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## Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action

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# OPTING OUT OF LIABILITY: THE FORTHCOMING, NEAR-TOTAL DEMISE OF THE MODERN CLASS ACTION

Myriam Gilles\*

## INTRODUCTION

In recent years, there have been hundreds of academic articles and scores of books written about class action litigation.<sup>1</sup> The law reviews abound with doctrinal critiques, letters to Congress, moralist manifestos, and economists' prescriptions for optimized class action rules. Reading it all, one would certainly think that abusive class action litigation is running amok in the United States.

On the doctrinal front, for example, Professor Martin Redish raises the objection that much of contemporary class action litigation is, in reality, a "lawyer-driven" hunt for bounty and that, when a court in such a case applies Rule 23 procedures to a substantive federal statute, it is effectively grafting a *qui tam* provision onto a law that contains no such remedy. Redish would have courts hold that Rule 23 may not be applied to lawyer-driven suits, lest it conflict with the remedial scheme of the substantive congressional enactment upon which the suit is based. Alternatively, he would settle for legislation banning the widespread scourge of lawyer-driven class actions.<sup>2</sup>

From the moralist corner, Professor Charles Wolfram raises the somewhat less nuanced objection that plaintiffs' lawyers are, well, immoral. Professor Wolfram's attack focuses on the "low state of ethical practice in class actions" and the "sell-out lawyers who, for millions in fees, are willing

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\* Professor, Benjamin N. Cardozo School of Law. A.B. 1993, Harvard; J.D. 1996, Yale.—Ed. I want to first thank Gary Friedman, who in fairness deserves more of a coauthor credit than a thank you. I would also thank participants in faculty workshops at the Stanford/Yale Junior Faculty Forum, and Virginia, Duke, Columbia, and Hofstra law schools for lively workshops on this paper. In particular, thank you to Jennifer Arlen, Mark Budnitz, Paul Carrington, Erwin Chemerinsky, George Cohen, Chris Drahozal, Cindy Estlund, Catherine Fisk, Risa Goluboff, Michael Herz, Pam Karlan, Jody Krauss, Melanie Leslie, Francis McGovern, Judith Resnik, Bill Rubenstein, Richard Schragger, Bob Scott, John Setear, Stewart Sterk, Jean Sternlight, Peter Strauss, Susan Sturm, Rip Verkeuke, Stephen Ware, and Ted White for careful reading and helpful comments. All errors are my own.

1. My focus here is on class action litigation and scholarship between the mid-1980s and the present. I have previously discussed the criticisms aimed at the class actions of the 1960s and '70s, which sought to desegregate schools, improve prison conditions, and obtain welfare rights for minorities and other disenfranchised citizens. See, e.g., Myriam E. Gilles, *Reinventing Structural Reform Litigation: Depunitizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000).

2. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77–83.

to sign away the rights of tens of thousands of faceless and lawyerless class members.”<sup>3</sup> The moralists<sup>4</sup> purport to be pessimistic about “reform” efforts so long as a “sizable number of lawyers . . . are attracted to the big-money rewards of morally compromised (but legal) professional work.”<sup>5</sup>

Law and economics, of course, has had a field day criticizing class actions. Economic analysis has led some scholars to conclude that the agency costs inherent in “entrepreneurial litigation” (that’s law and economics for lawyer-driven suits) produce inefficiencies that can only be addressed by a free market for legal claims, in which attorneys may purchase outright the claims of class members.<sup>6</sup> Related scholarship focuses on auctioning the lead counsel position in class actions,<sup>7</sup> on the problems of collusion between plaintiffs’ lawyers and defendants,<sup>8</sup> on the concomitant problems of self-dealing by class counsel,<sup>9</sup> or on the supposedly outsized leverage that class certification gives even the most baseless of class claims.<sup>10</sup> Indeed, eco-

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3. Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 CORNELL L. REV. 1228, 1231 (1995).

4. Other moralist arguments relate to the values of promoting plaintiff autonomy and preserving plaintiffs’ voices in the class action mechanism, see Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 813 (1995); insuring adequacy of class counsel and reducing opportunities for collusion between and among counsel, see Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995); and identifying potential and actual conflicts of interest between the class and its counsel, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1376 (1995).

5. Not content to disparage the morality of plaintiffs’ lawyers or to take aim at their wallets, Professor Wolfram levels his best shots at their egos: “what one needs to succeed in the field of class action plaintiff lawyering are: (1) a plaintiff; (2) capital; (3) political skills; and (4) luck.” Wolfram, *supra* note 3, at 1231. Professor Coffee is notably more restrained, arguing that class actions (in particular, mass tort class actions) raise concerns about possible collusion among adverse counsel. Coffee, *supra* note 4, at 1373–74.

6. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

7. See John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 5, 77–78; Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650 (2002); Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL’Y REV. 69 (2004); Julie Rubin, Comment, *Auctioning Class Actions: Turning the Tables on Plaintiffs’ Lawyers’ Abuse or Stripping the Plaintiff Wizards of Their Curtain*, 52 BUS. LAW. 1441, 1446–50 (1997).

8. See, e.g., John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853 (1995).

9. See Charles Silver, *Class Actions—Representative Proceedings*, in 5 ENCYCLOPEDIA L. & ECON. 194, 199–200 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

10. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 878 (1987); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000); William J. Lynk, *The Courts and the Plaintiffs’ Bar: Awarding the Attorney’s Fee in Class-Action Litigation*, 23 J. LEGAL STUD. 185 (1994). Professor Milton Handler put it most succinctly: “Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail!” 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).

conomic analysis has been brought to bear on virtually every imaginable issue related to class action litigation, prompting innumerable proposals for “reform.”

It is, I think, overly dramatic to say that all of this scholarship misses the point. And yet, almost universally, the staggering heap of academic reform proposals ignores a fundamental and transformative point: in the ongoing and ever-mutating battle between plaintiffs’ lawyers and the protectors of corporate interests, the corporate guys are winning. And they are winning because they have developed a new set of tools powerful enough to imperil the very viability of class actions in many—actually, most—areas of the law. In fact, I believe it is likely that, with a handful of exceptions, class actions will soon be virtually extinct.

Two factors guide this prediction: the demise of mass tort class actions and the rise of contractual class action waivers. First, as recently as ten years ago, a significant percentage of all class actions were tort cases; by most accounts, almost twenty percent.<sup>11</sup> Since that time, the mass tort class action has met a fate similar to that of the Dodo bird. The latter was last seen on the island of Mauritius in 1680; the former has rarely been glimpsed since the issuance of broad class decertification opinions by federal appellate courts in asbestos, tobacco, and product liability cases in the 1980s and 1990s.<sup>12</sup>

Second, and more significantly, the vast majority of the remaining class actions are based on some sort of contractual relationship. Virtually all consumer class actions, for example, arise out of some form of contract (adhesive or otherwise), just as employment discrimination class actions arise out of employment contracts. Federal antitrust class actions necessarily grow out of contracts (indeed, standing rules require as much), and the same is true for class actions relating to insurance benefits, ERISA plans, mutual funds, franchise agreements, and an endless variety of other matters.

All of these contract-based class actions are, I believe, on their way to Mauritius. Corporate caretakers have concocted an antigen, in the form of the class action waiver provision, that travels through contractual relationships and dooms the class action device. Where class actions are based on some sort of contractual relationship, this toxin is quite lethal. Developed in the late 1990s by marketers for one of the arbitral bodies,<sup>13</sup> among others,<sup>14</sup> the waiver works in tandem with standard arbitration provisions to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding. More virulent strains of the

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11. DEBORAH R. HENSLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 52–53 (2000).

12. See *infra* Part I.

13. See *infra* notes 120–127 and accompanying text (charting the early development of collective action waivers generally, and role of the National Arbitration Forum specifically).

14. See *infra* notes 128–131 and accompanying text (reviewing allegations that major credit card companies and issuing banks played a significant and clandestine role in the development of collective action waivers).

clause force the would-be plaintiff to waive even her right to be represented as a passive, or absent, class member in the event some other injured person manages to commence a class proceeding.

These provisions, which I term “collective action waivers,”<sup>15</sup> still face important judicial challenges, which have the potential to significantly limit their scope. The first round of attempts by plaintiffs’ lawyers to invalidate collective action waivers was rooted in state law unconscionability doctrine and allegations that the waivers were inconsistent with substantive federal statutes.<sup>16</sup> These arguments have met with failure everywhere except California, which has proven hospitable to the unconscionability challenge.<sup>17</sup>

The plaintiffs’ lawyers, however, are not going down without a fight and are beginning to bring second-wave challenges to collective action waivers, which are subtler and more surgical than the broad state-law unconscionability attack. For example, creative plaintiffs’ lawyers are arguing that the collective action waiver’s implicit prohibition against cost-spreading across multiple claimants precludes plaintiffs from vindicating federal statutory rights in complex matters that would be expensive to litigate, at least where each plaintiff has relatively little at stake.<sup>18</sup> On this theory, the anti-cost-spreading feature should be treated no differently than mandatory cost-splitting provisions, which current doctrine holds invalid where they would preclude the exercise of federal statutory rights.<sup>19</sup> The coercive imposition of collective action waivers by parties with market power has also been challenged under the Sherman Act.<sup>20</sup> It remains to be seen how much traction these second-wave challenges will find in combating the collective action waivers. Certainly, the scope of these challenges is more limited than the broad first-wave challenges.<sup>21</sup>

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15. I use the term “collective action waivers” rather than “class action waivers” because these provisions, in their usual contemporary form, waive not only the right to participate in class actions, but also the right to participate in classwide arbitrations or to aggregate claims with others in any form of judicial or arbitral proceeding.

16. See *infra* Section II.C (discussing the successes and failures of “first wave” challenges to collective action waivers).

17. See *infra* text accompanying notes 182–185 (discussing California cases voiding collective action waivers on unconscionability grounds).

18. A likely test case for these theories is brewing in federal court in New York, where numerous retailers are seeking to assert antitrust claims against American Express (“AmEx”) as a class, notwithstanding the presence of broad collective action waivers in the standard AmEx merchant agreement. As this Article goes to print, the matter is sub judice in *In Re American Express Merchants’ Litigation*, 03 Civ. 9592 (GBD) (S.D.N.Y. Dec. 23, 2003).

19. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (finding that the party seeking to avoid arbitration “bears the burden of showing [that] the likelihood of incurring such costs” would prohibit that individual from pursuing her rights); see also *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 551 (4th Cir. 2001) (finding that the party seeking to avoid arbitration has the burden of showing that the costs of the arbitration will deter her from bringing a claim in the arbitral forum and, as such, prohibit her from vindicating her statutory rights).

20. See *In Re Am. Express Merchants’ Litig.*, 03 Civ. 9592 (GBD) (S.D.N.Y. Dec. 23, 2003).

21. The second-wave challenges apply only to claims alleging violations of federal statutory rights where each claimant has a relatively minor sum at stake in pursuing the action, such that the costs of instigating an individual arbitration far exceed the costs of class litigation. These challenges

Assuming the collective action waiver emerges more or less unscathed from the current round of judicial challenges, it is only a matter of time before these waivers metastasize throughout the body of corporate America and bar the majority of class actions as we know them. It is true that, to date, the collective action waiver has likely had only minimal penetration;<sup>22</sup> early adopters include financial services companies, telephone and Internet firms, and a handful of other aggressive firms with a keen interest in avoiding class action liability. But I regard it as inevitable that firms will ultimately act in their economic best interests, and those interests dictate that virtually all companies will opt out of exposure to class action liability. Why wouldn't they?<sup>23</sup> Once the waivers gain broader acceptance and recognition, it will become malpractice for corporate counsel not to include such clauses in consumer and other class-action-prone contracts.

Ultimately, owing to new technologies and the emphatic judicial embrace of arbitration over the past twenty years, there are few areas of class action law to which the collective action waiver will not extend. Technology has vastly broadened traditional notions of contract and acceptance. Any transaction that may be cemented with the click of a mouse is susceptible to a class action waiver.<sup>24</sup> Judicial preferences for arbitration, meanwhile, have led courts to an unprecedented solicitude for unilateral "envelope-stuffer" amendments of adhesion contracts—for example, the unread notice stuffed in a consumer's monthly bill stating that, by continuing to use her credit card, or her telephone, she agrees to arbitrate any dispute that may arise.<sup>25</sup> Increasingly, these unilateral notices are taking the form of mass emails, or even website postings, which have been held to support the imposition of arbitration provisions and even collective action waivers.<sup>26</sup>

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therefore could not succeed in a host of claims brought under state laws addressing the rights of consumers, employees, commercial transactions, and others.

22. It is, of course, entirely possible that many companies have, in the very recent past, included collective action waivers in their contracts. Unless those waivers are challenged in court on a motion to compel arbitration or otherwise surface during litigation, it is difficult to quantify just how many are out there. Still, it is my sense—given the still-high number of consumer and commercial class actions filed annually—that many (most?) companies have not yet written the waivers into their agreements with potential class members. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (analyzing data on class actions filed over the past several decades and finding a recent uptick in class action litigation).

23. See *infra* note 123 (concluding that most rational, well-informed economic actors will determine these waivers to be in their best interests).

24. See *infra* Part III. See generally Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 243 (2000).

25. Under the Federal Arbitration Act, arbitration clauses need not be signed to be enforceable. 9 U.S.C. § 2 (2000).

26. See, e.g., *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 919 (N.D. Tex. 2000) (holding that credit card holders were bound by an arbitration clause contained in their monthly bill); see also Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 834–35 (2002) (“[M]any companies simply use envelope stuffers, warranty provisions, or employee handbooks to specify the available procedural recourse. Other companies obtain a signature on a

One seemingly contract-free bastion of class action practice is securities fraud litigation—specifically, the paradigmatic Rule 10b-5 case where the plaintiff has purchased shares of the defendant issuer on the secondary market. Without a contractual relationship between the plaintiff and the issuing company, it would appear that there is no way for the issuer to impose an arbitration clause or a class action waiver. And yet even these actions may be susceptible to the waivers: Is it not possible for a class action waiver to be effected by some form of publication notice—perhaps coupled with actual notice to all the exchanges and brokerage houses, and legends on stock certificates—so as to allow securities issuers also to opt out of class action exposure? Might courts not develop a doctrine that the waiver “travels with the stock”? Would such a rule be any more astonishing than the other developments here on our legal Mauritius?

In the end, I do not think the real story of the contemporary class action is adequately told by the doctrinalists, the law and economics scholars or—certainly—by the moralists. I think an accurate appreciation of the present and future of class action litigation requires a heavy dollop of legal realism. One needs to appreciate the evolutionary arms race that is afoot between entrenched corporate interests and entrepreneurial plaintiffs’ lawyers. Scholars and members of Congress are largely preoccupied with fine-tuning the rules governing the class action. Corporate lawyers, meanwhile, have plotted its demise.

My own view is that class actions—warts and all—do far more good than harm. I take it as beyond dispute that the threat of class action liability plays a vital role in deterring corporate wrongdoing. And while one might argue—as many scholars do—that class actions in contemporary practice may tend to *overdeter*, or that agency costs hamper the effectiveness of the class action device, I am aware of no serious argument that we should ditch class actions in their entirety. Everyone seems to agree that sound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings.<sup>27</sup>

In any event, class actions have to exist if we want to fix them. If companies may render themselves impervious to the class action procedure simply by checking a box that says “I do not wish to be exposed to class actions,” then—ultimately—all of the scholarly reform proposals will have been for naught. Accordingly, I would add to the heap of reform offerings

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credit card or employment application, a form filled out in a doctor’s office, or a loan agreement. Sometimes the clauses are provided on-line, and ‘accepted’ by the customer who clicks ‘enter.’”) (citations omitted); Caroline E. Mayer, *Hidden in Fine Print: ‘You Can’t Sue Us’*, WASH. POST, May 22, 1999, at A01 (noting that American Express imposed arbitration clauses on its cardholders through a nondescript insert in monthly bills).

27. See, e.g., David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1906 n.62 (2002) (noting the dominant consensus among scholars and commentators is that the class action device helps to “correct the obvious asymmetrical litigation power” seen in “‘low stake’ claims—cases involving loss that is large in the aggregate, but too small as incurred by each plaintiff for a competent attorney to consider any single claim economically worth prosecuting”).

my own proposed amendment to Rule 23, which would simply provide that the procedures set forth in the rule may not be waived by a standard-form adhesion contract.

But I am not holding my breath. Instead, I offer a dismal prediction of the near-total demise of the modern class action, organized as follows:

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## I. THE DEMISE OF MASS TORT CLASS ACTIONS

Mass tort class actions represent an early casualty in the shift of judicial attitudes against collective litigation activity in general, and the story of their demise may provide insight into the future of judicial treatment of other types of class actions. My project in this Part is not really a normative one: I find the doctrinal underpinnings of the cases that effectively ended “mass-class” to be perfectly coherent (albeit not outcome-determinative), and I regard the utilitarian justifications offered by courts and scholars to reflect perfectly understandable policy choices (albeit choices made from a menu of opposing, equally understandable policy choices). Instead, I am interested in the very fact of the demise of mass-class. Not that I suppose, Kübler-Ross-like,<sup>28</sup> to discern universal stages in the death throes of once-thriving procedural vehicles. Rather, I perceive that a Reagan-era judicial attitude adjustment animated the near disappearance of mass-class, and that this same basic judicial mindset may yet drive even more momentous developments in the law of class actions, as discussed in subsequent Parts.<sup>29</sup>

Mass tort class actions never enjoyed much of a heyday. The prevalence of individual causation and other issues in tort claims augured poorly for the widespread use of class actions in mass torts from the get-go.<sup>30</sup> Still, as collective action litigation in general took off around the country in the 1970s,<sup>31</sup> the use of class actions gained traction in the burgeoning mass tort field. Some inventive work by a handful of federal district judges in the late 1970s and 1980s momentarily portended a bright future. In fact, as late as the early 1990s, according to an influential RAND Institute study, tort claims accounted for nearly a quarter of class action litigation.<sup>32</sup> And yet, within a decade, commentators were chronicling the demise of the mass tort class action and arguing about whether there was any role at all for mass tort class actions going forward.<sup>33</sup>

What happened?

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28. Elisabeth Kübler-Ross, in her famous work, *ON DEATH AND DYING* (1969), described the five stages of grief as denial, anger, bargaining, depression, and acceptance.

29. I do not imagine this assertion is terribly controversial. The attitude shift I discuss in this Section is part and parcel of a more general movement away from the principles that animated the Warren Court's jurisprudence, the Great Society's legislative agenda, and the brief moment in U.S. socio-political thought when issues of equality, access, and opportunity were paramount. *See, e.g.*, Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143 (2003). *See generally infra* Part III.

30. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.”).

31. *See* Gilles, *supra* note 29, at 150.

32. *See supra* note 11 and accompanying text.

33. *See, e.g.*, Coffee, *supra* note 4; Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85 (1997).

### A. The Short Story of “Mass-Class”

As mass tort cases began to inundate the federal system in the 1970s and '80s,<sup>34</sup> the federal district courts were faced with a daunting challenge: they needed to find ways to dispose of tens of thousands of cases efficiently without compromising existing legal rules designed to protect the interests of individual litigants. Class actions were not an obvious place to look: in amending Rule 23(b) in 1966, the Advisory Committee had warned against the use of the class action device in mass tort cases because of the likely predominance of individual questions. “In these circumstances,” the Committee cautioned, “an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”<sup>35</sup>

So instead of pushing the class action envelope, district judges turned first to the familiar common law principle of issue preclusion. Particularly after the Supreme Court gave its blessings to the nonmutual offensive use of collateral estoppel in *Parklane Hosiery Co. v. Shore*,<sup>36</sup> it became possible to argue that if one plaintiff managed to establish a defendant's liability on a common issue—for example, whether the defendant failed to warn workers about the risks of asbestos exposure—then future claimants would be able to avail themselves of that finding without having to relitigate the issue.<sup>37</sup>

A pioneer of these efforts was Judge Parker. Faced with thousands of asbestos lawsuits in the Eastern District of Texas<sup>38</sup> and having heard identical liability evidence in case after case, Judge Parker turned in the early 1980s to collateral estoppel to bar defendants from relitigating particular liability issues that had been decided against them at trial.<sup>39</sup> For example, having

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34. See HENSLER ET AL., *supra* note 11, at 23 (“The 1980s saw the rise of a new form of litigation, the mass-tort suit. Consumers of drugs and medical devices, and workers and others exposed to toxic substances, sued manufacturers for injuries allegedly associated with these products.”).

35. See FED. R. CIV. P. 23(b)(3) advisory committee's notes.

36. 439 U.S. 322, 326 (1979) (“[Offensive collateral estoppel] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.”).

37. Some judges apparently preferred consolidation of cases under Rule 42 to issue preclusion. See Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1599 (1995) (discussing instances in which judges consolidated thousands of cases pursuant to Rule 42).

38. The Eastern District of Texas was a hotbed of asbestos litigation in the 1980s and '90s; in 1986, for example, over 700 asbestos cases were on the docket. Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 434 (1986). By 1990, “one out of every three civil cases filed in the Eastern District of Texas was an asbestos personal injury claim.” Deborah R. Hensler, *As Time Goes by: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1900 (2002). This led one commentator to describe the district as the “fertile crescent of asbestos litigation.” Francis E. McGovern, *Resolving Maure Mass Tort Litigation*, 69 B.U. L. REV. 659, 660 (1989).

39. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981); see also HENSLER ET AL., *supra* note 11, at 23 (commenting that judges, particularly in asbestos cases, found themselves “trying the issues that the cases have in common over and over again in individual trials”); McGovern, *supra* note 38, at 662–63 (“Judge Parker ruled that offensive collateral estoppel, or in the alternative, stare decisis or judicial notice, precluded a defendant's future assertion that it was not liable for asbestos related injuries.”).

tried the so-called "state-of-the-art" defense,<sup>40</sup> Judge Parker applied collateral estoppel to bar the defendant from litigating that defense in each new asbestos trial. This approach, naturally, eased the congestion on the court's docket and, not insignificantly, held out promise that terminally ill asbestos plaintiffs might see resolution of their cases during their abbreviated lifetimes.

Presaging a recurring pattern that would come to characterize mass tort litigation, the Fifth Circuit reversed this attempt by the district court to aggregate and streamline litigation.<sup>41</sup> On this occasion, the court held Judge Parker's use of collateral estoppel was inappropriate because, among other reasons, there existed prior "inconsistent verdicts" from other courts on the same liability issues.<sup>42</sup> Under the Fifth Circuit's ruling, if a defendant has managed to secure a favorable verdict on a particular issue—such as the state-of-the-art defense—then a plaintiff's verdict from a subsequent jury on the same issue will not be entitled to preclusive effect.<sup>43</sup> This reasoning effectively dooms issue preclusion in mass torts,<sup>44</sup> where the very volume of cases makes it inevitable that some jury, somewhere, will decide a given issue in favor of the defense.

At this point, from the perspective of the federal district judge swamped with mass tort cases, the class action device surely merited another look.<sup>45</sup> And so, in the early 1980s, inventive federal district judges began to find ways to use Rule 23 to address the mass torts of the day, including Agent Orange, asbestos, tobacco, DES, Dalkon Shield, and a host of others.<sup>46</sup>

40. Defendants in asbestos cases inevitably raised a state-of-the-art defense, claiming that recovery should be denied because the hazards of asbestos were unknowable at the time of exposure. *See, e.g.*, Jack Berman, Case Comment, *Beshada v. Johns-Manville Products Corp.: The Function of State of the Art Evidence in Strict Products Liability*, 10 AM. J.L. & MED. 93, 105 (1984).

41. *Hardy*, 681 F.2d 334 (5th Cir. 1982).

42. *Id.* at 346 ("[T]he Court noted that collateral estoppel is improper and 'unfair' to a defendant 'if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.'") (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979)).

43. *Id.* at 347.

44. *See, e.g.*, Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 222 (1991) ("[T]he federal appellate courts have effectively eliminated issue preclusion as a means of preventing the relitigation of duplicative claims, except in the narrowest of circumstances. These doctrines have frustrated the ability of federal courts to deal with mass tort cases in an aggregative fashion, thus requiring the repetitive adjudication of thousands of similar claims.") (footnote omitted).

45. *See HENSLER ET AL.*, *supra* note 11, at 24 (noting that "by the mid-1980s . . . as the number of mass tort cases mounted, trial and appellate courts had begun" to consider the use of class actions to streamline and manage their dockets).

46. Up to this point in the story—nearly two decades after the adoption of Rule 23—plaintiffs who had sought class status in mass tort cases had been almost universally rejected. *See, e.g., In re Fed. Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982), *rev'd*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982) (lake pollution); *Mink v. Univ. of Chi.*, 460 F. Supp. 713 (N.D. Ill. 1978) (DES); *Harrigan v. United States*, 63 F.R.D. 402 (E.D. Pa. 1974) (negligent surgery in veteran's hospital); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (asbestos expo-

Judge Parker, having been rebuffed in his other efforts to deal with the largest asbestos caseload in the country, certified a class under Rule 23(b)(3) to try the defendants' state-of-the-art defense.<sup>47</sup> Cautioning that the class would likely be decertified at a later point in the proceedings for adjudication of individual issues, Parker nonetheless believed that a one-shot trial on the primary defense would save significant time and money.<sup>48</sup> This time, the Fifth Circuit affirmed, observing in a 1986 decision that litigating this "issue consistently consume[s] substantial resources in every asbestos trial, and [that] the evidence in each case [is] either identical or virtually so . . . ."<sup>49</sup>

Also in the early 1980s, Judges George Pratt and Jack Weinstein of the Eastern District of New York certified a nationwide class of Vietnam veterans alleging injuries resulting from their exposure to dioxin—a.k.a. "Agent Orange"—during the war.<sup>50</sup> While the court was certainly mindful of the inherently individual causation and damages issues in mass-exposure cases, it certified under Rule 23(b)(3) to resolve the threshold government-contractor defense "that impact[s] equally on every plaintiff's claim."<sup>51</sup> The court noted that "later stages of this litigation, especially those concerned with individual causation and damages, 'may require reconsideration' of the certification."<sup>52</sup>

A similar tack was taken by Judge Williams in the Dalkon Shield litigation,<sup>53</sup> where he sua sponte certified a nationwide class of women solely for the purposes of trying the issue of punitive damages liability.<sup>54</sup> Putting aside, or putting off, individual questions of injury causation and damages, Judge Williams reasoned that individual suits were "neither

sure); *Snyder v. Hooker Chems. & Plastics Corp.*, 429 N.Y.S.2d 153 (Sup. Ct. 1980) (Love Canal toxic waste).

47. *Jenkins v. Raymark Indus.*, 109 F.R.D. 269, 282 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986). Judge Parker certified the class and then ordered an immediate interlocutory appeal, which was not then required under Rule 23(b), so that the Fifth Circuit could review his determination before the class action proceeded.

48. *Id.*

49. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986).

50. See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986). The case was consolidated by the Multidistrict Litigation Panel in 1979, preliminarily certified by Judge George Pratt in 1980, and finally certified as a damages and limited fund class action by Judge Jack Weinstein in 1983. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 8–18 (1995).

51. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 790 (E.D.N.Y. 1980).

52. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 722 (E.D.N.Y. 1983).

53. Two million Dalkon Shield contraceptive devices were inserted in women in the United States between 1970 and 1974, when the product was removed from the market. Some users sustained serious injuries such as "uterine perforations, infections, ectopic and uterine pregnancies, spontaneous abortions, fetal injuries and birth defects, sterility, and hysterectomies." *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 848–49 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); see also RONALD J. BACIGAL, *THE LIMITS OF LITIGATION: THE DALCON SHIELD CONTROVERSY* 12–13 (1990).

54. *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal. 1981), *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

sensible, nor fair to those plaintiffs last to queue at the courthouse door—possibly to face no recovery against a defendant with its pockets turned out, due either to the effect of a barrage of lawsuits, or to its refuge in Chapter XI bankruptcy proceedings . . . .”<sup>55</sup> Although the Ninth Circuit later reversed class certification, partly on the grounds that neither the plaintiffs nor the defendants had sought to try these claims under Rule 23(b)(3),<sup>56</sup> commentators widely applauded Judge Williams’ creativity in using the procedural tools at his disposal.<sup>57</sup>

The courts in all of these cases applied legal rules in a plausible fashion to reach results they believed just or efficient. These decisions reflect identifiable values, including a concern with fairness to plaintiffs such as the mesothelioma victims likely to die before their cases may be heard, or the Dalkon Shield victims who, in the absence of collective litigation, would have likely found a destitute defendant by the time their individual actions were called. Driven by these values and concerns—these moral intuitions—Judges Parker, Weinstein, Williams, and others<sup>58</sup> construed Rule 23 and related doctrine in a way that allowed collective action.<sup>59</sup> What these courts did, really, was to certify classes to try *issues*, as opposed to *cases*.<sup>60</sup> It was obvious to these judges that individualized issues such as injury-causation and damages would require decertification at a later stage or some other such procedural construction. But they saw no doctrinal problem with this approach. After all, Rule 23(c)(4)(A) provides that “[w]hen appropriate . . . an action may be brought or maintained as a class action with respect

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55. Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 332 (1983). At the time of class certification, Judge Williams determined that defendant A.H. Robins’s assets totaled \$280 million and that it faced potential liabilities equal to or greater than that amount. *Dalkon Shield*, 526 F. Supp. at 893; see also Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DEPAUL L. REV. 457, 485 (2002) (“With the bankruptcy filing of Manville in 1982, the true prospective dimensions of [mass] asbestos litigation began to dawn on many.”).

56. *Dalkon Shield*, 693 F.2d at 850–51. The plaintiffs and their counsel in the *Dalkon Shield* litigation actually opposed class certification. 526 F. Supp. at 890; see also Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 58.

57. See, e.g., Richard L. Marcus, *Benign Neglect Reconsidered*, 148 U. PA. L. REV. 2009, 2015 (2000) (“Judge Williams was right about judicial innovation . . . the courts have been ‘remarkably inventive’ in addressing the problems of mass tort litigation with existing procedural tools.”). Judge Williams himself later suggested that he was right to certify the class: “the inequities and shortcomings of the present system require that we judges work in an innovative fashion.” Williams, *supra* note 55, at 325.

58. See e.g., *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1341 (9th Cir. 1976) (upholding district court Judge Robert J. Kelleher’s certification of a class of common stock shareholders, finding the judge had “determined to the best of his ability the course the litigation would follow”); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979) (District Judge Skinner certified a class of women in Massachusetts who were exposed to DES in utero).

59. See McGovern, *supra* note 38, at 1882.

60. See Williams, *supra* note 55, at 326–27 (“One important, but both underutilized and overlooked, aspect of Rule 23’s repertoire provides the possibility of class adjudication not as an entire case, but limited to one or more issues common to a group of cases.”).

to particular issues.”<sup>61</sup> Rule 23(c)(4)(A) may be opaque and underused,<sup>62</sup> but commentators have long noted the general applicability of issue class actions to mass torts,<sup>63</sup> and it seems quite possible that such issue class actions were exactly what a number of judges had in mind in certifying classes during the late 1980s and early 1990s.<sup>64</sup>

Their moment, however, was short-lived, as the judicial values animating these mass tort class certifications ran headlong into a different set of judicial values, epitomized by Chief Judge Richard A. Posner of the Seventh Circuit in the watershed *Rhone-Poulenc* case.<sup>65</sup> Brought by a class comprising 120,000 hemophiliacs exposed to AIDS-infected blood, the case concerned the defendant’s widely used blood-screening and extraction product.<sup>66</sup> The district court certified a class solely to try the issue of defendant’s negligence; at the end of the case, the jury would issue a special verdict on negligence and, if the plaintiffs won, individual class members would fan out to courtrooms across the country to try causation, damages, and any other individual issues.<sup>67</sup>

On a writ of mandamus, the Seventh Circuit decertified the class. Writing for the panel, Judge Posner’s focus was on the fairness of the procedures to the defendant who “might easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to

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61. FED. R. CIV. P. 23(c)(4)(A); see also 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790, at 271 (2d ed. 1986) (“The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member.”).

62. See, e.g., Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1499 (2005) (“The ‘issues class’ provision of Rule 23(c)(4)(A) has been infrequently invoked, perhaps due to uncertainty as to how it is to be ‘construed and applied’ in conjunction with, or as a substitute for, the predominance analysis of Rule 23(b)(3).” (footnote omitted)); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 717 (2003) (“[Rule 23(c)(4)(A)] clearly envisions that a court may conduct a common class trial of ‘particular issues,’ but beyond that its meaning is opaque.”).

63. See, e.g., Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 263 (“[C]ases that do not otherwise meet the predominance and superiority requirements of Rule 23(b)(3) can be certified as issue classes.”).

64. Cabraser, *supra* note 62, at 1499 (“[The issue class action] standard is more flexible, enabling courts to examine the circumstances of a particular case to fashion the most efficient path toward resolution [because] [t]he rule simply requires that the issue proposed for class treatment be of ‘central’ importance to the disposition of the case.”).

65. *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995).

66. *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 413–14 (N.D. Ill. 1994). The defendants’ products extracted and concentrated proteins from donated blood through a process called “fractionating” for more effective treatment of hemophilia. The plaintiffs alleged that defendants failed to properly screen donated blood for the AIDS virus, resulting in injuries to the plaintiff class.

67. *Id.*, 157 F.R.D. at 422–23.

settle.”<sup>68</sup> Clearly disinclined for this core reason to allow the certification to stand, Judge Posner then offered other reasons for decertifying in this case, including: (i) the difficulty of applying numerous states’ negligence laws in a single proceeding; and (ii) the observation that plaintiffs had lost a majority of the individual trials against the defendant to date, suggesting that a classwide showdown had not been earned.<sup>69</sup>

Judge Posner’s opinion swiftly became the model for other appellate courts in decertifying mass tort classes.<sup>70</sup> Most famously, in *Castano v. American Tobacco Co.*, the Fifth Circuit decertified “the largest class action ever,” consisting of current, former, and deceased smokers and their families.<sup>71</sup> Again, the concern over the rights of defendants in mass tort class actions was paramount:

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.<sup>72</sup>

Here again, plaintiffs sought only to try class-common factual questions. Like *Rhone-Poulenc*, the *Castano* court found that differences in state law

68. *Rhone-Poulenc*, 51 F.3d at 1298; see also George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 533 (1997) (“More openly than in any other opinion, [the *Rhone-Poulenc*] court is concerned about the unfair pressure toward settlement that follows from class certification.”).

69. *Rhone-Poulenc*, 51 F.3d at 1299 (noting that at the time of the district court’s certification, thirteen individual cases had been tried, with twelve defendant-verdicts returned).

As one commentator has noted, Judge Posner was in fact so concerned about the be-all and end-all position that defendants found themselves in after a certification of a class in this era when the Federal Rules did not yet provide for appellate review of certification decisions that he issued the extraordinary writ of mandamus in order “to adjudicate the case without completely abandoning his jurisdiction.” Stephen D. Susman, *Class Actions: Consumer Sword Turned Corporate Shield?*, 2003 U. CHI. LEGAL F. 1, 2 (2003). The Federal Rules were amended in 1996 to provide an interlocutory appeal of class certification determinations. See FED. R. CIV. P. 23(f).

70. See, e.g., Cabraser, *supra* note 62, at 1481 (noting that the “*Rhone-Poulenc* decision has been vastly influential in all aspects of class action jurisprudence,” and in particular, “its ‘free-market’ attitude toward the maturation of mass torts through repetitive trials in multiple jurisdictions has held sway across the country”).

71. 84 F.3d 734 (5th Cir. 1996). The complaint alleged that the defendant tobacco companies fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature. *Id.* at 737.

72. *Id.* at 746 (citations omitted); see also Cabraser, *supra* note 62, at 1481 (“[The *Rhone-Poulenc* decision] was avowedly procorporate. [The court] voiced the concern, found nowhere in the Federal Rules, that a classwide trial on liability that the defendant lost would place it into bankruptcy, or force it to settle, short of trial, because the risk of loss, rather than or in addition to the risk presented by the merits, would force a corporate decision to surrender. Since such pressure would not be present had the company faced only a series of scattered individual trials—with lower consequences of defeat, and repeated opportunities for victory—class actions therefore comprise, in the *Rhone-Poulenc* analysis, a form of ‘blackmail.’”).

and among plaintiffs failed Rule 23's predominance requirement. And like *Rhone-Poulenc*, the Fifth Circuit pointed out that plaintiffs in previous tobacco cases had met with little success<sup>73</sup> and essentially did not have enough notches on their belts to warrant a winner-takes-all shootout at the OK Corral.<sup>74</sup> And, again, like *Rhone-Poulenc*, the court here was mainly concerned about the power issues and the pressure that certification placed on defendants.<sup>75</sup>

By this point, Judge Posner's snowball was well on its way down the hill. The *Castano* decertification was followed, in quick succession, by the Sixth Circuit's decertification of a class involving penile implants,<sup>76</sup> the Ninth Circuit's decertification of medical products liability classes,<sup>77</sup> and the Third Circuit's decertification of an asbestos class.<sup>78</sup> Finally, the Supreme Court got into the act, rejecting a prepackaged settlement deal in which

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73. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

74. The theory endorsed by the *Castano* and *Rhone-Poulenc* courts has come to be known as the "maturity theory" of mass torts, first developed by Francis McGovern. McGovern, *supra* note 38; see also *Castano*, 84 F.3d at 747 ("[A] mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23. This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication."); *Rhone-Poulenc*, 51 F.3d at 1300 (concluding that the claim against the defendants had not reached a level of "consensus or maturing of judgment" that would follow from further individual claims being filed and won); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master*, 69 B.U. L. REV. 695, 710 (1989) ("[T]he maturity prerequisite generates years of redundant litigation, diverting enormously valuable party, lawyer, expert, and judicial resources from other productive undertakings.").

75. *Castano*, 84 F.3d at 746 ("In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail." (internal citations omitted)).

76. *In re Am. Med. Sys.*, 75 F.3d 1069, 1085–86 (6th Cir. 1996). The court decertified this nationwide class, at least in part because the trial judge had failed to rigorously examine whether the negligence laws of all fifty states were sufficiently similar to allow class treatment, on the grounds that "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action." *Id.* at 1085.

77. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996). While the appellate court rejected Judge Posner's concerns about the undue pressure toward settlement incurred at the certification stage, it nonetheless concluded that individual issues predominated over class issues and that substantive differences in state law were inadequately analyzed. *Id.* at 1233. As one commentator notes:

The [Ninth Circuit's] rejection of the Seventh Circuit's approach is interesting, however, because the court in *Valentino* gives much greater attention to an explanation of the Seventh Circuit's concerns about pressure toward settlement and placing the fate of an industry in the hands of a single jury than it does to its conclusion that certification is inappropriate on grounds of lack of predominance.

Priest, *supra* note 68, at 534.

78. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).



plaintiffs and defendants agreed to certify an asbestos class for settlement purposes only.<sup>79</sup> Once again, the refusal to certify was driven, in part, by concerns with “fairness” to the defendants, given the coercive settlement power of a certified class proceeding.<sup>80</sup> And once again, the Court’s action found doctrinal cover in the notion that the predominance of common issues is undercut by the purported difficulty of applying allegedly disparate state laws—a rationale that has become central in the majority of these decertification cases.<sup>81</sup>

At this point, courts and commentators appear to agree: the mass tort class action is dead as a doornail.<sup>82</sup> The Ninth Circuit has postulated that a case having certain attributes *could* thread the needle, but that case has yet to appear.<sup>83</sup> And so, with all of this as background, I wonder: what does the short history of mass tort class actions portend for the future of collective litigation generally?

### B. *The Lesson of Mass-Class*

The doctrinal underpinnings of the decertification cases are plausible but shaky. To say the least, the cases are not driven by doctrine; the results are not compelled by legal rules. While the drafters of the modern Rule 23 were justified in doubting that the legal requirements of the rule would be met in the typical mass torts case, given the inevitable individual issues of causation and damages, those concerns went by the wayside with the advent of the issue-specific class action pioneered by Judge Parker and others.<sup>84</sup>

The remaining legal-doctrinal objections are fairly weak. It is simply not true that mass tort cases enmesh courts in “individual” issues by requiring the application of (allegedly) divergent state laws. First, the relevant state

79. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (vacating class settlement for failure to meet commonality requirements of Rule 23(b)).

80. George Priest makes a similar point when he notes that “lurking beneath the surface” in the decertification cases “is the fear that certification alone will be determinative of the dispute and unfairly determinative if the underlying substantive merit . . . is low.” Priest, *supra* note 68, at 523.

81. See, e.g., *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996) (“We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered.”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1293 (7th Cir. 1995); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998) (court determined that because multiple states’ laws applied, the class was uncertifiable; plaintiffs limited the class to those governed by Kansas law).

82. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372–74 (2000) (describing *Amchem* and *Ortiz* as having “essentially frozen the development of the class action”); S. Elizabeth Gibson, *A Response to Professor Resnik: Will this Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2097–98 (2000) (“While *Amchem* and *Ortiz* may not sound the death knell for mass tort class action settlements, the decisions certainly increase the difficulty of getting either type of class action certified by a district court and ultimately approved on appeal.”).

83. See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996).

84. Some commentators have argued that issue-specific class actions are not sanctioned by Rule 23(c)(4)(A) unless the entire case meets the common-predominance requirement of 23(b)(3). See Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L. REV. 567 (2004).

tort laws are generally not terribly divergent.<sup>85</sup> But second, in any event, the application of divergent states' laws to common facts hardly requires a trial of *individual* issues; it requires the trial of several groups of *common* issues. There is certainly no doctrinal impediment to such a procedure; indeed, Rule 23(c)(4) specifically provides for the establishment of subclasses and the trial of issues common to the class.<sup>86</sup>

A more compelling, rule-based objection to most mass tort class certifications lies in the "manageability" requirement of Rule 23(b). Having multiple subclasses, for example, may not be the most manageable or efficient solution for an overworked district court. But sometimes it surely is. There is a ring of pretext, not to mention chutzpah, in an appellate panel relying on manageability to reverse a Judge Parker, or a Judge Weinstein, or any district judge who is fashioning innovative procedures precisely because he is seeking to find ways to manage his docket in the face of an avalanche of mass tort filings.

No, something else is going on here, and Judge Posner has told us exactly what it is: it is a judicial empathy for the complaint of corporate defendants that large class actions present a great deal of pressure to settle cases.<sup>87</sup> Many commentators, unsurprisingly, have picked up on what they perceive to be the outcome-driven nature of the judge-made rules restricting mass tort class certification.<sup>88</sup> More interestingly, the "political-policy" underpinnings of this case law have not gone unnoticed by some district court

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85. At least two courts have certified nationwide state-law class actions where the law of all fifty states was implicated. See *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *In re Copley Pharm., Inc.*, 161 F.R.D. 456 (D. Wyo. 1995). Both of these cases were decided before the recent wave of decertifications discussed in this Part, but remain relevant as examples of claimants and courts willing to do the hard work of looking at and comparing the laws of a large number of jurisdictions. See *Castano*, 84 F.3d at 743 (decertifying class in part because the "surveys provided by the plaintiffs failed to discuss, in any meaningful way, how the court could deal with variations in state law"). Of course, it is possible that the plaintiffs today must meet a much higher standard in order to certify a nationwide state-law class action—and that even the most minute nuances in state laws may doom any such effort. See, e.g., *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 458 (D.N.J. 1998) (refusing to certify class even where plaintiffs provided a detailed appendix of the variations in state laws); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 222 (E.D. La. 1998) ("[P]roposed jury charges and interrogatories fall far short of addressing the nuances in state law which must be captured in any jury charge that does not invite reversal on appeal."). See generally Ryan Patrick Phair, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835 (2000).

86. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (in decertifying a class of asbestos-exposed workers, the Court ruled that its decision in *Amchem* had made it "obvious" that a class encompassing both presently injured and future claimants "requires division" into well-aligned subclasses); see also Hines, *supra* note 62, at 716–17; Romberg, *supra* note 63, at 297.

87. Corporate counsel constantly complain of the pressure that class action certification places on them. As one noted insurance defense attorney argued, "[T]he system is broken. The class action device is not meant to be used to force a settlement award that is disproportionate to what would be achieved if someone actually had to litigate their case on its own merits. The device is out of whack when used in this context." *Lawyers Present Pros, Cons of Class Action Suits*, CLASS ACTION REP., Oct. 18, 2004, available at [http://bankrupt.com/CAR\\_Public/041018.mbx](http://bankrupt.com/CAR_Public/041018.mbx) (quoting James R. Carroll, a partner with the law firm of Skadden, Arps, Slate, Meagher & Flom LLP).

88. See, e.g., Hines, *supra* note 84, at 580; Susman, *supra* note 69; see also Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157 (1998).

judges. As district judge Arthur Spiegel wrote, in a decision certifying a mass products class and refusing to follow *Castano* and *Rhone-Poulenc*:

Recently, several Circuit Courts have been highly critical of the use of class actions in mass tort and product liability cases. While we recognize the difficulties inherent in diversity based-class [sic] actions as outlined by the Circuit Courts, we continue to believe that class action provides the fairest, most efficient and economical means of dealing with these types of cases. . . .

We also strongly disagree with those Circuit Courts which have allowed their apparent economic biases to influence their interpretation of the requirements of Rule 23.<sup>89</sup>

Noting that the courts in *Castano* and *Rhone-Poulenc* were moved by the observation that mass-class “certification dramatically affects the stakes for defendants,” Judge Spiegel made the point that the stakes are equally affected by a refusal to certify:

[D]enying class certification makes it less likely defendants will be found liable or responsible for lower damage awards . . . . Plaintiffs in individual actions will have to bear a greater share of the cost and risk for maintaining their action as compared to plaintiffs in a class action. Often an individual action pits a single plaintiff relying on his or her own resources to fund the litigation against the vast resources of a large manufacturer and the large law firms which represents [sic] it.

Obviously, the procedural rules affect the outcome of litigation. These Circuit Courts seemed to ignore the essence of Rule 23 because of their philosophical disagreement with the effects of Rule 23.<sup>90</sup>

Whether or not current mass tort class action doctrine is “correct,”<sup>91</sup> the conclusion here is that a powerful judicial attitude has taken hold that portends poorly for class actions. Discomfort with the settlement pressure exerted by class actions has led courts to decertify Rule 23(b)(3) damages classes wherever current doctrine permits. And thus far, the cases most vulnerable to this analysis have appeared in the area of mass tort, where jurisdiction is founded on diversity, and where the presence of state law issues and choice-of-law problems has provided at least some doctrinal basis for decertification. But recently—and here I return to my main thesis—there has appeared on the scene a vehicle uniquely suited to allow predisposed jurists to thwart collective litigation in the non-tort sector of class action practice. All else being equal, this vehicle—the collective action waiver—should anticipate a warm judicial reception.

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89. *In re* Telectronics Pacing Sys., 172 F.R.D. 271, 275 (S.D. Ohio 1997).

90. *Id.* at 276; see also Cabraser, *supra* note 62, at 1480 (“Utterly absent from [Judge Posner’s] diatribe against class certification was any recognition that the victims had corresponding rights. Indeed, *Rhone-Poulenc* and its progeny exhibited no consciousness that consigning common issues to individual adjudication denies due process to the victims of mass wrongs.”).

91. For a more thorough critique of the case law surrounding mass tort class action certification, see generally Hines, *supra* note 62.

## II. THE COLLECTIVE ACTION WAIVER

In the multifaceted battle over class actions, entrenched corporate interests and equally entrenched plaintiffs' lawyers and interest groups have pursued competing legislative reform agendas, have pressed competing doctrinal arguments in court and have offered competing policy justifications in the scholarly and popular literature to support their positions. The dynamics of this multifront battle are mirrored throughout the law, as the same two sets of belligerents are squared off in fights up and down the substantive and procedural landscape over medical malpractice, asbestos, securities litigation, arbitration, and scores of other issues, each with legislative, litigation-strategic, and policy-theoretical dimensions.

For a variety of reasons, direct efforts in courts and legislatures to restrict class actions have met with very limited success. The hugely successful attack on mass tort class actions, first of all, has proven not to be exportable to other areas of class action practice. Outside of torts, one will rarely encounter in class cases the knotty issues of overlapping or conflicting state laws that Judges Posner and others relied upon to limit class certifications. Most class actions are founded on federal questions, such as federal consumer, civil rights, antitrust, and securities statutes. And any contract forming the basis of a putative class action—for example, franchise agreements or insurance contracts—will invariably contain a choice of law provision, and thus sidestep the conflicts problems that provide the doctrinal (if not the animating) rationale for *Rhone-Poulenc* and related cases.

Direct legislative reform efforts have also proven unsuccessful.<sup>92</sup> There have been some dramatic proposals, such as the Carter administration's attempt to create "private attorney general standing" under an amended Rule 23,<sup>93</sup> or Senator Jon Kyl's 2003 bill to prohibit plaintiffs' lawyers from receiving fees based on a percentage of recovery in large class actions,<sup>94</sup> but they have been overwhelmingly rejected.<sup>95</sup> For the most part, legislative efforts by true believers on both sides have given way to bland, incrementalist bills such as the recently enacted Class Action Fairness Act,<sup>96</sup> which creates

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92. See, e.g., Thomas Merton Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U. L. REV. 507, 509 n.21 (2000) (reviewing past failed legislative class action jurisdictional proposals).

93. See HENSLER ET AL., *supra* note 11, at 21 (discussing the Carter administration proposal).

94. See Marcia Coyle, *Times Five: Bolstered by High Fees in Tobacco Suits, Senate Bill Caps Hourly Pay in Class Actions*, DAILY BUS. REV. (Palm Beach), May 20, 2003, at A9 (reporting on proposal by Senators Kyl and Cornyn to limit contingency fees earned by lawyers in suits resulting in settlements or judgments of \$100 million or more).

95. Somewhat more successful are state-by-state efforts to tighten restrictions on class certification. See *AIG CEO Still Has Hopes that Tort Reform Will Pass*, BEST'S INS. NEWS, Sept. 8, 2004 (reporting that Alabama, Colorado, Florida, Georgia, Louisiana, Ohio, and Texas have recently enacted legislation that would make it more difficult to bring class actions in state court).

96. The Class Action Fairness Act of 2005 ("CAFA") provides that:

district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class

federal jurisdiction for nondiverse state law class actions implicating \$5 million or more.<sup>97</sup> Whatever one feels about the merits of this legislation, it is probably nothing to get exercised about<sup>98</sup> (unless one believes that well-connected plaintiffs' lawyers are routinely "hometowning" corporate defendants in state court class actions around the country—a proposition based on anecdote rather than evidence).<sup>99</sup>

However, while the multifront battle concerning class actions has failed to produce a clear victor, the defenders of corporate interests have enjoyed complete and total victory in the late-twentieth-century showdown over

action in which any member of a class of plaintiffs is a citizen of a State different from any defendant.

28 U.S.C. § 1332(d)(2) (2005). CAFA essentially expands diversity jurisdiction to incorporate non-federal-question class actions. Christopher Whalen, *Victory at Hand for GOP Tort Reform?*, INSIGHT ON NEWS, Feb. 3–16, 2004, at 27. Critics believe that CAFA will have negative effects on collective action litigation, as "many cases will wind up not being brought because federal judges have been constrained by a series of legal precedents from considering large class actions that involve varying laws of different states." Stephen Labaton, *Senate Approves Measure to Curb Big Class Actions*, N.Y. TIMES, Feb. 11, 2005, at A1.

97. Prior to the enactment of CAFA, there were a number of other proposals to federalize the class action mechanism. In 1999, for example, Representative Robert Goodlatte of Virginia introduced the Interstate Class Action Jurisdiction Act, which would have eliminated the complete diversity requirement and allowed judges to consolidate individual claims in order to meet the amount in controversy requirement. 145 CONG. REC. E1026 (daily ed. May 19, 1999) (statement of Rep. Goodlatte, introducing H.R. 1875). According to one commentator, "The motivating force behind this bill was the fear of class actions 'flooding into certain state courts.' In particular, Goodlatte feared state court favoritism toward local lawyers when facing off against out-of-state corporations" tipped the scales. Susman, *supra* note 69, at 14–15 (footnote omitted).

98. Susman, *supra* note 69, at 16 (noting that the Class Action Fairness Act is not "all that important" because while "generally premised on the notion that state courts are more conducive to class action practice than federal courts," and "are recklessly biased and need to be cabined," the author notes that the problem isn't that "state courts are inappropriately 'friendly,' but that federal courts are comparatively hostile"). *But see* Robert S. Whitman, *The Class Action Fairness Act: A Six-Month Assessment*, N.Y. L.J. at 4, Aug. 23, 2005 (noting that while it is still too early to "draw reliable conclusions about the effect of" CAFA, "the few cases decided thus far suggest that defendants view the act—and particularly its expansion of federal court jurisdiction—as a welcome development in the defense of class and mass actions").

99. *See* H.R. REP. NO. 108-144, at 13 (2003) ("[A] growing recognition among plaintiffs' lawyers that certain State courts are particularly friendly to class actions and will readily certify classes or approve settlements with little—if any—regard for class certification standards or the interests of class members."). Compare Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?* 74 TUL. L. REV. 1709, 1715 (2000) ("[T]he prevailing sense among some practitioners is that in many venues in the Gulf States—most notoriously Louisiana, Texas, and, until recently, Alabama—judges are more than willing to certify almost anything that walks through the courtroom doors."), with Susman, *supra* note 69, at 5 ("[W]hatever particular solicitude state courts once showed towards class actions has disappeared in recent years").

All this is not to say that there aren't a handful of extreme examples of cities and counties where consistently high jury awards attract plaintiffs' counsel. *See, e.g.*, Carlyn Kolker, *Madison County's Litigation Machine*, AM. LAW.: LITIG. 2004, Dec. 2004 (supp.), at 37 (describing Madison County, Illinois, where "thousands of multimillion-dollar class actions and mass tort cases" are filed annually and "[h]undreds of large corporations have found themselves on the losing end of the justice system"; noting that last year alone, 106 class actions were filed in Edwardsville, and "more than 1,000 individual asbestos cases were set for trial"—making this small town of just 261,000 residents "the bane of big businesses all over the country").

arbitration.<sup>100</sup> And it is from *this* campaign—not the ongoing class action battle, but the long-completed arbitration revolution—that the collective action waiver emerges.<sup>101</sup>

### A. Arbitration Hegemony

As the mid-twentieth-century hostility to arbitration<sup>102</sup> eventually gave way to acceptance,<sup>103</sup> and then as late-twentieth-century courts moved from accepting arbitration clauses to a posture of slavish deference,<sup>104</sup> corporate lawyers came to understand that there were few bounds to the limitations that may be placed on nominally “procedural rights” in clauses that enjoy the protection of the Federal Arbitration Act (“FAA”).<sup>105</sup>

100. Robert Alexander Schwartz, Note, *Can Arbitration Do More for Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809, 810 (2003) (noting that businesses have taken advantage of the many benefits of arbitration because of a “series of developments in the law of arbitration during the twentieth century”).

101. Professor Sternlight has noted:

One might call this the “do it yourself” approach to law reform: the company need not convince any legislature to pass revised laws, nor persuade any judicial body to change court rules, but rather merely choose to eliminate the pesky class action on its own. If companies attempted to take direct and obvious legislative or even contractual steps to eliminate class actions, they would likely encounter substantial resistance, even in this era of “tort reform,” from those who credit class actions for many important achievements. By contrast, using arbitration to eliminate class actions is advantageous for class action opponents in part because it is surreptitious.

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 11 (2000)

102. 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.”).

103. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (holding invalid agreement to arbitrate issues arising under Securities Act of 1933), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989) (holding that claims arising under Securities Act of 1933 were arbitrable); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) (finding that antitrust claims under the Sherman Act are inappropriate for arbitration), *overruled by* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985) (announcing a “national policy favoring arbitration,” which is not precluded by an arbitration agreement that raises claims founded on statutory rights). A number of scholars have carefully documented this doctrinal shift. See, e.g., Sternlight, *supra* note 101, at 126.

104. See Judith Resnik, *Procedure’s Projects*, 23 CIV. JUST. Q. 273, 289 (2004) (“Over the course of the twentieth century, the attitudes of legislators and court-based adjudicators [towards arbitration] changed.”).

105. Pub. L. 68-401, 43 Stat. 883 (1925) (codified as 9 U.S.C. §§ 1–14 (2000)). Enacted in 1925, the FAA apparently “call[ed] for a resounding reversal of the previous antipathy toward arbitration clauses.” Schwartz, *supra* note 100, at 810. The Supreme Court has held that “procedural” questions which “grow out of the dispute and bear on its final disposition,” *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964), such as “allegation[s] of waiver, delay or a like defense to arbitrability,” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983), are for the arbitral body to decide. So long as defendants can stuff as much as possible into this “procedural” box, their arbitration agreements will likely be upheld. *But see* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005) (“Some courts have viewed class actions or arbitrations as a merely procedural right, the waiver of which is not unconscionable. But as the . . . cases of this court

In a series of cases decided in the 1980s and '90s, the Supreme Court iterated and reiterated its view that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>106</sup> The Court has relied on this pro-arbitration federal policy to find that claims arising under federal statutes such as the Sherman Act, the Securities Act of 1933, and the Age Discrimination in Employment Act are arbitrable, unless Congress expressly states that a judicial forum is necessary for full vindication of the underlying rights secured by the statute.<sup>107</sup> As the Court has not yet encountered a statute that explicitly states a preference for litigation over arbitration, it is fair to say that all federal statutory claims are prima facie arbitrable. Similarly, the Court has held that the FAA applies in state as well as federal court proceedings and preempts state legislation affecting arbitration.<sup>108</sup>

Giving further vent to its "healthy regard" for arbitration, the Court's recent jurisprudence has put more and more "gateway" issues of arbitrability on the plate of arbitrators.<sup>109</sup> While it remains (as of this writing)<sup>110</sup> for courts to determine whether a valid contract requiring arbitration exists,<sup>111</sup> all other

have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights. Affixing the 'procedural' label on such devices understates their importance and is not helpful . . ." (citations omitted)).

106. *Mitsubishi Motors Corp.*, 473 U.S. 614 (1985); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

107. See, e.g., *Gilmer*, 500 U.S. at 25; *Rodriguez de Quijas*, 490 U.S. 477 (1989); *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987) (holding that securities fraud claims brought under Section 10(b) of the Security Exchange Act of 1934 were arbitrable); *Mitsubishi Motors Corp.*, 473 U.S. at 625.

108. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (finding that the FAA preempted a state law requirement that a contract containing an arbitration clause include notification on the first page of the contract); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (rejecting arguments by twenty state attorneys general in finding that the FAA applies in state as well as federal court); *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (holding the FAA preempted California Labor Code authorizing an action for the collection of wages "'without regard to the existence of any private agreement to arbitrate'"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that the FAA applies in state courts and preempting state legislation interpreted to protect franchisees from unfair arbitration agreements). Compare David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter/Spring 2005, at 5, 5 ("Despite its constant, talismanic repetition, the 'national policy favoring arbitration' is illusory and highly dubious federalism."), with Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2002) ("[T]here are 'strong indications' in the legislative history that the drafters of the FAA intended it to apply in state court.").

109. *Howsam v. Dean Witter Reynolds, Inc.*, 573 U.S. 79, 83 (2002); *Gilmer*, 500 U.S. at 26; see also *Elizabeth M. Avery, Green Tree Financial Corp. v. Bazzle: Class Actions and the Future of Arbitrating Antitrust Disputes*, ANTITRUST, Fall 2004, at 24 (discussing the "Court's growing body of jurisprudence suggesting a limited role for the courts in disputes governed by arbitration agreements").

110. See *infra* text accompanying notes 151–155 (discussing the Court's recent grant of certiorari in *Cardegna v. Buckeye Check Cashing Inc.*, 894 So. 2d 860 (Fla. 2005), cert. granted, 125 S. Ct. 2937 (2005), to resolve the question of whether a court or an arbitrator should determine whether a contract containing an arbitration clause is void ab initio).

111. Judges still retain some authority in determining whether to compel arbitration. In reviewing motions to compel, courts must first determine whether the arbitration clause at issue is valid. See 9 U.S.C. §§ 3–4 (2000); *Dean Witter Reynolds*, 470 U.S. at 218 (courts must compel

issues concerning the scope of arbitration agreements are now for arbitrators to decide.<sup>112</sup> So are questions such as whether classwide arbitration is available in a given case.<sup>113</sup>

In sum, the Supreme Court's arbitration jurisprudence over the past thirty years has evinced an incredibly expansive view of the FAA. And while the full import of this national policy favoring arbitration has been criticized by many,<sup>114</sup> including members of the Court itself,<sup>115</sup> there is no reason to believe the Court will swing back to a more nuanced interpretation of the FAA.<sup>116</sup>

Buoyed by this extraordinary judicial deference, corporate lawyers and business executives naturally sought ways to expand the reach of arbitration clauses, sharing their tactical insights in trade journals, at conferences, and

arbitration of disputes within valid arbitration agreements under the FAA). If the clause is found valid, the court must then determine whether the dispute between the parties is within the scope of the clause and suitable for a nonjudicial forum. *See Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 679 (8th Cir. 2001); *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994); *Painewebber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). If the court finds the arbitration clause valid and the dispute arbitrable, the party opposing arbitration then bears the burden of proving any defenses to the enforcement of the agreement. *See* 9 U.S.C. § 2 (2000); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000). Because of the presumption favoring arbitration and the breadth of most arbitration clauses, courts have not surprisingly found most clauses valid and most disputes within the scope of the agreement. *See First Options, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

112. *See* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 80 (2003) ("[T]hese cases show a trend toward moving . . . enforceability questions into the arbitrator's purview, consistent with the sweeping pro-arbitration policy that will result in more cases . . . going to arbitration.").

113. *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality concluding that the arbitrator, not the South Carolina courts, should have determined whether, as a matter of contract interpretation, Green Tree's arbitration clause permits classwide arbitration); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *see also infra* text accompanying notes 132–169.

114. *See, e.g., Mark E. Budnitz, Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995); *Thomas E. Carbonneau, Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); *Robert A. Gorman, The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635; *Schwartz, supra* note 108; *Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

115. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) ("There is little doubt that the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it."); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."). Justice Thomas, in particular, has been a strong voice of dissent in nearly every FAA case to come before the Court. *See, e.g., Bazzle*, 539 U.S. at 460 (Thomas, J., dissenting) ("[T]he FAA cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement."); *Mastrobuono*, 514 U.S. at 60 (Thomas, J., dissenting) (arguing that the choice-of-law provision in an arbitration agreement should make it an issue of state law, thus not governed by the FAA). Justice Thomas's basic position is that Congress never intended the FAA to apply to state courts, so the Court's decisions trigger important federalism concerns.

116. *See* Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEGOT. L. REV. 271, 287 (2003) ("[T]he use of arbitration clauses and referrals to arbitration continues to increase unabated.").



in high-level, top-secret planning sessions.<sup>117</sup> Indeed, by the early 1990s an ADR cottage industry was in full bloom,<sup>118</sup> fueled not by people interested in “alternative dispute resolution”—a sunny moniker reflecting the earnest, academic roots of the movement in the 1960s—but by corporations seeking ways to decrease their liability risks.

In this fertile environment, corporate lawyers created the collective action waiver and wrapped their newborn in the cloak of an arbitration clause, protecting it against attack with the now sacrosanct policies of the FAA.<sup>119</sup>

### B. *The Birth of the Collective Action Waiver*

In the late 1990s, trade-journal articles first appeared encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations. A 1997 “Practice Tips” column in the *Franchise Law Journal* suggested that, in the wake of a nine-figure class action jury verdict in favor of Meineke Discount Muffler franchisees against the home office,<sup>120</sup> franchisors should seriously consider requiring:

each franchisee in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, and because arbitrators do not issue runaway awards, strict enforcement of an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure.<sup>121</sup>

Another corporate attorney writing in a business journal recommended that commercial clients take full advantage of the favorable Supreme Court

117. See Complaint, *Ross v. Bank of Am.*, 05 Civ. 7116 (S.D.N.Y. Aug. 11, 2005). This class action complaint filed on behalf of all credit and charge card holders alleges that the defendant banks’ inclusion of collective action waivers in cardholder agreements is a violation of federal anti-trust laws. *Id.* The complaint further alleges that defendants held a series of secret meetings to discuss the implementation of these waivers. *Id.*, see *infra* text accompanying notes 128–131.

118. Resnik, *supra* note 102, at 617–18 (“[T]he market in ADR appears to be flourishing— with conferences (on topics such as ‘Court ADR’), services (through firms with names such as ‘EndDispute’ or ‘JAMS’ . . . ) law school classes, model rules, and an ever-expanding literature addressing the progress and challenges.” (footnotes omitted)).

119. Collective action waivers are not the only problematic clauses grafted onto arbitration provisions. Professor David Schwartz writes of a number of “remedy-stripping” clauses folded into broad arbitration agreements by “overzealous drafters” who hoped that “the courts’ enthusiasm for enforcing arbitration clauses would spill over onto the logically separable remedy limitation, one that would have had no chance of enforcement without the arbitration clause.” Schwartz, *supra* note 112, at 49–50.

120. *Broussard v. Meineke Disc. Muffler Shops*, 958 F. Supp. 1087 (W.D.N.C. 1997), *rev’d on other grounds*, 155 F.3d 331 (4th Cir. 1998).

121. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 *FRANCHISE L.J.* 141, 141 (1997). The author is a partner at the law firm Wiggin & Dana, which represents a number of franchisors. Citing other cases in which franchisors inserted such agreements into their franchise agreements and escaped massive liability, the author warned that “[i]n this day and age . . . most class action suits against established franchisors will involve impressively large aggregate damage claims. . . . [And while] [a]n arbitration clause may not be an invincible shield against class action litigation, it is surely one of the strongest pieces of armor available to the franchisor.” *Id.* at 142.

arbitration jurisprudence by incorporating class action waivers into arbitration clauses whenever practical.<sup>122</sup> Numerous reports of companies implementing these sorts of provisions also began to appear in the popular press throughout the late 1990s.<sup>123</sup>

This movement accelerated in 1999, when the National Arbitration Forum (“NAF”), a for-profit arbitral body designated in the arbitration provisions of many large companies,<sup>124</sup> disseminated marketing materials cautioning corporate attorneys that the only way to insulate their clients from class action liability in general—and Y2K computer class action liability in particular—was to implement arbitration provisions containing terms that expressly waive the right to class treatment.<sup>125</sup> Companies were responsive to this pitch. American Express, for example, sent notices to some two million small-merchant accounts stating that, henceforth, their merchant agreements would be deemed to include arbitration provisions containing express class waivers;<sup>126</sup> if the merchant objected, it was free to terminate its relationship

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122. Kay O. Wilburn, *A Clause You Don't Want to Overlook*, BUS. L. TODAY, Nov./Dec. 1996, at 55, 57–58.

123. For example, Alan Kaplinsky, an attorney representing major financial services institutions, was quoted as saying that “[a]rbitration is a powerful deterrent to class action lawsuits against lenders . . . . Stripped of the threat of a class action, plaintiffs’ lawyers have much less incentive to sue.” Paul Wenske, *Some Cardholders Are Signing Away Their Right to Sue*, KAN. CITY STAR, May 1, 2000, at A8; see also Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 702 (2004) (citing *Class Action Bans in Arbitration Pacts Could Create Limits on Substantive Rights*, U.S. L. WK., Nov. 25, 2003, at 2294 (Robert P. Davis, Esq. stated that he counseled his clients that the primary advantage of arbitration is that it allows them to avoid class actions: “despite the potential disadvantages to employers who require arbitration, the primary question asked by companies considering arbitration is: ‘Can we cut off class and collective actions by requiring arbitration?’”)); Michael Ferry, *Consumers: Forced Arbitration Is Bad*, ST. LOUIS POST-DISPATCH, Sept. 8, 1992, at 7D (“The banks, [for example,] are rewriting their consumer contracts—such as credit-card agreements and account agreements—to state that either the bank or a customer will refer a dispute to binding arbitration. . . . [T]he banks . . . are afraid of big jury verdicts and big class actions against them. They think arbitrators will be less likely than juries to give customers big damage awards.”); Caroline E. Mayer, *The Price is Rights: People Are Signing Away Consumer Protections—and Many Don't Even Know It*, NEWSDAY, May 30, 1999, at F8 (reporting that a growing number of companies are “rewriting the fine print of their contracts and sales agreements to require that consumers agree, in advance, to give up their right to sue and submit disagreements to arbitrators [and that] [s]uch clauses also bar consumers from participating in class action suits”).

124. NAF is “the exclusive arbitration administer of American Express, Discover (as of 2005), MBNA, and until 2003, First USA (now owned by Chase). It is also designated as an arbitration administrator for Capital One, Chase, Citibank, Diners Club, Household, and Providian.” Complaint ¶ 120, *Ross v. Bank of Am.*, 05 Civ. 7116 (S.D.N.Y. Aug. 11, 2005).

125. Complaint, ¶ 23 B, *Corbett v. National Arbitration Forum*, CGC-04-431-430 (May 17, 2004) (discussing an April 16, 1998 letter from NAF’s director to a corporate defense lawyer warning that “the ‘class action bar’ is threatening lawsuits over the Y2K issue,” and warning that the “‘only thing’ that will ‘prevent’ such suits is the adoption of an NAF arbitration clause ‘in every contract, note and security agreement’”); see also *id.* ¶ 22 D (also alleging that an NAF executive wrote to a prospective client in 1999 that “[a] number of courts around the country have held that a properly-drafted arbitration clause in credit applications and agreements *eliminates class actions*” and that NAF “*will make a positive impact on the bottom line*”).

126. The clause applies only to “small merchants,” defined by American Express as those transacting less than \$10 million in charges annually. In its contracts with these small merchants, American Express retains the right to unilaterally amend by furnishing written notice, such as “envelope stuffers” that accompany monthly statements. Plaintiffs’ Memorandum of Law in Opposition

with American Express and discontinue acceptance of the card. The AmEx waivers are pretty typical: they provide that the claimant may not participate in any class action or classwide arbitration, and may not join its claims with those of any other merchant inside the arbitral arena.<sup>127</sup>

### 1. *The Clandestine Role of the Credit Card Industry*

The development of collective action waivers was also aided by a brain trust of lawyers and business executives in the credit card industry. In a class action complaint filed in August 2005 against the major U.S. card-issuing banks, plaintiffs allege that defendants held a series of high-level, top-secret meetings beginning in 1998 to discuss the imposition and use of collective action waivers.<sup>128</sup> Towards those ends, plaintiffs allege the defendants formed internal organizations “devoted to collectively promoting and implementing” these waivers by filing “amicus curiae briefs for the purpose of persuading courts to enforce onerous and one-sided arbitration clauses,” and “filing countersuits against class action lawyers and suits for abuse of process,” among other activities.<sup>129</sup> According to the complaint, the defendant banks—normally cut-throat and fierce competitors—in this instance illegally colluded to fix material terms offered to cardholders.<sup>130</sup>

The plaintiffs’ allegations of defendants’ numerous clandestine meetings and other communications, which have withstood a motion to dismiss,<sup>131</sup> tell a fascinating story of an entire industry conspiring to avoid class action exposure by working together on drafting, implementing, and defending

to Motion to Compel Arbitration at 7, 11, *In Re Am. Express Merchants’ Litig.*, 03 Civ. 9592 (GBD) (S.D.N.Y. Dec. 23, 2003).

127. The clause provides: “You will not have the right to participate in a representative capacity or as a member of any class of claimants pertaining to any claim subject to arbitration. . . . There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.” *Id.* app. tab 4 (quoting Terms and Conditions for American Express Card Acceptance, dated October 1999).

128. Complaint ¶ 2, *Ross v. Bank of Am.*, 05 Civ. 7116 (S.D.N.Y. 2005). Plaintiffs claim that defendants’ collusive actions constitute an anticompetitive restraint on trade in violation of federal antitrust laws and seek declaratory judgment and an injunction against continued use of collective action waivers, as well as the withdrawal of all currently pending motions to compel arbitration. *Id.*

129. *Id.* ¶¶ 97–118. One internal group was the “Arbitration Coalition,” whose primary responsibility was to identify potential members (that is, banks and credit card companies seeking to reduce or eliminate their exposure to class actions by consumers). *Id.* (citing correspondence indicating that the Arbitration Coalition held at least sixteen meetings and conference calls from November 17, 1999 to October 2003 during which it identified and contacted “[l]eading companies that have adopted or are considering adopting arbitration to resolve disputes with their consumer customers”). Another internal group, the “Consumer Class Action Working Group,” “was spawned from the Arbitration Coalition’s ongoing frustrations with class actions.” *Id.* ¶¶ 113–14.

130. *Id.* ¶¶ 105–07 (citing email correspondence and meeting agendas in which the defendants discuss the “need to control class action litigation” by “sharing our thoughts and materials”).

131. Memorandum and Order, *Ross v. Am. Express Co.*, 04-Civ. 5723 (WHP) (S.D.N.Y. Sept. 27, 2005).

collective action waivers. And for our purposes here, the plaintiffs' story foreshadows the lengths to which corporate defendants are willing to go to implement these waivers and defend them against legal challenge.

### C. First-Wave Challenges

Inevitably, some of the companies that implemented class action waivers have since found themselves as the defendants in putative class actions. As these defendants asserted the waivers as a defense, plaintiffs' lawyers looked for ways to challenge their enforceability. For the most part, these "first-wave" challenges took one of two forms: (i) that the waivers are unconscionable as a matter of state law, or (ii) that compelling arbitration is facially inconsistent with the underlying federal statute upon which claims are based.

#### 1. Unconscionability

Plaintiffs challenging collective action waivers looked first to the common law contract doctrine of unconscionability.<sup>132</sup> Under the FAA, a party may oppose arbitration on such "grounds as exist at law or in equity for the revocation of any contract,"<sup>133</sup> and the Supreme Court has held that state-law unconscionability can be such a basis.<sup>134</sup>

Basic contract law directs that a contractual provision be deemed unenforceable and unconscionable if it is both procedurally and substantively unconscionable: "the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results."<sup>135</sup>

Unconscionability analysis has met with occasional success as a basis for challenging arbitration clauses generally, such as in cases where the claimant is forced to trek across the country to file his arbitration, or where the rules spelled out in the arbitration agreement force him to give up the

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132. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1376, at 21 (1962) (stating that standardized contracts offered to individuals on an "accept this or get nothing basis" are subject to vigilant judicial scrutiny to avoid enforcement of unconscionable provisions).

133. See 9 U.S.C. § 2 (2000).

134. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA).

135. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005). The court continued:

The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." . . . Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.

right to, say, punitive damages, or other remedies.<sup>136</sup> But the courts' reactions to unconscionability challenges leveled at collective action waivers have been far less positive: with the exception of a handful of cases<sup>137</sup> (mostly out of the Ninth Circuit and California)<sup>138</sup> finding such clauses substantively unconscionable, a vast majority of decisions have upheld collective action waivers against this challenge.<sup>139</sup>

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136. See, e.g., *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1551 (11th Cir. 1985) (arbitration clause unconscionable because it gave the drafting party an "arbitration option," while forcing the non-drafting party to arbitrate all claims); *Graham v. Scissor-Tail, Inc.*, 621 P.2d 165, 173 (Cal. 1981) ("[The arbitration clause is unconscionable] because it designates an arbitrator who, by reason of its status and identity, is presumptively biased in favor of one party . . ."); *Ramirez v. Circuit City Stores Inc.*, 90 Cal. Rptr. 2d 916, 920 (Ct. App. 1999) (arbitration clause unconscionable because it barred punitive damages); *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 564 (Ct. App. 1993), *rev. denied*, 18 Cal. Rptr. 2d 563 (1993) (arbitration clause unconscionable where it required all disputes to "be resolved by binding arbitration by the National Arbitration Forum, Minneapolis, Minnesota," a far distance for plaintiffs to travel).

137. See *Luna v. Household Fin. Corp.*, 236 F. Supp. 2d 1166, 1178 (W.D. Wash. 2002) (finding bar on classwide arbitrations unconscionable under Washington law); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000) (striking down collective action waiver as unconscionable and suggesting that it is impermissible to use arbitration provisions to completely eliminate exposure to class liability, and potentially to any liability at all, given that individual claims would have been impractical to pursue); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (same); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) (explaining that it was neither the class waiver nor the arbitration clause, taken alone, that rendered the provision void, but the use of these provisions in combination which raised suspicions of an unconscionable adhesion contract at work), *cert. denied*, 537 U.S. 1087 (2002); see also Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 78 n.13 (2004) (citing additional cases striking down collective action waivers as unconscionable).

138. See *infra* text accompanying notes 139-150.

139. See, e.g., *Jenkins v. First Am. Cash Advance*, 400 F.3d 868 (11th Cir. 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) ("We also reject Snowden's argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages."), *cert. denied*, 537 U.S. 1087 (2002); *Burden v. Check Into Cash, LLC*, 267 F.3d 483 (6th Cir. 2001); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360 (N.D. Ga. 2002); *McIntyre v. Household Bank*, 216 F. Supp. 2d 719, 724 (N.D. Ill. 2002); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566 (E.D. La. 2002); *Pick v. Discover Fin. Servs., Inc.*, No. Civ.A. 00-935-SLR, 2001 WL 1180278, at \*5 (D. Del. Sept. 28, 2001) ("[I]t is generally accepted that arbitration clauses are not unconscionable because they preclude class actions."); *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001) (rejecting argument that arbitration clause was unconscionable because it denied consumers the ability to pursue class actions and thereby vindicate small claims); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 578-79 (W.D.N.C. 2000); *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 922 (N.D. Tex. 2000); *Frerichs v. Credential Servs. Int'l*, 1999 U.S. Dist. LEXIS 22811 (N.D. Ill. 1999); *Zawikowski v. Beneficial Nat'l Bank*, No. 98 C 2178, 1999 WL 35304, at \*2 (N.D. Ill. Jan. 11, 1999); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 665 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 844 (2d Cir. 1999); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996); *Rosen v. SCIL, LLC*, 799 N.E.2d 488 (Ill. App. Ct. 2003); *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886, 893 (N.J. Super. Ct. App. Div. 2001) (enforcing class action provision against unconscionability challenge and concluding that there is no "overriding public policy in favor of class actions"); *Ranieri v. Bell Atl. Mobile*, 759

### a. California's Minority Position

California is currently the only state whose courts have regularly struck down collective action waivers in standard-form agreements as unconscionable.<sup>140</sup> In nearly all of these cases, courts have focused on the inherent unfairness of a contractual clause that prevents claimants “from seeking redress for relatively small amounts of money”<sup>141</sup> and thus immunizes defendants from class or representative suits.<sup>142</sup>

Recently, a fractured California Supreme Court endorsed these interpretations of its state's unconscionability doctrine. In *Discover Bank v. Superior Court*, the majority held that “at least some class action waivers in consumer contracts are unconscionable under California law.”<sup>143</sup> Specifically, the *Discover Bank* case focused on collective action waiver provisions that the defendant credit card company imposed upon the consumer as “an amendment to its cardholder agreement in the form of a ‘bill-stuffer’ that he would be deemed to accept if he did not close his account.”<sup>144</sup> The court held that such adhesive provisions are unconscionable under California law where they “may operate effectively as exculpatory contract clauses that are contrary to public policy.”<sup>145</sup> While acknowledging that California is clearly in the minority on this issue, the court was moved by the “important role of class action remedies in California law,”<sup>146</sup> as “the only effective way to halt and redress [consumer] exploitation.”<sup>147</sup>

N.Y.S.2d 448 (N.Y. App. Div. 2003); *Strand v. U.S. Bank Nat'l Ass'n* ND, 693 N.W.2d 918 (N.D. 2005); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190 (Tex. App. 2003); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001).

140. See, e.g., *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1173 (N.D. Cal. 2002); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002); see also *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Ct. App. 2001).

141. *Szetela*, 118 Cal. Rptr. 2d at 867.

142. See, e.g., *Ingle*, 328 F.3d at 1175 (“[B]y barring class arbitration in a contract of its own drafting, the defendant ‘sought to create for itself virtual immunity from class or representative actions despite their potential merit . . . .’” (quoting *Szetela*, 118 Cal. Rptr. 2d at 867)); *Ting v. AT&T*, 182 F. Supp. 2d 902, 931 (N.D. Cal. 2002), *modified*, 319 F.3d 1126 (9th Cir. 2003) (finding collective action waiver unconscionable because it “will prevent class members from effectively vindicating their rights in certain categories of claims, especially those involving practices applicable to all members of the class but as to which any consumer has so little at stake”); *Szetela*, 118 Cal. Rptr. 2d at 868 (“The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place. . . . The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored.”).

143. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005).

144. *Id.*

145. *Id.*

146. *Id.* at 1106.

147. *Id.* at 1105.

An interesting upshot of this ruling falls under the rubric of choice-of-law.<sup>148</sup> The dissent in *Discover Bank* warned darkly that the majority decision will establish California as a “magnet” jurisdiction for plaintiffs’ lawyers.<sup>149</sup> On this view, plaintiffs who are otherwise bound by collective action waivers will rush into California to file suit, seeking to hide behind the *Discover Bank* decision. This fear, I think, is greatly exaggerated. Under the terms of *Discover Bank* itself, the court may not disregard a contractual choice-of-law provision solely because the chosen state’s law would undermine a fundamental policy of California—as any collective action waiver now plainly would. Rather, it must also be the case that, in the absence of any contractual choice-of-law provision, California law would apply. This further limitation surely protects the Golden State from itinerant plaintiffs’ lawyers in search of favorable laws.<sup>150</sup>

### b. *The Future of Unconscionability*

On its face, the *Discover Bank* decision looks extremely promising from the perspective of consumer groups, liberal commentators, and plaintiffs’ lawyers. The highest court of the nation’s most populous state expressed the commonsensical notion that collective action waivers are inexcusably oppressive tools of corporate defendants seeking immunity from liability for widespread wrongdoing. One can hear the sighs of relief—“finally!”

But the *Discover Bank* decision is already imperiled: one week before the California Supreme Court entered its decision, the U.S. Supreme Court granted certiorari in *Cardegna v. Buckeye Check Cashing, Inc.* to resolve a split in the state and federal courts over whether a court or an arbitrator has authority to determine the legality of an underlying contract containing an arbitration provision.<sup>151</sup>

148. The *Discover* court remanded the case for resolution of the choice-of-law issue. The contract at issue designated Delaware law as controlling, but the court advised that should the trial judge find that Delaware’s acceptance of collective action waivers is “contrary to a fundamental policy of California,” the court must “then determine whether California has a ‘materially greater interest than the chosen state in the determination of the particular issue’ ” and that California’s law would otherwise apply but for the choice-of-law provision. *Id.* at 1117 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).

149. *Id.* at 1118 (Baxter, J., concurring in part and dissenting in part) (“[I]f California courts must, or may, dishonor class action waivers that are perfectly valid under the governing law selected by the parties themselves, California—which now takes a minority position on this issue—might well become the magnet for countless nationwide consumer class action lawsuits that could not be maintained elsewhere.”).

150. A second interesting upshot of *Discover Bank* is that it calls into question the assumption—shared by this author—that the Supreme Court’s decision in *Bazzele* precludes a court, as opposed to an arbitrator, from ordering classwide arbitration where an agreement expressly prohibits collective action. See generally *infra* Section II.E.

151. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005) [hereinafter *Buckeye II*], cert. granted., 125 S. Ct. 2937 (June 20, 2005) [hereinafter *Buckeye III*]; see also Andrew J. Pincus & David Gossett, Mayer Brown Rowe & Maw LLP, *United States: Supreme Court Docket Report*, MONDAQ BUS. BRIEFING, July 8, 2005, available at [http://www.mondaq.com/i\\_article.asp?articleid=33564&print=1](http://www.mondaq.com/i_article.asp?articleid=33564&print=1) (noting that the Florida Supreme Court’s decision is “consistent with

In *Buckeye*, plaintiffs entered into “payday loan” arrangements with the defendant,<sup>152</sup> which included signing a contract containing an arbitration clause, and subsequently filed a class action against Buckeye for charging “usurious interest from thousands of customers for consumer loans” in violation of Florida law.<sup>153</sup> The parties disagreed over whether the FAA required this challenge to be resolved by the trial court or the arbitrator. The Florida Supreme Court concluded that the FAA does not preclude a state court asked to compel arbitration from first deciding whether the contract at issue violates state law.<sup>154</sup>

Six federal circuit courts of appeal, on the other hand, have come to the opposite conclusion, finding that under *Prima Paint*,<sup>155</sup> the illegality of an underlying contract containing an arbitration clause is a question for the arbitrator under the FAA and not the court under state common law.<sup>156</sup> These federal courts have all compelled arbitration and left it to the arbitral bodies to resolve questions of illegality or fraud in the making of the contract.

So while the *Buckeye* controversy seems to revolve around a fairly narrow doctrinal question—whether the FAA preempts state courts from

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decisions of the Alabama, Minnesota, and South Dakota supreme courts,” but that “all six federal circuit courts that have considered the issue have reached the opposite result”).

152. *Buckeye II*, 894 So. 2d at 865 (Bell, J., specially concurring). According to the plaintiffs, Buckeye was engaged in “what it falsely portrayed as a check cashing service,” when in reality, it “charged and collected unconscionably usurious interest” from consumers. Brief in Opposition to Petition for a Writ of Certiorari at 5, *Buckeye III* 125 S. Ct. 2937 (2005) (No. 04-1264), available at 2005 WL 1285615. Buckeye essentially loaned its customers money against their next paycheck or government-issued check; customers “unable to repay these loans when due were permitted to extend their debt or roll-over their loans with Buckeye by paying ‘service fees.’” The fee on these extensions “ranged from approximately 137% to 1,317% A.P.R., and the rate was usually over 300% A.P.R.” *Id.* at 5–6.

153. When the defendant moved to compel arbitration of the claim, plaintiffs countered that the “arbitration agreement should not be enforced because it is contained in an illegal usurious contract and is, therefore, void ab initio.” *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228, 229 (Fla. Dist. Ct. App. 2002) [hereinafter *Buckeye I*]. The trial court agreed with plaintiffs on the illegality of the contract and denied Buckeye’s motion to compel arbitration. *Id.* The intermediate appellate court then reversed, finding the trial court erred in deciding the illegality issue because plaintiffs’ “challenge to the underlying contract’s validity must be resolved by an arbitrator, not a trial court.” *Buckeye II*, 894 So. 2d at 862.

154. Florida’s highest court found that state “public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause.” *Buckeye II*, 894 So. 2d at 864. In response to the court’s ruling, payday lenders have lobbied the Florida legislature to reconsider a bill that would prohibit customers from challenging these contracts in court—legislation that would essentially overturn the ruling in *Buckeye*. The proposed legislation, Senate Bill 2242, was approved by the Florida Senate Judiciary Committee in a 4–3 vote along party lines, with Senate Democrats arguing the bill was “unfair to low-income consumers who can challenge an illegal contract in court for nearly free due to legal services, but may have to split thousands of dollars in arbitration fees if they can’t go to court.” Joe Follick, *Payday Lending Bill Moves On*, SARASOTA TRIB., Apr. 13, 2005, at BS6.

155. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

156. See, e.g., *Jenkins v. First Am. Cash Advance LLC*, 400 F.3d 868 (11th Cir. 2005); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Burden v. Check Into Cash, LLC*, 267 F.3d 483 (6th Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000), amended by Nos. 98-3010 & 98-3817, 2000 U.S. App. Lexis 14467 (7th Cir. June 21, 2001); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159 (5th Cir. 1987).



entertaining illegality challenges to contracts containing arbitration clauses—there would seem to be no principled reason why *Buckeye* would not also govern the issue of who decides whether an arbitration clause is unconscionable under state contract law. Should the Supreme Court disagree with the Florida court and find that arbitrators have sole authority to determine the legality of the underlying contract under the FAA, I would then expect the lower courts to conclude that determinations on all state law contractual defenses to arbitration—including unconscionability—rest exclusively with the arbitrator. Indeed, the California Supreme Court in *Discover Bank* appears to have anticipated and sought to head off this possibility: noting that the U.S. Supreme Court had not yet addressed “the question [of] whether [the] determination of unconscionability should be made by a court or an arbitrator,”<sup>157</sup> the court asserted that such challenges are grounded in state common law and are therefore best left to state courts to decide.<sup>158</sup>

While it is impossible to predict what the Supreme Court will decide in *Buckeye*, or the scope of its decision, the Court’s pro-arbitration jurisprudence and penchant for giving arbitrators greater and greater authority raises the distinct possibility that unconscionability may become a dead-end in efforts to invalidate collective action waivers.<sup>159</sup>

## 2. *Facial Inconsistency of Arbitration with Federal Statutory Rights*

Another argument often made by first-wave plaintiffs’ counsel was that the collective action waiver is inconsistent with the provisions of the substantive federal statute being sued upon. One such statute is the Truth in Lending Act (“TILA”), which unambiguously provides for class action litigation in the text of the statute.<sup>160</sup> In a series of cases, courts have upheld collective action waivers in TILA cases, in the face of plaintiffs’ arguments that the waiver

157. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1115 (Cal. 2005).

158. *Id.* at 1113. The court went on to state that “the FAA does not federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses.” *Id.* at 1112–13. Because, in the court’s view, “California’s rule against class action waivers” does not target arbitration clauses, this rule cannot be preempted. *Id.* at 1112.

159. Professor Jean Sternlight is equally concerned about this outcome: “One of the really controversial issues is: Who decides whether arbitration itself is unconscionable—should it be a court or an arbitrator who might be biased?” Molly Selvin, *High Court Takes on Right to Sue*, L.A. TIMES, June 25, 2005, at C1. Professor Sternlight also predicted that the Supreme Court would reverse the Florida Supreme Court. *Id.*

160. Truth in Lending Act, 15 U.S.C. §§ 1601–1693r (2000).

irreconcilably conflicts with the statute's enforcement scheme.<sup>161</sup> For example, in *Johnson v. West Suburban Bank*,<sup>162</sup> plaintiff asserted that:

Congress consciously inserted language into the statutes with the intent of encouraging district court judges to certify class actions . . . . [and that] in the legislative history of amendments to the TILA, Congress communicated that class action remedies play a central role in the TILA . . . enforcement schemes . . . . [and further that] such litigation is meant to serve public policy goals through plaintiffs who act as private attorneys general, for the class action device is necessary to ensure meaningful deterrence to creditors who might violate the acts.<sup>163</sup>

The district court agreed with the plaintiff's argument on the "inherent conflict" between the statutory language and the arbitration clause and denied the motion to compel arbitration.<sup>164</sup> The Third Circuit reversed, explaining that "while arbitrating claims that might have been pursued as part of class actions potentially reduces the number of plaintiffs seeking to enforce the TILA against creditors, arbitration does not eliminate plaintiff incentives to assert rights under the Act."<sup>165</sup> After all, a plaintiff's individual recovery is the same whether a case is brought as a class action or as an individual suit. So while acknowledging that the plaintiff might be "correct in arguing that Congress contemplated class actions as a part of the TILA enforcement scheme, and even that class actions were self-consciously promoted by Congress in amending the statute,"<sup>166</sup> the court nonetheless held that the arbitration clause did not defeat "TILA's goal of encouraging private actions to deter violations of the act."<sup>167</sup>

Other federal circuit courts have reached similar results.<sup>168</sup> As a consequence, it appears that a congressional enactment will not be found to be

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161. See, e.g., *Lloyd v. MBNA Am. Bank*, No. 01-1752, 2002 U.S. App. LEXIS 1027, at \*4-5 (3d Cir. Jan. 7, 2002) (stating that because right to a class action is "merely procedural," and thus "may be waived," an arbitration agreement barring classwide relief for claims brought under TILA is enforceable); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024 (11th Cir. 2003) (same); *Sagal v. First USA Bank*, 69 F. Supp. 2d 627, 632 (D. Del. 1999) (compelling arbitration of plaintiff's TILA claims even though he was precluded from representing a class), *aff'd*, 254 F.3d 1078 (3d Cir. 2001).

162. 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

163. *Johnson*, 225 F.3d at 368-69.

164. *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999).

165. *Johnson*, 225 F.3d at 374 ("The sums available in recovery to individual plaintiffs are not automatically increased by the use of the class forum."). The court also observed that arbitration would not "necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors" because "[a]ttorneys' fees are recoverable under the TILA." *Id.*

166. *Id.* at 373.

167. *Id.* at 374-75.

168. See *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002) (rejecting plaintiff's claim that she would be "unable to maintain her legal representation given the small amount of her individual damages" and concluding that there is "no violation of public policy relating to consumer protection" in allowing TILA claims to be arbitrated); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001) (finding that plaintiff failed to "establish that Congress intended to preclude the arbitration of TILA claims, even where arbitration would prevent the

facially incompatible with a collective action waiver in the absence of a specific statutory antiwaiver provision, which Congress has yet to include in any legislative enactment.<sup>169</sup>

#### D. Second-Wave Challenges

None of this means, however, that a collective action waiver might not be void where it serves, in the individual case, to prevent a plaintiff from vindicating federal statutory rights. Beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>170</sup> the Court has repeatedly stated (albeit in dicta) that there is one critical limitation upon the availability of arbitration as a forum for the resolution of federal statutory claims: such claims may only be arbitrated “so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum.”<sup>171</sup> Looked at in this way, *Johnson* and related cases hold only that the federal statutes are not *facially* irreconcilable with the collective action waiver; that plaintiffs are not *necessarily and always* precluded by the waiver from being able to vindicate their federal rights under this federal statute. Put another way: plaintiffs’ lawyers can concede that the right to engage in collective action is a procedural and waivable right, and yet argue that where the waiver of that right in the particular case precludes the plaintiff from being able to vindicate his substantive federal statutory rights, the waiver must fall.<sup>172</sup>

And so, defeated but not deterred, plaintiffs’ lawyers have begun to launch a second-generation challenge, asserting that the collective action waiver’s implicit prohibition against spreading the costs of litigation or arbitration across multiple claimants precludes the individual plaintiff in certain cases from being able to vindicate her federal statutory rights.

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claims from being brought in the form of a class action” and that “Congress did not intend to preclude parties from contracting away their ability to seek class action relief under the TILA”).

169. The statutory antiwaiver provision would have to clearly reveal a congressional intent that disputes be resolved in a judicial forum, even in cases involving otherwise binding arbitration clauses. At one time, for example, the Supreme Court held that the antiwaiver provisions of the Securities Act of 1933 indicated that Congress had intended that parties had an absolute right to a judicial forum, see *Wilko v. Swan*, 346 U.S. 427 (1953), but the Court has since overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), requiring a clearer statement of congressional intent to trump the applicability of the FAA.

170. 473 U.S. 614 (1985).

171. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (brackets omitted) (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 635); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (same); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) (en banc) (“The Supreme Court has made clear that statutory rights . . . may be subject to mandatory arbitration *only* if the arbitral forum permits the effective vindication of those rights.” (emphasis added)).

172. See Roger J. Perlstadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 883, 1995 (2002) (“The treatment of statutory rights is different because of the public interest in the resolution of disputes over statutory rights—an interest that is separate from private parties’ interest in resolving a dispute between themselves. In order for these rights to be submitted to arbitration, the arbitration must allow effective vindication of them. Any arbitration of a statutory claim that did not allow for effective vindication of rights would ‘conflict[] with the statute’s purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions.’” (alteration in original) (internal citations omitted)).

The new challenges are rooted in *Green Tree Financial Corp. v. Randolph*,<sup>173</sup> where the Court recognized that the cost of prosecuting a particular claim under a particular arbitration agreement may serve as the predicate for finding that the litigant cannot “effectively vindicate” her rights under the rule of *Mitsubishi*: “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.”<sup>174</sup>

The case law that has sprouted up under *Green Tree* holds that statutory claims may be subjected to arbitration so long as the agreement at issue does not force plaintiffs to assume financial burdens so prohibitive as to “deter the bringing of claims.”<sup>175</sup>

The simple logic of this second-wave argument is that the collective action waiver—and particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals’ fees, and other disbursements—forces the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims.<sup>176</sup> In the absence of the waiver, the claimant may spread these costs across thousands of coventurers (or have them advanced by lawyers, as happens in practice). In the presence of the waiver, these costs fall on her alone. And these costs, in a complex commercial case, will exceed the value of the recovery she is seeking.<sup>177</sup>

A case sure to test this theory is currently underway in federal court in New York, where numerous small retailers are seeking class treatment for

173. 531 U.S. 79 (2000).

174. *Green Tree*, 531 U.S. at 90.

175. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (“[T]he appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant’s ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.”); see *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 217 (3d Cir. 2003) (holding that the Third Circuit will follow the approach of Sixth and Fourth Circuits in *Morrison* and *Bradford*, and striking provisions in arbitration clause that would have caused plaintiff to incur prohibitive costs); *Morrison*, 317 F.3d at 658 (explaining that the inquiry is whether “the arbitral forum under a particular arbitration agreement effectively prevents the vindication of a plaintiff’s statutory rights” and holding that a provision affecting the allocation of costs “should be held unenforceable whenever it would have the ‘chilling effect’ of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights” (emphasis added)); *Martin v. SCI Mgmt. L.P.*, 296 F. Supp. 2d 462, 468 (S.D.N.Y. 2003) (citing *Morrison* and noting that, under *Green Tree*, 531 U.S. 79 (2000), “significant arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights in an arbitral forum”); *Mildworm v. Ashcroft*, 200 F. Supp. 2d 171, 179 (E.D.N.Y. 2002) (Wexler, J.) (following *Bradford*).

176. As the Fourth Circuit held: “[T]he proper inquiry under *Gilmer* is not where the money goes but rather the amount of money that ultimately will be paid by the claimant.” *Bradford*, 238 F.3d at 556; see also *Morrison*, 317 F.3d at 660 (same).

177. A somewhat related argument, available only in cases where the defendant enjoys “market power” within the meaning of the antitrust laws, is that the forced imposition of the collective action waiver is, itself, an anticompetitive vertical restraint. This argument was rejected in *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468, 2003 WL 21254765, at \*1 (D. Kan. May 27, 2003). More recently, the plaintiffs have made a similar argument in the American Express litigation currently pending in federal court in New York. See Amended Complaint ¶¶ 92–100, *In re Am. Express Merchants’ Litig.*, No. 03 Civ. 9592 (GBD) (S.D.N.Y. Dec. 23, 2003) (briefs on file with author).

antitrust claims against American Express, arguing that the out-of-pocket cost of proving liability will by necessity run into the many hundreds of thousands of dollars or more, while the median small merchant stands to gain only \$5,200.<sup>178</sup>

It is not clear to what extent these second-wave challenges will find traction in the federal courts. I suspect they will find some. What we do know is that these arguments are fairly narrow, applying only to federal statutory claims in which the unavoidable out-of-pocket costs of proving liability will exceed the amount in controversy.

Finally, a more straight-to-the-jugular challenge to collective action waivers is also underway. As discussed above, in the *Ross v. Bank of America* class litigation, plaintiffs will seek to show that defendants “combined, conspired and agreed to implement” collective action waivers in cardholder agreements and that such waivers are an anticompetitive restraint on trade.<sup>179</sup> Specifically, plaintiffs allege that defendants’ unlawful conspiracy “inhibit[s] competition and harm[s] consumers” by giving defendants a “non-price trade advantage, which would not be available in the absence of concerted activity,” and which “has resulted in supra-competitive profits by shielding [d]efendants from liability arising from any illegal conduct or practice.”<sup>180</sup> This challenge, if successful, could invalidate collective action waivers involving consumer credit and charge cards, but would likely have little impact in other industries that have independently adopted such waivers.

### E. *The Chimera of Classwide Arbitration*

One question that arises when a collective action waiver is struck down—however common or rare an occurrence that may be—is “what happens to the arbitration clause?” It is perfectly rational to suppose that an arbitration clause may be enforceable while a collective action waiver contained within that clause is unenforceable, either because it is unconscionable under the circumstances or because it renders a federal substantive right impossible to vindicate.<sup>181</sup> One would then suppose, in such a

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178. Plaintiffs’ Memorandum of Law in Opposition to Motion to Compel Arbitration at 14, *In Re Am. Express Merchants’ Litig.*, 03 Civ. 9592 (GBD) (S.D.N.Y. Dec. 23, 2003) (arguing that “expert witness fees and other out-of-pocket costs that are necessarily incurred in a case of this nature, exclusive of class related expenses, are at least \$1 million,” while the median “small merchant plaintiff incurred \$1,751 in actual damages during the four-year statutory period, or \$5,252 in treble damages”).

179. Complaint ¶ 2, *Ross v. Bank of Am.*, No. 05-CV-711 (S.D.N.Y. 2005).

180. *Id.* at ¶ 127.

181. Courts have traditionally severed unconscionable or unenforceable provisions in agreements to arbitrate disputes, thereby allowing the dispute to go to an arbitral panel without the offensive terms. *See, e.g., Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 289 (3d Cir. 2004) (remanding for a determination of whether complained-of provision is unconscionable and must be severed); *McMullen v. Meijer, Inc.*, 355 F.3d 485, 487 (6th Cir. 2004) (finding unconscionable arbitration provision that gave employer exclusive choice of arbitrators and remanding case to determine whether the provision could be severed from the remainder of the agreement); *Morrison v. Circuit*

circumstance, that a court would strike the collective action waiver and yet enforce the arbitration clause, sending the case off to classwide arbitration—a procedure for which all of the major arbitral bodies maintain specific rules.

For a time, this option of court-ordered classwide arbitration looked to be a sensible way to show the requisite “healthy regard” for arbitration while respecting the value of collective legal action. For example, in *Szetela v. Discover Bank*,<sup>182</sup> the California court ruled the collective action waiver unconscionable, but then refused to strike the provision altogether; instead, it severed the class-waiver provision from the arbitration clause<sup>183</sup> and left plaintiffs to pursue their claims in a classwide arbitration.<sup>184</sup> Other courts faced with arbitration agreements that were silent as to classwide arbitration have similarly ordered class claims to proceed in the arbitral forum.<sup>185</sup>

In 2003, however, the Supreme Court took the classwide arbitration compromise off the table for federal and state court judges. In *Green Tree Financial Corp. v. Bazzle*,<sup>186</sup> the Court held that a court may not direct arbitrators to entertain an arbitration on a classwide basis where the agreement is silent regarding class arbitration; rather, it is uniquely for arbitrators to decide whether to allow classwide arbitration.<sup>187</sup>

City Stores, Inc., 317 F.3d 646, 677 (6th Cir. 2003) (en banc) (finding agreement’s cost-sharing provision unconscionable and severing unenforceable provisions from the agreement).

182. 118 Cal. Rptr. 2d 862 (Ct. App. 2002).

183. *Szetela*, 118 Cal. Rptr. at 867–68.

184. The California Supreme Court recently reiterated in *Discover Bank*, that “[u]nder California law, . . . class arbitration may be authorized, even when a contract of adhesion forbids it, because a class action waiver may be unconscionable.” *Discover Bank v. Superior Court*, 113 P.3d 1100, 1115 (Cal. 2005).

185. See *Keating v. Superior Court*, 645 P.2d 1192, 1207–08 (Cal. 1982) (concluding that individual arbitration of claims would seriously prejudice the interests of plaintiffs, the court ordered classwide arbitration to “give expression to the basic arbitration commitment of the parties”); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 794 (Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (interpreting the words “any controversy” in the parties’ arbitration agreement to include classwide arbitration); *Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co.*, 210 F.3d 771, 774–76 (7th Cir. 2000); *New Eng. Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5, 8 (1st Cir. 1988).

186. 539 U.S. 444 (2003).

187. The plurality stated that the issue was for the arbitrator because the clause at issue contained “sweeping language” committing all disputes between the parties to arbitration and granting the arbitrator “all powers” provided by the law and the contract. *Bazzle*, 539 U.S. at 451, 453. The plurality also noted that:

In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter . . . . They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.

The question here—whether the contracts forbid class arbitration—does not fall into this narrow exception. . . . [T]he relevant question here is what *kind of arbitration proceeding* the parties agreed to. . . . [That question] concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.

*Id.* at 452–53 (citations omitted). *But see* Peter J. Kreher & Pat D. Robertson III, *Substance, Process, and the Future of Class Arbitration*, 9 HARV. NEGOT. L. REV. 409, 422 (2004) (“[T]he Court’s decision [in *Bazzle*] represents a significant departure from the prevalent trend in judicial

For corporate defendants, then, the *Bazze* ruling alleviated the concern of judges ordering classwide arbitration, but raised another concern by making clear that arbitral bodies are free to order classwide arbitral proceedings. It is bad enough, from the corporate perspective, to engage in “bet-the-company” class action litigation without having to sacrifice the appellate rights and other safeguards that attend judicial proceedings, including interlocutory appeals of class certification decisions.<sup>188</sup>

Predictably, corporate defendants have begun to protect themselves after *Bazze* by making explicit in all collective action waivers that classwide arbitration is not permissible.<sup>189</sup> Articles have appeared in trade journals encouraging corporate counsel to “consider supplementing the class action waiver . . . by limiting the arbitrator’s authority to resolve individual disputes involving just the plaintiff and the company.”<sup>190</sup> With that safety-net language, even if a court were to invalidate the waiver, leaving the arbitration clause silent on the question of class treatment, the arbitrator “would still be contractually bound to arbitrate nothing more than the plaintiff’s individual claim.”<sup>191</sup>

Somewhat less predictably (or not, depending upon the level of one’s cynicism) the major arbitral bodies appear to also have ridden to the rescue of concerned corporate counsel. The American Arbitration Association (“AAA”)—purportedly based upon its reading of *Bazze*—issued a “Policy on Class Arbitration” in 2003 that allows its arbitrators to administer class-wide arbitrations only where “an order of a court directs the parties” to the Association.<sup>192</sup> Corporate counsel, however, need not fret: under *Bazze*,

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thought. . . [as a]ppellate courts [have] traditionally agreed that determination to certify a class should lie with trial courts rather than arbitrators.”)

188. See, e.g., Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update: Green Tree Financial Corp. v. Bazze—Dazze for Green Tree, Fizzle for Practitioners*, 59 BUS. LAW. 1265, 1272–73 (2004) (“Because courts on the whole are vastly more experienced than arbitrators in administering class action procedures, most companies faced with the prospect of class arbitration would likely prefer to remain in court rather than navigate through the uncharted waters of class-wide arbitration.”); Eric Mogilnicki, *Class Arbitration Ruling a Bad Mistake*, AM. BANKER, July 15, 2005, at 17 (“Class arbitration is unappealing to businesses because it combines the high stakes of class actions with the relatively informal procedures found in arbitration. Rules that make sense when individual cases are at stake—like limits on appeals—make no sense when hundreds of millions of dollars could be at issue.”).

189. As one commentator notes, “During oral argument, Justice Stevens opined that *Bazze* would not have any future significance because ‘isn’t it fairly clear that all the arbitration agreements in the future will prohibit class actions?’ Indeed, one would expect sophisticated drafters to expressly prohibit class arbitration in all post-*Bazze* contracts.” Avery, *supra* note 109, at 26; see also Samuel Estreicher & Steven C. Bennett, *Using Express No-Class Action Provisions to Halt Class-Claims*, N.Y. L.J., June 10, 2005, at 3 (“In response to *Bazze*, and the non-trivial risk that an arbitrator will entertain class or collective actions in the absence of such a clause, many employers have begun incorporating explicit ‘no-class action’ clauses into their employment alternative dispute resolution (ADR) programs.”).

190. Kaplinsky & Levin, *supra* note 188, at 1273.

191. *Id.*

192. The AAA’s classwide arbitration policy provides that pursuant to *Bazze*:

[T]he American Arbitration Association will administer demands for class arbitration . . . if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall

no court has the authority to issue such an order in the first place. The NAF—which helped develop and promote the collective action waiver in the first place<sup>193</sup>—has followed suit.<sup>194</sup>

In a surprising set of developments, JAMS, the third-largest private arbitral body,<sup>195</sup> announced in November 2004 a new policy to allow classwide arbitration even where the arbitration clause explicitly prohibits it. JAMS' decision to disavow collective action waivers "was made out of concern that the prohibitions unfairly curtail the rights of consumers and employees involved in an increasingly large number of class action arbitration claims."<sup>196</sup> The move immediately angered its corporate clientele, some of whom accused JAMS of trying to "insert itself as a guardian of social policy" by interfering with the freedom to enter into contracts.<sup>197</sup> A number of these clients, including Discover and Citibank, swiftly changed their contracts to remove JAMS as

be resolved by arbitration in accordance with any of the [AAA's] rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration . . . unless an order of a court directs the parties to the underlying dispute to submit their dispute to an arbitrator or to the Association.

Am. Arb. Ass'n, Rules and Procedures: American Association Policy on Class Arbitrations, <http://www.adr.org/sp.asp?id=22254> (last visited Oct. 23, 2005).

193. See *supra* notes 124–125 and accompanying text.

194. In the wake of *Bazze*, the NAF created a Class Claim Resolution Program, which provides for classwide arbitration "(a) by a written agreement between the parties; or (b) by court order." NAT'L ARB. FORUM, CLASS CLAIM RESOLUTION PROGRAM (2003), <http://www.arb-forum.com/arbitration/pdfs/Class-Claims-Res-0203.pdf>. NAF's position should not be surprising given its role in developing and advertising the benefits of collective action waivers to its clients. See, e.g., Complaint ¶¶ 121–23, *Ross v. Bank of Am.*, No. 05 CV 7116 (S.D.N.Y. Aug. 21, 2005).

195. JAMS, which is headquartered in Irvine, California, handles approximately 30,000 cases a year in its twenty-six Resolution Centers around the country, employs more than 165 individuals, and lists more than 200 full-time neutrals, many of whom are former judges and prosecutors. *JAMS Won't Restrict Class Action Right*, CONSUMER FIN. SERVICES L. REP., Dec. 29, 2004, at 1. In comparison, the AAA has thirty-four offices in the United States and Europe, and is widely viewed as the industry leader in private arbitration. See Am. Arb. Assoc., About Us, <http://www.adr.org/About> (last visited Oct. 23, 2005).

196. Justin Scheck, *New JAMS Rule Rejects Ban on Class Actions*, RECORDER (S.F.), Nov. 15, 2004, at 4.

197. Sue Reisinger, *New JAMS Policy Has Angered GCs*, Nat'l L.J., Jan. 24, 2005, at 8. Commentators were confounded by the new policy, given that JAMS was certain to lose money if its clients decided to go elsewhere for its arbitration needs. Some posited that, in the short term, JAMS could realize large fees by acceptance of classwide arbitrations. See Sue Reisinger, *GCs Squeeze JAMS Over Class Action Rule*, RECORDER (S.F.), Jan. 18, 2005, at 1 ("[T]he potential costs of arbitration would certainly rise if the process is opened up to include class actions."). It is also possible that since the new policy affected only those disputes between consumers and businesses—a small number compared to business-to-business arbitrations which make up the bulk of private arbitration—JAMS may have believed that the financial consequences of its new policy would be minimal, while potentially winning it many friends in consumer advocate groups, employment experts, plaintiffs' lawyers and others. See, e.g., *id.* ("Not surprisingly, plaintiff lawyers want the AAA to copy JAMS's policy. Cliff Palefsky, a spokesman on arbitration issues for the National Employment Lawyers Association, says his group has asked the AAA to ignore class action arbitration bans. A partner at McGuinn, Hillsman & Palefsky in San Francisco, Palefsky believes that employers have unfairly used arbitration as a way to avoid expensive class actions by their employees. Workers, he maintains, have more clout in an arbitration when they negotiate as a group than as individuals.").



an acceptable forum for arbitrating disputes.<sup>198</sup> Then, in March 2005, in a somewhat less surprising move, JAMS abandoned its policy of not enforcing class action waivers in arbitration clauses, citing “confusion and concern” over how the policy would be applied and criticisms that it undermined the neutrality of the arbitration process.<sup>199</sup> More likely, the pressure put on JAMS by its corporate clients was too much to bear.<sup>200</sup>

All three of the major arbitral bodies now have official policies that allow for classwide arbitration where an underlying agreement explicitly provides as much (even if this is unlikely ever to occur), rather than barring classwide arbitration altogether. This makes some sense: judges seeking to respect an arbitration clause and yet invalidate a class waiver may direct the parties to proceed to arbitration with the proviso that, if the arbitrator refuses to accord class treatment, the parties may return to court and the arbitration provision will be stricken as a whole. Arbitral bodies want to insure against this scenario: even in the wake of the recent JAMS turn-around on classwide arbitration, it may be that as collective action waivers proliferate, the arbitral bodies will see the potential for very large fees generated by their acceptance of some classwide arbitrations. While some (and perhaps all, if one judges by JAMS’ response) of these bodies will surely determine they are better off catering to their repeat corporate clientele, others may perceive a market opportunity in accommodating courts seeking ways to balance the need for collective action with the policies of the FAA.

### III. THE REACH OF COLLECTIVE ACTION WAIVERS

The vast potential reach of collective action waivers is, I think, entirely unappreciated by courts and commentators. Upon examination, collective action waivers have the capacity to derail putative class actions brought un-

198. See Erick Bergquist, *JAMS Backs Down on Class Action Arbitration*, AM. BANKER, Mar. 11, 2005, at 1 (“Several credit card companies, including J.P. Morgan Chase & Co., the Discover Financial Services, Inc. unit of Morgan Stanley, Citigroup Inc., informed borrowers recently that JAMS would no longer be an option for arbitration.”); Mike McKee, *What Can Customers Really Waive?: Courts to Examine Legality of Arbitration Agreements that Ban Class Actions*, RECORDER (S.F.), Apr. 7, 2005, at 1 (reporting that Discover and Citibank had written JAMS out of their contracts in protest of the new policy).

199. Erick Bergquist, *supra* note 204.

200. JAMS’ decision to reverse its class arbitration policy may also have been affected by the ruling in *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1289 (M.D. Ala. 2005), in which the court found that a JAMS arbitrator had overstepped his authority by ignoring express contractual language prohibiting class arbitration. The court also held collective action waivers valid and enforceable, *id.*, a ruling which may have impact on Alabama and Florida state-court determinations that such waivers are unconscionable. See, e.g., *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005), *cert. granted*, 125 S. Ct. 2937 (2005); *Leonard v. Terminix Int’l Co.*, 854 So. 2d 529 (Ala. 2002). As Alan Kaplinsky, an attorney best known for urging his corporate clients to insert collective action waivers in their contracts and for defending these waivers against legal challenges, self-interestedly noted, “This well-reasoned opinion eviscerates the legal underpinning of the JAMS policy . . . . This will hopefully prompt JAMS to reconsider the wisdom of its policy.” Posting to [http://www.adrinstitute.com/edit/feb\\_05/013105Gipson.htm](http://www.adrinstitute.com/edit/feb_05/013105Gipson.htm) (Jan. 31, 2005) (quoting Kaplinsky); see also Erick Bergquist, *Loan Arbitration Clauses Upheld in Appeals Court*, AM. BANKER, Feb. 24, 2005, at 9 (quoting Kaplinsky as saying that the *Gipson* ruling shows that “JAMS was wrong and didn’t have the right to determine the validity of class action waivers”).

der consumer, antitrust, securities, employment, and civil rights statutes, among other areas.<sup>201</sup> The waiver is viable wherever a contractual relationship connects the claimant to the defendant. And the nature of the contractual relationship required to do the trick has changed tremendously in recent years, as we have witnessed an unprecedented judicial willingness to find assent in shrink-wrap, scroll-text, and box-stuffer notices, and an unprecedented comfort level with “pay-now-terms-later” transactions.

The potential reach of collective action waivers, then, has been vastly extended, as courts have moved from a consent-grounded theory of contract to a utilitarian, economist’s model, in which overall, systemic efficiency gains are more highly valued than the quaint, Williston-era preoccupation with volitional assent.<sup>202</sup> Whatever one thinks of these developments, the implications for collective action waivers are portentous. The project in this Part is to explore the reach of the collective action waiver, in large part by focusing on shifting judicial notions of consent.<sup>203</sup>

### A. Locating the Contractual Predicate for Waivers

Upon examination, it is apparent that sufficient contractual bases for the imposition of arbitration clauses and class waivers, under current doctrine, are present in virtually all areas of contemporary class action practice.

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201. See Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, *LAW & CONTEMP. PROBS.*, Winter/Spring 2004, at 55, 56 (“Arbitration is no longer the province of sophisticated participants. Instead, individuals pursuing long-established statutory claims, such as those brought under the federal securities and antitrust laws, and newer but long-sought civil rights claims, including race, sex, age, and disability discrimination, may now be forced to arbitrate if the parties are deemed to have assented to a pre-dispute arbitration clause.”).

202. See Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 *WIS. L. REV.* 679, 679–80 (2004) (noting that standard-form agreements, which epitomize the modern view of contract-without-consent, are economically efficient because they facilitate “mass marketing of goods and services by creating one-size-fits-all contracts, the cost of which can be amortized over numerous transactions,” “permit sellers more readily to monitor a substantial sales force by avoiding variations in contract terms,” and “facilitate interpretation both by parties to the contract and third-party interpreters”).

Of course, a less benign interpretation of the movement from consent to efficiency might begin by observing that the newfound judicial willingness to find offer and acceptance is pretty much limited to vertical, top-down contracts imposing arbitration, as opposed to being applicable to all efficiency-enhancing transactions, however those might be defined. I am not aware, for example, of any trend towards dispensing with traditional requirements of consent in the context of agreements between business interests.

203. Importantly, this project is totally distinct from the liberal or “constitutionalist” critique of arbitration agreements, which argues that courts inappropriately apply a private law, objective standard of consent in evaluating arbitration agreements instead of the subjective standard that applies in other contexts (for example, plea bargains or jury waivers for the knowing waiver of the constitutional right to a jury trial). That is, the constitutionalist critique, thoughtfully elucidated by Professors Jean Stemplight and Stephen Ware, does not accept the application of contract law standards at all in this area. Here, by contrast, I take them as a given and look to see just where they may lead us. See Jean R. Stemplight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 *OHIO ST. J. ON DISP. RESOL.* 669 (2001); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, *LAW & CONTEMP. PROBS.*, Winter/Spring 2004, at 167.

### 1. Consumer Cases

Other than securities cases, which are discussed separately below, no area of law generates more class actions than consumer cases. Consumer actions, of course, are hardly monolithic. The term encompasses 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 under the Federal Communications Act and state analogues; deceptive trade practices and false advertising claims against manufacturers and service providers; and numerous other actions.

An attribute shared by most or all of these consumer actions is a contractual relation, be it direct or via a retailer or middleman, between the plaintiff and the defendant. The contractual relation is obvious in most cases: for example, cellular-phone service subscribers, mortgagees, and credit card holders receive actual, old-fashioned contracts which may contain the collective action waiver.<sup>204</sup> It is less obvious that a consumer who buys a computer in a box (or a toothbrush, or plane ticket) may have engaged in a transaction effecting the waiver of her right to participate in a class action or sue in court. And yet, under current doctrine, there is little question that ordinary retail purchases of goods—whether in-store or by telephone or internet—may support the imposition of an arbitration clause and collective action waiver.

One leading and somewhat controversial decision on this point comes from Judge Frank Easterbrook of the Seventh Circuit. In *Hill v. Gateway 2000, Inc.*,<sup>205</sup> a putative consumer class action, the plaintiff bought a computer over the telephone; when it arrived, inside the box was a brand new computer, the usual assortment of wires and cables, and a pamphlet containing “terms and conditions,” which included an arbitration clause. This document provided that the customer could return the computer within thirty days; otherwise, he would be deemed to have agreed to the terms. When the computer stopped working two months later and Gateway refused to repair or replace it, the plaintiff sued. Gateway defended by pointing to the arbitration clause which, it argued, required plaintiff to give up his right to sue and instead to take any claims against Gateway to one-on-one arbitration.<sup>206</sup>

In a decision that encapsulates the move from a consent-based to an efficiency-based theory of contract law, Judge Easterbrook upheld the arbitration provision:

Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations

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204. Demaine & Hensler, *supra* note 201, at 65–66 (describing a study of consumer contracts with included arbitration provisions: 100% explicitly prohibited class actions in a judicial forum, and 30% explicitly prohibited classwide arbitration).

205. 105 F.3d 1147 (7th Cir. 1997).

206. *Hill*, 105 F.3d at 1148.

support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.<sup>207</sup>

This excerpt, I think, represents the apotheosis of the economist's approach to contract law. The only value here is efficiency; consent is irrelevant.<sup>208</sup> Judge Easterbrook postulates that the price of establishing meaningful consent—in the explicit, meeting-of-the-minds sense of the word—would be to grind contemporary commerce to a halt.<sup>209</sup>

Whether or not *Hill v. Gateway 2000* was rightly decided,<sup>210</sup> Judge Easterbrook's view reflects the dominant perspective in this area of the law.<sup>211</sup> As a matter of current doctrine, there is nothing to stop a corporate defendant from contracting around default legal rules by placing a unilateral

207. *Id.* at 1149.

208. See Gillette, *supra* note 202, at 681 ("Assent typically reflects some arrangement to which there has been mutual agreement created by negotiations or conduct more explicit than opening a box or using a product that is accompanied (unknown to or ignored by the user) by a recitation of obligations. If we impose obligations under these circumstances, then we do so in spite of the absence of a formal agreement rather than because of it. To the extent we enforce these additional terms, we do so because we think that the parties either would or should have agreed to them or to terms sufficiently similar that it would not have been cost-effective to bargain for the alternative.").

209. *Id.* at 687 (suggesting that store clerks who had to warn consumers that more contract terms were coming their way "could undermine the very benefits that rolling contracts purport to provide. The ensuing colloquy concerning the forthcoming terms between an inquisitive buyer and an operator is more likely to create buyer agitation than enlightenment").

210. I rather suspect that if the law required store clerks to read all contract terms in order to make them binding, there would simply be no custom terms, beyond price and quantity, in retail transactions. There is nothing anomalous about a termless transaction; most transactions fall into this category.

I am not alone in criticizing the *Hill* decision, and other courts have come out differently on similar issues. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105–06 (3d Cir. 1991) (refusing to enforce warranty limitations printed on outside of software package, where terms differed from those in purchase order; treating limitations on package as additional terms proposed by manufacturer and never accepted by purchaser); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (refusing to enforce terms contained inside a box for a personal computer because plaintiffs did not expressly agree to the terms and were not informed of the manufacturer's policy that failure to return the computer within five days constituted agreement).

211. As stated by the district court recently in *O'Quin v. Verizon Wireless, L.P.*, 256 F. Supp. 2d 512, 516 (M.D. La. 2003): "[O]ther federal and state courts have come to similar conclusions [as Judge Easterbrook] under similar factual scenarios, which were all premised on the consumer having the opportunity to return the product in order to avoid any term or condition that he found to be unacceptable." See also *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1073 (C.D. Cal. 2002); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337–38 (D. Mass. 2002); *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91 (App. Div. 2002); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (App. Div. 1998); *M.A. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803 (Wash. Ct. App. 1999). In other words, these courts have found nothing overwhelmingly objectionable in the "money now, terms later" approach to sales of consumer goods. Furthermore, the Supreme Court implicitly bought into this reasoning in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991), where it enforced a forum selection clause that was printed on the back of a ticket received by passengers in the mail subsequent to a ticket purchase.

notice into a computer box, a monthly statement, or any other conduit.<sup>212</sup> It makes no difference whether or not the consumer would *expect* to find terms and conditions in these places because consumer expectations have no place on this view.<sup>213</sup> Indeed, even where consumers did not receive arbitration provisions in their original consumer contracts, courts have routinely held the continued use of a product (such a credit card) or failure to opt-out of a waiver (by returning, for example, a computer), indicates assent to all terms and conditions.<sup>214</sup>

The import of the reasoning in *Hill* and other such cases, when coupled with judicial solicitude for collective action waivers, is profound.<sup>215</sup> There is nothing, as a matter of current law, to prevent companies from unilaterally imposing a fully enforceable waiver of the right to collective action in all manner of consumer transactions.<sup>216</sup>

This means, among other things, that all of the many billions of dollars paid in recent years to settle consumer class actions could have been avoided; cigarette companies should be kicking themselves (not to mention

212. See Gillette, *supra* note 202, at 682 (noting that cases upholding such unilateral contracts “appear motivated by the utility and practicality of easy forms of contracting,” while cases refusing to enforce these agreements may base their holdings on the failure to find assent, but are “more rooted in a conclusion that the practice or the terms that [the contract] generates are offensive than in a belief that fealty to contractual rituals is important”).

213. Witness Judge Easterbrook’s dismissal of the *Hill* plaintiffs’ attempt to distinguish another Seventh Circuit case, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), which gave binding effect to an arbitration clause in a software license contained in a box of software diskettes. Rejecting the argument that a consumer entering into a software licensing transaction might *expect* to encounter such terms, while the purchaser of a consumer good might not, Judge Easterbrook wrote simply: “Plaintiffs ask us to limit *ProCD* to software, but where’s the sense in that?” *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997). The lesson is unmistakable: consumer expectations have no part in the analysis.

214. One intermediate appellate state court—with no reasoning or analysis whatsoever—relied on *Hill* to hold that even where a consumer credit contract omitted an arbitration clause altogether, the defendant could *still* invoke arbitration based on a unilateral mass mailer that it subsequently sent to its customers, providing that their continued use of the card would constitute assent to the new term. *Tsadilas v. Providian Nat’l Bank*, 786 N.Y.S.2d 478 (App. Div. 2004). On this logic—which is not in fact supported by *Hill*—a bank could send a consumer a bill-stuffer notice that if she continues to use her credit card, the bank acquires the right to, say, purchase her home. While there exists a body of law governing unilateral change in terms provisions—see *infra* text accompanying notes 248–250—there is clearly no justification for decisions such as *Tsadilas*, which would extend the *Hill* rule beyond recognition. See also *Brower*, 676 N.Y.S.2d 569 (App. Div. 1998) (same).

215. As one commentator has noted, Judge Easterbrook’s decision in *Hill* essentially “ruled that no contract had been formed when the Hills ordered their computer and gave their credit card number in payment,” but instead, “the terms of Gateway’s form contracts determined the process of offer and acceptance.” Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 19 (2004). As such, Easterbrook “assumed Gateway was only offering to sell and specifying that the form of acceptance was the Hills’ keeping the computer for thirty days, even though that ‘offer’ was not communicated to the Hills at a meaningful time and in a meaningful fashion—on the telephone, for example.” *Id.*

216. See Gillette, *supra* note 202, at 689 (“[The main concern about standard-form contracts] is that sellers systematically take advantage of their position to draft terms to which informed buyers would object. Much of the existing literature perceives SFCs as a zero-sum game in which the seller—the only party who participates in the drafting process—seeks to obtain as much as possible from the nonreading buyer and thus systematically incorporates proseller terms into the agreement.”).

their outside counsel) for failing to impose collective action waivers through the simple expedient of shrink-wrap text. Indeed, reading *Class Action Dilemmas*, the RAND Institute's much-cited empirical study, it strikes me that each of the consumer-related class action case studies chronicled in the report could have been totally avoided by the imposition of unilateral notices with consumer goods.<sup>217</sup> Consumers buy goods; goods have packaging; packaging may contain waivers of exposure to collective actions; therefore, the seller of goods need never be exposed to collective action by consumers.

## 2. Antitrust Cases

The potential reach of collective action waivers in the area of antitrust is even more extensive; indeed, it is total. I would venture that *all* federal antitrust class claims—representing a significant percentage of class action filings and a large chunk of all settlement dollars—are subject to the waiver, for the wholly fortuitous reason that the restrictive antitrust standing rules developed over the past twenty-five years ensure that, in the class context, the only persons with standing to bring antitrust suits are those with direct contractual ties to the defendant, making the imposition of collective action waivers elementary.<sup>218</sup>

Invariably, antitrust class actions are brought by purchasers of goods or services. The paradigmatic antitrust class action nowadays is a suit by purchasers alleging horizontal price-fixing; somewhat less common are the cases alleging that some vertical restraint—for example, a tying arrangement or a group boycott—had the effect of restricting competition and raising prices. But either way, antitrust class cases are *purchaser* cases. Actions by competitors remain an important source of antitrust enforcement, but they do not lend themselves to class treatment: competitor plaintiffs are very unlikely to be so numerous as to require class treatment, and, in any event, the question of whether any given competitor suffered “antitrust injury” will presumably be too fact-specific to satisfy Rule 23(b)(3). Thus, while a competitor antitrust class action would likely be impervious to collective action waivers, given the lack of a contractual nexus, that is a lot like saying Martians are impervious to the SARS virus.

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217. This also applies to companies who do not sell packaged goods directly to consumers. For example, in the Contact Lens Pricing Litigation—one of the RAND case studies—defendant Bausch & Lomb could have instructed optometrists that its contact lenses may only be distributed to the end user with a printed notice containing a collective action waiver. See Hensler et al., *supra* note 11, at 145–69. The same is true of manufacturers of blood clotting products for hemophiliacs, also featured in the RAND study, who could have required all hospitals which use their product to obtain informed consent from patients before treatment. *Id.* at 293–317. Of course, where the middleman fails to act as agreed upon, the manufacturer may be relegated to a contract claim against the middleman. See *id.* at 145–69.

218. In *Illinois Brick Co. v. Illinois*, the Supreme Court held that only the “overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party ‘injured in his business or property,’ within the meaning of the [antitrust statutes].” 431 U.S. 720, 729 (1977); see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

Not only are all antitrust class actions brought by purchasers, but under *Illinois Brick*,<sup>219</sup> only “direct purchasers”—that is, those that bought directly from the antitrust defendant—will have standing to assert federal antitrust claims. Downstream purchasers, or “indirect purchasers” in the parlance of antitrust, may not bring federal antitrust actions (although some fifteen or so states allow indirect purchasers to bring suits under limited circumstances under state antitrust laws).<sup>220</sup> The upshot is that the only people who can bring an antitrust class action in federal court are those upon whom collective action waivers may most easily and directly be imposed.

It follows, stunningly, that all of the many billions of dollars paid out in antitrust class action settlements and judgments are avoidable. A case-in-point is the massive tying class action against Visa and MasterCard, which ended in 2003 with a record \$3.05 billion settlement in favor of a merchant class led by Wal-Mart, Circuit City, and others.<sup>221</sup> If the Visa/MasterCard member banks had simply included collective action waivers in their standard-form merchant agreements, this mammoth liability would never have been incurred.<sup>222</sup> By contrast, a roughly similar class action filed by small merchants in 2003 against American Express may never get off the ground for the simple reason that AmEx *does* include collective action waivers in their standard-form merchant agreements.<sup>223</sup>

### 3. Civil Rights, Employment, and Entitlement Cases

In general, civil rights actions are certainly much farther removed from contract law than are antitrust or consumer cases. But many contemporary civil-rights cases, while not bottomed on contractual theories, implicate contractual relationships that are capable of communicating effective collective action waivers.<sup>224</sup>

Title VII cases, which have long “typified the sort of civil rights action that courts and commentators describe as uniquely suited to resolution by class action litigation,”<sup>225</sup> often involve a contract-based employment relation-

219. *Illinois Brick*, 431 U.S. at 729.

220. See *California v. ARC Am. Corp.*, 490 U.S. 93 (1989) (concluding that allowing recovery for indirect purchasers under state antitrust laws would not conflict with the policies expressed in *Illinois Brick*).

221. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005).

222. Of course, Wal-Mart and Circuit City—both plaintiffs in the antitrust litigation—would probably not have agreed to a collective action waiver in their negotiations with Visa and MasterCard. While it must be fairly typical to force all types of waivers and other remedy-stripping provisions on small merchants, large companies such as these have far greater bargaining power and are able to negotiate custom agreements, rather than merely acquiesce to standard-form contracts.

223. See *supra* text accompanying notes 176–178 (discussing American Express’s attempt to rely on those collective action waivers in a case currently before the Southern District of New York).

224. See generally Mara Kent, “Forced” vs. *Compulsory Arbitration of Civil Rights Claims*, 23 LAW & INEQ. 95 (2005) (reviewing cases and legislation on arbitration of civil rights claims).

225. Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 813 (2004).

ship. While arbitration of employment disputes is nothing new<sup>226</sup> (and some scholars have staunchly defended the use arbitration in the employment context)<sup>227</sup> the potential for collective action waivers to curtail most, if not all, employment class actions seeking broad-scale changes in the U.S. workplace is a more recent phenomenon.<sup>228</sup> Aggressive employers such as Circuit City have already used collective action waivers to avoid classwide exposure in the employment context.<sup>229</sup> Brokerage houses, which have recently paid out high settlements to avoid jury trials in gender-discrimination cases,<sup>230</sup> have long used arbitration clauses to shield themselves from classwide liability in employment claims;<sup>231</sup> one would expect these entities to soon add collective action waivers to ensure their immunity.<sup>232</sup> And the newfound ability of employers to notify employees of arbitration clauses via mass emails will make it far easier to impose these waivers.<sup>233</sup> Finally, while employment

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226. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30 (1998) ("For decades, private arbitration has been the vehicle of choice for unions, and it has worked well in this context.").

227. See, e.g., Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001).

228. See, e.g., ALAN F. WESTIN & ALFRED G. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION 4-5 (1988); Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes?: An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995). Some commentators have argued that arbitration has enormous benefits for employees because it is cheaper and faster than litigation. These studies have typically focused on individual claims such as wrongful discharge, rather than class-based claims.

229. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (endorsing mandatory arbitration of employment claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1990) (same); see also Miriam A. Chery, *Whistling In the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1078-79 (2004) ("[C]ourts have shifted from viewing mandatory pre-dispute arbitration contracts with suspicion to distinctly favoring them. In part this can be explained by the fact that enforcing mandatory arbitration contracts frees the federal courts from having to deal with a considerable volume of employment litigation."). However, in California, Circuit City's attempts to impose collective action waivers on employees have twice been rebuffed by the federal courts on unconscionability grounds. See *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1001 (9th Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).

230. See, e.g., Emily Thornton with Mara Der Hovanesian & Jennifer Merritt, *Fed up—and Fighting Back*, BUS. WK., Sept. 20, 2004, at 100 (reporting on a number of high-profile gender discrimination suits against Wall Street brokerage houses, including the record \$54 million dollar settlement of such claims by Morgan Stanley).

231. *Fletcher v. Kidder, Peabody & Co.*, 601 N.Y.S.2d 686 (App. Div. 1993), cert. denied, 510 U.S. 993 (1993) (compelling arbitration of race- and gender-discrimination claims brought against a brokerage firm).

232. There is already authority for the proposition that brokerage firms may enter into private agreements with employees that bypass the current regulatory regime. For example, in *Credit Suisse First Boston, LLC v. Padilla*, 326 F. Supp. 2d 508 (S.D.N.Y. 2004), the court held that brokerage firms may enter into agreements with employees that replace arbitration by a self-regulating organization (such as the NYSE or NASD) with arbitration by the AAA, NAF, or JAMS. But see *Credit Suisse First Boston Corp. v. Pitofsky*, 768 N.Y.S.2d 436 (App. Div. 2003) (finding that SEC rules require self-regulating organization arbitration for employment disputes against all member firms).

233. See *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005). In *Campbell*, a former employee sued for wrongful discharge under the Americans With Disabilities



suits are seemingly immune from collective action waivers where based on at-will rather than a contractual relationship, there is little to stop employers from forming contracts containing “at-will” terms and collective action waivers.<sup>234</sup>

Title IX cases (regarding education) are likewise amenable to collective action waivers. There is no reason, for example, why educational admissions materials could not include the waiver. The same goes for the leases, mortgages, and other contracts that tie the plaintiffs in Fair Housing Act cases to the defendants in those actions. Nor is there any doctrinal reason—given the state of current law—why government entities could not avail themselves of waivers to avoid class action liability in a broad array of cases, including employment, housing, entitlement, and education-related class actions.

Political constraints are another matter: I imagine that many government officials would not be comfortable opting out of the government’s own dispute-resolution system. But I can also imagine this sentiment changing—at least insofar as class actions are concerned—as waivers in other areas become more common, and as opportunistic politicians seize upon an easy issue (“My opponent is for big class actions against the taxpayers; I’m against them!”).<sup>235</sup>

Of course, there are other civil rights cases that do not implicate contractual relations, including cases concerning prison conditions, taxation, zoning, police misconduct, and so forth. While many types of civil rights actions have become very difficult to maintain, owing to the Prison Litigation Reform Act, the restrictive “equitable standing rule,” and other

Act. The defendant moved to compel arbitration arguing that the employee was bound by a mandatory arbitration clause included in a company-wide email. The court held the arbitration clause had not been agreed to, but strongly suggested that all that was needed to make such a clause effective was to require a response acknowledging receipt and acceptance of the new policy. *Id.*

234. Not that employers haven’t tried to insert such waivers into employee handbooks or other materials, but courts have been surprisingly sharp in determining whether employment manuals and other “orientation day” detritus containing arbitration clauses are valid. *See, e.g.,* Ramirez-de-Arellano v. Am. Airlines, Inc., 133 F.3d 89, 90 (1st Cir. 1997); Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 761–62 (9th Cir. 1997); Gallos v. FIC Am. Corp., No. 02 C 6328, 2003 WL 21804258, at \*1–2 (N.D. Ill. Apr. 14, 2003); Phox v. Atriums Mgmt. Co., 230 F. Supp. 2d 1279, 1282–83 (D. Kan. 2002); Snow v. BE&K Constr. Co., 126 F. Supp. 2d 5 (D. Me. 2001); Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683, 685–86 (N.D. Ohio 1998); Phox v. Allied Capital Advisers, Inc., 74 Fair Empl. Prac. Cas. (BNA) 809, 810 (D.D.C. 1997).

235. To some extent, this issue has come up with Government-Sponsored Enterprises (“GSEs”). Fannie Mae and Freddie Mac, both congressionally chartered companies, guarantee mortgage-backed securities in order to maintain liquidity and stability in the secondary mortgage market. In response to concerns by consumer groups and others, both Fannie Mae and Freddie Mac announced in 2004 that they would cease purchasing mortgage loans that contained mandatory arbitration clauses. *Fannie Goes to Bat for Buyers*, BALT. SUN, Oct. 10, 2004 at IL (“While Fannie Mae does not believe arbitration provisions are inherently abusive, we believe that mandatory arbitration can be used in an abusive fashion” (quoting a Fannie Mae spokesperson)). These actions prompted a number of private mortgage lenders to follow suit. *See* Erick Bergquist, AM. BANKER, Aug. 31, 2005 at 1 (reporting that the decision by Wells Fargo, Citibank, and Countrywide Financial Services to stop using collective action waivers was “largely caused by the decision last year by Fannie Mae and Freddie Mac to no longer buy loans with such clauses”).

developments,<sup>236</sup> such cases are, I think, impervious to class action waivers, and so form an irreducible stump of class action practice.

#### 4. Other Commercial Cases

Other major areas of class action practice include—for lack of a better term—commercial cases in which the claimants challenge the defendant's practices under, say, an insurance agreement (such as the numerous class filings aimed at Marsh & McLennan, piggybacking on the investigation by New York Attorney General Eliot Spitzer)<sup>237</sup> or a franchise agreement (witness the infamous Meineke Muffler verdict of one hundred million dollars, which inspired the movement to look to arbitration as a way of insuring against large class action verdicts).<sup>238</sup> Clearly—indeed, paradigmatically—such cases lend themselves to collective action waivers.

It is also possible that, at some point, collective action waivers could restrict class actions in cases against securities firms. Currently, customer claims against broker-dealers are governed by rules promulgated and administered by the various exchanges. The New York Stock Exchange (“NYSE”) and the National Association of Securities Dealers (“NASD”) have thus adopted procedures for the arbitration of customer claims which prohibit class claims in the arbitral forum, but also bar member firms from enforcing an arbitration agreement against a customer who has initiated a class action in court.<sup>239</sup> In approving these rules, the Securities and Exchange Commission (“SEC”) opined that:

[C]lass actions are better handled by courts and . . . investors should have access to the courts to resolve class actions efficiently. In the past, individuals who attempted to certify class actions in litigation were subject to the enforcement of their separate arbitration contracts by their broker-dealers. Without access [to] class actions in [appropriate] cases, both

236. See Gilles, *supra* note 1, at 1414.

237. In 2004, Spitzer sued Marsh & McLennan Companies, the nation's largest insurance brokerage firm, for bid-rigging and price-fixing. As of this writing, the investigation continues, and thus far, two Marsh & McLennan executives have pleaded guilty to criminal charges. See generally Marcia Vickers, *The Secret World of Marsh Mac*, BUS. WK., Nov. 1, 2004, at 78 (discussing Spitzer's investigation and the “several class actions” that sprung up in the aftermath of the attorney general's announcement).

While insurance-contract class actions are, by and large, vulnerable to the waiver, one area of class action litigation sure to survive any proliferation of collective action waivers is found in insurance claims under the laws of Kansas, Georgia, and a handful of states that have enacted statutes expressly prohibiting the arbitration of claims arising out of insurance disputes under the authority granted by the McCarran-Ferguson Act, 15 U.S.C. § 1101 (2004). See, e.g., *Mut. Reins. Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933 (10th Cir. 1992) (finding Kansas statute expressly invalidating arbitration clause contained in insurance contract was not preempted by the FAA). Such state laws have been held not to be preempted by the FAA. See, e.g., *McKnight v. Chi. Title Ins. Co.*, 358 F.3d 854, 857 (11th Cir. 2004) (“In the right circumstances, the McCarran-Ferguson Act provides an exception to the general rule of arbitration under the Federal Arbitration Act.”).

238. See *supra* note 121 (discussing the multimillion dollar verdict against Meineke Motors).

239. See *Arbitration Rules: Rules 600–639*, NEW YORK STOCK EXCHANGE GUIDE, at ¶ 2600, Rules 600(d), 636 (2004); *Code of Arbitration Procedure*, NASD MANUAL, at ¶ 3710, §§ 12(d)(2), 10301(d)(1) (2004); see also *Nielsen v. Piper, Jaffray & Hopwood, Inc.*, 66 F.3d 145 (7th Cir. 1995).

investors and broker-dealers have been put to the expense of wasteful, duplicative litigation.<sup>240</sup>

But there is nothing to keep broker-dealers from including a collective action waiver in their contracts with customers. If they were to do so, customers would be unable to bring class actions in court and would instead be forced to bring individual claims in the NYSE or NASD's arbitral forum. And the current regulation, prohibiting exchange members from enforcing an arbitration agreement against a class member, would be rendered meaningless.

Another burgeoning area of commercial class action litigation that may be vulnerable to collective action waiver are claims arising under ERISA, including suits against corporate pension trustees which shadow securities-fraud cases.<sup>241</sup> In these ERISA class actions, employees and retirees allege that the company and its directors breached their fiduciary duties by knowingly issuing false financial statements, which induced employees or their ERISA plan fiduciary to invest and maintain their plan assets in company stock at artificially high prices. ERISA class actions against Enron, WorldCom, and other infamous corporate debacles have been filed by employees whose retirement and stock savings plans were heavily invested in the company's now-decimated stock.<sup>242</sup> But, as with broker-dealer agreements, there is no doctrinal reason why pension documents could not contain collective action waivers; corporate fund managers just haven't adapted yet. Given the current state of the law, there would seem to be no reason why pension trustees (and indeed, all fund managers) would not wake up and insulate themselves from billions of dollars in potential class liabilities.

### 5. *The Special Case of Securities Fraud*

While the advent of collective action waivers may soon doom the availability of class actions against Wall Street brokerages, fund managers, and other investment professionals, the undisputed king of the class action jungle is the Rule 10b-5 suit against a securities issuer by plaintiffs who

240. Exchange Act Release No. 34-31371, 57 Fed. Reg. 52,659, at 52,661 (Nov. 4, 1992).

241. Nowadays, when an Enron or WorldCom scandal strikes, not only do the company's stockholders have a viable class claim against the corporation and its agents, but the company's pensioners often have an equally viable claim against the pension "plan fiduciary," which is generally a committee with membership that overlaps with that of the company's board. As many journalists have noted, there has been a disturbing trend in recent years of plan fiduciaries investing significant portions—sometimes 100%—of fund assets in the stock of the corporation. See Mary Williams Walsh & Jonathan D. Glater, *Pension Fund Trustees Taking Aim at Safeway*, N.Y. TIMES, Mar. 26, 2004, at C4. And of course, where the plan fiduciary body contains the company's CEO or other insiders, it is chargeable with knowledge of the wrongful activities of the company. As a result, the emergence of ERISA suits as a follow-on to major securities fraud suits is becoming more and more common. See Mary Williams Walsh, *Concerns Raised over Consultants to Pension Funds*, N.Y. TIMES, Mar. 21, 2004, at 1.

242. See, e.g., *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003); *In re Enron Corp. Sec., Derivative and "ERISA" Litig.*, No. MDL-1446 Civ.A H-01-3624, 2002 WL 31845114 (S.D. Tex. Aug. 16, 2002).

purchased shares on the open market.<sup>243</sup> And here, on the surface at least, it would appear the class action's march towards extinction breaks its stride in a meaningful way. In particular, it would appear that collective action waivers are impotent to penetrate the realm of classic 10b-5 litigation. There is simply no contractual relationship of any kind between the plaintiff and the defendant. The corporate issuer of securities contracts only with a syndicate of brokers, and even then only when it has a public offering. Remaining sales are transacted on a secondary market between strangers.

And yet, the classic securities fraud case may nonetheless be ripe for infiltration by collective action waivers. To appreciate how this could happen, it is necessary to look critically at the structure of other transactions in which courts have enthusiastically located enforceable arbitration agreements and collective action waivers. Courts following the reasoning exemplified in Judge Easterbrook's *Hill* decision have not hesitated to recognize binding arbitration clauses that obligate a plaintiff-consumer to arbitrate claims against a defendant-manufacturer, where the clause was contained inside (or on) a box that she bought at a third party retailer.<sup>244</sup> On this three-sided model, there is not necessarily any contract between consumer and manufacturer (although there may be a warranty or some ongoing service component); the only real contract is between the consumer and retailer. All that really matters to the court is that the consumer acts (or refrains from acting) while on notice that the terms and conditions established by the manufacturer include arbitration. It is a fiction to speak of an "agreement" to arbitrate between the plaintiff and the manufacturer, although courts often do.<sup>245</sup> What judges really mean is that the manufacturer

243. As Professor Sternlight explains:

[T]he securities industry has long been a major proponent and advocate of binding arbitration in general, its policies foreclose arbitration of class actions and instead allow investors to litigate such claims. In adopting the exclusion . . . the SEC foreclosed the possibility that companies might be permitted to deprive customers of the class action device simultaneously in both litigation and arbitration forums. The rule barring arbitral class actions was unanimously adopted in 1992 by the Securities Industry Conference on Arbitration ("SICA"). One by one the various individual brokerages secured SEC approval for the same rule.

The SEC opposed arbitration of class actions because whereas courts already had developed rules for handling class actions, arbitral organizations had not. It found that allowing arbitration of class actions would be wasteful and duplicative. In approving later versions of the exclusion of class actions from arbitration, the SEC frequently reiterated that it "is an important initiative to protect investors and the public interest."

Sternlight, *supra* note 101, at 45-48 (footnotes omitted).

244. See, e.g., *Cavalier Mfg., Inc. v. Clarke*, 862 So. 2d 634 (Ala. 2003) (compelling arbitration of claim brought by mobile home purchaser against manufacturer, even where manufacturer was not party to the retail installment contract in which the arbitration clause appeared).

245. In *Ross v. Bank of America*, for example, plaintiff cardholders allege that they never entered into valid and binding agreements to arbitrate disputes:

While defendants agreed between and among themselves to impose arbitration clauses, plaintiffs and other members of the class did not affirmatively agree to accept them. Defendants imposed the arbitration clauses on their cardholders in a manner designed to avoid detection by cardholders. The clauses were either engrafted onto existing cardholder agreements through change in terms notices or buried in the cardholder agreements of new cardholders. By hiding the arbitration clauses in change in terms announcements and cardholder agreements, defendants did

clearly announced the terms and conditions that attach to its product, and the consumer—on notice of those terms—accepted the product or elected not to return it. The requirement of privity is replaced by a “notice-plus-acceptance” test.<sup>246</sup>

So if I am right—if we are entering a world where the requisite “agreement” to arbitrate is satisfied by notice-plus-acceptance of the product—then the door may be open just wide enough to impose collective action waivers in the classic 10b-5 fraud-on-the-market context, provided that there is sufficiently clear notice. And clear notice shouldn’t be very difficult at all. I can imagine, for example, a NASDAQ website listing companies who have elected to “opt out” of class action exposure. Perhaps (somewhat formalistically) courts would require securities to bear legends reflecting the opt out. Certainly, actual notice could easily be provided by issuers to the stock exchanges, investment banks, and brokerage houses, all of which might be obligated to notify their customers in some broad fashion. Ultimately, companies could simply amend their corporate charters to give notice of the collective action waiver.<sup>247</sup>

Now, lest we get ahead of ourselves, there are strains of recent case law that push back against the creep towards a “notice-plus-acceptance” test for arbitration agreements. This issue comes up, for example, in cases where companies send out unilateral amendments to consumers under “change-in-terms” provisions—that is, contractual clauses that give companies the right to alter the terms of the agreement on written notice to the consumer. Some lower courts in recent years have refused to compel arbitration where an arbitration provision was sent to the consumer pursuant to a “change-in-terms” provision, reasoning that the addition of a new provision requiring

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not reasonably inform their cardholders of the arbitration clauses or their consequences. Either way, Plaintiffs and other members of the Class did not “agree” to the arbitration clauses. The clauses are *never* signed by any “party” to them. Silence on the part of cardholders is not evidence of an “agreement” to arbitrate.

Complaint ¶¶ 125–26, *Ross v. Bank of Am.*, No. 05 CV 7116 (S.D.N.Y. Aug. 21, 2005).

246. Professor Stephen Ware describes this as a “hub-and-spoke” version of contracting:

[A]utomobile insurance companies could have an enormous impact on negligence law if all their insurance policies had arbitration clauses making all the company’s other policyholders third-party beneficiaries. Then an auto accident involving, for instance, two Allstate customers would go to arbitration, not litigation. If all the insurers contracted with each other, they could extend this arbitration system to accidents involving customers of different insurers. . . . Nor would insurers have to be the only hub of hub-and-spoke arbitration agreements. A magazine could be a hub with spokes connecting all its subscribers. Mastercard could be a hub with spokes connecting all its cardholders.

Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 752 (1999) (footnote omitted).

247. Under Delaware law (and the law of many other states as well) corporations may amend their corporate charters to insulate themselves from liability for breach of the duty of care. These “waivers” are binding against all shareholders. DEL. CODE ANN. tit. 8, § 102(b) (2003). This could prove to be a sufficient statutory basis for imposing a collective action waiver.

arbitration goes well beyond the alteration of existing contractual terms, which would be a permissible “change-in-terms.”<sup>248</sup>

Numerous other courts, however, have reached a contrary result,<sup>249</sup> and, even more significantly, Delaware (whose law would be designated to control the contracts of any Delaware-chartered bank or corporation) has enacted a statute that expressly authorizes the addition of arbitration clauses through change-in-terms provisions.<sup>250</sup>

In the end, then, I think the cases refusing to recognize unilaterally imposed arbitration clauses are no more than speed bumps on a road inevitably leading away from traditional contract principles in the area of arbitration.<sup>251</sup> Courts have already recognized a number of circumstances under which nonsignatories may be bound to arbitration agreements, including the assumption by a nonparty of rights and responsibilities under a contract that contains an arbitration clause.<sup>252</sup> This is not a distant leap from a doctrine holding that a collective action waiver “travels with the stock,” as part of the basket of rights purchased by the shareholder in the open market when he purchases a company’s common stock.

### B. *How the Waiver May Come to Rule the Earth*

It seems inevitable that more and more companies will come to understand that class action exposure is largely optional under current doctrine. The penetration of collective action waivers is relatively miniscule today,

248. See *Stone v. Golden, Wexler & Sarnese*, 341 F. Supp. 2d 189 (E.D.N.Y. 2004); *Perry v. FleetBoston Fin. Corp.*, No. 04-507, 2004 U.S. Dist. LEXIS 12616 (E.D. Pa. July 6, 2004); *Long v. Fid. Water Sys., Inc.*, No. C-97-20118, 2000 U.S. Dist. LEXIS 7827, at \*9 (N.D. Cal. May 26, 2000); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273 (Ct. App. 1998); *Discover Bank v. Shea*, 827 A.2d 358 (N.J. Super. Ct. Law Div. 2001); *Sears Roebuck and Co. v. Avery*, 593 S.E.2d 424, 426 (N.C. Ct. App. 2004).

249. See *Bank One, N.A. v. Williams*, No. 3:01CV24-D-D, 2002 U.S. Dist. LEXIS 27217 (N.D. Miss. April 30, 2002); *Bank One v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001), *aff'd without opinion*, No. 01-60059, 34 Fed. Appx. 964 (5th Cir. April 5, 2002) (Ohio law); *Herrington v. Union Planters Bank of Miss.*, 113 F. Supp. 2d 1026 (S.D. Miss. 2000), *aff'd without opinion*, 265 F.3d 1059 (5th Cir. 2001); *Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410 (M.D. Ala. 1998) (relying in part on Alabama and Utah statutes that permit unilateral amendment but do not refer explicitly to whether that method can be used to add an arbitration clause); *SouthTrust Bank v. Williams*, 775 So. 2d 184 (Ala. 2000) (Alabama statute permits unilateral amendment but does not address whether arbitration clause can be added this way); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, (Ill. App. Ct. 2003) (Arizona law).

250. See DEL. CODE ANN. tit. 5, § 952(a) (2005) (Delaware statute expressly authorizes addition of arbitration clause through this method).

251. And of course, as collective action waivers proliferate over time, there will be less need to impose such clauses through unilateral change-in-terms provisions. Such unilateral amendments simply accelerate the pace at which the waivers may become commonplace.

252. The Second Circuit, for example, has thus far recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter-ego; and 5) estoppel. See *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999); *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 401-02 (S.D.N.Y. 2003).

but the visible tip represents a whopping and seemingly unavoidable iceberg.

Several factors will conspire to speed the waiver's rise. For one, in the wake of *Bazzle* and the announcement by all three major arbitral bodies that their arbitrators may not sua sponte order classwide arbitration, most companies that have arbitration clauses in their contracts with consumers or employees suddenly, automatically, have collective action waivers as well.<sup>253</sup> Second, the ability of companies to unilaterally impose waivers via change-in-terms provisions under the law of Delaware and other key states has been a huge boon to many of the largest banks and other institutions that regularly face broad exposure to consumers, allowing the banks to impose these terms on existing (and not just new) relationships.

Another factor here is the tight-knit business lobby, with their regular conferences and publications, all of which grease the skids for the fast development of procorporate legal ideas, once they reach a certain tipping point. And I do expect a tipping point, where it becomes perfectly clear to the broader business community that their interests demand the full-scale imposition of collective action waivers in all of the ways discussed above and others not yet considered. Most likely, this watershed moment will be precipitated by a major court decision—for example, if AmEx earns a free pass through its collective action waivers, whereas Visa and MasterCard were forced to pay \$3 billion.

One might ask: why hasn't this happened yet?<sup>254</sup> I am not entirely sure, but I offer a few observations. First, the collective action waivers are of fairly recent vintage, and have not been much tested by appellate courts. Relatedly, I think these waivers are fairly counterintuitive to liberally trained lawyers: a common reaction is "that can't be permissible." So I suspect there is some reluctance on the part of general counsel to rush into a perceived violation of applicable law. I also suspect that, for some fairly small subset of companies—the Ben & Jerry's of the world—the imposition of a collective action waiver in contracts with employees or consumers might serve to undermine the company's investment in its public image and good will.<sup>255</sup>

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253. See *supra* text accompanying notes 189–196 (discussing the response by the three major arbitral bodies to the Supreme Court's ruling in *Green Tree*).

254. Again, it is entirely possible that many more companies have inserted collective action waivers into their contracts and onto their packaging materials in recent years. But impressionistically, it appears that the early adopters have been fairly sophisticated entities; full penetration of the waiver, then, is not yet complete. Indeed, current data indicate that even standard predispute arbitration clauses are not as common as one would imagine. See Demaine & Hensler, *supra* note 201, at 56 (finding that among the consumer contracts studied, only those in the financial services industry consistently contained arbitration clauses); Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695 (finding that less than half the franchise agreements studied contained arbitration clauses).

255. See *supra* note 235 (discussing announcement by congressionally chartered governmental corporations refusing to accept mortgages containing mandatory arbitration clauses in effort to befriend consumer rights organizations).

Other possible rationales are less convincing. While certification of a settlement-only class is sometimes a useful way to achieve global peace,<sup>256</sup> it seems unlikely that a company would expose itself to class liability just to keep that option open—after all, if this option were so important, firms could provide in their contracts that the parties waive the right to participate in all collective actions *except for settlement classes*.<sup>257</sup>

Nor do I believe that firms refrain from imposing waivers to cause buyers to pay more today for the right to litigate collectively tomorrow. Such an argument assumes, for one thing, that consumers are aware of the existence of collective action waivers.<sup>258</sup> They're clearly not.<sup>259</sup> And even if they were, it is not clear that consumers would attach a negative value to the waivers at the time of contracting. I rather expect that, viewed *ex ante*, the prospect of class litigation always appears very remote—and certainly too remote to affect the price of the product.<sup>260</sup>

But none of this explains why *arbitration* agreements are not currently in wider use in consumer and even employee agreements.<sup>261</sup> My own view is that, before the collective action waiver issue arose, arbitration did not matter all *that* much. Sure, there is value for companies in being in arbitration as opposed to litigation,<sup>262</sup> but the avoidance of class actions is a much bigger deal. And so, previously, there was no overwhelming incentive to push the envelope by, for example, including arbitration agreements on shrink-wrap or in packaging; or by issuing written “at-will” employment contracts to hourly employees containing arbitration clauses. Now there is.

256. See, e.g., Judith Resnik, Statement Prepared for Public Hearings Considering Proposed Amendments to Fed. R. Civ. P. 23: Procedural Challenges: Revising the Class Action Rule, at 12 (Jan. 22, 2002) (on file with author) (noting that “some defendants have come to welcome certification of a class as a useful tool for them to reach closure on a set of problems of a plaintiff class”).

257. It is also striking that the companies with the most to gain from settlement classes—phone companies, credit card companies, and the like—are precisely the firms that have decided most aggressively to implement collective action waivers.

258. It also assumes, quite implausibly, that marketers would trumpet the possibility that the consumer might some day wish to engage in class action litigation against the company.

259. There is a great deal of evidence to suggest that consumers rarely read contracts, or understand the various terms and conditions which they “agree” to when purchasing goods and services. See generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983). These informational asymmetries only become starker with the increasing tendency of companies to place the terms and conditions of sale in scroll-text, envelope stuffers, and other such media. See also Complaint ¶ 3, *Ross v. Bank of Am.*, No. 05 CV 7116 (S.D.N.Y. Aug. 21, 2005) (asserting that “most cardholders are wholly unaware of the existence, let alone the implications, of the arbitration clauses”).

260. There is a rich behavioral economics literature on the consumer’s ability to discount the future in ways that may end up appearing irrational. See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1568 (1998).

261. See generally Demaine & Hensler, *supra* note 201; Drahozal, *supra* note 254.

262. Reisinger, *supra* note 197, at 8 (noting that general counsels “have long relied on arbitration as a way to keep legal costs down since it’s traditionally been viewed as cheaper than litigation”).



### C. Political and Policy Considerations

I have made clear my view that courts are likely to prove hospitable to collective action waivers for as far as the eye can see. Judicial attitudes do change, as we have seen, but they change slowly. The views of Judges Posner and Easterbrook on the legal issues discussed in this Article may rule the roost today, but they were decades in the hopper. Certainly, I do not see any judicial attitude shift in the offing that would cause courts to swing back to a more consent-centric view of contract or to elevate the interest of compensating small plaintiffs over concerns with overbearing settlement pressures.

Another possible limiter here is Congress, which could pass legislation providing that the procedures of Rule 23 may not be waived, or may not be waived in a standard-form agreement. While such an approach surely has the virtues of clarity and efficiency, the issue is likely moot for the time being: the 2004 election results make it unlikely that Congress will be disposed to curtail the ability of companies to opt out of classwide exposure any time soon (although it is certainly possible that, as part of the horse-trading to be carried out in a major litigation reform package, class action anti-waiver legislation could come into play).<sup>263</sup>

It is also theoretically possible that, should the waiver continue to survive legal challenges and fail to inspire legislative attention, the executive branch might step in to fill the enforcement vacuum created by an absence of collective litigation.<sup>264</sup> Courts, in upholding the validity of collective action waivers, seem to derive comfort from the abstract notion that “[e]ven if plaintiff cannot bring a class action, the Attorney General . . . [could] bring an action to enforce” the plaintiff’s and other similarly situated claimants’ rights.<sup>265</sup>

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263. From the perspective of trial lawyers and their Democratic allies, agreeing to litigation reform proposals would seem a small price to pay for obtaining an antiwaiver amendment to Rule 23. Whether they will correctly perceive the relative value of antiwaiver legislation, however, is anybody’s guess. I am likewise not sure that businesses and their Republican allies will correctly appreciate the stakes. Certainly, the relatively scant attention paid to collective action waivers to date makes me think that it is still possible for either side to make a monumental mistake in evaluating a measure that could, by and large, determine the future viability of class action litigation. See Sternlight, *supra* note 101, at 15–16 (“It is rather amazing that, despite its clear importance, the phenomenon of using arbitration to avoid class actions has received scant public attention. It has not been focused upon in Congress, in the popular press, or even among arbitration scholars. For example, the relationship between class actions and binding arbitration has not been addressed in the [FAA] or in the Uniform Arbitration Act (“UAA”). Similarly, no state arbitration statute contains specific provisions dealing with the treatment of class actions.” (footnotes omitted)).

264. Professor Resnik, in a statement prepared for hearings considering proposed amendments to Rule 23, noted that, should the executive branch step in, “the reliance on the private bar for such regulatory work could be reduced.” Resnik, *supra* note 256, at 14 (discussing a 1979 Justice Department proposal “for legislation to authorize it to bring small dollar value claims on behalf of injured individuals”).

265. *Tsadilas v. Provident Nat’l Bank*, 786 N.Y.S.2d 478, 480 (App. Div. 2004); *see also Iberia Credit Bureau v. Cingular Wireless L.L.C.*, 379 F.3d 159, 175 (5th Cir. 2004) (discussing the Louisiana state statute that allows the state attorney general to intervene as a plaintiff on behalf of consumers).

In any event, assuming that collective action waivers ever do receive critical attention in Congress or the executive branch, the binary political question presented is: are collective action waivers a good thing or a bad thing? And the antecedent theoretical question is, what set of norms does one draw on to decide whether we ought to allow waiver of collective action?

Certainly, we can anticipate a boilerplate economic argument in favor of recognizing collective action waivers, asserting that class action exposure entails costs, and that consumers—given the choice—may opt to waive their right to collective action if that meant cheaper goods and services. But the standard economic critique is totally unilluminating here: consumers may very well opt for the lower prices and sign the waiver. But if we buy this argument, then why not allow companies to require consumers (and employees and pensioners and so forth) to waive all prospective liability (or, say, a waiver of liability under TILA, or Title VII, or ERISA, or the Sherman Act) in exchange for a reduction on price, or a bump up in wages, or what have you? Consumers will do it; I take that as a given.<sup>266</sup> But current legal doctrine doesn't allow it: as a matter of public policy, we prohibit prospective waivers of federal statutory liability.<sup>267</sup>

We are therefore left with policy questions that must be answered on their own terms: shall we allow, in standard-form agreements, broad waivers of prospective substantive statutory liability? Waivers of the right to seek money damages, or injunctive relief? Of the right to proceed collectively? Each of these deserves a real answer.

#### CONCLUSION

The question on the table here—whether to enforce collective action waivers—totally and inevitably collapses into the question of whether class actions are a good thing or a bad thing. After all, on what theory might we uphold the right of companies to broadly impose collective action waivers, and yet oppose the repeal (or radical overhaul) of Rule 23 itself? The obvious answer, in any other context, would be freedom-of-contract principles. But here, the freedom-of-contract answer is unavailable. It was not “consent” or a “meeting of minds” that Judge Easterbrook found lying on the bottom of a computer box in *Hill v. Gateway 2000*; it was economic efficiency.

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266. See, e.g., Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 817, 824–25 (1987) (discussing asymmetric information, unequal bargaining power, and irrational consumer preferences).

267. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 n.19 (1985); see also David Schwartz, *supra* note 112, at 53–54 (“Under common law principles and numerous statutes, prospective waivers of substantive rights are generally disfavored. . . . Courts generally refuse to enforce contract clauses whose effect is to exempt a party from liability for its own future fraud or intentional torts, violations of statute, and injuries caused by gross negligence or recklessness. Common law doctrine is particularly restrictive of prospective waivers where a regulated party seeks to limit its liability to the party benefiting from the regulation—such as consumer or employment contracts.” (citations omitted)).

And so, we are back to the question of whether having class actions at all is efficient or desirable. To a large extent, the answer to this question depends on one's view of the values that collective action litigation promotes in our legal system.

My intuition, again, is that class actions do far more good than harm; that many prudent corporate decisions are made precisely because the palpable threat of class action liability hangs in the boardroom. I think it also indisputable that class actions serve a vital compensatory goal: in most cases, class members "would not likely have received any monetary compensation absent a class action."<sup>268</sup> As the Supreme Court recognized thirty years ago in *Eisen v. Carlisle & Jacquelin*:

A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.<sup>269</sup>

The use of class actions to fight racial discrimination, achieve equality in the workplace, and tackle consumer fraud illustrates that these suits can achieve public goals, both by compensating victims and deterring future wrongful conduct. For these reasons, and because no genuine freedom-of-contract interests are served by collective action waivers, my own view is that the waivers should not be enforceable. Allowing companies to simply opt out of exposure to collective litigation is no more defensible than a system in which corporations may decide whether they wish to be exposed to federal antitrust, securities, or civil rights laws. Indeed, it is less defensible, insofar as collective action waivers will invariably be buried in a mountain of terms and conditions, while substantive liability waivers might be expected to garner some attention.

The scholarship on class action practice has thus far consisted of doctrinal critiques, letters to Congress, moralist manifestos and economists' prescriptions for optimized class action rules from many of our great scholars. With the class action rule itself a seemingly permanent fixture on the legal landscape, scholarly attention has naturally been drawn to optimizing the legal rules that govern its operation. But with the advent of collective action waivers, the issues that face class actions have changed and the questions that scholars ask must also change. Do we allow companies to opt out of all potential classwide liability, or don't we? My hope is that we will see significant scholarship focused on this elemental question. Because suddenly, the question matters.

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268. *Id.* at 467 ("In most of the consumer class actions, the amounts at stake were small enough that most lawyers would not have taken non-class cases.").

269. 417 U.S. 156, 161 (1974); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.").