlement conferences, the experience of our judges indicates that the cases in the arbitration program, because of their early listing for the arbitration hearing, consume far less pretrial judicial time than the cases that are not eligible for arbitration.”).

waivers should not compromise the federal policy favoring arbitration.

#### IV. OTHER POTENTIAL SOLUTIONS

This Note has demonstrated that a legislative response is not a viable solution to class waivers because of the many fairness and process problems associated with class arbitration. Highlighting inadequacies of suggested reforms is of little use, however, if there are no other potential solutions. In an oft-cited opinion, Justice Grodin of the California Supreme Court acknowledged that class arbitration, though an imperfect solution, “must be evaluated, not in relation to some ideal but in relation to its alternatives.”<sup>172</sup> Justice Grodin concluded that when the alternative “is to force hundreds of individual [consumers] each to litigate its cause . . . in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may be a better, more efficient, and fairer solution.”<sup>173</sup> But allowing companies to avoid liability through use of class waivers is not the only alternative to implementation of class arbitration. Rather, other potential solutions exist. Congress could aim to lower consumers’ arbitration costs by providing attorneys’ fees or shifting costs onto businesses. Legislatures might also rely on administrative enforcement to deter business misconduct. Finally, even if a majority of jurisdictions choose not to adopt measures to protect consumers, Congress should limit choice-of-law provisions to prevent businesses from avoiding jurisdictions that do find class arbitration waivers unconscionable. These and other solutions warrant further examination by the legal community. This Part examines some of these potential solutions.

##### A. *Lower Individual Consumers’ Arbitration Costs*

Class waivers make it nearly impossible for some consumers to assert their claims. For low-value claimants, recovering an arbitral award is economically unfeasible, after factoring in attorneys’ fees and filing costs. The potential to aggregate claims might allow these consumers to seek relief. Because consumers are precluded from

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172. *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev’d in part sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

173. *Id.*

seeking relief due to the high costs and low returns of individual arbitration, one potential solution is to lower those costs.

1. *Attorneys' Fees.* Perhaps the easiest way to lower costs is to require losing businesses to reimburse all of a claimant's reasonable attorneys' fees. Though arbitration proceedings are informal, designed to allow participants to resolve disputes without legal counsel, complex consumer claims typically require an attorney's assistance.<sup>174</sup> Low-value claimants are unlikely to seek relief when the potential recovery is less than the attorney costs they must pay to obtain that relief. Although requiring businesses to pay reasonable attorneys' fees would not entirely address the problems presented by class waivers,<sup>175</sup> it would partially offset the high costs that prevent consumers from seeking relief.

To achieve this result, Congress could ban fee-waiver clauses in arbitration agreements and allow the recovery of attorneys' fees.<sup>176</sup> For instance, in *Johnson v. West Suburban Bank*,<sup>177</sup> the Third Circuit held that an arbitration agreement was not unconscionable, in part because the federal statute governing the consumer's claim permitted recovery of attorneys' fees.<sup>178</sup> If more consumer statutes permitted such a recovery, then the costs of asserting a low-value claim would at least partially be reduced. As a result, consumers would be more likely to assert low-value claims on an individual basis.

2. *Cost Shifting.* Another way to lower consumers' costs is to shift some or all of the arbitration filing fees to the drafting party. AAA's rules require that consumers with claims lower than \$10,000 are responsible for one half of the arbitrator's fees, up to a maximum of \$125, and businesses are responsible for most of the remaining

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174. Sternlight, *supra* note 58, at 81.

175. *See id.* (suggesting that even when attorneys' fees are recoverable, few attorneys would be willing to represent consumers with low-value claims).

176. This potential solution is certainly subject to the same critique offered earlier that Congress is unlikely to pass any legislation to protect consumers. *See supra* Part III.A. But because some consumer statutes already provide for attorneys' fees, *see, e.g.*, Truth-in-Lending Act, 15 U.S.C. § 1640(a)(3) (2006) (allowing for the recovery of attorneys' fees), perhaps this legislative action is more likely.

177. *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

178. *Id.* at 374.

costs.<sup>179</sup> Though these rules are favorable to the consumer, they do not help those with very small claims. For many consumers, the \$125 fee alone prevents filing a claim. As a result, the rules should provide that, for consumers with low-value claims, the business must pay the consumer's fees. Under AAA's rules, such a change would result in at most a shift of only \$125. And though this would raise the company's dispute-resolution costs, it seems unlikely that such a small shift in fees would lead businesses to avoid using arbitration.

Unlike recovery of attorneys' fees, however, cost shifting might be a difficult solution to implement. Legislation appears doubtful because the FAA likely would preempt any state statute requiring an arbitration provider to shift fees.<sup>180</sup> Therefore, consumers would likely have to depend on courts to provide this type of relief.<sup>181</sup> Courts could make it a point to consider the fees imposed on the consumer whenever arbitration agreements are challenged. The Supreme Court suggested in *Green Tree Financial Corp.-Alabama v. Randolph*<sup>182</sup> that when large arbitration costs preclude consumers from vindicating their statutory rights in arbitration, the arbitration agreement should be considered unenforceable.<sup>183</sup> In making this determination, courts could effectively require arbitration providers to shift the fees onto businesses by invalidating any arbitration agreement that fails to provide for such a shift in the case of low-value claimants. As courts continue to invalidate agreements, many companies may voluntarily begin to shift fees to themselves to continue use of arbitration. Arbitration providers might also amend their rules to require such a shift to retain as many disputes as possible.

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179. Am. Arbitration Ass'n, Consumer Arbitration Costs (effective July 1, 2003), <http://www.adr.org/sp.asp?id=22039>.

180. For a brief explanation of the preemptive effect of the FAA, see *supra* notes 116–17 and accompanying text.

181. Because of this dependency, shifting costs may prove to be an inadequate solution. Some courts might find that arbitration agreements failing to shift costs are unconscionable, whereas others might refuse to invalidate these agreements. This result, which is very similar to courts' treatment of class arbitration waivers, would provide consumers little relief.

182. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

183. *See id.* at 90 (“It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”).

*B. Rely on Administrative Enforcement to Protect Consumers*

Class arbitration waivers are problematic, not only for leaving low-value claimants without adequate relief, but also because they allow companies to avoid liability and continue detrimental and possibly illegal activities.<sup>184</sup> Because consumers are unable to assert their claims, businesses are not held liable for their actions. As a result, they continue their illegal actions, giving rise to yet more consumer injuries. In addition to lowering consumer costs, one way Congress could hold businesses accountable for their conduct is to rely on administrative enforcement. Even if courts continue to uphold class arbitration waivers, precluding many consumers from asserting their claims, legislators can ensure that businesses are held liable—and that their misconduct is hindered—by amending consumer statutes to include administrative enforcement mechanisms.

For example, the Truth-in-Lending Act (TILA)<sup>185</sup> empowers the Federal Trade Commission to enforce individual compliance with all of TILA's requirements.<sup>186</sup> If a company violates TILA, its actions could go unpunished in the absence of this enforcement mechanism, because individual consumers might lack the financial incentives to seek relief. But the Federal Trade Commission's penalties serve as a punishment, deterring violations of TILA. Courts have acknowledged that administrative enforcement mechanisms reduce the concerns accompanying class waivers.<sup>187</sup> Federal agencies can impose penalties to deter misconduct, even when private enforcement is unavailable due to class waivers. The effect is not to provide consumers with relief for their claims, though agency enforcement can include awards to private parties; rather, administrative enforcement inhibits the conduct giving rise to the consumers' claims in the first place. If more of the statutes concerning consumer arbitration proceedings contain administrative enforcement mechanisms, more low-value claimants will be able to seek relief.

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184. For an explanation of the problems accompanying class arbitration waivers, see *supra* Part I.B.

185. Truth-in-Lending Act, 15 U.S.C. §§ 1601–67 (2006).

186. 15 U.S.C. § 1607(c).

187. See, e.g., *Johnson v. W. Suburban Bank*, 225 F.3d 366, 375 (3d Cir. 2000) (enforcing an arbitration agreement containing a class waiver clause because TILA's provisions make public enforcement available).



C. *Limit the Use of Choice-of-Law Provisions in Arbitration Agreements*

Even if the majority of courts continue to uphold class arbitration waivers and legislatures elect not to take measures to increase business accountability, Congress should consider limiting the use of choice-of-law provisions to prevent businesses from avoiding those jurisdictions that consider class waivers unconscionable. Though the majority of courts generally consider class waivers valid and enforceable, a growing number have begun to scrutinize these waivers and their effect on consumers.<sup>188</sup> The growing support for consumer protection, however, even if it became support among a majority of the American judiciary, would still be insufficient to provide the relief called for by this Note because of use of choice-of-law provisions by corporations. Because American law treats arbitration agreements as a contract between the drafting party and the consumer,<sup>189</sup> businesses are generally able to select the forum and the applicable law that will govern any disputes.<sup>190</sup> Businesses, aware that some courts are critical of class waivers, have begun to incorporate choice-of-law provisions within their arbitration agreements to impose on consumers business-favorable laws.<sup>191</sup> The credit card industry, for instance, has successfully used choice-of-law provisions to impose Delaware law on all consumers subject to the industry's arbitration agreements.<sup>192</sup> Thus, even if California consumers have a colorable claim that a particular arbitration agreement is unconscionable under California law, those consumers

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188. For a summary of the various courts' treatment of class waivers, see *supra* Part I.D.

189. See *supra* note 17 and accompanying text.

190. Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 59 (2005).

191. See Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1908–09 (2006) (evaluating businesses' attempts to project nationwide the law of certain states in all arbitration agreements). Businesses also prefer to use choice-of-law clauses for efficiency reasons. Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT*, *supra* note 150, at 63, 74 (explaining that choice-of-law clauses are popular among contract drafters because they “help to achieve simplicity in an overly complex legal and business world by restricting the number of potentially applicable laws and thereby reducing the transaction costs of negotiating and contracting”).

192. Nagareda, *supra* note 191, at 1909.

might still be forced into arbitration if the company can successfully apply another state's unconscionability laws.

This is a troubling result because companies can continue to use class waivers even if nearly every state's laws hold that they are unconscionable, so long as one state's laws treat these clauses favorably. The inclusion of choice-of-law provisions might therefore negate any progress made by consumers in defeating class waivers. As a result, absent national legislation precluding the use of class waivers, consumer advocates must find a way to limit companies' ability to use choice-of-law provisions in arbitration agreements.<sup>193</sup>

#### CONCLUSION

As demonstrated over twenty-five years ago by Justice Grodin of the California Supreme Court, class arbitration waivers have the potential to significantly burden consumers seeking to hold businesses liable for their misconduct.<sup>194</sup> Class waivers regularly preclude consumers such as Gene Dale from obtaining relief. But imagine how Dale's story might have changed had Congress passed legislation barring the use of class waivers in arbitration agreements, as numerous commentators have called for. Dale and his fellow subscribers could then have brought a class claim against Comcast in an arbitration proceeding. Given the inadequacies of the class arbitration rules, however, both the subscribers and Comcast would sacrifice significant procedural protections. Discovery would be limited, many of the parties involved would play little or no role in selecting the arbitrator, and the consumers would have little chance of obtaining judicial review of the arbitrator's decision. Or, in light of these concerns, Comcast might instead have chosen to forgo arbitration altogether. Although Dale and other subscribers would then be free to file a class claim against Comcast, so too would countless other consumers. Dale would almost certainly face years of litigation before recovering his \$10.56.

To some, these results might seem superior to the existing situation, justifying a bar of class waivers. But if consumers deserve meaningful protection from business misconduct, consumer advocates

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193. *But see* Brunet, *supra* note 191, at 75 (maintaining that courts should enforce choice-of-law clauses because they advance party autonomy).

194. *See supra* notes 172–73 and accompanying text.

must shift their focus to new solutions. This Note has proposed three solutions. First, courts, legislatures, or arbitration bodies could shift attorneys' fees and arbitration costs for consumers. Second, legislatures could create administrative agencies to punish business misconduct. Third, Congress should limit companies' power to use choice-of-law provisions in arbitration agreements. Unless scholars examine these and other solutions, class waivers will continue to hurt the Gene Dales of the world.