ARE CONTINGENT-FEE ATTORNEYS DETERRED?: HOW COURTS CAN MORE EFFECTIVELY POLICE ADHESIVE ARBITRATION AGREEMENTS

Kenyon D Harbison, University of California, Los Angeles
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“[C]ourts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of...overwhelming economic power that would provide grounds ‘for the revocation of any contract.’” — United State Supreme Court

I. INTRODUCTION

In the past couple of decades, as consumer and employee arbitration have become more common, state and federal courts have increasingly struck down certain arbitration agreements. The courts, acting pursuant to section two of the Federal Arbitration Act (“FAA”), accomplish this by using old contractual tools that apply to all contracts, such as consideration and breach. They also use the modern contractual defense of unconscionability. Finally, especially where the claim is based on a federal statute, they increasingly step outside of contract principles and use a “statutory vindication” analysis, which seeks to determine whether the arbitration clause prevents plaintiffs from receiving access to arbitrators, or to remedies, in a way that effectively precludes any meaningful attempt to adjudicate and vindicate their statutory right.

This Comment makes two arguments. First, it argues that courts are misusing some of the tools they possess, such as consideration, while failing to adequately utilize others, such as statutory vindication. Second, this Comment concludes that access, and exculpation concerns – not abstract notions of fairness – should motivate courts to refuse to compel arbitration,

3 See, e.g., Floss v. Ryan’s Steakhouse, 211 F.3d 306 (6th Cir. 2000); Showmethemoney Check Cashers, Inc. v. Williams, 342 Ark. 112 (2000).
6 See, e.g., Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 659 (6th Cir. 2003).
or excise provisions from arbitration agreements. If courts take this Comment’s recommendations, they will be able to police arbitration agreements more effectively than they can at present, without running afoul of the Supreme Court by singling out arbitration clauses for discriminatory treatment.

Part I of the Comment provides a brief history of the FAA, a brief history of the Supreme Court’s interpretation of it, and background information about how most arbitration agreements are formed. Part II describes the policing “tools” courts have been using, and it critiques the application of each one. First, it argues that the traditional modes of contractual analysis (consideration, breach and fraud analyses) possess only limited applicability and, moreover, courts across the country are applying consideration analysis in a way that likely conflicts with the FAA. Second, this section argues that unconscionability is a powerful and legitimate tool. Third, this section concludes that statutory vindication analysis, while not without limitations, is more powerful than commonly thought, and should be far more broadly applied. This section finally concludes that while the unconscionability and statutory vindication analyses are the tools courts should use, courts applying them need to lay aside abstract, confusing discussions of “fairness,” and instead focus on the only issue that actually matters to plaintiffs: Does the arbitration clause contain provisions that will deter contingent-fee attorneys from taking even meritorious cases, thus effectively exculpating the defendant company from all possible claims?

Finally, Part III organizes these policing analyses thematically. It demonstrates that consideration analysis is typically used to combat “one-sidedness” concerns, breach analysis is used to discuss procedural concerns within arbitration, and both unconscionability and statutory vindication are used to address “fairness” (substantive, access- and claim-deterring) concerns. This section then argues that these final access and deterrence clauses are the only ones that should concern our courts, both because courts fortuitously have the most legitimate power to police in this area, but also because these types of clauses, by deterring even meritorious claims, are the ones most likely to cause actual harm to plaintiffs.

By taking the recommendations of this Comment, courts can effectively police the worst abuses, yet allow most arbitration agreements to stand and result in arbitration, thus furthering the pro-arbitration policy of the FAA and of the United States Supreme Court.

A. The Basics of the Federal Arbitration Act

When Congress passed the Federal Arbitration Agreement (“FAA”),

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7 In arguing for this change, this Comment uses a moderate number of cases and commentaries. It cannot provide an exhaustive response to all of the literature in each area.
in 1925, it tackled a long Anglo-American tradition of judicial hostility towards pre-dispute arbitration agreements. Under the Act’s provisions, whenever a binding arbitration agreement is found to exist between two parties, courts must compel arbitration and stay any pending litigation. This does not mean that all arbitration agreements must be enforced with no analysis. To the contrary, in section two of the FAA, Congress provided a clear rule: an arbitration agreement may be invalidated by a court, but only “upon such grounds as exist at law or in equity for the revocation of any contract.” These “grounds” of course include consideration, assent, and the standard contract defenses. In the modern era, after the FAA was applied to the states, the Supreme Court explained this section means a state, or a court applying state law, may not single out arbitration agreements for discriminatory treatment that other types of contracts do not receive.

**B. The Supreme Court’s Subsequent Elaboration of the FAA and the Explosion of Mandatory Arbitration**

People generally agree that, in the beginning, the FAA was: 1) at least intended by Congress to enforce pre-dispute arbitration agreements that were made between co-equal commercial enterprises; and 2) the FAA governed disputes concerning arbitration agreements that were brought in federal court. In the past forty years the Supreme Court has, at the very least, extensively elaborated on this vision of the FAA. As a general rule,

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11 Id. at § 2 (emphasis added). Section two of the FAA states in full: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Id.

12 See infra, section I(B).

13 Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (finding that a Montana statute that required arbitration agreements to be underlined and placed at the front of agreements conflicted with section two of the FAA).


15 See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331 (1996) (pointing out that the court has used freedom of contract principles to
the Court has broadly and consistently construed the FAA to manifest a “liberal federal policy favoring arbitration [over litigation in court].”\(^{16}\)

This process truly began in 1967. That year, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Supreme Court was faced with the question of whether, in light of *Erie Railroad v. Tompkins* and its progeny, the FAA remained applicable in federal diversity actions.\(^{17}\) The Court answered yes,\(^{18}\) a decision that cast the FAA as a substantive federal law (as opposed to a procedural provision guiding federal courts) enacted pursuant to Congress’ Commerce Power.\(^{19}\)

Subsequently, in the landmark case of *Southland Corp. v. Keating*, a seven-justice majority of the Supreme Court found that the FAA pre-empts any state law or public policy that conflicts with section two the FAA.\(^{20}\) The Court later also affirmed that the FAA applies to parties and transactions to the full extent of regulation that the Commerce Clause of the Constitution permits Congress.\(^{21}\) These cases ensured that the FAA would have tremendous scope, including the explicit ability to preempt all state laws that might attempt to bar the possibility of arbitrating certain state claims, or that might attempt to restrict the arbitration of claims by reference to non-interstate commerce.

The Court has also made it harder for parties to find individualized justifications for escaping arbitration clauses. For example, in *Prima Paint* the Court held that a party to a contract that contains an arbitration clause may not avoid arbitration by claiming the entire contract is induced by fraud. Rather, even if the arbitration agreement is one clause of a general agreement that is allegedly fraudulent, the arbitration clause must itself be


\(^{18}\) *Id.* at 405.


\(^{20}\) *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The court wrote: “In enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Id.* (emphasis added). See also Kenneth F. Dunham, *Great Gilmer’s Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 Am. J. Trial Advoc. 303, 321 (2005) (noting that “[s]tate employment claims have also been placed under the FAA umbrella through preemption.)

\(^{21}\) Allied-Bruce, *supra* note 20, at 273-74, 277.
independently invalidated in order for the party alleging fraud to avoid arbitration of its general fraud claim.\textsuperscript{22} Additionally, doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration, whether the issue is construction of the contract itself, or an allegation of waiver or delay.\textsuperscript{23} Thus, for example, if a valid arbitration agreement is silent on the issue of class arbitration, the arbitrator, not the court, decides whether the parties may join claims in arbitration or bring a class action in arbitration.\textsuperscript{24}

Finally, the Court has expanded the scope of arbitration to federal statutory claims, previously not considered arbitrable. It held in \textit{Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.} that claims arising under the Sherman Act could be arbitrated,\textsuperscript{25} and later expanded this to federal securities claims,\textsuperscript{26} as well as to claims arising under RICO and the Securities Exchange Act of 1934.\textsuperscript{27} Then in \textit{Gilmer v. Interstate/Johnson Lane Corp.} the court extended this rule to claims arising under the Age Discrimination and Employment Act of 1967 ("ADEA").\textsuperscript{28} After \textit{Gilmer}, it is hard to imagine a federal statutory claim that the Supreme Court would not find arbitrable. But in \textit{Gilmer} the Court also provided a caveat, which will prove crucial to this Comment’s analysis,\textsuperscript{29} when it indicated that while federal claims may be arbitrated, arbitration must allow the plaintiff to effectively \textit{vindicate his or her statutory rights}, so that the federal statute will “continue to serve its remedial and deterrent function.”\textsuperscript{30}

\textbf{C. An Added Wrinkle: Business Practice of Using Adhesion Contracts}

As radical a shift from litigation to arbitration as this may already appear, an increasingly common business practice has made it more so.

\textsuperscript{22} Prima Paint, \textit{supra} note 17, at 403-04. This is known as the separability doctrine, and is has been widely criticized. \textit{See}, e.g., Stephen J. Ware, \textit{Interstate Arbitration: Chapter 1 of the Federal Arbitration Act}, in \textit{ARBITRATION LAW IN AMERICA} 94-102 (Edward Brunet, et al., eds., 2006).

\textsuperscript{23} Cone, \textit{supra} note 16, at 24-25.

\textsuperscript{24} Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 449-53 (2003) (plurality opinion). But note that least one commentator has argued that the Bazzle plurality opinion does not set forth binding precedent and courts are wrongly applying it. Szalai, \textit{supra} note 3, at 4-5, 102.

\textsuperscript{25} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (allowing arbitration of claims arising under the Sherman Act).


\textsuperscript{28} Gilmer, \textit{supra} note 1, at 27.

\textsuperscript{29} \textit{See supra}, note 6 and accompanying text; \textit{see infra}, section II (C); III (???).

\textsuperscript{30} Gilmer, \textit{supra} note 1, at 28.
The Supreme Court’s elaboration on the FAA has coincided with the increasing use of contracts that companies presented to their consumers and employees on a “take-it-or-leave-it” basis, with no opportunity for negotiation or actual bargaining. They are colloquially known as “adhesion contracts,” a term coined by Edwin Patterson in 1919.\(^{31}\)

It is doubtful that the overall use of such agreements has been caused by the Supreme Court’s expansion of the FAA. In other words, extensive adhesion contracts do not exist solely so that a small arbitration clause can be slipped into them. Efficiency considerations certainly motivate a company engaging in millions of transactions to propagate all of its other terms this way as well, rather than negotiate hundreds of millions of clauses in millions of contracts.\(^{32}\) On the other hand, throughout the past twenty-five years, in the wake of the Supreme Court precedents described in section (I)(B), \textit{supra}, companies in a wide variety of industries have increasingly inserted pre-dispute arbitration clauses into general adhesion contracts that bind both their employees and their consumers.\(^{33}\) To conclude that the Supreme Court precedent described above has not caused this result would strain believability.

The use of these adhesion contracts raises a contractual assent issue, since consumers and employees are being forced into arbitration without really “agreeing.” This issue is beyond the scope of this comment. Many commentators have criticized the policy of allowing mandatory arbitration agreements to be enforced when there is very likely a lack of informed assent by millions of employees and consumers.\(^{34}\) Other commentators


\(^{32}\) Hill v. Gateway 2000, 105 F.3d 1147, 1149 (7th Cir. 1997) (“Practical considerations support allowing vendors to enclose the full legal terms with their products.”); Carrington & Haagen, \textit{supra} note 15, at 335-36 (stating in an article critical of modern arbitration law that adhesion contracts are “perhaps inevitable in an economy dominated by mass production and mass distribution”) (citing Friedrich Kessler, \textit{Contracts of Adhesion – Some Thoughts About Freedom of Contract}, 43 Colum. L. Rev. 629, 632 (1943). The question of to what extent we should care about “efficiency” in formulating our laws opens up a whole different kettle of worms that is beyond this Comment’s scope.


have generally applauded the process of enforcing arbitration agreements, regardless of whom they are applied to, and how.\textsuperscript{35}

Whatever one thinks about this as a normative matter, the Supreme Court held in \textit{Circuit City Stores, Inc. v. Adams} that a mandatory arbitration agreement presented as a condition of employment is enforceable under the FAA.\textsuperscript{36} The principle has not even recently been contested in the consumer context. Thus, this Comment begins with the assumption that in most cases, companies and organizations may use adhesive contracts to create binding pre-dispute arbitration agreements with consumers and employees. And courts must presumptively accept the fiction of consent.\textsuperscript{37} Rather, this Comment asks, when should Courts override both the “fiction of consent” and the federal policy favoring arbitration? And, more importantly, when is that legally proper?

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\textsuperscript{37} For this reason, section (II) (A), \textit{infra}, does not contain a discussion of assent.
II. A NEW ANALYSIS: TECHNIQUES FOR PROPER JUDICIAL POLICING OF ARBITRATION AGREEMENTS

A. The Old Tools of Contract: Consideration, Breach & Fraud Have Limited Utility In this Context

1. Failure of Consideration in Arbitration Agreements (Two Situations)

As made plain in the introduction, under the FAA courts have the authority to refuse to endorse arbitration agreements only “upon such grounds as exist at law or in equity for the revocation of any contract.” Failure of consideration is a classic ground and courts have often refused to enforce an arbitration agreement after finding a failure of consideration.

This result is often triggered by two specific types of sub-clauses that companies put in their arbitration clauses: 1) provisions reserving the drafting company’s right to modify the arbitration agreement either at any time or with a small amount of notice; and 2) non-even-handed language providing that the consumer or employee must arbitrate all of his/her claims against the company, but that the company may litigate its claims against the individual in court. In the first situation, this Comment argues there are only a factually narrow set of cases in which the doctrine can be properly applied, and the ultimate result depends upon whether it is acceptable to look only at the arbitration clause for consideration, or alternatively whether courts may examine the entire contract. In the second situation, courts are simply applying contract law incorrectly and there is no real consideration problem at all.

a. Situation One: Cases of Failure of Consideration in “Modify at Any Time” Clauses:

One decision employing a failure of consideration analysis against the first type of clause is the Sixth Circuit’s decision in Floss v. Ryan’s Steakhouse. In Floss a restaurant employer hired a third-party arbitration provider named Employment Dispute Services, Inc. (“EDSI”), and imposed

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38 Contract law of course provides many other potential tools and defenses. But the potential application of these to arbitration clauses is so limited that they are not discussed.
39 9 U.S.C § 2, supra note 11.
41 See e.g., Dumais v. American Golf Corporation, 299 F.3d 1216 (10th Cir. 2002); Floss, supra note 2; Phox v. Atriums Management Company, Inc., 230 F. Supp. 2d 1279 (D. Kan. 2002).
42 Gibson v. Neighborhood Health Clinics, 121 F.3d 1126 (7th Cir. 1997); Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985); Showmethemoney, supra note 2.
on the employee an agreement between EDSI and the employee.\textsuperscript{43} EDSI provided the arbitration forum in exchange for the employee’s agreement to arbitrate.\textsuperscript{44} The agreement specified that EDSI could alter rules and procedures of the arbitration at any time, with no requirement of notice to the employee.\textsuperscript{45} The court found that the arbitration agreement was illusory and did not create a binding contract because it was “fatally indefinite.”\textsuperscript{46} The court reasoned that it was fatally indefinite because the arbitration provider could change the terms of the arbitration agreement at any time and thus had “unfettered discretion in choosing the nature of [the] forum.”\textsuperscript{47} Notably, the court never attempted to look beyond the arbitration agreement itself for any promise by EDSI or Ryan’s Steakhouse that could provide consideration for Floss’ promise to arbitrate.

Another similar decision, but in a Maryland state court, was \textit{Cheek v. United Healthcare of Mid-Atlantic, Inc.}\textsuperscript{48} The offending provision in the \textit{Cheek} arbitration agreement said: “United HealthCare reserves the right to alter, amend, modify, or revoke the Policy at its sole and absolute discretion at any time with or without notice.”\textsuperscript{49} The court concluded that United’s promise to arbitrate was illusory, and that its employment of Cheek was not consideration for Cheek’s promise to arbitrate.\textsuperscript{50} The court reasoned that the power to change the arbitration agreement at any time implied that there was no real promise by United.\textsuperscript{51}

Like the Sixth Circuit in \textit{Floss}, the \textit{Cheek} state court looked only at the arbitration agreement when evaluating the company’s consideration.\textsuperscript{52} Unlike the court in \textit{Floss}, the \textit{Cheek} majority struggled with why it could only look to the arbitration agreement to find consideration. It made two arguments in support of its decision. First, it noted that in \textit{Prima Paint}\textsuperscript{53} the Supreme Court made “the arbitration clause … a severable part of the

\begin{itemize}
\item \textsuperscript{43} Floss, \textit{supra} note 2, at 309.
\item \textsuperscript{44} \textit{Id.} at 309-10.
\item \textsuperscript{45} \textit{Id.} at 315-16.
\item \textsuperscript{46} \textit{Id.} at 316.
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Cheek v. United Healthcare of the Mid-Atlantic, Inc.}, 378 Md. 139 (2003).
\item \textsuperscript{49} \textit{Id.} at 142-43.
\item \textsuperscript{50} \textit{Id.} at 144.
\item \textsuperscript{51} \textit{Id.} at 149. Actually, the \textit{Cheek} majority incorrectly characterized the clause in this case as allowing the defendant to revoke or alter the arbitration policy “even after invocation and decision [by the employee].” \textit{Id.} at 151 (emphasis added). Given that broader interpretation, there would be \textit{no question} that the agreement to arbitrate was illusory, even without the analysis that the majority gave. Clearly, if a company actually dared to use the provision after arbitration began it would breach the duty of good faith, as well.
\item \textsuperscript{52} \textit{Id.} at154 (majority opinion).
\item \textsuperscript{53} See \textit{supra}, note 17.
\end{itemize}
contract.”54 The Cheek court extrapolated from this that an arbitration agreement is “an independently enforceable contract,”55 in which “each party has promised to arbitrate disputes arising from an underlying contract, and ‘each promise provides consideration for the other.’”56

Second, the Cheek court was unwilling to use Cheek’s employment (a provision of the broader employment agreement) as consideration to match the employee’s consideration in the arbitration clause, because the type of employment Cheek had was itself at issue in the case.57 The court reasoned that it was not allowed to examine the “prohibited morass of the merits of the claims.”58 The court did not cite, but could have cited, the Supreme Court case of Howsam v. Dean Witter Reynolds, Inc for this proposition.59

The dissenting justice in Cheek believed that one must look to the entire agreement between the parties in order to evaluate consideration.60 First, quoting the dissent in Prima Paint, the Cheek dissenter stated that “[w]hether a number of promises constitute one contract (and are non-separable) or more than one is to be determined by inquiring ‘whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.’”61 Finally, as to the majority’s second argument (which, again, was about not being able to inquire into the prohibited merits of the underlying claim while attempting to find consideration) the dissent failed to see the problem, noting “[c]ourts are not required to inquire into the adequacy of consideration where there is at least some indicia of its presence.”62

Neither the position of Floss and the Cheek majority, nor the position of the Cheek dissenter, is unusual. For example, McNaughton v. United Healthcare Servs., Inc.63 is an Alabama state court case that went the

54 Id. at 153 (majority opinion) (citing Holmes v. Coverall North America, Inc., 336 Md. 534, 541-42, (Md. 1994). The Supreme Court confirmed this in Buckeye Check Cashing, Inc., v. Cardegna, 126 S.Ct. 1204, 1209 (2006). See also note 22, supra, and accompanying text.
55 Cheek, supra note 48, at 153 (citing Holmes, supra note 54, at 544).
56 Id.
57 Id. at 154.
58 Id.
59 Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002). Like purely procedural “questions which grow out of the dispute” the type of employment Cheek had was at issue in the case and would “bear on its final disposition.” Id. at 84.
60 Cheek, supra note 48, at 161-74.
61 Id. at 166 (dissent, quoting Prima Paint, supra note 17, at 424, quoting U.S. v. Bethlehem Steel Corp., 315 U.S. 289, 298 (1942)).
62 Id. at 167-68.
same way as the Cheek dissent. In McNaughton the court found that an employer’s promise of at-will employment to an employee was sufficient consideration for an arbitration clause that allowed the employer to “alter, amend, modify, or revoke” its arbitration agreement with its employee.64

b. Situation One Continued: The Limitations of Finding Failure of Consideration in “Modify at Any Time” Clauses

A brief review of a few select points of consideration doctrine is required in order to understand the limitations on this doctrine:

• First, courts are not supposed to consider adequacy of consideration: “[S]o long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant so that anything which fulfills the requirement of consideration will support a promise, regardless of the comparative value of the consideration and of the thing promised.”65

• Second, when a promisor “retains the right to decide whether or not to perform the [particular] promised act” that promise is illusory and is invalid since it is, in effect, no promise at all.66

• Third, when there are multiple promises in a contract, and “all promises or performances on one side are indiscriminately made [to be] consideration for all promises or performances on the other, … then if the performances or promises on one side fulfill the legal requirements of consideration, they will support any number of counter-promises on the other.”67

Is Floss acceptable under these rules? In Floss, recall, the arbitration agreement was “fatally indefinite” and illusory, which falls under the second rule above.68 Additionally, the arbitration agreement was a distinct agreement between the plaintiff and EDSI (a 3rd party), not a clause in the agreement between the plaintiff and his employer.69 Turning to the third rule above, Floss’ at-will employment could not possibly provide consideration for his promise to arbitrate, because it was not even

64 Id. at 597 n. 5. See also Blair v. Scott Specialty Gases, 283 F.3d 595 (2002); Hightower v. GMRI, Inc., 272 F.3d 239, 243 (4th Cir. 2001); Barker v. Golf U.S.A., 154 F.2d 788, 792 (8th Cir. 1998); Doctor’s Associates v. Distajo, 66 F.3d 438, 453 (2d Cir. 1995). See also supra note 48, at 161-74 (Harrell, dissenting).

65 WILLISTON ON CONTRACTS, § 7:21.

66 Id.

67 WILLISTON, supra note 65, at § 7:49 (citing Restatement Second of Contracts § 80(1), comment a (emphasis added).

68 See supra notes 46 and 47, and accompanying text.

69 See supra note 43 and accompanying text.
part of the same contract and was not even being provided by the same party whose promise to provide an arbitration forum proved illusory. Thus, Floss abides by the rules.

But Floss is a rarity. It illustrates the problem courts should recognize when, as in most situations, including Cheek, the arbitration clause is contained within the employer’s (or seller’s) arbitration agreement with the employee/consumer. Here, is the employer’s employment truly no consideration for an agreement by the employee to arbitrate? Such a result does not compute if one takes the third rule listed above seriously. Employment is a significant promise, and all of the promises are made indiscriminately. Moreover, looking at the first rule, it should not matter if the obligation is unequal, because courts cannot inquire into the adequacy of consideration.

There are not many other clauses in an employment contract about which a court would issue a blanket statement, saying the employment did not provide consideration. Thus, it appears that courts who use this analysis and look only at the arbitration clause for consideration are singling out arbitration agreements for discriminatory treatment that other types of contracts are not subjected to, in violation of Doctor’s Associates.

One may still ask whether cases like Cheek can be saved from the standard rules of contract law. The Cheek majority indicated how to do so when it pointed to Prima Paint. Even the Supreme Court itself later seemingly stated what Cheek derived from Prima Paint when the Supreme Court, reaffirming Prima Paint in Buckeye, held it stands for the proposition that “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” Moreover, a look at the Prima Paint dissent indicates that the Prima Paint dissenters explicitly viewed the majority decision as creating two separate contracts (which was one reason they dissented). Finally, even commentators critical of Prima Paint have said “it treats the arbitration clause as if it is a separate contract from the contract containing [it].” All of this indicates that the arbitration clause is a distinct contract. By characterizing the arbitration agreement as a separate contract, this rule functionally would return us to the situation in Floss, and as discussed just now in the context of Floss, the actions of courts like Cheek would be perfectly acceptable.

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70 Cheek, supra note 48, at 141-42.
72 Cheek, supra note 48, at 153.
73 Buckeye, supra note 54, at 1044.
74 Prima Paint, supra note 17, at 424 (Black dissent).
75 Ware, supra note 22, at 93.
76 See notes 68-69 and accompanying paragraph.
Is this right? No. Prima Paint’s “separability doctrine”\textsuperscript{77} should not be construed as Cheek construes it. After Prima Paint the arbitration clause is still one part of the contract, subject to normal contract rules, which say that consideration cannot be apportioned. First, there is no contractual reasoning in Prima Paint that magically turned the arbitration clause into its own agreement. The Supreme Court’s holding in Prima Paint was instead premised on what the FAA’s “statutory language [did] not permit,”\textsuperscript{78}

Second, the court calls the arbitration agreement “severable,” not “separate,” and the plain definition of a “severable contract,” is “a contract that includes two or more promises, each of which can be enforced separately, so that failure to perform one...does not necessarily put the promisor in breach of the other.”\textsuperscript{79} This definition affirms that the “severable” arbitration clause is nevertheless part of one contract.\textsuperscript{80} Applying the definition to the results in Prima Paint, the fraudulent breach there of a promise (contained in the broader agreement) does not mean that the party has breached another (the promise to arbitrate), and thus they still go to arbitration. That’s all.

Since Prima Paint does not create a separate contract, the only other way the case can reasonably be construed is to hold that the FAA statutorily mandated a “severability clause,”\textsuperscript{81} which could save an arbitration provision even if the rest of the agreement failed.

Moreover, there is no authority saying that a contract provision saved by a severability clause must be supported by its own consideration. Separate apportionment of consideration admittedly can be one test for whether a contract is severable,\textsuperscript{82} but “it is the parties’ intent which is

\textsuperscript{77} See Ware, supra note 22, at 93.

\textsuperscript{78} Prima Paint, supra note 17, at 404.

\textsuperscript{79} BLACK’S LAW DICTIONARY 264 (7th ed. 2000) (emphasis added).

\textsuperscript{80} Additionally, if one looks again at the court’s holding in Buckeye, one sees that the court said the arbitration clause was “severable from the remainder of the contract.” Buckeye, supra note 54, at 1044 (emphasis added).

\textsuperscript{81} A severability clause is “[a] provision that keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void or unconstitutional” BLACK’S, supra note 80, at 1106. It is also known as a saving clause and as a separability clause. Id.

\textsuperscript{82} W ILLISTON, supra note 64, at § 45:7. (“The apportionability of the consideration supporting the parties’ contract is frequently cited as a principal or chief test in ascertaining the parties’ intent and in judging the divisibility of their contract. [citation omitted] In other words, if the consideration supporting the parties contract is single, and cannot be apportioned to particular promises on each side, the contract is entire or indivisible;[ citation omitted] but if, on the other hand, the consideration is either expressly, or by necessary implication,[ citation omitted] divisible or apportionable, so that for each promise there is a corresponding consideration, the contract is divisible.[ citation omitted]”)
controlling on the issue [of severability], rather than merely whether the consideration is or can be apportioned.”83 Thus, making a clause severable does not necessarily mean consideration is, “or can be,” apportioned separately for that clause. Indeed, courts routinely hold just the opposite.84 The best way to look at Prima Paint is that instead of relying on intent to determine that a provision was severable, the Supreme Court shoehorned the result by construing the FAA in a way that created an implied severability clause. But it does not follow that the clause must be supported by its own consideration.

Nevertheless, this still does not mean that looking only at an arbitration clause for consideration is completely wrong. There are three reasons this might be true:

The first reason lays in the second argument of the Cheek majority, in which the court refused to consider whether Cheek’s employment provided consideration, because to do so would get into the “prohibited morass of the merits of the claims.”85 The court was quite right. There is a factually narrow range of cases where the only potential item of consideration the company can offer (in the broader contract) in return for the employee’s agreement to arbitrate (in the arbitration clause) is itself being disputed by the parties. This was true in Cheek, where the exact type of employment the plaintiff had, and whether it could provide consideration, was itself an issue the parties were disputing.86 In such cases, if courts analyzed whether the disputed claim could constitute consideration, they would likely be violating Supreme Court precedent, which holds that any adjudication of the merits of a claim is the arbitrator’s job.87 By such reasoning, the Cheek court’s holding was correct. Second, in a different, also narrow set of situations, the arbitration agreement can plausibly be construed as a separate agreement (like the agreement in Floss), despite the fact that no third party company is involved. For example, when an employee has already been hired, and the company never makes clear how his or her continued employment is

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83 Id. (emphasis added).
84 See, e.g., In re United Air Lines, Inc., 453 F.3d 463, 471 (7th Cir. 2006) (A severability clause “does not manifest an intent to single out any particular division of the agreement;” rather it “simply shows that the parties had the general and customary intent to have as much of their agreement survive adverse judicial intervention as possible.”).
85 See supra notes 57-58.
86 Cheek, supra note 48, at 154. Another court that came to the same conclusion was the Supreme Court of Arkansas. The Money Place, LLC v. Barnes, 349 Ark. 411, 412 (2002) (citing Prima Paint).
87 See supra note 59 and accompanying text. Admittedly, a conclusion saying “you can’t arbitrate because we don’t want to violate the federal policy favoring arbitration or step on arbitrators’ terrain to decide whether you can arbitrate” sounds a bit disingenuous.
contingent upon signing an arbitration agreement, it is hard to see how the employee’s employment can constitute consideration.\textsuperscript{88}

The third reason why courts might not be able to look outside the arbitration agreement for consideration is that at-will employment could plausibly be characterized as a unilateral contract, which would have a similar effect of putting us in a \textit{Floss}-like scenario. In fact, the dissenter in \textit{McNaughton} characterized at-will employment as a unilateral contract, which means it could only be satisfied by the employee’s performance.\textsuperscript{89} The arbitration agreement thus had to be separate bi-lateral contract – as plainly evidenced by the fact that one could conceive of circumstances leading to an arbitral claim \textit{even before employment (performance of the unilateral contract) began}; and thus the arbitration agreement required its own consideration.\textsuperscript{90}

Finally, it should be noted that is some authority for the proposition that arbitration contracts per se simply constitute their own separate agreement, but it is weak.\textsuperscript{91}

In conclusion, there is ambiguity concerning the question of whether courts may look only to the arbitration clause to find consideration where a company has drafted an illusory or vague arbitration clause that gives it the right to change or modify it at any time. While there are situations in which courts can legally invalidate such clauses, there are likely small in number, limited to situations like \textit{Floss}, and to the other situations outlined above. This is so unless at-will employment can be characterized as a unilateral contract.

c. \textit{Situation Two: Cases Finding a Failure of Consideration in “Non-Even-Handed” Arbitration Clauses, Using the Doctrine of Mutuality}

The second situation in which courts have used consideration analysis to refuse arbitration is when a company requires its employees or

\textsuperscript{88} Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131-32 (7th Cir. 1997) (applying Indiana law).
\textsuperscript{89} \textit{McNaughton, supra} note 63, at 604-05.
\textsuperscript{90} \textit{Id.} at 605.
\textsuperscript{91} “Whether a void agreement to arbitrate future disputes, incorporated in a general contract, will render unenforceable other divisions of the contract is a question of interpretation, but such an agreement is ordinarily \textit{treated as a separate contract}. Generally, it is \textit{not a part of the substance} of the general contract, pertains to the remedy \textit{only}, is \textit{collateral} to the contractual matters, and is, therefore, severable from the main body of the contract.” 4 Am. Jur. \textit{Alternative Dispute Resolution} § 77 (Supp. 2002) (emphasis added). While this was written to justify severability, it provides practical reasons, applicable to all contracts, that might provide courts with a principled basis for not invoking consideration from the broader contract.
consumers to arbitrate all claims, yet reserves its own right to use the court system for any claims it might have against the employee or consumer. In this situation, the analysis courts are using may be an even clearer violation of the FAA.

One such case is *Showmethemoney Check Cashers, Inc. v. Williams*.92 In *Showmethemoney*, a check-cashing company wanted to compel a consumer into arbitration after the consumer claimed that the company charged usurious check-cashing fees.93 The arbitration clause that the company was using left the company, on the other hand, with unfettered power to collect its customers’ unpaid fees using the court system.94 The court applied a rule that “[a] contract to be enforceable must impose mutual obligations on both of the parties thereto.”95 The court reasoned that this arbitration clause “fixed no real liability upon Showme.”96 Thus, the court found that there was a “lack of mutuality to support the arbitration agreement,” and the agreement was not enforceable.97

The Arkansas Supreme Court is by no means the only court to apply this sort of analysis, nor is it limited to state courts. The Seventh Circuit, in *Gibson v. Neighborhood Health Clinics, Inc.*, came to a similar holding, applying Indiana law.98 An arbitration clause contained in an “Understanding” bound only the employee.99 On the other hand, the company had not agreed to arbitrate any claims it might bring.100 The Seventh Circuit applied a rule that “[o]ften, consideration for one party’s promise to arbitrate is the other party’s promise to do the same.”101 There has to be some “detriment” to both parties.”102 The court reasoned that since the agreement to arbitrate was not “mutual,” the “Understanding” did not contain consideration for the employee’s promise to arbitrate.103

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93 *Id.* at 114-15.
94 *Id.* at 117.
95 *Id.* at 120 (quoting Townsend v. Standard Indus., Inc., 235 Ark. 951, 954-55 (1962). That case was quoting
96 *Id.* at 121.
97 *Id.*
98 *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d. 1126, 1130-31 (7th Cir. 1997).
99 *Id.* at 1131.
100 *Id.*
101 *Id.*
102 *Id.* at 1130.
103 *Id.* at 1131. See also *Hull v. Norcom, Inc.*, 750 F.2d 1547 (7th Cir. 1985).
d. Situation Two Continued: The Limitations on Using Mutuality to Invalidate Agreements in Which the Corporation Does not Agree to Arbitrate as Well

Understanding the problem with these two opinions requires a brief review of a few other aspects of consideration doctrine. The dominant modern notion of consideration is that it represents “bargained-for exchange” of promises. One way of phrasing this is to speak of a “mutuality of obligation.” That is a confusing term because to a court that only has to apply the doctrine rarely it could mean the parties must be bound by identical promises. But instead, mutuality of obligation means simply that both parties are bound by any set of promises constituting consideration for each other. Thus, it is just another way of saying that consideration exists, and it does not mean that the parties are bound by mutual, identical promises. In both of the cases discussed above, the courts do not follow these rules, because they think a promise to arbitrate must be met by an identical promise to arbitrate. In Gibson, the company “[could not] point to its own promise to arbitrate in order to make enforceable Gibson’s promise to do likewise.” In Showmethemoney their was “lack of mutuality” because Showme could “proceed immediately to court” while customers had to “submit all disputes … to arbitration.” This was a direct violation of contract law, and to the extent courts would never apply this doctrine to other clauses, a violation of the FAA.

Additionally, implicit in the courts’ analyses (though the courts do not discuss it) is the fact that these courts were singling out the arbitration clause to provide its own consideration. Otherwise, a court could find consideration elsewhere in the agreement to satisfy the lack of consideration in a non-mutual arbitration agreement. Thus, even if this were a correct contract interpretation, which it is not, their holdings would be subject to problems very similar to those already discussed in situation one. The courts would have to legally separate out the arbitration clause from the

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104 WILLISTON, supra note 65, at § 7:2.
106 Clausen & Sons, Inc. v. Theo, Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968) (applying Minnesota law); Heuser v. Kephart, 215 F.3d 1186 (10th Cir. 2000) (applying federal and New Mexico law).
107 See, eg., WILLISTON, supra note 65 § 7:14 (quoting James B. Berry’s Sons Co. of Illinois v. Monark Gasoline & Oil Co., 32 F.2d 74 (C.C.A. 8th Cir. 1929).
108 Gibson, supra note 98, at 1131.
109 Showmethemoney, supra note 92, at 121.
110 See supra section II (A) (1) (ii).
larger agreement, and treat it as its own contract. As previously discussed, that might involve the use of *Prima Paint*,\(^{111}\) a characterization of at-will employment as a distinct and unilateral contact,\(^ {112}\) or one of the other factual situations that can legitimately mean the arbitration clause must be supported by its own consideration.\(^ {113}\)

**e. Final Conclusions on This Section:**

In situations involving two types of clauses, “modify-at-any-time” clauses, and “you arbitrate but we don’t” clauses, courts are finding a failure of consideration. In situation one, to the extent courts cannot find some authority for their decision to look only at the arbitration clause to contain its own consideration, they are in violation of the Supreme Court’s holding in *Doctor’s Associates*, which held courts may not single out arbitration agreements for discriminatory treatment.\(^ {114}\) Thus, they need to find a principled way to justify their decision, either using the reasoning of *Cheek*,\(^ {115}\) or using one of the other potential methods discussed in section (II)(A)(1)(ii), above. In the context of the second situation, courts appear to be applying contract law simply incorrectly.

**2. Material Breach of the Agreement to Arbitrate and the Limitations of this Tool**

The second contract analysis courts are using under section two of the FAA\(^ {116}\) is to rescind arbitration agreements when there has been a material breach of the agreement to arbitrate.\(^ {117}\) Rescission\(^ {118}\) is permitted “for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract.”\(^ {119}\) The prime case exemplifying this approach was *Hooters of America, Inc. v. Phillips*.\(^ {120}\) Unfortunately, *Hooters* is incoherent as a breach case, and would better have been analyzed under unconscionability doctrine. Moreover, for a court to use a breach analysis to derail an arbitration agreement is incorrect as a matter of federal

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\(^{111}\) See *supra* notes 72-83 and accompanying paragraphs.

\(^{112}\) See *supra* notes 89-90 and accompanying paragraph.

\(^{113}\) See *supra* notes 68-69 (the *Floss* 3rd-Party situation) and 86-90.

\(^{114}\) *Doctor’s Assoc*s., Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (finding that a Montana statute that required arbitration agreements to be underlined and placed at the front of agreements conflicted with section two of the FAA).

\(^{115}\) See *supra* notes 86-90 and accompanying text.


\(^{118}\) Rescission a remedy for a non-breaching/defaulting party and restores the parties to their original position. *BLACK’S LAW DICTIONARY* 1048 (7th ed., 2000).

\(^{119}\) *WILLISTON ON CONTRACTS*, § 1467.

\(^{120}\) *Hooters*, *supra* note 117.
In *Hooters*, the Fourth Circuit held that an employer materially breached its agreement to arbitrate by promulgating egregiously unfair arbitration rules that lacked even “the rudiments of even-handedness,” and thus rescission was appropriate. The underlying lawsuit in the case was a Title VII sexual harassment lawsuit by a former employee of Hooters. Hooters’ arbitration agreement required the employee to notice at the outset the “specific act(s) or omissions(s) which are the basis of the Claim,” but Hooters did not have to provide any responsive pleadings or notice its defenses. The employee was required to provide the company with “a list of all fact witnesses with a brief summary of the facts known to each,” while Hooters did not have to reciprocate. The agreement also provided that Hooters and its employees would each select an arbitrator, then these two arbitrators would select a third. But the employee’s arbitrator and the third arbitrator had to be chosen from a list of arbitrators that Hooters created on its own. “[N]othing in the rules” prevented Hooters from removing arbitrators from the list if and when they ever ruled against Hooters. Hooters could “expand the scope of arbitration to any matter, ‘whether related or not the Employee’s Claim,’” but the employee could not “raise ‘any matter not included in the Notice of Claim.’”

Hooters was also “permitted to move for summary dismissal of employee claims before a hearing [was] held whereas the employee [was] not permitted to seek summary judgment.” Hooters, but not the employee, could record the hearing. Hooters could bring suit in court to “vacate or modify an arbitral award when it can show, by a preponderance of the evidence, that the panel exceeded its authority,” but employees could not. Finally, Hooters could modify the rules “in whole or in part” whenever it wished and “without notice” to the employee.

The Fourth Circuit reasoned that the rules were “so one-sided that their only possible purpose [was] to undermine the neutrality of the...
Thus, Hooters “materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.”

The Fourth Circuit stated that “generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance.” The court then oddly concluded:

In the case before us, we only reach the content of the arbitration rules because their promulgation was the duty of one party under the contract. The material breach of this duty warranting rescission is an issue of substantive arbitrability and thus is reviewable before arbitration.

Query how, in the context of adhesive arbitration agreements (and every single agreement discussed in this Comment is such an agreement), promulgation is not always the duty of only one party under the contract.

Furthermore, it is impossible to see any “breach” on these facts. The court’s logic seems to be: 1) “The parties agreed to submit their claims to arbitration;” 2) arbitration is “a system whereby disputes are fairly resolved by an impartial third party;” thus 3) Hooters “by contract took on the obligation of establishing such a system” and by creating a sham system “fail[ed] in performing its contractual duty.” Yet, all of this was in the original agreement. Thus, if we accept the fiction of mutual assent to adhesive arbitration agreements in the first place, which we must, Phillips assented to all of it. In fact there could be no “breach,” because Hooters was just doing exactly what it said in its arbitration agreement that it would do. For these reasons, Hooters is incoherent as a ‘breach’ case.

Rather than using a breach analysis, Hooters would better have been analyzed under unconscionability analysis, or perhaps even with a finding of a failure of consideration. The court said that Phillips “could legitimately expect that arbitration would not entail procedures so wholly one-sided as to ‘undermine the neutrality of the proceeding,” explicitly

134 Id. at 938.
135 Id. Several leading arbitration experts, including a “senior vice president of the American Arbitration Association (AAA), testified that the system established by the Hooters rules so deviated from minimum due process standards that the Association would refuse to arbitrate under those rules.” Id. at 939. Various other experts agreed, one calling this “so one sided, it is hard to believe that it was even intended to be fair.” Id.
136 Id. at 941. “Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award.” Id.
137 Id.
138 Id. at 940.
139 See infra section III.
140 Hooters, supra note 117, at 938.
implicating one version of substantive unconscionability rules. Additionally, the plaintiff, a waitress at Hooters, was very likely an at-will employee. Thus, assuming her employment could be characterized as a unilateral contract, then because Hooters could modify the rules at any time, this would also fail under a consideration analysis.

Finally, as a matter of federal arbitration law, even if one could find a breach of an arbitration agreement, this would be a matter for the arbitrator to decide, not a court, because before a breach occurs the parties are already bound by an arbitration agreement. It is the arbitrator who decides “allegation[s] of waiver, delay, or a like defense to arbitrability.” This would unquestionably include breach of an arbitration agreement.

As hard as it may be to believe, this all does not mean that Hooters is wrongly decided. As a matter of gut, it clearly is correct of course. But as a legal matter, the court also held that Hooters breached its obligations to act in good faith. The court reasoned this was so because arbitration is supposed to be a prompt and economical resolution, and when the plaintiff agreed to an arbitration agreement she could not legitimately have expected Hooters to draft an agreement that would be “so wholly one-sided as to present a stacked deck.” The doctrine of good faith is well established, so this was a legitimate basis for the court’s holding.

3. Fraudulent Misrepresentation Concerning an Agreement to Arbitrate, and the Limitations and Applications of this Tool

The final old-fashioned contractual technique courts have used to invalidate arbitration clauses, pursuant to FAA section two, is rescission of the arbitration agreement where a company engages in a fraudulent misrepresentation to induce the plaintiff to enter the agreement. A rare case holding this was Engalla v. Permanente Medical Group, Inc. Engalla, surprisingly, is a valid application of fraud doctrine to an arbitration agreement. Moreover, it may be extensible in at least one situation involving third-party arbitration organizations, thus providing plaintiffs with a tool to make sure their arbitration at least takes place according to the stated terms of their agreement.

141 See infra note 257 and accompanying text.
142 See supra notes 89-90 and accompanying text.
143 Hooters, supra note 117, at 939.
145 Hooters, supra note 117, at 940.
146 Id.
147 See Restatement (Second) of Contracts § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).
a. The Case of Engalla v. Permanente Medical Group, Inc. Described

Engalla is a complicated opinion, so several preliminary comments are required before a standard presentation of the facts, holding and reasoning of the case. First, it should be noted that the court did not consider whether the arbitration rules on their face constituted a “breach,” as the court in Hooters held. Second, though the court did consider whether the arbitration agreement itself was unconscionable, the court concluded it was not, and the court’s discussion of that argument is unimportant for this Comment’s purposes. Third, as a procedural matter, it is important to note that because of the procedural posture of the case, the court did not actually decide that there had been fraudulent misrepresentation, and thus did not actually deny the motion to compel arbitration; instead, the case was remanded to the trial court so it could “resolve conflicting factual evidence in order to properly adjudicate Kaiser’s petition to compel arbitration.”

Finally, the issue here of whether fraudulent inducement could lead to rescission of an arbitration contract was analyzed not with reference to the FAA, but rather according to California’s arbitration statute, Code of Civil Procedure section 1281. Thus it is important to note that (as it must according to Supreme Court precedent) California arbitration law materially mirrors the FAA and specifically shares the FAA “requirement that an arbitration agreement [ ] be enforced on the basis of state law standards that apply to contracts in general.”

Having noted all of that, Engalla was a consumer case in which the plaintiff, Mr. Engalla, was enrolled in Kaiser Permanente’s insurance through his employer. The arbitration clause that he was bound to specified that the two sides would each designate an arbitrator within 30 days, and that these two arbitrators would designate a third arbitrator within 30 days of that. The three arbitrators were to hold a hearing within “a reasonable time thereafter.”

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150 Id. at 985-86. “The alleged problem with Kaiser’s arbitration in this case was not any defect or one-sidedness in its contractual provisions, but rather in the gap between its contractual representations and the actual workings of its arbitration program.” Id. at 986. The court also declined to decide the issue whether or not Kaiser had waived the contractual right to arbitrate. Id. at 984.

151 Id.

152 Id. at 971-72, 980-81.


154 Id. at 960.

155 Id. at 962.

156 Id. at 962, n. 3
On May 31, 1991, the terminally ill Engalla submitted his malpractice allegations against Kaiser to arbitration pursuant to this arbitration agreement, and his attorney urged a quick resolution. Kaiser refused to designate an arbitrator until after Engalla did, although the arbitration agreement said nothing about such a rule. After disputing this, and hearing nothing from Kaiser, Engalla’s lawyer finally designated an arbitrator on July 8th. Kaiser designated its arbitrator, Mr. Ney, on July 17th, which was 47 days after being served with the claim. But Mr. Ney had informed Kaiser’s attorney that he could not accept any more assignments until November, a fact that Kaiser’s attorney did not inform Engalla’s attorney of, and which did not ultimately come to light until August 15th, after yet another month had passed.

Kaiser’s attorney also refused to change the arbitrator, though he did make provisions for a backup arbitrator to be available if the parties were ready for arbitration before Mr. Ney could handle the case. But this second Kaiser arbitrator was also planning to be out of country for three weeks in October. Moreover, at the insistence of Kaiser’s attorney, no discovery could take place until the Engalla’s and Kaiser’s arbitrators appointed the third neutral arbitrator, so the case was on hold.

Engalla’s attorney wanted to have the arbitration hearing in early September, and urged the quick selection of the neutral arbitrator. Additionally, Engalla’s arbitrator tried to push the process forward, left three unreturned phone calls with Kaiser’s arbitrator, wrote to him on August 12th, (about the same time they were finding out Kaiser’s arbitrator couldn’t actually hold the hearing until November) and then wrote a second time a few days later, still having heard nothing. The back-and-forth process of selecting an available and acceptable third neutral arbitrator continued until October 22, during which time Engalla’s attorney repeatedly pressed the matter, “begged” Kaiser and its arbitrator to expedite the process, and at one point waited two weeks for any reply. All told, 144 days – over and above the 60 days the arbitration agreement specified for

157 Id. at 960, 963.
158 Id. at 964.
159 Id.
160 Id.
161 Id. (emphasis added).
162 Id.
163 Id.
164 Id. at 965.
165 Id.
166 Id. at 966.
167 Id. at 966-67.
the appointment of the neutral third arbitrator – had elapsed by this point.\textsuperscript{168} Separately, there were also extensive delays in deposition scheduling.\textsuperscript{169} And Engalla died the day after the neutral third arbitrator was selected, on October 23, 1991.\textsuperscript{170}

In addition to the facts in Engalla’s particular case, historical data on Kaiser arbitrations indicated that significant delays occurred in 99% of the company’s malpractice arbitrations. In only 3% of cases was a neutral arbitrator even appointed within 180 days of a claim (the average time was 674 days) and there tended to be significant delays after that appointment, so that on average no hearings occurred until 863 days (2 and ½ years) after a claim was filed.\textsuperscript{171}

Moreover, as soon as Engalla died, California law caused his widow to lose half of her potential non-economic damages, dropping the total claim from $500,000 to $250,000.\textsuperscript{172} Thus, she withdrew from arbitration and filed a malpractice action in court.\textsuperscript{173} Kaiser filed a motion to compel her back into arbitration.\textsuperscript{174}

The California Supreme Court held that there was evidence to support a trial court’s findings that the insurer, Kaiser, “fraudulently induced Engalla to enter the arbitration agreement,” thus justifying a potential denial of Kaiser’s motion to compel arbitration.\textsuperscript{175} Despite its remand to the trial court,\textsuperscript{176} the important point of law is that the court endorsed in principle the result that fraudulent misrepresentation could lead to rescission of an arbitration agreement in this situation.\textsuperscript{177}

Based on overwhelmingly extensive, contrary historical data, and based on Kaiser’s actions in this particular case, the court reasoned that when Kaiser said a neutral arbitrator would be appointed within 60 days of claim filing, and when it said in its agreement that a hearing would take place in a “reasonable time thereafter,” Kaiser “misrepresented the speed of

\begin{footnotesize}
\begin{enumerate}
\item\footnotesize Id. at 967.
\item\footnotesize Id. at 968.
\item\footnotesize Id. at 969.
\item\footnotesize Id. at 967.
\item\footnotesize Id. at 969.
\item\footnotesize Id. at 960, 981.
\item\footnotesize See supra note 151 and accompanying text.
\item\footnotesize Id. at 960.
\end{enumerate}
\end{footnotesize}
its arbitration program. This was a misrepresentation on which Engalla’s employer relied by selecting Kaiser’s health plan for its employees, and that the Engallas suffered … as a result, despite Engalla’s own reasonable diligence.”\textsuperscript{178}

\textit{b. Analysis of Engalla and Limitations of Fraudulent Misrepresentation Doctrine in This Context}

The most important question about \textit{Engalla}’s holding is the question of whether or not it is consistent with the FAA, and with Supreme Court authority. During the \textit{Engalla} court’s discussion of the fraudulent misrepresentation claim (and for that matter during its discussion of the unconscionability claim) the court never once situated the case within federal arbitration law.\textsuperscript{179} Likewise, the dissent only cited one irrelevant Supreme Court opinion.\textsuperscript{180} However, the majority’s decision ultimately withstands scrutiny under Supreme Court case law.

The fact that Engalla initiated the arbitration, based on a valid arbitration agreement, and that one party (Engalla’s widow) then sought to leave an \textit{ongoing} arbitration due to the delaying conduct of the other (Kaiser), makes one wonder how resolution of these allegations could \textit{possibly} lie anywhere but in the hands of the arbitrator.\textsuperscript{181} The Supreme Court case of \textit{Moses H. Cone} clearly seems to say the arbitrator should handle this. Recall that in \textit{Moses H. Cone} the Supreme Court wrote of the presumption that the arbitrator should decide “allegation[s] of waiver, delay, or a like defense to arbitrability.”\textsuperscript{182} (Note that \textit{Moses H. Cone} thus flatly invalidates the \textit{Engalla} court’s other holding that the trial court could

\textsuperscript{178} Id. at 960.

\textsuperscript{179} The only citation to Supreme Court authority in the majority opinion occurred in its discussion of procedural issues, when it cited Volt Info Sciences v. Leland Stanford Jr. U. 489 U.S. 468, 476 (1989) Id. at 972. The court also did distinguish John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) on its way to concluding, erroneously, as discussed below, that the Engalla’s could proceed with a waiver claim. Id. at 982.

\textsuperscript{180} Id.at 995 (Brown dissent) (quoting Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes dissent) (making a rhetorical jab).

\textsuperscript{181} As noted above in the fact section, and as bemoaned by the dissenter in \textit{Engalla}, Mrs. Engalla only “withdrew from arbitration after Kaiser declined to stipulate that [her] separate loss of consortium claim survived her husband’s death.” Id. at 991 (Brown dissent). In other words, only after Kaiser’s alleged actions caused her claim to drop by half, to $250,000. \textit{See supra} notes 175-76 and accompanying text.

\textsuperscript{182} Moses H. Cone Mem’l Hosp. V. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983). Various commentators who have discussed \textit{Engalla} have not referred either to this case or to \textit{Prima Paint} for their impact on the legality of this decision. \textit{See e.g.} Moore, \textit{supra} note 187 (an early, extensive discussion of \textit{Engalla} that never mentions how federal case law backs up the case).
decide the issue of waiver.\footnote{Engalla, 15 Cal. 4th at 982} Fraudulent misrepresentation is not included in that list, but like breach, discussed in the previous section, and like all of the above, it seemed to occur after the parties had already gone to arbitration on a valid arbitration agreement. Moreover, clearly this case was really about delay, and on its face the above quote from \textit{Moses H. Cone} says that the arbitrator should decide such allegations.\footnote{The dissent in Engalla echoes such a conclusion. \textit{Id.} at 992 (Brown dissent) (quoting Titan/Value Equities Group, Inc. v. Superior Court, 29 Cal. App. 4th 482, 287-88 (1994)).}

Fortunately for Mrs. Engalla, and for the \textit{Engalla} court, another Supreme Court case, \textit{Prima Paint}, indicates that \textit{Engalla} is correctly decided. In \textit{Prima Paint}, as previously quoted in this Comment in less detail, the Supreme Court stated:

\begin{quote}
[T]he [ ] court is instructed to order arbitration to proceed once it is satisfied that ‘the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.’ [footnote omitted]. Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the ‘making’ of the agreement to arbitrate – the [ ] court may proceed to adjudicate it.\footnote{Prima Paint, 388 U.S. at 403-04 (citing 9 U.S.C. § 4) (emphasis added).}
\end{quote}

Under the italicized portions of \textit{Prima Paint}, above, the California court was acting within its authority, since that is exactly what it handled – a claim of fraud in the inducement. To be sure, the legal challenge in \textit{Engalla} could have been framed as delay (and thus, under \textit{Moses H. Cone}, for the arbitrator to consider). But the challenge wasn’t framed as delay, it was framed as fraud.

A single counter-argument exists, which is that in the above block quotation \textit{Prima Paint} was not contemplating a situation where a party makes a claim of fraudulent inducement \textit{after} arbitration has already commenced. Rather, the argument would go, \textit{Prima Paint} clearly contemplated an initial pre-arbitration claim that the arbitration clause was obtained through fraudulent inducement. Thus, if the Supreme Court were to consider \textit{Engalla} it would overturn it, citing \textit{Moses H. Cone}, and holding that despite \textit{Prima Paint}, a claim of fraud based on conduct occurring \textit{after} arbitration has commenced should be decided by the arbitrator.

But that doesn’t seem like it can be right. Recall that in this case the arbitration agreement provided for a speedy arbitration timeframe, including specific deadlines for picking arbitrators, which Kaiser missed by miles, and which it historically knew it very rarely if ever met.\footnote{See supra notes 155-71.} This key fact,
the fact that these were clauses in its arbitration agreement relating to time-sensitive issues within arbitration, means that fraud concerning them could not possibly occur prior to arbitration. The timing representations only revealed themselves as fraudulent misrepresentations because of the significant time that elapsed in arbitration without their fulfillment.187

If courts were to allow the arbitrator to decide the fraud allegation itself, this would not simply mean that courts would be permitted “to enforce an arbitration agreement [contained] in a contract that the arbitrator later finds to be void,” a result the Supreme Court later reaffirmed as the controversial result of Prima Paint.188 Rather, if the fraudulent conduct of one party led an arbitrator to conclude that the arbitration clause was fraudulently induced, then the courts, when they confirmed this result, would have to enforce the decision of an arbitrator who was acting on the authority of an arbitration clause that his or her own ruling rendered voidable by the wronged party!189 It is hard to believe that even the Supreme Court would endorse such a twisted result. Arbitration agreements would basically be exempted from the doctrine of fraudulent misrepresentation.

c. One Potential Application of the “Engalla Doctrine”

Unfortunately for aggrieved consumers and employees, it is hard to see how this is a broadly applicable doctrine, even though Engalla does seem to comport with Supreme Court precedent and with the FAA. The arbitration clause would have to include timing or other promises that were consistently historically violated, and were violated in the pending arbitration, as occurred in Engalla. Also, Kaiser administered its own arbitration program,190 whereas if a third party arbitrator administered the program (as is vastly more common), and engaged in the conduct that Kaiser engaged in, the plaintiff also have to show that the defendant company knew the arbitration organization consistently did such things. But this actually suggests one possible application of the “Engalla” Doctrine.

187 In an article that appeared shortly after the decision, one commentator suggested something similar in arguing that the majority’s opinion could be read as an application of the “unclean hands” doctrine. Jim Moore, Bad Facts, Good Law – Thoughts on Egnalla v. Permanente Medical Group, 26 W. St. U. L. Rev. 135, 176 (1998-1999). In other words, Kaiser, after causing the delay that resulted in the loss of half of the plaintiff’s potential damages, could not come to a court and ask to profit from its own wrongdoing. Id.


189 “If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.” Restatement (Second) of Contracts, § 164 (1).

190 Engalla, 15 Cal. 4th at 981.
There is one potential way to apply fraudulent misrepresentation doctrine even when a third-party organization administers the arbitration. When a third-party arbitration organization routinely fails to abide by the terms of the arbitration agreement that an employer or company routinely compels its consumers or employees to agree to, then so long as the company that uses the arbitration provider knows this occurs, fraudulent misrepresentation doctrine is applicable. This application of the “Engalla” doctrine to this fact situation could potentially be much more useful to plaintiffs than any analogy to the facts of Engalla itself.

One can see that this is not an arcane, hypothetical fact-pattern by looking at Morrison v. Circuit City Stores, Inc.,\textsuperscript{191} though the court there did not apply a fraudulent misrepresentation analysis and decided the case on other grounds.\textsuperscript{192} The Morrison court resolved two cases in its opinion and the relevant facts appear in the second case the court considered, involving plaintiff Shankle and defendant Pep Boys Corporation.\textsuperscript{193}

In the “Shankle decision” within Morrison, an arbitration agreement between the plaintiff and Pep Boys corporation specified that the third-party American Arbitration Association (AAA) would conduct the arbitration, that the parties would be given a list of eleven arbitrators, and that the arbitrator would be licensed to practice law in Tennessee.\textsuperscript{194} It also provided that, if the first list of arbitrators were deemed unacceptable, the AAA would provide further lists of arbitrators.\textsuperscript{195} Additionally, the agreement specified that the Federal Rules of Evidence and the Federal Rules of Civil Procedure would be applied, and it provided that conflicts between the agreement and the AAA rules would be resolved in favor of the agreement.\textsuperscript{196}

Despite all of these provisions, after the parties did not agree on the first list of arbitrators, AAA imposed a single arbitrator, and AAA additionally applied its own rules of procedure and evidence, instead of the federal rules.\textsuperscript{197}

The plaintiff claimed that Pep Boys had “misrepresented” that arbitration would occur under the terms of the agreement because it knew or should have known that AAA would not follow it.\textsuperscript{198}

\textsuperscript{191} Morrison v. Circuit City Stores, Inc., 317 F. 3d 646 (2000).
\textsuperscript{192} \textit{Id.} at 680-81.
\textsuperscript{193} \textit{Id.} at 678-79 (contained within Shankle decision. \textit{See id.} at 675-81). Note that this is \textit{not the same} Shankle decision as the one discussed in section (II)(C)(2)(i), Shankle v. B-G Maint. Mgmt. Of Col., Inc., 163 F.3d 1230 (10th Cir. 1999).
\textsuperscript{194} \textit{Id.} at 678.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.} at 678-79.
Thus, the plaintiff claimed, there was “no meeting of the minds.”\textsuperscript{199} The court summarily rejected this argument, reasoning that because the plaintiff did not “produce evidence that the AAA had a practice of ignoring specific terms...or that the AAA planned to ignore the agreement in this case” he could not prevail on this claim.\textsuperscript{200} Furthermore, the court thought that “ascribing knowledge of the AAA’s expected procedures to Pep Boys [did] not seem realistic.”\textsuperscript{201}

The \textit{Morrison} court was likely a bit too pessimistic about what a corporation like Pep Boys, which repeatedly relies on an arbitration provider like AAA, knows about AAA’s existing procedures. Any plaintiff could suss out such knowledge through the discovery process. In that regard, note the factual distinction in this example from \textit{Engalla}, where Kaiser’s history of failing to meet the “speedy arbitration” promises of its arbitration agreement (not only in that instance but historically) \textit{was} presented in pleadings by the plaintiff, and was discussed extensively in the opinion.\textsuperscript{202} Similarly, if a plaintiff could show that a company knew about its third-party provider’s ongoing failure to adhere to the company’s stated arbitration agreement,\textsuperscript{203} and if the plaintiff could establish all of the elements of misrepresentation,\textsuperscript{204} the plaintiff could potentially get the arbitration agreement rescinded under the doctrine of fraudulent misrepresentation, even if he or she had already engaged in some arbitration.

d. \textit{Final Conclusions on Fraudulent Misrepresentation}

In conclusion, \textit{Engalla} likely exhibits a valid application of fraudulent misrepresentation to an arbitration agreement, even though arbitration was in progress when the claim was first brought. It may also offer a useful way to rescind an arbitration agreement in situations such as that described in \textit{Morrison}, where a third-party arbitration provider consistently “changes the rules” of an arbitration agreement, and it can be shown that the defendant company using the provider knows of this pattern. Thus, \textit{Engalla} may provide plaintiff consumers and employees with a tool

\textsuperscript{199} Id. at 679. Note that misrepresentation is characterized as an improper means of obtaining assent. Restatement (Second) of Contracts, § 164 (1).

\textsuperscript{200} Morrison, 317 F. 3d at 679.

\textsuperscript{201} Id.

\textsuperscript{202} Engalla, 15 Cal. 4th at 961-69 (describing the history of this case, but also the historical data regarding the speed of Kaiser arbitrations).

\textsuperscript{203} One potential limit on this is the general practice arbitrators have of not revealing much about the process afterwards. This would make it easier for defendant companies to show that they lacked knowledge of a systematic failure to abide by the terms of the arbitration agreement.

\textsuperscript{204} See Restatement (Second) of Contracts, §§ 159, 162, 164, 167.
that can at least create more certainty about what they will face in their arbitration. This conclusion is further supported by the fact that American Law Institute cited Engalla as recently as 2004 to warn lawyers that they should not make the mistake of “maintain[ing] an arbitration program that is implemented in a materially different way from how it was promoted.”

Thus, perhaps Engalla is already being applied.

B. COURTS MUST CLARIFY THEIR LANGUAGE WHEN USING THE VAGUE, MODERN CONTRACTUAL DEFENSE OF UNCONSCIONABILITY

1. INTRODUCTION TO UNCONSCIONABILITY

The final contractual tool that courts are increasingly using to police arbitration agreements, pursuant to FAA section two, is the modern defense of unconscionability. Strictly speaking, unconscionability doctrine is not a “new” doctrine, as it has been recognized in the United States, at least in courts of equity, since the 18th Century. Nevertheless, its wide usage in modern courts is much more recent, picking up only after Congress enacted the Uniform Commercial Code (“UCC”) in 1962 and included this defense in section 2-302.

The federal, Congressional drafters of the UCC legalized the equitable unconscionability doctrine in courts of law to “invite[ ] [ie, codify Congressional intent for] courts to police bargains overtly for unfairness instead of resorting to ‘covert’ tools.” Previously, courts had used such ‘covert’ tools as “adverse construction of language, …manipulation of the rules of offer and acceptance, …determinations that the clause [was] contrary to public policy or to the dominant purpose of the contract.” Another such ‘covert’ tool courts had used in the past to police unconscionable unfairness was to find a failure of consideration, a tool...

206 9 U.S.C § 2, supra note 11.
210 Id. at 447. It should be noted that, despite the fact that it is now in the UCC, that does not of course mean that the doctrine of unconscionability applies only to transactions the UCC covers, since unconscionability maintains its roots in the common law.
211 FARNSWORTH ON CONTRACTS (1990) § 4.28, at 496.
212 Id.
already discussed above.\textsuperscript{214}

The United States Supreme Court, perhaps in an attempt to limit the scope of this powerful doctrine, defined unconscionable contracts in 1989 as those “that no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”\textsuperscript{215} But the Restatement indicates that that is simply the archaic, historical definition of the old equitable doctrine,\textsuperscript{216} as does the fact that the Supreme Court was citing a 1750 case.\textsuperscript{217} In fact, when that Court, and other courts, bandy about tests for unconscionability, it is important to remember that the doctrine is inherently quite vague.\textsuperscript{218} “Unconscionability is an amorphous concept that evades precise definition.”\textsuperscript{219} “It is not possible to define unconscionability. It is not a concept but a determination to be made in light of a variety of factors not unifiable into a formula.”\textsuperscript{220}

The cases in this section demonstrate that the application of this doctrine in the context of adhesive arbitration agreements is both extremely useful, and an honest way of assessing unfairness. Yet they also demonstrate how vague and amorphous the doctrine is, and its ability to be applied in a manner that is blunt and reduces the meaning of unconscionability, thereby opening courts to charges of hostility to arbitration.

2. Unconscionability Applied to Remedies Restrictions (Punitive Damages Waivers) in Arbitration Agreements

As indicated above, unconscionability doctrine has been regularly applied to punitive damages waivers occurring in adhesive arbitration agreements.\textsuperscript{221} This section examines the decisions of three courts, in three different states, that have found punitive damage waivers unconscionable. The fact that they each used slightly different formulations of the definition

\textsuperscript{214} See supra section II(A)(1).
\textsuperscript{216} Restatement (Second) of Contracts, § 208, Comment b “Historic Standards”).
\textsuperscript{217} See supra note 217.
\textsuperscript{218} “Unconscionability is one of the most amorphous terms in the law of contracts.” CORBIN, § 29.1.
of unconscionability demonstrates the malleability of this doctrine. Yet their decisions also reveal its limitations: it is not just vague, but is often applied in a frustratingly abstract manner that turns it into a blunt tool and reduces its meaning.

**a. Three Cases Applying Unconscionability Doctrine to Remedy Restrictions, Including to Punitive Damage Waivers**

1) *Stirlen v. Supercuts*,\(^{222}\) decided in California, is an often-cited case that thoughtfully used unconscionability analysis to address remedies restrictions in arbitration agreements. Plaintiff Stirlen had been employed as the CFO of Supercuts (the hair care franchise).\(^{223}\) The arbitration agreement at issue imposed a unilateral mandate of arbitration on Stirlen, limited his damages to “actual damages for breach of contract,” and excluded “other money damages, exemplary damages, specific performance, and/or injunctive relief.”\(^{224}\)

While extensively discussing the rules of unconscionability, the court noted that unconscionability doctrine was not susceptible to an abstract definition.\(^{225}\) Nevertheless the court gave a common definition of unconscionability doctrine, stating that it contains “both a ‘procedural’ and a ‘substantive’ element.”\(^{226}\)

First, the procedural element is comprised of two factors: oppression and surprise.\(^{227}\) Oppression arises from an inequality of bargaining power which results in no real negotiation and “an absence of meaningful choice,” while surprise involves “the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.”\(^{228}\)

Second, the substantive element turns on whether a contract is “one-sided” with no commercial justification.\(^{229}\) Thus it “involves the imposition of harsh or oppressive terms on one who has assented freely to them.”\(^{230}\)

\(^{222}\) *Stirlen*, 51 Cal. App. 4th at 250.
\(^{223}\) *Id.* at 1525. He sued when he was terminated after revealing allegedly fraudulent accounting practices to the company’s auditor. *Id.* at 1525-26.
\(^{224}\) *Id.* at 1529.
\(^{225}\) *Id.* at 1531.
\(^{227}\) *Id.*
\(^{228}\) *Id.*
\(^{229}\) *Id.*
\(^{230}\) *Id.*
“[N]ot all unreasonable risk allocations are unconscionable…rather enforceability…is tied to the procedural aspects of unconscionability…such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk allocation which will be tolerated.”  

Applying these rules, the court found that the first element, procedural unconscionability, existed – despite the plaintiff’s senior CFO position – because even as a CFO he had no realistic opportunity to modify an arbitration contract whose terms were described as non-negotiable, and which was only presented to him after he had accepted employment, and finally which all top corporate officers were required to sign without modification.

As to the second element, substantive-unconscionability, the court first found that Supercuts failed to show that there was a valid “commercial justification” for its remedies restriction. Following this determination, a majority of the court’s analysis focused on the “non-mutual” imposition of the arbitral forum upon Stirlen, an unconscionability argument which echoes section II (A) (1) consideration arguments. But the court was unwilling to stand on that alone. Still focusing on a lack of “bi-laterality,” the court took issue with “a variety of attendant discrepancies all favorable to the employer and prejudicial to employees.” The unilateral restriction on remedies, including punitive damages, was “one of the most significant discrepancies.” Thus, the court found that the arbitration agreement was substantively unconscionable.

2) Dunlop v. Berger, decided by the high court of West Virginia, is a consumer case that also invalidated a remedies restriction. In Dunlop a jeweler allegedly fooled buyers into accepting insurance contracts in their jewelry purchase agreements. The arbitration agreement included a

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231 Id.
232 Id. at 1534.
233 Id. at 1536-37.
234 Id. at 1537-39.
235 Id. at 1539.
236 Id. Others included a provision allowing Supercuts to terminate an employee while arbitration was pending and face not penalty regardless of the arbitration outcome, a provision making the statute of limitations one year long, and non-tollable, “even as to claims to which a longer period would otherwise apply.” Id. at 1542. Note that while Stirlen mentioned that denial of remedies under statutory claims were also at issue (see id. at 1539-40), potentially muddying the waters between unconscionability analysis here, and a statutory vindication analysis as discussed in section II (C), infra, this decision in California occurred prior to any cases applying statutory vindication. The discussion of the court here nevertheless serves to indicate how similar the analysis can (and should) be.
237 Id.
239 Id. at 552. When Dunlap, the plaintiff, purchased a ring for $150.00, the company
clause that waived any customer’s right to punitive damages, even should he or she prevail in arbitration.\footnote{240}

First, it is important to note that unlike the \textit{Stirlen} court, the court in \textit{Dunlap} did not analyze procedural unconscionability at all. Instead it implicitly recognized the procedural unconscionability inherent in all adhesion contracts,\footnote{241} and then confined its analysis to unconscionability of the terms themselves, which is to say, what the California court in \textit{Stirlen} called substantive unconscionability.\footnote{242}

As for the rules of unconscionability, the court stated a basic test of unconscionability that differed only slightly from the California court’s test, yet it did not actually apply the test. Instead it did something else. The test was whether, “in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct of contract, the conduct involved is, or the contract or clause involved are so one-sided as to be unconscionable under the circumstances existing at the time the conduct occurs or is treated or at the time of the making of the contract.”\footnote{243}

The court in \textit{Dunlap} held that the punitive damages waiver was unconscionable.\footnote{244} But instead of applying its test, which is facially similar to \textit{Stirlen}’s test, the court reasoned that because of the waiver “\textit{every Friedman’s customer} is deprived of their [sic] right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct – and that Friedman’s [is] categorically shielded from any liability for such sanctions, regardless of Friedman’s level of wrongdoing.”\footnote{245} The court also reasoned (without stating why) that the punitive damages waiver “would prohibit or substantially limit a person

\hspace{1cm}{\text{added a $1.48 charge for credit life insurance and $6.96 for property insurance. \textit{Id.} at 553-54. Employees of the company "just add[ed]" the insurance onto sales contracts, and if customers complained were told to say that there had been a computer error. \textit{Id.} at 552.}}

\hspace{1cm}{\text{\footnote{240} \textit{Id.} at 563.}}} \hspace{1cm}{\text{\footnote{241} \textit{Id.} at 557-58. The court quoted language defining an arbitration agreement as “all those contracts of big industry and all those contracts which, as the Romans said, resemble a law much more than a meeting of the minds [citations omitted].” \textit{Id.} at 557 (quoting Boase v. Lee Rubber & Tire Corp., 437 F.2d 527, 530 (3rd Cir. 1970). The court used standard procedural unconscionability terms such as lack of “equality of bargaining” (id., quoting Neal v. State Farm Ins. Companies, 188 Cal. App. 2d 690, 694 (1961)), and the expectation that consumers don’t read such contracts (id. at 558, see discussion of Mitchell v. Broadnax, 208 W.Va. 36, 52 (2000) (Starcher, J., concurring)).}}} \hspace{1cm}{\text{\footnote{242} \textit{Id.} at 562-64.}}} \hspace{1cm}{\text{\footnote{243} \textit{Id.} at 556 (quoting Arnold v. United Companies Lending Corp., 204 W.Va. 229, 234-35 (1998) (citing Uniform Consumer Credit Code, § 5.108 comment 3, 7A U.L.A. 170 (1974))).}}} \hspace{1cm}{\text{\footnote{244} \textit{Id.} at 564.}}} \hspace{1cm}{\text{\footnote{245} \textit{Id.} (emphasis added).}}
from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public.\textsuperscript{246}

3) \textit{Ex parte Thicklin},\textsuperscript{247} decided by the Alabama Supreme Court, also found a punitive damages waiver unconscionable,\textsuperscript{248} and the court severed the clause.\textsuperscript{249} In \textit{Thicklin}, when the plaintiff purchased a motor home from the defendant he signed an agreement including an arbitration clause that contained a punitive damages waiver.\textsuperscript{250}

In \textit{Thicklin}, as in \textit{Dunlap}, procedural unconscionability (to the extent the court analyzed it) was simply a de facto part of adhesion contracts.\textsuperscript{251} But Alabama’s definition of substantive unconscionability was quite different from the previous two cases. The court wrote: “whether [the substantive contract terms] are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene public interest or public policy; terms … that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law.”\textsuperscript{252} Thus far, this “unreasonably favorable” appears similar to the “one-sidedness” test of \textit{Stirlen} and \textit{Dunlap}. But unlike those courts, the \textit{Thicklin} court focused exclusively on the violation of “public policy,”\textsuperscript{253} which it was the role of the Alabama legislature, not the courts, to declare.\textsuperscript{254}

Thus, the court looked to an Alabama statute, which recognized “that certain circumstances – namely, gross, oppressive, or malicious fraudulent acts committed intentionally; malicious wrongful acts with an intent to injure or acts committed under circumstances to which the law will imply an evil intent; and conduct carried on with a reckless or conscious

\textsuperscript{246} \textit{Id.} There was some statutory vindication discussion in this case as well, but the unconscionability did not depend upon there being statutory claims. The court noted that the punitive damages would be available both under West Virginia statutory and common law claims (see \textit{id.} at 562), and did not distinguish between them in its analysis. \textit{Id.} at 562-64

\textsuperscript{247} \textit{Ex parte Thicklin}, 824 So.2d 723 (Ala. 2002) (overruled on other grounds).

\textsuperscript{248} \textit{Id.} at 733.

\textsuperscript{249} \textit{Id.} at 734.

\textsuperscript{250} \textit{Id.} at 726.

\textsuperscript{251} \textit{Id.} at 731. “Procedural unconscionability deals with ‘procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction.’” (quoting \textit{In Ex parte Foster}, 758 So. 2d 516, 520 n. 4).

\textsuperscript{252} \textit{Id.}

\textsuperscript{253} \textit{Id.} at 732.

\textsuperscript{254} \textit{Id.}
disregard of the rights or safety of others -- warrant the recovery of punitive damages." The court also noted provisions of the state's criminal code that imposed fines and imprisonment in an effort to inhibit the commission of intentional or reckless acts. Based on these cues from the statutes of the state, the court reasoned that this was conclusive evidence of a legislative policy "calculated to deter citizens from engaging in intentional or wanton acts that endanger others or that otherwise do harm." Thus, the court concluded that it was against public policy for a party to contract away its liability for punitive damages, "regardless whether the provision doing so was intended to operate in an arbitral or a judicial forum."

b. Analysis of the Application of Unconscionability to Remedies Restrictions

The first thing that should be clear is that these courts are honestly grappling with the underlying unfairness that has piqued them. Moreover, as these cases demonstrate, unconscionability is a powerful tool, which courts may use as *Thicklin* did, to sever a remedies restriction, or which courts may use to render an entire arbitration clause unenforceable, as *Stirlen* did.

In the differing rules they employ, they also illustrate that unconscionability, particularly substantive unconscionability, is a malleable doctrine. They use similar but slightly different tests: *Stirlen* focused on one-sidedness, *Dunlap* mentioned one-sidedness in its test but really focused on the plaintiff's inability to vindicate rights otherwise available, while *Thicklin* focused on a legislative policy to prevent reckless and wanton behavior. The *Stirlen* court in fact explicitly rejected the opportunity to do what *Thicklin* did, which was analyze "whether the restriction on employee remedies is 'against the [legislative] policy of the law.'"

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256 *Id.*
257 *Id.*
258 *Id.* at 733.
259 *Thicklin*, 824 So.2d at 734.
260 *Stirlen*, 51 Cal. App. 4th at 1552. Admittedly, this was only one among many clauses in *Stirlen* that the court pointed to in deciding that the entire arbitration agreement was unconscionable.
261 See *supra*, section II (B) (i).
262 See *Stirlen*, 51 Cal. App. 4th at 1531.
263 See *supra* notes 244-45 and accompanying text.
264 See *supra* notes 253-54 and accompanying text.
265 *Stirlen*, 51 Cal. App. 4th at 1530 (citing California Civ. Code, *supra* note XX, § 1668 and declining to analyze whether the punitive damages restriction violated this as a matter of public policy).
Yet the different tests for substantive unconscionability ultimately boil down to the same concepts. Unfortunately, in each of these cases the courts only express this in frustratingly abstract ways. Per Stirlen, they indicate a “denial of the underlying cause of action, which would be preserved in name only.”266 Or as the Dunlap court put it, they are “exculpatory provisions.”267

What is really going on here though, and why are they “exculpatory”? These courts are so caught up in the jargon-filled, vague language of unconscionability that they do not tell us or tell each other enough about what is really at stake. One potential conclusion one could draw is that when courts like Stirlen focus only on the terms of the agreement, and not on the status of the parties involved, they use unconscionability as a blunt tool and appear at first to reduce its meaning. For if one focuses on the costs of arbitration, and on the fact the punitive damages waiver will end the possibility that a lawyer might take the case on contingency, isn’t it quite possible that a plaintiff making more than $150,000 per year, as Stirlen did,268 could afford to pay his own attorney? Thus, he would still have access and the ability to seek adjudication.

The reason that is wrong is that it completely misses the real story behind punitive damages waiver: deterrence of meritorious claims by the disruption of contingency-fee arrangements. This story is discussed in far greater detail in section (II)(C), infra, because everything in statutory vindication depends upon it. But the basic gist is that the plaintiff Stirlen will most likely not in fact prosecute his claim if an attorney refuses to take it on contingency. If even a potentially meritorious claim is a loser for an attorney working on contingency – which is to say, impossible to make a profit on – then the claim would most likely be interpreted as unprofitable for the plaintiff to prosecute on his own, paying his own attorney costs.

The possibility of punitive damages is the only thing that makes many claims potentially worth the effort. With punitive damages gone, the claim does not go forward unless the plaintiff is irrationally vindictive. Thus, the offending company incurs no cost, no matter how bad the conduct that would have inspired the meritorious claim. This is exactly what the Dunlap court was implicitly acknowledging when it stated, without providing clear reasoning, that the punitive damages waiver “would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the

266 Id. at 1540.
267 Dunlap, 211 W.Va. at 564.
268 Stirlen, 51 Cal. App. 4th at 1533.
benefit and protection of the public.  269 A final conclusion that can be drawn from this, therefore, is that to the extent courts like *Thicklin* focus in their substantive unconscionability analysis upon the legislative policy of retribution alone, they miss half of the story.

3. **The Class Action Waiver: an Emerging New Clause Against Which Unconscionability is Increasingly Being Applied**

   a. **Introduction to the Special Controversy over Class Action Waivers**

   Another important application of unconscionability is policing the exploding use of class action waivers in arbitration clauses.  270 The stakes here may even be higher than in the context of punitive damages waivers and other remedy restrictions. The prospect of a class action may soon become the single most important reason why companies seek arbitration over litigation.  271 One commentator has raised a prophetic finger of doom and stridently asserted that class action waivers in adhesive arbitration agreements will soon end the modern class action.  272 Another, in a conclusion that would seem to confirm this, has argued that the Supreme Court will eventually allow class arbitration when the agreement is silent.

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269 *Id.* There was some explicit statutory vindication discussion in this case as well, but the unconscionability did not depend upon there being statutory claims. The court noted that the punitive damages would be available both under West Virginia statutory and common law claims (see *id.* at 562), and did not distinguish between them in its analysis. *Id.* at 562-64

270 A recent un-scientific survey of arbitration clauses found that over 30% of arbitration clauses included a provision preventing the consumer or employee from joining claims in arbitration. Linda J. Demaine & Deborah R. Hensler, *“Volunteering” to Arbitrate Through Predispute Arbitration Clauses: the Average Consumer’s Experience*, 67-SPG Law & Contemp. Probs. 55, 65 (2004).

271 That would be the subject of another Comment. The Supreme Court’s decision in *State Farm v. Campbell*, if it stands up and eliminates giant, unexpected awards of punitive damages in civil cases, will undoubtedly remove some of the pressure on companies to avoid fickle juries by going to arbitration. At that point, the primary remaining incentive they will have to arbitrate will come from the desire to avoid class actions.

272 Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373 (2005). Over twenty years ago the California Supreme Court, in an opinion allowing class arbitration, wrote: “If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial...” *Keating v. Superior Court of Alameda County*, 31 Cal.3d 584, 609-10 (1982), rev’d in part and appeal dismissed in part on other grounds, *Southland Corp v. Keating*, 465 U.S. 1 (1984).
and disallow it when the parties have consented to a class waiver. 273 (A hypothetical holding that would be followed, a day later, by all arbitration agreements in America containing class action waivers.) Other commentators have already argued for federal legislation banning this particular clause in arbitration agreements. 274

In the short term, a great deal of contested class action waivers will be enforced. But courts have already laid the groundwork for an intelligent assessment of when class action waivers should and should not be enforced. In doing so, they have applied a nuanced and case-specific version of unconscionability that, while not yet perfected, is more meaningful than the version applied in the previous context of punitive damages waivers. A class action waiver should be allowed when, considering the totality of the circumstances, it does not operate as effective insulation against liability for the company. In some cases, this may require consideration of the other remedies 275 available to the plaintiff.

b. Cases in which Courts Apply Unconscionability to Class Action Waivers

The California Supreme Court may have been the first court to lay down an explicit rule-scheme detailing when class action waivers are invalid. 276 In Discover Bank v. Boehr a cardholder brought a class action suit a credit-card company for improperly assessing late fees. 277 The

275 “Other remedies” is used here because class actions are clearly a form of remedy. “The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” Amchem Prods. V. Windsor, 521 U.S. 591, 617 (1997) (internal quotations omitted); see Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 52 Wm. & Mary L. Rev. 1, 28-33 (2000). Class actions are a group remedy designed to compensate for the practical lack of individual remedies.
277 Id. at 152. The cardholder alleged that Discover assessed late fees if money was
amounts of the individual late fees were small, approximately $29.\textsuperscript{278} Discover moved to compel arbitration and dismiss the suit based on the class action waiver in the cardholder’s arbitration agreement.\textsuperscript{279} The court decided the issue of whether the class action waiver was valid using an unconscionability analysis inquiring into both procedural and substantive unconscionability.\textsuperscript{280} The court held:

[When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another’ (Civ. Code, § 1668).\textsuperscript{281}]

As this quote indicates, the court wanted to avoid class action waivers in circumstances where, effectively, a class action provided the only possible remedy.\textsuperscript{282} In doing so the court relied on a general civil law affecting all contracts, not just arbitration contracts,\textsuperscript{283} and it articulated the above highly case-specific rule that lower courts could reasonably hope to follow.\textsuperscript{284}

But well before Discover Bank, in 2002 the Alabama Supreme Court received after 1:00pm of the specified due date, even though Discover had said a late fee would not be assessed if the money was received by that date. \textit{Id.} at 154. The class waiver was mailed to the cardholder as a “bill-stuffer” (along with a monthly bill) and amended the customer’s previous arbitration agreement with Discover to include the waiver. \textit{Id.} at 160. The customer was given the choice of accepting the amendment or closing his account. \textit{Id.}

\textsuperscript{280} Id. at 160. Under the circumstances described in footnote 131, supra, the court found de facto procedural unconscionability, and its analysis of the class action waiver focused on substantive unconscionability. \textit{Id.} at 162-63.

\textsuperscript{281} “Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extend they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.” \textit{Id.} at 161.

\textsuperscript{282} Section 1668 states in full: “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” CA Civ. Code § 1668.

\textsuperscript{283} See, e.g., Cohen v. DirecTV, Inc., 142 Cal. App. 4th 1442 (2006). Disclosure: the author of this Comment also wrote the first drafts of this majority opinion while an extern for Paul Boland of California’s Second District Court of Appeals in the summer of 2006.
had already held a class action waiver unconscionable in *Leonard v. Terminex Intern. Co. L.P.* Arguably, this opinion was less clear-cut than the *Discover Bank* holding, though the effects were the same. In *Leonard*, the plaintiffs argued that a person with a $500 individual claim could not individually get a lawyer to represent him or her on contingency, whereas someone with a $75,000 claim could. The court compared this individual claim amount to the relatively high costs of arbitration. Under Alabama unconscionability doctrine, the court evaluated whether the terms were “grossly favorable to a party that has…overwhelming bargaining power,” And the court found the class action waiver, along with a limitation on “indirect, special, and consequential damages or loss of anticipated profits,” “deprive[d] the Leonards of a meaningful remedy,” and thereby constituted “unreasonably favorable and patently unfair terms in [a] contract of adhesion” that were unconscionable.

Importantly, the *Leonard* court defended its holding against the charge that it treated the arbitration agreement differently than it would any other contract, in violation of the FAA. The court wrote: “a conclusion of unconscionability could apply with equal force to an effort to enforce a contract provision silent as to arbitration yet prohibiting participation in a class action under similar circumstances.”

A Missouri appellate court has also found a class action waiver unconscionable, in *Whitney v. Alltel Communications, Inc.* That case did not lay down as explicit a rule as the *Discover Bank* court did, but its reasoning implies almost the same rule. In *Whitney*, where there was a class waiver (as well as a separate remedies restriction) in a phone-services agreement, the plaintiffs had allegedly been improperly billed $0.88/month for some time, leading to a total injury of $24.64. The court used a Missouri version of unconscionability doctrine (yet another example of its malleability) that “such provisions of [a] standardized form which fail to comport with [the objective] reasonable expectations [of a weaker party]...
and which are unexpected and unconscionably unfair are held to be unenforceable.”295 The court held that the average person “would not reasonably expect that a dispute like the one at issue would be required to be resolved through arbitration on an individual basis.”296 “[T]he costs would be so prohibitively expensive as to preclude…[y]et because of the many customers affected, Alltel would be entitled to retain millions and millions of dollars from what were allegedly improper and deceptive charges.”297

Finally, it should be noted that a wide variety of other state and federal courts have also held class action waivers unconscionable or otherwise unenforceable,298 most recently the New Jersey Supreme Court.299

c. Analysis of How Unconscionability is Applied in this Context, and its Validity

Courts such as Discover Bank and Whitney have taken a laudable position in recognizing the remedial power of the class action. The decision by the influential California Supreme Court in Discover Bank is already being applied in other jurisdictions.300 But the case-by-case analysis should perhaps examine a broader range of items than those they suggest. In other words, when using a case-by-case analysis to determine whether a contract banning class actions is “exculpatory,” courts should take into account the totality of the arbitration agreement circumstances.

For example, it hypothetically may be relevant whether the company that instituted the class waiver has also agreed to pay all arbitration fees. Similarly, if punitive damages and other remedies remain available, then a class waiver may not be as exculpatory. If the Discover Card court’s criticism is that plaintiffs have effectively been denied the ability to pursue

295 Id. at 310.
296 Id. at 314.
297 Id. “Moreover, since no single customer could undertake a case against Alltel, the company would continue its improper and deceptive charges ad infinitum since none of its customers would have a practical remedy to bring about a stop to the conduct.” Id. (emphasis in original).
299 Muhammad v. County Bank of Rehoboth Beach, Delaware, 2006 WL 2273448 (August, 9, 2006).
300 Id. at 8-10.
any claim – quite a valid point – then when the company demanding arbitration, and forcing waiver of class adjudication, has also agreed to pay costs and let all other remedies remain open, it could make some difference.

On the other hand, note that in an even more recent finding of class action waiver unconscionability, Muhammad v. County Bank of Reheboth, the New Jersey Supreme Court held that “availability of attorney’s fees is illusory if it is [still] unlikely that counsel would be willing to undertake the representation.”301 Moreover, an even better argument, at least against weighing punitive damages and class action waivers against each other, is that the class action matters most in claims where tiny amounts of money at stake. In such a situation – for example with the $29 claims in Discover Bank – punitive damages are not going to provide an incentive for a plaintiff’s attorney to take an individual claim, because they could never be high enough to justify the costs the attorney would incur.

Whatever factors courts consider relevant, courts must use an analysis that explicitly considers whether the totality of circumstances indicate that the company has written an arbitration agreement that will deter any rational plaintiff’s attorney from taking a meritorious case on contingency, or that will otherwise prevent potential plaintiffs from even seeking adjudication.302

4. Conclusions on Unconscionability Analysis Applied to Remedies Restrictions and Class Action Waivers

In conclusion, courts will have the opportunity to continue applying unconscionability analysis both to standard remedies restrictions (for example, as to punitive damages) and also to class action waivers. Unconscionability can be used to invalidate these class action waivers when they function to exculpate defendants by deterring plaintiff attorneys from taking cases on contingency, which, because of the size of the claim, can be pursued in no other way. As the Supreme Court of New Jersey has stated: “The purpose of arbitration…is not to discourage consumers from seeking vindication of their rights.”303

Moreover, courts in applying unconscionability analysis to class actions are already beginning to use a more concrete and case-specific taxonomy of unconscionability than they have been using in the remedies-waiver context. In the context of remedies restrictions, the case law at least honestly grapples with the inherent unfairness of the clauses, but too often uses abstract language and fails to acknowledge the real story: deterrence of

301 Id. at *9.
302 See id. at *9–10.
303 Id. at *10.
contingent-fee financing of claims. In the class action context the cases focus on more concrete ideas of attorney-deterrence and on the financing of adjudication. That already provides for a more meaningful and transparent analysis. But courts can still improve by focusing, when appropriate, on the totality of all circumstances, even those that exist outside the arbitration agreement, such as cost-splitting and other remedies that may still be available.

C. The Statutory Right: Examining Costs, Remedy-Restrictions, and the Inability to Vindicate Statutory Claims Possesses Enormous Potential

1. Introduction to “Statutory Vindication”

“Statutory Vindication” analysis has emerged relatively recently, and shows a great deal of promise to force courts to focus honestly on the real access and claim-deterrence problems that certain clever arbitration clauses present. Under this analysis courts may find that a particular provision requiring a plaintiff to pay certain costs in arbitration, or to forego certain remedies even if she wins, prevents the plaintiff from vindicating her statutory rights. Unlike all other methods of policing arbitration agreements, “statutory vindication” does not originally derive its authority from section two of the FAA. This analysis instead derives from Supreme Court caveats in case law where it allowed for the arbitration of federal statutory claims.

This story begins in the 1980s, when the Supreme Court began holding that various federal statutory claims could be arbitrated. The first such decision applied to claims arising under the Sherman Act. As the Court later stated in *EEOC v. Waffle House, Inc.*, “[F]ederal statutory claims may be the subject of arbitration agreements…enforceable pursuant to the FAA because the agreement only determines the choice of forum.”

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304 See, e.g., Kristian v. Comcast Corp., 446 F.3d 25, 51 (1st Cir. 2006).
305 Though as we shall see, the California Supreme Court has linked it back into FAA section two as a means of justifying its extension to state statutory and common law claims. Little v. Auto Steigler, Inc., 29 Cal. 4th 1064, 1079-80, 1084 (2003).
306 See infra note 3XX and accompanying text.
The Court’s 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation* extended arbitration of statutory claims to claims brought under the Age Discrimination Employment Act (“ADEA”), provided that the plaintiff could “vindicate” his or her statutory rights.\(^{310}\)

In *Gilmer*, Robert Gilmer was a sixty-two-year-old securities dealer who had been hired as a manager of financial services at Interstate/Johnson Lane Corporation.\(^{312}\) He agreed in his New York Stock Exchange registration application to submit any dispute arising between him and his employer to arbitration.\(^{313}\) When he was terminated, he filed a claim with the Equal Employment Opportunity Commission (“EEOC”), alleging a violation under the ADEA.\(^{314}\) After the inevitable motion to compel arbitration, the district court denied the motion, but the Fourth Circuit reversed, holding that nothing in the ADEA language prevented an arbitrator from hearing these claims.\(^{315}\) The Supreme Court affirmed the Fourth Circuit ruling, and in doing so extended its statutory line of cases to claims brought under the ADEA.\(^{316}\) The court also made clear that FAA preemption extended this holding to state employment claims (and thus state statutory claims of any kind), which can also be arbitrated.\(^{317}\) Nevertheless, the *Gilmer* court re-articulated the *Mitsubishi* rule that “‘the statute serves its functions’ only ‘‘[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum’.”\(^{318}\)

*Gilmer* was followed nine years later, in 2000, by *Green Tree Financial Corp. v. Randolph*, in which the Court first seemed to articulate specific circumstances that might prevent plaintiffs from “vindicating” their statutory rights in arbitration.\(^{319}\) In *Green Tree*, unlike in previous cases like *Gilmer*, the issue of whether it was appropriate to arbitrate these claims was never even raised by the plaintiff, a consumer suing under the Truth in Lending Act (“TILA”), who instead argued that because she was poor, the


\(^{311}\) *Id.* at 29 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

\(^{312}\) *Id.* at 23.

\(^{313}\) *Id.*

\(^{314}\) *Id.* at 23-24.

\(^{315}\) *Id.* at 26.

\(^{316}\) *Id.* at 21.


\(^{318}\) *Gilmer*, *supra* note 310, at 28 (quoting *Mitsubishi*, *supra* note 348, at 637).

arbitration agreement’s silence on costs eliminated her access to the courts, thus preventing her from vindicating her statutory rights.320 A key fact of the opinion was that the arbitration agreement was silent with regard to arbitration costs.321

The court held that “the arbitration agreement’s silence with respect to costs and fees” did not “render it unenforceable.”322 In holding this, the court noted that the plaintiff has the burden of disputing a motion to compel arbitration.323 But nevertheless the court added crucial language (which was, admittedly, probably dicta) that “[i]t 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.”324 The court qualified this by stating that the “mere risk” the plaintiff might suffer prohibitive costs is too speculative to deny arbitration.325 Applying its principles in Randolph’s particular situation, the Supreme Court found that since nothing in the record indicated she would pay costs too high to vindicate her rights in the arbitral forum, her arbitration agreement had to be enforced.326

The Green Tree court did not address “[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence.”327 Nevertheless, the Supreme Court clearly assumed that the costs of arbitration could in some situations prevent arbitration of statutory claims, even where the parties had effectively agreed to arbitrate them, a principle numerous lower court cases have since recognized.328 The question was when.

Since these two cases involved federal statutory claims, statutory

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320 Id.
321 Id. at 82.
322 Id. at 94.
323 Id. at 91.
324 Id. at 90 (citing Gilmer, supra note 310, at 26, and Shearson/Am. Express, supra note 319, at 227).
325 Id. at 91.
326 Id. at 90-92.
327 Id. at 92.
328 See, e.g., Kristian v. Comcast Corp., 446 F.3d 25, 51 (1st Cir. 2006). Moreover, the Kristian court did a good job articulating the policy behind the Supreme Court’s decision to make a showing of prohibitive arbitration costs a valid challenge to enforcement of an arbitration agreement. “If, because of a consumer agreement – for example the Policies & Practices – a plaintiff’s only apparent dispute resolution forum is binding, mandatory arbitration, and the plaintiff cannot afford to arbitrate because of an inability to recover attorney’s fees and costs, the plaintiff is essentially deprived of any dispute resolution forum whatsoever. Id. Finally, as Kristian correctly notes, “Green Tree has never been abrogated. It is consistent with later decisions. Id. See also Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 659 (6th Cir. 2003).
vindication analysis has most commonly been applied to federal statutory claims, which is considered in section two, below. In that context, a per se standard of invalidity (meaning that all cost-splitting and often all remedies restrictions in statutory claims are forbidden), which arose after Gilmer, now competes with at least two forms of case-by-case analysis that arose in the wake of Green Tree, which many courts have interpreted to require such an analysis. In a case-by-case analysis courts seek to determine the negative impact of the particular arbitration agreement’s provisions. As shown below, courts that apply case-by-case analyses and focus on cost to the plaintiff are missing the real issue here: the deterrence of plaintiff’s attorneys who work on contingency. A better alternative may be to use a new case-by-case approach, proposed here, that focuses on attorney deterrence. On the other hand, the extreme difficulty of administering any of these case-by-case approaches (including the new approach), as well as the fact that the “per se invalidity” approach remains valid in the wake of Green Tree, both point to the ultimate conclusion that the early solution of per se invalidity may be best.

Section three, below, considers the application of this doctrine beyond federal statutory claims to state statutory and even state common law claims. The California Supreme Court and one federal circuit court have applied statutory vindication to state statutory claims. Only one court, the California Supreme Court, has applied statutory vindication analysis to state common law claims. In both of these contexts, the problem of FAA preemption appears to arise. But the results in these cases can successfully be defended against such a charge because they comport with policy principles that apply to all contracts generally. Statutory vindication analysis applied to state statutory and perhaps even state common law claims constitutes a valid, under-utilized avenue that courts should also consider pursuing when policing agreements to arbitrate state statutory and even state common law claims.

Finally, even if recent Supreme Court case law in Green Tree does now chill the application of a “per se ban” on cost splitting in the federal statutory context (discussed in section two, immediately below) it is less likely that the same is true in the context of state statutory and common law

329 See, e.g. id.
331 See, e.g. Bradford v. Rockwell Semiconductor Systems, Inc. 238 F.3d 549, 556 (4th Cir. 2001)
333 Kristian, supra note 328, at 51-53; Armendariz v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83 (2000).
claims (discussed later in section three).


As described in the sub-sections within this section, the road of federal “statutory vindication” leading through Gilmer and Green Tree has had a number of twists and turns. The ultimate conclusion courts should draw in the context of federal statutory claims is an open issue. As alluded to above, this section concludes that courts may be missing the real point in these cases: the validity of costs and remedy-restrictions likely should not depend upon the finances of the plaintiff because in reality they are a way of short-circuiting the contingent-fee financing of claims. Courts should be willing to invalidate an arbitration agreement based on arbitration costs, and in an ideal world they should inquire whether the costs of arbitration chill representation in arbitration that would otherwise not be chilled in a courtroom. In an ideal world courts would also consider remedies restrictions together with costs, because a lawyer who refuses to take even a meritorious claim on contingency would consider all of these factors.

But this is not an ideal world. Although some sort of standard that makes a case-by-case analysis (comparing the cost/benefit of arbitration to the cost/benefit of litigation) might be ideal, the general lack of facts creates such administrative difficulties that per se bans on remedy restrictions and even on cost-splitting may be the better standard, at least for now. Despite what some courts have argued, such per se bans on cost-splitting and remedies restrictions in the context of federal statutory claims are still valid following Green Tree, and they do not frustrate arbitration. They only frustrate certain arbitration agreements that are actually designed to deter attorney representation even of meritorious claims.

a. Cole v. Burns and the “First Wave” of Cases after Gilmer

Gilmer v. Interstate/Johnson Lane Corporation was very controversial after it was decided in 1991 because it was the first high court case to find that a civil rights claim could be arbitrated.335 The initial questions that arose in the wake Gilmer were: what exactly is it that

prevents a civil rights plaintiff from vindicating his or her statutory rights? And what can a plaintiff be forced to pay in arbitration that he or she would not have to pay for in litigation? These were questions that had more weight in the civil rights context created by *Gilmer* than they did when investors were being forced to bring their securities claims to an arbitrator.\(^{336}\)

A leading case that struggled with these questions in the wake of *Gilmer* was the 1997 case of *Cole v. Burns*.\(^{337}\) In *Cole* the D.C. Circuit refused to allow a corporate employer to force an employee to split the costs of arbitrating his statutory Title VII claims, holding in a per se ban on cost-splitting “that an arbitrator’s compensation and expenses must be paid by the employer alone.”\(^{338}\) The *Cole* court thought it was “unacceptable to require Cole to pay arbitrators’ fees, because such fees [were] unlike anything that he would have to pay to pursue his statutory claims in court.”\(^{339}\) Nevertheless, the court allowed arbitration of an employee’s Title VII claims after it construed ambiguity in the contract\(^{340}\) to mean that the employer had to pay all of the employee’s fees in arbitration.\(^{341}\)

The *Cole* opinion had a significant amount of influence on other circuits. A year after *Cole*, the Eleventh Circuit cited the case when it held in *Paladino v. Avnet* that a clause prohibiting remedies and imposing cost-splitting “defeat[ed] the [ ] remedial purposes of [Title VII] because it insulated Avnet from Title VII damages and equitable relief.”\(^{342}\) The court thus extended *Cole*’s per se ban (in Title VII claims) on splitting arbitration costs to the context of remedies restrictions. Echoing *Cole*, the court additionally found that a provision forcing the plaintiff to cost-split by paying $2,000 in filing fees was subject to a per se ban.\(^{343}\) This clause “deprive[d] an employee of any hope of meaningful relief,” which “undermines the policies that support Title VII.”\(^{344}\)

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\(^{339}\) *Id.*

\(^{340}\) The contract did not explicitly address who would pay the arbitrator’s fees. *Id.* at 1468.

\(^{341}\) *Id.* at 1485. Justice Ginsberg of the Supreme Court later characterized that as “writing a term into the contract. Green Tree, 531 U.S. at 98 (Ginsberg, concurrent in party and dissenting in part).

\(^{342}\) *Paladino*, *supra* note 337, at 1062.

\(^{343}\) *Id.*

\(^{344}\) *Id.*
A year after this case, in 1999, the Tenth Circuit held in *Shankle v. B-G Maint. Mgmt.* that an arbitration agreement that required a litigant to pay one-half of arbitration costs “failed to provide an accessible forum in which [litigant] could resolve his statutory rights.” 345 Both of these decisions, like *Cole*, on which they heavily relied, 346 constituted a per se ban on cost-splitting in arbitration agreements, at least in the context of the Title VII claims that they were considering. 347 After these cases, if a company wanted to arbitrate a Title VII claim, at least, the company had to pay for everything. Moreover, *Paladino* had gone even further by applying a “statutory vindication” analysis to preclude all remedies restrictions in (Title VII) statutory claims as well. 348

### b. The “Second Wave” Post-Green Tree Approach: Bradford and the Comparison to Litigation Costs

*Green Tree*, decided a year after *Shankle*, in 2000, has been described as the Supreme Court’s response to the “per se” cost-splitting bans of cases such *Cole*, et al, described above. 349 It is true that all three of those cases came after *Gilmer* but before *Green Tree*. Notably, too, *Green Tree* arose to the Supreme Court out of the Eleventh Circuit, 350 which had also decided *Paladino*.

But such a categorical conclusion is simplistic. It is crucial to note that the Eleventh Circuit’s holding in *Green Tree* was unique and different from those previous cases.

In *Green Tree*, the Eleventh Circuit had found that the plaintiff could not “vindicate her statutory rights under TILA” because “the arbitration agreement was silent with respect to payment of filing fees, arbitrators’ costs, and other arbitration expenses.” 351 This was the farthest extension of *Cole’s* “per se invalidation” doctrine: the doctrine used to invalidate arbitration agreements where costs merely might preclude access to the arbitral forum, even though the agreement was totally silent about

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345 Shankle, 163 F.3d at 1235. Though, according to the Eleventh Circuit, this court really did use a case-by-case approach as described below, because it enquired into the plaintiff’s ability to pay. Musnick v. King Motor Co., 324 F.3d 1255, 1259 (11th Cir. 2003).

346 Paladino, 134 F.3d at 1062; Shankle, 163 F.3d at 1233-35.


348 See supra note 343.


350 *Green Tree*, 531 U.S. at 82.

351 *Id.* (describing the procedural history in the lower appeals court).
costs. It was this sort of ‘extension to hypotheticals’ that the Supreme Court struck down in *Green Tree*, when it held that the “mere risk” the plaintiff might suffer prohibitive costs is too speculative to deny arbitration, \(^{352}\) and that “an arbitration agreement’s silence with respect to such matters does not render the agreement unenforceable.”\(^ {353}\)

*Green Tree* had quick effects. For example, within a couple of years of *Green Tree*, the Eleventh Circuit severely disapproved of *Paladino* in the case of *Anders v. Hometown Mortgage Services, Inc.*, where it distinguished *Paladino* and refused to invalidate an arbitration clause after similar arguments were presented by a plaintiff.\(^ {354}\)

Rather than per se bans on costs and remedies in federal statutory claims, a new approach arose. *Arnold v. Goldstar Financial Systems, Inc.*, a federal case decided a couple of years after *Green Tree*, is a district court opinion that exemplifies a simplistic but effective example of this post-*Green Tree* alternative approach.\(^ {355}\) *Arnold* dealt with a consumer arbitration agreement and an allegation that defendants had violated various federal and state credit statutes.\(^ {356}\) Citing *Green Tree*, the *Arnold* court denied a motion to compel arbitration because the costs of arbitration were “17 times higher” than proceeding in court.\(^ {357}\) In other words, it based its conclusion not merely on an analysis of costs of arbitration in a vacuum, but on the context of what the plaintiff would have to pay if he or she litigated the claim in a courtroom.

A number of courts have taken a similar comparative approach, but some have tried to create a more formalistic rule than the *Arnold* court used for determining when costs preclude access to the arbitral forum and prevent vindication of statutory rights. One example is the Fourth Circuit case of *Bradford v. Rockwell Semiconductor Systems, Inc.*\(^ {358}\) In *Bradford*, the plaintiff made $115,000 per year and had earned sales incentives averaging $33,000 in three years before his termination.\(^ {359}\) He brought an ADEA claim against his employer after being terminated.\(^ {360}\) While his

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\(^{352}\) See *supra* notes 324-25 and accompanying text.

\(^{353}\) *Green Tree*, 531 U.S. at 82.


\(^{355}\) *Arnold v. Goldstar Financial Systems, Inc.*, 2002 WL 1941546 (N.D. Ill., 2002). This case is cited merely as an example. But *Arnold* has not gone totally unnoticed. Key Citation on Westlaw indicates five other Illinois federal cases have cited it, and it has been mentioned in a number of secondary sources as well as a significant number of appellate and trial briefs across the country.

\(^{356}\) *Id.* at *1.

\(^{357}\) *Id.* at *9-10.

\(^{358}\) *Bradford v. Rockwell Semiconductor Systems, Inc.* 238 F.3d 549 (4th Cir. 2001).

\(^{359}\) *Id.* at 558, n. 6.

\(^{360}\) *Id.* at 552.
arbitration was pending he filed a claim in court as well. His arbitration agreement specified that he would share equally the arbitration expenses with his employer. The Bradford court refused to find his arbitration agreement unenforceable and it affirmed a lower court holding granting Rockwell’s summary judgement motion.

The reason for this was that the Bradford court believed that “an appropriate case-by-case inquiry must focus upon the claimant’s expected or actual arbitration costs and his ability to pay those costs, measured against a baseline of the claimant’s expected costs for litigation and his ability to pay those costs.” The Bradford court believed that this type of inquiry comported with Green Tree, and for this proposition it cited, in italics, the particular language in Green Tree that: “The ‘risk’ that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. To invalidate the agreement on that basis would undermine the liberal federal policy favoring arbitration agreements.” It also cited Green Tree where that case said that the party opposing arbitration “bears the burden of showing the likelihood of incurring [prohibitively expensive] costs.” The court called the fact that the arbitration agreement was silent on costs in Green Tree “a slightly different fact situation.” It also quoted Green Tree where the case said, “‘How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss.’” The court reasoned that all of these quotations in Green Tree evinced a focus on the “individualized costs and, by inference, the individualized deterrent effect arising from those costs” on the party opposing arbitration, and didn’t allow for a per se rule.

Thus, the Fourth Circuit articulated a case-by-case rule for finding when costs precluded statutory vindication, taking into account: 1) the potential litigant’s ability to pay arbitration costs and fees; 2) the difference between the expected cost of arbitration and of a judicial forum to the litigant; 3) whether that difference was “so substantial as to deter the bringing of claims” in the arbitral forum. The party opposing arbitration

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361 Id.
362 Id. at 551
363 Id. at 558-59.
364 Id.
365 Id. at 557 (quoting Green Tree, 531 U.S. at 522).
366 Id.
367 Id.
368 Id. (quoting Green Tree, 531 U.S. at 522-23).
369 Id.
370 Id. at 556.
bore the burden of demonstrating these elements. Applying these rules, the court reasoned that Bradford did not “offer any evidence of the expected cost of litigation.” He also did not show facts indicating that pursuing “his litigation in court would cost him any less than the amount of money that he has already spent on arbitration.”

c. The “Third Wave” Revised Alternative Approach: Morrison, and “Chilling”

The Bradford approach attracted criticism. In Morrison v. Circuit City Stores, Inc., the Sixth Circuit criticized per se bans on cost-splitting but created a revised case-by-case approach that was similar to, though not the same as, the Bradford test. Like Bradford, the Sixth Circuit in Morrison also dealt with the question of whether cost-splitting in an arbitration agreement undermined the purposes of federal anti-discrimination legislation. The plaintiff’s arbitration agreement required the defendant to pay “all costs of arbitration (except for the $75 filing fee), but each party had to pay one-half of the costs of arbitration following the issuance of an arbitration award, unless the arbitrator decides to use her discretionary power to require the losing party to pay all arbitration costs.”

The Sixth Circuit worried about the Bradford test for two reasons: First, the court worried that “requiring the plaintiff to come forward with concrete estimates of anticipated or expected arbitration costs asks too much at this initial stage,” because the arbitrator has not even been selected so his/her hourly rate is not known. Thus, average figures might appear “too speculative,” which was language the Morrison court no doubt used to refer directly to Green Tree’s concern. Moreover, the court thought that even if the arbitration agreement provided for cost- or fee-shifting by arbitrators on the basis of the arbitrator’s decision, “potential litigants (and

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371 Id. at 557.
372 Id.
373 Id. at 558.
375 Id. at 663.
376 Id. at 652.
377 Id. at 654-55. “Such costs include ‘the daily or hourly fees and expenses (including travel) of the Arbitrator who decides the case, filing or administrative fees charged by the Arbitration Service, the cost of a reporter to transcribe[ ] the proceeding, and expenses of renting a room in which the arbitration is held’ as well as incidental costs such as ‘photocopying or the costs of producing witnesses or proof.” Id. at 655 (quoting a parties’ Joint Appendix at 134).
378 Id. at 660.
379 Id.
380 Green Tree, 531 U.S. at 91.
reviewing courts) may not be able to gauge the likelihood of success or cost-shifting, especially prior to discovery.\footnote{Morrison, 317 F. 3d at 660. The court disagreed that this problem could be solved requiring “litigants to arbitrate their claims first and then to argue, upon judicial review of the arbitration award, that the costs that have been assessed are unreasonable” because “judicial review of arbitration awards is very narrow” and also this would not solve the problem of extensive arbitration costs deterring potential litigants and thereby frustrating the purposes of the statutory scheme. \textit{Id.} at 661-62.}

Second, the court thought the \textit{Bradford} approach was “inadequate to protect the deterrent functions of the federal anti-discrimination statutes at issue” because inquiry into the risk of one individual claimant being deterred from effective vindication did not take into account “similarly situated individuals [who] would be deterred by those risks as well.”\footnote{\textit{Id.} at 661.}

The \textit{Morrison} court chose an approach that differed from \textit{Bradford} because it was concerned about “the possible ‘chilling effect’ of the cost-splitting provision on similarly situated litigants, as opposed to its effect merely on the actual plaintiff.”\footnote{\textit{Id.} at 661.} The court said that reviewing courts “should consider the costs of litigation as the alternative to arbitration, as in \textit{Bradford}, but they must weigh the potential costs of litigation in a realistic manner.”\footnote{\textit{Id.} at 663.} It suggested a revised case-by-case approach under which “litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them \textit{and similarly situated individuals} from seeking to vindicate their federal statutory rights in the arbitral forum.”\footnote{\textit{Id.} at 663 (emphasis added). The inquiry into plaintiff’s income and resources “as a representative of this larger class’s ability to shoulder the costs of arbitration” did not require “a searching inquiry into an employee’s bills and expenses” under \textit{Green Tree}. \textit{Id.} \textit{Id.}} If so, the cost-splitting provision would be unenforceable.\footnote{\textit{Id.} \textit{Id.} at 663.}

The court defined similarly situated litigants as litigants of similar “job description and socioeconomic background,”\footnote{\textit{Id.} at 663.} but argued that \textit{Green Tree} did not mandate “a searching inquiry into an employee’s bills and expenses.”\footnote{\textit{Id.} \textit{Id.} at 664.} It also held that courts should look at “average or typical arbitration costs, because that is the kind of information that potential litigants will take into account in deciding whether to bring claims in the arbitral forum.”\footnote{\textit{Id.} \textit{Id.} at 664.} Finally, it argued that in evaluating costs the courts should “discount the possibilities that the plaintiff will not be required to pay costs or arbitral fees because of ultimate success on the merits” because...
deterrence was important, and employees would err on the side of caution.”

Applying these rules, the court held that the cost-splitting provision in “the Circuit City arbitration agreement would deter a substantial number of employees similarly situated to Morrison from seeking to vindicate their statutory claims” and thus it was unenforceable. In reaching this conclusion, the court reasoned that a litigant who made an approximately $50,000 salary would feel deterred by the obligation of paying at the end of arbitration the greater of $500 or 3% of her annual salary (in this case, $1,622) to arbitrate, after losing her job. The court noted that, by comparison, lawyers would take the cases of most litigants on a contingent basis in the judicial forum, resulting in almost no cost to the litigants in that forum.

Moreover, the court cited a recent study of arbitration costs saying that they ranged from three to “nearly fifty” (emphasis in original) times the basic costs of litigating in a judicial, rather than arbitral, forum. The court also reasoned that since arbitration costs rise as the claim amount rises, a Title VII claim, which allows for compensatory damages of up to $300,000, would be exceedingly expensive, which also indicated that a litigant with Morrison’s salary would be deterred from pursuing a claim at all. Finally, the court cited figures stating that the average arbitrator fee was “$700 per day and that the average employment case incurred a total of $3,750 to $14,000 in arbitration expenses.”

Notably, the Morrison court separately held that a remedies restriction in the arbitration agreement was invalid, and it used a different analysis. The arbitration agreement limited remedies to “injunctive relief, including reinstatement; one year of backpay and reimbursement for lost fringe benefits (which may be further reduced by interim earnings or public/private benefits received); two years of front pay if reinstatement is not possible; compensatory damages in accordance with applicable law; and punitive damages up to $5,000 or the sum of a claimant’s backpay and front pay awards, whichever is greater.” The court cited Gilmer for the proposition that “a party does not forgo the substantive rights afforded by

390 Id. at 664-65.
391 Id. at 669.
392 Id.
393 Id. at 664.
394 Id. at 669.
395 Id.
396 Id.
397 Id. at 670.
398 Id. at 670-71.
[a] statute [when she agrees to arbitrate a statutory claim].” In reaching its conclusion, the court reasoned that in this clause forced Morrison to forgo a whole “panoply of remedies under Title VII,” which undermined the remedial (compensation for discrimination) and deterrent (of further discrimination) principles of the statute. Thus the remedy restrictions were invalid.

**d. Analysis of Potential Cost-Based Failures and Remedies Restrictions-Based Failures to Vindicate Federal Statutory Claims**

**a) Defending Cole**

The first question one should ask concerns the Cole/Paladino per se ban on plaintiffs paying for costs in arbitration that they would not pay in court. What validity does this possess in the wake of Green Tree? For example, one commentator stated shortly after Green Tree that “[a]lthough it is not extinguished, that emerging position [of Cole] is clearly chilled by the majority opinion in Green Tree.” Going beyond that, Bradford’s strenuous attack leveled at Cole, supra notes 404-09 above, seems to suggest the per se ban is completely dead.

First, as in initial matter, it is very important to distinguish a per se ban on cost-splitting from a per se ban on remedy-restriction. In that vein, note that Green Tree says absolutely nothing about remedy-restrictions. Thus, Green Tree should have zero effect on decisions like Paladino’s, which held that the denial of damages and equitable relief in the arbitration of a Title VII claim is per se invalid because it “defeat[s] the [ ] remedial purposes” of Title VII. Courts should feel confident in invalidating remedy restrictions if they defeat the remedial purposes of a statute. Indeed, when the Morrison court struck down the remedy restriction (see notes 437 to 441, above), it basically applied a per se ban on the remedy restriction. Exactly how remedy restrictions defeat the remedial purposes of a statute will be discussed in more detail below.

But returning to per se bans on “cost-splitting” provisions, a very good argument can be made that the Bradford court was wrong, and that

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399 Id. at 670.
400 Id.
401 Id.
402 Cole, 105 F.3d at 1481.
404 See Green Tree, 531 U.S. at 82 (focusing entirely on the silence regarding cost-splitting).
405 See Paladino, 134 F.3d at 1082.
Green Tree does not invalidate Cole’s per se prohibition on cost-splitting at all. The argument begins with the recognition that the agreement at issue in Green Tree was totally silent with regard to costs.

At least four federal courts, the Ninth Circuit in Circuit City Stores, Inc. v. Adams, the First Circuit in Kristian v. Comcast Corporation, the New York District Court for the Northern District in Ball v. SFX Broadcasting, Inc., and the Tennessee District Court, Nashville Division, in Cooper v. MRM Investment Company, have recognized this distinction and have refused to find that Green Tree invalidates the Cole per se approach. As the Ball court put it:

In Green Tree, the Court noted that “we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” Id. at 92 (Emphasis added.) The Court concluded that the plaintiff had failed to meet her burden because “the record reveals only the arbitration agreement’s silence on the subject, and that fact alone is plainly insufficient to render it unenforceable.” [citation omitted]

This analysis, which focuses on the likelihood of substantial arbitration costs, is readily distinguishable from the analysis adopted by courts [such as the Bradford court] focusing on the financial situation of the particular plaintiff. As such, it is held that it is sufficient for an employee seeking to avoid arbitration to show a likelihood that he or she will be responsible for significant arbitrators’ fees, or other costs which would not be incurred in a judicial forum. Such a showing is sufficient to demonstrate that the challenged arbitration agreement does not provide an effective mechanism for the vindication of statutory rights.

The Ball court is absolutely right to distinguish Green Tree this way. Indeed, nothing in the above language the Ball court quotes from Green Tree lends any credence to the Bradford position that we have to look at the plaintiff’s costs and compare them to costs in litigation.

On the other hand, neither the Ball court, nor the other courts that have come out this way, dealt with the other problematic language in Green Tree, where it held that the “mere risk” of prohibitive cost was “too

406 For Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895, n.5 (9th Cir. 2002) (discussing this aspect of Green Tree while engaged in an an unconscionability analysis); Kristian v. Comcast, 446 F.3d 25, 51-53 (2006) (not employing a per se ban exactly, but distinguishing Green Tree because the agreement was silent as to cost-splitting, and invalidating a cost-splitting provision on a “strong showing” of prohibitive costs, without substantive analysis); Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 781-82 (M.D. Tenn.); Ball v. SFX Broadcasting, Inc., 165 F. Supp. 2d 230, 239-40 (N.D.N.Y.).

407 Ball, 165 F. Supp. 2d at 239-40.
speculative” to justify invalidation of an arbitration agreement. In fact, that was the language on which the Bradford court really hung its hat, so much so that it put it in a block quote in italics. But this language also can be explained. In Green Tree the risk was “too speculative” and this was a “mere risk” because the agreement was totally silent concerning costs.

To be sure, as the Bradford court put it, “the Green Tree court rejected Randolph’s argument because Randolph could not satisfy her burden of establishing that she was likely to incur prohibitive costs that would deter her from arbitrating her claims.” It is also true that Green Tree “analyze[d] the issue before it … in terms of the individual litigant and the arbitration agreement before it.” But that arbitration agreement before it was silent on costs. Since that is so, none of the above phrases contradict the proposition that the individual plaintiff in another case could satisfy her “individual” burden by pointing to an agreement that does have cost-splitting provisions (i.e., what would in that case be the “arbitration agreement before [the court]”).

Additionally (as the Bradford court dwelled on), the Green Tree court wrote: “How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with evidence contrary is a matter we need not discuss.” But this statement also does not mandate any inquiry into the plaintiff’s finances and whether she will pay substantially more in arbitration, as the Bradford court seemed to think. That is because one should take the Supreme Court at its word that it did “not discuss” how detailed the showing need be. If that statement is true, an equally likely possibility is that the detail of the showing need only be that the arbitration clause contains a cost-splitting provision, unlike the arbitration clause that was at issue in Green Tree.

In fact, this is the more reasonable interpretation, given that the Supreme Court did not accept certiorari on the earlier cases of Cole and Paladino both of which, unlike the appellate court holding in Green Tree, applied the per se rule to arbitration agreements that did contain a cost-splitting clause. Nor did the Court condemn, invalidate, or indeed even so much as mention a single one of these “per se” cases in Green Tree, yet

408 Green Tree, 531 U.S. at 91.
410 Id.
411 Id.
412 Id. (quoting Green Tree, 531 U.S. at 91 at 93.
413 Id. at 557-58.
another indication that the court was merely responding to the narrow fact situation that had irked it, and that properly lay before it: the Eleventh Circuit’s invalidation of an arbitration agreement that said nothing at all about costs\textsuperscript{415} and thus, under which (for all anyone knew), the company that promulgated the arbitration agreement also planned to pay all costs and drive its plaintiffs to arbitration in a pink limousine.

b) Critiquing Bradford and Morrison

Nevertheless, assuming for a moment that Bradford is correct, it would be productive to examine the standards of courts like Bradford and Morrison that have taken alternate versions of a facially more nuanced ‘case-by-case’ approach. The Bradford standard was pretty straightforward: can the litigant pay arbitration costs, what is the difference between the expected cost of arbitration and of a judicial forum to the litigant, and is that difference “so substantial as to deter the bringing of claims” in the arbitral forum?\textsuperscript{416} The problem is that if one thinks about it, these are pretty difficult questions to answer meaningfully. A major part of the Morrison court’s problem with Bradford boiled down to a concern about exactly that. For example, the Morrison court was concerned that it is impossible to know how much the plaintiff will pay in the arbitral forum before the arbitration has occurred.\textsuperscript{417} That’s a valid concern.

Even beyond that, what exactly is a “substantial difference”? If the plaintiff has to pay $5,000 more in arbitration, is that substantial enough? How does the level of the substantial difference interact with plaintiff income? Speaking of plaintiff income, since the inquiry focuses on how much money the plaintiff earns, how much income is enough? The plaintiff in Bradford made $115,000 per year and had earned sales incentives averaging $53,000 in three years before his termination.\textsuperscript{418} So would the result be different if the plaintiff had made $100,000? $95,000? $90,000? $70,000? $50,000? Where does one draw the line? How does one tell the plaintiff who is $1,000 above the “line” that he must arbitrate claims pursuant to a cost-splitting regime that a plaintiff who makes a mere $1,000 less can get invalidated? Because there really aren’t good answers to any of these questions, the Bradford regime is actually a pure policy call, or even a per se rule in favor of enforcing all cost-splitting regimes, which masquerades as a substantive inquiry.

Yet the Morrison alternative is not any better. Under Morrison, one is required to inquire into the average costs of arbitration for similarly

\begin{itemize}
\item \textsuperscript{415} See Green Tree, 531 U.S. at 91 at 82.
\item \textsuperscript{416} Bradford, 238 F.3d at 557.
\item \textsuperscript{417} Morrison, 317 F. 3d at 660.
\item \textsuperscript{418} Bradford, 238 F.3d at 558, n.6.
\end{itemize}
situated plaintiffs in order to prevent the chilling of claims.\textsuperscript{419} But how does one meaningfully do that? The \textit{Morrison} court cites a Public Citizen study of average arbitration costs in its analysis, indicating that arbitration of a $60,000 employment discrimination claim might incur costs “from three to fifty times the basic costs of litigating in a judicial, rather than arbitral, forum.”\textsuperscript{420} Yet, as the Public Citizen study acknowledges, there is a “paucity of empirical research” for courts to rely on.\textsuperscript{421} And if one actually looks at the Public Citizen study it is, while terrifying, quite anecdotal, consisting in large part of a non-scientific, non-statistical “parade of horribles” – anecdotal, emotional accounts of cases that have gone terribly in arbitration, have cost enormous amounts of money, and have resulted in the dropping of claims.\textsuperscript{422} Moreover, in calculating forum costs, the Public Citizen study does not consider the fact that a much lower amount of discovery typically occurs in arbitration than in court. While that has negative fairness implications, one can’t deny that it reduces the cost of arbitration in comparison with the courtroom, where the true “forum cost” is often much higher than a $120 filing fee.

Instead of looking at this study, the \textit{Morrison} court might just as easily have cited another figure, that “[b]y one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve.”\textsuperscript{423} This estimate does not break costs down by the size of the claim, but its existence indicates that, at best, the \textit{Morrison} court was not engaged in a very strenuous comparative analysis. But how could it be? There’s almost no meaningful data. Thus, the \textit{Morrison} court is basically the reverse of the \textit{Bradford} case: while pretending to undertake a substantive analysis, it is really engaged in the application of its own per se rule.\textsuperscript{424} Because the “similarly-situated” plaintiff analysis looks to people from the same “job description and socioeconomic background”\textsuperscript{425} the

\textsuperscript{419} See infra note 424 for a brief description of what is lacking in the \textit{Morrison} court’s analysis.
\textsuperscript{420} Morrison, 317 F. 3d at 669 (citing Public Citizen, \textit{The Costs of Arbitration} 40-42 (2002)).
\textsuperscript{421} Public Citizen, supra note 420, at 1.
\textsuperscript{422} Id. at 4-38.
\textsuperscript{424} In a sense, \textit{Morrison}’s standard is analogous to the classic example in evidence where a man is hit by a bus, doesn’t see whose bus it is, but sues company X, in a town where company X controls 75% of the bus market. \textit{Morrison}’s rule is like saying we should always hold the bus company liable, because statistically the chance is greater than 50/50 that it was liable. But such a rule has been rejected because, in a hundred such cases, the bus company would always be held liable, even though statistically it would not own the offending bus 25% of the time.
\textsuperscript{425} Morrison, 317 F. 3d at 663.
**Morrison** approach is also subject to the same line-drawing problems that the **Bradford** approach is subject to. When is a plaintiff part of a general “socioeconomic background” that is wealthy enough that he can vindicate his statutory claims, and how does one tell a socioeconomic group that is $1,000 above the “line” that it must arbitrate the same claims that a group which makes $1,000 less does not have to arbitrate? Or is there even really such a meaningful line that can or will be drawn? Likely not.

c) **A Proposed Alternative Case-by-Case Analysis**

Having examined **Bradford** and **Morrison** in detail, and still assuming that one should at least look beyond the per se approach, which one of these approaches should a court pick? From a cynical perspective, if one wants to validate almost all cost-splitting arrangements, one should pick **Bradford**, and if one wants to invalidate almost all of them, one should pick **Morrison**. But perhaps one should pick neither. A better conclusion may be that neither of these cases has hit on what is at stake in these cases: deterrence of contingent-fee financing arrangements. Viewing the situation this way, plaintiff wealth becomes irrelevant.

This conclusion is reached by first recognizing that the vast majority of small employment and consumer cases are taken on contingency, and are therefore not financed by the plaintiff. In fact, even in arbitration evidence indicates that many plaintiffs are represented on a contingency basis. Thus, the **Morrison** court was flat wrong to assume, as it did, that litigation would be less expensive because lawyers would not be taking arbitration cases on contingency. As an anecdotal matter, if one looks at the front of every case cited in this Comment, the plaintiffs, no matter how poor, had attorneys. A fair bet is that those attorneys were either operating pro bono or on contingency. All things being equal, those attorneys will operate in the arbitration environment as well.

To consider the full implications of this contingency-financing

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426 For example, “Ninety-five percent of personal injury cases are taken on a contingency [basis].” Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI-KENT L. REV. 625, 626, n.3 (1991). That would include consumers injured by a product. Painter also notes that contingency arrangements occur in antitrust litigation, shareholder derivative suits and securities litigation. *Id.*

427 Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 1 DISP. RESOL. J., 9, 12 (noting that “most lower-income employees have agreed to representation on a contingency basis” in the sample of AAA employment arbitrations she studied).

428 **Morrison**, 317 F. 3d at 664.

429 To the extent they do not, it may be because of opinions like **Morrison**, and cost-splitting schemes as approved in **Bradford**, which together tell attorneys that their time is more valuably spent finding plaintiffs whose arbitration agreements they can invalidate, than in representing a plaintiff in arbitration.
structure, imagine four potential arbitration plaintiffs. Plaintiff One is wealthy and also vindictively irrational. Plaintiff Two is wealthy but rational. Plaintiff Three is middle (or upper middle) class and rational. Plaintiff Four is flat broke and rational. After being wronged, all four hypothetical plaintiffs will consult an attorney and ask the attorney to take the case in arbitration on a contingency basis. The attorney, after evaluating the merits of the claim and looking at the provisions in the arbitration agreement, may say that she will not take the case.

If that happens, all four plaintiffs will conclude that the lawyer has decided that the cost and risk together outweigh the potential for a good return on her investment. Plaintiff One may very well pursue the claim anyway because she is motivated by her vindictiveness and can afford to indulge it. But in all likelihood none of the three rational plaintiffs will pursue a claim, whether they are rich, middle class, or poor, and whether or not it is actually meritorious. Plaintiff Two, even though she could afford it, will conclude that it’s not worth her own time and money if it’s not worth the contingency lawyer’s time and money. Plaintiff Four will be unable to afford a substantial claim on their own, and so won’t pursue it either. Plaintiff Three, depending on exactly how much money she has, will fail to pursue the claim either for the same reason as plaintiff two or for the same reason as plaintiff four.

If the claim is indeed without merit, that is the right result for each plaintiff. The problem is: what if the claim itself did have merit, and the above lawyer would have taken the case if there had not been provisions in the arbitration agreement such as extensive cost-splitting or remedy-restricting clauses? This situation describes how a plaintiff is truly prevented from vindicating a statutory right that he or she would otherwise be able to vindicate. And it would happen regardless of the wealth of any rational plaintiff. If one looks at the entire process this way, then attorney-deterrence is what courts engaging in a case-by-case analysis should focus on, instead of inquiring into the plaintiff’s income, or the ability of “similarly situated” plaintiffs to afford arbitration. Those are both essentially meaningless inquiries.

Viewing the entire situation as a matter of attorney-deterrence also brings the cost-splitting analysis with the remedy restriction analysis together into one single analysis. If one is thinking about the contingency-financing of claims, it makes little sense for courts to do what the Morrison

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430 The author acknowledges Professor Stephen Yeazell for this hypothetical, as well as for the general advice to focus more on the contingency-financing implications of arbitration clauses.

431 See Bradford, 238 F.3d at 556, n.5; Morrison, 317 F. 3d at 669.
court did, and evaluate these two clauses separately, because both would enter into a rational contingency attorney’s single cost/benefit analysis – cost-splitting obviously being one cost, and remedies obviously representing the potential benefit.

Thus, an alternative rule to those proscribed in *Bradford* and *Morrison* would be that courts should ask whether the negatives of arbitration: costs unique to arbitration (eg, filing and forum fees, arbitrator fees), and any remedies restrictions imposed by the agreement (ie, punitive damages waivers, fee-shifting waivers, etc), considered together, would deter a rational plaintiff’s attorney from taking even a potentially meritorious case on contingency that the attorney would otherwise be likely to take without the restrictions and cost-splitting. If so, then the arbitration clause is being used as a weapon to prevent the vindication of statutory claims by cutting off the only means by which plaintiffs will be able to secure representation; and the clause should be invalidated.

There would be two sub rules, both involving remedies restrictions: One: courts should pay attention to the language of the statute under which a claim is brought. In the case of remedies restrictions, they may simply be invalid, in which case they will not need to figure into an analysis of total cost/benefit. One can see an example of this in *Kristian v. Comcast Corporation*, a First Circuit decision from April 2006 that involved consumers who sued Comcast under state and federal antitrust statutes. The First Circuit in *Kristian* addressed a host of issues, one of which was an arbitration provision that would have prevented plaintiffs from recovering treble damages, no matter the result of the arbitration. Since the underlying federal statute specified that such relief “shall” be awarded, there was no ambiguity (which would put the decision in an arbitrator’s hands) and, “under federal law, the remedies provided by the antitrust statute [could not] be contractually waived.”

Sub-rule two: Courts should also consider the cost of prosecuting the actual statutory claim at issue when making this determination. Again

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432 *Id.* at 668-671.
433 In evaluating these questions, courts should potentially also consider: 1) the amount of attorney time the arbitration will likely take in comparison to litigation of a similar claim, and 2) courts should also take into account the amount of discovery that will take place in arbitration as opposed to what would likely be ordered in a courtroom. Both of these concerns represent costs that would factor into an attorney’s cost/benefit analysis.
434 *Kristian v Comcast*, Inc., 446 F.3d 25 (1st Cir, 2006).
435 *Id.* at 30-31. Because of the underlying claim, *Kristian* first serves to highlight the point that the analyses and cases examined thus-far in this section are not limited to the employer context, though they have been focused there.
436 *Id.* at 44-45.
437 *Id.* at 46, 48.
in the case of Kristian, the nature of the antitrust claims at issue “require[d] a huge outlay of financial resources [to arbitrate].438 Without the possibility of recovering costs and attorney’s fees, an individual plaintiff would undoubtedly have an “impossible time securing legal representation…, given the minor amount an individual plaintiff would likely recover relative to the cost of prosecution.”439 Thus, the average cost of prosecuting a particular statutory claim should figure into the analysis.

Under the rules and sub-rules discussed above, costs and remedy restrictions must be considered together, and a huge number of remedies-restriction clauses (if not all) will likely be struck down because nothing curtails a rational plaintiff lawyer’s desire to take a case more than restrictions on otherwise-available remedies, which precludes any possibility of profit. For example, fee-shifting provisions are baldly characterized as existing purely to “obtain ‘independent counsel for victims of civil rights violations’ to ‘ensur[e] the effective prosecution of meritorious claims.’”440 For similar reasons, Title VII allows compensatory damages awards of up to $300,000.441

Thus, although the contingency-representation prism has been advocated in the past by arbitration cheerleaders,442 by discussing cost alone without also considering remedies, those commentators miss the point. Take such provisions away as to any claim, and one takes away the attorney. It follows that remedies restrictions should almost never be valid. Moreover, it is not radical or “anti-arbitration” to argue that the vast majority of these remedy restrictions in arbitration agreements should vanish under this (or under any other) rule. The American Arbitration Association – which is not exactly Public Citizen – promulgates default rules explicitly stating that an arbitrator “may grant any remedy or relief that would have been available to the parties had the matter been heard in court.”443 Thus, by any measure, the onus should be on companies to explain why they should be able to impose a clause that even the largest independent arbitration organization does not recommend in its default rules.

On the other hand, it is at least theoretically possible that if a defendant can show that the costs of its chosen arbitration forum are quite cheap and arbitration is so easy that an average potential plaintiff can pursue

438 Id. at 52.
439 Id.
443 American Arbitration Association, Rule 34(d).
his or her claim on a pro per basis (even if a remedy-restriction will deter an attorney) then claims might potentially be allowed to proceed even when the arbitration clause contains remedy-restrictions. One could imagine this working in the context of extremely small, simple claims. But this is only assuming one is not in the sub-rule described above in the Kristian case, where the federal statute underlying the claim requires certain remedies.\footnote{See supra notes 436-37.}

This possibility should give arbitration organizations a direct incentive to collect more data on their arbitrations and on what plaintiffs pay.\footnote{Professor Hill’s study found that 32% of lower-income employees paid nothing in arbitration, either because the arbitrator reallocated fees to the employer or because the employees proceeded on pro se, or because the arbitrator awarded attorney fees. Hill, \textit{supra} note 427, at 12.} Provisions such as the one adopted by the American Arbitration Association (“AAA”) in 2002, which provides that total forum fees for employee-plaintiffs are limited to $125,\footnote{American Arbitration Association, National Rules for the Resolution of Employment Disputes (eff. Nov. 1, 2002).} are extremely helpful to defendants in this regard. But even in such a situation, it will presumably be the rare case indeed that can be handled effectively without an attorney. And no attorney will be able to afford to take the case if remedies otherwise available in court have been stripped.\footnote{It will be rare because such hypothetical claims are so small that most plaintiffs will suck-it-up and take the loss instead. Thus, the reasoning of this paragraph should not be construed as an avenue to attack class action waivers. Class actions are important precisely because claims such as these will be far more rare than companies perpetuating a multitude of tiny wrongs fairly should expect.}

Concededly, the new proposed approach is far from perfect. It is subject to measurement and line-drawing difficulties similar to those that hamper the Bradford and Morrison approaches. How does one know what amount of cost is too much? Does it depend upon how deep the attorney’s pockets are? Alternatively, how can one even complete the measurement, given that assessing the benefit portion might have to depend upon an analysis of the merits of the claim, which would be prohibited to a court? The only answer is that the analysis would have to depend upon a court’s good judgement as to what a reasonable attorney would conclude, looking at the known facts at the beginning of the case, and looking at the potential costs and remedies. That answer makes it possible for this approach to exhibit the same pretense of real analysis that characterizes the Bradford and Morrison approaches. Nevertheless, given the fact that these difficulties no more than parallel the difficulties of the existing case-by-case approaches of Bradford and Morrison, there seems to be no compelling reason why courts should continue using various forms of plaintiff-means
analysis as a vacuous proxy for the real story: deterrence of attorney-financing arrangements.

d) The Cole Standard May be Best of All

All of this confusion and difficulty over applying case-by-case standards suggests one final conclusion: if Cole is still valid in the wake of Green Tree, which it likely is, why not continue to apply Cole’s per se ban on cost-splitting? Even if many arbitration plaintiffs can secure contingency representation,\(^{448}\) unquestionably many cannot as well. Thus, if applied to plaintiffs via cost-splitting provisions, arbitral forum costs (which can range into the hundreds or even the many thousands of dollars\(^{449}\)) will deter the filing of claims among those who, for whatever reason, cannot secure contingency representation. And they will also deter filing in cases where the contingency representation covers only attorney fees, but does not cover independent forum costs associated with the forum provider and with the arbitrator.\(^{450}\) Whenever claims are not filed, for reasons other than a lack of merit in the statutory claim, it constitutes a failure to vindicate statutory rights. This should not happen. Rather than engage in superficial substantive analyses into costs, even attorney costs and benefits, perhaps courts should acknowledge a public policy that requires plaintiffs be able to vindicate federal statutory claims, and that recognizes the fact that in an overwhelming number of cases, cost-splitting, as well as remedies restrictions, are likely to prevent that.

On the other hand, there is one path by which courts might have no need to return to the Cole standard – or, more accurately, would arguably not even have to consider arbitral costs. That would happen if it could be demonstrated that virtually all plaintiffs in mandatory arbitration are represented on contingency. Remember that through the contingency prism, one looks at costs and remedy restrictions under a single cost/benefit analysis. Looked at that way, then from the perspective of plaintiff’s attorneys remedies restrictions are likely to be the determinative factor in whether they engage in arbitration representation, simply because the remedies provided for by statute will be vastly higher than any costs associated with the arbitral forum, even within a forum in which costs escalate as the claim amount arises. Thus, if it could be shown that all plaintiffs were indeed being represented on contingency in arbitration, then

\(^{448}\) Hill, supra note 427, at 9, 12 (noting that “most lower-income employees have agreed to representation on a contingency basis” in the sample of AAA employment arbitrations she studied).

\(^{449}\) Public Citizen, supra note 420, at 55.

\(^{450}\) The author has not been able to ascertain what the standard practice is in this regard.
provided the arbitral fees were not outrageous they would likely not deter attorneys from taking meritorious claims, and thus would be irrelevant in considering whether plaintiffs can vindicate their meritorious statutory claims. Instead, it would be enough to consider all remedies restrictions invalid.

**e. Conclusions on the Statutory Vindication of Federal Statutory Claims**

In conclusion, the Supreme Court created great controversy when it allowed for the arbitration of Title VII claims in *Gilmer*. This led courts like *Cole* and *Paladino* to issue per se bans on the splitting of arbitration costs, and (in *Paladino*) a per se ban on remedy restrictions, in order to ensure that the plaintiff’s statutory rights could be vindicated. The subsequent Supreme Court case of *Green Tree* has led many courts to adopt various case-by-case approaches, at least with regard to cost-splitting. But these case-by-case approaches miss the real story: cost-splitting and remedy-restrictions clauses in arbitration agreement deter contingent-fee attorneys from taking even meritorious claims that they otherwise should take. Moreover, all of these case-by-case analyses, including the new proposal to focus on attorney deterrence, suffer from enormous administrative difficulties. Thus, since *Cole*’s per se approach remains valid in the wake of *Green Tree*, it may be better for courts to return to that standard.

**3. The Statutory Vindication Analysis Applies Equally to the Vindication of State Statutory and even State Common Law Claims**

As the preceding section makes evident, the jurisprudence concerning statutory vindication of federal claims is extensive and vibrant at the federal circuit level. In the wake of *Gilmer* and *Green Tree* a question also has arisen concerning whether the same exact reasoning can be applied to state statutes and even to state common law claims. The California Supreme Court has taken this path, in two cases in which it first extended federal statutory vindication reasoning to state statutory claims, and then to state common law claims. As the court realized, this raises potential FAA preemption issues. But the court was correct in finding, first, that the FAA does not generally preempt the application of statutory vindication analysis to these claims. Second, the court is likely correct that even if *Green Tree* invalidates the *Cole* “per se invalidation” approach to cost-splitting in federal courts, it may not invalidate that approach in the context of state statutory and common law claims. To date, it appears the California court’s jurisprudence on this issue has been eclipsed in the eyes...
of courts and commentators by its unconscionability holdings. But statutory vindication of state statutory and common law claims is expanding and it offers a distinct and valuable analysis that state courts in other jurisdictions should consider employing.

**a. Armendariz, and Application of Statutory Vindication to State Statutory Claims**

As mentioned above, only one state court has applied the statutory vindication arguments used in cases like Cole, Bradford, and Morrison in the context of state statutory claims. That court was the California Supreme Court in the case of Armendariz v. Foundation Health Psychcare Services, Inc.\(^{451}\) In April of 2006, the First Circuit became the first federal court to apply this analysis to a state claim as well,\(^{452}\) though this section focuses on the California decision.

In Armendariz, the California Supreme Court held that arbitration of claims under the California’s Fair Employment and Housing Act (“FEHA”) were subject to certain minimal requirements, one of which was that the employer must “pay all types of costs that are unique to arbitration.”\(^{453}\) Citing Civil Code sections 1668\(^{454}\) and 3513,\(^{455}\) the court reasoned that FEHA was “enacted for public reasons and the rights it conferred on employees were unwaivable.”\(^{456}\) The court also reasoned that allowing cost-splitting created a “risk that employees [would] have to bear large costs to vindicate their statutory rights against workplace discrimination, and therefore chills the exercise of that right.”\(^{457}\)

Armendariz, which was handed down a few months prior to the

\(^{451}\) Armendariz v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83 (2000).
\(^{453}\) Id. at 113. Other requirements were: the arbitration agreement could not limit normally available statutory damages (id. at 103), there must be discovery “sufficient to adequately arbitrate [the] statutory claim (id. at 106), and a written arbitration decision was required, as was judicial review “sufficient to ensure the arbitrators comply with the requirements of the statute.” Id.
\(^{454}\) “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. CA Civ. Code § 1668. The court also stated, “Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law against public policy and may not be enforced.” Armendariz, supra note 491, at 100 (citing In re Marriage of Fell 55 Cal. App. 4th 1058 (1997)).
\(^{455}\) “Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.” Cal. Civ. Code § 3513.
\(^{457}\) Armendariz, 24 Cal. 4th at 491.
Supreme Court’s decision in Green Tree, not only applied a statutory vindication analysis to state statutory claims, but it also was clearly a per se ban on cost-shifting, in the mold of Cole, a case the Armendariz court referred to extensively. The court also noted that it was following Paladin and Shankle, the other Cole-like decisions discussed in the previous section. This analysis in Armendariz was entirely separate from the court’s unconscionability analysis.

Rather than summarizing the Armendariz court’s full defense against charges of FAA preemption – the main issue – it is more useful to continue to the court’s decision in Little, where the court responded in detail to its critics, and expanded Armendariz’ holding on statutory vindication of state claims to a state common law claim.

b. Little v. Auto Steigler: the Extension of Statutory Vindication Arguments to a State Common Law Claim, and the California Supreme Court’s Defense of the Analysis it Adopted in Armendariz

In 2003 the California Supreme Court followed up on its decision in Armendariz with Little v. Auto Steigler, Inc. In Little, the plaintiff worked for an automobile dealership. After being demoted and then fired, Little alleged tortious demotion in violation of public policy. In holding whether he could be forced to arbitration his claim, the California court extended the Armendariz holding regarding statutory vindication beyond a state FEHA statutory claim to Little’s claim, a California common law “Tameny” claim. Specifically, the court required four things: a plaintiff/employee seeking to arbitrate a Tameny claim must have “availability of damages remedies equal to those available in a Tameny suit brought in court, including punitive damages [citations omitted]; discovery sufficient to adequately arbitrate [the] claim; a written arbitration decision and judicial review sufficient to ensure that arbitrators have complied with the law respecting such claims; and allocations of arbitration costs so that

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458 Id. at 107-08.
459 Id. at 108.
460 See id. at 93-113. Compare to id. at 113-27.
462 Id. at 1069
463 Id.
464 Id. at 1081. In Tameny v. Atlantic Richfield Co. 27 Cal. 3d 167, 178 (1980) the California Supreme Court had “recognized that although employers have the power to terminate employees at will, they may not terminate an employee for a reason that is contrary to public policy.” Id. at 1076. “In other words, an employment agreement that required employees to waive claims that they were terminated in violation of public policy would itself be contrary to public policy.” Id. at 1077.
they will not unduly burden the employee.” 465

The court’s reasoning for its requirements was extensive. The court noted that the requirements of Armendariz, including the ban on cost-splitting, in arbitration, were based on the idea that certain statutory rights were not waivable. 466 This itself was grounded in two California state statutes (the same ones quoted in Armendariz), 467 which forbid, generally, all exculpatory contracts and also, again generally, forbid all private agreements from contravening a law established for a public policy reason. The Little court then reasoned here that a “Tameny” claim, like the FEHA claim considered by Armendariz, was designed to protect a public interest and likewise could not be contravened by a private agreement. 468

Next, the court turned to Supreme Court precedent to justify its decision. It recalled language in Gilmer that it called the “point of departure” for Cole, 469 and which also justified extending Armendariz to common law claims. This language from Gilmer stated that “[b]y agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial forum.” 470 The Little court reasoned there was no reason why this “would apply equally to nonstatutory public rights.” 471

Additionally, in Little the California Supreme Court took aim at the argument that the FAA preempted its holding here (and its earlier holding in Armendariz), and the court decided that the FAA did not preempt these holdings. 472 In reaching this conclusion the court noted that, under the FAA’s plain rules, arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 473 Furthermore, “[o]ne such long-standing ground for refusing to enforce a contractual term is that it would force a party to forgo unwaivable public rights.” 474 Thus, the court found that “[a]lthough the Armendariz requirements specifically concern arbitration

465 Id. at 1081.
466 Id. at 1076.
467 See supra notes 454-55.
468 Little, 29 Cal. 4th at 1077.
469 Id. at 1078.
471 Id.
472 Id. at 1079.
473 Id. at 1079 (quoting 9 U.S.C § 2, and quoting Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).
474 Id. (citing Baker Pacific Corp. v. Suttles, 220 Cal. App. 3d 1148, 1153-54 (1990) (mandatory employee waiver of all employer liability for asbestos exposure contrary to public policy)).
agreements, they do not do so out of a generalized mistrust of arbitration per se...but from a recognition that some arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights.\textsuperscript{475} The court pointed out that Armendariz and Little do not compel the use of a courtroom instead of arbitration; they merely assure minimum standards of fairness in arbitration.\textsuperscript{476} This was further evidence that they were not singling out arbitration for special treatment.\textsuperscript{477} Moreover, to the extent they appeared to treat arbitration clauses differently from other clauses by imposing a cost-shifting requirement, this was only because “arbitration, alone among contract provisions, may potentially require litigants to expend large sums to pay for the costs of the hearing that will decide his or her statutory [or] other public rights. In other words, it is not the arbitration agreement itself but the imposition of arbitration forum costs that under certain circumstances violates state law.”\textsuperscript{478} The court concluded, “nothing in the FAA prevents states from controlling arbitration costs imposed by adhesive contracts so that the remedy of prosecuting state statutory or common law public rights through arbitration is not rendered illusory.”\textsuperscript{479}

Turning now to the actual disposition in this case, it is notable that the court rejected Little’s contentions that the disputed arbitration clause was deficient with respect to the first three of the four requirements: remedies restrictions, discovery, or adequate judicial review.\textsuperscript{480} Nor did the court refuse to compel arbitration.\textsuperscript{481} The California court sent the case to arbitration and the only thing the court held was that on remand the court compelling arbitration had to require the employer to pay “all types of costs that are unique to arbitration.”\textsuperscript{482}

In holding this, the court acknowledged that in the wake of the Supreme Court’s ruling in Green Tree, a number of federal courts believed that one had to use a “case-by-case” analysis with regard to considering arbitration costs.\textsuperscript{483} The Little court acknowledged that federal court interpretations of Green Tree did not comport 100% with Armendariz’ Cole-based flat prohibition on allowing the plaintiff to pay costs of

\begin{itemize}
\item[475] Id. (emphasis in original).
\item[476] Id. at 1080.
\item[477] Id.
\item[478] Id.
\item[479] Id.
\item[480] Id.
\item[481] Id. 1085.
\item[482] Id. (quoting Armendariz v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83, 113 (2000).
\item[483] Id. at 1083.
\end{itemize}
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arbitration.484 But the court concluded that even if Green Tree did differ from the California rule, the FAA did not require “states to comply with federal arbitration cost-sharing standards.”485 The court also cited back to its FAA preemption reasoning (detailed in the paragraph, supra, containing notes 512 to 519), to remind its readers that it was merely applying general principles, and that therefore it could “not discern from the United States Supreme Court’s jurisprudence on FAA preemption a requirement that state law conform precisely with federal law as to the manner in which such public rights are protected.”486


The most important question of course is whether the California Supreme Court is correct that Little (and Armendariz) are justifiable extensions of the statutory vindication analysis to state claims, or whether, alternatively, the FAA preempts them. As a reminder, the Supreme Court’s own “statutory vindication” language was presented in cases involving federal statutory claims,487 and the federal circuits applied it while adjudicating cases that involved federal claims.488 Since those were federal claims, which were created by Congress, like the FAA itself, there could be no way that the FAA simply preempted them: they were co-equal federal statutes. But as it turns out, the Little court is also likely correct that the FAA does not preempt application of statutory vindication principles to state statutory claims.

Rather than re-summarizing the reasoning presented by the court above in Little,489 it might be helpful to begin with a hypothetical that was suggested by the Armendariz court: Suppose that a non-arbitration employment contract simply required employees to waive all of their rights under California’s FEHA statute.490 As the Armendariz court pointed out, any non-arbitral contract which “required employees to waive their rights under the FEHA would be contrary to public policy and unlawful.”491 That

484 Id. at 1084.
485 Id.
486 Id.
489 See supra notes 473-80, and accompanying paragraphs.
490 Cal. Gov. Code § 12900 et seq. FEHA, the Fair Employment and Housing Act, a California civil rights statute designed to prevent employment and housing discrimination. Id. at § 12920.
491 Armendariz v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83, 100-01
being the case, why should a California court allow a company to frustrate its statute’s remedial and deterrent purposes (by, for example, eliminating the remedies it provides for in FEHA, or by creating high arbitration costs) simply because the company includes this provision in an arbitration contract? That would make no sense, nor would the Supreme Court approve of such a result. That principle is all the court was appealing to in Little when it reminded its readers that arbitration contracts may be policed on such “grounds as exist at law or in equity for the revocation of any contract.”492

Moreover, recall that in Southland Corp. v. Keating, the Supreme Court found that the FAA pre-empts any state law or public policy that conflicts with section two the FAA.493 That does not change this result. All Southland means is that, as the Court wrote, “[i]n enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”494 Here, California is not requiring a judicial forum, and Southland is inapposite – in fact, in Little, the court ultimately remanded the case and ordered arbitration.495 California merely asks that an arbitration agreement should in fact comply with Supreme Court authority and thus “only determine[ ] the choice of forum,” which the Supreme Court states as its intended effect.496 But in determining that choice of forum, the agreement should not be allowed to dictate its remedies, costs, and procedures in a way that will likely deter anyone from being able to make bring even a meritorious claim in that forum.

By way of other courts supporting the California position, one other state court, the Missouri court in Whitney (discussed previously in section (II)(B)(4)(ii), supra, buttressed its unconscionability holding with the fact that a state statutory claim was at issue,497 which means that although the court did not cite to Armendariz, the Missouri court implicitly agreed that the principles of Green Treen extend beyond federal statutory claims to state statutory claims.498

(2000).

492 Id. at 1079 (quoting 9 U.S.C § 2).
494 Id. (emphasis added).
497 Id. at 311, 313. The court actually cited to Green Tree (id. at 311) and in reaching its holding wrote, “the costs would be so prohibitively expensive as to preclude, for all practical purposes, an aggrieved party from seeking redress for a violation of the Merchandising Practices Act.”
498 See Whitney v. Alltel Communications, Inc., 173 S.W.3d 300, 314 (Mo.App. W.D.
More importantly, one federal circuit has now accepted a position pretty much identical to the California court’s position, as applied to state statutory claims at least. In the case of Kristian v. Comcast, the First Circuit considered the validity of an arbitration agreement in a situation where the plaintiffs had brought both federal and state statutory antitrust claims.\footnote{Kristian v. Comcast, 446 F.3d 25, 29 (1st Cir. 2006).} In considering a restriction on the awarding of attorney-fees, which was contained in the arbitration contract, the court found that language prohibiting a “recovery of attorney’s fees and other costs directly conflicts with statutory language in federal and Massachusetts [antitrust] law, both of which provide for the recovery of attorney’s fees and costs in antitrust cases.”\footnote{Id. at 50 (emphasis added).} The court went on to find that the bar on attorney fees prevented the plaintiffs from vindicating their statutory rights in arbitration.\footnote{Id. at 52-53.} The court made absolutely no distinction between federal statutory claims and the Massachusetts state statutory claims, just as Armendariz doesn’t, nor did it even bother to consider that the FAA might preempt its holding as to state statutory claims. That court simply assumed the FAA did not. Kristian thus confirms the holding of Armendariz as applied to state statutory claims.

The application of these principles to state common law claims in Little is perhaps different, but insofar as state common law claims have historically required a certain level of access and certain remedies, it is indeed difficult to see why this would generally carry any less weight then a state legislative demonstration, particularly if the state has a generally applicable statute like California’s Civil Code section 3315, which as a reminder states that “[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”\footnote{CA Civ. Code § 3513.} To say that while Armendariz is valid, Little is not, would require one to say that the word “law” in the above statute refers only to the state’s statutory law and not to its common law. Such an interpretation would defy common sense.

Thus, the answer to whether statutory vindication was correctly applied in Little to state common law claims seems to depend entirely upon the factual characteristics of the claim and whether it is ordinarily waivable or not. Note how this also suggests the circumstances under which Little might potentially be adopted by courts in other states. First, such an adoption would require the state to have generally applicable statutes like

\footnote{2005); and V.A.M.S. § 407.020 et seq.}

\footnote{499}
section 3315, which forbids the contractual waiver of any law established for a public reason. 503 Second, this analysis could be applied only to common law claims that, like the “Tameny” claim in Little, have generally been considered “almost by definition unwaivable”504 in any context, which would have to include in arbitration.

As a final matter, in addition to the preemption issues discussed above, there is also the issue of how the Supreme Court’s Green Tree case impacts courts when they are applying a statutory vindication analysis to state claims. In this regard, Little is likely also correct that even if Green Tree impacts the Cole approach in the federal statutory context (discussed in section (II)(C)(2)(iv)), where it is binding precedent, it does not prevent a state court from applying a Cole-like standard to state statutory or common law claims. To construe Green Tree otherwise, as binding on state courts, would be to create a federal common law preempting all state determinations of whether their own statutes have been abrogated by any contract. That certainly doesn’t seem right (though admittedly the issue does remain open).

It should be noted that so far Little has not had much of an impact. Research indicates that very few cases outside of California have even mentioned or cited the case, and those that do tend to cite it for the general unconscionability principles that it uses in a separate part of the opinion that does not concern statutory vindication. 505 Perhaps this is owing to some general confusion about what statutory vindication is. For example, a number of publications have flatly misstated the statutory vindication holding in Little by saying that it is a kind of unconscionability analysis, 506 which it is not. Clearly both analyses ultimately are addressing the same thing: fairness in arbitration and the unfairness of exculpatory clauses that seek to deter the filing of claims rather than facilitate arbitration as an alternative to litigation. But as this entire large section of this Comment amply demonstrates, statutory vindication analysis depends upon its own unique wellspring of authority and should be thought of as a distinct analysis.

503 Id.
4. Conclusions in the Statutory Context

Within the context of federal statutory claims, courts that apply case-by-case analyses focusing on plaintiff cost are missing the real issue in these disputes: the deterrence of plaintiff’s attorneys who work on contingency. A better alternative may be to use a new case-by-case approach that focuses on attorney deterrence. But all of the case-by-case approaches are so extremely difficult to administer that, assuming the “per se invalidity” approach remains valid in the wake of Green Tree, which it likely does, courts should return to a per se rule that invalidates cost-splitting and remedies restrictions in arbitration agreements.

In the context of state statutory and even state common law claims, the problem of FAA preemption appears to arise. But the results in these cases can successfully be defended against such a charge because they comport with policy principles that apply to all contracts generally, and because they do not attempt to substitute the judicial for the arbitral forum. Statutory vindication analysis applied to state statutory and perhaps even certain historically unwaivable state common law claims constitutes a valid avenue that courts in other jurisdictions should consider pursuing when policing agreements to arbitrate state statutory and even those appropriate state common law claims.

Finally, even if recent Supreme Court case law in Green Tree does now chill the application of a “per se ban” on cost splitting in the federal statutory context it is less likely that the same is true in the context of state statutory and common law claims, where the case has only persuasive power.
III. THE CASES MAY BE DIVIDED INTO THREE THEMEATIC CATEGORIES, AND THE THIRD IS ALL THAT MATTERS

The clauses courts have policed in this Comment can be divided into three themes: clauses posing concerns related to A) “one-sidedness,” B) procedure in the arbitral forum, and C) substantive plaintiff access to, or deterrence from, the forum. Below, the previously discussed sections are now labeled by theme, and their normative potential to harm legitimate plaintiffs is critiqued in more detail. This section – as does the Comment overall – concludes that courts should focus on the third concern, where legitimate plaintiffs are most likely to be harmed, and where courts’ legitimate power to police arbitration agreements is also at its zenith.

A. One-Sidedness Concerns

The first of these themes is expressed in the consideration section, supra (II)(A)(1). Cases such as Floss and Cheek invalidated arbitration provisions that gave the company a unilateral right to modify the agreement. Additionally, addressing a second type of one-sided provision, the Showmethemoney court invalidated a unilateral requirement that the employee, but not the company arbitrate. Recall that this Comment found consideration analysis applied in this second situation to be wrong as a matter of contract law. In addition to that problem, section (II)(A)(1) clearly delineates the factual and contractual limitations of this analysis.

But looking beyond those limitations, if one thinks about these two types of clauses normatively, they should not concern courts. First, considering both types together, neither type cuts off plaintiff access to meaningful adjudication. Nor does either type represent a process within arbitration that undermines the neutrality or fairness of the actual forum.

Considering the first type of clauses – ones that allow modification of the agreement – one wonders why we should actually care if the company promulgating the arbitration agreement can change the terms of the arbitration clause, even with very little or even no notice. Does it really matter, especially when the employee never truly assented to the original terms in the first place? It doesn’t seem to. Rather, it seems like nothing more than a reenactment of the same “fiction of assent” that the employee or consumer agreed to in the first place.

509 See supra, section (II)(A)(1)(iv).
Moreover, as long as the original agreement contains a change-of-terms clause, the law ordinarily does not care about such changes, so long as the change does not violate principles of good faith and fair dealing, or materially violate the expectations of the other party.\textsuperscript{510} In fact, this is exactly the same situation we are all faced with by every other term our in credit card agreements as well, and in our agreements with our banks, etc., terms that are routinely changed via the use of so-called “bill stuffers.” Why should arbitration clauses treated be any differently? In fact, it seems like an application of state law that treats arbitration clauses differently in this respect also violates \textit{Doctor’s Associates}.\textsuperscript{511}

Finally, clearly no court is ever going to allow a company to violate the duty of good faith and fair dealing by changing the terms of the arbitration agreement \textit{during} arbitration, or \textit{after} the plaintiff files a claim. In other words, the circumstances that worry the courts most when they are making these preemptive invalidations either contractually cannot occur or would result in a very happy plaintiff as the ultimate winner in every such case.

Turning to the second classic type of one-sided arbitration clauses – those that compel only the plaintiff but not the company to arbitrate – even leaving aside the point that it violates contract law to bind parties to mutual, identical promises,\textsuperscript{512} this also does not really seem all that problematic. Who cares if only the employee arbitrates his or her claim, so long as courts are adequately policing the specifics of the arbitration agreement to make sure the company has not stripped out remedies and class-action provisions? Moreover, what does it profit the poor plaintiff when courts admonish the company that it must also arbitrate, if the courts are also going to turn around and allow the company to impose costs on the plaintiff that will either prevent her from paying to arbitrate her claim or will prevent her from securing an attorney on contingency at all?

Arbitration-access questions are of vastly greater importance than clauses like these. Clearly when companies use these clauses it is annoying, and at least at first glance looks unfair.\textsuperscript{513} But they are better characterized as a petty by-product of our courts’ decision to buy into the “fiction of assent” in the first place, rather than as a substantively unfair provision.

\textsuperscript{510} \textit{But see} Badie v. Bank of America, 67 Cal. App. 779 (1999) for an interesting opinion that not only applies these principles.

\textsuperscript{511} \textit{Doctor’s Assocs., Inc. v. Casarotto}, 517 U.S. 681, 683 (1996) (finding that a state, or a court applying state law, may not single out arbitration agreements for discriminatory treatment that other types of contracts do not receive).

\textsuperscript{512} \textit{See supra} notes 104-09.

\textsuperscript{513} No doubt many consumers and employees think that “business realities” would make it better for them to bring their claims in a courtroom, too, but the companies’ adhesive arbitration agreements give them no choice in the matter.
Perhaps, as an alternative to finding such clauses invalid, courts should treat them as creating a presumption that the company that has drafted them views the arbitration forum it has created as inhospitable (and let that presumption influence the court’s access analysis). But even this idea seems to be more rhetorical than meaningful, because the problematic provisions a company might also be imposing (such as remedies restrictions) make the forum hostile only to potential plaintiffs, but not to the company, and therefore create no reason why the company shouldn’t also want go into arbitration.

For these reasons, and for the reasons described in section (II)(A)(1), supra, courts are not only quite limited in their ability to police these clauses, but also they should have no need to do so if they are adequately policing the more damaging clauses that find their way into arbitration agreements, such as remedy-restrictions and cost-splitting provisions.

B. Concern about Procedures in the Arbitral Forum:

In this area, unlike in the area of “one-sidedness,” above, there is no doubt that courts have very good reason to be concerned, and should actively police clauses that violate principles of neutrality or create other procedural funny-business within arbitration. Here, the problem is the courts’ limited mandate to police such clauses, a state of affairs that Engalla, as well as the Supreme Court’s holding in Moses H. Cone, bring home. That said, the Hooters case illustrates the role courts can play through the use of unconscionability analysis (though in that case it was mis-written as a breach case,514 perhaps even intentionally515).

Engalla, which had a holding based on Kaiser’s long history of engaging in arbitration practices that in no way matched the stated terms of its arbitration provision, is another good example of concern about procedural unfairness in arbitration.516 But, as described in section (II)(A)(3), supra, is possesses limited applicability. Even if one applies it to third-party arbitration providers, as that section suggests, it is hard to imagine there are very many situations where third-party arbitration providers are consistently failing to abide by the stated terms of arbitration agreements promulgated by their clients in the way that Kaiser Permanente did in Engalla.

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514 See supra section (II)(A)(2).
515 The Fourth Circuit may have undertaken the breach and good faith analyses it did in Hooters because, while it was faced with one of the most egregious arbitration agreements ever drafted, it is also one of the most pro-arbitration courts in the country, and did not want to create clear precedent.
Additionally, and more importantly, the Supreme Court has severely constrained the ability of courts to police what goes on in arbitration, particularly in cases such as Moses H. Cone,\textsuperscript{517} which as a reminder held that allegations of waiver and delay in arbitration were for the arbitrator, not the court, to consider.\textsuperscript{518} The Court has also placed constraints upon the ability of courts to require as much discovery in arbitration as occurs in a case that is litigated in court,\textsuperscript{519} another limitation on policing of procedural fairness in arbitration.

On the other hand, Hooters, regardless of how one wants to characterize the doctrine it applied (or should have applied), illustrates the power that courts have to enforce procedural fairness in the arbitral forum. The Hooters arbitration agreement included any number of egregious procedural previsions.\textsuperscript{520} All of these were provisions that no court should allow to go forward. Indeed, they may represent the outer limits of what a company has attempted to slip into its arbitration agreement. All of them could have been invalidated using the doctrine of unconscionability.

Yet precisely because the provisions in the Hooters agreement represent the limits of what companies have attempted to slip into arbitration agreements, they are likely to be fairly rare. That is a conclusion buttressed by the fact that even the Fourth Circuit, historically one of the most pro-arbitration of all American courts, did not hesitate to invalidate them in Hooters. Following such a result, courts have not seen many agreements involving such provisions again.

Thus, looking at the clauses that courts have invalidated out of concern for the arbitral-procedural unfairness they include, it is clear that while this is a very valid concern for courts to have, it may not arise that often, either because the fact situation will be rare – as will be the case with applications of Engalla – or because the unfairness it promulgates is simply so obviously egregious that courts like the Hooters court have already immediately said no to it.

\textbf{C. Access to the Arbitral Forum}

The final concern courts have expressed is over plaintiff access to the arbitral forum. This is the underlying concern in the unconscionability cases of section (II)(B)(3), supra, which concerned remedies restrictions, the unconscionability cases of section (II)(B)(4), supra, which concerned

\textsuperscript{518} Id. at 24-25.
\textsuperscript{519} [insert citation]
\textsuperscript{520} Hooters of America, Inc v Phillips, 173 F.3d 933, 938 (1999). \textit{See also supra}, section II(A)(2), above, and accompanying notes.
class action waivers, and in the entire statutory vindication section, section (II)(C), *supra.*

This is where courts should focus their energy. As described above, courts have a lot of authority to police arbitration agreements for access concerns involving cost-splitting, remedies restrictions, class action waivers, and the like. Unfortunately, too often courts applying unconscionability analysis get lost in vague and abstract terminology. And in the context of statutory claims, courts have gotten lost in the thicket of evaluating the plaintiffs’ levels of income. Instead, in both of these analyses, courts should focus on what is important: the attorney-deterring, access-denying nature of cost-splitting, remedies restrictions, class action waivers, and other like clauses. This will allow courts to more efficiently and honestly invalidate access-denying provisions, which are the provisions that constitute the greatest threat to consumers and employees by preventing them from accessing the very arbitral forum that the arbitration agreement has purported to create.

It is perhaps obvious, but unconscionability analysis and statutory vindication analysis are similar inquiries. In *Kristian v. Comcast* the First Circuit declined to engage in a separate analysis of unconscionability after it analyzed the case under the rubric of statutory vindication.521 In doing so, the court noted “striking similarities between the vindication of statutory rights analysis and the unconscionability analysis.”522

But there is one important difference to note, which concerns their scope. Unconscionability is broadly available and can be applied in all cases, while statutory vindication is only available against federal statutory claims,523 and according to some courts, state statutory claims.524 According to the California Supreme Court it is also applicable to non-waivable common law claims,525 an analysis which, if adopted elsewhere, would significantly shrink the difference between the reaches of unconscionability and statutory vindication analyses.

Both analyses have at times failed to look at the real story of contingent-financing deterrence, especially when evaluating remedies restrictions. Too often courts applying unconscionability analysis get lost in vague and abstract terminology. A good example of this was the case of *Ex Parte Thicklin,* the Alabama Supreme Court case that hung its unconscionability analysis on the policy expressed by its state’s legislature.

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521 Kristian v. Comcast Corp., 446 F.3d 25, 63-64 (1st Cir. 2006).
522 Id. at 63.
523 See, e.g., the application Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).
524 See id. at 51-53; see also v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83 (2000).
to punish reckless and intentional acts with punitive damages.\textsuperscript{526} This is an
interesting analysis, and it’s also valid, but it fails to get specific about the
real problem plaintiffs face, which is that if the punitive damages provision
is allowed to stand, contingent-fee attorneys cannot possibly make a profit
on the claim, and thus the plaintiff cannot prosecute the claim.

On the other hand, in the class action waiver context, the case of
\textit{Discover Bank} did a much better job talking about the exculpatory effect
class action waivers create when the harm a company perpetuates is large,
but diffused amongst hundreds of thousands of customers.\textsuperscript{527} At bottom,
unconscionability analysis in this context should be concerned with such
practical concerns, like the \textit{Discover Bank} court was, and not with
legislative policy analogies or vacuous, figure-of-speech notions such as
“one-sidedness.”\textsuperscript{528} The important questions have to do with \textit{why} a clause
is unfair. And the answer almost invariably has to do with a way in which it
actually operates to deny the plaintiff access to any adjudicative forum.

The same critique applies in the context of vindicating statutory
claims, where the \textit{Kristian} court got it exactly right when it said that,
“\textit{W}ithout the possibility of recovering costs and attorney’s fees, an
individual plaintiff would \textit{undoubtedly} have an impossible time securing
legal representation…. given the minor amount an individual plaintiff
would likely recover relative to the cost of prosecution.”\textsuperscript{529} As discussed in
section (II)(C), whether courts are analyzing cost-splitting provisions or
remedy restrictions, they should think about the impact these clauses will
have upon a potential plaintiff’s ability to secure financing for even a
meritorious claim. As far as choosing a standard, the \textit{Cole per se standard}\textsuperscript{530}
makes this analysis easier, and likely reaches the correct result,
because it is hard to imagine a remedies restriction or a provision splitting a
significant amount of costs that will \textit{not} negatively impact a contingent-fee
attorney’s cost-benefit analysis.

Finally, there is no reason why this statutory vindication analysis
can’t be applied against clauses other than those explicitly discussed in
section (II)(C). For example, the \textit{Kristian} court applied it to invalidate a

\begin{footnotes}
\item[526] Ex parte Thicklin, 824 So.2d 723, 732 (Ala. 2002) (overruled on other grounds).
\item[527] \textit{Discover Bank} v. \textit{Boehr}, 36 Cal. 4th 148, 161-64 (2005)
\item[528] In that vein the entire line of cases, not previously discussed in this comment, that
use “\textit{one-sidedness}” language to analyze unconscionability, completely miss the point.
Courts committing this heresy are: \textit{Iberia Credit Bureau} v. \textit{Cingular Wireless LLC}, 279
F.3d 159 (7th Cir. 2004); \textit{Ingle} v. \textit{Circuit City Stores, Inc.}, 328 f.3d 1165, 1173 (9\textsuperscript{th} Cir.
2003); \textit{Iwen} v. U.S. West Direct, 977 P.2d 989, 995 (Mont. 1999); \textit{Taylor} v. \textit{Butler}, 142
S.W. 3d 277, 286 (Tenn. 2004); and \textit{Wisconsin Auto Title Loans, Inc.} v. \textit{Jones}, 714
N.W.2d 155, 160-61 (Wis. 2006).
\item[529] \textit{Kristian} v. \textit{Comcast Corp.}, 446 F.3d 25, 52 (1\textsuperscript{st} Cir. 2006) (emphasis added).
\item[530] \textit{Cole} v. \textit{Burns Int’l Sec. Servs.}, 105 F.3d 1465, 1481 (C.A.D.C. 1997).
\end{footnotes}
class action waiver, and the court explicitly cited Discover Bank as persuasive authority, while acknowledging that Discover Bank was decided on unconscionability grounds.\textsuperscript{531} Additionally, such an analysis would be quite effective in other areas, for example against a clause that created a very short statute of limitations even though the statute under which a claim was brought provided for a longer one. In any case, as with the unconscionability analysis, statutory vindication analysis should be applied in a concrete manner that explicitly describes, to all critics of court intervention in arbitration agreements, the way in which the invalidated clause is not an inherent part of the arbitral forum, but instead is a hidden soldier whose purpose is to make sure nobody actually has any incentive or ability to get to that forum.

\textbf{IV. CONCLUSION}

The past twenty years have seen tremendous growth in the use of mandatory arbitration instead of the courtroom to resolve disputes between parties, and at nearly every turn the Supreme Court has done all it can to facilitate this process. What is surprising is how many people believe that lower courts have almost no power and no role to play once a company has promulgated an arbitration agreement – any arbitration agreement – to its consumers or employees. But as this Comment demonstrates, courts in fact do have enormous power to make sure this increasing flood of arbitration agreements comports with generally applicable contract and fairness standards. From the cases cited in this Comment one may also draw the conclusion that courts possess a “scattershot mentality.” They are rightly concerned about the fairness of the arbitral forum and about ensuring plaintiff-access to it, so they are firing off legal shots in many directions – some perhaps more defensible than others. An unfortunate result of this is that corporate defense attorneys have had success in portraying courts that have the temerity to critique any content of arbitration agreement as “anti-arbitration.”

What this essay hopefully accomplishes is to focus the vision of courts on the clauses in arbitration agreements that actually harm plaintiffs most, and on the contractual and statutory vindication rules that can have the most powerful, and legitimate, impact. The goal is to increase the credibility of courts that undertake to police arbitration agreements. But that does not mean the goal is to hinder arbitration. If, in every case in which a claim-

\textsuperscript{531} Kristian, 446 F.3d at 53-60.
deterring provision is struck away, the case is sent to arbitration anyway, this commentator will not object. In that situation, courts could be assured they were furthering the federal policy in favor of arbitration, rather than furthering a corporate policy in favor of using that federal policy to deter any claims at all. It is crucial that courts focus more uniformly on these access-denying provisions – particularly class action waivers and remedy restrictions – because they are the most damaging to potentially meritorious claimants. If courts do this, then consumers and employees who are forced into arbitration agreements will be more likely able to go to arbitration and have their claims adjudicated.