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On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence

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Every year for each of the last ten years, Democratic legislators proposed amendments to the Federal Arbitration Act (FAA) that would prohibit businesses from including pre-dispute arbitration agreements in contracts involving employees.¹ Each year, these proposed amendments failed to gain traction. Over this same period, businesses continued to expand their use of arbitration agreements, particularly in their relationships with consumers.² The increased

¹ See, e.g., H.R. 815, 107th Cong. (2001) (proposing amendment to FAA prohibiting mandatory arbitration in employment agreements); H.R. 2282, 107th Cong. (2001) (proposing amendment to FAA that would prohibit arbitration agreements entirely in employment contracts). Although some of the early bills were responses to the use of arbitration to resolve statutory employment discrimination claims, drafters offered protection from arbitration to consumers as well. See, e.g., Arbitration Fairness Act, H.R. 3010, 110th Cong. (2007). In addition, legislators proposed amendments to various statutes such as the Consumer Credit Protection Act that would have had the same effect. See, e.g., Consumer Fairness Act, H.R. 1887, 108th Cong. (2003). Almost none of these bills were reported out of committee, and those that survived the committee step of the legislative process were not voted on by the House or Senate. Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (July 21, 2010) (Director of newly formed Consumer Credit Protection Agency authorized to prohibit or impose conditions or limitations on the use of arbitration between a consumer and a financial services provider if the Director determines, after conducting a formal study of the use of binding arbitration agreements in the financial services industry, that such prohibitions or limitations are in the public interest and for the protection of consumers).

² See Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. MICH. J.L. REFORM 871, 886 (2008) (finding clauses providing for mandatory arbitration in 92.9% of employment contracts and 76.9% of consumer contracts); Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 64 (2004) (examining a different mix of industries and finding that 35.4% of consumer contracts contained an arbitration clause, with 69.2% of financial services contracts containing such a clause); Katherine V.W. Stone, Rustic Justice: Community and Coercion Under the Federal Arbitration Act, 77 N.C. L. REV. 931, 933-36 (1998-1999) (discussing the expansion of arbitration into consumer agreements in relation to Supreme Court arbitration jurisprudence); Zachary Gima et al. Forced Arbitration: Unfair and Everywhere (Public Citizen 2009) (providing statistics and other information about the
use of consumer arbitration agreements, together with growing concern among the plaintiff’s bar and consumer advocates that these agreements unfairly disadvantage consumers, led to the reconfiguring of the legislation and its reintroduction in 2009 as the Arbitration Fairness Act. Unlike previous iterations of the legislation, which focused only on the impact of arbitration agreements on employees, the AFA amendments extend the moratorium on pre-dispute arbitration agreements to both consumers and franchisees.

This reintroduction seems to come at a good time for consumer advocates and the plaintiffs’ bar. With a democratic president and democratic-majority Senate in office, successful

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[3] H.R. 1020, 111th Cong. (February 12, 2009). S. 931, a companion bill, with similar provisions, was introduced to the U.S. Senate on April 29, 2009.

[4] The introduction occurred even though the three major providers of consumer arbitration services have voluntarily adopted comprehensive rules designed to ensure that arbitration is fair to consumers. See American Arbitration Association, Consumer Due Process Protocol, http://www.adr.org/sp.asp?id=22019 (effective Apr. 17th, 1998; last visited Jun. 30, 2010) (providing extensive protections to ensure that consumers have access to information about arbitration, that consumers have an equal voice in selecting a neutral arbitrator, that fees are reasonable, and that the right to representation is ensured); Judicial Arbitration and Mediation Services, Consumer Minimum Standards, http://www.jamsadr.com/rules-consumer-minimum-standards/ (effective Jul. 15th, 2009; last visited Jun. 30, 2010) (providing standards for consumer arbitrations including availability of all remedies at law, prohibitions on one-sided arbitration clauses that bind only the consumer, right to have the dispute heard in consumer’s hometown, right to a written arbitrator decision, right of consumer to participate in choosing the arbitrator, reduced fees, right to representation); National Arbitration Forum, Arbitration Bill of Rights, http://www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf (2007) (committing to adherence to a series of principles including preservation of remedies provided by law, reasonable fees, convenient hearings, reasonable discovery, access to information, and arbitrator neutrality).
adoption of the AFA would appear more likely.\(^5\) As in prior years, underlying the proposed legislation is dissatisfaction with the arbitration process stemming from the expansion of arbitration agreements to consumers and other parties who have little leverage when negotiating an arbitration agreement with a business.\(^6\) Yet the draconian anti-arbitration measure, inaptly

\(^5\) Although passage would *Seem more* likely, the legislation’s current focus, on eliminating pre-dispute arbitration agreements between one-shot and repeat players, may well be too extreme to garner sufficient support for passage. Although the 2009 version of the bill has eleven more sponsors in the House and 5 additional sponsors in the Senate when compared to the 2007 version, the bill has nevertheless been sitting in committee for over a year. Previous versions of the bill did not make it out of committee. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1250 (stating that passage of AFA is a significant possibility); Wayne Outten, a plaintiff’s attorney and arbitration critic, said, on a recent panel addressing the Arbitration Fairness Act, that the act has a “50-50 chance of passage.” 28 ALT. TO THE HIGH COST OF LITIGATION 122 (June 2010); Michael Fox, *It’s Not EFCA, Now It’s FAN*, Jottings by an Employer’s Law., Apr. 24, 2009, http://employerslawyer.blogspot.com/2009_04_01_archive.html (concluding that “odds are in favor of [the Arbitration Fairness Act of 2009’s] passage”). But See Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 612 (2009) (stating that “even with a Democratic Congress and President, it *Seems* unlikely that a bill that would so drastically alter the employment law landscape will actually become law in the near future).


named the “Arbitration Fairness Act,” does not remedy arbitration’s shortcomings, but instead eliminates pre-dispute arbitration agreements between most repeat and one-shot players. The current legislative proposal misses the mark primarily because it overstates the case against arbitration, rendering the legislation unpalatable to corporate and business interests as well as many consumer and employee advocates. Because corporate and other interests are likely to be successful in opposing the bill in its current form, the real changes needed in arbitration, i.e. changes to permit consumers with low value claims to have their cases heard in some forum, will not occur.

Perhaps not coincidentally, members of Congress proposed the Arbitration Fairness Act at a time when the Supreme Court’s decisions repeatedly ensure the enforcement of the liberal

the current arbitration system is “ripe for abuse” and that arbitration “as operated by NAF, does not provide protection for those consumers”); Robin Sidel & Amol Sharma, Credit-Card Disputes Tossed Into Disarray, THE WALL STREET JOURNAL, July 21, 2009, available at http://online.wsj.com/article_email/SB124822374503070587-IMyQjAxMDI5NDI4MzlyMjMzMzWj.html (due to consumer complaints, the AAA announced it will stop participating in consumer-debt-collection disputes until new guidelines are established).


Some consumer relief may come through passage of the Dodd-Frank Act. See Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (July 21, 2010). This legislation governing the financial services industry takes a less radical approach to arbitration, enabling the newly established Consumer Finance Protection Bureau to study the use of arbitration and implement reform if the reform is in the public interest and for the protection of consumers. Although the bill authorizes the agency to ban or limit pre-dispute arbitration agreements between consumers and covered financial providers for consumer finance products and services and in residential mortgages and home equity lines of credit as well as in securities law disputes, it does not mandate the elimination of arbitration.
federal policy favoring the use of arbitration as a dispute resolution mechanism.\(^9\) One recent decision abandoned almost thirty years of precedent to authorize parties to arbitrate unionized employees’ statutory discrimination claims.\(^{10}\) Another decision dealt a blow to consumers’ ability to pursue their claims, precluding arbitrators from ordering parties to use class arbitration when the parties’ arbitration agreement is silent on that issue.\(^{11}\) A third decision, *Jackson v. Rent-a-Center West,* empowered parties to delegate greater responsibility to the arbitrator. In *Jackson,* the Court decided that the parties can delegate to the arbitrator, if they use clear and unmistakable language, the power to decide whether an arbitration agreement is unconscionable.\(^{12}\) Finally, the Court may place the nail in the coffin on consumers’ ability to pursue class processes when bound by an arbitration agreement in *AT&T v. Concepcion.*\(^{13}\) In that case, the Court will decide whether the FAA preempts a judicial decision that prohibits enforcement of class action waivers when agreed to by consumers with low value claims.\(^{14}\)

Taken together, these cases reinforce the Court’s philosophy that parties’ arbitration agreements are enforceable and that, with few exceptions, parties should be able to structure arbitration as they see fit, including prohibitions on the use of class action procedures.

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10 See Pyett, 129 S.Ct. at 1464.
11 See Stolt-Nielsen, 130 S.Ct. at 1771. Some critics as well as Justice Ginsburg question whether this holding will extend to consumer arbitration. *Id.* at 1783 (Ginsburg, J., dissenting) (“Second, by observing that ‘the parties [here] are sophisticated business entities,’ and ‘that it is customary for the shipper to choose the charter party that is used for a particular shipment,’ the court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis.”)
12 See *Jackson,* 2010 WL 2471058 at *5.
13 See *AT & T Mobility LLC v. Concepcion,* 584 F.3d 849 (9th Cir. 2009), *cert. granted,* 78 USLW 3454 (U.S. May 24, 2010) (No. 09-893).
14 See *id.*
Why a disconnect between the judicial interpretation of the FAA and legislative view of arbitration? A partial answer may be found in the ongoing public campaign against arbitration. Public Justice and Public Citizen, among others, are waging. Despite substantial empirical evidence to the contrary, groups like Public Citizen receive considerable press attention for anecdotal reports about unfair or expensive arbitration processes in which consumers have participated. These reports garner legislative attention and may, perhaps, have encouraged legislators to propose a poorly conceived answer to a longstanding question – how the Federal Arbitration Act should be amended to adapt to the modern use of arbitration?

What legislation is necessary to reform arbitration? While arbitration’s critics attack the process on a variety of grounds, the most pressing issue in consumer arbitration, in the wake of recent Supreme Court decisions, is the lack of a viable forum for consumers with low value claims. Wireless phone companies, banks, computer sellers and cable companies routinely integrate arbitration agreements with class arbitration waivers in their boilerplate contract language with consumers. For most consumers, potential claims arising from such services

17 Darren P. Lindamood, Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009, 45 WAKE F. L. REV. 291, 310 (2010) (stating that preventing consumers from signing pre-dispute arbitration agreements “will result in less access to a remedy for plaintiffs with small claims... when employers or manufacturers are not bound by a predispute arbitration agreement, they can refuse to agree to arbitrate small claims with the knowledge that the high cost of litigation will prohibit the plaintiff from obtaining counsel.”)
18 Verizon, Sprint, AT&T and T-Mobile use class action waivers in their customer arbitration agreements. See http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true (effective date, 7/18/10); Sprint PCS Agreement, https://manage.sprint.pcs.com/output/en_US/MyPhoneandPlan/ChangePlans/popLegalTermsPrivacy.htm (1/26/11); Verizon Customer Agreement, verizonwireless.com (1/26/11); AT&T v. Concepcion, Supreme Court No. 09-893
involve relatively small amounts of money.\textsuperscript{19} Were class actions available,\textsuperscript{20} consumers with low value claims might be able to vindicate these kinds of complaints.\textsuperscript{21} The consumer’s acceptance of an arbitration agreement, however, precludes recourse to those forums (in most cases). Although arbitration services providers reduced the costs to the consumer of participating in arbitration,\textsuperscript{22} consumers participating in arbitration continue to pay some filing (describing ATTM’s arbitration agreement). See also Gima, supra note 2. Stephen Landsman, Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings, 37 FORDHAM URB. L.J. 273, 279 (2010) (discussing self-protective requirements in an unregulated markets featuring adhesive conditions); Peter Rutledge, Point: The Case Against the Arbitration Fairness Act, 16 DISP. RES. MAG. 4, 7 (2009) (arbitration’s deprivation of consumers’ ability to bring class actions is potentially problematic).

\textsuperscript{19} Peter Rutledge, Point: The Case Against the Arbitration Fairness Act, 16 DISP. RESOL. MAG. 4, 7 (2009) (Rutledge calls for more empirical research to determine whether the adoption of class action waivers is as widespread as consumer advocates believe.

\textsuperscript{20} Some scholars suggest that a “small claims court carve out” would be an adequate remedy for this problem. See Alan Kaplinsky, The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers, 1789 PLI/Corp 493, 516 (April 2010). Offering the option of small claims court may not be sufficient. The arbitration agreement in the Concepcion case specifically provided that consumers could elect to bring their claims in small claims court. In Brief of Petitioner-Appellant at 8, AT&T v. Concepcion, No. 09-893 (“Either party may bring a claim in small claims court in lieu of arbitration” ). Nevertheless, the Ninth Circuit held that the class-action waiver was substantively unconscionable on the grounds that there would still be insufficient incentive for consumers to bring low-value claims without a class process available.

\textsuperscript{21} See Laster v. AT&T Mobility, L.L.C., 584 F.3d 849, 855-56 (9th Cir. 2009) (“We held in Shroyer that a claim worth a few hundred dollars did not provide adequate incentive for a customer to bother pursuing individual arbitration. 498 F.3d at 986. The $30.22 at issue here is even less of an incentive to file a claim. As a result, aggrieved customers will predictably not file claims—even if the odds are that after the letter-writing and arbitrator-choosing, they will get a $30.22 offer—thereby “greatly reduc[ing] the aggregate liability” AT&T faces for allegedly mulcting small sums of money from many consumers.”). The Searle Civil Justice Institute study of consumer arbitration clauses, issued in 2009, found that 109 of the 299 arbitration clauses contained a class arbitration waiver. The study found that all cases involving cell phone companies (5 out of 5) and all credit card issuers’ agreements (26 of 26) contained class arbitration waivers. In other areas, such as automobile sales and home builder contracts, the appearance of the waivers was closer to 50 or 60%. Searle Civil Justice Institute, Consumer Arbitration Before the American Arbitration Association at 102-03 (March 2009).

\textsuperscript{22} See AAA Rules on Consumer Arbitration Costs, http://www.adr.org/sp.asp?id=22039 (last visited Jun. 26, 2010) (stating that for claims under $10,000, consumer is responsible for half the arbitrator fees up to a maximum of $125, and for claims between $10,000 and $75,000, the consumer is responsible for half the arbitrator fees up to a maximum of $375. Consumers are not responsible for administrative fees); JAMS Rules on Consumer Minimum Standards, http://www.jamsadr.com/rules-consumer-minimum-standards/ (last visited Jun. 26, 2010) (stating that the $250 is the maximum fee to be paid by a consumer when the consumer initiates the arbitration, and that the corporation is to pay all arbitration fees when the corporation initiates the arbitration); NAF Code of Procedure at 10, 62, August 1, 2008, available at http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf
fee and may also pay some portion of the arbitrator’s fee. As a result, access to a dispute resolution process may prove prohibitively expensive for consumers with relatively small claims. If the consumer has not signed an arbitration agreement, he or she might be able to find recourse in a class action process. If bound by an arbitration agreement, however, until recently, a consumer might find solace in class action arbitration, which arbitrators often ordered if the parties did not place a class arbitration waiver in their arbitration agreements. Although not definitively resolved, Supreme Court’s Stolt-Nielsen decision sent a strong message to those who might think class action arbitration was a possible remedy to the potential harshness of the arbitration process. Under Stolt-Nielsen, if the parties’ agreement to arbitrate does not explicitly authorize the use of class action arbitration, and the parties do not consent to it, the arbitrators may not order it.

With class action arbitration likely removed as an option for consumers with low value claims who are bound by arbitration agreements, the most pressing question in arbitration reform

See, e.g., id. Interestingly, some businesses have drastically altered the standard arbitration fee structure so that consumers pay little or no fee. For example, ATTM (formerly Cingular Wireless), which provides cellular services to over 80 million subscribers, gives subscribers with a dispute the option of pursuing their claim in small claims court or arbitration. If the consumer chooses to file an arbitration claim, ATTM reimburses the $125 AAA consumer filing fee and pays all the costs of arbitration regardless of who wins. See also, Sprint, T-Mobile and Verizon Wireless, infra note 18.

According to AAA’s searchable class arbitration docket, AAA is currently administering 302 class arbitration cases (site last visited 1/14/11).

Stolt-Nielsen, supra note 9 at 1768. In at least one class arbitration case since Stolt-Nielsen was decided, the arbitrator still ordered class arbitration even though the arbitration clause did not directly address the issue. See Benson Clause Construction Award (Meyerson, Arb.) (on file with author).
is what to do about consumers with small claims who cannot afford to bring those claims as individuals.\textsuperscript{26} Rather than attempt to eliminate arbitration in its entirety, a better approach, and one with greater likelihood of success in the legislative arena, would be to amend the FAA to permit class action arbitration, or, at the least, prohibit businesses from precluding class action arbitration or class actions in court through the use of a pre-dispute arbitration agreement.\textsuperscript{27} If

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26 One possible remedy for consumers is creating an exception to allow consumers bound by arbitration agreements to proceed in small claims court. See infra note 20. Amy J. Schmitz, Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms, 15 HARV. NEGOT. L. REV. 115, 117-18 (2010) (advocating that the “shoulds” of the 1998 Consumer Due Process Protocol, including a guarantee of consumer access to small claims court, be turned into legislative “musts”); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. MICH. J.L. REFORM 871, 890 (2008) (because small claims court may be just as inexpensive as arbitration, it is not clear that policy should favor the arbitration of small-scale disputes).

As discussed in note 20, the small claims court option may prove inadequate. Class processes, unlike small claims court create an incentive for consumers to bring the cause of action. See Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 WM. & MARY L. REV. 1, 28-31 (2000); Jean R. Sternlight & Elizabeth J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?, 67 LAW & CONTEMP. PROBS. 75 (Winter/Spring 2004). See also S.I. Strong, The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?, 30 MICH. J’L INT’L L. 1017, 1050 (2009) (lists an expert’s ten benefits of class actions: they (1) reduce duplication of discovery, motion practice, and pretrial procedures; (2) allow a single judge to familiarize himself or herself with the legal and factual issues; (3) provide consistency of results for all the injured and for the defendants; (4) enhance the possibility of a single action resolving the entire problem, hence preventing the need for repetitive litigation of similar issues; (5) permit plaintiffs’ attorneys to generate enough capital to conduct the litigation on a playing field level for both sides; (6) enhance the possibility of a global settlement, which can provide reasonable relief for prospective claimants while limiting the costs for both parties and providing closure to the dispute for defendants; (7) provide the possibility of a single fair punitive damage amount instead of repetitive and overlapping punishment; (8) give the court power to control legal fees, which may otherwise be much greater than warranted; (9) allow a single appellate panel to review the case; and (10) permit recoveries for small claims by those who may not even know they were injured); David S. Evans, Class Certification, the Merits, and Expert Evidence, 11 GEO. MASON L. REV. 1, 4 (2002) (stating that the four major benefits of class actions include: a reduction of litigation costs, an increased deterrent effect, economization of judicial resources, and affording a convenient method for defendants to settle large numbers of related claims); Myron S. Greenberg & Megan A. Blazina, What Mediators Need To Know About Class Actions. A Basic Primer, 27 HAMLINE L. REV. 191, 207 (2004) (describing efficiency benefits of class actions). Some courts agree. Muhammed v. County Bank of Rehoboth Beach, 912 A.2d 88, 99-100 (NJ 2006) (rational claimants forego rights rather than pursue low value claim); In re American Express Litigation, 554 F.3d 300, 320 (2d Cir. 2009).

27 Why is the availability of class processes important? Professor Jean Sternlight contends, “[m]any claims can be feasibly presented only by a class rather than on an individual basis, despite the fact that some courts continue to enforce arbitration and deny class actions in such impractical situations. Where plaintiffs can establish that the
the FAA were amended to address the real inequities in the arbitration process, (i.e. the use of class action waivers), consumers as well as arbitration itself (as a dispute resolution mechanism) would benefit.  

This article addresses the class action issue through the lens of recent Supreme Court jurisprudence. Before the Court decided *Stolt-Nielsen*, courts often disagreed about whether a consumer’s waiver of the right to pursue class actions in court or arbitration was unconscionable. Following *Stolt-Nielsen*, one would expect to see businesses altering their agreements with consumers so that the issue of class action arbitration is not addressed because, if the agreement is silent, neither a court nor an arbitrator would be able to order the parties to class arbitration. Following *Jackson*, one would expect to see those same businesses rewriting their arbitration agreements to delegate to the arbitrator decisions about whether an agreement to arbitrate is unconscionable. Although businesses have no guarantee that an arbitrator will reject unconscionability challenges more easily than would a court, one suspects that an arbitrator, who wants to arbitrate and earns a salary from arbitration, will be more inclined to find an arbitration agreement enforceable than would a court. And, finally, there may well be a ruling in the 2010-

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prohibition on class actions would deprive them of any forum in which to present their federal statutory claim by making that lawsuit economically unfeasible, courts should refuse to enforce such a provision—either by voiding the arbitration clause altogether, by holding the arbitration clause inapplicable as to class claims, or by permitting plaintiffs to present their claims in an arbitral class action.”  Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 102-03 (2000).

28 Studies reveal that consumer arbitration is a process that benefits both businesses and consumers. See Peter B. Rutledge, *Whither Arbitration?*, 6 GEO J.L. & PUB. POL’Y 549, 556-560 (2008) (reviewing empirical data suggesting that win rates and perceived fairness in consumer arbitration are comparable to or better than in litigation); Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association: Preliminary Report at 6-16, March 2009, available at http://www.searlearbitration.org/p/full_report.pdf* (reviewing empirical data suggesting that consumer arbitration is faster and cheaper than litigation with comparable win rates, and that there is a lack of evidence for repeat-player bias); Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV 1051, 1062-1070 (2009) (reviewing data NAF consumer collections cases and finding that arbitration frequently resulted in financial breaks for consumers, that most consumers paid few or no fees in arbitration, and that the cases are generally resolved quickly in arbitration).
2011 Supreme Court term that the FAA preempts judicial decisions rendering class action waivers unenforceable. These cases, considered together, show strong judicial support for arbitration but, at the same time, an anti-class arbitration sentiment. Even without the predicted result in Concepcion, the class action waiver issue needs legislative attention so that consumer arbitration may truly become a useful and beneficial alternative dispute resolution process. If Congress could address this issue effectively, the major problem associated with consumer arbitration would be resolved.

I. Consumer Arbitration

Although critics lambast consumer arbitration as unfair to consumers, numerous empirical studies of arbitration demonstrate that consumer arbitration agreements typically provide fair and affordable access to justice to consumers. The absence of consumer arbitration, which would shift these claims into traditional court processes, would effectively eliminate many of these claims because the litigation process is expensive and difficult to navigate without representation. In one area, though, consumer arbitration agreements appear to preclude access to justice rather than enable it. Contractual provisions banning class actions or class action arbitration effectively foreclose the prosecution of individual claims of low value.

29 As Professor Rutledge notes, addressing the class action waiver issue is a more “calibrated solution” than a wholesale ban on pre-dispute arbitration agreements. Peter Rutledge, Point: The Case Against the Arbitration Fairness Act, 16 DIS. RESOL. MAG. 4, 7 (2009).
Thus, an arbitration provision tends to be the end of the road for a consumer with a low value dispute. That businesses implement arbitration agreements with class action waivers for the primary purpose of preventing class claims offers further support for the argument that Congress should eradicate this aspect of arbitration agreements.\(^1\)

Because class action waivers prevent many consumers from pursuing their claims, and because courts often enforce these waivers, legislation addressing the class action waiver issue is necessary. This section will review the current state of empirical evidence on consumer arbitration and then focus on the impact of consumer arbitration agreements on the availability of class action procedures, whether in litigation or arbitration. Ultimately, this section will conclude that the primary objection to consumer arbitration agreements is not that they fail to provide justice to most consumers but that these clauses preclude access to justice for those consumers, typically with low value claims, who would only be able to pursue their claim if they join with other consumers.

A. The Current State of Consumer Arbitration

The increased use of consumer arbitration in non-negotiated agreements precipitated a call for empirical analysis of the costs and benefits of consumer arbitration as an alternate means for resolving disputes. The working assumption of many anti-arbitration advocates was that a

\(^1\) Even without empirical studies, there is a general sense that businesses utilize consumer arbitration agreements to avoid class processes. See David Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1319-20 (2009). Professor Schwartz discusses businesses’ motivation for adopting these clauses as well as the benefits of the class processes: “... arbitration may also displace class actions. By aggregating low-cost/low-stakes or high-cost/low-stakes cases into a single high-cost/high-stakes case, class actions can realize potential process-cost economies of scale that make them a relatively inexpensive forum for the class members—both in terms of monetary and information costs. Defendants’ aggressive efforts to use mandatory arbitration clauses as an escape from class actions provide a strong signal that their primary concern is to deter claims, not to ensure that all claims against them are aired more cheaply. While there is no doubt disagreement among some mandatory arbitration supporters about whether class actions are arbitrable—and the law remains unsettled—it is clear that at least some find the possibility of getting rid of class actions as the primary virtue of mandatory arbitration.”
business-promulgated dispute resolution clause must, by its very nature, be harmful to consumers. Initially, empirical research seemed to bolster this assumption.

In 2007, Public Citizen, a national non-profit consumer advocacy group, issued a scathing report attacking the consumer arbitration process. The Public Citizen report appeared to provide evidence that arbitration is unfair to consumers. Academics and arbitral organizations responded quickly, providing arguments and statistics suggesting significant difficulties with Public Citizen’s analysis of the available empirical evidence. Ultimately, review of the empirical evidence revealed that Public Citizen (and others’) claims that consumer arbitration is inherently unfair to consumers were overstated.

But the Public Citizen Report generated interest in conducting better empirical research of the consumer arbitration process. Each and every subsequent study of consumer arbitration concluded that, in the vast majority of consumer arbitrations, consumers pay fewer fees than they would in court, obtain results faster than they would in court and won greater relief than they would likely win in court. Although more empirical research would obviously shed additional light on the issue, the evidence from the research available does not support the promulgation of the Arbitration Fairness Act as currently written. Rather, it supports a narrow tailoring of the Act to address specific concerns, such as the increased use of class action waivers. This section briefly examines studies conducted following the issuance of the Public Citizen Report to determine what evidence is available from which subsequent assumptions can be made.

Professor Kristen Blankley and I examined the same data set Public Citizen used for its report but arrived at considerably different conclusions. Both studies evaluated the 34,000 NAF-administered California arbitration cases. Our examination of the data uncovered that well over 99% of the data set were collections cases, in which the consumer is the defendant. Thus, from our perspective, the NAF data set was of limited value. It was useful primarily for drawing conclusions about collections cases, not the consumer-initiated arbitration cases that raise concerns among anti-arbitration advocates.

Although the data set is of little use as a critique of the consumer-initiated arbitration process, some of our findings were interesting – at least as they related to issues of consumer fees and awards. The data showed that the vast majority of the cases involved attempted collection of debt from a consumer (and thus were initiated by the business). In these arbitrations, most consumers paid few or no fees. In all but five of the approximately 34,000 cases, the consumer paid under (and usually well under) $500 in arbitration fees. In fact, the data showed that in 99.6% of the cases, the consumer paid no fee at all. In addition, the data revealed that arbitration cases reached conclusion much more quickly than did similar claims filed in court.

33 All but 15 of these cases were designated “collections” cases. Collections cases are unlike other consumer cases. In a collections case, the consumer is the defendant. Typically, there is no question that the consumer owes the debt to the credit card issuer. In mediation, the consumer admits the debt and then typically works out a payment plan with the issuer. In arbitration, though, the debtor will lose, because he owes the debt. In such situations, all an arbitrator can do is enter an award against the debtor. Thus, the win-loss record for consumers in these cases is not cause for concern. Moreover, it mirrors consumer success in court collection cases. Hillard M. Sterling & Philip G. Schrag, Default Judgments Against Consumers: Has the System Failed?, 67 DENV. U. L. REV. 357 (1990) (finding consumers prevailed in Small Claims and Conciliation Branch of the Superior Court of the District of Columbia only 4% of the time, with the vast majority of cases being default judgments).

Unfortunately, because Public Citizen studied primarily collections cases, its study, and our subsequent analysis of it, reveal little about consumer-initiated arbitration claims. Fortunately, other studies of consumer arbitration examine consumer-initiated arbitration and provide helpful information in assessing the appropriateness of arbitration as a dispute resolution mechanism for consumer disputes.

In 2004, for example, Ernst & Young published a study about consumer arbitration.\(^3\)\(^5\) The results of this report suggest that consumers fare extremely well in consumer-initiated arbitration, prevailing in 55% of cases that reach decision and “obtaining favorable results”\(^3\)\(^6\) in close to 80% of the cases reviewed. In addition, the report contained the results of a telephone survey of 26 of the participants. The telephone survey found that 69% of the respondents indicated that they were satisfied or very satisfied with the process.

In 2006, Mark Fellows wrote an article in which, among other things, he analyzed California’s consumer arbitration data.\(^3\)\(^7\) Fellows’ analysis of the data revealed that consumers prevailed in 65.5% of consumer-initiated cases that reached decision. By contrast, consumer plaintiffs litigating contract claims in the 75 largest American counties prevailed only 61.5% of the time overall, and 60.9% of the time in bench trials. Businesses prevailed in 77.7% of business-initiated arbitration cases that reached decision. By contrast, business plaintiffs

\(^3\)\(^5\) Public Citizen criticized Ernst & Young’s report, primarily because of its small sample size (226 respondents) and the representativeness of the sample studied (limited to consumer-claimants).

\(^3\)\(^6\) This includes cases where the parties reached a settlement satisfactory to the consumer or the case was dismissed at the consumer’s request. 125 of the 129 cases settled or dismissed prior to arbitration are listed as “consumer prevailed.”

\(^3\)\(^7\) Mark Fellows, \textit{The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes}, \textit{METROPOLITAN CORPORATE COUNSEL}, July 2006, at 32. California legislation requires arbitration providers to disclose information about consumer arbitrations. \textit{See} Ca. Civ. Pro. § 1281.96(a) (private arbitration companies must provide quarterly publication of consumer arbitration information on their websites in a computer searchable format).
litigating contract claims in the 75 largest American counties prevailed 76.8% of the time overall, and 78.9% of the time in bench trial cases.

Fellows further stated that case duration in arbitration is shorter than in litigation. Consumer claims against businesses typically lasted 4.35 months in arbitration and 19.4 months in litigation. For business-initiated claims, the figures were 5.60 and 15 months respectively. In addition, for claims consumers brought against businesses, businesses paid an average arbitration fee of $149.50; for claims businesses initiated, consumers paid an average arbitration fee of $46.63. This is consistent with findings that consumers typically do not pay large arbitration fees.

Although similarly small, AAA’s study of 310 AAA consumer cases awarded between January and August 2007, offers further support for the theory that consumers often achieve positive results in arbitration. In that study, AAA noted that consumers prevail in 48% of cases in which they are the claimant. By contrast, businesses prevail in 74% of cases in which they are the claimant. Following that study, the Searle Civil Justice Institute examined 301 AAA-administered consumer arbitrations closed by an award between April and December 2007. The Searle Institute found that consumers in these arbitrations paid minimal administrative fees. For example, in cases with claims of less than $10,000, consumer claimants paid an average fee of $96; in cases where the consumer’s claim was between $10,000 and $75,000, the fees

40 Searle Civil Justice Institute, www.law.northwestern.edu/jep/symposia/JEP_CJ_2009_Drahozal2.pdf
41 Only $1 of those fees were administrative; the other $95 were arbitrators’ fees. Id.
increased to $219. Arbitration also proved to be a speedy dispute resolution process. The Searle Institute found that the average time from filing to final award was 6.9 months. This finding is consistent with Cole and Blankley’s analysis of the 34,000 NAF-administered cases. In that study, Cole and Blankley found that a majority of arbitration cases are settled within 200 days, or in under seven months.\textsuperscript{42} Similarly, cases that went to hearing were also resolved, on average, in less than seven months.\textsuperscript{43} By contrast, the average length of time from filing to trial in the federal district courts of California during that period was over 2 years.\textsuperscript{44}

Consumers in the AAA arbitrations also experienced success in their filings, winning relief in 53.3\% of the cases filed and receiving an average of $19,255.\textsuperscript{45} Arbitrators were also quite willing to award attorneys’ fees to consumer claimants who sought fees, awarding fees to claimants in 63.1\% of the cases. Finally, the study did not find a statistically significant repeat player effect – consumers won some relief in 51.8\% of cases against repeat businesses (i.e. businesses who appear more than once in the AAA dataset).

In addition, the study considered whether arbitration procedures were fair to consumers, using the question whether the parties complied with the Consumer Due Process Protocol\textsuperscript{46} to assess this issue. The study found that a substantial majority of consumer arbitration clauses comply with the due process protocol at the time the claim is filed and, that AAA refused to

\textsuperscript{42} Cole and Blankley, supra note 34, at 1071.
\textsuperscript{43} Id. at 1072.
\textsuperscript{44} Id. at 1073.
\textsuperscript{45} Searle Civil Justice Institute, www.law.northwestern.edu/jep/symposia/JEP_CJ_2009_Drahozl2.pdf
\textsuperscript{46} The Consumer Due Process Protocol sets fairness standards to govern consumer arbitration. See www.adr.org/sp.asp?id=22019. The Protocol, among other things, ensures an arbitration process that is accessible, reasonable in terms of cost and location, and overseen by competent, unbiased neutrals.
administer the case if the clause did not comply.\textsuperscript{47} AAA also independently conducted a protocol compliance review of arbitration clauses appearing in filed claims. As a result of this review, some businesses modified their arbitration clauses to ensure consistency with the due process protocol.

The Searle Institute identified potential limitations of its study – its small dataset, that all of the cases were administered by AAA – but nevertheless concluded that consumer arbitration appears speedier and less costly for consumers than critics have alleged and that the repeat player effect appears to be minimal, if non-existent in most cases.

While the data available is surely incomplete, it nevertheless suggests that elimination of consumer arbitration at the present time, as the Arbitration Fairness Act mandates, would be unwise. If consumers can save money while achieving results similar to or better than they would in court, it would seem counterintuitive to bar them from agreeing to do so. Rather than impeding consumer access to justice, any new legislation should facilitate access and focus on improving arbitration as a process for vindicating rights.\textsuperscript{48} As Professor Rutledge notes, some AFA advocates argue that the AFA in its current form is necessary so that consumers may bring class actions. While the evidence available on that issue, discussed in the next section, reveals a very different picture than does the evidence on consumer arbitration generally, an AFA that

\textsuperscript{47} Searle Justice Institute, www.law.northwestern.edu/jep/symposia/JEP_CL_2009_Drahozal2.pdf
\textsuperscript{48} Peter B. Rutledge, \textit{Point: The Case Against the Arbitration Fairness Act}, 16 Disp. Res. Mag. 4, 6-7 (2009) ("eliminating predispute arbitration agreements impedes rather than improves an individual’s access to justice.")
bans consumer arbitration entirely is unnecessary to solve the problem class action waivers create.49

B. Business Implementations of Class Action and Class Arbitration Waivers50

Although the available empirical evidence establishes that consumer arbitration may provide more benefit to consumers with significant individual claims than would litigation, the evidence also shows that the primary reason many companies implement arbitration provisions is to avoid class action procedures. While it is not surprising that companies would prefer to avoid class procedures, the effect of these clauses, which ultimately preclude individuals from vindicating low value claims either in the judicial or arbitral fora, is troubling. Although arbitration can be an efficient, speedy, low cost dispute resolution mechanism, the existence of this alternate forum should not be used to deny parties the ability to have their case heard in some venue. While numerous policy groups and academics have expressed concern regarding this issue, until the Supreme Court’s recent decision in Stolt-Nielsen, the impetus for radical

49 Searle Civil Justice Institute, Consumer Arbitration Before the American Arbitration Association: Empirical Results, March 2009, available at http://www.searlearbitration.org/report/empirical_results.php (consumer fees ranged from $125 to half of the arbitrator’s compensation if the claim was for greater than $75,000, the median time from filing to award was 168 days, and the average consumer claimant was awarded 52.1% of what they claimed); Sarah R. Cole & Kristen M. Blankley, Empirical Research on Consumer Arbitration: What the Data Reveals, 113 PENN. ST. L. REV. 1051, 1067-70 (2009) (NAF data indicates that most consumers paid few or no fees, spend roughly the same or less time as they would have in court, and consumer respondents did not have to pay the full amount claimed by the business); Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen 22 (April 2008), available at http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091 (arbitration is often less expensive, and even when it is not, existing mechanisms adequately regulate the burden borne by the individual).
50 Critics attack lack of arbitrator disclosure, limited discovery, limited judicial review and other factors as problematic. Yet problems other than the class processes bans are less significant – in part because the empirical research establishes that, for most consumers, arbitration provides a fair process for adjudication of their claims. Moreover, creation of documents like the Consumer Due Process Protocol, which major arbitral providers adopted, ameliorates the impact of some of these other issues. Finally, companies appear to be modifying their arbitration agreements (and arbitral providers modifying their cost structures) to address procedural problems. Searle Justice Institute, www.law.northwestern.edu/jep/symposia/JEP_CJ_2009_Drahozal2.pdf
change was not present. With the likely elimination of class action arbitration as an alternative to arbitration for a party with a low value claim, numerous individuals will be unable to vindicate their claims in any venue.

Empirical studies of consumer arbitration agreements establish that businesses, particularly credit card and cell phone companies, implement arbitration agreements in order to avoid either class action or class arbitration processes.\textsuperscript{51} Other industries also utilize pre-dispute arbitration agreements in their contracts with consumers, but to varying lesser degrees. Whatever the underlying motivation, the evidence shows that many industries systematically avoid class procedures through the implementation of consumer arbitration agreements.

In 2008, Theodore Eisenberg, Geoffrey Miller and Emily Sherwin published a study whose data suggests that businesses use arbitration agreements in consumer contracts frequently and for the primary purpose of avoiding class processes rather than, as is often claimed, for the purpose of promoting fair and efficient dispute resolution.\textsuperscript{52} The authors reviewed almost 200 consumer and nonconsumer contracts from 21 corporations in a variety of businesses (including wireless, banking and cable services). 75\% of the consumer contracts contained an arbitration clause. Each and every one of these arbitration clauses included a class arbitration waiver.\textsuperscript{53}

\textsuperscript{51} Jean R. Sternlight & Elizabeth J. Jensen, \textit{Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?}, 67 LAW & CONTEMP. PROBS. 75 (Winter/Spring 2004); Alan S. Kaplinsky, \textit{The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers}, 1789 PLI/CORP 493, 505 (2010) (“all major credit card issuers [are using arbitration], e.g., Citibank, Chase, AMEX, Discover Card, Capital One, GE Capital. Bank of America recently announced that it will no longer \textit{Seek} to arbitrate consumer disputes. However, it will continue to use and \textit{Seek} to enforce class action waivers”).


\textsuperscript{53} Theodore Eisenberg et al., \textit{Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts}, 41 U. MICH. J. L. REFORM 871, 884-86 (2008). Professor Eisenberg noted that 60\% of the consumer contracts that contained arbitration clauses also contained provisions that these clauses would be void if the arbitration process permitted classwide activity. Eisenberg also noted that waivers of
Based on this data, Professor Eisenberg and his co-authors concluded that businesses use consumer arbitration clauses as a means to avoid “aggregate dispute resolution.” The “strategic advantage” businesses obtain through use of these clauses is the avoidance or decreased threat of class actions.\footnote{Christopher R. Drahozal and Stephen J. Ware, \textit{Why Do Businesses Use (or Not Use) Arbitration Clauses}, 25 \textit{Ohio St. J. On Disp. Res.} 433, 470-72 (2010) (explaining that Eisenberg’s study is limited to a fairly narrow range of industries and that the use of arbitration by these types of businesses against other businesses is not truly “rare.”).}

A subsequent study of Eisenberg’s data clarified rather than debunked Eisenberg’s conclusions. According to Professors Chris Drahozal and Stephen Ware, Eisenberg’s conclusions should be limited to use of arbitration clauses in credit card and cell phone contracts and cannot necessarily be expanded to other businesses’ use of arbitration clauses.\footnote{Christopher R. Drahozal and Stephen J. Ware, \textit{Why Do Businesses Use (or Not Use) Arbitration Clauses}, 25 \textit{Ohio St. J. On Disp. Res.} 433, 468 (2010).} Reviewing data from the Searle Civil Justice Institute’s Consumer Arbitration Task Force Report, Drahozal and Ware found that while use of class arbitration waivers was common in cell phone company and credit card contracts, waivers were less frequently used by automobile dealers, casualty insurers, home builders and real estate brokers. According to the Searle data, auto dealers use class action waivers about 50% of the time, home builders use them about 65% of the time, but casualty insurers and real estate brokers never use them and mobile home dealers rarely use them. The authors also noted that even with credit card and consumer finance companies, the

\textit{classwide arbitration, provisions voiding the arbitration agreement if classwide activity is ordered and waivers of class action litigation are more frequent in consumer than in business to business and employment contracts.}\textit{ Id. at 895. The use of arbitration in consumer contracts, rather than in contracts involving other businesses, suggests that businesses’ claims that they use arbitration with consumers to promote efficiency and fairness, are pretextual. If fairness and efficiency were the goals, why not use arbitration in business-to-business contracts as well? In their subsequent study, Professors Drahozal and Ware cast doubt on this conclusion. See Christopher R. Drahozal and Stephen J. Ware, \textit{Why Do Businesses Use (or Not Use) Arbitration Clauses}, 25 \textit{Ohio St. J. On Disp. Res.} 433, 470-72 (2010) (explaining that Eisenberg’s study is limited to a fairly narrow range of industries and that the use of arbitration by these types of businesses against other businesses is not truly “rare.”).}
businesses may use arbitration not only to avoid class actions but also in order to collect bad debts.\textsuperscript{56}

The most recent empirical research on this issue offers additional support for Eisenberg et al.’s findings that companies utilize arbitration agreements with consumers in order to avoid class processes. Examining arbitration terms from thirteen wireless phone service and credit card contracts, Professor Amy Schmitz found that three did not include pre-dispute arbitration agreements, one had an opt-out provision and two had terms that were unavailable. The remaining seven contracts containing arbitration clauses varied in some respects. Importantly for this article, however, Professor Schmitz found that “all of the contracts’ arbitration provisions expressly precluded class action or consolidated proceedings of any kind, in court or in arbitration.”\textsuperscript{57} Professor Schmitz emphasized that her examination of nine wireless service companies’ arbitration clauses confirmed Eisenberg’s earlier conclusion that companies utilized arbitration clauses in consumer contracts in order to prevent class actions of any kind.\textsuperscript{58} After reviewing these clauses, Professor Schmitz concluded that “companies use arbitration clauses to limit their vulnerability to consumer claims, especially class actions.”\textsuperscript{59}

Taken together, Eisenberg et al.’s comprehensive study, followed by Schmitz’s survey, suggests strongly that financial services and telecommunications companies implement consumer arbitration agreements primarily to avoid class processes. The Searle data also offers

\textsuperscript{56} Id. at 474, n. 174. Drahozal and Ware questioned Eisenberg et al.’s conclusion that cell phone and credit card issuers use arbitration agreements only to avoid class relief. In their view, these companies use arbitration agreements as a means for collecting bad debts as well as to avoid class processes.


\textsuperscript{58} Id. at 147-48. Professor Schmitz reviewed nine contracts and found that all of them included waivers of class arbitration and court proceedings

\textsuperscript{59} Id. at 150.
general support for these conclusions, but suggests that other industries use arbitration agreements and class waivers less frequently or not at all. Professors Drahozal and Ware do not offer an explanation as to why these other businesses do not use class action waivers as frequently as do the telecommunications and financial services industry. While other explanations may ultimately prevail, it may be either that the uncertainty over the enforceability of such waivers, or AAA’s policy to refuse administration of cases that include class arbitration waivers, discourages these businesses from wholesale adoption of class process waivers.

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60 Some federal circuits have held that class action waivers are valid. These include the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. See Cappalli v. National Bank of Great Lakes, 281 F.3d 219 (3d Cir. 2001); Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000); Sagal v. First USA Bank, N.A., 254 F.3d 1078 (3d Cir. 2001); Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007); Cronin v. Citifinancial Services, Inc., No. 09-2310, 2009 WL 2873252 (3d Cir. Sept. 9, 2009); Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002); Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra, 198 F.3d 473 (4th Cir. 1999), cert. denied, 529 U.S. 1109 (2000); In Re Cotton Yarn Antitrust Litigation, Nos. 05-2392, 05-2393, 505 F.3d 274 (4th Cir. Oct. 12, 2007); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, No. 379 F.3d 159 (5th Cir. 2004); Burden v. Check into Cash of Kentucky, LLC, 267 F.3d 483 (6th Cir. 2001) cert. denied, 535 U.S. 970 (2002); Stout v. J.D. Byrider, 228 F.3d 709 (6th Cir. 2000); Caudle v. American Arbitration Association, 230 F.3d 920 (7th Cir. 2000); Livingston v. Associates Finance, Inc., 339 F.3d 553 (7th Cir. 2003); Iowa Grain v. Brown, 171 F.3d 504 (7th Cir. 1999); Champ v. Siegel Trading Co., Inc., 55 F.3d 269 (7th Cir. 1995); Cicle v. Chase Bank, USA, No 08-1362, 2009 WL 3172157 (8th Cir. Oct. 6, 2009); Pleasant v. American Express Company, 541 F.3d 853 (8th Cir. 2008); In re Piper Funds, Inc., 71 F.3d 298 (8th Cir. 1995); Dominium Austin Partners, L.L.C. v. M.J. Emerson, 248 F.3d 720 (8th Cir. 2001).

The Eleventh Circuit allows class actions waivers as long as a fee-shifting feature exists. See Bowen v. First Family Financial Services, Inc., 233 F.3d 1331 (11th Cir. 2000); Randolph v. Green Tree Fin. Corp., 244 F.3d 814 (11th Cir. 2001); Baron v. Best Buy Co., Inc., 260 F.3d 625 (11th Cir. 2001); Jenkins v. First American Cash Advance of Georgia, LLC and First National Bank in Brookings, 400 F.3d 868 (11th Cir. 2005), cert. denied, 126 S. Ct. 1457 (2006); Caley v. Gulfstream Aerospace Corporation, 428 F.3d 1359 (11th Cir. 2005); Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007).

The First, Second, and Ninth Circuits have found class action waivers unconscionable. See Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Skirchak v. Dynamics Research Corporation, 508 F.3d 49 (1st Cir. Nov. 19, 2007); Anderson v. Comcast Corp., 500 F.3d 66 (1st Cir. 2007); Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008); In re American Express Merchants' Litigation, 2009 WL 284525 (2nd Cir. Jan. 30, 2009); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), cert. denied, 540 U.S. 811 (2003); Ingle v. Circuit City Stores, 328 F.3d 1165 (9th Cir. 2003), cert. denied, 540 U.S. 1160 (2004); Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101 (9th Cir. 2003), cert. denied, 540 U.S. 1160 (2004); Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005); Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976 (9th Cir. 2007).
If the uncertainty of class process waiver enforceability or AAA and others’ policies not to administer cases containing class arbitration waivers initially discouraged some businesses from adopting class process waivers in arbitration agreements, a Supreme Court case decided in the 2009-2010 term, together with one that was heard in fall 2010, go far in alleviating concern about risking use of a waiver and may, for all practical purposes, eliminate class arbitrations. As a result, it is likely that businesses will increase their use of consumer arbitration agreements, even in those industries that were initially slow to adopt them. To understand fully why this is the case, this article now turns to these decisions.

II. Recent Supreme Court Arbitration Jurisprudence

In the 2010 term, the Supreme Court held that an arbitration agreement is enforceable even when the effect of the arbitration agreement is to preclude class arbitration processes. Following an earlier Supreme Court decision in Bazzle v. Green Tree Financial, in which a plurality of the justices held that the parties could delegate to the arbitrator the power to decide whether or not a class action arbitration is permissible,\(^\text{61}\) the Court in Stolt-Nielsen virtually closed the door on the possibility that courts will offer assistance to parties seeking some way to

\(^{61}\) Bazzle v. Green Tree Financial Corp., 123 S.Ct. 2402 (2003). In Bazzle, the South Carolina Supreme Court affirmed the arbitrator’s decision to order class action arbitration. After acknowledging that the state’s laws permitted consolidation of arbitrations without the parties’ express consent, the Court explained that “if we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so.” Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349, 360 (S.C. 2002).
aggregate their claims in class arbitration, unless the parties clearly and unmistakably express their intent to permit such aggregation.

Before Stolt-Nielsen was decided, arbitrators could, and often did, order class action arbitration when the parties’ arbitration agreement was silent regarding whether such action was permitted. Although businesses likely wished to avoid this result, they were reluctant to explicitly prohibit class actions or class action arbitration because some courts held that class action waivers, particularly in the consumer context, were unconscionable and unenforceable. As a result, many companies maintained arbitration agreements silent on the issue of class actions, hoping that the arbitrator assigned their case would not order class action arbitration.

In Stolt-Nielsen S.A. et al. v. Animalfeeds International Corp., the Court, in a 5-3 decision written by Justice Alito, reduced businesses’ uncertainty by casting doubt on the

62 See, for example, arbitrators in Bazzle, who ordered class action arbitration when the arbitration agreement was silent on the issue of class action arbitration. See also, Southland v. Keating, 465 U.S. 1 (1984).
63 See, supra, note 60.
64 Another reason that companies might have chosen to leave arbitration agreements silent on the issue of class actions is that both AAA and JAMS, the major arbitrator providers, adopted policies that they would only administer class action arbitrations in cases where the agreement was silent on the issue of class actions. http://www.adr.org/sp.asp?id=28763, http://www.jamsadr.com/rules-class-action-procedures/. AAA based its policy on its interpretation of Bazzle. AAA’s class arbitration policy stated, “In Bazzle, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.” Moreover, AAA stated that it would not handle arbitrations if the parties’ arbitration agreement precluded class processes. Id. JAMS, the other major provider, adopted a similar rule. Rule 1a of JAMS class arbitration policy states, “In Bazzle, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.” http://www.jamsadr.com/rules-class-action-procedures/
continuing viability of class action arbitration as an alternative dispute resolution mechanism, at least in agreements where the issue of class action arbitration is not explicitly addressed. The case involved two sophisticated business parties with relatively equal bargaining power who negotiated an arbitration agreement that did not address the question whether class action arbitration was permissible. At arbitration, the parties stated that they never agreed to participate in a class arbitration. Nevertheless, the arbitral panel ruled that class arbitration could proceed for two reasons. First, the panel held that the clause should be read to permit class action arbitration following the Court’s decision in Bazzle. Second, the panel concluded that it could order class arbitration because public policy favors class arbitration even if the arbitration agreement does not address class arbitration.

The Supreme Court ruled that the arbitrators should not have relied on Animalfeeds’ argument that public policy permits an arbitrator to construe an arbitration clause to allow class arbitration. Instead of relying on their view of public policy, the arbitrators should have

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66 The Court also held that the arbitrators’ decision to order class action arbitration, based on their view that public policy favors class action arbitration, exceeded the scope of their powers under Federal Arbitration Act sec. 10(a)(4) and therefore can be disregarded. While this article does not address the issue of scope of judicial review, I will note that this holding is remarkable because it suggests that courts may return to a more substantive review of arbitrator decision-making and that the doctrine of “manifest disregard” may still be viable despite the Court’s earlier holding in Hall Street v. Mattel, Inc., 552 U.S. 576 (2008).

67 Stolt-Nielsen is a shipping company who charters portions of its vessels for customers who want to ship liquids in small quantities. Animalfeeds, which supplies raw ingredients to animal-feed producers around the world, contracted, using a standard maritime contract known as a “charter party,” with Stolt-Nielsen to transport animal feed. Charterers, like Animalfeeds, select the particular charter party that they wish to use. In this case, the charter party Animalfeeds selected contained an arbitration clause drafted in 1950. The clause states that any disputes arising out of the contract will be settled in New York through tri-partite arbitration. The Department of Justice initiated a criminal investigation of Stolt-Nielsen in 2003, concluding that they were engaging in illegal price-fixing. Animalfeeds brought a class action against Stolt-Nielsen in federal court, as did other charterers. Ultimately, Animalfeeds was ordered to arbitration and filed a class action arbitration complaint against Stolt-Nielsen. The parties entered into a supplemental agreement enabling the arbitrators to decide whether class action arbitration was permitted.

68 The Court stated that Bazzle did not create a rule to be applied in deciding whether class arbitration is permitted. Rather (and the Court reminded readers that Bazzle was a plurality decision) the Court in Bazzle stated that arbitrators, rather than courts, interpret whether the parties agreed to class action arbitration. Thus, Bazzle does not bind the Court in this case and, “[a]n implicit agreement to authorize class action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.”
identified a rule of law (for example, the FAA, federal maritime law or New York law) that
governs the issue of class arbitration. Their failure to do so, combined with their choice to act as
a common law court to develop what they viewed as the best rule for the situation, exceeded the
scope of the panel’s powers under the agreement and therefore had to be reversed.

Justice Ginsburg, in dissent, expressed concern that the holding, which prohibits
arbitrators from ordering class arbitration unless the parties’ agreement allows it to do so, remain
limited to agreements among repeat players. Justice Ginsburg stated, “by observing that “the
parties [here] are sophisticated business entities,” and “that it is customary for the shipper to
choose the charter party that is used for a particular shipment, the Court apparently spares from
its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it
basis.” While Justice Ginsburg suggests that the majority’s holding about silent arbitration
clauses is limited to cases involving sophisticated repeat players, it is not clear that lower courts
will limit Stolt-Nielsen to its facts. A probable consequence of the decision is that every
business with an arbitration clause will maintain silence on the issue of class action arbitration
or, if its clause permits class action arbitration, to amend it so that it is silent on the issue.

69 Stolt-Nielsen, 130 S.Ct. at 1783 (Ginsburg, J., dissenting).
70 Paul Kirgis reached the same conclusion. In a blog post at www.indisputably.org. Professor Kirgis stated,
“Justice Ginsburg, in dissent, makes the point that this decision does not necessarily foreclose class arbitrations in
consumer cases. But it’s logic does not stop at complex commercial disputes.”
 http://www.indisputably.org/?p=1284. Philip J. Loree, a commercial litigator who has written extensively on this
case, agreed as well. According to Loree, Stolt-Nielsen “put the kibosh on class arbitration in the commercial
context and most probably also in the context of adhesive contracts . . .” Philip J. Loree, Jr., Stolt-Nielsen Delivers a
New FAA Rule – And then Federalizes the Law of Contracts, 28 ALTERNATIVES TO HIGH COST LITIG. 124 (June
2010).

But H. Scott Leviant disagrees, at least in California: “so much for Stolt-Nielsen destroying class actions”. He
believes that the motives behind California’s default rules favoring class arbitration apply most strongly in
international-corp-les.html.
71 Id. Professor Kirgis states, “So it is difficult to read the decision as anything but an attempt to single out and
eliminate class arbitration, except in cases where the parties explicitly provide for class arbitration (which will be
never).”
Although the Court did not decide “what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,” a logical interpretation of the opinion suggests that courts will not allow arbitrators to interpret silent clauses to permit class action arbitration.

The Court’s decision appears to prohibit future arbitrators from interpreting an arbitration agreement that is silent on the issue of class action arbitrations to allow for such arbitrations unless the parties, post-agreement, explicitly consent to the class action arbitration process. In addition, the Court’s suggestion that an arbitrator could look to some rule of law to support ordering class arbitration seems like a straw man. Nothing in the FAA addresses class arbitration and the Court itself indicated that class arbitration is so different from traditional arbitration that it is hard to imagine a court finding that the FAA is a source of authority for ordering class arbitration. What other rules of law would be available to justify ordering class action arbitration is also unclear. Because businesses prefer to avoid class actions, they will likely ignore the issue of class arbitration in their arbitration agreements to avoid the possibility that arbitrators will find that they agreed to class action arbitration.

Of course, parties could still argue that an arbitration agreement that is silent on the issue of class arbitration is unconscionable if it is interpreted to preclude class actions or class arbitration. Whether that challenge is likely to succeed will depend, in part, on another case that

72 Professor Jean Sternlight, among others, predicted that the decision will mean the end of class arbitration. Moreover, Sternlight suggested, companies will rely on Stolt-Nielsen to argue that the FAA preempts a claim that prohibition of class actions is unconscionable. See www.indisputably.org.

Alvin L. Goldman suspects that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” http://www.indisputably.org/?p=1295.

Barry Barnett points out that the recent Second Circuit decision Fenterstock v. Education Finance Partners, No. 09-1562-cv, slip op. at 31 (2d Cir. July 12, 2010) confirms his earlier suspicion that arbitrators “will have no choice but to deny almost all class certification requests.” http://blawgletter.typepad.com/bbarnett/2010/07/stoltnielsen-kills-class-arbitration-but-not-class-action-second-circuit-holds.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Blawgletter+%28Blawgletter+C2%AE%29.

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the Supreme Court will hear in the 2010-2011 term, *AT&T v. Concepcion*. That case raises the question whether the FAA preempts a state’s decision to declare unconscionable any arbitration agreements between businesses and consumers that do not permit class arbitration procedures.\(^\text{73}\)

In the case, the Concepcions were part of a consumer class action brought in California, contending that AT&T engaged in fraud when it offered a “free” phone to all customers who signed up for their service but then charged each consumer substantial sales tax ($30.22 for two phones to the named plaintiff). After the plaintiff filed its claim in federal court, AT&T moved for arbitration. The court, relying on California unconscionability law, held that the contract’s prohibition on class actions was unenforceable. Unlike arbitration provisions at issue in other cases, though, AT&T’s provision may provide the plaintiffs the ability to obtain full relief for their claims. The arbitration agreement applied AAA procedural rules, gave the consumer the option to bring his claim in small claims court in lieu of arbitration, permitted the arbitrator to award the full remedies that would have been available to the consumer in court and offered the consumer a $7,500 minimum recovery if the arbitral award exceeded AT&T’s last settlement offer.

The primary issue in this case is whether California’s treatment of unconscionability in the context of arbitration agreements differs from its treatment of unconscionability in traditional contracts. If the treatment differs, as AT&T contends, the Federal Arbitration Act would

\(^{73}\) The question whether a class action or class arbitration waiver in a consumer arbitration agreement is enforceable is [o]ne of the most important arbitration questions that has yet to be definitively resolved by the U.S. Supreme Court.” Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775, 775 (2005); F. Paul Bland & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDozo J. CONFlICT RESol. 369, 393 (2009) (enforceability of class waivers is “one of the most hotly contested issues in all of consumer and employee litigation.”).
preempt California’s rule.\textsuperscript{74} The question whether a class waiver is unconscionable first arose in an earlier California case, \textit{Discover Bank v. Vaden}.\textsuperscript{75} In \textit{Discover Bank}, a California court ruled that class action arbitration must be made available to consumers with arbitration agreements in order for those agreements to be enforceable. According to petitioner AT&T, California adopted a three part test in the \textit{Discover Bank} case to evaluate the enforceability of an arbitration agreement. Under the test, a court will declare an agreement unconscionable if it 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 amounts of money.”\textsuperscript{76} This test, AT&T claimed, is significantly different than the test used to evaluate whether unconscionability is present in contracts that do not contain arbitration agreements. The Ninth Circuit rejected this argument, holding that the FAA does not preempt the \textit{Discover Bank} rule because class proceedings do not reduce the efficiency of arbitration and that the rule is “simply a refinement of the unconscionability analysis applicable to contracts generally in California.”\textsuperscript{77}

\textsuperscript{74} In its brief, AT&T contends that for traditional contracts, California requires proof that the contract’s terms shock the conscience. By contrast, for arbitration agreements, AT&T states that California applies the \textit{Discover Bank} test, which is a different kind of test. The Ninth Circuit rejected this argument, stating that, “[i]t [the \textit{Discover Bank} test] is simply a refinement of the unconscionability analysis applicable to contracts generally in California.” \textit{Shroyer v. New Cingular Wireless Svs.,} 498 F.3d 976, 987 (9th Cir. 2007). AT&T further contends that California treats arbitration agreements differently than other contracts because they looked at the impact of the class waiver in the Concepcions’ agreement on nonparties to the agreement in order to justify the unconscionability finding. This approach stands in sharp contrast to traditional unconscionability analysis, which would only allow a court to examine the situation in front of the court, not the impact of the contract on third parties. Brief for Petitioner (No. 09-893) at 20.

\textsuperscript{75} \textit{Discover Bank v. Super. Ct.}, 113 P.3d 1100 (Cal. 2005).

\textsuperscript{76} \textit{Id.} at 1110.

\textsuperscript{77} \textit{Shroyer v. New Cingular Wireless Servs., Inc.}, 498 F.3d 976, 987 (9th Cir. 2007). The Third Circuit, addressing the same question, ruled that the FAA preempts Pennsylvania’s rule that provisions waiving the right to bring a class action are unconscionable. \textit{Gay v. CreditInform}, 511 F.3d 369 (3d Cir. 2007). The court stated, “whatever the
Determining whether the California rule treats arbitration agreements differently than other contracts is difficult at least in part because a court can only order class action arbitration in a context where an arbitration agreement exists. Thus, AT&T might argue that ordering class action arbitration treats arbitration agreements differently than other contracts, a rule that the FAA would preempt. However, in response, the consumer might argue that the court is not treating arbitration differently — it is only in a case involving an arbitration agreement that the issue of class action arbitration would arise. At any rate, if the Court finds that courts interpret unconscionability differently in arbitration cases than in other cases, it will rule that the California law is preempted.78

If AT&T were to win this case, state courts would then be precluded from requiring parties subject to an arbitration agreement to participate in a class action arbitration to avoid a finding of unconscionability. Thus, a consumer with a low value claim whose arbitration agreement is not one-sided enough to be declared unconscionable for other reasons but who could not afford or did not find it cost-efficient to bring his case in arbitration, would effectively be precluded from bringing a claim at all. The Supreme Court could narrow its decision to preclude states from ordering class arbitration if consumers can effectively vindicate their claims benefits of class actions, the FAA requires piecemeal resolution when necessary to give effect to an arbitration agreement. To the extent, then, that [Pennsylvania cases] hold that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract,” FAA Section 2 preempts them. Id. at 394.

78 Stephen A. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary is Circumventing the Federal Arbitration Act, 3 Hastings Bus. L. J. 47 (2006) (asserting that California applies a unique brand of unconscionability to arbitration agreements in direct contravention of the FAA and establishing through empirical analysis that application of the unconscionability doctrine in California results in invalidating arbitration agreements 47% of the time but invalidating other contracts only 11% of the time).
in individual arbitration (as the Concepcions appeared to be). But, its holding could certainly be broader.⁷⁹

Considering Stolt-Nielsen together with Concepcion’s potential outcome, leads to a conclusion that it will be the rare case indeed where consumers will be able to obtain class procedures if they are bound to an arbitration agreement. Whether the Supreme Court’s decision is “fair” or not is immaterial. The Court’s interpretation of the FAA is that parties will not be required to participate in class arbitrations unless they agree to do so and, most likely, courts will be unable to create blanket requirements that arbitration agreements that waive class action arbitration are unenforceable.

Given the likely judicial response in Concepcion, remedies for consumers with low value claims will no longer be available through the judicial system. Thus, consumers and their advocates must turn to Congress for assistance with this major concern. Unfortunately, the legislation currently before Congress, the Arbitration Fairness Act (AFA), is overbroad and creates more problems than it remedies. The next section of this article will evaluate the proposed AFA and then offer a more streamlined and targeted solution to the problems present in consumer arbitration.

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⁷⁹ The Supreme Court did not take the best case for resolving the issue of preemption and unconscionability. As is pointed out repeatedly by AT&T, the arbitration agreement in the AT&T contract with the Concepcions is unusually generous with respect to its terms. The Concepcions’ agreement with AT&T applies AAA’s procedural rules, permits the plaintiffs to bring their claims in small claims court in lieu of arbitration and permits the arbitrator to award any remedies that the plaintiffs could have obtained in court. In addition, plaintiffs would be entitled to a minimum $7,500 recovery if the arbitral award exceeded AT&T’s last settlement offer. While consumer arbitration agreements have, over time, offered fairer arbitral process to consumers, most agreements are not this generous to consumers. Most arbitration agreements do not offer the small claims court alternative or the minimum recovery guarantee. If the Court limits its holding to the facts of the case, holding that California’s application of unconscionability doctrine in this kind of arbitration setting is preempted, the question will remain open whether other, less generous agreements, would also be preempted.
III. Legislative Proposal to Reform Arbitration – the Arbitration Fairness Act (AFA)

The Arbitration Fairness Act proposes amendments to the Federal Arbitration Act (FAA) invalidating pre-dispute arbitration agreement covering an employment, consumer, franchise, or civil rights dispute. In addition, the amendments would require a court, rather than an arbitrator, to decide any dispute regarding the applicability of the FAA as amended (i.e., the AFA) to an arbitration agreement.

To support the legislation, drafters included a provision articulating findings about arbitration that would, if true, seem to justify the draconian measure the legislation proposes. Among other “findings,” the drafters emphasized that the dramatic increase in business and

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80 S. 931 defines “civil rights” dispute as a distinctive case-type; this language does not appear in HR 1020.
81 The AFA findings are as follows:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to dispute between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumer and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators’ decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously
employer use of arbitration clauses requires “millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.” In addition, the findings emphasize that employees have no choice but to accept onerous (according to the legislation, arbitration agreements may “deliberately tilt the systems against individuals”) arbitration clauses because these clauses are often conditions of purchases or employment – items about which it is difficult to negotiate. Moreover, the findings state that private arbitration companies may be biased in favor of corporate repeat players who are more likely to be repeat customers for the arbitration services. Finally, the findings suggest that arbitration is a poor substitute for litigation because the decision-makers are largely unaccountable both because arbitration takes place in private and because the decision-makers are rarely required to issue written opinions.

Recent Supreme Court jurisprudence energized AFA proponents. Yet a closer examination of the proposed statute reveals that the legislation focuses on the wrong issues. Eliminating pre-dispute arbitration agreements signed by franchisees, consumers and employees, is excessively overbroad. Even predictably anti-arbitration groups have responded negatively to the proposed legislation. The three primary critiques, one from an ADR organization and the other two from academics, will be discussed here.

unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.

82 Many others have criticized the AFA’s broad reach. See, for example, O. Russell Murray, Arbitration Fairness Act: Right Problem, Wrong Solution, thelearnedlawyer.com (April 27, 2009) (stating that, “[o]ne problem with the AFA’s approach to fixing this issue, however, is that the solution is overbroad. In other words, the proposed cure is worse than the problem it tries to fix. A narrower solution, and one that avoids throwing out the baby with the bath water, would be to mandate pre-dispute “opt-out” rights—give consumers, for example, the right to opt-out of arbitration at the time of purchase of the product or service.”); the American Bar Association passed Resolution 114, available at http://www.abanet.org/leadership/2009/annual/daily_journal/One_Hundred_Fourteen.doc, which was directed at the AFA and stated their official policy of opposition to legislation “that would be inconsistent with established international commercial arbitration standards.”; David L. Gregory & Edward McNamara, Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett, 19 CORNELL J.
The Association of Conflict Resolution (ACR), a group of both lawyer and non-lawyer mediators “dedicated to enhancing the practice and public understanding of conflict resolution,” issued a report critiquing the AFA’s extreme approach. The Report acknowledged that the AFA’s underlying goals, to improve access to procedure, protect due process and ensure integrity in the arbitration process, were important. Although ACR recognized that some pre-dispute arbitration agreements created defective processes, it nevertheless concluded that the “AFA’s remedy of completely prohibiting all such agreements . . . is not required in order to correct the problems underlying these agreements.”

ACR, not known in the past for its support of mandatory arbitration or arbitration generally, identified a number of potential benefits the arbitration process might have for consumers and other one-shot players. According to ACR, “[p]re-dispute mandatory arbitration has the potential for developing a fast, efficient, fair, low-cost dispute resolution process to

L. & PUB. POL’Y 419, 458 (2010) (stating that despite its benign title, the AFA is “in fact hostile to labor and employment arbitration,” and “a gross overreaction to the proven efficacy and fairness of labor and employment arbitration”); E. Gary Spitko, Exempting High Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements, 43 U.C. DAVIS L. REV. 591, 600 (2009) (stating that the AFA is “too broad,” and that it should “exempt claims by or against certain high-level employees and claims by or against certain small employers”); Paul B. Morrow, Determining if Mandatory Arbitration is “Fair”: Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks, 54 N.Y.L. SCH. L. REV. 187, 192 (2009/2010) (stating that when asymmetrically held information gives rise to risks that are uninsurable, mandatory arbitration is a “fair” measure of self-help); Bradley Dillon-Coffman, Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act, 57 UCLA L. REV. 1095, 1106-07 (2010) (explaining that Congress is “getting it wrong” with the proposed AFA); Lisa Rickard, Institute of Legal Reform Press Release, U.S. Chamber Inst. For Legal Reform Press Release, U.S. Chamber Inst. For Legal Reform Voters Strongly Back Arbitration: New Poll Shows (April 2, 2008), available at http://www.instituteforlegalreform.com/component/ilr_media/30/pressrelease/2008/401.html (warning that the AFA would eliminate access to a forum for many consumers and employees).


84 In a sense, pre-dispute arbitration agreements, because they do not permit parties to exercise a knowing and voluntary choice, are inconsistent with the mission and values of an organization like ACR, whose mission is to give “voice to the choices of quality conflict resolution” and that “everyone knows their choices for conflict resolution.” See http://www.acrnet.org/about/ACR-FAQ.htm. Although pre-dispute arbitration agreements seem consistent with ACR’s mission and vision, ACR has, in other contexts, supported the use of arbitration. In fact, ACR endorsed the Revised Uniform Arbitration Act in 2006. In approving the RUAA, ACR emphasized that it is committed to arbitration and will endorse policies and statutory enactments that support the “fairness and integrity of the arbitration process.” http://www.acrnet.org/pdfs/ACR_RUAA_Decision_Press_Release_FINAL.pdf.
which all citizens could gain access and whose procedures are fair and transparent.”

ACR recommended improving the process and procedures provided in pre-dispute arbitration agreements instead of “disenfranchising” one-shot players from utilizing an “affordable, viable, fair dispute resolution process to resolve their disputes in a timely manner.”

Taking a realistic approach, ACR recognized that complete elimination of pre-dispute arbitration processes might, as a practical matter, result in disenfranchisement of numerous one-shot players. With the courthouse as the only forum for resolution, ACR emphasized that many parties might not be able to access such a forum or afford to obtain adequate representation from lawyers to participate in such a forum. In addition, without pre-dispute arbitration processes available, the increased number of cases in the court system is likely to result in a case-load increase which further impacts the efficiency of the adjudicatory system. Finally, ACR emphasized that the elimination of pre-dispute arbitration agreements ignores the strides that many professional organizations and dispute resolution providers have made to improve the arbitration process.

Arbitration providers adopted consumer due process protocols to increase fairness in the dispute resolution process as well as payment structures for claim filers that take into account the limited funds most consumers have to spend on a dispute resolution process. Rather than throw the baby out with the bathwater, ACR proposed changes to the FAA that would ensure a higher level of due process to participants in pre-dispute arbitration processes, including increased discovery, access to representation, access to full statutory remedies, written decisions in higher value cases, arbitrator selection processes designed to ensure the selection of impartial

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85 Id.
86 Id.
87 Id. at 8.
and independent arbitrators, and mechanisms for ensuring that the proceedings are not costly or inconvenient to the one-shot player.\textsuperscript{88}

Criticism emanates from the academy as well. Professor Amy Schmitz, in her article, \textit{Regulation Rash? Questioning the AFA’s Approach for Protecting Arbitration Fairness},\textsuperscript{89} charged that the proposed Arbitration Fairness Act as potentially “too rash,” and advocated instead a “more measured approach.” Like ACR, Professor Schmitz asserted that the need for some reform of arbitration, particularly in the consumer context, must be balanced against the importance of avoiding “needless protectionism.”\textsuperscript{90} Although most consumer advocates and academics have been reluctant to do so, Professor Schmitz acknowledged that empirical studies of consumer arbitration, like the 2009 Searle Institute study of AAA consumer arbitrations, reveal that consumers experience considerable success in arbitrations when they pursue claims against a business.\textsuperscript{91}

In addition to citing the potential benefits to both sides of consumer arbitration, Professor Schmitz also articulated some of the drawbacks that might occur if the AFA were to pass. Among other issues,\textsuperscript{92} Professor Schmitz expressed concern about the impact of the proposed AFA on the separability doctrine. The separability doctrine states that any challenge to a contract that contains an arbitration clause must be decided in arbitration unless the challenge is

\textsuperscript{88} \textit{Id.} at 13-15.
\textsuperscript{89} 2 No. 10 Banking & Fin. Services Pol’y Rep. 16 (2009).
\textsuperscript{90} \textit{Id.} at 19.
\textsuperscript{91} \textit{Id.} at 21, citing 2009 Searle Institute Study of AAA Consumer Arbitration. The study stated that consumers were successful in 53% of the 301 arbitrations studied, and recovered an average of $19,255 or 52.1% of the damages they sought in those arbitrations.
\textsuperscript{92} Professor Schmitz expressed concern that the AFA’s elimination of pre-dispute arbitration agreements could harm international arbitration, because changes to chapter one of the FAA, which addresses domestic arbitration, could extend to chapters 2 and 3 of the FAA, which applies to international arbitration. The AFA might impact international arbitration because FAA chapters 2 and 3 expressly provide that FAA chapter one should fill in any interpretation gaps present in chapters 2 and 3. \textit{Id.} at 22, citing David D. Caron & Seth Schreiberg, \textit{Anticipating the 2009 U.S. “Fairness in Arbitration Act,”} 2 WORLD ARB. AND MEDIATION REV. 15-22 (2008) (expressing concern about the impact the AFA might have on international arbitration).
addressed directly to the arbitration clause. Thus, if a party claims that she was fraudulently
induced to enter a contract, and that contract contains an arbitration clause, she must arbitrate her
fraudulent inducement claim unless she alleges that she was tricked into agreeing to arbitration.
As Professor Schmitz states, the separability doctrine prevents parties from “cluttering courts
with pre-proceeding contract challenges not aimed at an arbitration agreement itself.” 93
Acknowledging that the AFA’s references to separability are ambiguous, Professor Schmitz
nevertheless asserts that the AFA would appear to reverse the separability rule. The result of
such a reversal would be more pre-arbitration litigation, increased arbitration and litigation costs,
and slower arbitration proceedings.

Quite similar to ACR, Professor Schmitz recommends a more measured approach.
Schmitz’s proposal would, effectively, codify the Consumer Due Process Protocol. Instead of
leaving the due process question to the parties or the arbitrator provider, Schmitz proposes to
codify into statutory concepts like notice of the arbitration clause, balanced arbitrator selection,
contained costs, adequate discovery, convenient hearing location, preservation of statutory
remedies, access to small claims court and allowance of class relief. 94

Lew Maltby, drafter of a Model Arbitration Act which he proposes as an alternative to
the AFA, codified many of Schmitz’s recommendations. Maltby’s Act includes a mandate that
consumers pay limited fees, have a right to a neutral provider and a written opinion, if requested.
Perhaps more importantly, Maltby’s Act permits consumers access to class action processes

93 Id.
94 Id. at 23-29. In addition to the procedures identified above, Professor Schmitz also recommends codification of
timely decisions and compliance with awards and allowance for consolidation of claims and joinder of parties.

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when necessary to vindicate their rights.\textsuperscript{95} While not broad sweeping in its application, Maltby’s proposal would protect consumers with low value claims in those cases where no alternate forum would be available.\textsuperscript{96}

AFA critics agree that the right answer is not to throw out pre-dispute arbitration agreements entirely, but instead make sure that arbitration works as a method for resolving disputes. ACR and Professor Schmitz’s attack the AFA on procedural grounds, attempting to ensure that arbitration of disputes between one-shot and repeat players takes place in an environment with sufficient due process. While codification of procedural requirements might improve arbitration, the major arbitration services providers have already adopted the Consumer Due Process Protocol.\textsuperscript{97} As a result, most arbitrations are conducted with the benefit of the enhanced procedural protections Schmitz advocates above. As Schmitz notes, however, the Protocol did not address the issue of class relief. It is likely that those negotiating the protocol were unable to reach a compromise on this issue because it is so divisive. Failure to resolve this issue, together with recent Supreme Court jurisprudence, makes helping litigants aggregate their low value claims the major issue in arbitration today. Thus, while I join the call for a result that preserves consumer arbitration, I propose a different solution.

\textsuperscript{95} Maltby’s Model Arbitration Act states that, “Class actions may be brought under circumstances in which they are necessary for the parties to be able to vindicate their legal rights.” (on file with author).
\textsuperscript{96} Although Maltby’s Act address the class action waiver problem, I propose a broader solution so that satellite litigation surrounding the question of whether an alternate forum is available can be avoided.
\textsuperscript{97} One of the key findings in the Searle Institute report was that the vast majority of consumer arbitration clauses already comply with the Due Process Protocol at the time the case is filed. Searle Institute Report at xiv (reporting that 76.6\% of arbitration clauses that come before AAA are consistent with the Consumer Due Process Protocol). In addition, AAA’s protocol review identified non-compliance and followed through with a response to arbitration clauses that contained protocol violations. Id. The Report also noted that “more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol” after AAA explained to them that their clauses did not comply.
IV. Proposed Revision of FAA

While calls for a legislative solution to this problem are not new, the recent Supreme Court decisions raised the stakes for consumers and their advocates because the decisions virtually prohibit arbitrators from ordering class processes. With that mind, I propose the following statute:

Section 1: Short Title of Act

This Act shall be known as the Consumer Class Action and Class Arbitration Waiver Reform Act.

Section 2: Definitions

(a) Commerce includes all transactions arising out of or involving interstate commerce;

(b) A consumer is any person who uses, purchases, acquires, attempts to purchase or acquire, or is offered or provided any real or personal property, tangible or intangible goods, services or credit for personal, family or household purposes, and includes passengers and shippers of goods on common carriers in commerce.

Section 3: Prohibition of Class Action and Class Action Arbitration Waivers in Consumer Arbitration Agreements

Subject to the provisions of Section 4 of this Act, an arbitration agreement between a consumer and a provider of goods or services is invalid to the extent that it precludes the consumer from accessing the court or arbitral system to participate in a class action.

98 Both Quebec and Ontario have already invalidated the use of class action waivers in consumer agreements. Quebec, bill 48 (eff. 12/06) and Ontario Consumer Protection Act, 2002 c.30 Sch.A s.8(1) invalidates provisions that prevent a consumer from commencing or participating in a class action.
This article posits that this proposed legislation will permit consumers with low value claims, who are bound by arbitration agreements, to pursue class processes in either arbitration or court. The primary objection to this legislation is likely to be that companies will no longer use arbitration clauses if they are required to participate in class arbitrations or class actions in court. In the briefing leading up to the *Concepcion* arguments, counsel and other interested parties vociferously argued that businesses would give up arbitration entirely if class processes were required.\(^9\) While class processes have significant costs, both for the corporation sued and, often for the parties pursuing them, the idea that businesses would give up arbitration because of the risk that they might be required to participate in class arbitration is laughable. In particular, evidence from AAA’s administration of class arbitration claims strongly suggests that class arbitration, if permitted through legislation, will continue to thrive and provide another creative avenue through which parties can adjudicate their disputes. Moreover, the continued use of arbitration in the many jurisdictions that have prohibited class action waivers in arbitration

\(^9\) In its opening brief, AT&T stated that “no rational business will agree” to class-wide arbitration. Class arbitration, AT&T contended, is “a lose-lose proposition” with all the cost and risk of litigation but none of the procedural protections and appellate oversight. *See also*, Daniel R. Higginbotham, Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers, 58 DUKE L. J. 103 (2008) (prohibition of class waivers will result in business reducing use of arbitration). Of course, some businesses may prefer to take class actions to court. The benefits and drawbacks of class actions in court proceedings are well-documented elsewhere, including in articles examining the pros and cons of class arbitration. *See*, for example, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1714 (2006) (the use of the class-action procedure for litigation may motivate parties to bring cases that for economic reasons might not be brought otherwise); David Schwartz, Mandatory Arbitration and Fairness, 84 NOTRE DAME L. REV. 1247, 1319-20 (2009) (“By aggregating low-cost/low-stakes or high-cost/low-stakes cases into a single high-cost/high-stakes case, class actions can realize potential process-cost economies of scale that make them a relatively inexpensive forum for the class members—both in terms of monetary and information costs.”); Thomas Burch, Comment, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 FLA. ST. U. L. REV. 1005, 1026-27 (2004) (Many consumers may not know of their potential claims; in a class action, a single informed consumer will inform all other class members as per notice); Jeffrey J. Greenbaum and Jason L. Jurkevich, *Class Actions Waivers in Arbitration Agreements: Can They Survive?* 11 CLASS ACTION LITIG. RPT. 39, 49 (January 8, 2010) (“[c]ompanies tend to be averse to class arbitration, believing it combines the disadvantages of class action litigation . . . with the disadvantages of arbitration . . ..”).
agreements offers further support for the belief that businesses will continue to use arbitration even if class waivers are unenforceable.

A. Business will continue to use arbitration even if class arbitration and class action waivers are unenforceable

Following the Court’s 2003 Bazzle decision, class arbitration became more common. 100 Although one would have expected businesses to draft language designed to avoid class arbitration following Bazzle, only some businesses, particularly credit card and cell phone companies, attempted to implement class arbitration waivers. 101 According to the Searle study, in its sample of 301 AAA arbitrations, only 36.5% of the cases arose out of arbitration clauses with a class action waiver. Well over half of the arbitration clauses did not contain class arbitration waivers. At the same time, class action arbitration as an ADR process grew in popularity. As of January 14, 2011, AAA was administering over 300 class action arbitrations. 102

Businesses who failed to amend their arbitration agreements to explicitly preclude class arbitration may have done so out of concern that a court would declare the waiver to be unenforceable. Alternatively, it may be that businesses do not find the prospect of participation in class arbitration repugnant. Or, it may be that, in the Circuits rejecting class action waivers as unconscionable, the corporations who have continued to use arbitration have done so because

100 See William K. Slate II and Eric P. Tuchmann, Class Action Arbitrations, [2008] Int. A.L.R. Issue 1 at 50 (class action arbitrations date from approximately 2002).
101 This is not to suggest that businesses are enthusiastic about class arbitrations. See David S. Clancy and Matthew M.K. Stein, An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History, 63 BUSINESS LAWYER 55, 62 (2007); Christopher R. Drahozal and Quentin R. Wittrock, Franchising, Arbitration and the Future of the Class Action, 32 ENTREPRENEURIAL BUS. L. J. 275, 286 (2009)
102 According to AAA’s searchable class arbitration docket, AAA is currently administering 302 class arbitration cases. (site last visited on January 14, 2011).
their arbitration policies are driven by the corporation’s national approach to dispute resolution. That is, for a corporation like AT&T, it may make economic sense to continue a national policy of implementing consumer arbitration agreements even if, in the First, Second and Ninth circuits, parties are permitted to use class action processes if certain criteria are met.

Whatever the reason, for the last seven years, businesses continued to implement arbitration agreements even though they risked the possibility that an arbitrator would order them to participate in a class action arbitration process. In balancing the costs and benefits of the use of arbitration, then, businesses appear to prefer arbitration, even with the possibility of class arbitration, to alternate forms of dispute resolution. Thus, concerns about the demise of arbitration, should Congress outlaw class arbitration waivers, seems overblown.

B. Class Arbitration May Prove to Be a Workable Dispute Resolution Process

Class arbitration is a dispute resolution process in its infancy. Used sparsely in California in the 1980s, following Bazzle, parties increased use of class arbitration processes. In response, AAA and JAMS quickly designed class arbitration rules to govern these cases. Not

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103 At least some plaintiffs attorneys perceived a benefit to class action arbitration. See Joseph Jaramillo, Recent Developments in Class Action Arbitration, http://www.gdblegal.com/documents/ArticlesAmicus_Briefs/Presentation_on_Class_Arbitrations.pdf (“Class arbitration offers the benefits of the class action device with potential advantages not present in court litigation. Employers have less opportunity for delay in arbitration proceedings, where discovery is often limited, as are the grounds for judicial review. Arbitration providers, such as the American Arbitration Association (“AAA”) and JAMS, have class arbitration rules in place to govern the process. These rules track Federal Rule of Civil Procedure 23, and provide standards for class certification, class notice, and approval of settlements. Thus, class arbitration can be a viable alternative to class action litigation for employees subject to an enforceable arbitration agreement.”); John H. Quisenberry and Susan Abitanta, Can Employers Preclude Class Actions Through Mandatory Arbitration Agreements that are Silent as to Whether Classes are Permitted, FORUM MAG. (2005) (classwide arbitration can provide parties with the same benefits as court class actions and is “available and preferred.”). Moreover, class arbitration processes could be altered to make them more cost-effective and efficient, allowing businesses, as well as consumers, to benefit. Mark Weidemaier, Arbitration and the Individuation Critique, 49 ARIZ. L. REV. 69, 100-101 (2007).

104 Id. at 70, 94-99 (class arbitration has potential benefits both for consumers and businesses).
surprisingly, these rules basically mirror Federal Rule of Civil Procedure 23, addressing administration of class action procedures in court. Shortly after Bazzle and again more recently, commentators raised a number of potential concerns about class arbitration. The primary criticisms of class arbitration are that it: [1] requires courts to use a more deferential standard to review class certification decisions and class arbitration awards than the abuse of discretion standard used to review trial court decisions. [2] class arbitration fails to protect the rights of the parties involved, at least in comparison to class actions conducted in court; [3] class

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106 See David S. Clancy and Matthew M.K. Stein, An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History, 63 BUSINESS LAWYER 55, 62 (2007); Daniel R. Higginbotham, Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers, 58 DUKE L.J. 103, 120-131 (2008) (posing that a legislative prohibition on class arbitration waivers would create other problems including businesses reducing use of arbitration generally and providing inadequate procedure to parties in the class). See also, Christopher R. Drahozal and Quintin R. Wittrock, Franchising, Arbitration and the Future of the Class Action, 32 ENTREPRENEURIAL BUSINESS LAW JOURNAL 275, 286 (2009) (stating that evaluation of AAA’s class arbitration docket would have to be done before conclusions about whether class arbitration is an adequate substitute for class actions could be drawn). Professor Drahozal notes in his statement before the House Judiciary Committee in 2009 that the next phase of the Searle Institute’s Consumer Arbitration Task Force is to “consider the extent to which class actions are comparable to the individual arbitrations . . . for purposes of developing a baseline for evaluating the costs, speed, and outcomes of AAA consumer arbitrations.” See Statement of Christopher R. Drahozal, House Judiciary Committee, Subcommittee on Commercial and Administrative Law at 8 (May 5, 2009).

107 Critics assert that class arbitration may be problematic because the standard of review for arbitration decisions (whether class certification decisions or arbitration awards) will be more deferential to the award than would the standard for reviewing decisions in court processes. Maureen A. Weston, Universes Colliding: The Constitutional Implications of Arbitral Class Actions, 47 WM & MARY L. REV. 1711, 1722 (2006); David S. Clancy and Matthew M.K. Stein, An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History, 63 BUSINESS LAWYER 55, 62 (2007) (questioning adequacy of judicial review). For example, one critic asserts, “If the arbitrator’s certification decision is subject to review only on FAA section 10 grounds or for “manifest disregard of the law; this would create a huge risk for a defendant: if a single “renegade arbitrator” certified a questionable class, the defendant would immediately be threatened with enormous liability.” Jack Wilson, “No-Class-Action Arbitration Clauses,” State-Law Unconscionability, And The Federal Arbitration Act: A Case For Federal Judicial Restraint And Congressional Action,” 84 QUINNIPIAC L. REV. 737, 778 (2004). But See, Note, Classwide Arbitration: Effective Adjudication or Procedural Quagmire? 67 VIRGINIA L. REV. 787, 806-07 (1981) (deferential review of class arbitration award does not present an “insurmountable obstacle.”) One would expect that the application of the arbitral standard of review would result in the more frequent affirmance of the arbitrator’s decision regarding class certification than would an appellate court’s review of a lower court’s certification decision because the standard is more deferential to the arbitrator’s decision. Because class arbitrators have decided few cases, however, concerns about the standard of review have not emerged.

108 Maureen A. Weston, Universes Colliding: The Constitutional Implications of Arbitral Class Actions, 47 WM & MARY L. REV. 1711, 1770 (2006) (discussing what process is due to class litigants). Some commentators suggest that the interaction between the courts and the arbitrator in the class arbitration process trigger state action and thus require that class arbitrations satisfy due process requirements. Note, Classwide Arbitration: Effective Adjudication
arbitration is an expensive and slow process;\textsuperscript{109} and \textsuperscript{4} the arbitrator selection mechanism is inadequate.\textsuperscript{110}

While commentators continue to worry about these issues, as a practical matter, it appears that none of these potential concerns have come to fruition. AAA’s website is home to the most comprehensive class arbitration data. AAA reports that it has enjoyed a steady number of class arbitration filings since 2003. The data show that claimants filed approximately 50 class arbitration cases per year, dropping to 36 in 2007.\textsuperscript{111} During that time period, arbitrators issued only 10 class certification decisions. It is not known whether these decisions were appealed. Of the remaining cases, most have settled or been withdrawn. Only 11 cases reached the award stage, and none of those awards were on the merits.\textsuperscript{112} Thus, many of the problems critics anticipated have yet to occur. While this is not an argument that the criticisms are invalid, it is a


practical point – based on existing data, concerns about the viability of class arbitration as a dispute resolution process seem to be overstated.\footnote{One would expect that potential defendants to class action arbitration, should it be mandated, will devise mechanisms to improve the process from their perspective. For example, arbitration clauses might more frequently require reasoned awards, including findings of fact or conclusions of law or broader standards of review. \textit{See} Carole J. Buckner, \textit{Due Process in Class Arbitration}, 58 \textit{Florida L. Rev.} 185, 259-63 (2006)(proposes voluntary due process protocol for class arbitration).}

Moreover, if Congress chooses to abandon the proposed AFA and replace it with legislation designed to preserve individual’s rights to proceed through class arbitration or class actions in court, many of the current critiques of class arbitration would be eliminated as potential bases for attack on the class arbitration process. Ultimately, Congress could choose to outlaw class arbitration and allow individuals bound to arbitration agreements to proceed with class processes in court. If, instead, Congress chose to permit class arbitration, it might provide greater definition and clarification of the relationship between courts and arbitrators during the class arbitration process. These efforts would help legitimize the class arbitration process as a viable dispute resolution mechanism and address some of the criticisms of the class arbitration process.

C. Impact on Arbitration of the Availability of Judicial Class Processes

If the legislation proposed in this article were to be enacted, corporations could, of course, choose to defend class actions in court rather than arbitration. To avoid that possibility, it seems likely that businesses would continue to make individual arbitration more attractive to consumers and/or make small claims court options available as AT&T did for the
Alternatively, businesses could participate in consumer class actions in court for those disputes the business is unable to resolve through other processes (such as mediation or individual arbitration).

Evidence from empirical analysis of corporations with arbitration clauses reveal two things: [1] arbitration generally benefits consumers and corporations; and [2] in jurisdictions that have declared class action waivers unconscionable, corporations continue to use arbitration agreements. While corporations would obviously prefer not to participate in class actions, an effort to educate consumers about the benefits of arbitration, together with continuing efforts to ensure the fairness of consumer arbitration for consumers, ought to reduce the risk that corporations will frequently be confronted with class actions either in court or in arbitration.

V. Conclusion

Unquestionably, businesses would prefer to avoid class processes when possible. Class processes are time-consuming and often expensive. At the same time, precluding litigants with small claims from accessing a forum where they can effectively vindicate their rights is problematic. To the extent that the opponents of arbitration are winning the public relations war (and, at this point winning the policy war against arbitration through the creation of a federal agency that may eliminate arbitration in the consumer financial services industry), this may be an opportune time to reform arbitration in a way that preserves the benefits of arbitration generally

114 Three major cell phone providers currently maintain a small-claims court carve out and include a severability clause that would send a class action to court rather than arbitration if a court holds the class waiver unenforceable. See http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true (effective date, 7/18/10); Sprint PCS Agreement, https://manage.sprint.pcs.com/output/en_US/MyPhoneandPlan/ChangePlans/popLegalTermsPrivacy.htm (1/26/11); Verizon Customer Agreement, verizonwireless.com (1/26/11).
while, at the same time, ensures that litigants are provided an opportunity to have their claims heard in some forum. Arbitration fairness should not mean the elimination of arbitration as a dispute resolution mechanism. Instead, arbitration reform should, focus on enabling consumers to vindicate their rights whether in individual or class settings.